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Digital Nomads and International Taxation of Income from Employment[2]

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Abstract

With ongoing economic, social, and technological changes, the nature and method of performing work are changing. The development of modern digital technologies has a significant impact on the traditional model of work, based on performing it in a strictly defined 'physical' place and under an employer's supervision. Naturally, the ongoing changes are multidimensional and have consequences, including an intriguing phenomenon of remote work, which in the cross-border dimension has led to the emergence of a new group of labour providers known as 'digital nomads'. The specificity of business activity of these nomads poses conceptual and practical challenges in the area of various branches of law, including tax law. The main purpose of the article is to answer the question whether international tax law, adequately to the changes taking place, regulates the taxation of digital nomads' income from cross-border remote work.

Keywords: tax jurisdiction, digital nomads, remote work, international taxation.

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Cyfrowi nomadzi a międzynarodowe opodatkowanie dochodów z pracy[3]

Streszczenie

Wraz z zachodzącymi zmianami ekonomicznymi, społecznymi i technologicznymi charakter i sposób świadczenia pracy podlegają zmianom. Rozwój nowoczesnych technologii cyfrowych w istotnym stopniu wpływa na tradycyjny model świadczenia pracy, oparty na wykonywaniu pracy w ściśle określonym „fizycznie" miejscu i pod nadzorem pracodawcy. Zachodzące zmiany mają oczywiście wielowymiarowy charakter i konsekwencje, a jednym z frapujących wątków jest zjawisko pracy zdalnej, która w wymiarze transgranicznym doprowadziła do wykształcenia się nowej grupy podmiotów świadczących pracę, określanych jako „cyfrowi nomadzi". Specyfika aktywności owych nomadów stawia wyzwania koncepcyjne i praktyczne w obszarze różnych gałęzi prawa, w tym prawa podatkowego. Głównym celem artykułu jest odpowiedź na pytanie, czy międzynarodowe prawo podatkowe w sposób adekwatny do zachodzących zmian reguluje opodatkowanie dochodów cyfrowych nomadów z tytułu transgranicznej pracy zdalnej.

Słowa kluczowe: jurysdykcja podatkowa, cyfrowi nomadzi, praca zdalna, opodatkowanie międzynarodowe.

[3] Badania wykorzystane w artykule nie zostały sfinansowane przez żadną instytucję.

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Introduction

States use their sovereignty in the tax sphere to determine the scope of their tax authority; it can be defined as the state competence – that results from its sovereignty and is exercised within the limits of international law – to regulate the scope of tax obligation in relation to which all or some elements of tax and legal facts contain a cross-border element.[4] In tax law, according to a commonly accepted model used to exercise tax powers by the state, the scope of territorial impact of this authority depends on the fact whether an entity obliged to pay tax in a given country under internal tax law has (or does not have) the status of a tax resident.

The territorial scope of the state's tax authority is based on two concepts of the 'connection' (nexus) between a given person and the state; both of these concepts refer to territorial and/or personal factors. The territorial connection is a key element in the exercise of tax powers of the state and it is manifested in the state's competence to put any tax on actual situations, legal transactions and things that occurred, were performed or located in the state, as well as to put tax on persons who are present and/or active within this country.[5] The personal nature of the connection between a taxpayer and the state, currently present in tax regulations of most countries, is usually based on the criterion of 'intensity' of links between a and the state. As far as natural persons are concerned, such a test of personal connections for income tax purposes is usually based on the place of residence criterion, which is identified by the length of a person's total stay in a given country or having a centre of vital interests (a centre of personal interests) in this country.

The type of connections with the state (territorial vs personal) is commonly associated with the scope of the state's tax powers. As for the territorial connection, which applies to entities that cannot be classified as tax residents, the state (without prejudice to tax sovereignty of other states) may impose tax obligation on such non-residents only in respect of income the source of which is located in this country (a limited tax obligation). However, in relation to the state's 'own' tax residents, nowadays, the states apply a territorially unlimited scope of tax obligation, which manifests itself in the state's competence to put tax on all income of 'its' tax resident,

[4] R. Lipniewicz, *Jurysdykcja podatkowa w cyberprzestrzeni. Model międzynarodowego opodatkowania dochodu*, Warszawa 2018, p. 64.

[5] S. Douma, *The Three Ds of Direct Tax Jurisdiction: Disparity, Discrimination and Double Taxation*, "European Taxation" 11, 2006, pp. 523–524.

regardless of geographical location of the source of this income;[6] thus, this competence also includes income from sources located outside the country (an unlimited tax obligation). This model of exercising tax authority is adopted in all modern tax systems, although the principles of recognition of a person as a resident or non-resident may be established in different ways, based both on the premises of place of residence or stay and other premises of a similar nature.[7]

The fact that two countries exercise their tax authority in the area of income taxes, based on the principle of residence on the one hand and on the principle of source on the other, may lead to a conflict of authorities (jurisdictions), which usually takes the form of double taxation in the legal sense.[8] To counteract such situations, states around the world conclude agreements (conventions) on the avoidance (prevention) of double taxation (also known as 'tax treaties'). The basic legal structure of such agreements is similar. This is due to the fact that the interested countries, when negotiating the content of bilateral tax treaties, rely predominantly on model (legally non-binding) provisions of the OECD Model Tax Convention on Income and on Capital.

Based on a tax treaty, taxation rights are allocated between the contracting states, and the norms expressing them are referred to 'distributive norms'.[9]

The key provisions of tax treaties based on the OECD Model Tax Convention, include a distributive norm that governs the method and place of taxation of cross-border income from hired labour, which is of fundamental importance for individuals providing work in a country other than the country of their tax residence. The commonly accepted model of cross-border taxation of income from work is being strongly criticized due to the phenomenon known as 'digital nomadism'. The analysis of the provisions of international tax law allows for proposing a thesis that we are dealing with a partial regulatory mismatch regarding the model of taxation of cross-border income from work in a case where work is performed remotely and is provided by people referred to as 'digital nomads'. It justifies holding a discussion in this paper about identifying fundamental areas of the above-mentioned regulatory mismatch and the resulting tax consequences.

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6 C. Elliffe, *Taxing the digital economy. Theory, Policy and Practice*, Cambridge–New York 2021, p. 6.

7 B. Kucia-Guściora, *Ustalenie i zmiana rezydencji podatkowej – skutki dla osób fizycznych*, "Krytyka Prawa" 4, 2019, p. 185.

8 A. Becker, *The Principle of Territoriality and Corporate Income Taxation*, Part 1, "Bulletin for International Taxation" 2016, 4, p. 190.

9 H. Litwińczuk, *Międzynarodowe prawo podatkowe*, Warszawa 2020, p. 83.

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The Phenomenon of Digital Nomadism

It is assumed that the term 'digital nomad' was first used in the 1990s by Tsugio Makimoto and David Manners in their book entitled *Digital Nomad*, published in 1997.[10] The concept of a digital nomad itself is defined in numerous ways, but it is a common element in many definitions of this phenomenon 'to combine working remotely and travelling for various reasons and lengths of time.'[11] This is possible primarily thanks to ever-improving (world-wide) access to the Internet (especially Wi-Fi) and extensive use of digital tools in the broad sense.[12] This means that physical presence in a 'fixed office space' is no longer necessary to provide work, the effects of which will be used in the same place.

Therefore, employees – both hired and self-employed individuals – especially in the so-called creative industries, are no longer so strongly associated with traditionally understood office spaces. Digital devices such as laptops, tablets, and smartphones make it possible to 'set up camp' anytime and anywhere, as long as there is access to electricity and Wi-Fi.[13] Therefore, 'physical proximity is no longer a condition for entering into an employment relationship.'[14] The essential link with a place where digital nomads work remotely 'relies on their short stay in that country;' what distinguishes digital nomads from the classic expatriate model, under which a person's stay in a country other than the country of original residence is of long duration and is often combined with actions aimed at 'establishing personal and professional roots in their new country.'[15]

Naturally, the nature of the digital nomadism itself is very diverse: some digital nomads travel for years, moving regularly between different countries and continents, while others travel for shorter periods, practising 'workcations and working sabbaticals lasting from several weeks to many months.'[16] The reasons it is difficult to clearly define this phenomenon also result from the wide range of models of

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10 K. Naumowicz, *Cyfrowi nomadzi na polskim rynku pracy – wybrane aspekty prawne pracy zdalnej w sektorze cyfrowym*, [in:] B. Godlewska-Bujok, K. Walczak (eds.), *Zatrudnienie w epoce postindustrialnej*, Legalis 2021.

11 MBO Partners, *The Digital Nomad Search Continues, Research Brief*, p. 3, https://webinar.hbrturkiye.com/storage/uploads/digital-nomad-research-brief-6152c2658471d.pdf (access: 8.09.2023).

12 K. Naumowicz, op. cit.

13 F. Brakel-Ahmed, *Wherever I Lay My Laptop, That's My Workplace: Experiencing the New World of Work in a Hotel Lobby*, [in:] J. Aroles, F. de Vaujany, K. Dale (eds.), *Experiencing the New World of Work*, Cambridge–– New York 2021, p. 39.

14 A. Perémy, *Tax Treaty Issues in Taxing Digital Dependent Labour Assignments*, [in:] I. Kerschner, M. Somare (eds.), *Taxation in a Global Digital Economy*, Vienna 2017, p. 235.

15 L.T. Pignatari, *The Taxation of 'Digital Nomads' and the '3 W's': Between Tax Challenges and Heavenly Beaches*, "Intertax" 2023, 5, p. 385.

16 MBO Partners, op. cit.

providing work with the use of information technologies. The International Labour Organization (ILO) points to inconsistent understanding across countries of such concepts as remote work, teleworking, working at home or home-based work, emphasizing that 'currently there is a lack of statistical standards defining these different concepts and countries are using slightly different and sometimes overlapping definitions, and different terms are being used interchangeably.'[17]

However, it seems that 'remote work' is a broader employment model, which covers the digital nomadism. The former is defined by the ILO as 'situations where the work is fully or partly carried out on an alternative worksite other than the default place of work.'[18] Remote work can be performed in various locations, which might be seen as an alternative to traditionally understood location where work is usually provided (an employer's office), considering obvious differences resulting from a given profession and employment status.[19] From this point of view, digital nomads are described as 'workers who utilise innovative approaches to remote work and who are in the process of moving towards the concept of a virtual office.'[20] The COVID-19 pandemic also affected worker's mobility so that many people began working remotely and often from a different location and jurisdiction than the usual and traditional 'workplace'.[21]

What narrows down the meaning of the concept of remote work in relation to digital nomads is the fact that remote work can be performed 'outside the office,' from an employee's permanent place of residence (in the country of residence), while the characteristic feature of digital nomadism is moving, in many cases crossing the states' borders, shifting from one destination to another. Digital nomadism is therefore defined as an extreme form of 'remote work,' in contrast to 'more mundane kinds' of remote work (e.g. teleworking once a week from home in the same country as the office is located).[22] Therefore, one may agree with the statement that 'every digital nomad is a remote worker, but not every remote worker is a digital nomad.'[23]

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17 ILO, *Defining and Measuring Remote Work, Telework, Work at Home and Home-Based Work, ILO technical note, ILO technical note COVID-19: Guidance for labour statistics data collection*, 5 June 2020, https://www.ilo.org/wcmsp5/groups/public/---dgreports/---stat/documents/publication/wcms_747075.pdf, p. 5. (access: 15.10.2023).

18 Ibidem.

19 Ibidem.

20 U. Rani, *Remote Platform Work and the Flexible Workforce: What Global Dynamics Can We See?* [in:] N. Countouris, V. De Stefano, A. Piasna, S. Rainone (eds.), *The Future of Remote Work*, Brussels 2023, p. 31.

21 L.T. Pignatari, op. cit., p. 385.

22 Z. Rasnača, *Enforcing the Rights of Remote Workers: The Case of Digital Nomads*, [in:] N. Countouris, V. De Stefano, A. Piasna, S. Rainone (eds.), op. cit., p. 202.

23 L.T. Pignatari, op. cit., p. 385.

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Digital nomadism is therefore a form of cross-border remote work, and a person who works mainly (exclusively) for an employer (or clients) based abroad, who has the right to stay in the host country for a specified period of time and works remotely with the use of digital tools can be considered a digital nomad.[24]

Digital nomadism can be characterized as an activity of both people providing hired labour to an employer located abroad, as well as the self-employed running individual, independent (business) activity for various foreign clients. From the point of view of tax consequences under international tax law, income earned by a digital nomad as part of these two basic forms of activity will be classified as 'income from employment' or 'business profits,' respectively, and it is based on separate models of tax powers division between the countries. Due to research goals I established, further analysis will concern the situation of employees working remotely for an employer based abroad.[25] The key issue is the possibility of effective application of provisions regarding income from hired labour contained in agreements for the avoidance of double taxation. Such tax treaties are currently the basic instrument of international tax law used to demarcate the scope of exercising tax authority in the field of income and property between countries around the world.

Taxation of Income from Labour in International Tax Law

As for contractual norms separating tax powers of the states – parties to the agreement, it can be observed that generally they do not differ significantly from standard provisions of the OECD Model Tax Convention. Pursuant to a general principle referred to in Article 15(1) of the OECD Model Tax Convention, an employee's remuneration is taxable only in the individual's state of residence unless the employment is performed in the other contracting state. If the work is so performed, the remuneration received for it may be taxed in this second state.[26] Therefore, in a situation where an employee is a tax resident of a given country and performs work in that country, the question of the place of taxation of such income is obvious: the right to put tax on income applies only to the country of a taxpayer's residence (even if remuneration is paid by a foreign entity). However, if an employee is a tax resident of one country and performs work in another country, the income from

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24 Z. Rasnača, op. cit., p. 202.

25 The issue of recognizing the professional activity of digital nomads as a permanent establishment for their employer and the necessity to pay tax on business profits in the source country also by an employer was left outside the research scope, as it might be an issue worthy of a separate, extensive study.

26 W. Morawski, B. Kuźniacki, *The German-Polish Tax Problems of Cross-Border Workers in the COVID-19 Pandemic – When the Remedy is Worse than the Problem*, "Bialystok Legal Studies" 2021, 4, p. 97.

work may also be taxed in the country where the work is performed. In order for Article 15(1) of the OECD Model Tax Convention to apply, a taxpayer must receive payments, salaries, and other similar forms of remuneration for work performed in the source country, while the method and place of payment are irrelevant.[27]

This provision allows for taxation of remuneration (according to national personal income tax regulations) in both contracting states, namely in an employee's country of residence and in the country where work is performed, i.e. the country of the source of income. Therefore, there is a risk of potential double taxation of income from work by taxing it with the national personal income tax in both countries – parties to the tax treaty. Such a risk can be minimized (reduced) by applying, in a taxpayer's country of residence, a method of avoiding double taxation as provided for in a given agreement and agreed with regard to this type of income.[28]

A typical delimitation of the scope of tax jurisdiction regarding income of natural persons who earn it from work they perform in a country that is not the country of their tax residence is based on the 'physical presence' paradigm and the activity of an entity providing work. The OECD Model Tax Convention specifies this paradigm in relation to individuals employed to perform work in a given country. Therefore, in order to correctly determine the place of taxation of cross-border work, it is crucial to determine the place where work is performed.

In the light of explanations contained in the official commentary to the OECD Model Tax Convention, 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 one 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.[29] In the light of the foregoing, it can be concluded that if an employee who physically resides in the country of their residence but is employed (formally) in another country, earns income from employment, then such income is not subject to taxation in the country of formal employment, even if the results of their work are used there.[30]

An exception to the rule is provided in Article 15(2) of the OECD Model Tax Convention; if work is performed by a given person outside the country of their tax residence, the right to put tax on income from work is vested in the country where work is actually performed. This provision specifies conditions, the cumulative

27 H. Litwińczuk, op. cit., p. 250.

28 M. Lang, *Introduction to the Law of Double Taxation Conventions*, Vienna 2013, pp. 131–141.

29 OECD, *Model Tax Convention on Income and on Capital: Condensed Version*, Paris 2017, p. 305.

30 Judgement of the Supreme Administrative Court of 29 April 2021, II FSK 2241/20, LEX No. 3195329.

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fulfilment of which means that even though work is performed in a country other than an employee's country of tax residence, the remuneration is taxed only in the country of that person's residence.[31] These conditions are as follows:

1. The remuneration recipient resides in a country other than the country of residence for a period or periods not exceeding a total of 183 days in any twelve-month period beginning or ending in a given tax year;
2. The remuneration is paid by (or on behalf of) an employer who is not a resident in a country where work is performed;
3. The remuneration is not borne by a permanent establishment that an employer has in the country of work performance.

Article 15(2) of the OECD Model Tax Convention contains distributive norms in relation to income of the so-called seconded workers. The right to put tax on income from employment for an employee's state of residence is based in this case on the criterion of the period of work performed in the source state, combined with the temporal threshold of the employee's 'stay' in such a state.

The fact the that 'place of work' paradigm was adopted in the international tax regime for correct application of the norm separating the scope of the tax power of two countries interested in taxing the same income (from hired labour), contained in Article 15 of the OECD Model Tax Convention (and, consequently, in most bilateral tax treaties around the world) raises a number of interpretative doubts in the context of people who pursue their professional activity in the digital nomadism formula.

Areas of Regulatory Mismatch in the Taxation Model for Remote Work Performed by Digital Nomads

The cross-border economic activity of digital nomads may generate a number of interpretative doubts under international tax law, both as to the adequacy of legal definitions used in tax treaties as well as the economic assessment (and, consequently, tax qualification) of this activity. This is primarily due to the fact that the basic structure of the international tax regime (the core of which is the global network of bilateral tax treaties) was created almost 100 years ago. Despite successive changes made as part of subsequent updates of the OECD Model Tax Convention, to this day it has not been possible to develop universally accepted rules for taxation of

[31] H. Litwińczuk, op. cit., pp. 250–251.

new forms of remote cross-border work, in particular with regard to employees described as digital nomads. This is vital because we are currently observing a significant increase in the international mobility of natural persons, which encourages some countries to implement instruments into their tax systems that make them 'attractive' in terms of taxation and draw in immigrants with sought-after competency.[32]

Two areas of potential regulatory mismatch for digital nomads working remotely for a foreign employer deserve special attention. Firstly, this is the issue of whether it is possible to determine an employee's tax residence, and secondly, the understanding of the 'place of work performance' paradigm in the context of the tax competence of the country where the source of income from cross-border remote work is located.

The issue of tax residence is of major importance in international tax law, as it helps determine whether a given taxpayer is subject to unlimited (as a resident) or limited (as a non-resident) taxation in a given tax system.[33] When it comes to the issue of the tax residence of individuals providing cross-border remote work, it is necessary to first indicate a potential risk of tax avoidance due to the inability to recognize a given person as a tax resident in any country. It is emphasized that tax residence is dynamic, 'it is not a permanent and unchanging factor'; it may therefore undergo changes as a result of 'intentional or unintentional actions of taxpayers that produce specific legal and tax effects.'[34]

The idea of international tax law assumes that a given entity (both an individual and a corporate) must have one place (understood as a country) of residence for tax purposes. It then becomes possible to apply the appropriate tax treaty concluded between the taxpayer's state of residence and the state where they earn income. As already mentioned, individual countries regulate the criteria for qualifying a natural person as a tax resident in their internal law (usually tax law, but it may also be, for instance, civil law). The length of stay criterion is commonly used, with a minimum threshold of 183 days. In the case of some digital nomads, whose way of operating assumes multiple changes of a country of their 'physical' stay during the year, the threshold of 183 days of residence may not be reached in any country, where digital nomadism has been practised for years. This phenomenon may be enhanced by the practice of some enterprises, which 'offer employees up to 90 days of international work per year in an effort to avoid tax and visa issues while meeting

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32 B. Kucia-Guściora, *Instruments Stimulating Taxpayers to Transfer Their Tax Residence to the Republic of Poland*, "Krytyka Prawa" 2023, 1, p. 199.

33 M. Jamroży, *Ograniczony obowiązek podatkowy osób fizycznych*, "Studia Ekonomiczne. Zeszyty Naukowe Uniwersytetu Ekonomicznego w Katowicach" 2018, 358, p. 112.

34 B. Kucia-Guściora, *Ustalenie i zmiana…*, p. 204.

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employees.' Such a solution allows them to avoid following the '183-day residency rules in most tax treaties that trigger a host of tax obligations for workers and companies.'[35]

This means that no country can impose on such a person an unlimited tax obligation, under which it could demand taxation of the worldwide income of its tax resident. Moreover, the inability to indicate a taxpayer's country of residence makes it impossible to apply an appropriate double taxation avoidance agreement. On the one hand, this may pose a tax risk for digital nomads themselves: if it is not possible to apply the tax treaty provisions, each country in which such a person earns income will apply national tax law provisions. It may result in higher taxation of income compared with the case where a taxpayer could apply an appropriate contract. On the other hand, if there is no tax treaty with provisions applicable in a given case, chances of effective cross-border exchange of tax information between tax authorities, as provided for in most such agreements, are also limited. This may substantially impede the verifiability of the correctness of the tax settlements of digital nomads (provided that, despite the lack of tax residence, a person working remotely in different countries will show any taxable income wherever).

If it is not possible (or it is made considerably difficult) to determine the tax residence of digital nomads, it will raise justified fiscal doubts from the point of view of a demand for fair distribution of tax powers between states. The remote work 'may disrupt the ties between the budget revenues from the income tax and the budget expenses on the local infrastructure – paying taxes in one region while using public infrastructure in another one results in higher budget expenditures in the second region not offset by respective tax yield.'[36]

In turn, for digital nomads themselves, the issue of double tax residence (i.e. a situation in which a person meets the national criteria for being recognized as a resident for tax purposes in two countries) may pose a potential tax risk. For instance, the tax law of one country defines tax residence based on citizenship (e.g. the United States), and another country, where a citizen of that country resides physically and performs remote work, makes tax residence dependent on the criterion of residence in this country. In the event of a residence conflict, its resolution is possible by applying the provisions of the tax treaty applicable to both countries. The OECD Model Tax Convention deals with residence–residence conflicts through tie-breaker rules in Article 4 which allocate the residence of the 'dual resident' person to one of those states, so that person is treated as a resident solely of that state for the purposes

[35] S. Courtney, *Taxes Make Digital Nomad Status a 'Myth' for Most Workers, Firms*, https://news.bloombergtax.com/daily-tax-report/taxes-visas-make-digital-nomads-a-myth-for-firms-workers-1 (access: 6.09.2023).

[36] V. Tyutyuryukov, N. Guseva, *From remote work to digital nomads: tax issues and tax opportunities of digital lifestyle*, "IFAC PapersOnLine" 2021, 13, p. 188.

of the Convention.[37] To solve this conflict, special rules must be established which give preference to the attachment to one state over the attachment to the other state.

According to the Commentary on the OECD Model Tax Convention, 'as far as possible, the preference criterion must be of such a nature that there can be no question but that the person concerned will satisfy it in one state only, and at the same time it must reflect such an attachment that it is felt to be natural that the right to tax devolves upon that particular state.'[38] The criteria for resolving the conflict of dual residence, listed in Article 4 the OECD Model Tax Convention, must be applied in a strictly defined order until it is recognized that one of these criteria has been met in a given country, i.e.: permanent home, centre of vital interests, state in which a given person has a habitual abode and citizenship. If at least one of these criteria is not met in any of the countries, the tax authorities of the contracting countries will resolve the conflict of tax residence by mutual agreement.

As for digital nomads, the question arises 'whether economic ties prevail over personal ties or do these have the same weight; how a personal fact is understood and evaluated in different countries.'[39] Moreover, employees whose job requires travelling half of their time may find themselves in an unclear situation regarding a habitual abode if they are employed in a country other than the country of their nationality (or they are citizens of both countries), because the OECD Model Tax Convention does not specify the exact minimum period of time to consider that a person 'habitually abides' in a given country.[40]

Moreover, digital nomads who are not residents of the countries where they earn most (all) of their income are usually not eligible to have their personal and family situation considered in the settlement of personal income tax on the same principles as in the case of resident taxpayers.[41] In practice, it means that digital nomads may not be entitled to tax reliefs available only to tax residents of a given country.

The second area that raises interpretative doubts is the understanding of the concept of the 'place of performance of work' in relation to the 'nomadic' model of cross-border remote work. The OECD Model Tax Convention grants the right to put tax on income from hired labour not only to an employee's country of residence,

37 OECD, *Tax and commerce @ oecd the impact of the communications revolution on the application of "place of effective management" as a tie breaker rule, a discussion paper from the technical advisory group on monitoring the application of existing treaty norms for the taxation of business profits*, Paris 2001, p. 4.

38 OECD, *Model Tax Convention…*, p. 109.

39 A. Perémy, op. cit., p. 236.

40 Ibidem.

41 European Economic and Social Committee, *Taxation of Cross-border Teleworkers and Their Employers*. Opinion No. ECO/585/2022, p. 5.

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but also to the country where work is performed (with the exception specified in Article 15(2) of the OECD Model Tax Convention in relation to seconded workers).

The phenomenon of digital nomadism may generate problems regarding the identification of the 'place of performance of work.' In a traditional economy, identification of the place of work is usually quite unambiguous, because it is difficult to separate – in the material sense – tasks performed by an employee from the location of production factors used by such an employee to do this work (machines, tools, or a desktop computer). The use of digital tools (such as software) and mobile devices (such as hardware) to provide work remotely means that an employee may be physically present in one country and may use resources necessary to perform work via a computer network in another country, e.g. a server with software used by an employee while working remotely.[42]

In such a situation, the question may be asked: does it mean that work should be considered to be performed in the place where an employee is 'physically' present, or rather in the place where 'digital factors of production' are located? An argument in favour of the first approach is this: what generates value for an employer is still a set of such human properties as knowledge, education, skills, abilities, physical and mental predispositions, energy, motivation to work,[43] rather than 'tools' an employee uses.[44] Therefore, when work is performed by the same person in several tax systems during the tax year, the income earned should be subject to taxation in all countries (as countries where the source of income is located) where an employee 'physically' performed work, even though they used software and applications 'installed' on servers located in other countries.

In turn, according to the second interpretive approach, digital nomads 'perform' their work using software available remotely from a country other than the country of their physical residence. What weights in favour of this approach is a dynamic interpretation of the concept of 'work performance'. It is based on the paradigm of work effects, not manual activities leading to them. In this understanding, the source of income is located where the effect of human activity occurs. In other words, it is about economic, and not just purely territorial, understanding of the place of work in the case of cross-border remote work.

That is to say, the use of a historically developed understanding of the 'place of work' for the purposes of tax treaties – where the place of an employee's physical presence and the place of effects of their work were closely related (which, obviously,

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42 R. Lipniewicz, op. cit., p. 315.

43 A. Jagoda, M. Klimczak, *Praca jako zasób – pojęcie pracy i jej znaczenie w naukach ekonomicznych*, "Acta Universitatis Nicolai Copernici, Ekonomia" 2011, 402, p. 157.

44 G. Beretta, *"Work on the Move": Rethinking Taxation of Labour Income under Tax Treaties*, "International Tax Studies" 2022, 2, p. 11.

still applies to many traditional activities, e.g. industrial production, crafts, etc.) – may lead to an allocation of income for tax purposes between the countries concerned (residence and source) that is inconsistent with the purpose of tax treaties. The allocation resulting from the availability of digital tools for remote work enables geographical (physical) separation between the place of work and the place where effects of this work are 'consumed' (used) (i.e. the location of the employer), which 'intensifies the already difficult problem of sorting out how to tax cross-border employment arrangements.'[45]

One should agree with an opinion that 'the strong link of physical presence for individuals in international tax rules is a nexus in need of change.'[46] The OECD Model Tax Convention (which bilateral tax treaties are based on) seems to insufficiently consider the ongoing digital transformation in the area of cross-border model of remote work.

The commonly adopted 'physical presence' paradigm properly addressed the issue of cross-border taxation of income from employment in the 'pre-digital' times, where it was an easy-to-verify factual factor based on which tax treaties grant the country of the (physical) place of work the competence to put tax on employees who are tax residents of another country. Due to doubts raised with regard to the understanding of the 'place of work' criterion regarding the activity of digital nomads, it seems reasonable to propose the development of a new tax nexus, which would be more suited to the nature of cross-border remote work, combined with a frequent change of tax systems applicable in countries where travelling workers 'physically' abide.

However, given many years of discussions and (still unfinished) negotiations as part of the OECD's Inclusive Framework under the Base Erosion Profit Shifting project launched in 2013 regarding the taxation of multinational corporations' income from 'digital activities,' reaching an international compromise on a new 'nexus' addressed to digital nomadism can be a very difficult task. Hence a bridging solution, namely a modification of Article 15(1) of the OECD Model Tax Convention. It consists in introducing a minimum period (e.g. 30 days) of traditionally understood work performance ('physical presence') for remote workers moving between tax systems, which, if not exceeded in a given country, would not result in the need to pay tax in the country of residence and work performance. In such a situation, the only country authorized to collect tax (until the residence threshold is exceeded) would be the country of tax residence of a digital nomad.

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45 D.R. Agrawalt, K.J. Stark, *Will the Remote Work Revolution Undermine Progressive State Income Taxes?*, "CESifo Working Paper" 2022, 9805, p. 69.

46 H. Niesten, *Frontier Workers' Tax and Social Security Status in Europe – Optimizing the Legal Status in a Changing Landscape*, "International Tax Studies" 2022, 10, p. 18.

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There is also a 'technical' demand, namely the shortening (with regard to the seconded workers providing cross-border remote work) the period of 183-day stay in a country other than an employee's country of residence in order to grant the country of residence the right to put tax on income from employment. This demand does not require fundamental changes in the concept of a 'nexus' connecting (for tax purposes) an employee with a country where work is performed in the traditional sense (meaning that an employee is physically present when performing their duties). This would, in my opinion, be a fairer model of the division of tax powers between a taxpayer's country of residence and the country where – as part of secondment by an employer – work is performed under conditions of frequent changes of the country of residence by digital nomads travelling during their secondment.

It should be noted in this context that 'some digital nomad visa programmes (such as those offered by Bermuda and Malta) offer an exemption from paying income taxes in the worker's destination country.'[47] It does not, however, solve the systemic risk of double taxation and improper allocation of taxable income between countries.

Conclusion

The interpretative doubts described herein make 'digital nomads potentially face extreme legal uncertainty when it comes to their tax liability and that of their employer.'[48] Employees who work remotely from abroad may find themselves in a situation in which their income will be subject to double taxation. This may lead to long-term and costly disputes between employees and the tax authorities of the countries that will exercise their tax powers. Depending on how foreign income is taxed in a given country, an employee may also be required to file two separate tax returns, perhaps at various times due to differences in tax return filing deadlines in each country.[49]

The noticeable risk of double taxation of digital nomads' income from remuneration, as well as the risk of non-taxation of such income in any country (tax avoidance), justifies the demands for changes in the provisions of international tax law (tax treaties) in relation to cross-border work provided by digital nomads. These risks are a consequence of regulatory mismatch of provisions of double taxation avoidance

47 K. Hooper, M. Benton, *The Future of Remote Work. Digital Nomads and the Implications for Immigration Systems*, Migration Policy Institute 2022, p. 11.

48 Z. Rasnača, op. cit., p. 201.

49 European Economic and Social Committee, op. cit., p. 1.

agreements, which are based on the OECD Model Tax Convention with its conceptual roots in the pre-WWII period. The current wording of the OECD Model Tax Convention was developed in the pre-digital times, when manufacturing activity was a dominant form of economic activity (and, consequently, the nature of work performed by employees). The authors of model solutions could not have imagined a situation in which work is performed remotely, without the need for an employee to be physically present at the workplace organized and supervised by an employer.

This justifies a demand for adapting the provisions of both the OECD Model Tax Convention as well as tax treaties to new realities. Digital nomads, among other recent phenomena, embody these realities. The point is that the distribution of tax powers between countries interested in taxing their income from remuneration would be recognized as fair by individual countries and would guarantee this group of employees the certainty and convenience of international taxation rules.

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