

# Applying treaty provisions and following OECD guidelines (2/29/21)



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If an individual is considered to be tax resident simultaneously in two treaty countries (e.g. Latvia and Lithuania) according to their national law, the dispute over the person's tax resident status will be resolved by treaty article 4(4), which provides for consecutively assessing the following criteria:

1. In which country does the person have a permanent home?
2. Where is the person's centre of vital interests – closer personal and economic ties?
3. If it is not possible to determine the country where the person has the centre of vital interests or if he does not have a permanent home in either country, the person is considered to be resident in the country where he has an habitual abode.
4. If the person has an habitual abode in both countries or in neither of them, he is considered to be resident in the country whose national he is.
5. If the person is a national of both countries or of neither of them, the competent authorities will decide the question of residence by mutual agreement.

In evaluating a permanent home as the first treaty criterion, we need to consider the OECD commentaries. The commentaries on treaty article 4(2)(a) state that the person has a permanent home in a particular country if he retains it for his permanent use, not simply for staying at a certain place where the circumstances of the situation clearly show that the stay is temporary.

The OECD commentaries on treaty article 4 state that in order to establish with which of the two countries the person has closer personal and economic ties (the centre of vital interests), we need to evaluate the person's family ties, public activities in the relevant country, occupation and profession, political and cultural activities, place of business, property, and other circumstances. And all these criteria should be evaluated as a set of circumstances, not each one separately. If these criteria do not make it possible to determine the person's tax residence country, the next criterion to assess is an habitual abode.

The OECD guidance on Covid-19 explains that it may be difficult to determine residence in Covid-19 circumstances for a number of reasons, so an habitual abode should be taken as the decisive criterion during the emergency situation, unless this can be done through the criterion of a permanent home being available in a particular country or the centre of vital interests.

According to the OECD commentaries, an habitual abode within the meaning of tax treaties is a term and test for determining the country where the person stays more frequently, for longer periods and more regularly, and which is part of the person's usual routine. However, the OECD commentaries state that an habitual abode does not mean the country where the person spends a greater number of days.

In this regard the lawmaker has stated that in evaluating the situation around the restrictions imposed because of Covid-19, we should consider, for instance, the following conditions:

1. The person was not considered a Latvian resident before the Covid-19 emergency situation was

implemented, and it was originally planned that the person would not be staying in Latvia for so long as to be considered a resident.

2. The length of stay in Latvia is not affected by any factors other than those related to the restrictions imposed because of Covid-19 (e.g. bans on entry and exit, illness, and other factors unrelated to the person's free will).

## Applying the OECD guidelines in Covid-19 circumstances

Although neither the State Revenue Service nor the Ministry of Finance has published their position on applying the OECD guidance on Covid-19, PwC has received the opinion that Latvia as an OECD member is applying treaty provisions and following the OECD's international guidelines on how those provisions should be applied in Covid-19 circumstances.

The OECD guidance on Covid-19 explains how to read and apply the OECD commentaries on treaty article 4 to determine tax residence in the context of the Covid-19 emergency situation. Specifically, the OECD guidance on Covid-19 states that in most situations where an individual's tax residence country could change, we need to consider the extraordinary and temporary *force majeure* nature of the consequences of the pandemic. So the OECD guidance on Covid-19 takes the view that none of the circumstances related to the pandemic may change the person's tax residence country.

The OECD guidance on Covid-19 does not make any new recommendations for applying treaty provisions but describes how those provisions should be applied and interpreted in *force majeure* circumstances based on the OECD commentaries published earlier.

In their reply, the Latvian tax authorities state that the travel and other types of restrictions that Latvia and other countries have imposed as well as their impact should be taken into account as *force majeure* circumstances in assessing situations and particular cases affected by the measures taken to contain the pandemic.