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Taxpayers' Residence as Basis for Exercising Tax Jurisdiction: A Conceptual Analysis

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ABSTRACT

State's jurisdiction to tax is exercisable when there is a link between the income derived and the proposed taxable person. The state can choose to attach such a nexus to the personality of the income earner who resides within its territory. It can then tax the person on a residence basis, whether or not the income was derived from a source within its territory (residence-based system). It can also attach such a link to the income itself, and then impose a tax on the basis of the source of that income, whether or not derived by a resident (source-based system). Thus, analysis of the concept of fiscal residence is crucial to the understanding of the extent of taxpayers' liability under the residence-based tax regime. Using the analytical tool of doctrinal method, the paper bring to fore the paper examines the interface between states' sovereignty and the scope their jurisdiction to impose and enforce tax. It also analyses the nature of fiscal residence and its theoretical underpin. It is found that, in choosing either of the residence or source based system, a state is expected to evaluate the central focus of its sovereignty, using a political conception of the state. The state may consider population as the main focus of sovereignty. Thus, imposing a tax on all income of its residents based on the personal relationship with the state, irrespective of the source of that income (residence-based). A state could as well consider its territory as the primary focus, thereby imposing a tax on all income derived from the territory, irrespective of the identity of the producer (source-based).

Key Words: *International Tax Regime, States' sovereignty, Residence-based tax Jurisdiction.*

INTRODUCTION

The necessary condition for exercising tax jurisdiction over any person by the state is the link between that proposed taxable person and the state. The state can choose to attach such a nexus to the personality of the income earner who resides[1] within its territory. It can then tax the person on a residence basis, whether or not the income was derived from a source within its territory. It can also attach such a link to the income itself, and then impose a tax on the basis of the source of that income, whether or not derived by a resident. No universal rules for determining the residency of a person (either natural or juristic) for tax purposes apply in all circumstances. Thus, each jurisdiction has its definitional rules of residence as contained in their respective income tax legislation and as interpreted by their courts. It is relatively rare for taxpayers to question the State's jurisdictional power to tax them, but they may fear that the divergence of the definitional rules in this regard may expose them to being regarded as tax residents of more than one state. Taxpayers may legitimately expect that states should cooperate with each other in defining who are 'residents' for tax purposes. On the other hand, States balance two conflicting interests when designing their domestic fiscal laws. States want to design their definitional rules in such a way as to protect their tax base and prevent manipulation by the taxpayers. But, at the same time, they need to accept the reality of globalisation, by considering the jurisdictional rules applied by other states.

Thus, the state may take account of the link to the income and impose tax on the basis that the source of that income is located within the state, whether or not the income was derived by a resident.[2] Alternatively, the state can take account of its linkage to the persona of an income earner who resides[3] within its territory.

[1] Or in the case of United States of America, if the person is a citizen even if he is not a resident

[2] Williams RC 'Income Tax in South Africa: Law and Practice (2006) 4th ed LexisNexis, Durban

[3] Or in the case of United States of America, if the person is a citizen even if he is not a resident. See

It can then tax that person on a residence basis, whether or not the income was derived from a source within its territory. The distinction between residence and source-based systems is irrelevant to a person who earns and invests his earnings in the state where he resides. The distinction between residence and sourced-based systems becomes relevant where the person derives his income in a state other than where he resides. There are no universal rules for determining the tax residence of either natural or juristic persons.[4] Thus, each jurisdiction has its definitional rules in respect of 'residence' as contained in their respective domestic income tax legislation and as interpreted by its own courts.

The absence of a globally accepted criterion for fiscal 'residence' test has led to diversity and inconsistencies in defining both individual and corporate residence. Thus, there are situations where an overlapping taxing power occurs between two or more states that have both adopted a residence-based system. In resolving such conflicts, States usually adopt both unilateral and bilateral mechanisms in the form of double taxation relief provisions in their domestic laws and an international bilateral Double Taxation Agreement (DTA) to resolve the conflicting jurisdictional claims and to enhance fiscal cooperation.[5] Thus, it is imperative to analyse the concept of fiscal residence as a connecting factor for tax exercising tax jurisdiction. This paper will focus on one of the connecting links, mentioned above, namely, residence-based income tax. The paper examines the interface between states' sovereignty and the scope their jurisdiction to impose and enforce tax. It also analyses the nature of fiscal residence and its theoretical underpin.

State Sovereignty and Jurisdiction to Tax

The power to impose tax is a dimension – and a crucial dimension – of state sovereignty.[6] The state must have a jurisdictional basis for exercising this power. Thus, the necessary precondition for the exercise of fiscal jurisdiction by a state is the existence of the requisite link between that person (or the potentially taxable amount, where the source of income is in issue) and the state.[7] Thus, each tax jurisdiction lays down its own definitional rules in this regard in their respective tax legislation, and these rules are of course subject to interpretation by their courts.

Tax jurisdiction is exclusively a creation of statute.[8] The taxing power cannot be conferred otherwise than by statute. However, the unsettled nature of the criteria used in determining such jurisdiction invites academic analysis of the fundamental operational concepts or connecting factors in the exercise of tax jurisdiction. As Avi-Yonah[9] puts it, "Taxes are the last topic on which one would expect sovereign nations to reach consensus". The

Blum, C and Singer, PN 'A Coherent Policy Proposal for U.S. Residence-Based Taxation of Individuals' (2008) 41 Vand. J. Transnat'l L. 708

[4] The determination of the residence status of the taxpayers is crucial because as it affects all other aspects of the tax system. It determines the scope of the taxable income, the rate of the tax, the level of allowable deductions, the availability of exemptions and the obligation to withhold tax. See Williams, RC (2006) at 32

[5] For the purpose of this paper, references to a bilateral or multilateral tax treaty regime are limited to the definitional rule of 'resident' for the purposes of the treaty, not the detailed content of the treaty.

[6] Martha, RSJ 'The Jurisdiction to Tax in International Law' (1989) Kluwer, Deventer at 12–18; Avi-Yonah, RS 'International Tax as International Law' (2004) 57 Tax Law Rev 483 at 484–91Qureshi, AH 'The Public International Law of Taxation: Texts, Cases and Materials' (1994) Graham & Trotman, London at 1–9 Knechtle, AA 'Basic Problems in International Fiscal Law' (1979) Kluwer, The Netherlands 37, 41; Qureshi, AH 'The Freedom of a State to Legislate in Fiscal Matters under General International Law' (1987) 41 BIFD 14; Rosenbloom, HD 'International Tax Arbitrage and the "International Tax System"' (2000) 53 Tax Law Rev 137.

[7] Or in the case of United States of America, if the person is a citizen even if he is not a resident. See Zelinsky, EA 'Citizenship and Worldwide Taxation: Citizenship as an Administrable Proxy for Domicile' (2011) 96 IOWA L. Rev. 1289Worster, WT 'The Constitutionality of the Taxation Consequences for Renouncing U.S. Citizenship' (2010) 9 Fla. Tax Rev. 921 at 1006; Kirsch, MS 'Taxing Citizens in a Global Economy'(2007) 82 N.Y.U. L. Rev. 443;

[8] Williams RC 'Income Tax in South Africa: Law and Practice (2006) 4th ed LexisNexis, Durban 7 (Neither international law nor common law can in any way impose tax obligation on any person)

[9] Avi-Yonah RS 'The structure of international taxation: A proposal for simplification' (1996) 74 Tax L. Rev. 1301 1303

analysis that follows will commence with the broad concept of state jurisdiction and then narrow the focus to tax jurisdiction.

The tax jurisdiction of a state connotes the sovereign power of that state to legislate in respect of all persons within that jurisdiction, in regard to the application and enforcement of such legislation.[10] The power of the state in this regard is an attribute of sovereignty.[11] The sovereignty of the state can be extended to everything that exists within the state,[12] subject to any limitations imposed by international law,[13] and may be exercised in varying ways according to the policies of the state in question.[14] The sovereign power of the state can only be called into question or limited in terms of its own constitution or when it involves an international element where the action of the state affects a person who is not a subject of that state.[15] The twin principles laid down in the case of *France vs. Turkey*[16] *(the Lotus case), namely.* the principles of equality and non-interference in the domestic affairs of other states[17] established the limitations of the state sovereignty.The latter principle was first applied in the case of United Kingdom of Great Britain vs. Northern Ireland-Albania (the Corfu Channel Case).[18]

Tax jurisdiction is an aspect of the state's sovereign power to levy a tax on taxable persons within its sovereignty including those who derive their income from it. [19] The nexus between tax jurisdiction and sovereignty, suggests that every type of jurisdiction is limited and subject to any limitations inherent in sovereignty in general.[20] In income tax, the state

[10] Colangero A J 'Jurisdiction, immunity, legality and jus cogens' (2014) 14 Chi. J. Int'l L. 53 at 58 see also Ludsin H 'Returning sovereignty to the people' (2013) 46 Vand. J. Transnational L. 97 Beale, 'The jurisdiction of a sovereign state (1923) 36 Harv. L. Rev. 241 see also Lowell A.L. "The limit of sovereignty' (1988) 2 (2) Harv. L. Rev 70 at 72.

[11] Wurzel H 'Foreign Investment and extraterritorial taxation' (1938) 38 Colum. L. Rev 809, Mann The Doctrine of jurisdiction in international law (1968) III RdC 1 30 (jurisdiction is an aspect of sovereignty, it is coexistent with it, and indeed, incidental to but is also limited by, the state's sovereignty, hence jurisdiction cannot exist without sovereignty.), Brownlie I 'Principles of Public international law' (1979) 3rd ed 289

[12] However, due to a particular relationship, a state may extend its jurisdiction to certain persons outside its territory. Also a state may lack power to exercise any form of jurisdiction over another group of persons living within its territory who enjoy certain legal immunity.

[13] Martha RSJ 'The jurisdiction to tax in international law: Theory and practice of legislative fiscal jurisdiction (1989) Kluwer Netherland, l, Martha RSJ 'Extraterritorial taxation in international law *in* Meessen KM (ed) 'Extraterritorial jurisdiction in theory and practice (1996) Kluwer Law International, London see also Yee S 'Universal Jurisdiction: concept, logic and reality (2011) 10 (3) Chinese Journal of Int'l Law 503 at 530

[14] Albrech AR "The taxation of alien under international law (1952) 29 British Yearbook of International Law (Brit. Y. B. Int'l Law) 145

[15] Danziger E International income tax (1991) Butterworth, Durban, 13, Martha RSJ 'The jurisdiction to tax in international law: Theory and practice of legislative fiscal jurisdiction (1989) Kluwer Netherland

[16] (1927) PCIJ

[17] Under the former principle no state is entitled to exercise any form of sovereign power beyond its boundaries, unless acting pursuant to a treaty or any principle of customary international law. The latter principle stipulates that in the absence of any prohibition by international law to the contrary; a state is at liberty to exercise any form of sovereign power within its boundaries without any form of outside intervention. see Shaw MN 'International law' (2008) Cambridge University Press, Cambridge at 621; Ryngaert C 'Jurisdiction in international law (2008) 1st ed oxford University Press, New York

[18] (1949) 4 ICJ and subsequently applied in the cases of Nicaragua vs. United States (1986) ICJ (the principle of non-interference is an important aspect of sovereignty); Democratic Republic of Congo vs. Uganda (2005) ICJ see also Jamnejad M and Wood M 'The principle of non-intervention' (2009) 2 Leiden J. Int'l L. 345 at 346

[19] Pires M 'International judicial double taxation of income (1989) Kluwer

[20] Christians A 'Sovereignty, taxation and social contract (2009) 18 Minn. J. Int'l L. 99 see also Jackson RH 'Human Rights Protection in a World of Sovereign States' in Ronald Tinnevelt and Gert Verschraegen (eds.) Between Cosmopolitan Ideals and State Sovereignty (2006) Palgrave Macmillan, New York 134-146; Jackson RH 'Sovereignty as a Doctrine of Moderation,' (2004) in C. Nolan (ed.), Power and Responsibility in World Affairs: Praeger, New York. 57-76; Epstein, RA 'Consent, not power, as the basis of jurisdiction frontiers of jurisdiction,' (2001) University of Chicago Legal Forum 1 (He analysed the word 'power' being used in discussing sovereignty. He stated that the power mentioned refers to power of the subject who give consent to the state to exercise the power on their behalf.) see also Guzman AT and Hsiang J 'Some ways that theories on customary

exercises this power by determining the taxable income, the taxable person, and the tax rate.[21] The vital questions are whether international law imposes limitations on a state's taxing powers; if it does, the nature of the limitations imposed by international law on the state's taxing power and the extent to which such limitations affect the state's taxing powers on domestic tax issues.

The traditional approach to the first question views tax jurisdiction as an aspect of the state's sovereign autonomy to tax those whom it is constitutionally proper to tax, without any outside interference.[22] This approach traces its origin to the judicial line of reasoning expressed by Lord Mansfield: "No country ever takes notice of the revenue laws of another."[23] Wurzel succinctly argues in favour of the notion of states' absolute taxing power, thus:

"National taxing power is an essential attribute of sovereignty and sovereignty is omnipotence... This connection with the notion of sovereignty makes a nation's taxing power primarily a problem of international, rather than of municipal, law…What we are merely interested in knowing: is there anything in the written or unwritten law of nations to indicate a universally recognised rule is authoritatively assigning among nations, and thereby impliedly limiting, the jurisdiction to tax? The answer is very definitely in the negative..." [24]

The central argument of the proponents of this approach is that the state's tax jurisdiction over persons within its sovereignty and any self-imposed limitation thereon is purely a creation of domestic laws. It could be argued that this approach was grounded on the principle of 'non-interference' in the domestic affairs of a state by any other state as established in the Lotus case.[25]

international law fail: A reply to Loszlo Blutman' (2014) 25 (2) Eur. J. Int'l law 559 However, due to economic integration, transactions are being carried out across borders resulting to a situation where more than one country is able to tax the same item (should the country in which the recipient of income resides or the country in which the income derived) makes the intervention of international law very relevant.

[21] Cappelen AW 'The Moral Rationale for International Fiscal Law' (2006) 15 (1) Ethic and International Affairs noted some features of tax jurisdiction;

1) The character of the country (rich or poor) and that of the tax subject (whether he has the ability to pay are immaterial to justification of taxation.
2) Historical relationships do not create the right to tax, for example, former residence or former citizenship—do not create tax liabilities.
3) The nature of the nexus between a state and its tax subjects determines the tax liability of the tax subjects. That is a personal nexus creates unlimited tax liability, while an economic nexus creates limited tax liability.
4) It regulates the distribution of the taxing right among nations and it does not recognize the tax right of any other groups or entities.

[22] Finke J 'Sovereign immunity: rule, comity or something else' (2010) 21 (4) Eur. J. Int'l Law 881 (states are free to make as long as they observe the boundaries set by international law): Florani M 'The irony of int'l law: How int'l law limits state sovereignty (2010) available at www.aglr.wordpress.com/2010/04/05; Christians (2009) supra; Rosenbloom, HD "Sovereignty and the Regulation of International Business in the Tax Area" (1994) 20 Canada-United States Law Journal 267at 267. (No area of the law is closer to the subject of sovereignty than taxation); Park, WW 'Fiscal jurisdiction and accrual basis taxation: lifting the corporation veil to tax foreign company's profit (1978) 78 Colum. L. Rev. 1609

[23] *Hollman V. Johnson* (1775) 1120 at 1121.However, this line reasoning has been judicially negated in the cases of Government of India v. Taylor (1955) AC 491-8 and Krok v. CSARS (2015) ZASCA 107

[24] Wurzel H 'Foreign Investment and extraterritorial taxation' (1938) 38 Colum. L. Rev 809 at 812 – 814. Subsequent writers also followed this line of reasoning. See Norr 'Jurisdiction to tax and international income' (1962) 17 Tax L. Rev. 431 (No rule of international law exist to limit the extent of any country's taxing jurisdiction): Mann 'The doctrine of jurisdiction in international law (1968) III RdC 1 10; Hadari Y 'The choice of national law applicable to the nationality of such enterprise' (1974) 1 Duke L. J. 1 at 53 (..a country is free to adopt any theory of tax jurisdiction for suitable to its legal system); also Tillinghast D 'Tax aspects of international transactions (1978) see also Knechtle A 'Basic problem in international fiscal law' (1979) Kluwer, Deventer – asserts that national laws are not subject to any restrictions from international law. See also *Burnet V. Brook US 288 378 – (*'we determine national power in relation to other countries and their subjects by applying the principles of jurisdiction recognized in international relations.)

[25] And other subsequent decisions: Nicaragua vs. United States (1986) ICJ (the principle of non-interference is an important aspect of sovereignty); Democratic Republic of Congo vs. Uganda (2005) ICJ see also Jamnejad M and Wood M 'The

However, this principle was established in cases involving issues other than monetary affairs (including taxation).[26] Therefore, it cannot be slavishly applied to all the domestic affairs of the state, especially the exercise of a tax jurisdiction.[27] Since the view adopted in the traditional approach on the first question has made tax sovereignty a sacrosanct, it follows that the second question may not be addressed.

A modern approach to both questions postulates that the state's taxing power stems from sovereignty and that sovereignty is a power vested in the state. [28] The co-existence of this power requires a principle of international law to give direction to these incompatible forces, hence the need for international norms regarding taxation, capable of distributing taxing power between states. Therefore, the taxing power of the state is subject to any limitation imposed by international law.[29] Also, in the course of raising revenue, the state could come into conflict with other States, or require the assistance of those States in achieving its desired tax base. Thus, the states' divergence in defining the scope of their tax jurisdiction could lead to a situation where more than one state[30] seeks to exercise substantive tax jurisdiction over the same income, and where those states all rely on fiscal sovereignty to justify their stand. On the other hand, a state may require the assistance of other states to exercise its enforcement powers in respect of its tax jurisdiction. This approach aligns the concept of national sovereignty with taxation in an integrated world economy.

In most tax jurisdictional discourse states rely on their tax sovereignty to counter the influence of globalisation on their domestic tax regimes, especially when the subject matter involves a question of the definition of key terms.[31] Moreover, the connection between tax sovereignty and the impact of economic integration leads to an inconclusive debate among tax experts. Some commentators have claimed that raising revenue for the public good is an obligation imposed on the state, and that this duty cannot be severed from tax sovereignty, notwithstanding the impact of

principle of non-intervention' (2009) 2 Leiden J. Int'l L. 345 at 346

[26] Hertogen A 'An unusual suspect? Monetary sovereignty and financial instability (2010) 2 Goettingen J. Int'l L. 243 (He argues that a state's exercise of monetary sovereignty through its monetary policies can affect financial stability of other countries. Therefore, the principle of non-interference of domestic affairs is not applicable in the regard)

[27] Christians A 'Networks, norms, and national tax policy (2010) 9 (1) Wash. Univ. Global Studies L. Rev. 1 at 5 ('that early decisions against multilateralism led to the soft global tax governance structure supported by the OECD today')

[28] Christians (2009) supra at 105 Ring, DM 'What's at Stake in the Sovereignty Debate' (2008) 49 Va. J. Int'l L. 1 Bruce G. et al 'Negotiating Globalization: Global Scripts and Intermediation in the Construction of Asian Insolvency Regimes' (2006)31 Law & Soc. Inq. 521 at 522; Stewart, M 'Introduction: New Research on Tax Law and Political Institutions' (2006) 24 Law in Context 1, 1; Cockfield, AJ 'The Rise of the OECD as Informal 'World Tax Organization' Through National Responses to E-Commerce Tax Challenge (2006) 8 Yale J.L. & Tech. 136 at 169: Li, J 'Tax Sovereignty and International Tax Reform: The Author's Response, (2004)52 Can. Tax J. 141 at 144; Scholte JA 'Globalisation: a critical introduction' (2005) 2nd ed Palgrave Macmillan, New York, 519 Bräutigam, D 'Building Leviathan: Revenue, State Capacity, and Governance' (2002) 33 IDS Bulletin 10, 10 Michael J. Graetz, Taxing International Income: Inadequate Principles, Outdated Concepts, and Unsatisfactory Policies (2001) 54 Tax L. Rev. 261 at 277

[29] For the purpose of imposing the limitation, sovereignty may be categorised into the personal and territorial. Martha RSJ 'The jurisdiction to tax in international law: Theory and practice of legislative fiscal jurisdiction (1989) Kluwer Netherland - while establishing the limit imposed on municipal tax jurisdiction by international law, introduced the concepts of personal and territorial jurisdiction ; (the former gives the state the power to make and enforce its laws over any person that falls within its sovereignty by reason of his nationality, whereas the latter empowers a state to extend its laws over any alien who comes within the territory of the state) and from which he deduces the fundamental element that determines the extent of state tax jurisdiction – the elements are fiscal attachment, personal attachment and economic attachment.

[30] This can be the country where the recipient of the income resides or where the income was derived.

[31] Ring, (2008) supra at 9 (She identified quest for controlling revenue and fiscal policy as the functional rationales for grounding states' tax policies on sovereignty. Melo, G M 'Taxation in the Global Arena: Preventing The Erosion of National Tax Bases or Impinging on Territorial Sovereignty? A Critique of the OECD's Report," (2000) 12 Pace Int'l L. Rev. 183, 186

globalisation.[32] Thus, states are entitled to reject any act that can reduce or take away their sovereignty. However, other commentators make the case for entrenching an obligation on the states to cooperate with each other in formulating tax rules and policies.[33] The reality of global economic integration raises a question as to whether tax sovereignty entitles a state to define its tax jurisdiction freely, and whether other states cannot insist on compliance with a minimum standard?[34]

No state can declare the tax law of another state void,[35] nor can it impose its tax law on another State as they all enjoy equality of sovereignty.[36] However, even those[37] insisting on the absolute sovereignty recognise the fact that no state can prevent another from levying a tax on any person within its territory or with whom it has personal or economic connections. It follows that the tax jurisdiction of each state implies a corresponding right vested in other States[38] and that no state can implement its tax jurisdiction in isolation.[39] It can be concluded, therefore, that no state can claim exclusive tax jurisdiction. However, how to cooperate is a challenging issue.

It follows from the above that states need a forum where they can achieve co-operation in exercising their respective tax jurisdiction

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[32] Zou A 'International legal review of the relationship between international tax law and national tax sovereignty: Theoretical foundation and development practice (2014) Univ. of Hong Kong Faculty of Law Research paper No. 2014/010 Ring, DM (2008) 49 Va. J. Int'l L. (loss of tax sovereignty can undermine both revenue and fiscal policy of a no satisfactory method for balancing competing claims of tax sovereignty has not been articulated.); Bruce G. et al 'Negotiating Globalization: Global Scripts and Intermediation in the Construction of Asian Insolvency Regimes' (2006)31 Law & Soc. Inq. 521 at 522; Stewart, M 'Introduction: New Research on Tax Law and Political Institutions' (2006). 24 Law in Context 1, 1; Bräutigam, D 'Building Leviathan: Revenue, State Capacity, and Governance' (2002) 33 IDS Bulletin 10, 10 Graetz, MJ 'Taxing International Income: Inadequate Principles, Outdated Concepts, and Unsatisfactory Policies (2001) 54 Tax L. Rev. 261 at 277; Melo, G M 'Taxation in the Global Arena: Preventing The Erosion of National Tax Bases or Impinging on Territorial Sovereignty? A Critique of the OECD's Report," (2000) 12 Pace Int'l L. Rev. 183, 186 ("The right to tax forms one of the most intimate relationships between the sovereign and its subjects …The decision to tax or not to tax and the manner in which to tax within domestic borders is one that has always been within the absolute discretion of each sovereign." See also Federal Board of Inland Revenue v. Nigerian General Insurance Company Ltd. (1966) LLR 88 at 95

[33] Hertogen (2010) supra; Christians (2009) (argued that an international social contract imposed a sovereign duty to have mutual respect for each other and to align its tax law and policies in conformity with that of other states). Jamnejad M and Wood M 'The principle of non-intervention' (2009) 2 Leiden J. Int'l L. 345 at 346; Kwiecien R 'Sir Hersch Lauterpacht's idea of state sovereignty – is it still alive (2011) 13 Int'l community L. Rev 23 at 25: Leon I 'when cooperation and intervention meet, sovereignty in the Mexico-United States relationship' (2011) Keinan Y 'The Case for Residency-Based Taxation of financial transactions in developing countries (2008) 9 (1) Fla Tax Rev. 3; Amsterdam L. Forum 54 Mann FA 'Further studies in international law' (1990) Clarendon press, Oxford 4

[34] The minimum standard envisaged here distilled from the idea of the social contract as Christians argued. (Christians, A 'Sovereignty, taxation and social contract' (2009) 18 MINN. J. INT'L L. 99 at 101) The social contract imposed a duty on the sovereign states to voluntarily and unilaterally abstain from designing tax policies that impede the tax policies of other states.

[35] Christians (2009) supra

[36] Section 501 (a) of the US Foreign Account Tax Compliance Act (FATCA) 2013 seems to have negate the above assertion. Because the section imposed a reporting obligation on all foreign financial institutions to furnish the US government will all relevant information on the US citizens' foreign account. For recent discussion on FATCA see Maxwell, J and Li, A 'FATCA: What it Is, What it isn't, and what's Next' (2015) 19 (2) Asia-Pacific Journal of Taxation. However, the provision of FATCA centred on the enforcement not on the substantive tax jurisdiction. Therefore, no state can exercise its substantive tax jurisdiction on another state.

[37] Melo (2000) supra Ring, DM (2008) Zou (2014) supra

[38] As a result of the increase in movement of persons from one state to another caused by globalisation, the corresponding exists even where there is no cross border trade between the states.

[39] Genschel, P 'Globalization and the Transformation of the Tax State' 13 EUR. REV. 53, 60 (2005) (The traditional idea that "all taxable events have a clearly identifiable place in space" within one jurisdiction or another "has always been a fiction.").

without forfeiting or diluting their sovereignty. This forum would need to be set up by an international tax regime or body.[40] It is submitted that co-operation in delimiting tax jurisdiction does not derogate from the sovereignty of the states but rather enhances it. Zou[41] views states' action in safeguarding their national sovereignty as a process of law-making revolution in taxation at an international level. The inconsistency of the European Court's position on the tax sovereignty of its member states has led to brewing tension on tax jurisdiction in the European Community (EC).[42]

The jurisdictional conflict in the EC indicates that bilateral or multilateral treaties do not achieve the desired co-operation objectives.[43] Apart from the EU co-operation regime, the Organisation for Economic Co-operation and Development (OECD) is also playing a role in that respect, but the anticipated co-operation amongst the states has not yet been achieved. This shows the inadequacy of the current co-operation mechanism.[44]

The difficulty of achieving the desired co-operation amongst the states may be a result of the peculiarities inherent in taxation.[45] As a result of the delicate nature of tax jurisdiction most states that have recognised the World Trade Organization (WTO) in order to co-operate in matters of trade, have refused to do so in matters of taxation. Rather, they have constituted themselves into various non-binding peer groups, such as the OECD, which generate soft laws. Also, the international tax regime acts more as a conflict resolution mechanism (mostly through the OECD and other organisational soft laws) than as positive law. The regime has only persuasive authority on domestic taxation. By its nature, as rules for conflict resolution, the international tax regime does not address the

[40] It is worth noting that, no consensus as to whether there is an international tax regime, capable of extracting an international norm on tax issue. Rosenbloom, D The David R. Tillinghast Lecture International Tax Arbitrage and the "International Tax System", (2000) 53 Tax L. Rev. 137, 140-1argued that what we claimed today to be the international tax regime comprises only the different tax laws of various countries exist and those laws vary greatly from each other. Avi-Yonah, RS 'International tax as international law (2007) Cambridge, Avi-Yonah, RS (2000) 'Commentary on David Rosenbloom's, The David R. Tillinghast Lecture International Tax Arbitrage and the "International Tax System", 53 Tax L. Rev. 167, 169. It has been argued from other angle that the network of bilateral treaties that are largely similar in policy, and even in language, constitutes an international tax regime, which has definable principles that underlie it and are common to the treaties. This assertion is supported by Brauner A 'An international tax regime in crystallization (2003) 56 Tax L. Rev. 259 at 326; Sneirson JF 'Soft paterlism for close corporation: helping shareholders helping yourselves' (2008) Wis. L. Rev. 899; Trubek DM and Trubek LG 'New Governance and legal regulation: complementary, revalvary and transformation (2007) 13 Colum. J. Eur. L. 539; Cords D 'Let's get together: collaborative tax regulation' (2013)11 Pitt. Tax Rev. 47

[41] Zou (2014) supra

[42] See Faulhaber, LV Sovereignty, Integration and Tax Avoidance in the European Union: Striking the Proper Balance, (2010) 48 Colum. J. Transnat'l. L. 177 at 181; Isenbaet M 'The contemporary meaning of 'sovereignty in the supranational context of the EC as applied to the income tax case law of the ECJ (2009) EC Tax Rev: Bizioli G 'balancing the fundamental and tax sovereignty: some thought on recent ECJ case law on direct taxation (2008) 48 (3) European Taxation; Vanistendael F 'Denkavit international: the balance between fiscal sovereignty and the fundamental freedom (2007) 47 (2) European Taxation

[43] *Saint-Gobain vs. Aechen-Innenstadt C-307/97 ECR 1-6161; Gilly vs. Fiscaux du Bas-Rhin C-336/96 ECR 1-2793; De Groot vs. Van financien C-385/00 ECR 1-5821*(the Member States arefree to unilaterally define the connecting factors for the allocation of taxation rights or to do so in tax treaties.). However, *in Bosal Holding BV v. Staatssecretaris van Financien, C-168/01 ECR 1-9409; Marks & Spencer C-446/03, ECR I-1083; Manninen's case C-319/02 ECJ* departed from the earlier notion of tax sovereignty of the member states.

[44] Rosenbloom HD et al 'The unruly world of tax: a proposal for an international tax cooperation forum' (2014) 15 (2) Fla. Tax Rev. 57 Avi-Yonah, R S. "Globalization, Tax Competition, and the Fiscal Crisis of the Welfare State." (2000) 113 (7) Harv. L. Rev.

[45] Azam R 'Global taxation of cross-border ecommerce income' (2012) 31 Va. Tax Rev. 639 Palmer KL 'Toward unilateral coherence in determining jurisdiction to tax income' (1989) 30 Harv. Int'l L. J. 1 noted that historical antecedent, move to expand or protect jurisdictional based as well as having divergent views of the global integration led to this situation – absence of universal jurisdictional rule.

substantive issue of tax jurisdiction,[46] but rather, the enforcement of the tax jurisdiction of the states involved.[47]

The Concept of Fiscal Residence

Research for this study was conducted within the framework of a residence-based tax system, including the issue of double taxation[48] and tax avoidance,[49] and including an analysis of the concept of residence either as a tiebreaker rule or as an anti-avoidance mechanism. However, this paper will be limited to the conceptual analysis of the concept of fiscal residence as expressed in domestic legislation.[50] A residence-based system connotes that States should impose a tax on both the domestic and foreign income of their residents. The residence status of a person is thus crucial in determining his tax liability as the ascertainment of tax liability is the condition precedent that person's becoming subject to tax. A liability to tax is distinct from being subject to tax.

Under a residence-based regime, a person becomes both 'liable to tax' and 'subject to tax'[51] once he falls within the definition of "resident" provided by the tax system. He remains liable to tax even if, the regime exempts him from paying the tax, or if it granted him certain tax relief thereby making that person not subject to tax. Thus, all persons subject to tax are liable to tax, but not all persons liable to tax are subject to tax.[52] 'Residence' can be used to determine whether or not a person is liable or is subject to tax. The crux of this paper is the notion of residence as a determinant of establishing 'liability to tax' not of being 'subject to tax.'

Despite the concerns regarding the international tax regime, that regime is highly relevant in limiting the scope of domestic tax systems in the current integrated global economy. These limitations are the parameters that determine the extent of the state's tax jurisdiction. These are the fiscal attachments; [53] that is to say, the relationship between the state and taxpayers. Such a relationship is deemed to exist when the same persons are subject to either the 'personal sovereignty' or the 'territorial sovereignty'[54] of the state. In other words, either personal fiscal attachment or economic fiscal attachment to the state. Thus, a state's tax jurisdiction can only be justified if it is exercised in respect of persons with some nexus, link, connecting factor[55] or closeness[56] to the state.

The fiscal attachments mentioned above, refer to the nexus and connections that link the taxing state with the persons sought to be taxed. The attachments serve as the basis for assuming tax

[46] Substantive and enforcement tax jurisdiction is explained later in this chapter.

[47] Martha (1989) 5

[48] Gutuza, T 'An analysis of the methods used in the South African domestic legislation and in double taxation treaties entered into by South Africa for the elimination of international double taxation' Unpublished PhD Thesis submitted to the Faculty of Law University of Cape Town, South Africa, 2013.

[49] Oguttu, AW 'Curbing offshore tax avoidance: the case of South African companies and trusts' Unpublished PhD Thesis submitted to the Faculty of Law, University of South Africa 2007.

[50] The establishment of a jurisdictional link is a condition precedent for asserting tax jurisdiction. It is the primary connecting factor. The tiebreaker rule, as well as the rules for determining the eligibility for tax reliefs or exemptions, are secondary connecting factors. Because, the nexus between the taxing state and the potential taxpayer must first be established before the issue of enjoying certain relief or exemptions or even benefiting from any DTA come up. A point worth noting is that before a tiebreaker rule applies to any situation, the resident status of the taxpayer in one of the parties must have been established. Thus, its application is grounded on the establishment of the jurisdictional link. Therefore, while dealing with the jurisdictional nexus under the domestic laws, the role of residence in the DTA should be a secondary consideration. Conversely, in analysing the role of residence under the DTA, the question of jurisdictional nexus under the domestic law is of equal importance. In the same vein, the issue of eligibility for reliefs or exemption is also grounded an established jurisdictional link.

[51] Wheeler, J 'Persons qualifying for treaty benefits' in Trepelkov, A et al (ed) 'United Nations Handbook on Selected Issues in Administration of Double Tax Treaties for Developing Countries' (2013) UN Publication, New York 60 at 63.

[52] A person is said to be liable to tax once he falls within the category of taxable persons provided by the taxing statute. However, the statute may exempt the taxable person from paying the tax or the class of income earned by the taxable person,

[53] Martha RSJ 'The jurisdiction to tax in international law: theory and practice of legislative fiscal jurisdiction (1989) Kluwer Netherland

[54] Abraham B 'An economic analysis of territorial sovereignty in international law (2012) available at http://ssrn.com/abstract=2280746

[55] Danziger (1991) 13

[56] Martha (1989) 117

jurisdiction. They are established through two fundamental principles that clothe the taxing authorities with jurisdiction to tax income. These principles are 'source' and 'residence.' Despite the interface between source and residence as a tax base, this paper focuses only on the residence base.

The concept of residence as a connecting factor in tax jurisdiction could be viewed from the perspective of the two discrete aspects of tax jurisdiction as formulated by Hellerstein.[57] He describes tax jurisdiction as comprising two separate elements, namely 'substantive' and 'enforcement' tax jurisdiction.[58] The former relates to the power of the state to impose a tax on its taxable subjects and it encompasses the two fundamental principles mentioned above, source and residence. The latter relates to the power of the state to compel the collection of tax over which it has substantive jurisdiction, using its established legal and administrative mechanism for that purpose.

The enforcement jurisdiction includes the jurisdiction of the state to impose an obligation on another person (the withholding agent, who is not the actual income earner) to collect the tax on behalf of the state. It also raises different residency issues from the one envisaged by substantive jurisdiction, hence the need for examining residency from both points of view. Hellerstein[59] also argues that the question whether a state has jurisdiction to impose a tax is different from whether it has jurisdiction to compel the collection of the tax. These two powers are often exercised by different organs within the same tax jurisdiction.[60]

A state needs to evaluate the central focus of its sovereignty, using a statist political conception.[61] Thus, a state may consider population as the main focus of sovereignty. This entails imposing tax on all income of its residents based on the personal relationship with the state, irrespective of the source of that income (a residence-based system). Alternatively, a state could consider its territory as the primary focus, thereby imposing a tax on all income derived from within the territory, irrespective of the identity of the producer (a source-based system).[62]

The difficulty in this regard is that most countries use a hybrid system, adopting a residence basis together with some aspects of a source basis or vice versa.[63] The driving force

[57]Hellerstein W 'Jurisdiction to tax income and consumption in the new economy: a theoretical and comparative perspective (2003) 38 (1) Ga. L. Rev 1. See also Hellerstein W 'OECD – Jurisdiction to in the Digital Economy: Permanent and other establishments (2014) 68 (6/7) Bulletin for international taxation and Swain JA 'Misalignment of substantive and enforcement tax jurisdiction in a global economy: causes and strategies for realignment (2010) 63 (x) National Tax Journal, Fox special issue – who traced the major causes of misalignment between substantive and enforcement jurisdiction and stated the strategies for achieving greater jurisdictional alignment include (1) reducing administrative and compliance cost, (2) adopting simplified compliance regimes for foreign taxpayers, (3) repealing the physical-presence test and (4) "reverse engineering" substantive jurisdiction rules in recognition of existing limits on enforcement capabilities, Cockfield AJ ' Jurisdiction to tax: A law and technology perspective (2003) 38 Ga. L. Rev. 85 – 118, Restatement of the law (Third), Restatement of the foreign relations law of the United States (1988) 2

[58] Restatement (Third) of Foreign Relations Law of the United States (1987) § 421 - Jurisdiction to enforce is defined as the authority of a state "to employ judicial or non-judicial measurers to induce or compel compliance or punish non-compliance with its laws or regulations, provided it has jurisdiction to prescribe"

[59] Hellerstein (2003)

[60] For instance, in a federal state like Nigeria, the federal government possesses substantive jurisdiction to impose income tax while the states possess the enforcement jurisdiction to compel the collection of the tax.

[61] Gliksberg D 'The effect of the statist-political approach to international jurisdiction of the income tax regime – the Isreal case" (1994) 15 Mich. J. Int'l L. 459

[62] Ibid, see also Musgrave PB 'Sovereignty, Entitlement, and Cooperation in International Taxation' (2001) 26:4 Brooklyn J. of Int'l L. that national right to tax the global income of residents is recognized in international law and the exercise of tax sovereignty over foreign source income is necessary to achieve equitable tax treatment of resident taxpayers by making all income, wherever earned, subject to tax, consistent with the accretion principle.

[63]Williams RC 'Income Tax in South Africa: Law and Practice (2006) 4thed LexisNexis, Durban 56, Olivier L and Honiball M 'International tax: A South African Perspective (2008) 4thed Siberink, Cape Town 51 – when a state adopt residence-based, an aspect of source is also adopted, in that non-residents are taxed on the income sourced within the state. Likewise, state that adopts a

for such an election is a policy decision by the state. According to Graetz, this decision should be made on the basis of the culture, economic and political capacity and history of the state.[64] Two definitional tests are being used to determine the residency of both individuals and corporations for tax purposes: That is the statutory criterion together with a facts and circumstances test. Each of these tests involves theoretical and policy issues. For the statutory test, tax policy considerations come to the fore, while the facts and circumstances test involves both conceptual and judicial interpretation, as well as tax policy issues.

There is broad agreement on the two general principles that underlie residence-based taxation. Taxpayers that have a sufficiently close nexus to the state are treated as 'residents' of that state, and are consequently liable to tax on their global income. Taxpayer who lack such a nexus are regarded as 'non-residents' and are liable for tax vis-à-vis that state only on the income they derive from or which is connected with the state. As was noted earlier, where individual taxpayers are concerned, the ability-to-pay and the benefits they receive from the state provide the theoretical justification for residence-based taxation. Moreover, residence within a state enables that state to determine the capacity of the individual to pay tax on his overall income.

The distinction between residence and source-based systems is irrelevant to the person who earns and invests his income in the state he resides. The distinction becomes relevant where a person derives his income in a state other than where he resides, for in such a situation, the state where the person resides and the state from which he derives the income may both assert a taxing power over the same income. In resolving such conflicting claims, the state of residence may recognise the primary right of the source state to tax the income derived from within its territory.[65] This could be implemented through the instrumentality of a 'foreign tax credit'. Alternatively, the state of residence may recognise the exclusive right of the source state to tax the income through the mechanism of a 'foreign tax exemption'. The conflict occurs where one state adopts a residence-based tax sytem, and the other adopts a sourced-based system.[66]

Situations can occur where an overlapping taxing power occurs between two or more states that have both adopted a residence-based system. In resolving this kind of conflict, the affected states commonly resort to Double Taxation Agreements (DTA) to resolve the conflicting jurisdictional claims and enhance co-operation between them. A DTA is a bilateral treaty entered into by the two states involved. However, the point has already been made that, due to global economic integration, the network of bilateral tax treaties cannot serve the desired coordination objective. That is why many commentators[67] have called for a shift from a

source-based use to extend their tax net by deeming certain income from domestic source. This is a shift from what was obtainable in 1980s - Avi-Yonah RS Tax coverage and globalization (2010) working paper No. 214, University of Michigan Law School, stated that in the 1980s the was divided into two group: the major group consisting of countries that tax both residents and non-residents on a territorial basis while exempting foreign source income. The other group tax their residents on a worldwide basis proving a foreign tax credit. Furthermore, the problems associated with choosing either residence or source-based systems is compounded by Australia. It adopted a hybrid system like other countries, but in 2006 it amended its law to exempt the foreign sourced income of a temporary resident as defined in section 768 – 900 of the Tax Laws Amendment Act No. 4 of 2006.

64 Graetz MJ 'International taxation: inadequate principles outdated concepts and unsatisfactory policies (2001) 54 Tax L. Rev 261,279

65 Dagan, T 'The Tax Treaties Myth' (2000) 32 N.Y.U. J. Int'l L. & Pol. 939 at 980

66 This is outside the scope of this research.

67 Cockfield, AJ 'International Tax Competition: The Last Battleground of Globalization' (2011) 63 (12) Tax Notes International 867; from the empirical research conducted there are more than 2600 DTA around the globe. See Braun, J and Zagler, M 'An economic perspective on double tax treaties with(in) developing countries' (2014) 6 (1) World Tax Journal 1. Sawyer, A 'Developing an international (world) tax organisation for administering binding rulings and APAs – the way forward (2006) 21 Austl. Tax Forum 287 (He examined the possible model of the international tax organisation, balancing between creating an independent body or to subsumed it into the existing international organisations like WTO or IMF.). see also Raad, KV 'International Coordination of Tax Treaty Interpretation and Application' (2001) 29 Intertax 212 Thuronyi, V 'In Defense of International Tax Cooperation and a Multilateral Tax' Treaty' (2001) 22 Tax Notes International at 1291; Pinto, D 'A Proposal to Create a World Tax Organisation' (2003) 9 New Zealand Journal of Taxation Law and Policy at 14. Hadida, J 'Prospects for Multilateral Cooperation

bilateral treaty regime to a multilateral treaty[68] in order to address the issue of divergence of tax laws between states. As has already been noted, multilateral tax treaties may come under constitutional challenge on the ground of a diminution of states tax.[69]

Despite the above concerns about the international tax regime, it is very relevant in limiting the scope of domestic tax regimes in the current integrated global economy. These limitations are the parameters that determine the extent of the state's jurisdiction to tax a person. These are the fiscal attachments; [70] that is the relationship between the state and taxable persons. Such a relationship is deemed to exist when the same persons are subject to either the 'personal sovereignty' or the 'territorial sovereignty'[71] of the state. In other words, either personal fiscal attachment or economic, fiscal attachment to the state. Thus, the state tax jurisdiction can only be justified if it is exercised on persons that have some nexus, link, connecting factor[72] or closeness[73] of connection with the state.

Two definitional tests are being used to determine the residency of both individuals and corporations for tax purposes: That is the statutory as well as facts and circumstances tests. Each of these tests involves theoretical and policy issues. For the statutory test, the questions have more of tax policy considerations behind it, while for facts and circumstances, both theoretical and judicial interpretations, as well as tax policy issues, are relevant.

UNDERLYING PRINCIPLES FOR THE RESIDENCE - BASED REGIME

In the light of the preceding analysis, the prevailing rules governing tax jurisdiction consist of constitutional norms, statutory provisions, tax policy and accepted legal principles of taxation. The analysis of principles and tax policy will premise on the issue of justification of residence-based taxation from the perspective of equity, efficiency and administration. According to Roxam,[74] tax policy is the context in which discussion of how the tax system should be structured or reformed takes place. It is a forum where those[75] with competing interests in the operation of the tax system set forth arguments in support of their interest, and seek to influence the resulting structure of the tax system, as embodied in tax law. These different and competing policy interests are part of the problem hindering the formulation of a proper jurisdictional standard for the income tax regime.[76]

In making a tax policy analysis, the claims of these competing interests should be narrowed down to the central issues of equity, efficiency and certainty. Therefore, in determining the allocation of tax rights both law and economics must cooperate.[77] Thus, a lawyer may embark on the tax policy argument using language derived from economics, but from a different perspective (legal). For instance, tax neutrality is considered to be an economic concept while tax equity, on the other hand, is a legal concept.

The norm in the tax policy analysis[78] is that the analyst must identify the perspective from

in Taxation' (2006) unpublished LL.M Thesis submitted to the Institute of Comparative Law, Faculty of Law, McGill University Montreal, Canada.

[68] Which could be either regional (like Nordic countries tax treaty) or global tax treaty.

[69] XU, M 'Road forward to a multilateral tax treaty regime? ' (2014) Global Tax News available at hhttp://www.dlapiper.com/en/global/insights/publi cation/2014/10 assessed on 10/5/2015 (He observed that the proposed multilateral tax treaty would require significant changes to the domestic tax laws. Therefore, the states that are highly protective of their sovereignty such as US China Russia and the UK are not likely to endorse to the proposal. Thus, the proposal may end up remain at regional level.)

[70] Martha RSJ 'The jurisdiction to tax in international law: theory and practice of legislative fiscal jurisdiction (1989) Kluwer Netherland

[71] Abraham B 'An economic analysis of territorial sovereignty in international law (2012) available at http://ssrn.com/abstract=2280746

[72] Danziger (1991) 13

[73] Martha (1989) 117

[74] Roxan I " Limit to globalisation: Some implications for taxation, tax policy and the development (2012) LSE Law, society and Economy Working paper No. 3 available www.lse.ac.uk/collections/law/wps/wps.htm

[75] Such as government, taxpayers, legislators and academics

[76] Misey Jr, RJ 'Simplifying international jurisdiction for US transfer taxes: Rethinking citizenship and replace domicile with the green card test' (1992) 76 Marquette L. Rev. 77

[77] Vogel, K., 'Worldwide vs source taxation of income A review and re-evaluation of argument' (part 1) (1988) 16 intertax

[78] For the purpose of analysis, tax policies can be divided into three, namely: a) Policies that are general for all tax purposes, which include raising

which they intend to address the issue. The aforementioned basic policy issues are broadly categorised into equity/fairness and efficiency.[79] For the purpose of addressing residency issues from the enforcement tax jurisdiction perspective, efficient administration and simplicity will also be used as a benchmark for analyzing the residence-based system. The analysis will bring to the fore the interface between tax policy and tax laws. Tax policy is a framework that provides the guidelines, principles and objectives to be achieved in the operation of the tax system, whereas, tax laws function, for examples, to create a tax base and the taxable person, to impose rates and to prescribe penalties for default.[80]

EQUITY AND FAIRNESS

An analysis of tax equity and fairness usually commences with the rule of horizontal and vertical equity.[81] The former means equally-situated persons should be treated equally, and the latter means a unequally-situated person should be treated unequally.[82] The principle of equity is crucial to the residence-based system. It ensures that residents of the state who earn the same volume of income, either within the state or from a foreign source should be taxed equally (horizontal equity).[83] However, the progressivity of income taxation postulates that it is equitable and fair to make a person whose income has been increased pay at a higher tax rate in proportion to his increased income (vertical equity). However, the notion of horizontal and vertical equity, as the twin norm of assessing the fairness of the tax regime, has been criticized as irrelevant in the tax policy analysis.[84] Some

revenue, equity, efficiency and progressivity; b) Policies that are unique to income tax like, policy discourse on benefit and ability-to-pay and choice between source and residence base; and c) Policies that are unique to international income taxation, namely, neutrality, foreign tax credit, exemptions and deductions and double taxation. See Leandra, L'Statutory Speed Bumps: The Roles Third Parties Play in Tax Compliance' (2007) 60 *Stanford L. Rev.* 695

[79] Notwithstanding the fact that, using efficiency in tax policy analysis has been challenged as it favours the developed countries that are capital exporters that require efficiency to enhance it while equity and fairness analysis favours developing countries – Cockfield A 'Purism and contexualism within international law analysis: How trading analysis fails developing countries' (2007) 5 (2) ejournal of tax research 199 While according to Greatz MJ 'Taxing international income: inadequate principles, outdated concepts and unsatisfactory policies' (2001) 54 Tax L. Rev. 261 the appropriate taxpolicy analysis required by developing countries (capital importers) is equity and fairness, while efficiency analysis is usually use for international taxation.

[80] Okauru I O 'Federal Inland Revenue Service and taxation reforms in democratic Nigeria' (2012) FIRS Safari Book Ltd, Ibadan 610 at 101

[81] Galle B 'Tax Fairness' (2008) 65 Wash. & Lee L. Rev. 1323Palmer RL 'Toward unilateral coherence in determining jurisdiction to tax income (1989) 30 Harv. Int'l L. J. 1 at 64; Bittker, B I. "Equity, Efficiency, and Income Tax Theory: Do Misallocations Drive Out Inequities" (1979) 16 San Diego L. Rev.735 For criticism of the whole idea of equity see Repetti J and Ring D 'Horizontal equity revisited' (2012) 13 (3) Fla. Tax Rev. 135

[82] Williams RC 'Income Tax in South Africa: Law and Practice (2006) 4thed LexisNexis, Durban

[83] Galle (2008) supra; Wood RJ 'Supreme Court Jurisprudence of Tax Fairness' (2006) 36 Seton Hall L. Rev. 421 (Horizontal is not controversial, the difficulty arises in its application rather than in its definition. The primary concern centres on the criteria that should be used to determine whether taxpayers are similarly situated.) Dodge JM 'Theories of tax justice: Rumination on the benefit, partnership and ability to pay principles' (2005) 58 Tax L. Rev.399 at 402, Elkins D Horizontal equity as a principle of tax theory (2006) 24 Yale L. &Pol'y Rev. 43 88, Musgrave RA 'Horizontal equity: A further note' (1993) 1 Fla. Tax Rev. 354.

[84] Repetti J and Ring D 'Horizontal equity revisited' (2012) 13 (3) Fla. Tax Rev. 135 Galle B 'Tax Fairness' (2008) supra The concept of HE may be incoherent when it comes to comparisons between taxpayers in different jurisdictions, or, at least, comparisons that require us to decide the worthiness of those other sovereigns' views.) Infanti AC 'Tax equity' (2008) 55 Buff. L. Rev. 1191(the notion of equity is not suitable for assessing the fairness of tax policy) Martinez, LP 'The Trouble with Taxes: Fairness, Tax Policy, and the Constitution '(2004). 31 Hastings Const. L.Q. 413 Bagaric M and McConvill, J 'Stop Taxing Happiness: A New Perspective on Progressive Taxation' (2005) 2 Pitt. TAX Rev. 65; Buchanan, NH 'The Case Against Income Averaging' (2006) 25 Va. Tax Rev. 1151; Dodge, JM 'Theories of Tax Justice: Ruminations on the Benefit, Partnership, and Ability-to-Pay Principle' (2005).58 Tax L. Rev. 399; Kahn, JH 'The Mirage of Equivalence and the Ethereal Principles of Parallelism and Horizontal Equity' (2006) 57 Hastings L.J. 645, 652 (Each instance of different tax treatments must be examined separately to determine whether the difference is warranted);

commentators are basing their criticism of the horizontal and vertical equity on the inconsistency in the judicial approach to the principles.[85]

Despite the above criticism on horizontal and vertical equity, tax experts have embraced the two equity norm in most of their contributions.[86] Therefore, they are relevant in assessing the fairness of the tax system. Moreover, the horizontal equity is more related to the determination of fairness in the definition of taxable income and taxable person while vertical equity is closest to the issue of ascertaining the tax rate. Therefore, the horizontal equity is the most relevant to this paper, because the issue of the tax rate is not within its scope. Notwithstanding the fact that unequal treatment of taxpayers with similar incomes can affect the progressivity of the tax system.[87]

Moreover, the principle is relevant in assessing a residence-based system from the perspective of the substantive and enforcement tax jurisdiction in the two countries. Most of the writers[88] on this issue have examined the equity and fairness of the residence-based system from the perspective of a substantive tax jurisdiction. They have ignored the fact that enforcement tax jurisdiction also involves equity and fairness issues affecting the resident taxpayer.

For example, a state in exercising its substantive tax jurisdiction may impose a tax on the global income of two of its residents. The determination of the horizontal equity involves the questions: whether the tax imposed on the global income of the two residents is fair; whether the two residents earn their income equally and if they have equal income whether the state has treated them equally. Here, the principle of horizontal equity becomes clear, but the difficulty is how to apply it in respect of the two residents mentioned above. The two residents may be working for the same employer, placed in the same rank. However, one of the residents may incur an employment-related deductible expenses such as; extra uniform fees or continuing professional education that the other does not; or one of the two residents might earn domestic income whereas the other resident might earn foreign income from other states.

The fairness concern will be compounded in a situation where, under a typical residence-based system, the state is taxing both its resident and non-resident who earned equal income in that state. It can levy a tax on both domestic-sourced and foreign-sourced income of the resident, but it is only allowed to tax the domestic-sourced income of the non-resident.[89] Thus, that the two taxpayers with equal incomes were not treated

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Miller, JA 'Equal Taxation: A Commentary (2000) 29 Hofstra L. REV. 529 (discussing challenges to the concept of horizontal equity); Kaplow L ' Horizontal equity: measures in search of principle' (1989) 42 Nat'l Tax J. 139

[85] Henry Ordower, H 'Horizontal and Vertical Equity in Taxation as Constitutional Principles: Germany and the United States Contrasted' (2006) 7 Fla. Tax Rev. 259 Wood, RJ Supreme Court Jurisprudence of Tax Fairness' (2006) 36 Seton Hall L. Rev. 421 Barker, WB 'The Three Faces of Equality: Constitutional Requirements in Taxation' (2006) 57 Case W. Res. L. Rev. **1** Martinez, LP 'The Trouble with Taxes: Fairness, Tax Policy, and the Constitution' (2004) 31 Hastings Const. L.Q. 413, 421, 427-38 (asserting that the U.S. Supreme Court has failed to employ notions of tax equity in determining the constitutionality of taxing statutes).

[86] I conducted a search on Hein Online on 8/11/2014 to find the number of article published between 2000 to 2014 in which the horizontal and vertical equity appeared. The search revealed that horizontal equity appeared in about 341 articles while vertical equity appeared in about 268 articles.

[87] For example capital investment is moveable in nature while labour and active business is more or less static. This is the reason for imposing lower tax rate on capital and relatively higher rate on labour. Because higher tax rate on capital could lead to the movement of the capital to another jurisdiction with lower rate. However, when a state imposes low tax rate on capital and higher tax rate on income, it follows therefore, that that state violates horizontal equity in achieving vertical equity.

[88] Repetti J and Ring D (2012) supra James R. Repetti, J R 'Democracy and Opportunity: A New Paradigm in Tax Equity, (2008) 61 Vand. L. Rev. 1129; Galle (2008) supra; Palmer RL 'toward unilateral coherence in determining jurisdiction to tax income (1989) 30 Harv. Int'l L. J. 1 at 64 (administrative convenience may not constitute a tax policy goal at all) Bittker, B I. "Equity, Efficiency, and Income Tax Theory: Do Misallocations Drive out Inequities" (1979) 16 San Diego L. Rev.735 Schoenblum JA 'Tax Fairness or Unfairness? A Consideration of the Philosophical Bases for Unequal Taxation of Individuals' (1995) 12 Am. Tax. Pol'y 221.

[89] Whatever he earned in another state is not taxable by the first state

equally as envisaged by horizontal equity, although Elkins[90] claims that what horizontal equity requires is the similarity of the taxpayers and not their identical features. However, it is challenging to discern the distinction between the two. From the enforcement jurisdiction perspective, the determination of equity and fairness of the residence-based system involved questions whether the state's tax administration mechanism is fair and equitable in nature; whether such enforcement mechanism applies to the income of the two residents equally.

As equity and fairness principles hinge on equality in the tax system, the two basic criteria provide a relevant standard of equality and inequality: benefit and ability-to-pay norms. Thus, these norms subsumed all issues relating tax equity and fairness.

BENEFIT PRINCIPLE

Benefits principle is one of the tax equity and fairness norm that suggest that people could be required to contribute to a state based on the benefits he received from the government.[91] In the 18th century, the concept of benefit was viewed from the social contract perspective. That is, the tax payable is considered as a consideration furnished by the taxpayer for the contract he entered into with the state for the provision of security of his life, liberty and property. Tax in that era was involved real properties and excise on certain goods and services since the income tax was not based on the notion of benefits received from the state.[92] The second version of benefits principle arose in the 19th century. It was extended to income tax, under this version benefits accruable to any person from the government was linked to the amount paid by that person that is the more he pays, the more he benefits. This policy was challenged as it demanded poor to pay more taxes than rich because it was the poor that need most of the government benefit, and there was no accurate measurement of the benefit.[93]

The extended version of benefits principle suggests that the measure of a person's benefit from the government should be based on his financial well-being. As the government established an enabling environment for wealth accumulation and set up conditions for such accumulation, therefore, whoever satisfy the requirements must pay the tax without tracing any particular benefit he enjoys from the government. The notion of benefits principle could be traced to the issuance of a report published under the auspices of the League of Nations.[94] It also received a judicial blessing in the locus classicus case of Cook v. Tait.[95]

Some authors[96] argued that benefits principle was more appropriate in international than the national tax. This assertion cannot be justified in the light of the tax incentive regimes. Under this regime, a high-income earner or even multinational corporations (who enjoy the benefit of infrastructure provided by the host state) are being granted a tax holiday or even exempted totally from the tax. As a corollary to this, even those that are not exempted could enjoy the government benefit without paying any tax during the period of utilising the infrastructure. For instance, a person can escape the tax net if he failed the technical rule or physical presence test of individual residency. The difficulty in ascertaining the amount of to benefit each person receives from the state

[90] Elkins D 'Horizontal equity as a principle of tax theory' (2006) 24 Yale L. & Pol'y Rev. 43

[91] Dodge JM 'Theories of tax justice: Rumination on the benefit, partnership and ability to pay principles' (2005) 58 Tax L. Rev.399 at 402

[92] Ibid note 71

[93] Ibid note 71

[94] Committee of Technical Experts on Double Taxation and Tax Evasion, League of Nations, Double Taxation and Tax Evasion 5-9, 1927, available at www.law.wayne.edu/tad/Documents/League/League_Tech_Experts.pdfAvi-Yonahstated that the benefit principle implies (in international context) the taxation of active business income primarily at source, and passive investment income at residence - Avi-Yonah,R.S. Tax Competition, Tax Arbitrage and the International Tax Regime, Bulletin for International Taxation (2007) 61, 130.

[95] Cook v. Tait, 265 U.S. 47, 56 (1924) (where a U.S. citizen residing in, and apparently deriving all of his income from a foreign country properly may be taxed in the U.S. on his worldwide income "based on the presumption that government by its very nature benefits the citizen and his property wherever found"); National Paper & Type Co. v. Bowers, 266 U.S. 373, 376 (1924) (where it was held that "power of the United States to protect its interests and redress its wrongs in whatever parts of the world its business may take it").

[96] Avi- Yonah 'Globalisation, tax competition and the fiscal crisis of the welfare state (2000) 113 Harv. L. Rev 1572, Rixom (2012), Fleming (2001) supra.

makes the ability to pay principle is a more appropriate fairness norm for residence-based. Roxon[97] stated that one of the problems of ability-to-pay was that it separate person's obligation to pay tax on the level of benefit received from government spending. However, he contradicted himself where he said that benefits principle was not relevant in national taxation due to the difficulty in ascertaining the amount of benefit a taxpayer received from the government.[98]

ABILITY-TO-PAY PRINCIPLE

Ability-to-pay principle denotes that the amount payable by any taxpayer should reflect the quantum of the taxpayer's resource, measured by income, wealth, consumption or whatever metric is considered appropriate.[99] The principles of ability to pay and benefit are used in the sense of underlying principles for allocating tax jurisdiction. [100] Some writers viewed ability-to-pay as an aspect of tax equity and fairness, comprising both horizontal and vertical components of equity.[101] Fleming[102] made a case for applying the ability to pay in taxing worldwide income of a resident. He stated that the most important criteria for spreading the income tax burden on individual taxpayers were the proposition that allocate this onus should be on the basis of comparative economic well-being that is the ability to pay. It has been argued that income may be a poor measure of economic well-being because people who start with the equal ability may make different decisions about working and saving that affect their income.[103] The issue of handling some income such as leisure and underachievement as an obstacle to the principle of ability to pay, since such income could not be measured.[104] Other commentators argued that there is a consensus that in computing for the ability to pay purposes, items that cannot be measured; leisure and underachievement are omitted.[105] The Ability to pay principle forms constitutional limitation of the taxing power in Germany, Spain and Italy.[106] Also to that Seto criticised ability to pay principle from the perspective of people with disabilities, making a case for reform of the existing notion.[107]

In the case of corporations, there is greater difficulty in ascertaining ability to pay, and the principle of ability to pay consequently has no role in tax policy, in that tax liability is determined simply on the basis of the quantum of taxable income; the ability to pay of its shareholders is of course not a consideration[108] because they have no liability for the corporation's tax, save where anti-avoidance statutory provisions provide otherwise.

Corporate tax must thus be justified on grounds other than ability- to-pay. [109] There are two competing methods of taxing a corporation. The first is the integration of both corporate and individual income tax into a single system. In the second method, a corporation can deduct the dividend it pays to its shareholders. The shareholders then pay tax on the dividend at the individual level.[110]Where a state adopts a

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97 Rixom (2012),

98 Ibid

99 Roxan I (2012) supra – Noted that there is debate as to whether economic well-being of a person should be measured by reference to income that is both saved and consumed or only by reference to consumption, see McNulty JK ' Flat tax, consumption-type income tax proposals in the US: A tax policy discussion of fundamental tax reform (2000) 88 Cal. L. Rev. 2095

100 Kemmeren, E.C.C.M., Source of Income in Globalizing Economies: Overview of the Issues and a Plea for an Origin-Based Approach' (2006) Bulletin for International Taxation, November, 431

101 Zolt EM 'The uneasy case for uniform taxation (1996) 16 Va. Tax Rev. 39 86, see also Greatz MJ and Schenk DH 'Federal income taxation: principles and policies' (1995) 3rd (ed) 31 Branford DF 'Untangling the income tax (1986) 53 150

102 Fleming JC et al 'Fairness in international taxation: The ability-to-pay case for taxing worldwide income' (2001) 5 (4) Fla. Tax Rev.299

103 Burman LE 'Taxes and inequality' (2013) 66 Tax L. Rev. 563

104 Fried H 'The puzzling case for proportionate taxation (1999) 2 Chapman L. Rev. 157 182, Zolt EM (1996) supra

105 Lindsey VW 'The widening gap under the Internal Revenue Code: the need for renewed progressivity' (2001) 5 Fla. Tax Rev. 1

106 Vanistendael F 'Legal framework for taxation in Thuronyi V 'Tax design and drafting' (1996) 1 IMF

107 Seto, TP and Buhai SL 'Tax And disability: ability to pay and the taxation of difference (2006) 154 Univ. Pennsylvania L. Rev. [Vol.: 1053

108 K 'The Debt-Equity Distinction in a Second-Best World' (2000). 53 Vand. L. Rev. 1055, 1113 at 1114

109 Fleming, J C et al 'Fairness in International Taxation: The Ability-to-Pay Case for Taxing Worldwide Income' (2001) 5 Fla. Tax Rev. 299

110 For detailed discussion on this systems see: Graetz MJ and. Warren AC 'Unlocking business tax reform' (2014) Tax Notes 707 See also Graetz

residence-based system, the state must provide a framework for determining who its residents are. However, as has already been noted, states differ in their determination of 'resident' and 'non-resident'.

While discussing the relationship between benefit and ability to pay principles, Dodge argued that the best fairness norm is the ability to pay norm. As it is less contentious compared to benefit principle, because it separates tax fairness from social justice theory – measurement of benefit derived.[111] However, he failed to realise that the measurement issues he raised in challenging benefits principle are also going to be a problem in the ability to pay because the assessment of a person's well-being requires another measurement. Therefore, the benefit and the ability to pay should not be separated as a person is to pay tax on the benefit he received from the government based on his ability-to-pay. Avi-Yonah stated that benefits principle was always part of the ability-to-pay principle.[112] Roxon described ability to pay as an extended version of benefits principle, and he states:

"… Appropriate price for a person to pay for the whole of general government services, including redistribution, is the amount determined by measuring the ability to pay. The appropriate measure of the total benefit received from general government services is taken to be the amount of the tax payable on the basis of ability to pay."[113]

The fusion of ability to pay and benefits principle by the above statement coupled with the non-measurability of government benefit (especially to non-resident) linked the notion of benefits principle with the concept of redistribution. There is a consensus as to the legitimacy of redistribution in taxation as it has social value.[114] However, the libertarian could argue that redistribution is a means of taking from those who are entitle to market rewards and giving to those who are not. It is worth noting that the distinction between redistributive and benefits principles of tax may not be clear.[115] One may argue that redistributive taxes could be understood as benefit taxes in the sense that wealthy individuals pay them for the benefit (lower crime rate, a better-educated workforce) that the egalitarian society provide.

Therefore, both the benefit and the ability to pay norms are very relevant to the determination fairness in ascertaining the connecting factor between the proposed taxpayer and the taxing authority on the ground of residency. Thus, it is equitable and fair for the state to impose a tax on all the income[116] of its residents on the ground of the benefit being received by the taxpayer from the state. Moreover, on the same ground, extension it can also extend the tax to non-residents for all income he derived from the state. Stratford CJ has this to say:

"…the privilege and protection of resident can justly be called upon to contribute towards the cost of the good order and the government of the country that shelter him."[117]

Both benefit and the ability to pay norms of tax equity or fairness principle has to do fair and equitable distribution of the tax burden and allocation of tax jurisdiction between persons within a state or between nations. By the features of a residence-based system[118] coupled with the reality of globalisation evoke that no state can adopt and administer residence-based

MJ and Warren, AC 'Integration of Corporate and Individual Income Taxes: An Introduction' (1999) Tax Notes, Sept. 27, 1767Graetz MJ and. Warren AC, 'Income Tax Discrimination and the Political and Economic Integration of Europe,' (2006). 115 Yale L. J. 1186; Amiram D et al., ''Tax Avoidance at Public Corporations Driven by Shareholder Demand: Evidence From Changes in Shareholder Dividend Tax Policy' (2014), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2111467; Ikin C and Tran, A 'Corporate Tax Strategy in the Australian Dividend Imputation System,' (2013) 28 Australia Tax Forum 523; Vann, RJ 'Corporate Tax Reform in Australia: Lucky Escape for Lucky Country?' (2013) 1 Brit. Tax Rev. 59-75

[111] Dodge (2005)

[112] Avi-Yonah (2007)

[113] Roxan I (2012)

[114] Ibid

[115] Cappelen AW 'The Moral Rationale for International Fiscal Law' (2006) 15 (1) Ethic and International Affairs

[116] Both domestic and foreign.

[117] Kergeulen Sealing & Whaling Co. Ltd V CIR (1939) AD 487, 10 SATC 363

[118] That is taking both domestic and foreign sourced income of those residing in the state on one hand and taxing the domestic sourced income of the resident of another state. Subject to tax credit (for foreign paid tax), deducted and exemption where applicable.

taxation within its boundaries without involving another state. Therefore, cooperation between the states towards aligning their respective definitional rule of residency for tax purpose is the panacea to the problems mentioned above of achieving fairness in defining the tax base and the taxable person.

EFFICIENCY PRINCIPLE

The efficiency principle connotes that tax imposed by the state should not be a consideration while making any decision to invest or save in that state.[119] The efficiency could be either economic or administrative. For the economic efficiency, the states use tax to achieve economic goals.[120] The attainment of the economic goal is always inevitable. Hence, the states initiate tax policies that violate the equity and fairness principle either in terms of the allocation of the tax burden on both the residents and non-residents of the state.[121]

In determining the tax base and taxable person, the state interferes with the taxpayers' decision. Therefore, it must consider the balance between fairness on the taxpayers and economic efficiency for achieving an equitable distribution of the tax burden between the residents and non-residents of the state.[122] Ideally, the trade-off between equity and efficiency at domestic level centred the on the income derived from activities such as labour and active domestic business other than capital investment.[123] However, the residence-based system involves close interaction between the states, especially in the area of capital investment by the residents of the states. Thus, it is expected that taxpayers of all the states should have equal treatment no matter where they derived the income. Lack of consistency in the definitional rule leads the taxpayers to invest in the states where they could get a higher after-tax return.

National and international tax interests differ, and no any foreign body can reconcile these differing interests.[124] Therefore, from the perspective of domestic taxation, both Capital Export Neutrality and Capital Import Neutrality are inferior to national neutrality.[125] National governments assign a tax burden and provide benefit. Therefore, no function is more at the government than its system of taxation.[126] At the international level, the issue neutrality arises where two or more jurisdictions lay claim to tax income from an international transaction. That is the jurisdiction where the investment took place and the jurisdiction where the investor resides. At the national setting of the hand, only one body lays the claim to tax either using residence or source connecting factors.[127]

As noted earlier, the state can have a connection with the taxpayer either because of the economic activity that generates the income took place within its territory, or the income earner resides there. However, the jurisdictional rules that define the economic activity or the income earner are characterised by inconsistencies and conflicts both in domestic and at international level.[128] These problems

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119 Hasen D 'Tax neutrality and tax amenities' (2012) 12 (2) Fla. Tax Rev. 62 see also Weisbach, DA 'Line drawing, doctrine and efficiency in the tax law' (1998) Chicago working paper in Law and Economics available at www.law.uchicago.edu/ Publications/Working/index.html. assessed on 10/10/2014, see also Bittker, B I "Equity, Efficiency, and Income Tax Theory: Do Misallocations Drive Out Inequities" (1979). *Faculty Scholarship Series.* Paper 2301. http:// digitalcommons.law.yale.edu/fss_papers/2301 - to determine whether taxpayers or groups of taxpayers are equals or unequal, equity theorists compare their pretax economic incomes

120 Palmer (1989)

121 For example the state may grant a tax holiday or incentives to certain class of residents or non-residents. It may also exempt them totally from the tax regime. This segregation violate the fairness principle but in order to achieve an economic goal the state closes its eyes toward that.

122 Thus, there are two competing interests: the taxpayers (both residents and nonresidents) want to be treated equally and fairly, on the other hand the state want to maximize its economic efficiency. Therefore tax legislation must be designed to balance these interests.

123 Knoll, MS 'Reconsidering international tax neutrality' (2011) 64 Tax L. Rev. 99; Shaheen F ' International tax neutrality: reconsiderations' (2008) 27 Va. Tax Rev. 203.

124 Cockfield A 'Purism and contexualism within international law analysis: How trading analysis fails developing countries' (2007) 5 (2) E-journal of tax research 199

125 Shaviro, DN (2007) at 155

126 Dodge supra

127 Hasen D 'Tax neutrality and tax amenities' (2012) 12 (2) Fla. Tax Rev. 62

128 The inconsistencies do occur in the national legal regime. For instance the determination of residence rule as contains in sections 2, 8(7), 15 and 27 of the Nigerian Personal Income Tax Act 2004 (as amended) amplified by the 1st schedule to the Act. (Detailed analysis of these provisions will be made later in this paper) The conflicts, on the other hand, do happen at international as a result of different definitional rule adopted by various

could affect the economic decision of the taxpayer. Therefore, to avoid this predicament, the definitional rule of the source of income and that of residence should be designed in a neutral form. Economic efficiency as a policy issue always asks; whether the tax system promotes or hinder economic efficiency and the extent to which the tax regime distorts the behaviour of the taxpayer.

CERTAINTY

The fairness and efficiency of every tax policy cannot be achieved if the objectives of the policy are not certain. Certainty embodies concepts such as simplicity, clarity and consistency.[129] In determining the tax liability of every person, the states express the objectives of their tax policies through the objective and subjective tests. Failure to design the tests in clear and simple terms makes the taxpayer uncertain about his tax liability. The uncertainty may lead the person to lose confidence in the tax system. The certainty and simplicity of a provision are assessed by determining its opposite, which is the complexity.[130] The question is how to determine a complex tax provision?

The usual methods for identifying the complexity of tax provisions are: 1) the readability of the law; 2) the compliance cost; 3) the volume of the law. Given the current global nature of taxation, the complexity in the domestic tax provisions of one state may transcend to other states.

Thus, the domestic rules must intersect with each other. Therefore, any inconsistencies between the tax provisions of the one States and those of other states can lead to undesirable outcomes of double or even multiple taxations. Therefore, there is the need to design the rules for determining residence in more simple and clear terms.

CONCLUSION

There is a convergence of the states on the two general principles that underlie the jurisdiction to tax – residence and sources-based systems. Thus, the taxpayers with a sufficiently close nexus to the state are treated as 'residents' and are liable to taxation on their global income. Moreover, the taxpayers without such close connections to the state should be regarded as 'non-residents' and are made to pay tax only on the income they derived from or connected with the state. Choosing either of the two fundamental principles that form the link between the taxing state and the tax subject. That is a state is expected to evaluate the central focus of its sovereignty, using a statist political conception of the state.[131] The state may consider population as the main focus of sovereignty. Thus, imposing a tax on all income of its residents based on the personal relationship with the state, irrespective of the source of that income (residence-based). A state could as well consider its territory as the primary focus, thereby imposing a tax on all income derived from the territory, irrespective of the identity of the producer (source-based).[132]

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countries. That is to say, two or more countries can claim tax jurisdiction over the same income of one person, due to the divergence of definition of the income or the income earner as the case may be.

[129] *Cooper*, G '*Themes and Issues in tax simplification*' (*1993*) *10 Aust. Tax Forum*. *417*.

[130] Tran-Nam, B 'Tax Reform and tax simplicity: A new and 'simpler' tax system?' (2000) 6 UNSW Law Journal 6

[131] Gliksberg D 'The effect of the statist-political approach to international jurisdiction of the income tax regime – the Isreal case" (1994) 15 Mich. J. Int'l L. 459

[132] Ibid, see also Musgrave PB 'Sovereignty, Entitlement, and Cooperation in International Taxation' (2001) 26:4 Brooklyn J. of Int'l L. that national right to tax the global income of residents is recognized in international law and the exercise of tax sovereignty over foreign source income is necessary to achieve equitable tax treatment of resident taxpayers by making all income, wherever earned, subject to tax, consistent with the accretion principle.