

# LIUC – Università Carlo Cattaneo

International Tax Law

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*Income from immovable property,  
income from employment and other  
income*

Prof. Marco Cerrato

# **Article 6**

## **Income from immovable property**

# Article 6 OECD Model

## Overview

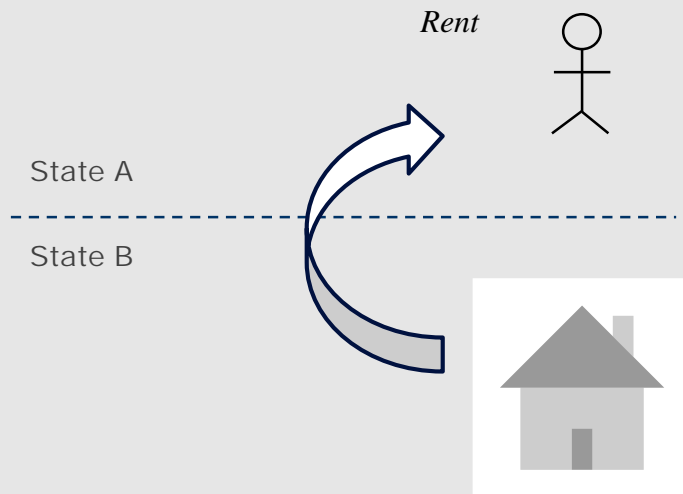
- Article 6(1)

*“Income derived by a resident of a Contracting State from immovable property (including income from agriculture or forestry) situated in the other Contracting State may be taxed in that other State”*

# Article 6 OECD Model

## Paragraph 1

- Article 6(1) applies only when the immovable property is located in the Contracting State different than the Contracting State of residence of the recipient of the income



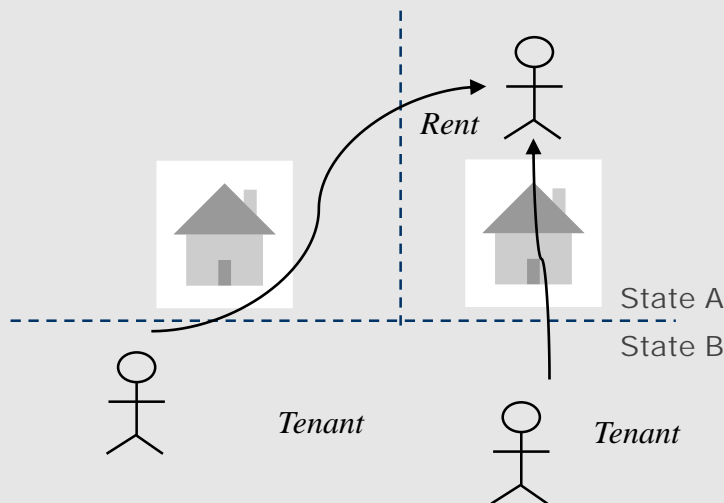
### Article 6:

- Taxing right attributed to the State where the real estate property producing the income is situated (State of source)
- State of residence of the recipient of the income to eliminate the double taxation (credit method vs. exemption method)

# Article 6 OECD Model

## Income from immovable property

- Article 6(1) OECD MC does not apply when real estate:
  - is not in a Contracting State
  - is in the Contracting State of residence of the recipient



*DTT A-B:*

- *Art. 6(1) does not apply*
- *Art. 21 applies*
  - *Exclusive right to tax of A*

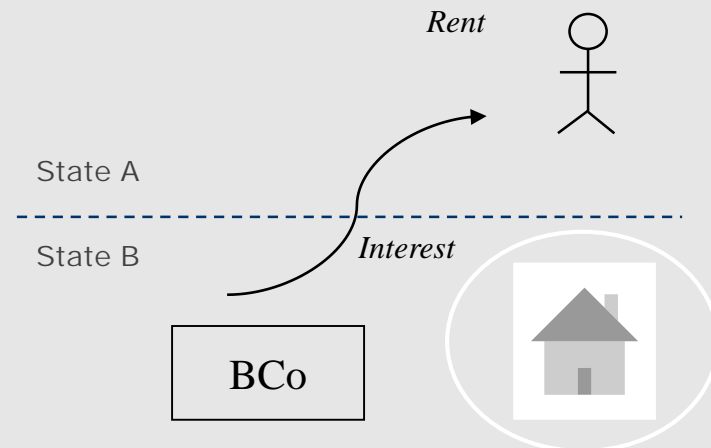
# Article 6 OECD Model

## Paragraph 2

- Article 6(2):
  - reference to the law of the Contracting State where the property is situated
  - ships, boats and aircrafts shall never be considered immovable property
  - income from indebtedness secured by immovable property is dealt with by Article 11

*DTT A-B:*

- *Art. 6 does not apply*
- *Art. 11 applies*



# Article 6 OECD Model

## Income from agriculture and forestry

- Article 6(1):
  - Income from agriculture and forestry
    - Contracting States may agree to deal with it under Article 7 as a business income
    - Includes income from agricultural and forestry activities

# Article 6 OECD Model

## Paragraph 3

- Article 6(3):
- The provisions of article 6 shall apply irrespective of the form of exploitation of the immovable property
- Income derived from the direct use, letting or use in any other form of immovable property



# Article 6 OECD Model

## Paragraph 4

- Article 6(4):

- “The provisions of paragraphs 1 and 3 shall also apply to the income from immovable property of an enterprise”.*

- Article 7 (Business profit, *infra*):

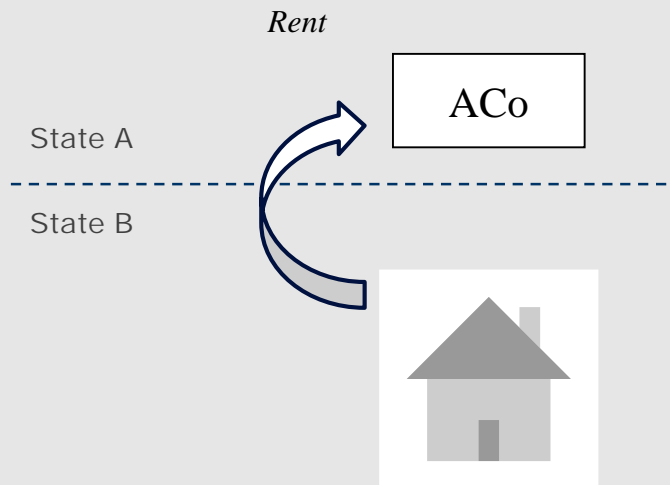
- “Profits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein”.*

- “Where profits include items of income which are dealt with separately in other Articles of this Convention, then the provisions of those Articles shall not be affected by the provisions of this Article”.*

# Article 6 OECD Model

## Income from immovable property of an enterprise

- Article 6 prevails over Article 7: the State in which the immovable property is located has the right to tax



*DTT A-B:*

- *Art. 7 does not apply*
- *Art. 6 applies*

# **Article 15**

## **Income from employment**

# Article 15 OECD Model

## Overview

- Article 15 of the 2014 OECD Model Tax Convention (“OECD MTC”) regulates “**income from employment**”
- This concept is not defined in the OECD MTC
  - Its content can be derived from the distinction drawn by the OECD MTC between employment income and business profits (Article 7 OECD MTC): focus on the relationship of subordination and on the lack of entrepreneurial risk
  - Directors fees, pensions and income from government service are not “income from employment” since Articles 16, 18 and 19 OECD MTC take precedence over Article 15. Income from the activities of entertainers or sportspersons (Article 17 OECD MTC) are not covered as well

# Article 15 OECD Model

## Example

- Severance payments that help employees during transition to another job fall under Article 15 OECD MTC because they are based on employment relationships
- If the severance payment is granted in lieu of a pension it should be treated as a pension → Article 18 OECD MTC applies, giving the residence State the sole right to tax

# Article 15 OECD Model

## Paragraph 1

- Article 15 OECD MTC attributes the exclusive taxing right to the residence State of the recipient **unless** the employment is exercised in the other contracting State  
→ **Principle of the place of work:** the State of activity has a right to tax as well

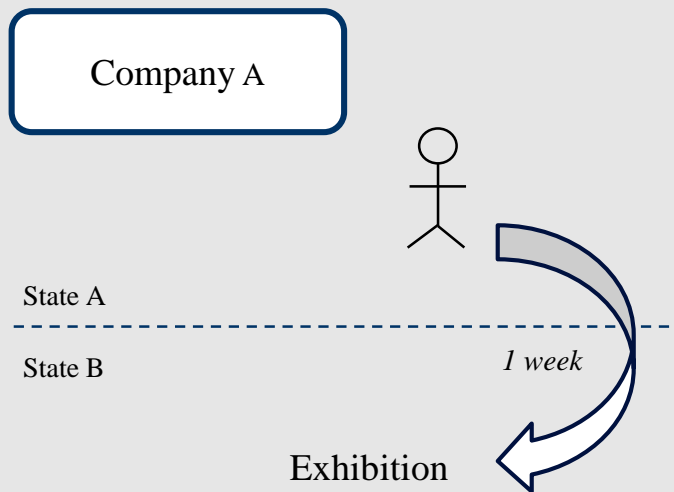
# Article 15 OECD Model

## Paragraph 2

- **Exception to the principle of the place of work** → the residence State will have the exclusive right to tax if the employment is exercised in the other contracting State and the following requirements are all met
  - The recipient of the income is not present in the other contracting State for more than **183 days** within a 12-month period
  - The remuneration is paid by an employer or on behalf of an employer who is **not resident** in the State of activity
  - The remuneration is **not borne by a PE or a fixed base** that the employer has in the State of activity

# Article 15(2) OECD Model

## Example 1



- An employee of Company A works at an exhibition in State B for one week, while during the rest of the year he works in State A
- Under Art. 15(2) only State A has the right to tax the income of the employee during that week
  - Presence in State B for a period not exceeding 183 days
  - Company A not resident in State B
  - Payments coming from a company that has no PE in State B



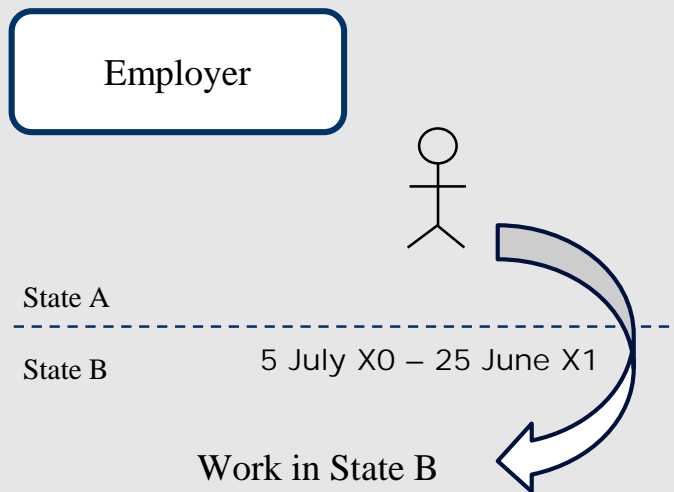
# Article 15(2) OECD Model

## 183-days period

- 183-days period calculated on the basis of **days of physical presence**
  - The Commentary to the OECD MTC clarifies that the following days are included in the calculation:
    - Part of a day
    - Day of arrival and day of departure
    - 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 and days of sickness
  - The 1992 OECD MTC clarified that the period has to be calculated as the aggregate of 183 days in any 12-month period commencing or ending in the fiscal year concerned (*cfr.* example in the next slide)

# Article 15(2) OECD Model

## Example 2

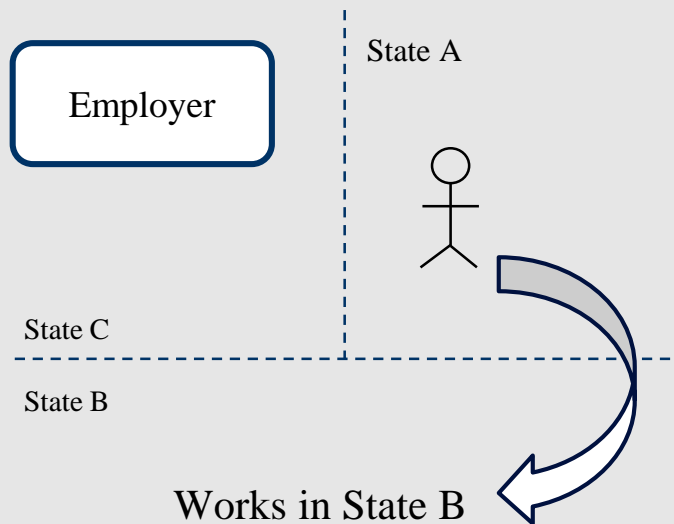


- A person resident in State A works in State B for a State A employer from 5 July X0 to 25 June X1. The State A employer does not have a PE in State B, which could bear the remuneration of the employee
  - Art. 15(2) does not apply because the employee is present in State B for more than 183 days within a 12-month period
  - Both the State of activity (State B) and the residence State (State A) have taxing rights on that income
- Before the 1992 OECD MTC, since the employee would not have exceeded 183 days in either calendar year, the exception to the place of work principle would have been applicable → State A would have had the sole taxing right

# Article 15(2) OECD Model

## Example 3

- Article 15(2) OECD Model is only applicable **if the employer is not resident in the State of activity** → it also applies if the employer is resident in a third State



- A taxable person resident in State A works in State B for an employer resident in State C. The employer does not have a PE in State B
- Art. 15(2) is applicable → the residence of the employer in a third State (State C) does not change the legal situation

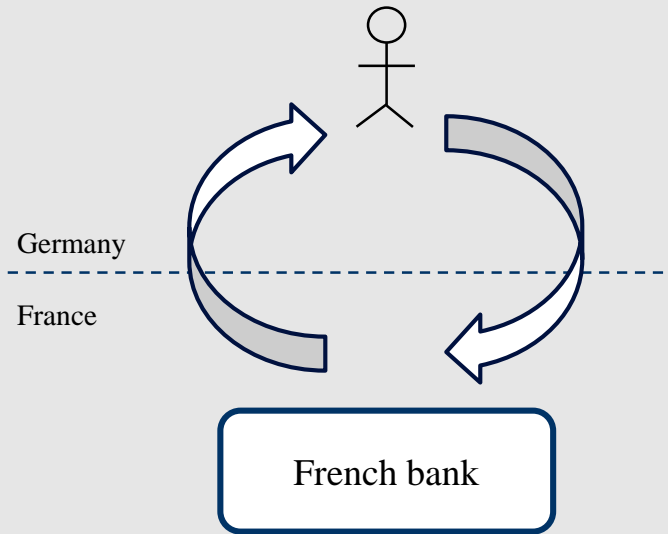
# Article 15 OECD Model

## Frontier workers

- The OECD MTC does not contain special rules for **frontier workers** → they are covered by the general provisions of Article 15 OECD MTC
- Few European DTCs provide for **specific provisions**
  - If income from employment is derived by a person who is resident in one State and has his/her place of employment in the other State and returns to that residence State daily, the income is taxable only in the residence State
- *E.g.* Article 15(4) of the Italy-Swiss DTC refers to the **Swiss-Italian Agreement of 3 October 1974**
  - income derived by a “frontier worker” in respect of an employment
  - an Italian frontier worker is defined as an individual who (i) works in the canton of Graubünden, Ticino or Valais and (ii) is resident in an Italian municipality whose territory falls in a 20 km zone from the border with one of those cantons

# Article 15 OECD Model

## Frontier workers - Example



- A person is employed by a French bank and is resident in Germany. Every day he commutes from Germany to France and returns to Germany in the evening
  - Under Art. 13 of the France-Germany DTC (not corresponding with any article of the OECD MTC) income from employment derived by persons who work in the frontier zone of one of the contracting States and have their permanent homes in the frontier zone of the other contracting State, to which they generally return each day, shall be taxable only in that other State
- Germany has the right to tax the income from employment and France does not have any taxing right

# Article 15 OECD Model

## Paragraph 3

- Article 15(3) **2014** OECD MTC

Remuneration derived in respect of an **employment exercised aboard a ship or aircraft** operated in international traffic, or aboard a **boat engaged in inland waterways transport**, may be taxed in the Contracting State in which the place of effective management of the enterprise is situated

- Article 15(3) **2017** Draft OECD MTC

Remuneration derived by a **resident of a Contracting State** in respect of an employment, as a **member of the regular complement of a ship or aircraft**, that is exercised aboard a ship or aircraft operated in international traffic, other than aboard a ship or aircraft operated solely within the other Contracting State, shall be taxable only in the first-mentioned State

→ clearer and administratively simpler rule

# **Article 16**

## **Directors' fees**

# Article 16 OECD Model

## Overview

- Article 16 OECD MTC covers directors' fees and similar remuneration that a person receives in his/her capacity as a “**member of a board of directors**”
- This concept is not defined in the OECD MTC
  - According to prevailing opinion it refers to supervisory activities
  - Income from management activities is not covered by Article 16
- Article 16 UN Model deviates from the OECD as it has a second paragraph covering remuneration paid to “**top-level managerial positions**”
  - Persons occupied with supervising activities, as well as persons performing management activities, fall within the scope of the provision



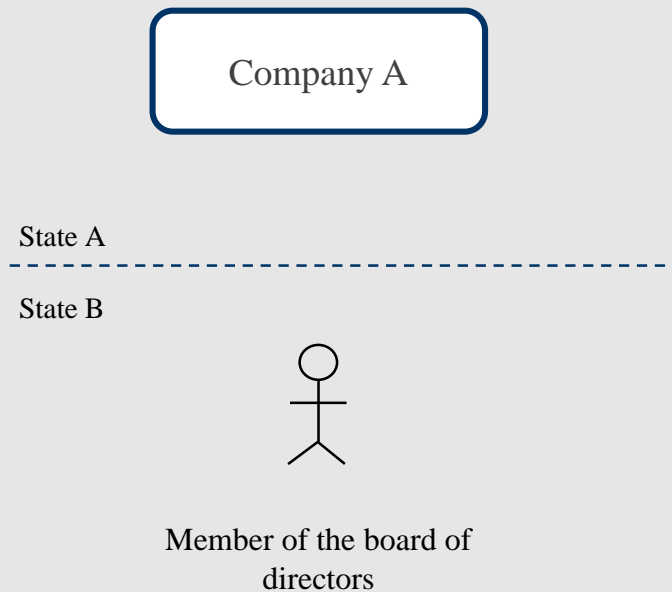
# Article 16 OECD Model

## Allocation of taxing rights

- Under Article 16 OECD MTC the residence State of the company for which the person receiving the remuneration serves as a member of the board of directors may tax such remuneration
- Since it might sometimes be difficult to ascertain where the services are performed, the provision treats the services as performed in the State of residence of the company

# Article 16 OECD Model

## Example



- A member of the board of directors of Company A is resident in State B. Under Art. 16, since the place of effective management of the company is in State A, State A has the right to tax the board member
  - The taxes paid in State A have to be credited against the taxes paid in State B (Art. 23)

# **Article 17**

## **Entertainers and sportspersons**

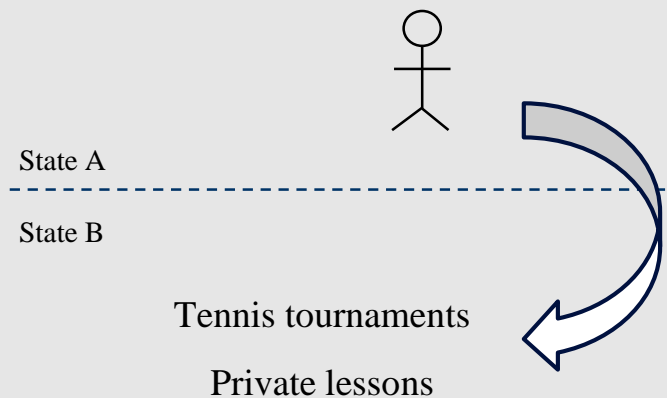
# Article 17 OECD Model

## Overview

- Article 17 OECD MTC regulates the income of **entertainers**, such as theatre, motion picture, radio or television artistes, of **musicians** and of **sportspersons**
- These concepts are not defined in the OECD MTC
  - It can be concluded from the examples provided in the Commentary that they can only be persons **appearing in public**
  - Income generated by entertainers not performing in public – such as painters, sculptors, authors or composers – is not covered by Article 17
  - Article 17 applies not only to athletes in the classic sense, but also to golfers and jockeys. Activities from the field of entertainment, such as billiards, chess or bridge, are also regarded as sport activities

# Article 17 OECD Model

## Example 1



- A famous tennis player resident in State A earns income in State B from **tennis tournaments** as well as from giving **private lessons**
  - The income from the tournaments is covered by Art. 17
  - The income from the tennis lessons is not covered by Art. 17 since they are not related to a public performance

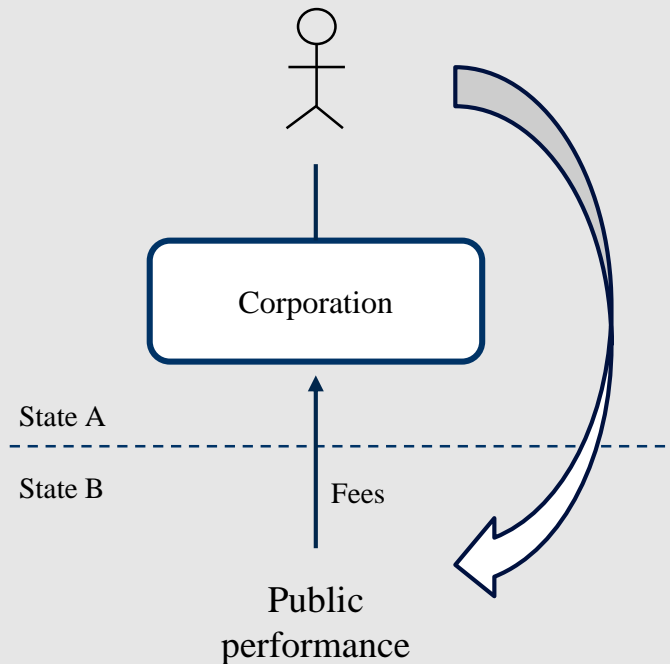
# Article 17 OECD Model

## Allocation of taxing rights

- Article 17(1): the **State of activity** has the right to tax the income
  - The rule applies regardless of whether the entertainer or the sportsperson performs as an employee or independently
  - A PE or a fixed base is not required
- Article 17(2): “**look-through approach**” → *cfr.* example in the next slide

# Article 17 OECD Model

## Example 2



- A singer resident in State A plans to perform in State B. For this purpose, he establishes a corporation. The singer is the only shareholder of that corporation. The corporation agrees to provide the services of the singer to perform in State B and the fee is paid to the corporation  
→ Art. 17(2) OECD MTC guarantees, based on the **look-through approach**, that State B can tax the artiste's income

# **Article 18**

## **Pensions**



# Article 18 OECD Model

## Overview

- Article 18 OECD MTC regulates **pensions** and **other similar remuneration** paid to a person resident in a contracting State with respect to former employment
  - These payments must primarily serve the maintenance of the person (though not exclusively)
  - Covers pension payments made in consideration of past private employment. If the payments result from a former independent personal service, they do not fall under Article 18 OECD MTC
  - Pensions paid for government services do not fall under Article 18 since they are covered by Article 19(2)
  - Article 18 UN Model explicitly mentions payments made under a public scheme that forms part of the social security system of contracting State

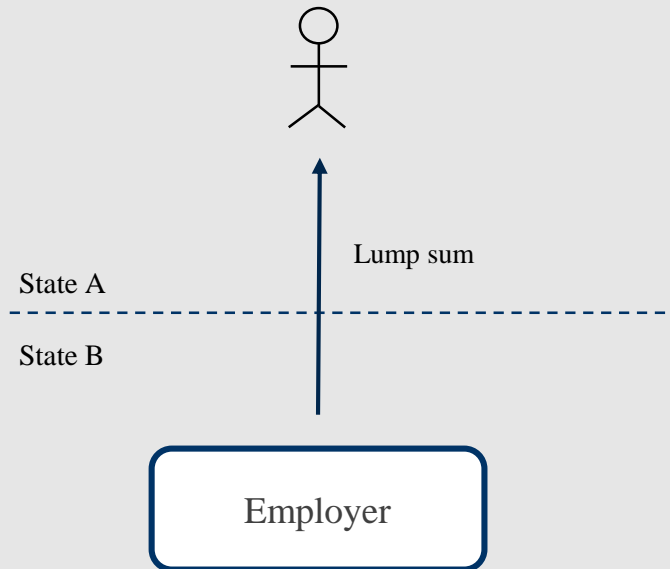
# Article 18 OECD Model

## Allocation of taxing rights

- Under Article 18 OECD MTC, the residence State of the recipient has the exclusive right to tax. The State making the pension payment – the former State of activity – cannot tax.
- The above principle often causes problems between two contracting States, especially if a taxpayer was able to deduct his pension contributions from his taxable income in his previous State of residence and then moves to another State: the new State of residence will have the exclusive taxing rights, while the other contracting State provided the tax advantage
  - If a taxpayer moves from a State where the pension contributions are taxed to a State where the pension payments are taxed, he will endure double taxation
  - If the situation is reversed, the pension shall remain untaxed altogether

# Article 18 OECD Model

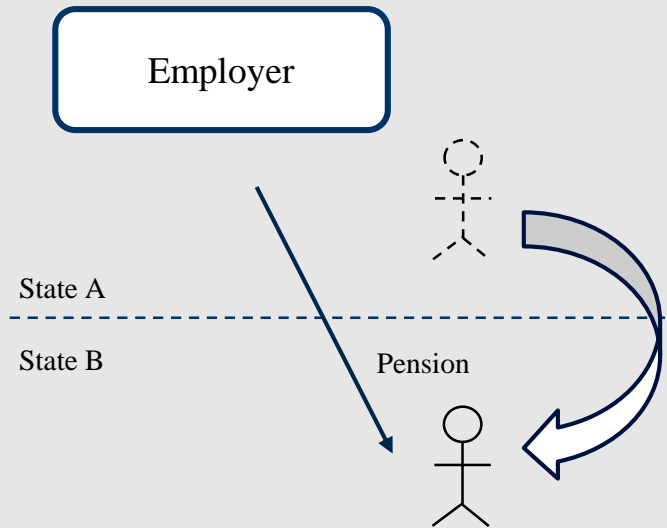
## Example 1



- An employee resident in State A has worked for a company resident in State B for 25 years: 5 years in State B, the remaining period outside of it
- During his employment he contributed to the employer's pension plan. When he decides to retire he requests to redeem his pension rights related to his employment outside of State B. The request is granted and the taxpayer receives a lump sum on which withholding taxes are imposed
- Does State B retains taxing rights under Art. 18 OECD MTC?
  - Also such rights are covered by the term **“other similar remuneration”**: State A, as the residence State, has the exclusive taxing right

# Article 18 OECD Model

## Example 2



- An employee resident in State A was employed by a company resident in State A and contributed to its pension plan
- After his retirement, he moved to State B and now receives a pension in State B
  - State B has the exclusive taxation right under Art. 18 OECD MTC
  - State A cannot tax the pension income

# **Article 19**

## **Government service**

# Article 19 OECD Model

## Overview

- Article 19(1) OECD MTC regulates **salaries, wages and other similar remuneration** paid by a contracting State, or by a political subdivision or a local authority thereof, to an individual in respect of services rendered to that State or subdivision or authority
  - The income must be paid by the State itself or by a political subdivision
  - If the payments are made by other public entities, Article 19 OECD MTC is not applicable
  - The word “salaries, wages and other similar remuneration” suggest that these payments would then be categorized as income from employment

# Article 19 OECD Model

## Allocation of taxing rights

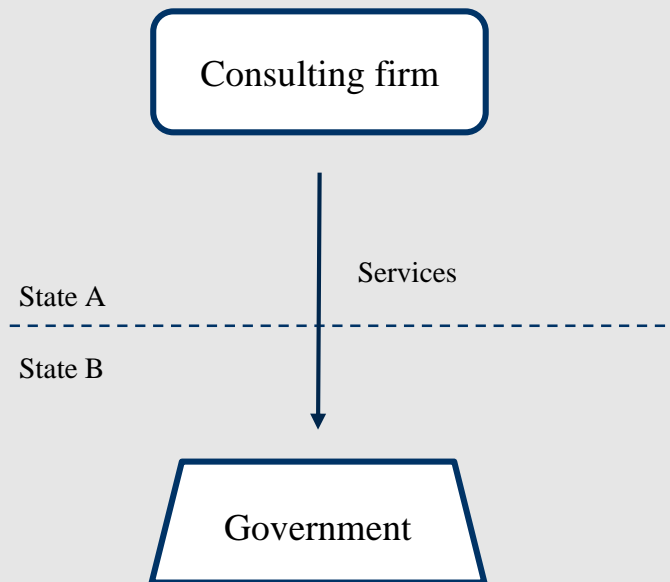
- Article 19(1)(a) OECD MTC: the taxation rights are exclusively attributed to the State for which the services are provided
  - One State is prevented from indirectly taxing the other State
  - The State of activity has no right to tax

**Exception:** Article 19(1)(b) OECD MTC allocates the exclusive right to tax to the State of activity if the recipient of the income:

- is resident in the State of activity; and
- is either a national of the State of activity or in any case has not become a resident of that State exclusively in order to perform services there

# Article 19 OECD Model

## Example 1

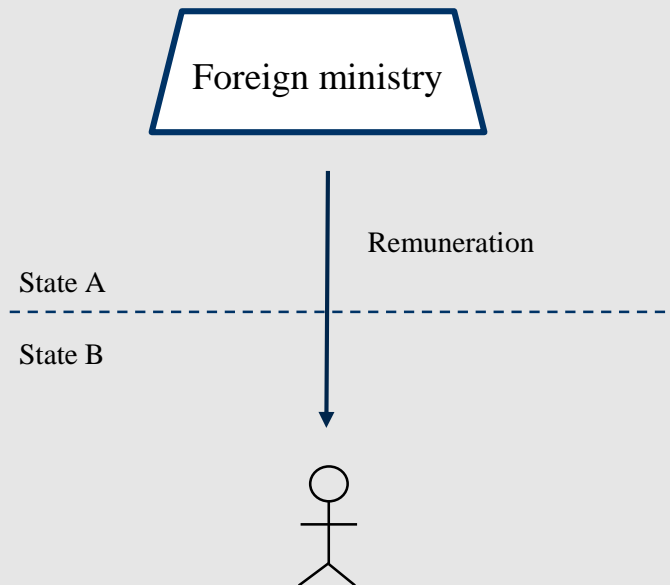


- A consulting firm resident in State A provides services to the State B's government for the recruitment of a highway construction company. The consulting firm works for the State B's government on the basis of a service contract  
→ Art. 19 OECD MTC cannot be applied



# Article 19 OECD Model

## Example 3



- State A's foreign ministry engages a citizen of State B who resides in State B. The employee's job is carried out in State B. State A is the "State of the fund"
  - Under Art. 19(1)(b), State B has the exclusive taxing right since the recipient of the income is resident in State B, renders his services in State B and is a national of State B
  - State A cannot tax the income

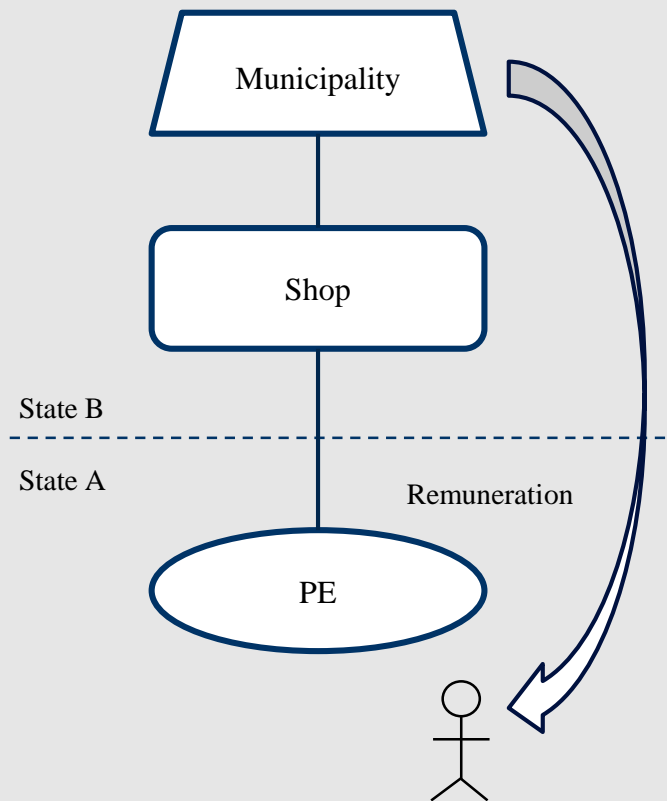
# Article 19 OECD Model

## Paragraph 2

- Article 19(2) covers **pensions and other similar remuneration** paid by, or out of funds created by, a contracting State or a political subdivision or a local authority thereof
  - Pension payments made to individuals for services performed for the State or its subdivision or authority. Article 19(2) OECD MTC takes precedence over Article 18 OECD MTC
- Article 19(3): salaries, wages, pensions and other similar remuneration for services rendered in connection with a **business carried on by a contracting State or a political subdivision or a local authority thereof** are not covered by Article 19 (e.g. State railways, post office, etc.)
  - Taxed based on the rules for employment (Art. 15), directors' fees (Art. 16), entertainers and sportspersons (Art. 17) or pensions (Art. 18) → *cfr.* example in the next slide

# Article 19 OECD Model

## Example 2



- A resident of State A is employed by a shop operated by a municipality of State B. The employee works in a PE of this shop and receives his remuneration from the municipality of State B  
→ Art. 19 does not apply since Art. 15 applies to remuneration paid in respect of services rendered in connection with a business carried on by a territorial authority of a contracting State

# Article 19 OECD Model

## Allocation of taxing rights

- The State of the fund principle also applies to **pensions**
  - Article 19(2)(a) OECD MTC: the contracting State making pension payments to a former employee has the exclusive right to tax these payments
  - However, the State of the fund principle is overruled if the recipient of the income is both resident in the other contracting State and a national of that State

# **Article 20**

## **Students**

# Article 20 OECD Model

## Overview

- Article 20 OECD MTC covers **payments that a student or business apprentice receives for maintenance, education or training**
- It applies to a student or business apprentice who is or was, immediately before visiting a contracting State, a resident of the other contracting State
- The category of persons to which this provision applies is not defined
  - The main purpose of the person's presence in the host State must be education or training
  - The student or business apprentice might also perform other employment activities on the condition that the main purpose of the stay still remains education or training
  - The payments can also be employment income

# Article 20 OECD Model

## Allocation of taxing rights

- Article 20 OECD MTC does not allocate taxing rights to the source State but rather **prevents the host State from taxation**
- It is required that the person is **present** in the host State
  - It is possible that the recipient of the payments remains resident in the other contracting State or becomes resident in the host State during the studies, provided he or she was resident in the first-mentioned State directly before the entry
  - If a person changes residence to a third State at the time of starting the training or education in the host State, Article 20 is applicable even though the other allocation rules are not
- Only **payments from sources outside the host country** are covered. Payments from sources within the host country can be taxed there

# Article 20 OECD Model

## Allocation of taxing rights

- *“Payments which a student or business apprentice who is or was immediately before visiting a Contracting State a resident of the other Contracting State and who is present in the first-mentioned State solely for the purpose of his education or training receives for the purpose of his maintenance, education or training shall not be taxed in that State, provided that such payments arise from sources outside that State”.*



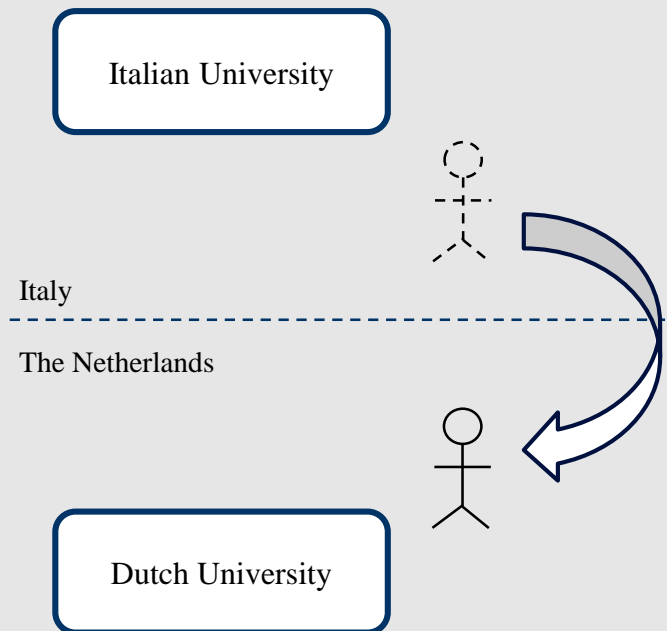
# Article 20 OECD Model

## Allocation of taxing rights

- According to some DTCs, Article 20 also applies to **professors, researchers and teachers**, provided they are only temporarily present in the host State and that such persons are, or immediately before their stay were, resident in the other contracting State

# Article 20 OECD Model

## Example



- An Italian university professor is a guest professor at a Dutch university
- Art. 20 of the Italy-Netherlands DTC provides that he is not taxable in the Netherlands, provided that he is present in the Netherlands solely for the purpose of teaching and that he does not stay in the Netherlands for a period exceeding 2 years. In addition, he must either remain an Italian resident or must have been resident in Italy before he started to work as a guest professor in the Netherlands
- If the professor ceases to be a resident of Italy, he must become a Dutch resident to be covered by the Italy-Netherlands DTC.

# **Article 21**

## **Other income**

# Article 21 OECD Model

## Other income

- Article 21(1)
  - *“Items of income of a resident of a Contracting State, wherever arising, not dealt with in the foregoing Articles of this Convention shall be taxable only in that State”*
  - Exclusive right to tax to the Contracting State of residence
  - No taxing right to the other Contracting State

# Article 21 OECD Model

## Other income

- Coordination with Article 7:
  - Article 7(4) includes a residual provision according to which Article 7 does not apply in relation to items of income in the scope of other provisions of the OECD MC – potential conflict between Article 7 and Article 21
  - Article 21(2) provides that Article 7 prevails
- Applies to income from third States as well as to income from the Contracting State of residence