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Taxation of influencers: A double taxation or a non-double taxation issue?

by

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Summary

For better or worse, the boom of social media platforms has had a great incidence on everyday life. A single post can reach large audiences in seconds, an unimaginable phenomenon years ago. Behind a post, there can be a hobbyist with no profit intentions or a career influencer with a marketing strategy. Either way, the chances of making money from a single post are wide.

Consequently, Tax Authorities have seen a potential for tax collection from these activities. They are increasing efforts in audit activities and in providing guidance to influencers by issuing interpretation statements and guidelines. Indeed, these guidelines are a relevant tool in the present research as they provide a view of how Tax Authorities around the world are dealing with influencers' taxation.

Although states have begun to regulate influencer activities in areas such as advertising and consumer protection, that is not the case in tax law. This research analyses various Tax Authority's guidelines on the matter and concludes that the rules already in place in most jurisdictions are applied to influencers' activities. This demonstrates that a tax system with solid foundations can adapt to new phenomena such as the boom of people making money from social media. This does not mean that some regulations are still needed, for example, there is doubt about how influencers receiving cryptocurrencies in exchange for their services should be taxed.

That being said, the present research aims to contribute to the discussion of how influencers are taxed from a local and international perspective and determine if they are more exposed to double taxation due to the particularities of their activities. After introducing the main concepts that are needed to understand what an influencer is and how they make money, this document provides research on local and international tax consequences for them. In the former, a comparative study of tax law applied to influencers in different jurisdictions is made, while in the latter, an analysis of their activities under the provisions of the OECD model tax convention is provided.

The conclusion is that influencers are not more exposed to double taxation because of the singularity of their activities. They face similar challenges to the ones of other taxpayers involved in cross-border transactions. Nevertheless, the scenarios of double taxation and double-non taxation for them have a common ground; given the fact that they can pursue money from different platforms and different types of content, (e.g. videos, photos, blogs) there is a need to properly identify the type of income that fits each one of their activities as not necessarily all will classify under the same type of income and this play a paramount role in the application of double tax treaties and the subsequent result of double taxation or double nontaxation.

Abbreviation List

DTT	Double Tax Treaty
MC	Model Convention
OECD	Organisation for Economic Co-operation and Development
OECD MC	OECD Model Tax Convention on Income and on Capital
PE	Permanent Establishment
TC	Tax Convention
UAE	United Arab Emirates
UN MC	United Nations Model Double Taxation Convention between Developed and Developing Countries
US MC	United States Model Income Tax Convention
UK	United Kingdom
US	United States
YPP	YouTube Partner Programme

1. Introduction

1.1 Background

“Youseum” is the most recent attraction in Stockholm. Opened in 2022 the venue consists of different thematic rooms offering visitors playgrounds to create content for social media. It is promoted as ‘the perfect place for those who love capturing moments and being in front of a camera’.¹ The concept is relatively recent, in 2019, the first one of its kind was inaugurated in Amsterdam, a new one is expected soon in Germany and the owners have projects of expansion for 15 new locations in the coming years.²

This new venue is seen as a temple for influencers,³ the term social “*influencer*” is used to refer to a ‘key individual with an extensive network of contacts, who plays an active role in shaping the opinions of others within some topic area, typically through their expertise, popularity, or reputation’.⁴ ‘Unlike celebrities, they can be anywhere (...), an influencer can be a popular fashion photographer on Instagram, or a well-read cybersecurity blogger who tweets’.⁵

What began as a hobby for some is now their core business. There are multiple profitable ways to make money on social media. Although brand promotion through Instagram is the primary source of income for influencers,⁶ other platforms such as YouTube, TikTok, Twitch, Twitter, and Facebook offer plenty of options to monetize content.

That being the case, a museum for selfies is not a surprise in an era in which more than 6.5 billion images are shared on social media platforms daily. Of those, approximately 1% (65 million) contain branded content.⁷ The power of a single image posted on social media over consumers is noticeable. Statistics show that nearly 80% of the brands that engage in influencer marketing used Instagram in

¹ About Youseum Stockholm. <https://youseum.se/en/about-youseum/> (accessed 11 April 2022)

²L. Merlin. ‘Youseum: using social media to explore real topics’, Bloolooop, 21 February 2022. <https://bloolooop.com/museum/in-depth/youseum/> (accessed 11 April 2022).

³ O. Salazar-Winspear. ‘Me, myself and my iPhone: Selfie museum opens in Sweden’, Encore!, 15 April 2022, <https://www.france24.com/en/tv-shows/encore/20220415-me-myself-and-my-iphone-selfie-museum-opens-in-sweden> (accessed 5 May 2022)

⁴ D. Chandler and R. Munday. ‘*A Dictionary of Media and Communication*’, 3 ed, Oxford University Press, 2020, <https://www-oxfordreference-com.ludwig.lub.lu.se/view/10.1093/acref/9780198841838.001.0001/acref-9780198841838-e-3683?rskey=DtPhbP&result=1> (accessed 5 May 2022).

⁵ W. Geysler. ‘What is Influencer Marketing? - The Ultimate Guide for 2022’, Influencer Marketing Hub, 2 March 2022, <https://influencermarketinghub.com/influencer-marketing/> (accessed 5 May 2022).

⁶ A poll from HypeAuditor shows that 40.15% of instagramers have this source of income. N. Baklanov. ‘Data from our Survey of 1865 Intragram Influencers’, Hype-Journal, 28 June 2021, <https://hypeauditor.com/blog/data-from-our-study-of-1865-instagram-influencers/> (accessed 11 April 2022).

⁷ J. Hartmann et al., ‘The Power of Brand Selfies’. *Journal of Marketing Research*, vol 58 (6), 20212, p 1159. <https://journals.sagepub.com/doi/pdf/10.1177/002224372111037258> (accessed 11 April 2022).

2021. Not in vain, 75% of brand marketers intend to dedicate a budget to influencer marketing in 2022.⁸

As with any other individual, influencers making money are charged with taxes. Given the nature of their activities, the personal income tax is the predominant type of tax levied on them. Even though in principle, this is a domestic issue related to the income tax law of each country, the fact that the influencers use digital platforms, have followers around the world, and enter into agreements with multinational entities makes this also an issue of international tax law.

1.2 Aim and research question

This investigation aims to contribute to the discussion of how influencers are taxed from a local and an international tax perspective. When including international tax law in the analysis, one may wonder if the taxpayer is subject to double taxation or if he can be favored from double non-taxation. In that sense, the question that will be addressed in this research is if, due to the particularity of their activities, influencers are more exposed to double taxation or, on the contrary, benefit from double non-taxation.

1.3 Method and material

The legal dogmatic method is used to research and analyze sources by evaluating current positive laws on the topic in various countries.⁹ As the subject of this research is assessed from a local and international perspective, a comparative research method on tax law of selected jurisdictions is used. The material consulted includes tax legislation and Tax Authorities' guidance on the subject. The OECD model tax convention on income and capital, particularly the commentary on articles 7 (business profits), 12 (royalties), 14 (employment income), and 17 (income of entertainers), is the primary source for the analysis in the international tax field. The study is complemented with doctrinal research to identify arguments from scholars on the topic.

1.4 Delimitation

This study only focuses on the income tax of influencers as individual taxpayers. Their activities can likely trigger other kinds of taxes. For instance, those who sell their own products and render services can have sales tax or VAT obligations, while those with substantial assets are likely to be subject to wealth taxes in countries where such a tax is in place. Those additional taxes are not part of this study as they deserve a separate broad analysis.

⁸ W Geysers. 'The State of Influencer Marketing 2022. Benchmark Report', Influencer Marketing Hub, 2 March 2022. <https://influencermarketinghub.com/influencer-marketing-benchmark-report/> (accessed 11 April 2022).

⁹ S Douma, *Legal Research in international and EU Tax Law*, 2014 Edition, Wolters Kluwer Business, p 17 -18.

In the same way, the study focuses on individual taxation only and will not include the research from a corporate tax perspective. It is not unusual to see individuals who own companies through which they engage in their activities with third parties. Some influencers establish a company for these purposes. In those cases, the company is a separate taxpayer, and corporate taxation is applicable rather than individual taxation. The analysis of the tax consequences for the company is not addressed in this study.

Another topic that is not analyzed in this contribution is the tax evasion in this group of taxpayers. Certainly, Tax Authorities are increasing the focus on influencers,¹⁰ and the issuing of guidance from the Authorities is a form to instruct them on their obligations. Such guides will be an essential tool for this investigation. In addition, transversal issues of other disciplines related to influencer's activities, such as intellectual property rights and consumer protection rights, are not part of the study.

1.5 Outline

This analysis will be divided into five chapters; the second chapter serves as a background to understand what a social media influencer is and his core business by including the definition of an influencer and explaining the different ways, they make money. The third chapter analyzes the fiscal effects on influencers' activities from a local tax point of view. In contrast, the fourth chapter evaluates the implications from an international tax law perspective and comments on double taxation and double-non taxation in this group of taxpayers. The last chapter is the conclusion of the analysis.

¹⁰ The Canadian Tax Authority is an example of this, the Authority has under surveillance the social media accounts of influencers to compare their declared earnings with the lifestyle they spot in their accounts. In addition, the auditing division created a new unit that focus on the 'platform economy' which include the businesses of social influencers. See for instance news articles on <https://www.mondaq.com/AdviceCentre/Content/4612/CRA-Auditors-Are-Watching-Canadas-Social-Media-Influencers> and <https://nationalpost.com/news/politics/the-cra-is-watching-you-auditors-scouring-social-media-for-unreported-income-from-influencers>

2. Understanding the business of influencers

The Swedish clothing brand *H&M* is one of the most mentioned brands on Instagram.¹¹ Part of this success is due to the brand's teamed with influencers in different campaigns. With strategies that rank from Christmas campaigns with influencers to polls to know the design preferences of influencers' followers, the brand has reached important audiences. Whereas in 2018, a poll to discover followers' choices for design elements attracted 425.000 viewers in two weeks,¹² a Christmas campaign with influencers in 2016 had more than twelve million views on Instagram and Facebook; the success of the campaigns relates to the proper choice of influencers.¹³

The above is one of the numerous examples of good results from influencer marketing. Apart from understanding the impact of its business, to adequately address the tax implications of a particular taxpayer, it is necessary to know what his core business is and from what activities the income is derived. Comments on both aspects follow below.

2.1 Definition of influencer

A proposed definition of the term influencer based on a review of various definitions in the literature is the following:

*“An influencer is a content creator with a commercial intent, who builds trust and authenticity-based relationships with their audience (mainly on social media platforms) and engages online with commercial actors through different business models for monetisation purposes”.*¹⁴

From the above definition, the key aspects are content creation, commercial intent, monetization, trust, and authenticity.¹⁵ Nowadays, more than 50 million people globally consider themselves content creators.¹⁶ However, not everyone

¹¹ J. Santora, 'Key Influencer Marketing Statistics You Need to Know for 2022', Influencer Marketing Hub, 29 March 2022, <https://influencermarketinghub.com/influencer-marketing-statistics/#:~:text=Influencer%20Marketing%20Industry%20to%20Reach,billion%2C%20indicating%20a%20steady%20growth>, (accessed 13 April 2022).

¹² J. Forrester, 'H&M use Instagram Influencers to Inform Clothing Designs', Talking Influence, 2 August 2018, <https://talkinginfluence.com/2018/08/02/hm-use-instagram-influencers-to-inform-clothing-designs/>, (accessed 13 April 2022).

¹³ Mediakix, '5 Influencer Marketing Case Studies' [ebook], https://issuu.com/ritaliustaysgold/docs/casestudy_032719, (accessed 14 April 2022)

¹⁴ F. Michaelsen, L. Collini, et. al., 2022, *The impact of influencers on advertising and consumer protection in the Single Market*, Publication for the committee on Internal Market and Consumer Protection (IMCO), Policy Department for Economic, Scientific and Quality of Life Policies, European Parliament, Luxembourg. p 9, [https://www.europarl.europa.eu/RegData/etudes/STUD/2022/703350/IPOL_STU\(2022\)703350_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2022/703350/IPOL_STU(2022)703350_EN.pdf), (accessed 20 April 2022).

¹⁵ Michaelsen and Collini, *The impact of influencers on advertising and consumer protection in the Single Market*, p 9.

¹⁶ Y. Yuan, 'SignalFire's Creator Economy Market Map', SignalFire, <https://signalfire.com/blog/creator-economy/> (accessed 20 April 2022).

has the real power to influence others. To be considered an influencer it is necessary to establish ‘credibility in a specific area or industry’.¹⁷

There are multiple ways to classify influencers. The most common methods are by follower numbers (i.e., from Mega influencers with more than 1 million followers to micro and nano-influencers with less than 10,000 followers), by types of content (i.e., from bloggers to YouTubers), and by niche (i.e., from fitness to travel influencers).¹⁸

For tax purposes, there is no standard definition of what a social media influencer is. However, some Tax Authorities have defined the concept or described the subject when providing guidance on their fiscal implications. That is the case of the Philippines Tax Authority, for whom the term refers to ‘all taxpayers, (...), receiving income, in cash or in kind, from any social media sites and platforms (...) in exchange for services performed as bloggers, video bloggers or “vloggers” or as an influencer, in general, and from any other activities performed on such social media sites and platforms’.¹⁹

Whereas for the Canadian Tax Authority, ‘influencers use social media platforms to make regular posts on their channels and usually attract a number of followers who (...) pay close attention to their content. They can motivate their followers to buy products or services through the promotions and recommendations they make on their social media channels’.²⁰

On the other hand, the Puerto Rican Tax Authority states that the influencer is someone

‘who has: (i) the power to affect the purchasing decisions, lifestyle and/or behavior, among others, of other people, due to their authority, knowledge, position or relationship with their audience or, (ii) has a group of followers in a social network, with whom he actively relates’.²¹

These three Tax Authorities mention the critical aspects of the proposed definition quoted at the beginning of this section. However, in the case of the Philippines, the definition is broader, mainly anyone who receives income from

¹⁷ P. Suciú, ‘Is Being A Social Media Influencer A Real Career?’, Forbes, 14 February 2020, <https://www.forbes.com/sites/petersuciú/2020/02/14/is-being-a-social-media-influencer-a-real-career/?sh=5ca1c925195d> (accessed 21 April 2022).

¹⁸ J. Santora, ‘12 Types of Influencers You Can Use to Improve Your Marketing’, Influencer Marketing Hub, 29 June 2021, <https://influencermarketinghub.com/types-of-influencers/>, (accessed 13 April 2022).

¹⁹ Bureau of International Revenue, Republic of the Philippines, Revenue Memorandum Circular No 97-2021, 16 August 2021, p 2. https://www.bir.gov.ph/images/bir_files/internal_communications_2/RMCs/2021%20RMCs/RMC%20No.%2097-2021.pdf (accessed 15 April 2022).

²⁰ Canada Revenue Agency, Government of Canada, ‘Compliance in the platform economy’ <https://www.canada.ca/en/revenue-agency/programs/about-canada-revenue-agency-cra/compliance/sharing-economy.html>, (accessed 15 April 2022).

²¹ [Translated by the Author] Gobierno de Puerto Rico. Departamento de Hacienda. Carta Circular de Rentas Internas Num. 21-11. 31 March 2021, p 3, https://hacienda.pr.gov/sites/default/files/publicaciones/2021/04/cc_ri_21-11_premios_regalos_y_giveaways_-_final.pdf (accessed 8 May 2022)

any activity on social media can be considered a social media influencer under their definition. Whereas the Puerto Rican Tax Authority adds a feature to the discussion and states that the quantity of followers is crucial to establish that a person is an influencer.²² On the other hand, by indicating that influencers make “regular” posts on their platforms, the Canadian guide refers to one key aspect, the recurrency of the activity.

2.2 Activities and sources of income

Influencers earn money in multiple ways depending on the platform used and the content shared. This is known as “*monetization*,” which is the term used to refer to revenue generation through different business models.²³ The rates charged by influencers depend on different factors such as their reach and engagement, the channel used, and the number of posts required, among others.²⁴ On the other hand, each platform offers various possibilities to make an impact on followers. While YouTube is preferred for sharing video formats, Instagram is the most popular for sharing images and stories.²⁵ Moreover, the type of content and the platform used are correlated with the various possibilities to gain income from social media. While brand sponsorships are the primary source of income, follower donations are less popular.²⁶ As mentioned, each platform offers diverse possibilities, as described below.

2.2.1 YouTube

Advertising revenue is the most common way to make money from YouTube. On average, a channel can receive \$18 per 1.000 ad views.²⁷ Another way is through affiliate marketing or merch shelf; under this model, the revenue is generated from affiliate links for services or products the YouTuber recommends.

Other features from this platform that allow monetization are the *memberships* (where members make recurring payments in exchange for special perks offered by the creator), *super chat & super stickers* (where the fans pay to get their

²² Gobierno de Puerto Rico. Departamento de Hacienda. Carta Circular de Rentas Internas Num. 21-11. 31 March 2021, p 3.

²³ F. Michaelsen, L Collini, et. al., 2022, *The impact of influencers on advertising and consumer protection in the Single Market*. P 9.

²⁴ W. Geysler, ‘Influencer Rates: How Much do Influencers Really Cost in 2022?’, Influencer Marketing Hub, 26 November 2021, <https://influencermarketinghub.com/influencer-rates/> (accessed 15 April 2022).

²⁵ M. Moran. ‘29 Significant Influencer Marketing Statistics And Trends (2022)’, Startup Bonsai, 12 April 2022, <https://startupbonsai.com/influencer-marketing-statistics/> (accessed 16 April 2022).

²⁶ Adsholars, ‘Influencers share their secret to earning big bucks on social media’, <https://adsholars.com/blog/how-to-make-money-influencer-marketing-2020/>, (accessed 16 April 2022).

²⁷ W. Geysler, ‘How Much do YouTubers Make? – A YouTuber’s Pocket Guide [Calculator]’, Influencer Marketing Hub, 4 January 2022, <https://influencermarketinghub.com/how-much-do-youtubers-make/>, (accessed 16 April 2022).

messages highlighted in chat streams), and *premium revenue* (where viewers pay a subscription fee to watch premium content).²⁸

A key unique feature of YouTube is that, unlike other platforms, the creator allows space for advertisement in its channel to share in revenue and that there is a payment system in place (YouTube's Partner Program).

2.2.2 Instagram

Instagram is the preferred option for brands that engage in influencer marketing.²⁹ The most lucrative and usual form of partnership between brands and Instagram influencers is through *sponsorship*, where the influencer posts content in its account in exchange for a payment. Pay per campaign depends on different factors, such as the influencer's number of followers and the engagement ratio.

Other ways to make money on this platform is through affiliate marketing (where the influencer post affiliate links to promote products and receives commission payments based on the total sales driven for the brand),³⁰ “*badges*” (where followers can buy “badges” to support the influencer live videos) subscriptions and own products promotion.

2.2.3 Only fans

Defined as the social platform revolutionizing creator and fan connections, OnlyFans has significantly increased creator and fan growth since its foundation in 2016. The site allows content from all genres.³¹ Even though it is mainly known for its adult content, the creators offer a variety of content, from fitness workouts to cooking classes.

The typical way to make money on this platform is by subscription payments to access exclusive content. Apart from it, fans can pay for personalized messages and live interactions. Also, the platform offers a referral program.

Transactions are exclusively between the creator and fans, and the platform acts as a payment intermediary to collect, hold, and process the payment.³² Creator earnings are 80% of fan payments, and the remaining 20% is for the platform.

2.2.4 Facebook, Twitter, TikTok, Pinterest

²⁸ YouTube, ‘How to earn money on YouTube’, YouTube Help, <https://support.google.com/youtube/answer/72857>, (accessed 16 April 2022).

²⁹ W Geysler. ‘The State of Influencer Marketing 2022. Benchmark Report’

³⁰ Instagram, ‘Recommend products and get paid for it’, <https://creators.instagram.com/earn-money/affiliate>, (accessed 18 April 2022).

³¹ OnlyFans, <https://onlyfans.com/about.html>, (accessed 18 April 2022).

³² OnlyFans, Standard contract between fan and creator, <https://onlyfans.com/contract> (accessed 18 April 2022).

Among social media, other platforms offer plenty of options to monetize content as described above. For instance, the video app TikTok (which is currently the fastest growing social platform being the most downloaded app in 2021),³³ offers similar options for monetization, being sponsored content the most common, likewise Facebook and Twitter. On the other hand, Pinterest is defined as the visual discovery engine,³⁴ ideal for brand partnerships as the platform allows creators to make their content more “actionable” and “shoppable”; the feature “shoppable idea pins” helps creators to gain commissions from the sale of products by including a tag to affiliate products on idea pins.³⁵

2.2.5 Twitch, Facebook gaming, Youtube gaming

Live streaming is mainly associated with watching gamers playing video games. However, platforms such as Twitch offer the possibility for creators to share other kinds of content such as music and sports. Over 5.79 billion hours were watched on Twitch in the third quarter of 2021.³⁶ This platform offers various possibilities for gamers and streamers to gain money, “bits” and subscriptions are the more popular ways for viewers to support channels. Bits are virtual goods that viewers can use to cheer in chat to show support, and the creator receives \$0.01 for each bit used in the chat.³⁷ Running advertisements in the channel and adding sponsored content to the stream are other ways to monetize used in Twitch, Facebook gaming, and YouTube gaming.

2.3 Conclusion of the chapter

Nowadays, influencers are present on mainly every social media platform. Even though there is no single definition of the term, most of the definitions proposed in the literature coincide with the main features that characterize an influencer. Some Tax Authorities also use those features when referring to the term. Essentially, they have the power to influence their audiences' decisions, and such a power is used to reach followers around the world and gain money from all the different options available on social media to monetize their content.

³³ W. Geysler, ‘TikTok Statistics- 63 TikTok Stats You Need to Know [2022 Update]’, 31 March 2022, <https://influencermarketinghub.com/tiktok-stats/#toc-7> (accessed 18 April 2022).

³⁴ Pinterest, ‘All about Pinterest’, <https://help.pinterest.com/en-gb/guide/all-about-pinterest> (accessed 18 April 2022).

³⁵ Pinterest, ‘Introducing new ways for Creators to earn money and partner with brands on Pinterest’, 27 July 2021, <https://newsroom.pinterest.com/en-gb/post/introducing-new-ways-for-creators-to-earn-money-and-partner-with-brands-on-pinterest>, (accessed 18 April 2022).

³⁶ J. Clement, ‘Number of hour watched on leading gaming live stream platforms worldwide in 3rd quarter 2021, by platform’, Statista, 8 April 2022, <https://www.statista.com/statistics/1030795/hours-watched-streamlabs-platform/#statisticContainer> (accessed 19 April 2022).

³⁷ Twitch, ‘Bits and Subscriptions’, <https://www.twitch.tv/creatorcamp/en/get-rewarded/bits-and-subscriptions/#:~:text=You%20receive%20%240.01%20for%20each,will%20receive%20the%20remainin%20%20%25> (accessed 19 April 2022).

3. Tax Consequences from a local tax point of view

Currently, in most jurisdictions, no tax legislation specifically addresses influencer taxation. What is more common is to find Tax Authorities' guidance on the topic. Some with broad and complete explanations such as the guidelines of New Zealand, Philippines, Singapore, and Sweden, and others with more general comments such as the guidance of the Norwegian, Finish, Canadian, and German Tax Authorities. In all cases, what is common is that all guidance's foundation is the current income tax law for individuals in each country.

The present chapter describes the fundamental issues of influencer taxation from a local tax law perspective considering the comments of different Tax Authorities. Before entering into the discussion of the international tax law implications for influencers, it is necessary to clarify the local tax treatment as it will be later needed to understand the tax consequences when adding an international component to the analysis.

3.1 Qualification of the taxpayer

In general, an influencer is not considered a special or exclusive category of taxpayer. The standard view among Tax Authorities is that they classify as self-employed individuals. However, this does not mean that they cannot be considered employees in certain circumstances.

For example, in France, influencers will be classified as employees if they are 'in a situation of legal subordination with regard to the brand that uses his/her services or has the presumption of salaried status'.³⁸ As this will play a role in defining the taxpayer's status, in order to classify the contractual relationship as a service or as employment, a key point is the analysis of the contract between the brand and the influencer.³⁹

Thus, when analyzing a labor status, subordination is a crucial point. In any case, when teamed with brands it seems that influencers are not totally independent to create their content. A poll on 800 influencers revealed that only 29% of them are asked for their opinion on content direction, while from 100 marketers, 55% responded that the content strategy and direction of a sponsored partnership are decided before influencers join the campaign.⁴⁰

³⁸ S. Némarq-Attias and T. Romand, 'Influencer marketing: what legal and tax status should influencers have?', CMS Francis Lefebvre Avocats, 14 April 2022, <https://www.lexology.com/library/detail.aspx?g=267ea687-aa27-46ae-bd2b-4bbcc36f6573> (accessed 20 April 2022).

³⁹ S. Némarq-Attias and T. Romand, 'Influencer marketing: what legal and tax status should influencers have?'

⁴⁰ Activate, 'Two Sides of the Same Coin: Exploring the Brand and Influencer Relationship in Influencer Marketing', p 8, <https://src.bna.com/H9x> (accessed 6 May 2022).

On the other hand, when analyzing the independence of the activity, the fact that “*it is carried on at own expense and risk*” is also an essential point. That is the case of Norway, for instance, where the conditions to be considered self-employed (i.e., performing a commercial activity) apart from running the activity at own risk includes that the activity ‘has a certain scope, is likely to generate a profit over time, or is aimed at having a particular duration’.⁴¹

In a similar way, the Finnish Tax Authority provides proper guidance on how to differentiate between working as an employee and working as a self-employed individual. Among the criteria to consider in the analysis are the supervision and direction, the allocation of responsibilities, and the tools and materials necessary to work.⁴² In the evaluation of the first criteria, it is common to see that in employment relationships ‘the employer has control over the work and can give detailed instructions’,⁴³ while for self-employed individuals ‘the customer is only buying the end result of the work’,⁴⁴ even though it ‘can supervise the progress (...) and give some instructions to ensure that the end result is satisfactory’.⁴⁵ In the second criterion, in an employment relationship, is the employer ‘who carries responsibility for the work’,⁴⁶ while self-employed individuals are ‘fully accountable for work quality’.⁴⁷ Finally, in an employment relationship is the employer who ‘must provide tools and materials’,⁴⁸ on the contrary, self-employed individuals ‘almost always own the tools used in their work’.⁴⁹

Apart from the usual qualification between employee and self-employed, considering the grey line between being a mere hobbyist or a career influencer is also essential, as, in some jurisdictions, hobbies are tax-free. That is the case in Norway, where there are no tax consequences if there is no commercial activity.⁵⁰ Another relevant point to consider, even if the activity is a hobby, is the intention to make a profit from it. In the case of New Zealand, the Tax Authority considers various factors in the analysis of whether an amount received by a person is income, being the intention to make a profit a relevant point. They Authority states:

The word “hobby” might be used to describe an activity that does not normally make a profit or where the person does not have an intention of making a profit (...) whether and amount is income does not depend on the ordinary meaning of the word “hobby.” In case law, the courts’ focus is on

⁴¹ The Norwegian Tax Administration, ‘Am I Self-employed?’, <https://www.skatteetaten.no/en/business-and-organisation/start-and-run/am-i-self-employed/> (accessed 20 April 2022).

⁴² Vero Skatt, ‘Do I work as an employee or self-employed?’, <https://www.vero.fi/en/individuals/tax-cards-and-tax-returns/income/earned-income/employee-or-self-employed/> (accessed 20 April 2022).

⁴³ Vero Skatt, ‘Do I work as an employee or self-employed?’

⁴⁴ Vero Skatt, ‘Do I work as an employee or self-employed?’

⁴⁵ Vero Skatt, ‘Do I work as an employee or self-employed?’

⁴⁶ Vero Skatt, ‘Do I work as an employee or self-employed?’

⁴⁷ Vero Skatt, ‘Do I work as an employee or self-employed?’

⁴⁸ Vero Skatt, ‘Do I work as an employee or self-employed?’

⁴⁹ Vero Skatt, ‘Do I work as an employee or self-employed?’.

⁵⁰ The Norwegian Tax Administration, ‘Am I Self-employed?’

whether an intention to make a profit exists (which is relevant to whether there is income from a business).⁵¹

A particular case is the one of Spain, where having a YouTube channel for a hobby is considered a business activity. From one side there is no need to have the intention to make a profit and from the other side, unlike Canada (as seen in the definition of the term influencer) the recurrency is not considered a requirement to have a business activity. Thus, for the Spanish Tax Authority, it is enough to have a single economic activity to have a taxable event.⁵²

The taxpayer's qualification is of great importance as it has consequences in terms of compliance obligations and is linked with the type of taxable income, which also has implications in terms of the tax rate applicable and deductions allowed.

Apart from the filing of an income tax return, among other possible compliance and additional obligations of a self-employed individual are record keeping,⁵³ keep books of accounts duly registered,⁵⁴ practice tax withholding to recipients of payments, checking whether they are liable to register for VAT and pay social security contributions.

Certainly, the qualification of the subject is not an issue that can be taken for granted. A misclassification can trigger potential audits from tax, pension, and employment Authorities.⁵⁵ On the other hand, if influencers classify as employees, they will be subject to the standard treatment of any other employee. Usually, the employer will withhold income taxes and social security from their paycheck.⁵⁶ In any case, local rules must be examined carefully to determine what are the tax consequences for the payer. For instance, in Sweden, even though there is no labor agreement in place with the influencer, the payer is obliged to pay employer contributions and withhold income taxes when the influencer is not registered for the F-tax (*F-skatt*).⁵⁷

⁵¹ Inland Revenue. Te Tari Taake. 'Content creators- tax issues', Interpretation Statement, 28 September 2021, p 5. <https://www.taxtechnical.ird.govt.nz/-/media/project/ir/tt/pdfs/interpretation-statements/2021/is-21-08.pdf?modified=20210927204643> (accessed 21 April 2022).

⁵² Dirección General de Tributos. Resolución Vinculante V0992-16 de 14 de Marzo de 2016, <https://www.iberley.es/resoluciones/resolucion-vinculante-dgt-v0992-16-14-03-2016-1436931> (accessed 21 April 2022)

⁵³ Inland Revenue. Te Tari Taake. 'Content creators- tax issues', p 36.

⁵⁴ Bureau of International Revenue, Republic of the Philippines, Revenue Memorandum Circular No 97-2021, p 5.

⁵⁵ K. Bruce, M. Goldstein and S. Hansel, 'Is your social media influencer or blogger an employee or an independent contractor? What companies need to know before they engage bloggers and other independent contractors', 9 April 2015, <https://www.lexology.com/library/detail.aspx?g=238ac2f1-b131-49ee-b15a-2bfd4c3619d>, (accessed 1 May 2022).

⁵⁶ S. Némarg-Attias and T. Romand, 'Influencer marketing: what legal and tax status should influencers have?'

⁵⁷ Skatteverket. Ersättning och utbetalning till influerare (influencers), <https://skatteverket.se/foretag/arbetsgivare/lonochersattning/ersattningochutbetalningtillinfluere.4.309a41aa1672ad0c8378166.html?q=influencers> (accessed 21 April 2022).

3.2 Types of remuneration

As multiple are the ways to monetize content for influencers, various are the forms of income received aside from normal cash remuneration.

Statistics show that 2021 saw an increase in brands paying money to influencers compared with previous years; 34,4% paid with cash, another 34,4% gave them free products, 25% provided discounts on products and services, and 5.9% entered their influencers in a giveaway. The fact that there is still a low percentage of payments in cash means that firms work with micro and nano influencers who are willing to receive payments in kind.⁵⁸

Tax Authorities have a common view that benefits in kind are taxable. However, there are slight variations in how the amount of such benefits should be determined, and depending on the facts and circumstances of the agreement between the brand and the influencer, some benefits in kind may end up not being taxable.

From a taxpayer's point of view, the evident disadvantage of being paid only with free products or discounts is that there would be a due tax amount to pay from these transactions and no cash to pay for it. For some influencers, the fact that they are taxed on items they wouldn't have bought can be a reason to decline sponsored items.⁵⁹

Furthermore, who pays and who receives the payment is also important. The Tax Authority of Singapore comments on both situations by stating that 'payments are taxable regardless of whether they were received directly from the advertisers or indirectly through a blogger/ social media management company'.⁶⁰ Similarly, 'any benefit whether monetary or in-kind provided to the families and friends of (...) influencers will be taxable on the bloggers/social media influencers'.⁶¹

3.2.1 Free products and experiences

Products and experiences given for free to influencers in exchange for a post are the most usual way of agreement. However, there are cases in which products are sent to the influencer for free with no expectations of posting or any actions required for the influencer.

⁵⁸ W Geysler. 'The State of Influencer Marketing 2022. Benchmark Report'.

⁵⁹ S. Kassam. 'Social-Influencer Freebies Worth Billions Present Tax Temptation', Bloomberg Tax, 23 May 2019, <https://news.bloombergtax.com/daily-tax-report-international/social-influencer-freebies-worth-billions-present-tax-temptation>, (accessed 20 April 2022).

⁶⁰ Revenue Authority of Singapore (IRAS), 'Income Received from Blogging, Advertising & other Activities Performed on Social Media Platforms', p 2, https://www.iras.gov.sg/media/docs/default-source/uploadedfiles/pdf/social-media-influencer.pdf?sfvrsn=6204a1de_0 (accessed 21 April 2022).

⁶¹ Revenue Authority of Singapore (IRAS), 'Income Received from Blogging, Advertising & other Activities Performed on Social Media Platforms', p 1.

Both situations should be analyzed according to local legislation to define their tax implications.

3.2.1.1 For consideration

In the first situation, the most common outcome in most countries is that non-monetary income is taxable, and the transaction is subject to the same rules applicable to barter transactions.⁶² This means that the fair market value of goods or services received from bartering is reportable and taxable.⁶³ The challenge in this kind of transaction is how and who determines the correct value of the good or service. Here the answer can vary in each jurisdiction. For example, in their guidance to influencers, when referring to the market value, the Swedish Tax Authority states that it is ‘the price you would have paid yourself if you had purchased the product in a store or a webpage’,⁶⁴ while the New Zealand Tax Authority states that it ‘will usually be the amount the content creator would receive if they sold the item’.⁶⁵

Regarding whom determines the value, it is also not a unique response, the New Zealand Tax Authority mentions that the one who estimates the resale value is the content creator while the Swedish Tax Authority states that when reporting benefits in the form of services or products is the client who sends a payslip or a payment notice to the creator and reports it monthly to the Authority.⁶⁶ That is the local rule, but what happens when the payer is not a Swedish company who is not obliged to send monthly reports to the Tax Authority? Then, if the Authority has not been informed, it is the content creator who has to disclose the payment in the tax return and presumably the one who has to determine the market value of the product. A practical solution to this situation is that the value of the product and the service is stated in the wording of the agreement between the parties.

3.2.1.2 Without consideration

The situation might be different and more complex to evaluate if the product is received without an agreement in place, meaning not in consideration for services. The main issues that arise are how to grant a value to an item if there is no agreement in place and if the fact that there is no consideration means that there is no taxable event.

⁶² Canada Revenue Agency, Government of Canada, ‘Compliance in the platform economy’.

⁶³ Internal Revenue Service, ‘Topic No. 420 Bartering Income’, <https://www.irs.gov/taxtopics/tc420> (accessed 22 2022).

⁶⁴ (Author’s translation). Skatteverket, ‘Influere (influencer) och bloggare’, <https://www.skatteverket.se/privat/skatter/arbeteochinkomst/inkomster/kopforsaljningochspelpainternet/influerebloggareochspelare/influereochbloggare.441f1c61d16193087d7f125bd.html> (accessed 22 April 2022).

⁶⁵ Inland Revenue. Te Tari Taake. ‘Content creators- tax issues’, p 15.

⁶⁶ Skatteverket, ‘Influere (influencer) och bloggare’.

Apart from income tax law, in some jurisdictions, it will be necessary to consult tax law referring to occasional gains and gifts to determine if a taxable event is present in a situation like this. Various aspects are commonly considered when it comes to tax gifts.

a) Recurrency

Whether the gift is recurrent or occasional is crucial in some jurisdictions. In the case of New Zealand, ‘occasional unsolicited gifts are unlikely to be taxable’,⁶⁷ while if received regularly, they will become taxable. The same principle applies in Singapore, where one of the conditions to meet to not be required to declare non-monetary benefits is that the product/service is given for one-off consumption, meaning that it is not a regular supply.⁶⁸

b) Value of the gift:

If the value of the item is not significant and the product is considered under the category of usual promotional gift, there will not be taxable income in some jurisdictions. That is the case in Finland, where products whose selling price is no more than EUR 50 (including VAT) are not considered a taxable income. In any case, the threshold is not relevant if the product is received as a form of compensation.⁶⁹ A similar approach is taken in Singapore, where apart from not being a recurring supply if the item does not exceed SGD 100 it will not be subject to tax. The threshold does not apply when the item is provided over a period of time.⁷⁰

c) The reason behind the gift:

A grey zone area is the analysis of the reason behind the gift. In each case, it implies the evaluation of particular facts and circumstances. For some jurisdictions, it is a key point of analysis. Likely an audit activity from a Tax Authority will follow the idea that nothing in life is free. A US Internal Revenue Service spokesperson said that “*Businesses don’t send product to people called ‘influencers’ just because they want somebody to have a product,*” (...) “*They send product for access to services that influencers have because those people may provide value to them. (...)*”⁷¹

⁶⁷ Inland Revenue. Te Tari Taake. ‘Content creators- tax issues’, p 16.

⁶⁸ Revenue Authority of Singapore (IRAS), ‘Income Received from Blogging, Advertising & other Activities Performed on Social Media Platforms’, p 1.

⁶⁹ Vero Skatt. ‘Income from blogs, vlogs and social media platforms – individual taxpayers’, <https://www.vero.fi/en/individuals/tax-cards-and-tax-returns/income/earned-income/income-from-social-media/#some> (accessed 23 April 2022).

⁷⁰ Revenue Authority of Singapore (IRAS), ‘Income Received from Blogging, Advertising & other Activities Performed on Social Media Platforms’, p 1.

⁷¹ S. Kassam. ‘Social-Influencer Freebies Worth Billions Present Tax Temptation’, Bloomberg Tax, 23 May 2019, <https://news.bloombergtax.com/daily-tax-report-international/social-influencer-freebies-worth-billions-present-tax-temptation>, (accessed 20 April 2022).

For instance, in New Zealand, gifts with no strings attached can be income if they are a product of the content-creating activity of the influencer.⁷² In Sweden, to be considered taxable, it is enough that the influencer keeps the gift and the donor expects that the influencer advertises the content.⁷³ While the UK business income manual also provides guidance on the topic by stating that ‘voluntary payments designed in some way to augment the consideration payable for goods or services whether past, present or future, are taxable’,⁷⁴ the fact that the consideration is open for past or future transactions make the evaluation more complex as in the moment of the recipient of the good it is not clear if the donor intends to enter in a future agreement with the influencer or to compensate a past action from him.

3.2.2 Discounts on products and services

Nowadays, special rates for influencers are common, while some restaurants may have special prices for influencers,⁷⁵ some hotels have implemented a process with application forms in which detailed influencer information is requested for free stays or discounts.⁷⁶ Within Tax Authorities’ guidance on taxation for influencers, there are few comments on this type of compensation. The Swedish Tax Authority states that the discount has value if it is redeemed, and the taxable amount is the difference between what the influencer pays and the market price,⁷⁷ while the Norway Tax Authority indicates that discounted products must be entered at sales value after deducting what was paid for the item.⁷⁸ In case of doubt regarding the treatment in jurisdictions with no specific guidelines on this topic, it might be helpful to consult legislation regarding the tax implications of employee discounts. A key question in the analysis is if the discount is offered to the public in general or exclusively to the influencer due to his activity as a content creator.

3.2.3 Subsequent use of the goods

Another relevant question is what happens with the goods after influencers receive them. The product can be kept, returned, sold, or donated. The subsequent

⁷² Inland Revenue. Te Tari Taake. ‘Content creators- tax issues’, p 16.

⁷³ Skatteverket, ‘Influere (influencer) och bloggare’.

⁷⁴ HM Revenue and Customs, ‘BIM 41810- Specific receipts: voluntary receipts: others’, Business Income Manual, <https://www.gov.uk/hmrc-internal-manuals/business-income-manual/bim41810> (accessed 23 April 2022).

⁷⁵ News.com.au, ‘Restaurant savages ‘influencer’ for asking for discounted rates’, news.com.au, 21 August 2020,

<https://www.news.com.au/travel/travel-updates/travel-stories/restaurant-savages-influencer-for-asking-for-discounted-rates/news-story/fab775274cf6f241968924d2b4544312> (accessed 23 April 2022).

⁷⁶ T. Lorenz. ‘Instagram’s Wannabe-Stars Are Driving Luxury Hotels Crazy’, The Atlantic, 13 June 2018, <https://www.theatlantic.com/technology/archive/2018/06/instagram-influencers-are-driving-luxury-hotels-crazy/562679/> (accessed 23 April 2022).

⁷⁷ Skatteverket, ‘Influere (influencer) och bloggare’.

⁷⁸ The Norwegian Tax Administration, ‘ Blogging and social media’, <https://www.skatteetaten.no/en/person/taxes/get-the-taxes-right/employment-benefits-and-pensions/hobby-odd-jobs-and-extra-income/blogging/> (accessed 23 April 2022).

action is essential as it is also likely to be considered for analyzing tax consequences.

3.2.3.1 Keep or return the goods

Once the goods are received, the tax treatment will differ depending on whether the goods are returned or maintained by the influencer. If returned to the sender, there is no income, and consequently, there is no taxation. In this regard, the New Zealand Tax Authority is clear when states that if ‘content creators do not want to be taxed on receipt of a non-monetary item, they should not accept the item’.⁷⁹ On the contrary, if the product is kept (regardless of whether it is advertised or not), there is a tax liability. That is the straightforward conclusion made by the Tax Authority of Sweden.⁸⁰ While the recommendation of the Norwegian Authority to ensure that the correct tax is paid in case of gifts that are discarded is to have an internal voucher (with date and signature) to make a note of what is received and what is discarded.⁸¹

3.2.3.2 Selling goods

The subsequent sale of goods that were previously sent by brands to influencers is not unusual. Some might consider this influencer’s practice an offense to followers as they promote products by posing with fancy clothes that sooner are posted by them for sale in online shops.⁸²

No additional guidance is needed to conclude that a sale transaction generally triggers tax consequences. Both New Zealand and Swedish Tax Authorities provide good examples of the tax consequences in the case of influencers selling goods that were received for free or as part of a sponsorship campaign.

The general conclusion is that two separate taxation events should be reported, the first one is the receipt of the item (even if the person does not sell it), and the second one arises if the item is sold.

It is common in most jurisdictions that in a sale transaction, the initial cost of the good is considered to offset it from the selling price to determine the taxable amount. The New Zealand Tax Authority states clear guidance on the topic:

Although the person did not spend any money to acquire the item, a cost will be given to the item. This cost will be equal to the income derived on

⁷⁹ Inland Revenue. Te Tari Taake. ‘Content creators- tax issues’, p 14.

⁸⁰ Skatteverket, ‘Influere (influencer) och bloggare’.

⁸¹ The Norwegian Tax Administration, ‘Blogging and social media’.

⁸² The case of 5 influencers selling clothes was investigated by a Journalist of *The Tab* in the UK. The finding shows that they sell the clothes soon after posing with them on Instagram, and some promote them as new clothes despite being used previously by them. D. Shadijanova, ‘Named and shamed: The celebs selling free clothes they get from Depop for a profit’, *The Tab*, <https://thetab.com/uk/2018/09/05/your-fave-insta-influencers-are-selling-free-clothes-they-get-from-bands-on-depop-80057>. (accessed 25 April 2022).

receipt. This means the person will not be taxed twice (although if they sell the item for more than its value on receipt, they could be taxed on the difference).⁸³

3.2.3.3 *Donation of goods*

Influencers also play a part in charity activities. Evidently, the ones with a celebrity status are who donate the more.⁸⁴ However, micro and nano influencers also donate and participate in fundraising campaigns for nonprofit organizations, with goods results for these organizations.⁸⁵

A good example of donations made by influencers is the case of the ones who participate in the beauty industry's niche and who frequently receive beauty product samples. They choose between products to keep and products to donate.⁸⁶ To define the tax treatment of such donations, local tax laws should be analyzed carefully as for donations to be considered a tax relief, there are some requirements to be met. In some countries, donations are considered a deduction, while in others a tax credit is given. In both cases, a common condition is that the donation should be made to a qualified organization. For instance, if the item is donated to the influencer's followers, it will likely not qualify for a charitable deduction or a tax credit,⁸⁷ unless the donation to the followers is done as part of the influencer's business. In such a case, the cost of the product donated will qualify as a deductible business expense.

(Further comments on deductions for influencers are addressed in point 3.4).

"Giveaways" campaigns are a proper example of an activity in which the donation of goods by influencers can classify as a deductible expense. In these kinds of campaigns, the influencer's primary purpose is to increase the number of followers by offering a prize. The usual strategy is to attract participants by asking them to comment on a post in exchange for a chance to win a prize. The giveaways campaigns can be partnered with a brand or independently run by influencers. If a giveaway campaign is run by an influencer in which the award is a good that was previously sent to him, that can be considered part of the

⁸³ Inland Revenue. Te Tari Taake. 'Content creators- tax issues', p 14.

⁸⁴ For instance, celebrities with most followers on Instagram such as Cristiano Ronaldo and Ariadna Grande are among the ones who donate the most in 2017. Y. Hackett, 'A good influence? Celebs' charity donations revealed', TFN, 22 August 2019, <https://tfn.scot/lists/the-biggest-charitable-donations-from-most-followed-influencers> (accessed 25 April 2022).

⁸⁵ C. Axelrad., '22 Social Media Influencer Strategies Nonprofits Can Use', Bloomerang, <https://bloomerang.co/blog/22-social-media-influencer-strategies-nonprofits-can-use/> (accessed 6 May 2022)

⁸⁶ H. Elizabeth, '10 Social Media Influencers Who Are Actually Using Their Powers For Good', TheTalko. 10 May 2019, <https://www.thetalko.com/social-media-influencers-helping-positive-impact/> (accessed 25 April 2022).

⁸⁷ The New Zealand Tax Authority provides an example where a donation made by a content creator is a tax credit. In such an example, the request is that the approved donee organization is listed by the Tax Authority. Inland Revenue. Te Tari Taake. 'Content creators- tax issues', p 12.

influencer's activity. Consequently, a deduction will be allowed to the influencer on the product's price.⁸⁸

On the other hand, influencers should be aware of the compliance obligations that may arise from these campaigns. For instance, the Puerto Rican Tax Authority states that influencers must file an informative return when granting prizes in giveaways campaigns.⁸⁹ Among other information, the amount of the award, the id, name, and address of the recipient must be informed.⁹⁰ This informative return must be filed to be able to claim the deduction. On the other hand, the Authority states that the recipient of the prize is subject to tax on the amount of the award and must report the income in his tax return.⁹¹

3.3 Categories of Income

When categorizing income for tax purposes, the common division is between employment, business, and property income. Within each category, there are also particular types of income. For instance, rental income is listed within the category of property income.⁹² Apart from the main categories mentioned above, other kinds of income have tax consequences, such as pensions and capital gains.

The comments below are only related to employment and business income as those are the most common source of income from the main influencer's activities. In chapter 4, royalty income will be addressed from an international tax point of view.

As mentioned in section 3.1, the taxpayer's qualification is crucial as it relates to the kind of taxable income. Thus, if the taxpayer is an employee, it is assumed that his income is employment/labor income,⁹³ while if the taxpayer is self-employed, it is customary to assume that he perceives business income. However, even though one may expect this is the standard approach, local tax law may have some special rules that do not necessarily classify a term under the scope of labor income for the fact that there is a labor relationship or under business income for the fact that an individual is an independent contractor or self-employed.

⁸⁸ The New Zealand Tax Authority provides an example where jewellery donated in a giveaway campaign can be deducted by the influencer. Inland Revenue. Te Tari Taake. 'Content creators- tax issues', p 19.

⁸⁹ Gobierno de Puerto Rico. Departamento de Hacienda. Carta Circular de Rentas Internas Num. 21-11. 31 March 2021, https://hacienda.pr.gov/sites/default/files/publicaciones/2021/04/cc_ri_21-11_premios_regalos_y_giveaways_-_final.pdf (accessed 8 may 2022)

⁹⁰ This data must be informed by the influencer in Form 480.6A. See the form in: [file:///Users/andreaalbuena/Downloads/480.6a_2018_informativo%20\(jcn\).pdf](file:///Users/andreaalbuena/Downloads/480.6a_2018_informativo%20(jcn).pdf)

⁹¹ Gobierno de Puerto Rico. Departamento de Hacienda. Carta Circular de Rentas Internas Num. 21-11.

⁹² L. Burns and R. Krever, "14 Individual Income Tax". In *Tax Law Design and Drafting, Volume 2*. USA: International Monetary Fund. 1998., <https://www.elibrary.imf.org/view/books/071/06712-9781557756336-en/C14.xml> (accessed 6 May 2022).

⁹³ Even though this is the normal rule, there can be jurisdictions in which the term "employment income" is not only reserved for individuals with employment contracts. That is the case in Colombia for instance, where the income derived from independent contractors' activities can classify as employment income for tax purposes if some conditions are met.

Furthermore, an employee can have different sources of income apart from the main employment income. The same applies to self-employed individuals. In both cases, side activities that derive from other sources of income are also taxable. That is the conclusion from the Tax Authorities of Singapore and New Zealand, to the question of whether the income earned on a part-time basis is subject to tax for someone who works full-time as a salaried employee and part-time as a YouTuber or blogger, the Singapore Authority's answer is affirmative, assessing the income as self-employed income.⁹⁴ While the New Zealand Authority states that the amount derived from a secondary activity 'can be taxable even if they have a job or other business from which they derive most of their income'.⁹⁵

An illustration of an individual with a side activity is a teacher who posts videos in YouTube. This case has been addressed by the Spanish and the New Zealand Tax Authorities. The latter provides the example of a school music teacher with complementary activities (such as playing the guitar occasionally for a local band and posting videos for a YouTube music channel in which he interviews musicians), concluding that the income from both side activities is a form of secondary income and that must be included in the teacher's tax return regardless that he has a full-time job.⁹⁶ In the case of Spain, the Tax Authority analyzed the case of a public worker, who posts children's fairy tales videos on YouTube and who is requested for sporadic face-to-face performance for kids, concluding that the activity as a storyteller outside of an employment relationship constitutes the exercise of a business activity.⁹⁷

When determining what type of income corresponds to the influencer's activity, in each particular case, local tax legislation must be revised to see if it defines the terms business and employment income. Doctrine on design and drafting of tax law provides essential elements to differentiate both kinds of income by indicating that 'the basic definition of employment income should include any compensation directly or indirectly related to the employment relationship'.⁹⁸ While for business income, 'the starting point (...) is to determine whether the activity giving rise to the income is properly characterized as a business (...). In broad terms, a business is a commercial or industrial activity of an independent nature undertaken for profit.'⁹⁹

⁹⁴ Revenue Authority of Singapore (IRAS), 'Income Received from Blogging, Advertising & other Activities Performed on Social Media Platforms', p 2.

⁹⁵ Inland Revenue. Te Tari Taake. 'Content creators- tax issues', p 7.

⁹⁶ Inland Revenue. Te Tari Taake. 'Content creators- tax issues', p 7.

⁹⁷ Dirección General de Tributos. Resolución Vinculante V2852-20, 22 de Septiembre de 2020, <https://www.iberley.es/resoluciones/resolucion-vinculante-dgt-v2852-20-22-09-2020-1530882> (accessed 27 April 2022)

⁹⁸ L. Burns and R. Krever, "14 Individual Income Tax".

⁹⁹ L. Burns and R. Krever, "16 Taxation of Income from Business and Investment". In *Tax Law Design and Drafting, Volume 2*. 1998, USA: International Monetary Fund, <https://www.elibrary.imf.org/view/books/071/06712-9781557756336-en/C16.xml> (accessed 6 May 2022).

Even though in most of the cases influencers are classified as self-employed individuals and most of their income is business income. As previously mentioned in section 3.1, there is a possibility that what appears to be a service relation is in reality an employment relationship, determining if there are elements of a labor relationship between the influencer and the brand is key in the analysis.¹⁰⁰

3.4 Deductions and expenses allowed on influencer's activities

Once the type of activity and income are classified for tax purposes, the determination of the tax base and application of tax rates will define the final tax liability.

Taxable income is 'normally defined as gross income less allowable deductions'.¹⁰¹ Even though the essential elements of the tax base apart from the gross income are the exempt income and deductions,¹⁰² the present subchapter will only discuss deductions as those relate to the taxpayer's activities, having a common approach among tax jurisdictions in the items that are deductible for influencers. In contrast, exempt income is an amount that has more variation among jurisdictions as it is more connected with Government's political, administrative, and structural reasons,¹⁰³ among others.

The categorization of income described in point 3.3 is of great relevance in the present analysis as it is also related to the tax reliefs permitted. In the case of employment income, the doctrine has recognized that 'there are significant differences from jurisdiction to jurisdiction in the treatment of employee expenses. The trend, however, is to restrict employment-related deductions (...). One solution that has been tried in some jurisdictions is to simply deny deductions for employee expenses or to allow a flat deduction.¹⁰⁴

Some jurisdictions have a restricted list of deductions to decrease employment income, not allowing expenses related to the activity, such as the transportation costs from the employee's home to the employer's office.¹⁰⁵ In contrast, others permit such kinds of related expenses.¹⁰⁶

3.4.1 Deductions for business income

Depending on the business niche, the platform used, and the type of content shared, influencers must incur certain expenses to run their activities. For

¹⁰⁰ See comment in footnote 81.

¹⁰¹ L. Burns and R. Krever, "14 Individual Income Tax".

¹⁰² L. Burns and R. Krever, "14 Individual Income Tax".

¹⁰³ L. Burns and R. Krever, "14 Individual Income Tax".

¹⁰⁴ L. Burns and R. Krever, "14 Individual Income Tax".

¹⁰⁵ For instance, in Colombia deductions for employment income derived from labor relationships are exhaustively indicated in tax law. Employees expenses related with the activity are not deductible.

¹⁰⁶ That is the case in Sweden. The transportation cost, from the employee's home to the employer's offices, either in train or car, can be deducted.

instance, for a gamer, apart from a computer with solid performance and special gaming software,¹⁰⁷ it is recommended to have multiple screens, a gaming chair, noise-canceling headphones, a gaming microphone, and a big mousepad,¹⁰⁸ among other tools.

From a tax point of view, in the case of business income, each local rule states the conditions to accept an expense as a deduction. Doctrine on the matter mentions that ‘early income tax laws often used restrictive language such as “ordinary and necessary” when defining deductible expenses. (...) Other (...) referred to expenses that were “wholly and exclusively” incurred to derive income subject to tax’.¹⁰⁹

This restrictive language is used by Tax Authorities in their guidance for influencers’ taxation. For instance, Singapore’s Tax Authority states that ‘influencers can claim certain expenses, provided the expenses are incurred *wholly* and *exclusively* in the production of the income’ [emphasis added].¹¹⁰ Similarly, the Tax Authority of the Philippines mentions that expenses may be deductible “provided that they are *directly* and *exclusively* related to the production or realization of the income’ [emphasis added].¹¹¹ A less restrictive approach is used by the Canadian Tax Authority, which states that expenses ‘will generally be deductible where they are incurred for the purpose of earning income from social media activities’.¹¹²

The main point of coincidence among the Authorities when analyzing the deduction of expenses is that ‘crucially a relationship must exist between the expense and the business or income-earning activity.’¹¹³ When other conditions are added for having the possibility of deduction, such as the “exclusivity,” the “necessity,” and the “proportionality” of the expense, in case of doubt, case law on the topic is vast in different jurisdictions as this is one of the topics where audits from tax authorities commonly focus.

Another point of coincidence is that articles for personal use are not deductible. The example of clothes is used by some Tax Authorities to explain that expenses on clothing are not deductible even though the image of an influencer is key to attracting followers. The New Zealand Authority’s view on this topic mentions

¹⁰⁷ App for PC, ‘10 + Must Have Important Software For Gaming PC Laptops And Windows’, App for PC, 20 February 2022,

<https://apps-for-pc.com/must-have-software-for-gaming-pc/> (accessed 30 April 2022).

¹⁰⁸ J. Adams, ‘Essential Tools Every Gamer Needs’, ArmchairArcade, 29 May 2019, <https://armchairarcade.com/perspectives/2019/05/29/essential-tools-every-gamer-needs/> (accessed 30 April 2022).

¹⁰⁹ L. Burns and R. Krever, “16 Taxation of Income from Business and Investment”.

¹¹⁰ Revenue Authority of Singapore (IRAS), ‘Income Received from Blogging, Advertising & other Activities Performed on Social Media Platforms’, p 1.

¹¹¹ Bureau of International Revenue, Republic of the Philippines, Revenue Memorandum Circular No 97-2021, 16 August 2021, p 4.

¹¹² Canada Revenue Agency, Government of Canada, ‘Compliance in the platform economy’.

¹¹³ Inland Revenue. Te Tari Taake. ‘Content creators- tax issues’, p 14.

that ‘the content creator may wear or use clothing only for the online content. However, these factors will not make expenses of clothing or its maintenance deductible as the private element is still paramount’.¹¹⁴

The time in which the expense is incurred might also play a role in the deductibility. If the expense is made at the beginning (when the business has not started yet), during the course of the business, or when the main activity is no longer performed (but still some profits derive from it), the outcome might vary.

In the first case, when the business activity has not yet started, the New Zealand Tax Authority recognizes that even though there is an intention to make a profit, the fact that there is not yet an earning activity disregards the deduction.¹¹⁵ The example provided is the case of an individual who wants to be a professional online gamer and who purchases the equipment he considers he needs to be competitive. For the Authority, even though the individual intends to make a profit, the income activity has not started as he is not deriving regular amounts from the activity.¹¹⁶ The Canadian Tax Authority has a similar approach by differentiating the treatment of expenses that are made before and after the commencement of a business, stating the following:

Expenses in respect of a proposed business that are incurred prior to the commencement of the business do not constitute a business loss or a non-capital loss and thus cannot be applied against income in the year the expenses were incurred (...). [on the contrary] After a business has commenced, all expenditures that are recognized for purposes of the Income Tax Act and that were made in respect of the business are to be classified in the usual way as being expenses incurred for the purpose of earning income (...).¹¹⁷

On the other hand, the New Zealand Tax Authority indicates that when the activity is no longer performed but a profit is still generated, expenses are no longer allowed even though passive income is still made from past content. An illustration of a situation like this is the case of a YouTube channel with old videos that still has views and generates profits.¹¹⁸

The following list contains examples of deductions that are mentioned by different Tax Authorities in their guidance on influencer taxation. This list is not exhaustive, and the deductions applicable to each influencer will depend on the particularities of the content creation activity and the local tax law on the topic of deductibility of expenses.

¹¹⁴ Inland Revenue. Te Tari Taake. ‘Content creators- tax issues’, p 32.

¹¹⁵ Inland Revenue. Te Tari Taake. ‘Content creators- tax issues’, p 24

¹¹⁶ Inland Revenue. Te Tari Taake. ‘Content creators- tax issues’, p 24

¹¹⁷ Canada Revenue Agency, Government of Canada, ‘ARCHIVED - Commencement of Business Operations’, 14 March 1977, <https://www.canada.ca/en/revenue-agency/services/forms-publications/publications/it364/archived-commencement-business-operations.html> (accessed 4 may 2022).

¹¹⁸ Inland Revenue. Te Tari Taake. ‘Content creators- tax issues’, p 8.

- Cost of maintaining a website
- Internet subscription fees
- Payments to freelance writers for writing a post
- Food testing/sampling (if the influencer is a food blogger, for instance)
- Home office costs
- Phone and internet access
- Depreciation losses on equipment
- Vehicle or travel expenses (if the content creation activity involves traveling)
- Professional fees (accounting or tax agents/ professional photographer fees)
- Talent agency commission
- Assets (computer equipment, laptop computers, screens)
- Filming expenses (cameras, microphone, and other filming equipment)
- Video editing expenses
- Advertising expenses

Finally, it is worth mentioning that most jurisdictions highlight the fact that there is a need for taxpayers to substantiate expenses and have sufficient evidence to claim a deduction.¹¹⁹

3.5 Conclusion of the chapter

Local tax law of selected countries was the tool to review the approaches to the influencer's taxation in different jurisdictions. The primary sources consulted in the research were the guidelines published by Tax Authorities, which offered a similar approach to the issues analyzed in this chapter.

The standard view among jurisdictions is that an influencer is not a particular category of taxpayer. They can be classified either as self-employed or as an employee. Therefore, their income is classified either as business income or employment income, being business income the category that fits the most with the main influencers' activities. The statement on the matter by the Philippines Authority summarizes this point clearly by mentioning that influencers 'are classified for tax purposes as self-employed individuals or persons engaged in trade or business as sole proprietors, and therefore, their income is generally considered business income'.¹²⁰

There is almost a unanimous approach that the granting of products (which is one of the most common ways to compensate influencers) is a taxable event and that the product's fair market value should be taxable. What happens with the product

¹¹⁹ Bureau of International Revenue, Republic of the Philippines, Revenue Memorandum Circular No 97-2021, p 4.

¹²⁰ Bureau of International Revenue, Republic of the Philippines, Revenue Memorandum Circular No 97-2021, p 2.

after the influencer receives it is of paramount importance as a subsequent sale or donation can trigger additional tax and compliance obligations.

The expenses made by influencers to support their activities are commonly deductible. However, special attention should be observed to this topic as every jurisdiction has its particular conditions to accept the deductibility of expenses. Not all coincide in the type of deductible expenses.

The overall finding from this chapter is that around the world, influencer's local taxation does not differ from the taxation of other individuals with different activities and that the tax law that is already in place in most jurisdictions applies to this activity (which some consider a new profession). This makes us reflect that drafting proper tax law can help to offer a solution to the issues that arise from new phenomena such as the boom of people creating content on the internet and monetizing their activities.

4. Taxation of influencers from an international tax point of view

A taxpayer that enters into cross-border transactions needs clarity not only on local tax consequences but also on the consequences that might arise from these transactions from an international tax point of view. In influencer activities, there can be a cross-border element in many situations. For instance, if the content created is used in a different jurisdiction from where it was made, if sponsorship is agreed with a brand that is located in another jurisdiction from that of the influencer, or if the influencer is part of the travel and leisure niche it is expected that he is traveling around the world, this means being present in many jurisdictions. In each of these cases, some factors must be analyzed carefully to determine the tax consequences from an international tax point of view. The main factors to consider are the *fiscal residency* of the influencer and the *source* of the income. Sections 4.1.1 and 4.1.2 below refer to these two factors.

Furthermore, the main risk a taxpayer faces with cross-border transactions is being taxed twice on the same taxable income in two different jurisdictions. This is known as “*juridical double taxation*”.¹²¹ This issue arises due to the international income tax regime structure. Predominantly, income tax for residents is levied on the domestic and foreign income, while for non-residents, it is levied on domestic income.¹²² Thus, a resident of one country who earns income from a source in another country is exposed to double taxation ‘if one country will tax that income on a source basis and the other country on a residence basis’.¹²³

To prevent double taxation, countries entered into bilateral double tax treaties. There is an extended network of tax treaties among developed countries.¹²⁴ However, developing countries do not have such a comprehensive network of treaties.¹²⁵ In the absence of a tax treaty, the risk of double taxation increases.

The opposite situation is not to be taxed anywhere, which is a less likely outcome but still possible. This is known as “*double non-taxation*”. It ‘is not as obvious

¹²¹ OECD. Glossary of Tax Terms.

<https://www.oecd.org/ctp/glossaryoftaxterms.htm#:~:text=DOUBLE%20TAXATION%2C%20ECONOMIC%20AND%20JURIDICAL,taxed%20on%20the%20same%20item> (accessed 9 May 2022)

¹²² R. Vann, "18 International Aspects of Income Tax". In *Tax Law Design and Drafting, Volume 2*. USA: International Monetary Fund, <https://www.elibrary.imf.org/view/books/071/06712-9781557756336-en/C18.xml>, (accessed 9 May 2022).

¹²³ R. Vann, "18 International Aspects of Income Tax". In *Tax Law Design and Drafting, Volume 2*.

¹²⁴ In 2020, 82 was the average number of tax treaties of European countries members of the OECD. K. Zvinys, ‘Tax Treaty Network of European Countries’, Tax Foundation, 3 September 2020. <https://taxfoundation.org/tax-treaties-european-tax-treaty-network-2020/> (accessed 9 May 2022).

¹²⁵ In 2018, no African country had more than 19 agreements in place. E. Quak and H. Timmis., ‘Double Taxation Agreements and Developing Countries’. K4D Helpdesk Report. Brighton, UK: Institute of Development Studies, 2018, p 4. https://assets.publishing.service.gov.uk/media/5b3b610040f0b645fd592202/Double-Taxation-Treaties_and_Developing_Countries.pdf (accessed 9 May 2022).

as double taxation. It results from gaps in the interaction of different tax systems and some cases due to the application of tax treaties.¹²⁶

The present chapter analyzes the main factors to consider and the main issues that arise when determining the tax consequences from an international tax point of view from influencers' activities in a global field. The starting point is the analysis of the model tax conventions, which are the foundation of the tax treaties agreed between countries, which in turn are the principal source of international tax law.

4.1 Model Tax Conventions

Both the New Zealand and the Philippines guidance mention that when taxed overseas an influencer can apply a double tax treaty (DTT) in order to prevent double taxation. That is also the case for all influencers who are fiscal residents of countries that have such treaties in place. Thus, 'only persons who are residents of one or both of the contracting states are regarded as being entitled to treaty benefits'.¹²⁷ Currently, more than 3000 agreements compose the tax treaty network worldwide.¹²⁸

As a tool to prevent double taxation, DTTs are bilateral agreements that distribute the taxation rules among two jurisdictions. There are three main models of double tax conventions: the OECD model, the United States model, and the United Nations model. They all follow a similar structure and use the same methodology by categorizing income per type and distributing taxation rights between the taxpayer's country of residence and the place where the income is sourced. The model that is most used among jurisdictions is the OECD MC. Thus, in the present chapter, the OECD commentaries on the model TC are extensively used as a tool for interpretation.

The types of income that are categorized in the OECD MC and that fit more with influencer's activities are business profits, royalties, income from employment, and income from entertainers and sportspersons. Section 4.1.3 refers to these categories.

Moreover, when the same income is taxed twice, the tax treaty offers methods to avoid double taxation, such as the application of tax credits or exemptions. Also,

¹²⁶E. Erdős and L. Kiss, (2019). Double Taxation and Double Non-Taxation as the New Tendencies of EU e-Tax Law, p. 4,

https://www.researchgate.net/publication/337654968_Double_Taxation_and_Double_Non-Taxation_as_the_New_Tendencies_of_EU_e-Tax_Law, (accessed 11 May 2022).

¹²⁷ M. Lang, 7. Persons covered in Introduction to the Law of Double Taxation Conventions (Second Revised Edition) (IBFD 2013), Books IBFD, https://research-ibfd.org.ludwig.lub.lu.se/#/doc?url=/document/idtc2012_c07, (accessed 10 May 2022).

¹²⁸International Centre for Tax and Development , 'The Tax Treaties Explorer', Institute of Development Studies, United Kingdom, <https://www.ictd.ac/dataset/tax-treaties-explorer/> (accessed 9 May 2022).

the application of reduced tax rates to particular types of income is common. These measures are known as the treaty benefits.

Behind the design of the international tax framework is the concept of “*economic allegiance*”, which ‘is based on factors aimed at measuring the existence and the extent of the economic relationships between a particular state and the income of a person to be taxed’.¹²⁹ Among those factors, the most significant weight is given to the place of residence and the origin of wealth.¹³⁰ This is the reason behind the distribution of taxing rights between countries based on the residence of the taxpayer and the source of the income. Comments below refer to these two factors.

4.1.1 Residency

From time to time, we see news that highlights influencers’ intention to move to a country in which taxes are lower. In 2021, Logan Paul (a YouTuber with more than 23 million followers at the time of writing this document) announced that he was moving to Puerto Rico from Los Angeles, admitting that the main reason for his decision was the lower taxation in Puerto Rico.¹³¹ Also, in 2021, Ruben Doblas (who has more than 40 million followers on his channel ‘elrubiusOMG’ at the time of writing this document) announced that he was moving from Spain to Andorra not only to be close to his friends but because not paying too much tax “is a plus”.¹³² The tendency of Spanish influencers moving to Andorra is not new,¹³³ a report in 2021 indicates that ‘9 from 15 of most followed Spanish YouTubers live or will move to the Principality’.¹³⁴

A significant decision such as moving from the home country driven by the wish to pay lower taxes means that there is a connection between the place of fiscal residence and the tax burden. Thus, the concept of fiscal residency is paramount when analyzing fiscal implications.

¹²⁹OECD (2014), “Fundamental principles of taxation,” in *Addressing the Tax Challenges of the Digital Economy*, OECD Publishing, Paris, p 36, <https://www.oecd-ilibrary.org/docserver/9789264218789-5-en.pdf?expires=1652252307&id=id&accname=guest&checksum=C3618DDA9B60EE271754A53AD92954AE> (accessed 11 May 2022).

¹³⁰ OECD (2014), “Fundamental principles of taxation”, in *Addressing the Tax Challenges of the Digital Economy*, OECD Publishing, Paris, p 37.

¹³¹ M. Espada. ‘Influencers, Developers, Crypto Currency Tycoons: How Puerto Ricans Are Fighting Back Against the Outsiders Using the Island as a Tax Haven’, Time USA, 19 April 2021, <https://time.com/5955629/puerto-rico-tax-haven-opposition/>, (accessed 9 May 2022).

¹³² El Mundo, ‘El youtuber El Rubius se va a Andorra: “Llevo 10 años de mi carrera cotizando en España”’, 18 January 2021, <https://www.elmundo.es/tecnologia/videojuegos/2021/01/18/60055117fc6c83943a8b45a2.html> (accessed 9 may 2022).

¹³³ ‘Andorra has been attracting late teenage to twenty-something eGaming and other influencers as early as 2017’. Andorra Solutions, ‘Why Did Spanish Esports, Youtuber Influencers Move To Andorra? Low Tax? Think Again’, Wolters Kluwer, 15 February 2021, <https://www.lowtax.net/articles/Why-did-Spanish-esports-Youtuber-influencers-move-to-Andorra-Low-tax-Think-again-595938.html>, (accessed 9 May 2022).

¹³⁴ Andorra Partner. ‘Andorra Youtubers’, <https://andorrapartner.com/youtubers-in-andorra/#:~:text=The%20elite%20athletes%20and%20aristocrats,in%20Andorra%20for%20few%20years>, (accessed 9 may 2022).

Even though tax residency is defined by local tax legislation, it has consequences also on international taxation. The term ‘resident of a contracting state’ used in the OECD MC ‘refers to the concept adopted in the domestic laws’.¹³⁵ To be a resident of a contracting state ‘is a condition for the application of the tax treaty’.¹³⁶

For Vann, ‘the basic idea behind the (...) concept is that a person is a resident of a country if the person has close economic and personal ties to the country’.¹³⁷ Unlike the tax issues, analyzed in the previous chapter, rules that refer to tax residency differ among jurisdictions.

Three usual approaches are used to determine if an individual is a fiscal resident: a) The analysis of fact and circumstances ‘where no criterion is definitive but all the facts are weighed (...)’,¹³⁸ b) The adoption of rules ‘that are used for other purposes in civil law (such as (...) the domicile’,¹³⁹ and c) ‘A rule of thumb based on the number of days that a person spends in the country.’¹⁴⁰ Among these approaches, some of the criteria that are used for the test are the following:

-Citizenship: This is the main criterion used by the United States. It ‘is the only major country that uses citizenship as a residence-type test.’¹⁴¹ Thus, ‘all U.S citizens and U.S residents are treated as U.S tax residents’.¹⁴²

-Physical presence: Under this criterion, an individual is considered a fiscal resident if he meets the six months/183-days rule. Thus, for instance, in Spain, individuals are residents if they ‘have stayed longer than 183 days in Spanish territory over the calendar year’.¹⁴³ Some countries count the days in a calendar year while others consider any 12-month period.

-Habitual abode: The OECD commentary defines habitual abode as the ‘notion that refers to the frequency, duration and regularity of stays that are part of the

¹³⁵ OECD. Model Tax Convention on Income and on Capital: Condensed Version 2017, p 106, https://read.oecd-ilibrary.org/taxation/model-tax-convention-on-income-and-on-capital-condensed-version-2017_mtc_cond-2017-en#page108, (accessed 9 May 2022).

¹³⁶ M. Lang, 7. ‘Persons covered in Introduction to the Law of Double Taxation Conventions’,

¹³⁷ R. Vann, "18 International Aspects of Income Tax". In *Tax Law Design and Drafting, Volume 2*. USA: International Monetary Fund, <https://www.elibrary.imf.org/view/books/071/06712-9781557756336-en/C18.xml>, (accessed 9 May 2022).

¹³⁸ R. Vann, "18 International Aspects of Income Tax". In *Tax Law Design and Drafting*,

¹³⁹ R. Vann, "18 International Aspects of Income Tax". In *Tax Law Design and Drafting*.

¹⁴⁰ R. Vann, "18 International Aspects of Income Tax". In *Tax Law Design and Drafting*.

¹⁴¹ R. Vann, "18 International Aspects of Income Tax". In *Tax Law Design and Drafting, Volume 2*.

¹⁴² United States- Information on residency for tax purposes, p 1. <https://www.oecd.org/tax/automatic-exchange/crs-implementation-and-assistance/tax-residency/United-States-Tax-Residency.pdf> (accessed 9 May 2022).

¹⁴³ Information on residency for tax purposes, p 1. <https://www.oecd.org/tax/automatic-exchange/crs-implementation-and-assistance/tax-residency/SPAIN-Tax-Residency.pdf> (accessed 9 May 2022).

settled routine of an individual's life and are therefore more than transient'.¹⁴⁴ This criterion is used in Austria, where habitual abode 'means the place where an individual is present under circumstances that show that s/he does not merely stay at that place or in that country temporarily'.¹⁴⁵

-Economic Relations: Economic tie with a given territory is a criterion commonly linked with factors such as the place of work or/and the place from which an individual administers his property.¹⁴⁶ For instance, among the circumstances that are analyzed in the Netherlands are if an individual works and has an insurance in the country.¹⁴⁷

-Personal Relations: This criterion encompasses factors such as the individual's 'family and social relations (...) his political, cultural or other activities'.¹⁴⁸ The Swiss law on the matter properly illustrates this criterion, referring to the place "where the individuals' personal relationships are focused, where they regularly spend their non-working hours, where they foster friendships and family ties, and where they take part in the social life of the community (...)'.¹⁴⁹

Less common factors that are considered in other countries are the place of registration,¹⁵⁰ or moving to a country under a permanent visa.¹⁵¹

The factors listed above are considered by governments when drafting local tax legislation to define the conditions requested to be considered a fiscal resident. The similarity among these factors is that they are circumstances that demonstrate connection with a jurisdiction. Thus, the fiscal residency status of an individual implies that there is a personal nexus with a given place. As mentioned by Lang, 'for states to levy taxes by virtue of their sovereignty, there must (...) be a personal (...) nexus or connection, between the taxpayer and the state'.¹⁵² Fiscal residence is a connecting factor.

¹⁴⁴ OECD. Model Tax Convention on Income and on Capital: Condensed Version 2017, p 111, https://read.oecd-ilibrary.org/taxation/model-tax-convention-on-income-and-on-capital-condensed-version-2017_mtc_cond-2017-en#page112 (accessed 9 May 2022).

¹⁴⁵ Austria. Information on Residency for tax purposes. https://www.oecd.org/tax/automatic-exchange/crs-implementation-and-assistance/tax-residency/Austria_Tax_Residency.pdf, p 1. (accessed 9 May 2022).

¹⁴⁶ OECD. Model Tax Convention on Income and on Capital: Condensed Version 2017, p 110. https://read.oecd-ilibrary.org/taxation/model-tax-convention-on-income-and-on-capital-condensed-version-2017_mtc_cond-2017-en#page112 (accessed 9 May 2022).

¹⁴⁷ Netherlands. Information on residency for tax purposes. <https://www.oecd.org/tax/automatic-exchange/crs-implementation-and-assistance/tax-residency/Netherlands-Tax-Residency.pdf> (accessed 9 May 2022).

¹⁴⁸ OECD. Model Tax Convention on Income and on Capital: Condensed Version 2017, p 110.

¹⁴⁹ Switzerland-Information on residency for tax purposes, <https://www.oecd.org/tax/automatic-exchange/crs-implementation-and-assistance/tax-residency/Switzerland-Residency.pdf> (accessed 9 May 2022).

¹⁵⁰ This is the case in Belgium, <https://www.oecd.org/tax/automatic-exchange/crs-implementation-and-assistance/tax-residency/Belgium-Tax-Residency.pdf> (accessed 10 May 2022).

¹⁵¹ This is the case in Brazil, <https://www.oecd.org/tax/automatic-exchange/crs-implementation-and-assistance/tax-residency/Brazil%20Tax%20Residency.pdf> (accessed 10 May 2022).

¹⁵² M. Lang, 1. The problem of double taxation in Introduction to the Law of Double Taxation Conventions (Second Revised Edition) (IBFD 2013), Books IBFD, https://research-ibfd.org.ludwig.lub.lu.se/#/doc?url=/document/idtc2012_c01 (accessed 10 May 2022).

From an international tax perspective, the concept is important in applying a double tax treaty. As mentioned previously, for the DTT to apply to a given taxpayer, such taxpayer needs to be a resident of one of the countries that are part of the treaty. Another point of relevance is that the DTT model convention offers tie-breaker rules in case an individual is considered a resident of both jurisdictions at the same time. Such tie-breaker rules are ‘designed to prevent an individual from being deemed resident, for the purpose of the treaty, in both treaty countries’.¹⁵³ With the application of article 4(2) of the OECD MC, only one of the countries will consider the taxpayer as a fiscal resident under the scope of the agreement. This is particularly important when analyzing what country has the power to tax each income category.

For influencers (as with any other individuals), defining where they are fiscal residents is crucial as various consequences will arise from such status. The habitual repercussions of being a fiscal resident are:

- a) In various jurisdictions, the common consequence is that the taxpayer will be subject to taxes on worldwide income (or full tax liability). This is known as the “*universality principle*”.¹⁵⁴
- b) Being subject to progressive tax rates on worldwide income instead to flat tax rates.¹⁵⁵
- c) In case of being considered fiscal resident in two jurisdictions simultaneously, be able to apply the tie-breaker rules of article 4(2) of the OECD MC to determine fiscal residence in only one jurisdiction for the purposes of the agreement.
- d) Be able to claim treaty benefits when a DTT is in place between his country of residence and another country.

In the latter point, it is worth mentioning how the Philippines Tax Authority stressed the fact that ‘failure to prove the residency (...) is fatal to the taxpayer’s claim for treaty benefits’.¹⁵⁶ The recommendation of this Tax Authority to influencers who are fiscal residents in their territory and who are also subject to taxes abroad is to obtain a tax residency certificate from their Tax Affairs Division to be able to prove overseas that they are residents of the Philippines and be able to claim the treaty benefits abroad. The same situation applies in most jurisdictions that have a DTT in place.

¹⁵³ OECD. Glossary of tax terms. <https://www.oecd.org/ctp/glossaryoftaxterms.htm#R> (accessed 10 May 2022)

¹⁵⁴ M. Lang, 1. ‘The problem of double taxation in Introduction to the Law of Double Taxation Conventions’.

¹⁵⁵ For example, that is the case in the US, where ‘*Income of residents is subject to the graduated tax rates that apply to U.S. citizens*’. Internal Revenue Service. ‘Taxation of US Residents’, <https://www.irs.gov/individuals/international-taxpayers/taxation-of-us-residents>. (accessed 10 may 2022).

¹⁵⁶ Bureau of International Revenue, Republic of the Philippines, Revenue Memorandum Circular No 97-2021, 16 August 2021, p 8.

4.1.2 Source

While ‘residence establishes the relationship between a country and the taxpayer (...), source concerns the connection between the income itself and a country’.¹⁵⁷ The source of the income is considered an objective connecting factor. For Lang, ‘it is sufficient that parts of the transaction or activity involve the taxing state or the object of the action is somehow connecting to the taxing state’.¹⁵⁸ Determining where is the source of the income is of great importance as when countries tax worldwide income, some allow tax credits when taxes are paid on foreign source income.¹⁵⁹

An example of a source rule in the case of influencers’ blogs on foreign servers is provided by the Norwegian Tax Authority, which states that regardless of the location of the website, the tax is determined by the country from which the blog is operated.¹⁶⁰ ‘If the blog is located abroad, but operated from Norway, Norwegian tax and duty rules must be followed’.¹⁶¹

Source rules differ depending on if the income is passive or active. “*Passive income*” refers to the income in which the ‘recipient does not participate in the business activity giving rise to the income, e.g., dividends, interest, rental income, royalties, etc’.¹⁶² As opposed to “*Active income*” where an activity is performed, and there is material participation of the recipient, e.g. employment income.¹⁶³ In the latter, the income is usually sourced in the place of the taxpayer’s activity, while passive income is sourced in the place of the activity of the payer of the income.¹⁶⁴

Whereas some countries do not have source rules in their domestic tax laws, others have detailed rules. Concerning tax treaties, source rules are explicitly mentioned in some articles, while in most kinds of income, the source rule is implicit. The method adopted in treaties to prevent both countries from asserting that the same income is sourced in each country is to specify expressly or implicitly a single source rule.¹⁶⁵ The following section includes comments regarding the source rule in the types of income that apply to influencers’ activities.

¹⁵⁷ R. Vann, "18 International Aspects of Income Tax". In *Tax Law Design and Drafting*.

¹⁵⁸ M. Lang, 1. The problem of double taxation in Introduction to the Law of Double Taxation Conventions (Second Revised Edition) (IBFD 2013), Books IBFD , https://research-ibfd-org.ludwig.lub.lu.se/#/doc?url=/document/idtc2012_c01, (accessed 11 May 2022).

¹⁵⁹ Internal Revenue Service, ‘Sourcing of Income’, p. 3, https://www.irs.gov/pub/int_practice_units/ftc_c_10_02_05.pdf (accessed 12 May 2022).

¹⁶⁰ The Norwegian Tax Administration, ‘ Blogging and social media’.

¹⁶¹ The Norwegian Tax Administration, ‘ Blogging and social media’.

¹⁶² OECD. Glossary of Tax Terms, <https://www.oecd.org/ctp/glossaryoftaxterms.htm#R> (accessed 11 May 2022).

¹⁶³ J. Kagan, ‘Active Income’, Investopedia, 29 December 2021, <https://www.investopedia.com/terms/a/activeincome.asp> (accessed 11 May 2022).

¹⁶⁴ R. Vann, "18 International Aspects of Income Tax". In *Tax Law Design and Drafting*.

¹⁶⁵ R. Vann, "18 International Aspects of Income Tax". In *Tax Law Design and Drafting*.

4.1.3 Categories of income

Section 2.2 of this document referred to the most common activities and forms of monetization of influencers. The most diverse the social media platforms, the most possibilities to create content. For instance, apart from posting a weekly video on YouTube, an influencer can post photos from sponsorships on his Instagram account and conduct a live interaction with followers on Facebook. Each one of these activities must be analyzed separately for purposes of determining its fiscal consequences from an international tax point of view. This is because there are different categories of income in the model tax conventions that can fit in a given activity. There is of great importance to take into account that some types of income supersede others and, as a consequence, are prevalent.

The comments below refer to income categories in tax treaties that are most likely to fit with influencers' activities taking the OECD MC as the main tool of analysis. Comments regarding UN MC and US MC are included in the section of royalty income as there is an important divergence among them for this specific type of income.

4.1.3.1 Business profits (Article 7 OECD MC)

Article 3 of the OECD MC includes a list of definitions of some of the terms used within the convention. Concerning the term “*business*,” the article states that ‘it includes the performance of professional services and of other activities of an independent character’.¹⁶⁶ As a consequence, the provision of Article 7 that refers to the allocation of taxing rights of business income applies to independent personal services.

This clarification is important as until 2000, the allocation of taxing rights from income derived from personal services was ruled by Article 14 of the OECD MC. This article was eliminated from the model in 2000. Adding independent personal services to the definition of business ensures that such services fall under the scope of Article 7. The reason for the elimination was that the former Article 14 ‘essentially had the same legal consequences as Art. 7 and was therefore superfluous’.¹⁶⁷

a) Source rule for business profits:

Vann states that the primary sourcing rule for taxing business income is associated with a permanent establishment.¹⁶⁸ Certainly, the term permanent establishment is crucial in this article. However, an analysis of whether a PE is created in another jurisdiction due to the activities of an influencer exceeds the scope of this document.

¹⁶⁶ OECD. Model Tax Convention on Income and on Capital: Condensed Version 2017, p 29.

¹⁶⁷ M. Lang, 9. Allocation rules in Introduction to the Law of Double Taxation Conventions.

¹⁶⁸ R. Vann, "18 International Aspects of Income Tax". In *Tax Law Design and Drafting*.

For the purposes of this research, it is enough to be aware that the term PE ‘refers to a relatively enduring presence in a country through either location (e.g., an office) or personnel’.¹⁶⁹

b) Allocation of taxing rights for business profits:

The first rule of Article 7 grants exclusive taxation of business profits to the State of residence of the taxpayer followed by an exception to that rule that grants the taxing rights to the other contracting State in case the business is conducted through a permanent establishment situated in such State.

c) Influencer’s activities under this type of income:

When analyzing if an influencer’s activity is classified as a business profit from an international tax point of view it is crucial to have in mind that it is likely that some subcategories of income that compose the profits may be subject to different rules under other articles of the Convention. In such a case, those provisions are prevalent. For instance, see comments of section 4.1.3.2 on royalty income.

If that is not the case, then the profit may be classified under business profits if the activities are conducted with an independent nature (rather than that under an employment relationship). For instance, a sponsorships agreement in which an influencer compromises to post a photo on Instagram to promote a brand can be classified as a business profit and therefore by taxed only in the place of fiscal residence of the influencer if the contracting brand is a resident of a country with whom the country of residence of the influencer has a DTT in place. If the influencer has a PE in the other State, then the taxing right will be allocated to such other State.

The discussion of whether or not the income can be classified under Article 17 (income from entertainers) will be addressed in section 4.1.3.4.

d) Delimitation of business profits with other types of income:

As business profits is composed by items of income,¹⁷⁰ one should carefully analyze each of these items to determine if there is another specific allocation rule within the treaty. For instance, one of such items is royalties, in such a case ‘irrespective of any domestic classification the distributive rules on royalties [Art. 12] take precedence over the business profits rule.’¹⁷¹

¹⁶⁹ R. Vann, "18 International Aspects of Income Tax". In *Tax Law Design and Drafting*.

¹⁷⁰ Ekkehart Reimert, and Alexander Rust. *Klaus Vogel on Double Taxation Conventions*. Kluwer Law International, 2022. *EBSCOhost*, <https://search-ebSCOhost-com.ludwig.lub.lu.se/login.aspx?direct=true&AuthType=ip.uid&db=nlebk&AN=3150733&site=eds-live&scope=site>. (Accessed 12 May 2022).

¹⁷¹ Ekkehart Reimert, and Alexander Rust. *Klaus Vogel on Double Taxation Conventions*

On the other hand, as mentioned below in Section 4.1.3.3 there can be situations in which a contract that has the appearance of a services agreement (where it is expected that an independent activity is conducted by an individual) is in reality an employment agreement. In such a case, Article 15 (income from employment) is applicable.

Lastly, Article 17 (income of entertainers) takes precedence over the business profits provision.¹⁷²

4.1.3.2 Royalty Income (Article 12 OECD MC)

The OECD MC defines royalties as “*payments of any kind received as a consideration for the use of, or the right to use, any copyright of literary, artistic or scientific work including cinematograph films, any patent, trade mark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience*”.¹⁷³

The analysis of royalty income in cross-border transactions is not free of divergences. This is because the three model conventions have a different approach in the term’s definition, in the allocation of taxing rights, and in the source of the income. Even if the OECD MC is the one followed in a bilateral treaty (which is the most common case), a careful analysis is recommended as various treaties adopt a different definition of the term and a different rule for the allocation of taxation rights than the one suggested in the OECD MC.

a) Source Rule for royalty income

-United States MC: The source rule for royalties in the US relies on the theory ‘that the place in which the intangible property is used is the situs of the economic activity giving rise to the income’.¹⁷⁴ Thus, the US MC states that ‘royalties shall be deemed to arise in a Contracting State when they are in consideration for the use of, or the right to use, property, information or experience in that Contracting State’.¹⁷⁵

-United Nations MC: Under this model, the source of the income is in the State where the payer is resident.¹⁷⁶

¹⁷² Ekkehart Reimert, and Alexander Rust. *Klaus Vogel on Double Taxation Conventions*

¹⁷³ OECD. Model Tax Convention on Income and on Capital: Condensed Version 2017, p 37.

¹⁷⁴ Internal Revenue Service, ‘Sourcing of Income’, p. 14.

¹⁷⁵ United States Model Income. Tax Convention, p 28, https://home.treasury.gov/system/files/131/Treaty-US-Model-2016_1.pdf (accessed 10 May 2022).

¹⁷⁶ United Nations, Model Double Taxation Convention between Developed and Developing Countries 2017, p. 23, https://www.un.org/development/desa/financing/sites/www.un.org.development.desa.financing/files/2020-03/UN%20Model_2017.pdf (accessed 10 May 2022).

-OECD MC: There is no mention regarding the source of the income as it allocates taxing rights to the residence state. As it ‘limits taxation to the beneficial owner’s residence State, [it excludes] source taxation in the State of the payer’.¹⁷⁷

b) *Allocation of taxing rights in royalty income:*

The allocation of taxing rights under each model has a principal rule and a subsequent provision that changes the allocation rule if the recipient of the royalties carries out business in the other contracting State through a PE. Comments below refer to the principal rules.

As all allocation rules for royalties refer to the “beneficial owner” it is key to understand the term. Neither the OECD MC nor the UN MC provides a definition. However, Vogel clearly explains that ‘its function is the *exclusion* of agents collecting income in the name of and for the account of another person and intermediaries collecting income in their own name but for the benefit of another person’ [emphasis added].¹⁷⁸

Also, the US MC does not provide a definition. However, the technical explanation of the 2006 US MC states that the beneficial owner ‘is the person to which the income is attributable under the laws of the source State’.¹⁷⁹

The distribution of taxing rights varies depending on the model consulted. The main rules are the following:

-United States MC: The wording of the first paragraph of Article 12 is identical to the OECD MC, assigning the taxing right only to the beneficial owner’s resident State. The second paragraph contains an exception to this rule and grants taxation rights to the source jurisdiction if the beneficial owner benefits from a special tax regime regarding the royalty in its State of residence.

-United Nations MC: This model assigns a *non-exclusive* taxing right to the beneficial owner’s resident State by allowing a limited taxation in the source State.¹⁸⁰

-OECD MC: This model assigns an *exclusive* taxing right to the beneficial owner’s resident State.¹⁸¹

¹⁷⁷ Ekkehart Reimert, and Alexander Rust. Klaus Vogel on Double Taxation Conventions. Kluwer Law International, 2022.

¹⁷⁸ Ekkehart Reimert, and Alexander Rust. Klaus Vogel on Double Taxation Conventions. Kluwer Law International, 2022.

¹⁷⁹ United States Model Technical Explanation Accompanying the United States Model Income Tax Convention of November 15, 2006. <https://www.irs.gov/pub/irs-trty/temod006.pdf> (accessed 12 May 2022).

¹⁸⁰ Ekkehart Reimert, and Alexander Rust. Klaus Vogel on Double Taxation Conventions. Kluwer Law International, 2022.

¹⁸¹ Ekkehart Reimert, and Alexander Rust. Klaus Vogel on Double Taxation Conventions. Kluwer Law International, 2022.

c) *Influencer's activities classified under royalty income:*

As previously noted, the taxation of royalties in cross-border transactions differs between states. Thus, a taxpayer should carefully review the countries involved in the transaction to determine the fiscal implications according to the treaty in place (which in many cases can differ from the convention that served as a model).

The starting point is determining if Article 12 is applicable. Thus, if royalties 'arise in one contracting state and are paid to a person in the other contracting state',¹⁸² the income falls under Article 12. Consequently, if 'royalties arise in the same contracting state in which the recipient of the royalties is resident, (...) the article does not apply.'¹⁸³

The proper illustration of royalties paid to influencers is the case of income derived from the YouTube partner programme (YPP). Under this programme, YouTubers are able to monetize content in various ways, the most common is by allowing YouTube to display ads on their channels. The income arises when viewers watch the advertisements, and such revenue is split between YouTube and the creator, 55% for the Youtuber and 40% for Youtube.¹⁸⁴ The income is considered royalty as the content creator of a video allows the use of his channel to display advertisements.

Before 2021, this kind of revenue was classified as non-employee compensation in the US. But in June of that year, the characterization changed to royalties. The change in the US is of great repercussion to YouTubers as Google (the YouTube owner) is obliged to practice income tax withholding in the US. A non-employee compensation for services performed outside the US is not subject to US income taxes as it is considered a foreign source income. On the contrary, royalties are taxed in the US because they are sourced there since the content is used in the US territory.¹⁸⁵ Particularly, for YouTube videos, it is possible to determine that the content was used in the US as the platform knows the location of the viewers.

The step to follow from this situation is to review if the country of residence of the YouTuber has a DTT in place with the US. If so, article 12 of such a treaty should be consulted to determine what is the fiscal treatment that was agreed upon under the treaty. If for instance, the royalty income is taxed only on the

¹⁸² M. Lang, 9. Allocation rules in Introduction to the Law of Double Taxation Conventions (Second Revised Edition) (IBFD 2013), Books IBFD, https://research-ibfd.org.ludwig.lub.lu.se/#/doc?url=/document/idtc2012_c09 (accessed 11 May 2022).

¹⁸³ M. Lang, 9. Allocation rules in Introduction to the Law of Double Taxation Conventions (Second Revised Edition) (IBFD 2013),

¹⁸⁴ L. Sweatt, 'YouTube Partner Program: How to Monetize Your Channel', 30 November 2020, vidIQ, <https://vidiq.com/es/blog/post/youtube-partner-program-guide/> (accessed 11 May 2022).

¹⁸⁵ J. Knott, 'YouTube AdSense Money is Now Royalty Income - Withholding Taxes?' [online video], 12 June 2021, <https://www.youtube.com/watch?v=kHVutwh409s> (accessed 12 May 2022).

place of residence of the YouTuber (which is the case of the DTT between the UK and the US) or if it is taxed in the US with a lower tax rate (which is the case of the DTT between Australia and the US).

The above is the reason why YouTube requested its YouTubers to provide information on what country they are fiscal residents. Depending on the country of fiscal residency Google will apply a withholding tax rate or not. If the country of residence of the YouTuber has no DTT with the US that means that there is no treaty benefit to claim and as a consequence, the standard withholding tax rate on royalty income will be applicable in the US.¹⁸⁶

d) Delimitation of royalty income with other types of income:

Article 12 is *lex specialis* to the entrepreneurial income of article 7 (business profits).¹⁸⁷ This is because income from royalties is a special provision that ‘belongs to the group of special allocation rules that are defined by the asset,’¹⁸⁸ which takes precedence over the classification based on the type of activity, such as entrepreneurial income.¹⁸⁹

Articles 12 and 17 (income of entertainers and sportspersons) are in the relation of mutual exclusivity.¹⁹⁰ The commentary of the OECD MC illustrates a situation in which both articles interact and how to allocate taxing rights. For instance, the fees from a broadcast music performance fall under Article 17 and if the presentation was recorded and is later played, the income gained from playing falls under Article 12.¹⁹¹

4.1.3.3 Employment income (Article 15 OECD MC)

a) Source rule for employment income:

This Article contains the general rule for taxation of employment income by stating that such income is taxable in the State where the employment is actually

¹⁸⁶YouTube, U.S. tax requirements for YouTube earnings, YouTube Help, <https://support.google.com/youtube/answer/10391362?hl=en#zippy=%2Cdoes-this-mean-i-will-be-taxed-both-in-my-country-of-residence-as-well-as-in-the-us%2Cwhat-if-i-dont-earn-revenue-from-viewers-in-the-us-on-my-channel> (accessed 12 May 2022).

¹⁸⁷ Ekkehart Reimert, and Alexander Rust. Klaus Vogel on Double Taxation Conventions. Kluwer Law International, 2022.

¹⁸⁸ Ekkehart Reimert, and Alexander Rust. Klaus Vogel on Double Taxation Conventions. Kluwer Law International, 2022.

¹⁸⁹ Wassermeyer, F., ‘Grundfragen internationaler Personengesellschaften im Abkommensrecht’, FR 539 (2010), cited in Ekkehart Reimert, and Alexander Rust. Klaus Vogel on Double Taxation Conventions. Kluwer Law International, 2022.

¹⁹⁰ Von Pannwitz, K., in: Haase, Außensteuergesetz und DBA, 3rd edn (2016) at m.no. 19 cited in Ekkehart Reimert, and Alexander Rust. Klaus Vogel on Double Taxation Conventions. Kluwer Law International, 2022.

¹⁹¹ Commentary on Article 12, no 18, OECD Model Tax Convention on Income and on Capital: Condensed Version 2017, p. 305.

exercised,¹⁹² in other words where the employee is physically present when performing the activities.¹⁹³ This is known as the “*principle of the place of work*”.¹⁹⁴

b) Allocation of taxing rights for employment income:

Paragraph one of Article 15 contains a first rule which allocates the right to tax the employment income to the state in which the employee is resident, Immediately, within the same paragraph, the “general rule” is included. It is an exception to the first rule and indicates that if the employment is exercised in the other Contracting State (different from the resident state), the remuneration may be taxed in that other state.

The second paragraph of Article 15 contains an exception to the “general rule.” It allocates the taxing right to the resident state if the three conditions mentioned in letters a to c of such Article are met.

c) Influencer’s activities classified as employment income:

Categorizing influencers’ activities under employment income is less likely as it is more common to see influencers rendering services as independent contractors than under labor agreements. However, despite being the usual approach, there are still chances that influencers can be classified as employees if there are facts that evidence subordination and control from the contracting company with the influencer (see comments on Section 3.1 regarding the taxpayer’s qualification).

The OECD commentary states that ‘the concept of employment to which Article 15 refers is to be determined according to the domestic law of the State that applies the Convention’.¹⁹⁵ Thus, if a State considers services to be employment services, Article 15 is applicable.

It follows that the article will apply in the situation in which there is an actual employment service when the formal agreement in place coincides with the nature of the service rendered, and to situations in which even though the wording of a contract suggests that there is a services agreement, in reality, there is a real employment relationship behind. The latter occurs when “substance over form rules” are applied. In this regard, the OECD commentary mentions that ‘the relevant domestic law may ignore the way in which services are characterized in the formal contracts. It may prefer to focus primarily on the nature of the services

¹⁹² Commentary on Article 15, no.1, OECD Model Tax Convention on Income and on Capital: Condensed Version 2017, p. 305.

¹⁹³ Commentary on Article 15, no.1, OECD Model Tax Convention on Income and on Capital: Condensed Version 2017, p. 305.

¹⁹⁴ M. Lang, 9. Allocation rules in Introduction to the Law of Double Taxation Conventions.

¹⁹⁵ OECD. Model Tax Convention on Income and on Capital: Condensed Version 2017, p 315.

rendered by the individual (...) to conclude that there is an employment relationship between the individual and that enterprise'.¹⁹⁶

In countries that do not apply the substance over form approach, the formal approach is applied, this means that the formal agreement should be respected for tax purposes,¹⁹⁷ except when 'the treaty with the State includes an alternative provision covering 'unintended situations' such as 'hiring out of labour' (...) or there is evidence of abuse (...)'.¹⁹⁸

d) Delimitation of employment income with other types of articles:

Article 17 of the OECD MC (income of entertainers and sportspersons) is considered "*lex specialis*". Thus, it takes precedence over the rules of Article 15.¹⁹⁹

However, when entertainers receive sponsorship, advertising promotional fees, or merchandising payments that are not connected to a certain performance in a country the income is not covered by Article 17. Instead, if it is an employee who receives the income, it will be covered by Article 15, if it is a self-employed individual, it will be covered by Article 7(business income).²⁰⁰

4.1.3.4 Income from entertainers (Article 17 OECD MC)

The term entertainer is not defined in the current OECD MC, as for the OECD 'it is not possible to give a precise definition of 'entertainer'.²⁰¹ However, the model provides a list of examples of persons that could be classified as entertainers. Within such examples, there is no mention of influencers, even though the most recent version of the commentary dates from 2017 and the influencer phenomena began before that date.

The absence of definition makes the analysis of the classification complex. Consequently, there is no consensus among scholars on whether the activities of influencers should be classified under this Article. For Kostikidis, influencers are entertainers, and their income falls under Article 17. This author states that 'they gain advertising income which falls under article 17 (...), provided that their

¹⁹⁶ Commentary on Article 15, no. 8.6, OEDC Model Tax Convention on Income and on Capital: Condensed Version 2017, p. 315.

¹⁹⁷ E. Reimert, and A. Rust. *Klaus Vogel on Double Taxation Conventions*. Vol. Fifth edition. Alphen aan den Rijn: Kluwer Law International, 2022. <https://search-ebSCOhost.com.ludwig.lub.lu.se/login.aspx?direct=true&AuthType=ip.uid&db=nlebk&AN=3150733&site=eds-live&scope=site>. (accessed 11 May 2022).

¹⁹⁸ E. Reimert, and A. Rust. *Klaus Vogel on Double Taxation Conventions*.

¹⁹⁹ E. Reimert, and A. Rust. *Klaus Vogel on Double Taxation Conventions*.

²⁰⁰ Commentary on Article 17, no. 9, OEDC Model Tax Convention on Income and on Capital: Condensed Version 2017, p. 333-334.

²⁰¹ Commentary on Article 17, no 3. OEDC Model Tax Convention on Income and on Capital: Condensed Version 2017, p. 332.

posts have an entertaining effect on the public'.²⁰² A different view is the one stated by Molenaar and Grams for whom the example provided by the OECD MC on the activities of models is an argument to consider that influencers activities do not fall under this category. For them 'an influencer is more like a model, in respect of which the OECD has stated in the Commentary of Article 17 that presenting clothes during a fashion show or photo sessions falls outside the scope of article 17'.²⁰³

A practical way to address this issue is perhaps following the words of Vogel for whom, 'to determine the limits of Article 17 the decisive questions are whether a person qualifies as an 'entertainer' and whether that person derives performance-related income'.²⁰⁴ Concerning the latter criterion, it is decisive for the application of the article as 'if the performing element is a negligible part of what he does in the State, the whole of the income will fall outside the Article'.²⁰⁵

a) Source rule for income from entertainers:

Under Article 17 of the OECD MC, income from entertainers is sourced in the country where the activity is carried out.

b) Allocation of taxing rights in income from entertainers:

Article 17 'preserves the source country entitlement of the performance State',²⁰⁶ by allocating the right to tax in the place where personal activities as an entertainer are exercised.

c) Influencer's activities under this type of income:

As mentioned before, to determine if an influencer activity falls under the scope of Article 17, it is recommended to evaluate if the influencer qualifies as an entertainer and if the income derives from performance activities.

Regarding the qualification as an entertainer, the OECD MC refers to a 'stage performer, film actor or actor in a television commercial'.²⁰⁷ It also states that the

²⁰² S. Kostikidis, Influencer Income and Tax Treaties, 74 Bull. Intl. Taxn. 6 (2020), Journal Articles & Opinion Pieces IBFD, https://research-ibfd-org.ludwig.lub.lu.se/#/doc?url=/document/bit_2020_06_o2_2 (accessed 12 May 2022).

²⁰³ D. Molenaar & H. Grams, Influencer Income and Tax Treaties: A Response, 74 Bull. Intl. Taxn. 9 (2020), Journal Articles & Opinion Pieces IBFD, https://research-ibfd-org.ludwig.lub.lu.se/#/doc?url=/document/bit_2020_09_o2_2 (accessed 12 May 2022).

²⁰⁴ E. Reimert, and A. Rust. *Klaus Vogel on Double Taxation Conventions*.

²⁰⁵ Commentary on Article 17, no 4. OEDC Model Tax Convention on Income and on Capital: Condensed Version 2017, p. 332.

²⁰⁶ E. Reimert, and A. Rust. *Klaus Vogel on Double Taxation Conventions*.

²⁰⁷ Commentary on Article 17, no 3. OEDC Model Tax Convention on Income and on Capital: Condensed Version 2017, p. 332.

‘article may also apply to activities with an *entertainment character present*’.²⁰⁸ Moreover, in their examples, the OECD refers to activities such as ‘events,’ ‘once in a lifetime appearances,’ and ‘performances.’

Taking this into account, I consider that activities such as writing a travel blog, posting a photo or a tweet to promote a brand are not activities with a performance nature and have no entertainment character behind them. However, creating a TikTok video (where the background music is crucial) or broadcasting a live video to interact with followers may qualify as an activity of an entertainment nature. When that is the case, the income from such activities is taxed in the place of the physical location of the influencer.

Lastly, where there are agreements with ‘package deals,’ it is ideal to follow Vogel’s recommended approach again. For instance, ‘when an overall payment is made, it must be in principle be subdivided into the performance-related part covered by Article 17 and the part representing ‘royalties’ in the sense of Article 12’.²⁰⁹

d) Delimitation to income from entertainers with other articles:

Article 17 takes prevalence over Articles 15 (employment income) and 7 (business profits). In this regard, the commentary states that ‘entertainers and sportspersons who are residents of a Contracting State may be taxed in the other Contracting State in which their personal activities as such are performed, whether these are of a *business or employment nature*’ [emphasis added].²¹⁰

The interaction with Article 12 (royalties) was addressed in section 4.1.3.2.

4.2. Risk of double taxation or possibilities of double non-taxation

Being an influencer does not seem to increase the exposure to double taxation or the possibilities of double non-taxation. The exposure is similar if the individual is an independent advisor (e.g., an engineer, lawyer, accountant) or an influencer. Also, when entering in cross-border transactions, self-employed or employed individuals can face similar issues in terms of double taxation. Yet, the particularity in the case of influencers is that when self-employed, they benefit from the liberties of not being tight with an employment relationship and be able to freely choose the jurisdiction from which they operate and how to conduct their own business.

4.2.1 Double non-taxation

²⁰⁸ Commentary on Article 17, no 3. OEDC Model Tax Convention on Income and on Capital: Condensed Version 2017, p. 332.

²⁰⁹ E. Reimert, and A. Rust. *Klaus Vogel on Double Taxation Conventions*.

²¹⁰ Commentary on Article 17, no 1. OEDC Model Tax Convention on Income and on Capital: Condensed Version 2017, p. 332.

Two examples of famous influencers willing to move from their home country to a low tax jurisdiction were provided in Section 4.1.1. However, moving to a place where there is no income tax at all is yet possible. For instance, Dubai, apart from being considered a “heaven” for influencers for its luxury lifestyle,²¹¹ is also an example of a place where being a resident can mean no taxation at all. In such a case, where the country of residence charges no income tax at all, double non-taxation depends on the tax treatment in the place of source. For instance, a resident of Dubai with royalties from the UK will not face income taxes in either place as Article 12 of the DTT between the United Arab Emirates (UAE) and the UK provides that royalties are taxed only in the taxpayer's place of residence. Thus, since there is no income tax in the UAE, there is no tax charged in any of both countries.

Furthermore, nowadays, there is a rise in the number of countries offering digital nomad visas due to the new trend of remote work. Some countries not only grant a visa but a favorable tax regime. For instance, that is the case in Costa Rica and Panama, where the general rule is that income is taxed on a territorial basis, meaning that foreign source income is not taxable there. In that case, an influencer resident of Costa Rica or Panama that has business income from Spain will benefit from Article 7 of the DTT signed by Spain with both countries, which provides that business income is taxable in the taxpayer's place of residence. As in the place of residence, there is no income tax on foreign source income the result is no tax charged in any jurisdiction.

On the other hand, as pointed out previously, under US tax law, YouTube is obliged to withhold income taxes to YouTubers on royalty income arising from viewers located in the US. What happens then when viewers are located outside the US? By the time of writing this article, the author is not aware of other jurisdictions worldwide that oblige YouTube to withhold income taxes for royalty income arising from viewers in territories different from the US. In such a case, YouTubers with audiences outside the US and whose resident jurisdiction does not charge income tax on royalties arising abroad will not be subject to taxation.

Finally, as described by Vogel, a situation of double non-taxation could occur when the state of work and the state of residence treats the income differently.²¹² As commented previously in sections 3.1 and 4.1.3.3 there is a dichotomy between being self-employed and employed. Such dichotomy can end in a non-double tax event. For instance, if the place of work of the influencer considers that the income is not classified as employment income but instead it is considered a business profit, then, under article 7 of the OECD MC the income is taxed in the place of residence, while if the residence country considers that

²¹¹ ‘Dubai, the new heaven for international influencers in pandemic times’, 9 June 2021, Kawa, <https://kawa-news.com/en/dubai-the-new-heaven-for-international-influencers-in-pandemic-times/> (accessed 23 May 2022).

²¹² E. Reimert, and A. Rust. *Klaus Vogel on Double Taxation Conventions*.

the income is employment income, under the general rule of Article 15 of the OECD MC the income is taxed in the place where the employment is conducted. As a result, neither jurisdiction will end taxing the income.

4.2.2 Double Taxation

Influencers with the highest risk of being exposed to double taxation are the ones who are residents of countries that have a small network of tax treaties (e.g., influencers from Latin America, Central America, and Africa). In those cases, the absence of a treaty and the absence of a unilateral tax credit provision in their places of residence means that there will be exposure to double taxation. For instance, YouTubers with viewers located in the US who receive royalties from their videos and who are residents of countries that do not have a DTT in place with the US are in the worst-case scenario compared to the ones who are residents of countries with DTT in place with the US. This, as they are not able to apply for treaty benefits, being subject to income tax withholding in the US on the highest tax rate applicable to royalty income in such a country. Moreover, if there is no unilateral tax credit measure available in their country of residence, they are likely to be subject to double taxation.

Moreover, there can be situations in which there is no double taxation but and exposure to higher taxation. This occurs when the overall tax burden derived from a cross-border situation is higher than if the transaction is merely domestic. For instance, this can be the case of influencers subject to income tax withholding on their gross income in the place of source and who are not allowed to deduct their business expenses there. This situation is less common among the EU countries as to avoid breaches of the fundamental freedoms there; self-employed individuals who are residents of a member state and who have income sourced in other member state (where they are non-residents) are allowed to deduct their business expenses there.²¹³ However, outside the EU, the situation is different as many countries tax non-residents on a gross basis without allowing deduction of business expenses. In addition, Article 17 of the OECD MD is not of help as it does not mention how to calculate the income of entertainers, if on a gross or a net basis. However, even though the commentary states that this is a subject determined by domestic laws, it suggests that the contracting states that want to give an option to the taxpayer to be taxed on a net basis can include a paragraph in the DTT, drafted in a way that permits the taxation on net basis.²¹⁴

²¹³ P. Wattel. 'Progressive Taxation of Non-Residents and Intra-EC Allocation of Personal Tax Allowances: Why Schumacker, Asscher, Gilly and Gschwind Do Not Suffice', International Bureau of Fiscal Documentation. European Taxation, 2000. p 223.

²¹⁴ Commentary on Article 17, no 10. OECD Model Tax Convention on Income and on Capital: Condensed Version 2017, p. 336.

5. Conclusion

In analyzing influencers' activities from an international and a local perspective, the first conclusion is that the general rule in most countries is that there are no special provisions that govern their activities. Instead, the legislation already in place is applicable to them in a similar way to the other taxpayers.

From a local point of view, the definition of the type of taxpayer, the qualification of income, the tax treatment of barter transactions, and the allowance of deductions for business expenses are similar in the jurisdictions analyzed with some slight variations on specific subjects such as the distinction between a hobby or business activity and the particular type of expenses allowed in each jurisdiction. On the other hand, from an international tax perspective, except for the controversy regarding using Article 17 of the OECD MC, the Author considers that the rules already in place are sufficient to encompass their activities. Choosing between the application of Article 7 of the OECD MC (business profits) or Article 17 (income from entertainers) depends on the particularities of each activity. If the influencer is considered an entertainer and his activity has a real performance nature, Article 17 can be applied.

The second conclusion is that influencers are not more exposed to double taxation and are not more likely to benefit from double non-taxation due to the particularities of their activities. Like other taxpayers, they face similar challenges when entering into cross-border transactions. Nevertheless, the scenarios of double taxation and double-non taxation for them have a common ground; given the fact that they can pursue money from different platforms and different types of content, (e.g. videos, photos, blogs) there is a need to properly identify the type of income that fits each one of their activities as not necessarily all will classify under the same type of income and this play a paramount role in the application of double tax treaties and the subsequent result of double taxation or double nontaxation.

On the other hand, the particularities of their lifestyle and activities can generate common scenarios for being subject to double taxation or non-double taxation. In the latter, the possibility for them to apply for nomad visas and benefit from lower tax jurisdictions if moving from their home country is currently a popular scenario. In the former, royalties can be subject to double taxation if there is no DTT in place with the country of source of the income.

Lastly, as noted throughout the document, the main tools used in this investigation were the guidelines issued by different Tax Authorities regarding influencer taxation. It was evident that lately, the Authorities have focused their audit activities on influencers. Even though influencers are not considered a specific or new kind of taxpayer, they are seen as a group of taxpayers from whom there is a high tax collection potential. Challenges arise for both sides; for instance, Tax Authorities struggle to detect income from barter transactions and

determine the value of the goods received by the influencer, while influencers challenge to avoid double taxation and to classify their type of income by an apportionment properly followed the delimitation rules of the OECD MC.

Having said that, the discussion about influencers' taxation is far to be over. The boom of influencers is a recent dynamic trend that is developing fast along with the growth of social media. Thus, still, there is a way to go in matters such as the consequence of influencers receiving cryptocurrencies in exchange for their services and the imminent new regulations arising from the taxation of the digital economy. In all these upcoming discussions it is paramount that Tax Authorities inform influencers of their obligations in a similar way they have done until today in some jurisdictions.

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