The 183 Day Rule: Some Problems of Application and Interpretation

(adopted by the OECD Council on 24 October 1991)

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I. INTRODUCTION

1. The international exchange of goods and services has increased substantially over the last decade. The OECD Model Convention provides relatively simple rules which were primarily designed to encourage such exchanges. The Model Convention has, however, become the object of difficulties in its application both for the taxpayers and the tax authorities. The Commentary to Article 15 of the Model Convention does not give much guidance for the resolution of those difficulties and there is therefore a need to clarify the interpretation of Article 15 in several respects but particularly as regards the way in which the 183 day period is calculated. This note reviews this question and offers suggestions as to how it should be dealt with.

II. THE 183 DAY RULE IN THE MODEL CONVENTION

A. *The rule*

2. The general rule of taxation of income from employment is embodied in the 1977 Model Convention in paragraph 1 of Article 15. According to this rule, income from employment is taxable in the State in which the employment is exercised. However, paragraph 2 of that Article contains an exception (the so-called 183 day rule) to this general rule.

3. Three conditions must be met before the exception can apply:

a) the taxpayer must not be present in the State of activity for a period or periods exceeding in the aggregate 183 days in the fiscal year concerned;

b) the remuneration must be paid by, or on behalf of, an employer who is not a resident of the State of activity, and

c) the remuneration must not be borne by a permanent establishment or a fixed base which the employer has in the State of activity.

4. The State of residence, the State of activity and the taxpayer may have divergent views on whether the State of activity has the right to tax or not. In the event of a disagreement between the tax authorities of the State of activity and the taxpayer, the latter has recourse to the mutual agreement procedure by making a request to the tax authorities of his State of residence. A mutual agreement procedure should lead to the avoidance of double taxation but in the absence of a general agreement as to the interpretation of the rules, it may end up in excessive taxation or in no taxation.

5. The use of different methods, or of the same method applied differently, is unimportant except when the State of residence and the State of activity have opposite views on whether or not the employee qualifies for the

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exemption in the State of activity. The difficulties thus arise only at the margin and the Committee is conscious of the fact that the divergencies in the application of the rule are used by some simply as a planning device to obtain a double exemption. A simple solution to that problem which would solve both double taxation and double exemption problems would be to specify in the Commentary that, in the case of conflict, the State of residence would accept the calculation made by the State of activity. However, the Committee considers that such a solution may open the door to abuse and may also need to be adapted in the context of relations with non-member countries. It has consequently rejected it.

6. However, it is important, for practical reasons, to maintain this rule since, even though domestic legislation allows a number of member countries to tax any activities, however short, exercised on their territory, in practice it may not be possible to tax people working for a short duration, either because of lack of information or because the costs of collection would be exorbitant compared to the return. It is also important for the taxpayer who finds it easier to deal with only one tax system, *i.e.* that of his State of residence with which he is familiar. The State of residence should, nonetheless, be in a position to exercise its taxing right when the State of activity abandons its own right.

B. *Persons to whom the 183 day rule applies*

7. According to the Commentary on paragraph 2, this rule "is mainly 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 them abroad". The wording of paragraphs 1 and 2 of Article 15 of the Model Convention does not entirely correspond to this statement as it does not refer to "qualified personnel".

8. There is general agreement that the wording of the Commentary, which could be interpreted as a limitation, needs to be amended to remove any ambiguity as regards the meaning of "qualified personnel". It is suggested that, in line with the practice of most member countries, this could be achieved by deleting the reference to "qualified personnel" and by clearly stating that the provision applies to all individuals rendering dependent personal services (sales representatives, construction workers, engineers, etc.) unless their remuneration falls under another Article of the Convention.

C. *Calculation of the 183 day period*

9. The Commentary to Article 15 does not specify the way the 183 day period should be calculated. Since the rule has been in existence for several years, member countries have individually (or as a group, which is the case with the Nordic countries) defined their own way to make the calculation. Two

main methods have been designed: one which uses the actual stay in the other State (*i.e.* the number of days in the fiscal year that the taxpayer is physically present in the other State) and the other which uses the actual duration of the activity (*i.e.* the number of days that the individual has performed the activity without regard to short breaks in the taxpayer's stay which are spent at home or in a third country).

10. Member countries were asked to reply to a questionnaire on the way they calculate the period and replies have been received from all member countries. Annex I summarises the replies and an analysis of them is provided below.

i) Methods used

11. The majority of member countries (17 out of 24) use the "days of physical presence" method although, in the case of *Switzerland*, a mixed method is used, *i.e.* physical presence related to the activity. *France*, *Germany*, *Greece*, *Italy*, *Luxembourg*, the *Netherlands* and *Spain* use the "duration of the activity" method; *Belgium* also uses this method, but only in the case of conventions where Article 15 was explicitly drafted accordingly.

ii) Days included or excluded from the calculation

12. The following analysis of the replies covers both methods:

a) Part of day:

All member countries except *Austria* and *Ireland* include part of day in the calculation. Some countries do it on an hourly basis so that a part of a day is included but does not equate to a full day but this usually applies only to certain frontier workers. In addition, the *United States* exclude the time spent in the *United States*, if less then 24 hours, while in transit between two points outside the *United States*.

b) Day of arrival:

Austria and *Italy* are the only countries which exclude the day of arrival from the calculation (in the case of *Italy*, only if it is not related to the beginning of the activity).

c) Day of departure:

Austria, *Ireland* and *Italy* are the only countries which exclude the day of departure from the calculation (in the case of *Italy*, only if it is not related to the activity).

d) Saturdays and Sundays:

All member countries include Saturdays and Sundays spent inside the State of activity.

e) National holidays:

All member countries include national holidays spent inside the State of activity.

f) Holidays spent inside the State of activity:

In all the countries using the "days of physical presence" method, holidays spent inside the State of activity are, with three exceptions, always included in the calculation whether the holidays are taken before, during or after the exercising of the activities. The exceptions are *Australia*, *Austria* and *Switzerland* which exclude the holidays if they are taken either before or after exercising the activities.

As for countries using the "duration of the activity" method, the replies vary. *France* includes the holidays in all cases, provided they are related to the activities; the *Netherlands* always exclude them whenever the holidays are taken inside of the *Netherlands*; *Luxembourg* includes them if they are taken during the time the activities are exercised and has not yet decided on whether to include or exclude days of holidays taken in the country before and after exercising the activity; *Italy* and *Greece* exclude them if they are taken before or after exercising the activities and include them if taken during the activities; *Germany* includes holidays taken during or after exercising the activities but excludes them if taken before exercising the activities; finally, *Spain* includes them if they are taken before or while exercising the activities but excludes them if they are taken after the completion of the activities.

g) Holidays spent outside the State of activity:

All member countries except *Belgium*, *France*, *Germany*, *Greece*, *Luxembourg* and *Spain* exclude such days. *Italy* includes them but there is room for flexibility.

h) Short breaks (2 or 3 days):

All seven countries using the "duration of the activity" method include such short breaks in the calculation when they are taken outside the State of activity; in the other group of countries only *Belgium* and *Switzerland* follow that approach. All the other countries exclude such days. As for short breaks inside the State of activity they are included in the calculation by all member countries.

i) Days of sickness:

All of the replying countries with the exception of *Italy* and the *United States* include days of sickness in the calculation. Whilst the *United States* answer indicates that they exclude such days, their practical position is in line with that of most other countries. In an earlier submission on this question they explained that an individual is not treated as being

present on any day when, because of a medical condition that arose whilst such individual was in the *United States*, the individual is physically unable to leave. They added that the rule is interpreted narrowly, so that it applies only to people who would have left the *United States* but for their medical emergency.

Denmark, *Finland*, *Iceland*, *Norway* and *Sweden* would exclude days of sickness if they are spent outside of their respective countries. *Luxembourg* would also exclude such days if the sickness exceeds fourteen days. *France* includes them but only if they are consecutive to the activity.

Finally, the *Netherlands* include them but only to the extent they are considered as a normal interruption of work, *i.e.* if the sickness lasts no longer than one or two weeks; if it does, then those days will be excluded.

j) Death or sickness in the family:

All member countries except *Italy* include such days in the calculation (*Luxembourg* has not yet decided on its position). The observations made by *Denmark*, *Finland*, *Iceland*, *Norway* and *Sweden* and by the *Netherlands* under *i*) above are also applicable in this case.

k) Interruption because of strikes or lock-out or delays in supply:

All member countries except *Italy* (for strikes or lock-out) include such days in the calculation (*Luxembourg* has not yet decided on its position). *Italy* includes days of interruption because of delays in supplies but they could exclude them in certain cases. In line with their observation on other questions *Denmark*, *Finland*, *Iceland*, *Norway* and *Sweden* exclude these days if they are spent outside of their respective countries. *Ireland* excludes them in some cases.

iii) Comments and suggestions on the calculation of the period

13. The answers show that there is a high degree of uniformity in several respects in the calculation of the 183 day period but that there are also important divergences, in particular with respect to holidays.

14. The "days of physical presence" method is an objective test the application of which is straightforward in most countries: the individual is either physically present in a country or he is not. It is considered that days of absence could easily be documented by the taxpayers when required. It is admitted that exception could be made in special circumstances (*e.g.* people in transit or people prevented from leaving because of illness as is the practice in the *United States*) but it is generally agreed that these should be limited. A few countries, however, go beyond this practice and exclude: *Austria*, part of a day,

day of arrival, day of departure and holidays before and after the activities; *Ireland*, part of a day and day of departure; *Australia* and *Switzerland*, holidays before and after the activities.

15. The "duration of the activity" method is a more difficult concept than the one underlying the physical presence method because it is not easy to decide when an assignment begins or ends and which days should be disregarded when calculating the 183 day period. Replies to the questionnaire confirm these difficulties. There is, however, unanimous agreement on the following points: part of a day (included), Saturdays and Sundays (included), national holidays (included), short breaks outside and inside the State of activity (included) and interruptions because of delays in supplies (included).

16. The Committee considers that only the "days of physical presence" method clearly falls within the wording of Article 15 and that the use of any other method, or the use of that method with exceptions, increase the difficulties of applying the provision. Most argued that the only way to apply the method was by way of a strict interpretation, *i.e.* that no exception whatsoever should be made when a person is present in the State of activity. However, a few felt that such a rigid application could have undesirable results, *e.g.* a person otherwise exempt in the State of activity became taxable because he felt sick while in transit in that State at some other time or because he happened to have spent some holidays in that State a long time before starting his activities. It is with these considerations in mind that the Committee has reviewed the way the 183 day period should be calculated.

17. The majority of delegates felt that few exceptions should be made in the application of the method. A few felt, however, that a certain degree of reasonableness should be allowed. To ensure uniformity in the application of the 183 day rule and to avoid the problems referred to above, the Committee agreed that member countries should use only the "days of physical presence" method and that it should be calculated in the following way:

INCLUDED:

- part of a day
- day of arrival
- day of departure
- Saturdays and Sundays spent inside the State of activity
- national holidays spent inside the State of activity
- holidays spent inside the State of activity
  - before exercising the activities
  - while exercising the activities
  - after completion of the activities
- short breaks spent inside the State of activity

- days of sickness, unless they prevent the individual from leaving and he would have otherwise qualified for the exemption
- days spent inside the State of activity due to
  - death or sickness in the family
  - interruption because of strikes or lock-out
  - interruption because of delays in supplies

EXCLUDED:

- transit between two different points outside the State of activity if the individual is present in the State of activity for less than 24 hours
- holidays spent outside the State of activity
- short breaks (for whatever reason) spent outside the State of activity.

18. The adoption of this method to calculate the 183 day period requires that a number of member countries change their practice, but these countries have all indicated a willingness to do so.

D. Work concentrated in only one State

19. The exemption in the State of activity concerns, according to the Commentary, employment of a short duration abroad. This statement does not reflect the wording of the Article nor the reality because each fiscal year is treated separately. The scope of application is therefore much wider than employment of short duration. The 183 day rule may in fact be applicable to a one year stay, *e.g.* if the employee stays in the State of activity from 2 July of one year through 1 July of the next year and the fiscal year of that State is the calendar year. All member counties have confirmed that this is the case when the wording of the Model is used. The provision would even apply where an employment of more than one year does not result in a presence of more than 183 days in any year. This situation will occur especially in industries where working periods are concentrated, as is the case in the offshore oil and gas industry. It is therefore recommended that all references to “short duration” be deleted from the Commentary.

E. The proper fiscal year

20. It has been argued that the fiscal year concerned shall be understood as the fiscal year of the taxpayer. This can easily be determined if the taxpayer remains resident in the same State throughout the calendar or fiscal year but, if he changes his residence and becomes resident in the State of activity or in a third State, it may create difficulties. In practice, the fiscal year is generally understood to be the fiscal year of the State of activity. If the fiscal year of a State corresponds to the calendar year, the fiscal year concerned therefore cannot end earlier than 31 December even if the taxpayer changes his residence.

21. Paragraph 2 of Article 3 of the 1977 Model Convention reads as follows: "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." Thus if two Contracting States have different fiscal years, the State in which the employment is exercised can interpret the term "fiscal year" as meaning *its* fiscal year (*Norway/United Kingdom* November l, 1972, Department Finance Letter Skatte Nytt No. 12, 1972/A72-310). The State of residence could, on the same ground, argue that the proper fiscal year is its own but the context – whether an exemption should be given in the State of activity – clearly requires that it is the fiscal year of the State of activity that is concerned. The Committee recommends that this opinion be expressed in the Commentary.

F. *The residence of the employer*

22. The second condition for application of the 183 day rule requires that the employer not be a resident of the State in which the temporary employment is exercised. Some treaties, however, provide that the remuneration for the activity carried on during the employee's temporary presence must be "paid by an employer resident in the first-mentioned State", *e.g.* an employer resident in the same Contracting State as the employee. Such a provision broadens the scope of the right to tax of the State of activity. It also increases the possibility of avoiding a double exemption as stated by *Norway* in footnote 9 to Annex I. The Committee agreed that these views, which could be expressed in the Commentary as an alternative wording of this provision for exemption countries, should be considered in the context of the revision of the Model Convention.

G. *"Is not borne by a permanent establishment"*

23. The third condition for the application of the 183 day rule is that the remuneration not be borne by a permanent establishment or a fixed base which the employer has in the State in which the employment is exercised.

24. The interpretation of the term "is not borne by" raises several questions which the Committee agreed should be the subject of a thorough review at a later time.

H. *Double taxation and double exemption*

25. Double taxation or double exemption may result from the inconsistent application of the 183 day rule. Double taxation could arise in a case where the State of residence of the taxpayer does not recognise the right of the State of activity to tax but the State of activity does tax. This can happen if the two

countries use different methods for calculating the 183 day period or use the same method but with a different interpretation. It can also happen if they disagree on whether or not the remuneration is borne by a permanent establishment. In such a case, the State of residence may refuse to give a foreign tax credit on the grounds that taxation in the State of activity is not in conformity with the treaty and double taxation would remain unless other provisions in the domestic legislation (*e.g.* relief in case of hardship) are used. If the State of residence is an exemption country which exempts the foreign remuneration only if the taxpayer has been away for more than 183 days, a disagreement between the countries will also result in double taxation.

26. Double exemption can arise where the State of residence exempts the income and considers that the income should either be exempt or taxed in the State of activity and the latter considers that, in both cases, it should exempt the income. One possible way to deal with these problems would be to introduce a "subject to tax" rule in paragraph 2 of Article 15 whereby the State of activity would exempt the income only if the State of residence of the taxpayer taxes it. The Committee has not reached a conclusion on this question and intends to review the matter at a later date.

I. Conclusion

27. This note deals with some of the difficulties arising with the application of the 183 day rule and identifies a number of areas where further discussion is called for. The discussion resulted in an agreement to adopt a uniform way of calculating the period and, in order to reflect such agreement, the Committee recommends that the following changes be made to the Commentary to the Model Convention.

III. PROPOSED CHANGES TO THE COMMENTARY ON ARTICLE 15[1]

1. Paragraph 3 is deleted and replaced by the following:

> 3. Paragraph 2 contains, however, a general exception to the rule in paragraph 1. *This provision covers all individuals rendering dependent personal services (sales representatives, construction workers, engineers, etc.), to the extent that their remuneration does not fall under the provisions of other Articles, such as those applying to government services or artistes and sportsmen.*

1 Parts in italics indicate proposed changes and additions to paragraph 3 of the Commentary on Article 15 of the OECD 1977 Model Double Taxation Convention on Income and on Capital, which would be divided in new paragraphs 3 to 7.

4. The three conditions prescribed in this paragraph must be satisfied for the remuneration to qualify for the exemption. *The first condition is that* the exemption is limited to the 183 day period. It is further stipulated that this time period may not be exceeded "in the fiscal year concerned". The formulation used may create difficulties in case the fiscal years of the Contracting States do not coincide. In order to avoid these difficulties such Contracting States may prefer to use another phrasing, for instance "fiscal year of that other State" or "calendar year". *However, if paragraph 2 of Article 3 comes into play in the determination of the proper fiscal year, the context would clearly require that the fiscal year of the State of activity is the one that should prevail.*

5. *Although various formulas have been used by member countries to calculate the period there is only one way which is consistent with the wording of this paragraph: the "days of physical presence" method. The application of this method is straightforward as the individual is either present in a country or he is not. The presence could also relatively easily be documented by the taxpayer when evidence is required by the tax authorities. Under this method the following days are included in the calculation: part of a day, day of arrival, day of departure and all other days spent inside the State of activity such as Saturdays and Sundays, national holidays, holidays (see paragraph 6) before, during and after the activity, short breaks (training, strikes, lock-out, delays in supplies), days of sickness (unless they prevent the individual from leaving and he would have otherwise qualified for the exemption) and death or sickness in the family. The following days are not taken into account: transit between two different points outside the State of activity, holidays spent outside the State of activity and short breaks (for whatever reason) spent outside the State of activity.*

6. *While holidays spent inside the State of activity are normally included in the calculation, some flexibility is acceptable if the taxpayer can demonstrate to the satisfaction of the tax authorities of both Contracting States that the holidays are clearly related or not related to the activity.*

7. *The second condition is that* the employer paying the remuneration must not be a resident of the State in which the employment is exercised. *Thirdly,* should the employer have in *the* State *in which the employment is exercised* a permanent establishment (or a fixed base if he performs professional services or other activities of an independent character), the exemption is given only on condition that the remuneration is not borne by a permanent establishment or a fixed base which he has in that State. It should be noted that, *where remuneration is dealt with under a different Article of the Convention, such as Article 17, the provisions of that Article, and not of this Article, apply.*

2. Paragraphs 4 to 7 are renumbered paragraphs 8 to 11 respectively.

ANNEX I

R (9)

Countries using the "day of physical presence" method

	AUS	AUT	BEL	CAN	DEN	FIN
1. Are the following days included or excluded from the calculation?						
1.1 Part of a day	INC	EXC	INC	INC	INC	INC
1.2 Day of arrival	INC	EXC	INC	INC	INC	INC
1.3 Day of departure	INC	EXC	INC	INC	INC	INC
1.4 Saturdays and Sundays (spent inside the State of activity)	INC	INC	INC	INC	INC	INC
1.5 National holidays (spent inside the State of activity)	INC	INC	INC	INC	INC	INC
1.6 Holidays spent inside the State of activity						
1.6.1 before exercising the activities	EXC	EXC	INC	INC	INC	INC
1.6.2 while exercising the activities	INC	INC	INC	INC	INC	INC
1.6.3 after the completion of the activities	EXC	EXC	INC	INC	INC	INC
1.7 Holidays spent outside the State of activity	EXC	EXC	INC (22)	EXC	EXC	EXC
1.8 Short breaks (2 or 3 days)						
1.8.1 outside the State of activity e.g. for consultation, compensatory leave, etc.)	EXC	EXC	INC (22)	EXC	EXC	EXC
1.8.2 inside the State of activity	INC	INC	INC	INC	INC	INC
1.9 Days of sickness	INC	INC	INC	INC	INC (4)	INC (4)
1.10 Death or sickness in the family	INC	INC	INC	INC	INC (4)	INC (4)
1.11 Interruption because of						
1.11.1 strikes or lock-out	INC	INC	INC	INC	INC (4)	INC
1.11.2 delays in supplies	INC	INC	INC	INC	INC (4)	INC
2. The exemption is given twice if the employee is present in the country for less than 183 days in two consecutive fiscal years	YES	YES	YES (23)	YES (3)	YES (5)	YES
3. 3.1. The 183 day rule is applied in the case of an employment solely exercised in the State of activity when the work is concentrated to limited periods and does not exceed 183 days during the year	YES	YES	YES	YES	YES	YES
3.2 This rule applies even if such an arrangement goes on year after year	YES	YES (1)	YES	YES	YES	YES
4. The wording of sub-paragraph 2 b) of Article 15 is used in your tax treaties. If not, please indicate how you depart and the reasons therefor.	YES	YES	YES (24)	YES	YES	YES

INC = Included EXC = Excluded

Countries using the "day of physical presence" method *(cont.)*

	ICE	IRE	JAP	NZE	NOR	POR (10)
1. Are the following days included or excluded from the calculation?						
1.1 Part of a day	INC	EXC	INC	INC	INC	INC
1.2 Day of arrival	INC	INC	INC	INC	INC	INC
1.3 Day of departure	INC	EXC	INC	INC	INC	INC
1.4 Saturdays and Sundays (spent inside the State of activity)	INC	INC	INC	INC	INC	INC
1.5 National holidays (spent inside the State of activity)	INC	INC	INC	INC	INC	INC
1.6 Holidays spent inside the State of activity						
1.6.1 before exercising the activities	INC	INC	INC	INC	INC	INC
1.6.2 while exercising the activities	INC	INC	INC	INC	INC	INC
1.6.3 after the completion of the activities	INC	INC	INC	INC	INC	INC
1.7 Holidays spent outside the State of activity	EXC	EXC	EXC	EXC	EXC	EXC
1.8 Short breaks (2 or 3 days)						
1.8.1 outside the State of activity e.g. for consultation, compensatory leave, etc.)	EXC	EXC	EXC	EXC	EXC	EXC
1.8.2 inside the State of activity	INC	INC	INC	INC	INC	INC
1.9 Days of sickness	INC (4)	INC (2)	INC	INC	INC (4)	INC
1.10 Death or sickness in the family	INC (4)	INC (2)	INC	INC	INC (4)	INC
1.11 Interruption because of						
1.11.1 strikes or lock-out	INC (4)	INC (2)	INC	INC	INC (4)	INC
1.11.2 delays in supplies	INC (4)	INC (2)	INC	INC	INC (4)	INC
2. The exemption is given twice if the employee is present in the country for less than 183 days in two consecutive fiscal years	YES (5)	YES	YES	YES	YES (5)	YES
3. 3.1 The 183 day rule is applied in the case of an employment solely exercised in the State of activity when the work is concentrated to limited periods and does not exceed 183 days during the year	YES	YES	YES	YES	YES	YES
3.2 This rule applies even if such an arrangement goes on year after year	YES	YES	YES	YES	YES	YES
4. The wording of sub-paragraph 2 b) of Article 15 is used in your tax treaties. If not, please indicate how you depart and the reasons therefor.	NO	YES	YES	YES	NO (9)	YES

INC = Included EXC = Excluded

Notes to Annex I.

Countries using the "day of physical presence" method *(cont.)*

	SWE	SWI (11)	TUR	UK	US
1. Are the following days included or excluded from the calculation?					
1.1 Part of a day	INC	INC	INC	INC	INC (12)
1.2 Day of arrival	INC	INC	INC	INC	INC
1.3 Day of departure	INC	INC	INC	INC	INC
1.4 Saturdays and Sundays (spent inside the State of activity)	INC	INC	INC	INC	INC
1.5 National holidays (spent inside the State of activity)	INC	INC	INC	INC	INC
1.6 Holidays spent inside the State of activity					
1.6.1 before exercising the activities	INC	EXC	INC	INC	INC
1.6.2 while exercising the activities	INC	INC	INC	INC	INC
1.6.3 after the completion of the activities	INC	EXC	INC	INC	INC
1.7 Holidays spent outside the State of activity	EXC	EXC	EXC	EXC	EXC
1.8 Short breaks (2 or 3 days)					
1.8.1 outside the State of activity e.g. for consultation, compensatory leave, etc.)	EXC	INC	EXC	EXC	EXC
1.8.2 inside the State of activity	INC	INC	INC	INC	INC
1.9 Days of sickness	INC (4)	INC	INC	INC	EXC
1.10 Death or sickness in the family	INC (4)	INC	INC	INC	INC
1.11 Interruption because of					
1.11.1 strikes or lock-out	INC	INC	INC	INC	INC
1.11.2 delays in supplies	INC	INC	INC	INC	INC
2. The exemption is given twice if the employee is present in the country for less than 183 days in two consecutive fiscal years	YES (5)	YES	YES	YES	YES
3. 3.1 The 183 day rule is applied in the case of an employment solely exercised in the State of activity when the work is concentrated to limited periods and does not exceed 183 days during the year	YES	YES	YES	YES	YES
3.2 This rule applies even if such an arrangement goes on year after year	YES	YES	YES	YES	YES
4. The wording of sub-paragraph 2 b) of Article 15 is used in your tax treaties. If not, please indicate how you depart and the reasons therefor.	YES	YES	YES	YES	YES

INC = Included EXC = Excluded

Countries using the "duration of activity" method *(cont.)*

	FRA	GER	GRE	ITA (15)	LUX	NETH	SPA
1. Are the following days included or excluded from the calculation?							
1.1 Part of a day	INC	INC	INC	INC	INC	INC	INC
1.2 Day of arrival	INC	INC	INC	EXC (16)	INC	INC	INC
1.3 Day of departure	INC	INC	INC	EXC (16)	INC	INC	INC
1.4 Saturdays and Sundays (spent inside the State of activity)	INC	INC	INC	INC	INC	INC	INC
1.5 National holidays (spent inside the State of activity)	INC	INC	INC	INC	INC	INC	INC
1.6 Holidays spent inside the State of activity							
1.6.1 before exercising the activities	INC (18)	EXC	EXC	EXC	(6)	EXC	INC
1.6.2 while exercising the activities	INC (18)	INC	INC	INC	INC	EXC	INC
1.6.3 after the completion of the activities	INC (18)	INC	EXC	EXC	(6)	EXC	EXC
1.7 Holidays spent outside the State of activity	INC	INC	INC	INC (17)	INC	EXC	INC
1.8 Short breaks (2 or 3 days)							
1.8.1 outside the State of activity e.g. for consultation, compensatory leave, etc.)	INC	INC	INC	INC	INC	INC	INC
1.8.2 inside the State of activity	INC	INC	INC	INC	INC	INC	INC
1.9 Days of sickness	INC (19)	INC	INC	EXC	INC (7)	INC (13)	INC
1.10 Death or sickness in the family	INC	INC	INC	EXC	(6)	INC (13)	INC
1.11 Interruption because of							
1.11.1 strikes or lock-out	INC	INC	INC	EXC	(6)	INC	INC
1.11.2 delays in supplies	INC	INC	INC	INC (17)	(6)	INC	INC
2. The exemption is given twice if the employee is present in the country for less than 183 days in two consecutive fiscal years	YES (20)	YES	YES	YES	YES	YES (14)	YES (5)
3. 3.1 The 183 day rule is applied in the case of an employment solely exercised in the State of activity when the work is concentrated to limited periods and does not exceed 183 days during the year	NO (20)	YES	YES	YES	YES	YES	YES
3.2 This rule applies even if such an arrangement goes on year after year		YES	YES	YES	YES	YES	NO
4. The wording of sub-paragraph 2 b) of Article 15 is used in your tax treaties. If not, please indicate how you depart and the reasons therefor.	YES	YES	YES (21)	YES	YES (8)	YES	YES

INC = Included. EXC = Excluded.

1. But only if there is no interrelationship between the recurrent stays in the State of activity; otherwise, there is only one continuing period in which the days spent in the State of activity are counted, the days spent outside that State are ignored.

2. These days are excluded if it is clear before arrival in the State that there was no expectation that these circumstances would occur.

3. Treaties under negotiations and new model treaty do not, since they refer to a "period or periods not exceeding in the aggregate 183 days in any twelve month period commencing or ending in the calendar year concerned".

4. If the employee spends the day in the State of activity the answer is yes and if it is outside the answer is no.

5. The answer is yes provided that the convention says that the relevant period to calculate the 183 days is the fiscal year. (If the relevant period to calculate the 183 days is any period of 12 months the answer might be no in some cases.)

6. *Luxembourg* has not yet determined its position.

7. If the sick leave does not exceed 14 days.

8. There is an exception in the treaty with *Belgium* which specifically includes "normal breaks in work" in the 183 days period.

9. Subparagraph 2 *b*) of Article 15 in the Norwegian Model Convention has this wording:

   > the remuneration is paid by, or on behalf of, an employer who is a resident of the State of which the recipient is a resident, and whose activity does not consist of the hiring out of labour; and

   According to subparagraph 2 *b*) of the OECD Model, it is sufficient for the remuneration not to be taxed in the State of activity when the employer is not a resident of that State. However, where the employee is not a resident of the same State as the employer, he will not be taxable there and there will be no obligation on the employer for the withholding of taxes. The State of residence of the employee may not even know where the employee has been working nor his salary, nor know the identity of the employer. It is doubtful whether the Article on exchange of information will work properly in these cases even if there exists a convention between all three States. Therefore, to avoid non-taxation, *Norway* finds that the best solution in these cases is to give the right to tax to the State of activity because that State is most likely to have the necessary information for a correct assessment of the salary. The reason for adding the second departing condition saying that the activity of the employer must not consist of the hiring-out of labour, is that in *Norway* a hired-out employee for tax purposes is deemed to be employed by the user of the labour. A clarification of this question is also recommended in the report concerning "Taxation issues relating to international hiring-out of labour."

10. Whilst there is an exception in the treaty with *Belgium* which uses the duration of the activity method, the period specifically includes normal breaks of work and the calendar year is used rather than the fiscal year. The calendar year is also used in the treaties with *Finland* and *Norway*.

11. *Switzerland* uses the method of "physical presence" related to the activities.

12. Although the *U.S.* generally considers a part of a day to be a "day" for purposes of satisfying the 183-day rule, an exception is made for certain commuters and for persons present in the *United States* less than 24 hours while in transit between two points outside the *United States*.

13. Provided that the duration of the sickness can be considered as a normal interruption of work which means that it lasts no longer than one or two weeks.

14. With the exception of a few treaties in which the 183 day rule is linked to a period of twelve months instead of the fiscal or calendar year.

15. This, or the other method, has no legal or administrative basis but is generally used as a guideline for tax offices. The replies may vary according to the circumstances.

16. If the day of arrival or the day of departure has no relation to the beginning or end of the activity.

17. These are generally included but there is room for flexibility.

18. Only if related to the activities.

19. Consecutive to the activities.

20. Except if otherwise provided in a tax treaty.

21. Except for three old treaties (*United States*, 1950; *United Kingdom*, 1953; and *India*, 1965) which provide that the employer must be a resident of the State of which the employee is a resident.

22. Included unless the worker can prove otherwise.

23. In recent treaties *Belgium* has insisted on a provision providing that the exemption will not be granted of the stay is of 183 days or more in any twelve month period.

24. A few treaties provide that the employer must be a resident of the same State as the employee or that the employer must either be a resident of the same State as the employee or be a permanent establishment situated in that State.

ANNEX II

RECOMMENDATION OF THE OECD COUNCIL

Concerning the Application and Interpretation of the 183 Day Rule set by the OECD Model Double Taxation Convention on Income and Capital

(adopted by the OECD Council on 24 October 1991)

THE COUNCIL,

Having regard to Article 5 b) of the Convention on the Organisation for Economic Co-operation and Development of 14th December 1960;

Having regard to the Recommendations of the Council of 11th April 1977 concerning the Avoidance of Double Taxation and of 21st September 1977 concerning Tax Avoidance and Evasion [C(77)40(Final), C(77)149(Final];

Having regard to the Report of the Committee on Fiscal Affairs of 24 January 1991 on The 183 Day Rule: Some Problems of Application and Interpretation (DAFFE/CFA(91)6/REVI);

Considering that the 1977 OECD Model Double Taxation Convention on Income and Capital (hereinafter referred to as the "Model Convention") has helped member countries to harmonise bilateral conventions on the basis of uniform principles, definitions, rules and methods, to agree on a common interpretation and to extend the existing network of such conventions;

I. RECOMMENDS that Governments of member countries, when applying existing bilateral Double Taxation Conventions on Income and Capital, follow the recommendations of the above-mentioned Report concerning the interpretation of the 183 day rule set out in paragraph 2 of Article 15 of the Model Convention and, in particular, to adopt the "days of physical presence" uniform method set out in the Report.

II. INSTRUCTS the Committee on Fiscal Affairs to modify the Commentary on paragraph 2 of Article 15 of the Model Convention as recommended in paragraph 27 of the Report, when the Model Convention is next revised.

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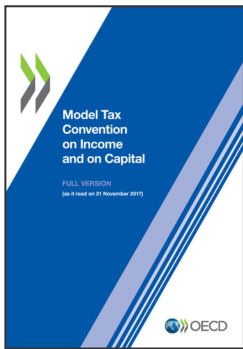

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