

# Income from International Private Employment

## SAMPLE CHAPTER

### INTRODUCTION

#### 1 General introduction

This study is a discussion of some of the difficulties that may arise when private sector employees are engaged in cross-border activities. In particular, this study focuses on those difficulties which occur in relation to taxation, where it would be expected that bilateral tax treaties, which are often based on the Organisation for Economic Cooperation and Development [OECD] Model Convention, would offer a solution. Such cross-border activities do not only occur often and increasingly, but may also affect both the employees and the enterprises in which they are employed or are going to be employed, e.g. an obligation to withhold wage tax could be imposed on these enterprises. Fortunately, the Fiscal Committee of the OECD is devoting a great deal of attention to resolving some of these difficulties.<sup>1</sup>

In this context, the increasing number of cross-border activities may be illustrated as follows. According to the International Labour Organisation, approximately 86 million people are currently working outside their own countries, and this number will increase as globalisation progresses.<sup>2</sup> Even though these situations are not always covered by tax treaty provisions comparable with Article 15 of the OECD Model Tax Convention, this fairly absolute figure does give an indication of the relative importance of this issue.

---

1. OECD Public Discussion Draft, Proposed Clarification of the Scope of Paragraph 2 of Article 15 of the OECD Model Tax Convention, 5 April 2004 (OECD, Paris, 2004)/ <http://www.oecd.org/dataoecd/52/61/31413358.pdf>; OECD Discussion Draft, Tax Treaty Issues Arising from Cross-border Pensions, 14 November 2003 (OECD, Paris, 2003)/ <http://www.oecd.org/dataoecd/12/21/34562290.pdf>; OECD Report, Cross-Border Income Tax Issues Arising from Employee Stock Option Plans (OECD, Paris, 2004)/ [http://www.oecd.org/document/58/0,2340,en\\_2649\\_201185\\_33700026\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/58/0,2340,en_2649_201185_33700026_1_1_1_1,00.html). The recommendations in the last two documents have been included in the 2005 update of the OECD Model and the Commentary thereto.

2. See [http://www.hrmanager.com.au/index.cfm?wUPub\\_Id=38&wUIss\\_Id=425&wUArt\\_Id=1787](http://www.hrmanager.com.au/index.cfm?wUPub_Id=38&wUIss_Id=425&wUArt_Id=1787).

The increasing number of cross-border activities may also be illustrated by the findings of J. Dumont and G. Lemaître of the Directorate for Employment Labour and Social Affairs (DELSA) of the OECD.<sup>3</sup> These findings show that, for example, the US figures (2003 figures, with a further update in 2005) include 809,540 expatriates (390,244, almost 50%, of whom are highly educated), i.e. persons who have been posted to the US from another OECD Member State under such circumstances that they have become residents of the US.<sup>4</sup> Not included in these figures are persons who live and work in the US under comparable circumstances but originate from non-Member States or persons working in the US while remaining residents of the country from which they are posted. Other figures that may be mentioned are those for Belgium (321,544; 10,797 of whom with higher education), France (1,013,581; 348,432 of whom with higher education), Germany (993,757; 865,355 of whom with higher education), the Netherlands (616,909; 209,988 of whom with higher education) and the UK (3,229,676; 1,265,863 of whom with higher education). In addition, there is a considerable number of OECD Member States which have been making efforts to provide tax incentives for hiring highly educated employees, and this may cause the number of cross-border activities to increase even further. These include Australia, Austria, Belgium, Denmark, Finland, France, Japan, Korea, the Netherlands, New Zealand, Norway, Canada, Sweden, and the UK.<sup>5</sup>

The above focuses mainly on longer postings. In many instances, however, commuting, e.g. employees living in one State and working in another to which they travel every day, or a short-term posting will be involved, in which context the place of residence does not shift to the State to which the employee is posted. To the author's knowledge, there are no clear figures available at this time. The figures of Statistics Netherlands [Centraal Bureau voor de Statistiek] may serve as an illustration. They register cross-border employees who work in the Netherlands from Germany and Belgium and vice versa. Cross-border employees are characterised by the fact that they are covered by a health insurance fund [ziekenfonds] (salary threshold of € 33,000 for 2005),<sup>6</sup> in which

---

3. "Counting Immigrants and Expatriates in OECD Countries: a New Perspective". These findings have been published at

<http://www.oecd.org/dataoecd/27/5/33868740.pdf>. The OECD has set up a specific database containing data on expatriates (see

[http://www.oecd.org/document/51/0,2340,en\\_2649\\_37415\\_34063091\\_1\\_1\\_1\\_37415,00.html](http://www.oecd.org/document/51/0,2340,en_2649_37415_34063091_1_1_1_37415,00.html)).

4. Such persons would fall under Art. 15(1), first sentence, OECD Model. The other rules of Art. 15 may become relevant if the employee in question is still performing activities in the country from which he is posted, or for the calculation of the 183 days in connection with the reference period of arrival in and departure from the US.

5. See J-C. Dumont and G. Lemaître, *op. cit.*, p. 20.

6. It is useful to note that these thresholds were abolished as of 1 January 2001. As of that date the Netherlands introduced a new health insurance regime.

context employees must live in one State while working within the territory of another.<sup>7</sup> On the basis of these premises, the following figures emerge for 2004<sup>8</sup>:

- 20,365 employees lived in Belgium and worked in the Netherlands;
- 13,885 employees lived in Germany and worked in the Netherlands;
- 5,885 employees lived in the Netherlands and worked in Belgium;
- 9,390 employees lived in the Netherlands and worked in Germany

Because of the limited definition used, among other things in respect of the income, the actual number of cross-border activities is far higher than that shown by the above figures.<sup>9</sup> However, it can be observed that such cross-border activities increased in 2004 in comparison with previous years.<sup>10</sup> Another example is offered by Belgium, where in 2001, 52,357 residents worked in one of the surrounding countries (Luxembourg, France<sup>11</sup>, Germany and the Netherlands). In 2001, 28,800 residents from these four countries worked in Belgium.<sup>12</sup> Belgium registered 24,536 frontier workers residing in France in 2004.<sup>13</sup> Another example is offered by Austria where 58,000 Austrian residents worked in Germany, whereas 48,000 residents of Germany worked in Austria in 2004.<sup>14</sup>

---

7. J. van Cruchten and R. Kuijpers, "Cross-border employment between the Netherlands and Belgium or Germany", *Sociaal-economisch maandstatistiek* 2003, no. 2, p. 19.

8. These figures have been obtained from the Statistics Netherlands and are published on [www.cbs.nl](http://www.cbs.nl).

9. This data also provides an indication of the importance of the relevant treaty provisions based on Article 15 of the OECD Model, as there are no frontier workers regulations in force between the Netherlands, Belgium and Germany containing an allocation of the taxation right over the employment income of the cross-border employee; the provisions which are similar to Article 15(1) and (2) of the OECD Model are therefore fully applicable.

10. J. van Cruchten and R. Kuijpers, *op. cit.*, p. 19.

11. Only with France is there a cross-border employment provision pursuant to which the right to tax the relevant employment income can be allocated to the State of residence of the cross-border employee, provided that the applicable conditions have been met. As to the tax treaties executed by Belgium with other States, the rules of the provisions in the relevant tax treaties which are based on Art. 15 of the OECD Model apply in full.

12. These figures originate from the website of the Belgian Ministry of Employment; [http://aps.vlaanderen.be/statistiek/nieuws/arbeidsmarkt/2002-09\\_grens.htm#top](http://aps.vlaanderen.be/statistiek/nieuws/arbeidsmarkt/2002-09_grens.htm#top) (the figures have been processed and registered by D. Malfait).

13. Compare the reply of the Belgian Minister of Labour and Consumer Affairs on a parliamentary question of Mrs. Lahaye-Battheu (15 February 2005).

14. A. Holzapfel, "Österreichische Grenzgänger als Bezieher von deutschen Arbeitslosengeld", *SWI* 2006, no. 2, p. 58.

## 2 Subject of this study

This study addresses the aspects that may play a significant role in the interpretation and application of bilateral tax treaties if private sector employees exercise their employment across borders. The purpose of this study is fourfold.

- (1) An examination of the system of Art. 15 and the principles underlying this system.
- (2) How are this system and these principles applied by case law in various jurisdictions, law literature, and the policy of tax authorities?
- (3) Does the system of Art. 15 need to be amended, and if so, in what way?
- (4) Does the application of Art. 15 need to be changed, and if so, in what way?

The starting point in this study is Art. 15 of the OECD Model and the corresponding Commentary. The other more specific provisions which, depending on the domestic tax law systems at issue and other factors, could be deemed to form a part of a functionally "closed system" constituted by Article 15 et seq., such as directors' fees (Art. 16) and pensions (Art. 18), are not analysed separately but are discussed where relevant to defining the scope of Art. 15. Many tax treaties between OECD Member States, but also treaties which have been entered into between non-Member States and Member States, take the OECD Model as the starting point for their bilateral negotiations. Art. 15 is often included without amendments in the relevant tax treaties. This study is restricted to Art. 15 of the OECD Model, which means that Art. 15 of the 2001 United Nations Model Double Taxation Convention between Developed and Developing Countries<sup>15</sup> or Art. 15 of various Model or Standard Tax Treaties, e.g. the 1996 US Model Income Tax Convention<sup>16</sup> and the 1987 Dutch Standard Tax Treaty<sup>17</sup>, are not analysed in depth.

---

15. Incidentally, Art. 15 of the 2001 United Nations Model Double Taxation Convention between Developed and Developing Countries is almost entirely identical to Art. 15 of the OECD Model.

16. Art. 15(1) and (2) of the 1996 US Model Income Tax Convention is almost entirely similar to Art. 15(1) and (2) of the OECD Model. Differences between these Models can be noted as regards Art. 15(3); see further Chapter VIII.

17. Art. 15 of the 1987 Standard Tax Treaty is also comparable to Art. 15 of the OECD Model where the main differences can be noted with respect to the period over which the 183 day period has to be calculated and Art. 15(3). Furthermore, it is useful to note that this Standard Tax Treaty seems currently not to be used by the Netherlands when negotiating tax treaties. These negotiations are, at least with respect to Art. 15(1) and (2), based on the OECD Model.