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Global Tax Alert

PE Watch: Latest developments and trends, May 2020

EY Tax News Update: Global Edition

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Overview

This is a monthly report with brief summaries of the latest global activity with respect to permanent establishments (PEs). The report will include multilateral developments at the OECD and regionally as well as the latest country specific legislative and administrative activity related to the global focus on PEs. Links to more detailed information are included.

OECD

On 3 April 2020, the OECD Secretariat published [guidance](#) on the tax implications due to the COVID-19 crisis and their connection with tax treaty provisions. Among others, the guidance covers three situations where concerns have been raised regarding the PE status due to disruptions related to COVID-19, namely: home offices, agency PE, and construction PE.

See EY Global Tax Alert, [OECD Secretariat issues guidance on impact of the COVID-19 on treaty-related issues](#), dated 10 April 2020.

On 4 May 2020, the OECD held its [15th Tax Talks webcast](#) whereby it provided a brief update on the OECD's international tax work and their work in the context of the COVID-19 crisis. Among others, the OECD is preparing guidance on transfer pricing issues that result from the COVID-19 pandemic

to limit exposure to tax uncertainty. Unlike the OECD's work regarding tax treaties in light of COVID-19, which was prepared by the OECD Secretariat, the work on transfer pricing guidance will be carried out by Working Party 6 and thus a consensus by all members is required. In light of this, the COVID-19 transfer pricing guidance will likely not be available before year-end.

See EY Global Tax Alert, [OECD hosts webcast to provide update on its tax work during COVID-19 crisis](#), dated 11 May 2020.

Hong Kong

On 27 March 2020, Hong Kong's Inland Revenue Department (IRD) issued revised [Practice Note No. 39](#) (on the digital economy, electronic commerce and digital assets) which, among other things, includes guidance on e-commerce PEs and the attribution of profits to those PEs. The Practice Note provides that a server or datacenter in Hong Kong, at the disposal of a nonresident enterprise, may constitute a PE if such equipment is capable of concluding contracts, processing payments or delivering digital goods in Hong Kong even without the involvement of human activities in Hong Kong.

These Practice Notes are issued for the information of taxpayers and their tax representatives.

See EY Global Tax Alert, [Hong Kong Tax Authority indicates a server in Hong Kong may constitute a permanent establishment](#), dated 10 April 2020.

India

On 24 April 2020, the Supreme Court (SC) of India rendered its decision in the case of *Union of India & Anr. v. U.A.E. Exchange Centre* ([Civil Appeal No. 9775 of 2011](#)).

In the instant case, the taxpayer, a company incorporated in the United Arab Emirates ('UAE'), was engaged in offering, inter alia, remittance services for transferring amounts from the UAE to India. The taxpayer had set up a Liaison Office (LO) in India. The activities undertaken in India by the LO were comprised of downloading information from the main server of the respondent in the UAE and printing documents (such as checks/drafts) drawn on the banks in India as per the instructions given by the nonresident Indians remitters in the UAE. The question in dispute was whether the taxpayer's

activities in India were preparatory or auxiliary in nature and covered by the exclusion clause of Article 5(3)(e) of the India-UAE tax treaty (equivalent to Article 5(4)(e) of the 2014 OECD Model Tax Convention).

The SC ruled in favor of the taxpayer and upheld the ruling of the High Court which stated that:

- ▶ The activities carried on by the LO in India did not in any manner contribute directly or indirectly to the earning of profits or gains by the company in the UAE.
- ▶ The transaction was concluded in the UAE, whereas, the activity performed by the LO in India was only support services which enabled the taxpayer to render services to their clients abroad.

Accordingly, the SC found the activities in question to be of a preparatory or auxiliary character.

The above ruling is quite relevant for money remittance companies and potentially other businesses which are primarily operated from outside India with some preparatory and auxiliary activities in India. It is to be noted though that India has introduced an equalization levy of 2% on certain nonresident service providers providing services to customers in India and its application with respect to the specific facts may need evaluation.

Indonesia

On 31 March 2020, the Indonesian Government published an [emergency measure](#) to manage the economic impact of the COVID-19 crisis, including tax policy changes. Among others, the emergency measure makes changes to the taxation of cross-border trading through an Electronic System or e-commerce. A foreign seller, service provider or Trading Organizer Through Electronic System (PPMSE) meeting the significant economic presence criteria can be deemed to have a PE and subject to income tax in Indonesia. The significant economic presence will be further defined in future regulations with reference to the level of: consolidated group revenue, sales in Indonesia, and/or the number of users in Indonesia.

If income tax cannot be imposed due to the application of a double tax convention, the foreign seller, service provider or PPMSE meeting the significant economic presence criteria will be subject to an Electronic Transaction Tax (ETT). The tax rate, tax base and the procedure to calculate income tax and the ETT shall be regulated by a Government Regulation.

The foreign seller, service provider or PPMSE may also be appointed by the Minister of Finance as a Value-Added Tax (VAT) agent, which is required to collect VAT on the utilization of intangible goods and/or taxable services from outside of the Indonesia Customs Area (ICA) within the ICA, where this is done through the Trading Through Electronic System (PMSE). The Minister of Finance will issue regulations providing the criteria and mechanics of the VAT collection mechanism and will confirm whether this measure will be administered directly or via Indonesian agents.

Singapore

On 6 April 2020, the Inland Revenue Authority of Singapore (IRAS) published [guidance](#) on the impact of COVID-19 related travel limitations in determining whether a foreign company may have a PE in Singapore. According to the guidance, IRAS will not consider the unplanned presence of employees of a nonresident taxpayer, that may need to stay in Singapore due to travel restrictions relating to COVID-19, as the creation of a PE, provided it meets all the following conditions:

- a. The nonresident taxpayer does not have a PE in Singapore for the tax year 2020.
- b. There are no other changes to the economic circumstances of the company.
- c. The employee's physical presence in Singapore is temporary, as a general guide not more than 183 days in the year 2020 from the date of the first arrival in Singapore.
- d. The activities performed by the employee(s) during the unplanned presence would not have been performed in Singapore if not for the travel restrictions.

United Kingdom

On 7 April 2020, Her Majesty's Revenue and Customs (HMRC) updated its International Manual to include [guidance](#) to, among other things, its approach to PEs in the United Kingdom (UK) in relation to the COVID-19 pandemic.

HMRC considers that the existing legislation and guidance in relation to PEs already provides sufficient flexibility to deal with changes in business activities in connection to the COVID-19 crisis. In particular, and thus HMRC does not consider that a nonresident entity will automatically have a fixed place of business PE after a short period of time as a degree of permanence is required. Further, HMRC acknowledges that while the habitual conclusion of contracts in the UK would also create a dependent agent PE taxable presence in the UK, it is a matter of fact and degree as to whether that habitual condition is met.

On 5 May 2020, HMRC updated the above guidance to include a paragraph at the end indicating that HMRC believes their guidance is consistent with the guidance published by the OECD Secretariat on 3 April 2020.

United States

On 21 April 2020, the United States (US) Internal Revenue Service (IRS) published [frequently asked questions \(FAQs\)](#) that provide relief for certain US business activities conducted by a nonresident alien or foreign corporation when the activities were only conducted in the US due to COVID-19-related travel disruptions. In particular, the FAQs provide that the activities will not be taken into account for a period of up to 60 consecutive calendar days beginning on or after 1 February 2020, and on or before 1 April 2020 (COVID-19 Emergency Period) for purposes of determining whether the individual or entity is engaged in a US trade or business or has a US PE. The activities must have been performed by one or more individuals temporarily present in the US who would otherwise not have performed them in the US but for COVID-19-related travel disruptions.

See EY Global Tax Alert, [Report on recent US international tax developments](#), dated 24 April 2020.

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