

MOBILITY OF INDIVIDUALS AND WORKFORCES

Tax Challenges Raised by
Digitalization



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IBFD

Mobility of Individuals and Workforces

Why this book?

This book represents the end of an exciting journey that started in early 2022 with the essential idea to add something which many in the international tax community felt was lacking. Namely, since 2013, we have seen unprecedented efforts in transforming the global tax structure. However, these have been exclusively focused on corporate income taxation, primarily of multinationals, while little or no attention was paid to personal income taxation. Individuals who belong to the wealthiest sections of society are increasingly prone to changing their allegiances due to taxation. Economies are focusing on attracting human capital – talent – with increasing vigour. Furthermore, the way in which we as humans work, as well as our everyday lives and habits, have also been deeply impacted by technological developments. The very nature of employment is rapidly changing, with our laptops and tablets becoming our offices and places of work. Today, humans are more mobile than ever in history, while the emergence of the English language as the true planetary lingua franca opens venues for inclusion of individuals in (for them) previously foreign environments, which never in the past existed on such a global scale. When completing a simple tax return, we are increasingly communicating with bots – artificial intelligence – instead of talking to civil servants. Inadvertently, these developments, which are impacting the lives of individuals, are also affecting the ways in which companies are doing or organizing their businesses. As none of the previously mentioned issues have been comprehensively addressed within the international tax academy, this book attempts to fill the void by providing an in-depth analysis of how the mobility of humans permitted by digitalization impacts direct taxation, both corporate – but more importantly individual – income taxation. In other words, its main objective is to designate relevant topics and open the debate, which will most certainly become of primary relevance in the near future. Actually, developments from the United Nation and the OECD testify to the fact that the future is now.

Title:	Mobility of Individuals and Workforces
Date of publication:	March 2024
ISBN:	9789087228668 (print), 9789087228682 (PDF), 9789087228675 (e-pub)
Type of publication:	Book
Number of pages:	590
Terms:	Shipping fees apply. Shipping information is available on our website.
Price (print/online):	EUR 155 USD 170 (VAT excl.)
Price (eBook: e-Pub or PDF):	EUR 124 USD 136 (VAT excl.)

Order information

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ISBN 978-90-8722-866-8 (print)
ISBN 978-90-8722-867-5 (eBook, ePub); 978-90-8722-868-2 (eBook, PDF)
NUR 826

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Preface

This book represents the end of an exciting journey which started in early 2022 with the essential idea to add something which many in the international tax community felt was lacking. Namely, since 2013 and the G20 St. Petersburg conference, we have seen unprecedented efforts, under the auspices of the OECD/G20 BEPS Project, to transform the global tax structure. However, these have been exclusively focused on corporate income taxation, primarily of multinationals, while little or no attention has been paid to personal income taxation.

While we accept the contentions giving rise to the original BEPS Project as a given when it comes to corporations, we should not ignore that they are just as relevant with individuals. Individuals who belong to the wealthiest sections of the society are also participants in the sovereign goods market, using the terminology of Dagan, and are prone to changing their allegiances due to taxation or having taxation as a desirable side effect. Economies are focusing on attracting human capital and talent with increasing vigor. Furthermore, the way in which we as humans work, our everyday lives and habits have also been deeply impacted by technological developments. To give some examples, streamers and influencers have entered our homes and are doing so often from the confines of their own private dwellings. The very nature of employment is rapidly changing, with our laptops and tablets increasingly becoming our offices and places of work. Humans are today more mobile than ever in history, while the emergence of the English language as the true planetary lingua franca opens venues for inclusion of individuals in previously foreign environments, which never existed in the past on such a global scale. When completing a simple tax return, we are increasingly communicating with bots and artificial intelligence instead of talking to civil servants. Inadvertently, these developments which are impacting the lives of individuals are also affecting the ways in which companies are doing or organizing their businesses.

As none of the previously mentioned issues were being comprehensively addressed within the international tax academy, we began a project aimed at filling the gap. The idea was to assemble a large group of dedicated researchers (from academia and the professional sector) who would analyse how mobility of humans permitted by digitalization impacts direct corporate taxation but, more importantly, individual income taxation. In other words, the main objective of our project was to designate relevant topics and open up the debate, which will most certainly become of primary relevance in the near future. Actually, developments from the United Nations and the OECD testify to the fact that the future is now.

During the spring of 2022, a group of 23 meticulous researchers was assembled and they set out to focus on almost 20 specific topics. In October of the same year, a two-day conference was held in Belgrade, Serbia, where they had the opportunity to present their research and findings to a broad spectrum of the international tax community, coming from academia, practice, as well as government and policy. Finally, their work has been compiled under the confines of this book. The topics covered follow the already presented outline of the most relevant issues in international taxation, wherein we first direct our attention at mobility and individual income taxation.

We start off with Brauner in chapter 1, taking on the topic of taxing the “brain drain” and asking the question of whether the impact of remote work and increased mobility of workers on developed countries is sufficient for opening the discussion on how we should tax mobile individuals today. He notices that the modern economy is probably more dependent on attracting human talent than on finding capital and that we are witnessing countries increasingly introducing tax incentives for personal income taxation purposes, which are designed to give their economies an edge when it comes to attracting the world’s best and brightest.

In chapter 2, Hongler addresses the issue on the opportunity to introduce a billionaire tax. While arguing that the fight against domestic and global inequalities are not fully persuasive justifications to challenge special income tax regimes through international tax policy proposals, he emphasizes the relevance of transparency and information sharing to ensure a just distribution of the tax burden within the boundaries of respective tax jurisdictions.

In chapter 3, Beretta deliberates on the tax residence of individuals in the age of geographical diversification. He rightly points out that, so far, all of the work on harmful preferential tax regimes starting since the late 1990s was focused only on corporate taxpayers, ignoring the fact that quite similar benefits were being offered to wealthy individuals. Developing on this conclusion, his research contains a proposal on how to begin the work on limiting the (ab)use of the opportunities arising from the proliferation of special tax regimes for personal income tax purposes.

In chapter 4, Kostić deals with the changing paradigm of employment, as well as mobility of workers and the impact these developments have on international taxation. He points out that, in addition to us no longer being able to clearly define what represents employment, modern technology in

combination with the changes of the legal forms through which people are hired has enabled individuals to remain static, while their labour enters and becomes a part of the global market. Furthermore, drawing on the premise of a common autonomous international tax understanding of employment, he develops the personal income tax aspects of business models based on engaging remote workers, aspects which have so far been in the shadow of permanent establishment (PE) implications of such business models, wherein the most influential sources in international tax law have thus been primarily focusing on exceptional cases involving top level management.

Chapter 5 and its authors, Strban and Mišič, add significant value to the overall analysis as they enter the scene from a background, which is not tax related, but is inherently linked with individual income taxation and provide us with the social security perspective of workers' global mobility. Drawing on the existing European experiences, they offer principle guidelines on how to adjust social security rules in the new environment.

Chapters 6 (Tenore), 7 (López López) and 8 (Báez Moreno), respectively, deal with the increasingly relevant topic of special tax regimes to boost the relocation of senior executives and high-net-worth individuals, how these special tax regimes interact with tax treaty law, and in particular, anti-abuse rules. In the world of Pillar Two, where corporate income tax rates may no longer be available as means to lure corporate headquarters, countries are turning to providing incentives to those who will – in the end – decide on the location of such headquarters. Furthermore, we are seeing more and more jurisdictions fighting to become the (tax) home of the world's wealthiest individuals, while measures being introduced to such effect are not being adequately scrutinized in the existing global tax community. Tenore systematizes the myriads of schemes available in the world today and shows how these schemes – given their peculiar features and functioning – may interact with tax treaties in a number of situations, for example, raising issues of treaty entitlement or issues concerning conflicts of qualifications that are primarily stemming from a different characterization of the income at the domestic level. Lopez shows us that when a taxpayer fulfils the residence requirements set out in the tax treaty, even a situation of double non-taxation may be seen as the logical outcome of legitimate and sovereign policy choices by states and, according to him, the intended result from the relocation of an individual in the other jurisdiction should remain outside the scope of a double tax treaty and cannot be overturned unilaterally by one of the two states.

Báez Moreno undertakes to answer the daunting question of whether the change in tax residence by an individual might be deemed (and are we

heading in that direction) as an example of abuse in the same way as we have become accustomed to accept in the case of incorporated structures and suggests amendments to the existing provisions of our tax treaties in order to mitigate the most evident risks of *shopping on the sovereign goods market* by wealthy individuals.

Tetlak opens up the debate on the taxation of the new forms of entertainers and sportspersons under tax treaties in chapter 9 and provides us with an in-depth insight into the taxation of their most novel – but already mainstream – types, all of whom have been enabled by digitalization (e.g. individuals who play videogames for a living (e-sportspersons/gamers), online sextertainer and edutainers).

In chapter 10, Molenaar further develops the analysis in relation to the taxation of online influencers and advocates for a revision and improvements of article 17 of the OECD Model following the same principles that govern Pillars One and Two (OECD), as well as article 12B of the UN Model.

Mobility of individuals has a huge impact on the international corporate tax system as well.

First, mobility impacts corporate tax residency. For instance, if the key decision-makers of a corporation move from one country to another country, then it becomes challenging to pin down the tax residence of the company. The issue is discussed by Escribano in chapter 11 and she reflects on the future of corporate tax residency in the age of remote work and mobility of individuals. The author does provide several solutions to fix the corporate tax residency concept. In particular, she suggests that countries could rethink their domestic corporate tax residency rules. At the same time, policymakers could revisit the tiebreaker rules in tax treaties and provide for a “serious” list of criteria that competent authorities should take into account to establish residency of a corporation.

Second, mobility impacts the PE concept. For instance, if a corporation engages remote workers or highly mobile workers in another country, then – depending on the exact fact pattern – a PE could be created. In particular, the concept of home office PEs or management PEs is gaining traction, as also evidenced by increasing case law/tax administration guidance emerging from a number of countries (such as Austria, Denmark and Spain). In chapter 12, Gadžo elaborates in a detailed manner on this issue and remarks that remote work, once again, challenges the appropriateness of the current PE concept, which is based on physical factors. While the author

provides certain ideas on how the PE concept could be reshaped, he concludes by stating that any new reform should be based on strong normative grounds.

Third, mobility impacts the entire multinational enterprise (MNE) profit allocation system. Under the current international tax law framework, each and every entity MNE is treated as a separate entity for tax law purposes. In a majority of the situations, transfer pricing rules based on the arm's length principle (ALP) are currently used to allocate profits among separate legal entities (e.g. based on the "associated enterprises" article of tax treaties – article 9 of the OECD Model – and the relevant national law). At the same, in many circumstances, the ALP is also used to allocate income/expenses and, consequently, profits to a PE (e.g. based on the "business profits" article of tax treaties – article 7 of the OECD Model – and the relevant national law). Against this backdrop, in chapter 13, with the aid of several examples/case studies, Buriak discusses how profits could be attributed to different types of home office PEs and workforce PEs. She also goes one step further and analyses the manner in which the secondment of workers among various related entities impacts the profits to be allocated to those entities.

Fourth, mobility also impacts substance requirements of an entity. To recap, BEPS Actions 5, 6 and 8-10 reinforced the application of the "substance" requirement. In many circumstances, substance is equated to the presence of personnel in an entity (separate legal entity or PE). However, the current standards do not specifically state whether the personnel who are employed/attached/attributed to an entity need to be in the same location of the entity. In chapter 14, Navarro raises and discusses this issue in a detailed manner from the perspective of the existing profit allocation system, selected rules in tax treaties, such as the principal purpose test, as well as the ATAD 3 proposal – the shell entities – Directive. The author states that his examination of the notion of substance in these areas reveals that often, their content is blind in what regards the specific location of the personnel of an entity and, therefore, prone to further planning. As MNEs can still manipulate the notion of substance and achieve tax savings, the author believes that, in the long term, it would be sensible to allocate profits of an MNE to countries based on immobile factors. In chapter 15, Arginelli further elaborates on the ATAD 3 proposal and whether it is a proportionate anti-tax abuse tool. He raises doubts on the necessity of an additional layer of anti-tax abuse regulation and the appropriateness of the timing of its introduction in the EU legal order. According to him, the ATAD 3 proposal may be harshly criticized because it plainly fails to achieve its goals and shows some fundamental drawbacks from a technical tax perspective.

Fifth, mobility also impacts the new international corporate tax system, that is, the Pillar Two and Pillar One system (if Pillar One ever sees the light of day). Against this background, in chapter, Chand 16 illustrates (i) the impact of complex mobility-related cases on profits allocated to different related entities under article 9 (using secondment outcomes decided in advance pricing agreements as an example) as well as profits attributable to PEs under article 7 (using home office and agency PEs as an example); and (ii) the potential spillover effects that such mobility-related cases can have on the new two-pillar system, which is demonstrated with the aid of numerical examples. The author concludes that the Pillars go beyond the ALP, despite the fact that transfer pricing rules (in one way or another) are still an integral part of the Pillars, as financial statements have to adhere to the ALP or must be adjusted for ALP outcomes to determine GloBE income/loss or elimination of profit/loss.

The final segment of this book is dedicated to new horizons created by the digitalization phenomenon, which will inevitably have a fundamental effect on the way in which international tax law is designed and/or implemented. In chapter 17, Obrist and Danz provide detailed insight into the rather novel topic of how cryptocurrencies and non-fungible tokens should be taxed from a global standpoint. Not surprisingly, their conclusions that the current rules provided by the OECD are highly anachronistic and inappropriate to be applied to highly digitalized and decentralized activities like the ones currently performed on the blockchain and that locating the source of the income and the stakeholders is complicated. In chapter 18, Turina addresses the ever-developing topic of the exchange of information and data protection standards, providing a critical analysis on the Crypto-Asset Reporting Framework, as well as the EU DAC8 proposal. Our book ends with chapter 19, in which Mazur addresses the challenging topic of the potential emergence of artificial intelligence and robots as a new category of taxpayers. While concluding that taxing robots is not the right policy choice, she emphasizes the need to take action now to minimize the negative effects of automation's inevitable disruption while maximizing its benefits.

To conclude this preface, the book does not contain all the answers to the questions that are raised by the new paradigm dictated by global mobility and digitalization. However, the book provides its readers with insights and thoughts of researchers who are devoting their professional lives to international taxation and are trying to chart the paths of development in an area of law which often seems lost in the past and unable to come to grips with the reality of the modern age. This book is truly an international develop-

ment as its authors come from three continents, while the conference itself managed to represent four. It contains the views from both developing and developed countries, from economies which are the source of remote work and those whose corporations employ such labour.

On a final and personal note, when looking at the line-up of authors of this book, we as editors can only recall the words of the famous gospel hymn *When the Saints Go Marching In*: “I want to be in that number”. Truly, our joint work has been a joy, while sharing the companionship of such esteemed colleagues is nothing less than a privilege. Therefore, we thank the authors whose work has made this book possible and hope that we have, through our efforts, done due credit to their talent and dedication.

Svetislav V. Kostić
Andrés Báez Moreno
Vikram Chand
Mario Tenore

Part I

Mobility and International Individual Taxation: Emerging Policy and Technical Issues Under National Tax Law and Treaties (Tax and Non-Tax)

Chapter 1

Mobility of Individuals, the “Brain Drain” and Taxation in the Digital Age

Yariv Brauner*

1.1. Introduction

We have all (enviously) recently read stories about “digital nomads”, laying on hammocks in the shade of palm trees in relaxed designer clothes with their laptops and open beer bottles (or cans) cooling at their sides.¹ The digital revolution permitted these digital nomads to practice their usually high-skilled craft essentially anywhere (so, why not an exotic beach?). The COVID-19 pandemic has further accelerated the detachment of workers from their traditional places of work by sending “home” large portions of the world’s population.² Both technological advances and cultural shocks, therefore, made what may have been viewed until recently as anecdotal a phenomenon that gained both public attention and required policy responses.

Salience often drives attention to tax policymaking and, therefore, the concern over the taxation of the digital nomads has not been exceptional. Pandemic and post-pandemic policy discourse fervently discussed needed revisions of international tax laws.³ Most states enacted temporary measures

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1. See, e.g., K. Chayka, *When You’re a ‘Digital Nomad,’ the World Is Your Office*, The New York Times Magazine (8 Feb. 2018), available at <https://www.nytimes.com/2018/02/08/magazine/when-youre-a-digital-nomad-the-world-is-your-office.html> (accessed 11 Nov. 2023) (subscription required); and J. Poitevien, *Digital Nomads Told Us What It’s Like to Work Remotely Around the World – and How You Can Do It Yourself after the Pandemic*, Insider (17 Dec. 2020), available at <https://www.insider.com/how-to-become-digital-nomad-work-remotely-after-pandemic-2020-12> (accessed 11 Nov. 2023).

2. See, e.g., A. Loubier, *How Remote Work Has Spiked Since the Covid Crisis*, Forbes (9 Mar. 2021), available at <https://www.forbes.com/sites/andrealoubier/2021/03/09/how-remote-work-has-spiked-since-the-covid-crisis/?sh=44da51832386> (accessed 11 Nov. 2023); and K.M. Kniffin, et al., *COVID-19 and the workplace: Implications, issues, and insights for future research and action*, 76 *American Psychologist* 63 (2021).

3. See, e.g., R. Collier, A. Pirlot & J. Vella, *Tax Policy and the COVID-19 Crisis*, 48 *Intertax* 794 (2020); P. Baker, *International Tax in the Time of COVID-19*, 48 *Intertax*

to adjust the rules to the realities of the pandemic in their jurisdictions,⁴ yet all are still struggling to absorb the possible new reality of the post-pandemic time.

Existing laws can easily contain the global mobility of individuals and have been doing so with little change during the last century.⁵ The resilience of these laws stems from their primary reliance on the concept of residence, or the physical presence of the individual taxpayer within a jurisdiction, to establish its taxpayer status.⁶ The income tax-centric international tax regime views individuals as workers (or work producers) and, therefore, attaching income earned to the physical presence of the income earner is universally viewed as logical and, hence, legitimate. The few exceptions to this universal norm do not reject it but rather frame exceptions as necessary for the integrity and stability of the general norm itself.⁷ Even the pandemic relief provisions – usually exemptions of “accidental” residents from being taxed as such – followed typical exceptions from the general norms, such as medical emergency or force majeure.⁸

Not all is well, however, since there are at least three instances that do not fit well in the general norm. One is neither new nor insignificant. High-skilled migration from less developed states to the most developed, often dubbed as “brain drain”, has been continuous and concerning for many states.⁹ The idea that a highly skilled immigrant automatically becomes a resident of its host state due to its work and continuous physical presence in such state, albeit simple and straightforward, does not sit well with the home state that “prepared” the migrant to become the taxpayer it is yet

805 (2020); and M.P. Devereux et al., *Discretionary fiscal responses to the COVID-19 pandemic*, 36 *Oxford Review of Economic Policy* 225 (2020).

4. See, e.g., A.P. Dourado ed., *Special Volume on Covid-19*, 48 *Intertax Issue* 8-9 (2020).

5. See, e.g., F. Pötgens, *Income from International Private Employment* (IBFD 2007), Books IBFD; and P. Pistone, *Taxation of Employment*, in *Research Handbook on International Taxation* p. 65 (Y. Brauner ed., Elgar 2020).

6. All based on *OECD Model Tax Convention on Income and on Capital* art. 4 (27 Nov. 2017), *Treaties & Models* IBFD [hereinafter *OECD Model*], on residency.

7. See, e.g., arts. 16 (Directors’ Fees), 18 (Pensions) and 19 (Government Service) *OECD Model*.

8. See, e.g., the United States’ Rev. proc. 2020-20 (providing foreigners additional 60 days during which they were not considered relevantly present in the United States, all due to the COVID-19 pandemic). See also the *OECD guidance on tax treaties and the impact of Covid-19*, available at <https://www.oecd.org/coronavirus/policy-responses/updated-guidance-on-tax-treaties-and-the-impact-of-the-covid-19-pandemic-df42be07/> (accessed 7 July 2022).

9. See, e.g., S.V. Kostic, *International Taxation and Migrations*, in *Research Handbook on International Taxation* p. 353 (Y. Brauner ed., Elgar 2020).



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