

## The Offshore Taxation Review

# THE INTERPRETATION OF DOUBLE TAXATION CONVENTIONS: RESIDENCE OF DUAL RESIDENT AND TEMPORARILY NON-UK RESIDENT INDIVIDUALS

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## **1 The Residence of Individuals**

### **1.1 Dual Residence**

An individual can sometimes be resident in two (or more) states. If there is a double taxation treaty between the states, it will usually provide a mechanism for determining in which of those states he is deemed to be resident for the purposes of the convention. Problems of dual residence could arise where an individual ordinarily resident in the UK spent a limited period of time resident in some other country, particularly in order to realise substantial capital gains. If he never ceases to be ordinarily resident in the UK, he has always been in principle still liable to UK capital gains tax on those gains. In such a case, however, an appropriately worded double taxation treaty can confer an exemption from the UK charge.

### **1.2 Temporarily Non-UK Resident Individuals**

The UK Finance Act 1998 has introduced into the Taxation of Chargeable Gains Act 1992 a new section 10A, "temporarily non-resident individuals", which, broadly speaking, charges to UK tax certain capital gains of individuals who cease to be resident or ordinarily resident in the United Kingdom for less than five years of

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assessment. It does so by deeming such gains to be gains of the year of return. It is accepted, clearly, that such a charge can continue to be overridden by a double taxation treaty.<sup>2</sup> It thus becomes more important than ever to ascertain when an individual is protected by a double taxation treaty on the grounds that he is, for the purposes of the treaty, a resident only of the Contracting State other than the UK.

## 2 Interpretation of Double Taxation Conventions

### 2.1 A Trap for UK Advisers

In this article, I shall also take the opportunity to illustrate a point which has not been sufficiently appreciated in the common law world,<sup>3</sup> certainly in the world of UK tax advisers. The techniques of interpretation of an international convention and the legitimate aids to its construction are very different from those appertaining to a UK statute. If one approaches such a convention without wearing heavily correcting spectacles, one is likely to come a cropper. That which is held to be the true construction can sometimes be bizarre, if not downright incredible, to the common lawyer. To parody the words of the ancient Greek tragedian:

“Many things God makes to be  
Past Hope or Fear.  
The Construction men looked for  
Cometh not  
And a Construction was there  
Which no man thought.  
So hath it happened here.”

### 2.2 *Memec plc v IRC*

#### 2.2.1 The Decision

The principles of construction are laid out in a recent decision of the Court of Appeal, *Memec plc v IRC* [1998] STC 754.<sup>4</sup> Although that case was not concerned with personal taxation but with the right of an English company to claim under the Anglo-German treaty a credit for underlying tax in respect of a dividend paid by its German

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<sup>2</sup> Section 10A(10).

<sup>3</sup> Or in Scotland which, while technically a civil law jurisdiction, has in general come to share a common approach to statutory construction with other parts of the UK.

<sup>4</sup> While I represented the taxpayer, the canons of construction were agreed by both sides. The difficulty came in applying them!

subsidiary,<sup>5</sup> the principles are applicable to the interpretation of double taxation conventions generally.

It is one thing for an English judge to pay lip service to foreign canons of construction. It is another thing for him to apply them. Although *Memec* is not the first case in which the principles have been formally acknowledged in an English court in a double taxation convention case, it is, in my view, the first time they have really been acted on so as to produce a result which would have been quite impossible if one had regard only to English canons of construction. The taxpayer's argument depended on construing the definition in Article VI, which referred merely to 'the term "dividends" as used in this Article'<sup>6</sup>, as extending to the whole of the Convention. The argument in favour of a literal construction was, if one had regard merely to the principles of English law, overwhelming. The argument against such a construction was, necessarily and unsurprisingly, extremely complex and sophisticated. Suffice it to say that it was accepted by two judges, Robert Walker J, as he then was,<sup>7</sup> and Sir Christopher Staughton<sup>8</sup> and rejected by the other two judges, Peter Gibson and Henry LJ.

### 2.2.2 The Canons of Construction

A full discussion of the principles of interpretation of international conventions in general and of double taxation conventions in particular is so complicated as to be beyond the scope of this (or, indeed, any) article. The judgments in *Memec* in the Court of Appeal contain the latest statements by that Court and are accurate and illuminating, if not exhaustive.

Peter Gibson LJ said:<sup>9</sup>

"Mr Venables rightly cautioned us against interpreting the convention as though it had been drafted in Lincoln's Inn. He and Mr Henderson were at

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<sup>5</sup> As the German company was a member of a German *stille gesellschaft* or silent partnership, the case also raised fundamental questions of the UK taxation of partnerships and in particular their transparency. At the risk of appearing tendentious, although the Court of Appeal's decision is now authoritative in the case of a German silent partnership, it has left the law on the taxation of other types of foreign partnership in a state of confusion, a confusion the House of Lords has declined to dispel.

<sup>6</sup> Italics supplied.

<sup>7</sup> Now Robert Walker LJ, a judge of the Court of Appeal.

<sup>8</sup> Formerly Staughton LJ, now a retired member of the Court of Appeal.

<sup>9</sup> At page 765.

one in regarding the statement by Mummery J in *IRC v Commerzbank AG* [1990] STC 285 at 297-298 as correctly summarising the approach to be adopted. That judge warned against a literal interpretation, particularly where it would be inconsistent with the purposes of the provision or treaty in question. He said that interpretation should take account of the fact that a convention is not designed to be construed exclusively by English judges but is addressed to a wider judicial audience. I would add to that comment that in the case of a double taxation agreement the judicial audience is in addition to the judges found in the constituent parts of the United Kingdom only the judges to be found in the courts of the other contracting party. It is not to be assumed that the convention is addressed to a wider international audience than that. Mummery J also referred to the general principle of international law now embodied in art 31(1) of the 1969 Vienna Convention on the Law of Treaties (Vienna, 23 May 1969; TS 58 (1980); Cmnd 7964) that a treaty should be interpreted in good faith and in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”

In addition, Peter Gibson LJ himself went on to state that Robert Walker J had “found of some help a decision of the Bundesfinanzhof<sup>10</sup> (1982) BFH 22 HFR 301.” He “also found of some help the views expressed in Klaus Vögel on Double Taxation Conventions (2nd edn, 1990) p 1064.”<sup>11</sup> He admitted that “the views of an acknowledged expert in this field, as Professor Vögel undoubtedly is, deserve respect”. Peter Gibson LJ concluded that Robert Walker J “rightly said that those two matters which he found of some help were not determinative.”

Sir Christopher Staughton stated:

“A decision by the courts of one state which is party to a bilateral treaty is not, in my judgment, as compelling on the courts of the other party as in the

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<sup>10</sup> [RV’s footnote] The (West) German federal appeals court for tax cases.

<sup>11</sup> [RV’s footnote] The extracts from Professor Vögel’s learned work which were cited to the Special Commissioner in *Memec* were described by him as “verging on the incomprehensible”: [1996] STC 1336 at page 1341. The main difficulty is that, although it is translated into a sort of English, the thought and style remain uncompromisingly Germanic. The size of the work and the sheer bulk of the information it contains do not make it easy going. When I first read it, my view was very much that of the Special Commissioner. My present view is that, while it can be very hard work, it is well worth making the effort. Once one has mastered the Teutonic English and learned how to translate it into idiomatic English, one discovers within it not only enormous learning and intellect but even some intellectual subtlety.



case of a multilateral treaty. But there is in effect a multilateral aspect here. At least one other treaty (between Germany and Switzerland) has to our knowledge similar wording; and it is very probable that a great many others do, since some such wording is to be found in the Model Tax Conventions on Income and on Capital of the Organisation for Economic Co-operation and Development of 1963 and 1977.

“It seems to me very likely that continental courts generally, like the German court already mentioned, would reject the semantic restriction attributed to the words ‘as used in this Article’, and would hold that the definition could be relied on elsewhere in the convention. In the interest of uniformity, I would do the same.”

The submission I made in my Skeleton Argument as to the interpretation of a convention based on an OECD Model Convention was also common ground, although not referred to expressly in the judgments:

“As the Anglo-German Convention was clearly based on the OECD 1963 Model Convention, the OECD Commentary is a legitimate aid to its construction. See *Sun Life Assurance Company of Canada v Pearson* (1986) 59 TC 250 at 310B (Vinelott J) and 331 C-D (CA).”

By implication, Peter Gibson LJ also accepted my (uncontroversial) submission that in construing the OECD Model Convention the French text was equally as authoritative as the English one.<sup>12</sup>

### 3 The OECD Model Convention and Commentary

Very many double taxation conventions, especially ones concluded by the UK, are based on the OECD Model Convention. As noted, the official Commentary on that Model is, in both the English and French text, a legitimate aid to construction of the Model and hence of any Article contained in a convention based on the Model. The problem is that there can be substantial conflicts between what appears to, say, an Englishman, to be the meaning based on the plain wording of the Convention and the meaning it is intended to bear as deduced from the Commentary.

Diplomatic considerations require that an organisation such as the OECD must have employees from many countries. In practice, it would not be surprising if some sort of quota system is going to apply, formal or informal. Absolute quality cannot be the sole criterion of selection. While I know nothing of the manner of appointment of

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At page 776, before the first divide.

employees of the OECD, the practice of the United Nations and the EC Commission is well known. When one considers that United Kingdom English is not the native language of many of the employees, one should not be too surprised at the results. When, further, one bears in mind that the drafting of a Model or Commentary will be a diplomatic exercise, one should not be too surprised to find something less than complete consistency. While this warning does not make life any easier for the adviser trying to interpret a convention, it does at least advert him to the danger.

#### **4 OECD Model Treaty Article 4**

##### **4.1 The Article**

Article 4 of the OECD Model Treaty is headed “Resident”. It is widely adopted with no or minimal modification. It is an excellent illustration of how apparently plain language can bear a quite different meaning if one has regard to the OECD Commentary. It provides:

- “1 For the purposes of this Convention, the term “resident of a Contracting State” means any person who, under the laws of that State, is liable to tax therein by reason of his domicile, residence, place of management or any other criterion of a similar nature. But this term does not include any person who is liable to tax in that State in respect only of income from sources in that State or capital situated therein.
- 2 Where by reason of the provisions of paragraph 1 an individual is a resident of both Contracting States, then his status shall be determined as follows:
  - (a) he shall be deemed to be a resident of the State in which he has a permanent home available to him; if he has a permanent home available to him in both States, he shall be deemed to be a resident of the State with which his personal and economic relations are closer (centre of vital interests);
  - (b) if the State in which he has his centre of vital interests cannot be determined, or if he has not a permanent home available to him in either State, he shall be deemed to be a resident of the State in which he has an habitual abode;
  - (c) if he has an habitual abode in both States or in neither of them, he shall be deemed to be a resident of the State of

which he is a national;

- (d) if he is a national of both States or of neither of them, the competent authorities of the Contracting States shall settle the question by mutual agreement.

- 3 Where by reason of the provisions of paragraph 1 a person other than an individual is a resident of both Contracting States, then it shall be deemed to be a resident of the State in which its place of effective management is situated.”

#### 4.2 The “First Eleven” Article

No discussion of this topic can ignore the important article ‘Dual Residence of Individuals: the Meaning of the Expression in the OECD Model Convention’ by Dr John F Avery Jones and ten others published in two instalments in the *British Tax Review* 1981, pages 15 and 104. I shall refer to these authors as “the First Eleven”. While this most learned article contains references to the municipal laws of several countries and to a certain number of rulings and judicial decisions, one is left with the feeling, as so often in international taxation, that, while they throw some modest light on the topic, they cannot be regarded as conclusive or authoritative and are sometimes obviously irrelevant or wrong.

It is stated in the introduction:<sup>13</sup>

“Article 4 is a scheme to reduce the conflict between the internal law definitions of residence, preferring more permanent connections, such as permanent home, to residence based merely on length of stay ...”

The reader can easily judge for himself, from the quotations from the Commentary which follow, particularly in regard to the concept of “habitual abode”, the extent to which this statement in fact accords with the published views of the OECD.

The authors state<sup>14</sup> that the “1943 Mexico and the 1946 London, Draft Conventions of the League of Nations appears to be the immediate predecessors of Article 4 of the OECD Model”. It would, in my view, be very dangerous to conclude from that that the OECD Model Article 4 can be interpreted as though it was in the form of the earlier drafts. The draftsman of the OECD Model has used different terminology. He may have done so for a very good reason.

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<sup>13</sup> Page 17, first divide.

<sup>14</sup> At page 17, second divide.

The authors conclude that the expressions in Article 4(2) are to be given a general international law meaning. The general rule, contained in Article 3(2) of the Model, that an undefined term is to bear the meaning it has in the law of the State applying the treaty, is thus overridden.<sup>15</sup> I respectfully agree with their conclusion and reasoning.

### 4.3 “Permanent Home Available to Him”

#### 4.3.1 Importance

What is a “permanent home”? This question will often be vital. For, provided a person has a permanent home in Contracting State A and none in Contracting State B, he is resident in Contracting State A and that is the end of the matter. There is to be no enquiry into the place where his centre of vital interests is or into any habitual abode of his.

It is clear that a person can have more than one permanent home available to him. Hence, the test is certainly not the common law one of domicile. It is also clear, as a matter of simple logic and plain language, that one can have an habitual abode in a State without having a permanent home available to one in that State.<sup>16</sup>

#### 4.3.2 The OECD Commentary

The OECD Commentary on Article 4(2) starts with some general points:

“9 This paragraph relates to the case where, under the provisions of para 1, an individual is a resident of both Contracting States.

“10 To solve this conflict special rules must be established which give the attachment to one State a preference over the attachment to the other State. 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.”

The reader will judge for himself the extent to which Article 4(2) achieves the

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<sup>15</sup> As this rule can notoriously work in very arbitrary ways, it should be one which is easily displaced.

<sup>16</sup> The OECD Commentary manages to obscure, rather than elucidate, even that point! See below.

(laudable) purpose of laying down preference criteria which are “of such a nature that there can be no question but that the person concerned will satisfy [them] in one State only”. In my view, it fails lamentably to make very much clear at all. The reader might also ask himself how one ascertains when it is “natural” for the “attachment” of an individual to a State to be such that the right to tax him devolves on that State. Diplomatic drafting indeed!

The Commentary continues:

- “11 The Article gives preference to the Contracting State in which the individual has a permanent home available to him. This criterion will frequently be sufficient to solve the conflict, eg where the individual has a permanent home in one Contracting State and has only made a stay of some length in the other Contracting State.
- 12 Sub-paragraph (a) means, therefore, that in the application of the Convention (that is, where there is a conflict between the laws of the two States) it is considered that the residence is that place where the individual owns or possesses a home; this home must be permanent, that is to say, the individual must have arranged and retained it for his permanent use as opposed to staying at a particular place under such conditions that it is evident that the stay is intended to be of short duration.
- 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).”

When does a period of time spent in a State amount merely to a stay of some length” in that State? When it is a three-month holiday? Or a visit on a three-year contract of employment? It seems that “permanent” does not mean “permanent”. The contrast is with a “stay [which] is intended to be of short duration”. How short is “short”, we are not told. We cannot even be sure from the Commentary that a home intended to be kept for more than a short duration is a “permanent” home, even when the individual has arranged and retained it for his use for more than a short duration, since no express explanation is given of what is meant by “permanent” use.

As a matter of logic, one can apparently have a permanent home which is not an habitual abode.<sup>17</sup> That also suggests something a great deal less than “permanent” in the accepted sense of the word. Perhaps the draftsman had in mind the Latin root *permanere*, meaning “to stay continuously” as opposed to a mere transitory stay or, possibly, intermittent stays. If so, his choice of “permanent” was particularly unfortunate, as he has overlooked several hundred years of the development of the meaning of the term in the English language.

The Commentary envisages that a “permanent” home is one which the propositus “owns or possesses”. If one construed this as an English statute, one would conclude that any form of ownership or possession was enough. A leasehold interest, even a very short one, is still a form of ownership. Given that paragraph 13 of the Commentary makes it clear that a rented furnished room is enough, it would appear that the propositus need not even have any interest in the land (as opposed to merely contractual rights).<sup>18</sup> Paragraph 18 of the Commentary on “habitual abode”, discussed below, where it is stated that a person who moves from hotel to hotel in a State (as well as in others) can have an “habitual abode” in that State, also provides indirect support for the view that a permanent home does not have to be that permanent.

Possession does not connote any particular right to possess. Possession as an exclusive licensee of, say, a company or a trust would suffice. On the other hand, it is possible to inhabit a property without having in law “possession” of it or even being the occupier of it. In my view, these technical considerations are not relevant in the context of the Commentary.

If a person owns a home but does not possess it, for example because he has leased it to a stranger for a term of years, is it still his permanent home? While arguably it could be, if it was his main home before the lease and is intended to be such after its expiration, the requirement that the permanent home should be “available to” him, would in such a clear case put it out of consideration for Article 4(2) purposes.<sup>19</sup>

The First Eleven, in their discussion of the meaning of “available to him”, consider the case where a person does not currently have the right to occupy what has been his permanent home because he has rented it out for a year. They rightly criticise a Canadian decision that the taxpayer did have a permanent home in Canada because he would be able to occupy it on the termination of the lease.

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<sup>17</sup> There is good reason to suppose that the phrase “habitual abode” does not refer to a physical dwelling, but is an abstract concept. See below.

<sup>18</sup> I discuss the views of the First Eleven on this point below.

<sup>19</sup> Of course, if the lease were to a “friendly” party and the home were still available for use or occupation by the owner, different considerations would arise.

The First Eleven also state, in the context of this discussion, that “the house must be available between visits for it to be relevant for this purpose.” I would respectfully ask whether this can, in its unqualified form, really be an invariable test. Suppose a man owns a house in London which is his principal residence but also owns a home in the Mediterranean which is a permanent home in relation to him because it is kept available for his immediate use throughout the year. Suppose that at Christmas and in the summer he leases his London home for two or four weeks, so that it is not available to him during that period. Can it be said that on that account it is not a permanent home in relation to him?

Given that mere ownership cannot be a relevant criterion, the Commentary is in my view to be interpreted as meaning that what counts is possession in a very untechnical sense. It would appear to be sufficient that “living accommodation [is] available ... for his use” on a “permanent” basis.<sup>20</sup> While the Commentary itself does not in terms go that far, it seems inconceivable that a home I share with my wife and children should not be their permanent home simply because they have no rights over or respecting it. The First Eleven share this view, citing a ruling of the Swiss Federal Tax Administration.<sup>21</sup>

Does the fact that a home is used only for a limited purpose mean that it cannot be a permanent home? I do not so read paragraph 13 of the Commentary. If I rent a holiday cottage in Provence for certain weeks every year, it will not be my permanent home. Similarly, if I regularly stay in the same hotel when I am on business in Florida or, if I am a student, in the same room in my college during term time. That is because the accommodation is not available to me continuously throughout the year.<sup>22</sup> Yet if I own a holiday home in Provence, at least if I do not rent it out when I am not there, or find it cheaper or more convenient to keep a house in Florida for my use whenever I am on a business trip there or if, being a student, I rent lodgings off the campus which are available to me all year round, then, in my view, there is nothing to stop any of these being a permanent home.

The First Eleven take a different view.<sup>23</sup> After citing the OECD Model Commentary paragraph 12, “this home must be permanent, that is to say, the individual must have arranged and retained it for his permanent use as opposed to staying at a particular place under such conditions that it is evident that the stay is intended to be of short

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<sup>20</sup> cf UK Taxes Act 1998 section 336(3).

<sup>21</sup> Page 28, second divide.

<sup>22</sup> Whether a year is the appropriate period one should take into account is itself an open question. See below.

<sup>23</sup> At page 25.

duration”, they continue:

“A similar statement is contained in a ruling of the Swiss Federal Tax Administration in relation to the Switzerland-Germany treaty (1971), in which a permanent home is described as being any form of home that is at a person’s disposal for an extended period of time in which he is actually living regularly and not staying only occasionally for the purposes of recreation, health treatment, study, sport etc. [Footnote] See also New York State Official Computation of Codes, Rules and Regulations, Regulation § 102.2 (e) relating to “permanent place of abode”: “however, a mere camp or cottage, which is suitable and used only for vacations, is not a permanent place of abode.” [end of footnote] The exclusion of houses used for recreation etc. is in accordance with the OECD Model’s Commentary’s reference to the exclusion of a home available “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).”<sup>24</sup> “permanent” is used here objectively in contrast to temporary and not subjectively in the sense of a place where the taxpayer intends to spend the rest of his life.”<sup>25</sup>

I would respectfully dissent from the view that a place where one stays “occasionally for the purposes of recreation, health treatment, study, sport etc.” cannot be a permanent home. What the OECD Commentary in my opinion means is that a place taken for a short period, e.g. a house in Tuscany rented for one summer only, cannot constitute a permanent home. If, however, one owns the house and it is continuously available for a long enough period, then it can and normally will be a permanent home. The fact that stays are intermittent will not matter. A Lord Justice of Appeal who stays five nights a week in a modest rented flat in Lincoln’s Inn and spends merely a number of weekends at his palatial country house where he reads novels, hunts, exercises and generally relaxes, would be amazed if he were told the latter was not a permanent home of his.<sup>26</sup> If, nowadays, he chose a country home in the Pas de Calais because it was easier to reach than a home in Derbyshire, the position would be no different.

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<sup>24</sup> [RV’s footnote] at the end of paragraph 13.

<sup>25</sup> At the end of the quotation, there is included, no doubt through a printer’s error, closing quotation marks, which are here omitted. A cursory reading of the BTR original might give the erroneous impression that the last sentence is a quote from the Commentary, whereas it is simply the view of the First Eleven. Apart from the one footnote included directly in the quotation, I have not here reproduced other footnotes.

<sup>26</sup> And just imagine his reaction if the UK Inland Revenue were to deny him main residence relief from capital gains tax on the sale of the country home!



The New York State regulation quoted goes to a different issue. I quite agree that a “camp or cottage which is suitable and used only for vacations” may well fail to constitute a “permanent home”, but that will be because it is not continuously available throughout the year. A clear case would be where the home were uninhabitable, say, in winter, because it had no heating or electricity or because the roads to it were impassible. No doubt, difficult questions of fact and degree will arise. The propositus might consider it unthinkable to visit his beach house on Fire Island in February or his gingerbread cottage in Key West in July, yet would that fact alone prevent either of them from being a permanent home?

Where I do agree with the First Eleven is in their statement:<sup>27</sup> “It is impossible to generalise about holiday homes, which may vary from a small bungalow to a large house ...; the matter must be one of degree...” However, their next statement is not so true in 1999 as it was in 1980: “and the argument will in most cases be academic as the next test, the centre of vital interests, is unlikely to decide the issue in favour of the country of the holiday home.”

I agree with the First Eleven when they state that where a person inherits an empty house which he never intends to use, this would not be a permanent home, even if it is continuously available for his use, as it is not his home at all. The same result must follow if the house is fully furnished. They also consider the position where a person has left what was undoubtedly a permanent home and has moved into another permanent home and has been unable to sell or let the old one. They seem to regard the crucial test as whether the taxpayer could live in the house. While I agree that if he cannot, it cannot be a permanent home of his, yet the converse does not follow. If he has abandoned it as his home and has no intention of living there, then it is not his home at all and it is irrelevant that it is kept furnished and heated so that it can be preserved and presented more effectively to purchasers or tenants.

As regards “permanent home available to him”, the First Eleven make the point that the French version of “permanent home” is “un foyer d’habitation permanent”. The French text is equally authoritative in construing the Model as is the English text.<sup>28</sup> They rightly conclude that the words “home” and “foyer” appear “to be used deliberately in contrast to a place, such as a house or an apartment ... Home .. conveys “the seat of domestic life and interests” and is much more than a mere place, and *foyer* conveys the same meaning, being the fire around which the family are gathered.” The learned authors consider that “it might be argued against this proposition that the

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<sup>27</sup> Page 26, before the second divide.

<sup>28</sup> While “foyer” is literally a hearth, the expression is used metaphorically. The *Larousse Unabridged Dictionary* translates “Rentrer dans ses foyers” as “to go back to one’s own country; [domicile] to return home”, “foyer conjugal” as “family home”, and “foyer fiscal” as [administration, i.e. government] “household”.

OECD Model's Commentary does not make this distinction: 'Any form of home may be taken into account (house or ... apartment belonging to or rented by the individual, rented furnished room).'" I do not myself see the force of this objection, possibly because my social background is rather different from theirs. If one has in mind only High Net Worth Individuals, the reference to a rented furnished room may no doubt be mystifying. To those of us to whom a rented furnished room has been a home, it is not. There must be very many migrant workers who have had to leave their wives and families behind in a home in one country and live in a rented furnished room in another country where they are able to find work. They have two homes in a very real sense.

The learned authors point out that the French Ministry of Foreign Affairs in interpreting "permanent home" in the France-Switzerland treaties stated in January 1974: "By the use of the word "foyer", emotional and family links are called into play." They possibly suggest that a permanent home may be a place where a taxpayer habitually lives, with his wife and children, if any. I would very much doubt that this is an accurate interpretation of Article 4 of the Model, although given the quality of the drafting one cannot be dogmatic. The presence or absence of a wife and children may no doubt be relevant to the question of centre of vital interests, but that is another matter. If a man keeps his wife and daughter in a house in London and maintains another house in Malta which he visits only with his lover, it seems to me that the latter is still a permanent home of his.

#### 4.3 Centre of Vital Interests

After stating the uncontroversial in paragraph 14, the Commentary continues:

- "15 If the individual has a permanent home in both Contracting States, it is necessary to look at the facts in order to ascertain with which of the two States his personal and economic relations are closer. Thus, regard will be had to his family and social relations, his occupations, his political, cultural or other activities, his place of business, the place from which he administers his property, etc. The circumstances must be examined as a whole, but it is nevertheless obvious that considerations based on the personal acts of the individual must receive special attention. If a person who has a home in one State sets up a second in the other State while retaining the first, the fact that he retains the first in the environment where he has always lived, where he has worked, and where he has his family and possessions, can, together with other elements, go to demonstrate that he has retained his centre of vital interests in the first State."

This is by and large unexceptionable. Incidentally, the last sentence, where the word “permanent” is not even used, suggests that it is relatively easy for a home to qualify as a “permanent” home.

The interpretation of “centre of vital interests” is beyond the scope of this article. The First Eleven discuss it at pages 104-110.

#### 4.4 “Habitual Abode”

The Commentary continues:

“16 Sub-paragraph (b) establishes a secondary criterion for two quite distinct and different situations:

- (a) the case where the individual has a permanent home available to him in both Contracting States and it is not possible to determine in which one he has his centre of vital interests;
- (b) the case where the individual has a permanent home available to him in neither Contracting State.

Preference is given to the Contracting State where the individual has an habitual abode.

“17 In the first situation, the case where the individual has a permanent home available to him in both States, the fact of having an habitual abode in one State rather than in the other appears therefore as the circumstance which, in case of doubt as to where the individual has his centre of vital interests, tips the balance towards the State where he stays more frequently. For this purpose regard must be had to stays made by the individual not only at the permanent home in the State in question but also at any other place in the same State.”

How does one interpret the words “the fact of having an habitual abode in one State rather than in the other appears therefore as the circumstance which, in case of doubt as to where the individual has his centre of vital interests, tips the balance towards the State where he stays more frequently”? In my view, the authors of the Commentary are trying to say, albeit in convoluted English, “where a person has a permanent home in more than one State, the State in which he has an habitual abode is that where he stays more frequently”. The First Eleven took a different view. See below.

State of habitual abode is, then, to be determined by frequency of stay in a State,

whether or not at one's permanent home in that State. This makes sense on the basis that "habitual abode" is an abstract concept, rather like ordinary residence, as opposed to a physical abode, such as 7 Acacia Avenue, where the propositus habitually lives. The French text supports this: "où elle séjourne de façon habituelle" ("where the person habitually lives").<sup>29</sup> This is very much the view of the First Eleven, at page 113. If this is what the draftsman meant, it is an awfully obtuse way of stating it. Article 4(2)(b) envisages that a person can have an habitual abode in more than one country, yet, if the Commentary is right, this could come into play only where he spent exactly the same amount of time in two countries in which he had a "permanent home available" to him. Moreover, the different wording in the second situation, where he has a permanent home in neither State, gives room for argument that the authors of the Commentary did not really mean what they have apparently said. See below.

This interpretation of "habitual abode" gives no weight to the nature or quality of the permanent home in each state. Suppose a person has in London a substantial home which on any view is his main residence. He has a pied-à-terre in Paris where he spends weekends. He has a holiday home in Provence in which he passes much of the summer. He spends a fair amount of the winter in a home in Florida. One year,<sup>30</sup> he may have to spend a substantial time litigating in Hong Kong and may undertake a round-the world trip as a holiday. It may well be in that year that he spends more time in France than in England, yet it would be an abuse of the English language to say that he has an habitual abode in France but not in England.

In practice, it will normally be possible to avoid such a ridiculous conclusion by deciding his residence status under Article 4(2)(a), by applying the centre of vital interests test. Such, however, will not invariably be the case. Indeed, Article 4(3)(b) (and paragraph 16(a) of the Commentary) expressly contemplates such a situation.

The First Eleven state, at the bottom of page 113: "The commentary to the OECD Model is not helpful in explaining [the] meaning of ["habitual abode"] as it merely uses the same expression." I quite agree that no one could call this section of the Commentary "helpful", in that it merely complicates the quest in search of the true construction of the article. On the other hand, in my view, one cannot, regrettably, say that it is not *relevant*.

The First Eleven state, at page 116, first divide:

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29 They suggest at page 113, after the last divide, a plausible explanation why the English version of Article 4 is so peculiar: "Perhaps the French was the original language and the translation resulted in somewhat quaint English."

30 As to the period of comparison, see below.

“According to the OECD Model, the correct way of applying the test is to ask of each State whether the taxpayer has an habitual abode there, just as one asks whether he has a permanent home. The Commentary [paragraph 17 (“Tips the balance towards the State where he stays more frequently”) and 19 (“the Comparison”)]<sup>31</sup> on the other hand suggests that it is a test more in the nature of the State with which his personal and economic relations are closer, that is to say it is a comparative test: in which State is his abode more habitual?” This is probably an unintended result of the commentary which goes on to say: “The comparison 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...*”<sup>32</sup> The passage to which we have added italics is, it is submitted, the correct test to be applied under paragraph (b), and the reference to it being a comparison is misleading. This interpretation is also supported by the fact the OECD Model goes on to deal with the position of the taxpayer having an habitual abode in both States; if the test merely involved a comparison of the time spent in each State this could occur only when the time spent in each was identical or nearly so, which does not seem likely to have been the intention. It seems that by using the expression “habitual”, what is meant is whether living in each State is normal. [Compare the interpretation of normal expenditure as meaning habitual expenditure by the Court of Appeal in Northern Ireland in *A-G for N.I. v Heron* [1959] T.R.1. ...]<sup>33</sup>

I agree that the Commentary hardly reflects the text of the Article. As regards the second sentence in the above quotation from the First Eleven, I do not at all read the Commentary as being concerned at this point with one’s personal and economic relations, but with comparative length of stay. I read the words in paragraph 17 of the Commentary “in case of doubt as to where the individual has his centre of vital interests”, as referring simply to the fact that the habitual abode test in Article 4(2)(b) comes into play only where the centre of vital interests test in Article 4(2)(a) cannot resolve the problem. Likewise, I read paragraph 19 of the Commentary, set out below, as dealing only with the question over what period one determines in which of the States the individual has spent more time. I do agree with the force of the objection that the OECD Model contemplates that an individual can have an habitual abode in more than one State. Finally, the First Eleven suggest that “habitual” means “normal”,

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31 RV’s footnote: the words in square brackets are taken from a footnote to the First Eleven’s article at this point.

32 RV’s footnote: I have supplied the closing quotation marks as I believe they must have been omitted from the article as a printer’s error.

33 RV’s footnote: the words in square brackets are part of a footnote of the First Eleven at this point.

but cite no authority and give no reason for this. The mere substitution of one common and ambiguous word for another does not, in my respectful view, do much to resolve the problem. Now, one possible meaning of “normal abode” is the UK concept of “ordinary residence” - a concept itself not without its problems. The difficulty is that much of what “ordinary residence” involves is already catered for in the centre of vital interests test, the application of which will already, *ex hypothesi*, have been unsuccessfully tried, at least in the usual case where the individual has a permanent home in both States.

The Commentary continues, discussing the second situation at which Article 4(3)(b) is aimed:

- “18 The second situation is the case of an individual who has a permanent home available to him in neither Contracting State, as for example, a person going from one hotel to another. In this case also all stays made in a State must be considered without it being necessary to ascertain the reasons for them.”

The situation where a person spends long enough in a State and/or has sufficient other connection with it to make him resident in that State under its domestic law yet has no “permanent home available” to him must be very rare, if “permanent home” is interpreted as widely as the Commentary suggests. While the interpretation suggested produces a perfectly sensible rule in these unusual circumstances, it is straining the English language to the utmost to say of a person who wanders from hotel to hotel that he has an “habitual abode” in that State in which he happens to spend longer time in a particular period, especially when, *ex hypothesi*, he spends enough time in some other State to be resident there under its domestic law.

The second sentence could lay the foundation for an argument that in the case where the individual has a permanent home in both States it is necessary to consider the reasons for the stays in each State.

It will be appreciated that according to the Commentary, there need not be anything enduring about an “habitual abode”. While the answer to the important question “How permanent must a ‘permanent home’ be?” is left shrouded in obscurity, the Commentary does at least attempt to specify over what length of time one should determine where an individual has his habitual abode:

- “19 In stipulating that in the two situations which it contemplates preference is given to the Contracting State where the individual has an habitual abode, sub-para (b) does not specify over what length of time the comparison must be made. The comparison 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 and to determine also the intervals at which the stays take place.”

This paragraph brings to mind the old Latin tag about explaining *obscurum per obscurius*.<sup>34</sup> The first part of the second sentence is circular and the second part irrelevant. It tantalisingly raises a most important general point: “Over what period of time does one look to determine questions such as residence?” In my view, given that all jurisdictions of which I am aware impose taxes on an annual basis, a period of twelve months should be enough, especially given that the regular pattern of most people’s lives involves no more than a yearly cycle.

## 5 Conclusion

Article 4 of the OECD Model and the Commentary thereon are in a sorry state as regards the concepts of “permanent home available” and “habitual abode”. One is reminded of the old saying that a camel is an animal invented by a committee. It is, alas, unrealistic to suppose that the OECD Model and Commentary will ever be drafted otherwise than by a committee.

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<sup>34</sup> i.e. trying to elucidate an obscure point with an even more obscure explanation, a phenomenon commonly encountered in examination scripts of weaker candidates.