

OECD Secretariat issues guidance on impact of the COVID-19 crisis on treaty-related issues

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Executive summary

On 3 April 2020, the Organisation for Economic Co-operation and Development (OECD) published on its website an *OECD Secretariat Analysis of Tax Treaties and the Impact of the COVID-19 Crisis* (the [guidance](#)).

Governments around the globe are taking increasingly stringent containment measures to slow the spread of the COVID-19 virus. As a result of these measures, many cross-border workers are unable to physically perform their duties in their country of employment. This unusual situation raises tax issues that could affect how the right to tax is divided between countries, which is governed by international tax treaty rules that delineate taxing rights.

At the request of concerned countries, the OECD Secretariat has issued guidance on these issues based on an analysis of the international tax treaty rules. The guidance deals with issues related to:

- (i) Creation of permanent establishments
- (ii) Residence status of companies (based on place of effective management)
- (iii) Treatment of cross-border workers
- (iv) Residence status of workers

In the guidance, the OECD encourages countries to work together to alleviate the unplanned tax implications and potential new burdens arising due to effects of the COVID-19 crisis.

Detailed discussion

Background

The OECD has published on its [website](#) materials related to tax measures in response to the COVID-19 crisis. These materials include a [flyer](#) from the Forum on Tax Administration summarizing some of the possible responsive actions that tax administrations could take to support taxpayers during the COVID-19 crisis and a [flyer](#) on potential tax policy responses that focus on limiting the damage to productive potential and protecting the vulnerable. In addition, the OECD has published a country policy [tracker](#) that monitors the global response to COVID-19.

OECD Secretariat Analysis of Tax Treaties and the Impact of the COVID-19 Crisis

On 3 April 2020, the OECD published guidance on the tax implications of the dislocation of cross-border workers due to the COVID-19 crisis that provides an analysis of the relevant tax treaty provisions. The analysis in the guidance is based on the OECD Model Tax Convention.

The guidance does not represent the official views of the OECD member countries and therefore countries may take different approaches on the issues. The conclusions in the guidance are based on the assumption that the dislocation of workers is extraordinary and temporary. However, that assumption will need to be re-assessed as the crisis continues to unfold.

Concerns related to the creation of permanent establishments (PEs)

The guidance covers three different situations where concerns are raised regarding PE status because of worker dislocation during the COVID-19 crisis:

1. *Home office*: According to the guidance, employees teleworking from home (i.e., from a home office) during the COVID-19 situation would not create a PE for the employer. The guidance explains that carrying on intermittent business activities at the home of an employee does not make that home a place that is at the disposal of the enterprise. Also, for a home

office to create a PE for an enterprise, it must be used on a continuous basis for carrying on business of an enterprise and the enterprise generally must require the individual to use that location to carry on the enterprise's business.

2. *Agency PE*: The guidance indicates that the temporary conclusion of contracts in the homes of employees or agents because of the COVID-19 crisis should not create PEs for the businesses. Under Article 5(5) of the 2014 OECD Model, the activities of a dependent agent such as an employee would create a PE for an enterprise if the employee habitually concludes contracts on behalf of the enterprise. Under the 2017 version of the OECD Model, a PE would be created if the employee habitually concludes contracts or habitually plays the principal role leading to their conclusion. Under either version, the main point according to the guidance is that it has to be habitual. An employee's or agent's activity in a State is unlikely to be regarded as habitual if he or she is only working at home in that State for a short period because of force majeure and/or government directives extraordinarily impacting his or her normal routine. The guidance notes that a different approach may be appropriate, however, if the employee was habitually concluding contracts on behalf of the enterprise in his or her home country before the COVID-19 crisis.
3. *Construction site PE*: The guidance indicates that a construction site PE would not be regarded as ceasing to exist when work is temporarily interrupted due to the COVID-19 crisis. According to the guidance, the duration of such an interruption of activities should, however, be included in determining the life of a site and therefore will affect the determination whether a construction site constitutes a PE (i.e., a construction site will constitute a PE if it lasts more than 12 months under the OECD Model or more than six months under the United Nations Model).

The guidance also highlights that the threshold presence required under domestic law to register for tax purposes may be lower than the applicable requirements under a tax treaty, such that corporate income tax registration requirements may be triggered even in the absence of a PE. The OECD therefore encourages tax administrations to provide guidance on the application of the domestic law threshold requirements, domestic filing and other guidance to minimize or eliminate unduly burdensome compliance requirements for

taxpayers in the context of the COVID-19 crisis. The guidance notes Ireland as an example of a country that has already issued guidance on disregarding the presence of an individual in Ireland for corporate income tax purposes with respect to a company that employs or otherwise receives services from the individual, if such presence is shown to result from travel restrictions related to COVID-19.¹

Concerns related to the residence status of a company (based on place of effective management)

The COVID-19 crisis may raise concerns about a potential change in the “place of effective management” of a company as a result of a relocation, or the inability to travel, of its chief executive officer or other senior executives. This potential change of circumstances may trigger an issue of dual residency in cases where the change in the place of effective management results in a company being considered resident in two countries simultaneously under their respective domestic laws. In such cases, tax treaties provide tie-breaker rules ensuring that the entity is considered to be resident in only one of the states:

- ▶ If the treaty contains a provision like the 2017 OECD Model tie-breaker rule, the competent authorities determine the residency on a case-by-case basis by mutual agreement. This determination will take into consideration all of the facts and circumstances during the relevant period.
- ▶ In situations where the treaty contains the pre-2017 OECD Model tie-breaker rule, the criterion used to determine the residence of a dual-resident entity is the place of effective management. To determine the “usual” and “ordinary” place of effective management, all relevant facts and circumstances should be examined and not only those that pertain to an exceptional and temporary period such as the COVID-19 crisis.

Therefore, it is unlikely that the COVID-19 situation will create any changes to an entity’s residence status under a tax treaty, particularly when the tie-breaker rule contained in tax treaties is applied.

Concerns related to cross-border workers

During the COVID-19 crisis, if a government provides wage subsidies to employers to keep their employees on the payroll despite restrictions in the exercise of their employment, the payments that employees are receiving in these circumstances should be attributable to the place where the employment used to be exercised before the COVID-19 crisis. Where the source country has a taxing

right, the residence country must relieve double taxation under Article 23 of the OECD Model, either by exempting the income or by taxing it and giving a credit for the source country tax.

Also, in some bilateral treaties, there are provisions that apply special treatment to the employment income of cross-border workers with specific limits on the number of days that a worker may work outside the jurisdiction where he or she regularly works. The guidance notes that exceptional circumstances call for an exceptional level of coordination between countries to mitigate the compliance and administrative costs for employees and employers associated with involuntary and temporary change of the place where employment is performed.

Concerns related to a change to the residence status of individuals

The guidance discusses two main situations related to a change to the residence status of individuals during the COVID-19 crisis:

- ▶ A person is temporarily away from his or her home, gets stranded in the host country because of the COVID-19 crisis and attains domestic law residence there. In this situation, the guidance indicates that such a temporary dislocation should not have tax implications as the person would not be a resident of the host country for purposes of an applicable tax treaty. This is because the tie-breaker test included in Article 4 of the OECD Model (permanent home, center of vital interests, place of habitual abode, and nationality) would award residence to the home state.
- ▶ A person is working in a country (the “current home country”) and has acquired residence status there, but he or she temporarily return to the “previous home country” because of the COVID-19 situation. In this situation, the same treaty rules apply, but their application produces a more uncertain result because the person’s attachment to the previous home country is stronger than the attachment to the host country in the first situation. The residence question in this situation will usually be determined using the test of “habitual abode” (i.e., where the individual lived habitually, in the sense of being customarily or usually present). The guidance notes that because the COVID-19 crisis is a period of major change and an exceptional circumstance, tax administrations and competent authorities will have to apply this test by considering a more normal period of time (i.e., the time before the crisis) when assessing a person’s resident status.

Also, it is noted in the guidance that countries have already issued useful guidance and administrative relief on the impact of COVID-19 on the domestic and tax treaty determination of the residence status of an individual (for example, Australia, Ireland and the United Kingdom).

Implications

The guidance provides a useful analysis of some treaty-related issues that arise because of dislocation caused by the COVID-19 crisis. However, the guidance is informational only and does not represent the official views of the OECD member countries. It also should be noted that the analysis reflected in the guidance only covers the OECD Model Tax Convention. Provisions in bilateral double tax treaties may differ from the OECD Model and such differences would need to be considered in analyzing the result in any particular situation.

In addition, the OECD has announced it is urgently working on other concerns raised by businesses, taxpayers and tax administrations due to the COVID-19 crisis. Therefore, more information may be coming from the OECD on other international tax questions that can arise in the current situation.

In countries around the world, various measures are being put in place to address the COVID-19 crisis, which may have tax implications. Countries also are putting in place tax measures aimed at supporting businesses and individuals during the crisis. Businesses should closely monitor these developments and assess the potential impact on their operations.

EY has created a [tracker](#) that provides a snapshot of the tax policy changes in more than 100 countries around the world in response to the ongoing crisis and that is updated daily.

Endnote

1. See EY Global Tax Alert, [Ireland relaxes tax residence rules in relation to COVID-19](#), dated 31 March 2020.

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