

# **European and International Tax Moot Court 2015-2016**

## **MEMORANDUM FOR THE APPLICANT**

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## II. STATEMENTS OF FACTS

1. The Applicant is M. Dario von Klempner, born on 27 August 1980 in Rainbowcity (Rainbowland).
2. The Applicant has always lived in Rainbowcity. He married Countess Peach who has never earned any income, and founded a family of three kids with her. They in their have been living all together in their house in Rainbowcity since 2005.
3. The Applicant began his professional career at the age of 17 as a professional racer, and put an end to this activity, 8 years later when he moved in with his family. He has not had any professional activity between 2005 and 2012.
4. M. Browser, the CEO of Noentiendo (a company with its seat and place of effective management in Gameland) wanted to hire the Applicant to help his company to improve its car racing games. The Applicant eventually accepted. On 2 January 2012, he signed his contract at the premises of Noentiendo. To his surprise, he was not given an employment contract but a freelance contract. Also to his surprise, the counterparty of the contract was not Noentiendo but Sonica, a company resident in Playland. This contract had been pre-signed by the CEO of Sonica. M. Browser told the Applicant not to worry and specified that it would be possible to change the form of the contract in one year's time. No contract amendment had been signed.

The terms of the contract were as follows:

- a) Nature: the contract was entitled "freelance agreement"; parties recognized that they did not intend to construe the contract in a way that it could be seen as an employment contract;*
- b) Duration: 1 year, renewable for equal periods in the absence of written communication terminating the agreement submitted by either of the parties 1 month prior to the renewal;*
- c) Type of services: business consulting and development, marketing strategy and implementation;*
- d) Confidentiality: the freelancer should maintain secrecy about all business-related issues of the contractor or of any other third party he would be working with;*

*e) Payment: for the provision of the services, Super Dário would be entitled to 10,000 coins per month, paid on the 27th of the month in which the services were provide;*

*f) Settlement of disputes: in case of any disputes regarding the agreement, they should be solved under the competent courts of Playland;*

*g) Monthly activity reports: Super Dário may be asked to submit monthly reports of his activities. In such a case, the activities to be reported would start from the moment of the request.*

**5.** The same day, an *addendum* of this contract was signed between the same parties, specifying that the Applicant would be working under the supervision of the COO of Noentiendo as an expert provided by Sonica.

The terms of the addendum were as follows:

*i) During a period of 1 year, the services are to be provided at one of the offices of Noentiendo, under the instruction of the COO of Noentiendo or the person he delegated. Super Dário is to present a monthly report of his activities to this COO.*

*ii) Noentiendo is to provide a laptop and a fast internet connection.*

*iii) Noentiendo is to provide housing (hotels or serviced apartments), health insurance (covering payments in the case of sick days), civil liability insurance and a contribution for a private pension plan.*

*iv) The services are to be provided from 9:00 a.m. until 18:00 p.m. with a 1-hour lunch break.*

*v) Super Dário is entitled to use common facilities, such as the restaurant, gym, leisure areas, etc., in the same way that any of the employees working for that specific office would.*

*vi) Super Dário is to be in charge of the strategy for the operative and marketing development of all the racing games developed by Noentiendo in its different offices. For that, he will need to be present at the premises of the different offices of Noentiendo.*

*vii) Property: all equipment and materials are the property of Noentiendo.*

viii) *For the settlement of disputes regarding any provisions of the addendum, Gameland courts are competent.*

**6.** There is an overall agreement framing the relation of Sonica and Noentiendo.

The terms of the agreement were as follows:

*a) Sonica would provide services and some expert external consultants on a regular basis;*

*b) The payment of each one of those services/external consultants would be done separately;*

*c) Sonica's business model is mentioned on their website: they provide external consultants and other experts, and they charge their gross cost plus a 5% surplus fee. They explain that this enables companies to be more flexible in the organization of their workforce while having major tax and social security savings, as the burden in Playland was considerably lower;*

*d) Examining the bank statements of Sonica and Noentiendo, it is observed that a monthly amount is paid on the 20th of each month, and this amount also changes each month. The transfer was labelled "transfer";*

*e) Sonica would not be the only supplier of services or experts to Noentiendo. Sonica would also provide these services and experts to other companies.*

**7.** The Applicant started working in Noentiendo premises after signing his contract until its termination on 15 June 2012. His dismissal has come up with the will of Noentiendo (expressed to Sonica) to end its collaboration with him because of the bad social reputation he was dragging as he resumed to his drinking habits and contemptible behaviour in his private life. Its formal contract with Sonica ended after 165 days (5 months and 13 days).

**8.** In recent years, Noentiendo merged with its competitors (all located in Gameland) in the computer games business. For logistic reasons, each one kept its own offices and continued to develop its own sets/brands of games. The Applicant worked periodically from the premises of each of the Noentiendo subsidiaries. He was rotating each week

among 10 offices scattered in Gameland. One week per month, he e-worked from a touristic location in Gameland. He was under the direct and complete supervision of Noentiendo's COO to carry on his tasks. The Applicant received his remuneration, directly coming from Sonica's bank account located in Playland, on his own bank account.

**9.** During his employment period, the Applicant travelled to Rainbowland every weekend to meet his family and attend sports events and social gathering.

**10.** On 31 October 2012, the Applicant decided to enter a clinic for his drinking concerns. The hospital's policy was particular; he consented to be released only since he was completely healed from his addiction. The Applicant left the hospital on 31 December 2012, after 2 months (61 days) of stay in the hospital.

**11.** After his dismissal, the Applicant derived 2,800 coins from some appearances in Rainbowland's nightclub.

**12.** The Applicant did not file any tax return in Rainbowland for 2012.

### III. ISSUES

**13.** Through this memorandum, the Applicant challenges the assessment initiated by the Tax Administration of Rainbowland concerning his cross-border income, earned in 2012 in Gameland. Thereby, the Applicant will prove that the procedure initiated against him is unlawful by demonstrating the following points:

#### I. BREACH OF ARTICLE 4.2 OF THE DOUBLE TAX CONVENTION

**14.** By the present memorandum, the Applicant alleges primarily that, pursuant to Article 4.2 of the DTC, he is resident of the State of Gameland. Consequently, Rainbowland has no ground to tax the Applicant on a worldwide basis. As a non-resident, he would only be taxed in Rainbowland if there was an income sourced in Rainbowland, which was not the case.

**15.** For that purpose, the Applicant will firstly demonstrate that he was resident of Rainbowland as well as Gameland under the respective but identical domestic law of these States for the fiscal year 2012.

**16.** Secondly, the Applicant will establish his entitlement to the Double Tax Convention between Rainbowland and Gameland (hereinafter “DTC”), in force since 2004 and patterned on the 2003 version of the OECD Model Convention (hereinafter the “OECD MC”), benefits – pursuant to its Article 1 – and substantiate the primacy of the DTC on the domestic law.

**17.** Thirdly, the Applicant will show that the procedure undertaken by the Tax Administration of Rainbowland is materially in contradiction of the requirements stated by Article 4.2 of the DTC and that he is, under this provision, resident of Gameland.

#### II. BREACH OF ARTICLES 15 AND 23 A OF THE DOUBLE TAX CONVENTION

**18.** In the alternative, even if Gameland was not considered as the resident but as the source State of the taxpayer, Rainbowland has still no ground to tax the Applicant pursuant to Article 15 of the DTC.

**19.** Before arguing that Article 15 is applying in the favour of the Applicant, he shall first and

foremost demonstrate that this article is relevant to the taxable income and that it would be inconsistent for the Tax Administration to apply Article 7 relating to business profits.

**20.** *Prima facie*, by means of the *Sham* general principle of law, the Applicant will proceed to the disqualification of his simulated freelance contract with Sonica hiding the genuine one engaging him vis-à-vis Noentiendo (the addendum to the freelance contract signed the same day). The rule states that only the genuine and not the pretended contract entered into by the parties will be taken into account.

**21.** The Applicant will then provide a definitive interpretation of the term ‘employment’, which is not defined by Article 15 of the OECD MC, and therefore bring us to the acknowledgment of his employment relationship with Noentiendo.

**22.** In the light of the foregoing and on basis of Paragraph 1 of Article 15, even as a resident of Rainbowland, the Applicant will anchor that the remuneration deriving by him in the execution of his employment is exclusively taxable in Gameland for the circumstance that he had worked there.

**23.** To achieve the precedent point, the Applicant will set apart the general exception laying down in Paragraph 2 and thus observe the failure of his situation to meet its three cumulative conditions.

### III. IRRELEVANCY OF ARTICLE 12 OF THE DOUBLE TAX CONVENTION

**24.** The Applicant will readily disqualify any pretended link between the services provided by him to Noentiendo and any intellectual property *lato sensu*.

## IV. ARGUMENTS

### I. BREACH OF ARTICLE 4.2 OF THE DOUBLE TAX CONVENTION

#### 1.1. THE DUAL RESIDENCE OF THE APPLICANT

**25.** The Tax Administration of Rainbowland pretends to have a full tax liability over the Applicant on the ground he is, under the law of Rainbowland, resident of that State. However, the Administration seems to have ignored that, at national law level, the Applicant is also resident of the State of Gameland for the fiscal year 2012.

**26.** The three criteria requested to be observed in order for an individual to be considered as a resident of either one or the other State are symmetric. Those are indications and not cumulative. We shall demonstrate that they are met in both States and that, as a consequence, the Applicant has a dual residence.

**27.** *First criterion:* the individual has to spend more than 110 days within a tax year in the jurisdiction.

In order to compute this 110 days period without any ambiguity, we may refer to “*days of physical presence*” method settled in the Article 15 Double Tax Convention in force between the two involved States.

Under this method the following days are in particular included for the calculation of the presence of an individual in a State: 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 before, during and after the activity, short breaks, days of sickness (unless they prevent the individual from leaving and he would have otherwise qualified for the exemption) and death of sickness in the family<sup>1</sup>.

In facts, the Applicant arrived before 1<sup>st</sup> January 2012 in Gameland and returned in Rainbowland on 20 June 2012 after having been informed that his contract had been

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<sup>1</sup> OECD MC, Comm. Art. 15, point 5.

terminated. It follows from the application of the abovementioned method that the Applicant spent 171 days in Gameland during this period. In this regard, we note that even if he went some weekends to Rainbowland, the days of his departure (Saturdays morning) and the days of his arrival (Sundays evening) are included in the calculation of his presence in Gameland.

In addition, after he returned to Rainbowland, the Applicant came back in Gameland to check into rehabilitation at a detoxification clinic during 61 days, from 31 October 2012 to 31 December 2012. These days have to be included as “days of sickness” in the calculation of presence and do not fall into the exception “*unless they prevent the individual from leaving*”. Indeed, such an exception concerns forceful hospitalizations, which is not the case in the present situation since the Applicant decided freely and voluntarily to enter into this famous clinic.

In conclusion, he had spent a total of 232 days in the jurisdiction of Gameland within the taxable year of 2012. Since he spent the rest of his time in Rainbowland, we can suppose that he stayed there at least 110 days too.

**28. *Second criterion:*** the individual has his habitual abode/main dwelling in the country.

The Applicant has to be considered as having his habitual abode in Gameland, since it is the State in which he had spent more time in 2012. However, his main dwelling is located in Rainbowland.

**29. *Third criterion:*** the individual has at his disposal a physical place that he can use as a home for more than a mere temporary period.

**30.** It is doubtless that the Applicant has at his disposal a house in Rainbowcity (Rainbowland) where his wife and kids live.

**31.** However, we may consider that the clinic of detoxification where the Applicant checked into rehab in Gameland also constituted a physical place used as a home for more than a mere temporary period. Indeed, the Applicant entered voluntary into this clinic and knew that he could leave only when the doctors would consider that he was cured. In practice, it took 61 days, but it could have lasted more than a year. This shows that the Applicant was determined

to consider the clinic located in Gameland as a physical place that he can use as home for more than a mere temporary period.

**32.** Furthermore, we remind that those three criteria are non-cumulative and have to be assessed as indications. In the light of the foregoing, the Applicant has a dual residence in Rainbowland as well as in Gameland.

## 1.2. PERSONAL SCOPE AND BINDING FORCE OF THE DTC

**33.** According to Article 1 of DTC in force between the two States since 2004 and patterned on the 2003 version of the OECD MC, the Convention applies *to persons who are residents of one or both of the Contracting States*.

**34.** The Applicant, resident of both of the Contracting States, has therefore to be regarded by the Tax Administration of Rainbowland as being entitled to the treaty benefits. Moreover, we outline that the provisions of the DTC prevail on the domestic law since they are considered as *lex specialis*<sup>2</sup>. Furthermore, the Contracting States are both monist States. Consequently, clear and unconditional tax treaty provisions have direct effect and may thus be invoked against the State by domestic and foreign taxpayers<sup>3</sup>.

**35.** The main purpose of the OECD Model Tax Convention and its Commentaries is to clarify, standardise and confirm the fiscal situation of taxpayers engaged in commercial, industrial, financial or any other activities in other Member countries, through the application by all Member countries of common solutions to identical cases of international juridical double taxation in order to remove its harmful effects on the exchange of goods and services and the free movement of capital, technology and persons between Member countries<sup>4</sup>.

**36.** Avoiding double taxation is precisely what we are trying to reach, through this Memorandum, by underlining the fact that – by application of the treaty provisions – the Applicant is liable to Gameland's jurisdiction to tax, not Rainbowland's one.

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<sup>2</sup> M. LANG, *Introduction to the law of double taxation Conventions*, 2010 Edition, Linde, 2010, p. 37.

<sup>3</sup> M. LANG, *ibidem*, p. 85.

<sup>4</sup> See paragraphs 1 to 3 of the Introduction of the OECD Model Tax Convention.

### 1.3. PROPER APPLICATION OF ARTICLE 4.2 DTC

**37.** Even if there is no necessity under Article 1 and 4.1 of DTC to award one of the two States of residence the priority of rank, things are different under the allocation rule of Article 4.2. If both States are regarded as being the Residence State under Articles 1 and 4.1, Article 4.2 provides a list of criteria, the so-called tiebreaker rules, that helps to determine which is the Residence State for the application of the allocation rules.

**38.** As far as possible, the preference criterion must be of such a nature that there can be no question but the person concerned will satisfy it in only one State. This is not the case for the first criterion laid down in Article 4.2, which is the permanent home.

**39.** Indeed, this criterion is not relevant to appreciate the unstable lifestyle of the Applicant. During the taxable period, the Applicant only spent brief periods in Rainbowland, although it is the place where he owns a home. He spent most of the year working in Gameland and did not stay in this State only for business: he chose to go back to Gameland and to be hospitalized in one of its detoxification clinic where he stood 61 days. As abovementioned, the Applicant was determined to consider the clinic located in Gameland as a physical place that he can use as home for more than a mere temporary period.

**40.** Since the criterion of “permanent home” does not solve the conflict of residence, we need to assess the situation in the light of the second criterion, which is “the center of vital interests”. According to this criterion, if an individual has a permanent home in both contracting States, he becomes resident of the State with which his/her personal and economic relations are closer. On the one hand, personal relations exist in the person’s social life and family life. On the second hand, economic relations will be found in activities linked to a source of income. According to Professor Michael Lang, priority cannot be given to either personal relations or economic relations because the concept is indivisible<sup>5</sup>.

**41.** In the present situation, the Applicant had in the taxable year his personal relations closer in Rainbowland, but his economic relations closer in Gameland. Indeed, the Applicant has his family life and social interests in Rainbowland. During his brief period of stay in Rainbowland, he continued to go and watch his football club and went on Sunday Mass.

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<sup>5</sup> M. LANG, *ibidem*.

However, Gameland remains the State where he worked to generate his income. Since the personal and the economic relations are indivisible, the criterion of the “center of vital interests” does not solve the dual residence.

**42.** We must therefore refer to the third criterion of Article 4.2, which is the “habitual abode” of the individual. According to the OECD Commentary of Article 4, the place where a person has his habitual abode has to be understood as the State where the person spends more time<sup>6</sup>.

**43.** This was confirmed by a judgement of the French *Cour Administrative d’Appel* where the Court considered the case of a French taxpayer who lived in Ivory Coast where he worked. As the Applicant, the taxpayer had his family in France and visited them one or two months per year. The French Court stated that it was impossible to determine the permanent home of the taxpayer since his family lived in France but he was permanently in Ivory Coast for work. The Court referred therefore to the next test: the place where the taxpayer principally resides. It was concluded that the taxpayer was resident of the Ivory Coast<sup>7</sup>.

**44.** *In casu*, we have already mentioned that the Applicant spend more time in Gameland, precisely 232 days. In conclusion, Gameland must be considered as the State of residence of the Applicant. Rainbowland has thus no ground to tax the income earned in 2012 by the Applicant in Gameland.

## II. BREACH OF ARTICLES 15 AND 23 A OF THE DOUBLE TAX CONVENTION

**45.** Even if Gameland was not considered as the resident but as the source State of the taxpayer, Rainbowland has still no ground to tax the Applicant pursuant to Article 15 of the DTC.

**46.** According to this provision, the income derived from employment is taxable exclusively in the State of residence, unless if such employment is exercised in the other Contracting

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<sup>6</sup> M. LANG, *ibidem*.

<sup>7</sup> FR. CAA 28 déc. 1995, 94P401491.

State. In this situation, the source State of the income has the primary right to tax unless if the conditions of the so-called 183-day rule are fulfilled<sup>8</sup>.

**47.** Before arguing that Article 15 is applying in the favour of the Applicant, we shall first and foremost demonstrate that this article is relevant to the taxable income and that it would be inconsistent for the Tax Administration to apply Article 7 relating to business profits.

**48.** Indeed, the freelance agreement in force between the Applicant and Sonica is a simulated act and by consequence the characterization given by the agreement to the income has to be rejected by the Administration. All the facts converge in the sense that the professional relationship was not of an independent but of a dependent nature, and that the counterparty rather Noentiendo than Sonica.

## 2.1. THE SIMULATED CONTRACT BETWEEN SONICA AND THE APPLICANT

### *a) Sham as a general principle of law*

**49.** *Sham* is a private law concept which enhances the prevalence of the substance over the form in a situation where “*the parties outwardly enter into an act whose effects they agree to modify or destroy by another contract, which remains secret. Sham thus presupposes two contracts, each contemporaneous with the other, but one of which is intended only to lay a false scent. There exists only one real contract, the secret contract*”<sup>9</sup>. Thus, only the genuine and not the pretended contract entered into by the parties will be taken into account. We should emphasize that this secret contract need not to be written<sup>10</sup>.

**50.** The test put in place assesses if the parties accepted all the legal consequences of the contract presented to the tax authorities, or if there is a secret contract modifying any or all the legal consequences of the apparent one. One of the classical forms of *sham* creates a relation between two parties who are not actually involved in it, e.g. A, B and C may agree that the contract be presented as being between A and B but is actually between A and C. *Sham* is sometimes limited to one element of the transaction, whereas it could affect the

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<sup>8</sup> H.- J. AIGNER, W. LOUKOTA, *Source versus Residence in International Tax Law*, 2005 Edition, Linde, 2005, p. 209.

<sup>9</sup> H. DE PAGE, *Traité élémentaire de droit civil*, vol. II, 3e éd, 1964, §618. (For a recent synthesis of the state of play on sham in Belgian private law, see P. VAN OMMESLAGHE, « La simulation en droit des obligations », *Les obligations contractuelles*, Jeune Barreau de Bruxelles, 2000, p. 147 et s.)

<sup>10</sup> P. VAN OMMESLAGHE, *op. cit.*, *Les obligations contractuelles*, p. 153 et s.

characterization of the transaction or the mere existence of the legal transaction as well in order to evade or avoid duties or taxes *inter alia*.

**51.** Indeed the principles of « legality of tax », on the one hand, and the principle the tax is governed by private law, on the other, grant the « free choice of the least taxed route » as the Belgian case law of the Cour de cassation expressed it in its *Brepols* judgment of 1961 confirmed by *Au Vieux Saint-Martin* judgment of 1990, rejecting in turn the *fraud legis* and « economic reality » doctrines. It states « *there is no sham, or, therefore tax fraud, where in order to enjoy a more favourable tax treatment, and using the freedom to contract, without however violating any legal obligation, the parties enter into acts of which they accept all the consequences, even if the form they give thereto is not the most usual one* »<sup>11</sup> and « *even if these acts are entered into with the sole purpose of reducing the tax burden* »<sup>12</sup>. Thus, as a matter of principle, tax avoidance is effective unless there is a sham within its meaning in private law which the tax authorities can prove. In practice, cases where sham has been held to exist are less exceptional than one might think. By the « *presumption of fact* » left to the insight and wisdom of the judge<sup>13</sup>, he can derive one fact from another fact or a group of facts. Thus, the Court might decide that the facts and circumstances surrounding the transaction demonstrated that the real contract between the parties was different from the one they presented.

**52.** In these constructions, being assumed that tax law is a matter of public policy and that taxes must be assessed in accordance with the law, the taxpayer is allowed to invoke the tax avoidance rules or doctrines in his favour, to the extent that the tax should be assessed based on the genuine contract as well.

#### ***b) Ramsay principle as binding precedent***

**53.** Through the often quoted precedent *Craven v. White* (1988), Lord Oliver summarized the four essential requirements for the application of the Ramsay doctrine: (i) that the series of transactions was, at the time when the intermediate transaction was entered into, preordained in order to produce a given result; (ii) that the transaction had no other purpose than tax mitigation; (iii) that there was at that time no practical likelihood that the pre-planned events would not take place in the order ordained, so that the intermediate transaction was not even

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<sup>11</sup> Cass., 6 June 1961 (*Brepols*).

<sup>12</sup> Cass., 22 March 1990 (*Au Vieux Saint-Martin*).

<sup>13</sup> Article 1353 du Code civil belge.

contemplated practically as having an independent life; and (iv) that the preordained events did in fact take place<sup>14</sup>.

***c) Artificial character of the structure***

**54.** In the case brought under our knowledge, it is clear that the conclusion of the distance freelance contract between the Applicant and Sonica (Playland) hides a secret relation between him and Noentiendo (Gameland). Much evidence in the record shows that the apparent contract is purely virtual and designed to be set apart. Indeed, the relationship existing between Noentiendo and the Applicant is the only one that should be considered as sticking to the reality. We shall see hereunder the grounds upon which we should consider the relationship with Sonica as virtual and inconsistent. Then, further in this memorandum, we shall determine the nature of this genuine relation bringing the Applicant and Noentiendo together.

**55.** First and foremost, in respect with the pre-contractual frame, the facts state that anyone but Browser – the CEO of Noentiendo – started to talk with the Applicant, since the end of his career. While doing so, he was expressing his will to hire him especially to help the company improve their car racing games. Besides, Browser had the intent of attracting the attention of Rainbowland’s media onto his firm for advertising and marketing purposes.

**56.** The Applicant eventually accepted. The day he reported to the premises of Noentiendo to sign his employment contract, he was surprised to face a pre-signed freelance contract whereby, and in addition, the counterparty was an unknown company to him: Sonica, a company residing in Playland.

**57.** He got, at this moment, skilfully manipulated by Browser who did not miss to remind him all he need was a job to put himself back together, and told him not to pay attention to this detail, that he would receive good money and that this contractual form would be adapted very quickly. It is a typical situation of abuse of weakness in which the Applicant had been faced with a “*fait accompli*”.

**58.** What draws particularly our attention is that, on the same date, an addendum to the freelance contract – detailing the constraining and mandatory relation between Noentiendo and the Applicant – was signed by the same parties. This ancillary contract, settling a

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<sup>14</sup> W. T. Ramsay Ltd v. IRC [1982] AC 300, [1981] STC 174, 54 TC 101; Furniss v. Dawson [1984] AC 474, [1984] STC 153, 55 TC 324.

subordination link, is precisely the genuine employment contract, which we shall inspect and husk further in our reasoning in order to qualify it as such.

**59.** *In fine*, the promptness of the mounting reveals us the existence of a step transaction and persuades us to disqualify the link with Sonica and establish a single relation with Noentiendo.

## 2.2. INTERPRETATION OF THE TERM “EMPLOYMENT”

**60.** Since the simulated freelance agreement has to be rejected, we can assess the real nature of the taxable income.

**61.** Article 15 of the OECD Tax Model Convention fails to give a definition of the term “employment”. This term must thus be interpreted in order to determine if the Applicant was in an employment relationship and, if so, with whom.

### *2.2.1 The subsequent application of Article 15 Commentary*

**62.** Fortunately, the 2010 version of the OECD Model Commentaries provides specifics indications to determine the Contracting State that has to characterize the professional activities and which interpretation method it has to apply for that purpose<sup>15</sup>.

**63.** Before stating the content of the Commentary, we shall demonstrate its binding force and legitimate its subsequent application.

**64.** Firstly, it is admitted that the Commentaries of the OECD Convention, which are legally non-binding instrument, can be considered as a source of legal obligation through acquiescence and estoppel principles<sup>16</sup>.

**65.** Precisely, when a tax treaty is concluded between two OECD Member countries, which is the case in the present situation, Professor Frank Engelen defends that “*the parties cannot assert in good faith that the provisions of the treaty must be given a different meaning than*

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<sup>15</sup> L. DE BROE, « Art. 15. Income from Employment » in *Klaus Vogel on double taxation convention*, Fourth edition, Kluwer, 2015, vol. 2, p. 1142.

<sup>16</sup> C. CHIKIN, *Normative Development in the International Legal System*, in D. Shelton (ed.), *Commitment and Compliance*, Oxford University Press, Oxford, 2000, p. 31.

*the one established in the Commentaries on the identical provisions of the OECD Model Tax Convention in so far as:*

- a. Both parties have voted in favour of the recommendations concerning the Model made by the OECD Council pursuant to Article 5(b) of the OECD Convention;*
- b. Neither party has entered a reservation on the provisions of the Model nor made an observation on the interpretation of those provisions as set out in the Commentaries thereon;*
- c. The treaty follows the pattern and the main provisions of the Model; and*
- d. Neither party has indicated in the course of the actual negotiations that it understood the provisions of the treaty differently than as set out in the Commentaries on the identical provisions of the Model<sup>17</sup>.”*

**66.** The DTC concluded by the State of Rainbowland and the State of Gameland in 2004 fulfils all these four conditions. Consequently, it must be presumed that these two Contracting States have acquiesced in the interpretation laid down in the Commentaries. This acquiescence leads to a tacit agreement to interpret and apply the provisions of a Tax Treaty that are identical to those of the Model Convention.

**67.** This tacit agreement is, according to Article 31(2) of the Vienna Convention on the Law of Treaties, comprised in the context for the purpose of the interpretation of a treaty<sup>18</sup>. The acquiescence of both parties can also operate as estoppel in cases where one of the parties would later assert that a different interpretation was in fact intended<sup>19</sup>.

**68.** In addition, International law protects the legitimate expectations of the parties that had every reason to believe that each of them had the intention to interpret and apply the provisions of the Tax Treaty in accordance with the Commentaries<sup>20</sup>.

**69.** As already mentioned, since the involved States are carrying a monist approach, there is a direct effect of the Treaties ratified by them as well as the taxpayers could invoke any provision rooted in it. By analogy, we transpose this reasoning to the Commentaries due to their full endorsement without reservations by the two States, to such an extent that each and every national taxpayer could bring them before the Courts in order to build his defence.

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<sup>17</sup> F. ENGELEN, Interpretation of tax treaties under International law, IBFD Doctoral Series, 2004, p. 465.

<sup>18</sup> F. ENGELEN, *ibidem*, p. 466.

<sup>19</sup> F. ENGELEN, *ibidem*.

<sup>20</sup> F. ENGELEN, *ibidem*.

**70.** The conclusion that the Commentary can be recognized as a source of legal obligation for the State of Rainbowland through acquiescence, estoppel and the principle of legitimate expectations applies to the Article 15 Commentary as it stand since its 2010 version<sup>21</sup>.

**71.** Indeed, pursuant to paragraph 35 of the Introduction of the OECD Model Convention of 2003, which is the pattern of the treaty concluded by Rainbowland and Gameland, “ (...) *Other changes or additions in the Commentaries are normally applicable to the interpretation and the application of Conventions concluded before their adoption, because they reflect the consensus of the OECD Member countries as to the proper interpretation of existing provisions and their application to specific situations.*”

**72.** Furthermore, paragraph 36 of the same Introduction distinguishes changes to the Commentaries that lead to an *a contrario* interpretation to those that simply attend to clarify the previous ones. The *a contrario* interpretation, which is normally a direct result of amendments to the OECD Model itself, cannot be applied to a Convention concluded before their adoption.

**73.** It appears thus clearly that the changes that clarify the previous Commentaries, such as the 2010 version of Article 15 Commentary, should be considered relevant by any Tax authority to interpret and apply the Convention concluded before the adoption of these changes.

**74.** The latter Commentary of Article 15 is therefore binding on the Tax Administration of the State of Rainbowland. We shall outline its content and apply it to the present situation.

**75.** Since its 2010 version, the Article 15 Commentary designates the “*State where the activities are performed*” as being the determining State. Professor Luc De Broe notes that this is particularly clear in no. 8.10. of the Commentary as it mentioned that “*The approach described in the previous paragraphs therefore allows the State in which the activities are exercised to reject the application of paragraph 2 in abusive cases (...)*”<sup>22</sup>.

**76.** The Applicant performed his work within the borders of Gameland. Gameland is therefore the State that must determine whether there is a relationship employment and, if it is the case, with whom.

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<sup>21</sup> F. ENGELEN, *ibidem*, p. 467-468.

<sup>22</sup> L. DE BROE, *op. cit.*, p. 1144.

**77.** Contrary to Rainbowland, Gameland gives precedent to the substance and does not hesitate to re-characterize any contract for the provision of services as an employment contract whenever it can be concluded that the recruiter wanted and employment contract and not a contract of services. The main elements to assess this are the subordination, the acceptance of instructions from a superior, the fulfilment of a work schedule and the exercise of the activity at the premises of the employer.

**78.** If the State of work applies a “substance-over-form” approach such as Gameland, the Commentary provides that this State may ignore the form and may look at the nature of the services and their integration into the business of the recipient of the services<sup>23</sup>.

**79.** Supposing the Tax Administration would refuse to consider the approach of the State of Gameland, it even follows that paragraph 8.13. proposes an autonomous method of interpretation that must be applied, if the definitions of employment and employer are too broad under the domestic law of the State of work<sup>24</sup>.

**80.** Paragraph 8.13. precises that the nature of the services rendered by the individual is an important factor to determine the nature of the professional relationship. As a matter of fact, an employee provides services that are integral part of the business activities carried on by his employer. It is essential to determine whether the services rendered by the individual constitute an integral part of the business of the enterprise to which the services are provided. The paragraph adds that a key consideration will be to highlight which enterprise bears the responsibility or the risk attached to the results generated by the individual’s work.

**81.** *In casu*, it is clear that, for many reasons, the Applicant did not bear the risks of the activities he exercised at the premises of Noentiendo...

- According to the contract, Noentiendo was to provide housing, health insurance covering payments in the case of sick days, civil liability insurance and a contribution for a private pension plan.

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<sup>23</sup> Commentary of Art. 15 OECD MC, point 8.6.

<sup>24</sup> L. DE BROE, *op. cit.*, p. 1153.

- The expenses connected with his activity should normally have been produced by the Applicant and reimbursed by the principal, which is was not the case. Noentiendo was to provide all equipment and all this material was its property.
- The contract does not stipulate that the Applicant was bearing the brunt in case of considerable profit fluctuation. Moreover, it grants him a stationary payment of 10,000 coins paid on the 27<sup>th</sup> of each the month during which the activities were carried.
- The Applicant could neither accept nor decline an order neither could he thus influence the success of an activity.
- The only relationship the Applicant had with Sonica was for the payment of his monthly and stationary income.

**82.** In light of the previous statements, the nature of the services rendered by the Applicant does not point out an independent but rather an employment contract, not with Sonica but with Noentiendo.

**83.** In such situation, where the factual employment relationship seems to be different from the formal contractual relationship, paragraph 8.14 states relevant criteria to determine who the employer is:

1. *Who has the authority to instruct the individual regarding the manner in which the work has to be performed?*

The addendum mentions explicitly that the worker has to provide his services under the instruction of the COO of Noentiendo or the person he delegated during the term of the contract. Furthermore, the worker has to present every month a mandatory report of his activities to his COO.

2. *Who controls and has the responsibility for the place at which the work is performed?*

The agreement stipulates that the worker has the obligation to work and provide the services at the premises of Noentiendo.

In practice, the Applicant had to work from the premises of the ten Noentiendo subsidiaries in Gameland. It is significant to point out that a yearly plan of the offices in which he provided

his services was drafted by the COO of Noentiendo, and that this plan was completely respected.

*3. The remuneration of the individual is directly charged by the formal employer to the enterprise to which the services are provided.*

In this regard, paragraph 8.15 outlines that where an individual who is formally in a contractual relationship with one undertaking (Sonica) and provides services to another company (Noentiendo), the financial arrangement made between the two firms is clearly relevant.

Indeed, the income of the Applicant was directly charged by Sonica to Noentiendo. Examining the bank statements of Sonica and Noentiendo, it is observed that a monthly amount is paid on the 20th of each month.

*4. Who puts the tools and materials necessary for the work at the individual's disposal?*

It has already been mentioned that Noentiendo provided all equipment and that all this material was the property of this company.

*5. Who has the right to select the individual who will perform the work and to terminate the contractual arrangements entered into with that individual for that purpose?*

Noentiendo selected the Applicant: Browser, the CEO of the company had spotted the skills of the Applicant and wanted to hire him to improve the Noentiendo's car racing games. Furthermore, this is Noentiendo that has terminated the contract with the Applicant because of his bad behaviour at nightclubs. Sonica had simply informed the Applicant of this decision on the 15 June 2012. As we have already demonstrated, Sonica was an artificial intermediary.

*6. Who determines the holidays and work schedule of the individual?*

According to the addendum of the freelance agreement, the Applicant had to fulfil a strict work schedule: 9:00 a.m. until 18:00 p.m. with 1-hour lunch break. There is no mention of holiday leaves in the contract.

**84.** According to all of the objective criteria outlined above, the formal contractual relationship between the Applicant and Sonica must be disregarded.

**85.** Indeed, the rendered services may properly be regarded as rendered in an employment relationship between the Applicant and Noentiendo rather than as under a contract for services concluded between two enterprises<sup>25</sup>.

**86.** In conclusion, it is crystal clear that a right observation of the latest version of the Article 15 Commentary should bring the Administration to consider the income derived from the services exercised by the Applicant for Noentiendo during the taxable period of 2012 has to be characterized by the Tax Administration as an employment income.

**87.** Article 15 of the Tax Treaty Convention in force between Rainbowland and Gameland has to be applied in the present situation.

### *2.2.2 Traditional methods of interpretation*

**88.** Even if the Tax Administration would not consider the subsequent application of the Article 15 Commentary, the respect of the traditional methods of interpretation of undefined terms brings us to the same conclusion.

**89.** Prior to the 2010 version of the OECD Model Commentaries, the doctrine was split regarding which interpretation method should be used in order to determine the meaning of the terms *employment* and *employer* for the purposes of Article 15 OECD MC<sup>26</sup>.

**90.** Firstly, some scholars considered that those terms had to be determined in accordance with Article 3(2) OECD MC. Secondly, others believed that those should be given an autonomous interpretation in line with Articles 31 and 32 of the Vienna Convention on the Law of Treaties. We shall therefore develop both approaches.

#### A. ARTICLE 3(2) OECD MODEL TAX CONVENTION

**91.** Pursuant to Article 3(2), the meaning of a term must be determined in accordance with the domestic law of the State applying the treaty, unless the context requires otherwise. Two different positions on how interpret this Article exists.

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<sup>25</sup> Commentary of Art. 15 OECD MC, point 8.11.

<sup>26</sup> L. DE BROE, *op. cit.*, p. 1145.

**92.** One of the position interprets the words “unless the context otherwise requires” as an exception to the rule that any undefined term of the DTC has the meaning it has under the domestic law of the State that applies the treaty<sup>27</sup>.

**93.** The second position looks primarily to the context of the treaty to determine the meaning of an undefined term. The reference to the domestic law should then occur only if the context does not solve the conflict<sup>28</sup>.

**94.** In the present case, those differences of view do not matter since, as we shall demonstrate, the context of Article 15 not only solves the conflict of interpretation, but it would also be contrary to this one to apply the domestic law of Rainbowland.

**95.** The *context* of this Article has to be given a very broad meaning<sup>29</sup> but notably includes the objectives sought by the OECD Tax Convention and the common intention of the Contracting States<sup>30</sup>. *In casu*, an interpretation of “*employment*” in line with the domestic law of the State of Rainbowland would inevitably create a situation contrary to the common intention of the parties and generate double taxation situation.

**96.** Indeed, it seems to be obvious that two States with fundamentally different conceptions of what an employment is did have the intention to respect the distributive rules of interpretation by signing a Tax Treaty Convention. If each Contracting State could impose currently its domestic definition to characterize the same income, then it would have been senseless to conclude a Tax Treaty.

**97.** It would hence be contrary to the common intention of the contracting parties if the Tax Administration decided to define “*employment*” and “*employer*” in line with the national law of Rainbowland without considering the distributive rules of interpretation.

**98.** Furthermore, such method of interpretation would create a double taxation situation since on the one hand, Rainbowland focuses on the form given to the contract and legitimates its approach on the idea of legal certainty. In this formal conception, there can be no employment

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<sup>27</sup> See in particular K. VOGEL and R. PROKISCH, IFA General Report, « Interpretation of Double Taxation Conventions », *Cahiers de droit fiscal international*, vol. 78a, Kluwer, 1993, pp. 81-82.; P. BAKER, *Double Tax Conventions and International Tax Law*, Sweet & Maxwell, 2002, p. 21; F. ENGELN, *op. cit.*, p. 480.

<sup>28</sup> See in particular M. LANG, *The application of OECD Model Tax Conventions to Partnerships : A Critical Analysis of the Report Prepared by the OECD Committee of Fiscal Affairs*, Linde, 2000, pp. 20-28; J. HEINRICH and H. MORITZ, « Interpretations of Tax Treaties », *European Taxation* 4, 2000, p. 150 ; H.- J. AIGNER, W. LOUKOTA, *op. cit.*, p. 215.

<sup>29</sup> L. DE BROE, *op. cit.*, p. 1148; B. ANICETO DA SILVA, “The tie-breaker rule (Art. 4 of the OECD MC)- relevance of domestic law or autonomous interpretation?” in *Fundamental Issues and Practical Problems in Tax Treaty Conventions* edited by M. SCHILCHER and P. WENINGER, Linde, 2008, vol. 54, p. 339.

<sup>30</sup> L. DE BROE, *op. cit.*

relationship without any written contract of employment, named as such and in which the parties expressly recognized that they want to be governed by the rule applicable to employment.

**99.** On the second hand, Gameland gives precedent to the substance and does not hesitate to re-characterize any contract for the provision of services as an employment contract whenever it can be concluded that the recruiter wanted an employment contract and not a contract of services.

**100.** If the two Contracting States decide to rely on their own domestic approach in order to characterize the work relationship of the Applicant, it will inevitably lead to an absurd result where the same income will be taxed twice on the same taxpayer and for the same period of time, on the basis of two different dispositions of the Tax Treaty: Article 7 in the State of Rainbowland and Article 15 in the State of Gameland.

**101.** In this regard, we remind that the main purpose sought by the OECD Tax Model Convention is *“to clarify, standardise, and confirm the situation of the taxpayer who are engaged in commercial, industrial and financial or any other activities in other countries through the application by all countries of common solutions to identical cases of double taxation<sup>31</sup>”*.

**102.** Once more, it would be contrary to the Tax Treaty Convention if the Tax Administration of Rainbowland decided to refer to its domestic approach in order to define the term *“employment”*.

**103.** However, the Commentaries of the OECD MC solve the issue of double taxation by stating a distributive rule of interpretation. When the observation of the domestic law generates a situation of double taxation, the Commentary clearly states that the Residence State must accept the determination of the State of work and grant relief for double taxation even if under its domestic law there is no employment relationship<sup>32</sup>.

**104.** This is confirmed by Article 23 Commentary which provides that even if the Residence State would have qualified the term differently under its domestic law and would have applied

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<sup>31</sup> OECD Model Tax Convention, Introduction, point 2.

<sup>32</sup> Commentary of Art. 15 OECD MC, point 8.10.

a different provision of the Model Convention, the income is taxed in accordance with the provision of the Convention<sup>33</sup>.

**105.** In this regard, a 2011 judgment of the *Hof van Beroep of Antwerp* based on similar facts than the present case supports this claim.

**106.** In the facts, an independent manager resident in Belgium worked more than 183 days in the Netherlands. Under the Dutch law, this same worker was considered as an employee. The Belgian taxpayer claimed the exemption in Belgium on the grounds of Article 15 and 23 of the 2001 DTC between Belgium and the Netherlands since the compensation that he received was characterized as an employment income under the Dutch law. The Tax Administration refused, arguing that the compensation he received was under the Belgian law an income derived from independent services and that the taxpayer had no fixed base in the Netherlands.

**107.** The Court dismissed this argument and considered that this is for the State of work to determine whether the activity performed was of an independent or an employment nature. Such characterization is binding on the Residence State even if it may define the relationship differently<sup>34</sup>.

**108.** In the light of this judgment, it is clear that it would be contrary to the Tax Treaty Convention if the Tax Administration refused to observe the domestic law of the State of work to define the terms “*employment*” and “*employer*”.

**109.** In this regard, as it has already been mentioned, the law of the State of Gameland has adopted a “substance-over-form” approach and according to its constant case law, any contract can be re-characterized for the provision of services as an employment contract whenever it can be concluded that the recruiter wanted an employment contract and not a contract for services.

**110.** As we have already shown, the main elements to re-characterize a contract under the law of Gameland (subordination, the acceptance of instructions from a superior, the fulfilment of a work schedule and the exercise of the activity at the premises of the employer) are met.

**111.** In conclusion, pursuant to Article 3(2), the Tax Administration of Rainbowland must accept the determination given by the law of the State of Gameland in order to characterize

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<sup>33</sup> Commentary of Art. 23 OECD MC, points 32.1 and 32.3.

<sup>34</sup> Belgian Court of Appeal Antwerp of 21 June 2011, TFR, 2011/62.

the work relationship. Since the latter is under the law of the Netherlands a relationship of employment, Article 15 of the Tax Convention must be applied.

## B. ARTICLES 31 AND 32 VCLT

**112.** Some scholars give primacy to an autonomous interpretation of Tax Treaties in accordance with the general principles settled in Articles 31 and 32 of the Vienna Convention on the Law of Treaties<sup>35</sup>.

**113.** Article 31 VCLT contains three separate principles. The first principle is that the Treaty must always be interpreted in good faith. The second principle is that the words used in a Treaty should be given their ordinary meaning. The ordinary meaning of a word is presumed to be the authentic expression of the intention of the parties. Finally, the last principle states that this ordinary meaning has to be given not in isolation of the disposition but in the context of the Treaty in the light of its object and its purposes<sup>36</sup>. The *context* comprises in particular the text of the treaty as a whole, including its preamble and its annexes.

**114.** In this respect, the terms “*employment*” and “*employer*” have to be autonomously interpreted in drawing the line into business profits settled in Article 7 of the Tax Treaty Convention<sup>37</sup>.

**115.** It results from Article 7 that the owner of business profits bears the risk of and the responsibility for, but also the chance out of the business. By way of contrast, employment is characterized by the subordination of the employee to the employer. The common understanding is that all activities constitute employment if the person involved is committed to supply his capacity for work in such a manner that he is subordinated to his employer’s directions in the exercise of his vocational discretion or that he is bound to obey his employer’s instructions within the organisational set up of the latter’s business. The essential criteria to distinguish dependent from independent services is therefore to what extent a person is personally and economically dependent when carrying out his activities<sup>38</sup>.

**116.** In view of the detailed description of the Applicant’s relationship of work (see point 83), it has to be concluded that, according to the context of the DTC for the purposes of Articles

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<sup>35</sup> L. DE BROE, *op. cit.*, p. 1147.

<sup>36</sup> M. KANDEV, « Tax Treaty Interpretation : Determining domestic meaning under 3(2) of the OECD Model », *Revue Fiscale Canadienne*, vol. 55, n°1, 2007, p. 36.

<sup>37</sup> H.- J. AIGNER, W. LOUKOTA, *op. cit.*,

<sup>38</sup> H.- J. AIGNER, W. LOUKOTA, *ibidem*.

31 and 32 of the VCLT, which comprises notably the text of the DTC as a whole, this relationship has to be considered as a relationship of employment between the Applicant and Noentiendo. Therefore, Article 15 of the DTC has to be applied.

### 2.3. PROPER APPLICATION OF ARTICLE 15 DTC

#### *a) The principle*

**117.** According to Article 15 OECD MC, the income derived from employment is taxable exclusively in the State of residence, unless if such employment is exercised in the other Contracting State. The rule therefore relies upon the principle of the place of work<sup>39</sup>.

**118.** An exception of this principle of the place of work is set out in Paragraph 2 of the Article 15. Pursuant to this Paragraph, the Residence State will have the exclusive right to tax even if the employment was exercised in the other Contracting State if the following requirements are met:

- a) The recipient of the income is not present in the other Contracting State for more than 183 days in any twelve month period commencing or ending in the fiscal year concerned, and;
- b) The remuneration is paid by an employer or on behalf of an employer who is not resident of the State of activity, and;
- c) The remuneration is not borne by a permanent establishment or a fixed base that the employer has in the State of activity

If any of those conditions is not fulfilled, the State of activity has the right to tax in accordance of Article 15(1) OECD MC. The burden of proof falls on the residence State.

#### *b) Application to the Applicant's situation*

**119.** In application of the place of work rule, the income deriving by the Applicant, even considered as a resident of Rainbowland, is exclusively taxable in Gameland. In accordance with Article 23 A OECD MC, Rainbowland has to exempt such income from tax.

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<sup>39</sup> M. LANG, *Introduction to the law of double taxation Conventions, op. cit.*, , p. 114.

**120.** Furthermore, even if the burden of proof falls on the Tax Authorities of Rainbowland, we shall demonstrate that the three cumulative conditions prescribed in Paragraph 2 are not met.

**121.** *Firstly*, the Applicant was present in Gameland for more than 183 days in the fiscal year concerned. As already shown (see point 27), in accordance with the *day of physical presence method* lays down in Article 15 Commentary, the Applicant spent 232 days within Gameland in 2012.

**122.** *Secondly*, a company resident of Gameland paid the remuneration of the Applicant. Indeed, as already discussed (see point 83), the employer who bore the burden of the remuneration was not Sonica but Noentiendo, a company resident of Gameland.

**123.** *Thirdly*, the remuneration of the Applicant is borne by a fixed base that the employer has in the State of Gameland. Noentiendo is a fixed base located in Gameland.

**124.** Since none of the conditions is observed, we conclude to the remuneration's taxability in Gameland, source State where the employment was duly exercised for the fiscal year. Consequently, Rainbowland has to exempt the remuneration from tax in accordance with Article 23 A of the DTC.

### III. IRRELEVANCY OF ARTICLE 12 OF THE OECD MODEL CONVENTION

**125.** In principle, royalties in respect of licences to use patents and similar property and similar payments are income to the recipient from a letting, which may be granted in connection with an enterprise<sup>40</sup>.

**126.** Paragraph 1 of Article 12 lays down the principle of exclusive taxation of royalties in the State of the beneficial owner's residence<sup>41</sup>. Paragraph 2 defines the term « royalties »<sup>42</sup>. According to the Commentaries, these relate, in general, to rights or property constituting the different forms of literary and artistic property, the elements of intellectual property specified in the text and information concerning industrial, commercial or scientific experience<sup>43</sup>.

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<sup>40</sup> Commentary of Art. 12 OECD MC, point 1.

<sup>41</sup> Commentary of Art. 12 OECD MC, point 3.

<sup>42</sup> Commentary of Art. 12 OECD MC, point 8.

<sup>43</sup> *Ibidem*.

**127.** The definition applies to payments for the use of, or the entitlement to use, rights of the kind mentioned, whether or not they have been, or are required to be, registered in a public register. The definition covers both payments made under a license and compensation, which a person would be obliged to pay for fraudulently copying or infringing the right<sup>44</sup>.

**128.** Basically, the situation does not need to be deepened on this point due to the mere fact that – to our knowledge – the Applicant has never granted any licence, neither to Noentiendo nor to Sonica.

**129.** Furthermore, the nature of the work provided (business consulting and development, marketing strategy and implementation) had *stricto sensu* no link with intellectual property to the extent that the Tax Administration would have no ground to seek for jurisdiction to tax.

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<sup>44</sup> *Ibidem.*

## V. CONCLUSION

**130.** The Applicant requests Your Honourable Court to acknowledge that he is, pursuant to Article 4.2 of the DTC, resident of the State of Gameland. Consequently, Rainbowland has no ground to tax the Applicant on a worldwide basis.

**131.** Indeed, according to the criterion of the habitual abode, which is the only that solves the conflict of dual residence, the Applicant is resident of the State where he spent more time during the taxable year<sup>45</sup>. Having spent 232 days within the State of Gameland in 2012, the Applicant is therefore resident of that State.

**132.** In the alternative, if Your Honourable Court considers that the Applicant is resident of the State of Rainbowland, this later has still no ground to tax him pursuant to Article 15 of the DTC relating to income derived from employment.

**133.** Indeed, since the artificial freelance agreement between the Applicant and Sonica has to be disregarded and that the professional relationship between the Applicant and Noentiendo has to be regarded as an employment relationship, Article 15 is applicable to the present case.

**134.** In application of Article 15 of the DTC, which sets out the rule of the place of work, the income deriving by the Applicant is taxable in Gameland. The three cumulative conditions of the so-called 183-day rule are not fulfilled<sup>46</sup>.

**135.** According to Article 23 A of the DTC, Rainbowland has to exempt such income from tax.

**136.** Finally, the Applicant outlines that the nature of work he provided to Noentiendo (business consulting and development, marketing strategy and implementation) had no link with intellectual property. Consequently, the Tax Administration of Rainbowland cannot claim a taxation of the income derived by the Applicant on the ground of Article 12 OECD MC.

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<sup>45</sup> M. LANG, *op. cit.*, p. 85.

<sup>46</sup> H.- J. AIGNER, W. LOUKOTA, *op. cit.*, p. 209.

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