Updated guidance on tax treaties and the impact of the COVID-19 pandemic

21 January 2021

This note revisits the guidance issued by the OECD Secretariat in April 2020 on the impact of the COVID-19 pandemic on tax treaties. Unprecedented measures imposed or recommended by governments, including travel restrictions and curtailment of business operations (broadly referred to in this guidance as public health measures), have been in effect in most jurisdictions in various forms and stages during most of 2020 due to the COVID-19 pandemic and this situation is expected to continue in 2021. This guidance is intended to provide more certainty to taxpayers during this exceptional period.

This guidance represents the Secretariat's views on the interpretation of the provisions of tax treaties (i.e. each jurisdiction may adopt its own guidance to provide tax certainty to taxpayers). But it reflects the general approach of jurisdictions[1] and illustrates how some jurisdictions have addressed the impact of COVID-19 on the tax situations of individuals and employers. The guidance is relevant only to circumstances arising during the COVID-19 pandemic when public health measures are in effect. It seeks to avoid instances of double taxation but cannot be relied on to create instances of double non-taxation. Much of the analysis covers circumstances where factual determinations by tax administrations are required and the guidance does not purport to replace the judgement of tax administrations in those cases.

[1] This guidance was discussed in Working Party 1 in its Inclusive Framework configuration, which supports its publication.

Introduction

1. The impact of the coronavirus disease ("COVID-19") has been profound. The rapid spread of the virus has strained local medical infrastructures, led to restrictions on travel and social contact, and created unprecedented disruptions to the global economy.

2. During the pandemic period, many enterprises have faced curtailment of their operations, and have been forced to close offices and other business premises forcing those businesses to change how their business is conducted (e.g. working from home). In many jurisdictions, international travel was either suspended or severely restricted for a number of weeks leaving people stranded in jurisdictions where they might not otherwise be. This temporary dislocation of people can have tax consequences for those individuals and the businesses for which they work.

3. In light of the exceptional circumstances, on 3 April 2020, the OECD Secretariat issued guidance on the application of international tax treaty rules in circumstances where cross-border workers or individuals were stranded in a jurisdiction that was not their jurisdiction of residence. The guidance was issued as an urgent response to requests from concerned jurisdictions which as a result of the COVID-19 pandemic had taken unprecedented measures that affected the mobility of individuals such as restricting travel and implementing strict quarantine requirements. For that reason, the paper was published under the responsibility of the Secretary-General of the OECD stating that the opinions expressed and the arguments employed therein did not necessarily reflect the official views of OECD member countries.

4. These unprecedented measures imposed or recommended by governments, including travel restrictions and curtailment of business operations, (broadly referred to in this guidance as "**public health measures**") have been in effect in most jurisdictions in various forms and stages during most of 2020 and may remain in effect in 2021. This guidance is intended to provide more certainty to taxpayers during this exceptional period when those public health measures were applicable by reflecting the general approach of members and by illustrating how some jurisdictions have addressed the impact of COVID-19 on the tax situations of individuals and employers. In that respect we note that Working Party 6 is adopting a similar approach and seeking to issue additional transfer pricing guidance relevant only to the circumstances of the COVID-19 pandemic. This guidance represents the Secretariat's views on the interpretations on the provisions of tax treaties (i.e., each jurisdiction may adopt different interpretations from those in this guidance).

5. Similarly, this revisited guidance applies only to situations arising during the COVID-19 pandemic while relevant public health measures to restrict the spread of COVID-19 are still in effect. It is temporary in nature and seeks to address the exceptional circumstances of the COVID-19 pandemic only. It seeks to avoid instances of double taxation but cannot be relied on to create instances of double non-taxation. Much of the guidance covers circumstances where factual determinations by tax administrations are required and the guidance does not purport to replace the judgement of tax administrations in those cases.

6. The unique and almost unprecedented restrictions arising from government responses to COVID-19 have led to practical challenges for business and for workers. For example, depending on where the employee is located during the COVID-19 restrictions, new taxing rights over the employee's income may arise in other jurisdictions. Those new taxing rights may displace existing taxing rights and require refunds of some tax withheld at source. Governments have taken practical approaches to the impact of COVID-19 restrictions in these circumstances and have issued guidance outlining how the rules will be enforced. That guidance has been widely welcomed by business.

7. When the OECD Secretariat guidance was first issued (April 2020), it was unclear how long the restrictions would persist and it was expected that many of the situations analysed would be temporary only. Over nine months have passed since the guidance was issued and some of the measures and the restrictions described remain in place. This guidance considers some additional fact patterns not addressed in detail in April; examines whether the analysis and the conclusions outlined in April continue

to apply where the circumstances persist for a significant period; and contains references to country practice and guidance during the COVID-19 period.

8. The following sections outline the application of the existing rules and the OECD Commentary on concerns related to:

- the creation of permanent establishments (i.e. home office, dependent agent PE) and the interruption of construction sites;
- changes in residence for entities and individuals and the application of tie-breaker rules to dual residents; and
- income from employment i.e. payments under stimulus packages, stranded workers, cross-border (frontier) workers and teleworking from abroad.

Concerns related to the creation of permanent establishments

9. Some businesses may be concerned that employees dislocated to jurisdictions other than the one in which they regularly work, and working from their homes during the COVID-19 pandemic, could create a "permanent establishment" (PE) in those jurisdictions, triggering for those businesses new filing requirements and tax obligations.

10. As explained below, the exceptional and temporary change of the location where employees exercise their employment because of the COVID-19 pandemic, such as working from home, should not create new PEs for the employer. Similarly, the temporary conclusion of contracts in the home of employees or agents because of the COVID-19 pandemic should not create PEs for the businesses. Finally, a construction site PE would not be regarded as ceasing to exist when work is temporarily interrupted. But jurisdictions may consider "stopping the clock" for determining whether the PE threshold has been satisfied during certain periods where operations are suspended as a public health measure to prevent the spread of the COVID-19 virus.

11. However, thresholds under domestic law (including state/provincial legislation) that require a business to register for tax purposes may be lower than those applicable under a tax treaty. In addition, not all income taxes are covered by the applicable tax treaty, (e.g. state income taxes in the United States of America).

12. A number of tax authorities have issued guidance on whether changes in work practices prompted by the COVID-19 pandemic can result in the creation of a PE. Business have welcomed the greater certainty provided by the guidance in these unprecedented times. A sample of that guidance is included in Box 1.

13. Jurisdictions are invited to consider adopting a similar approach.

Box 1. Sample of guidance issued by jurisdictions on creation of a PE

The **Australian** Tax Office issued guidance[2] noting that the effects of COVID-19 will not alone result in the company having an Australian permanent establishment if it meets all the following:

- The foreign incorporated company did not have a permanent establishment in Australia before the effects of COVID-19.
- There are no other changes in the company's circumstances.

[2] See: https://www.ato.gov.au/business/international-tax-for-business/working-out-your-residency/.

- The unplanned presence of employees in Australia is the short-term result of them being temporarily relocated or restricted in their travel because of COVID-19.

The guidance confirms that it will not apply compliance resources to determine if a company has a permanent establishment in Australia if:

- the company did not otherwise have a permanent establishment in Australia before the effects of COVID-19
- the temporary presence of employees in Australia continues to solely be as a result of COVID-19 related travel restrictions
- those employees temporarily in Australia will relocate overseas as soon as practicable following the relaxation of international travel restrictions
- the company has not recognised those employees as creating a permanent establishment or generating Australian source income in Australia for the purpose of the tax laws of another jurisdiction.

The guidance further notes that the approach is applicable until 31 January 2021.

The **Austrian** Federal Ministry of Finance issued guidance[3] noting that if an Austrian employee of a foreign company carries out his work in a(n) (Austrian) home office during the COVID-19 pandemic due to the measures recommended by the respective governments, this is due to force majeure. Therefore, in view of the extraordinary nature of the COVID-19 crisis – and provided that work in the home office does not become the norm – there will be no PE within the meaning of Art 5 OECD Model for the foreign company, because the home office lacks sufficient disposal of the company over the home office. In addition, the employer provides an office which in normal circumstances is available to its employees.

The Austrian Federal Ministry of Finance also issued guidance[4] noting that temporary interruptions of construction sites due to the COVID-19 pandemic should in principle not lead to a suspension of the deadline of Art 5(3) OECD Model – subject to any deviating bilateral agreement (with reference to: Secretariat Analysis of Tax Treaties and the Impact of the COVID-19 Crisis from 3.4 .2020, p. 3)

The **Canada** Revenue Agency issued temporary guidance[5] noting that, as an administrative matter, it will not consider an entity resident in a treaty country to have a permanent establishment in Canada solely because its employees perform their employment duties in Canada solely as a result of the travel restrictions being in force. Further, the Canada Revenue Agency will not consider an "agency" permanent establishment to have been created for the non-resident entity solely due to a dependent agent concluding contracts in Canada on behalf of the non-resident entity, while the travel restrictions are in force, provided that such activities are limited to that period and would not have been performed in Canada but for the travel restrictions. It is noted that Canada Revenue Agency guidance is always applied on a case-by-case basis.

[3] See: Chapter 3, Austrian Guidance with regard to the application and interpretation of DTT during the COVID-19 pandemic, "Info zur Anwendung und Auslegung von Doppelbesteuerungsabkommen im Zusammenhang mit der COVID-19 Pandemie", Info of the Austrian MOF, 20.07.2020, 2020-0.459.612, https://findok.bmf.gv.at/findok?execution=e100000s1&segmentId=719aaa9a-fba3-4ad0-b331-ea4919b90f3b.

[4] See: Chapter 4, Austrian Guidance with regard to the application and interpretation of DTT during the COVID-19 pandemic, "Info zur Anwendung und Auslegung von Doppelbesteuerungsabkommen im Zusammenhang mit der COVID-19 Pandemie", Info of the Austrian MOF, 20.07.2020, 2020-0.459.612, https://findok.bmf.gv.at/findok?execution=e100000s1&segmentId=719aaa9a-fba3-4ad0-b331-ea4919b90f3b.

[5] See:https://www.canada.ca/en/revenue-agency/campaigns/covid-19-update/guidance-international-income-tax-issues.html (applicable from March 16 until September 30, 2020).

The **German** Federal Ministry of Finance issued guidance noting that an interruption of construction and installation work caused by the COVID-19 pandemic will not be counted for purposes of the PE time threshold under Article 5(3) of the OECD Model Tax Convention, provided that:

- the duration of the interruption is at least two weeks,
- the personnel of the enterprise (or any commissioned personnel) have been withdrawn from the construction site or have left it, and
- the relevant income will be taxed, e.g. in the jurisdiction of residence of the enterprise or its personnel, where the suspension of the lapse of time results in the enterprise not having a PE in Germany. In this respect, spontaneous information in tax matters can be provided to the tax administration of the other contracting jurisdiction.

Germany would ignore the time of interruption as described in the guidance, but it would combine the time spent before and after the interruption (so that PE duration test does not start afresh after the pandemic-related interruption).

Greece's Independent Authority for Public Revenue issued guidance[6] noting that:

- for the period 18 March-15 June 2020 it will not consider a non-resident entity to have a permanent establishment in Greece solely because an employee is present in Greece and performs their employment duties in Greece (i.e. their home) as a result of public health measures. The guidance follows the OECD interpretation that a fixed place cannot be of a purely temporary nature, but needs a degree of permanency, as well as that the employer did not require that the home be used for its business activities, but it is a result of government recommendations. For periods preceding 18 March 2020 and following 15 June 2020, it shall be assessed whether such restrictions were in place;
- for the period 18 March-15 June 2020 it will not consider an agency permanent establishment to have been created for a non-resident entity solely because an agent is concluding contracts in Greece (i.e. their home jurisdiction) on its behalf or is stranded in Greece, provided that such person did not habitually conclude contracts on behalf of the non-resident entity in Greece before the COVID-19 outbreak. It is a matter of fact and degree as to whether that habitual condition is met. For periods preceding 18 March 2020 and following 15 June 2020 it shall be assessed whether such restrictions were in place;
- a construction site is not regarded as ceasing to exist when work is temporarily interrupted due to COVID-19 restrictions, but the time of such interruption is included in the calculation of time thresholds for construction PE.

Ireland's Revenue has issued guidance[7] to disregard the presence of an individual in Ireland – and where relevant, in another jurisdiction – for corporate income tax purposes for a company in relation to which the individual is an employee, director, service provider or agent, if such presence is shown to result from travel restrictions related to COVID-19. The individual and the company should maintain a record of the facts and circumstances of the bona fide relevant presence in Ireland, or outside Ireland, for production to Irish Revenue if evidence that such presence resulted from COVID-related travel restrictions is requested.

[6] See: https://aade.gr/sites/default/files/2020-07/E2113_2020.pdf.

[7] See: https://www.revenue.ie/en/corporate/communications/covid19/compliance-with-certain-reporting-and-filing-obligations.aspx.

New Zealand's Inland Revenue issued guidance[8] confirming that the COVID-19 pandemic will not cause non-resident companies to have a PE in New Zealand because their employees are confined or stranded in New Zealand. A non-resident company will not derive New Zealand income because of a PE after only a short period of time. The fixed place needs a degree of permanency – the fixed place cannot be of a purely temporary nature.

The **UK's** HM Revenue & Customs issued guidance[9] noting that existing guidance is flexible and makes clear that HM Revenue & Customs considers that a non-resident company will not have a UK fixed place of business PE after a short period of time as a degree of permanence is required. Similarly, the guidance confirms that whilst the habitual conclusion of contracts in the UK would also create a dependent agent PE in the UK, it is a matter of fact and degree as to whether that habitual condition is met.

The **US** Internal Revenue Service issued guidance[10] noting that during an Affected Person's COVID-19 Emergency Period (comprising a single period not exceeding 60 consecutive days. starting on or after February 1, 2020 and on or before April 1, 2020), services or other activities performed by one or more individuals temporarily present in the United States will not be taken into account to determine whether the non-resident or foreign corporation has a PE, provided that the services or other activities of these individuals would not have occurred in the United States but for COVID-19 Emergency Travel Disruptions as the term is described in the relevant guidance. The guidance provides: "Individuals who do not have the COVID-19 virus and attempt to leave the United States may also face cancelled flights and disruptions in other forms of transportation, shelter-in-place orders, quarantines, and border closures, or they may feel unsafe traveling during the COVID-19 Emergency due to recommendations to implement social distancing and limit exposure to public spaces (collectively, COVID-19 Emergency Travel Disruptions)."

Note: The sample of jurisdictions' guidance referenced includes guidance on both domestic law and application of treaties. It is noted that for most jurisdictions, guidance on the domestic law does not affect interpretation of treaty provisions and the Commentary. The inclusion of references to guidance on domestic law is for illustrative purposes only and is not intended to suggest that domestic law ought to be applied or interpreted in conformity with the Commentary.

[8] See: https://www.ird.govt.nz/covid-19/international/tax-residency.

[9] See: https://www.gov.uk/hmrc-internal-manuals/international-manual/intm261010.

[10] See: https://www.irs.gov/newsroom/faqs-for-nonresident-alien-individuals-and-foreign-businesses-with-employees-or-agents-impacted-by-covid-19-emergency-travel-disruptions.

Home office

14. Whilst noting that the issue of whether a PE exists is a test based on facts and circumstances, in general, a place must have a certain degree of permanency and be at the disposal of an enterprise in order for that place to be considered a fixed place of business through which the business of that enterprise is wholly or partly carried on.

15. Paragraph 18 of the Commentary on Article 5 of the OECD Model explains that even though part of the business of an enterprise may be carried on at a location such as an individual's home office, that should not lead to the conclusion that that location is at the disposal of that enterprise simply because that location is used by an individual (e.g. an employee) who works for the enterprise. The carrying on of intermittent business activities at the home of an employee does not make that home a place at the disposal of the enterprise. A home office may be a PE for an enterprise if it is used on a continuous basis for carrying on business of that enterprise and the enterprise generally has required the individual to use that location to carry on the enterprise's business.

16. During the COVID-19 pandemic, individuals who stay at home to work remotely are typically doing so as a result of public health measures: it is an extraordinary event not an enterprise's requirement. Therefore, considering the extraordinary nature of the COVID-19 pandemic, teleworking from home (i.e. the home office) because of an extraordinary event or public health measures imposed or recommended by government would not create a PE for the business/employer, either because such activity lacks a sufficient degree of permanency or continuity or because the home office is not at the disposal of the enterprise. In addition, it still provides an office which in the absence of public health measures is available to the relevant employee. This applies whether the temporary work location is the individual's home or a temporary dwelling in a jurisdiction that is not their primary place of residence.

17. If an individual continues to work from home after the cessation of the public health measures imposed or recommended by government, the home office may be considered to have certain degree of permanence. However, that change alone will not necessarily result in the home office giving rise to a fixed place of business PE. A further examination of the facts and circumstances will be required to determine whether the home office is now at the disposal of the enterprise following this permanent change to the individual's working arrangements.

18. Paragraphs 18 and 19 of the Commentary on Article 5 of the OECD Model indicate that whether the individual is required by the enterprise to work from home or not is an important factor in this determination. Paragraph 18 explains that where a home office is used on a continuous basis for carrying on business activities for an enterprise and it is clear from the facts and circumstances that the enterprise has required the individual to use that location (e.g. by not providing an office to an employee in circumstances where the nature of the employment clearly requires an office), the home office may be considered to be at the disposal of the enterprise. As an example, paragraph 19 notes that where a cross-border worker performs most of their work from their home situated in one jurisdiction rather than from the office made available to them in the other jurisdiction, one should not consider that the home is at the disposal of the enterprise because the enterprise did not require that the home be used for its business activities.

19. In conclusion, individuals teleworking from home (i.e. the home office) as a public health measure imposed or recommended by at least one of the governments of the jurisdictions involved to prevent the spread of the COVID-19 virus would not create a fixed place of business PE for the business/employer.

Agency PE

20. The question may also arise whether the activities of an individual temporarily working from home for a non-resident employer could give rise to a dependent agent PE. Under Article 5(5) of the OECD Model, the activities of a dependent agent such as an employee will create a PE for an enterprise if the

employee habitually concludes contracts on behalf of the enterprise. Thus, in order to apply Article 5(5) in these circumstances, it will be important to evaluate whether the employee performs these activities in a "habitual" way.

21. An employee's or agent's activity in a jurisdiction is unlikely to be regarded as habitual if they are only working at home in that jurisdiction because of an extraordinary event or public health measures imposed or recommended by government. Paragraph 6 of the 2014 Commentary on Article 5 explains that a PE should be considered to exist only where the relevant activities have a certain degree of permanency and are not purely temporary or transitory. Paragraph 33.1 of the Commentary on Article 5 of the 2014 OECD Model provides that the requirement that an agent must "habitually" exercise an authority to conclude contracts means that the presence which an enterprise maintains in a jurisdiction should be more than merely transitory if the enterprise is to be regarded as maintaining a PE, and thus a taxable presence, in that jurisdiction. Similarly, paragraph 98 of the 2017 OECD Commentary on Article 5 explains that the presence which an enterprise maintains in a jurisdiction should be more than merely transitory if the enterprise is to be regarded as maintaining a PE in that jurisdiction under Article 5(5).

22. A different approach may be appropriate, however, if the employee was habitually concluding contracts on behalf of enterprise in their home jurisdiction before the COVID-19 pandemic.

23. Likewise, if the employee continues to work from home for a non-resident employer after the COVID-19 pandemic, on a habitual basis and continues to conclude contracts on behalf of the enterprise, it would be more likely that the employee would be considered to habitually conclude contracts on behalf of the enterprise. As noted in paragraph 98 of the Commentary on Article 5 of the OECD Model, the extent and frequency of activity necessary to treat an agent as acting "habitually" depends on the nature of the contracts and the business of the enterprise. In that respect, the same sort of factors considered in paragraphs 28 to 30 of the Commentary on Article 5 of the OECD Model would be relevant. For example, those paragraphs, among other things, note that whilst the practices followed by member countries have not been consistent in so far as time requirements are concerned, experience has shown that PEs normally have not been considered to exist in situations where a business had been carried on in a country through a place of business that was maintained for less than six months (conversely, practice shows that there were many cases where a PE has been considered to exist where the place of business was maintained for a period longer than six months).

24. In conclusion, the agent's activity in a jurisdiction should not be regarded as "habitual" if they have exceptionally begun working at home in that jurisdiction as a public health measure imposed or recommended by at least one of the governments of the jurisdictions involved to prevent the spread of the COVID-19 virus and, therefore, would not constitute a dependent agent PE provided the person does not continue those activities after the public health measures cease to apply.

Construction site PE

25. It appears that many activities on construction sites are being temporarily interrupted by the COVID-19 pandemic. 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. In general, 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 UN Model. Paragraph 55 of the Commentary on Article 5(3) of the OECD Model explains that a site should not be regarded as ceasing to exist when work is temporarily discontinued (temporary interruptions should be included in determining the duration of a site). Examples of temporary interruptions given in the Commentary are interruptions caused by bad weather, a shortage of material or labour difficulties.

26. The Commentary does not include a bright line test on the meaning of "temporary" interruption, thus jurisdictions may have different views of the duration of a "non-temporary" interruption and on other

conditions that make the interruption of a different nature than the examples of interruptions in paragraph 55 of the Commentary. Accordingly, some jurisdictions may consider that particular periods of interruption required by domestic COVID-19 restrictions in their jurisdiction should not be included in the calculation of the time thresholds for construction PEs. Such an approach would result in those jurisdictions not asserting the existence of a PE if the duration test would only be satisfied by including days during which operations were prevented on the construction site as a result of COVID-19 restrictions. As noted above, this guidance cannot be relied on to create instances of double non-taxation.

27. In conclusion, a construction site PE would not be regarded as ceasing to exist when work in the site is "temporarily" interrupted, but jurisdictions may consider, in light of the extraordinary circumstances of the COVID-19 pandemic and based on the facts and circumstances, that certain periods where operations are prevented as a public health measure imposed or recommended by the government where the site is located to reduce the spread of the COVID-19 virus constitute a type of interruption that should be excluded from the calculation of time thresholds for construction site PEs.

Concerns related to change of residence

28. The COVID-19 pandemic may raise concerns about a potential change in the "place of effective management" of a company as a result of a relocation, or inability to travel, of board members or other senior executives. The concern is that such a change may have as a consequence a change in a company's residence under relevant domestic laws and affect the jurisdiction where a company is regarded as a resident for tax treaty purposes.

29. It is unlikely that the COVID-19 situation will create any changes to an entity's residence status under a tax treaty. A temporary change in location of board members or other senior executives is an extraordinary and temporary situation due to the COVID-19 pandemic and such change of location should not trigger a change in treaty residence.

30. A number of jurisdictions have issued guidance on whether temporary changes in work and company management practices prompted by the COVID-19 pandemic can result in changes in corporate residence. A sample of that guidance is included in Box 2.

Box 2. Sample guidance issued by jurisdictions on corporate residence

The **Australian** Tax Office issued guidance[11] on its domestic law residence test (central management and control). That guidance notes that if the only reason for holding board meetings in Australia or directors attending board meetings from Australia is because of the effects of COVID-19, then the Australian Tax Office will not apply compliance resources to determine if the company's central management and control is in Australia.

The **Canada** Revenue Agency issued guidance[12] on the application of the place of effective management tie-breaker and noted that in light of the extraordinary circumstances resulting from the travel restrictions, as an administrative matter, where a director of a corporation must participate in a

[11] See: https://www.ato.gov.au/business/international-tax-for-business/working-out-your-residency.

[12] See: https://www.canada.ca/en/revenue-agency/campaigns/covid-19-update/guidance-international-income-tax-issues.html (applicable from March 16 until September 30, 2020).

board meeting from Canada because of the travel restrictions, the Canada Revenue Agency will not consider the corporation to become resident in Canada solely for that reason.

Greece's Independent Authority for Public Revenue issued guidance[13] noting that for the application of tie-breaker rule based on the place of effective management for the period 18 March-15 June 2020, the place of effective management of an entity will not be affected solely because the members of the team that make the key management and commercial decisions of an entity are temporarily located in a jurisdiction other than the one where the decisions are usually made, provided that such change is of temporary nature and due to exceptional circumstances. In any case, entities should maintain a record of facts and circumstances of the bona fide presence in a different jurisdiction as evidence that such presence resulted from COVID-19-related measures. For periods preceding 18 March 2020 and following 15 June 2020 it shall be assessed whether restrictions were in place.

Ireland's Revenue has issued guidance[14] to disregard the presence of an individual in Ireland – and where relevant, in another jurisdiction – for a company in relation to which the individual is a director, if such presence is shown to result from travel restrictions related to COVID–19.

New Zealand's Inland Revenue issued guidance[15] on their domestic law corporate residence test (central management and control). The guidance notes that the COVID-19 pandemic will not cause corporate taxpayers to be tax resident in New Zealand because directors of a company are confined or stranded in New Zealand. The guidance further notes that the occasional exercise of control by the directors from New Zealand, for example through a board meeting, will not make the company tax resident in New Zealand.

The **UK**'s HM Revenue & Customs issued guidance[16] noting that the existing legislation and guidance in relation to company residence already provides flexibility to deal with changes in business activities necessitated by the response to the COVID-19 pandemic. They do not consider that a company will necessarily become resident in the UK (as a matter of domestic law or under the terms of a double tax treaty) because a few board meetings are held in the UK, or because some decisions are taken in the UK over a short period of time. Existing guidance makes it clear that they will take a holistic view of the facts and circumstances of each case. Likewise, they do not believe that a company will necessarily become non-UK resident for UK tax purposes because a few board meetings are held, or some decisions are taken, outside the UK for a short period of time.

The **US** Internal Revenue Service issued guidance that provides relief to certain non-resident individuals who, but for travel and related disruptions resulting from the global outbreak of the COVID-19 virus, would not have been in the United States long enough during 2020 to be considered resident aliens under the "substantial presence test" or to be ineligible for treaty benefits on services income. With respect to the relief provided under the substantial presence test, this guidance establishes procedures to allow an individual to apply the medical condition exception to exclude up to 60 consecutive days spent in the United States during a time period starting on or after February 1, 2020, and on or before April 1, with the specific start date to be chosen by each individual. It also provides procedures for an individual to exclude those days of presence in order to claim benefits under an income tax treaty with

[13] See: https://aade.gr/sites/default/files/2020-07/E2113_2020.pdf.

[14] See:https://www.revenue.ie/en/corporate/communications/covid19/compliance-with-certain-reporting-and-filing-obligations.aspx.

[15] See: https://www.ird.govt.nz/covid-19/international/tax-residency.

[16] See: https://www.gov.uk/hmrc-internal-manuals/international-manual/intm120185.

respect to services income. See Rev. Proc. 2020-20, 2020-20 I.R.B. (May 11, 2020) (also referenced in Box 4 of this paper with respect to 183-day exception for income from employment).[17]

Note: The sample of jurisdictions' guidance referenced includes guidance on both domestic law and application of treaties. It is noted that for most jurisdictions, guidance on the domestic law does not affect interpretation of treaty provisions and the Commentary. The inclusion of references to guidance on domestic law is for illustrative purposes only and is not intended to suggest that domestic law ought to be applied or interpreted in conformity with the Commentary.

31. This potential change of circumstances may trigger an issue of dual residence (in cases where the change in the place of effective management results in a company being considered a resident of two jurisdictions simultaneously under their domestic laws). However, as recognised by the Commentary on the OECD Model, situations of dual residence of companies are relatively rare.

32. But even in situations where there would be dual residence of an entity, tax treaties provide tie-breaker rules ensuring that the entity is resident in only one of the jurisdictions. If the treaty contains a provision like the 2017 OECD Model tie-breaker rule, competent authorities deal with the dual residence issue on a case-by-case basis by mutual agreement. This determination will take into consideration all of the facts and circumstances over the determination period. No single factor is determinative, rather a range of factors are taken into consideration.

33. In particular, paragraph 24.1 of the OECD Commentary on Article 4 illustrates the range of factors that the competent authorities are expected to take into consideration to make their determination, which includes: where the meetings of the company's board of directors or equivalent body are usually held; where the chief executive officer and other senior executives usually carry on their activities; where the senior day-to-day management of the company is carried on; where the person's headquarters are located; etc. It is also possible for competent authorities to agree to more general frameworks for such determinations, for example where particular fact patterns are present, under the authority of Article 25(3).

34. In situations where the treaty contains the pre-2017 OECD Model tie-breaker rule, the place of effective management will be the only criterion used to determine the residence of a dual-resident entity for tax treaty purposes. According to paragraph 24 of the Commentary on Article 4 of the 2014 OECD Model, the place of effective management is the place where key management and commercial decisions that are necessary for the conduct of the entity's business as a whole are in substance made. All relevant facts and circumstances must be examined to determine the place of effective management. Paragraph 149 of the Commentary on Article 29 of the 2017 OECD Model explains that the concept of "place of effective management" was interpreted by some jurisdictions as being ordinarily the place where the most senior person or group of persons (for example a board of directors) made the key management and commercial decisions necessary for the conduct of the company's business.

35. Therefore, all relevant facts and circumstances should be examined to determine the "usual" and "ordinary" place of effective management, and not only those that pertain to an exceptional period such as the COVID-19 pandemic.

36. In conclusion, an entity's place of residence under the tie-breaker provision included in a tax treaty is unlikely to be impacted by the fact that the individuals participating in the management and decision-making of an entity cannot travel as a public health measure imposed or recommended by at least one of the governments of the jurisdictions involved.

[17] See: https://www.irs.gov/pub/irs-drop/rp-20-20.pdf.

Concerns related to a change to the residence status of individuals

37. Despite the complexity of the rules, and their application to a wide range of potentially affected individuals, it is unlikely that the COVID-19 restrictions to travel will affect the treaty residence position.

38. Jurisdictions 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. A sample of that guidance is included in Box 3 below.

Box 3.Sample of guidance on residence of individuals

The **Australian** Tax Office has published guidance[18] stating that where a person that is not an Australian resident for tax purposes is in Australia temporarily for some weeks or months because of COVID-19, she will not become an Australian resident for tax purposes provided that person:

- usually lives overseas permanently
- intends to return there as soon as they are able to.

Canada's Revenue Agency has issued guidance[19] on the domestic residence test which comprises a facts and circumstances test and a days of presence test. On the facts and circumstances test, the guidance notes that if an individual stayed in Canada only because of the travel restrictions, that factor alone will not cause the Canada Revenue Agency to consider the common-law factual test of residency to be met. On the number of days test, the guidance notes that as an administrative matter and in light of the extraordinary circumstances, the Canada Revenue Agency will disregard the days during which an individual is present in Canada and is unable to return to their jurisdiction of residence solely as a result of the travel restrictions. This guidance applies where, among other things, the individual is usually a resident of another jurisdiction and intends to return, and does in fact return, to their jurisdiction of residence as soon as they are able to.

Finland's guidance[20] notes that the COVID-19 pandemic does not affect the way the Finnish tax authorities determine an individual taxpayer's residence under Finnish law or under tax treaties.

France has issued guidance[21] recognising that the COVID-19 pandemic does not affect the way the French tax authorities determine an individual taxpayer's residence under French law or under tax treaties.

Greece's Independent Authority for Public Revenue issued guidance[22] noting that under the domestic residence test for individuals for the period 18 March-15 June 2020: a) the test of habitual abode is not affected by exceptional circumstances prompted by COVID-19 and b) days spent in Greece during this period due to travel restrictions or as a measure of personal protection and security can be disregarded for purposes of determining residency (days of presence test). Further, the guidance also refers to the

[18] See: https://www.ato.gov.au/General/COVID-19/Support-for-individuals-and-employees/Residency-and-source-of-income/#ChangeoftaxresidencyduetoCOVID19.

[19] See: https://www.canada.ca/en/revenue-agency/campaigns/covid-19-update/guidance-international-income-tax-issues.html (applicable from March 16 until September 30, 2020).

[20] See: https://www.vero.fi/en/detailed-guidance/statements/82178/effects-of-the-coronavirus-pandemic-on-taxes-on-income-received-under-an-employment-contract-in-a-foreign-country-the-six-month-rule-and-forces-majeures2/.

[21] See: https://www.impots.gouv.fr/portail/international-particulier/residence-fiscale-et-confinement-crise-covid.

[22] See: https://aade.gr/sites/default/files/2020-07/E2113_2020.pdf.

application of tie-breaker rules for residence included in tax treaties and specifies that the test of habitual abode is not affected by a temporary dislocation due to COVID-19. For periods preceding 18 March 2020 and following 15 June 2020 it shall be assessed whether restrictions were in place.

India's Department of Revenue issued guidance[23] confirming that if an individual was unable to leave India during March 2020, some of the days spent in India during March can be disregarded for the purposes of applying the domestic residency rules. The days that may be disregarded depends on the circumstances of the restrictions imposed on the individual.

Ireland's guidance[24] provides for "force majeure" circumstances where an individual is prevented from leaving Ireland on his or her intended day of departure because of extraordinary natural occurrences.

New Zealand's Inland Revenue issued guidance[25] noting that the domestic days of presence residency tests are not strictly applied where an individual is present in New Zealand or absent from New Zealand as a result of the COVID-19 pandemic provided that person leaves within a reasonable time after they are no longer practically restricted in doing so. New Zealand also issued guidance[26] on the application of tax treaties and it notes that the residence tests in tax treaties are interpreted in a holistic and integrated manner and it is not expected that persons will be treated as resident under tax treaties just because of the current emergency conditions.

The **UK** issued guidance[27] on whether days spent in the UK can be disregarded for purposes of determining residency due to exceptional circumstances. Further, the UK issued guidance[28] on the application of tie-breaker tests for residence included in treaties and noted that although a person may become resident in the UK under the statutory residence test, their residence under a treaty will not change due to a person's temporary dislocation.

The **US** Internal Revenue Service issued guidance[29] that provides relief to certain non-resident individuals who, but for travel and related disruptions resulting from the global outbreak of the COVID-19 virus, would not have been in the United States long enough during 2020 to be considered resident aliens under the "substantial presence test" or to be ineligible for treaty benefits on services income. With respect to the relief provided under the substantial presence test, this guidance establishes procedures to allow an individual to apply the medical condition exception to exclude up to 60 consecutive days spent in the United States during a time period starting on or after February 1, 2020, and on or before April 1, with the specific start date to be chosen by each individual. It also provides procedures for an individual to exclude those days of presence in order to claim benefits under an income tax treaty with respect to services income. See Rev. Proc. 2020-20, 2020-20 I.R.B. (May 11, 2020) (also referenced in Box 4 of this paper with respect to 183-day exception for income from employment).

[23] See: https://www.incometaxindia.gov.in/communications/circular/circular_no_11_2020.pdf.

[24] See: https://www.revenue.ie/en/corporate/communications/covid19/compliance-with-certain-reporting-and-filing-obligations.aspx.

[25] See: https://www.ird.govt.nz/covid-19/international/tax-residency.

[26] See: https://www.ird.govt.nz/covid-19/international/tax-treaties.

[27] See https://www.gov.uk/hmrc-internal-manuals/residence-domicile-and-remittance-basis/rdrm13200.

[28] See: https://www.gov.uk/hmrc-internal-manuals/residence-domicile-and-remittance-basis/rdrm13410.

[29] See: https://www.irs.gov/pub/irs-drop/rp-20-20.pdf.

Note: The sample of jurisdictions' guidance referenced includes guidance on both domestic law and application of treaties. It is noted that for most jurisdictions, guidance on the domestic law does not affect interpretation of treaty provisions and the Commentary. The inclusion of references to guidance on domestic law is for illustrative purposes only and is not intended to suggest that domestic law ought to be applied or interpreted in conformity with the Commentary.

39. Two main situations could be imagined:

- A person is temporarily away from their home (perhaps on holiday, perhaps to work for a few weeks) and gets stranded in the host jurisdiction by reason of the COVID-19 pandemic and attains domestic law residence there.
- A person is working in a jurisdiction (the "current home jurisdiction") and has acquired residence status there, but they temporarily return to their "previous home jurisdiction" because of the COVID-19 situation. They may either never have lost their status as resident of their previous home jurisdiction under its domestic legislation, or they may regain residence status on their return.

40. In the first scenario, it is unlikely that the person would acquire residence status in the jurisdiction where the person is temporarily because of extraordinary circumstances. There are, however, rules in domestic legislation causing a person to become a resident if they are present in the jurisdiction for a certain number of days. But even if the person becomes a resident under such rules, if a tax treaty is applicable, the person is unlikely to be a resident of that jurisdiction under the treaty's tiebreaker rule. Such a temporary dislocation should therefore have no tax implications in the vast majority of cases.

41. In the second scenario, it is again unlikely that the person would regain residence status for being temporarily and exceptionally in the previous home jurisdiction. But even if the person is or becomes a resident under such rules, if a tax treaty is applicable, the person is unlikely to become a resident of that jurisdiction under the tax treaty due to such temporary dislocation if their connections to the current home jurisdiction are stronger than those to the previous home jurisdiction.

42. For the purpose of a tax treaty – which governs the allocation of taxing rights over employment income – an individual can be resident of only one jurisdiction at a time (their "treaty residence"). The rules are set out in Article 4 of the OECD Model. The starting point is domestic law. If the person is resident in only one jurisdiction, that is the end of the matter. If they are resident in both jurisdictions being tested, the tie-breaker rules in Article 4 of the OECD Model are applied. There is a hierarchy of tests, starting with the question in which jurisdiction does the person have a permanent home available to them.

43. In the first case above, it seems likely that the tie-breaker test would mostly award treaty residence to the home jurisdiction. This is because it is probably unlikely that the person would have a "permanent home" available to them in the host jurisdiction. But if they did (and an apartment rented for a sufficiently long period would count), and they had rented out their dwelling in their home jurisdiction, they would be treated as treaty resident of the host jurisdiction. Where the person had a permanent home in both jurisdictions, it seems likely that the other tie-breaker tests (centre of vital interests, place of habitual abode, and nationality) would award residence to the home jurisdiction.

44. In the second case, the same treaty rules apply, but their application produces a more uncertain result because the person's attachment to the previous home jurisdiction is stronger. In cases where the personal and economic relations in the two jurisdictions are close but the tie-breaker rule was in favour of the current home jurisdiction, the fact that the person moved to the previous home jurisdiction during the COVID-19 pandemic may tip the balance towards the previous home jurisdiction. This would usually be decided using the test of "habitual abode". According to paragraph 19 of the Commentary on Article 4 of the OECD Model, however, the habitual abode of a person is where the individual lived habitually, in the sense of being customarily or usually present; the test will not be satisfied by simply determining in which of the two contracting jurisdictions the individual has spent more days during that period. "Habitual abode" refers to the frequency, duration and regularity of stays that are part of the settled routine of an individual's

life and are therefore more than transient. Days spent in a person's previous home jurisdiction because of travel restrictions imposed as a public health measure by one of the governments of the countries involved should not result in a change to the person's habitual abode. The determination of habitual abode must cover a sufficient length of time for it to be possible to ascertain the frequency, duration and regularity of stays that are part of the settled routine of the individual's life.

45. In conclusion, because the COVID-19 pandemic is a period of major changes and an exceptional circumstance, tax administrations and competent authorities will have to consider a period where public health measures imposed or recommended by the government do not apply when assessing a person's residence status. If in the context of and as a result of the COVID-19 pandemic, an individual's temporary presence in a jurisdiction results in them becoming dual-resident, that person's place of residence for the purposes of the tie-breaker included in the applicable treaty is unlikely to change, given that the tie-breaker provision requires consideration of factors that shall also be assessed in a more normal period. A dislocation because a person cannot travel back to their home jurisdiction due to a public health measure of one of the governments of the jurisdictions involved should not by itself impact the person's residence status for purposes of the tax treaty. A different approach may be appropriate however, if the change in circumstances continues when the COVID-19 restrictions are lifted.

Concerns related to income from employment

Days of presence test in Article 15(2)(a)

46. Article 15 (Income from employment) of the OECD Model governs the taxation of employment income, distributing the right to tax between the employee's jurisdiction of residence and the place where they perform their employment.

47. The starting point for the rule in Article 15 of the OECD Model is that "salaries, wages and other similar remuneration" are taxable only in the person's jurisdiction of residence unless the "employment is exercised" in the other jurisdiction. The Commentary on Article 15 explains that this means the place where the employee is "physically present when performing the activities for which the employment income is paid." But there are conditions attached to the place of exercise test. That other jurisdiction (the source jurisdiction) may exercise a taxing right only if the employee is there for more than 183 days[30] or the employer is a resident of the source jurisdiction, or the employer has in the source jurisdiction a permanent establishment that bears the remuneration.

48. The application of Article 15 to the following fact patterns is considered below:

- Wage subsidy and similar income received by cross-border workers that cannot perform their work due to restrictions
- A worker who is stranded in a jurisdiction where they are not resident but previously exercised an employment
- A worker who works remotely from a jurisdiction for an employer who is resident in another jurisdiction

[30] Depending on the treaty, the period could be 183 days in the taxable year concerned or in any twelve-month period commencing or ending in the taxable year concerned.

Income of cross-border workers that cannot perform their work due to COVID-19 restrictions (e.g. wage subsidies to employers)

49. Where a government has stepped in to subsidise the keeping of an employee on a company's payroll during the COVID-19 pandemic despite being unable to work, the income that the employee receives from the employer should be attributable to the place where the employment used to be exercised. In the case of employees that work in one jurisdiction but commute there from another jurisdiction where they are resident (cross-border workers), this would be the jurisdiction they used to work in.

50. Some stimulus packages adopted or proposed by governments (e.g. wage subsidies to employers) are designed to keep workers on the payroll during the COVID-19 pandemic despite restrictions to the exercise of their employment. To the extent these may be the last payments received in respect of the employment, the payments resemble termination payments. These are discussed in paragraph 2.6 of the Commentary on Article 15 of the OECD Model, which explains that they should be attributable to the place where the employee would otherwise have worked. In most circumstances, this will be the place the person used to work before the COVID-19 pandemic. Alternatively the payments may resemble those which are routinely received during paid periods of absence the entitlement to which arises in connection with where the work was performed. Examples of such other routine payments include vacation pay, paid sick leave, or paid furlough, none of which have been known to cause difficulties in international taxation.

51. Where the source jurisdiction has a taxing right, the residence jurisdiction 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 jurisdiction tax.

52. In **conclusion**, where an employee resident in one jurisdiction and who formerly exercised an employment in another jurisdiction receives a COVID-19 related government subsidy from the work jurisdiction to maintain the relationship with the employer, the payment would be attributable to the work jurisdiction under Article 15 of the OECD Model.

Stranded worker: exceeding days of presence threshold due to travel restrictions

53. The COVID-19 pandemic has caused individuals who are resident in one jurisdiction and exercised an employment in another jurisdiction to become stranded in that other jurisdiction. Where an individual resident in one jurisdiction and exercising employment activities in another jurisdiction:

a) is prevented from leaving that other jurisdiction by COVID-19 restrictions, and

b) would otherwise have left that other jurisdiction and qualified for the exemption from source taxation in Article 15(2),

some jurisdictions believe it is appropriate, given the exceptional circumstances, to disregard days to which these conditions apply when asserting a taxing right under the 183-day test (see Box 4).

54. Where a person is resident in one jurisdiction and is exercising an employment in the other jurisdiction (the source jurisdiction), the source jurisdiction may tax the remuneration from the employment in certain circumstances – one of which is where the employee is present in the source jurisdiction for more than 183 days. Paragraph 5 of the Commentary on Article 15 explains that all days of presence count (working days or not) – and provides several examples, one of which is "days of sickness". But it contains an exception: if those days of sickness "prevent the individual from leaving and he would have otherwise qualified for the exemption", they do not count towards the days of presence test in Article 15(2)(a).

55. Given the nature of the COVID-19 public health measures of many governments, the exception can be understood to apply where conditions (a) and (b) above are satisfied. This may cover situations where an employee is prevented from travelling because they are in quarantine due to exposure to the

COVID-19 virus. In addition, it may cover situations where either government has banned travelling and cases where it is, in practice, impossible to travel due, for example, to cancellation of flights. This may not cover the situation where an individual does not travel based on a mere recommendation by the governments involved to avoid unnecessary travel. Any decision to disregard days spent in a source jurisdiction as a result of COVID-19 restrictions may result in the source jurisdiction not exercising taxing rights allocated to it under the terms of a double tax treaty which it would be entitled to do.

56. In **conclusion** where an employee is prevented from travelling because of COVID-19 public health measures of one of the governments involved and remains in a jurisdiction, it would be reasonable for a jurisdiction to disregard the additional days spent in that jurisdiction under such circumstances for the purposes of the 183 day test in Article 15(2)(a) of the OECD Model. Some jurisdictions may however take a different approach or may have issued specific guidance outlining their approach to such circumstances.[31] Taxpayers in this situation are encouraged to contact their local tax authority.

Special provisions in some bilateral treaties that deal with the situation of cross-border workers

57. A change of place where cross-border workers exercise their employment may also affect the application of the special provisions in some bilateral treaties that deal with the situation of cross-border workers. These provisions apply special treatment to the employment income (and in some cases replacement income such as short-time work compensation) of cross-border workers and may often contain limits on the number of days that a worker may work outside the jurisdiction they regularly works before triggering a change in their status.

58. Some jurisdictions have agreed special treaty provisions with neighbouring jurisdictions to which employees frequently commute for work. These provisions allocate the taxing rights in a different way to Article 15 of the Model Convention. For example, under some of those provisions employees commuting to a neighbouring jurisdiction are taxable on their employment income only in the home jurisdiction provided any employment activity carried on elsewhere is limited to a maximum stated period (typically ranging from 4 to 6 working weeks). Some of those treaties include provisions according to which teleworking days are considered working days within the work jurisdiction. Some jurisdictions have agreed to treat the COVID-19 pandemic as force majeure or an exceptional circumstance and, accordingly, the time spent by the employee teleworking in their home jurisdiction will not be included in the calculation of the maximum work days outside the work jurisdiction limitation for the purposes of the treaty.[32]

Teleworking from abroad i.e. working remotely from one jurisdiction for an employer of the other jurisdiction.

59. A change in the place where the employment is exercised may give rise to a change in the allocation of taxing rights under the current treaty rules.

60. Accordingly, if the jurisdiction where employment was formerly exercised should lose its taxing right following the application of Article 15, additional compliance difficulties would arise for employers and employees. Employers may have withholding obligations, which are no longer underpinned by a substantive taxing right. These would therefore have to be suspended or a way found to refund the tax to

[31] Sweden takes a different approach and jurisdictions listed in Box 4 below have issued specific guidance on their approach.

[32] See Memorandum of Understanding in respect of Belgium France double tax treaty: https://finances.belgium.be/fr/Actualites/%EF%83%98belgique-france-r%C3%A9gime-travailleurs-frontaliers-%E2%80%93-coronavirus-covid-19.

the employee. The employee would also have a new or enhanced liability in their jurisdiction of residence, which would result in new filing obligations.

61. Some examples illustrating changes in allocation of taxing rights over employment income are included below:

- Before the COVID-19 pandemic, an employee resident in Jurisdiction A normally exercised their employment in Jurisdiction B. The employee began to exercise his employment from Jurisdiction A due the COVID-19 pandemic. According to Article 15:
  - if the employer was resident in Jurisdiction B, Jurisdiction B is entitled to tax the income derived from the period during which the employee was physically present in Jurisdiction B (i.e., a reduction in Jurisdiction B's taxing right);
  - if the employer was not resident in Jurisdiction B or did not bear the cost of the employee's remuneration through a PE in that jurisdiction, Jurisdiction B would likely lose its taxing right under a treaty if the employee spent less than 183 days there (i.e., a complete loss of Jurisdiction B's taxing rights).
- Before the COVID-19 pandemic an employee was resident in Jurisdiction A, became stranded in Jurisdiction B and began to exercise his employment there. Under Article 15, Jurisdiction B would be permitted to tax the employment income if the employer was also resident in that jurisdiction or bore the cost of the employee's remuneration through a PE in that jurisdiction. In cases where the employer was resident elsewhere, Jurisdiction B would be entitled to tax the employment income only if the employee exceeds the 183 day threshold.

62. Exceptional circumstances call for an exceptional level of coordination between jurisdictions to mitigate the compliance and administrative costs for employees and employers associated with an involuntary and temporary change of the place where employment is performed. Where relevant, MAP should be applied efficiently and pragmatically to help resolve issues arising out of the COVID-19 pandemic. Jurisdictions have issued useful guidance and administrative relief to mitigate the unplanned tax implications and potential new burdens arising due to effects of the COVID-19 pandemic. A sample of that guidance is included in Box 4.

63. In **conclusion**, changes in the jurisdiction where an employee exercises their employment can impact where their employment income is taxed: new taxing rights over the employee's income may arise in other jurisdictions and those new taxing rights may displace existing taxing rights. As payroll taxes are often withheld at source, addressing the change will result in compliance and administrative costs for the employer and employee. Some jurisdictions have issued guidance and administrative relief to mitigate the additional burden.

Box 4.Guidance on taxation of employment income and sample competent authority arrangements

The **Australian** Tax Office has issued guidance[33] noting that COVID-19 has created a special set of circumstances that must be taken into account when considering the source of the employment income of a non-resident who usually works overseas but instead performs that same employment in Australia as a result of COVID-19. Whilst the Australian Taxation Office is willing to accept that where the remote working arrangement is short term (three months or less) the income from that employment will not have an Australian source; where the working arrangement is longer than three months, relevant circumstances need to be examined to determine if the employment is connected to Australia. A relevant factor to take into account in determining whether that income is Australian sourced, is whether that non-resident is working from Australia solely as a result of COVID-19 restrictions. However, the guidance further notes that employment income earned by a resident of another country while working in Australia may be deemed by a tax treaty to be from sources in Australia and any applicable treaty should be reviewed carefully, as wording, conditions and time periods vary from treaty to treaty.

The **Austrian** Federal Ministry of Finance issued guidance[34] noting that a governmental subsidy for a reduction in the working time of employees (of up to 100%) that an employer pays forward to his employees is taxable in the jurisdiction in which the activity to which the subsidy relates would have been carried out as determined under a provision based on Art 15 OECD Model on the basis of the principle of causality. However, if a double tax treaty contains a separate provision for income from statutory social insurance or similar income, the guidance notes that a compensation for this type of subsidy is not within the scope of Art 15 OECD Model, but falls under the respective special provision of the double tax treaty, which – as a rule – assigns the taxation right to the state-of-fund.[35]

The Austrian Federal Ministry of Finance issued guidance[36] noting that in the context of Art 15(2)(a) OECD Model days of presence caused by illness are not to be counted if the illness prevents the employee from leaving the country and the tax exemption in this jurisdiction would – as a result – not be available anymore. This interpretation applies as well in case the employee is prevented from leaving a jurisdiction due to COVID-19 under the following circumstances:

- the employee is prevented from leaving the jurisdiction as a result of COVID-19, and
- is not working during the period of time, when he is prevented from leaving the jurisdiction.

---

[33] See: https://www.ato.gov.au/General/COVID-19/Support-for-individuals-and-employees/Residency-and-source-of-income/#Sourceofemploymentincomeearnedwhileworki.

[34] See : Chapter 2, Austrian Guidance with regard to the application and interpretation of DTT during the COVID-19 pandemic, "Info zur Anwendung und Auslegung von Doppelbesteuerungsabkommen im Zusammenhang mit der COVID-19 Pandemie", Info of the Austrian MOF, 20.07.2020, 2020-0.459.612, https://findok.bmf.gv.at/findok?execution=e100000s1&segmentId=719aaa9a-fba3-4ad0-b331-ea4919b90f3b.

[35] See for example, the corresponding competent authority agreement concluded between Austria and Germany with regard to the application of Art 18 (2) of the respective double tax treaty: https://findok.bmf.gv.at/findok?execution=e100000s1&segmentId=4f45c5a9-4d31-4258-b0ed-367159caffee.

[36] See: Chapter 1.1, Austrian Guidance with regard to the application and interpretation of double tax treaties during the COVID-19 pandemic, "Info zur Anwendung und Auslegung von Doppelbesteuerungsabkommen im Zusammenhang mit der COVID-19 Pandemie", Info of the Austrian MOF, 20.07.2020, 2020-0.459.612, https://findok.bmf.gv.at/findok?execution=e100000s1&segmentId=719aaa9a-fba3-4ad0-b331-ea4919b90f3b.

As a result, the guidance notes that the additional days spent as a result of COVID-19 would not be counted towards the days of stay and the state of residence would have the exclusive taxing right according to the 183-day rule.

The Austrian Federal Ministry of Finance issued guidance[37] noting that in the context of Art 15(4) of the Austria-Liechtenstein double tax treaty (special provision on cross-border workers) individuals who were previously classified as cross-border workers because they commuted "as a rule every working day", but who now work from home to curb the further spread of the COVID-19 pandemic (among other things due to the recommendations made by the respective governments) do not lose their status as cross-border workers.

A competent authority agreement[38] concerning the COVID-19 pandemic was concluded between Austria and Italy with regard to the application of Art 15(4) of the respective double tax treaty (special provision on cross-border workers). Accordingly, "taxpayers who usually commute to their place of work but work from home to curb the spread of COVID-19 continue to work as cross-border commuters within the meaning of Art 15(4)".

A competent authority agreement[39] concerning COVID-19 was concluded between Austria and Germany with regard to the application of Art 15(6) of the respective double tax treaty (special provision on cross-border workers). Accordingly, working days for which wages are paid and on which cross-border commuters only exercise work in the home office due to the measures to combat the COVID-19 pandemic will not be included in the calculation of the 45-day limitation.[40] That competent authority agreement provides with regard to the application of Art 15(1) of the respective double tax treaty, "working days [...] during which employees solely work in the home office due to the measures to combat the COVID-19 pandemic can be considered as working days spent in the contracting state in which the employees would have exercised their work without the measures to combat the COVID-19 pandemic".

Canada's Revenue Agency has issued guidance[41] noting that some U.S. residents who regularly exercise their employment in Canada and who are normally not present in Canada in excess of 183

[37] See: Chapter 1.3, Austrian Guidance with regard to the application and interpretation of double tax treaty during the COVID-19 pandemic, "Info zur Anwendung und Auslegung von Doppelbesteuerungsabkommen im Zusammenhang mit der COVID-19 Pandemie", Austrian MOF, 20.07.2020, 2020-0.459.612, https://findok.bmf.gv.at/findok?execution=e100000s1&segmentId=719aaa9a-fba3-4ad0-b331-ea4919b90f3b.

[38] See: Consultation on the Basis of the Austro-Italian double tax treaty concerning questions during the COVID-19 pandemic, Konsultationsvereinbarung zu den Auswirkungen der COVID-19-Pandemie auf die Grenzgängerregelung iSd Art. 15 Abs. 4 DBA-Italien", https://findok-intra.bmf.gv.at/findokintra?execution=e3s2.

[39] See: Para 3, Consultation on the Basis of the Austro-German DTT concerning questions during the COVID-19 pandemic, 15.4.2020, „Konsultationsvereinbarung zum DBA-Deutschland betreffend Arbeitnehmer und im öffentlichen Dienst Beschäftigte im Homeoffice sowie Kurzarbeitergeld und Kurzarbeitsunterstützung iZm der COVID-19-Pandemie", https://findok.bmf.gv.at/findok?execution=e100000s1&segmentId=4f45c5a9-4d31-4258-b0ed-367159caffee.

[40] The 45-day limitation is a limitation previously agreed between Austria and Germany concerning the status of cross-border workers. It refers to days on which the border is not actually crossed (due to home office work). Exceeding this limitation leads to a loss of the cross-border worker status. As a result, the general provisions of Art 15 would apply in such cases.

[41] See: https://www.canada.ca/en/revenue-agency/campaigns/covid-19-update/guidance-international-income-tax-issues.html (applicable until the earliest of the time when employee returned or was able to return to their jurisdiction of residence, the day specified on an applicable Regulation 102 waiver, the day the non-resident employer was certified

days (and, for that reason alone, are not taxable in Canada on their employment income) may now be exercising their duties in Canada for an extended period of time, as a result of the travel restrictions. The guidance confirms that until the earliest of certain events, including when the employee returned or was able to return to their jurisdiction of residence and 31 December 2020, those days will not be counted toward the 183-day test in the Canada-United States income tax treaty. Canada will also take this approach in applying the days-of-presence test in other tax treaties.

Finland's tax authority has issued guidance[42] noting that the COVID-19 pandemic does not affect the way the Finnish tax authorities determine how to interpret tax treaty articles on employment income. The same guidance outlines how domestic force majeure rules can result in days spent in Finland not counting for the purposes of Finland's domestic six month rule where a Finland resident was assigned to work abroad but returns to Finland as a result of the COVID-19 pandemic.

Germany's Federal Ministry of Finance has concluded consultation agreements[43] with the competent authorities of Austria, Belgium, France, Luxembourg, the Netherlands, Poland and Switzerland that contain a mutual agreement on a temporary and factual fiction. For the period of time during which the health authorities continue to advise to work from home due to a high risk of infection, days on which cross-border workers work remotely can be considered as being spent in the state where the work would have been carried out without the COVID-19 related measures. However, this fiction does not apply to working days that would have been spent at home or in a third State independently from these measures. The fiction is optional, i.e. a cross-border worker for whom the fiction would be disadvantageous has the right to apply the rules of the tax treaty as they stand. In relation to Austria, it has also been agreed that days on which cross-border workers work remotely due to COVID-19 related measures shall not be deemed harmful for the qualification as „commuter". Further, the mutual agreements with Austria, France, Luxembourg and the Netherlands also contain a provision regarding the treatment of social security payments received for days spent idle at home (e.g. „Kurzarbeitergeld"). It is the common understanding that these payments fall within the scope of the respective treaty article governing social security payments.

Greece's Independent Authority for Public Revenue issued guidance[44] noting that, for tax treaty purposes, payments that employees receive from their employers despite restrictions to the exercise of their employment (i.e. wage subsidies) fall within the scope of Article 15 OECD Model and are attributable to the place where the employment used to be exercised before the COVID-19 outbreak.

Ireland's Revenue issued guidance[45] on domestic law confirming that Irish Revenue will not seek to enforce Irish payroll obligations for foreign employers in genuine cases where an employee was working abroad for a foreign entity prior to COVID-19 but relocates temporarily to Ireland during the COVID-19 period and performs duties for his or her foreign employer while in Ireland.

by the Minister as a qualifying non-resident employer and the non-resident employee was also a qualifying non-resident employee, or 31 December 2020).

[42] See: https://www.vero.fi/en/detailed-guidance/statements/82178/effects-of-the-coronavirus-pandemic-on-taxes-on-income-received-under-an-employment-contract-in-a-foreign-country-the-six-month-rule-and-forces-majeures2/.

[43] See: https://www.bundesfinanzministerium.de (in German language) "COVID-19, Konsultationsvereinbarung".

[44] See: https://aade.gr/sites/default/files/2020-07/E2113_2020.pdf.

[45] See: https://www.revenue.ie/en/corporate/communications/covid19/compliance-with-certain-reporting-and-filing-obligations.aspx.

New Zealand's Inland Revenue issued guidance[46] on domestic law under which a non-resident person will become subject to New Zealand income tax on their employment income if they exercise their employment in New Zealand for 92 days or more. The guidance notes that the COVID-19 pandemic could cause employees to have to stay in New Zealand longer than 92 days despite their plans to leave. The guidance provides that if the employee leaves or returns to their jurisdiction within a reasonable time after they are no longer practically restricted in travelling, then any extra days when the person was unable to leave (that are in addition to the 92 days) will be disregarded.

The **UK** HM Revenue & Customs issued guidance[47] noting that there is no change to the employment article and how it applies will depend on the employee's circumstances. The UK accepts that a non-resident is not liable on employment income relating to employment exercised in the UK during a period of unexpected enforced stay due to the COVID-19 pandemic[48].

The US Internal Revenue Service issued guidance[49] confirming that for purposes of computing days of presence in the United States under the 183 day test in the dependent services provision of US treaties, days of presence (comprising a single period not exceeding 60 consecutive days, starting on or after February 1, 2020 and on or before April 1, 2020) during which the individual was unable to leave the United States due to COVID-19 Emergency Travel Disruptions, as the term is described in the relevant guidance, will not be counted.

Note: The sample of jurisdictions' guidance referenced includes guidance on both domestic law and application of treaties. It is noted that for most jurisdictions, guidance on the domestic law does not affect interpretation of treaty provisions and the Commentary. The inclusion of references to guidance on domestic law is for illustrative purposes only and is not intended to suggest that domestic law ought to be applied or interpreted in conformity with the Commentary.

[46] See: https://www.ird.govt.nz/covid-19/international/tax-residency.

[47] See: https://www.gov.uk/hmrc-internal-manuals/residence-domicile-and-remittance-basis/rdrm13410.

[48] See: https://www.gov.uk/tax-uk-income-live-abroad.

[49] See: https://www.irs.gov/pub/irs-drop/rp-20-20.pdf.