

Questions concerning the use of centre of vital interests tiebreaker test in tax law

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The expression "centre of vital interests" has been analysed in a number of studies of various legal systems [1, 2, 3]. The need for analysis arises from the fact that this term is widely used in legislation [4] and tax treaties.

Many tax treaties are based on the OECD Model Tax Convention on Income and on Capital [2]. Article 4 of this Convention addresses residency. If an individual is a resident of both Contracting States, his status is determined by the State in which he has a permanent home. If the individual has a permanent home in both Contracting States, preference shall be given to the State in which the individual has his centre of vital interests. Article 4(2) of the Convention and its Commentary explain the term "centre of vital interests".

According to recent case studies, it is still controversial. In the first place, what period of time is to be examined using this test? Second, are personal relationships more important than economic ones? Third, to what extent should subjective factors be excluded?

There is no direct mention of the time period over which the centre of vital interests test is to be applied. In order to determine this period, we should consider the purpose of this test. It is used when two countries dispute whether an individual is a tax resident of one of them. So, there should exist an overlap between the fiscal year of the two countries. This overlap should be investigated.

The optimal approach seems to be based on the distinction of the taxpayer's relations for each year separately, as they clearly change during the relevant period. The question is whether future intentions should be taken into account and which links are more important. This leads to the question of assessing the relative weight of different factors.

The importance of personal and economic ties should be defined. It is crucial because the centre of vital interests is seen as weighing facts in each year of dual residence. Different states define the importance differently [2]. The Commentary on OECD Model Tax Convention suggests that the circumstances must be examined as a whole, but particular attention should be paid to the personal actions of the individual.

This doesn't necessarily mean only personal relationships, including family, social activities and other factors, which may be many. The OECD Model Tax Convention and its Commentary do not provide a closed list. Personal actions may be related to economic activity. For example, moving with family to another country for a higher salary and better education for individual's children is a combination of personal and economic factors.

According to case studies, tribunals examine a wide range of facts: from workplaces and family events such as weddings and funerals to licenses and property portfolios.

Moreover, the blurred boundary raises another issue. The importance of subjective and objective factors in their comparison is a matter of debate. If we consider this tiebreaker to be an objective test, then less attention should be paid to subjective factors. The reason for this is that they can be easily manipulated and quickly changed. At present, they are taken into account by the courts, but they are not given the most important role.

A recent case *Oppenheimer v HMRC* [2022] included all the three issues mentioned above. It created a heated discussion because using of the concept saved taxpayer over 10 million pounds.

In conclusion, the centre of vital interests test involves weighing up the facts in each year of dual residence to understand what the taxpayer should pay, but the relative weight of different factors (personal and economic, subjective and objective) is still unclear. Furthermore, other issues may arise depending on the jurisdiction. For example, the official languages of the OECD Model Tax Convention on Income and on Capital are English and French. There is no official authorised actual translation of this document to Russian. This circumstance leads to inconsistency of the unofficial translations. Their use creates difficulties during court proceedings.

In order to avoid an increase in the tax burden, a taxpayer should carefully examine the national legislation, tax treaties and residence status.

References

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