Tax residency: beyond citizenship

The role of citizenship in determining tax residency

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Building a better working world

Contents

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Executive summary

The start of the 21st century has seen further developments of globalisation, with the phenomenon of “global citizens,” individuals who are traveling with sufficient regularity that it is hard to identify a natural home location, now becoming more of a significant population. Domestic regimes are not developed with these types of citizens in mind and hence, without special rules, can result in outcomes that are sub-optimal for the global citizen and the countries, to the detriment of both. To address this risk, new programmes, such as “citizenship by investment” (CBI) have been developed, seeking to apply appropriate rules to these individuals.

CBI programmes provide a valuable service for those who use them. Properly designed, CBI programmes should not undermine the tax regime, disturb existing concepts of tax residency or put at risk tax revenues either within their own territory or that of others. This paper sets out how a number of governments that operate CBI define tax residency for individuals, the limited (if any) role that citizenship plays within that definition of tax residency and how this relates to the issues above.

A primary concern of tax policymakers with CBI programmes is that this may result in a lack of information about tax residency. However, this is a question of accurately determining tax residency rather than relying on citizenship alone. With the exception of the US and a small minority of countries that take a different approach than most other countries to tax residency, these issues can be best addressed through design of the exchange of information and transparency measures, rather than through restricting citizenship. For countries such as the US, where citizenship brings individuals within the scope of tax, citizenship plays an inclusive role for tax purposes, bringing more people within the taxing remit of the country. It is however still a concept separated from tax residency, and citizenship does not grant automatic tax residency.

The conclusion drawn from the examples in this paper is that citizenship should be distinguished from tax residence. The tax provisions relating to the exchange of information should operate on the basis of tax residence and it should be made clear that this does not naturally follow citizenship. Any tax concerns that might arise around the interaction of citizenship with exchange of information would naturally be addressed through tax provisions rather than restricting citizenship.

The paper is structured as follows:

- Section 2 presents a conceptual distinction between tax residency and citizenship, identifying why holding citizenship of a given jurisdiction does not automatically mean that a person is tax resident in such a jurisdiction.

- Section 3 draws some conclusions on the role of citizenship in the definition of tax residency and the risks of tax residency.

The appendices set out the detailed criteria for tax residency in a number of countries:

- Appendix A: This section covers the definition and concepts for defining tax residency in a number of jurisdictions, including Cyprus and Malta in Europe; and Dominica, Saint Kitts and Nevis, and Saint Lucia in the Caribbean.

- Appendix B: This section discusses the exceptional approach taken by the United States, where citizenship does confer taxation rights.

1. Tax residency and citizenship

Many personal income tax regimes will seek to tax a tax resident on all of their income sources, irrespective of its source country. In this context, the personal connections between the taxing country and the potential tax payer are of the utmost importance.[1]

Traditionally, three criteria have been used to determine how connected an individual is to a particular jurisdiction: nationality/citizenship, residence and domicile.[2] For many people, these three elements will be the same country. However, there are now a number of high net worth individuals (HNWIs) for whom the answers to these questions are different, given their mobile lifestyles. As a result, citizenship, residence and domicile are often dissociated elements, and the same individual can have different personal connections with more than one country. Naturally, this dissociation has an impact on determining the allocation of taxing rights.

This section draws out the distinctions between citizenship and tax residence. For this purpose, this section will:

- Outline the concepts of citizenship and tax residency.
- Explain the links between both concepts for taxing purposes.

1.1 Citizenship

The relationship between a sovereign state and its citizens is a legal bond with two dimensions:

- The external dimension or ”nationality” means that this relationship should be respected by other countries. Consequently, this entails certain obligations between countries concerning the treatment of foreigners (e.g., extradition and deportation processes).

- The internal dimension or ”citizenship” means that there is a set of bilateral rights and obligations between a country and its citizens, including the duty to contribute to public expenses.[3]

Hence, citizenship is one of the closest connections between a person and a country. The bilateral nature of this bond is the origin of the duty to pay taxes. Charles Taylor, a Canadian political philosopher, describes the importance of this aspect in democratic societies:

> *”The nature of this kind of society (…) is that it requires a certain degree of commitment on the part of its citizens. Traditional despotism could ask of people only that they remain passive and obey the laws. A democracy, ancient or modern, has to ask more.* ***It requires that its members be motivated to make the necessary contributions: of treasure (in taxes),*** *sometimes in blood (in war); and it expects always some degree of participation in the process of governance. A free society has to substitute for despotic enforcement with a certain degree of self-enforcement. Where this fails the system is in danger.”*[4]

Therefore, there is a natural association between being a citizen and the duty to contribute to the public expenses of a country. Indeed, this relies on the idea that as citizens, people belong to a community and therefore, they have a social obligation to support fellow members of their own society.[5]

[1] R. Mason (2016), “Citizenship Taxation,” *Southern California Law Review,* https://ssrn.com/abstract=2606744
[2] *ibid.*
[3] R. Bauböck (2006), *Migration and citizenship: legal status, rights and political participation,* https://nbn-resolving.org/urn:nbn:de:0168-ssoar-272191
[4] C. Haas (2001), *What is citizenship? An introduction to the concept and alternative models of citizenship*, http://www.epice-net.org/grundtvig/docs/citizenship%20haas.pdf
[5] R. Mason (2016).

As noted above, in the past, citizenship and residency tended to coincide across the population. However, globalisation has accelerated international mobility and currently, these two concepts are now more separated. For instance, a person can have more than one citizenship and still be a tax resident of a third country.

1.2 How the tax residency has developed beyond citizenship

The development of a tax resident concept separate to that of citizenship can be traced back to the discussions of the first draft of the OECD Model Tax Convention. In 1923, a technical study concluded that:

> "*the mere relation of citizenship could no longer be considered a sufficient tie to impose on non-residents by their country of nationality. Instead, a permanent or habitual resident in a country should contribute to the expenses of such jurisdictions as a result of his economic interest.*"[6]

This acknowledges that the obligation to pay taxes and indeed the ability to impose tax payment obligations should consider wider characteristics than citizenship. On one side, a foreign citizen who is living and working in the country will be benefiting from the services that the country provides and therefore there is a strong argument that the individual should be contributing to the revenues of that country. On the other, a citizen living abroad can be expected to be contribution to that country and therefore any tax arising out of citizenship should acknowledge the responsibilities to contribute to the economy in which the citizen is living.

Given the above, the concept of tax residence has developed, often built around the degree of personal socioeconomic links with a country.[7] Countries use a number of approaches and tax residence tests can require[8]:

- Having physical presence for a minimum amount of time; for example, at least half (183) the days in a year,[9]
- Having a permanent home available, as opposed to staying at a particular place under such conditions that it is evident that the stay is intended to be of short duration.[10]
- Having a close centre of vital interests. This would involve an assessment of where the personal and economic relations of the individual are, including his/her family and social relations, his/her occupations, his/her political, cultural or other activities, his/her place of business, the place from which he/she administers his property, etc. All the circumstances must be examined as a whole, but considerations based on the personal acts of the individual must also receive special attention.[11]
- Having a habitual abode in the sense of being customarily or usually present; this notion refers to the frequency, duration and regularity of stays that are part of the settled routine of an individual's life and are therefore more than transient.[12]

In this regard, a wide interpretation has been given to the concept of tax residence of individuals under fiscal legislation within the Caribbean and the wider Commonwealth jurisdictions. Whilst it may be common for a person to be a citizen (whether by birth or naturalisation) of the same jurisdiction in which he is resident, it is clear that citizenship is not

[6] G. Lideikyte-Huber (2015), *Taxation without Representation: The Case of Resident Non-Citizens*, 69 Bull. Intl. Taxn. 10 (2015), Journals IBFD.
[7] *ibid.*
[8] OECD (2017), *Model Tax Convention on Income and on Capital: Condensed Version 2017*, https://doi.org/10.1787/mtc_cond-2017-en.
[9] *ibid.*
[10] *ibid.*
[11] *ibid.*
[12] *ibid.*

an overriding determinant of residence, particularly since there have been numerous cases in which citizens of a jurisdiction have been deemed non-residents of the same jurisdictions by the Courts. Further detail is set out in Appendix A.

Generally, nationality or citizenship will only play a role if none of the previous residence tests are enough to determine the country of tax residence[13]. As such, whilst there remains a connection between the determination of tax residence and citizenship, reference to citizenship is rarely used as a tie-breaker in relation to residence.

1.3 Tax residency under the 'citizenship' model

Many countries will accept that a citizen who is a tax resident elsewhere and is not a tax resident in the country of their citizenship by the tests set out in Section 1.2 above will not have an income tax liability in their country of citizenship.

However, a notable exception to this approach is the US. In addition to determining tax residence by usual tests (possession of a work visa or a "green card." and substantial presence in the country), an individual is automatically considered to be a tax resident by virtue of holding US citizenship. This means that, whether an individual is born a US citizen or acquires US citizenship later in life, at the point citizenship is awarded that individual will become a US tax resident in perpetuity or until their citizenship is relinquished.

However, even in this case, the citizenship may not be the definitive factor. Bilateral income tax treaties may override US domestic law and hence, a US citizen may still claim a non-resident position if the specific criteria set out in the tax treaty are met (e.g., residency and closer ties to other country).

1.4 Examples of tax residency determination

Below are three potential scenarios where the importance of citizenship varies for tax purposes.

- **Scenario 1.**

  Consider the following example:

  - An individual resident of Country A moves to Country B to work at different locations for a period of 190 days.
  - During that 190-day period, he is considered a resident of both countries A and B under their respective domestic tax laws.
  - The individual lived in Country A for many years before moving to Country B, remains in Country B for the entire period of his employment there and returns to Country A to live there permanently at the end of the 190-day period.
  - During the period of his employment in Country B, the individual does not have a permanent home available to him in either Country A or Country B.

  In this example, the determination of whether the individual has a habitual abode in one or both countries would appropriately consider a period of time longer than the 190-day period of dual-residence in order to ascertain the frequency, duration and regularity of stays that were part of the settled routine of the individual's life.[14]

  Here, citizenship is irrelevant for tax purposes.

[13] *ibid.*
[14] *ibid.*

- **Scenario 2.**

  Consider the following example:

  - In one calendar year an individual is a resident of Country A under that Country's tax laws from 1 January to 31 March, then moves to Country B.

  Because the individual resides in Country B for more than 183 days, the individual is treated by the tax laws of Country B as a Country B resident for the entire year. Applying the special rules to the period 1 January to 31 March, the individual was a resident of Country A. Therefore, both Country A and Country B should treat the individual as a Country A resident for that period, and as a Country B resident from 1 April to 31 December.[15]

  Here, citizenship is irrelevant for tax purposes.

- **Scenario 3.**

  Consider the following example:

  - Over a period of five years, an individual owns a house in both Country A and Country B but the facts do not allow the determination of the State in which the individual's centre of vital interests is situated.

  - The individual works in Country A, where he habitually lives but returns to Country B two days a month and once a year for a three-week holiday.

  In that case, the individual will have a habitual abode in Country A but not in Country B. Assume, however, that over the same period of five years, the individual works short periods of time in Country A, where he returns 15 times a year for stays of two weeks each time, but is present in Country B the rest of the time (assume also that the facts of the case do not allow the determination of the country in which the individual's centre of vital interests is situated).

  Hence, the individual will have a habitual abode in both Country A and Country B.[16] In this case, nationality or citizenship plays a role, since usually the preference of the right to tax will be given to the country of which an individual is a national or citizen.

As shown, citizenship usually plays a limited role in in the determination of tax residency and is generally only used as an ultimate proxy.

[15] *ibid.*
[16] *ibid.*

2. The role of Citizenship by Investment

2.1 The benefits of citizenship

Citizenship by investment (CBI) schemes allow individuals to obtain citizenship rights through local investment. The rationale for seeking citizenship will vary by individual, but common examples include:

- Political stability: If the home country is politically unstable or unsafe, obtaining a second citizenship can provide the individual and family the ability to live a more secure life.
- Escape prejudice: For some minority groups, the second passport can also be a way of escaping prejudice and discrimination. As well as benefiting the individual personally, a new citizenship can also improve the lives of children and future generations.
- Visa-free travel or visa-on-arrival access: Citizenship can avoid inconveniences when traveling abroad and visa applications can be a costly, time consuming and a generally frustrating procedure.
- Lifestyle benefits: Citizenship by investment programmes often provide the investor and their families with access to better basic services such as health care, education, security and transport.

Many CBI promoters will also note that tax benefits can also be achieved. However, in practice this arises as the countries that offer CBI may provide tax incentives which are separate from the CBI programme but can be accessed at the same time. Consequently, these tax incentives should be considered independent and unrelated to the CBI programme, albeit that the CBI programme can in certain instances make it easier to access the tax incentives. For example, CBI programmes give individuals the right of abode, which may make access to tax incentives easier.

For this reason, it is perhaps not unsurprising that confusion can arise over how tax interacts with CBI. This is true despite comments by international organisations, for example:

> "*These schemes [CBI] grant a right of citizenship of a jurisdiction or a right to reside in a jurisdiction. They generally do not provide tax residence … .*"[17]
>
> And
>
> *"The use of these schemes in itself does not equate to tax evasion ... ."*[18]

2.2 Citizenship and tax risk

Given the increasing ability for HNWIs to travel and invest anywhere in the world and that countries seek to tax residents on their worldwide income, tax authorities face a significant risk of under declaration of tax liabilities. Consequently, the Common Reporting Standard (CRS) was developed in response to the G20 request and approved by the OECD Council on 15 July 2014.

This calls on jurisdictions to obtain information from their financial institutions and automatically exchange that information with other jurisdictions on an annual basis. It sets out the financial account information to be exchanged, the financial institutions required to report,

[17] OECD (19 February 2018 to 19 March 2018). *Consultation document: Preventing abuse of residence by investment schemes to circumvent the CRS.*
[18] Report from the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the Regions (23 January 2019) *Investor Citizenship and Residence Schemes in the European Union*.

the different types of accounts and taxpayers covered, as well as common due diligence procedures to be followed by financial institutions.

This information exchange provides a very valuable tool for tax administrators and hence there is significant attention focused on making sure that it is not undermined. With this in mind, one of the concerns expressed in relation to CBI is that these schemes can potentially be exploited to help undermine the CRS due diligence procedures. The concern is that the ability to obtain citizenship in a country that offers CBI may lead to inaccurate or incomplete reporting under the CRS. For example, unless a clear distinction is made by the reporting financial institution, there is a risk that information could be sent to the country of citizenship rather than to one in which the individual is a taxpayer.[19]

This concern may well be valid but the better means to address this concern would appear to be to ensure that the correct information is collected by the reporting financial institution. This was explicitly covered when the CRS provisions were developed, as noted in the CRS Implementation Handbook,[20] which showed how the standards for CRS differ from those used for the US' equivalent FATCA regime:

> "While a large proportion of the Standard precisely mirrors the FATCA IGA [Inter Governmental Agreement], there are also areas of difference. These differences are due to: the removal of US specificities (such as the use of citizenship as an indicia of tax residence and the references to US domestic law found in the FATCA IGA) …"

[19] OECD (19 February 2018 to 19 March 2018). *Consultation document: Preventing abuse of residence by investment schemes to circumvent the CRS.*
[20] OECD (2018) *Standard for Automatic Exchange of Financial information in Tax Matters - Implementation Handbook* – Second edition, OECD, Paris.

3. Conclusion

Based on the above analysis, it is clear that citizenship is a concept distinct from tax residency. Citizenship should not give rise to tax avoidance and evasion opportunities, as the reporting rules are explicit in not using citizenship as a test.

However, care should be taken to ensure that the rules for tax reporting are properly understood by countries and financial institutions. This points to a focus on capacity building in relation to the tax provisions.

These concerns over the scope for CBI to facilitate tax avoidance and evasion therefore seem to be based on weaknesses in the tax implementation rather than a feature of CBI programmes themselves. Consequently, the way to resolve these concerns would seem to be independent of the CBI programmes themselves.

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Appendix A: Determining tax residency in different jurisdictions

This section will look at countries with CBI programmes and set out the specific rules for determining tax residency across these countries, namely:

- Cyprus and Malta in Europe
- Dominica, Saint Kitts and Nevis, and Saint Lucia in the Caribbean

A.1 Tax residency regimes in Europe

Cyprus

Tax residency rules

Under Cyprus Income Tax Law (ITL), the definition of resident of Cyprus, when applied to an individual, means an individual who stays in Cyprus for a period or periods exceeding in aggregate 183 days in any calendar year. In addition, as of 1 January 2017, the definition of a tax resident also includes an individual who does not stay in any other state for one or more periods exceeding in aggregate 183 days in the same tax year and who is not considered a resident for tax purposes in any other state in the same tax year, provided that the individual cumulatively meets the following criteria:

- Stays in the Cyprus for a period or periods totalling at least 60 days in the year of assessment

- Exercises any business in Cyprus and/or is employed in Cyprus and/or holds an office for a person tax resident in Cyprus at any time during the year of assessment

- Maintains a permanent residence in Cyprus which is owned or rented by him/her

It is further provided that an individual (who cumulatively fulfils the aforementioned conditions), is not considered a resident for tax purposes in Cyprus in the tax year, if during the said tax year, the exercise of any business in Cyprus and/or the employment in Cyprus and/or the holding of an office for a person tax resident in Cyprus is terminated.

The Special Contribution to the Defence Fund (SDC) is a tax payable by Cypriot tax residents who have a domicile of origin or domicile of choice in Cyprus. SDC rates vary from 3% (on 75% of rental income from immovable property), to 30% (on interest income not arising in the ordinary course of the business nor closely connected thereto i.e. passive interest income), to 17% (on dividend income). Other types of income such as business profits and capital gains are outside the scope of SDC.

In the case a person is also a tax resident of Cyprus, tax is charged on their worldwide income accruing or arising from sources both within and outside Cyprus. Individuals who are not tax residents of Cyprus are taxed on income accrued or derived from sources in Cyprus.

Domicile status

An individual is considered to be domiciled in Cyprus for SDC purposes, if such an individual has a domicile of origin or domicile of choice in Cyprus. The term “domicile of origin” is defined in the Wills and Succession Law as the domicile that has been obtained or maintained by person due to their own acts and follows the following criteria:

- In case a legitimate child was born during his/her father’s life, the child’s domicile of origin is the domicile of the father during the child’s year of birth.

- In case of an illegitimate child or a child that was born after the death of his/her father, the child’s domicile of origin is the domicile of the mother during the child’s year of birth.

Non-domicile status

An individual who is not domiciled in Cyprus, regardless of their residency, is not subject to SDC. The following criteria is used to determine if an individual is exempt from SDC:

- ► An individual who has obtained and maintained a domicile of choice outside Cyprus in accordance with the Wills and Succession Law, provided that such an individual has not been a tax resident of Cyprus, as this is defined in the Cypriot Income Tax Law, for any period of 20 consecutive years preceding the tax year.
- ► An individual who has not been a tax resident of Cyprus, as this is defined in the Cypriot Income Tax Law, for a period of 20 consecutive years, prior to 16 July 2015 (prior to 2015 tax year).
- ► Notwithstanding the above, an individual who has been a tax resident of Cyprus for at least 17 years out of the last 20 years prior to the relevant tax year is deemed to have their domicile in Cyprus.

Administrative issues

The tax residency status should be assessed each year based on the number of days spent in Cyprus in every particular year and (if the 60 days rule is used) whether the other criteria are met. For the purpose of calculating the days of residence in Cyprus, the day of departure from Cyprus is considered to be a day out of Cyprus, the day of arrival into Cyprus is considered to be a day in Cyprus, the arrival in Cyprus and departure from Cyprus on the same day is considered to be a day in Cyprus, and the departure from Cyprus and return to Cyprus on the same day is considered to be a day out of Cyprus.

An individual seeking tax residency must proceed with registration as a Cypriot resident by filing an application to the Migration Department and then apply for registration with the Cyprus Tax Department, in order to obtain its unique tax identification code (TIC). It is possible to apply for a tax residency certificate even during the first tax year of becoming a tax resident in Cyprus.

An individual is also required to file a Declaration of Individual for exemption from as a non-domiciled (Form T.D 38) together with copies of documents confirming that the domicile of origin of his/her father was outside Cyprus at the moment of birth of the individual.

The role of citizenship for tax residency purposes

Citizenship does not determine tax residency in Cyprus. Tax residency is purely based on number of days spent in Cyprus per calendar year (in conjunction with some other criteria, as described above).

Malta

Tax residency rules

In terms of article 4 of the Income Tax Act, Cap. 123 of the Laws of Malta (hereinafter Income Tax Act), Malta asserts its jurisdiction to tax on the basis of source, ordinary residence and domicile.

The term "ordinary residence," being a term borrowed from British income tax rules, is not defined in the Income Tax Act and as such Maltese adjudicating authorities tend to follow British case law to define the term, especially in view of the interpretative rules contained in the Income Tax Acts itself.[21] Ordinary residence is generally understood to mean residence that is normally part of a person's everyday life and is contrasted with occasional and

[21] Article 2(2) of the Income Tax Act, Cap. 123 of the Laws of Malta provides that, *"Words and expressions used in this Act which are not known to the law of Malta but are known to the English law, shall, so far as may be necessary to give effect to this Act and consistently with the provisions thereof, have the meaning assigned to them in the English Law and be construed accordingly."*

temporary residence. The constitutive elements of ordinary residence have been held to consist of the following:

- A regular physical presence in a country, residence that is part of the regular order of a person's life
- Residence with a degree of continuity
- Residence taken up voluntarily

The use of the term "ordinary residence" as a taxing nexus applies solely in a domestic context. Double tax agreements that Malta has entered into with other jurisdictions refer to the notion of "residence" as a taxing nexus and therefore it is useful to consider the interpretation of this term too. In terms of the Income Tax Act, a resident is:

> *"An individual **who resides in Malta except for such temporary absences** as to the Commissioner may seem reasonable and not inconsistent with the claim of such individual to be resident in Malta."* [22]

This definition of residence is somewhat of a subjective definition in that it leaves ample room for interpretation and provides the Commissioner for Revenue with discretion as to what residence actually entails.

The Commissioner for Revenue and adjudicating authorities tend to treat as a resident of Malta whoever is physically present in Malta, in the aggregate, for a number of days equivalent to six months or more in a tax year (the "183-day" or "physical presence" test). This 183-day rule was drawn by analogy from another article in the Income Tax Act that defines "temporary residents," that is, persons who are not liable to tax in Malta on any basis other than source, as:

> *"Any person who is in Malta for some temporary purpose only and not with any intent to establish his residence therein and who has not actually resided in Malta at one or more times for a period equal in the whole to six months in the year preceding the year of assessment."* [23]

The definition of temporary residents also points to another attribute of tax residence, being the intention to establish residence in Malta. Determining the intention of an individual is a subjective exercise and as such, the Commissioner for Revenue and Maltese Courts also tend to seek to establish whether an individual is a tax resident of Malta by applying a "facts and circumstances" test. A facts and circumstances test entails analysing the individual's life circumstances, patterns and intentions to determine whether the individual's links with Malta represent a regular physical presence of the individual in Malta, that is, residence that is part of the regular order of the individual's life. Given that the concept of ordinary residence, as explained above, entails regular physical presence in a country, the facts and circumstances test is also considered as indicative of ordinary residence.

In accordance with guidance published on the OECD's Automatic Exchange Portal for the purposes of identifying the criteria for individuals to be considered as tax resident in Malta in terms of article 2(1) of the Income Tax Act,[24] the following factors are usually taken into account to determine residency of individuals:

- Place of abode
- Physical presence (i.e., spending more than 183 days in Malta)
- Regularity and frequency of visits
- Intention to reside in Malta
- Ties of birth
- Ties of family
- Business ties

[22] Article 2(1), Income Tax Act, Cap. 123 of the Laws of Malta
[23] Article 13, Income Tax Act, Cap. 123 of the Laws of Malta
[24] Malta: Information on Residency for tax purposes, available on: https://www.oecd.org/tax/automatic-exchange/crs-implementation-and-assistance/tax-residency/Malta-Residency.pdf

The role of citizenship for tax residency purposes

A press release issued by the Ministry of Finance in October 2018[25] seeks to clarify that citizenship is not a determinant of tax residence. It also clarifies that beneficiaries of Malta's Individual Investor Programme and the Malta Residence and Visa Programme (Malta's citizenship by investment and residence by investment programmes) are not automatically considered as tax resident in Malta by virtue of them being beneficiaries of any of these Programmes, but they should nonetheless satisfy the physical presence test and/or the facts and circumstances test to be considered as tax residents of Malta for the purposes of the Income Tax Act. In fact, the press release provides the following:

> *"The determination of residence for tax purposes is a facts-based exercise; under the Maltese Income Tax Act, an individual would be considered resident for tax purposes in Malta depending on that person's physical presence in Malta. Furthermore, an individual would become liable to taxation in Malta once such an individual becomes resident in Malta for tax purposes and is not given any beneficial tax treatment purely on the basis of qualification under [the Individual Investor Programme or the Malta Residence and Visa Programme]."*

A.2 Tax residency regimes in the Caribbean

Dominica, Saint Kitts and Nevis, and Saint Lucia are all Commonwealth jurisdictions. Consequently, they each follow established common law jurisprudence, particularly that established by the United Kingdom.

Within the legal framework of tax legislation of the territories, the overriding determinants of tax residence are the terms "resident" and "ordinarily resident," which is only partially defined in the respective legislation. Over the years, there has been significant judicial consideration to these terms, in attempt to ascribe definitions to the terms, even in the context of the more complicated factual situations.

While the Courts have ultimately determined that the treatment in each case is a question of fact and extent, a number of general guidelines has been generated that are treated as a true representation of the scope of tax residence.

- **Resident.** The following factors have generally considered to be determinative in assessing tax residence:
  - The place where an individual dwells permanently, or for a considerable time, or where an individual has his settled or usual place of abode.
  - Physical presence in a location would not typically amount to residence where the person's presence is no more than a stop-gap measure.
  - Determinants of residence in a particular jurisdiction could include the amount of time a person spends in that jurisdiction, the nature of his presence there and his connection with the jurisdiction.
  - Residence connotes a degree of permanence and expected continuity.
  - Short but regular periods of physical presence in a jurisdiction may amount to residence, especially where presence stems from a continuous obligation, such as business obligations.
  - An individual may have a status of dual residence.
- **Ordinarily resident.** This term has been given a wider interpretation and includes:

[25] Press Release by the Ministry for Finance, available on: https://mfin.gov.mt/en/Press_Releases/Pages/PR182259.aspx

- ► A person's abode in a particular jurisdiction, which he has adopted voluntarily and for settled purposes as part of the regular order of his life, whether of short or long duration.
- ► An individual may be ordinarily resident in more than one country at the same time.
- ► Within the purview of ordinary residence, the voluntary adoption of residence for a settled purpose may be dictated by business or working requirements.
- ► Where a person has had a single place of abode for an enduring period of time, the status of ordinary residence is unlikely to cease unless it can be demonstrated that there has been definite break in the pattern of that person's life.

The role of citizenship for tax residency purposes

In this regard, a wide interpretation has been given to the concept of tax residence of individuals under fiscal legislation within the Caribbean and the wider Commonwealth jurisdictions. Whilst it may be common for a person to be a citizen (whether by birth or naturalisation) of the same jurisdiction in which he is resident, it is clear that citizenship is not an overriding determinant of residence, particularly since there have been numerous cases in which citizens of a jurisdiction have been deemed non-residents of the same jurisdictions by the Courts.

The next subsection will cover the legislative tests of tax residence of individuals under each of jurisdictions under review.

Dominica

Tax residency rules

Individuals tax resident in Dominica are liable to tax on a worldwide basis. The test of tax residence of an individual largely codifies the aforementioned jurisprudence on tax residence of individuals. Namely, a tax resident is defined to include:

- ► A person whose permanent place of abode is Dominica and he/she is physically present in Dominica for at least some part of the year of income. A person that has his/her permanent place of abode in Dominica, but is not present in Dominica throughout an entire year of income may be deemed non-resident where the Comptroller of Inland Revenue is satisfied that the person in question was absent for a full year of income by reason of education, medical treatment or for some other reasonable purpose.
- ► A person who spends not less than 183 days in Dominica during a year of income.
- ► A person only spends some period of time in Dominica during a year of income, but spends a continuous period of not less than 183 days in Dominica between income years. This applies to both preceding and successive income years. For example, a person who would spend only the first 30 days of an income year in Dominica, but spent at least the final 153 days of the immediately prior income year in Dominica would be deemed to be tax resident in Dominica. Similarly, a person who is only physically present in Dominica for the final 30 days of an income year, but spends at least the first 153 days in Dominica for the immediately following income year will be deemed a tax resident of Dominica.

Additionally, the tax legislation of Dominica specifies that where individuals tax resident in Dominica, but not ordinarily resident therein, generate foreign source income, such income shall not be liable to tax to the extent that the income is not received in Dominica.

A person is deemed under the Dominica legislation to be ordinarily resident in Dominica where that person has his/her permanent place of abode in Dominica and is physically present in Dominica for at least some part of the year of income.

While the tax legislation of Dominica certainly does prescribe a definition of residence for individuals, that definition is ultimately subject to certain caveats:

- The legislative tests of tax residence are ultimately derived from international jurisprudence and are drafted in a very broad manner. As such, they should be interpreted in line with the broader context of established common law principles.

- The definitions ascribed to tax residence, or ordinary residence as the case may be, do not preclude common law principles of tax residence being applied. Consequently, an individual may still fall within or outside of the scope of a resident or an ordinary resident based upon common law precedent.

Ultimately, the Dominica legislation codifies and even expands upon common law principles of tax residence of an individual, but only to an extent. It has generally been established both by the Courts and tax authorities around the world that it is extremely difficult to create a uniform test, which establishes when an individual will be deemed tax resident in a country, recognising that each scenario should be dealt with on a case-by-case basis. Consequently, the interpretation of the residence provisions, except where the facts of a particular case dictate otherwise, necessitate that reference is made to the established jurisprudence to determine whether an individual will be deemed resident or ordinarily resident in Dominica.

Saint Kitts and Nevis

Tax residency rules

It is crucial to establish that Saint Kitts and Nevis abolished personal income taxes on individuals in 1980.[26] Nonetheless, references to residence and ordinary residence were retained within the scope of the legislation.

Prior to the abolishment of personal income taxes, individuals that were tax resident in Saint Kitts and Nevis were deemed liable to tax on worldwide basis. To the extent that an individual was not ordinarily resident in Saint Kitts and Nevis, he would liable to tax on his/her Saint Kitts and Nevis source income and also on his foreign source income where it was received in Saint Kitts and Nevis.

Domestic tax law of Saint Kitts and Nevis does not contain a specific and prescribed definition of residence. Rather, it is achieved through the distinguishing a resident from a temporary resident. Specifically, the legislation defines a temporary resident as including a person:

- Only in Saint Kitts and Nevis for a temporary purpose only.

- Who is not in Saint Kitts and Nevis with the purpose of establishing his/her residence therein.

- Who has not resided within Saint Kitts and Nevis for a period greater than or equal to six months during a year of income.

As with other jurisdictions within the Caribbean that deploy a similar legislative approach to residence, tax residence is generally guided by whether an individual has spent at least six months in an income year in Saint Kitts and Nevis and also whether the generally perceived permanent home or residence of an individual is in Saint Kitts and Nevis. In relation to this latter point, the legislation further identifies that where a resident of Saint Kitts and Nevis

[26] Source: https://www.sknird.com/IncomeTax-Page.aspx?PageID=137

(whose home is in Saint Kitts and Nevis) exercises a trade, profession or vocation partly in Saint Kitts and Nevis and partly elsewhere during a year of income, all of the income will be deemed to have arisen in Saint Kitts and Nevis.

The Saint Kitts and Nevis tax legislation does not, however, contain a definition of what constitutes an individual being ordinarily resident in Saint Kitts and Nevis.

Ultimately, the definitions of tax residence and ordinary residence in Saint Kitts and Nevis are limited. In the absence of using practical time threshold tests, much would naturally be left to common law jurisprudence on what constitutes tax residence, as has been established earlier.

Saint Lucia

Tax residency rules

The tests of tax residence in Saint Lucia are the equivalent of those in Dominica. Individuals tax resident in Saint Lucia are liable to tax on a worldwide basis. The test of tax residence of an individual largely codifies the aforementioned jurisprudence on tax residence of individuals. Namely, a tax resident is defined to include:

- A person whose permanent place of abode is Saint Lucia and he is physically present in Saint Lucia for at least some part of the year of income. A person that has his permanent place of abode in Saint Lucia, but is not present in Saint Lucia throughout an entire year of income may be deemed non-resident where the Comptroller of Inland Revenue is satisfied that the person in question was absent for a full year of income by reason of education, medical treatment or for some other reasonable purpose.
- A person who spends not less than 183 days in Saint Lucia during a year of income.
- A person only spends some period of time in Saint Lucia during a year of income, but spends a continuous period of not less than 183 days in Saint Lucia between income years. This applies to both preceding and successive income years. For example, a person who would spend only the first 30 days of an income year in Saint Lucia, but spent at least the final 153 days of the immediately prior income year in Saint Lucia would be deemed to be a tax resident in Saint Lucia. Similarly, a person who is only physically present in Saint Lucia for the final 30 days of an income year, but spends at least the first 153 days in Saint Lucia for the immediately following income year will be deemed a tax resident of Saint Lucia.

Additionally, the tax legislation of Saint Lucia specifies that where individuals tax resident in Saint Lucia, but not ordinarily resident therein, generate foreign source income, such income shall not be liable to tax to the extent that the income is not received in Saint Lucia.

A person is deemed under the Saint Lucia legislation to be ordinarily resident in Saint Lucia where that person has his/her permanent place of abode in Saint Lucia and is physically present in Saint Lucia for at least some part of the year of income.

While the tax legislation of Saint Lucia certainly does prescribe a definition of residence for individuals, that definition is ultimately subject to certain caveats:

- The legislative tests of tax residence are ultimately derived from international jurisprudence and are drafted in a very broad manner. As such, they should be interpreted in line with the broader context of established common law principles.
- The definitions ascribed to tax residence, or ordinary residence as the case may be, do not preclude common law principles of tax residence being applied. Consequently, an individual may still fall within or outside of the scope of a resident or an ordinary resident based upon common law precedent.

Ultimately, the Saint Lucia legislation codifies and even expands upon common law principles of tax residence of an individual, but only to an extent. It has generally been established both by the Courts and tax authorities around the world that it is extremely difficult to create a uniform test, which establishes when an individual will be deemed tax resident in a country, that each scenario should be dealt with on a case-by-case basis. Consequently, the interpretation of the residence provisions, except where the facts of a particular case dictate otherwise, necessitate that reference is made to the established jurisprudence to determine whether an individual will be deemed resident or ordinarily resident in Saint Lucia.

Appendix B: Tax residency in the United States of America

From a United States tax perspective, US. residents are subjected to tax on their worldwide income, regardless of the origin location. An individual can become a U.S. tax resident in a number of ways:

► **Citizenship**: By virtue of holding US citizenship, an individual is automatically considered a US tax resident. Whether an individual is born a US citizen or acquires US citizenship later in life, at the point citizenship is awarded, that individual will continue to be a US tax resident in perpetuity or until their citizenship is relinquished. Please note, there are additional considerations with relinquishing citizenship that are not discussed herein.

► **Resident Alien** under IRC Section 7701(b)(1)(A):

  ► **Green Card Holder**: Should an individual be granted a Green Card, he/she assumes the role of a US tax resident for as long the Green Card is held. Their status as a US tax resident will commence at the earlier of their meeting of the Substantial Presence Test (SPT), as discussed later, or on the first day in the calendar year the individual is present in the US as a lawful permanent resident (i.e., Green Card Holder).

  ► **Substantial Presence Test (SPT)**: An individual meets the substantial presence test for any calendar year in which he/she is physically present in the US on at least 31 days and the sum of the number of days on which such individual was present in the US during the current year and the 2 preceding calendar years (when multiplied by the applicable multiplier determined under the following table) equals or exceeds 183 days:

    - 100% of days present in current year
    - 1/3 of days present in the previous year
    - 1/6 of the days present in the second year before the current year

If an individual does not meet any of the above criteria, and does not make an election to be treated as a Resident Alien under IRC Section 7701(b)(4), they would be considered a US Non-resident Alien for tax purposes. US Non-resident Aliens are subject to US taxes on their US sourced income only.

Furthermore, it is important to note that bilateral income tax treaties may override US domestic law. As such, an individual may be considered a US tax resident under SPT and still claim a non-resident position by means of an income tax treaty if very specific criteria are met (e.g., residency and closer ties to other country). This is a less common position requiring a very specific analysis and must be considered on a case-by-case basis.
It is important to note that while the US does not impose a territorial-based system of taxation on Individuals, there are ways a US citizen or Green Card Holder living and working outside of the US can minimize the impact of double taxation.

► **Foreign Tax Credit or deduction:**

  ► The Foreign Tax Credit (FTC) allows an individual to receive a credit for taxes they pay in a foreign jurisdiction on income taxed in the US and that location, up to the amount of US taxes imposed on that income. The FTC can be claimed on a Paid or Accrued basis. The Paid basis considers the actual foreign taxes an individual has paid during the US tax year, while the Accrued basis considers the foreign tax liability assessed during the year. In the event that the foreign location operates on a different fiscal year than the US, the tax liability is considered from the foreign tax year ending within the US year

  - ► To qualify as a foreign tax for purposes of the FTC[27]:
    - o The tax must be imposed on the taxpayer
    - o The taxpayer must have paid or accrued the tax
    - o The tax must be the legal and actual foreign tax liability
    - o The tax must be an income tax (or tax in lieu of an income tax)

  - ► The Foreign Tax Deduction allows for a similar reduction in US taxation based upon the foreign taxes paid or accrued in the foreign jurisdiction. Rather than taking the foreign taxes paid/accrued as a credit, the taxes are taken as a deduction to offset the taxpayer's income in the respective tax year.

- ► **Foreign Earned Income and Foreign Housing Exclusions**, IRC Section 911

  - ► Under IRC Section 911(a), an individual can elect to exclude a portion of his/her income earned outside of the US as well as a portion of their housing costs on their US tax return.

  - ► The allowable exclusions for both the Foreign Earned Income Exclusion and the Housing Exclusions are adjusted each year for inflation. The Housing Exclusions are dependent on the location of the taxpayer's foreign residence.

There are certain tests that must be met in order for an individual to qualify to claim the Foreign Earned Income and/or Foreign Housing Exclusions.

From a US tax perspective, while there have been talks of the US moving to a territorial-based taxation system for individuals from time to time (as politicians place bills to the government for consideration), it is unlikely that this approach would come to fruition at any point in the near future.

This outline is not an exhaustive look into the applications of the US income tax system and does not address the specifics of claiming the aforementioned deductions or credits. For more detailed guidance into the application of the above, please refer to the respective Internal Revenue Code Sections. The above is discussed as it related to US domestic income tax law and does not address Social Tax or Employment Tax considerations or the specific application of Income Tax Treaties.

Additionally, while this paper addresses taxation from a US federal income tax perspective, it should be noted that the US employs a state income taxation regime as well. Currently, 43 out of 50 states may impose an income tax on individuals living or working in their state. Each state has a unique set of laws addressing residency in their state and each should be reviewed on an individual basis.

Any US tax advice contained herein was not intended or written to be used, and cannot be used, for the purpose of avoiding penalties that may be imposed under the Internal Revenue Code or applicable state or local tax law provisions.

[27] IRS Pub. 514, *Foreign Tax Credits*