PEER-REVIEWED ARTICLE*

Visiting Academics in Double Tax Treaties

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Professors, researchers, lecturers and teachers have become more and more mobile and active throughout the world. Although science itself is borderless, visiting academics are forced to cross-national borders. As a consequence, among other issues, tax problems may arise. This article is devoted to issues concerning the taxation of visiting academics. First, it will analyse how OECD Model deals with the taxation of academics who teach and do research around the globe. Then, it will examine the specific clauses on visiting academics provided for in many tax treaties worldwide and will discuss the tax consequences of these clauses. The aim of the authors is to contribute to a better understanding of the international tax implications of temporary cross-border teaching or research activities by academics.

1. INTRODUCTION

Globalization has not stopped with academics. Quite on the contrary, it appears that professors, researchers, lecturers, and teachers (as well as students) have become more and more mobile and active throughout the world. Many countries have also recognized that there are positive aspects to international academic exchange. Their national law either offers various kinds of (tax) benefits or they include special provisions in their double tax treaties in order to attract visiting academics. The Organisation for Economic Co-operation and Development (OECD) Model[1] – although it does so for foreign students – does not contain a provision for visiting academics. However, the absence of specific rules should not be interpreted as an obstacle to the inclusion of such rules in bilateral tax treaties whenever this is felt desirable.[2] In the literature, the taxation of visiting academics has also been only a relatively minor issue.[3] Therefore, the authors of this article have decided to deal with the topic in greater detail. This article will discuss some of the tax problems regarding academics who teach and do research around the globe and will hence form a basis for a better understanding of the international tax implications for this group of people. It should also meet the interest of readers beyond the scientific tax community. Whenever this article refers to 'visiting academics', this term will have to be understood very broadly. Among others, it

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* Before articles have been accepted for publication in Intertax' peer-reviewed section, they have been subject to double-blind peer review; that is, two academic reviewers who shall remain anonymous to the author and to each other and neither of whom are from the same country as the author have valuated the article's academic merit. Only articles confirmed by the reviewers to show the highest standards of scholarship are accepted for publication in this section.

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1 OECD, *Model Tax Convention on Income and on Capital* (2010) (hereinafter OECD Model). All references to the OECD Model and its Commentary are (unless otherwise indicated) to the 2010 version. All references to the UN Model Tax Convention (2001) (hereinafter UN Model) and its Commentary are (unless otherwise indicated) to the 2001 version.

2 See para. 11 of the Commentary on Art. 15 OECD Model.

3 So far the following articles have been dedicated to this issue: Karl-Heinz Bauer, 'Die Besteuerung der Auslandslehrer', *Finanz-Rundschau* (1988): 425 et seq.; Josef Bauer, 'Studenten, Gastlehrer und Gastprofessoren im DBA Recht', in *Arbeitnehmer im Recht der Doppelbesteuerungsabkommen*, eds Wolfgang Gassner, Michael Lang, Eduard Lecher, Josef Schuch & Claus Staringer (2003), 225 et seq.; Wolfgang Gassner & Michael Lang, 'Double Non-taxation of a Belgian Tax Law Professor Lecturing in Vienna', in *Liber Amicorum Luc Hinnekens* (2002), 219 et seq.; Heinz Jirousek, 'Besteuerung international tätiger Gastprofessoren', *Österreichische Steuerzeitung* (1998): 619 et seq.; Dennis Karjala, 'Income Taxation of Academics Studying or Teaching Abroad', *Journal of Legal Education* (1994): 531; Michael Lang, 'Irrwege der DBA-Auslegung am Beispiel der Besteuerung von Lehrbeauftragten', *Steuer & Wirtschaft International* (1998): 508 et seq.; Moris Lehner, 'Basic Features of the Taxation of Guest Professors, Teachers, Scholarship Holders and Student Trainees at Home and Abroad', in *European Research Structures Changes and Challenges, Mobility of Researchers in the European Union*, ed. Max-Planck-Gesellschaft (1994), 108 et seq.; Helmut Loukota, 'Grundsätze für die steuerliche Behandlung international tätiger Gastprofessoren', *Steuer & Wirtschaft International* (1998): 456 et seq.; Helmut Loukota, 'Vermeidung von Irrwegen bei der DBA-Auslegung', *Steuer & Wirtschaft International* (1998): 559 et seq.; Jacques Malherbe, 'Professeurs en mission temporaire à l'étranger', *Journal de Droit Fiscal* (2001): 57 et seq.; Jörg-Manfred Mössner, 'Visiting Professors and Double Tax Conventions', in *Liber Amicorum Cyrille David* (2005), 237 et seq.; Rainer Prokisch, 'Besteuerung von Gastprofessoren, Auslandslehrern und ausländischen Studenten', *Internationale Wirtschaftsbriefe*, Fach 3, Deutschland, Gruppe 3 (1994): 1091 et seq.; Rainer Prokisch, 'The Mobility of Scientists in Europe: Problems Relating to Fiscal Law', in *European Research Structures Changes and Challenges, Mobility of Researchers in the European Union*, ed. Max-Planck-Gesellschaft (1994), 113 et seq.; Rainer Prokisch, in *Double Taxation Conventions*, 3rd edn, ed. Klaus Vogel (1997), Art. 15; Rainer Prokisch, in *Doppelbesteuerungsabkommen*, 5th edn, eds Klaus Vogel & Moris Lehner (2008), Anhang III zu Art. 15; Tan How Teck, 'The

includes teachers, professors, lecturers, and researchers, whose main profession is teaching or research or both.[4]

2. THE TAXATION OF VISITING ACADEMICS IN THE OECD MODEL

2.1. *Introductory Remarks*

In 2000, the OECD explicitly acknowledged that the taxation of visiting academics can turn out to be a difficult task.[5] In fact, the crucial point is under which conditions a visiting academic can be considered to be an employee and under which conditions self-employed. Absent any special rule on visiting academics, at least three allocation rules of the OECD Model might apply to internationally active academics: Article 7, Article 15, and possibly, Article 19.[6]

2.2. *Employed or Not Employed: That Is the Question*

2.2.1. *Autonomous Interpretation*

There has been a long and fierce dispute among academics on how and where to draw the line between dependent (Article 15 OECD Model) and independent (Article 7 OECD Model) personal services. The OECD Model lacks a definition of the term *employment*. For some authors, this suffices to resort to domestic tax legislation via Article 3(2) OECD Model.[7] This approach, however, poses an inherent risk of creating qualification conflicts: Austria, for instance, by virtue of a domestic law provision, considers all income of professors, lecturers, and teachers as income from employment.[8] Other states may take a different view.[9] As a consequence, qualification conflicts will likely occur. In order to avoid undesirable situations of double taxation and double non-taxation alike, it has been shown[10] that Article 3(2) OECD Model has to be applied very cautiously and restrictively. Article 3(2) OECD Model only applies *unless the context otherwise requires.* Moreover, it has been demonstrated by Lang[11] and other authors,[12] for instance, that based on an international, common understanding of the term '*employment*' and the context of a tax treaty, Article 7 and Article 15 OECD Model can indeed be given an autonomous meaning. Thus, the requirements for recourse to domestic law according to Article 3(2) OECD Model are, in essence, not met. In its 2010 update, the Commentary to the OECD Model now, however, recommends a *renvoi* to the domestic law of the state applying the treaty in order to determine whether an individual is employed or not in the context of the

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"Teachers and Researchers" Article in Singapore's Tax Treaties', *Bulletin for International Fiscal Documentation* (2006): 119 et seq.; Benedicte Wiberg, 'Professorreglen i de danske dobbeltbeskatningsoverenskomster', *Skat Udland* (1996): 196 et seq.; Ulf Zehetner, 'Gastprofessoren, Gastlehrer, Studenten und Auszubildende nach dem neuen DBA Österreich-Deutschland', in *Das neue Doppelbesteuerungsabkommen Österreich-Deutschland*, eds Wolfgang Gassner, Michael Lang & Eduard Lechner (1999), 185 et seq.

4 See also the introductory remarks on the personal scope of a specific visiting academics provision below at s. 3.4.1.

5 OECD, *No. 7: Issues Related to Article 14 of the OECD Model Tax Convention* (2000), para. 12.

6 See also para. 2 of the Commentary on the UN Model: *Although articles 14, 15, 19 and 23 may generally be adequate to prevent double taxation of visiting teachers, some countries may wish to include a visiting teachers article in their treaties. Reference is made to paragraphs 11 to 13 of the Commentary on article 20 for a comprehensive treatment of this subject*; further Jörg Manfred Mössner, 'Visiting Professors and Double Tax Conventions', in *Liber Amicorum Cyrille David* (2005), 237 (237 et seq.).

7 See Helmut Loukota, 'Vermeidung von Irrwegen bei der DBA-Auslegung', *Steuer & Wirtschaft International* (1998): 559 (559 et seq.); after a careful analysis, see also Frank Pötgens, *Income from International Private Employment – An Analysis of Article 15 OECD Model* (2006), 292 et seq.; Bernard Peeters, 'Article 15 of the OECD Model Convention on "Income from Employment" and its Undefined Terms', *European Taxation* (2004): 72 et seq.; apparently also Gianluca Pezzato, 'The Meaning of the Term "employment" under article 15 of the OECD Model Convention', in *Taxation of Employment Income in International Tax Law*, eds Daniela Hohenwarter & Vanessa Metzler (2009), 49 (65 et seq.). On this issue in greater detail: John Avery Jones et al., 'The Interpretation of Tax Treaties with Particular Reference to Article 3(2) of the OECD-Model', *British Tax Review* (1984): 14 et seq. and 90 et seq.; John Avery Jones, 'Qualification Conflicts: The Meaning of Application in Art. 3(2) of the OECD Model', in *Festschrift für Karl Beusch*, eds Heinrich Beisse, Marcus Lutter & Heribald Närger (1993), 43 et seq.; John Avery Jones, 'The "One True Meaning" of a Tax Treaty', *Bulletin for International Fiscal Documentation* (2001): 220.

8 See s. 25(1)(5) EStG (Income Tax Code). A similar provision used to be included in a decree by the Federal Finance Minister (BGBl II 287/1997) until it was – lacking a legal basis – abolished by the Constitutional Court (*Verfassungsgerichtshof,* 15 Jun. 2000, V 102/99, VfSlg 15.811/2000). Subsequently, the problem was resolved by an amendment to the Income Tax Code (BGBl I 142/2000 as amended by the Constitutional Court in BGBl I 2006/109). The issue caused a fierce debate within the Austrian tax community: Heinz Jirousek, 'Besteuerung international tätiger Gastprofessoren', *Österreichische Steuerzeitung* (1998): 619 et seq.; Helmut Loukota, 'Grundsätze für die steuerliche Behandlung international tätiger Gastprofessoren', *Steuer & Wirtschaft International* (1998): 456 et seq.; strongly disagreeing Michael Lang, 'Irrweg der DBA-Auslegung am Beispiel der Besteuerung von Lehrbeauftragten', *Steuer & Wirtschaft International* (1998): 508 et seq.; contra Helmut Loukota, 'Vermeidung von Irrwegen bei der DBA-Auslegung', *Steuer & Wirtschaft International* (1998): 559.

9 See Wolfgang Gassner & Michael Lang, 'Double Non-Taxation of a Belgian Tax Law Professor Lecturing in Vienna', in *Liber Amicorum Luc Hinnekens* (2002), 219 (especially at 224 et seq.).

10 See Michael Lang, *Introduction to the Law of Double Taxation Conventions* (2010), MN 76 et seq.; Michael Lang, 'Die Bedeutung des originär innerstaatlichen Rechts für die Auslegung von Doppelbesteuerungsabkommen (Art. 3 Abs. 2 OECD-MA)', in *Außensteuerrecht, Doppelbesteuerungsabkommen und EU-Recht im Spannungsverhältnis – Festschrift für Helmut Debatin*, eds Gabriele Burmester & Dieter Endres (1997), 283 (287); Ulf Zehetner, 'Gastprofessoren, Gastlehrer, Studenten und Auszubildende nach dem neuen DBA Österreich-Deutschland', in *Das neue Doppelbesteuerungsabkommen Österreich-Deutschland*, eds Wolfgang Gassner, Michael Lang & Eduard Lechner (1999), 186 (191); Edwin van der Bruggen, 'Unless the Vienna Convention Otherwise Requires: Notes on the Relationship between Article 3(2) of the OECD Model Tax Convention and Articles 31 and 32 of the Vienna Convention on the Law of Treaties', *European Taxation* (2003): 142 (154 et seq.); Edwin van der Bruggen, 'Good Faith in the Application of Double Taxation Conventions', *British Tax Review* (2003): 25 (39 et seq.).

11 See Michael Lang, *Steuer & Wirtschaft International* (1998): 511 et seq.

12 See Gerard Coulombe, 'General Report', in *Cahiers de Droit Fiscal International* Vol. 67b, *Taxation of payments of non-residents for independent personal services*, ed. International Fiscal Association (1982), 39 (40 et seq.); Rainer Prokisch, in *Double Taxation Conventions*[3], ed. Klaus Vogel (1997), Art. 15 MN 16 et seq.; Michael Lang & Ursula Zieseritsch, 'Der Begriff der unselbständigen Arbeit nach Art. 15 OECD-MA', in *Arbeitnehmer im Recht der Doppelbesteuerungsabkommen*, eds Wolfgang Gassner, Michael Lang, Eduard Lechner, Josef Schuch & Claus Staringer (2003), 31 (46 et seq.).

international hiring out of labour,[13] under the condition that the applying state's classification does not arbitrarily contradict a general understanding of the matter.[14] Such an approach may sound practicable, yet in essence it is not helpful at all: Without an autonomous meaning of the term *employment*, it will never be possible to tell whether a domestic law provision contradicts specific *objective criteria*[15] of a general understanding every state would have to accept when applying its national law. The OECD approach apparently presupposes an autonomous notion of the concept of employment but still hesitates to openly admit this, which is regrettable. In conclusion, the authors of this article have nevertheless decided to adhere to an autonomous approach, which will be subsequently elaborated on.

2.2.2. *Criteria for Separation*

2.2.2(a) *Subordination*

In his General Report for the 1982 IFA Congress in Buenos Aires, Coulombe[16] sought to define a common international understanding, an international consensus on the essence of the term *employment*, and concluded that the decisive point would be the subordination link between the person rendering and the person receiving the services.[17] In addition, the rare examples mentioned in the Commentary on Article 15 OECD Model (sales representative, construction worker, engineer)[18] are in line with this perception. A person is usually considered subordinated if he is bound to directions and control and subject to disciplinary power of someone else when performing his services.[19] Especially as regards visiting academics, Mössner,[20] Prokisch,[21] as well as the Austrian *Verwaltungsgerichtshof*[22] and the French *Conseil d'Etat*[23] argue that another aspect should be taken into account: the individual's integration into the business and organization of the person to whom he owes his services.[24] In the authors' opinion, this aspect, however, does not constitute a separate criterion. Rather, the submission to the organization and business of someone else additionally illustrates the principle of subordination.

Another aspect may be considered: Article 15(2) OECD Model speaks of the relationship between employer and employee. In the context of the international hiring out of labour, the 'real employer' for taxation purposes may sometimes be difficult to determine. Hence, the Commentary on this rule provides some criteria that should help resolve this issue.[25] Many of these criteria relate to the principle of subordination. Among other sections, paragraph 8.14 of the Commentary on Article 15 OECD Model recommends considering who has the authority to give instructions as to how the services of the individual are performed, who controls and is responsible for the place where the work is performed, who puts the tools and materials necessary for the work at the individual's disposal, who has the right to impose disciplinary sanctions related to the work of the individual, etc. Lang and Zieseritsch[26] argue that these criteria can be applied not only to determine the real employer out of two possible employers but also to find out whether an individual has an employer at all. Pötgens[27] questions this approach, which would apply the criteria mentioned in the Commentary to bona fide situations, *since paragraph 8 of the 1992–2005 Commentary on Article 15 seems to restrict itself to cases of abuse.* However, he concedes that this might become different when the

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[13] See also below s. 2.2.2.a.

[14] Paragraphs 8.7 and 8.11 of the Commentary on Art. 15 OECD Model.

[15] Paragraph 8.11 of the Commentary on Art. 15 OECD Model.

[16] See Gerard Coulombe, in *Cahiers de Droit Fiscal International* Vol. 67b, 40 et seq.

[17] See also Frank Pötgens, *International Private Employment*, 270 et seq., who can also determine some similarities among various jurisdictions on the understanding of the term 'employment'. Still, this author advocates generally interpreting this term via Art. 3(2) OECD Model on the basis of the domestic tax law of the state applying the treaty (Frank Pötgens, *International Private Employment*, 292 et seq.).

[18] See para. 3 of the Commentary on Art. 15 OECD Model.

[19] See Rainer Prokisch, in *Double Taxation Conventions*[3], ed. Klaus Vogel, Art. 15 MN 16a.

[20] See Jörg-Manfred Mössner, in *Liber Amicorum Cyrille David*, 240 et seq.

[21] See Rainer Prokisch, in *Doppelbesteuerungsabkommen*, eds Klaus Vogel & Moris Lehner, 5th edn (2008), Art. 15 MN 166.

[22] *Verwaltungsgerichtshof*, 24 Jun. 2004, 2001/15/0113. It should be noted, however, that the Court argues on the basis of domestic tax law.

[23] *Conseil d'Etat*, 10 May 1991, No. 76585.

[24] In addition, the German *Bundesfinanzhof* (28 Apr. 1972, VI R 71/69 BStBl II 1972, 617; 4 Feb. 1975, IV R 180/72 BStBl II 1976, 292) applied this criterion, among other benchmarks, to determine whether or not an academic was employed. Since these two decisions relate to purely domestic cases and were, consequently, decided on the basis of domestic tax law, they may not be directly used in international cases.

[25] The Commentary on Art. 15 OECD Model was extensively redrafted in the 2010 update to the OECD Model. Before the 2010 update, para. 8 of the Commentary on Art. 15 OECD Model only contained a very small number of criteria. This gave rise to criticism (e.g., Luc De Broe et al., 'Interpretation of Art. 15(2)(b) of the OECD Model Convention: Remuneration Paid by, or on Behalf of, an Employer Who Is Not a Resident of the Other State', *Bulletin for International Fiscal Documentation* (2000): 503 (508)). Inserted by the 2010 update, para. 8.14 of the Commentary on Art. 15 OECD Model now contains an extended number of criteria to be considered.

[26] Michael Lang & Ursula Zieseritsch, in *Arbeitnehmer im Recht der Doppelbesteuerungsabkommen*, eds Wolfgang Gassner et al., 46 et seq.

[27] Frank Pötgens, *International Private Employment*, 268.

2004 Discussion Draft[28] is implemented into the OECD Commentary,[29] which actually happened in 2010. Paragraphs 8.8–8.10 of the 2010 Commentary on Article 15 OECD Model still use the expressions *abusive* and *abuse*, yet a general reference in paragraph 1[30] and a statement in paragraph 8.1[31] of the Commentary on Article 15 OECD Model allow for a contrary conclusion. It is therefore very possible to follow the proposal made by Lang and Zieseritsch. The criteria mentioned in the Commentary can – *mutatis mutandis* – also be used to determine whether or not an employment relationship exists at all.

However, for visiting academics (especially university professors and research associates), it may be asked whether subordination is a suitable criterion for separation, since (visiting) academics might be protected by academic freedom, known to many states worldwide.[32] This argument deserves some attention yet it needs to be clarified that academic freedom is a concept interpreted and understood very differently throughout the world. While academic freedom is explicitly granted to individuals (university professors, lecturers, and researchers) in Austria, Germany, or France, for example,[33] this right is exclusively reserved for universities in the United States.[34] However, even if individuals are protected by academic freedom, this principle (only) implies that they are free to choose their fields of research, areas of scientific interest, and their methods of research, that they are free to arrange their teaching concepts, and that they are protected from any interference when carrying out this work. It is, however, not a contradiction to the principle of academic freedom that academics are subjected to, for instance, disciplinary power (in case they fail to fulfil their lecturing obligations or neglect standards of academic decency) or to organizational directions of their universities (e.g., assignment of a professor to a new institute after the former has been shut down).[35] Consequently, if carefully applied, the concept of subordination does not contradict the principle of academic freedom but serves well as a criterion to distinguish between independent and dependent services, even in the context of visiting academics.

This having been said, a lot of circumstances have to be considered in order to consider a visiting academic subordinated to his host university, for example, the disciplinary power of the host university, integration into the business and organization of the host university, engaging in research for the benefit of the host university, availability for research associates and students, obligation to regularly hold lectures and to take exams personally, involvement in managerial responsibilities and other duties, etc.[36]

2.2.2(b) *Business Risk*

Apart from subordination, a further criterion may be derived from the context of the OECD Model: Article 15 OECD Model has to be read in contrast to Article 7 OECD Model. The latter provision relates to the profits of an *enterprise.* Article 3(1)(c) OECD Model defines that the term *'enterprise' applies to the carrying on of any business.* Lang derives from this wording that being an entrepreneur, that is, being self-employed, is inevitably connected to the taking of risks.[37]

To determine whether and to which extent a visiting academic bears any business risks related to his engagement, different factors need to be taken into account: For example, who takes care of the obligation to bear social security contributions has to be looked at: the visiting academic or – at least in part – the university? Further, the structure of the remuneration (regular salaries or one-time lump sum payments) has to be considered. Moreover, it is of significance whether or not the visiting

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[28] OECD, *Public Discussion Draft Changes to the Commentary on Para. 2 of Art. 15*, released in April 2004 and revised as of 12 Mar. 2007. A slightly modified version was implemented into the Commentary on the OECD Model through its 2010 update. A critical discussion of the draft has been published by Frank Pötgens, 'Proposed Changes to the Commentary on Art. 15(2) of the OECD Model and Their Effect on the Interpretation of "Employer" for Treaty Purposes', *Bulletin for International Fiscal Documentation* (2007): 476 (476 et seq.).

[29] See Frank Pötgens, *International Private Employment*, 268.

[30] Paragraph 1 of the Commentary on Art. 15 OECD Model, *inter alia*, states: *The issue of whether or not services are provided in the exercise of an employment may sometimes give rise to difficulties which are discussed in paragraphs 8.1 ff.*

[31] Paragraph 8.1 of the Commentary on Art. 15 OECD Model, *inter alia*, states: *While the Commentary previously dealt with cases where arrangements were structured for the main purpose of obtaining the benefits of the exception of paragraph 2 of Article 15, it was found that similar issues could arise in many other cases that did not involve tax-motivated transactions and the Commentary was amended to provide a more comprehensive discussion of these questions.*

[32] See Jörg-Manfred Mössner, in *Liber Amicorum Cyrille David*, 241.

[33] See, e.g., Austria: Art. 17 *Staatsgrundgesetz*; Germany: Art. 5(3) *Grundgesetz*; France: Art. L 952-2 *Code de l'éducation*.

[34] See US District Court for the Eastern District of Virginia, 15 Jan. 2008, Civil Action 3:07-cv-00646-HEH, *Stronach v. Virginia State University*; Supreme Court, 17 Jun. 1957, *Sweezy v. New Hampshire*, 354 U.S. 234 (1957).

[35] See, e.g., Christian Starck, in *Das Bonner Grundgesetz – Kommentar*, 5th edn, eds Herrmann von Mangoldt, Friedrich Klein & Christian Starck (2005), Art. 5 MN 377 and 381; Ingolf Pernice, in *Grundgesetz – Kommentar*, ed. Horst Dreier (1996), Art. 5 III MN 30; some of these issues were also discussed in decisions of German courts, e.g., *Bundesverfassungsgericht*, 26 Jun. 1979, 1 BvR 290/79, BVerfGE 51, 369; 8 Apr. 1981, 1 BvR 608/79, BVerfGE 57, 70; *Bundesverwaltungsgericht*, 5 Feb. 1965, VII C 151.63, BVerwGE 20, 235. Apparently concurring, Jörg-Manfred Mössner, in *Liber Amicorum Cyrille David*, 241.

[36] See s. 2.2.4 for examples.

[37] Michael Lang, *Steuer & Wirtschaft International* (1998): 510 et seq.; further, Michael Lang & Ursula Zieseritsch, in *Arbeitnehmer im Recht der Doppelbesteuerungsabkommen*, eds Wolfgang Gassner et al., 46 et seq.

academic is also paid when he cannot fulfil his obligations in the case of illness or lack of students enrolled in a course, etc.[38,39]

2.2.2(c) *Conclusion*

Employment as used by the OECD Model is a typological term. A full judgment on whether or not a visiting academic is employed, therefore, has to rely on all facts and circumstances of the particular case.[40] Still, many of these aspects can be brought in some order so that two big groups of criteria emerge: the subordination of the visiting academic, on the one hand, and the visiting academic's taking of business risks related to his assignment, on the other hand. To be considered an employee, in most cases, a visiting academic has to be both subordinated to his host university and may not be exposed to any significant business risks.

2.2.3. *Legal Consequences*

2.2.3(a) *Application of Article 7 OECD Model*

In case the visiting academic is considered self-employed, his income would fall under Article 7 OECD Model. Under this rule, the profits of an enterprise of a contracting state are taxable only in the residence state unless the enterprise carries on business in the other contracting state through a permanent establishment (PE) to which this remuneration can be attributed. Article 5 OECD Model requires for a PE to be constituted that an enterprise disposes of a fixed place of business through which it carries on business wholly or partially. Skaar belongs to the first of the academics to have created a systematic interpretation approach to the PE concept in Article 5 OECD Model.[41] He developed certain tests[42] that need to be checked in order to find out whether or not a PE had been constituted. In a nutshell, a PE has to be permanent from both a geographical and a temporal point of view. It must be at the disposal of the entrepreneur, and business must be carried out through it.

Applying the aforesaid to visiting academics, this could mean the following: If an academic has a right to use an office at his host university in order to prepare or fulfil at least part of his obligations to the host university for a certain period of time (in accordance with the OECD Commentary and the practice of many states[43] for at least six months[44]), this should be sufficient for him to constitute a PE.[45] Since the office at the university will most likely not belong to the visiting academic but to the host university, it will be important that the visiting academic is really entitled to dispose of this office.[46] This, consequently, requires that the professor has a key and has access to this office whenever he wishes. If all these criteria are satisfied, a PE will be established. This situation is similar to independent business consultants who often spend a lot of their working time at their clients' offices.[47] The Austrian *Verwaltungsgerichtshof* confirmed the existence of a PE in a comparable situation.[48]

It should also be mentioned in this regard that a visiting academic may constitute a Service PE, if the applicable treaty is based on the UN Model[49] or simply provides for such a rule. The issue of Service PE rules has become more important, because an example of a Service PE provision that the OECD member countries are free to negotiate on in their tax treaties has been inserted into the OECD Commentary in its 2008 update.[50] In general, such clauses provide that an individual rendering services for a

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38 See s. 2.2.4 for examples.

39 See also Canadian Federal Court of Appeal, 15 Mar. 2002, A-563-00, *Wolf v. Her Majesty the Queen*, 2002 FCA 96, especially at para. 86 et seq.: In this decision, the Federal Court of Appeal discusses a set of tests (control, ownership of the tools, chance of profit, financial risk) to determine whether the appellant was employed or not. It should be noted, however, that the Federal Court of Appeal bases its reasoning on domestic legislation.

40 See Michael Lang & Ursula Zieseritsch, in *Arbeitnehmer im Recht der Doppelbesteuerungsabkommen*, eds Wolfgang Gassner et al., 47.

41 Arvid Skaar, *Permanent Establishment – Erosion of a Tax Treaty Principle* (1993); further, Jacques Sasseville & Arvid Skaar, 'General Report', in *Cahiers de Droit Fiscal International* Vol. 94a, *Is there a permanent establishment?*, ed. International Fiscal Association (2009), 17 et seq.

42 Place of business', 'location', 'right of use', 'business activity', and 'business connection' tests: Arvid Skaar, *Permanent Establishment*, 109 et seq.; see also Jacques Sasseville & Arvid Skaar, in *Cahiers de Droit Fiscal International* Vol. 94a, 23 et seq.

43 See para. 6 of the Commentary on Art. 5 OECD Model.

44 See also Franz Wassermeyer, in *Doppelbesteuerung* (Loose Leaf), eds Helmut Debatin & Franz Wassermeyer (July 2009), Art. 5 OECD-MA MN 37a and 42b.

45 See also Austrian Ministry of Finance, 4 Dec. 2000, EAS 1747.

46 See, in this regard, Canadian Federal Court of Appeal, 24 Feb. 2000, A-707-98, *Dudney v. H.M. the Queen*, 2000 DTC 6169 (FCA), paras 19, 20, and 24: The existence of a fixed establishment was denied in this case since the taxpayer, an independent business consultant, had access to his office, which was located at his client's premises, only during his client's business hours and only for the purposes of performing services to his client.

47 On this issue especially, Franz Wassermeyer, in *Doppelbesteuerung* (Looseleaf), eds Helmut Debatin & FranzWassermeyer (July 2009), Art. 5 OECD-MA MN 42b.

48 *Verwaltungsgerichtshof*, 21 May 1997, 96/14/0084: Swiss business consultant comes to Austrian client for 300 days, where he is given an office at the client's premises so that he can carry out his work there.

49 Article 5(3)(b) UN Model; see also Art. 14(1)(b) UN Model.

50 Paragraph 42.23 of the Commentary on Art. 5 OECD Model.

certain time[51] in another state will constitute a PE in that state.

In conclusion this means the following: The visiting academic is taxable in his residence state, unless his income is attributable to a PE in the other state. If his income is attributable to a PE he maintains in the other state, he will be taxable in this state.

2.2.3(b) *Application of Article 15 OECD Model*

If the visiting academic is employed, it will be the state of activity (most likely the host state) that will have the primary right to tax the visiting academic's salary (Article 15(1) OECD Model). An exception to this principle is made in case the requirements of Article 15(2) OECD Model are met: Under this rule, the visiting academic would remain taxable in the residence state, if (1) he stays less than 183 days in the host state, (2) his remuneration is not paid by or on behalf of an employer resident in the host state, and (3) his remuneration is not borne by a PE that the employer has in the host state. All these requirements need to be met cumulatively.[52] Otherwise, the visiting professor will be taxed in the host state.

2.2.4. *Examples*

Example 1: A is a renowned lawyer in Italy, who has a five-year contract with a German university he visits regularly (every two months for one week). He holds four lectures a year, takes exams, and provides assistance to master and doctoral students. A participates in the scientific life of his host university, takes part in research projects, and also helps developing the university's curricula. He receives a regular salary, the university makes social security contributions for A, and he will not lose his salary claims if he becomes ill.

Solution: A is employed by his host university. He is taxable in Germany (Article 15(1) DTC Germany-Italy).

Example 2: B is a surgeon resident in Japan and, once a year, holds a one-week lecture at a British medical school on recent developments in the area of heart surgery. After having finished his lecture, he flies back to Japan. He receives a lump sum payment under the condition that the lecture really took place.

Solution: B is an independent contractor. He is self-employed. B does not constitute a PE in the United Kingdom and, therefore, remains taxable only in Japan (Article 7 DTC Japan-United Kingdom).

Example 3: C is a professor of chemistry in Poland. He is invited to become a visiting fellow of a Norwegian university for a seven-month period. He is supposed to give advice to his host university's scientific staff whenever requested. In practice, he comes over to Norway every second or third week for a couple of days each. C does not hold any lectures, nor does he take any exams, nor is he in contact with the university's students. C only participates in university life when he wishes to do so. At his Norwegian host university, he has an office, in which he can also take care of all his other activities (e.g., private research, advising enterprises in the pharmaceutical and petroleum industries). He receives a monthly payment and is insured by his host university.

Solution: It is not easy to decide this case. The authors of this article, however, tend to consider C to be self-employed due to his loose ties to the host university. C seems to be an external consultant rather than a member of the university. Thus, the existence of a subordination link seems doubtful in this context. His income therefore falls under Article 7 DTC Norway-Poland. Since C disposes of an office in Norway for seven months, however, he may constitute a PE in this state and, consequently, could be taxable there (Article 5 DTC Norway-Poland).

2.3. *Application of Article 19 OECD Model?*

2.3.1. *Application of Article 19(1) OECD Model?*

2.3.1(a) *Requirement 1: 'Salaries, Wages or Other Similar Remuneration'*

If a visiting academic is working for a public university, the question may arise whether or not Article 19(1) OECD Model – *Government service* – also applies to his income. This provision reads as follows: *Salaries, wages and other similar remuneration, paid by a Contracting State or a political subdivision or a local authority thereof to an individual in respect of services rendered to that State or subdivision or authority shall be taxable only in that State*. It follows from the wording (*salaries, wages and other similar remuneration*), which is also used in Article 15 OECD Model, that this provision, unlike Article 19 US Model,[53] only applies to income derived from dependent personal services. This is also clarified by the Commentary on Article 19(1) OECD Model.[54]

Notes

[51] Article 5(3)(b) UN Model: 183 days in any twelve-month period for the same or connected projects; para. 42.23 of the Commentary on Art. 5 OECD Model: 183 days in any twelve-month period for the same or connected projects, or if 50% of gross revenues are derived from services rendered in the other state.

[52] Franz Wassermeyer, in *Doppelbesteuerung* (Loose Leaf), eds Helmut Debatin & Franz Wassermeyer (March 2002), Art. 15 OECD-MA MN 88.

[53] See the Technical Explanations on Art. 19 para. 1 US Model 2006.

[54] See para. 2.1 of the Commentary on Art. 19 OECD Model.

2.3.1(b) *Requirement 2: 'Paid by a Contracting State [. . .]'*

The more exciting question, however, is how far the scope of Article 19(1) OECD Model in respect of the origin of the remuneration reaches. Literally, it covers all income *paid by a Contracting State or a political subdivision or a local authority thereof.* The Commentary provides some further examples, explicitly referring to *constituent States, regions, provinces, départements, cantons, districts, arrondissements, Kreise, municipalities or groups of municipalities, etc.*[55] All these examples have in common that they refer to certain territorial entities of a state. Scholars have therefore argued that the scope of Article 19(1) OECD Model has to be limited to such legal entities.[56] Article 19(1) OECD Model accordingly only applies if an individual receives remuneration from one of these entities. In other words, it is required that exactly one of these entities legally owes and pays such remuneration.[57]

The question may arise as to how to deal with legal entities, other than a state or comparable territorial entity, albeit established under public law (public legal entity, *personne morale a droit public*, *Körperschaft öffentlichen Rechts*, etc.), which can itself own property, conclude contracts, and can be sued. According to the prevailing opinion among tax scholars,[58] Article 19(1) OECD Model does not apply to remuneration paid by such entities, because they are neither mentioned in the text of the Model nor in its Commentary. Such restrictive position seems to be correct from a teleological point of view: As mentioned by the Commentary on Article 19 OECD Model, this provision is drafted in accordance with the rules of international courtesy and respect between sovereign states.[59] It remains, however, doubtful whether entities independent from a state, political subdivision, or local authority thereof are affected by the concept of state sovereignty at all. Finally, this understanding, in the authors' opinion, can also be supported by another argument: In 1995, France filed a reservation to Article 19(1) OECD Model, claiming *that the scope of the application of Article 19 should cover: (. . .) remuneration paid by public legal entities of the State or a political subdivision or local authority thereof, because the identity of the payer is less significant than the public nature of the income.*[60] This reservation suggests a narrow scope of Article 19 that France wished to extend.

Turning back to visiting academics, Article 19(1) OECD Model applies if a visiting academic receives remuneration paid by a university that is part of a contracting state, political subdivision, or local authority thereof. Remuneration paid by public universities legally distinct from a state, political subdivision, or local authority thereof, however, is not governed by this rule but by the general provisions of the OECD Model. However, some bilateral tax treaties explicitly cover (all kinds of) public legal entities,[61] as advocated by France.[62]

Needless to say, yet important to stress, is that the mere payment by a qualifying public entity does not suffice for the application of Article 19(1) OECD Model. It is required that the payment really originates from public funds.[63] If the payment is not made out of public funds, Article 19 OECD Model fails to apply.

2.3.1(c) *Requirement 3: 'In Respect of Services Rendered to that State [. . .]'*

Article 19(1) OECD Model provides that the recipient of the income has to render his services to the payer of the income (*services rendered to that state {. . .}*). The question arises whether the taxpayer is, under this provision, required to be employed by the paying state or not. Especially when it comes to visiting academics, it may happen that these persons are not employed by a

Notes

55 See para. 3 of the Commentary on Art. 19 OECD Model.

56 See Michael Rodi, in *Double Taxation Conventions*, 3rd edn, ed. Klaus Vogel (1997), Art. 19 MN 14 et seq.; in more detail, Christian Waldhoff, in *Doppelbesteuerungsabkommen*, 5th edn, eds Klaus Vogel & Moris Lehner (2008), Art. 19 MN 21 et seq.

57 See Michael Rodi, in *Double Taxation Conventions*[3], ed. Klaus Vogel, Art. 19 MN 12; in more detail, Christian Waldhoff, in *Doppelbesteuerungsabkommen*[5], eds Klaus Vogel & Moris Lehner, Art. 19 MN 27. A different position seems to be taken by, e.g., the Austrian tax administration: BMF, 18 Nov. 2008, EAS 3015.

58 See Michael Rodi, in *Double Taxation Conventions*[3], ed. Klaus Vogel, Art. 19 MN 14; Franz Wassermeyer, in *Doppelbesteuerung* (Loose Leaf), eds Helmut Debatin & Franz Wassermeyer (October 2004), Art. 19 OECD-MA MN 48 et seq.; Martin Svalbach, 'The State-of-the-Fund Principle', in *Taxation of Employment Income in International Tax Law*, eds Daniela Hohenwarter & Vanessa Metzler (2009), 293 (307).

59 See para. 1 of the Commentary on Art. 19 OECD Model. Critical regarding this motive, see Franz Wassermeyer, in *Doppelbesteuerung* (Loose Leaf), eds Helmut Debatin & Franz Wassermeyer (October 2004), Art. 19 OECD-MA MN 1; Pasquale Pistone, 'Government Service', in *Source versus Residence*, eds Michael Lang, Pasquale Pistone, Josef Schuch & Claus Staringer (2008), 283 (289 et seq.).

60 See para. 13 of the Commentary on Art. 19 OECD Model.

61 See, e.g., Art. 19 DTC France-Sweden; Art. 19 DTC Albania-Austria; Art. 19 DTC Germany-Switzerland.

62 See fn. 60.

63 See Pasquale Pistone, in *Source versus Residence*, eds Michael Lang, Pasquale Pistone, Josef Schuch & Claus Staringer, 285; Michael Rodi, in, *Double Taxation Conventions*[3], ed. Klaus Vogel, Art. 19 MN 12; in more detail, Christian Waldhoff, in *Doppelbesteuerungsabkommen*[5], eds Klaus Vogel & Moris Lehner, Art. 19 MN 28.

contracting state, although their salaries are being paid by this state.[64]

According to Rodi,[65] Article 19 OECD Model (1977) requires an employment relationship between a state and an individual paid by that state. A similar position is taken by Wassermeyer[66] and by the Austrian *Verwaltungsgerichtshof* in a recent decision.[67] Waldhoff[68] is of a different opinion and advocates applying Article 19 to individuals who are paid by a state if they are rendering services that are in the public interest.

With regard to the 1954 Germany-The United States Tax Treaty,[69] the *Bundesfinanzhof* held that the government service provision of this tax treaty applied only to remuneration paid by public employers to their employees. On the Government service provisions of the 1966 Germany-Spain[70] as well as the Germany-Egypt[71] and the 1987 Germany-Yugoslavia[72] tax treaties, all of which deviate from Article 19 OECD Model, the *Bundesfinanzhof* subsequently took a different position, holding that these provisions did not require an employment relationship between an individual and the paying state. It was sufficient that the individual rendered services that were in the interest of the paying state. The Belgium *Cour de Cassation*[73] took a similar position when it applied the Government service provision of the 1970 Belgium-The Netherlands Tax Treaty, which also deviated from Article 19 OECD Model, on state pensions of a teacher who formerly worked for a publicly subsidized private school. The Court held that the services of the teacher were rendered on behalf of the paying state, because the former school of the teacher had received a considerable amount of public funding and had been controlled by the government.

Turning back to the drafting of Article 19 OECD Model, notice should be given to the word *that* in the phrase *in respect of services rendered to that State or subdivision or authorities thereof*. Read in connection with the introductory phrase of this provision (*Salaries, wages and other similar remuneration paid by*), it seems as though the drafters of the OECD Model had in mind a specific connection between the paying state and the individual paid.[74] The OECD Commentary supports this view, when it – admittedly *en passant* – speaks of *State employees* and *persons receiving pensions from past employment by a State*.[75] It is more than doubtful whether such a specific link can be established under the condition that the services are rendered to a third person even though they are rendered in the public interest. A teleological argument[76] (Article 19 OECD Model *is framed in order to conform with the rules of international courtesy and mutual respect between sovereign States*[77]) in support of a broader construction of Article 19 OECD Model is not very convincing: The state-of-the-fund principle only applies to dependent personal services, whereas payments by a state in respect of individual personal services do not fall under Article 19 OECD Model at all. Since this principle is only fragmentarily realized by Article 19 OECD Model, it should be applied very carefully and should not be used as a general guideline of interpretation.

To sum up, Article 19(1) OECD Model requires that there be an employment relationship between the state and the individual paid by that state. Together with Rodi[78] and the *Bundesfinanzhof*,[79] it should be noted, however, that many treaties depart from the OECD Model in this respect and can, consequently, lead to different interpretation results.

2.3.1(d) *Conclusion*

In conclusion, Article 19(1) OECD Model applies if three conditions are cumulatively met: (1) An individual is

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64 This situation can occur, for example, in Germany, where persons teaching in German schools abroad are employed by private organizations yet receive their remuneration from the German state: *Bundesfinanzhof*, 23 Sep. 1998, I B 53/98; 13 Aug. 1997, I R 65/95; 4 Dec. 1991, I R 38/91; 2 Mar. 1988, I R 96/84; *Finanzgericht Baden-Württemberg*, 8 Dec. 1998, 4 K 111/98.

65 Michael Rodi, *Recht der Internationalen Wirtschaft* (1992): 489 et seq.

66 Franz Wassermeyer, in *Doppelbesteuerung* (Looseleaf), eds Helmut Debatin & Franz Wassermeyer (October 2004), Art. 19 MN 41.

67 *Verwaltungsgerichtshof*, 27 Jan. 2011, 2009/15/0151 on Art. 19 DTC Austria-Liechtenstein.

68 Christian Waldhoff, in *Doppelbesteuerungsabkommen*[5], eds Klaus Vogel & Moris Lehner, Art. 19 MN 29.

69 *Bundesfinanzhof*, 31 Jul. 1991, I R 47/90.

70 *Bundesfinanzhof*, 13 Aug. 1997, I R 65/95.

71 *Bundesfinanzhof,* 23 Sep. 1998, I B 53/98.

72 *Bundesfinanzhof*, 20 Aug. 2008, I R 35/08.

73 *Cour de Cassation*, 4 Mar. 2004, F010076N, F.J.F. 2004, 715.

74 See also the similar approach by Michael Rodi, *Recht der Internationalen Wirtschaft* (1992): 489.

75 Paragraph 2.1 of the OECD Commentary on Art. 19 OECD Model: *{ . . .} This amendment was intended to clarify the scope of the Article, which only applies to State employees and to persons receiving pensions from past employment by a State, and not to persons rendering independent services to a State or deriving pensions related to such services.*

76 As applied by the *Bundesfinanzhof* in its judgment of 13 Aug. 1997, I R 65/95 at para. 25, for instance.

77 Paragraph 1.1 of the Commentary on Art. 19 OECD Model.

78 Michael Rodi, *Recht der Internationalen Wirtschaft* (1992): 488 et seq., especially at 490.

79 *Bundesfinanzhof*, 31 Jul. 1991, I R 47/90, paras 14 et seq.

required to receive salaries, wages, or other similar remuneration from employment directly (2) paid by a contracting state, political subdivision, or local authority thereof (3) in respect of services that are rendered to that state, subdivision, or authority thereof. If all these conditions are fulfilled – and provided that the requirements of the exception in Article 19(1)(b) are not met – the paying state will be exclusively entitled to tax the income.

Finally, it should be noted that in the recent tax literature from an equality and non-discrimination point of view legitimate concerns about the justifiability of the state-of-the-fund principle have been voiced.[80] The ECJ, which had to deal with this issue, has so far taken a different view, though.[81]

2.3.2. *Application of Article 19(3) OECD Model?*

2.3.2(a) *Market Conditions*

Article 19(3) OECD Model restricts the scope of Article 19(1) and 19(2) OECD Model: *The provisions of Articles 15, 16, 17 and 18 shall apply to salaries, wages, pensions, and other similar remuneration in respect of services rendered in connection with a business carried on by a Contracting State or a political subdivision or a local authority thereof.* The *telos* of this provision is to ensure that, in case a state engages in market activities, both public and private sector enterprises and their employees are competing under the same conditions.[82] Consequently, Article 19(3) OECD Model has to be interpreted in such a manner that it excludes all market activities of a state from the application of the state-of-the-fund principle as contained in Article 19(1) and Article 19(2) OECD Model.[83] Having said this, the question needs to be raised whether, for instance, a state university or other state-run educational institution can be considered a business activity of a state within the meaning of Article 19(3) OECD Model.

According to Loukota, the term *business activity* requires a minimum degree of profitability.[84] Such profitability would, however, certainly have to be denied if the educational institution relies on public subsidies and raises only low amounts of student fees. In other words, it is necessary to find out whether the respective activity is offered at market conditions or not. This will, among other criteria,[85] inevitably have to do with – at least intended – profitability.[86] It primarily needs to be looked at whether the state university raises sufficient, that is, market fees for its services (e.g., postgraduate LL.M. programmes)[87] or whether it offers competitive services to practitioners (e.g., seminars on recent trends in a specific field of research). The crucial point is whether there is a market with supply and demand that is ready to pay adequate fees for what it gets. In these cases, it is appropriate to speak of a *business activity* of the paying state (university).

2.3.2(b) *Salary Split*

Finally, the question arises of how to deal with academics who are rendering their services both in connection and without connection to a business activity of the paying state (e.g., a Swedish professor comes to a French public university to teach its regular students, to provide assistance to its doctoral students, to hold lectures in the postgraduate MBA programme, and to speak at practitioners' seminars organized by the university), provided that all activities are organized by the state university and provided that the visiting academic receives an overall remuneration for all his activities. The (overall) remuneration of such academics then needs to be split into a business and a non-business part.[88] An appropriate measure to do this could be the number of lecturing and preparation hours accountable for each part.[89]

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[80] See, e.g., Michael Lang, 'Art. 19(2): The Complexity of the OECD Model Can Be Reduced', *Bulletin for International Taxation* (2007): 17 (20 et seq.) with further references.

[81] *European Court of Justice*, 12 May 1998, C-336/96, *Gilly* [1998] ECR I-2793.

[82] Michael Lang, *Introduction to the Law of Double Taxation Conventions*, MN 371; Katharina Semrau-Deutsch, 'The business-activity clause in Art. 19 para. 3 OECD MC', in *Taxation of Employment Income in International Tax Law*, eds Daniela Hohenwarter & Vanessa Metzler (2009), 317 (321).

[83] Michael Lang, *Bulletin for International Taxation* (2007): 21.

[84] Helmut Loukota, in Andreas Kolb et al., 'Employment Income under Tax Treaty Law – Case Studies', *Steuer & Wirtschaft International* (2002): 522 (523); differing Mike Waters, in Andreas Kolb et al., *Steuer & Wirtschaft International* (2002): 525; taking into account additional aspects, Katharina Semrau-Deutsch, in *Employment Income*, eds Daniela Hohenwarter & Vanessa Metzler, 329 et seq.

[85] See, in detail, Katharina Semrau-Deutsch, in *Employment Income*, eds Daniela Hohenwarter & Vanessa Metzler, 329 et seq.

[86] See Helmut Loukota, in Andreas Kolb et al., *Steuer & Wirtschaft International* (2002): 523; further, Bernhard Raschauer, 'Vergütungen für Dienste in Ausübung öffentlicher Funktionen', *Steuer & Wirtschaft International* (1993): 79 (83).

[87] See the discussion of a similar case in Andreas Kolb et al., *Steuer & Wirtschaft International* (2002): 522 et seq.

[88] See also Michael Lang, 'Public Sector Pensions and Tax Treaty Law', in *Liber Amicorum Cyrille David* (2005): 223 (228 et seq.); Michael Lang, *Bulletin for International Taxation* (2007): 19 et seq. on the comparable issue of attributing the private and public amounts of the pension earned by individuals having been employed in both the public and private sectors during their working life. The contrary position is taken by the Swedish *Regeringsrätten*, which held that social security system pensions would exclusively fall under Art. 18 (8 Apr. 2003, RÅ 2003, ref. 20).

[89] See also Michael Lang, *Bulletin for International Taxation* (2007): 19 et seq.

2.3.2(c) *Conclusion*

Article 19(3) OECD Model applies if the services rendered by the visiting academic are connected to a business activity of the paying state entity. This will have to be assumed if the state entity offers its services to third parties at market fees. Should this be the case, the income would be covered by other treaty provisions, notably Article 15 OECD Model. In case a visiting academic renders his services both in connection and with no connection to a business activity of the paying state and receives an overall remuneration, it is advisable to split the overall remuneration into two parts – the one falling under Article 15 and the other under Article 19(1) OECD Model.

3. PROVISIONS FOR VISITING ACADEMICS IN DOUBLE TAX TREATIES

3.1. *Introduction*

Numerous double tax treaties contain – in contrast to the OECD Model – a special rule on the taxation of visiting academics.[90] Some tax treaties include these rules in a separate article, while other tax treaties integrate such a provision into their students article. Generally speaking, visiting academics clauses exempt from host state tax remuneration, which is paid in respect of cross-border teaching or research activities during a temporary period.[91]

Taking a look back into history, it seems that a specific provision on visiting academics was first agreed on in the France-Sweden Tax Treaty of 1936,[92] which is a couple of years later than when the first students provision was adopted in the Czechoslovakia-Germany Tax Treaty of 1921.[93] When the OECD Model was negotiated, Working Party 10 of the OEEC Fiscal Committee originally wanted to include an article on visiting academics in the Model Convention, since *the exchange of professors is of greatest importance* and such a provision was also *rather often found in current conventions*.[94] The draft article read:

> Article D: Notwithstanding the provisions of Article C (1), remuneration shall be exempt from tax in the Contracting State in which the services are performed, if the remuneration is received by: (a) a professor or teacher from the other Contracting State for teaching, during a period not exceeding two years, at a university or other establishment for higher education in the first-mentioned Contracting State, or [. . .].[95]

After this proposal was made, some delegations lodged objections to it, most of whom feared that such a clause may cause *complete tax freedom*[96] for visiting academics. For lack of consensus, Working Party 10 of the OEEC Fiscal Committee therefore suggested to not include a specific rule on visiting academics but instead to clarify in the Commentary that such a provision may be included by contracting states in their bilateral conventions, whenever this is felt *desirable.*[97] The OECD followed this advice, and so the Commentary on Article 15 OECD Model 1963 included the proposed clarification.[98]

Though such a clause was discussed during its drafting negotiations,[99] the UN Model does not contain a visiting academics provision either. Nevertheless, the UN also allows its members to include such an article in their bilateral tax treaties. However, a specific drafting of such

Notes

90 See, e.g., the list provided on German DTCs by Rainer Prokisch, in *Double Taxation Conventions*[3], ed. Klaus Vogel (1997), Art. 15 MN 96; see also, on China's DTCs, Oliver-Christoph Günther, Weibo Xing & Jingping Zhang, 'Employment Income (Arts 15, 16, 18, 19, and 20 OECD Model)', in *Europe-China Tax Treaties*, eds Michael Lang, Jianwen Liu & Gongliang Tang & ass. eds Oliver-Christoph Günther & Bristar Mingxing Cao (2010) 163 (163 et seq.); Philip Baker, *Double Taxation Conventions* (Loose Leaf) (2002), Art. 20 MN 20B.05.

91 See Rainer Prokisch, in *Double Taxation Conventions*[3], ed. Klaus Vogel (1997), Art. 15 MN 97.

92 See Art. VIII para. 4 Protocol to the DTC France-Sweden: *A professor, teacher or temporary assistant of one of the two countries who derives remuneration for services rendered during a temporary stay not exceeding two years at a university or other institution of higher education equivalent to a university of the other country shall be exempt from tax on such remuneration in that other country* (unofficial translation from IBFD Tax Research Platform, <www.ibfd.org>).

93 See para. 3 of the Protocol to the DTC Czechoslovakia-Germany: League of Nations, *Double Taxation and Fiscal Evasion*, Doc. C. 345. M. 102. 1928. II (1928), 14; Marek Herm, 'Students Articles in Model Conventions and in Tax Treaties', *Intertax* (2004): 69 (in particular 72); Art. 10 Mexico Model Tax Convention (1943) and Art. 11 London Model Tax Convention developed by the League of Nations were the first model provisions in conventions that provided for a students article.

94 See OEEC Fiscal Committee, 11 Sep. 1957, Document FC/WP10(57)1, 11, available in the OECD History Database, <www.taxtreatieshistory.org>.

95 See *ibid.*

96 See OEEC Trade and Finance Directorate, 25 Feb. 1958, Document TFD/FC/31, 2, available in the OECD History Database. The OEEC Report made the following comment*: 3. It appears from the replies that only two Delegations would be prepared to accept the traditional rule for years' tax exemption. Another Delegation states that the rule would be acceptable if agreed by all Delegations. Other Delegations object to the rule just because it might imply complete tax freedom as regards the remuneration received by the visiting professors. It is, therefore, proposed by some of these Delegations that the exemption provided for be granted only if such remuneration is subject to tax in the professor's home country by reason of the fact that he retains his residence there during his temporary visit in the other country. On the other hand, one Delegation maintains that no special rule should be included, as the application of the main rule for the taxation of income from dependent services is best designed with a view to avoiding cases of complete tax exemption.*

97 OEEC Trade and Finance Directorate, 25 Feb. 1958, Document TFD/FC/31, 3, available in the OECD History Database.

98 Paragraph 6 of the Commentary on Art. 15 OECD Model 1963 (2010: para. 11) reads: *No special provision has been made regarding remuneration derived by visiting professors or students employed with a view to their acquiring practical experience. Many conventions contain rules of some kind or other concerning such cases, the main purpose of which is to facilitate cultural relations by providing for a limited tax exemption. Sometimes, tax exemption is already provided under domestic taxation laws. The absence of specific rules should not be interpreted as constituting an obstacle to the inclusion of such rules in bilateral conventions whenever this is felt desirable.*

99 Paragraph 11 of the Commentary on Art. 20 UN Model.

rule is suggested in order to avoid situations of double non-taxation.[100]

3.2. *Object and Purpose*

The object and purpose of a visiting academics provision is to foster the bilateral relations between the contracting states and thereby contribute to a better understanding of the culture, history, and language of the respective other state and especially to promote cross-border teaching and research.[101] How this aim is achieved depends on the respective wording of the provision at hand. As a general rule, it can be stated that granting a tax benefit cannot be recognized as the primary objective of such a specific provision. Historical documents show that this has never been the motivation for drafting such a rule.[102] The UN Model Commentary even urges states to include specific safeguards to ensure taxation of visiting academics in at least one state.[103] If a specific clause for visiting academics forms part of a tax treaty, the drafters of the DTC rather intend to let the visiting academic remain taxable in his residence state only. The reason might be that the revenue generated by taxing visiting academics will often only be small in amount; therefore, source taxation is abolished (especially because visiting academics have expenses not only in the host state but also in their {former} state of residence). Another explanation may be that the visiting academic should not be occupied with tax administration inconveniences in the host state. Especially when it comes to short assignments (less than two years), it may be difficult for the academic to become familiarized with a new tax system. Some provisions, however, seem to grant a tax benefit to visiting academics, as well. As will be shown below,[104] they – in certain constellations – even accept double non-taxation.[105]

To give benefits to visiting academics is legitimate from a policy point of view. However, it is questionable whether tax treaties are the right instrument for such measures.[106] Provisions that focus on a certain group of persons are not unknown in the OECD Model (Articles 15(3), 16, 17, 19, and 20 OECD Model). However, contracting states should rather be restrictive in adding additional provisions to their bilateral tax treaties that focus only on small groups of persons.

3.3. *Different Types of Provisions*

In the literature, a distinction is made in principle between two general types of provisions that can be found for visiting academics in tax treaties:[107] On the one hand, there are provisions that include the requirement that the visiting academic remains a resident of his original state of residence and therefore is subject to unlimited tax liability in that state. If the status of residence in the original residence state is lost, the DTC provision for visiting academics is no longer applicable, and therefore, the tax exemption in the host state will be lost. Double non-taxation can, therefore, be avoided. On the other hand, the literature mentions tax treaties that include provisions for visiting academics that grant the tax exemption in the host state, although the visiting academic is no longer resident is his original residence state. Such clauses may lead to double non-taxation.[108]

A partial analysis of a number of worldwide tax treaties in force[109] shows that the description of the two general types of provisions mentioned in the literature should be filled out by another criterion: the source of the remuneration. Consequently, actually four types of provisions can be found in DTCs worldwide, whereby the first and third rules are more common than the two other provisions. The fourth Model Provision is similar to Article 20 OECD Model:

(1) A visiting academic who is a resident of a contracting state and who is temporarily present in the other contracting state for a period not exceeding (. . .) years for the purpose of exercising (. . .) activities shall be exempt from tax in that other state in respect of any remuneration derived from such (. . .).[110] (subsequently referred to as Model Provision 1)

Notes

[100] See paras 11 to 13 of the Commentary on Art. 20 UN Model.

[101] See Jörg-Manfred Mössner, in *Liber Amicorum Cyrille David*, 237 with further references.

[102] See fn. 96 et seq.

[103] Paragraph 13(a) of the Commentary on Art. 20 UN Model.

[104] Especially Model Provisions 3 and 4 (see ss 3.3, 3.5.4, and 3.5.5).

[105] See Michael Lang, 'General Report', in *Cahiers de Droit Fiscal International* Vol. 89a, *Double non-taxation*, ed. International Fiscal Association (2004), 73 (83 et seq.), according to whom such provisions 'intentionally allow' double non-taxation.

[106] Similarly, Philip Baker, *Double Taxation Conventions*, Art. 20 MN 20B.07.

[107] See Rainer Prokisch, in *Double Taxation Conventions*[3], ed. Klaus Vogel (1997), Art. 15 MN 98 et seq.

[108] See *ibid.*

[109] The authors analysed approximately ninety tax treaties, concluded by states (Austria, Belgium, Brazil, China, Germany, The Netherlands, Switzerland, United Kingdom, The United States, etc.), which contain visiting academics clauses.

[110] See, e.g., Art. 20 DTC France-The Netherlands, Art. 20 DTC Australia-China, Art. 20 DTC Armenia-Belgium, Art. 20 DTC Austria-France, Art. 20 DTC Germany-New Zealand, and Art. 20 DTC France-Germany.

(2) A visiting academic who is a resident of a contracting state and who is temporarily present in the other contracting state for a period not exceeding (. . .) years for the purpose of exercising (. . .) activities shall be exempt from tax in that other state in respect of any remuneration derived from such (. . .) arising from sources outside that state.[111] (subsequently referred to as Model Provision 2)

(3) A visiting academic who is or (immediately) before visiting a contracting state was a resident in the other contracting state and who is temporarily present in the first-mentioned contracting state for a period not exceeding (. . .) years for the purpose of exercising (. . .) activities shall be exempt from tax in the first-mentioned contracting state in respect of any remuneration derived from such (. . .).[112] (subsequently referred to as Model Provision 3)

(4) A visiting academic who is or (immediately) before visiting a contracting state was a resident in the other contracting state and who is temporarily present in the first-mentioned contracting state for a period not exceeding (. . .) years for the purpose of exercising (. . .) activities shall be exempt from tax in the first-mentioned contracting state in respect of any remuneration derived from such (. . .) arising from sources outside that state.[113] (subsequently referred to as Model Provision 4)

3.4. *Requirements*

3.4.1. *Introductory Remarks*

In the following sections, different requirements found in visiting academic provisions will be carefully analysed. When the requirements are subsequently construed, it should be borne in mind that no general conclusions can be drawn or solutions offered in this article. Since each tax treaty is different, it will – in treaty practice – be important to take a look at the bigger picture: the exact wording of the treaty provision, its history, and its context. For this reason, we have decided to discuss the interpretative issues related to visiting academics provisions on the basis of one specific clause each. Additionally, major trends and differences in treaty practice will be mentioned.

3.4.2. *Persons Covered*

Article 20 DTC Austria-Germany reads:[114]

> 1. Eine natürliche Person, die sich auf Einladung eines Vertragsstaats oder einer Universität, Hochschule, Schule, eines Museums oder einer anderen kulturellen Einrichtung dieses Vertragsstaats oder im Rahmen eines amtlichen Kulturaustausches in diesem Vertragsstaat höchstens zwei Jahre lang lediglich zur Ausübung einer Lehrtätigkeit, zum Halten von Vorlesungen oder zur Ausübung einer Forschungstätigkeit bei dieser Einrichtung aufhält und die im anderen Vertragsstaat ansässig ist oder dort unmittelbar vor der Einreise in den erstgenannten Staat ansässig war, ist in dem erstgenannten Staat mit ihren für diese Tätigkeit bezogenen Vergütungen von der Steuer befreit, vorausgesetzt, dass diese Vergütungen von außerhalb dieses Staates bezogen werden. (. . .).

Article 20 DTC Austria-Germany applies to *natürliche Personen* that is *individuals*. It does not confine its scope to certain groups of people. According to Zehetner, it is not of importance that the visiting academic is also a teacher, researcher, or professor in his (former) residence state but decisive is only what he is doing in the host state.[115] In that view, persons who teach in addition to their profession (e.g., teaching lawyers) may also benefit from Article 20 DTC Austria-Germany. In a general administrative directive, the German tax administration takes a different position: It is of the opinion that visiting academics clauses only apply to persons whose main profession is teacher or professor. However, no particular proof of qualification needs to be produced.[116] This restrictive position can hardly be supported, especially when it comes to Article 20 DTC Austria-Germany. Given the purpose of this provision, that is, to facilitate academic exchange, its scope cannot be limited to full-time professors or full-time researchers only. Surely, practitioners who – in addition to their main profession – are intensively interested in and engaged in academic activities can enrich the international exchange of

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[111] See, e.g., Art. 21 DTC Belgium-Ghana.

[112] See, e.g., Art. 19 DTC The Netherlands-South Africa, Art. 21 DTC China-Vietnam, Art. 22 DTC Ireland-Japan, Art. 20 DTC Belgium-Kuwait, Art. 19 DTC Austria-San Marino, and Art. 20 DTC Germany-Pakistan.

[113] See, e.g., Art. 20(2) DTC Turkey-The United States, Art. 20 DTC China-Serbia and Montenegro, and Art. 19(1) DTC Germany-United Kingdom.

[114] Article 20: *1. An individual who visits a Contracting State at the invitation of that State or of a university, college, school, museum or other cultural institution of that State or under an official programme of cultural exchange for a period not exceeding two years solely for the purpose of teaching, giving lectures or carrying out research at such institution and who is, or was immediately before that visit, a resident of the other Contracting State shall be exempt from tax in the first-mentioned State on his remuneration for such activity, provided that such remuneration is derived by him from outside that State* (unofficial translation from IBFD Tax Research Platform, <www.ibfd.org>).

[115] See Ulf Zehetner, in *Das neue Doppelbesteuerungsabkommen Österreich – Deutschland*, eds Wolfgang Gassner, Michael Lang & Eduard Lechner, 193.

[116] German Ministry of Finance, 10 Jan. 1994 – IV/C 5, BStBl I 1994, 14, para. 5.

knowledge and should be covered by this provision, as well.

3.4.3. *Activities Covered*

Article 20 DTC Belgium-The United States (1970) reads: Teachers

1. An individual who is a resident of one of the Contracting States at the time he becomes temporarily present in the other Contracting State and who, at the invitation of the Government of that other Contracting State or of a university or other recognized educational institution in that other Contracting State is temporarily present in that other Contracting State for the primary purpose of teaching or engaging in research, or both, at a university or other recognized educational institution shall be exempt from tax by that other Contracting State on his income from personal services for teaching or research at such university or educational institution, for a period not exceeding 2 years from the date of his arrival in that other Contracting State.
2. This Article shall not apply to income from research if such research is undertaken not in the public interest but primarily for the private benefit of a specific person or persons.

Article 20 DTC Belgium-The United States (1970) applies to individuals who are teaching or are engaging in research. The provision does not define the expressions *teaching* or *engaging in research.* It is, however, reasonable to construe them broadly. Given the purpose of this provision, that is fostering bilateral intellectual exchange, it surely covers all activities related to the instruction of other people and the scientific quest for knowledge and understanding. Interpretational issues will – most likely – only arise as regards the additional requirement that the teacher or researcher becomes temporarily present for the *primary* purpose of teaching or engaging in research. This can be illustrated by a US Tax Court decision where the Court had to distinguish between teaching and training activities: In the *Langroudi* case, the *US Tax Court* had to deal with the appeal of a Belgian citizen who had come to the United States to receive training as a resident physician in internal medicine and anaesthesiology.[117] Since the appellant had come to the United States for the primary purpose of receiving training, the *US Tax Court* denied him the benefits of the visiting academics clause. The view of the Court can be supported: The treaty concerned contains special provisions on both visiting academics (Article 20) and students or trainees (Article 21), which each provide different requirements for their application. This shows that the tax treaty – for taxation purposes – wanted to distinguish between visiting academics and students or trainees. This intention of the contracting states has to be respected.

3.4.4. *Residence*

3.4.4(a) *Residence Required for the Application of a Visiting Academics Clause?*

As regards visiting academics clauses drafted in accordance with Model Provisions 1 and 2, residence in the sending state undoubtedly is a requirement for their application. However, this is not so clear as regards visiting academics clauses comparable to Model Provisions 3 and 4. The Austria-Bulgaria Tax Treaty can be taken as an example: Article 1 reads:

> This Convention shall apply to persons who are residents of one or both of the Contracting States.

Article 20 of that DTC provides:

> 1. An individual who visits a Contracting State for a period not exceeding two years for the sole purpose of teaching or carrying out research at a university, college, school or other recognised educational institution in that State and who is or was immediately before that visit a resident of the other Contracting State, shall be exempt from tax in the first-mentioned State on any remuneration for such teaching or research, provided that such remuneration is derived by him from outside that State.

From its wording, Article 20 DTC Austria-Bulgaria opens the possibility that a visiting academic, formerly resident in the sending state, is present in the host state without becoming a resident of that state but being resident in a third state. Should the visiting academic still benefit from the tax treaty between the host and sending states when he is not a resident of either contracting state? In our opinion, the question has to be denied.[118] Residence in at least one contracting state is a requirement for treaty entitlement according to Article 1 DTC Austria-Bulgaria. Without residence in at least one contracting state, the treaty cannot be applied. This view is supported by the fact that the tax treaty only provides for three explicit exceptions to this principle: Article 24(1), Article 25(1) in the case of Article 24(1), and Article 26(1). From

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[117] US Tax Court, 5 Sep. 2007, *Mehrdad Hamzeye Langroudi v. Commissioner of Internal Revenue*, Docket No. 9489-06S.

[118] See also Johann Hattingh, 'The Role and Function of Art. 1 OECD Model', *Bulletin for International Fiscal Documentation* (2003): 546 (552); concurring, e.g., Jacques Malherbe, 'Professeurs en mission temporaire à l'étranger', *Journal de Droit Fiscal* (2001): 57 (60).

this context, it can be concluded that absent any special opening clause in a specific provision, the principle enshrined in Article 1 DTC Austria-Bulgaria prevails over all other treaty provisions. A strong argument against this view was made by Maisto with regard to the DTC France-Italy.[119] According to this author, not applying the students or academics provision in cases of dual non-residence would lead to the *unreasonable and undesired* result that residents of the host state (i.e., persons with a closer link to this state) would not be taxed there, whereas non-residents (i.e., people with a weaker link) would be taxed there. Still, the authors hesitate to follow Maisto: Given the context of the tax treaty, exceptions to the principles of treaty entitlement should be provided for explicitly. Moreover, it should be considered that in such a triangular situation a useful solution will only be achieved if *all* treaties involved (including the treaties with the third state) are applied. Finally, reference has to be made to Article 1 US Model (2006) that *explicitly and generally* allows for exceptions to the general rule of treaty entitlement: *This Convention shall apply only to persons who are residents of one or both of the Contracting States, except as otherwise provided in the Convention.*[120] Should contracting states wish to grant the benefits of a visiting academics clause to academics having been resident in the sending state yet being actually resident in neither state, it is suggested that they provide for this explicitly or adopt a provision similar to Article 1 US Model. The same issue arises with regard to the similarly drafted Article 20 OECD Model. In this regard, the same arguments may be applied.[121] However, tax scholars take different opinions on this question.[122]

Summing up, Article 20 DTC Austria-Bulgaria applies only on visiting academics who are resident in at least one contracting state.

3.4.4(b) *Is Article 4(2) OECD Model Relevant?*

In cases of dual residence, it is questionable whether the 'tiebreaker rules' corresponding to Article 4(2) OECD Model apply in the context of the visiting academics provisions or not.

Article 20(1) DTC Germany-The United States may serve as an example:

> Remuneration that a professor or teacher who is a resident of a Contracting State and who is temporarily present in the other Contracting State for the primary purpose of carrying out advanced study or research or for teaching at an accredited university or other recognized educational institution, or an institution engaged in research for the public benefit, receives for such work shall be taxable only in the first-mentioned Contracting State for a period not exceeding two years from the date of his arrival. (. . .)

In the tax literature,[123] the opinion is found that it follows from the object and purpose of the provision that there is no need to determine the residence state, because residence is regularly established in the host state in addition to the residence in the home state.[124] At least as regards Article 20 Germany-The United States, this opinion cannot be followed. The visiting academics article uses the term *resident*. An exclusive definition of what has to be understood under *residence* is contained in Article 4 DTC Germany-The United States. This provision also includes special tiebreaker rules (Article 4(2)) for situations of dual residence. In such situations, the one and only residence state for further treaty application has to be determined by means of these tiebreaker rules. Unless specific reasons allow for a different conclusion, it has to be assumed that this principle has to be accepted throughout the entire tax treaty.[125] Without further proof, it is not possible to disregard Article 4(2) DTC Germany-The United States when it comes to the visiting academics

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[119] Guglielmo Maisto, 'Residence of Individuals and the Italy-France Tax Treaty', *European Taxation* (1999): 42 (44).

[120] See Luc De Broe, in *Source versus Residence*, eds Michael Lang, Pasquale Pistone, Josef Schuch & Claus Staringer, 340; Marek Herm, *Intertax* (2004): 81.

[121] In the OECD Model, however, four provisions are explicitly overriding Art. 1: Art. 24(1), Art. 25(1) in cases of Art. 24(1), Art. 26(1), and Art. 27(1) OECD Model. See also Michael Lang, 'Does Art. 20 of the OECD Model Convention Really Fit into Tax Treaties?', in *Festschrift Avery Jones*, eds Philip Baker & Catherine Bobbett (2010), 257 (261 et seq.).

[122] According to Johann Hattingh, 'The Role and Function of Art. 1 OECD Model', *Bulletin for International Fiscal Documentation* (2003): 546 (552), Art. 1 prevails over Art. 20; a similar position is taken by Michael Lang, in *Festschrift Avery Jones*, 261 et seq. The other solution is advocated for by Luc De Broe, *Source versus Residence*, eds Michael Lang, Pasquale Pistone, Josef Schuch & Claus Staringer, 340; Marek Herm, *Intertax* (2004): 81; Jacques Malherbe, *Journal de Droit Fiscal* (2001): 60; Guglielmo Maisto, *European Taxation* (1999): 44; and Cao Deng, Students as Dual Residents, in *Dual Residence in Tax Treaty and EC Law*, eds Matthias Hofstätter & Patrick Plansky (2009), 272 (290 et seq.).

[123] See, e.g., Rainer Prokisch, in *Double Taxation Conventions*[3], ed. Klaus Vogel (1997), Art. 15 MN 98c.

[124] A similar result was achieved by Canadian courts in the *Stickel* case on Art. VIIIA DTC Canada-The United States (1942): Federal Court – Trial Division, 9 Nov. 1977, *Hunt v. Her Majesty the Queen*, 77 DTC 5404; Federal Court of Appeal, 15 Mar. 1973, *Stickel v. Minister of National Revenue*, confirmed by Supreme Court of Canada, 27 May 1974, *Stickel v. Her Majesty the Queen*, 74 DTC 6268. In the Federal Court decision, a remarkable passage in the speech of the Chief Justice should be cited: *We do not find it expedient to attempt to formulate any definition of what is implied by the words 'is a resident' in their context in Article VIIIA. No matter how narrowly the expression is construed, it would certainly embrace the appellant if he had been sufficiently affluent and hard hearted to have left his family in a family home in the United States for the two-year period and to have continued to incur the expense of maintaining his community and social relationships there during the period of his two years' absence. { . . .} If that would have been so in the case of a person who could afford to maintain his family in the United States while away, and was willing to do, we are of the view that a person who is on a two-year 'temporary' visit to teach in a foreign university was equally a 'resident' of his native land for the purposes of Article VIIIA even though he took his family with him and did not continue to incur the expense of maintaining his community and social relationships in his native land* (para. 12).

[125] See also Jörg-Manfred Mössner, in *Liber Amicorum Cyrille David*, 248 et seq.

provision. Another argument has to be accounted for: Article 20 DTC Germany-The United States distinguishes between being *resident* in one state and being *temporarily present* in the other state. Being *present* should not be mixed up with being *resident*, because being resident requires a higher degree of allegiance to a state than being merely present. This perception is strengthened by the fact that the expression *present* is joined by the word *temporarily*. Applying the tax exemption on residents of the host state would contradict the clear wording of the provision. For these reasons, Article 20 DTC Germany-The United States fails to apply if an academic is resident in the host state according to Article 4(2) of that DTC.[126] In practice, this means the following: First, it has to be determined whether the visiting academic is also resident in the host state according to Article 4(1) DTC Germany-The United States, and if answered in the affirmative, it has to be looked at whether the sending or the host state has to be considered 'residence state' for further treaty application (Article 4(2)). If the visiting academic has to be considered resident in the host state according to the tiebreaker rules, he does not meet the requirements of the visiting academics provision (resident in one state – temporarily present in the other state) any longer. In case the visiting academic abandons residence in the sending state during his visit to the host state, the following must hold: All other requirements being met, Article 20 DTC Germany-The United States applies in respect of the time the visiting academic kept his residence in the sending state. As regards the remaining time, the general rules will apply.[127]

3.4.5. *The Time Limit*

3.4.5(a) *Starting and Ending Points of Time*

Nearly all tax treaties provide for a time limit for the visiting academic's stay in the host state, which must not be exceeded in order to qualify for the exemption in the host state. Article 19 DTC China-The United States, for example, contains the following provision:

> An individual who is, or immediately before visiting a Contracting State was, a resident of the other Contracting State and is temporarily present in the first-mentioned Contracting State for the primary purpose of teaching, giving lectures or conducting research at a university, college, school or other accredited educational institution or scientific research institution in the first-mentioned Contracting State shall be exempt from tax in the first-mentioned Contracting State for a period not exceeding three years in the aggregate in respect of remuneration for such teaching, lectures or research.

The existence of the three-year time limit requirement[128] gives rise to a variety of difficult questions: First of all, it is questionable when the presence in the host state starts and ends. Will the visiting academics provision be applied from the beginning of the presence in the host state, therefore when the visiting academic enters the state, or from the actual start of the purpose of the presence, for example, teaching or conducting research. A few of the tax treaties analysed solve this problem by defining the starting point of time, for example, from the date of arrival of the visiting academic at the university[129] or from the date of the first arrival in the host state.[130] However, a lot of tax treaties do not refer to the starting and ending points of time, and hence, a solution has to be found. According to a competent authority agreement between China and the United States addressing the application of the three-year income tax exemption granted to visiting professors and teachers under Article 19 DTC China-The United States, the three-year exemption period begins to run from the first day a resident of a contracting state enters the other contracting state (host state) to teach, give lectures, or conduct research.[131]

From a systematic and teleological perspective, the authors of this article reject this approach since the time limit requirement (*temporarily present* as well as *exempt from tax { . . .} for a period not exceeding three years in the aggregate*) is clearly linked to the expression *for the primary purpose of teaching, giving lectures or conducting research at a university,*

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[126] The same result is advocated by a number of authors with regard to other treaties as well: See Dieter Eimermann, in *Doppelbesteuerung* (Loose Leaf), eds Helmut Debatin & Franz Wassermeyer (May 2009), Art. 20 USA MN 26; Jörg-Dietrich Kramer, in *Doppelbesteuerung* (Loose Leaf), eds Helmut Debatin & Franz Wassermeyer (October 2002), Art. 16 Frankreich MN 7; further, Ulrich Wolff, in *Doppelbesteuerung* (Loose Leaf), eds Helmut Debatin & Franz Wassermeyer (January 2006), Art. 20 Neuseeland MN 9; Dirk Siegers, in *Doppelbesteuerung* (Loose Leaf), eds Helmut Debatin & Franz Wassermeyer (May 2004), Art. 17 Luxemburg MN 11. Similarly, on Art. VII DTC Denmark-The United States (1948), Danish Høyesteret, 26 Jan. 1994, 329/1992, *William Ole Brekke v. Skatteministeriet*, *Tidsskrift for Skatteret* 1994, No. 184, also published in *European Taxation* (1994): 152; see also the comments on this decision by Leif Weizman, 'Visiting Academics', *European Taxation* (1994): 152 (154 et seq.).

[127] Marcus Mick, in *Doppelbesteuerung* (Loose Leaf), eds Helmut Debatin & Franz Wassermeyer (July 2009), Art. 17 Niederlande, MN 4, seems to be of a similar opinion on the DTC Germany-The Netherlands.

[128] Most tax treaties include a two-year time limit; see, e.g., Art. 21 DTC China-Vietnam, Art. 22 DTC Ireland-Japan, Art. 20 DTC Japan-Switzerland, Art. 22 DTC India-The United States, and Art. 20 DTC Armenia-Belgium.

[129] See Art. 21 DTC Armenia-Belgium.

[130] See Art. 13(3) DTC Bahrain-France, Art. 20 DTC France-Jamaica, Art. 21 DTC China-Vietnam, and Art. 16(3) DTC Congo-Zimbabwe.

[131] Competent Authority Agreement Regarding the Interpretation of Article 19 of the Agreement between the Government of the United States of America and the Government of the People's Republic of China for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income. Available on <www.irs.gov/pub/irs-utl/china_us_article_19_final_tax_media_drop_3_1_1.pdf>; see also *IBFD Tax News*, 22 Mar. 2011.

college, school or other accredited educational institution or scientific research institution. Therefore, the clock should only start running when the visiting academic commences his teaching or research activities and should stop running when he finishes them. Hence, a visit as tourist or other stay prior to having commenced or after having finished his teaching or research duties does not conflict with the granting of the tax benefit.[132]

3.4.5(b) *Retrospective Taxation, if Time Limit Is Exceeded?*

Second, in case a visiting academic exceeds the time limit provided for in the treaty, it is questionable whether the host state can tax his entire remuneration for the full period of presence or whether taxation by the host state is limited to the remuneration that is attributable to the excess period of presence. According to the competent authority agreement between China and the United States on Article 19 DTC China-The United States, an individual remaining in the host state beyond the permitted three-year period may be taxed by the host state from the first day of the fourth year, while such an individual's remuneration for the first three years remains exempt.[133] This interpretation is totally correct, because the provision itself provides that the visiting academic *shall be exempt from tax in the first-mentioned Contracting State for a period not exceeding three years in the aggregate in respect of remuneration for such teaching, lectures or research.*

A different conclusion, however, may be reached as regards Article XIII DTC Germany-United Kingdom 1964 (amended 1970):

> A professor or teacher from one of the territories, who receives remuneration for teaching, during a period of temporary residence not exceeding two years, at a university, college, school or other educational institution in the other territory, shall be exempt from tax in that other territory in respect of that remuneration.

In a decision on this provision, the *Bundesfinanzhof* denied any tax exemption from the very beginning of the stay.[134] This result at first sight seems harsh: Would it not be more compatible with the object and purpose of a visiting academics provision to allow for an overall two-year tax exemption regardless of the actual stay of the academic?[135] Even though one supports this view, such a result is hard to reach from a methodological perspective: If the presence of the visiting academic lasts longer than the specific time period stated in the tax treaty, the visiting academics clause is no longer applicable, because a requirement for its application (*a professor {. . .} during a period of temporary residence not exceeding two years {. . .}*) is not fulfilled. The contrary position, which would grant the tax exemption for the first two years regardless of the actual stay of the visiting academic, however, mingles the legal requirements with the legal consequences of the provision, which is methodologically impermissible. Still, it seems arguable that the purpose of a visiting academics provision should not be frustrated by a retrospective taxation in the host state.[136] Given the clear wording of the provision, such teleological approach, however, would transgress the borders of interpretation. It should be added, though, that the original intentions of the visiting academic must not be taken into account.[137] Finally, it has to be mentioned that the retrospective non-application of the visiting academics provision entails further problems, including the possible revision of already existing tax assessments. This, however, is a question of the domestic procedural laws of the host and the sending state.

Germany and the United States, for example, were aware of the problem of retrospective taxation and hence agreed on a redrafted visiting academics provision in 2006. They also clarified this in the Technical Explanations of this treaty.[138] As shown above, the DTC China-The United States also acknowledged the issue. In any case, it is preferable that the two contracting states decide explicitly on the retroperspective[139] or non-retroperspective[140] application of this DTC rule in the treaty. States that try to attract visiting academics, however, should not be interested in taxing a researcher

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[132] In line with this opinion on the DTC Canada-The United States: Federal Court of Appeal, 15 Mar. 1973, *Stickel v. Minister of National Revenue*, confirmed by Supreme Court of Canada, 27 May 1974, 74 DTC 6268; contrary opinion to other DTCs: *Bundesfinanzhof*, 13 Mar. 1985, I R 86/80; 22 Jul. 1987, I R 224/83; Ulf Zehetner, in *Das neue Doppelbesteuerungsabkommen Österreich – Deutschland*, eds Wolfgang Gassner, Michael Lang & Eduard Lechner, 196 with further references; Karl-Heinz Bauer, Die Besteuerung der Auslandslehrer, *Finanz-Rundschau* (1998): 431.

[133] See fn. 131.

[134] *Bundesfinanzhof*, 22 Jul. 1987, I R 224/83; see further Canadian Tax Review Board, 10 Mar. 1975, *Wyatt v. Her Majesty the Queen*, 75 DTC 72; Tax Review Board, 11 Mar. 1975, *Shihadeh v. Her Majesty the Queen*, 75 DTC 74; Special Commissioners, Belfast, 25 Nov. 1996, *Devai v. Commissioners of Inland Revenue* [1997] STC 31.

[135] See also Rainer Prokisch, in *Double Taxation Conventions*[3], ed. Klaus Vogel, Art. 15 MN 99b.

[136] See *ibid.*, Art. 15 MN 99a with further references.

[137] On this issue, see *ibid.*, Art. 15 MN 99a with further references.

[138] Technical Explanations on Art. XI Protocol DTC Germany-The United States.

[139] See, e.g., Art. 20 DTC Hungary-The United States (signed on 4 Feb. 2010 but not yet in force): If the visit exceeds two years, the first-mentioned State may tax the individual under its domestic law for the entire period of the visit.

[140] See, e.g., Art. 20 DTC Germany-The United States.

retrospectively, for example, if he extends his stay in the interest of the host state university in order to complete a research project.[141] In any event, short-term extensions of the time limit because of an illness or a comparable reason should not lead to a denial of the benefits of a visiting academics provision. The German tax administration, for example, is right to resolve these problems on the basis of equity.[142]

3.4.5(c) *Recurrent Visits and Interruptions*

Moreover, recurrent visits and interruptions between these visits are time limit aspects that have to be considered in greater detail. According to the Chinese and US competent authorities' agreement on Article 19 DTC China-The United States, the three-year exemption period is suspended when an individual discontinues teaching, giving lectures, or conducting research and departs the host state. The three-year exemption period resumes, however, when an individual returns to the host state to teach, give lectures, or conduct research, provided the individual is, or immediately before returning to the host state was, a resident of the other contracting state.[143] In the authors' view, this position is convincing and is very well supported by the wording of the provision (*three years in the aggregate*).

A different question is what happens if the time limit has expired and the visiting academic becomes engaged for another period some time later. Two examples of UK case law illustrate the issue. The first decision was delivered by the *High Court London* in its *Vas* case[144] and refers to Article 21 DTC Hungary-United Kingdom:

> An individual who visits one of the Contracting States for a period not exceeding two years for the purpose of teaching or engaging in research at a university, college or other recognised educational institution in that Contracting State, and who was immediately before that visit a resident of the other Contracting State, shall be exempted from tax by the first-mentioned Contracting State on any remuneration for such teaching or research for a period not exceeding two years from the date he first visits that State for such purpose.

The taxpayer, a Hungarian national, worked at the same university in the United Kingdom for around five years; however, his assignment was split into three parts, each of which was separated from the other by a brief period he spent in Hungary. At issue was whether the taxpayer qualified for an exemption under the visiting academics provision for the third and fourth years. The court denied this claim, in order to prevent the result that the taxpayer could *escape United Kingdom tax for substantially the whole of his life provided that he resumed his residence in Hungary for a brief period between successive appointments each of which was limited to two years.*[145] A similar solution was achieved by the *Special Commissioners* in the *Devai* case. Here, the taxpayer interrupted his stays in the United Kingdom with short-time travels to Ireland and Hungary and again was denied the exemption under the visiting academics provision of the DTC Hungary-United Kingdom.[146] The crucial question now is whether a visiting academic can ever qualify for an exemption for a second time in his life, after he has once consumed this treaty benefit. Together with Prokisch, one may infer from the purpose of this provision (encouraging academic exchange) that an academic should not be denied further benefits for the rest of his lifetime.[147] Instead, some tax authorities require some kind of cooling-off period between two successive visits, for example, six[148] or twelve[149] months.[150] Such a specific minimum period should be considered to be a rule. However, in exceptional cases, it may turn out that from the purpose of the separate stays themselves a different result for the calculation of the period should be achieved.[151] The taxpayer must at least be given the

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[141] See also Rainer Prokisch, in *Double Taxation Conventions*[3], ed. Klaus Vogel, Art. 15 MN 99a and 99b; Ulf Zehetner, in *Das neue Doppelbesteuerungsabkommen Österreich – Deutschland*, eds Wolfgang Gassner, Michael Lang & Eduard Lechner, 196 et seq.

[142] See German Ministry of Finance, 10 Jan. 1994, BStBl I 1994, 14.

[143] See fn. 131.

[144] High Court London, Chancery Division, 8 Dec. 1989, *Commissioners of Inland Revenue v. Vas* [1990] STC 137.

[145] High Court London, Chancery Division, 8 Dec. 1989, *Commissioners of Inland Revenue v. Vas* [1990] STC 137. See also the critical remarks on this decision by John Tiley, 'Double Taxation – Visiting Academics', Cambridge L.J. (1990): 225 (226 et seq.) and by Roger Moore & Michael Edwardes-Ker, 'Expatriate Academics: the Vas Case', *European Taxation* (1990): 195 et seq.

[146] See Special Commissioners, Belfast, 25 Nov. 1996, *Devai v. Commissioners of Inland Revenue* [1997] STC 31.

[147] Rainer Prokisch, in *Double Taxation Conventions*[3], ed. Klaus Vogel, Art. 15 MN 99c.

[148] German Ministry of Finance, 10 Jan. 1994, BStBl I 1994, 14, para. 2. However, the German authorities will, in some cases, also allow a tax exemption if the interruption is for fewer than six months.

[149] Internal Revenue Service, Rev. Ruling 56-164.

[150] See also *Finanzgericht Baden-Württemberg*, 14 Jun. 2001, 14 K 341/94.

[151] Similarly, Ulf Zehetner, in *Das neue Doppelbesteuerungsabkommen Österreich – Deutschland*, eds Wolfgang Gassner, Michael Lang & Eduard Lechner, 197 et seq.; Roger Moore & Michael Edwardes-Ker, *European Taxation* (1990): 198.

chance to prove that the recurrent visits are not connected to each other.[152]

Another issue is whether an individual who has already benefited from a tax treaty as a student or trainee (e.g., Article 20 OECD Model) in the period immediately preceding his teaching or research activities can take advantage of a visiting academics provision. In the authors' view, a stay as a student or trainee has a totally different purpose than a stay as a visiting academic.[153] The same is true for visiting academics who stay in the other contracting state for the purpose of teaching only and later for research only or the other way round.[154] Therefore, the two stays may not form part of the same calculation period. In the literature, it is also mentioned that a second, independent, stay should be considered if the financing is from another source or if the taxpayer teaches or conducts research at another university in the same state.[155] The application of these criteria seems unjustified, at least by tax treaties, where these criteria do not form elements of the requirements of a visiting academics provision. Moreover, they are also easy to circumvent.

3.4.6. *Institutions Covered*

Most visiting academics clauses apply only if a visiting academic becomes active at certain institutions, which vary from treaty to treaty. However, most of them cover activities exercised at a university, college (primary or secondary) school, or other educational institution, for example, Article 16 DTC Australia-Germany:

> Remuneration which a professor or teacher who is a resident of a Contracting State and who visits the other Contracting State for a period not exceeding two years for the purpose of carrying out advanced study or research or of teaching at a university, college, school or other educational institution receives for those activities shall not be taxed in that other State.

Some treaties can be found that constrict the scope, for example, Article 20(1) DTC China-Croatia, to accredited institutions only:

> An individual who is, or immediately before visiting a Contracting State was, a resident of the other Contracting State and is present in the first-mentioned Contracting State for the primary purpose of teaching, giving lectures or conducting research at a university, college, school or educational institution or scientific research institution accredited by the Government of the first-mentioned Contracting State shall be exempt from tax in the first-mentioned Contracting State (. . .) for such teaching, lectures or research.

For the first-mentioned tax treaty, however, which does not restrict the scope to specific institutions only, it seems reasonable and in accordance with the object and purpose of the provision to allow for a broad understanding: Any educational institution – be it accredited or not– should be covered by this visiting academics provision. A different distinction should be made, though: Since the visiting academics provision aims at facilitating intellectual exchange between states, it does not cover every commercial institution offering courses, workshops, and trainings to clients of all kinds.[156] The decisive criterion seems to the authors of this article whether the host institution is educating their students and awarding them degrees rather than offering know-how and handing out certificates of attendance to their customers. As for research institutions, it will have to be looked at whether the research is conducted in the interest of later profit making. Thus, researchers hired by pharmaceutical companies cannot enjoy the benefits of this visiting academics clause, since they exclusively work for the economic benefit of their employer. An according safeguard has been explicitly included into some treaties: Article 20(2) DTC China-Croatia, for example, states:

> This Article shall not apply to income from research if such research is undertaken not in the public interest but primarily for the private benefit of a specific person or persons.

3.4.7. *Sources from outside the Host State*

When applying a visiting academics provision that is modelled after Model Provisions 1 and 3, it is irrelevant where the payer of the income is located. Consequently, income received by a visiting academic is exempt from tax in the host state even if the payer is also located in the host state and the payer claims a deduction from taxable income for the payments.[157] Double tax treaties that are similar to Model Provisions 2 and 4, in contrast, only

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[152] See Ulf Zehetner, in *Das neue Doppelbesteuerungsabkommen Österreich – Deutschland*, eds Wolfgang Gassner, Michael Lang & Eduard Lechner, 197 with further references.

[153] See also Austrian Ministry of Finance, 3 Nov. 1998, EAS 1357.

[154] If the visiting academic has done teaching as well as research first and after a specific period of time performs only one of the two activities, the calculation period may not be interrupted. The same result has to be applied if the visiting academic first performed only teaching or conducting research and after a specific period of time expanded his activities to the other one.

[155] See Rainer Prokisch, in *Double Taxation Conventions*[3], ed. Klaus Vogel, Art. 15 MN 99a and 99c; contrary Austrian Ministry of Finance, 13 Nov. 1995, EAS 756.

[156] Similarly, Michael Rosenthal, in *Doppelbesteuerung* (Loose Leaf), eds Helmut Debatin & Franz Wassermeyer (December 2002), Art. 19 Australien MN 30.

[157] Friedhelm Jacobs et al., *Handbook on the United States-Germany Tax Convention*, Art. 20 MN 208.

exempt the income in the host state provided that it arises from sources outside the host state. When is a payment considered to arise outside the host state? De Broe has shown clearly for Article 20 that paragraph 2.2 of the Commentary on Article 20 OECD Model, which was included by the 2005 update (*For purposes of this Article, payments that are made by or on behalf of a resident of a Contracting State or that are borne by a permanent establishment which a person has in that State are not considered to arise from sources outside that State*), must be construed along the same lines as Articles 15(2)(b) and (c) OECD Model.[158] In the view of the authors, this opinion can also be strongly supported for visiting academics provisions that only exempt the income remitted from outside the host state.

3.4.8. *Further Requirements*

In many bilateral tax treaties, other restrictions on the application of provisions for visiting academics can be found. According to some treaties, visiting academics must be invited to the host state;[159] other treaties require even that the invitation is approved by the government.[160] However, in some tax treaties, no invitation is required if the visiting academic comes under an agreement on cultural exchanges.[161] Some treaties impose even higher requirements, for example, that a non-profit-making institution that pays the remuneration of a visiting academic is at least 50% subsidized (based on annual expenditures) by the other contracting state.[162]

3.5. *Legal Consequences*

3.5.1. *Application and Operation*

The application and operation of a visiting academics provision seems to entail difficulties. Some clauses explicitly allocate taxing rights to one state;[163] others make the tax exemption of the academic's income in the host state conditional upon its taxation in the residence state[164] or provide for an exemption in both contracting states.[165] Most visiting academics provisions, however, are drafted similarly to Article 20 OECD Model, providing only for an exemption in the host state. An example can be found in Article 20 DTC Belgium-The United States (1970), which is comparable to Model Provision 3:

> An individual who is a resident of one of the Contracting States at the time he becomes temporarily present in the other Contracting State and who, at the invitation of the Government of that other Contracting State or of a university or other recognized educational institution in that other Contracting State is temporarily present in that other Contracting State for the primary purpose of teaching or engaging in research, or both, at a university or other recognized educational institution shall be exempt from tax by that other Contracting State on his income from personal services for teaching or research at such university or educational institution, for a period not exceeding 2 years from the date of his arrival in that other Contracting State.

In this regard, it seems as though Article 20 DTC Belgium-The United States (1970), as well as the students article of the OECD Model, differs from all other allocation rules of the OECD Model, because it only imposes a restriction on the host state, without wasting any thoughts on the taxing claims of the other state.[166] It is thus sometimes argued that such provisions do not really allocate taxing rights but merely provide for a limited tax exemption in the host state.[167] With regard to Article 20 OECD Model, Lang has analysed the issue, taking into account several peculiarities of this provision, and has concluded that this clause does not really fit into the system of allocation rules of Chapter III of the OECD Model.[168]

Following this conclusion and having in mind that always (only) one allocation rule of a tax treaty has to be applicable, it may be argued that Article 20 OECD Model, and a visiting academics clause alike, has to be applied together with another provision of Chapter III of the OECD Model (which

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[158] See Luc De Broe, in *Source versus Residence*, eds Michael Lang, Pasquale Pistone, Josef Schuch & Claus Staringer, 354 et seq. with further references.

[159] See, e.g., Art. 20 DTC Brazil-Germany, Art. 21 DTC Germany-Italy, Art. 20 DTC Germany-Trinidad and Tobago, Art. XIII DTC Japan-Sri Lanka, and Art. 21 DTC Austria-Barbados; see also Spanish Tribunal Económico-Administrativo Central, 22 Dec. 2000, Case 3037/1997.

[160] See, e.g., Art. 20 DTC France-The United States, Art. 19 DTC Belgium-Korea, Art. 20 DTC Germany-Mauritius, and Art. 20 DTC Belgium-Kuwait.

[161] For example, Art. 20 DTC Brazil-Germany.

[162] For example, Art. 21 DTC Germany-Iran.

[163] For example, Art. 22 Israel-The Netherlands.

[164] For example, Art. 22 Finland-United Kingdom.

[165] For example, Art. 22 Portugal-The United States.

[166] Exceptions to this general rule though exist: see s. 3.5.4.

[167] See Michael Lang, in *Festschrift Avery Jones*, 258 with further references; Luc De Broe, in *Source versus Residence*, eds Michael Lang, Pasquale Pistone, Josef Schuch & Claus Staringer, 329 with further references.

[168] See Michael Lang, in *Festschrift Avery Jones*, 267.

is then considered a *real* allocation rule).[169] The issue can be illustrated by two court decisions – one from the Netherlands and one from Belgium.

In a judgment on the *students article* of the Belgium-The Netherlands Tax Treaty,[170] which is comparable to Article 20 DTC Belgium-The United States (1970), a Netherlands court[171] held that Article 21 (i.e., the *students article*) was only applicable in the host state, whereas the residence state had to apply Article 22 (i.e., the *other income article*).

On Article 20 DTC Belgium-The United States (1970), a Belgian court[172] held that the visiting academics provision does not prevent the residence state from taxing the income exempted in the host state. The court additionally clarified that the Belgian *exemption vaut impôt* doctrine[173] did not apply to the provision either since the source state was forbidden to enforce its taxing rights by virtue of a treaty law restriction instead of a domestic law provision.[174]

The authors of this article tend to follow the reasoning of the Belgian court. It is not disputed that the tax claims of each state originate from the domestic tax law of the respective states.[175] Depending on whether the student/visiting academic meets the specific requirements in the national tax law of either state, he can be taxed in both states.[176] Double taxation may occur and a tax treaty provision is needed to alleviate this consequence. If the requirements of a students or visiting academics provision are met, it restricts the host state's taxation claim. Thus, double taxation can be successfully reduced to single taxation. In this context, it should be recalled that double tax treaties usually restrict the taxing rights a contracting state already possesses under domestic tax law.[177] It is not required that the taxing right of a state has to be 'confirmed' by a treaty provision. If a state is not restricted by the treaty, nothing can stop this state from taxing a specific item of income.[178] Baker summarizes this perception very clearly: *Whether or not {the income, added} is taxable in the country of usual residence of the academic may depend on whether he has retained his residence there and whether that state taxes overseas-source income.*[179] These considerations, however, only allow for one conclusion: Both Article 20 OECD Model and Article 20 DTC Belgium-The United States (1970) provide for an (albeit indirect) allocation of taxing rights: The taxing claim of the host state is denied, whereas the taxing claim of the sending state persists. In essence, both Article 20 OECD Model and a visiting academics provision can thus be considered an allocation rule. The application of a second allocation rule, as conducted by the *Gerechtshof Leeuwarden*, is neither necessary nor permissible. Provisions comparable to Article 23A/B OECD Model need not be applied alongside a visiting academics provision either, since the issue of double taxation has already been solved at the level of the allocation rule itself.[180]

When discussing Article 20 OECD Model, Lang concludes that this provision encourages double non-taxation.[181] The same conclusion might be drawn as regards visiting academics provisions. This should be borne in mind when subsequently considering the specific legal consequences of each model alternative of a visiting academics provision.

3.5.2. *Legal Consequences of Model Provision 1*

Model Provision 1 requires that the visiting academic remains resident in the sending state. The host state is prohibited from taxing the visiting academic's remuneration and the (probable) tax claims of the sending state, which additionally is the residence state, are not affected. Subject to the domestic tax law of the sending or residence state, the visiting academic will be taxable only in that state. Sometimes, the same result is achieved in a different way: As explicitly provided for in Article 20(1)

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169 See, e.g., the considerations of Michael Lang, in *Festschrift Avery Jones*, 265 et seq.

170 Article 21 DTC Belgium-The Netherlands (1970): *Payments which a student or business apprentice who is or was formerly a resident of one of the States and who is present in the other State solely for the purpose of his education or training receives for the purpose of his maintenance, education or training shall not be taxed in that other State, provided that such payments are made to him from sources outside that other State* (unofficial translation from IBFD Tax Research Platform, <www.ibfd.org>).

171 See *Gerechtshof Leeuwarden*, 24 Jun. 1983, 1137/82, BNB 1984/302.

172 *Cour d'Appel Liège*, 4 Mar. 2001, *Journal de Droit Fiscal* (2001): 52 with comments by Jacques Malherbe.

173 Under this doctrine, income that cannot be taxed in the source state by virtue of its domestic tax law must, nevertheless, be exempted in the residence state under Art. 23A OECD Model. For details on this doctrine, see Luc De Broe & Niels Bammens, 'Interpretation of Subject-to-Tax Clauses in Belgium's Tax Treaties – Critical Analysis of the "Exemption vaut Impôt" Doctrine', *Bulletin for International Taxation* (2009): 68 et seq.

174 Critically, Jacques Malherbe, *Journal de Droit Fiscal* (2001): 57 et seq.

175 See Michael Lang, *Introduction to the Law of Double Taxation Conventions*, MN 1 et seq.; also Philip Baker, *Double Taxation Convention*, Art. 20 MN 20B.07.

176 As regards students/visiting academics provisions comparable to Model Provisions 3 and 4, which do only require residence in the sending state prior to the student's/visiting academic's visit to the host state, the effective taxation of such persons in the sending state will inevitably depend on whether they remain taxable in this state or not.

177 See Kees Van Raad, 'Five Fundamental Rules in Applying Tax Treaties', in *Liber Amicorum Luc Hinnekens* (2002): 587 (587 et seq.).

178 See Klaus Vogel, in *Double Taxation Conventions*[3], ed. Klaus Vogel, Introduction MN 56; see also Michael Lang, *Introduction to the Law of Double Taxation Conventions*, MN 45.

179 See Philip Baker, *Double Taxation Conventions*, Art. 20 MN 20B.07.

180 See Michael Lang, *Introduction to the Law of Double Taxation Conventions*, MN 400. Apparently contrary, *Cour d'Appel Liège*, 4 Dec. 2010, J.D.F. 2001, 52.

181 See Michael Lang, in *Festschrift Avery Jones*, 264 et seq.

DTC Germany-The United States, a visiting academic is taxable only in the residence state if he meets the requirements of this clause. Double non-taxation may occur, if the sending or residence state by virtue of domestic tax law refrains from taxing this income. This, however, is not a peculiarity of this provision but may happen in connection with any other allocation rule of the OECD Model.[182]

3.5.3. *Legal Consequences of Model Provision 2*

In principle, nothing changes as to what has been said about Model Provision 1. The sending or residence state may tax the visiting academic's remuneration, provided it is entitled to do so under its domestic tax law. One peculiarity should be addressed, however: Visiting academics provisions drafted in accordance with Model Provision 2 distinguish between remuneration originating from sources inside and outside the host state: Only remuneration arising from sources outside this state is exempt from tax in the host state, whereas remuneration arising from sources inside this state is governed by the other allocation rules of the treaty (e.g., Article 7, Article 15, or Article 19 OECD Model). This raises concerns: Is it justifiable to treat visiting academics differently just because they are paid out of different states?

3.5.4. *Legal Consequences of Model Provision 3*

Model Provision 3 covers two different situations: The visiting academic remains resident in the sending state and the visiting academic no longer is resident in the sending state. Thus, a visiting academic also qualifies for the exemption in the host state if he was resident in the sending state (immediately) prior to his visiting the host state. In the former case, nothing changes as to what has been said on Model Provision 1: The visiting academic is not taxable in the host state but – subject to the domestic tax law of the sending or residence state – may be taxed there. In the latter case, the situation seems to be different: First, it is no longer possible to distinguish between a residence and a host state, since these states may collide, which indeed is a peculiarity when comparing such a provision with the other allocation rules of the OECD Model.[183] Second, it appears as though the visiting academic would not have to pay taxes anywhere – double non-taxation may occur. However, on second thought, this situation is not so different from the aforementioned one: Model Provision 3 is still capable of allocating income. Income, however, is not distributed between the residence state and host state but between the sending state and host state. In addition, double non-taxation is not a cogent consequence of Model Provision 3. The occurrence of double non-taxation depends on whether the sending state is able to tax the visiting academics remuneration under its domestic tax law, especially when the visiting academics keeps his residence status in the sending state under domestic tax law. The following example may explain these considerations: A is a US citizen and university professor who comes to Hungary to teach at a Hungarian university for two years, whereas his tax treaty residence is in Hungary according to Article 4(3) DTC Hungary-The United States (2010).[184] Under Article 20(1) of this double tax treaty, the professor is exempt from tax in Hungary, since he was resident in the United States immediately before going to Hungary and his visit to Hungary will not exceed two years. As a US citizen, the professor, however, remains taxable in the United States on his worldwide income. Since the visiting academics clause of the applicable treaty only restricts the tax claim of the host state, the sending state is not prohibited from taxing this remuneration if it can do so under its domestic tax law. As for the United States, this will – in this constellation – mainly depend on whether or not the exclusion for foreign-source income for citizens and resident aliens living abroad applies.[185] Recently, doubts have been raised in the tax literature, whether the sending state in its capacity as former treaty residence state would really be entitled to claim taxing rights on this income: Lang questions whether the former residence state would, in that case, have a sufficient *genuine link* according to international customary law in order to be entitled to impose taxes on students or visiting academics. Moreover, it would be difficult for this state to enforce this taxing claim.[186]

As shown by this example, even Model Provision 3 can allocate income and does not necessarily lead to double non-taxation. The latter result may, however, occur whenever a sending state is not empowered under domestic tax law to tax such income. It may, therefore, be assumed that such clauses implicitly accept, if not encourage, double non-taxation.[187] One comprehensible explanation for this discrimination may be that a visiting

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[182] See Michael Lang, *Introduction to the Law of Double Taxation Conventions*, MN 42 et seq.

[183] See Michael Lang, in *Festschrift Avery Jones*, 262 et seq.

[184] Signed on 4 Feb. 2010 but not yet in force.

[185] Section 911 Internal Revenue Code, Title 26, s. 911 US Code; on this issue, see Dennis S. Karjala, 'Income Taxation of Academics Studying or Teaching Abroad', *Journal of Legal Education* (1994): 531 (535 et seq.).

[186] See Michael Lang, in *Festschrift Avery Jones*, 264 et seq.

[187] See *ibid.*; Michael Lang, in *Cahiers de Droit Fiscal International* Vol. 89a, 82.

academic who (at least in terms of Article 4(2) OECD Model) is ready to abandon all links to his former residence state in order to come to and work in the host state should be granted a special tax benefit.

Finally, two examples from tax treaty practice should be mentioned, where contracting states agreed on a definitive result. Some states – obviously aware of the allocation consequences of visiting academics clauses comparable to Model Provision 3 – chose to adopt special provisions in their treaties: On the one hand, Article 22 DTC Portugal-The United States *expressis verbis* declares the remuneration of visiting academics exempt in both contracting states.[188] On the other hand, Article 22 DTC Finland-United Kingdom grants the exemption in the host state only, if the visiting academic is subject to tax in the sending state.[189]

3.5.5. *Legal Consequences of Model Provision 4*

Model Provision 4 is quite similar to Model Provision 3, because it also applies in two different situations: On the one hand, such a provision applies if the visiting academic keeps residence in the sending state throughout his stay in the host state. On the other hand, it also applies if the academic was a resident of the sending state (immediately) before coming to the host state. Contrary to Model Provision 3, Model Provision 4, however, only exempts income derived from sources outside the host state (i.e., the sending or a third state). In this regard, Model Provision 4 is comparable to Model Provision 2 and here also concerns are raised: Is it justifiable to distinguish between a visiting academic paid out of sources inside and outside the host state? Under this clause, it makes a difference where the academic is paid from: If the professor is paid from sources inside the host state, he will be taxed (Article 7, Article 15, or perhaps Article 19 OECD Model applies). If he is paid from sources outside the host state, he may be taxed in the sending state or nowhere if the sending state cannot tax his income and double non-taxation occurs.[190]

3.6. *Interaction of a Visiting Academics Provision with Other Treaty Provisions*

3.6.1. *The Issue*

In case a double tax treaty contains a provision on visiting academics, the question arises how this clause interacts with the other treaty provisions. As outlined above,[191] despite their being drafted somehow differently than other 'normal' allocation rules in double tax treaties, it is nevertheless possible and useful to characterize a visiting academics clause as an allocation rule. Having said this, it needs to be stated that always only one allocation rule can apply.[192] If a treaty contains a visiting academics clause, however, prima facie at least four other allocation rules could also apply (Articles 7, 15, 19, and 21 OECD Model). It is therefore necessary to determine which of these rules takes precedence over the other. In the tax literature, a different approach is suggested, namely the parallel application of overlapping rules:[193] By applying two conflicting rules together, the rule with the greater restriction on the source state should always become effective. However, this approach may also lead to complete exemption of this income in the residence state if the residence state is an exemption country.[194] Van Raad accepts this outcome since *imperfect treaties sometimes produce imperfect results.*[195] Although this is very true, the authors of this article would, nevertheless, like to try to find a solution by traditional tax treaty interpretation methods. This will be demonstrated by means of the recently concluded DTC Cyprus-Germany (2011). The visiting academics provision (Article 19) of this treaty reads:

> 1. An individual who visits a Contracting State at the invitation of that State or of a university, college, school, museum or other cultural institution of that State or under an official programme of cultural

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[188] Similarly, e.g., Art. 21 DTC France-Portugal.

[189] Similarly, e.g., Art. 21 DTC Fiji-United Kingdom, Art. 20 DTC Bangladesh-Belgium, Art. 20 DTC Austria-Malaysia, Art. 20 DTC Australia-China, and Art. XI DTC Malawi-United Kingdom.

[190] The visiting academic will be taxed as follows: (1) If he keeps residence in the sending state and is paid from sources outside the host state, he is taxable in the sending state (the visiting academics provision applies) or in a third state (in case Art. 19 of the sending state-third state treaty applies). (2) If he keeps residence in the sending state and is paid from sources inside the host state, his taxation depends on Arts 7, 15, and 19, as well as Art. 23A/B. He may be taxable in the host state, in the sending state, or in both states. (3) If he is no longer resident in the sending state, but only in the host state and is paid from sources outside the host state, he will not be taxable in the host state (but maybe in the sending state – see above s. 3.5.4, or in a third state, if Art. 19 of the host state-third state treaty applies). (4) If he is no longer resident in the sending state, but only in the host state and is paid from sources inside the host state, he will be taxed in the host state according to its domestic law (for lack of cross-border situation, it is not necessary to apply a treaty).

[191] See s. 3.5.1.

[192] Lang, *Introduction to the Law of Double Taxation Conventions*, MN 173.

[193] See Kees Van Raad, 'Application of Tax Treaties to Items of Income That Are Covered by More than One Distributive Provision', in *A Vision of Taxes within and outside European Borders – Festschrift Prof. Vanistendael*, eds Luc Hinnekens & Philippe Hinnekens (2008), 729 (732 et seq.); also Kees Van Raad, in *Liber Amicorum Luc Hinnekens* (2002), 592 et seq.

[194] See Kees Van Raad, in *Festschrift Prof. Vanistendael*, 732 et seq.; also Kees Van Raad, in *Liber Amicorum Luc Hinnekens*, 592 et seq.

[195] See Kees van Raad, in *Festschrift Prof. Vanistendael*, 736.

exchange for a period not exceeding two years solely for the purpose of teaching, giving lectures or carrying out research at such institution and who is, or was immediately before that visit, a resident of the other Contracting State shall be exempt from tax in the first-mentioned State on his remuneration for such activity, provided that such remuneration is derived by him from outside that State.

3.6.2. *Business Profits and Visiting Academics*

As for Article 7 DTC Cyprus-Germany, the solution is rather easy, because this provision explicitly yields to other articles dealing with the same item of income (Article 7(7) DTC Cyprus-Germany).

3.6.3. *Income from Employment and Visiting Academics*

As for Article 14 DTC Cyprus-Germany, it is slightly more difficult, since this provision – at least explicitly – yields only to the provisions of *Articles 15 to 18* (Directors' fees; Artistes and sportsmen; Pensions, Annuities and similar remuneration; Government service). The visiting academics as well as the students provision is not mentioned in this enumeration.[196] Nevertheless, tax treaty interpretation shows that Article 19 supersedes Article 14 DTC Cyprus-Germany. It follows from a literal interpretation that the visiting academics clause has a much narrower scope than Article 14 of that DTC (the headline of Article 19 reads *Visiting Professors, Teachers and Students*; the text of Article 19 addresses individuals visiting a state for the purpose of teaching, giving lectures, or carrying out research. Article 14, by contrast, is directed at all kinds of employees). Systematic interpretation suggests a similar result: The visiting academics provision follows instantly to the special provisions on income from employment (Article 15–Article 18) and before the catch-all provision of Article 20.[197] It is not convincing to assume that such a special provision, placed so closely to the provisions on employment income, would not cover such income. Teleological considerations confirm these arguments: A visiting academics clause is agreed in order to foster cross-border intellectual exchange – foreign academics should be attracted to come to the other state for a limited period.[198] Such an attraction would be completely frustrated if it applied to self-employed academics only. Finally, the Commentary on Article 15 OECD Model may be used to support this view. Since the content of Article 14(1) DTC Cyprus-Germany is nearly identical to Article 15(1) OECD Model (the only deviation in the wording being: *Articles 15 to 18* in Article 14(1) DTC Cyprus-Germany versus *Articles 16, 17, 18 and 19* in Article 15(1) OECD Model), it is permissible to take advantage of the OECD Model and its Commentary for the purpose of treaty interpretation.[199] The Commentary on Article 15 OECD Model declares that OECD Member States are free to agree on a *special provision* for *visiting professors and students employed (. . .) whenever this is felt desirable.*[200] It follows from all these considerations that a visiting academics clause is *lex specialis* to Article 15 OECD Model[201] and therefore inevitably supersedes this provision. This holds equally for the DTC Cyprus-Germany.

3.6.4. *Government Service and Visiting Academics*

The relationship between Article 19 and Article 18 DTC Cyprus-Germany is different from the relationship between the visiting academics provision and Article 14 of that DTC, because in the former case two *leges speciales* face one *lex generalis*. Still, the result will not change: The visiting academics clause supersedes Article 18 DTC Cyprus-Germany as well. It has to be acknowledged that an extra provision for visiting academics is narrower in scope than a provision on government officials.[202] Moreover, it would hardly be understandable why academics visiting state universities should be refused a tax incentive granted to the academics visiting private universities. Hence, the only convincing solution is that Article 18 DTC Cyprus-Germany gives way to a visiting academics provision.

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[196] With regard to the students article, the same issue arises in the OECD Model. Slovenia recognized this problem and inserted a reservation on Art. 15 OECD Model in its 2010 update (para. 14 of the Commentary on Art. 15 OECD Model): *Slovenia reserves the right to add an article which addresses the situation of teachers, professors and researchers, subject to various conditions and to make a corresponding modification to paragraph 1 of Article 15.*

[197] This seems to hold for nearly every tax treaty containing a visiting academics provision. The only exception to this principle seems to be Art. 27 DTC Ireland-The Netherlands.

[198] See s. 3.4.3.

[199] See Michael Lang, *Introduction to the Law of Double Taxation Conventions*, MN 85.

[200] Paragraph 11 of the Commentary on Art. 15 OECD Model.

[201] See Frank Pötgens, 'The "Closed System" of the Provisions on Income from Employment in the OECD Model', *European Taxation* (2001): 252 (255); Friedhelm Jacobs et al., *Handbook on the United States – Germany Tax Convention*, Art. 20 MN 141.

[202] See also, on the DTC Belgium-Germany, Peter Malinski, in *Doppelbesteuerung* (Loose Leaf), eds Helmut Debatin & Franz Wassermeyer (November 1997), Art. 20 Belgien MN 5.

This solution is also taken for granted by several authors on other tax treaties.[203] A different view seems to be taken by some scholars, though.[204] With regard to a very special constellation (a visiting academic being paid by the sending state), the German tax administration adopted a different opinion and decided in favour of a priority of the *Government service* provision over the visiting academics provision in this case.[205] This opinion is not convincing, however, at least as regards the DTC Cyprus-Germany: Article 19 of this tax treaty also applies to such income: The taxing rights of the sending state are not affected under this rule. Whether the sending state can enforce its taxing rights depends on its domestic tax law. The application of Article 18 of this tax treaty is not necessary.

Finally, reference is made to Article 20 DTC Germany-Portugal, which explicitly provides for priority of the Government service provision over the visiting academics clause of the tax treaty.

3.6.5. *Other Income and Visiting Academics*

Finally, Article 19 DTC Cyprus-Germany overrides the *Other income* article of the tax treaty (Article 20), because Article 20 only applies unless an item of income has been successfully subsumed under the *foregoing Articles of this Convention*. If the visiting academics clause applies, Article 20 will consequently fail to do so.[206]

4. Conclusion

In a globalized world, cross-border teaching and research activities of academics for a temporary period are becoming more and more important. Countries therefore try to foster academic exchange. In this article, it has been demonstrated how the remuneration paid to visiting academics is taxed under double tax treaties with and without specific bilateral tax treaty provisions for visiting academics. The following conclusions can thus be made:

(1) As regards treaties following the OECD Model, income derived by visiting academics in respect of their teaching or research is covered by Article 7, Article 15, or Article 19 OECD Model.

(2) In an autonomous interpretation, the relevant criteria for distinguishing between dependent (Article 15 OECD Model) and independent (Article 7 OECD Model) personal services (rendered by a visiting academic) are the integration of the individual into the organization of the recipient of his services and the business risk the individual has to bear when rendering his services.

(3) Article 19 OECD Model only applies if the visiting academic is rendering his dependent personal services to a state institution and is paid by the state in respect of these services, unless the services are rendered in connection with a business activity of the paying state.

(4) If a tax treaty contains a special visiting academics provision, this clause may also apply to the visiting academic.

(5) Special rules on visiting academics vary from treaty to treaty. Still some similarities can be found: Most visiting academics provisions apply to visiting academics who are resident in one state (at least immediately before their stay in the host state) and present in the other state for a limited period of time in order to teach or carry out research.

(6) From a structural point of view, in general, four groups of visiting academics provisions can be distinguished, depending on whether or not the visiting academic is required to maintain residence in the sending state and whether or not only the income derived from sources outside the host state is exempted from host state taxation.

(7) Since the details of visiting academics provisions are drafted differently, it was not possible to give general interpretation guidelines in this article. However, it has been shown how several specific clauses taken from many different tax treaties have been construed by courts and tax scholars worldwide to give some indications for their interpretation and application.

Notes

[203] See Franz Wassermeyer, in *Doppelbesteuerung* (Loose Leaf), eds Helmut Debatin & Franz Wassermeyer (October 2004), Art. 20 OECD-MA MN 3; Dieter Eimerman, in *Doppelbesteuerung* (Loose Leaf), eds Helmut Debatin & Franz Wassermeyer (May 2009), Art. 20 USA MN 21; Rosenthal, in *Doppelbesteuerung* (Loose Leaf), eds Helmut Debatin & Franz Wassermeyer (December 2002), Art. 19 Australien MN 9; Wolf Wassermeyer, in *Doppelbesteuerung* (Loose Leaf), eds Helmut Debatin & Franz Wassermeyer (May 2000), Art. 20 Argentinien MN 4; Alain Steichen, in *Doppelbesteuerung* (Loose Leaf), eds Helmut Debatin & Franz Wassermeyer (May 2004), Art. 17 Luxemburg MN 42; Iris Schrage, in *Doppelbesteuerung* (Loose Leaf), eds Helmut Debatin & Franz Wassermeyer (October 2004), Art. 20 Korea MN 3; Michael Rosenthal, in *Doppelbesteuerung* (Loose Leaf), eds Helmut Debatin & Franz Wassermeyer (May 2007), Art. XVII Irland MN 4; Preuss, in *Doppelbesteuerung* (Loose Leaf), eds Helmut Debatin & Franz Wassermeyer (September 2000), Art. 20 Japan MN 9.

[204] See Friedhelm Jacobs et al., *Handbook on the United States – Germany Tax Convention*, Art. 20 MN 142; Marcus Mick, in *Doppelbesteuerung* (Loose Leaf), eds Helmut Debatin & Franz Wassermeyer (July 2009), Art. 17 Niederlande MN 2; Dirk Siegers, in *Doppelbesteuerung* (Loose Leaf), eds Helmut Debatin & Franz Wassermeyer, Art. 17 Luxemburg (May 2004), MN 5; in part also concurring, Ulrich Wolff, in *Doppelbesteuerung* (Loose Leaf), eds Helmut Debatin & Franz Wassermeyer (January 2006), Art. 20 Neuseeland MN 2 and Rainer Prokisch, in *Double Taxation Conventions*[3] ed Klaus Vogel, Art. 15 MN 97b.

[205] German Ministry of Finance, 10 Jan. 1994 – IV/C 5, BStBl I 1994, 14, para. 1.

[206] The drafting technique of the visiting academics clause (Art. 27) of the DTC Ireland-The Netherlands seems interesting, however, because it forms part of Ch. VI (Special provisions) and not of Ch. III (Taxation of income).

(8) Most visiting academics provisions do not completely fit in the system of allocation rules. Still, it has been shown that most visiting academics clauses can be applied like any other allocation rule of the OECD Model. It is neither necessary nor possible to combine a visiting academics provision with a second allocation rule. However, applying a visiting academics provision may sometimes lead to double non-taxation.

(9) The relationship between visiting academics provisions and the other applicable allocation rules of the OECD Model has been analysed and it seems as though, in most cases, a special visiting academics provision takes precedence over any other allocation rule of the OECD Model.