
Policy Forum: Comments on *Corporate Residence and International Taxation*, by Robert Couzin

Editor's note: Since the corporate tax itself lacks any single or compelling theoretical justification, almost every foundational concept of the tax is contestable and poses intractable problems to judges and policy analysts. Over 50 years ago, Henry Simons lamented, in his survey of the tax rules relating to corporate reorganizations,

To ask what corporation income-tax procedure should do here, is to open up an awful question which delusions have concealed, namely: What is the corporation tax up to anyway? What, so to speak, is it fundamentally trying to do? Such questions totally demoralize discussion. Once raised, they indicate why the particular problems are hard: we simply don't know, no one knows, what the problems are. There can be no good answers to detailed problems within a bad or anomalous tax.¹

Undaunted, Robert Couzin chose to write a book about a concept of corporate tax that is central to the allocation of income and taxing rights among competing jurisdictions, and to many of the most contentious contemporary developments in international taxation—namely, the legal concept of corporate residence. *Corporate Residence and International Taxation* (Amsterdam: International Bureau of Fiscal Documentation, 2002) views this concept from every conceivable angle, including a detailed and nuanced review of the evolution of the UK rules, a careful parsing of the concept of residence as used in income tax conventions, an appraisal of the development of the Canadian rules, a comprehensive analysis of the details of the Canadian rules, and a tentative assessment of the relative advantages of residence-based corporate tax. Although somewhat agnostic about a number of suggested alternatives to corporate residence as a fundamental basis for asserting jurisdiction to tax, Couzin concludes his treatise (at 272) by noting that the alternatives raise “large questions, not easily resolved in either theory or practice,” but that “the unsatisfactory nature of corporate residence taxation should be an additional catalyst to the discovery of workable solutions.”

Brian Arnold is not agnostic about the concept of corporate residence: he views it as an essential building block of a modern tax system and of international agreements

1 Henry Simons, “Federal Tax Reform” (1946-47) vol. 14, no. 1 *University of Chicago Law Review* 20-65, at 33.

for allocating taxing rights, and thus concludes, “[I]f we did not have a concept of corporate residence, we would have to invent one.” He reviews a number of areas in which the concept appears to be irreplaceable, including the taxation of passive investment income. Although he concedes that it would be possible to replace residence-based taxation with a territorial system for business income, unless the source rules, both for income and expenses, were substantially strengthened, there would be a clear potential for tax avoidance and evasion. Arnold reviews several possible tests for corporate residency. He raises concerns about a test based on the residence of the shareholders and argues that it is time to stop relying upon the central management and control test. He suggests that instead of just one or two tests of corporate residence, a corporation should be deemed to be resident in a country if it satisfies any one of a number of tests that he enumerates.

Michael McIntyre infers that “[a] reasonable conclusion to be drawn from this fascinating book is that corporate residence, as currently understood, is not a coherent concept.” It is not a coherent concept, he argues, because it is premised on the assumption that corporations can be analogized to individuals. Yet the metaphor of a corporation as an individual in this context has almost no meaning. Corporations simply cannot have a residence. For example, McIntyre notes that “[a]sking where a corporation ‘keeps house’ is like asking whether a corporation would be a carnivore if it happened to be an animal.” Similarly, “[a] corporation engages in business in much the same way that the owner of a baseball team plays baseball.” He argues that the problem with the commonly used tests of corporate residence, aside from their incoherence, is that they are too easy for taxpayers to manipulate.

McIntyre suggests that a country can resolve the problems posed by corporate residence by either of two routes. First, it can abandon the attempt to give meaningful content to the concept and adopt a system of worldwide combined reporting with formulary apportionment. Second, it can adopt a test of corporate residence that is difficult to manipulate, such as a test that turns on a list of connections that a corporation may have with a country, including where it is effectively managed and controlled. Adopting either of these approaches, McIntyre argues, would allow “Canada and other responsible governments to regain the sovereign powers they have ceded to multinational enterprises by establishing for themselves the jurisdictional reach of their corporate tax.”

In what is, in part, an eloquent tribute to Robert Couzin, Scott Wilkie’s comment refers to Couzin’s book as “a significant and unique contribution to the international tax literature.” Wilkie elaborates upon the crisis in international taxation to which Couzin’s corporate residence conundrums appear to point. He situates the analysis in the book within the broader tax policy debates and reviews the contribution that each chapter in the book makes to our understanding of corporate residence and international taxation more generally. In particular, in the light of new developments in areas such as financial innovation and electronic commerce, Wilkie raises serious questions about whether there remains a meaningful distinction between the concepts of residence and source, let alone whether that difference can be interpreted and enforced.

Although the commentators “amply and ably illustrate some of the directions a debate on the international taxation of corporations might take,” Couzin remains doubtful that we are there yet. He concludes his comment by asking, “whether corporate residence as we know it today works either in theory or in practice.” This question leads to another, which Couzin poses both at the beginning and near the end of his book (at 264): “[W]hat is the purpose of taxing corporations?” Henry Simons despaired that such questions about the corporate tax “totally demoralize discussion.” Couzin’s book and these comments prove otherwise.