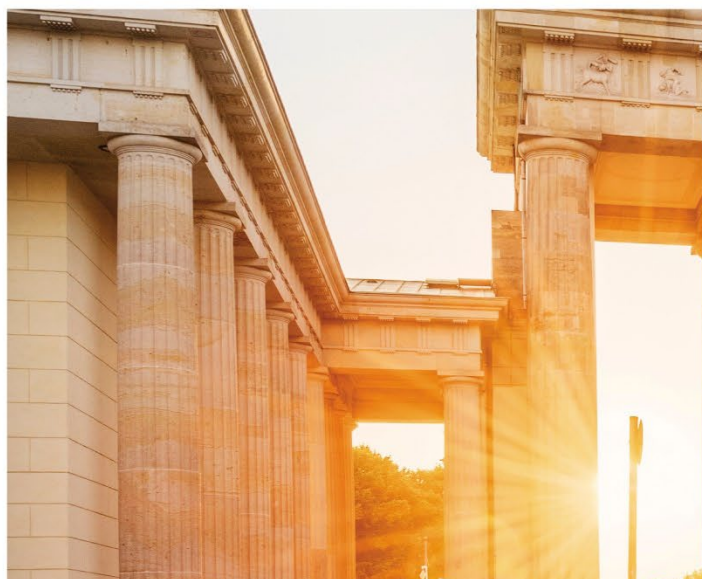




74th Congress of the International Fiscal Association in Berlin

4 – 8 September 2022

www.ifatax2022.com



Taxation of families, mobility of individuals

Chair: Stéphanie AUFERIL
Date: 8th of September 2022

Overview of presentation – Topics & Panelists

- **Taxation of individuals based on tax residence, domicile, citizenship**
- **Attractive tax regimes**
- **Anti-avoidance provisions and Exit taxes**
- **Estate planning strategies and use of trusts**

Chair

- **Stéphanie AUFERIL – France**
Arkwood SCP

Panelists

- **Maria Ines ASSIS – Portugal**
Abreu Advogados
- **Seth ENTIN – USA**
Greenberg Traurig, P.A.
- **Inbal FAIBISH WASSMER – Israel**
Goldfarb Seligman & Co
- **Nicola SACCARDO – Italy**
Charles Russell Speechlys LLP
- **Mark SUMMERS – UK**
Charles Russell Speechlys AG
- **Claudia SUTER – Switzerland**
Homburger AG

Secretary

- **Stéphanie SEBBAGH – France**
Arkwood SCP



Taxation of individuals

Taxation of individuals

TAXATION OF INDIVIDUALS MAY BE BASED ON:

- Tax residence
- Domicile
- Citizenship
- Source of income

FOCUS ON

ASSESSMENT OF AN INDIVIDUAL'S TAX RESIDENCE:

- Domestic tests vs. OECD tests
- Concept of “domicile”
- Taxation based on citizenship?

Taxation of individuals

ASSESSMENT OF AN INDIVIDUAL'S TAX RESIDENCE:

- Domestic tests vs. OECD tests
- Concept of “domicile”
- Taxation based on citizenship?

▪ Example of domestic tests:

- Day counts
- Habitual abode
- Place of exercise of main professional activity
- Registration as a resident with a Municipality
- Center of life / Main center of interests and affairs / Main home
- Statutory Residence Test
- Lawful permanent resident (green card) test

▪ OECD Model Treaty tie-breaker rules:

- Permanent home
- Center of vital interests
- Habitual abode
- Citizenship

Taxation of individuals

ASSESSMENT OF AN INDIVIDUAL'S TAX RESIDENCE:

- Domestic tests vs. OECD tests
- Concept of “domicile”
- Taxation based on citizenship?

“Domicile” – A key concept in the UK

- Common law concept of a person's “permanent home” relevant for transfer taxes and access to the remittance basis.
- UK has the concept of a “**domicile of origin**” (typically taken from father at birth).
- UK has the concept of a “**domicile of choice**” if a person moves to another jurisdiction (permanently or indefinitely). This suppresses the domicile of origin but does not eliminate it, it can revive.
- US domicile is similar to the UK domicile of choice. It is retained until a person forms a new domicile.

Taxation of individuals

ASSESSMENT OF AN INDIVIDUAL'S TAX RESIDENCE:

- Domestic tests vs. OECD tests
- Concept of “domicile”
- Taxation based on citizenship?

“Domicile” in the US

- Relevant concept for Transfer Tax (Estate, Gift, and Generation-skipping taxes)
- US “domicile”: Living in the U.S., for even a brief period of time, with “no definite present intention of later removing therefrom.”

Taxation of individuals

ASSESSMENT OF AN INDIVIDUAL'S TAX RESIDENCE:

- Domestic tests vs. OECD tests
- Concept of “domicile”
- Taxation based on citizenship?

The US citizenship-based taxation

▪ **Income Tax**

Citizens are taxed on a worldwide basis, regardless of whether they spend any time in the United States.

▪ **Transfer Tax**

Citizens are taxed on a worldwide basis, regardless of whether they spend any time in the United States.

▪ **Treaties**

“Saving Clauses” allow U.S. to tax its citizens as if the relevant treaty were not in effect.

Taxation of individuals

TAX IMPLICATIONS OF A RELOCATION?

- **Timing of acquisition of tax residence**
 - **Split year treatment**
 - **Italy:** *no split year treatment under domestic law; split year treatment under income tax treaty only if specific provision (e.g. treaty with CH)*
 - **Israel:** *split year very common for New Residents (Aliyah) and for Returning Residents*
 - **France:** *tax residence status appreciated from date to date : no minimum time during which it is required to fulfill a criteria in order to qualify as a resident*
 - **Day count**
 - **US:** *first day of physical presence during the year (with an up-to ten day de minimis exception). Treaty tie-breakers may provide relief.*
 - **Anti-abuse measures in Portugal in case of departure**

Taxation of individuals

TAX IMPLICATIONS OF A RELOCATION?

- **Overlap of residences**
 - *Dual residency when both countries see a person as resident*
 - *Practical issues:*
 - (i) *moving from Switzerland to Israel*
 - (ii) *moving from France to the UK*
- **“Tax Nomads”**
 - *Risks of “dropout periods” for permanent travelers, individuals splitting their time and resources between several jurisdictions*
 - *Practical issue: Owns a U.S. home, spends 121 days per year in the U.S., 121 days per year in the UK and the remainder of the time in the Bahamas.*





Attractive tax regimes



Attractive tax regimes

- Many countries implemented **favorable tax regimes** to attract high-net-worth individuals:

FOCUS ON

- Aliyah tax incentives – *Israel*
- Forfait tax regime – *Italy, Switzerland*
- Non-habitual resident regime – *Portugal*
- Remittance basis – *UK*
- The Puerto Rico exception – *US*
- Impatriate tax regime – *France*

Attractive tax regimes – *Israel*

New & returning residents tax regime (Aliyah)

■ Requirements:

- i. For new residents: eligibility for Aliyah confirmed by an authorized body (usually the Jewish Agency)
- ii. For Veteran returning residents proof for being a non-resident for over and above 10 consequent years
- iii. Citizenship is not an issue

■ Main features of the regime:

- *10-year exemption on all non-Israeli sourced income*
- *10-year exemption from reporting on non-Israeli sources assets and income (note possible forthcoming abolishment of the reporting exemption)*
- *Exemption from management & control review of CFCs*
- *Trusts and foundations may benefit from the same preferential regime as the settlor and beneficiaries.*
- *Note possible issues with work performed in Israel and with possible permanent establishment issues.*

Attractive tax regimes – Switzerland

Forfeit tax regime (lump sum taxation)

- **Requirements:**
 - i. Non-Swiss citizen
 - ii. Tax residence (residence / abode) in Switzerland
 - iii. No gainful activity in Switzerland
 - iv. Compliance with conditions for lump sum taxation by every family member individually

- **Calculation of taxable income:**
 - The highest of the following:
 - *Effective standard of living*
 - *Minimum tax basis*
 - *Lump sum standard of living*
 - Application of ordinary tax rates on amount so determined.

Attractive tax regimes – *Italy*

Forfeit tax regime (lump sum taxation)

■ Requirements:

- i. Non-residence (under domestic tax law) in at least 9 out of 10 years prior to the first year of application of the regime
- ii. Tax residence in Italy

■ Main features of the regime:

- *100k flat income tax on foreign-source income and foreign source gains (special rule for gains on substantial participations in the first 5 years of Italian tax residence)*
- *No wealth tax on assets held outside Italy*
- *No reporting obligations on assets held outside Italy*
- *No inheritance and gift tax on assets situated outside Italy*
- *15 years maximum duration*
- *Optional extension to one or more qualifying family members (25k EUR flat income tax each)*
- *Optional ruling*

Attractive tax regimes – *Portugal*

Non-habitual tax resident regime (NHR)

■ Requirements:

- i. Tax residency in Portugal (both under domestic tax law and double tax treaties signed by Portugal)
- ii. Non-Portuguese tax residency (both under domestic tax law and double tax treaties signed by Portugal) in the 5 years preceding the one in which the individual becomes Portuguese tax resident

■ Main features of the regime:

- *10% flat rate on foreign-sourced pension income*
- *20% flat rate on employment or business income derived from high added value activities (sourced in Portugal and/or outside of Portugal)*
- *Exemption from taxation (as a rule) on foreign-sourced investment income (rents, dividends, interest, royalties) – there are some pitfalls (e.g., capital gains from immovable assets)*
- *10 years maximum duration (non-renewable)*

Attractive tax regimes – *Portugal*

Non-habitual tax resident regime (NHR)

■ Other relevant features:

- *Income from digital assets (e.g. crypto), art, antiques, precious metals, collector items (cars, wines, etc) not subject to tax unless obtained professionally*
- *No wealth tax (except residential real estate located in Portugal with tax value exceeding 600k euros (or 1,2Million euros in case of married or un-married partners) subject to additional property tax)*
- *No inheritance tax or estate tax for forced heirs or non-Portuguese situs assets*
- *No reporting obligations on assets (except IBAN/SWIFT of foreign bank accounts)*

Attractive tax regimes – UK

The remittance basis

■ Requirements:

- i. Remittance basis user (RBU) must be capable of claiming a non-UK common law domicile
- ii. Remittance basis must be claimed on self-assessment tax return for each year

■ Main features of the regime:

- *Deferral of tax: RBU taxed on all income and realized gains that are UK source or remitted to the UK*
- *RBUs are typically limited on treaty benefits to value actually remitted to the UK or no benefits at all*
- *After 7 of 9 tax years residency the RBU must pay GBP30,000 per year to claim remittance basis; this rises to GBP60,000 per year after 12 of 15 tax years residency*
- *An RBU who is 15 of 20 tax years resident in the UK is subject to global taxation including Inheritance Tax (IHT) (so-called « deemed domicile »)*
- *Very complex and comprehensive anti-avoidance rules: professional tax compliance costs are high*
- *Prior to deemed domicile any non-UK domiciliary (not just RBUs) are subject to IHT only on UK situs assets*

Attractive tax regimes – US

The Puerto Rico exception

- A “bona fide resident of Puerto Rico” is not subject to federal income tax on Puerto Rico source income.
 - *Specific rule treats built in gains at time of move to Puerto Rico as US source income for 10 years.*
- Puerto Rico tax law provides incentives (e.g., 4% (or less) corporate tax rate and no tax to individual on dividends and capital gains).
 - *For example, Puerto Rico’s Incentives Code (Act 60).*

Attractive tax regimes – *France*

The impatriate regime

- **Requirements:**
 - i. Tax residency in France
 - ii. Non-French tax residency in the 5 years preceding the arrival in France
 - iii. Employment contract in a French company or management position (only for income tax regime)

- **Main features of the regime:**
 - *For income tax purposes: 8-years exemption of the impatriation premium, salary related to activity performed abroad and 50% of passive income.*
 - *For wealth tax purposes: 5-years exemption of non-French situs real estate*

Attractive tax regimes

Q: *Which impacts on double tax treaties' access?*

- **Article 4.1 OECD Model:** *For the purposes of this Convention, the term “resident of a Contracting State” means any person who, under the laws of that State, is liable to tax therein by reason of his domicile, residence, place of management or any other criterion of a similar nature [...]. This term, however, does not include any person who is liable to tax in that State in respect **only of income from sources in that State or capital situated therein.***
- **Illustrations of withholding tax issues:**
 - *Regazzacci decision held by the French Supreme Court regarding application of the France-UK DTT to taxpayer enjoying the regime of remittance basis in the UK (CE, July 27th 2012 n° 337656 et 337810, min. c/ Regazzacci)*
 - *Israel: treaty application on new and returning residents*

Attractive tax regimes

- **Article 27§1 of the Swiss-UK income tax treaty:** “Where under any provision of this Convention income from a source within Switzerland is relieved from Swiss tax and, under the laws in force in the United Kingdom, an individual, in respect of such income, is subject to tax **by reference to the amount thereof which is remitted to or received in the United Kingdom and not by reference to the full amount thereof**, then the relief to be allowed under the Convention in Switzerland shall apply only to so much of the income as is remitted to or received in the United Kingdom.”

(Similar provisions provided under article 29 of the France-UK income tax treaty.)

- **Illustrations of tie-breaker rules issue:**

- **Tiziano Ferro decision** held by Italian Supreme Court regarding the remittance basis (Judgment n° 21696 of October 8th 2020). Cf. Italian tax authorities' approach to treaty entitlement of Italian lump sum taxpayers





Anti-avoidance provisions and Exit taxes



Anti-avoidance provisions and Exit taxes

EXIT TAX REGIMES:

- Exit tax regimes implemented in **France** and **the US**
 - *2004 ECJ case law de Lasteyrie du Saillant (re. the French exit tax) for the EU compatibility of European exit tax regimes*
- Introduction of a more sophisticated Exit Tax regime in **Israel**
- Exit tax in **the US** :
 - *Citizen or long-term permanent resident who expatriates is subject to a mark-to-market exit tax (and other income consequences).*
 - *Transfer tax on gifts and bequests by expatriates to US persons.*
 - *Conversion of U.S. trust to “foreign non-grantor trust” gives rise to tax.*
- Exit tax on trusts and companies in **the UK**
- No Exit tax for individuals in UK, Italy, Portugal (except for shareholders involved in tax neutral corporate reorganizations with latent capital gains) and Switzerland

Anti-avoidance provisions and Exit taxes

“TAX TAIL”:

- **US** imposes “exit tax” on “expatriates” (former US citizens and long-term green card holders). US imposes tax on gifts and bequests by expatriates to US persons.
- Proposed reform may enable **Israeli Tax Authority** to levy taxes also after relocation and tax due in trust to ensure future payment following relocation.

ANTI-AVOIDANCE PROVISIONS OF TREATIES:

- Article 14.6 of the **France-UK DTT** authorizing France to keep on taxing gains on substantial participations of former French residents after their relocation to the UK
- Art. 13.5 of the **UK-Italy DTT** on capital gains not «subject to tax» in the new State of residence





Estate planning strategies and use of trusts



Estate planning strategies and use of trusts

Q:

- 1. The concept of trusts**
- 2. Recognition of trusts by other jurisdictions?**
- 3. How to treat trust of another jurisdiction in case of mobility of the settlor or beneficiaries?**

Estate planning strategies and use of trusts



CASE STUDY: Taxation of individuals in relation to trusts

A trust resident on the island of Jersey, the settlor is alive. The trust holds various classes of assets, some of them through a BVI company.

- The **settlor** becomes tax resident in your jurisdiction. How is he/she or the trust / company taxed as a result during lifetime and on death? What disclosures, compliance and registrations are required?
- A **beneficiary** becomes tax resident in your jurisdiction. How is he/she or the trust / company taxed as a result during lifetime and on death? What disclosures, compliance and registrations are required?

Taxation of individuals when acting as trustee



CASE STUDY: Taxation of individuals when acting as trustee

It is very common with domestic estate planning in the US and UK for individuals to act as trustees of their own family trusts and estate plans.

Taking Case Study 1 but with a US or UK settlor acting as trustee / co-trustee and a US or UK limited liability holding entity for investments:

- What are the tax implications for the **US trust** when the settlor leaves the US and moves to the UK?
- What are the tax implications for the **UK trust** when the settlor leaves the UK and moves to the US?





Conclusion, Q&A







Appendices



Appendix 1: Domestic tests for tax residence status

➤ France

- Place of the individual's home, or in the absence of a home in France, principal place of abode
- Main professional activity
- Center of economic interests

➤ Israel

- Center of life as the leading test (to be change if new reform is enacted).
- Day count as a strong indication for residency: 183 days in a tax year or 425 days in 3 consequent year.
- In various recent court and ruling decisions residency was possible also with significant day count (~145 days).

➤ Italy

- Registration as a resident with a Municipality
- Habitual abode
- Main center of interests and affairs (similar to center of vital interests)

➤ Portugal

- 183 days, consecutive or not, in Portugal in any 12-month period
- Habitual abode
- Split year taxation: tax residency in the first day of physical presence and non-tax residency in the first day of departure
- Departure: some anti-abuse measures apply

Appendix 1: Domestic tests for tax residence status

➤ Switzerland

- Residence
- Habitual abode: Default after 30 / 90 days (more or less) uninterrupted stay
- Split year taxation: pro-rated taxation of income / wealth at full-year tax rate
- Departure: establishment of new residence abroad required

➤ United Kingdom

- Statutory Residence Test (SRT) is complex and can give an answer between 16 and 183 nights in the UK for residency
- Split year taxation (sometimes)
- Departure: SRT treats “leavers” more harshly than “arrivers” in night counting

➤ United States of America

- Lawful permanent resident (green card) test; or
- Substantial presence test
 - 183 days or more, taking into account:
 - All days of presence in the current year, and
 - 1/3 of days of presence in the prior year, and
 - 1/6 of days of presence in the year before that.
 - Some exceptions (such as the closer connection exception).

Appendix 2: France – Tax treatment of trusts



- Trusts do not exist under French law. However, in 2011, French lawmakers have introduced into the French tax code specific tax rules in order to deal with foreign trusts connected to France (*French law n°2011-900 dated 29 July 2011*).
- For **wealth tax as well as gift and inheritance tax purposes**, French rules governing the taxation of foreign trusts are, generally speaking, disconnected from the actual features / characteristics of the trust. Foreign trusts are deemed tax transparent i.e. assets transferred into a trust are considered as still being part of the settlor's estate.
 - During the life of the settlor, distribution to a beneficiary who is not settlor is a triggering event for French gift tax.
 - The death of the settlor is a triggering event for French inheritance tax even if the assets remain undistributed.
 - French territoriality rules apply subject to provisions of double tax treaties.
- For **income tax and capital gain tax purposes**, revocable trust are generally treated as transparent whereas, for irrevocable trusts, taxation generally occurs upon distributions, subject to specific anti-abuse rules.
- Trustees of foreign trusts connected to France are liable to **reporting obligations** in France.

Appendix 3: Israel – Tax treatment of trusts



- Trusts, foundations and similar regimes are expected and used by Israeli resident and by families with Israeli family members.
- Although Israel has a trust law as of 1979, it is not commonly used and usually trusts with Israeli residents tend to use foreign trustees and non-Israeli jurisdiction as the applicable law
- Current regime is based on the taxation of trust rules as those appear in the Israeli Income Tax Ordinance, which, in essence, set the taxation and reporting duties based on the residency of the settlors and the beneficiaries. Generally, the trust will be subject to taxation in Israeli on its passive income at a rate of 25%-33%, depends on the type of income.
- Trusts in which all beneficiaries are charities complying with the definition of a “public purpose beneficiary” may be entirely exempt in Israel
- Trust create by an Israeli resident irremovably for the benefit of non-Israeli residents (and no Israeli resident can be appointed to the trust may exit the Israeli tax network upon a one-time reporting and payment of exit tax
- Trusts in which all beneficiaries are new residents or veteran returning residents, can enjoy the tax benefits of these beneficiaries, i.e., 10-year tax exemption on all non-Israeli assets and income.

Appendix 4: Switzerland – Residence in general



➤ Swiss tax residence

- Objective element: physical presence in a permanent home
- Subjective element: intent to stay in Switzerland
 - Personal interests
 - Business interests

➤ Swiss tax abode

- Physical presence
 - 30 days with gainful activity
 - 90 days without gainful activity
- Unifying link required

Appendix 4: Switzerland – Residence / forfait regime



➤ Lump-sum taxation (forfait regime)

- Does not impact Swiss tax residence
- Eligible for treaty relief (requires declaration in Swiss tax return)
- Exceptions: Austria, Belgium, Canada, France, Germany, Italy, Norway, United States

➤ Modified lump-sum taxation

- Prerequisite for the application of treaty relief
- All sources of income from respective state are included in Swiss tax return (not only those for which treaty relief is requested)

Appendix 4: Switzerland – Residence and PoEM



- Legal entities whose registered office or effective management is located in Switzerland are subject to **unlimited taxation**. They are taxed on the total of their worldwide income (profits) and the corresponding assets (capital).
- The **place of effective management** is where the threads of management converge and where the **main business decisions are made**. The decisive factor is therefore the **management of the core business** within the scope of the company's purpose. In this context, management is to be distinguished from mere administrative activities and the activities of the highest corporate bodies, insofar as they are limited to the supervision of the actual management and certain basic decisions.
- Default if PoEM cannot be established: place of residence of shareholder (individual)

Appendix 4: Switzerland – Draft Swiss trust law



Draft bill published on 12 January 2022: intends to introduce trusts into Swiss law.

- The trust will be a specific legal instrument (neither contract nor legal entity)
- Maximum duration: 100 years
- No creation of charitable trusts or purpose trusts
- Taxation:
 - So far, trust itself and the trustees have not been subject to taxation, but rather its settlor and/or its beneficiaries
 - No proposed change to the taxation of revocable and irrevocable fixed interest trusts
 - Proposed new rules regarding taxation of irrevocable discretionary trusts
 - Establishment of trust: Donation or inheritance tax payable (at maximum tax rate)
 - Taxation as legal entity of Swiss resident beneficiary
 - If beneficiaries cannot be identified and settlor was Swiss resident, trust is subject to tax

Appendix 5: Portugal – Tax residence in general



Under domestic tax law, an individual will be deemed Portuguese tax resident if:

- He/she stays for more than 183 days in Portuguese territory, whether these days are consecutive or not, in any 12 month period commencing or ending in the year concerned; or
- If staying for a shorter period, has in this territory, in any given day of a 12 month period commencing or ending in the year concerned (the tax-year is the calendar year), a dwelling under circumstances that lead to the presumption of an intention to hold and occupy it as a place of habitual residence.

Appendix 5: Portugal – Tax residence and NHR regime



- Qualifies as Portuguese tax resident
- Eligible for treaty relief
- Eligible to get a tax residence certificate under Art 4 of the DTT concluded by Portugal
- Must report income in Portuguese tax return income obtained worldwide even if exempt from taxation in Portugal
- Must report IBAN/SWIFT of all foreign bank accounts

Appendix 5: Portugal – Tax treatment of trusts



- Portugal has not signed the Hague Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition
- Portuguese civil code does not have any provision for the institute of trust
- No case law accepting the validity of the creation of trust by Portuguese nationals or residents or the recognition of foreign trusts
- Taxation
 - Amounts **paid or made available** by a trust (either to the settlor or the beneficiaries), when such amounts are **not connected with the liquidation (winding-up), revocation or extinction of the trust** – investment income taxed at a flat rate of 28% or 35%, depending on the tax residency of the trustees;
 - **Income derived from a trust upon its liquidation, revocation or extinction:**
 - If derived by the settlor – capital gains taxed at a flat rate of 28% or 35%, depending on the tax residency of the trustees;
 - If derived by a beneficiary (non-settlor) – donation taxed at a flat rate of 10%

Appendix 6: UK – Tax treatment of trusts



UK Protected Settlement and Excluded Property Trust Regime:

- Current regime created under Finance No.2 Act 2017
- Trust funded a non-UK domiciled individual (whether non-UK resident or RBU pre 15 years) will be a Protected Settlement provided that
 - All income is non-UK source (realised gains can be UK)
 - Trustees are non-UK resident
 - Settlor does not add further value once deemed UK domiciled (otherwise trust is tainted)
 - Settlor remains non-UK domiciled at common law
- Benefits of a Protected settlement (broadly) are that tax only charged on distributions and benefits received by UK residents (tax regime and computation is complex)
- A trust comprising non-UK situs assets settled by a non-UK domiciled individual is an Excluded Property Trust – assets are outside the scope of IHT even if the settlor becomes deemed or actually UK domiciled