

Special Taxation Regimes for High-net-worth Individuals: Challenges to Article 4 and the Definition of Tax Residence

Regimes Especiais de Tributação para Pessoas Físicas de Alto Patrimônio: Desafios ao Art. 4º e à Definição de Residência Fiscal

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Abstract

This article examines the compatibility of special tax regimes for newly domiciled individuals with the existing elements for the characterisation of tax residence for the purposes of a tax treaty. Special tax regimes for individuals grant more favourable tax treatment to attract foreign individuals who meet certain criteria, often mixing a level of investment and permanence in the new jurisdiction. The research question of this article is whether these criteria, however, stretch the traditional elements for the characterisation of tax residence as set out in Article 4 of tax treaties. Indeed, Article 4 is an example of renvoi, in that it defines a resident of a State as a person liable to tax under the laws of that State. However, the article argues that Article 4 contains elements that can be construed as a minimum standard of residence. It depicts Article 4 of the Model Conventions and some deviations, arguing that such a provision contains a twofold definition: (i) liability to tax; and (ii) sufficient nexus. While some special tax regimes partially waive the liability to tax, the literature and existing deviations in Article 4 address the non-liability-to-tax offered by such regimes. The article argues that the tie-breaker rules provide a glimpse of elements considered representative of a sufficient nexus to a country. The article concludes that special tax regimes overlook the traditional elements of tax residence.

Keywords: high-net-worth individuals, tax residence, special tax regimes, double tax treaties, article 4, tie-breaker rules.

Resumo

Este artigo examina a compatibilidade de regimes especiais de tributação para novos residentes com os elementos existentes para a caracterização da

residência fiscal para fins de acordos para evitar a dupla tributação (ADTs). Regimes especiais de tributação para pessoas físicas concedem tratamento fiscal mais favorável para atrair estrangeiros que atendam a determinados critérios, frequentemente combinando um nível de investimento e permanência na nova jurisdição. A pergunta de pesquisa deste artigo é se esses critérios, no entanto, ultrapassam os elementos tradicionais para a caracterização da residência fiscal conforme estabelecido no art. 4º dos ADTs. O art. 4º é um exemplo de renvoi, na medida em que define um residente de um Estado como a pessoa sujeita à tributação sob as leis desse Estado. Contudo, o artigo argumenta que o art. 4º contém elementos que podem ser interpretados como um padrão mínimo de residência. Ele descreve o art. 4º das Convenções-Modelo e alguns desvios, argumentando que tal disposição contém uma definição dupla: (i) sujeição à tributação; e (ii) nexos suficientes. Embora alguns regimes especiais de tributação renunciem parcialmente à sujeição à tributação, a literatura e os desvios existentes no art. 4º abordam a isenção de tributação oferecida por tais regimes. O artigo argumenta que as regras de desempate (*tie-breaker rules*) fornecem elementos representativos de um nexo suficiente com o país. O artigo conclui que os regimes especiais de tributação ignoram os elementos tradicionais da residência fiscal.

Palavras-chave: pessoas físicas de alto patrimônio, residência fiscal, regimes especiais de tributação, acordos para evitar a dupla tributação, art. 4º, regras de desempate.

1. Introduction: acquisition of tax residence under a special tax regime

In the last few decades, multilateral efforts have focused on addressing corporate tax competition, leaving specific aspects of tax competition and mobility of individuals overlooked¹. In the context of international tax competition for individuals, “special tax regimes” refer to a diversity² of domestic beneficial frameworks. These regimes have in common the granting of preferential tax treatment designed to attract foreign individuals, who must meet certain criteria to acquire tax-resident status. These criteria, however, waive certain domestic requirements for the characterisation of newly arriving foreigners as residents for tax purposes.

This article addresses the following research question: whether special tax regimes pose a challenge to the application of the definition of “resident” in Article 4 of Double Tax Agreements (DTAs) that follow the OECD and UN Models. The article questions whether these regimes, which waive significant traditional

¹ As noticed by SOLER ROCH, María Teresa. Individuals: The Forgotten Taxpayers in a BEPS Scenario. In: PISTONE, Pasquale (ed.). *Building Global International Tax Law: Essays in Honour of Guglielmo Maisto*. Amsterdam: IBFD, 2022. Chapter 10. p. 197-20.

² As defined by OFFERMANN, René; BOTELHO MONIZ, Rita. Special tax regimes for high-net-worth individuals. *European Taxation* v. 60, n. 8. Amsterdam.

residence requirements, imply an erosion of the minimum concept of tax residence, assuming there is one.

The hypothesis advanced in this article is that Article 4 does not grant States a white canvas to define residence. Rather, this article defends that it contains an implicit, autonomous minimum content of sufficient nexus and substantive tax liability. By designing regimes that systematically waive physical presence, family ties, and genuine socio-economic integration, States are not merely exercising their domestic tax sovereignty; they are distorting that minimum concept of tax residence.

2. Challenges to the application of double tax treaties in view of special tax regimes

The legal mechanisms of special tax regimes interact with a core foundation of international tax law: the definition of tax residence. Defining a taxpayer as a resident of a contracting state is relevant to determining whether they will be able to access the benefits of a DTA. From a domestic perspective, the definition of a person as a tax resident determines which country has the right to impose taxation.

For individuals, as tax systems are still essentially based on the dichotomy between source and residence for the allocation of taxing rights, jurisdictions will often design tax policies and tax regimes differentiating between residents and non-residents. Special tax regimes stay somewhere in the middle: between the tax treatment given to residents and to non-residents.

This section first sets out the definition of residence under Article 4 of the OECD and UN Models, before turning to the specific challenges that special tax regimes pose to that definition.

2.1. Article 4: the definition of residence in tax treaties

Tax treaties based on the OECD and UN Models restrict entitlement to benefits to persons who are residents of one or both of the Contracting States. At the domestic level, jurisdictions often design tax laws that differentiate between residents and non-residents, subjecting them to either territorial or worldwide taxation.

However, determining which country has the legitimate right to impose taxation generally depends on where a person has the strongest economic and social connections. This country is generally defined as the residence country, where the person will be subject to comprehensive taxation. The comprehensive income taxation is not exclusive, though. Individuals can also be subject to tax in a country where they do not reside but from which they derive income. This is referred to as the source country, from which income is derived, and assets and capital generating that income are located.

As explained by Schoueri³, the principles of residence and source are responses provided by various legal systems to determine the taxpayer's ability to pay and, therefore, to establish a sufficient connection to justify the levy of tax by a particular jurisdiction.

This is why the wording of Article 4 in both the OECD and UN Model Tax Conventions includes a renvoi clause when defining the term "resident".

2.2. Article 4(1): the renvoi clause

Article 4(1) of the Double Tax Treaties⁴ defines the expression "resident of a Contracting State" as a person who, under the laws of that State, is liable to tax therein, by reason of his domicile, residence, place of management or any other criterion of a similar nature.

The expression "liable to tax" does not necessarily imply a full tax liability, because it might otherwise exclude from the scope of the Convention all residents of countries adopting a territorial principle⁵. The Commentaries to Article 4(1) of the OECD Model state that double tax treaties do not normally concern the domestic laws of the States that lay down the conditions under which a person will be treated as liable to tax in that State. There are no standards in the treaties that determine how the domestic laws of the States should be designed to fulfil the claims to be liable to tax in that State⁶.

2.3. Article 4(2): double tax residence and the tie-breaker rules

The renvoi mechanism is the reason double tax residence can arise⁷: conflicts occur when domestic residence definitions are incorporated via renvoi into bilateral treaties.

To solve double tax residence, Article 4(2) of double tax treaties provides a list of tie-breaker rules, which must be applied in the following order: availability of a permanent home, having closer personal and economic relations (centre of vital interests), having a habitual abode, nationality, and, finally, if none of the previous rules are able to solve the double tax residence status, the competent authorities shall settle the question by mutual agreement.

³ SCHOUERI, Luís Eduardo. *Residência Fiscal da Pessoa Física*. *Revista Direito Tributário Atual* v. 28. São Paulo: IBDT, 2012, p. 149-172.

⁴ The latest edition of the OECD Model was published in 2017 and is available at: https://doi.org/10.1787/mtc_cond-2017-3-en.

⁵ Paragraph 8.3 of Commentaries to article 4(1) of the OECD Model.

⁶ Paragraph 4 of Commentaries to article 4(1) of the OECD Model.

⁷ SCHOUERI, Luís Eduardo. The residence of the employer in the 183-Day Clause Article 15 of the OECD's Model Double Taxation Convention. *Intertax* v. 21, n. 1, 1993, p. 20-29.

2.4. *Application to special tax regimes*

Special tax regimes designed for a selected group of individuals raise challenges to the application of double tax treaties. Article 4 of the DTAs operates on a presumption that domestic tax residence reflects an objective, physical, or economic connection to the State⁸. This connection justifies the exercise of worldwide taxation and the subsequent access to treaty benefits. Special tax regimes challenge this traditional view by detaching the legal status of a resident from traditional physical and socio-economic indicators. That is, elements adopted to verify a close connection to a certain jurisdiction, such as the number of days in the country and having family and economic ties, are often overlooked.

The difficulties in applying DTAs to special tax regimes can be framed from two perspectives. On the one hand, special tax regimes that grant tax incentives and waive tax payments contradict the “liable to tax” concept set out in Article 4(1) of DTAs. When a jurisdiction grants paper-resident status based on merely nominal requirements, it employs the *renvoi* clause to export a domestic legal fiction into the bilateral treaty network.

On the other hand, when special tax regimes result in dual residence, the conflict can be more practically resolved under the tie-breaker rules of Article 4(2). Tie-breaker rules, however, are mainly designed to address the avoidance of double residence status and are not sufficient to tackle the problem of double non-taxation – the individual or at least a portion of his or her income not being taxed in either residence nor in source states. It can be argued that the hierarchical criteria established in these rules were designed for a less mobile economic environment and face challenges when applied to individuals under preferential regimes.

Highly mobile individuals can easily maintain permanent residential properties in multiple jurisdictions simultaneously, neutralising this first test. Special regimes allow individuals to separate these elements. An individual can maintain family and personal links in the source state while legally and financially structuring their economic interests within the jurisdiction offering the special regime. The flexibility of remote work and global mobility allows individuals to distribute their time across multiple states without establishing a clear habitual abode in any one of them, making the metric inconclusive.

2.4.1. *Examples of special tax regimes and challenges they represent*

These regimes are not a uniform category. Krajcуска’s classification⁹ of in-patriate regimes within the European Union distinguishes them by their under-

⁸ SCHWARZ, Jonathan. *Schwarz on Tax Treaties*. 7. ed. London: Wolters Kluwer, 2025, p. 112.

⁹ KRAJCUSKA, Filip. *The Future of Special Individual Income Tax Regimes for Inward Expatriates in the European Union*. European Taxation. Amsterdam: IBFD, 2024.

lying policy objective, such as talent retention, investment attraction, or general competitiveness, and notes that several states confine these benefits to non-nationals, a practice he flags as raising its own equality concerns distinct from the treaty-entitlement question addressed here. The four regimes examined below span this typology, from investment-driven frameworks (Italy, Uruguay) to presence-conditioned frameworks (Portugal, Greece), and are chosen precisely because that variation produces different outcomes under the liable-to-tax and sufficient-nexus analysis developed in Section 3.

The Italian flat-tax regime (Article 24-bis of the Italian Income Tax Code) confers resident status on individuals who transfer their fiscal domicile to Italy and pay an annual substitutive tax of €100,000 on all foreign-source income, regardless of its amount. Physical presence is not specified as a formal requirement beyond domicile transfer. Where the individual has no prior Italian residence, and therefore no dual-residence conflict to resolve, the question is whether the formal Italian residence, combined with a blanket exemption of foreign income from ordinary Italian taxation, satisfies the “liable to tax” requirement in a substantive sense. Given the structural insulation from foreign-income taxation, a treaty partner applying a strict reading of Article 4(1) could argue that the Italian tax liability is insufficiently comprehensive to justify treaty access for the full scope of the Convention’s distributive rules.

The Portuguese NHR (Non-Habitual Resident) regime, before its closure to new entrants, conditioned treaty access on physical presence for at least 183 days per year, which satisfied the habitual abode criterion. The consequence argument in the dual-residence context was therefore limited: the NHR satisfied the tie-breaker rules, because the physical presence requirement maintained the substantive connection. Where the NHR individual also retained a permanent home in the source State, however, the centre of vital interests test would require genuine factual assessment rather than deference to the formal Portuguese status.

The Greek non-dom regime and the Swiss *Pauschalbesteuerung* (lump-sum taxation) present intermediate cases. The Greek regime requires a minimum investment and physical presence of at least 183 days, which partially preserves the substantive nexus. The Swiss *forfait*, by contrast, taxes the individual on an expenditure basis rather than on worldwide income, and the exclusion in Article 4(1) of the US Model, which expressly denies resident status to persons taxed on a fixed-fee or *forfait* basis, would, if replicated in other treaties, produce the consequence of denial of treaty access in the single-residence scenario.

The Uruguayan territorial regime offers a limiting case. Uruguay taxes only Uruguayan-source income; an individual taxed exclusively on territorial income is, by definition, not taxed on the income streams that the DTA network principally governs. For such an individual, the “liable to tax” requirement is satisfied only in a formal sense; in substance, the treaty benefits are claimed without the

corresponding exposure to taxation that the bilateral system presupposes. Here the consequence argument has the strongest purchase: treaty access is claimed precisely for the income not subject to Uruguayan tax, which is the mirror image of the double non-taxation that treaties are designed to prevent.

3. Addressing the challenges

3.1. A twofold definition of tax residence

Article 4(1) of the DTAs reads as follows:

“For the purposes of this Convention, the term ‘resident of a Contracting State’ means any person who, under the laws of that State, is liable to tax therein by reason of his domicile, residence, place of management or any other criterion of a similar nature [...]”.

To better frame the question at hand, the present article proposes to segregate the definition of resident in Article 4 of DTAs into two parts:

Part 1 refers to the sentence: “any person who, under the laws of that State, is liable to tax therein”.

Part 2 refers to the sentence: “by reason of his domicile, residence, place of management or any other criterion of a similar nature”.

3.2. The “liable to tax” requirement

The tension underlying this requirement has been described by Schön¹⁰ as one of fiscal sovereignty: a state offering reduced or eliminated personal tax liability to attract mobile individuals is, from the domestic perspective, exercising a legitimate sovereign choice to deviate from comprehensive worldwide taxation. The difficulty is that this sovereign choice, once exported through the *renvoi* clause of Article 4(1), operates on a bilateral treaty network built on the assumption that residence entails something closer to comprehensive liability. It is against this background that the structural question below must be assessed.

As mentioned above, the phrase “liable to tax” does not require that an individual be subject to the comprehensive tax liability. However, special tax regimes stretch this concept in various forms. For example, territorial and lump-sum raise questions on the liability to tax.

This raises a structural question: can an individual who is structurally insulated from substantive, comprehensive taxation by a state’s unilateral policy truly be considered “liable to tax” for the purpose of claiming bilateral treaty benefits? If a state waives its domestic taxing rights over an individual’s global income, the traditional rationale for eliminating double taxation via treaties ceases to exist, transforming the treaty into an instrument for double non-taxation.

¹⁰ SCHÖN, Wolfgang. Is Everybody Obligated to Pay Taxes Somewhere? *Working Paper of the Max Planck Institute for Tax Law and Public Finance* n. 2023-09, jul. 2023.

This concern must, however, be kept within its proper limits. Once the substantive nexus required by Article 4(1) is satisfied, the resulting low or non-taxation of foreign-source income cannot be treated as a ground for denying treaty benefits. As López argues¹¹, a state's decision to waive taxation of certain income, once residence is properly established, reflects a legitimate and sovereign policy choice, and the resulting non-taxation falls outside the scope of the tax treaty rather than constituting a defect curable by unilateral reinterpretation of Article 4 by the other Contracting State. The argument advanced in this article therefore does not extend to every instance of preferential taxation; it is confined to cases in which the domestic criterion generating residence itself falls short of the *ejusdem generis* threshold, and does not license treaty partners to revisit residence determinations merely because the tax outcome that follows from a genuinely satisfied nexus is favourable to the taxpayer.

3.2.1. Deviations found in Article 4

Special tax regimes defy the application of Article 4(1) whenever the incoming individual is not considered liable to tax and, because of that, would not be entitled to the benefits of the treaty. Further, to the extent that the requirements for being qualified as a resident are waived, there is an erosion of the concept of “resident” as a person bearing a sufficient connection to the country, defying the criteria described in Article 4(2).

Since the OECD and UN Models provisions are not sufficient to cover the situations caused by the special tax regimes, this article aims to identify and discuss deviations from Article 4 of the OECD and UN Models, which may help to address uncertainties towards the characterisation of tax residence at a treaty level.

To start with, the United States Model Income Tax Convention (“US Model”)¹² presents a deviation in article 4(1) that seems tailored to address the case of special tax regimes. The second sentence of article 4(1) excludes from the characterisation as a “resident” any person whose tax is determined on a fixed-fee, “forfeit” or similar basis, or who is liable to tax in respect only of income from sources.

The broad exclusion posed by the US Model would encompass preferential fixed-fee regimes, such as the *forfait*, such as the Swiss *Pauschalbesteuerung*. The US Model goes in an opposite direction when compared to the Commentary to Article 4(1) of the OECD Model in respect to excluding from the concept of resident persons who are not subject to full tax liability (worldwide taxation). This

¹¹ LÓPEZ LÓPEZ, Hugo. Chapter 7: Special Tax Regimes to Attract Individuals and Their Interaction with Treaty Law: Entitlement Issues. In: KOSTIĆ, S. et al. (ed.). *Mobility of Individuals and Workforces: Tax Challenges Raised by Digitalization*. Books IBFD, 2024.

¹² UNITED STATES. United States Model Income Tax Convention. 2016. Available at: https://home.treasury.gov/system/files/131/Treaty-US-Model-2016_1.

provision could potentially exclude taxpayers subject to tax liability limited to a territorial basis, such as the Uruguayan special tax regime.

One example of a tax treaty network to be reviewed is the tax treaties signed by Switzerland. Article (5) of the treaty between Switzerland and Italy, which excludes from the concept of resident an individual who is not subject to the taxes generally levied on all the income from the other State, which is generally liable to tax. Similar provisions can be found in the treaties signed by Switzerland with Germany, Belgium, Norway, Italy, Austria, Canada, the United States and France, which establish that the entitlement to the benefits of the treaty will only be allowed if Switzerland taxes all income from each of these countries.

What the mechanisms analysed have in common is that they deny the characterisation of tax treaty residence by individuals not liable to tax in the new State. If that is the case, the treaty benefits would not be applicable to that individual.

While the liability to tax may be useful for addressing the characterisation of residence for individuals applying to special tax regimes, these provisions do not address the other criteria for assessing whether the individual effectively bears economic and social connections to the country. *De lege ferenda*, Savvas Kostikidis¹³ proposes an amendment to the Commentaries to Article 4(2) to include a rebuttable presumption that a person retains their residence in the original state, if remigration occurs within an observation period, adding a temporal requirement and a preference to the original residence state.

3.3. The preservation of a “sufficient nexus”

Even though the concept of residence is particular to each tax system, the definition of residence as a subjective nexus to the jurisdiction conveys the general idea according to which a person bears a degree of permanence in that state¹⁴.

The expression “criterion of a similar nature” in Article 4(1) establishes an *ejusdem generis* rule. It implies that any domestic criterion used to establish residence should share the essential characteristics of “domicile” or “residence”. These concepts are historically rooted in physical presence, permanence, and a genuine link.

This reading finds support in Beretta and Soares’ proposal¹⁵ of a substantial economic presence test for individuals benefiting from preferential regimes, un-

¹³ KOSTIKIDIS, Savvas. A Better Way to Establish Tax Treaty Residence For Mobile Individuals. *Tax Notes International*, June 12, 2023, p. 1464.

¹⁴ SCHOUERI, Luís Eduardo. Residência Fiscal da Pessoa Física. *Revista Direito Tributário Atual* v. 28. São Paulo: IBDT, 2012, p. 151.

¹⁵ BERETTA, Giorgio; SOARES, Rosa Freitas. Chapter 5: Competing for Taxpayers: A Blueprint to Identify and Assess Harmful Tax Regimes for Individuals. In: LAZAROV, Ivan; VLUGT, Svetislav (ed.). *Blueprint for Individual Income Taxation Reform in a Globalized World: 2024 IBFD Academic Tax Conference – 16-17 May 2024*. Amsterdam: IBFD, 2025.

der which entitlement to such benefits should depend on the individual being at least *de jure* or *de facto* connected to the territory. Although framed as a domestic anti-abuse standard rather than as an interpretation of Article 4, the substance of that test converges with the *ejusdem generis* reading defended here: both approaches deny that a purely formal or administrative link can substitute for a genuine connection to the jurisdiction. The convergence is significant because it suggests that the minimum content proposed for Article 4(1) is not merely a treaty-interpretation artifact, but reflects a broader normative consensus, also present in the domestic anti-abuse literature, that preferential tax status should track substance rather than form.

Kostikidis¹⁶ reaches a parallel conclusion from a different angle, showing more generally that shortened physical-presence requirements allow the formal characterisation of tax residence without the corresponding economic reality that residence is meant to signify. This is a distinct point from the *de lege ferenda* remigration proposal discussed above: here, the concern is not what should be done about departing residents. The more basic observation that domestic law can manufacture the label of residence while withholding its substance. Read together with Beretta and Soares' economic presence test, this reinforces the claim that the divergence between formal and substantive residence is a recognised problem across the literature, not a construction specific to this article's reading of Article 4.

This argument is also supported by the operational logic and hierarchy of the tie-breaker criteria. The order of the criteria in Article 4(2) denotes a strict preference over the attachment to one state. The Commentaries to Article 4(2) state that preference is given to the criterion of such a nature that there can be no question but that the person will satisfy it in one State only, and at the same time, it must reflect such an attachment to that State that it is natural that the right to tax devolves upon that particular State. While the tie-breaker rules of Article 4(2) apply explicitly to resolve cases of dual residence, they also clarify the interpretation of Article 4(1). The hierarchy of Article 4(2) reflects an international consensus on what constitutes a genuine link between an individual and a state.

The structural challenge arises because special tax regimes are designed to require none of these elements, establishing a formal residence that conflicts with the object and purpose of the Model Conventions. By allowing individuals to isolate their formal legal status from their physical presence and socio-economic integration, the hierarchical tests of Article 4(2) frequently fail to produce an objective outcome.

When the permanent home and the centre of vital interests are rendered inconclusive due to deliberate planning, the conflict is pushed down to national-

¹⁶ KOSTIKIDIS, Savvas. *Residence and economic substance of subsidiary corporations in international and European tax law*. Munich: University of Munich, 2022.

ity or mutual agreement procedures. This breakdown demonstrates that the tie-breaker sequence is unsuited for managing individuals whose residency status is defined by fiscal design rather than geographic permanence. The challenge, therefore, is not merely administrative; it represents a subversion of the multilateral network by unilateral regimes.

3.4. Consequences for treaty access

The consequence of this argument depends on the existence of a dual-residence situation. Section 3.4.1 addresses the dual-residence scenario, where the tie-breaker rules of Article 4(2) are analysed not as mere criteria for achieving the tie-breaking result, but rather criteria that convey a certain preference to concrete elements. Section 3.4.2 addresses the single-residence scenario, where no tie-breaker conflict arises and the argument instead bears on the threshold question of treaty access itself.

3.4.1. The dual-residence scenario: consequence within the tie-breaker rules

Where the individual is resident under the domestic law of two Contracting States simultaneously, for instance, because the originating State continues to treat the individual as a resident during a waiting or observation period, the tie-breaker rules of Article 4(2) are the appropriate mechanism. In that scenario, the consequence of the argument advanced in this article operates within the existing treaty framework: the erosion of physical presence and socio-economic integration caused by the special regime renders the tie-breaker criteria inconclusive, because the criteria themselves presuppose a genuine geographic attachment that the regime is specifically designed to minimise.

In such cases, the very elements listed within the tie-breaker provide interpretive guidance. The application of the treaty should treat the deliberate erosion of the residency indicators as relevant to the factual assessment of where the individual genuinely satisfies each criterion, rather than treating the formal legal status conferred by the special regime as conclusive. The consequence in the dual-residence case is therefore not the automatic denial of treaty benefits, but rather a stricter factual inquiry that gives effect to the substantive content of each tie-breaker criterion, resisting outcomes that would result in neither contracting state having a genuine claim.

3.4.2. The single-residence scenario: the question of treaty access

The more difficult and consequential scenario arises where the individual is a resident only of the State offering the special regime, that is, where there is no dual residence and the tie-breaker rules are not triggered. Here, the question is whether the other Contracting State may deny treaty benefits to that individual

on the ground that the individual does not satisfy the implicit threshold of Article 4(1), notwithstanding that a formal domestic residence status exists.

As argued above, the phrase “by reason of his domicile, residence, place of management or any other criterion of a similar nature” operates as an *ejusdem generis* constraint on the domestic criteria that a State may invoke through the renvoi clause. A criterion that shares none of the essential characteristics of domicile or residence, i.e., no required physical presence, no habitual abode, no socio-economic integration, is arguably not a “criterion of a similar nature” within the meaning of Article 4(1). On this reading, the renvoi clause does not extend to a purely administrative or fiscal criterion that confers residence as a function of investment or registration alone.

This reading finds direct support in López¹⁷, who reaches a similar conclusion when applying Article 4(1) to inbound-expatriate regimes: where residence is determined on the basis of non-substantive criteria, the individual does not have access to treaty benefits, since only a criterion establishing a genuine link with the state of residence satisfies the renvoi clause.

López illustrates the point with two regimes subsequently found deficient on this ground. Portugal’s now-repealed “residence by dependence” criterion, under which an individual was deemed resident merely because a family member met the substantive residence test, was held by the Portuguese Supreme Administrative Court¹⁸, in decisions concerning the Portugal-Germany tax treaty, not to satisfy Article 4, because the individual had not demonstrated any real and effective link between his economic activities and Portuguese territory. Italy’s alternative basis for acquiring tax residence through mere registration in the local municipality is flagged by López on the same ground, as failing to meet the substantive-link requirement despite conferring domestic resident status. These examples confirm that domestic law may create formal residence without the *ejusdem generis* threshold of Article 4(1) being met, and that this gap has already been recognised by a national court rather than being a purely doctrinal construct.

If that construction is accepted, the other Contracting State is not obliged to extend treaty benefits, because the individual does not qualify as a “resident of a Contracting State” within the autonomous meaning of Article 4. The consequence in the single-residence scenario is therefore potentially more far-reaching: it goes not merely to the resolution of dual residence, but to the threshold question of treaty access itself.

¹⁷ LÓPEZ LÓPEZ, Hugo. *Chapter 7: Special Tax Regimes to Attract Individuals and Their Interaction with Treaty Law: Entitlement Issues*. In: KOSTIĆ, S. et al. (ed.). *Mobility of Individuals and Workforces: Tax Challenges Raised by Digitalization*, Books IBFD, 2024.

¹⁸ Portuguese Supreme Administrative Court decisions of 25 Mar. 2009, case 068/09 and of 24 Feb. 2011, case 0876/10.

4. Conclusions

Special tax regimes for high-net-worth individuals challenge the structural framework of international tax agreements by separating legal residence from physical presence and socio-economic integration. This article has argued that Article 4 of the Model Conventions does not grant Contracting States an unfettered licence to export any domestic residence concept into the bilateral treaty network. The renvoi clause in Article 4(1) operates within implicit limits: the domestic criterion must share the essential characteristics of domicile or residence and must be accompanied by a substantive liability to tax that reflects a genuine fiscal connection to the State. Where these conditions are not met, the argument of the article has a concrete consequence, but that consequence is not uniform.

Two distinct scenarios must be distinguished. The first is the dual-residence scenario, in which an individual qualifies as a resident under the domestic law of both Contracting States and the tie-breaker rules of Article 4(2) are engaged. In that scenario, the argument of this article operates within the existing framework: the deliberate erosion of physical presence and socio-economic integration caused by the special regime should inform the factual application of each tie-breaker criterion, ensuring that the outcome reflects substantive attachment rather than formal administrative status. The tie-breaker rules were designed for individuals with genuine geographic connections; they should not be applied in a manner that treats the absence of such connections as a neutral factor.

The second, and more consequential, scenario arises where the individual is a resident only of the State offering the special regime and no dual residence exists. In that case, the tie-breaker rules are not triggered, yet the argument of this article has its most significant practical effect. Where the domestic criterion underlying the special regime shares none of the characteristics of domicile or residence, no physical presence requirement, no habitual abode, no genuine socio-economic integration, it is arguably not a “criterion of a similar nature” within the *ejusdem generis* scope of Article 4(1). The renvoi clause does not then carry that criterion into the Convention. On that reading, the other Contracting State is not obliged to extend treaty benefits, because the threshold requirement of treaty residence is not satisfied. The consequence in the single-residence scenario is thus not merely a recalibration of the tie-breaker outcome, but a denial of treaty access itself.

The reach of the argument varies by regime. Regimes that maintain a genuine physical presence requirement, such as the Greek non-dom regime’s 183-day rule or the former Portuguese NHR’s presence threshold, are less vulnerable to the threshold argument, because they preserve the substantive nexus that Article 4(1) presupposes. Regimes that waive physical presence entirely, or that substitute a lump-sum or expenditure basis of taxation for comprehensive liability, such as the Swiss *Pauschalbesteuerung* or the Italian flat-tax regime, are far more exposed:

for those regimes, the question of whether the “liable to tax” requirement is satisfied in a substantive sense is genuinely open, and a treaty partner applying a strict autonomous interpretation of Article 4 could reasonably withhold benefits. The Uruguayan territorial regime represents an extreme case: an individual taxed only on Uruguayan-source income is, by definition, not liable to tax in respect of the foreign-source income streams that the treaty network principally governs, making the claim to treaty benefits structurally anomalous.

These consequences counsel a clear response at the treaty policy level. The deviations already found in the United States Model and in certain Swiss bilateral treaties demonstrate that it is both possible and desirable to codify, at the treaty level, an explicit exclusion from the definition of “resident” of individuals whose tax liability is limited to a fixed fee, a forfeit, or a territorial basis. Short of such textual amendment, the autonomous interpretation of Article 4(1) advanced in this article provides a basis for limiting treaty abuse without requiring new legislative action, though it does require treaty partners to adopt a more searching analysis of whether the domestic criterion invoked through the renvoi clause genuinely satisfies the substantive threshold that the Convention presupposes.

Ultimately, special tax regimes that systematically waive physical presence, family ties, and genuine socio-economic integration do not merely exercise domestic fiscal sovereignty; they distort the minimum concept of residence on which the bilateral treaty network is built. The integrity of that network depends on ensuring that treaty benefits are granted to genuinely connected taxpayers.

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