Fiscal Domicile in the Law of Double Taxation Agreements

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I. PROBLEM

Since 1963, when the O.E.C.D., the successor of the O.E.E.C., published a Draft Double Taxation Agreement, many Double Taxation Agreements, e.g. the Double Taxation Agreement between the Republic of South Africa and Switzerland, contain a special article bearing the title “Fiscal Domicile” although in other such Agreements either no title or the title “Residence” is given to the same article.

The term “Fiscal Domicile” is not self-explanatory. “Fisc” may be understood as that branch of the Government which is expressly charged with the collection of revenue, but not as the Government in its general sense. Does, then, the term “Fiscal Domicile” refer to a domicile of the fiscus or does it rather suggest a domicile of the taxpayer for fiscal purposes? The answer must be gathered from the article of the Double Taxation Agreement which bears that title, due regard being had to the context.

II. PERSON

Whatever the meaning of “Fiscal Domicile” is, it is clear that it relates to a “person”. “Person” is defined in most, if not all, Double

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1 The letters stand for “Organisation for Economic Co-operation and Development”.

2 The letters stand for “Organisation for European Economic Co-operation”.


6 E.g. the Double Taxation Agreement between the United Kingdom of Great Britain and Northern Ireland and Portugal of 27th March, 1968 (art. 4).

7 J. Chase, N. O. v. Du Toit’s Trustee, (1858) 3 Searle 82, per Cloete, J.
Taxation Agreements. Under the Double Taxation Agreement between the Republic of South Africa and the United Kingdom of Great Britain and Northern Ireland, which is one of the latest Double Taxation Agreements and will, therefore, be used here as a test Agreement of its kind, the term “person” includes any body of persons, corporate or not corporate.

When applying this definition, as well as any other provision of the Double Taxation Agreement, one must bear in mind that the Double Taxation Agreement itself contains a conflict’s rule: any term not otherwise defined shall, unless the context otherwise requires, have the meaning which it has under the laws in force in the territory of the Contracting State concerned relating to the taxes the subject-matter of the Double Taxation Agreement. This rule has attracted some criticism, it being feared that the tax legislation of a country may change and unilaterally modify the field of application of a Double Taxation Agreement. If, by the way, the particular term has no counterpart in the internal taxing statute of the Contracting State concerned and is, what has been called, a term of international tax language, one must have resort to the ordinary rules of construction applicable to the interpretation of an internal statute, taking into account, inter alia, the object of the measure which is to avoid double taxation.

Against this background it may be pointed out that also in South African tax law the term “person” includes a body of persons unincorporate. But a partnership is here not a body and, therefore, not a “person” whereas, by reason of a specific statutory provision in the Income Tax Act, “person” includes the estate of a deceased person.

According to the Double Taxation Agreement the term “company” means any body corporate, but the latter is not defined.

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8 See note 5 above. In the absence of an indication to the contrary, articles quoted hereafter refer to this Double Taxation Agreement.
9 Art. 2(1) (f).
10 Art. 2(3).
16 Art. 2(1) (g).
These remarks in regard to "person" cannot be concluded without referring to the terms "enterprise" and "permanent establishment" respectively. The Double Taxation Agreement distinguishes crisply between a resident of a Contracting State (who is a person), on the one hand, and the industrial or commercial enterprise or undertaking carried on by him, on the other.\(^{17}\) A permanent establishment, which generally means a fixed place of business where the business of the enterprise is wholly or partly carried on,\(^{18}\) is also not treated as a person.\(^{19}\)

**III. RESIDENT OF A CONTRACTING STATE**

What is meant by "Fiscal Domicile" emerges from the first paragraph of the article in question:\(^{20}\) For the purpose of the Double Taxation Agreement the term

"resident of a Contracting State"

means any person who, under the law of that State, is

"liable to taxation"

therein

"by reason of his domicile, residence, place of management or by any other criterion of a similar nature".

Apart from the fact that "domicile", together, moreover, with other incidents, is used only to explain the meaning of "resident" for the purpose of the Double Taxation Agreement, the importance attached to it is rather slender, for it is coupled with such incidents as "residence" and "place of management", and its range is further watered down by the additional words: "or any other criterion of a similar nature".

"Domicile",\(^{21}\) coloured as it is by the twin rule that a person cannot have more than one domicile at a time and cannot be without a domicile, means the place or country which is considered by law to be a person's permanent home.\(^{22}\)

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\(^{17}\) Art. 2(1) (6).

\(^{18}\) Art. 4(1).

\(^{19}\) See also van den Tempel, op. cit., p.29 (No. 54).

\(^{20}\) Art. 3.

\(^{21}\) "Verblyf", "domicile", "Wohnsitz".

The meaning of "residence"\textsuperscript{23} cannot be precisely and exhaustively defined and may vary with the object and intention of the enactment in which it is used.\textsuperscript{24} The residence of an individual will often be the place where he eats, drinks and sleeps.\textsuperscript{25} The residence of a legal person (company) is generally considered to be the place where the central management and control actually abide,\textsuperscript{26} it being immaterial where, according to its constitution, the legal person ought to be controlled.\textsuperscript{27} It may be suggested that the term "place of management"\textsuperscript{28} purports to refer to the residence of a person other than an individual as set out above. It has long been established that a man may have more than one residence for the purposes of income tax statutes,\textsuperscript{29} and this is also true in the case of a legal person (company),\textsuperscript{30} provided its control and management are evenly divided between two or more countries.\textsuperscript{31} At any rate, as will be seen later, one of the provisions of the Double Taxation Agreement deals specifically with double residence, the possibility of which must, therefore, be accepted in this connection.

It is very difficult to say \textit{in abstracto} what is meant by the words "or any other criterion of a similar nature".\textsuperscript{32} In any case the \textit{ejusdem generis} rule (\textit{noscitur a sociis}) applies, in terms of which those general words are confined to incidents of the same kind as the preceding specified ones.\textsuperscript{33} The combination of domicile, residence and place of management which preceed the general words shows, however, an
intention that each of these terms should not be construed too rigidly and narrowly.

IV. INDIVIDUAL RESIDENT OF BOTH CONTRACTING STATES

Where an individual is a resident of both Contracting States, paragraph (2) of article 3 provides for a number of alternative tests to be applied which will now be considered in their proper order.

(a) Permanent Home

An individual who is a resident of both Contracting States, is in terms of sub-paragraph (a) deemed to be a resident of the Contracting State in which he has a permanent home available to him. "Permanent home", it is considered, must be distinguished from "domicile". In terms of the earlier remarks "domicile" means the place or country which is considered by law to be a person's permanent home. As follows from this definition, domicile need not necessarily be the actual permanent home of a person, for the law may, and in fact often does, regard a certain country or State as the domicile of a person although such person may not have a permanent or even any home there. A permanent home is clearly more than residence, ordinary residence or even habitual residence which latter is a special test as will be seen later. "Permanent" is not necessarily the same as "everlasting"; in connection with "establishment" it has been held to be employed in the sense of "indefinitely continuing". Some intention, viz. an intention as to permanency, may very well be a requisite.

(b) Centre of Vital Interests

If, however, an individual has a permanent home available to him in both Contracting States, he is in terms of sub-paragraph (a) of paragraph (2) of article 3 deemed to be a resident of the Contracting State with which his personal and economic relations are closest.

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34 "n permanente tuiste"; "foyer d'habitation permanent"; "staendige Wohnstätte".
35 See above ad notam 22.
36 See sub (c) below.
37 See Henriksen v. Grafton Hotel, Ltd., [1942] 1 All E.R. 678 (C.A.) at 684F per du Parcq, L.J.
39 See also Mathebula v. Ermelo Municipality and Another, 1955(4) S.A. 443 (T) (3 J.J.) at 445D. The decision, though, dealt with a different statute, but the principle is the same.
40 "Waarmee sy persoonlike en ekonomiese verbondings die nouste is"; "avec lequel ses liens personnels et économiques sont les plus étroits"; "zu dem sie die engeren persönlichen und wirtschaftlichen Beziehungen hat".
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or, as is added in brackets, where his centre of vital interests\textsuperscript{41} is. As will be noticed, both the personal and the economic relations of such a person must be closest with the particular Contracting State, it being not enough that either the personal or the economic relations have that degree of closeness. "Personal relations", it is considered, refer to the private life of the person concerned whereas "economic relations" relate to the office, business, profession or employment of that person. In a particular case it may admittedly be very difficult to determine in which Contracting State the taxpayer has his centre of vital interests.

(c) Habitus Abode

In fact the article envisages that contingency. In such a case and further also where the taxpayer has not a permanent home available to him in both Contracting States, he is in terms of sub-paragraph (b) of paragraph (2) of article 3 deemed to be a resident of the Contracting State in which he has an habitual abode.\textsuperscript{42} "Abode", like "residence" with which it is often equated, cannot be precisely defined. "Habitual" residence (abode) is now a fashionable concept in modern private international law (conflict of laws) as a compromise between nationality and domicile; there is no requisite of permanence\textsuperscript{43} although there must be some continuity.\textsuperscript{44}

(d) Nationality

If the taxpayer has an habitual abode in both Contracting States or in neither of them, then he is in terms of sub-paragraph (c) of paragraph (2) of article 3 deemed to be a resident of the Contracting State of which he is a national. The nationality of a person, it is considered, must be determined by the law of the country whose national the person in question is alleged to be.

(e) Mutual Agreement

If the taxpayer is a national of both Contracting States or of neither of them, then, as sub-paragraph (d) of paragraph (2) of article 3 lays down, the taxation authorities of the Contracting States shall determine by mutual agreement whose "resident" he is. It is here not a requisite, it is submitted, that the taxpayer possesses a nationality at all: also in the case of a stateless person it can be said that he does not possess the nationality of either of the Contracting States.

\textsuperscript{41}"Sy tuiste van levensbelange"; "centre des intérêts vitaux"; "Mittelpunkt der Lebensinteressen".

\textsuperscript{42}"n gesoonteverblyfsplek"; "où cette personne séjourne de façon habituelle"; "gewohnlicher Aufenthalts".

\textsuperscript{43}See sub (a) above.

V. PERSON OTHER THAN AN INDIVIDUAL RESIDENT OF BOTH CONTRACTING STATES

In the case of a person, other than an individual, article 3 envisages only one contingency, viz. that such a person may be a resident of both Contracting States. Likewise only one solution is offered: what solely matters is in which Contracting State such person's "place of effective management"\(^{45}\) is situated. It is here that such person is deemed to be a resident (paragraph (3) of article 3).

Earlier it was suggested that "the place of management" really means the place where the central management and control actually abide and that, where the legal person's control and management are evenly divided between two or more countries, such a legal person resides in fact in two or more countries.\(^{46}\) In the premises it is difficult to conceive of cases where there is an effective management (control) in one Contracting State only. To render the paragraph workable, it must be construed, it is considered, to refer to the Contracting State where the particular legal person has its place of the "more", if not "most", effective management (control).

In the former Double Taxation Agreement\(^{47}\) there occurred the following additional sentence which has now been omitted:

"The same provision shall apply to partnerships and associations which under the national laws by which they are governed are not legal persons."

The reason for omitting the extension of the provision to partnerships and associations which are not legal persons must have been that as between the Republic and the United Kingdom it was of no practical value. A partnership is neither in the Republic\(^{48}\) nor in the United Kingdom\(^{49}\) a taxable entity. In the Republic an association which is not a legal person, too, is not a taxable entity,\(^{50}\) and the position in the United Kingdom appears to be the same. But the absence of legal personality does not necessarily mean that no tax is attracted. For in the case of a partnership there always is or are, and in the case of an association which has no legal personality there may be, some other person or persons who is or are liable for tax. Depending on the merits, the internal law may, however, provide for an exemption.

\(^{45}\)"Plek van effektiewe bestuur"; "siège de direction effective"; "Ort der tatsaechlichen Geschäftsführung".

\(^{46}\)See above ad notas 28 and 31.

\(^{47}\)Double Taxation Agreement between the Republic of South Africa and the United Kingdom of Great Britain and Northern Ireland, Proc. No. R. 142 of 1962 (art. II (1) (b) (iii)).

\(^{48}\)See above ad notam 14.

\(^{49}\)See Harrison v. Willis Brothers, [1965] 3 All E.R. 753 (C.A.) at 757E, F per Lord Denning, M.R.

\(^{50}\)See above note 14.
Whether, therefore, the sentence now omitted was of no practical value, as suggested here, or not, its omission does not at any rate create a casus omissus. Moreover, any difficulty or doubt as to the application or interpretation of the Double Taxation Agreement may be resolved in the mutual agreement procedure provided for by article 24.

VI. THE APPLICATION OF THE CONCEPT “RESIDENT OF A CONTRACTING STATE”

By now it should be clear that “Fiscal Domicile” is a misnomer. “Residence” may be an improvement on “Fiscal Domicile”, but is still not wholly correct. The concept, the Double Taxation Agreement is really dealing with, is “Resident of a Contracting State”. The title chosen is, however, not without justification: it shows the modern trend away from too rigid a concept of domicile towards an elastic concept of residence. In what follows an attempt will be made to set out the practical implications of the concept “Resident of a Contracting State” in the Double Taxation Agreement, without, however, dealing fully with the mechanics of the various articles involved.

(a) Industrial or Commercial Profits

Where a resident of one of the Contracting States carries on a trade or business through an enterprise\(^1\) in the other Contracting State, his industrial or commercial profits are not subject to tax in the latter Contracting State unless such enterprise is a permanent establishment\(^2\) situated therein (article 6 (1)). The term “industrial or commercial profits” is defined as meaning income derived by an enterprise from the conduct of a trade or business, including income derived by an enterprise from the furnishing of services of employees or other personnel, but it does not include dividends, interest, royalties or rents other than dividends, interest, royalties or rents effectively connected with a trade or business carried on through a permanent establishment which an enterprise of one of the Contracting States has in the other Contracting State; nor does the term include remuneration for personal (including professional) services (article 6 (6)).

Special provisions apply in the case of associated enterprises: where either an enterprise of a Contracting State participates directly or indirectly in the management, control or capital of an enterprise of the other Contracting State, or the same persons participate directly or indirectly in the management, control or capital of an enterprise of a Contracting State and an enterprise of the other Contracting State and in either case conditions are made or imposed between the two enter-

\(^1\)See above ad notam 17.

\(^2\)See above ad notam 18.
prises, in their commercial or financial relations, which differ from those which would be made between independent enterprises, then any profits which would, but for those conditions, have accrued to one of the enterprises, but, by reason of those conditions, have not so accrued, may be included in the profits of that enterprise and taxed accordingly (article 8).

(b) Profits from the operation of ships or aircraft

A resident of a Contracting State is exempt from tax in the other Contracting State on profits from the operation of ships or aircraft other than profits from voyages of ships or aircraft confined solely to places in the other Contracting State (article 7).

(c) Dividends

Dividends paid by a company which is a resident of a Contracting State to a resident of the other Contracting State may be taxed in that other Contracting State (article 9 (1)). However, such dividends may be taxed in the Contracting State of which the company paying the dividends is a resident and according to the law of that Contracting State, but the tax so charged must not exceed \(5\%\) or \(15\%\) per cent of the gross amounts of the dividends, as the case may be (article 9 (2)).

These provisions do not apply if the recipient of the dividends, being a resident of a Contracting State, has in the other Contracting State, of which the company paying the dividends is a resident, a permanent establishment and the holding by virtue of which the dividends are paid is effectively connected with the business carried on through such permanent establishment (article 9 (5)), and special provisions may apply where the beneficial owner of dividends being a resident of a Contracting State owns 10 per cent or more of the class of shares in respect of which the dividends are paid and does not suffer tax thereon in the State (Art. 9(4)).

Where a company which is a resident of a Contracting State derives profits or income from the other Contracting State, that other Contracting State may not impose any tax on the dividends paid by the company to persons who are not residents of that other Contracting State or subject the company’s undistributed profits to a tax on undistributed profits, even if the dividends paid or the undistributed profits consist wholly or partly of profits or income arising in such other State (article 9 (6)).

\(5\%\)If those dividends are beneficially owned by a company which is a resident of the other Contracting State and which controls directly or indirectly at least 25 per cent of the voting power of the company paying the dividends.

\(15\%\)If those dividends are either beneficially owned by a company which is a resident of the other Contracting State or paid to a resident of the other Contracting State who is subject to tax there in respect thereof.
In the case of a dividend paid by a company which is a resident of South Africa to a company which is resident in the United Kingdom and which controls directly or indirectly at least 10 per cent of the voting power in the South African company, the credit to be allowed against any United Kingdom tax must take into account the South African tax payable by the company in respect of the profits out of which such dividend is paid (article 22(1)(b)).

In the case of a dividend paid by a company which is a resident of the United Kingdom to a company which is resident in South Africa and which controls directly or indirectly at least 10 per cent of the voting power in the United Kingdom company, the credit to be allowed against any South African tax must take into account (in addition to any United Kingdom tax creditable) the United Kingdom tax payable by the company in respect of the profits out of which such dividend is paid (article 22(2)).

(d) Interest

Interest arising in one of the Contracting States and paid to a resident of the other Contracting State may be taxed in that other State (article 10(1)). However, such interest may be taxed in the Contracting State in which it arises, and according to the law of that Contracting State, but the tax so charged must not exceed 10 per cent of the gross amount of the interest if the recipient is subject to tax thereon in the other Contracting State (article 10(2)); this provision does not apply if the recipient of the interest being a resident of a Contracting State has in the other Contracting State a permanent establishment and the debt-claim giving rise to the interest is effectively connected with a trade or business carried on through such permanent establishment (article 10(4)).

A provision in the law of a Contracting State which relates only to interest paid to a non-resident company with or without any further requirement or which relates only to interest payments between interconnected companies, with or without any further requirement, does not operate so as to require such interest paid to a company which is a resident of the other Contracting State to be left out of account as a deduction in computing the taxable profits of the company paying the

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55That is generally South African tax payable under South African law and in accordance with the Convention, whether directly or by deduction, on profits, income or chargeable gains from sources within South Africa (art. 22(1)(a)).

56That is generally United Kingdom tax payable under the laws of the United Kingdom and in accordance with the Convention, whether directly or by deduction, on profits, income or chargeable gains derived from sources within the United Kingdom by a resident of South Africa in as much as it does not exceed the South African tax unless South Africa does not impose tax on such profits, income or chargeable gains (art. 22(2)).
interest as being a dividend or distribution; this provision does not apply to interest paid to a company which is a resident of a Contracting State in which more than 50 per cent of the voting power is controlled directly or indirectly by a person or persons resident in the other Contracting State (article 10(5)).

(e) Royalties

Royalties arising in a Contracting State and paid to a resident of the other Contracting State who is subject to tax there in respect thereof shall be exempt from tax in the first-mentioned Contracting State (article 11(1)). But this provision does not apply if the recipient of the royalties being a resident of a Contracting State has in the other Contracting State a permanent establishment and the right or property giving rise to the royalties is effectively connected with a trade or business carried on through such permanent establishment (article 11(3)).

A provision of the law of a Contracting State requiring royalties paid by a company to be left out of account as a deduction in computing the company's taxable profits as being a distribution shall not operate in relation to royalties paid to a resident of the other Contracting State (article 11(4)(a)). But this provision shall not apply to royalties paid to a company which is a resident of that other Contracting State if the same persons participate directly or indirectly in the management or control of the company paying the royalties and the company deriving the royalties and more than 50 per cent of the voting power in the company deriving the royalties is controlled directly or indirectly by a person or persons resident in the Contracting State in which the company paying the royalties is resident (article 11(4)(b)).

(f) Services

PROFESSIONAL SERVICES. Income derived by a resident of a Contracting State in respect of professional services or other independent activities of a similar character shall be subjected to tax only in that Contracting State unless he has a fixed base regularly available to him in the other Contracting State for the purpose of performing his activities; in the latter case such part of that income as is attributable to that base may be taxed in the other Contracting State (article 13).

DEPENDENT ACTIVITIES. Salaries, wages and other similar remuneration derived by a resident of a Contracting State in respect of an employment shall be subjected to tax only in that State unless the employment is exercised in the other Contracting State; in the latter case such remuneration as is derived therefrom may be taxed in that other State (article 14(1)). But remuneration derived by a resident of a Contracting State in respect of an employment exercised in the other Contracting State shall be subjected to tax only in the first-mentioned
State if the recipient is present in the other State for a period or periods not exceeding in the aggregate 183 days in the fiscal year concerned and the remuneration is paid by or on behalf of an employer who is not a resident of the other State and the remuneration is not deducted from the profits of a permanent establishment or a fixed base which the employer has in the other State (article 14(2)).

In relation to remuneration of a director of a company derived from the company, these provisions shall apply as if the remuneration were that of an employee in respect of an employment and as if references to employers were references to the company (article 14(3)).

Remuneration for personal services performed aboard a ship or aircraft in international traffic\(^57\) may be taxed in the Contracting State of which the person deriving the profits from the operation of the ship or aircraft is a resident (article 14(4)).

PUBLIC ENTERTAINERS. Income derived by public entertainers, such as theatre, motion picture, radio or television artistes and musicians and by athletes from their personal activities as such may be taxed in the Contracting State in which these activities are exercised (article 15).

PUBLIC SERVICES. Remuneration paid by a Contracting State to any individual for services rendered to that Contracting State in the discharge of governmental functions shall be exempt from tax in the other Contracting State if the individual is not ordinarily resident\(^58\) in that State or is ordinarily resident in that State solely for the purpose of rendering those services (article 17(1)). The term “Contracting State” includes in the case of South Africa the Administrations of the Provinces of South Africa (article 17(4)). These provisions do not apply to payments in respect of services rendered in connection with any trade or business carried on by either of the Contracting States for purposes of profit (article 17(3)).

PROFESSORS. A professor or teacher who visits one of the Contracting States for a period not exceeding two years for the purpose of teaching at a university, college, school or other educational insti-

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\(^{57}\)“International traffic” includes traffic between places in one country in the course of a voyage which extends over more than one country (art.2 (1) (i)).

\(^{58}\)Like residence, ordinary residence bears no special or technical meaning. “Ordinary” residence, however, has been contrasted with “extraordinary” residence, but all which is required is apparently some degree of continuity. The question is often asked whether there can be more than one ordinary residence. It is considered that the answer must be sought in the facts. The authorities are collected in an article of mine in (1952) 1 Taxpayer pp. 167 et seq., at pp. 167-8 and see also Dicey-Morris, op. cit., pp. 86-9 and 483, and Graveson, o.c., pp. 97 and 231-2.
tution in that Contracting State and who is or was immediately before that visit a resident of the other Contracting State shall be exempt from tax in the first-mentioned Contracting State on any remuneration for such teaching in respect of which he is subject to tax in the other Contracting State (article 18).

(g) Pensions

PENSIONS IN GENERAL. Any pension and any annuity derived from sources within South Africa by an individual who is a resident of the United Kingdom and subject to United Kingdom tax in respect thereof shall be exempt from South African tax (article 16(1)).

Any pension and any annuity derived from sources within the United Kingdom by an individual who is a resident of South Africa and subject to South African tax in respect thereof shall be exempt from United Kingdom tax (article 16(2)).

"Annuity" means here a stated sum payable periodically at stated times during life or during a specified or ascertainable period of time under an obligation to make the payments in return for adequate and full consideration in money or money's worth (article 16(3)).

PENSIONS FOR PUBLIC SERVICES. Any pension paid by a Contracting State to any individual for services rendered to that Contracting State in the discharge of governmental functions shall be exempt from tax in the other Contracting State in so far as the remuneration for those services was exempt from tax in the other Contracting State or would have been so exempt if this Convention had been in force at the time when the remuneration was paid (article 17(2)). Here, too, the term "Contracting State" includes in the case of South Africa the Administrations of the Provinces of South Africa (article 17(4)), and these provisions do not apply to payments in respect of services rendered in connection with any trade or business carried on by either of the Contracting States for purposes of profit (article 17(3)).

(h) Students and apprentices

Payments which a student or business apprentice from a Contracting State who is present in the other Contracting State solely for the purpose of his education or training receives for the purpose of his maintenance, education or training shall not be taxed in that other State, provided that such payments are made to him from sources outside that other State (article 19).

(i) Income not dealt with

Any income not dealt with in the foregoing derived by a resident of a Contracting State who is subject to tax there in respect thereof shall be subjected to tax only in that State (article 20).
(j) Capital Gains

Capital gains from the alienation of any property forming part of the business property of a permanent establishment which an enterprise of a Contracting State has in the other Contracting State or of any property pertaining to a fixed base available to a resident of a Contracting State in the other Contracting State for the purpose of performing professional services, including such gains from the alienation of such a permanent establishment (alone or together with the whole enterprise) or of such a fixed base, may be taxed in the other Contracting State (article 12(1)). Capital gains derived by a resident of a Contracting State from the alienation of ships and aircraft operated in international traffic and movable property pertaining to the operation of such ships and aircraft shall be taxable only in that Contracting State (article 12(2)).

Capital gains from the alienation of any other property shall be taxable only in the Contracting State of which the alienator is a resident (article 12(3)). But the right of a Contracting State to levy according to its own law a tax on capital gains from the alienation of any property derived by an individual who is a resident of the other Contracting State and has been a resident of the first-mentioned Contracting State at any time during the five years immediately preceding the alienation of the property is not thereby affected (article 12(4)).

\[67\text{See note 57 on p. 91.}\]