

Subject: International Taxation
(subject code: 353915001)

**Tax Jurisdictions, Administration,
and Taxing Rights (Week 3-Week 4)**

September 30, 2014

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Introduction – Domestic Tax System

- According to Adam Smith (*Wealth of Nations* published in 1776), 4 principles of taxation are:
 - ◆ **Equity** – ability to pay, taxable capacity
 - ◆ **Certainty** – know exactly what is being taxed, when to pay, and how much to pay
 - ◆ **Convenience** – payable at the time convenient to the taxpayer
 - ◆ **Economy** – reasonable enforcement and collection costs
- These 4 principles have been the foundation of most countries in developing their domestic taxation rules and systems.

Introduction – Domestic Tax System (Cont)

- Following Smith’s theory, each country or tax jurisdiction has right to:
 - Define the taxpayers
 - Define the tax scope
 - Set the tax rate
 - Determine the tax base

- In essence, the domestic law alone decides the connecting factors, namely:
 - Who can be taxed ? (“Tax Subject”)
 - What can each tax ? (“Tax Object”)
 - Residence Rules vs. Source Rules

- The study of international taxation, therefore, requires:
 - Knowledge of domestic tax laws of more than one country,
 - How they are applied in each country.

Tax Subjects & Tax Residence Rules

- In general, **residents** are taxable on their worldwide income (“unlimited” or full liability).
- A tax resident may be defined under the domestic tax rules, or defined by practice, or by court decision.
- By definition, a person who is not a tax resident under the domestic law is a **nonresident**.
- In general, nonresidents are only taxable on the income and gains within the country (“**limited liability**”), subject to exceptions.
- A person may be a “dual resident” – accordingly, conflicts may arise among jurisdictions.

Residence of Individuals

- The tax residence of individuals is normally decided on factors that can be determined by external observation.
- Generally the determination of “residency” it is based either on:
 - The “physical presence” in the country, or
 - The “facts and circumstances”
- The “physical presence” in the country – easy to apply and objective.
- The “facts and circumstances” – may be difficult and subjective.

Residence of Individuals (Cont)

Physical Presence Test

- Normally 183 days or six months in the fiscal year, or a 12-month period, or over a period of preceding years.
- Many countries use the actual “days of physical presence” method.
- Some prefer the “duration of activity” or the “period of the activity.”.
- In certain countries, the physical stay does not affect the tax residence, e.g. the Netherlands.

Residence of Individuals (Cont)

Facts and Circumstances Test

- The following “facts and circumstances” are often used to determine the tax residence of individuals:
 - Residence or home available
 - “Residence” or “Home” often implies a permanent dwelling place
 - “Residence” or “Home” – any property that the taxpayer has for his effective use in a “permanent way”
 - Intention to stay may or may not be relevant
 - May include holiday apartments but not hotel rooms unless they are rented permanently.

Residence of Individuals (Cont)

Facts and Circumstances Test (Cont)

- Economic, social or family ties (“center of vital interests”):
 - Subjective and determine from the taxpayers’ family, social, political and cultural links with a country
 - Broader than just the place where he/she resides/stays for any period, or has a home
 - E.g. Australia, Canada, New Zealand, etc.
- Permanent or principal residence, or habitual , usual or customary place of abode:
 - “Habitual” “usual” “customary” suggests “non-temporary” basis or residence.
 - E.g. Australia, Japan, New Zealand, and Singapore etc.

Residence of Individuals (Cont)

Facts and Circumstances Test (Cont)

- Intention to reside permanently:
 - The intention to reside permanently, or not on a temporary basis:
 - E.g. U.K.
- Official registration:
 - Persons whose names are in one country's population registers (e.g. for voting purposes) as tax residents.
 - E.g. Italy, the Netherlands
- Nationality:
 - The citizenship can affect the residence status in certain circumstances:
 - E.g. U.S., Korea

Residence of Individuals (Cont)

Facts and Circumstances Test (Cont)

- Immigration status:
 - The immigration or residence visa can influence the residence status.
 - The visa status may reflect the intention to reside permanently in a country.
 - E.g. the U.S., Australia, Canada.

Residence of Individuals (Cont)

Taiwan's Resident Rules for Individuals

- 中華民國境內居住之個人(所得稅法第7條)：
 - 在中華民國境內有住所，並經常居住中華民國境內。
 - 在中華民國境內無住所，而於一課稅年度內在中華民國境內居留滿183天。
- 非中華民國境內居住之個人：前項以外之個人。
- 司法院大法官議決釋字第198號，所得稅法第七條第二項之規定，乃以納稅義務人在中華民國境內有無住所為標準，故只須納稅義務人在中華民國境內有住所，並有經常居住之事實，縱於一課稅年度內未居住滿一百八十三天，亦應認其為「中華民國境內居住之個人」。

Residence of Individuals (Cont)

Taiwan's Resident Rules for Individuals (cont)

- 住所：申請戶籍遷入登記.....，即在我國境內設有住所。戶籍地乃多項權利義務法律關係之所繫，則無論係以久住之意思設定住所於該地，或因一時之目的居住於該地，依民法第22條規定該戶籍地即可視為住所，因此，縱於一課稅年度內未居住滿183天，仍應視為中華民國境內居住之個人。(95年11月30日最高行政法院95判1957號)

Residence of Individuals (Cont)

Taiwan's Resident Rules for Individuals (cont)

- 針對所§7II「中華民國境內有住所，並經常居住中華民國境內者」之認定原則
(財政部 101年9月27日台財稅字第10104610410號令)
 - 個人於一課稅年度內在中華民國境內設有戶籍，且：
 - 於一課稅年度內在中華民國境內居住合計滿31天。
 - 於一課稅年度內在中華民國境內居住合計在1天以上未滿31天，其生活及經濟重心在中華民國境內。
 - 生活及經濟重心在中華民國境內：
 - 享有健保、勞保、國民年金保險或農民健康保險等社會福利。
 - 配偶或未成年子女居住在中華民國境內。
 - 在中華民國境內經營事業、執行業務、管理財產、受僱提供勞務或擔任董事、監察人或經理人。
 - 其他。

Residence of Companies

- The residence of companies generally decided by either:
 - The place of incorporation or legal seat, or
 - The location of management or real seat..
- The place of incorporation or legal seat: in general the country of incorporation
- However, the “location of management or real seat” may not be the same as the “place of incorporation or legal seat”.
- The “location of management or real seat” may include, but not limited to:
 - The place where central management is located;
 - The place where its statutory seat is located;
 - The place where its business is conducted;
 - The place where its general meeting of shareholders is held; and
 - The place where its books and records are maintained.

Residence of Companies (Cont)

- The following will be considered under “the place of management” criteria:
 - Effective management
 - Central management and policy execution
 - Operational/day-to-day management and control
 - Location of real business carried out

- The OECD defines “effective management” as –
 - The place where key management and commercial decisions that are necessary for the conduct of the entity’s business are in substance made.
 - The place of the top management that makes the policy decisions and takes actions affecting the whole entity
 - An entity may have more than one place of management but I can only have one place of effective management at any one time.

Residence of Companies (Cont)

- In the case of conflict, the OECD provides a tie-breaker based on the place of *effective management* for dual resident companies.
- Some examples of domestic laws in determining corporate residency:
 - ◆ Incorporation or legal seat:
 - Incorporation or registration is the sole decisive factor: E.g. Japan
 - Incorporation or registration is one of the criteria, e.g. Thailand, Australia, New Zealand, Canada, the UK

Residence of Companies (Cont)

- Some examples of domestic laws in determining corporate residency (Cont):
 - Location of management or real seat
 - Location of management or real seat is the sole decisive factor: e.g. Hong Kong, Malaysia, Singapore
 - Location of management/control or real seat is one of the criteria: e.g. the U.K., Australia, NZ, Canada.
 - Other criteria:
 - Head office/Main office: e.g. Japan, Taiwan, Korea
 - Principal activity: e.g. Italy, the Netherlands
 - Nationality/tax residence of controlling shareholders/directors: e.g. Australia, NZ

Residence of Companies (Cont)

Corporate Residency Rules in Taiwan

- 公司居住者

- 凡在中華民國境內經營之營利事業(所得稅法第3條)

- 應依本法規定，課徵營利事業所得稅。營利事業之總機構在中華民國境內者，應就其中華民國境內外全部營利事業所得，合併課徵營利事業所得稅。

- 營利事業之總機構在中華民國境外，而有中華民國來源所得者(所得稅法第3條)

- 應就其中華民國境內之營利事業所得，依本法規定課徵營利事業所得稅

- 凡實際管理機構在中華民國境內之營利事業者(所得稅法修正草案第43-4條)

- 自104年度起，營利事業直接或間接持有符合一定條件之總機構在中華民國境外關係企業全部資本或過半數資本，或具有重大影響力者，應依該關係企業當年度盈餘，按其持有關係企業資本之比例，認列投資收益，計入當年度所得額課稅。

Residence of Companies (Cont)

Corporate Residency Rules in Taiwan (cont)

- 總機構(未定義於所得稅法中，故參考公司法第3條之定義)
 - 公司法第三條(公司之住所、本公司、分公司)
 - 公司以其本公司所在地為住所
 - 本法所稱本公司，為公司依法首先設立，以管轄全部組織之總機構；
 - 所稱分公司，為受本公司管轄之分支機構。

Residence of Other Entities

- The corporate residence rules apply to other business organizations that operate as companies, such as “partnership,” “trust/trust companies” and “cooperative societies”.
- Special rules applies to partnership, depending on whether partnership is taxed as a corporate or a “pass-through” (or “fiscal transparent”) entity;
- The residence of trust is determined by the residence or location of:
 - The majority of the trustees
 - Place of management or administration of trust
 - The location of trust assets
 - Beneficiaries
 - Grantor/settlor.
- Branch or PE of a foreign company - generally retains the same tax residence as its head office, subject to the exception, e.g. the effective management rules.

Tax Nonresidents

- A non-resident normally pays tax on the income (actual or deemed) derived or sourced from that country only (“source based taxation”).
- Non-residents may also be treated differently from residents:
 - They may be taxed on a different basis from residents, e.g. tax rates, no imputation credits, final tax, deemed profit basis, etc.
 - They may be required to pay additional taxes compared to a resident in the same circumstances, e.g. branch profit tax in the US
 - They may be exempt from taxes that residents would pay, e.g. interest from FX bonds in Korea;
 - They may be subject to more rigorous tax withholding and compliance rules due to the practical difficulties in enforcing the tax laws on them;
 - Since tax treaties only apply to residents of a Contracting State, they cannot claim treaty benefits, e.g. branch of a foreign company.

Full v Limited Taxation

- One of the reasons given for residence as a basis for worldwide tax is that a person is expected to make a contribution for the privilege and the protection that the country of residence provides him.
- Some countries tax the worldwide income of their citizens, regardless of their tax residence. The diplomatic protection and the privilege that are provided by the country of citizenship are the reasons for taxing them
- Typical examples, U.S., Korea.

Full v Limited Taxation (Cont)

- Exceptions to the worldwide taxation of residents (cont):
 - ◆ Received or remittance regime:
 - Some countries that follow the full territorial regime also tax certain or all the foreign source income that is received by , or remitted to, residents, e.g. Singapore
 - ◆ Received/Receipt vs. Remittance
 - Received/receipt – “to take possession of”
 - Remitted – “transfer of the foreign income”
 - An “overseas receipt” is a “remittance” when it is transferred to a domestic bank account from an overseas account of the taxpayer.
 - ◆ Nil tax regime – tax havens jurisdictions
 - ◆ Territorial regime, i.e. only taxing on local or deemed local income) – e.g. Hong Kong and Taiwan (excluding “alternative minimum tax”) (individual only)

Source of Income or Gain

- The source rules identify
 - Where the income arises, and
 - Which country has the taxing right over it.
- The source rules should enable the tax jurisdiction:
 - To identify the income and its recipient
 - To “quantify” the income, and
 - To “enforce” one jurisdiction’s taxing rights.
- Each country has its own rules (“basic source rules”) under the domestic law, e.g. Article 8 of Taiwan’s Income Tax Law, Administrative Guidelines and Court Decisions

Source of Income or Gain (Cont)

■ 中華民國來源所得(所得稅法第8條)

本法稱中華民國來源所得，係指左列各項所得：

- 在中華民國境內取得之其他收益。
- 依中華民國公司法規定設立登記成立之公司，或經中華民國政府認許在中華民國境內營業之外國公司所分配之股利。
- 中華民國境內之合作社或合夥組織營利事業所分配之盈餘。
- 在中華民國境內提供勞務之報酬。但非中華民國境內居住之個人，於一課稅年度內在中華民國境內居留合計不超過九十天者，其自中華民國境外僱主所取得之勞務報酬不在此限。
- 自中華民國各級政府、中華民國境內之法人及中華民國境內居住之個人所取得之利息。
- 在中華民國境內之財產因租賃而取得之租金。
- 專利權、商標權、著作權、秘密方法及各種特許權利，因在中華民國境內供他人使用所取得之權利金。
- 在中華民國境內財產交易之增益。
- 中華民國政府派駐國外工作人員，及一般雇用人員在國外提供勞務之報酬。
- 在中華民國境內經營工商、農林、漁牧、礦冶等業之盈餘。
- 在中華民國境內參加各種競技、競賽、機會中獎等之獎金或給與。

Source of Income or Gain (Cont)

- 所得稅法第八條規定中華民國來源所得認定原則

為使徵納雙方對於所得稅法第八條規定中華民國來源所得有認定依據可資遵循，特訂定此原則，原則中針對所得稅法第八條中之認定基準有進一步的規範(如：以勞務提供地為勞務報酬來源所得認定基準、營業利潤依境內及境外貢獻程度劃分原則等)

- 條文之下載連結

<http://www.mof.gov.tw/ct.asp?xItem=53375&ctNode=657>

Source of Income or Gain (Cont)

- “Taxing Source Rules” – to determine whether the income is domestic or foreign-source.
 - The rules specify the connecting factors for the taxability of the income by the host country
 - The rules affect the credit given by the home country for the taxes paid abroad on the foreign-sourced income.
- Most of countries combine the taxing source rules with the basic source rules under their domestic law.
- For those follow the territorial tax regime often treat certain foreign –source income as deemed domestic source, e.g. HK.

Source of Income or Gain (Cont)

- Different “characteristics” of income/gains may result adverse tax impacts, for example, would “gains/profits” realized from land transaction be considered/taxed under:
 - capital gains
 - income tax
 - land value incremental tax

- International agreements play a very important role in resolving conflicts among tax jurisdictions and/or to “limit” the scope of “sources” and “taxing rights” of each jurisdiction.

Permanent Establishment

- If a nonresident is deemed or considered having a “permanent establishment” (PE) in another country, the said nonresident may create “taxable” presence in that country.
- An enterprise in one country is NOT liable to the income tax of the other country unless it has a PE through which it conducts business in that other country.
- Definition of PE varies from one to another country under the domestic laws.
- The OECD also provides clear definition of “PE”
- In general, a PE constitutes “fixed place of business” or “business/PE agent”

Permanent Establishment (Cont)

- Typically “fixed place of business” constitutes:
 - A place of management
 - Branch or an office
 - Building site, warehouse
 - Factory, a workshop, assembly project, mine, etc.
- Typically “business/PE agent” includes:
 - Anyone who has general authority to take orders and/or conclude contracts
 - Anyone who is required to deliver products/goods on behalf of its foreign principal, and so.
- “Length of stay of employees of a foreign enterprise may create PE:
 - Typically if employees of a foreign enterprise stay in another country for more than 90 or 120 days may create “PE” exposures

Permanent Establishment (Cont)

所得稅法第10條

■ 固定營業場所 (Fixed Place of Business)

- 係指經營事業之固定場所，包括管理處、分支機構、事務所、工廠、工作場、棧房、礦場及建築工程場所。但專為採購貨品用之倉棧或保養場所，其非用以加工製造貨品者，不在此限。

■ 營業代理人 (Business Agent)

係指合於下列任一條件之代理人：

除代理採購事務外，並有權經常代表其所代理之事業接洽業務，並簽訂契約者。

- 經常儲備屬於其所代理之事業之產品，並代表其所代理之事業將此項貨品交付與他人者。
- 經常為其所代理之事業接受訂貨者。

Permanent Establishment (Cont)

所得稅法施行細則第10條

- **營業代理人(Business Agent)**
 - 國外營利事業所派調查商情及報價接洽之聯絡人員，並不代表其事業簽訂契約或交付定貨者，不屬本法第十條第二項所稱之「營業代理人」。

Permanent Establishment (Cont)

- “Force of Attraction”
 - A PE is taxed by the country in which it is located not only on the income and property of the PE, but
 - But, also on all other income derived by its foreign head office from sources in the county where the PE is located.
- “Attribution” of Income of PE
 - In many country, the concept of “attribution” is adopted to determine the income of a PE
 - The attribution of income on transfers within a single legal entity often creates international tax issues.
 - “Direct” method – profits should be allocated between the associated units within an enterprise on the basis of separate accounts kept on an arm’s length basis (also known as “separate accounting” method).
 - “Indirect” method – allocation the total profits of the enterprise to the PE under some some apportionment criteria/formula.

Permanent Establishment (Cont)

Force of Attraction

財政部76年1月9日台財稅第7575300號

境內有分支機構之外商總機構直接對境內銷售貨物或提供勞務之課稅規定

外商之國外總機構直接對我國客戶銷售貨物或提供勞務，其營利事業所得稅部分，自民國七十六年一月一日起應依左列規定辦理：

(一) 銷售貨物：應按一般國際貿易認定，不再認定為在華分支機構之營業收入課稅，惟該國外總機構因該等交易行為所匯撥與在華分支機構之補助經費或佣金，應由在華分支機構依法列計收入報繳營利事業所得稅。

(二) 提供勞務：國外總機構直接對我國客戶在我國境內提供銷售勞務所取得之報酬，屬於該國外營利事業之中華民國來源所得，應由該國外事業在華分支機構依法繳納營利事業所得稅。