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The assessment of Permanent Establishments under the COVID-19 context



In early April this year, the OECD Secretariat released the *"Analysis of Tax Treaties and the Impact of the COVID-19 Crisis"*, providing guidelines on tax treatments for treaty-related issues (including the creation of PE) which may arise due to the COVID-19 epidemic. The OECD recommends that tax administration should produce domestic regulations to address such treaty related issues. Nevertheless, the OECD recommendations have no binding effect on any countries/regions.

This newsletter summarizes the key points of this OECD Analysis in respect of PE determination and introduces the corresponding special measures raised by certain countries including China under the COVID-19 context.

According to the prevailing China Corporate Income Tax (CIT) law, a non-resident enterprise (non-TRE) that has an establishment or place in China is subject to CIT on China-sourced income as well as on foreign-sourced income effectively connected with such China establishment or place. Non-TREs may apply tax treaty treatment where it is available and applicable. Under the context of tax treaty, the concept of Permanent Establishment (PE) provides the right of a Contracting State to tax the "business profits" of an enterprise of the other Contracting State. In other words, a Contracting State cannot tax the profits of an enterprise of the other Contracting State unless the enterprise carries on business through a PE constituted therein.

The unprecedented COVID-19 epidemic has forced many countries to adopt emergent measures to control the spread of virus, such as implementing international traffic control and strict quarantine requirements, restricting business travel, etc. These measures may interrupt or even disrupt businesses' human capital plan, employees need to work from home or have to stay in a country other than its employment base for an extended period of time or even in the long run. Under such context, business activities performed by employees or other personnel of a non-TRE in countries other than the country in which they should regularly present may lead to the creation of a PE, thus raising issues in respect of the right to tax between countries.

In early April this year, the OECD¹ Secretariat released the *"Analysis of Tax Treaties and the Impact of the COVID-19 Crisis"* (hereinafter referred to as the "OECD Analysis" or "Analysis")², providing guidelines on tax treatments for treaty-related issues (including the creation of PE) which may arise due to the COVID-19 epidemic. The OECD recommends that tax administration should produce domestic regulations to address such treaty related issues. Nevertheless, the OECD recommendations have no binding effect on any countries/regions.³ In August, China's State Taxation Administration (STA) provided its technical position via a written memorandum in Q&As⁴ format on its official website to address implementation issues related to certain provisions under tax treaty including assessment of PE under the context of COVID-19 epidemic.

Note:

1. Organisation for Economic Co-operation and Development
2. *Analysis of Tax Treaties and the Impact of COVID-19*, <http://www.oecd.org/coronavirus/policy-responses/oecd-secretariat-analysis-of-tax-treaties-and-the-impact-of-the-covid-19-crisis-947dcb01/>
3. This article is mainly based on the *OECD Model Tax Conventions on Income and on Capital* for technical discussion.
4. <http://www.chinatax.gov.cn/chinatax/n810219/n810744/c101510/c101520/c5155584/content.html>



This newsletter summarizes the key points of this OECD Analysis in respect of PE determination and introduces the corresponding special measures raised by certain countries including China under the COVID-19 context.

Definition and types of PE

In the DTAs (Double Taxation Agreements/Arrangements) signed by China with other jurisdictions, usually the term “PE” is defined as “a fixed place of business through which the business of an enterprise is wholly or partly carried on”. PEs are normally categorized into several common types: fixed place PE, service PE, construction PE and dependent agent PE. In addition, in some DTAs, there are provisions pertaining to insurance PE.

Types of PEs	Major factors pointing to PE
Fixed Place PE	<ul style="list-style-type: none"> ▶ The place is used for business purposes on a sufficiently stable and constant basis ▶ Excluding places through which the business activities conducted are merely preparatory and auxiliary
Service PE	<ul style="list-style-type: none"> ▶ An enterprise of a Contracting State that performs services (including consultancy services) through its employees or other personnel in the other Contracting State; and ▶ The furnishing of services should last for a certain period of time (normally it shall refer to a period or periods aggregating more than 183 days within any 12-month period)
Construction PE	<ul style="list-style-type: none"> ▶ A building site, a construction, assembly or installation project or supervisory activities in connection therewith; and ▶ Such site, project or activities shall last for a certain period of time (e.g., more than six months)
Dependent Agent PE	<ul style="list-style-type: none"> ▶ A person (excluding independent agent) carries on business in a Contracting State on behalf of an enterprise of the other Contracting State; and ▶ The person has the right to conclude contracts on behalf of the enterprise and habitually exercises the right
Insurance PE	<ul style="list-style-type: none"> ▶ DTAs concluded by China with some countries (Tunisia, Mexico, Finland, Brunei, Sri Lanka, etc.) contain the content of insurance business that may constitute PEs

OECD guidelines on the creation of PEs during the COVID-19 epidemic

Due to the measures (e.g., entry and exit restrictions, quarantine requirements) imposed by various countries, many cross-border workers have to work from home or in a country other than their country of employment.

When it comes to cross-border elements (cross-border workers, individuals being stranded in a country other than the country of employment, etc.), various tax issues may arise, notably the taxing right between countries which are currently governed by tax treaties. In order to help countries address these issues, the OECD Secretariat issued a guidance based on the analysis of treaty rules and the key points are as follows:

Home office should not create a Fixed Place PE

The OECD Analysis suggests that exceptional and temporary changes in the workplace of employees caused by the epidemic should not constitute PEs for the employers, which is also consistent with Paragraph 18 of the Commentary on Article 5 of the OECD Model Tax Convention (“OECD Model”). In general, for a place to be a PE of an enterprise, it must be at the disposal of the enterprise and be used on a continuous basis to carry on wholly or partly the enterprise’s business. In the context of COVID-19, part of the business of an enterprise may be conducted at a location such as an employee’s home office, according to the OECD Analysis, which should not lead to the conclusion that the home office has become at the disposal of that enterprise (i.e. not temporary) merely because it is used by an employee who works for the enterprise. However, a home office may constitute a PE if it is used on a continuous basis for conducting that enterprise’s business and the enterprise has required the individual to do so.



The OECD has given its technical position on the possible PE issues that may be involved in working from home. However, some issues thereof still remain unclear, for example:

- ✓ Where restrictions are released in the host country (i.e. the temporary workplace) but not in the home country (i.e. the employment location), the personnel cannot return to the home country and have to work at the subsidiary in the host country
- ✓ An employee's main workplace is closed and he or she voluntarily chooses a proper location in a third country to work
- ✓ By taking into consideration all the facts and circumstances such as family, travel costs, attractiveness, safety, etc., where the travel restrictions are released, **companies arrange workplaces for their employees or allow employees to decide by themselves even on a remote basis**

In addition to considering the OECD Analysis, countries may also make more specific provisions for some complicated situations when formulating domestic tax laws in this regard. Enterprises are advised to pay special attention to new developments.

Construction PE

Generally, a construction site will constitute a PE if it lasts for more than 12 months under the OECD Model or more than six months under the UN Model. According to the OECD Analysis, where a construction site is temporarily interrupted by the COVID-19 crisis, the duration of such interruption should still be included in determining the length of a site and considered for the threshold calculation, therefore will affect the determination on whether such construction site constitutes a PE. This is in line with the Commentary on Article 5(3) of the OECD Model, which states that a site should not be regarded as ceasing to exist due to temporary interruption caused, for example, by **a shortage of material or labor difficulties**. Enterprises should pay attention to temporary interruptions of construction sites caused by the epidemic to manage PE risks.

Dependent Agent PE

Under the current OECD Model, where an agent acting in a Contracting State on behalf of an enterprise (of the other Contracting State), has and habitually exercises the right to conclude contracts on behalf of the enterprise, the enterprise will generally be treated as constituting a dependent agent PE in that State. The COVID-19 outbreak raised the question of whether the activities of individuals working temporarily at home for non-resident employers may also constitute agent PEs. In such a case, it is quite important to evaluate whether the activities are performed "**habitually**".

The OECD suggests that where an employee or agent concludes a contract for a non-resident employer while working from home temporarily as a result of force majeure and/or government directives under COVID-19, it should not be regarded as a habitual activity, thus not constituting a PE. However, the general rule shall apply if such activities would have been habitually performed regardless of the COVID-19 outbreak.

Special measures of various jurisdictions on assessing PEs under COVID-19

The OECD Analysis is not legally binding and would not change the prevailing treaties and domestic tax laws. However, as a guiding document, it has technical influence in such a special context. The OECD also suggests that tax administrations should consider issuing appropriate guidance to provide positions to increase tax certainty and support business activities and economic recovery.

Around the time of the OECD Analysis, some countries such as Australia, Canada, China, the United States have introduced their own domestic rules. It is widely agreed that the epidemic meets the conditions of force majeure, and therefore, temporary exceptions and special tax treatments should be provided (see the table below for details of the measures).

(Note: certain jurisdictions have specified a validity period for below temporary exceptions)



Temporary measures released (selected):

Country	Key points of PE determinations during the epidemic
U.S. ⁵	<ul style="list-style-type: none"> ▶ Certain US business activities conducted by foreign persons in the US due to the COVID-19 emergency within the specified time will not constitute PEs ▶ Documentation should be retained for proving that the relevant activities would not have been otherwise performed in the US
U.K. ⁶	<ul style="list-style-type: none"> ▶ A nonresident entity will not be considered as constituting a Fixed Place PE in the UK after a short period of time as a degree of permanence is required ▶ A dependent agent PE is constituted or not depends on whether the contracts are habitually concluded
Australia	<ul style="list-style-type: none"> ▶ Where a foreign company holds board meetings in Australia purely due to travel restrictions caused by COVID-19, central management and control should not be regarded as in Australia ▶ Unplanned foreign employees' presence in Australia may not lead to a permanent establishment in Australia
Canada	<ul style="list-style-type: none"> ▶ If relevant activities would not have been performed in Canada but due to travel restrictions, the Canada Revenue Agency (CRA) will not consider the existence of an employment-constituted PE or a dependent agent PE ▶ Any days of physical presence in Canada because of travel restrictions will be excluded when considering the threshold for service PE purposes ▶ The CRA reserves the right to review each scenario on a case-by-case basis as whether a PE is constituted should depend on all facts and relevant analysis
Singapore ⁷	<ul style="list-style-type: none"> ▶ Unplanned presence of employees of a nonresident taxpayer in Singapore due to travel restrictions relating to COVID-19 will not be considered as constituting a PE of a taxpayer, provided certain conditions are met
Ireland ⁸	<ul style="list-style-type: none"> ▶ The presence of an individual (an employee, director, service provider or agent) in Ireland resulting from travel restrictions related to COVID-19 will not be considered for Irish corporation tax purposes
Denmark & Malta	<ul style="list-style-type: none"> ▶ Both countries announced that they will adopt the OECD guidance
Malaysia	<ul style="list-style-type: none"> ▶ The temporary presence of employees of a nonresident company will not result in the creation of a PE provided certain conditions are met, such as: <ul style="list-style-type: none"> ✓ the company did not have a PE in Malaysia before any travel restrictions ✓ there are no changes in the company's economic circumstances
Germany	<ul style="list-style-type: none"> ▶ The guidance released by the German tax administration only covers Construction PE: the interruption period should not be considered for calculating the threshold provided the company meets certain conditions, such as: <ul style="list-style-type: none"> ✓ interruption period lasts for at least two weeks ✓ employees are not present in the construction site ✓ the income derived from the construction project is taxed in the resident country of the nonresident company and the nonresident employees

Note:

5. <https://taxnews.ey.com/news/2020-1100-irs-provides-relief-for-potential-tax-consequences-caused-by-covid-19-travel-restrictions>
6. <https://taxnews.ey.com/news/2020-1292-pe-watch-latest-developments-and-trends-may-2020>
7. <https://taxnews.ey.com/news/2020-1292-pe-watch-latest-developments-and-trends-may-2020>
8. <https://www.revenue.ie/en/corporate/communications/covid19/compliance-with-certain-reporting-and-filing-obligations.aspx>



Country (cont'd)	Key points of PE determinations during the epidemic (cont'd)
Austria	<ul style="list-style-type: none"> ▶ For a home office PE, employees of nonresident companies working from home should not constitute a PE unless it has become a new norm ▶ For a construction PE, the interruption period caused by COVID-19 should be taken into account for calculating the threshold
Indonesia	<ul style="list-style-type: none"> ▶ Up to the issuance of this newsletter, the Indonesian Government has not released any guidance in response to the OECD Analysis ▶ However, an emergency measure was published to manage the economic impact of the COVID-19 crisis, e.g., changing the rules of PE determinations related to cross-border trading through an electronic system or e-commerce, key points to note include: <ul style="list-style-type: none"> ✓ Cross-border traders meeting the “significant economic presence criteria” can be considered as constituting a PE in Indonesia and subject to income tax ✓ Electronic Transaction Tax (ETT) will be imposed instead in case income tax cannot be imposed due to the application of a DTA ✓ VAT will also be imposed if applicable

It is obvious that many countries have provided certain degree of exceptions which is consistent with the guidance of OECD. The OECD Analysis does not specify the implementation period for these treatments. While the developments of the epidemic vary among jurisdictions, observations told us that there is always a chance of dramatic development within one jurisdiction, so it is understandable to see that most of the jurisdictions do not specify a clear implementation period except for Canada (which is also subject to change). Enterprises with overseas investments are advised to check the applicable exception period and updates (if any) so as to manage the PE risks caused by the epidemic better.

In addition, it is worth-noting that some countries amended their domestic laws to tax certain cross-border transactions before the release of the OECD Analysis to alleviate the impact of the epidemic on economy. Just as mentioned above as an example, in Indonesia, the tax administration tightened its taxation scope and stipulated cross-border transactions that meet the conditions will be deemed as PEs that give rise to income tax or ETT exposures in Indonesia. Cross-border traders are advised to pay attention to policy updates at any time to avoid unnecessary tax exposures.

Response of China

In August, China's STA issued an article in Q&A format to clarify its technical positions on certain tax treaty implementation issues under the COVID-19 epidemic, including the determination of PE, place of effective management as well as tax residency. Local tax departments are expected to follow STA's technical position accordingly.

In general, China's technical position expressed in this Q&A is consistent with that suggested by the OECD, while certain treatments that are more lenient and commercial. On the other hand, China STA's position has put in more thoughts on actual circumstances, which specified certain situations under which the relief may not be applicable.

As mentioned in the Q&As, the STA's technical interpretation is only valid “during the period of epidemic prevention and control”. However, the STA did not define what exactly does it mean. In view of the current unpredictable development of the crisis, it is advisable for businesses to pay close attention to any updates, adjust approaches accordingly to manage any potential tax risks.

China's position on determination of PEs during the epidemic

▶ **Temporary** working from home—should not constitute PEs, which is consistent with the OECD Analysis

The STA stated that if working from home (or WFA - working from anywhere) during the epidemic is deemed as Intermittent or occasional behavior, these temporary working places should not constitute Fixed Place PEs, which is consistent with the suggestion in the OECD Analysis.



According to prevailing rules set under STA Circular Guoshuifa [2010] No. 75 (Circular 75), a PE is constituted when it meets the following conditions:

- ✓ The existence of a “place of business”;
- ✓ The place of business is “fixed”, i.e., it should be established at a distinct location with a certain degree of continuity;
- ✓ The business activities are wholly or partly carried on in that place.

Most of the changes of working places under the epidemic is temporary and unanticipated, which differs from the above-mentioned planned business activities which would constitute PEs.

Points to note:

The STA has not defined the term “temporary” in its Q&As. Depending on the context of Fixed Place PE, if an employee decides to change the temporary working-from-home to become his/her long term work arrangement, with the personal and business considerations (e.g., housing cost, travel cost, family reasons, safety issues), this change would theoretically change the character from “temporary” to “permanent”. The associated PE risks shall arise. Meanwhile, it would be challenging to prove whether an individual has the intention to a “long-term” change and when such change happened; also it is not clear when such PE would be triggered if the change happens.

- ▶ Temporary conclusion of contracts in an individual’s home in China on behalf of overseas enterprise – will not constitute a Dependent Agent PE if such activities are carried out only on an incidental basis.

According to China prevailing domestic rules, where an enterprise of one Contracting State carries on business activities through an agent in the other Contracting State and the agent concludes contracts on behalf of that enterprise habitually, the enterprise will be treated as constituting a PE in that other Contracting State. Characteristics of the contracts and related businesses and the frequency of agent’s activities will be taken into account when assessing whether such behaviors are “habitual”.

STA announced that temporary conclusion of contracts in an individual’s home within China on behalf of overseas employer will not constitute a Dependent Agent PE provided such activities are carried out on an incidental basis.

Points to note:

Exceptions for the above treatments:

- ✓ Scenario A: **Before the outbreak** of the COVID-19 epidemic, the individual has already been acting in China on behalf of overseas enterprises for an extended period of time, and has habitually exercised the right to conclude contracts in the name of the enterprise.
- ✓ Scenario B: **After the outbreak** of the COVID-19 epidemic, the individual **has changed to** conduct such activity in China on behalf of overseas enterprise on a long-term basis. This individual has habitually exercised the right to conclude contracts in the name of the enterprise.

It is easy to understand why the relief cannot be granted under Scenario A, as the individual’s activities would have been habitually performed regardless of the COVID-19 outbreak.

In Scenario B, it is mentioned that “the individual has changed to conduct such activity in China on behalf of overseas enterprise on a long-term basis”. It is rather challenging to measure “long-term”, to assess “changed to” and differentiate that from “temporary” activities caused by the epidemic. Some individuals may be stranded in China due to strict travel restrictions of their home country, instead of a personal choice; some may opt to stay in China on a continuous basis after taking into account various factors (e.g., housing cost, travel cost, family, safety, etc.). Meanwhile, it is important to understand whether such change is also subject to change along the development of the epidemic, both individuals and overseas businesses may change their choices at any time. From the substance of PE, factors including timing, duration, frequency should be collectively considered when assessing whether an activity is “habitual” or only “temporary” due to COVID-19.

Another thing which shall not be overlooked is that, according to Circular 75 (a STA ruling which provides general implementation guidance on treaty provisions), concluding a high-value single sales contract on behalf of overseas enterprise may be deemed as falling under the threshold of “habitual activity” and therefore trigger a Dependent Agent PE. Circular 75 is a valid official ruling issued by STA. How this rule prescribed under Circular 75 interacts with the COVID-19 exception treatment is not clear at the moment. Individual cases should be determined based on total facts and circumstances. Enterprises are recommended to actively communicate with tax authorities or seek assistance from professionals to manage such PE risk where necessary.



- Construction PE – the duration of temporary interruption due to the epidemic is allowed to be excluded when calculating the threshold for PE purposes

China provides more commercial and lenient tax treatments when assessing a Construction PE under the pandemic context. According to the DTAs concluded between China and other jurisdictions, in general, a construction site will constitute a PE if it lasts for more than 12 months under the OECD Model or some other more than six months under the UN Model. The OECD Analysis states that the duration of an interruption of activities caused by the epidemic (e.g., shortage of resources) **should not be excluded** when calculating the duration of a site for PE assessment purpose.

China however allows the exclusion of the duration of such an interruption. The Q&As indicate that if a construction is fully suspended as the workers have been fully evacuated due to the pandemic, the suspended period should be excluded when calculating the duration of a site for PE assessment purpose. This should be welcomed by the business communities.

Points to note:

Same as what we have discussed, as the STA did not specify the “period of the COVID-19 epidemic”, it is currently uncertain when this Q&As’ technical position remains valid. According to Circular 75, if a construction project is interrupted due to lack of resources (e.g., equipment, materials) or seasonal weather conditions while workers and facilities are not fully evacuated, the interruption period should not be excluded from the total duration period for PE assessment. Businesses should pay close attention to any follow-up developments and keep well the documentation evidence to support any position taken; while in doubt, do reach out to professionals for more updated and accurate position or assessment.

A PE case study (China) - cooperative joint education (CJE) service

China’s STA periodically releases settled cases (Case Study Collection) in relation to the enforcement of tax treaty provisions. Below is one PE case published in the latest issue. Although this case occurred prior to the epidemic, it may still serve as a technical reference for enterprises to understand the technical positions of China on PE assessment. The interpretations below are fully based on information published in the Case Study Collection. However, this article does not conclude that the case’s settlement represents any policy update of the STA in assessing PE.

This case involves the CJE service provided by a foreign university and a Chinese college together, in which the following phased learning approach was adopted:

- ✓ Stage I: Students take courses at the Chinese college and Chinese college pays a portion of tuition fee to the foreign university.
- ✓ Stage II: Students complete all the courses, internships and theses at the foreign university and the Chinese college pays another portion of tuition fee to the foreign university.

In this case, China tax authority considered the Sino-foreign CJE program constituted a PE as it meets threshold of a fixed place of business, i.e., fixed, permanent and operational. It is concluded that the foreign university should pay China income tax for the profits attributable to the PE created.

- ✓ *Our observation – Determination of PE and tax treatment for Sino-foreign CJE*

At the time when the above-mentioned case occurred, there was no clear provision for the tax treatments related to CJE under China domestic tax law. Nevertheless, shortly after this case, China STA released STA Public Notice (PN) [2018] No. 11 (“PN 11”), which clearly clarifies that, the foreign party of a Sino-foreign CJE institution which does not have a legal entity status⁹ or a place where the educational activities of a Sino-foreign CJE program¹⁰ are conducted would constitute a PE in China. In general, where a CJE is a legal entity, it shall be treated as a China TRE for CIT purposes and PE issue would no longer be relevant. Those foreign education institutions that do not hold a legal person status or have provided education services without a PRC establishment may need to make reference to PN11 to assess their PE risk.

Although the tax calculation method was not specified in the above-mentioned case, PEs usually are subject to CIT on a deemed basis. In previous cases, tax authorities may refer to STA Circular Guoshuifa [2010] No. 19 to determine the deemed profit rate.

In the above case, eventually the PE related tax was paid as required by the tax authority, but it is unclear whether the taxpayer has applied remedies such as administrative review. Under China domestic tax laws, where there is a tax dispute, taxpayers may apply for administrative appeal provided the tax, surcharges or guarantees charged are settled. Where taxpayers disagree with the decision of administrative appeal, they may appeal to the people’s courts afterwards.

Note:

9. Sino-foreign CJE institution shall refer to the education institutions established by foreign education institutions together with Chinese education institutions within the territory of China to mainly provide educational services to Chinese citizens. (Regulations of the PRC on Sino-Foreign Cooperative Education)
10. “Sino-foreign cooperative education program” refers to the educational activities carried out jointly by Chinese education institutions and foreign education institutions without establishing any education institution in China, but with cooperation in various areas (courses, curricula, etc.), targeting mainly Chinese citizens. (Implementation Measures for the Regulations of the PRC on Sino-Foreign Cooperative Education)



✓ The implications of this PE case to those PE issues arising from temporary cross-border distance learning programs during COVID-19

Due to the COVID-19, many overseas study plans have been interrupted. Globally, lots of schools have introduced temporary cross-border or web-based learning programs. Students who cannot go back to their campus due to the epidemic may either choose online learning, or opt for on-site learning in the campus of a domestic partner school, i.e., a physical learning facility would be provided in a different jurisdiction. It is uncertain whether this new learning model would cause PE issues for overseas education institutions.

As suggested in the OECD Analysis, such temporary arrangements made by foreign education institutions to seek support from partner schools of another country to facilitate on-site studies in response to a force majeure situation shall not constitute PEs. However, there are continuous uncertainties; the OECD Analysis may not be able to cover all very particular circumstances, e.g. where the border entry restrictions are lifted but the schools continue to offer such distance learning so students continue to opt for it in consideration of family, travel costs or safety concerns, it is not clear if the relevant PE risk cannot be lifted.

In addition, the epidemic has led to many web-based learning activities. In view of the criteria for PE determination under prevailing tax treaties, e-learning are indeed not covered. Such activities are usually provided through internet and the servers may be located in a jurisdiction different from the service provider (i.e., the tutors or the education organization), these activities are therefore difficult to be assessed by the conventional criteria for determining Fixed Place PE, Dependent Agent PE and Construction PE under current treaty models.

Conclusion - When the “temporary” becomes the “new normal”

Both the length and impact of the COVID-19 epidemic are unprecedented. Many governments have released various relief measures including temporary tax reliefs to support the recovery of the economy.

How long and wide the epidemic is going to last is still uncertain; the control or relief measures of every country are different, the OECD Analysis can provide certain guidance on the determination of PEs and temporary relief measures on the impact of COVID-19. It is however imperative to note that both the OECD Analysis and measures put in place by various countries generally carry consistent conditions, i.e., they all base on the fact that **the remote, off-site, cross-border business activities and models should only exist temporarily because of the unexpected interruption brought by COVID-19 epidemic**. However, if the epidemic lasts even longer and leads to a long-time (one year or above) change of the business models, these “temporary activities” may become the “new normal” or the “new business model”, tax administrations may review the current temporary relief policies, evaluate and balance between relief and tax revenues, and formulate new long-term policies.

Businesses also need to be aware of the tax issues that may arise when employees work in another jurisdiction for an extended period of time. Whereas the recent exception rules released by respective jurisdictions may help to reduce the PE risks for businesses during the epidemic, it does not waive or reduce the employees’ possible Individual Income Tax (IIT) obligations in the country where they physically perform their duties. Businesses shall pay attention to the obligation of IIT withholding and filing involved and make sure that the relevant compliance or liabilities issues are well managed.

Foreign corporations that carry out business activities in China should note that STA expresses its positions through a list of Q&As instead of a formal rule. Other STA formerly issued rulings related to tax treaty treatments (including Circular 75) are still valid. Theoretically, the recommendations under such Q&As may face challenges and limitations regarding its legal authority. However, in practice, we also believe that STA’s technical positions shared in this Q&As will be referenced and followed by local tax authorities. As a result, these business-friendly positions should relieve certain uncertainties and provide certain flexibility under the COVID-19 crisis.

In addition to practical implementation, the validity period of the Q&As should not be ignored. As it is a temporary guidance in response to the COVID-19 epidemic, the STA may consider extending or abolishing it depending on the development of the epidemic, its technical position may also be replaced by subsequent Q&As or ruling.

Considering the unprecedented and unpredictable nature of the virus, and with the very different approaches and strategies taken by different countries, it may not be reasonable to expect policy-makers to provide a clear timeline for those temporary measures. Under this context, professional assistance would be helpful for assessing individual cases. Businesses and individuals are recommended to keep the relevant records and documentations (e.g., entry and exit records, epidemic situation records, local requirements and restrictions for entry and exit, details of business activities conducted in China) for further references when necessary.

Chinese “Going-out” enterprises are advised to pay attention to guidelines announced by the respective source jurisdictions and monitor how the jurisdictions would follow the OECD’s recommendations or have their own policies to observe.

We will keep a close eye on any development of the relevant policies and update you accordingly. Hope you all stay safe and healthy.



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