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Tax Residency of Companies in Mexico

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A Practice Note setting out the situations where a company is subject to Mexican corporate income tax. It also discusses when a non-Mexican resident company has a permanent establishment in Mexico and how permanent establishments are taxed under Mexican law. It also describes how the right to tax a company's profit may be allocated under a double tax treaty if a company is tax resident in two jurisdictions.

This Note describes the cases where resident and non-resident companies must pay Mexican corporate income tax. It also describes how the right to tax a company's profits may be allocated between different jurisdictions under a double tax treaty in case of double residence.

Basis of Taxation: Tax Residence

In broad terms Mexican corporate income tax applies to:

- Companies resident in Mexico for tax purposes. This broadly includes companies incorporated in Mexico with their main seat of business or place of effective management in Mexico, and foreign legal entities with their main seat of business or place of effective management in Mexico. See Tax Residence under Mexican Law.
- Non-resident companies which have a permanent establishment (PE) in Mexico (see Permanent Establishment).
- Non-resident companies which derive income sourced in Mexico (not through a PE) (see Non-Resident Companies Without Permanent Establishment in Mexico).

Tax Residence under Mexican Law

Under Mexican law, a company is considered tax resident in Mexico if its main seat of business or place of effective management is located in Mexico.

Place of Effective Management

The place of effective management of an entity is in Mexico if the individuals who are in charge of taking and executing decisions of control, management, operation, and administration of the entity and its activities, are located in Mexico (Article 6, Regulations of the Federal Fiscal Code).

A legal entity is considered a tax resident in Mexico if the parties entitled to decide its business strategies, policies, distribution of profits, dividends, or other core subjects are located in Mexico.

Notably, the Federal Fiscal Code no longer uses the entity's place of incorporation to determine its tax residence.

Legal Entities and Tax Transparency of Certain Legal Figures (Fideicomisos)

Legal entities include:

- Corporations.
- Decentralized agencies when they primarily carry out business activities.
- Credit institutions.
- Civil societies.
- Civil associations.
- Financial institutions.
- Partnerships.
- Joint ventures through which business activities are conducted in Mexico.

(Article 7, Income Tax Act.)

For more information, see Practice Note, Trading Vehicles: Overview (Mexico).

These legal entities have their own legal personality for Mexican tax purposes. Depending on the nature of the relevant legal entity, different tax treatments and special provisions within the Mexican Income Tax Law may apply.

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Article 13 of the Income Tax Act sets out special provisions in order to regulate trusts (Mexican legal figures or vehicles).

The general rule is that tax transparency is not recognized with respect to Mexican entities or legal figures (such as trusts (Mexican *fideicomisos*), joint ventures, and partnerships. However, there are certain types of trusts that are subject to a pass-through treatment (fiscally transparent). Special regulations allow for this as long as certain requirements are met. In this scenario, tax consequences arising from income derived by these legal figures would be triggered at the level of its beneficiaries. Trusts are frequently used due to their versatility (that is, they are incorporated by means of an agreement and can be specifically tailored to adopt a wide range of corporate and business purposes).

In addition, Mexican *fideicomisos* is an attractive tax transparent legal figure for foreign investors as it allows for tax consequences to be triggered at the level of the beneficiaries (for instance, treaty benefits are claimed by the beneficiaries depending on their jurisdiction of residence).

New Rules on Tax Transparent Entities and Legal Figures

Mexican legislation recognised tax transparency for entities and legal figures that were not deemed to be taxpayers in other jurisdictions, which allocated income to the participators of such entities and legal figures. Regardless, in 2020 a new rule was included in Article 4-A of the Income Tax Law, which came into force in 2021 to simplify the collection of taxes from income that ultimately is derived by these participators in transparent entities and legal figures, whether Mexican tax residents or non-residents.

This introduction of new rules to tax foreign transparent legal figures was deemed to be in accordance with Mexico's international tax policy: the general rule is not to recognise tax transparency of foreign legal entities or figures unless it has been agreed otherwise in a specific double tax treaty.

These new provisions apply to foreign tax transparent legal entities and legal figures, which obtain Mexican sourced income, disregarding their tax transparent status such that they become subject to tax under the general rules applicable to legal entities that are either:

- Tax residents in Mexico (if the foreign entity or legal figure falls within the requirements to be considered a Mexican tax resident).
- Non-resident legal entities.

Should their business be primarily managed in Mexico, they could be treated as Mexican tax resident.

An exception to this rule in order to recognise tax transparency was included in Article 205 of the Mexican Income Tax Law, in respect of tax transparent legal figures managing private equity funds invested in Mexican legal entities, provided that the relevant transparent legal figure and its members are tax residents in a jurisdiction with which Mexico has entered into an exchange of information agreement considered as a "broad" agreement by the Mexican tax authorities, among other requirements.

Rule 2.1.2 of the resolutions issued by the Mexican tax authorities sets out the characteristics that an agreement must have for it to be considered "broad", which essentially consist of either having:

- An information exchange agreement in force which follows the OECD model for these purposes.
- The text of article 26 of the OECD Model Tax Convention included in a double tax treaty in force, and that the relevant jurisdiction effectively exchanges information with Mexico. A list of jurisdictions that fulfil these requirements can be found in rule 2.1.2 of the resolutions.

In addition, Mexico has entered into different mutual agreements with foreign tax authorities to recognize the tax transparency of certain foreign legal entities and figures in particular. For instance, in 2006 a Mutual Agreement between Mexico and the US entered into force, under which the entitlement to treaty benefits for certain transparent entities is recognized. These include US limited liability companies (LLCs) provided:

- The corresponding tax residency certificate is obtained.
- Income derived from one state is taxed in the other state as income in the hands of a resident in that state.

Place of Effective Management of Foreign Companies

Mexican tax law sets out an exact definition of "place of effective management". The place of effective management of an entity is in Mexico if the individual (or individuals) responsible of taking or executing decisions of control, management, operation, or administration of the entity and its activities, are located in Mexico. See Place of Effective Management.

In this regard, the Federal Administrative Court of Mexico has established in various precedents and rulings that the place of effective management of a company lies where substantial decisions in relation to the operation of the business are made.

Generally, Mexican tax legislation considers several key factors, which are analysed on a case-by-case basis,

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to determine the place of effective management of a foreign company, including where:

- Directors and, sometimes, other individuals playing in effect an important part in the decision-making for the company, make their decisions.
- The board of directors meets.
- Decisions are formally made (that is, where board meetings are formally held).
- Executive and administrative decisions are made.
- The company's strategic and financial planning is done.
- Key management is located.
- The company's records and board minutes are kept.
- The company's headquarters or main office is located.
- The company's assets are located, and where the company's primary operations are carried out.

These are just some indicators of the place of effective management. Ultimately, the determination of the place of effective management will depend on the particular facts and circumstances of each case.

Taxation of Mexican Tax Resident Companies

Taxable Base

A Mexican resident company determines Mexican corporate income tax on their total net income. The net income is calculated in accordance with the profit and loss account results and considering certain tax adjustments under Mexican law.

As a general guideline, any modification that represents an increase in the company's equity, whether in cash, goods, credits, services, or any other type, should be considered as taxable income for income tax purposes.

However, exceptionally, the following are not considered taxable income for income tax purposes:

- Capital contributions.
- Payment of losses by shareholders.
- Premiums for placement of shares in equity (paid in capital).
- Revaluation of assets and capital.
- Dividends from Mexican resident entities.
- Income from tax incentives.

Mexican corporations required to pay corporate income tax may deduct from their annual taxable income, the amount of expenses incurred for the development of their business activities (authorised deductions).

For these purposes, the Income Tax Law establishes a catalogue of expenses that companies may consider as "authorised deductions" to determine the taxable income tax base on which the corporate income tax is paid.

In general terms, the following items are examples of deductible expenses:

- Cost of sales.
- Operating expenses.
- Investments.
- Interest.
- Annual inflation adjustment.
- Foreign exchange losses.
- Royalty payments.

Further, should the relevant company have employees, it is obliged to pay employees' profit sharing. Employers in Mexico are obliged to distribute 10% of their taxable profits to their employees as employee profit sharing, provided that the employer generates taxable profits in the tax year (Article 123, Political Constitution of the United Mexican States). In 2021, the Federal Employment Law introduced a limit to the employees' profit-sharing payment, per employee, of up to three months of the relevant employee's wage or the average of the profit-sharing payments received in the last three years, whichever is more favourable to the employee.

To calculate the taxable profit, taxpayers must add the taxable income and deduct from it the total deductible expenses incurred during the year. To the result obtained, the ten percent rate for employees' profit sharing is applied. For this calculation, tax losses pending application from previous years and employees' profit sharing paid during the year may not be reduced.

For practical purposes, the mechanics can be summarized as follows:

	Taxable income
Minus:	Authorised deductions
Minus:	Employees' profit sharing paid during the year
Equal:	Taxable profit or loss
Minus:	Unamortised carried forward tax losses
Equal:	Tax result
By:	30% corporate tax rate
Equal:	Income tax payable
Minus:	Provisional monthly payments

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Tax losses may be carried forward and offset against profits generated in the following ten tax years.

Adjustments to Tax Profits

Under the controlled foreign company (CFC) rules, profits realised by Mexican controlled foreign subsidiaries that benefit from a low tax regime are taxable in advance at the Mexican parent.

The purpose of the CFC rules is to prevent the artificial shift of passive income (such as interest, dividends, royalties, or lease rents) from Mexico to low-tax jurisdictions. Mexican legislation considers a country to have a low-tax regime if the relevant profits are not taxed or are taxed at a level that is 75% lower than the taxation, which would apply if the profits were taxed in Mexico.

A foreign company becomes a CFC when more than 20% of its revenue is passive income.

To this regard, Mexican tax residents or foreign residents with a permanent establishment in Mexico could be required to pay in advance Mexican corporate income tax in terms of Title VI of the Income Tax Law (Preferential tax regimes and multinationals) on income accrued through foreign legal entities:

- Directly or indirectly (in proportion to their participation therein).
- Which are tax transparent.

In general terms, taxpayers who receive income subject to a preferential tax regime must keep specific accounting records for each of the legal entities and legal figures through which they derive foreign income, and to pay the related income tax separately from the rest of their accruable taxable income. There is also a requirement to submit specific tax returns detailing income derived from these entities and legal figures in February.

Tax Rates

Mexican corporate income tax is applied at a standard rate of 30%.

In the case of foreign residents that generate business profits in Mexico, the applicable tax treatment varies depending on whether the income is attributable to a permanent establishment or whether it is considered Mexican-sourced income (that is not attributable to a permanent establishment).

Foreign residents with a permanent establishment would trigger income tax on business profits they derive (attributable to the permanent establishment), and income tax on those profits would be levied on a similar basis as if the relevant foreign resident were a Mexican legal entity (subject to the corporate tax rate of 30%).

Income tax on profits obtained by a foreign resident without a permanent establishment (or to which the income item cannot be attributed), would be triggered depending on the nature of the activities from which the income is derived (such as royalties, dividends, interest). That is, while certain business profits could be considered not to be Mexican-sourced and not attributable to a Mexican permanent establishment, other income items, such as passive income, that fall under certain legal provisions included in the Mexican Income Tax Law, would be taxed at source by means of withholding taxes.

Dual Tax Residence

Dual tax residency can occur when a Mexican company has its legal seat, domicile, and place of management and control in Mexico, but carries out a trade, receives income, or has a permanent establishment in another jurisdiction, such that local legislation in the later jurisdiction treats the company as a tax resident.

A foreign company, which has its place of effective management or main seat of business in Mexico, may be considered a tax resident both in the place it is incorporated in and in Mexico, because it has its place of effective management or main seat of business in Mexico.

Double tax residence may lead to double taxation of the same profits in the relevant jurisdictions.

Domestic law and double tax agreements (DTAs) (also known as double tax treaties or conventions) aim to prevent or to solve this double taxation issue for dual tax resident companies by providing double taxation relief under different methods, depending on the relevant treaty (such as exemption, credit, deduction).

Double Tax Treaty Protection

In the case of dual tax residence, the country of tax residence is determined by the DTA existing between Mexico and the other country. For an introduction to the purpose and interpretation of DTAs in a UK context but relevant more widely, see Practice Note, Double tax treaties: introduction.

It is necessary to look at the relevant DTA for the terms of the tie-breaker rule (that is the rule of the DTA determining which of the two countries is the country of tax residence where the company will pay corporate income taxes).

Mexico has entered into a network of DTAs with approximately 75 jurisdictions. DTAs are largely based on the Organisation for Economic Co-operation and Development (OECD) Model Tax Treaty on Income and on Capital 2017 (OECD model tax treaty), a standard form that many countries use as a starting point when

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negotiating a DTA(for background on the OECD model tax treaty, see Practice Note, Double tax treaties: introduction: Interpretation of DTAs).

The following sections set out a general overview of how the issue of dual tax residence is typically dealt with based on the OECD model tax treaty and the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (MLI).

OECD Model Tax Treaty

The OECD model tax treaty states that a company is resident in a country if it is liable for tax in that country by reason of its domicile, residence, place of management, or any other criterion of a similar nature (Article 4).

The OECD model tax treaty (before being amended by the MLI) provided that, should a company be resident in two countries, it should be treated as resident in the jurisdiction where its place of effective management is located (Article 4(3)). This is the place where key management and commercial decisions that are necessary for the conduct of the company's business as a whole are made. To determine this, all relevant factual circumstances must be examined.

Determining where a company is effectively managed may be difficult, given that senior directors are often highly mobile individuals, and that meetings are often carried out and decisions adopted through electronic communication.

Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (MLI)

The MLI is a multilateral treaty signed by more than 95 countries that amends and supplements existing DTAs with various anti-abuse provisions, depending on the elections made by the signatories. The MLI was published on 24 November 2016 (see Legal Update, OECD publishes multilateral instrument on BEPS (detailed update)). It was opened for signature on 31 December 2016. For further information, see Practice Note, OECD multilateral instrument on BEPS.

Mexico is a party to the MLI, signature of the MLI has been ratified, and it has entered into force on 1 July 2023, with effects from 1 January 2024.

Article 4 of the MLI changes the tie-breaker for dual resident companies by providing that the place of residence of a company resident in both countries is to be determined by the competent authorities of both countries by mutual agreement, taking into account the place of effective management, the place where the company is incorporated, and any other relevant factors.

For jurisdictions for which mutual agreement procedures apply, a company is considered a dual resident until the competent authorities reach an agreement.

No Double Tax Treaty Protection

Where there is no applicable DTA, the company will be resident in both Mexico and the other jurisdiction. The company will therefore be subject to the tax laws of that other jurisdiction as well as to Mexican tax on its worldwide profits and may be taxed twice on some or all of its profits.

This position is, obviously, highly undesirable and one should avoid this situation arising wherever possible. To do so, one must take any measures necessary to ensure that the requirements for residence either in Mexico or in the other jurisdiction are not (or cease to be) met.

The Mexican Income Tax Law allows Mexican taxpayers to credit any foreign income tax paid in other jurisdictions, provided certain requirements are met.

Non-Mexican Tax Resident Companies with Permanent Establishment (PE)

Companies which are not tax resident in Mexico are still subject to Mexican corporate income tax if they have a PE in Mexico (see Permanent Establishment).

For the taxation of a non-tax resident company that is located in Mexico without a PE in Mexico, see Non-Resident Companies Without Permanent Establishment in Mexico.

Permanent Establishment

The definition of a PE is set out both under Mexican law and under the DTAs entered into by Mexico.

As a general principle of Mexican law, the provisions set out under international treaties prevail over domestic legislation. However, the Mexican definition of PE applies where:

- No DTA is available.
- A DTA has been entered into, though the Mexican domestic regime proves to be more favourable.

PEs in Mexico are taxed under Title II of the Mexican Income Tax Law, on profits attributable to such PE.

Permanent Establishment under Mexican Law

According to the Mexican Income Tax Law a non-resident legal or natural person acts through a PE for Mexican tax purposes if that person either:

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- Holds available premises or workplaces of any kind in the Mexican territory through which it carries out its business activities (in whole or in part), or through which personal independent services are provided.
- Acts through an agent with sufficient authority to execute contracts on its behalf (independent agent), who habitually executes contracts on said person's behalf or plays the principal role leading to the execution of contracts on behalf of that person.

The following premises constitute a PE:

- Executive headquarters.
- Branches.
- Agencies.
- Offices.
- Factories.
- Workshops.
- Facilities.
- Mines.
- Quarries.
- Any other place of exploration, extraction and exploitation of natural resources.
- Individual or entity other than an independent agent if said person exercises powers in the name or on behalf of a foreign resident which permit the latter to conduct in this country any activity.
- The place where the trustee carries out business activities through a trust.
- The place where an insurance company residing abroad collects premiums in Mexico or if insurance is issued against risks located in Mexico.
- The place where construction services and real estate works are provided for more than 183 days in a period of 12 months.
- Maquiladora operations in certain circumstances.
- All of these premises save for the one in the last bullet, regardless of the length of time. (Article 2, Income Tax Law)

Additionally, the Federal Administrative Court has issued jurisprudence accepting the use of the Commentaries to Article 5 of the OECD Model Tax Convention as valid sources of interpretation to determine the concept, characteristics and extent of PEs. This is because Article 2 of the Mexican Income Tax Law follows the definition used in DTAs, unless Mexico has made particular reservations on the relevant Articles or observations to the Commentaries.

Permanent Establishment under Double Tax Agreements

Nearly all DTAs entered into by Mexico are based on the OECD model tax treaty. The OECD Commentaries to Article 5 of the OECD Model Tax Convention is generally considered an important aid to interpretation of a DTA, in particular to establish whether a PE exists in Mexico. The Federal Administrative Court has set jurisprudence accepting the Commentaries to Article 5 of the OECD Model Tax Convention as valid sources of interpretation.

Under Article 5 of the OECD model tax treaty, a company has a PE in a jurisdiction if either:

- It has a fixed place of business in that jurisdiction through which its business is wholly or partly carried on (see Permanent Establishment as Fixed Place of Business under the OECD Model Tax Treaty).
- A person acting for the company has and habitually exercises in that territory authority to conclude contracts in the company's name (the dependent agent)(see Dependent Agent as Permanent Establishment).

For more information, see Practice Note, Companies: UK residence and permanent establishments: Permanent establishments and double tax treaties.

Mexico has a reservation on Article 5, reserving the right to tax individuals performing professional services or other activities of an independent nature if they are present in Mexico for more than 183 days within a 12-month period.

Permanent Establishment as Fixed Place of Business Under the OECD Model Tax Treaty

Under the OECD model tax treaty, a fixed place of business through which the business of a foreign company is wholly or partially carried out can be any of the following:

- A place of management.
- A branch.
- An office.
- A factory.
- A workshop.
- A mine, an oil or gas well, a quarry or any other place of extraction of natural resources.
- A building site or construction or installation project that lasts more than 12 months.

(Article 5.1, OECD Model Tax Convention.)

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Under the commentary to the OECD model tax treaty, "fixed" means that there must be both:

- A link between the place of business and a specific geographical point.
- A certain degree of permanency.

This requirement excludes any temporary place of business.

Activities that are purely preparatory or ancillary to the main business carried out by a non-resident company will not be considered to be carried out at a PE even where they are carried out through a fixed place of business (Article 5.3, OECD model tax treaty). This includes:

- Storing, displaying or delivering the company's goods or merchandise.
- Maintaining the company's goods or merchandise for the purpose of:
  - storage, display or delivery; or
  - processing by another person.
- Purchasing goods or merchandise for the company.
- Collecting information for the company.

(Article 5.4, OECD model tax treaty.)

Relevantly, Article 13 of the MLI, which has been signed and ratifies by Mexico, deals with the artificial avoidance of PE status through specific activity exemptions.

Dependent Agent as Permanent Establishment

A dependent agent is a person acting for the company, who habitually exercises the authority to conclude contracts in the company's name in that territory.

The OECD commentary states that this includes contracts that bind the company even if they are not in the company's name. The commentary also specifies that this should be taken to refer to contracts that relate to the company's business proper (as opposed, for example, to contracts concerning only the company's internal operations).

However, the activities of an agent do not give rise to a PE if the agent is of independent status and is acting in the ordinary course of his business (Article 5.6, OECD model tax treaty).

Relevantly, Mexico has observations on the Commentaries to Article 5.6 (Commentary 38) considering that the arm's length principle ought to be taken into account when determining whether an agent is dependent or independent in nature, so that Mexico is entitled to add appropriate wording in that respect to its DTAs.

How to Allocate Profits to a Permanent Establishment in Mexico

Mexico does not follow the authorized OECD approach for the attribution of profits to a PE, as described in OECD 2010 Report on the Attribution of Profits to Permanent Establishments dated (22 July 2010) (PE Report), as it has a reservation on Article 7 of the OECD model in order to use the previous version of Article 7 before the 2010 update.

Under the previous version's approach the jurisdiction keeps the right to determine the profits of a PE to be taxed by a customary apportionment (such method of apportionment shall be in accordance with the principles contained in the previous version of Article 7).

These principles consisted in attributing profits to a PE based on the profits it might be expected to make if it were a separate company engaged in the same or similar activities under the same or similar conditions, considering the functions performed, assets used, and risks assumed by the enterprise through the relevant PE and through other parts of the enterprise.

Taxation of Non-Resident Companies with Permanent Establishment in Mexico

Non-resident companies that obtain income through a PE in Mexico must pay taxes in Mexico on the income attributable to the Mexican PE.

The taxable base of a Mexican PE for non-resident income tax purposes is determined pursuant to the provisions on corporate income tax, subject to the following:

- The transfer-pricing regulations, pursuant to Article 76 of the Mexican Income Tax Law. Transactions between related parties must comply with the arm's length principle.
- Payments, which the PE makes to its non-resident parent company for royalties, interest, commissions, consideration for technical assistance services, and for the use or assignment of assets or rights, are generally non-deductible.
- Concerning transactions between a Mexican tax resident and a foreign related party, the former would be required to determine its accruable income and authorised deductions bearing in mind that the price and compensation for the relevant transaction should be equal to that which would have been paid to an independent party (arm's length principle).
- In terms of the applicable Mexican laws, it is possible to obtain an advanced pricing agreement from the tax

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authorities. This could take up to three years. Generally speaking, resolutions issued by Mexican authorities with respect to advanced pricing agreements could be valid and enforceable during the tax year in which the application is filed, for the previous tax year, and up to the subsequent three tax years. Nonetheless, advanced pricing agreements could be valid longer if they resulted from an amicable procedure in terms of an international treaty to which Mexico is a party.

The tax rate applicable to Mexican PEs is generally equal to 30%.

Non-Resident Companies Without Permanent Establishment in Mexico

Income sourced in Mexico is generally taxable there unless a DTA or a domestic exclusion or exemption prevents such taxation.

Subject to the existence of a DTA or domestic provision preventing taxation, under Mexican law some types of income are subject to taxation in Mexico if obtained by non-residents without a PE in Mexico. Some of the most significant items of income for companies that carry out economic activities in Mexico without a PE include:

- Wages and pensions.
- Income derived from independent personal services provided in Mexico.
- Rental income derived from real estate situated in Mexico.
- Dividends and other income derived from stakes in the equity of companies resident in Mexico.
- Income directly or indirectly derived from real estate assets located in Mexican territory or from rights relating to those assets.
- Interest when the capital sum is invested in Mexico, or when paid by a Mexican resident or Mexican PE.
- Royalties where the intellectual property is used in Mexico, or when paid by a Mexican resident or Mexican PE.
- Capital gains deriving from:
  - securities issued by legal persons resident in Mexico;
  - securities issued by legal persons with more than 50% of their asset book value deriving from real estate located in Mexico; and
  - real estate located in Mexico.

Taxes to non-resident companies are normally levied as a withholding tax.

Where withholding tax is imposed, the payor is required to account for such tax and file a withholding agent tax return.

Residence: Flowchart

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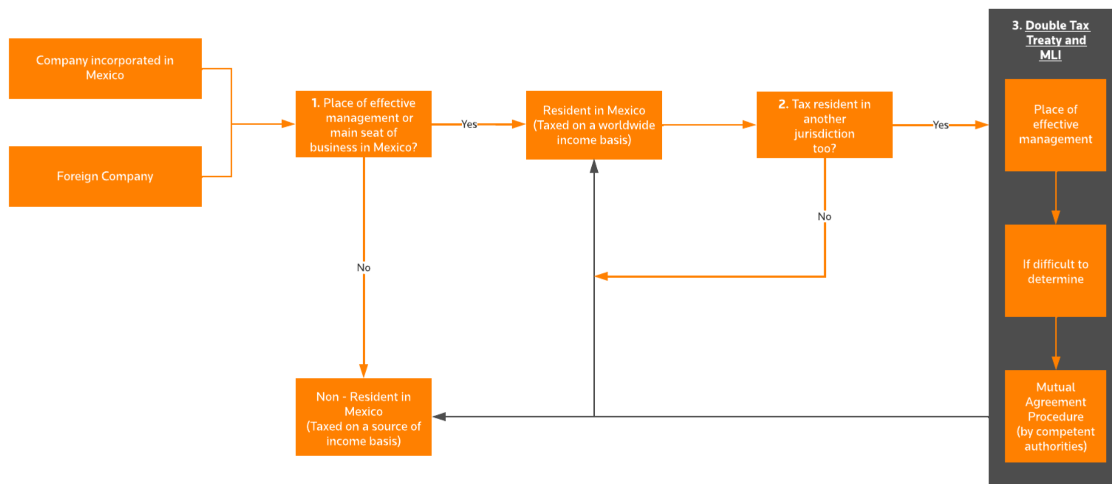
Tax Residence of Companies in Mexico: flowchart



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