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TAXATION OF DIGITAL NOMADS:

Employment income and the OECD Model
Convention

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Marooned on a desert island, still running your business or doing your job.

Makimoto and Manners

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Abstract

The increasing mobility of individuals, together with globalisation and technological evolution, results in both economic and professional changes, such as the expansion of digital nomadism. These changes entail significant tax implications. This thesis discusses the taxation of digital nomads in a context of an employment relationship. This is due to the technological revolution we are witnessing and which has brought with it new ways of connecting with each other namely with our employer, the way of providing the labour activity, leaving behind a criterion of physical presence to give way to a new one, that of digital presence.

Although it is still an undefined concept, we consider as digital nomads those individuals who do not base their activity on a fixed territory, making use of a set of skills that allow them to carry out their professional activity with an internet connection, without infrastructure needed.

This has become a challenging reality for international taxation, not only in terms of how to tax the employment income earned by these individuals but also due to the growing economic relevance of digital nomads, taking into account the application of Article 15 of the OECD Model.

Faced with this reality, the need for legislative changes capable of impacting the daily tax practice is recognized, since the allocation of international taxation powers to one of the disputing States depends on the place where the work is carried out, which is determined according to a criterion of physical presence. As such, it is our opinion that we are faced with a taxation based on outdated criteria that needs to be reconsidered in order to adapt to the taxation of international remote work, particularly in the case of digital nomads.

Keywords: international taxation; remote work; labour mobility; digital nomads; physical presence; digital presence; exit taxes.

List of abbreviations and acronyms

AEOI – Automatic Exchange of Information

BEPS – Base Erosion and Profit Shifting

CIT - Corporate Income Tax

CJEU – Court of Justice of the European Union

DNVs – Digital Nomad Visas

DST – Digital Services Tax

DTC – Double Taxation Conventions

EEA – European Economic Area

EOIR – Exchange of Information on Request

EU – European Union

ICT – Information and Communications Technology

MLI – The Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting

OECD Model – OECD Model Tax Convention on Income and on Capital

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PIT – Personal Income Tax

TICTM – ICT-based mobile work

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1. Introduction

1.1. Framework

Remote work has recently peaked with the outbreak of the Covid-19 Pandemic¹. Until then, a standard employment relationship was grounded on the premise that the worker had to go to the workplace to perform his activity. Despite the fact that there were remote working situations, it was the Covid-19 Pandemic crisis that profoundly transformed work practices². Added to this, there is digitalisation and the mobility of individuals³. Those have made possible to provide a labour activity at a distance, without the need for the worker to go to the company's premises, working entirely digitally, and even allowed the worker and the company to be established in different countries.

¹ “The on-going digitalisation of the workplace, with high-speed internet access and videoconferencing tools, has allowed employees to work remotely, from the comfort of their own homes, a development heavily accelerated by the COVID-19 pandemic” in BAERT, Pieter, “*Tax policies for a new generation*”, 2022, available at [https://www.europarl.europa.eu/RegData/etudes/ATAG/2022/733697/EPRS_ATA\(2022\)733697_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/ATAG/2022/733697/EPRS_ATA(2022)733697_EN.pdf), last accessed on 19.02.2023.

² This phenomenon exists for some time now, as GIORGIO BERETTA tell us given that “labour, in all its dimensions of geographical and occupational mobility, has been 'on the move' in the last few years (...) emerged in California in the 1970s and was commonly practised by workers in the information and communications technology (ICT) industry” in BERETTA, Giorgio, “*'Work on the Move': Rethinking Taxation of Labour Income under Tax Treaties*”, *International Tax Studies*, Vol. 5, No. 2, 2022, p.2-3.

³ As stated in the study requested by the EMPL committee: “Between 2006 and 2019 the incidence of workers working from home grew slowly in the EU27, from 10% in 2006 to 14.3% in 2019. This increase was mainly due to the increase in the share of those working from home only sometimes (from 5.5% in 2006 to 9% in 2019), while the share of those usually working from home increase donly very little (from 4.6% in 2006 to 5.4% in 2019) (...). The COVID-19 pandemic has resulted in a massive expansion of TICTM, mostly as a result of measures introduced by governments across the EU, such as the closure of schools and child care services, recommendations and obligations to work from home, as well as strict lockdown measures” in LODOVICI, Manuela et al., “*The impact of teleworking and digital work on workers - Special focus on surveillance and monitoring, as well as on mental health of workers*”, 2021, available at [https://www.europarl.europa.eu/RegData/etudes/STUD/2021/662904/IPOL_STU\(2021\)662904_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2021/662904/IPOL_STU(2021)662904_EN.pdf), last accessed on 08.02.2023.

Most tax treaties follow the currently in force OECD Model Tax Convention⁴ ⁵. This thesis analyses the tax framework adopted in a situation of international remote work, under Article 15 of the OECD Model, where the employee and the employer reside or are established in different jurisdictions, in which the work may be provided digitally.

The allocation of taxing powers to one of the States in dispute will depend on the place where the activity is carried out, considering the physical presence of the worker. Faced with an overlapping claim to tax on the same income, specific mechanisms are used to eliminate double taxation, either by granting a tax credit or by exempting income subject to taxation abroad.

In view of the above and considering the evolution of the digital economy, it becomes necessary to adapt the way employment income is taxed. Consequently, the application of Article 15 of the OECD Model raises new challenges with regard to the international taxation of employment income of dependent workers. As we will explain below, the allocation of taxing powers according to the OECD Model is still largely based on criteria reliant on physical presence. We will also discuss how the inadequacy of physical presence as a connecting element becomes visible.

1.2. Research Question and Delimitation of the Thesis

Purpose

With this research we intend to answer the following question: does it still make sense to use physical presence as a prevailing criterion for allocating taxing rights in case of employment income?

Each country has its own domestic rules for considering certain individuals as residents, dictating consequences that are fundamental when it comes to fixing the

⁴ “*Model Tax Convention on Income and on Capital: Condensed Version 2017*”, 2017, available at <https://www.oecd.org/ctp/treaties/model-tax-convention-on-income-and-on-capital-condensed-version-20745419.htm>, last accessed on 20.03.2023.

⁵ «The Organisation for Economic Co-operation and Development's Model Tax Convention on Income and on Capital (the OECD Model) is the most influential and widely followed model tax convention on which Double Tax Agreements between states are based. It underpins nearly all of the 3,000-odd bilateral tax treaties that are currently in force throughout the world» in HAN, Keefe, “*The Mistaken Removal of Article 14 from the Model Tax Convention*”, Auckland University Law Review, 2010, available at <http://www.austlii.edu.au/nz/journals/AukULawRw/2010/9.pdf>, last accessed on 28.03.2023.

territorial scope for tax liability rules. And although we acknowledge the existence of a previous (and practical) issue concerning the residence of digital nomads, we will not be addressing this problem, assuming that these individuals are considered residents for tax purposes according to the OECD Model. This means that we will assume that digital nomads remain as residents in another state, moving on to discuss the taxation powers in the Source state.

One of the purposes of this dissertation is to demonstrate that “the traditional connecting elements that we find in the international tax system are crystallized” and in conflict with the globalisation of economic activities and the dematerialisation of the economy⁶. These factors, together with those of efficiency and equity, demonstrate the residence's artificiality, which derives from its inadequacy to the current global economic landscape. Therefore, the consideration that residence depicts a genuine territorial connection between a taxpayer and a given jurisdiction is inaccurate due to the progressive digitalisation and hybridisation of the (labour) world.

Moreover, we also intend to illustrate that the criteria for taxation of employment income created in the past were designed for a completely different context than the one we live in nowadays and are inadequate in view of the current international situation. As such, in the 21st century the current distribution of taxation powers may not be the most appropriate since the criterion of physical presence is no longer essential for the provision of work.

Digital nomads can be self-employed or dependent workers. In the case of dependent workers, Article 15 of the OECD Model is applied regarding income from private employment. On the other hand, in the case of self-employed workers, Article 7 of the OECD Model should be applied (formerly Article 14 which was eliminated from the OECD Model in 2000 and absorbed into Article 7). In the course of this research, as we intend to address the case of employment income, we shall only analyse the tax framework concerning the income derived by digital nomads from dependent work. Other types of income as well as income derived by individuals that are not considered digital nomads is outside of the scope of this work.

⁶ PRZEPIORKA, Michell, *Possibilidade de tributação em bases territoriais no sistema jurídico brasileiro – ofensa ao princípio da universalidade?*, Revista de Direito Tributário Internacional Atual, No. 4, IBDT, 2018, p. 154

In order to answer the research question, we will start by explaining who digital nomads are and what is the motivation behind this lifestyle. In addition, we will also explain the event that triggered the change in work patterns in recent years and the growing trend towards remote working and digital nomadism.

Next, we will move on to the analysis of Article 15 of the OECD Model, regarding income from employment and designed for dependent workers. We will also address the question of whether the current distribution of taxing rights is the most appropriate in the light of international developments and whether it still makes sense to use physical presence as a proxy to allocate these same taxation rights. Furthermore, we shall make a critical analysis of the 183-day rule in the aforementioned article.

After that, we will highlight the fragility of the connecting elements taking into account the continuous globalisation. In this respect, we will attempt to prove that the criterion of physical presence has been replaced, in some situations, by a virtual one, and therefore work can be carried out entirely in a digital way. We will acknowledge the outdatedness of tax treaties by ignoring the digital presence but recall the possibility of applying the physical presence test.

Then, we will present some amendments that we consider to be relevant in view of the current overall scenario of taxation of the digital economy.

Finally, we will address the topic on exit taxes as a possible approach to solve the problem of taxation of digital nomads, proceeding with an analogy with the taxation of crypto-active assets in Portugal.

It is important to note that the present thesis is purely conceptual, without any consideration on the practicability of the solutions presented. Practicability is a matter for the Tax Authorities. However, there is a previous moment, in which we find ourselves, which is from a technical point of view decisive for the *ex ante* discussion and exploitation of the topic. It is only afterwards that theory and practice should be adjusted.

2. Labour mobility and digital nomadism

Before the pandemic hit, labour mobility was limited to a small group of individuals, namely highly skilled workers or people with a high net worth⁷ ⁸. But with the outbreak of the pandemic, there was an immediate change in working patterns, with people having their homes connected 24/7 to the internet⁹.

Many people were confined to their current location, unable to return to their homes and forced to work from there. Others decided to leave their homes to live and work elsewhere while the pandemic waves raged. Remote work, initially introduced as a short-term response in order to preserve jobs, it eventually became the conduit used, leaving many employers' workplaces behind. We can consider that remote work, once a low-ranging phenomenon concentrated in a few countries and with a limited number of individuals, has now become a very attractive work modality not only for employees but also for self-employed.

The continuous digitalisation and decentralisation of jobs, derived from the mass adoption of remote work in a post-pandemic context, have given rise to a change in the

⁷ BERETTA states that “Before the pandemic, labour mobility mostly interested only a fraction of the working population, such as highly skilled and high-net-worth individuals, who are often offered preferential conditions by countries to relocate in their territory, including tax incentives (e.g., in the form of taxes on income at flat or proportional rather than progressive rates)” in BERETTA, Giorgio, “*Work on the Move: Rethinking Taxation of Labour Income under Tax Treaties*”, *International Tax Studies*, Vol. 5, No. 2, 2022, p.2.

⁸ RITA DE LA FERIA and GIORGIA MAFFINI also observe that «Until now, this mobility (...) was restricted to a small portion of individuals, and thus to a small portion of the tax base. Such individuals were, in particular, high net worth individuals, highly skilled non-officeworkers (...)» in DE LA FERIA, R. & MAFFINI, G., “*The Impact of Digitalisation on Personal Income Taxes*”, *British Tax Review*, 2021, p.164.

⁹ “The increase in TICTM in the context of the pandemic has led to considerable changes in work organisation, also in management culture (...). As a result, workers across occupational groups and sectors had to quickly make this transition – often overnight – and adapt to both using new digital and collaboration tools (...)” in LODOVICI, Manuela et al., “*The impact of teleworking and digital work on workers - Special focus on surveillance and monitoring, as well as on mental health of workers*”, 2021, available at [https://www.europarl.europa.eu/RegData/etudes/STUD/2021/662904/IPOL_STU\(2021\)662904_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2021/662904/IPOL_STU(2021)662904_EN.pdf), last accessed on 08.02.2023.

paradigm of international law¹⁰. The development of technology combined with greater flexibility in immigration legislation has made it possible for people to work remotely, no longer being tied to a daily life comprising their habitual abode and place of work. This phenomenon is commonly referred to as digital nomadism.

We understand that the concept of *digital nomads* is not entirely uniform as defended by OLGA HANNONEN. In fact the author argues that the “terminological uncertainty in defining digital nomads is growing along with studies on the phenomenon”¹¹. Nevertheless, when referring to *digital nomads*, we mean individuals who do not base their activity on a fixed territory, making use of a set of skills that allow them to carry out their professional activity with an internet connection, without infrastructure needed. That is why “depending on the country, a digital nomad may be allowed to be an employee of an enterprise abroad, a freelancer or a self-employed entrepreneur”¹². Thus, digital nomads will be expatriates, i.e., people who have left their country and live abroad¹³.

Digital nomadism is a growing phenomenon that already demonstrates *economic relevance*, raising practical questions on the subject considering the new digital reality¹⁴. Despite having been addressed for the first time in 1997, if we attempt to situate this

¹⁰ “Interestingly, the impact of COVID-19 related teleworking may have more far-reaching repercussions as regards the spatial distribution of work” in LODOVICI, Manuela et al., “*The impact of teleworking and digital work on workers - Special focus on surveillance and monitoring, as well as on mental health of workers*”, 2021, available at [https://www.europarl.europa.eu/RegData/etudes/STUD/2021/662904/IPOL_STU\(2021\)662904_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2021/662904/IPOL_STU(2021)662904_EN.pdf), last accessed on 08.02.2023.

¹¹ HANNONEN demonstrates the various definitions developed on the term digital nomads, beginning and ending with the same conclusion: “Studies on digital nomadism are growing, but the term is used in a variety of, and often contradicting, ways” in HANNONEN, Olga, “*In search of a digital nomad: defining the phenomenon*”, 2020, available at: <https://link.springer.com/article/10.1007/s40558-020-00177-z>, last accessed on 29.01.2023.

¹² OECD, “*Should OECD countries develop new Digital Nomad Visas?*”, 2022, available at <https://www.oecd.org/migration/mig/MPD-27-Should-OECD-countries-develop-new-Digital-Nomad-Visas-July2022.pdf>, last accessed on 03.01.2023.

¹³ “Expatriate – persons who have left their country and live abroad.”, available at: <https://www.oecd.org/ctp/glossaryoftaxterms.htm#E>, last accessed on 22.10.2022.

¹⁴ KOSTIC, Svetislav V., “*In search of the Digital Nomad – Rethinking the Taxation of Employment Income under Tax Treaties*”, World Tax Journal, Vol. 11, Issue 2, 2019, p.207.

phenomenon on a timescale, we can easily comprehend the impact that the pandemic has had on digital nomadism¹⁵.

Bearing this in mind, we can see that significant changes are currently taking place in traditional working patterns. Alongside, people are disconnecting from the personal ties that used to bind them to a particular place. The main driver of this movement is the desire to travel and experience new cultures, followed by the urge to belong to a community of like-minded people. In addition, the cost of living is cheaper abroad than in their home countries.

Until recently, countries only agreed to ease their immigration restrictions and offer tax incentives to highly skilled or high-net-worth individuals, as discussed above. But with the increasing offer of job opportunities through remote work, several European countries (such as Portugal, Estonia, Croatia, Greece, Germany and Spain) felt the need to adapt to this new trend and have decided to create visas targeted specifically for remote workers - called digital nomad visas (DNVs).

It happens that the advent of digital nomads brought to light the legal void associated with these individuals. Traditionally, remote workers could apply for a tourist visa, which would normally be valid for 90 days¹⁶. But if they wanted to stay longer than allowed, it would be necessary to apply for a work visa. However, for this type of visa it was required to submit an employment contract with a local entity. This way, through DNVs, the stay for digital nomads can be extended up to 1 year or more instead of the narrower time limitation of a tourist visa. As a rule, these visas require a minimum annual income, although thresholds may vary¹⁷. As such, if these travelers do not want to apply for a visa, they should always resort to the physical presence test under penalty of exceeding the 183 days threshold, and thus triggering a double taxation scenario. It could also create a physical presence for the digital nomad's company, entailing tax consequences.

¹⁵ The first to write on the subject were Tsugio Makimoto and David Manners, in 1997, in a book called "Digital Nomad".

¹⁶ For more information on the Schengen visa, please visit <https://www.schengenvisainfo.com>, last accessed on 14.03.2023.

¹⁷ Consider the Portuguese example that with Law 18/2022, of 25 August, created in its Article 18-B the temporary stay visa for the exercise of professional activity provided remotely, also foreseen in Article 54 (1) (i) of Law 23/2007, of 4 July. For a complete reading of the legislative text, we refer to <https://files.dre.pt/1s/2022/09/19000/0002800097.pdf>, last accessed on 14.03.2023.

While reducing uncertainty and the potential abuse of short-stay tourist visas, these DNVs could pose a tax competition situation and create potential jurisdictional mismatches¹⁸. But an increasing number of countries are considering adapting their legal and tax regimes to accommodate this category of workers, in order to allow for a differentiation in taxation considering the income of residents.

3. Income from Employment

3.1. Rethinking Article 15 of the OECD Model

The mobility of individuals entails consequences for the States' budgets. As soon as the border is crossed, States' taxation powers are affected, generating revenue losses for one country and gains for another, depending on the country of departure or destination, respectively. Under international law, in a situation where a person lives in one place but works in another, both the residence State and the source State may have taxation rights. As we will expand below, the consideration made between the connecting elements and the relationship established with the contracting States involved results in the attribution of taxing competence to the residence State or to the source State. States base these same rights on their domestic legislation, often giving rise to situations of double taxation¹⁹.

Remote work allows the provision of work activity anywhere in the world as long as one has access to the internet. This differs greatly from the paradigm of dependent work, according to which the provision of the activity has always implied the commute of the worker and his physical presence in a certain space. This is the concept behind Article 15 of the OECD Model. And since the scope of our work will focus on income

¹⁸ “Given that some countries provide generous tax relief as part of their DNV schemes, there is a risk that such schemes may give rise to tax competition concerns” in OECD, “*Should OECD countries develop new Digital Nomad Visas?*”, 2022, available at <https://www.oecd.org/migration/mig/MPD-27-Should-OECD-countries-develop-new-Digital-Nomad-Visas-July2022.pdf>, last accessed on 03.01.2023.

¹⁹ Professors Ekkehart Reimer and Alexander Rust agree that “both the State of residence and the State of employment impose their tax in accordance with their domestic law without being restricted by the DTC in so doing” in REIMER, Ekkehart & RUST, Alexander et al., “*Klaus Vogel on Double Taxation Conventions*”, Kluwer Law International, 4^a Edição, Vol.1, 2015, p. 886.

derived from the employment relationship, we will be exploring Article 15 of the OECD Model.

Regarding income derived from dependent employment, Article 15 (1) first part of the OECD Model continues to grant taxation powers to the State of residence when it states that “(...) salaries, wages and other similar remuneration derived by a resident of a Contracting State in respect of an employment shall be taxable only in that State (...)”. The reason behind this is that the OECD Model continues to believe that the tax residence of an individual is sufficient evidence of a person's fundamental relationship with a given State. Therefore, in the case of remote workers, reality dictates exclusive taxation in the residence State, even though the activity was carried out remotely for a company located in another State.

However, the paradigm underlying the allocation rules above has been changing. With digitalisation it became possible to provide the same activity without the need for the worker to go to the traditional workplace or even to be in the country where the activity is being provided. As such, the development of working patterns should be accompanied by the development and updating of taxation framework.

An exception to the rule is provided in Article 15 (1) second part, when it determines “(...) unless the employment is exercised in the other Contracting State. If the employment is so exercised, such remuneration as is derived therefrom may be taxed in that other State”. This leads us to the workplace. Which would be, according to the first comment on Article 15 of the OECD Model, the place where the worker is physically located when carrying out that activity.

Article 15 (2) of the OECD Model, on the other hand, creates an exception to the aforementioned by attributing to the State of residence the exclusive power to tax income from dependent employment, as long as the three cumulative conditions prescribed therein are met: (a) the recipient is present in the other State for a period or periods not exceeding in the aggregate 183 days in any twelve-month period commencing or ending in the fiscal year concerned; (b) the remuneration is paid by, or on behalf of, an employer who is not a resident of the other State; and (c) the remuneration is not borne by a Permanent Establishment which the employer has in the other State.

As a result, in order to be granted taxation powers to the source State, it is necessary not only that the requirement of Article 15 (1) to be met, but also for the conditions of Article 15 (2) not to be met. However, given the reality of remote workers who use technology to carry out their activity, as is the case of digital nomads, this results

in a limited cumulative tax competence, since: (a) digital nomads hardly ever exceed the 183-day threshold in the source State²⁰; (b) digital nomads are paid by entities abroad; (c) situations where workers are paid through a Permanent Establishment of their employer, i.e. in the State of residence, are rare. It follows that Article 15 (2) fails to restore the balance of the excessive allocation of taxing powers in favour of the residence State.

According to EKKEHART REIMER and ALEXANDER RUST the allocation of taxation powers primarily to the State of residence stems from the conviction that that State would be in a better position to tax both domestic and foreign source income. In addition, proximity to the source State would presumably be fragile. The author also refers to the personal presence of the employee to indicate the place where the work is undertaken. This implies that, in terms of taxation, it matters whether the employee is physically present. Consequently, the taxation to which the individual is subjected will reflect workplace variations²¹. Therefore, a link should be established between the source of employment income and the qualified situs of the employee during the performance of their employment²². This is due to the ongoing transition that humans are experiencing to a nomadic lifestyle as a result of increasing mobility in the digital world.

In view of the above we understand that digital nomads will have multiple workplaces. And for the most part, income will be originated in the territory of each country where their activity is carried out. As a result, we are faced with a wage split between different States: on the one hand we will have the State of residence claiming taxation powers, and on the other hand the States where such income is originated. But since digital nomads do not tend to exceed the 183-day stay threshold, the source States are never assigned taxation powers. This means they are not being taxed in any of the countries on whose infrastructure they rely on to generate their income²³.

Faced with this situation, it becomes unfair for the countries that accommodate these individuals and provide them with the most varied resources not to see a return in terms of tax payments, other than local consumption and sometimes pro-bono work

²⁰ As it will be concluded later on, specifically on p. 20 of the current Thesis.

²¹ “As a rule, the place where the employment is exercised is the place where the employee is personally present. (...) If there is a change in the place of work, taxation will depend on the length of time worked in the one and in the other State” *in* REIMER, Ekkehart & RUST, Alexander, 2015, *op. cit.*, p.886-892.

²² KOSTIC, Svetislav V., 2019, *op. cit.*, p. 205-206.

²³ KOSTIC, Svetislav V., 2019, *op. cit.*, p. 211.

among the population. “Attracting digital nomads is expected to bring economic benefits (tax and local consumption), but also to boost innovation. (...) However, the benefit for the host country brought by digital nomads remains unclear. The benefit - local consumption should also be weighed against the tax implications and efforts required to oversee these programmes”²⁴. Perhaps these limited benefits should be considered in relation to the tax implications entailed in attracting these individuals. This is why digital nomads are considered “a new type of extraterritorial elite”, acting as “a response to governments inability to bring equal opportunity to all”²⁵.

We believe it does not make sense for digital nomads to generate value for a foreign company without their remuneration being taxed in that jurisdiction, denying any tax claim to the source State. In the case of remote workers, and in particular of digital nomads, the fact that they carry out their activities from different States gives rise to a fragmentation of the right to tax their income. The result is that a tax resident of one State who receives income from work carried out digitally in another State cannot be taxed in the latter, even if the results of his or her work have been exploited there, by virtue of an outdated activity provision criterion. In the end, digital nomad’s residence will be the one to have exclusive taxation rights over his or her employment income, being totally excluded any share from the source State in the taxation of such income²⁶.

The question arises whether it still makes sense to give relevance to a criterion of physical presence when an activity is provided exclusively in a digital manner. Thus, we agree with KOSTIC when he states that “in today’s digital world, not only are people losing the traditional personal ties to one specific place, but the concept of work is undergoing radical change. Does it still make sense to speak of an individual’s fixed place of work when referring to persons whose primary tool is their laptop or, increasingly, their tablet or smart phone? (...) Consequently, it is not only becoming more and more

²⁴ OECD, “*Should OECD countries develop new Digital Nomad Visas?*”, 2022, available at <https://www.oecd.org/migration/mig/MPD-27-Should-OECD-countries-develop-new-Digital-Nomad-Visas-July2022.pdf>, last accessed on 03.01.2023.

²⁵ The authors consider that “the digital nomad is in many ways much like a citizen, essentially a de-facto citizen, but unregulated due to their ambiguous legal status. Thus, we arrive at the emerging trend of digital nomads participating in the market economy through unregulated de-facto citizenship” in WANG Blair; SCHLAGWEIN, Daniel et al., “*Digital Nomadism and the Market Economy: Resistance and Compliance*”, Fortieth International Conference on Information Systems, 2019, p. 8.

²⁶ KOSTIC, Svetislav V., 2019, *op. cit.*, p.211.

difficult to link a particular person to a specific jurisdiction for the purposes of taxation, but modern technology is also forcing a rethink of the way in which employment income is related to a particular geographical spot²⁷”.

We can easily understand that, at the time of its drafting, the OECD Model could not foresee a situation of international remote work. Thus, taking into consideration the increasing technological evolution and mobility of individuals, Article 15 of the OECD Model is stuck in time, unable to catch up with the progression in the way dependent work is provided while completely disregarding the place of value creation.

Therefore, we consider it to be fundamental to proceed to a rethink of Article 15 of the OECD Model, in order to update the international taxation of income from dependent work to encompass new forms of work, particularly remote work, where digital nomads are included, obeying a fair taxation of the digital economy²⁸.

3.2. The 183-day rule

The 183-day rule stipulates that if a person moves temporarily to another State and performs his or her activity there for less than 183 days in any 12-month period, the State where the work was carried out will be entirely precluded from taxing the income formed there. In such circumstances, taxation powers will be granted exclusively in the worker's State of residence, even if no activity is undertaken there.

In our opinion, the purpose for this rule is to facilitate the international mobility of persons and business operations within international trade by preventing an excessive administrative burden for both the employee and the employer in the source State. But it seems that because of this obsolete mindset derived from a sedentary lifestyle, we are faced with outdated international solutions regarding the taxation of income from

²⁷ KOSTIC, Svetislav V., 2019, *op. cit.*, p.205.

²⁸ The same conclusion can be found in the Explanatory Statement: “International tax issues have never been as high on the political agenda as they are today. The integration of national economies and markets has increased substantially in recent years. This has put a strain on the international tax framework, which was designed more than a century ago (...) thus requiring a bold move by policy makers to restore confidence in the system and ensure that profits are taxed where economic activities take place and value is created” in OECD, “*OECD Explanatory Statement: 2015 Final Reports: OECD/G 20 Base Erosion and Profit Shifting Project*”, 2015, available at <https://www.oecd.org/ctp/beps-explanatory-statement-2015.pdf>, last accessed at 02-02-2023.

employment. In fact, in our mobile world, DTCs should contain solutions that enable a more assertive response to this type of challenge.

As far as Article 15 (2) is concerned, in contrast to the previous paragraph, we agree with BERETTA when he identifies two major differences: while Article 15 (1) refers to “employment is so exercised”, Article 15 (2) (a) uses the expression “present”. This leads us to the conclusion that this expression refers to “physical presence” as the place where the activity is carried out²⁹. According to the 183-day rule what should be counted are the days of physical presence and not the days on which the employment is actually exercised, although it must be exercised at some point within the timeline.

It is according to this rule that digital nomads live, bouncing from one country to another without ever exceeding the threshold. Therefore, they are exempted from paying taxes by the OECD Model itself in all countries where they set foot. As it happens, digital nomads benefit from the infrastructure system of the countries to which they travel and generate income there, without contributing through taxes on the income from their work to any public services they use on a daily basis (including police, hospitals, roads, among others)³⁰.

Perhaps Article 15 of the OECD Model should be rewritten, maintaining subparagraph (a) but changing its current threshold from 183 to 90 days. According to ARNOLD, it makes sense to lower this threshold, not only by the State's right to tax income generated in its territory but also by the administrative costs of levying the tax³¹.

Hence, if an individual is present for more than 90 days in a given territory, in any 12-month period in the tax year in question, the source State's powers of taxation are triggered on the income generated there by his or her activity work. This means that if work is carried out virtually but with physical presence in another State, exceeding the proposed threshold, taxation powers should be distributed between the source State and the individual's State of residence.

²⁹ BERETTA, Giorgio, 2022, *op. cit.*, p.10.

³⁰ KOSTIC, Svetislav V., 2019, *op. cit.*, p. 211.

³¹ BRIAN ARNOLD argues that “there is no clear justification for any particular number of days (...) the period should be based on a balancing of the source country’s right to tax income arising in or having its source in its territory and the compliance and administrative difficulties in collecting the tax” *in* ARNOLD, Brian J., “*The Taxation of Income from Services under Tax Treaties: Cleaning Up the Mess*”, Bulletin for International Taxation, Vol. 65, No.2, 2010, p.10.

We are aware that this may be a challenging amendment: (a) not only given that it becomes difficult for the taxpayer himself to deal with a jurisdiction other than his State of residence's tax system (or several, as may be the case with digital nomads); (b) but also since in practical terms it may be difficult to tax individuals in such a short period; (c) in addition to these factors, there is a lack of information and high taxing costs involved. We recognise that “potential administrative problems should equally be taken into account, given the need for both the employer and the employee to keep an appropriate record of the days spent in each country in any 12 months. On the other hand, national tax authorities might have difficulty verifying the proof of physical presence provided to them by taxpayers or whether an individual’s physical presence in a country is actually connected with the exercise of work or not”³².

Moreover, we acknowledge as a critique the possibility of knowing whether it truly solves the problem of taxation of international remote work, applicable, in our case, to digital nomads. Perhaps this proposal may be flawed since it still depends, to a great extent, on a criterion of physical presence for the allocation of taxation powers, whose inadequacy we acknowledge above, bearing in mind the digital reality.

However, as mentioned in the commentary to Article 15 (1) of the OECD Model, the physical presence test is fairly “straightforward”³³. Nowadays, is relatively accessible to tax authorities to monitor cross-border movements. To this end, they make use of information technology and geo-location applications to locate the State in which a particular individual is to be found. To do so, tax administrations rely on current tax legislation and the progressive deprotection of privacy³⁴.

³² BERETTA, Giorgio, 2022, *op. cit.*, p.13.

³³ “*Model Tax Convention on Income and on Capital: Condensed Version 2017*”, 2017, Commentary on Article 15, Paragraph 2, 2017, p.311.

³⁴ As confirmed by the European Court of Audits when it states that “Since 2011, the European Parliament and the Council have agreed a series of legislative initiatives, enabling Member States to share tax information in different ways. This legislation establishes the framework for EOIR, AEOI, spontaneous exchanges of information and feedback, the presence of tax officials from one country in another tax authority’s administrative offices and their participation in administrative enquiries, and other means of administrative cooperation”, in EUROPEAN UNION, “*Audit preview - Exchange of tax information in the EU*”, 2019, available at https://www.eca.europa.eu/lists/ecadocuments/ap19_14/ap_tax_information.pdf, last accessed on 03-02-2023.

4. The fragility of the connecting elements

4.1. Residence

When faced with an income that has a connection with more than one legal system, it becomes imperative to proceed to a distribution of tax competences. It is at this moment that International Tax Law comes into action, resorting to the elements of connection to determine with which State the connection is the strongest, and thus limit the tax claims of the other State in dispute.

With respect to taxation of income from employment, the OECD Model in its Article 15 establishes two principles regarding the distribution between States of their taxing powers, namely the residence principle and the source principle. The first one uses the taxpayer's residence as a connecting factor. For certain, residence is one of the most frequently used criteria as a subjective connecting factor in determining an individual's worldwide income taxing power. The source principle, on the other hand, uses the place of origin of the income as a connecting element, regardless of whether the income is domestic or foreign, resident or not.

Residence is the primary connecting factor used by States to determine their taxing powers. Regarding the term “resident”, the OECD Model determines that it will be “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, and also includes that State and any political subdivision or local authority thereof as well as a recognised pension fund of that State. This term, however, does not include any person who is liable to tax in that State in respect only of income from sources in that State or capital situated therein³⁵”. Its foundation is based on the idea that it is with their State of residence that citizens have the tightest bond which justifies the tax payment for the use of infrastructures.

As the OECD Model is still quite territorial and focused on the residence of individuals, their mobility, the new forms of technology and the growing digitalisation of the economy end up not being coherent with the current reality, highlighting the fragility of the connecting elements. Indeed, the said OECD Model is still anchored on the idea

³⁵ “*Model Tax Convention on Income and on Capital: Condensed Version 2017*”, 2017, Chapter 2, Article 4, 2017, p.30

that an individual's tax residence is sufficient proof of their fundamental relationship with a given contracting State, thus restricting the source State's taxing rights.

But we made the mistake of relying on the tax residence of individuals on the basis of the criteria set out in Article 4 of the OECD Model because we believed that the static nature of individuals would remain unchanged. However, the revival of the nomadic side of the human being ends up threatening not only tax residence but the very concept of residence itself. Perhaps the criteria in this article no longer reflect such strong personal ties capable of linking a person to a particular jurisdiction, having its integrity questioned. The truth is that instead of founding the condition of resident in ontological reality, the legislator opts to proceed to a fictional reading³⁶.

We agree with GRAETZ when he says that “we have been blinded by adherence to inadequate principles and remain wedded to outdated concepts. As a result, we have no sound basis for pronouncing our international tax policy satisfactory or unsatisfactory”³⁷. This comes about since we can no longer consider tax residence as a neutral criterion capable of establishing a nexus with a particular jurisdiction or of conferring taxation prerogatives. Just as we cannot determine with certainty where work is being carried out. Consequently, from a Personal Income Tax (PIT) perspective, allocating taxing rights according to tax residence is no longer feasible.

The growth of the digital world coupled with changing work patterns are impacting the way in which labour income is taxed, making it pressing for treaties to adjust to this new reality and manage to unravel detailed solutions. This way, we agree with KOSTIC when he tells us that “(...) it is not only becoming more and more difficult to link a particular person to a specific jurisdiction for the purposes of taxation, but modern technology is also forcing a rethink of the way in which employment income is related to a particular geographical spot”³⁸.

If before tax competition was restricted to a narrow number of individuals namely highly skilled workers or people with a high net worth, we now see that the tax base has broadened substantially, converting from immobile to mobile, as a consequence of the

³⁶ COURINHA, Gustavo Lopes, “*A Residência no Direito Internacional Fiscal: Do Abuso Subjectivo de Convenções*”, A residência enquanto critério de residência, 2020, p.83.

³⁷ GRAETZ, M.J., “*The David Tillinghast Lecture: Taxing International Income – Inadequate Principles, Outdated Concepts and Unsatisfactory Policy*”, Brooklyn Journal of International Law, Vol.26, Issue 4, Article 8, 2001, p. 269.

³⁸ KOSTIC, Svetislav V., 2019, *op. cit.*, p.205.

greater propensity for individual mobility³⁹. Therefore, there is an urge to widen the spectrum of mobility to encompass not only capital but also people.

4.2. Physical Presence vs Digital Presence

In case of international mobility of workers or cross-border employment, the connection between the workplace and the worker's physical presence becomes difficult to establish.

As previously mentioned, Article 15 (2) (a) contains the expression "present", which refers to a criterion of physical presence that underlies the notion of the place where work is carried out. As it happens, tax liability is attributed to the source State, where the work takes place and income is generated. Based on a territorial approach, income earned by non-tax residents will be taxed on a limited basis, considering the source of the income. Therefore, the tax claim of the source State is based on the fact that wealth is produced therein, as there is no other link.

Nevertheless, work may be carried out digitally disregarding the concept of physical presence. In that case, we would be in a precarious situation, given the failure of the OECD Model to determine this concept as stated in the commentary to Article 15: "Employment is exercised in the place where the employee is physically present when performing the activities for which the employment income is paid. One consequence of this would be that a resident of a Contracting State who derived remuneration, in respect of an employment, from sources in the other State could not be taxed in that other State in respect of that remuneration merely because the results of this work were exploited in that other State"⁴⁰.

The OECD Model only addresses the situation where the activity is provided physically, not answering the case where the activity is carried out digitally. Since physical presence is an inherent characteristic of the human being, it seems reasonable to keep it as an income-sourcing rule. However, this criterion becomes insufficient in the

³⁹ "The ongoing developments in the labour market resulting from digitalisation signal a substantial increase in mobility, and with increased mobility comes more significant change to the tax base - as has clearly been seen in CIT over the last 40 years" in DE LA FERIA, R. & MAFFINI, G., "The Impact of Digitalisation on Personal Income Taxes", British Tax Review, 2021, p.164.

⁴⁰ "Model Tax Convention on Income and on Capital: Condensed Version 2017", 2017, Commentary on Article 15, Paragraph 1, 2017, p.305.

light of the *work-from-anywhere* reality⁴¹. In the end, the distribution of tax competence between the State of residence and the source State derives from the assessment of the place where the work is actually carried out which in turn will be linked to a criterion of physical presence.

It follows that the relevant criterion for the application of the second part of Article 15 (1) of the OCDE Model is the physical location of the employee, at the time of the provision of the activity, and not the place where the results of the employee's activity are exploited.

But the fact is that digitalisation and globalisation of employment, together with the latest trend of remote work, have profoundly changed the reality we used to know, replacing the criterion of physical presence by a virtual one. “Therefore, the theoretical basis underpinning the physical presence rule is losing touch with reality”⁴². In the case of digital nomads, the problem of physical presence being used as a proxy to tax private employment income under Article 15 of the OECD Model is obvious. Thus, we propose to refer to a criterion of digital presence - *see* Appendix I. However, it would be presumptuous on our part to define this concept. In addition, as mentioned at the beginning of our dissertation, this is a conceptual thesis, which does not intend the practical implementation of concepts.

Hence, if there is a strong enough link for source taxation to occur, there will be a cumulative claim to tax. That cumulative claim to tax arises from the potential claim of both States to tax the income: (a) the residence State considering the connecting element of residence; and (b) the source State considering the connecting element of the workplace.

This is when the DTCs are used as a mechanism to eliminate double taxation. As it turns out, in a situation where there is an overlap between tax claims, which may lead to a potential double taxation, DTCs are used to restrict the tax claim of one of the States in conflict. In other words, through these mutual agreements, a State's taxing power is self-limited, through the application of its domestic law, with the purpose of avoiding a situation of double taxation. Otherwise, the two conflicting tax claims would result in double taxation of the same income from employment since the source State would tax it at source and the State of residence would tax it under the worldwide income taxation

⁴¹ BERETTA, Giorgio, 2022, *op. cit.*, p. 12.

⁴² BERETTA, Giorgio, 2022, *op. cit.*, p. 23.

principle. If a situation of possible double taxation remains, it will be eliminated by the State of residence in accordance with Article 23 A or 23 B of the OECD Model.

From the above, we understand that the current international tax rules are outdated. As it happens, they only give power to tax to a jurisdiction when a company has a physical presence there, not keeping pace with the ongoing digital transformation of the economy that entails the digitisation of some business models. The OECD/G20 BEPS Project has declared the current tax challenges of the digital economy as one of its top priorities in view of the mismatch that exists between where value is created for digital businesses and where users are located.

Following the failed BEPS 1.0 attempt, several States have adopted unilateral taxation positions, increasing the risk of fragmentation of the single market and distortion of competition, constituting an obstacle to the competitiveness of the Union. With the clear purpose of establishing a common tax system, a solution consisting of two Pillars was created⁴³. Still, the solution found in the BEPS 2015 Final Report does not provide an answer to the problem of taxation of digital nomads, as it does not clarify what nexus should be established to grant taxing powers: “The Report did not recommend, for the time being, a withholding tax on digital transactions (which include digital cross border services); nor did it recommend a new nexus for taxation in the form of a significant economic presence test. However, it was recognized that countries were free to include such provisions in their tax treaties, among other additional safeguards against BEPS”⁴⁴.

⁴³ The main goal of Pillar I is to reallocate profits to market jurisdictions. Therefore, it is intended to overcome those situations that require physical presence, attributing taxing power to a given volume of transactions. Thus, Pillar I tells us who can tax, through Amount A which makes it possible to determine the existence of significant involvement in the economy of a market or jurisdiction. The aim of Pillar II is to determine the minimum that can be taxed, which corresponds to a global minimum tax of 15%, which means that any multinational with a consolidated profit of €750 million, regardless of its place of residence and profits, pays at least 15%.

⁴⁴ UNITED NATIONS, “*Model Double Taxation Convention between Developed and Developing Countries*”, Department of Economic & Social Affairs, Part Two, Commentary on chapter III: Taxation of Income, Article 12A – Fees for technical services, 2017, p.318-319.

4.3. Physical Presence Test

Having demonstrated how outdated the connecting elements are in today's mobile reality, we believe that a valid solution would be to abandon those elements and replace them by a more contemporary jurisdictional nexus. Following the proposal made by BERETTA, we consider that the effective presence of an individual in a given territory would be proven through a physical presence test. The purpose of this test is to grant States the power to tax the worldwide income of individuals who have been physically present there, without changing the method for calculating that income in each country.

This physical presence test comprises an arithmetic formula, “consisting of a fraction the numerator of which would show the number of days or hours spent in a calendar year by an individual in a state, while the denominator would be the total number of days or hours in a calendar year. The percentage derived from the result of such a formula would express the effective degree of allegiance of an individual to a State and, therefore, the proportional entitlement of such State to a slice of the total pie, consisting of the worldwide income earned by that individual in a given calendar year”⁴⁵. As a result, we would be able to determine the degree of permanence and split the income across the various borders, emphasising the states where physical presence actually took place.

This fractional solution derives from the Schumacker Doctrine. This doctrine was developed after the 1995 decision of the CJEU on non-discrimination on grounds of nationality in the framework of Freedom of Movement for Workers⁴⁶: “Inevitably, a world in which the tax base is divided into many jurisdictions and in which taxation on personal income is imposed nationally cannot lead to a 'fair' outcome unless, somehow, there is full transparency in tax arrangements and full cooperation between jurisdictions in exchanging information, as well as reciprocal and immediate assistance by countries in addressing mismatches arising from the parallel exercise of their taxing powers.

⁴⁵ BERETTA, Giorgio, “*Cross-Border Mobility of Individuals and the Lack of Fiscal Policy Coordination Among Jurisdictions (Even) After the BEPS Project*”, Kluwer Law International BV, Intertax, Vol. 47, Issue 1, 2019, p.108.

⁴⁶ Case C-279/93 – Finanzamt Köln-Altstadt v Schumacker, Judgment of the Court of 14 February 1995, available at <https://curia.europa.eu/juris/liste.jsf?language=en&num=C-279/93>, last accessed on 02/01/2023.

However, even after BEPS, a scenario of perfect and mutual coordination among conflicting policies of states appears to be remote”⁴⁷.

This physical presence test may be implemented unilaterally by each State, according to its own domestic rules. Nevertheless, we believe that a preferable solution would be to automatically introduce amendments to the negotiating network through the Multilateral Instrument (MLI), thus modifying all existing tax treaties.

We anticipate that one of the advantages by adopting this test would be a decrease in the tax system's vulnerability to abusive planning, compared to the traditional criteria still in practice. But for the test to succeed, international cooperation of all States is essential so that the worldwide income of the individual can be assessed. In this regard, it is important to highlight the relevance of the Administrative Cooperation Directive (Directive 2011/ 16/EU) as a mechanism for the exchange of information between tax authorities that contributes to the common goal of maximising global revenues.

5. Proposed amendments

Given the increasing mobility of individuals, the progressive digitalisation of the economy and the dematerialisation of business activities, it becomes challenging to provide a concrete solution that suits the current international remote working scenario. However, there are some considerations that we believe to be of the greatest importance for the future of international taxation with regard to income from dependent work.

The current connecting elements are not capable of balancing the distribution of taxing powers between the States in dispute in an international situation of remote working. Thus, the excessive reliance placed on the worker's State of residence for taxation has been demonstrated, with the source State being heavily penalised. As such, we consider that there should also be a more balanced distribution of taxation powers, through greater sharing with the source State, which would result in a scenario of cumulative competence in the taxation of income from remote working.

Although it may be reasonable to keep physical presence as a criterion for allocating taxing rights, in a situation of remote working, and in particular of digital nomads, it no longer makes sense to use it as a proxy. Meaning that, in the case of an activity that is

⁴⁷ BERETTA, Giorgio, “*International Mobility of Individuals after BEPS: The Persistent Conflict between Jurisdictions*”, *Bulletin for International Taxation*”, Vol. 72, No.7, 2018, p.10.

provided digitally, completely dematerialised, relying on a criterion of physical presence to allocate taxation powers according to the place where the activity is carried out, is no longer feasible.

Hence, there is a clear need to rethink and reformulate Article 15 of the OECD Model considering the progressive globalisation and digitalisation, by no longer referring to geographic proxies. Faced with the paradigm shift and the outdatedness of the current criterion used in remote working situations, we propose the addition of a subparagraph to Article 15 (2) of the OECD Model, by referring to a criterion of digital presence.

We also believe that the current threshold present in article 15 (2) (a) of the OECD Model should be reconsidered and changed, by lowering it from 183 to 90 days, given the current scenario of high propensity of individuals to mobility.

In order to update the international rules on employment income taxation, the OECD Model must be adapted to accommodate the changes previously mentioned. To this end, the MLI, as the multilateral mechanism for the revision of DTCs, should be used. Through a joint commitment of all OECD Member States, they should review their conventions network in order to include the necessary amendments to update the taxation of income from remote work and, consequently, the digital economy.

We defend that only by including the above amendments can the OECD Model truly modernise - *see* Appendix I. Only then could Article 15 of the OECD Model reduce the reliance on physical presence for the allocation of tax competences. As previously discussed, we believe that this is not the case under the current wording of the referred article. Based on the research carried out we consider that there are enough reasons to justify a balance in the taxation of this income in order to ensure equality regarding other types of activities.

6. Exit Tax: A Possible Way Forward

Exit tax is a tax levied on both individuals and corporate entities upon transfer of residence to another Member State⁴⁸. The purpose of this tax is to prevent loss of revenue by the source State on assets generated in its territory.

By temporarily relocating their companies to Member States with lower tax rates and preferential regimes, companies engage in abusive tax planning. This abusive tax

⁴⁸ Directive (EU) 2016/1164 of 12 July 2016.

planning allows companies to obtain more tax benefits and lower tax costs⁴⁹. To suppress this phenomenon, in 2016 the European Commission created the Directive (EU) 2016/1164 with the purpose of establishing rules against tax avoidance practices that impact the functioning of the internal market.

According to this Directive, capital gains generated in the source State are subject to taxation when the taxpayer transfers the assets from its head office to a Permanent Establishment (or vice versa) situated in another Member State or third country. Likewise, the same will apply when the taxpayer transfers its tax residence to another Member State or third country. Or when it transfers the activity carried out by the Permanent Establishment from one Member State to another or to a third country⁵⁰.

Governments wish to protect their tax sovereignty by deeming the exit of a taxpayer or an asset as *taxable events*⁵¹. Therefore, the purpose of this provision is to ensure that the source Member State does not forfeit its power to tax assets generated within its territory⁵². Since the goal is to preserve the tax base at the moment of the exit, income over which a state loses power of taxation and that was accrued during the period the taxpayer was a resident, is assessed and taxed⁵³.

Nonetheless, it should be noted that the CJEU has reflected from early on the potential restriction of fundamental freedoms, in particular when used as grounds for justification related to the fair distribution of taxation powers between Member States.

Briefly, since it is not the main focus of this thesis, this Directive allows the taxpayer to pay the tax immediately or to defer it in five-year deferral periods. However, it is only possible to defer when the corresponding transfer occurs to a Member State or third country that is party to the European Economic Area (EEA) Agreement or has entered into an agreement on mutual assistance⁵⁴.

⁴⁹ RIBES, Aurora, “*La cláusula exit taxation en la propuesta de Directiva Europea para luchar contra la elusión fiscal*”, *Cronica Tributaria*, No.159, 2016, p.165-182.

⁵⁰ Article 5 (1) of Council Directive (EU) 2016/1164 of 12 July 2016.

⁵¹ VON BROCKE, Klaus & MÜLLER, Stefan, “*Exit Taxes: The Commission versus Denmark Case Analysed against the Background of the Fundamental Conflict in the EU: Territorial Taxes and an Internal Market without Barriers*”, *Ec Tax Review*, Kluwer Law International, Vol. 22, Issue 6, 2013, p.299.

⁵² Directive (EU) 2016/1164 of 12 July 2016.

⁵³ ZERNOVA, Daria, “*Exit Taxes on Companies in the Context of the EU Internal Market*”, *Intertax*, Kluwer Law International, Vol. 39, Issue 10, 2011, p.472.

⁵⁴ Article 5 (2) of Council Directive (EU) 2016/1164 of 12 July 2016.

By applying the exit tax mechanism and the Directive 2010/24/EU to the case of digital nomads, we understand the need to develop an exchange of information and the provision of assistance for levying tax in the Member State of destination.

This way, at the time of the departure, the individual should be obliged to fill in a tax declaration, where he or she discloses the days of permanence in the source State. This would happen because when the digital nomad enters, we do not know how long he or she will remain in that State. This way, the amount of tax to be paid would be calculated using the capitation method⁵⁵. Meanwhile, through the combination of data between Customs and Tax Authorities, the possibility for fraud would be reduced.

By doing so, we also avoid any situation of double taxation, since each Member State taxes its fair share. The source State calculates the tax up to the moment the digital nomad leaves its territory. In turn, the following source State or the State of residence itself will calculate the amount of tax from the moment the digital nomad enters its jurisdiction.

Moreover, we consider this feasible, using as an example the Portuguese case of taxation on crypto-assets. With the new State Budget Law for 2023, the Portuguese government provides for exit taxation determining that when a change of residence occurs, this event is considered as a disposal of the crypto, “except when the taxpayer or the counterparty is resident in a Member State of the EU or the EEA, or any other country with an agreement with Portugal that provides for the exchange of information for tax purposes”⁵⁶.

Thus, considering the application of this regime to digital nomads, they would be taxed at the moment of departure, counting the days they spent in the source State, according to the capitation method. This could not be the case only when they reside in a Member State of the EU, the EEA or any other State with which there is no information exchange agreement.

⁵⁵ “Capitation tax is an assessment levied by the government upon a person at a fixed rate regardless of property, business, or other circumstances. Since it is a tax upon the individual, and not upon merchandise, a capitation tax is frequently labeled as a head tax.”, available at: <https://definitions.uslegal.com/c/capitation-tax/>, last accessed at 05-03-2023.

⁵⁶ GOUVEIA, Maria, “2023 Portuguese State Budget: the end of crypto El Dorado?”, International Tax Review (ITR), 2023, available at <https://www.internationaltaxreview.com/article/2b3n19bqkr4qdpq7jdm2o/sponsored/2023-portuguese-state-budget-the-end-of-crypto-el-dorado>, last accessed at 28-01-2023.

This way, we confer taxation power to the source State which until then could be aggrieved by accepting (and even often encouraging) the hosting of digital nomads. At the same time, we are able to rebalance the distribution of taxation powers at the moment of the digital nomad's departure, through his or her communication of the period of permanence in each State. From a legal and technological perspective, this would be an acceptable solution. From a practical point of view, it will be necessary to study it. But if we were able to put a probe on Mars, surely we should also be able to do this.

Besides, another solution would be for the company itself to control the location of its employees who are working remotely from another State without being present at the employer's premises. This way, the company collects the location information of its workers who do not perform their activity physically but remotely, and communicates it directly to the Tax Authorities, under the penalty of generating a risk of a Permanent Establishment in other States and having to pay taxes there.

7. Conclusion

We believe that it is safe to say that the Covid-19 Pandemic was the most recent event that triggered a change in the world and in humanity. It has changed the way we communicate, it has transformed jobs, shattered borders and shortened distances. In the last three years we have witnessed an intensification of globalisation and digitalisation as never seen before. However, the international tax system has been staring blindly into this transition. Therefore, it seems necessary to revitalise the system in order to fairly tax activities that were once provided in a different way from the working realities known until now.

With this thesis, we intended to demonstrate that the most recent trend towards digital nomads is in fact an unstoppable movement with an increasing number of stakeholders. We were able to understand that the driving force behind this paradigm shift was the Covid-19 Pandemic, which triggered the decentralisation in labour policies, allowing for an expansion of work mobility opportunities. Still, we do not believe that the concept of *workplace* as we know it will disappear, but rather give way to a hybrid working environment, much more flexible and collaborative.

We have analysed Article 15 of the OECD Model from which it follows that in the case of a remote worker, such as digital nomads, there is a strong bias in favour of the

residence State, relying entirely on an obsolete criterion of physical presence, with regard to Article 15 (1). Meanwhile, Article 15 (2), instead of compensating this excessive attribution of taxing power, determines extra conditions that only provide tax competence to the source State when cumulatively verified. Therefore, in order for tax competence to be attributed to the source State, it will be necessary for the condition set out in Article 15 (1) to be met and for none of the conditions referred to in Article 15 (2) to be fulfilled.

Given the changes in labour patterns, the high propensity of individuals to mobility, the digitalisation of the economy and globalisation, it becomes clear that Article 15 needs to be reformulated in order to update it to the 21st century. Rethinking a connecting factor other than physical presence will make it possible to balance the scales of power between the disputing States, i.e., the State of residence and the source State.

From everything previously stated, it seems clear that both Article 15 of the OECD Model as well as the respective Comments do not reflect the latest trend towards remote work, particularly digital nomads. As it seems, there is a genuine mismatch regarding the taxation foreseen in this Article to the current reality. It is imperative to proceed with a review, and hopefully an update, of the existing international tax system with regard to income from dependent work, in order to accommodate income from remote work. This way, it will be possible to achieve a more balanced and fair taxation for the source State, as far as this type of income is concerned.

In the case of a dematerialised activity, we have also questioned the dependence of the distribution of tax competences on the place where the worker performs his or her activity. We also have challenged the current solution which looks at the place where the worker is physically present, in accordance with a criterion of physical presence. As such, we believe that a new connecting element should be developed, capable of restoring the balance of jurisdictions between the residence State and the source State, with regard to the taxation of employment income derived from international remote working.

Finally, we believe that a similar approach to the one implemented for crypto-active assets could be adopted for digital nomads, through the application of the exit taxes and the Directive 2010/24/EU. In addition, the moment the digital nomad leaves the country, the days spent in the source State should be counted by filling in a tax return, being taxed according to the capitation method. This way, the scales of taxing powers between the source State and the State of residence would be rebalanced.

8. Appendix I - Rewording of Article 15 of the OECD Model (Income from Employment)

1. Subject to the provisions of Articles 16, 18 and 19, salaries, wages and other similar remuneration derived by a resident of a Contracting State in respect of an employment shall be taxable only in that State unless the employment is exercised in the other Contracting State. If the employment is so exercised, such remuneration as is derived therefrom may be taxed in that other State.
2. Notwithstanding the provisions of paragraph 1, remuneration derived by a resident of a Contracting State in respect of an employment exercised in the other Contracting State shall be taxable only in the first-mentioned State if:
 - a) the recipient is **physically** present in the other State for a period or periods not exceeding in the aggregate **90 days** in any twelve month period commencing or ending in the fiscal year concerned, **or**
 - b) the recipient is digitally present in the other State, and**
 - c) the remuneration is paid by, or on behalf of, an employer who is not a resident of the other State, and
 - d) the remuneration is not borne by a permanent establishment which the employer has in the other State.
3. Notwithstanding the preceding provisions of this Article, remuneration derived by a resident of a Contracting State in respect of an employment, as a member of the regular complement of a ship or aircraft, that is exercised aboard a ship or aircraft operated in international traffic, other than aboard a ship or aircraft operated solely within the other Contracting State, shall be taxable only in the first-mentioned State.

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