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Article 15 of the OECD Model: The 183-Day Rule and the Meaning of ‘Not a Resident’ in Cases of Hybrid Partnerships

Kasper Dziurdz*

Article 15(2) of the Organisation of Economic Co-operation & Development (OECD) Model is important in taxing employment income from a short-term assignment of employees and the hiring-out of labour. This article examines whether, for purposes of the 183-day rule, the employer needs to be a resident of a state and how conflicts regarding the employer status of hybrid partnerships can be solved.

I TRANSPARENT PARTNERSHIPS AS AN EMPLOYER

For the application of the 183-day rule, Article 15(2)(b) requires that the remuneration is paid by, or on behalf of, an employer who is not a resident of the source state.¹ Whether an employer is a resident of the source state is decided under Article 4. Under Article 4(1), ‘the term “resident of a Contracting State” means any person who, under the laws of that State, is liable to tax therein by reason of his domicile, residence, place of management or any other criterion of a similar nature’. Hence, only a person as defined in Article 3(1)(a) and (b) who has a certain personal attachment to a state can be a resident of that state. Which forms of personal attachment to a state form the basis of a comprehensive taxation is a matter to be decided by domestic law.²

According to the OECD Commentary, where:

a partnership is treated as fiscally transparent in a State, the partnership is not ‘liable to tax’ in that State within the meaning of paragraph 1 of Article 4, and so cannot be a resident thereof for purposes of the Convention. . . . Where the application of the Convention is so refused, the partners should be entitled, with respect to

their share of the income of the partnership, to the benefits provided by the Conventions entered into by the States of which they are residents to the extent that the partnership’s income is allocated to them for the purposes of taxation in their State of residence.³

Accordingly, even though a partnership which is treated as fiscally transparent is a person,⁴ it cannot be regarded as a resident. Can such a fiscally transparent partnership still be an employer who is – always – not a resident of the source state for purposes of the 183-day rule?

Article 15(2)(b) is worded in a negative way. It does not require the employer to be a resident of the residence state or a third state. It only requires the employer to *not* be a resident of the source state. Based on this negative wording, even if a fiscally transparent partnership is not a resident, it still could be an employer who is *not* a resident of the source state.

The OECD Commentary observes that the application of Article 15(2)(b):

in the case of fiscally transparent partnerships presents difficulties since such partnerships cannot qualify as a resident of a Contracting State under Article 4. While it is clear that such a partnership could qualify as an

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¹ For purposes of this article, the source state is always ‘the other Contracting State’, regardless of what and where the source of income is, and, therefore, regardless of where the employment is exercised and whether or not the 183-day rule applies. The residence state is always the residence state of the employee and, thus, the employer may be a resident of the residence state, the source state or a third state.

² See, with further references, K. Dziurdz, *Kurzfristige Arbeitnehmerüberlassung im Internationalen Steuerrecht* sec. 6.2.1 (Linde 2013).

³ OECD Commentary 2000–2012 on Art. 1, para. 5. See also Org. Econ. Co-operation & Dev., *The Application of the OECD Model Tax Convention to Partnerships*, 6 Issues Intl. Taxn. pp. 13–16 (m.nos. 33–42) (1999) [hereinafter *Partnership Report*].

⁴ OECD Commentary 2000–2012 on Art. 3, paras. 2 and 10.1. See also *Partnership Report*, pp. 12–13 (m.nos. 29–32).

'employer' (especially under the domestic law definitions of the term in some countries, e.g., where an employer is defined as a person liable for a wage tax), the application of the condition at the level of the partnership regardless of the situation of the partners would therefore render the condition totally meaningless. The object and purpose of subparagraphs b) and c) of paragraph 2 are to avoid the source taxation of short-term employments to the extent that the employment income is not allowed as a deductible expense in the State of source because the employer is not taxable in that State as he neither is a resident nor has a permanent establishment therein. These subparagraphs can also be justified by the fact that imposing source deduction requirements with respect to short-term employments in a given State may be considered to constitute an excessive administrative burden where the employer neither resides nor has a permanent establishment in that State. In order to achieve a meaningful interpretation of subparagraph b) that would accord with its context and its object, it should therefore be considered that, in the case of fiscally transparent partnerships, that subparagraph applies at the level of the partners. Thus, the concepts of 'employer' and 'resident', as found in subparagraph b), are applied at the level of the partners rather than at the level of a fiscally transparent partnership. This approach is consistent with that under which other provisions of tax Conventions must be applied at the partners' rather than at the partnership's level.⁵

Hence, the Commentary emphasizes that Article 15(2)(b) should not be rendered totally meaningless (which it would be if an employer could never be a resident of the source state) as well as that Article 15(2)(b) and (c) intends to avoid source taxation to the extent that the employment income is not allowed as a deductible expense in the source state because the employer is not a resident of the source state (in the case of fiscally transparent partnerships, the remuneration could be deductible at the level of resident partners). Accordingly, the Commentary concludes that, in the case of transparent partnerships, only *a resident* of a state can be an employer for purposes of the 183-day rule. As a fiscally

transparent partnership is not regarded as a resident, it cannot be an employer either.⁶

The historical development of the 183-day rule supports the opinion that only a resident can be an employer for purposes of the rule. The negative wording of Article 15(2)(b) can be traced back to the first draft of the Working Party No. 10 of the OEEC Fiscal Committee in 1957. While in its initial 1957 report on the taxation of income from dependent and independent personal services the Working Party observes that 'in most conventions it is . . . provided that the services shall be performed for or on behalf of an employer resident of the same State as the individual employed',⁷ it chooses for the first draft a different wording: the 183-day rule applies only if 'the remuneration for the services is paid by or on behalf of a person not being a resident of the other Contracting State'.⁸ In the commentary on the first draft, the Working Party explains that '[i]n order to make it possible for . . . [an employee] to enjoy the exemption provided for, even if the employer is a resident of a third State it is proposed – somewhat in divergence to the general pattern – that it is sufficient if the employer is not a resident of the same State in which the services are performed'. Consequently, the aim of the negative wording was to catch an employer who is *a resident* of a third state. It was not the aim to apply the 183-day rule in cases where the employer is not a person (this would have been absurd since in the first draft the term 'person' is used instead of the term 'employer') or where the employer, though being a person, is not a resident of a state. Later a drafting group replaced 'person' with 'employer',⁹ but there is no indication that changes to the content were intended with these changes to the wording.¹⁰ Hence, it can be derived that Article 15(2)(b) requires an employer to be both a person and a resident.

Moreover, the systematic context implies that the term 'not' in Article 15(2)(b) does not allow an entity that misses the status of being a person or being a resident of a state to become an employer. Otherwise, also permanent establishments under Article 5 could be an employer who is not a resident of the source state. However, Article 15(2)(c) contains its own rule for permanent establishments: the 183-day rule applies only if 'the remuneration is not borne by a permanent establishment which the employer has in the

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⁵ OECD Commentary 2000–2012 on Art. 15, paras 6.1–6.2. See also Partnership Report, pp. 34–35 (m.nos. 89–91).

⁶ See also, for example, L. De Broe, et al., *Interpretation of Article 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'*, Bull. Intl. Fiscal Documentation 515 (2000); F. Pötgens, *Article 15(2)(b) of the OECD Model: Problems Arising from the Residence Requirement for Certain Types of Employers*, European Taxn. 216 et seq. (2002); B. Peeters, *Article 15 of the OECD Model Convention on 'Income from Employment' and its Undefined Terms*, European Taxn. 81 (2004); F. Pötgens, *Income from International Private Employment* 216 et seq. (2007).

⁷ OEEC Fiscal Committee, FC/WP10(57)1, 11 Sep. 1957, p. 2. The historical OEEC and OECD materials are available at <http://www.taxtreatieshistory.org>.

⁸ FC/WP10(57)1, *supra* n. 7, at 8.

⁹ OEEC Fiscal Committee, TFD/FC/34, 28 Apr. 1958.

¹⁰ See Dziurdź, *Arbeitnehmerüberlassung*, *supra* n. 2, at sec. 3.1.3.

[source state]'. For that reason, a permanent establishment – even though it is not a person and thus not a resident of the source state – cannot be an employer.¹¹ If it is derived from Article 15(2)(c) that being an employer requires being a person (which is the case for partnerships¹² but not for permanent establishments),¹³ it should also be derived from Article 15(2)(c) that being an employer requires being a resident of a state. If the term 'not' in Article 15(2)(b) does not eliminate the requirement of being a person, it should also not eliminate the requirement of being a resident, since both requirements are inherent in the term 'a resident' which is used in Article 15(2)(b) and defined in Article 4(1).

Even though the negative wording of Article 15(2)(b) suggests that an employer need not be a person or a resident, systematic, teleological and historical considerations speak for the opposite result. Only a person who is a resident of a state may be an employer for purposes of the 183-day rule.

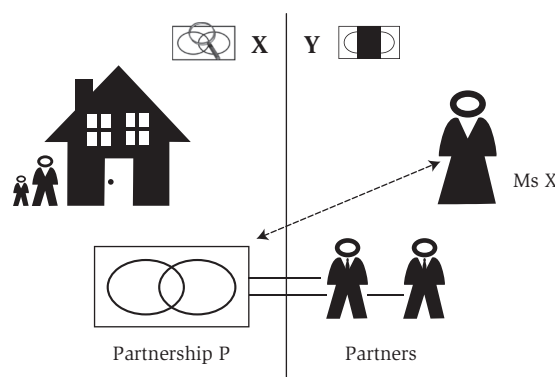
2 HYBRID PARTNERSHIPS AS AN EMPLOYER

According to the OECD Commentary, a fiscally transparent partnership cannot be a resident and, therefore, cannot be an employer under Article 15(2)(b). This view, however, causes problems where a hybrid partnership is involved that is treated as fiscally transparent in the residence state and as fiscally opaque in the source state. Example 1 considers this.

EXAMPLE 1

X, a resident of State X, is employed by P, a partnership, and she works for P in State Y. P has its seat and place of management in State X but its partners are residents of State Y. P earns business profits in State Y without having a permanent establishment in State Y. State X treats the partnership as fiscally transparent; State Y treats the partnership as fiscally opaque. X is present in State Y for not more than 183 days during the relevant period.

Figure 1 Is the Hybrid Partnership a (Non-)resident Employer? (Example 1)



From the viewpoint of State Y, the partnership P is an employer under Article 15(2)(b) and (c) since it treats P as fiscally opaque. Thus, as the employer is not a resident of State Y and has no permanent establishment in State Y, the 183-day rule applies and X's remuneration in respect of the employment exercised in State Y is taxable only in State X. From the viewpoint of State X, the partners of the partnership P are employers under Article 15(2)(b) and (c) since it treats P as fiscally transparent. Thus, as the employers are residents of State Y, the 183-day rule does not apply and X's remuneration in respect of the employment exercised in State Y is taxable in State Y under Article 15(1). If State X applies the exemption method under Article 23 and exempts the remuneration, this can lead to double non-taxation.

If the residence state in which the partnership has its seat and place of management treats the partnership as fiscally transparent and the source state of which the partners are residents treats the partnership as fiscally opaque, it is unclear whether the partnership or the partners are an employer. Under a solution based on the OECD's view on qualification conflicts¹⁴ and a response of the Austrian Federal Ministry of Finance,¹⁵ the residence state is not required

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¹¹ See, for example, H. Vogel, Aktuelle Fragen bei der Auslegung von Doppelbesteuerungsabkommen, *Betriebs-Berater* 1978, p. 1024; M. Kempermann, Die Bestimmung des 'Arbeitgebers' und seiner Ansässigkeit in den '183-Tage-Klauseln' der Doppelbesteuerungsabkommen, *Deutsche Steuer-Zeitung* 1982, p. 144; B. Siefert, Der Arbeitgeberbegriff im deutschen Abkommensrecht, *Recht der Internationalen Wirtschaft* 1986, pp. 979 et seq.; A. Peter, Kann eine Betriebsstätte im Sinne der DBA Arbeitgeber sein? *Internationales Steuerrecht* 1999, pp. 458 et seq.

¹² See *supra* n. 4.

¹³ See, however, K. Vogel, *Double Taxation Conventions*³ (1997) Art. 15 m.nos. 27a–27b, who is of the opinion that the employer need not be a 'person', but that from the context it may be derived that a permanent establishment may not be an employer; similarly R. Prokisch in K. Vogel and M. Lehner, *Doppelbesteuerungsabkommen*⁵ (2008) Art. 15 m.nos. 52–53.

¹⁴ OECD Commentary 2000–2012 on Art. 23 A and B, paras. 32.1 et seq.

¹⁵ Austrian Federal Ministry of Finance, 17 Jan. 2000, Dienstnehmerentsendung nach Ungarn durch eine inländische KG mit ungarischen Teilhabern, Express Antwort Service (EAS) 1589, GZ. 04 0101/26-IV/4/99, published in *Steuer und Wirtschaft International* 2000, p. 59. See also Pötgens, *supra* n. 6, at 219–220; Pötgens, *Income*, *supra* n. 6, at 752–755.

to exempt the remuneration under Article 23 since the income may not be taxed in the source state 'in accordance with the provisions of this Convention'. As the source state, for deciding whether the partnership or its partners are an employer, is allowed to refer to the tax treatment of the partnership under its domestic law, the source state rightly considers that Article 15(2) precludes it from taxing the remuneration (the fiscally opaque partnership is an employer and is not a resident of the source state). Thus, the residence state should, for the purposes of applying Article 23, consider that the remuneration may not be taxed by the source state in accordance with the provisions of the convention, even though the residence state would have applied the convention differently (the partners of the fiscally transparent partnership are employers and are residents of the source state) so as to have the right to tax that income if it had been in the position of the source state.

However, this solution is to a certain extent not fully convincing as the hybrid partnership as an employer still would not be a resident of the residence state; the residence state treats it as fiscally transparent. Therefore, the hybrid partnership would be a resident nowhere. Even though compatible with the negative wording of Article 15(2)(b), this result would contradict systematic, teleological and historical arguments which imply that the 183-day rule requires the employer to be a resident of a state. Even the OECD Commentary states that a fiscally transparent partnership cannot be an employer because it cannot qualify as a resident (otherwise, Article 15(2)(b) would be rendered 'totally meaningless').¹⁶ How then can the hybrid partnership be an employer if, according to the Commentary,¹⁷ it cannot qualify as a resident? Either the hybrid partnership cannot be an employer for both the residence state and the source state because it is not a resident or – to be an employer – it must be a resident of the residence state even though the residence state treats it as fiscally transparent.

Under another solution suggested by Ulf Zehetner,¹⁸ the residence state must follow the source state's tax treatment of the partnership as well, but for other reasons. Article 15(2)(b) does not require that the employer actually be a resident of a state but only that the employer would be a resident of the source state if it were to have a personal attachment to the source state. As the source state treats the hybrid partnership as fiscally opaque, the partnership would be a resident of the source state if it were to have its seat or place of management therein. Whether the residence state or a third state treats the partnership as fiscally transparent or

opaque is irrelevant. Thus, the partnership may even then be an employer for purposes of the 183-day rule if it is nowhere a resident – provided that it would be a resident of the source state if it were to have its seat or place of management therein. In other words: Article 15(2)(b) – with its negative wording – does not eliminate the requirement of being a resident of the source state if there is or would be a personal attachment to the source state, but it eliminates the requirement of being a resident of the residence state or of a third state if there is no such personal attachment to the source state.

Ulf Zehetner substantiates this solution on the basis of the object and purpose of Article 15(2)(b) and (c), namely, that these conditions intend to offer compensation to the source state for a reduction in tax revenue and, therefore, that there must be a link between deduction and taxation of the remuneration in the source state. As the source state treats the hybrid partnership as fiscally opaque but the partnership is neither a resident of the source state nor does it have a permanent establishment there, the employee's remuneration does not reduce tax revenue in the source state so as to justify a corresponding taxation. Consequently, there is no teleological reason to view the partners who are residents of the source state as employers and thereby to prevent the application of the 183-day rule.

However, the remuneration may reduce tax revenue in the source state. According to the OECD Commentary, neither the hybrid partnership nor the partners are able to claim tax treaty benefits since the partnership is treated as fiscally transparent in the state in which it has its seat and place of management (residence state), and no income is allocated to the partners in the state of which they are residents (source state).¹⁹ Therefore, the source state may tax the partnership as a person subject to limited tax liability without restriction. If the activities of the partnership trigger limited tax liability, for example because under domestic law a permanent establishment is established in the source state (which need not necessarily be a permanent establishment for tax treaty purposes) or just because the results of the business are used in the source state, the partnership's business profits are taxable in the source state and the remuneration in respect of the employment is expected to be deductible in the source state as well. Following its alleged object and purpose, Article 15(2)(b) would have to offer compensation to the source state for the reduction in tax revenue by having the employee's remuneration taxable in the source state. In order to have the remuneration taxable in the source state, the

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¹⁶ See *supra* n. 5.

¹⁷ See *supra* n. 3.

¹⁸ U. Zehetner, Die Arbeitgeberbereinschaft von Personengesellschaften nach Art. 15 Abs 2 OECD-MA, in W. Gassner, M. Lang and E. Lechner (eds.), *Personengesellschaften im Recht der Doppelbesteuerungsabkommen* (2000) pp. 163 et seq. and 176 et seq.; U. Zehetner, Personengesellschaften als Arbeitgeber nach Art. 15 Abs. 2 OECD-MA? *Steuer und Wirtschaft International* 2001, pp. 108 et seq.; U. Zehetner & S. Dupal, Der abkommensrechtliche Arbeitgeberbegriff, in W. Gassner, M. Lang, E. Lechner, J. Schuch and C. Staringer (eds.), *Arbeitnehmer im Recht der Doppelbesteuerungsabkommen* (2003) pp. 151 et seq. See also Pötgens, *supra* n. 6, at 220; Pötgens, *Income*, *supra* n. 6, at 753 et seq.

¹⁹ OECD Commentary 2000–2012 on Art. 1, paras. 6.2 et seq. and 6.5. See also Partnership Report, pp. 20 et seq. and 26 et seq. (examples 3, 6 and 7, m.nos. 51 et seq. and 64 et seq.).

183-day rule would need to not apply and for Article 15(2)(b) there would need to be an employer who is a resident of the source state. However, only the partners of the hybrid partnership are residents of the source state. Should – in order to offer compensation to the source state for reduction in tax revenue – the partners be regarded as employers under Article 15(2)(b) even though the source state treats the partnership as fiscally opaque and deducts the remuneration at the level of the hybrid partnership?

To oblige the residence state, in the case of hybrid partnerships, to follow the source state's tax treatment of the partnership and, therefore, to follow the source state's view on whether the partnership or the partners are an employer, appears to be a sound solution. However, this solution is not necessarily supported by the object and purpose of Article 15(2)(b) and (c) and, even if applied under Article 23, an important problem remains: In cases where the source state treats the partnership as fiscally opaque but the partnership is established in a state which treats it as fiscally transparent, the hybrid partnership as an employer would not be a resident of any state. This result would be compatible with the negative wording of Article 15(2)(b) but systematic, teleological and historical considerations speak against it. It should therefore be considered whether the fiscal treatment of the partnership is at all relevant for purposes of the 183-day rule.

3 RELEVANCE OF THE PARTNERSHIP'S TAX TREATMENT?

Unlike the assumption made in the literature, Article 15(2)(b) and (c) appears *not* to have the object and purpose of ensuring that the source state in which the employment is exercised retains its taxation right if the remuneration is recognized as a deduction from profits taxable in the source state and, therefore, it does not represent compensation to the source state for its reduced tax revenue. Article 15(2)(b) and (c) rather decides whether there is a sufficient level of presence which prevents withholding tax obligations from being an excessive administrative burden.²⁰

Under the place-of-work principle in Article 15(1), it is irrelevant where the remuneration is deductible, i.e., whether in the residence state, the source state or a third state. Why then should the deductibility be decisive under the 183-day rule as an exception to the place-of-work principle? It is also unclear why the weight of the administrative burden in the source state, which the 183-day rule intends

to eliminate in order to facilitate the international movement of personnel and the operations of enterprises engaged in international trade, should depend on the deductibility of the remuneration. It is, rather, the presence of the employer in the source state and the connection between that presence and the employee's services that make the administrative burden caused by the levying of withholding tax excessive or not. In addition, residence in the source state does not necessarily imply deductibility in the source state. If the employer is a resident of the source state, the 183-day rule does not apply by reason of Article 15(2)(b). This is so even if the remuneration is borne by a permanent establishment that the employer has in the residence state or a third state and, therefore, where there is no danger of 'double losses' for the source state.²¹ Finally, from a historical perspective, the intention to link taxation to deductions is not supported. Only in its initial 1957 report on the taxation of income from dependent and independent personal services did Working Party No. 10 of the OEEC Fiscal Committee explain the reasons for Article 15(1) and (2), but the explanation focused on practical aspects and the pay-as-you-earn system.²² It is interesting to note that even Article 15(3) was never intended to make the remuneration taxable in the state in which it is deductible, i.e., the state in which the place of effective management of the transport enterprise is situated. Rather, the rule in Article 15(3) appears 'to be the correct choice for many countries which have already introduced, or which propose to introduce, taxation at the source on salaries and wages. It is normal to make the employer responsible for the formalities of taxing remuneration paid to members of crews: such a procedure ensures simple and speedy collection and permits of satisfactory control'.²³

Given this background, it is arguable that Article 15(2)(b) and (c) is not intended to offer compensation to the source state for reduced tax revenue. Rather, Article 15(2)(b) and (c) assures that the place-of-work principle is followed if the employer has a sufficient level of presence in the source state and, therefore, the withholding tax obligations in the source state do not impose an excessive administrative burden. If there is a sufficient level of presence, as the employer is a resident of the source state or has a permanent establishment in the source state for which the employee works, the administrative burden resulting from withholding tax obligations is not intended to be excessive and, therefore, there is no reason for an exception to the place-of-work principle. Accordingly, there is no reason why the fiscal treatment of a partnership in the residence state, the source state or a third

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²⁰ See, in detail and with further references, K. Dziurdź, *Article 15 of the OECD Model: The 183-Day Rule and the Meaning of 'Borne by a Permanent Establishment'*, Bull. Intl. Taxn. 123–124 (2013); Dziurdź, *Arbeitnehmerüberlassung*, *supra* n. 2, at sec. 3.2.

²¹ See Dziurdź, *Arbeitnehmerüberlassung*, *supra* n. 2, at sec. 5.2.

²² FC/WP10(57)1, *supra* n. 7, at 11.

²³ OEEC Fiscal Committee, FC/WP5(56)1, 2 Oct. 1956, p. 11 and FC/WP5(57)2, 6 May 1957, p. 17. See also OEEC Fiscal Committee, FC(58)2, 13 Feb. 1958, p. 14; FC/M(58)2, 29 Mar. 1958, p. 7; FC(58)2 (Rev. 1) Pt. 1, 19 Apr. 1958, p. 12; TFD/FC/64, 11 Apr. 1959, pp. 15 et seq.; TFD/FC/64 (Rev. 1), 5 May 1959, p. 19; FC(59)2, 21 May 1959, p. 19; and C(59)147, 18 Jun. 1959, p. 16.

state should be relevant for purposes of the 183-day rule. Also for the employee, it would be difficult to understand why he should be taxed differently depending on whether he is employed by a fiscally transparent or opaque person.²⁴ If a partnership or also a corporation as an employer has its seat or place of management in the source state, the level of presence in the source state is sufficient to follow the place-of-work principle by taxing the remuneration in the source state in which the employment is exercised and to impose source deduction requirements in that state. It is irrelevant whether the partnership or corporation is treated as fiscally transparent or opaque, and for what reason – tax transparency of partnerships, check-the-box regime, group tax regime, etc. – the income is not allocated to the partnership or corporation.

For purposes of the 183-day rule, the term 'resident of a Contracting State' defined in Article 4 should be understood as meaning that a partnership is a resident of the state in which it has its seat or place of management, regardless of whether it is treated as fiscally transparent or opaque. Klaus Vogel has early on pointed out that:

[a]pplication of the distributive rules is *not* conditional on the person concerned *actually* being taxed (as a resident). All it requires is that the person concerned has that personal attachment to at least one of the contracting States – the 'State of residence' – which *might* result in him becoming subject to full tax liability. . . . The question whether a person . . . may be a *taxable entity* under the law of the State concerned, is not a condition for treaty entitlement. The consequence thereof for a partnership, if it is not taxable as such under the law of the State in question, is that its treaty entitlement depends on the local attachment which would apply if the partnership were a taxable entity in that State.²⁵

In order to achieve the object and purpose of Article 15(2)(b) and (c), namely, to apply the exception from the place-of-work principle only if the employer has not reached a certain level of presence in the source state, good arguments speak in favour of this interpretation of residence. Thus, for purposes of the 183-day rule, the actual tax treatment of partnerships should be irrelevant. With this interpretation of 'a resident' in Article 15(2)(b), problems regarding the employer status of hybrid partnerships can be solved as well.

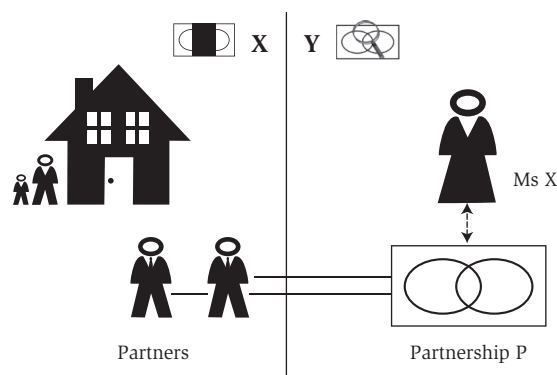
EXAMPLE 1 (CONTINUED)

Since X works for the partnership P, it is P which must be regarded as the employer under Article 15(2)(b) and (c). Whether P is treated as fiscally transparent or opaque in State X or State Y is irrelevant. P has its seat and place of management in State X and thus is personally attached to State X. If P were a taxable entity in State X, it would be subject to comprehensive taxation. P is, therefore, for purposes of the 183-day rule, a resident of State X under Article 4. Since the conditions of Article 15(2)(b) are met, the 183-day rule applies and X's remuneration for the employment exercised in State Y is taxable only in State X.

EXAMPLE 2

X, a resident of State X, is employed by P, a partnership, and she works for P in State Y. P has its seat and place of management in State Y but its partners are residents of State X. P earns business profits in State Y without having a permanent establishment in State Y.²⁶ State X treats the partnership as fiscally opaque; State Y treats the partnership as fiscally transparent. X is present in State Y for not more than 183 days during the relevant period.

Figure 2 Is the Hybrid Partnership a Resident Employer?
(Example 2)



Since X works for the partnership P, it is P which must be regarded as the employer under Article 15(2)(b) and (c). Whether P is treated as fiscally transparent or opaque in State X or State Y is irrelevant. P has its seat and place of management in State Y and thus is personally attached to

Notes

²⁴ K. Kovacs, *Dual Resident Employer Under Article 15 (2) OECD MC*, in *Dual Residence in Tax Treaty Law and EC Law* 214 (M. Hofstätter & P. Plansky eds., 2009).

²⁵ K. Vogel, *Double Taxation Conventions*³ (1997) Art. 15 m.no. 24a. See also, for example, M. Lang, *The Application of the OECD Model Tax Convention to Partnerships* 31 et seq. (2000); M. Lang, *Taxation of Income in the Hands of Different Taxpayers from the Viewpoint of Tax Treaty Law*, Bull. Intl. Fiscal Documentation 596 et seq. (2001).

²⁶ Under Art. 5(2)(a), the term 'permanent establishment' includes especially a place of management. However, it is thinkable that a partnership has no permanent establishment in the state from which it is managed since the examples in Art. 5(2) are to be seen against the background of the general definition given in Art. 5(1) and, therefore, the requirements of Art. 5(1) must be met; see OECD Commentary 1977 on Art. 5, para. 11; OECD Commentary 1992–2012 on Art. 5, para. 12. Where there is no *fixed* place of business from which the partnership is managed, the place of management does not constitute a permanent establishment.

State Y. If P were a taxable entity in State Y, it would be subject to comprehensive taxation. P is, therefore, for purposes of the 183-day rule, a resident of State Y under Article 4. Since the conditions of Article 15(2)(b) are not met, the 183-day rule does not apply and X's remuneration for the employment exercised in State Y is taxable in State Y under Article 15(1).

4 CONCLUSIONS

Article 15(2)(b) is worded in a negative way. It does not require that the employer be a resident of the residence state or a third state. It only requires that the employer be *not* a resident of the source state. Based on this negative wording, even if a fiscally transparent partnership is not a resident, it could still be an employer who is – always – *not* a resident of the source state. However, based on teleological and systematic considerations as well as from the historical development of the 183-day rule, it can be derived that only a person who is a resident of a state can be an employer.

According to the OECD Commentary, a fiscally transparent partnership cannot qualify as a resident and thus cannot be an employer. If this view is followed, problems arise when a hybrid partnership which has its seat and place of management in the residence state and the partners of which are residents of the source state is treated as fiscally transparent in the residence state and as fiscally opaque in the source state. In such a case, if an

employee works for the hybrid partnership, it is unclear whether the hybrid partnership or the partners are an employer under Article 15(2)(b) and (c). If the residence state follows the source state's tax treatment of the hybrid partnership and regards the partnership as an employer, according to the Commentary the partnership would still not be a resident of the residence state and thus would be nowhere a resident. This result would be in accordance with the negative wording of Article 15(2)(b) but systematic, teleological and historical considerations speak against it; the employer needs to be a resident of a state.

Article 15(2)(b) and (c) decides whether the employer has reached a level of presence in the source state which is sufficient for following the place-of-work principle without having excessive administrative burdens. Thus, there is no reason why the tax treatment of a partnership in the residence state, source state or a third state should be relevant for purposes of the 183-day rule. If the partnership has its seat or place of management in the source state, the level of presence in the source state is sufficient to follow the place-of-work principle; the administrative burden resulting from source deduction requirements in the source state is not intended to be excessive. Consequently, in order to achieve the object and purpose of Article 15(2)(b) and (c), the term 'a resident' in Article 15(2)(b) should be understood as meaning that a partnership is a resident of the state in which it has its seat or place of management, regardless of whether it is treated as fiscally transparent or opaque.

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