OECD Guidance to Tax Issues Created by the COVID-19 Crisis

The COVID-19 pandemic has resulted in Lockdown in the majority of the countries resulting in people getting stranded in geographies where they are not residents. This has resulted in Tax issues impacting the right to Tax between countries. OECD has given guidance on the subject concerns basis the International Tax Treaty rules.

These concerns along with the guidance associated with these are as follows:-

1. **Issues relating to the creation of the permanent establishment**

   The pandemic would result in Individuals getting stuck at various geographies which are different from the place where they usually work or in countries different from their place of residence. This may purportedly result in the creation of "Permanent Establishment" P.E.in the countries where they are stranded resulting in filing compliances and tax obligations. This would be especially true in cases where the threshold presence required by the domestic tax law is lesser than that given under the treaty.

   ### OECD response

   - **Countries Tax administrations** should provide guidance on the domestic law threshold requirements domestic filing and other requirements similar to ***Ireland*** which disregards the presence of an individual in Ireland and where relevant, in another jurisdiction for corporate taxation in the case of an individual who is an employee, service provider, director or agent of the company.

   - **Home office** through which the business of an enterprise is wholly or partly carried out during the COVID crisis may not be considered a PE unless the enterprises require the individual to use that location to carry on the enterprise's business. Para 18 of the OECD commentary on Article 5 of the OECD Model explains that even though part of the business of an enterprise is carried intermittently out from an individual's home office it should not lead to the conclusion is at the disposal of the enterprise. It must be used on a continuous basis and to qualify as a PE there must be a certain degree of permanence. During COVID-19 crisis individuals who stay at home to work remotely are typically doing so as a result of a government directive. It is a force majeure, not an enterprise requirement. Accordingly, the home office would not constitute a PE as it lacks permanence nor is it at the disposal of the enterprise.

- **Agency PE** would only be established as per Article 5 where the relevant activities have a certain degree of permanence and are not purely temporary or transitory leading to the conclusion of contracts by the agent habitually. Para 6 & 33.1 of the Commentary on Article 5 that a PE should be considered to exist when the presence that the agent/enterprise must maintain in a country should be more than merely transitory. The activities of the conclusion of the contracts would be habitual only if they have a certain degree of permanence.

- **Construction site PE** as per para 55 commentary on Article 5(3) of the OECD Model explains that a site should not be ceasing to exist when work is temporarily discontinued and temporary interruptions caused by COVID-19 should be included in determining the duration of a site.

2. **Issues relating to the residential status of companies**

The crisis has resulted in the relocation of top management of companies and this may change the company's residence as per the domestic law. This may trigger an issue of double residency.

OECD response

Though the positions of dual residence are rare the treaties provide a way out in terms of tie-breaker rules ensuring that the entity is a resident of one of the states. The competent authorities of both the states generally thrash the issue of residence which is as per the 2017 OECD tie-breaker rules. The OECD commentary para 24.1 of Article 4 illustrates the facts and circumstances to be considered in the subject period. The authority to do so by the competent authorities of both the states is provided under the Mutual Agreement Procedure Article 25 (3). The treaties which are based on the 2014 OECD Model - the place of effective management is the place where the key management and commercial decisions are made to conduct the business as a whole are in substance made. Therefore all facts and circumstances are examined to determine the usual and ordinary place of effective management and not only those that pertain to an exceptional and temporary period such as the COVID-19 crisis.

3. **Issues relating to cross border workers**

Governments are subsidizing the cost of keeping an employee on a company's payroll during the pandemic despite restrictions caused to the exercise of their employment on account of their physical presence in the country of source. This may result in the country of the source (Salary Income) losing it's right to tax as per Article 15. This may create issues regard to compliance for both employers and employees.

OECD response

The stimulus packages referred above are designed to keep workers on payroll during the crisis despite the restrictions on the exercise of their employment. These payments resemble termination payment. The commentary on the Article explains that the remuneration should be attributable to the place where the employee would generally have worked. In most circumstances, this will be the place the person used to work before the COVID crisis. If the country where the employment is exercised should lose its taxing right on account of Article 15, additional compliance difficulties would arise for employers and employees. This would require an exceptional level of coordination between countries to mitigate the compliance and administrative costs for employees and employers associated with the involuntary and temporary change of the place where the employment is performed. The OECD is working with countries to mitigate the unplanned tax implications and the new compliance issues arising out of it.

4. **Issues relating to a change of residential status of individuals**

The crisis could create two scenarios which may need addressing :

- An individual may be temporarily away from home and get stuck up in another country and attain Residential status in the host country on account of domestic tax laws

- An individual who has attained residency in a country on account of work, returns to his home country on account of the Crisis. The person may have never lost his residential status of his previous home country or they may regain residential status on their return.

UK, Ireland & Australia have issued guidance in these situations and have disregarded these days stay in the host country arising out of the crisis.

OECD response

As per Article 4 of the OECD Model Treaty an individual can be a resident in only one country at a time. The starting point is the domestic law of the country. If an individual is a resident of one country that would settle the issue, however, if an individual is a resident of both the countries as per the domestic law then the tie-breaker rules as per Article would decide the matter.

In the first case, it would be relatively simple as the Treaty would award the Treaty residence to the home country as the various tests prescribed sequentially would tip in favor of the home country and would award the residence to the home country. In these circumstances, no remedial measure is suggested by OECD.

In the second case, the same tie-breaker rules would apply but these would produce a more uncertain result. It is suggested that the COVID crisis is a period of major changes and exceptional circumstances so a more normal period of time when assessing a person's residential status may be considered by the competent authorities of both the countries.

Our Recommendations

We suggest that the Company or the individual should keep detailed records and proof of the circumstances which led to the residence of the individual or the Key management personnel in a country on account of the COVID-19 related travel restrictions to be produced before the tax authorities in case the need to show a temporary dislocation of the individual or his/her activities, to avoid any tax distress caused at a later date.

In addition, Countries that have not come out with Tax relief measures like India should possibly come out with relief measures like Ireland, the UK & Australia that have come out with relief measures arising out of COVID-19 and disregarding the stay in their countries caused by exceptional/extraordinary circumstances. This may be important as the OECD guidance is not mandatory in nature and would require a change in the domestic law or notification to alleviate the tax distress.