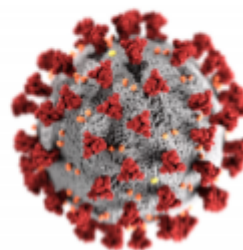




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## COVID-19 Updates



# The OECD's Analysis of Tax Treaties and the Impact of the COVID-19 Crisis

06/04/2020

On April 3, 2020 the OECD published the [OECD Analysis of Tax Treaties and the Impact of the COVID-19 Crisis](#) (the "**Guidance**"). Recognizing that the question of physical presence can affect tax outcomes, the Guidance addresses several possible international taxation "accidents" that may result from the unprecedented travel restrictions and strict quarantine requirements implemented by governments worldwide. **Such restrictions *de-facto* dictate the physical whereabouts for many individuals, and the main takeaway from the Guidance is that generally any pandemic-induced change to the physical location is temporary (and involuntary), and should therefore be given little to no weight in the tax analysis, inter alia, of the following areas:**

### Permanent Establishments ("PE")

Many employees currently work from home. Where their home is in a country other than the country in which they regularly work, it raises the concern that such work would constitute a PE for the employer in the "home countries", resulting in burdensome filing requirements and tax obligations. The Guidance states that working from home should not create new PEs for the employer. The reason being, in general, that a PE must have a certain degree of permanency, and be at the disposal of the enterprise. It is currently force majeure (and not an employer's requirement) that induces the temporary work from home. Similarly, the temporary conclusion of contracts from the homes of agents also should not trigger a PE, as it is not "habitual". The same logic applies, naturally, to those stranded in foreign countries and working from there. **The temporariness aspect is key**, and the OECD compares the situation to a construction site PE, which would not be regarded as ceasing to exist simply since work is temporarily interrupted.

The OECD further acknowledges that the Guidance is limited to the interpretation of tax treaties and that the threshold presence required under domestic law to register for tax purposes may be lower than that applicable under a tax treaty. Furthermore, it may be that not all relevant taxes are covered by the applicable treaty. Therefore, the

OECD encourages tax administrations to provide guidance to eliminate the uncertainties in these areas and minimize compliance burdens.

### Residence Status of a Company

Senior executives' inability to travel may raise concerns about a potential shift in the "place of effective management", and therefore an entity's residence status under treaties and domestic law. Such concerns are also rooted in individuals working from home, or stranded in a country that is not their country of residence. Here, too, the OECD states the situation should not create any changes to an entity's residence status under a tax treaty, emphasizing the determination should be based on the "usual" and "ordinary" place of effective management, not on an exceptional and temporary period. We believe similar logic should be used in applying the concept of "management and control" for determining residence of corporations under domestic laws such as the Israeli Tax Ordinance.

### Residence Status of Individuals

Many countries' domestic legislation deems a person to be a resident if present in the country for a certain number of days. Israel is no different, applying a (contradictable) presumption of residency if certain quantitative criteria are met. However, the Guidance provides that where a tax treaty is applicable, then even if a person is viewed as a resident under domestic rules, it is unlikely that the temporary dislocation will affect a person's treaty residence position. Accordingly, tax administrations and competent authorities are urged to consider a more normal period of time when assessing a person's resident status. The OECD further (approvingly) mentions some tax authorities that issued guidance according to which days spent in a country can be disregarded for purposes of determining residency due to exceptional circumstances, as a way to provide useful guidance and administrative relief. Israel has so far not done so, and that puts at particular risk individuals who are not entitled to tax treaty benefits, either since their home tax jurisdiction has not concluded such a treaty with Israel or since they cannot benefit from such a treaty (for example, non-dom residents of the UK).

### The Takeaway

Israel is a member of the OECD and generally follows the OECD treaty interpretation. Therefore, where an applicable tax treaty is in place, the OECD's interpretation prevails reducing the risk of unintended tax consequences for the persons entitled to treaty benefits whose physical presence shifts due to the pandemic. Where there is no applicable treaty, the implications are somewhat less clear, yet the spirit of the analysis and the OECD Guidance remains the same.

In any case, the Israeli Tax Authority (ITA) has not yet issued any guidance on such issues.

The ITA's actions in reaction to the Corona crisis, as of now, have been almost exclusively technical, and mainly sum up to extending certain (not all) statutory timeframes and allowing short-term deferral of certain monthly payments.

Disappointingly, in the sole exception in addressing the implications of the crisis on substantive tax law matters (regarding the calculation of tax on employees' company cars during the crisis), the ITA has demonstrated a very strict and conservative (even somewhat petty) approach.

We hope the Guidance, as well as the policy implemented by other treaty-countries, would apply pressure to the ITA to adopt a policy more in line with the obvious

contemporary constraints.

Keeping this in mind, we encourage our clients to document the unique facts and circumstances of the *bona fide* relevant presence inside or outside of Israel due to COVID-related travel restrictions, in case such evidence is later required in a tax controversy procedure.

We wish you good health, Happy Passover and Happy Easter, and a rapid return to normal.

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