

GMS Flash Alert

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OECD - Updates to "Resident" Commentary, Comments Sought

On July 11, 2017, the Organisation for Economic Co-operation and Development (OECD) released the draft contents of the 2017 update to the OECD Model Tax Convention.¹ The OECD is **seeking comments by August 10, 2017**, regarding the parts of the 2017 update that have not previously been released for comments as part of the Base Erosion and Profit Shifting (BEPS) Action Plans, but are aligned with BEPS. This includes changes to:

- Paragraph 13 of the Commentary on Article 4 of the OECD Model related to whether a house rented to an unrelated person can be considered to be a "permanent home available to" the landlord for purposes of the tie-breaker rule in Article 4(2)(a).
- Paragraphs 17 and 19 of, and the addition of new paragraph 19.1 to, the Commentary on Article 4. These changes are intended to clarify the meaning of "habitual abode" in the tie-breaker rule (refer to Article 4(2)(b) and Article 4(2)(c)).

WHY THIS MATTERS

The OECD Model Tax Convention and Commentary require periodic updating as the global tax/regulatory, technology, and business environments change. Many countries rely on the Model and associated Commentary to fashion their double taxation treaties and help address problems that may arise in applying the particular tax treaty and determining the correct application of tax and taxing rights in a particular circumstance.

The OECD's new draft changes to the commentary on Article 4 should help clarify for employers, employees, tax practitioners, tax authorities, and treaty negotiators, the heretofore ambiguity that has surrounded residency determination and the tax treatment and taxing rights in situations where individuals rent out their homes and the meaning of habitual abode in respect of the tie-breaker rules.

The proposed changes to Article 4 – if finally included in the updated Model and Commentary – will impact international assignees and their multinational employers.

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Background and New Requirements

To resolve situations in which an individual may be exposed to double taxation because of dual residency, Article 4 addresses when an individual is considered to be a resident of a state. If an individual qualifies as a resident in two places, Article 4(2), creates a series of “tie-breaker” tests.

Permanent Home Availability

The first Commentary update has to do with the Article 4(2)(a), which prioritizes residency in the state in which an individual has a “permanent home available.” If that exists in two places, then the individual is deemed to be a resident in the place in which the individual’s personal and economic relations are closer. (This sub-test is known as the “center of vital interests.”)

Paragraph 13 of the Commentary to Article 4(2)(a) explains that the permanence of the home, which can be an apartment or merely a rented furnished room, is essential. The individual must have access to the home at all times continuously and not occasionally.

13. As regards the concept of home, it should be observed that any form of home may be taken into account (house or apartment belonging to or rented by the individual, rented furnished room). But the permanence of the home is essential; this means that the individual has arranged to have the dwelling available to him at all times continuously, and not occasionally for the purpose of a stay which, owing to the reasons for it, is necessarily of short duration (travel for pleasure, business travel, educational travel, attending a course at a school, etc.).

The draft adds to the Commentary clarifying language that explains a home is no longer available to the individual if rented to an unrelated party so that the individual is not in possession of the home and cannot stay there.

For instance, a house owned by an individual cannot be considered to be available to that individual during a period when the house has been rented out and effectively handed over to an unrelated party so that the individual no longer has the possession of the house and the possibility to stay there.

KPMG NOTE

This enhancement in paragraph 13 makes it clear that when an individual’s home in the home country is rented to an unrelated party, for purposes of assessing the individual’s residency, that rented home cannot be referred to as a means of establishing his center of vital interests in the home country.

The updated draft provides a helpful clarification to the permanent home test because it makes clear that renting out a house, apartment, or room to a third party means that the home is not “available” to the individual.

Habitual Abode

The second update is more extensive and has to do with the tie-breaker rule in Article 4(2)(b) and Article 4(2)(c) and the tests relating to the determination of “habitual abode,” when an individual has a permanent home available to them in both contracting states and the center of vital interests cannot be determined or in cases where there is no permanent home.

Most of the new draft Commentary for Article 4(2)(b) is in paragraphs 16 through 19, which explain that the number of days in each place is not necessarily determinative for purposes of where an individual's habitual abode is. The draft update clarifies that the determination period must cover a sufficient length of time to ascertain *the frequency, duration, and regularity of stays that are part of the settled routine of an individual's life.*

One of the examples provided in the draft updated Commentary posits a five-year period during which an individual owns houses in two states and spends sufficient time to have a habitual abode in both states. Another example stresses that care should be taken to consider a period of time during which there were no major changes of personal circumstances that would affect the determination. The new language also notes that the relevant period may not correspond to the dual-residence period.

KPMG NOTE

The existing Commentary refers to "where he stays more frequently," "all stays made in a State," and "the determination must cover a sufficient length of time for it to be possible to determine whether the residence in each of the two States is habitual..."

The new comments delve into the substance of the term "habitual abode" – shifting away from formal criteria, such as number of days spent in either state – to a three-fold test: frequency, duration, and regularity of stay. These are to be assessed in view of an individual's facts and circumstances. While more complex, it may nevertheless lead to a more accurate determination of tax residency.

Next Steps: Submitting Comments?

Parties concerned about the draft modifications by the OECD may wish to consider submitting comments. Comments on the draft changes may be submitted electronically in Word format to taxtreaties@oecd.org and they should be addressed to the Tax Treaties, Transfer Pricing, and Financial Transactions Division, OECD/CTPA. The deadline for submission of comments is August 10, 2017.

FOOTNOTE:

1 See the July 11, 2017 news release "[OECD releases the draft contents of the 2017 update to the OECD Model Tax Convention](#)," on the OECD website.

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Contact us

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