Title: Interpretation and qualification of short-term employment in cross-border situation at Article 15(2) OECD MC

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To the love of my life Agnesa, for whom I’ll do everything.

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### Abbreviations

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<tr>
<td>OECD MC</td>
<td>OECD Model Tax Convention on Income and on Capital</td>
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<td>Commentary</td>
<td>The OECD Model Tax Convention on Income and on Capital</td>
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<td>OECD</td>
<td>Organisation for Economic Cooperation and Development</td>
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<td>OECC</td>
<td>Organisation for European Economic Cooperation</td>
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<td>UN Model</td>
<td>United Nation Model Double Taxation Convention between Developed and Developing Countries</td>
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<td>VCLT</td>
<td>Vienna Convention on the Law of Treaties</td>
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<td>EU</td>
<td>European Union</td>
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<td>OSCE</td>
<td>Organization for Security and Co-operation in Europe</td>
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<td>ICJ</td>
<td>International Court of Justice</td>
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1. Introduction

1.1. Problem

The free movement of people and capital has enabled individuals and businesses to engage in cross-border transactions. Global economy and the competitiveness between international groups have acknowledged the necessity for a dynamic human workforce and openness of the labour market for mobility of workers within affiliated companies and different multinational enterprises. Cross-border short-term employment\(^1\) has been crucial part of modern development of the international business.\(^2\)

Mobility of workers puts several issues regarding taxation rights as the jurisdiction where the remuneration should be taxable is the core of the problem. States accordingly claim taxing rights based on the domestic law, consequently, situation of judicial double taxation arises. However, double tax treaties for decades now are being considered as great legal instruments to encourage and facilitate cross-border mobility and mitigate double taxation.

In today’s economy the tax treaty network is expanding and majority of these tax treaties are drafted in line with the OECD MC, while the fundamental provisions concerning taxation of cross-border income from employment are stipulated in Article 15. Still, despite the fact that it is considered as one of the most important Articles for many taxpayers due to its scope in cross-border situation and continuous review there is a lack of an consistent interpretation and legal certainty as one of the key points of discussion is the interpretation of the terms used which are not defined in the OECD MC itself.

Thus, one of the most controversial issues of interpretation is the term “employer” in Article 15 OECD MC as assessment of who the real employer is for the seconded\(^3\) employee can prove to be significant for the taxation rights of the one particular jurisdiction. Moreover, as the term is not defined in tax treaties

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\(^1\) Cross-border short term employment covers intra-group secondments and international hiring out of labour.

\(^2\) de Kock back in June 1999 has described the international hiring-out of labour as a phenomenon of growing importance. See further at de Kock, "International hiring-out of labour: field experience in the Netherlands", (1999) Bulletin for International Fiscal Documentation

\(^3\) Secondments refer to structures between affiliated enterprises in which an employee of a group-company temporarily performs assignments to another group-company.
contracting states refer to their own domestic interpretation according to Article 3(2) of the OECD MC. However, as some countries consider either the formal contractual relationship alternatively substantive approach other countries have no tax law definition of the term employer consequently differences are present.

Due to its importance the interpretation of Article 15 in respect of the term “employer”, a reference to formal and material law sources can be made in order to interpret the term. Thus, besides general rules of interpretation stipulated in Article (3)2 OECD MC, the VCLT and the Commentary to OECD MC have an important role in the interpretation process. Nevertheless, despite having a number of legal remedies available the interpretation of the terms used in Article 15(2) remains challengeable and the conflict of interpretation between Contracting States is present. Thus, the necessity to have a unified interpretation of the term “employer” OECD has amended its Commentary to Article 15(2) in 2010 aiming to accord the requirements of many taxpayers engaged in cross-border employment.

1.2. Objective

The purpose of the thesis is to elaborate the interpretation and qualification issues of the terms use in Article 15(2) OECD MC in general and in particular the expression “employer” as the 2010 Commentary to OECD MC intends to clarify this issue. As this thesis will illustrate the difficulties surrounding the issue of interpretation a comparison on the Commentary’s views on the explanation of the terms used in Article 15 will be addressed. Furthermore, in the light of the 2010 Commentary the interpretation of the object and purpose of the 183 day rule will be explained as well as the interpretation of the expressions “paid by, or on behalf of” and “borne by” will be elaborated.

1.3. Delimitations

As elaborated above this thesis is based strictly on the rules stipulated in the OECD MC and its Commentary concerning taxation of the employment incomes in cross-border situation, therefore, will not deal with the UN Model. As the focus is the interpretation of the term “employer” in particular and in general the second

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4 Legal doctrine and case law are also important legal sources on the interpretation process of the term “employer”
paragraph of Article 15 other undefined terms in the OECD MC as well as additional paragraph within Article 15 are outside of the focus of this thesis, consequently, will not be elaborated.

Rules within EU concerning labour mobility will not be addressed either triangular cases. As the allocation of taxing rights in regard to employment income will be elaborated other income such as personal capital gains of the seconded employee will not be covered.

1.4. Method used

Within the framework of the purpose of this thesis the author will answer to its objective through the traditional and analytical legal method. Conventions and their commentaries mentioned above, legal literature and case law on the relevant provisions will be described, critically analysed and evaluated.

As the aim is to give an overview on the interpretation and qualification issues within Article 15(2) OECD MC the current legal situation and interpretative legal remedies for the provisions contained in this Article will be examined. Furthermore, changes made to the OECD MC Commentary will be analysed, also the reflection of legal authors will be elaborated. Alternatives to current systems will be suggested by the author where appropriate.

This thesis is divided into four chapters.

Chapter one contains the problem, objective of the study, methodology used and delimitations.

In chapter two general aspects of international taxation and rules on tax treaty interpretation will be discussed including an analysis on the legal value of commentaries. Article 15 will be brought by analysing and describing its functions as a fundamental Article for taxing rights in cross-border remunerations from employment.

In chapter three the main objective of this thesis will be answered by explaining in depth the issue of interpretation in regard to second paragraph of Article 15. Interpretative divergences and tax consequences will be elaborated, while the reflection of the Commentary in regard to interpretation and qualification issues
and changes made in regard to the term ‘employer’ in particular will be presented and analysed.

In *chapter four* the focus of the author will be to give an independent and comprehensive analysis on Article 15 and in the interpretative process of the terms used, suggestions as alternative and preferred approach on better understanding the mentioned issues will be presented.
2. The OECD Model Convention

2.1. Fundamental concepts of international taxation

International tax law emerged as an area of tax law after the development of modern income taxation during the mid-1800s when western states started to develop systems for the taxation of a person’s total income based on the ability to pay. Several principles are fundamental to tax, however, the jurisdiction to tax is based on the connection of either the person or the income to the state in question namely the concept of residence and the source taxation.

The residence principle is based on the presumption that a state will tax its residents on their global income, while the source taxation is based on the connection of a particular income earns to the other state. In international taxation disputes arise when two states claims taxation rights based on the mentioned principles which leads to judicial double taxation which is defined as:

A form of double taxation on the same income by both country of residence and the source country in respect of the same subject matter and for the same period of time.

However, in order to resolve the juridical double taxation and give priority to one jurisdiction to tax states enter into tax treaties.

Tax treaties are defined as international agreements which aim to reduce or eliminate double taxation by committing themselves to relinquish completely or partly their taxing rights according to their domestic legislation in a specific situation. Accordingly in tax treaties the taxing rights of the source state are usually limited to a certain percentage while the residence state will give credit for the taxes paid in the source state.

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5 Martin Berglund and Katia Cejie, *Basics of International Taxation From a Methodological Point of View* (Iustus Forlag, 2014) p.21-24
7 Berglund and Cejie (2014) p.27
8 See further at Lang (2012) p.31-36
2.2. The OECD Model Convention

Individual states⁹ and different international organizations have developed suggested Model Tax Conventions.¹⁰ The UN Model Tax Convention and in particular the OECD Model Tax Convention on Income and on Capital are the most influential models. At the present the tax treaty network is mostly based on the OECD MC and is regarded as a key ‘platform’ on the development of tax treaties.

OECD was constituted in September 1961,¹¹ while in July 1963 with the suggestion of the Fiscal Committee¹² the OECD Council adopted the Draft Double Taxation Convention on Income and Capital. Since then numerous tax treaties haven been adopted based on the model by facilitating cross-border trade and investment by elimination the income tax obstacles to these transactions and preventing tax evasion and double taxation.¹³

The OECD MC wording is not binding for the contracting states, therefore, they are free to make changes in their tax treaties as they agree. The OECD MC is divided in 7 chapters with 31 articles, starts with the personal and material scope, business profits and income, methods for relieving double taxation, non-discrimination principles and mutual agreement procedures¹⁴.

2.3. Article 15 Income from employment

Article 15 constitutes fundamental basis for taxing rights in cross-border remunerations from employment. In principle Article 15 plays the role of ‘lex generali’ to other provision which are related to salaries and applies exclusively to

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¹⁹ USA is one of the countries that has developed its Model Income Tax Convention and is used as a starting point in bilateral treaty negotiations with other countries.
¹⁰ The OECD and the UN have developed Model Tax Conventions. See further at Lang (2010) p.27-28.
¹¹ OECD is the successor of OEEC which was founded in April 1948. It emerged from the Marshalla Plan aiming to continue work on a joint recovery programme and in particular to supervise the distribution of aid in Europe. Also was meant to promote co-operation between 18 participant countries member of the OEEC and develop intra-European trade by reduction tariffs and other barriers. See further at: http://www.oecd.org/general/organisationforeuropeaneconomicco-operation.htm
¹² The Fiscal Committee, which became the Committee on Fiscal Affairs with the new mandate in 1971 works within OECD. In 2013 its mandate was revised, still its main objective is to; promote and develop an effective and sound tax policies, guidance and creation of international tax standard that will allow government to provide better services to the citizens and maximising economic growth, to enable OECD and partner (members and non-members) to improve their national tax systems and promote cooperation and coordinating among them in the area of taxation and reduce tax barriers to international trade.
¹³ Frank Potgens et al, Income from the International Private Employee (IBFD, 2007) p.41-55
¹⁴ Article 14 of the OECD MC was deleted in 2000, and the expression “Employment” replaced expression “Dependent personal services” to reflect the deletion of the Article 14 dealing with independent personal services.
individuals. As previously stated contracting states are free to make deviations from the wording of the OECD MC.\textsuperscript{15} It is generally accepted that income from employment should be taxed in the state of residence of the employee, however, when employment is exercised in another state the right to tax is shifted to the state of employment if:

a) the employee is present in the work state for a period or periods not exceeding in the aggregate 183 days in a given 12 month period.

b) the remuneration is “paid by, or on behalf of” an employer who is not a resident of the work state.

c) the remuneration is not borne by a Permanent Establishment that the employer has in the work state.\textsuperscript{16}

Article 15(1) establishes the general rule of the taxation of income from employment as the place of work principle as such the income is primarily taxable in the country in which the employment is exercised. Accordingly, the revised Commentary makes it clear that employment is exercised in the place where the employee is physically present.\textsuperscript{17} However, Article 15(2) stipulates an exception to the place of work principle by reversing the allocation of the taxing rights to the state of residence, regardless the fact that the employment has been carried out in another state. The exception in Article 15(2) is dependent on three conditions listed above which cover individuals rendering services in the course of an employment and as a matter of fact when these conditions are fulfilled the taxing rights of the source state are restrained.\textsuperscript{18}

Thus, as previously stated on the introduction of this thesis Article 15 is considered important for many taxpayers which are engaged in cross-border activities, however, there is a lack of clarity and legal certainty due to the fact that there are

\textsuperscript{15}Michael Lang, Pasquale Pistone, Josef Schuch and Claus Staringer, \textit{The Impact of the OECD and UN MC on Bilateral Tax Treaties} (Cambridge Tax Law Series, 2012) Examples: Austria in its tax treaties in general follows the OECD MC with regard to Article 15, however, there are deviations that can be found within the treaties with Germany, Italy and Liechtenstein. These treaties on taxation of frontier workers gives taxing rights to the residence state. See further at Katharina Steininger p.128

Sweden also in most parts follows the OECD MC, however, there are some deviations with regard to allocating rules on employment on ships and aircrafts which are exclusively allocated to the residence state, additionally a sentence has been added relating to SAS which states that Swedish residents are taxes exclusively in Sweden when employed with SAS. See further at Marting Berglun p.1072

\textsuperscript{16} OECD MC Article 15(2) at Kees van Raad, \textit{Materials on International, TP & EU Tax Law} (International Tax Center ITC Leiden, 2016/17) p.25

\textsuperscript{17} OECD Commentary to Article 15 paragraph 1, van Raad(2016/17)p.384-395

\textsuperscript{18} OECD Commentary to Article 15 paragraph 2 \textit{at seq}, van Raad (2016/17 p.389
terms used which are not defined in the model itself as this will be further elaborated on the upcoming sections of this thesis.

2.4. Fundamental features of Article 15(2) dealing with employment income

The purpose of the Article 15(2) is to facilitate the movement of individuals in course of employment. The central issues of this article is whether the source country has taxing rights in incomes derived from employment under the tax treaty and if there are taxing rights which conditions should be fulfilled. However, as previously stated Article 15(2) of the OECD MC contains an exception to the Article 15(1) in all situations where three requirements are fulfilled and the salary is taxable exclusively in the residence state of the employee.

Physical presence of the employee in the source country is fundamental on taxation of the employee, if the employee is present in the source country for more than 183 days within 12 month period in the fiscal year. At the presence the idea is that if the threshold exists for more than 6 month is sufficient time to have links with the country’s economy to justify the taxing rights by that country.

2.5. Undefined terms in Article 15 OECD MC and the issue of interpretation

Article 15 establishes the general rule for the taxation of income from employment in cross-border situation. Even though it is an important article for many taxpayers who are engaged in cross-border activities a number of terms used in particular under second paragraph are not defined in the Model, as a result interpretation conflicts between contracting states are present which may lead to double taxation or double not-taxation.

Terms used under Article 15 such as: salaries, wages and other similar remuneration and in particular ‘an employer’ as an important characterization in order to determine where income from employment is taxable, are not defined in the Model, consequently for many taxpayers engaged in cross-border employment activities

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19 Potgens et al. (2007) p.264
20 According to Potgens et al (2007) p.114, paragraph 1 of the Commentary to Article 15 “sets the rule that employee’s residence state has to grant relief from double taxation based on the tax treaty”
this is a practical concern. However, for undefined terms that are used in the tax treaty unless the context requires a different interpretation a reference to the meaning according to the domestic law is allowed.22 Nevertheless, it is debatable whether the term ‘employer’ refers to a domestic law meaning or whether it has an autonomous meaning.23

Furthermore, the reference under Article 3(2) does not automatically solve the issue as differences in interpretation of tax treaty rules may lead to double taxation or double non-taxation situation if for example the work state interprets the term ‘employer’ autonomously while the residence state by referring to domestic law follows the formal contractual relationship,24 thus, non-definition of the term ‘employer’ in the model becomes a burden which has been continuously addressed by the OECD. In 2010 the Commentary to OECD MC was updated and explanations on the term ‘employer’ have been included, accordingly the concept of employment under domestic law of the source state is relevant while the residence state is generally obliged to follow the qualification of the source state.25

In the upcoming sections of this thesis the author will analyse and review in depth the problems and changes made by the 2010 OECD Commentary regarding the interpretation of the term “employer” within Article 15(2) and the qualification conflicts that exist. In addition, considerations that OECD Commentary puts on the domestic law concept of employment in regard to the interpretation of the term employer and restrictions within will be analysed, aiming to put some light on the interpretation of the undefined terms under Article 15.

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22 Under Article 3(2) OECD MC a reference to the domestic law for terms which are not defined is possible. This is explained in depth under subsection 2.5.3 Article 3(2) OECD MC
23 According to Dziurdz countries have different views on the interpretation and derive the meaning of “employer” either by reference to domestic law or autonomously from the tax treaty. See further at: Kasper Dziurdz, Article 15 of the OECD MC: The 183-day rule and the meaning of “Employer” BTR, N.1 (2013), British Tax Review
24 J.F. Avery Jones, Short-term employment assignments under Article 15(2) of the OECD Model, 63 Bull. Int'l. Taxn. 1 (2009), Journals IBFD.
25 Interpretation issues concerning the term ‘employer’ were raised by OECD in 1984 in the report “Taxation Issues Relating to International Hiring-Out of Labour”, following this report OECD updated its Commentary on Article 15 in 1992, still Article 15(2) was unclear, hence, in 2004 and 2007 two reports were published “Proposed Clarification of the Scope of Paragraph 2 of Article 15 of the Model Tax Convention” respectively “Revised Draft Changes to the Commentary on Paragraph 2 of Article 15”. After these two draft reports revised explanations of the term ‘employer’ have been included in the 2010 Commentary and they reflect the current view of the OECD.
2.6. Interpretation of tax treaty

Interpretation of tax treaties is fundamental on reaching the real objective and purpose of the treaties itself. The ‘object and purpose’ is a term of art with no practical definition, however, it is decisive in resolving possible controversies in tax treaties. Despite efforts by different scholars to create a clear definition regarding the purpose and objective this area remains an enigma in today’s international law.26

2.6.1. The Vienna Convention on the Law of Treaties

Vienna Convention on the Law of Treaties has entered into force in January 1980 and in today’s international law has an important role and contains rules on the interpretation of the international tax treaties due to the fact that tax treaties are generally accepted as international agreements. VCLT is obligatory to states who are signing parts and the interpretation of treaties must be made in accordance with Article 31-33. In addition, provision of VCLT in particular Article 31 reflects customary international law therefore, may apply also to countries who are not parties of the VCLT.27 For the purposes of this topic only Article 31, 32 and 33 will be shortly elaborated.

Article 31(1) sets out the general rule of the means of interpretation and reads as follows:

A treaty shall be interpreted in good faith 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.28

From the wording of the Convention and its explanation should be built the meaning that is given to the context, object and purpose of the treaty. Moreover, the wording in good faith explains the importance of interpretation in the ordinary meaning of the legal principle ‘pacta sunt servanda’.29

27 ICJ in its judgement on the case Kasikili/Sedudu Island (Bostwana/Namibia), (1999) decided that even though neither Bostwana nor Namibia are parties to the VCLT, Article 31 is applicable inasmuch as it reflects customary international law
28 Vienna Convention on the Law of Treaties at Article 31(1)
29 Pacta sunt servanda is a Latin phrase and stands for ‘agreement must be kept’, is arguably as one of the oldest principle of international law. State practice has recognized the fundamental meaning of pacta sunt servanda
While Article 31 sets the general rule of interpretation Article 32 provides the so called supplementary means of interpretation\(^{30}\) and reads as follows:

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.\(^{31}\)

Accordingly, Article 32 comes in if the results of an interpretation according to Article 31 VCLT has left ‘room for discussions’, and is consider a supplementary to Article 31 aiming on going into preparatory work and circumstances of the conclusion of the tax treaty.\(^{32}\) While, Article 33 oversees interpretation of treaties authenticated in two or more languages by putting a note that the terms of the treaty are presumed to have the same meaning in each text.\(^{33}\)

\subsection{2.6.2. Article 3(2) OECD Model}

Interpretation of international tax treaties can be tackled not only in terms of the VCLT but also in terms of the tax treaties which are drafted in reference to the OECD MC. The OECD MC provides a general rule for income from employment and business, however, no comprehensive definition is given, therefore, contracting states in most cases use the meaning that it has under their respective domestic law in accordance with Article 3(2) OECD MC.\(^{34}\)

\begin{itemize}
\item Article 3(2) was lastly updated in 1995 and reads as follows:

\end{itemize}

\begin{itemize}
\item as an important rule of international law on a customary practice. In the end of nineteenth and early twentieth century this concept began to be expressed in writing on different multilateral declarations even though was not documented as a principle by name. The concept was included on the Declaration of London 1871 as well as on the League of Nation founding document.
\item According to West (2017) Articles of the VCLT are not seen as hierarchical when it comes to “authentic” means of interpretation and “supplementary” means of interpretation, cause the value of the Commentaries is recognize by the courts. See further at C. West, References to the OECD Commentaries in Tax Treaties: A Steady March from “Soft” Law to “Hard” Law? 9 World Tax J. (2017), Journals IBFD.
\item Vienna Convention on the Law of Treaty at Article 32
\item Luigi Sbolci, \textit{Supplementary Means of Interpretation} (ed), Enzo Cannizzaro, \textit{The Law of Treaties Beyond the Vienna Convention} (Oxford Scholarships Online, 2011) p.158
\item Vienna Convention on the Law of Treaty at Article 33
\item See further at Lang (2010)p.50-53 regarding Article 3(2)
\end{itemize}
As regards the application of the Convention by a Contracting State any term not defined therein shall, unless the context otherwise requires, have the meaning which it has under the law of that State concerning the taxes to which the Convention applies, any meaning under the applicable tax laws of that state prevailing over a meaning given to the term under other laws of that state.35

From the wording of the Article 3(2) contracting states can rely on their national laws in all cases when OECD MC definitions are not clear or do not respond to the objective and the meaning of the treaty. In this regard, according to Vogel Article 3(2) is considered as a ‘general rule of interpretation’ in situations when interpretation issues arise, still in his opinion the scope of Article 3(2) is limited as is focused only in terms that are used in the treaty and no justification is provided for such reference and the reliance on general legal principles of domestic law in interpreting tax treaties.36

On this note it is important to mention that in cases when contracting state cannot agree on the interpretation of terms and when discrepancies exist they can refer to Article 25 of the OECD MC. This Article institutes the mutual agreement procedure for resolving difficulties arising out of the application of tax treaties.37 Accordingly, any taxpayer may present the case to the component tax authorities when is dissatisfied with the decision of one or both contracting states on the interpretation of tax treaties.38

Additionally, according to the Commentary to Article 25 paragraph 7 the mutual agreement procedure is autonomous procedure from the domestic rules and not necessarily tax authorities reach an agreement for the disputes, therefore, the taxpayer is open to litigate the case in the court authorities.39 Furthermore, if

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37 OECD Commentary Scope of Article 25, van Raad (2016/17) p.537
39 Paragraph 7 to Article 25 at OECD MC Commentary, van Raad (2016/17)
situations remain unresolved for a longer period than two-years\textsuperscript{40} the taxpayers has the right to bring the case to arbitration procedure.\textsuperscript{41}

2.6.3. Commentary to the OECD MC and its legal value

The Commentary to the OECD MC is very important legal remedy in the interpretation of tax treaties.\textsuperscript{42} The Commentary has been updated regularly in particular from 1992 since its first version in 1963. The introduction of the OECD MC highlights that tax treaties should be conform to the OECD MC and follow the Commentaries when applying and interpreting the provisions of their bilateral tax conventions that are based on this model.\textsuperscript{43} Still the commentary is not mandatory in any part and should be seen as a recommendation on the interpretation process. Moreover, proposals of the OECD Committee on Fiscal Affairs that changes to the commentary are normally applicable to the interpretation of tax treaties are debateable.\textsuperscript{44}

Additionally, even between commentators there are different views on the question of legal effect of Commentaries. Some commentator reject the opinion that Commentaries have binding force because of the lack of normative status or sufficient judicial practice while other commentators have the opinion that although the Commentaries are not legal norms they are source of interpretation by courts since are regularly being consulted all over the world.\textsuperscript{45} Furthermore, there are views that commentaries are recommendations with no legal binding effect for

\textsuperscript{40} Contracting states may reserve the right to extend the time limit from two years to three years which is in line with the UN Model.
\textsuperscript{41} OECD Commentary to paragraph 84 at Article 25 has allowed contracting states to depart from the arbitration decision by allowing them to agree on different solution, this is allowed under Article 12 EU Arbitration Convention by doing so they are free to amend the following sentence: […] \textit{Unless a person directly affected by the case does not accept the mutual agreement that implements the arbitration decision or the competent authorities and the persons directly affected by the case agree on a different solution within six month after the decision has been communicated to them, the arbitration decision shall be binding on both States and shall be implemented notwithstanding any time limits in the domestic laws of these states.}
\textsuperscript{42} Lang (2010) p.43
\textsuperscript{43} OECD MC, paragraph 3 of the Introduction “The main purpose of the OECD MC, which provides a means of settling on a uniform basis the most common problems that arise in the field of international judicial double taxation. As recommended by the Council of the OECD member countries, when concluding or revising bilateral conventions, should conform to this Model Convention as interpreted by the Commentaries thereon and having regard to the reservations contained therein and their tax authorities should follow these Commentaries, as modified from time to time and subject to their observations thereon, when applying and interpreting the provision of their bilateral tax conventions that are based on the Model Convention”.
\textsuperscript{44} Michael Lang and Florian Brugger, \textit{The role of the OECD Commentary in tax treaty interpretation} (2008) Australian Tax Forum
\textsuperscript{45} Latvia for example doesn’t follow the OECD MC or the Commentary, they consider them nothing more than a gentlemen’s agreement. While Sweden follows the OECD MC and its Commentary as important aspects on the interpretation of Tax Treaties
courts or tax authorities, however, in order to foster legal certainty they should be followed. Nevertheless, even though this issues are debatable most of the member states put lot of importance to the commentary when interpreting tax treaties.

As mentioned it is debatable if the application of the commentary is within the frame of the VCLT. The state practices and legal views differ. In general courts dealing with tax treaty issues have problems on interpretation and this differ also from legal interpretative methodology of different countries, e.g. in United Kingdom the emphasis is on the structure and the letter of the law while in Germany they put more emphasises on the teleological aspect.

It is worth mentioning that not only national courts have applied the OECD Commentary, the European Court of Justice has referred to the Commentary as well in the Case C-513/03 Van Hilten vs Van Der Heijden [2006] ECR I-1957 by stating that for the purposes of the allocation of fiscal competence, it is not unreasonable for the EU Member State to draw guidance from international practice and in particular from OECD MC. However, it is generally agreed that OECD Commentary cannot operate as a definitive guide on tax disputes.

From the legalistic perspective scholars have made observations on the application of the commentary within VCLT frame, according to Vogel the context as defined by Article 31(2) VCLT it is narrow and refers only to agreements and instruments which were made in connection with the treaty, therefore, commentaries cannot influence the interpretation of treaties as subsequent agreements under Article 31(3). However, Vogel keeps the opinion that Commentaries are important even though their interpretation is not binding on taxpayers and on courts, moreover, within the frame of VCLT can be used as a supplementary means of interpretation.

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47 According to West (2017) the difficulty with respect to use of the OECD Commentaries in treaty interpretation is their place in the legal hierarchy of sources. Accordingly, OECD Commentary do not represent a law making treaty, customary law or a principle of law, however, can be categorize as in the group of judicial decisions and doctrine, however, cannot be considered binding but rather persuasive.

48 West, (2017)

49 C-513/03 Van Hilten vs Van Der Heijden [2006] ECR I-1957

50 Klaus Vogel, *The Influence of the OECD Commentaries on Treaty Interpretation.* (2000), Journals IBFD.
3. Interpretation and qualification conflict with regard to Article 15 OECD MC

3.1. Article 15(2)(b) and (c) of the OECD MC and the changes made to the OECD Commentary in 2010

The 2010 Commentary to Article 15 intends to clarify the issue of interpretation of the expression “employer” in Article 15(2) of the OECD MC. The amendments to Commentary to Article 15 are a result of the Discussion Draft on Revised Draft Changes to the Commentary to paragraph 2 of Article 15. In the upcoming subsections of the thesis the author will elaborate the changes to OECD Commentary in regard to Article 15 and the interpretative inconsistency including qualification conflicts in this regard. Furthermore, in this section the explanation of the expressions “paid by or on behalf of” and “borne by” in accordance with the choices given by the commentary will be elaborated, as well as, the objective and purpose of the 183 days rule.

3.1.1. “Employer” in regard to Article 15(2) OECD MC

The interpretation of the term “employer” within this subparagraph (b) is fundamental on the application of the Article 15. There are two main question which should be considered, first the relationship between the remuneration and the qualification of the income from an employment and second the question of who the employer is in cases of short-term assignments of employees and international hiring-out of labour in terms of formal or economic employer.51

As stated previously in this thesis under Article 15(2) the term “employer” it is not defined in the OECD MC, therefore, according to Article 3(2) parties under OECD MC refer to the domestic law meaning of “employer”, consequently, there are different meanings given to the interpretation of employer, in this regard some states under domestic law generally do not question the formal contractual relationship which derives from the concept of labour law of domestic jurisdictions while other jurisdictions may ignore the formal contractual relationships, by emphasising the concept of economic employer which jurisdictions concentrate solely on the reality of the employment. In addition, some jurisdictions interpret the

51Kasper Dziurdź and Frank Pötgens, Cross-Border Short-TermEmployment, 68 Bull. Intl. Taxn. 8 (2014), Journals IBFD
term in the light of Article 15(2) and derive the meaning of employer based on the object and purpose of the Article 15(2). Due to divergences on the interpretation of the term “employer” double taxation or double non-taxation may result despite the existence of a tax treaty.

Following the OECD report on “Taxation Issues Relating to International Hiring-Out of Labour” of 1984 were the problem of interpretation of the term employer has been raised, OECD updated its Commentary on Article 15 in 1992 by including explanations on the term ‘employer’, however, its scope as well as, the definition of the term employer with a references to Article 3(2) and the economic meaning of employer within the Commentary to Article 15 on both cases of abuse or bona fide cases remained unclear. Consequently, the commentary to Article 15 was revised in 2010 on the explanation of the term “employer”, accordingly based on the revised commentary the concept of employment under domestic law it is decisive on the meaning of the term employer. Furthermore, was noted that the concept of employment in the domestic law of the work state must be respected by allowing that state to tax the employment income in accordance with its jurisdiction. This methods including the difference between self-employment relationship and employment relationship which has been suggested to be change will be elaborated together with the provisions contained in the Commentary to Article 15 in the next section of this thesis.

3.1.2. Commentary to Article 15(2) OECD MC

Under subsection 2.6.3 of this thesis an analysis on the legal value of the commentary and its amendments on the interpretation of the OECD MC Articles have been given. Article 15 of the OECD MC and explanations given at the Commentary are designed to provide guidance on the interpretation of the taxation of income from employment. As the objective of this thesis is Article 15 in particular the three cumulative conditions in the paragraph (2) this subsection will

52 J.F. Avery Jones, Short-term employment assignments under Article 15(2) of the OECD Model, 63 Bull. Intl. Taxn. 1 (2009), Journals IBFD.
53 Dziurdz (2013), See also Dziurdz and Potgens (2014)
54 Paragraph 8.4 of the Commentary on Article 15 OECD MC, van Raad (2016/17) p.395
55 Paragraph 8.10 of the Commentary on Article 15 OECD MC, van Raad (2016/17) p.396
be focus on the choices given by the Commentary with regard to the term “employer”.

Prior to the changes in 1992 the commentary to Article 15 had no explanations on the meaning of ‘employer’. As elaborated on the previous section the revised commentary to Article 15 in 1992 dealt with the meaning of employer, however, the term remained unclear, as a matter of fact two different approaches have been adopted by countries in the interpretation of the Article 15(2); first the reference by contracting state to domestic law meaning which refers to the formal approach in domestic law or either in the concept substance over form and second the autonomous interpretation of the meaning from the tax treaty in both abusive cases of international hiring out of labour or in bona fide cases.56

Due to the lack of clarity and legal certainty the OECD Commentary on Article 15 was revised aiming to clarify the interpretation and understanding of the term “employer” for treaty purposes, as well as, preventing double taxation and double non-taxation. With regard to the international hiring-out of labour the 2010 Commentary provides a different meaning of the term employer. While the 1992 version of the Commentary to Article 15(2) based on the context favours an autonomous economic meaning of the term employer in order to prevent unintended results in cases of the international hiring-out of labour, the 2010 version has made a distinguished between the cases of abuse and cases of international hiring out of labour.57

In this regard, in both situations; first, when a formal contractual relationship is not questioned by parties under domestic law rules and exceptions under 15(2) may apply in cases of hiring out of labour, the Commentary to Article 15 allows parties to adopt special provisions, second, when a formal contractual relationship it is possible to deny the application of the exception under article 15(2) in cases of abuse parties should refer to the Commentary to Article 1.58 Consequently, the choices given by the 2010 Commentary on the issue of international hiring out of

56 Eva Burgstaller 'Employer' Issues in Article 15(2) of the OECD Model Convention Proposals to Amend the OECD Commentary (2005) InterTax
58 Dziurdz and Potgens (2014)
labor and cases of abuse are different by offering a distinguish between those two as well as providing a different meaning of the term employer comparing to the 1992 version of the OECD Commentary to Article 15.

Additionally, in the literature it is debatable if the changes to the Commentary on Article 15 on 2010 should be used in relation to tax treaties concluded before 2010, thus under paragraph 36 of the OECD Commentary it is states:

that changes to the Commentary should be relevant in interpreting and applying conventions concluded before the adoption of these changes, it disagrees with any form of a contrario interpretation that would necessarily infer from a change to an Article of the Model Convention or to the Commentaries that the previous wording resulted in consequences different from those of the modified wording.\(^{59}\)

In my understanding the choices given by the commentary in this issue are vague and is up to the contracting states to decide on applying such changes in their tax treaties, still changes may be consider as additional source of interpretation.

One can conclude that changes made on 2010 to the OECD Commentary on Article 15 are not necessarily coherent, however, even though these changes have been minor the term employer depending on the version has a different meaning depends when the treaty was concluded. Regardless changes made the 2010 version of the Commentary to Article 15 does not predetermine the meaning of the term employer, therefore, the interpretation of the undefined terms should be based on the Article 31 and 32 of the VCLT.\(^{60}\)

**3.1.3. Paragraph 8 of the Commentary on Article 15(2) OECD MC**

As previously mentioned prior to the changes in 2010 the Commentary to Article 15(2) was amended in 1992 with the aim on addressing the issue of international hiring-out of labour and abusive practices of engaging foreign employees for a period less than 183 days, as well as, advocates the principle of substance over form in suspected cases. According to Potgens in legal literature paragraph 8 prior to the

\(^{59}\) OECD MC, Presentation of the MC at paragraph 36, van Raad(2016/17) p.64

\(^{60}\) Dziurdź and Pötgens (2014)
changes has been criticised because according to the wording of the Commentary there might be only one employer, the structure of the paragraph 8 was unclear by not offering a complete definition of the employer, moreover, the employer status may be used only in cases of international hiring-out of labour, however, no clear meaning of what an abuse is has been given, as well as, the distinction between bona-fide and abusive cases was not explained.\textsuperscript{61}

The 2004 Discussion Draft was aiming on addressing the scope of paragraph 8 of the Commentary to Article 15 on the issue of the interpretation of the term “employer” in domestic law, as well as, the distinction between employment and self-employment. The proposal recognized the differences on how countries define the employer. Accordingly, for countries following the formal approach the contractual relationship will not be questioned for tax purposes unless manipulations were supposed, as those countries are free to adopt bilaterally provisions excluding granting of the exceptions provided for in paragraph 2 in unintended situations. For countries following the substantive approach the distinguishing of the cases where services are rendered by an individual to an enterprise should be granted to be rendered based on a contract of service.\textsuperscript{62}

As previously stated the revised Commentary on 2010 to Article 15 addresses both the abusive structures and bona fide cases in cross-border situations.\textsuperscript{63} Furthermore, the revised Commentary to Article 15 focuses on the expression ‘employer’ for treaty purposes as this has been unclear in practice prior to the changes. Nevertheless, the 2010 commentary to Article 15 in its major part is focused on the employment relationship, however, an analysis of when a person can be considered as an employer for purposes of the Article 15(2) is also given.\textsuperscript{64}

\section{3.2. Formal and De Facto Employer}

The 2010 Commentary to Article 15 as previously explained distinguish between different concepts of interpretation on the term employer as it is used in Article

\textsuperscript{61} Frank Potgens, \textit{The 2010 OECD Updates, Model Tax Connection & Transfer Pricing Guidelines A Critical Review, Chapter 9 Some Selected Interpretation and Qualification Issues with Respect to Article 15(2)(b) and (c) of the OECD Model} (2011) Kluwer p.126
\textsuperscript{63} Paragraph 8.1 of the Commentary on Article 15 OECD MC, van Raad(2016/17) p.A-394
\textsuperscript{64} Paragraph 8.16 – 8.27 of the Commentary on Article 15 OECD MC, examples are given on the question who can be considered as an employer for treaty purposes, van Raad(2016/17) p.399–401
15(2) of the OECD MC. This differentiates between the formal interpretation based on the domestic law and the substantive meaning that should be given to the term ‘employer’.65

3.2.1. Formal Employer

According to the 2010 Commentary paragraph 8.3 for states following the formal approach to employer, bilaterally may adopt provisions in situations when are concerned that benefits could result in unintended situations such as ‘international hiring out of labour’.66 However, the 2010 Commentary has no explanatory provisions on the issue of international hiring out of labour either restricts the interpretation of the employer.

According to Burgstaller interpretation choices given by the Commentary are vague, hence, there are two possibilities in this respect, first; a reference to domestic law for undefined terms used under Article 15(2) second; treaty terms must be interpreted in the light of the ‘context’ of the treaty including the undefined terms.67 Accordingly, in the view of the 2010 Commentary the interpretation of undefined terms it is possible within Article 15 by considering the object and purpose of the treaty.68

In addition to the formal concept of employer, the 2010 Commentary to Article 15 stress that a number of states consider that employment services are rendered only if there is a formal employment relationship.69 However, countries following a formal explanation of the term ‘employer’ are predisposed to enter into situation involving the international hiring-out of labour, in this regard Germany for example use a substantive explanation of the term ‘employer’ for treaty purposes aiming to avoid unintended situation in regard to method of invoicing and the hiring as an employer.70

65 Valter Aderoni, Updated to the Commentary on Article 15 of the OECD Model-Thoughts on the Interpretation of the Term ‘employer’ for Treaty Purposes, (Kluwer, 2011)
66 Paragraph 8.3 of the Commentary to Article 15(2) OECD MC, van Raad(2016/17) p.395
67 Burgstaller (2005)
68 Under subsection [2.5.3 Article (3)2 OECD Model] of this thesis an explanation on the reference to Article 3(2) have been given. However, it is important to point out that the term ‘employer’ in concrete situation may differ between two countries, hence, the 2010 Commentary ‘predicts’ such conflicts by providing examples that could be used in cases of disagreements.
69 Paragraph 8.4 of the Commentary to Article 15, van Raad(2016/17) p.395
70 According to German Case Law due to non-explanation of the term ‘employer’ in tax treaties in depth evaluation should be made in accordance with the intentional context of the treaty. A decision on the
3.2.2. De Facto Employer

This concept refer to countries which apply the substance over form rule within their domestic law to determine the real employer and primary focus on the nature of the service. The 2010 Commentary to Article 15 refer to countries who primarily focus on the nature of the service rendered by an individual to an enterprise and cases where the contract for service between two separate enterprises, the first one should be considered as an employment relationship while the second one is a contract for service.\textsuperscript{71}

States following substance over form approach can use domestic law in order to explain the concept of employment and define services which can be characterized as employment services, however, according to paragraph 8.13 and 8.15 limitations exists,\textsuperscript{72} based on the objective criteria states are obliged to use the choices given by the Article 15. Accordingly, the conclusion on the matter of employment relationship between the service rendered and the individual and the enterprise is the employer in accordance with the Article 15(2)(b) OECD MC.\textsuperscript{73}

Furthermore, interpreting ‘employment’ is crucial in determining the meaning of ‘employer’ as this is a pre-condition to conclude that an employment relationship exist as services rendered for persons are given by an employer as this are regarded within the wording of the Article 15 OECD MC as a contract of services.\textsuperscript{74}

3.2.3. Substance over form, interpretation of De Facto Employer

The interpretation of substance over form approach as stated should be applied on the bases of the objective criteria laid down at 2010 Commentary at Article 15. From the wording of the Commentary under this approach states may refer to their domestic law, however, limitation exist in certain cases as contracting states cannot argue that services are deemed to constitute employment service, as only when

\begin{itemize}
  \item interpretation of the term ‘employer’ has been delivered in 21 August 1985 by the German Federal Tax Court in the case IR 63/80
  \item Paragraphs 8.2 and 8.4 of the 2010 Commentary to Article 15 OECD MC provides guidance concerning the question of weather services are provided under a contract of employment or a contract for service.
  \item According to Arnold (2011) the reference to domestic law should be limited and subject to an ‘objective criteria’ test in order to make sure that contracting states will not misuse employment services which may result in inappropriate taxing rights of the source state.
  \item Commentary to Article 15 OEC MC, van Raad(2016/17)p.383 et seq.
  \item Under paragraph 8.4 of the 2010 Commentary to Article 15 the contract of service is consider the contract where the service is rendered by an individual to an enterprise and it is consider an employment relationship, while the contract for services are considered contracts of services between two separate enterprises.
\end{itemize}
facts and circumstances clearly appears that services are rendered under a contract for services concluded between two separated enterprises.  

Furthermore, according to the Commentary if states would be allowed to deem services in cases where no employment relationship exists or to deny the status of employment to a non-resident enterprise that provides services through its own personnel to an enterprises carried on by a resident would be meaningless. Nevertheless, where services rendered by an individual may properly be regarded by a state in an employment relationship rather than under a contract for services concluded between two enterprises, that state should consider that the individual does not carry on the business of the enterprise that constitutes the individual's formal employer.  

The 2010 Commentary on Article 15 OECD MC is not clear enough on the interpretation method of the term employer, it uses the domestic law meaning of “employment” to interpret the term “employer”, however, it is not clear if this interpretation is an indirect reference to domestic law or states are independent on the interpretation of “employer”, moreover, the 2010 Commentary does not consider situations where states have a definition of “employer”. While on the first aforementioned situation the author shares the opinion with other scholars that the interpretation should be based on the general rules of interpretation set on the VCLT, in situation where states have a definition of the term “employer” in their domestic legislation situation should be solved in the reference to Article 3(2) of the OECD MC. 

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75 Paragraph 8.11 of the Commentary to Article 15 OECD MC, van Raad (2016/17) p.397  
76 Ibid  
77 Dutch Supreme Court in 2006 in the case V-N 2002/65 has refer to the “employment” definition to interpret the expression “employer” as Dutch domestic law does not have a definition of the term “employer”, moreover, the Supreme Court has concluded that the expression employer has to be interpreted substantively in this context. At this conclusion the Supreme Court came independently without relying on paragraph 8 of the Commentary to Article 15 of the OECD MC. See further at, Frank Potgens, ‘The Dutch Supreme Court Reaffirms and Clarifies “de facto employer” under Article 15 of the OECD Model’, Intertax, Issue 2 (2008)  
78 Potgens (2011) for example is very sceptical on the choices given by the 2010 Commentary on the interpretation method of the term employer. He keeps the opinion that a reference to VCLT to interpret the term employer should be made and no method of interpretation should be included in the Commentary. Moreover, he advocates on the reference to Article 3(2) OECD MC for states who have a definition of the term “employer”. 

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3.3. **OECD Commentary on qualification and interpretation conflict in regard to term “employer” under Article 15(2)(b)**

As previously mentioned the issue of interpretation and qualification of the term “employer” was examined first in the OECD Report on Taxation Issues Relating to International Hiring-Out of Labour in 1984, thus, in 1992 the explanation on the term “employer” was included in the OECD Commentary to Article 15 aiming on countering the cases of abuse, however, the exact scope of the Article 15(2) and the reference to domestic law meaning under Article 3(2) especially as there might be no definition of the term “employer” was unclear. Furthermore, the 2004 Discussion Draft was criticised. Nevertheless, the 2007 Discussion Draft and in particular the 2010 Commentary under Article 15 paragraph 8.10 refers to paragraphs 32.1 to 32.7 under Article 23 by acknowledging the issue of qualification conflicts.

OECD in its 2010 Commentary to Article 15 within paragraph 8 explains the term ‘employer’ however, as it is could lead to obscurities adding the fact that Article 23 of the OECD only deals with qualification conflicts and not with interpretation conflicts in situations when domestic laws of contracting states have different views concerning the term ‘employer’. Thus, divergences according to the Commentary to Article 23 paragraph 32.3 are not to be consider as qualification conflicts but as interpretation conflicts.

The OECD recommends that the residence state should interpret the term employer independently, however, the issue should be addressed under Article 23 OECD MC as to whether the work state has tax the remuneration in accordance with the convention, subsequently, addressing this matter under Article 23 does not involve the characterization of income or who is an employer, thus, the relief from double taxation should take place, otherwise if no relief takes place by referring to the provisions of the tax treaty will imply the fact that misinterpretation of the domestic law and tax treaty provisions has taken place.

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79 For example did not address the current paragraph 32.1 – 32.7 under Article 23 OECD MC, See also Potgens (2011)

80 Paragraph 32.3 of the Commentary to Article 23 OECD MC, van Raad (2016/17) p.484. In addition, according to Potgens even in cases when only one state has a definition of ‘employer’ within domestic law and the other state interpret the expression autonomously should be regarded as interpretation conflict.

81 Potgens(2011) p.134
Theoretically, the conflict would be resolved in cases when the residence state interprets the term ‘employer’ autonomously and the work state explains it with a reference to its domestic law as a result of application of Article 3(2) OECD MC, in such situation the resident state would follow the work state characterization on determine who is an employer. However, in situation when the work state has no definition of the term ‘employer’ the interpretation will be autonomously without any reference to Article 3(2) OECD MC.82

Accordingly, for Potgenz and de Heer the residence state will consider relieving tax for the work state in accordance with the Article 23 and will not interpret the term ‘employer’ autonomously or by a reference to Article 3(2) OECD MC.83 However, according to De Broe et al there might be another issue due to the fact that the residence state might take a different approach on solving such situations if a reference to Article 3(2) occurs by questioning the work state’s domestic law characterization of the term ‘employer’.84

As stressed in this thesis a reference to domestic law meaning under Article 3(2) for terms which are not defined in the tax treaty itself unless the context requires a different meaning it is possible, however, qualification conflicts arise in situations when the residence and the source state apply different treaty provisions as a result of this domestic law reference double taxation may arise.85 Facing this complicated situation the OECD in August 1999 issued a report on the application of the OECD MC Tax Convention to Partnership by requiring the residence state to follow the source state qualification,86 in this regard also the Commentary to Article 15 under paragraph 8.10 suggests the same choice by given the liability to tax to the work state and the residence state granting relief for double taxation pursuant to Article 23 OECD MC.87

82 Ibid
83 Frank Potgens and Lucas de Heer ‘The International Public Law Effectiveness Principle and Qualification Conflict from a Dutch Perspective’ (2012) Intertax, Issue 1
84 According to De Broe at al Interpretation of Article 15(2)(b) of the OECD Model Convention: “Remuneration Paid by, or on Behalf of, an Employer Who is not a Resident of the Other State” Volume 54, 10th Issue (IBFD, 2000), in situations when the work state characterization puts in a difficult situation the residence state a reference to Article 3(2) is allowed, moreover, such a reference is in accordance with Article 31 and 32 VCLT
85 De Broe at al, (2000)
87 Paragraph 8.10 of the Commentary to Article 15 OECD MC, van Raad (2016/17)
Accordingly, paragraph 8.10 anticipates a situation in which the residence state is obliged to follow the source state interpretation,\textsuperscript{88} furthermore, paragraph 8.10 offers the same solution in accordance with paragraphs 32.1 to 32.7 of the Article 23 OECD MC in situations when one of the contracting states follows the autonomous interpretation of the term employer and does not refer to Article 3(2).\textsuperscript{89} In the authors view there is no consistency because the solutions for qualification conflicts proposed by the Commentary are strictly based on the assuming that both states will apply the Article 3(2) while in any other situation this would involve a conflict of interpretation within the meaning of the paragraph 32.5 of the Article 23 OECD MC Commentary and in those situation a reference to Article 25 for solving the interpretation conflict have to be made.\textsuperscript{90} Therefore, discrepancies in the Commentary to Article 15 paragraph 8.10 and Article 23 in particular paragraphs 32.3 and 32.5 are present, in Potgens and de Heer view the authority of the Commentary is enfeebled when contradictions exists, therefore, an update of the paragraphs 32.3 and 32.5 should take place in order to express the broader view of the paragraph 8.10.\textsuperscript{91}

3.4. Objective of the 183 day rule and the interpretation of “Pay by, or on behalf of” and “borne by” at Article 15(2) OECD MC

3.4.1. Objective of the 183 days rule

The objective of the 183 day rule is to facilitate the mobility of individuals in course of employment as well as the operations of the enterprises engaged in international trade. The 183 days rule avoids administrative burden for employees and employers. In retrospective it is debated that the 183 days rule first emerged in the

\textsuperscript{88} This was considered outside of the scope of the paragraph 32.3 and 32.5 of the Commentary to Article 23 by De Broe et al. (2000)

\textsuperscript{89} As mention Germany has adopted the autonomous interpretation of the term ‘employer’. See further at Potgens (2007) p.593

\textsuperscript{90} In contrary for example under paragraph 7 of the Commentary to Article 7 OECD MC, a more restrictive approach in situation when contracting states apply different methods for allocation of the free capital to a PE by given an advantage on the selection of the method to the state in which the PE is situated and the duty of the other state to follow this method. Therefore, once can be concluded that OECD by purpose has left a less restrictive approach in its definition of qualification conflict concerning the term ‘employer’

\textsuperscript{91} Potgens and de Heer, (2012)
German—Sweden Tax Treaty in 1928, moreover, the rule also contain in The League of Nations Mexico Model (1943).92

The 183 day rule provides an exception to the place of work principle.93 Accordingly, the Commentary to Article 15 (2)(b)(c) purpose are:

[...] to avoid the source taxation of short-term employments to the extent that the employment income is not allowed as a deductible expense in the State of source because the employer is not taxable in that State as he neither is a resident nor has a permanent establishment therein.94

Consequently, if employment income is taxable only in the resident state the administrative burden for the employees and employers which can result from tax obligations in the source state can be avoided. In this regard, if the work is temporarily the administrative burden is considered as excessive.95

However, the existence of the PE is relevant for the application of the 183 day rule in situation when the employee works temporarily in the source state and applies if the remuneration is not borne by the PE itself. Under Article 15(2)(c) the 183 day rule does not apply if the remuneration is borne by a PE in the state in which the employment is exercised.96

Concerning the 183 day rule there is still lack of clarity and legal certainty in practice even though changes as explained above has happened. The issue of calculation of 183 days it is not set fully as there is no consensus on the method of calculation. Under OECD Commentary is stated that only days spent in the state of employment have to be taken into consideration, therefore, in order to have a consistent interpretation in accordance with the wording of the OECD Commentary the “days of physical presence” method should be used as this method is straightforward as the individual is or is not present in a country, and easily

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93 Dziurdź and Pötgens, (2014)
94 Paragraph 6.2 of the Commentary to Article 15 OECD MC, van Raad(2016/17) p.392
95 Dziurdź and Pötgens, (2014)
96 Dziurdź (2013)
documented by the taxpayer.\footnote{Paragraph 5 of the Commentary to Article 15 OECD MC sets the “days of physical presence” method on calculation of the 183 days period, under this method also in the calculation are included the part of a day, days of arrival, days of departure and other days spend in the state of activity including weekends, public holidays and the days of sickness.} In my view this should be solved by expanding the explanations in the commentary.

### 3.4.2. Paid by, or on behalf of

When applying the treaty under Article 15 the work state is limited to tax. The term “paid by, or on behalf of” and “employer” are not defined in the OECD MC, therefore, in line with Article 3(2) of the OECD MC contracting states may interpret those terms in accordance with their meaning under domestic law.\footnote{Potgens keeps a different opinion, he states that the expression “paid by of on behalf of” should be interpreted autonomously from Article 3(2) OECD MC.}

Nevertheless, according to Dziurdz it is arguable if “paid by, or on behalf of” is an independent condition from the question who the employer is and the requirement of the employer having the economical bear, however, in situations when there is only one employee this becomes a question of secondary importance due to the fact that the remuneration can be borne by a person who has no employment function at all in situations when the employer receives financial support from a fund that is not directly linked to the employee. Therefore, in line with Article 15(2)(b) if “paid by, or on behalf of” is a condition to be understood independent from the question of who the employer is this condition in terms of an employer who is not a resident of the source state and pays remuneration for the employer will never be fulfilled as there is no paying employer.\footnote{K. Dziurdz, Article 15 of the OECD Model: The 183-Day Rule and the Meaning of “Borne by a Permanent Establishment”, 67 Bull. Intl. Taxn. 3 (2013), Journals IBFD.}

As stated previously the remuneration in respect of an employment may be taxed in the source state if the employment is exercised in the source state and the three cumulative conditions under Article 15(2) are fulfilled. In this regard if the employer and the persons paying the remuneration are residents of the source state and the taxation of the remuneration takes place in the source state there will be an administrative burden therefore the 183 days rule would apply, nevertheless if “paid by, or on behalf of” is an independent condition which is not connected to the status...
of the employer the objective and purpose of the 183 days rule might not be achieved.¹⁰⁰

Thus, in the literature there are two issues in this regard, first if the remuneration must be born economically by the employer to be “paid or on behalf of” the employer and second if this condition is independent from the employer, therefore, if the remuneration it is not paid by the employer but by someone else on behalf of the employer and later the remuneration is charged to the employer, accordingly such a change should not bring us to the conclusion that the remuneration is paid on behalf of the employer and has no influence on Article 15(2)(b). Consequently, the analysis that takes place on the charged of remuneration from a persons to another under Article 15(2)(b) is in fact an analysis of who the direct employer is.¹⁰¹

However, outside of the academic discussion under article 15(2)(b) “paid by, or on behalf of” and “an employer” in fact are interconnected and are considered together, moreover, in line with the suggestions given by the Commentary the condition “paid by or on behalf of” is not independent from who the employer is.¹⁰²

3.4.3. ‘Born by’ at Article 15(2)(c) of the OECD MC and its meaning according to the Commentary

The interpretation of the concept “borne by” at Article 15(2)(c) OECD MC according to the 2010 Commentary is interrelated to the attribution rules under Article 7 OECD MC. Therefore, its interpretation should be autonomous from Article 3(2) OECD MC because under Article 3(2) can be interpret concepts that have legal meaning, and from its function ‘borne by’ is a factual matter since deals with the allocation of the salary costs to the PE, moreover, ‘borne by’ is defined within Article 7 OECD MC.¹⁰³

Accordingly in regard to Article 7 the Commentary to Article 15 emphasises the possibility to deduct costs for tax purposes while under paragraph 7.1 the same choices are given also if the PE is exempt from taxation in the state of activity. Therefore, the employer is entitled to take the deduction, however, certain

¹⁰⁰ Paragraph 6 of the Commentary to Article 15(2) OECD MC, van Raad(2016/17) See also Dziurdz (2013)
¹⁰¹ Dziurdz (2013)
¹⁰² Paragraph 2 of the Commentary to Article 15 OECD MC, van Raad (2016/17) p.389 et seq.
¹⁰³ Potgens (2011), Also see Frank Potgens ‘The Netherland Supreme Court and Remuneration Born by a Permanent Establishment – Third Time Lucky?’, (IBFD, 2008)
remuneration are not deductible because of their nature as this will be decided based on the result of the test.\textsuperscript{104}

The 2010 Commentary has introduced a new paragraph at Article 15 in regard to the expression ‘borne by’ and read as follow:

For the purpose of determining the profits attributable to a permanent establishment pursuant to paragraph 2 of Article 7, the remuneration paid to an employee of an enterprise of a Contracting State for employment services rendered in the other State for the benefit of a permanent establishment of the enterprise situated in that other State may, given the circumstances, either give rise to a direct deduction or give rise to the deduction of a notional charge, e.g. for services rendered to the permanent establishment by another part of the enterprise. In the latter case, since the notional charge required by the legal fiction of the separate and independent enterprise that is applicable under paragraph 2 of Article 7 is merely a mechanism provided for by that paragraph for the sole purpose of determining the profits attributable to the permanent establishment, this fiction does not affect the determination of whether or not the remuneration is borne by the permanent establishment.\textsuperscript{105}

Accordingly the added paragraph is important in two ways: first; the salary costs are attributable to the PE on the bases of Article 7, and second, the costs from the salary are rechargeable to the PE.\textsuperscript{106} However, in Potgens view the criteria in the 2008 and 2010 version of Article 7 of the OECD MC was and continues to be depended in the fact that the work has been carried out for purposes of the permanent establishment, therefore, in order for the costs to be allocated to the PE a dealing under the Authorized OECD Approach has to be identified between the head office and the PE.\textsuperscript{107}

\textsuperscript{104} Paragraph 7.1 of the Commentary to Article 15 OECD MC, van Raad (2016/17) p.393
\textsuperscript{105} Paragraph 7.2 of the Commentary to Article 15 OECD MC, van Raad(2016/17) p.393-394
\textsuperscript{106} Dziurdz and Potgens (2014)
\textsuperscript{107} Potgens (2011) p.142
3.4.4. “Borne by” based on the Arm’s Length Principle

Article 7 of the OECD MC refer to the PE and its definition under Article 5. Accordingly, under Article 7(2) remunerations in respect of employment are attributable to a PE in the source state by putting a note on the profits that the PE is:

[…] expected to make in its dealings with the other parts of the enterprises, if it were a separate and independent enterprise engaged in the same or similar activities under the same or similar conditions, taking into account the functions performed, assets used and risks assumed by the enterprise through the permanent establishment and through the other parts of the enterprise.

In this note also Article 15(2)(c) refers to the PE definition, therefore, under Article 7(2) the arm’s length principle can answer the question under Article 15(2)(c) if the remuneration is ‘borne by’ a PE that the employer has in the source state.

It is generally understood that administrative expenses, as well as, employment expenses for purposes of a PE may be attributed to the PE, therefore, according to Dziurzdz in the light of the Article 15(2)(c) would be surprising if these expenses would be ‘borne by’ the PE in the source state because as such Article 15(2)(c) would prevent the application of 183 day rule to the remuneration which are deductible in the source state, even if the remuneration has been paid for a service provided or good delivered to the PE. In this regard, if the PE is treated as an independent enterprises under Article 15(2)(c) and as such if between independent enterprises the employee does not lose his status when it charges the remuneration to another person it is unclear why this should be relevant for the application of Article 15(2)(c). Accordingly in such situations the question to whom the remuneration is charged as part of a fee for a service or a good delivered depends on who the employer is which is addressed under Article 15(2)(b) and is focused

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108 Paragraph 2 of the Commentary to Article 7 OECD MC, van Raad (2016/17) p.196
109 OECD MC Article 7(2), van Raad(2016/17) p.15
110 Dziurdz (2013)
111 Prior to the changes proposed on the OECD Report on Attribution of Income to Permanent Establishment (1993) Article 7(3) read as follow “In determining the profits of a permanent establishment, there shall be allowed as deductions expenses which are incurred for the purposes of the permanent establishment, including executive and general administrative expenses so incurred, whether in the State in which the permanent establishment is situated or elsewhere” See further concerning Article 5 and Article 7 at Ekkehart Reimer, Nathalie Urban and Stefan Schmid, Permanent Establishments A Domestic Taxation, Bilateral Tax Treaty and OECD Perspective (Kluwer 2011) p.172 et seq.
on who exercise the relevant employer functions by paying the remuneration itself or is paid by another person on its behalf.\textsuperscript{112} In the light of Article 15(2)(c) the remuneration to fill the condition must be ‘borne by’ the PE therefore, in this regard it is important to know the reason of the attribution of the remuneration to the PE.

Even though the PE is treated as a separate and independent enterprise, Article 15(2)(b) addresses the person who exercises the relevant employer function, nevertheless, the principle under Article 15(2)(b) connects the presence of a persons to the employee’s service in the source state is relevant under Article 15(2)(c) on connecting the employee’s service with the presence of the PE in the source state as such to establish if the remuneration is born by the PE or not.\textsuperscript{113}

As stated previously in this thesis the objective and purpose of the 183 day rule is to prevent the administrative burden and facilitate the international movement of personnel and the operations of enterprises engaged in cross-border trade, hence, in order for this objective to be better achieved under Article 15(2)(c) it is given a consideration not where the remuneration is, but to the part of the enterprise in which the relevant employer functions are primarily exercised, moreover the 183 day rule should prevent taxation in situation when the employer provides services or products to PEs in many different jurisdictions and as a matter of this services the employer is active in different jurisdiction for a shorter period of time.\textsuperscript{114}

In this regard, the employee remuneration under arm’s length principle is deductible from the activities in different jurisdiction, however, this should not exclude the application of the 183 day rule as the remuneration is not ‘borne by’ the PE. The place of work principle would be full field in a situation when the employee works for a PE similarly as he would work for an employer and the employer’s presence in the source state and the connection between the employees and the PE are strong enough.\textsuperscript{115}

\textsuperscript{112} Dziurdz (2013) p.126  
\textsuperscript{113} Ibid.p.126-127  
\textsuperscript{114} Peeters (2004)  
\textsuperscript{115} Dziurdz and Potgens (2014)
3.4.5. “Remuneration is not borne by a permanent establishment”

The application of the Article 15(2)(c) raises a number of questions starting from the scope of the term ‘borne by’. The 183 day rule under the Article 15(2)(c) of the OECD MC does not apply if the remuneration is born by a PE in the state in which the employment is exercised.\footnote{Peeters (2004)} Even though the OECD Commentary offers an extensive explanation on the application of this rule in practice there is no uniformity of the interpretation. Accordingly, e.g. while the Supreme Court in the Netherlands in its decision follows the choices given under Article 15(2)(c) OECD MC,\footnote{BNB 1999/267, For extensive explanation on the case see further Kees van Raad, Construction Project PR in the Netherlands Supreme Court Decision of 1998, (1999) Kluwer. This is also illustrated at Peeters(2004)} German case law seems to deviate the choices given by the OECD Commentary.\footnote{See the decision of German Court in the case BFH IR 63/80. A similar decision has been made on the case IR 73/13 of a German employ who served in the Republic of Kosovo with the OSCE Mission under the 183-day clause in the DBA-Yugoslavia (Republic of Kosovo)}

Nevertheless, according to the Commentary;

[...] the phrase ‘borne by’ must be interpreted in the light of the underlying purpose of subparagraph c) of the Article, which is to ensure that the exception provided for in paragraph 2 does not apply to remuneration that could give rise to a deduction, having regard to the principles of Article 7, and the nature of the remuneration in computing the profits of a permanent establishment situated in the State in which the employment is exercised.\footnote{Paragraph 7 of the Commentary to Article 15(2)(c) OECD MC, van Raad (2016/17) p.393}

In this regard, according to De Broe et al. the 183 day rule may be excluded if the remuneration is not borne by the PE,\footnote{De Broe et al., (2000)} thus, if the salary is borne by or should be charged to the PE will not satisfied the 183 day rule.\footnote{Peeters (2004)}

While under the Article 15(2)(b) the remuneration is borne by the PE in cases when the PE as a separate and independent enterprise are engage in same or similar activities and conditions under Article 15(2)(c) the remuneration is borne by and can be determined as a direct charge or indirectly as part of a fee as a service or
goods delivered is not borne by the PE, this can happen in cases when for example the PE no longer exists.\textsuperscript{122}

Furthermore, the interpretation of this issue and the term permanent establishment is even more complicated in triangular situations, therefore the taxation of such remuneration under the rules of Article 15(2) it becomes even more complicated,\textsuperscript{123} however, triangular cases are outside the scope of this thesis hence will not be further elaborated.

\textsuperscript{122} See further at Dziurdz (2013)
\textsuperscript{123} Peeters (2004)
4. Analysis and reflections

4.1. Interpretation and qualification conflict regarding short term employment at Article 15(2) OECD MC

Even though Article 15(2) was meant to facilitate mobility of employees and taxation procedures for the parties involved in short-term employment, practice has shown that problems exists. OECD has continuously amended its Commentary to Article 15(2) lastly in 2010, however, interpretation and qualification conflicts are still present. In legal literature there is a consensus among legal scholars that Article 15, is a complex article due to the three cumulative exceptions listed under the second paragraph and in situation when the three requirements are fulfilled the remuneration from the employment is taxable exclusively in the residence state of the employee and the work state has no taxing rights.

As elaborated in this thesis the understanding and interpretation of the terms used under Article 15(2) are a pressing issue in legal practice and in academia are largely debated, in particular the term ‘an employer’. As explained under subsection 3.2 of this thesis the Commentary to Article 15 distinguish between the formal interpretation based on the domestic law and the substantive meaning that should be given to the term ‘employer’. For the first afore mentioned interpretative method the author agrees with Burgstaller that the Commentary is vague. Moreover in my opinion the reference to domestic law or adoption of provisions bilaterally by contracting states is not the ideal solution due to limitation that exists and the divergences within domestic laws of different countries, furthermore, adoption of provisions bilaterally dose not respond to the general idea of the OECD MC to solve the issue at the international level.

In my view the interpretation of substance over form approach is a better method on assessing the real employer. Accordingly, assessing the substance of the service and offering arguments based on the domestic law in my view gives more legal certainty for taxpayers. However, as mentioned under subsection 3.2.3 limitation

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124 When drafted by the Fiscal Committee the Commentary to Article 15 was expressed: “Intended to facilitate the international movement of qualified personnel as in the case of firms which sell capital goods and are responsible for installing and assembling abroad”, however, the current version of the Commentary does not refer to qualified personnel but to all individuals rendering services in the course of employment.
exists also regarding this method, moreover the author is aware that this method puts more administrative burden for taxpayers and tax authorities.

As a final note on this issue in my opinion Article 15(2) hasn’t fulfilled its objective consequently for both individuals and companies has proven to be an issue to predict tax consequences and in general there is a lack of legal certainty. Therefore amendments should take place by further explaining the undefined terms in particular the term ‘employer’ which will better guide contracting state on solving the interpretation problems.

In addition, as explained in this thesis in particular under subsection 2.6.2 the OECD MC under Article 3(2) allows contracting state to refer to domestic law to interpret the undefined terms used in the tax treaty and the relevance of this reference has been proven in numerous case law. In this regard, in the author’s view the continues interpretative reference to domestic law has motivated the legal uncertainty and has contributed to have the current situation as states have been hesitance to address and define the terms within OECD MC and build an autonomous interpretation of such terms in particular the term ‘employer’.

Also, the author agrees with Avery Jones that using “context” in reference to Article 3(2) in the limited and objective sense for purposes of interpreting tax treaties overrides the usage of additional tools that might be useful on treaty interpretation.125

Further, under subsection 2.6 and 2.6.1 an explanation on the tax treaty interpretation has been given respectively the importance and the role of VCLT provision on the treaty interpretation was elaborated. Before going any further is important to mention that tax treaties have been a great legal instruments to avoid double taxation and promote cross-border activities. But, when it comes to the interpretation of the tax treaties contracting states do not have identic understanding of legal provisions mostly because of legal domestic tradition, particularly for provisions that are not define in the OECD MC, consequently in order to avoid

125 J.F. Avery Jones, The interpretation of tax treaties with particular reference to Article 3(2) of the OECD Model (1984)
interpretative conflicts and to reach the purpose of the treaty, contracting states refer to provisions contained in VCLT.

Article 31 of the VCLT sets the general rule of interpretation stressing that undefined treaty terms “[...] shall be interpreted in good faith in accordance with the ordinary meaning of the treaty, their context and in light of its object and purpose”. From the wording of the VCLT there is still lack of strict interpretative method and therefore can be concluded that this is quite general and does not offer a concrete answer for the undefined terms used in tax treaties and remains in abstract and theoretical level.

In the author’s understanding the wording of the Article 31 VCLT can be used to help building the meaning of the treaty and unify the interpretation of undefined treaty terms, still as Vogel points out the context as defined within VCLT is narrow and refers only to agreements and instruments made in connection with the treaty, consequently cannot influence the interpretation of the treaty. Thus, provision under VCLT used as supplementary means of interpretation in regard to interpretation of the undefined terms in tax treaty might bring practical results.

Under subsection 2.6.3 the author has elaborated the importance and the legal value of the OECD MC Commentary, once can be concluded that even though contracting states put a lot of importance to the Commentary when it comes to the interpretation of the tax treaties, still, the legal status of the Commentary is difficult to be establish, furthermore, even though the OECD Committee proposes that changes to the commentary are applicable to the interpretation of tax treaties, still in practice is questionable if changes have any impact on tax treaties concluded prior to the changes. In the author’s opinion changes to the commentary can be considered as additional source of interpretation, if contracting states agree to consult them.

The amendments of 2010 to the Commentary to Article 15 paragraph 2 intended to clarify the terms used in order to avoid interpretation conflicts. However, even though amendment took place the Commentary is not clear enough on the interpretation method of the term employer, as explained under 3.1.1. Further, as mentioned under subsection 3.1.3 prior to the changes the paragraph 8 of the

126 Vienna Convention on the Law of Treaties at Article 31(1)
Commentary was criticised for its wording, the structure and for non-definition of the term employer, furthermore, there was no clear distinction between bona-fide and abusive cases nor the meaning of what an abuse is consider.

However, the updated commentary under paragraph 8 has explained the term ‘employer’, but as mentioned under subsection 3.3 the present wording is not very clear and could lead to different understanding in particular when it comes to the categorisation of the qualification conflicts and interpretation conflicts because under paragraph 8.10 of the Commentary residence state is oblige to follow the source state interpretation, however, the same solution is offered also when one of the contracting states follows the autonomous interpretation without any reference to Article 3(2) therefore, can be concluded that there is no consistency because the solutions for qualification conflicts proposed by the Commentary are strictly based on the assuming that both states will apply the Article 3(2) while in any other situation this would involve a conflict of interpretation within the meaning of the paragraph 32.5 of the Article 23.

Hence, the author shares the same view with Potgens and de Heer that amendments are needed in particular paragraphs 32.3 and 32.5 of Article 23 in affect to paragraph 8.10 of the Article 15 in order to express the broader view of paragraph 8.10 on the issue.

As mentioned under 3.4.1 the OECD Commentary has given explanation concerning the calculation of the 183 day rule, still the issue of calculation is not fully set. In the authors opinion further explanations in the commentary are needed in accordance with the ‘days of physical presence’ method incorporated in the Commentary. Further, the author maintains the opinion that clarifying the term ‘employer’ will are help on assessing the condition “paid by or on behalf of” as this as mentioned are interconnected.

With all being said the author keeps the opinion that setting a uniform interpretation under OECD MC Commentary would have been preferable to solve the issue of interpretation of the terms under Article 15(2). Moreover, addressing this within an international level instrument such as commentary would respond to the idea of the tax treaties and would prove more legal certainty to many tax payers engage in
cross-border activities and therefore, would fit to the main idea of the OECD MC to facilitate the cross-border economic activity and mitigate double taxation.
5. Bibliography

Books


Articles


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**Cases**


**Conventions & Commentaries**


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