

Tax Residency Status: Issues to Consider When Moving Abroad



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Recent social and economic developments have had a powerful impact on many Ukrainian citizens and businesses and have led them to look for a better life beyond the borders of Ukraine. Obviously, Ukrainians moving abroad is not something new. Periods of economic crisis in almost every state are usually accompanied with outflow of human and financial capital.

Moving to the new place of residence or transfer of business activities to another state is a serious challenge. Apart from organizational issues, especially when individuals are moving, the issue of tax residency status usually takes one of the last places on the agenda. In this regard, it only becomes relevant when registering at a new place, receipt of income by such person in Ukraine or abroad, as well as the acquisition or disposal of property or other assets.

It should be noted that the controlling authorities usually apply a fiscal approach when assessing the status of a tax resident in Ukraine without proper analysis of the facts and application of the principle “substance over form”.

The criteria for determining the status of a tax resident of Ukraine

The *Tax Code of Ukraine* of 2 December 2010 with further amendments in subsection “b)” of paragraph 14.1.23 of Article 14 (TC) establishes list of criteria for determining the status of an individual as a tax resident of Ukraine, which are applied in consecutive order. These criteria are the following:

- place of residence;
- place of permanent residence;
- centre of vital interests;
- staying on the territory of Ukraine for at least 183 days during the year;

Ukrainian legislation does not clearly distinguish the terms “place of residence” and “place of permanent residence”, which leads to inconsistent interpretation and application

— citizenship of Ukraine.

Also, according to TC sufficient basis for determining the tax residency status of a person is a self-determination of the principal place of residence on the territory of Ukraine or registration as a self-employed person. In this article, we would like to analyse the peculiarities of practical application of certain criteria when determining the status of a tax resident of Ukraine, which are crucial to the tax status of an individual.

Place of residence vs. place of permanent residence

The criteria for the tax residency status established by TC generally comply with the *Model Tax Convention on Income and on Capital of the Organization for Economic Cooperation and Development* (OECD) and treaties on avoidance of double taxation, signed and ratified by Ukraine, except for the first criterion, the place of residence. Such separation of the mentioned criterion was established historically by the *On Personal Income Tax Act of Ukraine of 22 May 2003* with further amendments.

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The *On Freedom of Movement and Free Choice of Place of Residence in Ukraine Act of 11 December 2003* with further amendments operates with the term “place of residence”, defining it as accommodation, located on the territory of the administrative-territorial unit in which the person resides. The mentioned Act also establishes the obligation to register information about temporary or permanent place of residence of the person within 30 calendar days after the arrival to a new place.

At the same time, Ukrainian legislation allows an individual to have several places of residence, not excluding residence in other states.

The place of residence is confirmed by a registration mark in his/her civil passport. However, Ukrainian legislation does not establish any options for confirmation of the place of permanent residence.

At the same time, Ukrainian legislation in the customs sphere and sphere of foreign economic activity operates with the term “place of permanent residence”. It is defined as a place of residence on the territory of a state for not less than one year of an individual who does not have permanent residence on the territory of other states, and intends to reside on the territory of the first state for an indefinite period, without limiting such residence by certain purpose, provided that such residence is not a consequence of the performance of that person’s obligations under the contract.

Therefore, from the practical point of view, there are additional challenges in determining the tax residency status in accordance with the first two criteria stipulated by TC due to existing non-compliance of legislative provisions. Additionally, individuals moving abroad usually do not deregister from their place of residence, which formally can be interpreted as the existence of multiple places of residence and used an argument in favour of the controlling authorities.

Determination of the permanent place of residence according to the OECD

The first criterion of the *OECD Model Tax Convention on Income and on Capital* with respect to the definition of tax resident status is “per-

manent home”, which means a place where the individual owns or possesses a home; this home must be permanent, that is to say, the individual must have arranged and retained it for his permanent use 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.

The permanence means that the individual has arranged to have the dwelling available to him at all times continuously, and not occasionally for the purpose of a stay, which, owing to the reasons for it, is necessarily of short duration (travel for pleasure, business travel, educational travel, attending a course at a school, etc.).

Therefore, the OECD does not specify the legal form of the definition of a permanent home and recommends relying on the substance of such residence, not on its formalization by the right of ownership, lease, etc.

At the same time, given the fiscal approach of the controlling authorities in Ukraine while determining the tax residency status, the application of the OECD approach may not always have a positive result for the taxpayer.

Centre of vital interests

According to the clarifications of the State Fiscal Service of Ukraine centre of vital interests includes family, social relations, political, cultural or other activities, place of employment or business activities.

In most cases, this criterion is of a subjective nature and may not be applied in a consistent manner.

When applying the criterion of citizenship of Ukraine, it should be noted that double citizenship is prohibited in Ukraine

For example, if a person resides abroad and owns certain corporate rights in Ukraine, and remains on the territory of Ukraine for a certain period of time, Ukrainian controlling authorities will most likely not be able to determine the centre of vital interests and will apply the next criteria to determine the tax residency status.

Stay on territory of Ukraine for at least 183 days during the year

The criterion of staying on the territory of Ukraine for at least 183 days during the year applies in cases when the previous criteria for determining the status of a tax resident are equally applicable to both the states in which the person resides.

Therefore, the presence of a person on the territory of Ukraine for less than 183 days does not automatically mean that the person is not a tax resident of Ukraine.

The period of stay in Ukraine is calculated including the dates of departure and arrival for the calendar year. In case of doubt on the actual presence on the territory of Ukraine (for example, when there are no stamps in the passport on crossing the border), the person may apply for a certificate confirming days of departure and arrival to Ukraine issued by the departments of the State Border Service of Ukraine.

Citizenship of Ukraine

When applying the criterion of citizenship of Ukraine, it should be noted that double citizenship is prohibited in Ukraine. If an individual violating the law has dual citizenship

he/she is not allowed to offset taxes paid from income originating from foreign sources against taxes that should be paid from the same income in Ukraine.

Conclusions

Given the above analysis as well as the practice of interpretation and application by the controlling authorities, the provisions of TC and international agreements with regard to the definition of tax residency status, we would propose the following recommendations.

First of all, a person who intends to move to another state, should analyse the issue registration of place of residence in Ukraine and options of de-registration and new registration in the consular register in the new state. In addition, the person should carefully calculate the number of days of stay on the territory of Ukraine.

In any case, it is recommended that the application of all mentioned criteria be accompanied with the relevant documents, which can strengthen the legal position of the taxpayer.

Moreover, despite the rule of consistent application of the criteria of tax residency status, in our opinion, a comprehensive analysis and confirmation of the tax residency status on the basis of the relevant documents according to the principle of “substance over form” is crucial to determining the state in which such individual is obliged to declare and pay taxes on income received (except for income taxed on receipt in the source state).

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