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The Impact of COVID-19 on Tax Residence and Permanent Establishments

In light of the COVID-19 crisis and the disruptions to business and the movement of people, the Irish Revenue Commissioners (the “Irish Revenue”) published on 23 March 2020 a number of measures relaxing the concepts of tax residence and permanent establishments because of the COVID-19 travel restriction. The Irish measures were subsequently followed by similar announcements by the OECD Secretariat on 3 April 2020 and the HMRC in the UK on 5 April 2020. All parties have adopted a similar approach, as discussed below.

Individual Residence

An individual will be considered to be Irish tax resident for a year if they are present in the State (the Republic of Ireland) for 183 days or more in the year or 280 days over two years with at least 31 days presence in each year. Where an individual is in the State at any point in the day, they are considered to be present in the State for that day.

However, Irish Revenue [guidance](#) states that “where an individual is prevented from leaving the State on his or her intended day of departure due to extraordinary natural occurrences...none of which could reasonably have been foreseen and avoided – the individual will not be regarded as being present in the State for tax residence purposes for the day after the intended day of departure provided the individual is unavoidably present in the State on that day due only to ‘force majeure’ circumstances”.

Where an individual is prevented from departing the State due to COVID-19, the Irish Revenue have confirmed they will consider this ‘force majeure’ and any unintended additional days spent in the

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State due to this 'force majeure' will not be counted for Irish tax residence purposes.

Company Residence and Permanent Establishments (“PEs”)

Where a company is centrally managed and controlled is a key factor in determining its tax residence. Restrictions on chief executive officers and senior executives travelling because of COVID-19 may raise concerns about triggering new filing requirements and tax obligations from a potential:

- ▣ change in the place of central management and control of a company, and
- ▣ creation of a PE (a fixed place of business through which the business of an enterprise is wholly or partly carried on) by an employee or agent working away from their usual place of business.

Where due to COVID-related travel restrictions, an individual is:

- ▣ present in the State, or
- ▣ present in another jurisdiction, and would otherwise have been present in the State,

the Irish Revenue have stated they will be prepared to disregard such presence in the State or outside the State for corporation tax purposes for a company in relation to which the individual is an employee, director, service provider or agent.

The Irish Revenue have recommended that the individual and the company maintain a record of the facts and circumstances of the COVID-related presence in the State, or outside the State, for production in case they request such evidence. It is understandable that such a recommendation has been made as the particular facts and circumstances for all individuals and companies will not exactly be the same so it must be open to the Irish Revenue afterwards to review. Even with travel restrictions in place there are actions, which for example companies may be able to take when making decisions that require board approval, which will lessen the risk of a change in tax residency of a company.

UK

The UK has taken a similar approach to the Irish Revenue Commissioners in relation to corporate residence and PEs.

HMRC guidance states that it is the long-term situation that is important and all facts and circumstances are to be considered in determining a company's residence. The fact that some board meetings and some decisions are taken in the UK over a short period of time will not mean the company is UK resident. Although where board meetings are held is important, it is not determinative and where central management and control abides is a question of fact. Even if central management and control is in the UK this does not necessarily equate to UK residence and (if applicable) the relevant double tax treaty would need to be considered, taking in to account all the facts and circumstances.

Similarly, HMRC do not believe a non-resident company will have a taxable presence giving rise to a UK PE after a short period of time. UK legislation requires the business to be carried on through a fixed place of business in the UK or an agent to be habitually exercising authority to carry out the business in the UK in order for a PE to arise. A fixed place of business will not arise during a short period of time as it lacks permanency and the habitual conclusion of contracts depends on the facts of the situation.

OECD

The OECD Secretariat has issued [guidance](#) to deal with the impact of COVID-19 on issues that affect the right to tax between countries.

The guidance states that the displacement of senior executives due to the virus is unlikely to impact on a company's residence as a temporary change in their location is an extraordinary and temporary situation.

The guidance also says that a temporary change in the location where employees exercise their employment because of COVID-19, such as working from home, should not create a PE for the employer. Similarly, the temporary conclusion of contracts in the home of employees or agents because of COVID-19 should not create a PE.

A PE must have a certain degree of permanency and be at the disposal of an enterprise. For a home office to be a PE for an enterprise, it must be used on a continuous basis for carrying on its business and the enterprise generally has to require the individual to use that location to carry on the enterprise's business. Also, an individual's home office should not be considered to be a location at the disposal of an enterprise simply because that location is used by an individual who works for the enterprise.

Therefore, the OECD Secretariat asserts that working from home would not create a PE, either because such activity lacks a sufficient degree of permanency or continuity or because the business has no access or control over the employee's home office, considering the unusual circumstances of the pandemic and the assumption that this does not become the new norm over time.

The guidance also notes that individuals who stay at home to work remotely during the COVID-19 crisis are typically doing so because of government directives - it is force majeure not an enterprise's requirement.

While the OECD Secretariat is an important arm of the OECD, it does not represent the member countries of the OECD, as the role of the Secretariat is to collect data, provide analysis and formulate recommendations. Nevertheless, its views and recommendation are important in any consensus decisions taken by member countries of the OECD Council.

Conclusion

The message from Irish Revenue, the HMRC in the UK and the OECD Secretariat is essentially that any exceptional and temporary change of the location where individuals reside or where board of director decisions have to be taken are unlikely by themselves to change residence or create a PE.

Of course, what happens if this temporary period of travel restrictions lasts longer than perhaps expected is unknown.

While the guidance issued by the Irish Revenue, the HMRC in the UK and the OECD Secretariat is welcomed, the area of tax residence and when a PE arises can be complex and so while these announcements are welcomed, companies will still need to be cognisant of double tax treaties, as the views of one tax authority may not be sufficient. For example, the tie-breaker test in many double tax treaties regarding tax residence will need to be considered. That is why the views (and the rationale behind such views) of the OECD Secretariat are particularly helpful in that respect. No doubt, we can expect to see more countries make announcements in the coming weeks and months on the topic of residence and PEs.

Contact information

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