

The tax/social security impact of COVID-19 on cross-border activities

The COVID-19 pandemic has forced governments to take unprecedented measures such as restricting travel and implementing strict quarantine requirements. As a result of these measures, many cross-border workers are unable to physically perform their duties in their country of employment, construction activities might be temporarily interrupted and board meetings may take place digitally. This situation raises many tax/social security issues and may have an impact on the right to tax between countries, which is currently governed by international tax treaty rules. Below a summary of the possible tax and social security consequences that may apply for these cross-border activities.

In practice, due to the COVID-19 pandemic, the place of residency of employees and directors (who are currently required to work from home) as well as the place of effective management of entities (due to dislocation of board members) may be questioned. Furthermore, the dislocation of employees and directors has triggered discussions on the establishment of a permanent establishment (“PE”).

As a starting point each cross-border activity will have to be assessed from a domestic law perspective. Subsequently a tax treaty should be consulted to determine which country has the right to levy tax and which country will have to provide for some type of tax relief to avoid that double taxation occurs. Regarding the latter the OECD has recently published their point of view on the tax treaty implications when it comes to employment changes caused by the COVID-19 pandemic. In this respect, the OECD also encourages governments to provide further domestic solutions for cross-border cases.

1. PE ISSUES

In general a PE 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.

Home office

In practice a home office could constitute a PE for corporate tax purposes. Due to a travel ban and/or quarantine situation set by authorities, employees may be forced to work in their home country instead of the country of employment. This raises the question to what extent these activities at home may lead to a PE in the home country of the employee. According to the OECD, intermittent business activities at the home of an individual does not automatically make that home a place at the disposal of the enterprise. The OECD takes the position that employees who work from home are typically doing so due to government directions (and not due to an enterprise’s requirement). As such, no PE should be in place for individuals who are forced to work from home due to the COVID-19 pandemic.

Agency PE

Additionally, the question arises whether employees temporarily working from home could constitute a dependent agency PE. In particular, the activities of a dependent agent will

create a PE if the employee habitually concludes contracts on behalf of the enterprise. According to the OECD, an employee's or agent's activity in a State is unlikely to be regarded as habitual if he or she is only working at home for a short of period due to majeure and/or government directives. However, this might be different if the employee was habitually concluding contracts on behalf of enterprise in his or her home country before the COVID-19 pandemic.

Construction 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. Due to the COVID-19 pandemic many construction activities might be temporarily interrupted. However, in line with the OECD commentary, the duration of (temporary) interruptions should be included in determining the life of a site and therefore could have impact on the recognition of a construction PE.

Place of effective management

It is mentioned by the OECD that a temporary change in location of (senior) executive officers should not result in a change of tax residency / effective place of residence. Especially, if the tie breaker rule contained in tax treaties is applied. Reason for this is that the change is an extraordinary and temporary situation caused by the COVID-19 pandemic.

Expectations / Dutch point of view

When looking at the Netherlands and how the OECD guidance in general is implemented, we expect that the recent OECD guidance will be followed for Dutch tax purposes. As such, we do not expect a different viewpoint from the Dutch tax authorities other than the OECD viewpoint explained. However, depending on the actual duration of the COVID-19 pandemic, this is something that should be followed closely.

Furthermore, question is how the recent OECD guidance will be implemented by other countries. In particular, since the current OECD Model commentary provides little guidance on tax implications of very exceptional circumstances (such as the COVID-19 pandemic). With this the legal status of the report could be argued, i.e. could a taxpayer obtain legal certainty from the OECD report.

Considering the before (and also taken into account that PE and residence matters in practice are often a grey area) we recommend that a careful analysis of the tax implications is performed. Atlas Tax Lawyers is more than happy to assist on this.

2. TAXATION AND SOCIAL SECURITY POSITION EMPLOYEES

The fact that many mobile employees are forced to work from home due to a travel ban or quarantine situation set by authorities may impact their income tax and social security position and may lead to reporting obligations for the employer.

In this respect the residence status of the employee under tax treaties may be jeopardized. However, considering the temporary and extraordinary circumstances the OECD deems it unlikely that the COVID-19 pandemic will indeed effect the residency status of employees. A

more normal period of time should be considered for determining residence. Nevertheless, working in a different country than the employment country may lead to a change in taxation and social security.

Taxation

The main rule under tax treaties is that the employee's salary is taxed in the working country. As a result, employees that normally work in another country than their home country may become subject to taxation in their home country, which could affect their net income. Subsequently, their employer might even have a reporting obligation in that country and should set-up a payroll. The latter will depend on domestic tax law of the employee's home country.

In aforementioned situation it is important to assess the domestic law applicable and subsequently the tax treaty regarding the allocation of the right to levy taxes on the employee's salary. The OECD is working with countries to mitigate unplanned tax implications and asks countries to take measures.

With respect to home workers Germany and the Netherlands have already agreed that home working days may be treated as days worked in the country where the frontier employee would have worked under normal conditions. It is not necessary to opt for this alternative treatment. The home working days can continue to be treated as days actually worked. This choice can be incorporated in the wage tax return and subsequently in the 2020 income tax return. This appointment is valid from March 11, 2020 to April 30, 2020 and is extended monthly, until either the Netherlands or Germany cancels the agreement. Consultations with Belgium about the treatment of home working days are still ongoing.

Social security

Within the EU, The EU Regulations for coordination of social security continue to apply despite the presence of COVID-19 in Europe. Significantly changed working patterns can lead to a change in social security coverage for frontier employees (employees who reside in one EU country and work exclusively in one other EU country) as well as certain multi-state employees (employees who reside in one EU country, their employer(s) is located in another EU country and they normally work less than 25 percent in their home country). In general, other types of mobile employees should not be at risk of experiencing changes to their social security coverage as a result of their changed working patterns.

We advise employers to wait for work to be resumed as normal and then assess if there are any changes to the social security that require action, focusing on frontier employees and certain multi-state employees only. The social security Regulations provides for solutions to a varied spectrum of working patterns, so employees should be able to maintain their current social security coverage without alteration by applying some of the other provisions in the Regulations.

The Dutch social security authority explicitly states on their website that from a Dutch perspective nothing will change even though people are now forced to work in their home country.