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[2020] 117 taxmann.com 51 (Article)Date of Publishing: **June 12, 2020****Bigger consequences of unpredictable prolonged stays under international taxation - Covid 19****SURABHI BANSAL**

Partner, S S Kothari Mehta & Co.

**LUV GUPTA**

Executive-Taxation, S S Kothari Mehta & Co.

In order to fight the global outbreak of Novel Coronavirus, the countries across the globe have taken some aberrant measures such as suspension of international travel, imposing lockdown etc. Subsequently many individuals had to prolong their stay in India, this may give rise to several tax related issues of individuals and corporates. In the aftermath these issues will have an impact on right to tax between the countries.

The Organisation for Economic Co-operation and Development (OECD) released guidance on these issues, planted on the analysis of tax treaties and impact of COVID-19 crisis. It may be noted that the OECD council at Ministerial level adopted a resolution on 16 May 2007 to strengthen co-operation with India, as well as with Brazil, China, Indonesia and South Africa, through a programme of enhanced engagement, defining these countries as Key Partners of the OECD. Participation in OECD bodies and fora is encouraged as a means of allowing Indian policy makers to benefit from the OECD's technical expertise and analytical capacity.

The following is the brief discussion on the concerns noted in OECD secretariat analysis w.r.t unpredictable prolonged stay of individuals in different countries

Concerns related to a change in the residential status of individuals: The OECD secretarial analysis has witnessed two main situations with respect to individuals that may arise because of this pandemic. The following are those two situations:

- An individual who is away from the country of residence whether due to holidays or even to work for few weeks and gets stranded in other country (host country) by the reason of travel restrictions because of Covid-19. This may lead to a situation of gaining the status of resident under domestic law of host country
- An individual working in a country that is the current country of residence or home country, but that individual temporarily returns to the previous home country because of COVID-19 situation.

This may lead to a situation of regaining the status of resident in the previous home country.

Article 4 of OECD model provides that an individual can be resident in only one country at a time. The article also provides the tie-breaker rule where an individual is considered as resident of two countries at time.

Out of the two cases mentioned above, in first case it is more feasible that the tie-breaker test will award the treaty residence to the home country, whereas there may be a case that even after tie-breaker test the residence is awarded to the host country. In the second case it is more likely that tie-breaker rule will award the treaty residence to the previous home country.

The guidance provides the competent authorities to disregard the extension in stay of individuals due to exceptional circumstances. Some of the countries for example Ireland, Australia, UK, and Singapore have already issued relaxation on this issue. India has also issued a circular no.11/2020 for relief for financial year 2019-20, from the residency provisions under section 6 of the Income-tax Act, 1961.

Concerns related residential status of a company (place of effective management): Owing to the COVID-19 crisis, there may be a change in the location of Directors or CEOs of foreign enterprise, who take their key managerial decisions. In this case foreign enterprises are exposed to the risk of having their "Place Of Effective Management" (POEM) in the country where the key decisions makers of the enterprise are stuck. Therefore, in such cases the foreign enterprise may be considered as resident of India as their key managerial decisions are taken in India. This may also lead to a situation of dual residency.

The treaties provide the tie-breaker rule for the situation of dual residency. Even in tie breaker rule the POEM will be the only criteria to determine the residence of an entity which is considered as dual resident. The guidance issued by the OECD provides that all relevant facts and circumstances should be examined to determine the "usual" and "ordinary" POEM and not only those that pertain to an exceptional and temporary period such as the COVID-19 crisis. As of now there are no formal guidelines or clarifications issued by the CBDT.

Concerns related to creation of permanent establishment: Globally the employers have now allowed the employees to work from alternative workplaces like their home, hotel etc. The resultant is that now the employees are located in countries other than the countries in which they normally perform their duties. This has exposed some foreign enterprises to the risk of constituting a permanent establishment (PE) of them in those countries. The following are the types of PE that may be created:

- Service PE

It is triggered where the services are furnished by a foreign enterprise through employees or other personnel, in the source country, if the services are provided beyond a specific threshold of number of days provided under the tax treaty.

For instance, in case where the employees of a foreign enterprise, who's stay in India is prolonged because of the reason that they are unable to leave, may result in creation Service PE.

- Construction/Installation PE

It is triggered where building site or construction, installation or assembly project or supervisory activities in connection therewith continue beyond period specified on the respective treaty.

For instance, in case where the duration of the construction, installation or assembly project may have increased because of interruption of activities on the project site, this increased duration may result in construction PE.

- Dependent Agent PE

It is triggered when a foreign enterprise is represented by an agent in the source country and the agent habitually exercises and has the authority to conclude contract on behalf of the foreign enterprise.

For instance, the employees of foreign enterprise who has the authority and responsibility of concluding the contract in any other country outside India are concluding contracts in India while staying here because of COVID-19 crisis. This may result in creation of dependent agent PE.

The guidance note prescribes that exceptional and temporary change of the location where employees exercise their employment, the temporary conclusion of contracts in the home of employees or agents because of the COVID-19 crisis should not create PEs for the businesses. As of now there are no formal guidelines or clarifications issued by the CBDT.

Concerns related to cross border worker: Where workers that are cross border commuters get stranded to a country that is not the country where they usually work and they continue to work remotely from the first mentioned country, there may arise some cross border tax implications. In case where an employee works in the country other than the country of residence then right to levy tax on employment income is of the country in which employment is performed.

It has been rightly stated in the guidance issued by the OECD that Article 15 (Income from employment) of the OECD Model provides for the taxation of employment income. It distributes the right to tax between the place where employees perform their employment and their state of residence. The Article 15 right from the opening provides that "salaries, wages and other similar remuneration" are taxable only in the person's state of residence unless the "employment is exercised" in the other state. Further, the Commentary on Article 15 explains that this means the place where the employee is "physically present when performing the activities for which the employment income is paid." The place of exercise test has some conditions attached which says that the other state (the source state) may exercise a taxing right only if the employee is there for more than 183 days or the employer is a resident of the source state, or the employer has in the source state a permanent establishment that bears the remuneration. Moreover, as per the Article 23 of OECD model where the source country has a taxing right, then residence country provides the relief from double taxation either by exempting such income or by giving a credit for the tax paid in source country. Similar provisions are available in almost all the treaties of India.

It is suggested in the guidance issued by OECD that if the country where employment was exercised, before the COVID-19 pandemic, lose its taxing right following the application of Article 15, then some additional compliance burden will also arise for the employers and employees. Therefore the countries should try to bring a level of coordination between them to mitigate the compliance and administrative costs for employees and employers associated with involuntary and temporary change of the place where employment is performed. Some countries for example Belgium have already entered an agreement with France and Luxembourg; Netherlands has entered into an agreement with Germany to mitigate the above mentioned issue.

To sum up, though CBDT has already issued a circular to provide relaxation to individuals for FY2019-20 from provisions under section 6 of the Income-tax Act, a lot more is to be done. Taking cognizance of the situations discussed above, as this should also be considered as pressing priority, CBDT may also issue guidelines and clarifications to prevent unwarranted consequences and litigation with respect to other cross-border tax issues.

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