



TAX REFORM FOR REMOTE WORKING ABROAD

Introduction and Background

Over the past few years, remote working has become considerably more important in the daily operations of businesses globally. This is largely due to the rapid evolution of digitalization which will continue to enhance greater mobility as well as efficient and networked activity in the future. Options for remote working can provide greater flexibility for employees and enhanced performance resulting in greater efficiency in business processes and activities. Furthermore, reduced travel to work can have positive environmental impacts with respect to lower carbon emissions as well as potential cost savings for those employers able to decrease office space. In the search for skilled employees, employers that offer flexible working models have become increasingly more attractive or sought after.

This trend has been more particularly driven by the COVID-19 pandemic. With the onset of lockdowns and containment measures during the pandemic, businesses had to adapt in real time to ensure business continuity, which included providing employees with adequate digital infrastructure and tools to work remotely and ensure connectivity in a relatively seamless manner.

Nonetheless, these adjustments pose challenges to taxation and social security practices and policies due to applicable domestic and bilateral rules. In cases where employees live abroad or stay abroad for an extended period of time, there is a risk of the unintended creation of permanent establishments (“PE”), place of effective management (“POEM”) or additional registration (including labour laws or social security) and declaration obligations in certain cases, which can result in considerable administrative burden and implications on liquidity for many businesses. In response, the Organization for Economic Co-operation and Development (OECD) issued recommendations¹ to member countries to reduce any unintended or negative impact of remote working due to the COVID-19 pandemic, with respect to taxation and social security practices and policies.

Some of these recommendations are outlined below, with more specific details provided in Annex I:

- The exceptional and temporary change of location where employees exercise their employment because of the pandemic, such as working from home (or another country) should not create PEs for employers.
- Even though part of the business activities of an enterprise may be conducted at a location such as an individual’s home office, that should not lead to the conclusion that the location is at the disposal of the enterprise simply because the location is used by an employee. Intermittent business activities carried out at the home of an employee does not make that home a place at the disposal of the employer.

¹ <https://www.oecd.org/coronavirus/policy-responses/oecd-secretariat-analysis-of-tax-treaties-and-the-impact-of-the-covid-19-crisis-947dcb01/>

- Where a government has stepped in to subsidise the keeping of an employee on a company's payroll during the COVID-19 pandemic, the income should be attributable to the place where the employment was previously exercised. Other employment income would be taxed where employment is performed.

In response to the pandemic, many governments adopted policies in line with the OECD recommendations, providing flexibility under the special conditions of the pandemic. These measures played an instrumental role in supporting businesses and employees during the pandemic.

However, it is becoming apparent that remote working abroad is not limited to the duration of the pandemic and will likely be extended in the long term. On the 22nd of June 2021, the OECD released a report: : [Implications of remote working adoption on placed-based policies](#) which proposes policy takeaways to guide short and long-term policy making to better prepare regions for the 'new normal'.

It highlights how changing patterns of work could impact regional development and a range of policy areas, including infrastructure, healthcare and the environment and also provides useful insight for governments in considering appropriate frameworks and approaches to accommodate new ways of working.

On the 19th of July 2021, the OECD released a further report: "[Tax Administration: Towards Sustainable Remote Working in a post-COVID-19 Environment](#)", which explores some key issues that tax administrations could consider in designing remote working policies, processes and guidance. The report is specifically tailored for tax administrations to help ensure that, where applicable, longer-term remote working is sustainable for both the tax administration as well as individual employees. The report examines issues related to information and communication technology, employee policy implications, organizational culture, staff well-being, as well as services to taxpayers.

Whilst the report is focused on tax administrations, it further underscores the broader need for clear guidance for businesses and governments alike as they consider options to adapt their operations to incorporate possibilities for remote working for employees on a long-term basis.

The International Chamber of Commerce (ICC), as the institutional representative of 45 million businesses in over 100 countries around the world, highlights some key considerations and proposed recommendations in this regard.

Considerations:

As businesses plan for a post-pandemic scenario, it is imperative that they are equipped with clear guidance to help inform their decision-making as they consider parameters for sustained remote working conditions, as well as the relative implications and compliance requirements to set these in place. The envisaged administrative burden, including new tax obligations, would be important considerations for employers.

In order to obtain legal certainty for all parties involved, a permanent solution is necessary to clearly set out the parameters for sustained remote working conditions. In the current context, various legal issues pose challenges for businesses and their employees, some of which include:

- Labour law regulations
- Social insurance liability for the employee and/or employer
- Tax implications for the employee and/or employer

- Registration obligations (e.g., registration of residence)

This document, developed by the ICC Commission on Taxation, focuses specifically on the tax implications of remote working for businesses and the need for reform of existing guidance to accommodate these developments. For practical purposes, it is essential that comprehensible criteria are established to decide the cases in which cross-border remote working has no detrimental impact on taxation. This requires an internationally coordinated approach. The aim should be to reduce administrative burden and provide more legal certainty for businesses without risking tax revenues for governments. A common, legally binding understanding should be reached by the European Union (EU), OECD or the United Nations (UN) in this regard.

General Recommendations:

As the current rules do not align with evolving business needs, ICC respectfully sets out the following recommendations for consideration in developing policies/guidance to address a new working environment and assist businesses in facilitating remote working conditions fit for an ever evolving 21st century.

As remote working influences the right to tax between countries, policymakers should:

- Provide detailed guidelines with respect to the international tax treaty rules governing the delineation of taxing rights to accommodate extended remote working conditions. This would be an important development to align tax laws between countries and provide mechanisms to eliminate double taxation of businesses.
- Provide internationally coordinated guidelines for a common understanding of policies and approaches for long-term remote working. In this respect, certain modifications could be effected in the Commentaries of the OECD Model Tax Convention (namely Article 15), covering all the related tax issues and implications with respect to international remote work. A new article could also be inserted in the OECD Model Tax Convention (for example, through an instrument similar to the Multilateral Instrument (MLI), in terms of effectiveness and simplicity).
- Establish a common, harmonized framework.
- Develop recommendations for member states on how to interpret certain articles of tax treaties, or alternatively, consideration for determining the applicable law where member states are equally bound by domestic legislation.
- Provide clear and detailed criteria to ensure that permanent establishments (of all kinds) are not created by default by cross-border remote working. However, special attention could be paid to potential abuse of the respective regime. This should also include regulations accompanied by illustrations to help guide tax officials and taxpayers in their understanding and decision-making processes, of what constitutes ‘temporary’, ‘permanent’ and ‘habitual’ PEs. Further, it should also provide a list of activities which are carried out for a short/temporary period (which may be prescribed on a reasonable basis) and would not constitute a PE.
- Provide clear and detailed criteria to ensure that significant economic presence/digital presence of the enterprise is not created by cross-border remote working of the employees.
- Further, it should be also clarified that COVID-induced temporary stay should be considered an exception to POEM. It should also be clarified that COVID-induced stay exemptions are not restricted to government directives but apply for as long as is declared a pandemic by the World Health Organization.

Specific recommendations:

Approach:

In cases where the employer continues to provide office space for the employee in the country of employment and the employer decides to grant “International Remote Work” (IRW) based **on the request of the employee** on a **temporary basis** (max. 120 working days per annum), this shall neither create a fixed place of business nor a dependent agent permanent establishment (DAPE) and shall not lead to an effective place of management.

Further, where an employee performs employment duties in a country other than the country of employment in excess of 120 working days p.a. due to the host country’s travel restriction directives, the employee’s presence shall not create a fixed place of business, DAPE, or an effective place of management.

Reason:

If businesses decide to grant IRW based on the request of the employee, or due to host country travel restrictions and on a temporary basis, there is no permanence, no fixed place with access to the enterprise (no fixed establishment). The employer has no influence on the location of remote work and hence the disposal test fails which is critical for establishment of Fixed Place PE. Further, in absence of such location used habitually by the employee, the test of Agency PE shall also fail. With regards to POEM, a list of key personnel should be identified and encouraged to take key decisions critical to the operations and management of the enterprise in the office premises to avoid running the risk of residency in other jurisdictions. Furthermore, if there is a deemed PE based on the “Authorized OECD Approach” (AOA) principle, no significant people functions are allocated to the deemed PE (no “Key Entrepreneurial Risk-Taking” (KERT) functions). This function is still allocated to the business where the employee is employed and not to the deemed PE. A split of a KERT-function is not foreseen under the AOA. Due to its simplicity, this approach creates legal clarity and therefore legal certainty for many cases. In other words, it should be deemed that the employment is still exercised in the place of the employer’s establishment, instead of the place of residence of the employee.

Example:

The executive employee “C” works for 230 working days for an employer in State A, but is resident in State B. Previously, the employee only worked in the office in State A. At his request, the employer allows him to work remotely in State B for 2 working days per week.

According to the approach outlined above, the location of remote working has no impact for the employer, as remote working was permitted at the sole request of the employee without exceeding the limit of 120 working days. There is no PE established in State B and no registration obligations for the employer or the employee. The taxation right still remains in State A for the employer.

No risks of extensive tax planning:

The suggested approach would not create tax planning opportunities in comparison to the existing rules. The new rules would not provide an opportunity for businesses to avoid the creation of PEs. As the IRW would only be granted on the request of the employee or as a result of Government directives, it therefore cannot be considered to be initiated by the employer for tax planning purposes. Furthermore, the IRW would be restricted to a limited period of time to ensure that there can be no optimized tax

position for the business. With respect to the employee, the tax consequences would follow the existing rules.

Wage tax:

As the employer does not have access to or knowledge of the individual employee's private circumstances in any country other than the country of employment, the employer cannot determine the tax residence status of the employee. Therefore, the employer cannot comply with the applicable wage tax withholdings in countries other than in the country of employment and should only be obliged to withhold wage tax in the country of employment. The onus should be on tax authorities to address specific situations where a tax return discloses that the residency of the employee has had an impact on an employee's tax liability.

Conclusion:

As employers consider conditions for sustained remote working for employees in a post-pandemic world, it is essential for them to achieve legal certainty and clarity regarding remote working in view of current divergent tax laws across different jurisdictions. Therefore, explicit legal provisions referring to the IRW regime would be very useful in this respect. Moreover, clear guidance from policymakers and governments will be instrumental for businesses as they assess these issues and seek to establish new frameworks to adopt specific policies to ensure seamless business continuity, reduce administrative burden and safeguard employees' rights in the process.

ANNEX 1 : OECD recommendations and relative considerations

OECD provided recommendations to member countries to reduce any unintended or negative impact of remote working due to the COVID-19 pandemic, with respect to taxation and social security practices and policies.

(A) Fixed Place PE

- The exceptional and temporary change of location where employees exercise their employment because of the pandemic, such as working from home (or another country) should not create PEs for employers since it is on account of government directives and should be considered as 'force majeure' and not an enterprise's requirement.
- For a location to be a PE, it must be used on a continuous basis for carrying on business of that enterprise. Further, the fact that such individual has been mandated to use the location by the enterprise to carry on such business shall lead to a PE. In order to provide the basic amenities, it is possible that the enterprise may provide certain facility and infrastructure to employees, which could either be the premises of their sister entities or shared working spaces etc. In such cases, there is a real risk of such premises being considered a Fixed Place PE. The same could also be the case under certain exceptional circumstances, with respect to the Board of Directors (BoD) members that participate in the BoD meetings from home or another country. Moreover, in this case of digital BoD meetings, no adverse tax consequences should arise from an economic substance point of view. Therefore, the case of BoD members should also be thoroughly examined in this respect.
- Even though part of the business activities of an enterprise may be conducted at a location such as an individual's home office, that should not lead to the conclusion that the location is at the disposal of the enterprise simply because the location is used by an employee. Intermittent business activities carried out at the home of an employee does not make by definition that home a place at the disposal of the employer.

(B) Agency PE

- For an individual to be a dependent agent PE for a non-resident employer (enterprise), such individual should habitually conclude contracts on behalf of the enterprise. In case of employees working from home, the possibility of such employees engaging in negotiation and contract formation for the enterprise cannot be ruled out. However, considering that it is necessity (in view of travel restrictions) and not a matter of choice of enterprise, it should not give rise to dependent agent PE.

(C) Place of Effective Management

- A temporary change in location of the CEOs and other senior executives is an extraordinary and temporary situation caused due to the COVID-19 crisis and government directives. This can cause tax exposure in the event national tax authorities consider location of such key personnel as constituting a POEM. In ordinary circumstances, the companies and senior personnel are mindful of POEM considerations, however they may not be able to exercise the necessary caution such as maximum no. of days, frequency of meetings in a jurisdiction etc because of government directives.

(D) Cross border Workers

- Broadly, there may be two scenarios wherein individuals can attain dual residence status due to:

- Being stranded in a country other than home country for few weeks
 - Returning to their previous home country from their current home country due to the COVID-19 situation.
- For determining the residential status, reference should be made to the tie-breaker test under the residence article of the treaty which will ultimately award the residential status to the current home country.
 - However, in case of second situation, the tie-breaker test may not lead to a certain result, due to the close proximity to the previous home country hence, the critical test would be test of “habitual abode”. “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 more than transient. Also, it must cover a sufficient length of time for ascertaining the frequency, duration and regularity of stays.
 - Due to the COVID-19, in case the individual working in a state different than resident state exceeds the threshold prescribed in the tax treaty, then the source state may claim a change in residential status of the employee and assert the right to tax the employment income of such individual. In that case, the residence state should provide relief from double taxation.

ABOUT THE INTERNATIONAL CHAMBER OF COMMERCE (ICC)

The International Chamber of Commerce (ICC) is the institutional representative of more than 45 million companies in over 100 countries. ICC's core mission is to make business work for everyone, every day, everywhere. Through a unique mix of advocacy, solutions and standard setting, we promote international trade, responsible business conduct and a global approach to regulation, in addition to providing market-leading dispute resolution services. Our members include many of the world's leading companies, SMEs, business associations and local chambers of commerce.