



Intercontinental Trust Ltd

## The impact of Covid-19 on international tax issues (Part II)

We had written [previously](#) on how international tax issues may be affected in the wake of the measures implemented by most countries to combat the pandemic. We now note that the OECD has taken stock of cross border tax issues that are likely to arise due to our current situation and has provided its guidance on how to best deal with those issues taking into account the international tax treaty principles.

### 1. Creation of Permanent Establishment

#### Issue:

Enterprises may be concerned that their employees working remotely from other countries may create a “*permanent establishment*” in those jurisdictions and therefore creating tax obligations in those countries.

#### Guidance

- i. The “exceptional and temporary change” of the location from where the employees perform their duties (which may include entering into contracts on behalf of their employer) should not create any permanent establishment for the employer. This characteristic is at odds with the definition of a permanent establishment which must have a “high degree of permanence and be at the disposal” of the enterprise.
- ii. However, the OECD urges tax administrations to provide guidance on the matter as certain jurisdictions may have lower thresholds for enterprises to register and or make filings.
- iii. As for construction sites which must be halted due to the pandemic, the length of such interruption must be considered when determining whether the construction site constitutes a permanent establishment<sup>1</sup>.

### 2. Place of Effective Management

#### Issue:

Enterprises may find that their senior executives or directors are unable to travel and that this inability to travel may impact their tax residence.

#### Guidance

- i. In the event that this set of circumstances results in double tax residence, the OECD highlights that most tie breaker rules<sup>2</sup> in tax treaties will look at the place of effective management as a key criterion.

<sup>1</sup> 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.

<sup>2</sup> We understand for treaties containing the 2017 OECD tie breaker rule, competent authorities deal with the dual residency on a case by case basis.

- ii. The relevant Commentary on this article provides that in order to determine the place of effective management of a company, consideration must be given to all facts and circumstances to determine where ordinarily the key decisions are made. Therefore the conclusion should be that exceptional relocation due to Covid-19 is not usual and therefore should not be taken into account.

### **3. Cross border workers**

#### Issue:

States are concerned about their taxing rights over employment income where employees are working from their state of residence, which is different from the place where they used to perform their employment.

#### Guidance

- i. The principle for taxing employment income follows the “place of exercise test”<sup>3</sup>.
- ii. The State where the employee used to work before Covid-19 crisis has the taxing right over wage subsidies from governments. Where the Source State has taxing right, the Residence State should provide relief from double taxation.
- iii. Suspension of withholding tax on employment income is required where the country where employment was formerly exercised lose its taxing right<sup>4</sup>. In such circumstances, employees might have new or enhanced tax liability in their Residence State.

The OECD is working with countries to mitigate the unplanned tax implications and potential new burdens arising due to effects of the COVID-19 crisis.

### **4. Residence status of individuals**

#### Issue:

The residence status of individuals might change where they get temporarily stranded in a host country or where they temporarily return to their previous home country.

<sup>3</sup> The place of exercise test includes the employee spending more than 183 days or the employer is a resident of the source State, or the employer has in the source State a permanent establishment that bears the remuneration.

<sup>4</sup> Following the application of Article 15 of the OECD Model Tax Convention

## Guidance

- i. The tie-breaker test should be used to determine the residence of individuals.
- ii. Where an individual get stranded temporarily in a host country, it is unlikely that his/her residence status will change.
- iii. Where an individual who acquired residence in one country, returns to his/her previous home country, the application of the tie-break test might produce uncertain results. The OECD recommends to apply the “habitual abode”<sup>5</sup> test to determine the residency of an individual.
- iv. In the current circumstances, tax administrations should consider a more normal period of time when assessing an individual’s tax residence.

As of now no guidance has been issued by the Mauritius Revenue Authority on these issues but we hope that the MRA will adopt the same approach as recommended by OECD. Please do not hesitate to contact us if you have concerns or queries in relation to your tax residence or the economic substance of your company.

This alert is not intended as legal/tax advice and nor should be relied on as such.

5 “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.

For any additional information please contact us.

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