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# DOUBLE TAXATION OF A CROSS-BORDER TELEWORKER IN A NON-TREATY SITUATION

## on the example of Finland and Portugal

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# ABSTRACT

The digitalisation has enabled people to work remotely from almost anywhere in the world. Information and communications technology has made it possible to do practically any work, that can be done using phone or computer, from any location. Teleworking has been a familiar concept especially to office workers at the latest since the covid-19 pandemic forced people to home offices in spring 2020. Teleworking from abroad has also become more common in recent years.

This research clarifies the reasons for double taxation and the methods for preventing it in a non-treaty situation when a Finnish national employee moves of their own free will to Portugal for teleworking from there for a Finnish employer.

Teleworking from abroad on a voluntary basis may cause double taxation. In a non-treaty situation, issues arise when the collection of taxes is in the interests of both countries and the rules on taxation are determined by the national legislation of each country involved. A dual residence conflict arises due to the Finnish three-year rule when a Finn moves abroad, in which case both countries may be unwilling to eliminate the double taxation as they both consider themselves being the residence country of the taxpayer.

The Finnish six-month exemption rule of work abroad is not applicable to remote work from abroad and the credit method of Finnish domestic legislation is only applicable to foreign sourced income. Acquiring the NHR status in Portugal is a good way to avoid double taxation in this situation, provided that the work is considered being high value-added. The best way to avoid double taxation seems to be becoming a non-resident taxpayer in Finland although it might take three years in most cases.

To conclude, remote working from abroad likely causes double taxation and the ordinary methods for preventing it seem to be ineffective, especially in the absence of a tax treaty.



Keywords: double taxation, telework, remote work, non-treaty situation, cross-border employment, personal income taxation

# 1. INTRODUCTION

Remote working on a voluntary basis from abroad, which has attracted interest in recent years due to the development of digitalisation and especially in the wake of the covid-19 pandemic, is a challenge for international taxation. An ordinary employee is unable to determine the possible consequences of teleworking from abroad for the worker himself and to the employer, especially when there exists no applicable tax treaty, which is the case between Finland and Portugal. This research examines:

> Why teleworking from abroad may cause double taxation and what are the methods for preventing it on the example of Finland and Portugal?

The present research restricts itself to the application of income tax rules on a natural person's income from employment in a non-treaty situation. Portugal has been selected as the subject of the research firstly because among Finnish people it is a popular country to go to and secondly because it does not have a tax treaty with Finland.[1]

Remote working or teleworking is a work arrangement that allows an employee to perform their usual work tasks in a place outside of the employer's physical premises by using information and communications technology.[2] Unlike posting abroad, a voluntary teleworking from abroad is based on the employee's own desire to go abroad to a place of their own choice[3], not on the employer's order to perform work abroad in a place determined by the employer due to the work tasks. This is an important distinction to note because from the Finnish domestic law perspective the application of the relevant tax exemption rule requires that it is a work-related stay abroad, which is not the case in a voluntary remote working from abroad.[4]

When a person and their income has a connection with at least two countries, the double taxation may arise due to the simultaneous application of the residence state principle, the source state principle and the nationality principle by the countries concerned. In addition, the double taxation may emerge due to the dual residence conflict, which means that the employee is treated as a resident taxpayer in both of the countries according to their domestic rules. The double taxation

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[1] Toivainen, A. (2022), Kansainvälisten veroasioiden palsta, *Verotus 1/2022*, 124–130.
[2] Caillier, J. G. (2012), The Impact of Teleworking on Work Motivation in a U.S. Federal Government Agency, *The American Review of Public Administration*, *42*(4), 461–480.
[3] Carbajo Nogal, C. (2020), Tax Aspects of Teleworking in the Personal Income Tax. *Cluj Tax Forum Journal, 2020(5)*, 8–16.
[4] Verohallinnon ohje: Ulkomailla työskentelyn verotus, VH/5712/00.01.00/2021, The date of issue: 11.2.2022.

may also be caused by the qualification conflict or the classification conflict. [5] In a conflict situation, neither of the countries consider itself to be obliged to provide a relief from the tax paid to the other country.

A tax treaty between two or more countries aims to abolish or limit international double taxation by determining which country is the residence country and which is the source country and by allocating the taxing rights between those two. In the absence of a tax treaty, however, the national legislation of each of the countries involved determines the rules on taxation, including the possible methods for eliminating the international double taxation. The double taxation may be abolished by applying an exemption method, a credit method, a deduction method or a reduced rate method. [6]

The taxation of cross-border teleworkers' income in a non-treaty situation in the covid-19 context has previously been researched by Kim but she only focused on the issue in the USA area.[7] There has been some research on cross-border telework in Europe in the light of covid-19 but for example Carbajo Nogal focused on the possible consequences of domestic and cross-border teleworking for the deductible expenses.[8] Da Costa and Soares researched teleworking from abroad in general and from Portuguese perspective and showed that teleworking from abroad might have consequences regarding personal income taxation, social security and the creation of a permanent establishment. They concluded that it is necessary to analyse the possible consequences carefully case-by-case in order to lower the risks for both the worker and the employer[9] with which the author agrees.

However, although there has been no tax treaty between Finland and Portugal since the beginning of 2019[10], which has made the situation unclear and complex, and teleworking from abroad has attracted interest in recent years, little attention has been paid to the risk of double taxation of a natural person's cross-border employment income and to the methods for avoiding such risk in a non-treaty situation on the example of Finland and Portugal. Until 2019, Finland's network of tax

[5] Helminen, M. (2013), *Finnish international taxation*, (2nd ed.) University of Helsinki, Faculty of Law, 27-28.
[6] *Ibid.*, 29–30.
[7] Kim, Y. R. C. (2021), Taxing Teleworkers, *55 UC Davis L. Rev. 1149 (2021),* University of Utah College of Law Research Paper No. 473.
[8] Carbajo Nogal, *supra nota* 3. 8-16.
[9] da Costa, S. F., & Soares, C. (2021), Teleworking from abroad: some issues regarding taxation, social security and labour law, *Red-Revista Electronica De Direito*, 83–100.
[10] Veronmaksajat: *Suomen ja Portugalin uusi verosopimus ei tule voimaan vuoden 2019 alussa*, (2018). Retrieved from: https://www.veronmaksajat.fi/ajankohtaista/Ajankohtaista/Uutiset/suomen-ja-portugalin-uusi-verosopimus-ei-tule-voimaan-vuoden-2019-alussa/#c6448ccb, 5 March 2022

treaties has covered all the EU countries[11] and that is probably one reason why the previous research on cross-border employment within the EU from Finnish perspective has focused mainly on tax treaty situations.

This research aims to clarify the reasons for double taxation when a Finnish national employee leaves voluntarily for Portugal to telework from there for a Finnish employer, to present the available methods for preventing the double taxation in the absence of tax treaty and explain why domestic relief methods may be insufficient. As the taxation affects to the whole society it can be analysed from many perspectives, for example from the state's, corporate or society's perspective. In this research, the consequences of such telework are analysed from the employee's viewpoint.

This is a qualitative legal research because the aim is to gain a better understanding of the double taxation in the cross-border employment when there is no applicable tax treaty, and the material is collected from relevant academic literature, legal articles, legislation, the instructions of the tax authorities as well as from judicial decisions. The reasons for double taxation and the methods for providing the double tax relief are resolved by analysing the legal literature and the Finnish and Portuguese domestic laws, including the detailed guidance by tax authorities in the light of the hypothetical case, using legal dogmatic method.[12] The interpretation and systematization of the legal material on taxation of earned income is important for the society because when the taxman takes part of the income the taxpayers want to know on what basis and how much they are being taxed. Since the legal dogmatic method allows normative argumentation, despite its descriptive nature, it lets this research to include criticism and justification of applicable law.[13] The legal materials are analysed bearing in mind the fundamental freedoms provided by the EU law.

Structurally, the research itself is divided into five chapters. After the introduction, the second chapter introduces the theoretical framework by presenting and justifying the methodology and materials of the research, defining the main concepts and principles as well as presenting the limitations and assumptions of the research. Then, in the third chapter the reasons for double taxation are analysed in the light of the case study of Finland and Portugal. The fourth chapter analyses the possible methods for preventing double taxation in that case study. In the fifth chapter, the research is summarised and the achievements are discussed.

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[11] Toivainen, *supra nota* 1, 124–130.
[12] Husa, J. (2013). *Oikeusvertailu*. Lakimiesliiton kustannus, Estonia. 91–92.; Hirvonen, A. (2011), *Mitkä metodit? Opas oikeustieteen metodologiaan*, Yleisen oikeustieteen julkaisuja 17, Helsinki. 21–24.
[13] Peczenik, A. (2005), Juridikens Allmänna Läror. *Svensk Jurist Tidning*, 250-272.

# 2. THEORETICAL BACKGROUND

## 2.1 Limitations and assumptions of the research

The aim of the research is to clarify the reasons for double taxation in cross-border remote work in a non-treaty situation when a teleworker has gone abroad of their own free will, not due to work, on the example of Finland and Portugal. Also, this research aims to clarify the methods for preventing double taxation in such situation as well as explain why the domestic legislation is sometimes insufficient for eliminating double taxation.

The research focuses on a hypothetical case in which an employee moves from Finland to Portugal on a voluntary basis and continues working remotely for their same Finnish employer as previously. Posting abroad is excluded from this research. In this case, the employer is a Finnish private company, registered and located in Finland and thus the salary is paid from Finland. The other country, in this case Portugal, is the country where the employee is physically staying and performing the work remotely, and thus it is called the country of work for the purposes of this research. The employee is teleworking from Portugal for longer period than 183 days and does not have a family or immovable property in neither of the countries. In this situation the tasks of the employee are such that they do not form a permanent establishment for the employer in the country of work. The term income from employment usually refers to the different kind of remunerations earned from work but this research is limited to the employee's cash salary and thus will not go into details of the specific employment income types. The present research does not take a stand on whether the concept of an economic employer is applied in the countries in question or not.

## 2.2 Definition of cross-border remote work

The research focuses on remote working from abroad because the digitalisation has enabled it and the covid-19 pandemic may have increased the willingness to voluntary teleworking from abroad as showed in recent studies and articles.[14] Remote working or teleworking can be defined as a

[14] The increased interest towards teleworking from abroad has been pointed out in several articles, for example by Kemppinen (Kemppinen, T. (2021), *Finland: Remote work from abroad – questions for employers to consider*, Bird & Bird. Retrieved from: https://www.twobirds.com/en/insights/2021/finland/finland-remote-work-from-abroad-questions-for-employers-to-consider, 10 April 2022); and for example, Mankinen showed that 8% of the study group consisting of Finnish employees were willing to telework from abroad during the covid-19 (Mankinen, J. (2021), *Matkailijoiden etätyöskentely Tahkon ja Nilsiän alueella.* (Graduation thesis) Savonia University of Applied Sciences.); Carbajo Nogal also pointed out that not all the telework from abroad during covid-19 has been voluntary all the time but instead due to sudden confinement for example during holiday trip, which has led to extended stay abroad. (Carbajo Nogal, *supra nota* 3.)

work arrangement that allows an employee to perform their usual work tasks in a place outside of the employer's physical premises by using information and communications technology.[15] The worker may voluntarily choose the place of performing the work tasks. Remote working can be done full-time or part-time.[16] In principle, it can be done for example at home, summer cottage or in a foreign country.[17] A cross-border remote work refers to a situation in which an employee moves abroad on a voluntary basis in order to work remotely from there for the same employer as previously.

Especially when talking about tax matters it is important to distinguish the concept of remote working from working as a posted worker. Posting a worker in another place, city or country than the usual office is based on the employer's order to perform work in a certain place determined by the employer due to the work tasks, although posting a worker requires an agreement between the employee and employer.[18] Working remotely in the place freely chosen by the employee is based on the employee's desire to go abroad and on the agreement between the employer and employee. The usual reasons to move to another country to remote work from there are some personal reasons, for example a spouse's posting in another country, completing studies abroad or combining working and holiday.[19] Thus, the main differences between the posted worker and the voluntary remote worker are who chooses the place of work and what are the reasons for moving abroad.

The notions telecommuting and telework mean the same thing in a today's workplace[20] even though telecommuting has been a separate concept according to some scholars.[21] Also, the notion remote work has been used as a synonym for telework extensively in the recent academic literature and news. Thus, those terms are used as synonyms in this paper.

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[15] Caillier, *supra nota* 2, 461–480.
[16] Gajendran, R. S., & Harrison, D. A. (2007). The good, the bad, and the unknown about telecommuting: meta-analysis of psychological mediators and individual consequences. *Journal of applied psychology*, *92*(6), 1524–1541.
[17] Caillier, *supra nota* 2. 461–480.
[18] Saarinen, M. (2018). *Ulkomaankomennus, Työ-, sosiaali- ja vero-oikeudelliset näkökohdat*. Alma Talent Oy. 27–29.
[19] Ulkomailla työskentelyn verotus, *supra nota* 4.
[20] Gajendran & Harrison, *supra nota* 16. 1524–1541.
[21] Sullivan, C. (2003). What's in a name? Definitions and conceptualisations of teleworking and homeworking. *New technology, work and employment*, *18*(3), 158–165.

## 2.3 International tax law

International tax law does not consist of supranational rules that apply in every country. Each country makes its own tax legislation independently. Although, the bilateral and the multilateral tax treaties concluded with other countries limit the country's power to collect taxes under the domestic rules. Also, in the case of the EU member states, the rules of EU tax law supersede the domestic legislation.[22] Despite the tax treaties and the EU law, every country's international tax law, which is part of their domestic law, differs from other countries' international tax law. Therefore, this kind of research aiming to resolve a specific legal question on the example of certain tax jurisdictions cannot be made focusing on international tax law in its broad sense. This research is narrowed to focus on Finnish and Portuguese international tax law.

## 2.4 Reasons and forms of double taxation in general

Things that usually affect to taxation of income earned from employment abroad are in which country the work has been exercised, for how long the employment takes place, is the employer from public or private sector and is the employer from work country or from somewhere else.[23] The taxation of work done abroad is also affected by whether the employee is a tax resident in the country concerned.[24] The key questions of international tax law in this research are: What is the residency for tax purposes of the employee according to Finnish law and according to Portuguese law? What happens if the employee has the residence for tax purposes in two different countries and how such conflict could be resolved? The usual reasons and forms of international double taxation are briefly explained below.

### 2.4.1 Simultaneous application of different principles

When a person is physically working in one country and the salary is paid from another country there is a cross-border situation at hand. In such situation, the income may be subject to international double taxation due to the simultaneous application of the residence state principle, the source state principle and the nationality principle by the countries concerned.[25]

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[22] Helminen, M. (2016). *Kansainvälinen verotus*. Talentum Pro, Helsinki. 29–36.
[23] *Ibid.*, 445.
[24] Malmgrén, M., & Myrsky, M. (2017). *Kansainvälinen henkilö- ja yritysverotus*. (3rd ed.), Alma Talent, Helsinki, 206.
[25] Helminen (2013), *supra nota* 5, 27–28.

The taxation is usually based on the residence state principle, the source state principle or the nationality principle.[26] The residence state principle means that the taxpayer's worldwide income is taxed in the taxpayer's residence state regardless of their nationality or the source of the income. When the source state principle is applied the income is taxed in the country of its origin. A country that applies the nationality principle taxes the taxpayer's worldwide income because the recipient has the nationality of that country even though s/he would live in another country or receive the income from another country. Some countries may apply several principles at the same time in order to obtain the widest possible power of taxation.[27] Especially in a cross-border situation, if the countries involved apply different principles at the same time, it might lead to double taxation.

The income taxation in Finnish domestic law is based on the residence state and the source state principles.[28] The tax liability of a natural person in Finland is divided into general tax liability and limited tax liability. The tax residency is regulated in *Tuloverolaki* (TVL, in English: Income Tax Act)[29] according to which "a natural person is subject to general tax liability in Finland when s/he is living in Finland in the tax year (a resident taxpayer). In that case, in principle, s/he has to pay tax from their worldwide income, i.e. income received from Finland and from other countries."[30] "A natural person is considered to be living in Finland if s/he has the actual apartment and home in Finland or if s/he is constantly dwelling in Finland for over six months."[31] Whereas, "a natural person is subject to limited tax liability when s/he has not lived in Finland during the tax year and in that case s/he is liable to pay tax only from the income sourced from Finland (a non-resident taxpayer)."[32]

In its income taxation, Portugal also applies the residence state principle and the source state principle. In Portugal, the residence for tax purposes of a natural person is determined in *Código do Imposto Sobre o Rendimento das Pessoas Singulares* (CIRS, in English: Personal Income Tax Code)[33] according to which, "an individual is considered to have the residence for tax purposes in Portugal if s/he stays more than 183 days in Portugal during a twelve-month period, or if an

[26] Helminen (2016), *supra nota* 22, 87.; About the principles, see also Vapaavuori, A. (1991). *Suomeen suuntautuvien portfoliosijoitusten verokohtelu*. Suomalaisen lakimiesyhdistyksen julkaisuja. A-sarja N:o 186. Suomalainen lakimiesyhdistys. Helsinki 1991. (Dissertation). 36–39.
[27] Helminen (2016), *supra nota* 22, 87–88.
[28] *Ibid.*, 88.
[29] Tuloverolaki. 30.12.1992/1535 (TVL)
[30] TVL 9.1 § (freely translated from Finnish to English by the author)
[31] TVL 11 § (freely translated from Finnish to English by the author)
[32] TVL 9.2 § (freely translated from Finnish to English by the author)
[33] Código do Imposto Sobre o Rendimento das Pessoas Singulares 30/11/1988 (CIRS)

individual maintains a habitual residence in Portugal."[34] When a natural person is a tax resident in Portugal, s/he has the liability to pay taxes on his/ her worldwide income which includes inter alia the income from employment exercised in Portugal.[35] Non-resident taxpayers, instead, are liable to pay taxes only on the income sourced from Portugal.[36]

### 2.4.2 Dual residence conflict and source-source conflict

Double taxation might also be caused by a dual residence conflict which means that several countries at the same time consider themselves as the residence country of a taxpayer. The taxpayer is treated as a resident taxpayer in both of the countries according to their domestic rules and thus both countries tax the same income from the same taxpayer. [37] Usually the residence state taxes the taxpayer's worldwide income. Similarly, a source-source conflict may cause double taxation when two or more countries consider themselves as the source states of the same income.[38]

### 2.4.3 Classification conflict and qualification conflict

In addition, a classification conflict or a qualification conflict may cause double taxation. A classification conflict emerges due to the different interpretation of facts of the case or different interpretation of the tax treaty by the contracting parties.[39] Whereas, a qualification conflict arises when there are differences in the contracting states' domestic laws and because of that they think that a different provision or a different income category of the tax treaty applies to the case.[40] For example, one country believes that the income is dividend and the other treats it as interest.[41] Classification conflicts and qualification conflicts will not be covered in this research any further because this research focuses on natural person's cash salary and does not go into details of different salary types and how they are defined in domestic laws and interpreted by domestic tax authorities.

[34] PWC Worldwide Tax Summaries: *Portugal – Individual: Residence*. The date of publication: 18.8.2021. Retrieved from: https://taxsummaries.pwc.com/portugal/individual/residence, 3 March 2022.
[35] da Palma Borges, R., de Sousa, P. R., & Pimentel, M. C. (2010), The taxation of sportspeople in Portugal, *The International Sports Law Journal, (3-4),* 75-81.
[36] *Ibid*. da Palma Borges et al., 75–81.
[37] Helminen (2016). *supra nota* 22, 91.
[38] Helminen (2013). *supra nota* 5, 28.
[39] McMillan, C. M. (2021), *Finding a Governing Law to Resolve Conflicts of Tax Laws*, LLM Theses, 55, Toronto, 19-20.; Helminen (2016), s*upra nota* 22, 90-91.
[40] McMillan, *supra nota* 39, 17–18.; Helminen (2016), *supra nota* 22, 91.
[41] Helminen (2016), *supra nota* 22, 91-92.

### 2.4.4 Forms of double taxation

International double taxation can be international juridical double taxation or international economic double taxation. International juridical double taxation means that two or more countries tax the same taxpayer's same income at the same time.[42] It is typically caused by the simultaneous application of the source country principle and the residence country principle.[43]

International economic double taxation refers to a situation in which two or more countries tax the same income when it is in the hands of different taxpayers.[44] International economic double taxation may emerge for example when the dividends are distributed and the residence country of the distributor taxes him/ her for the profits and the recipient's country of residence taxes him/ her from the dividend.[45]

This research focuses on international juridical double taxation. International economic double taxation, which concerns collecting tax from two or more taxpayers for the same income, will not be covered. Therefore, hereinafter, the reference to double taxation refers specifically to the international juridical double taxation, unless otherwise stated.

## 2.5 Elimination of international juridical double taxation

A tax treaty between two or more countries aims to abolish or limit international double taxation by determining which country is the residence country and which is the source country and by allocating the taxing rights of different tax objects between those countries. By agreement, either state may give up their taxing rights concerning certain income totally or partly.[46] A country may also include provisions for eliminating international double taxation in its national legislation. In the national legislation, a country may unilaterally waive its right to tax for example in case of certain type of income or in particular situation, i.e. when specific conditions are met.[47] In the absence of a tax treaty, however, it is the national legislation of each of the countries involved which determines the rules on taxation. International juridical double taxation can be eliminated by applying an exemption method, a credit method, a deduction method or a reduced rate method.[48]

[42] Covrig, G. (2012). Conventions for the avoidance of double-taxation. Romania case. *Contemporary Readings in Law and Social Justice*, *4*(1), 426-430.
[43] Helminen (2013), *supra nota* 5, 28.
[44] Covrig, *supra nota* 42, 426–430.
[45] Helminen (2016), *supra nota* 22, 92.
[46] Helminen (2013), *supra nota* 5, 29.
[47] *Ibid.*
[48] *Ibid*.

In the exemption method, the different tax objects are divided between the residence country and the source country in the way that a certain income is taxed only in one of the countries by excluding the other country's taxing right. Usually it is the residence country which gives up its right to tax the income received from another country, the source country, because typically, according to tax treaties, the residence country's obligation is to provide relief from the taxes paid to the source country.[49] When one of the countries fully exempts the income from taxation, it is called a full exemption. The exemption is partial when one of the countries exempts only a part of the income. Some countries apply the exemption with progression method which means that the income taxed in the one country, usually in the source country, is not taxed in the other country, usually in the residence country, but that income is taken into account when the progressive personal income tax rate is determined or applied to the taxpayer's other income.[50]

The credit method provides that the taxes paid by the same taxpayer in the source country are deducted from the taxes that the taxpayer should pay for the same income in the residence country. Sometimes, quite rarely, the source country may deduct the taxes paid in the residence country from the taxes payable for the same income in the source country.[51] A full credit means that the residence country provides credit for the full amount of tax paid to the source country and thus the taxpayer may receive tax return from the country of residence if the tax rate is higher in the source country.[52] However, the most common type of credit is the normal or ordinary credit which means that the taxpayer pays in total at least the same amount as if s/he had earned all the income from the residence country. In that case, the tax which is deducted in the residence country cannot be higher than the tax payable for the foreign sourced income in the residence country.[53]

In the deduction method the tax paid in the source country can be deducted from the taxable income in the country of residence of the taxpayer. When this method is applied, the double taxation is not fully eliminated.[54] One possibility to limit the international double taxation is to apply reduced rate method, which means that the foreign sourced income is taxed with a reduced tax rate in the country of residence.[55]

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[49] Malmgrén & Myrsky, *supra nota* 24, 43.
[50] Helminen (2016), *supra nota* 22, 94.; Helminen (2013), *supra nota* 5, 29.
[51] Helminen (2013). *supra nota* 5, 29.
[52] *Ibid.*, 30.
[53] Malmgrén & Myrsky, *supra nota* 24, 53.
[54] *Ibid.*, 58.
[55] *Ibid.*, 60.

If taxpayers find themselves being taxed against the international taxation rules the final way to seek the elimination of double taxation could be the international tax dispute resolution procedure based on the Council Directive (EU) 2017/1852 on tax dispute resolution mechanisms in the European Union. However, in Finland in a non-treaty situation, this procedure only applies to disputes on the transfer pricing and the attribution of profits to permanent establishments.[56] Therefore, this mechanism is not analysed any further in this research.

## 2.6 Why Finland and Portugal?

In the case study of this research a Finnish employee leaves voluntarily for Portugal to remote work from there for his/ her Finnish employer. The Finnish perspective is chosen because the willingness to voluntary teleworking from abroad has attracted interest recently at least among Finnish people and also due to the author's personal acquirements. Portugal has been selected as the subject of the study firstly because among Finnish people it is a popular country to go to and secondly because it does not have an income tax treaty with Finland. This is highly exceptional because Finland has a bilateral[57] income tax treaty with all the other EU-countries.[58]

Finland terminated the previous tax treaty with Portugal in 2018 to expire at the end of the year. A new tax treaty between Finland and Portugal was already signed in 2016 and both countries should have taken the necessary national measures to implement it and then notify each other by the end of November 2018. In order to accelerate Portugal's efforts, Finland terminated the previous tax treaty signed in 1970. However, the notification required from Portugal was not received in time to allow the new tax treaty to apply immediately from the beginning of 2019.[59] Consequently, there is no tax treaty in force between Finland and Portugal at the moment.

The lack of tax treaty makes international taxation more complicated because the treaty is not there to provide the rules for taxation of cross-border employment income. In the absence of a tax treaty, the elimination of double taxation is based on the relief methods of the domestic legislations of Finland and Portugal alone. Using the example of these two countries it is possible to make an interesting research on the reasons for double taxation of cross-border telework in a non-treaty

[56] Verohallinnon ohje: Kansainvälisten veroriitojen ratkaisumenettely, VH/1581/00.01.00/2022, Date of issue: 24.3.2022.
[57] However, Finland has concluded the multilateral tax treaty between the Nordic countries.
[58] Toivainen, *supra* nota 1, 124–130.
[59] Veronmaksajat, *supra nota* 10.

situation and explain why the taxpayer is not always able to get the double tax relief from either of the countries.

# 3. REASONS FOR DOUBLE TAXATION IN THE CASE STUDY

International taxation deals with situations in which a taxpayer and their income has a connection with two or more countries at the same time. When a Finnish employee moves to Portugal for remote working from there for a Finnish employer the employee and their income has a connection with two countries, Finland and Portugal. Such income may be subject to double taxation due to the simultaneous application of the residence state principle, the source state principle and the nationality principle. In addition to the simultaneous application of these principles, the double taxation may also be caused by the dual residence conflict, the source-source conflict, the qualification conflict or the classification conflict. [60] In a conflict situation, neither of the countries consider itsef to be obliged to provide relief from the tax paid to the other country.

## 3.1 Simultaneous application of the residence state principle and the source state principle

In both Finland and Portugal the taxation is based on the residence state principle and the source state principle. As a general rule, both of the countries tax the tax residents from their worldwide income and the non-residents from the income sourced from that country. The tax residency is formed in the similar way in both countries, typically by living there.

In the hypothetical case, the Finnish national employee moves from Finland to Portugal in order to work remotely for a Finnish employer. First of all, the employee is considered to be a tax resident in Portugal according to Portuguese national rules because s/he spends more than 183 days in Portugal. In principle, the employee is deemed to be a tax resident from the first day of stay until the day of departure.[61] In that case, Portugal would apply the residence state principle to the employee and tax their worldwide income, including the income earned from teleworking for a Finnish employer. At the same time, if Finland considers itself being the source country, it could tax the income. In that case, the employee would be subject to double taxation due to the simultaneous application of the residence state principle and the source state principle.

## 3.2 Dual residence conflict

A dual residence conflict arises when two or more countries at the same time consider themselves to be the country of residence of the taxpayer and thus treat them as a tax resident. All those states

[60] Helminen (2013), *supra nota* 5, 27-28.
[61] KPMG: *Portugal – Thinking Beyond Borders for Portugal*, (1/2021), Retrieved from: https://home.kpmg/xx/en/home/insights/2021/07/portugal-thinking-beyond-borders.html, 3 March 2022.

consider themselves to be entitled to collect tax from the taxpayer's income which likely causes double taxation. A dual residence conflict exists only where, under the national law of each country involved, the person has their residence for tax purposes in that country.

From the Finnish perspective, a dual residence conflict typically arises if a Finnish national moves abroad and becomes a tax resident in the other country but at the same time is still treated as a resident taxpayer in Finland according to Finnish three-year rule. Finnish nationality alone does not provide grounds for a tax liability in Finland but the so-called three-year rule that applies only to Finnish nationals may cause the tax liability for a Finn who leaves Finland for working abroad. In that case the individual is liable to pay taxes to Finland on their worldwide income for the three consecutive years after leaving.[62] "A Finnish citizen is considered to be living in Finland even though s/he is not constantly dwelling in Finland until three years has gone by from the end of the year when s/he moved from Finland. Unless otherwise indicated, a Finnish citizen is not considered to have resided in Finland after the said period."[63]

In the case study, the employee moves to Portugal to stay there for longer than 183 days and thus becomes a resident taxpayer in Portugal from the first day of stay and at the same time becomes liable to pay tax in Portugal from their worldwide income according to Portuguese national law. The employee is therefore considered to be resident in two countries, in which case the double taxation occurs if and when each country taxes the employee on their worldwide income.

## 3.3 Source-source conflict

A source-source conflict arises when two or more countries consider themselves as the source countries of the same income.[64] The income earned from Finland is inter alia salary income from employment that has been performed exclusively or mainly in Finland for an employer located in Finland.[65] The Finnish Tax Administration has regarded that the work has been performed in Finland and the income is sourced from Finland if 51% of the work that has accrued this salary have been carried out in Finland.[66] In the case study, the income is paid from Finnish private company but if less than 51% of the work has been performed in Finland the salary is not considered to be sourced from Finland. Since the employee is physically staying in Portugal while

[62] Helminen (2013), *supra nota* 5, 47.
[63] TVL 11 § (freely translated from Finnish to English by the author)
[64] Helminen (2013), *supra nota* 5, 28.
[65] TVL 10.4 §.; Andersson, E., Linnakangas, E., Frände, J. (2016), *Tuloverotus*, (8th ed.), Talentum Media Oy, Lithuania, 98.
[66] *Ibid.*; See also case Korkein hallinto-oikeus, KHO 1994 B 556.

performing the work remotely for Finnish employer the income may be considered being a remuneration from work done in Portugal. The Portugal sourced income is defined as a compensation derived from activities performed in Portugal or a compensation paid by a Portuguese entity.[67] Therefore, if the employee is performing more than 51% of the activities accruing the salary concerned in Portugal, it is unlikely that the double taxation could be caused due to the source-source conflict.

## 3.4 Conclusion

When a Finnish national employee moves to Portugal for teleworking from there for a Finnish company, the double taxation may arise due to the simultaneous application of the residence state principle and the source state principle or due to the dual residence conflict. If at least 51% of the activities are carried out in Portugal it is unlikely that Finland considers the salary sourced from Finland and thus the source-source conflict is not probable reason for double taxation in this case. The most typical reason for double taxation of a Finnish citizen's income in cross-border remote working is the dual residence conflict which arises quite easily due to the three-year rule applicable to Finnish nationals who move abroad and become tax residents in a foreign country as well. The methods for preventing the double taxation will be analysed in the next chapter.

[67] KPMG Portugal, *supra nota* 61.

# 4. METHODS FOR PREVENTING DOUBLE TAXATION IN THE CASE STUDY

When a Finnish worker leaves for Portugal in order to continue to work remotely from there for their employer which is situated in the worker's previous country of residence, the worker's income from employment may be subject to double taxation typically due to dual residence conflict as shown above. In the absence of an applicable tax treaty, the domestic legislations of Finland and Portugal provide the grounds for eliminating the double taxation. A country may have included the provisions for eliminating international double taxation in its national legislation. In the national legislation, a country may have unilaterally given up its right to tax for example in case of certain type of income or in a particular situation, i.e. when specific conditions are met. International juridical double taxation can be eliminated by applying an exemption method, a credit method or a deduction method.[68] Both Finland and Portugal apply credit and exemption method which will be analysed next. In addition, the changes in the tax residence status as the ways to avoid double taxation will be discussed in this chapter.

## 4.1 Credit method in Finnish law

The elimination of double taxation in Finland is conducted by applying the provisions of *Laki kaksinkertaisen verotuksen poistamisesta* (later MenetelmäL, in English: the Act on the methods to be used when granting relief) which provides the rules for the provision of double tax relief.[69] The law applies in a tax treaty and in a non-treaty situation. The credit method is, in principle, used when the double tax relief is granted in a non-treaty situation.[70] In a non-treaty situation, if Finland is regarded as the residency state for tax purposes, Finland may provide relief only from tax paid to the other country's state, not for example from local taxes paid to the city or province which could have been credited when the tax treaty was in force.[71] In addition, in order to get the relief based on the credit method of Finnish MenetelmäL, certain conditions must be fulfilled. The credit may only be granted for the employee's own taxes which have been paid for foreign sourced income, and the income must not be tax-exempt in Finland according to domestic law.[72] Also, it is the taxpayer's obligation to request the relief.

[68] Helminen (2013), *supra nota* 5, 29.
[69] Laki kansainvälisen kaksinkertaisen verotuksen poistamisesta 18.12.1995/1552 (MenetelmäL)
[70] Malmgren & Myrsky, *supra nota* 24, 224–225.; Ulkomailla työskentelyn verotus, *supra nota* 4.
[71] Helminen (2013), *supra nota* 5, 32.
[72] *Ibid*.

In case of dual residence conflict, the credit method does not work in a non-treaty situation if Finland does not consider itself to be obliged to provide the relief. In the case study, if the salary is considered to be sourced from Finland, the credit method of MenetelmäL cannot be applied to provide relief from double taxation because one condition is not met: the income is not foreign sourced. However, if at least 51% of the activities that have accrued that salary have been performed in Portugal, Finland considers the salary being foreign sourced.[73] In that case, the credit method can be applied to provide the relief if the employee requests the relief, the tax has in fact been paid to Portugal and the employee presents adequate proof of that.

## 4.2 Finnish six-month exemption rule

The Finnish national legislation has a so-called six-month rule aiming to prevent double taxation in the cross-border employment. The six-month rule provides tax exemption on income earned from employment abroad when an employee who is a tax resident in Finland works abroad due to the work tasks for at least six consecutive months during which the employee does not reside in Finland for more than six days per month.[74] In principle this rule can apply in both the tax treaty and the non-treaty situations if the set conditions are met. This rule applies only to income from employment, not for example to pensions even if it was accrued while working abroad.[75] The six-month rule creates a significant exception to the general rule of Finland's right to tax generally liable tax resident of his/ her worldwide income.[76]

It must be clarified that the six-month rule only resolves how the income earned from employment abroad is treated for tax purposes in Finland. It differs from the 183-day rule used in most tax treaties in the way that the 183-day rule resolves whether the country of employment has the right to collect tax under the tax treaty concerned.[77]

In order to apply the Finnish six-month rule, it is not required that the country of work actually taxes the salary concerned and Andersson et al. have argued that the six-month rule could even lead to double non-taxation in a non-treaty situation if the country of work has exempted the income from taxation.[78] The idea is that there should not be a tax treaty preventing the employment country from taxing such income. However, the six-month rule cannot be applied if the work

[73] Andersson et al., *supra nota* 65, 98.; See also KHO 1994 B 556, *supra nota* 66.
[74] TVL 77 §
[75] Helminen (2016), *supra nota* 22, 462–463.
[76] Andersson et al., *supra nota* 65, 346–348.
[77] Malmgrén & Myrsky, *supra nota* 24, 220.
[78] Andersson et al., *supra nota* 65, 348.

country does not have the right to tax such salary according to the double tax treaty between Finland and the country of work.[79]

In its detailed tax guidance, the Finnish Tax Administration, however, has specified in particular that the six-month tax exemption rule does not apply to teleworking from abroad, for example when a person leaves abroad due to the posting of a spouse or of their own free will.[80] Teleworking for a Finnish employer from abroad, for example during a vacation or while studying abroad, does not fall within the scope of this provision either. The reason for this limitation is that in these situations the stay abroad is not due to the work itself and the work does not require a stay abroad.[81] To conclude, for the six-month exemption rule to apply, the work itself must require being abroad and thus the six-month exemption rule cannot provide relief from the double taxation in a non-treaty situation of cross-border telework in this case study.

## 4.3 The severance of substantial ties with Finland

What is relevant from the Finnish law perspective is whether Finland considers the employee living in Portugal to be resident or non-resident for tax purposes in Finland. Finnish citizen who has moved to Portugal during the previous three years might be subject to the general tax liability in Finland according to the three-year rule. Unless otherwise indicated, a Finnish citizen is not considered to have resided in Finland after the said period.[82] However, the three-year rule is not applied if the taxpayer shows that the essential ties to Finland have already been severed at the time s/he moved abroad or at some point before the three-year period has gone by. In that case, once there are no longer substantial ties, the employee is treated as a non-resident taxpayer and thus is liable to pay tax only on the income earned from Finland.

The employee may be deemed to have essential ties to Finland for example if his/ her family lives permanently in Finland, s/he conducts business in Finland or owns immovable property in Finland.[83] On the contrary, s/he could claim that the essential ties to Finland have severed because s/he has neither immovable property nor business or family living in Finland. The severance of the substantial ties has to be requested by the taxpayer because otherwise Finland treats him/ her as a resident taxpayer by default until three years has gone by from the end of the moving year.

[79] Malmgrén & Myrsky, *supra nota* 24, 214–215.
[80] Ulkomailla työskentelyn verotus, *supra nota* 4.
[81] *Ibid*.
[82] TVL 11 §
[83] Helminen (2016), *supra nota* 22, 128–135.

The Finnish three-year rule is interesting in the light of the fundamental freedoms of European Union law as it can be seen as a quite strict exit tax which may hinder the free movement of persons within the EU. European Union law provides free movement of persons, including workers, within the EU and prohibits all kinds of obstacles that are hindering the free movement. This means that any restrictions based on taxation in either the exit state or host state are in principle forbidden.[84] At the same time Finland applies its three-year rule of tax liability on Finnish nationals who move out of Finland. Helminen mentions that the exit taxes which ensure the taxing right of the accrued but not yet realized income to the exit country may be in compliance with EU law but it depends on the details of the domestic rule. Sometimes the problem is that the domestic exit tax rule is not in accordance with the principle of proportionality.[85]

The toughness of the three-year rule may support the fact that there should not be very high requirements for the taxpayer to prove the negative fact that s/he has no longer substantial ties to Finland. In addition, the Finnish Administrative Court has also supported this in its ruling on case KHO 1981/3184. [86]

If the employee in the hypothetical case manages to prove that s/he does not have the substantial ties to Finland after moving to Portugal, s/he will no longer be liable to pay tax for their worldwide income to Finland. In that case, the employee is only liable to pay tax from the income sourced from Finland. Thus, if Finland does not consider the teleworker's salary paid from Finnish company to be Finnish sourced[87] Finland cannot tax such salary. However, if the income earned from such telework is still considered being sourced from Finland the employee is liable to pay taxes from that income to Finland. In that case, it would usually be the obligation of Portugal as a residence country to provide the relief from the tax paid in Finland.

Portuguese domestic law also applies the credit method as a primary method for preventing double taxation. The credit is provided up to the amount of Portuguese tax payable for income sourced from abroad. However, in a non-treaty situation, it seems to be available only for corporate income taxes paid abroad.[88] Thus, a more favourable method for a natural person taxpayer could be the exemption method provided by the non-habitual resident regime which will be discussed next.

[84] Helminen, M. (2018), *EU-vero-oikeus: Välitön verotus*, (4th ed.), Alma Talent, Helsinki, 65–91.
[85] *Ibid.*, 75–78.
[86] This viewpoint is supported by Finnish Supreme Administrative Court's case KHO 1981/3184
[87] See section 3.3.
[88] Castro & Co. International: International Tax – Portugal Highlights In Plain English (2020), Retrieved from: https://www.castroandco.com/documents/Castro-Co.-Portugal-Highlights.pdf, 2 May 2022.

## 4.4 Acquiring the non-habitual resident status in Portugal

One way to avoid the double taxation is to apply for the special non-habitual resident (NHR) status provided by Portuguese domestic law. In addition to the basic tax residency rule, Portugal applies the NHR regime to certain individuals. A non-habitual tax resident refers to an individual who has acquired a special status under which the person is inter alia not liable to pay taxes in Portugal on certain income earned from abroad.[89] NHR status can only be requested by a person moving from abroad and who has not been tax resident in Portugal during the previous five years.[90] NHR's aim is to attract financially strong foreigners to move to Portugal.[91]

NHR regime provides a tax relief from foreign sourced income for ten years for those who qualify as non-habitual residents, for example private sector pensioners or workers.[92] The NHR regime provides tax exemption on employment income sourced from another country which has no tax treaty with Portugal if the income can be taxed already in the source country under its domestic rules and the income is not considered to be sourced from Portugal under the domestic Portuguese law.[93] If the exemption method cannot be applied for example because the employment income is not taxed at the source it will be taxed at 20% rate if the work belongs to those high value added activities. Otherwise it will be taxed at the ordinary progressive rates. [94] The Portuguese sourced employment income of the non-habitual residents is taxed at 20% rate if that income is accrued from particular high value-added activities which include inter alia scientific, artistic and technical professions. If the income is not derived from those activities it is taxed according to the normal progressive rates. [95]

Since Portugal's NHR regime can provide a tax relief for ten years for foreigners migrating to Portugal it has been claimed to be an attractive option for Spain as a place of residence for Finnish pensioners during their retirement years.[96] It has been claimed that especially wealthy Swedes and Finns move to Portugal in order to enjoy low taxes but for example Rauhut has argued in his

[89] Verohallinnon ohje: Portugalissa asuvan Suomesta saaman eläkkeen verotus A155/200/2015 (2015), Retrieved from: https://www.vero.fi/syventavat-vero-ohjeet/kannanotot/47704/portugalissa_asuvan_suomesta_saaman_ela/, 3 April 2022.

[90] KPMG Portugal, *supra nota* 61.

[91] Rauhut, D. (2021). Heading for a 'Better Life'? Why Swedes Move to Portugal. *Nordic journal of migration research, 11* (3). 341-360.

[92] Wallin, A. (2017). The transnational lives of Finnish retirees in Torrevieja. *Matkailututkimus, 13*(1-2), 6-20.

[93] da Palma Borges et al., *supra nota* 35, 75–81. See also: Newco: *Invest in Portugal – Living in Portugal: Tax Residence*, Retrieved from: https://www.newco.pro/en/invest-in-portugal/living-in-portugal/tax-residence, 7 May 2022.

[94] *Ibid*.

[95] *Ibid*.

[96] Wallin, *supra nota* 92, 6–20.

research that most of those immigrants cannot enjoy the tax benefits provided by NHR rules because they have no capital income or they have worked in the public sector and thus their pension is anyways taxed in the country to which they have worked for.[97] The author agrees because the same applies to the cross-border teleworkers whose work is not considered being high value-added.

However, acquiring the non-habitual residence status in Portugal seems to be effective way to avoid double taxation on the example of Finnish national moving for Portugal to telework from there for a Finnish employer if the employment activities belong to the high value-added activities. In that case, the employee is taxed from their Finnish sourced income only in Finland because the employment income is fully exempted from taxation in Portugal under the NHR regime. However, if the salary is considered being Portugal sourced it is taxed at 20% rate in Portugal.

## 4.5 Exceptional relief for a special reason

An alternative for a taxpayer facing double taxation would also be to apply for a special relief under section 89 of Laki verotusmenettelystä (VML, in English: Act on Assessment Procedure)[98] or a general tax relief under section 88 of the VML. However, in the literature it has been interpreted that the relief for a special reason under section 89 of the VML would not be possible in non-treaty dual residence conflicts causing double taxation.[99] Though, a partial or total exemption from the tax under section 88 of the VML seems to be possible due to a reduction in the ability to pay taxes or due to another unreasonable situation. However, the general relief is discretionary and its use is not very common.[100]

## 4.6 Conclusion

When a Finnish national moves to Portugal for working remotely from there, their Finnish sourced income from employment will likely be subject to international double taxation. Although there are several methods for preventing such double taxation the final tax burden of the employee depends on whether the countries in question treat him/ her as a resident taxpayer or a non-resident taxpayer. In a dual residence conflict situation, the international juridical double taxation is usually

[97] Rauhut, *supra nota* 91, 341–360.
[98] Laki verotusmenettelystä 18.12.1995/1558 (VML)
[99] Helminen, M. (2002), Kansainvälisen kaksinkertaisen verotuksen poistaminen kaksoisasumiskonfliktitilanteessa. *Verotus 2/2002*, 131–135.
[100] Helminen (2016), *supra nota* 22, 110–111.

not eliminated in the absence of a tax treaty because neither of the countries consider itsef to be obliged to provide relief from the tax paid to the other country.[101]

The credit method and the exemption method provided by Finnish domestic law cannot function in providing the elimination of double taxation in cross-border telework in a non-treaty situation if the salary is sourced from Finland. That is because the credit method is only applicable to foreign sourced income and the exemption method is applicable only on the income from employment performed abroad if the work itself requires being physically abroad. That is why the Finnish methods may be quite inefficient especially if the salary is accrued from activities performed mostly in Finland. However, proving that the substantial ties to Finland could be severed in this situation, it could eliminate the double taxation only if the income is considered to be sourced from Portugal.

However, the employee could request to be registered and treated as a non-habitual tax resident if s/he has not been a tax resident in Portugal during the previous five years. In that case, the foreign sourced employment income, e.g. salary paid from Finland, may be exempt in Portugal for the next ten years provided that the specific conditions are met. Therefore, acquiring the non-habitual tax resident status in Portugal seems to be efficient way for a teleworker to avoid double taxation in a non-treaty situation if their activities are high value-added. If the teleworker's activities are not high value-added, the NHR status will not make much difference.

Dagan argues that the fundamental aim of tax treaties, to eliminate double taxation, can be achieved actually more efficiently through domestic legislation as many countries already provide double tax relief in their national laws and in a non-treaty situation the state of source would not have to waive its right to tax.[102] This research disproves that on the part of the actual elimination methods of the domestic legislations in this case study. The most efficient way to avoid double taxation seems to be acquiring the non-resident status in Finland.

[101] Helminen (2002), *supra nota* 99, 131–135.
[102] Dagan, T. (2000), The tax treaties myth, *N.Y.U. Journal of International Law & Politics, 32(939)*, 939-996. Referenced in Mutava (Mutava, C. N. (2019), Review of tax treaty practices and policy framework in Africa, ICTD Working paper 102, 6.)

# 5. CONCLUSION

The current research included analysing and interpreting material collected from legal literature, articles and domestic legislations of Finland and Portugal to determine the reasons for double taxation when a Finnish employee is working remotely from Portugal for a Finnish employer and the methods for preventing it. The methods were analysed also pointing out some problems that they have and the reasons why the elimination of double taxation based on domestic legislation is not always obvious.

In a cross-border remote work situation when there is no tax treaty, the double taxation is caused typically due to the dual residence conflict. In addition, it may emerge due to the simultaneous application of the residence state principle and the source state principle. If a natural person is regarded as a tax resident in Finland according to three-year rule even though s/he is actually living in Portugal, his/ her worldwide income is, in principle, taxed in Finland. At the same time the income earned from employment exercised in Portugal is in principle taxed in Portugal under its domestic legislation.

In a dual residence conflict situation, the elimination of double taxation is typically not easy because neither of the countries consider themselves being obliged to provide the relief from taxes paid in the other state. In a non-treaty situation, the double taxation is eliminated using the elimination methods of the domestic laws. The Finnish credit method is only applicable to foreign taxes paid from foreign sourced income and the exemption method is applicable only on the income from employment performed abroad if the work itself requires being physically abroad. Thus Finnish methods are not always sufficient. The NHR regime of Portugal, which provides exemption from taxation of foreign sourced employment income for ten first yeas of residence in Portugal, seems to be the most beneficial for a teleworker whose activities are defined as high value-added. However, the best way for a regular teleworker to avoid double taxation would be to acquire the status of non-resident taxpayer in Finland. Though, that status cannot be achieved before three years has gone by from the end of the moving year unless the worker shows that their substantial ties to Finland have been severed earlier.

Other consequences of teleworking from a non-treaty country, which were not covered in this research, are for example the social security issues of the cross-border teleworker as well as the registration and reporting requirements in the work country, the risk of the creation of a permanent establishment for the employer in the country of remote work, the risk of economic employer, i.e.

working and staying in the work country may create an economic employer for the employee even though the salary is paid from another country by the formal employer. These are interesting questions for further research.

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