
**Committee of Experts on International
Cooperation in Tax Matters
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**Taxation and Coronavirus disease (COVID-19): pandemic and post-pandemic issues
Report by the Secretariat**

Summary

This paper is for Committee *decision*.

Following the mandate given by the United Nations Committee of Experts on International Cooperation in Tax Matters at its twenty-third session to the Small Group on “Taxation and Coronavirus disease (COVID-19): pandemic and post-pandemic issues”, this report describes some gaps that may need some clarification

As the Subcommittees on Transfer Pricing and on the Update of the United Nations Model Double Taxation Convention between Developed and Developing Countries as well as the Subcommittee on Taxation of the Digitalized and Globalized Economy are taking up some aspects, or work, on these issues as part of their work plan, a *decision* by the Committee is requested on taking the work forward through its integration of relevant issues into the work plans of those Subcommittees. Should the Committee take this decision, the Committee could then request these Subcommittees to reflect in their reports to the 25th session on gaps and possible means of address.

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I. Background

1. At its twenty-third session in October 2021, the United Nations Committee of Experts on International Cooperation in Tax Matters (Committee) decided to establish a small group with a mandate to:
 - identify gaps not covered by existing guidance and reflecting the realities for developing countries that would require additional clarification, illustration and orientation; and
 - report back its activities, recommendations, priorities, and conclusions at the 24th session of the Committee.
2. The small group is not yet active. The Secretariat has drafted this note for the Committee's consideration. This note describes some gaps in the existing guidance that would benefit from clarification and illustration. Those gaps are related to:
 - The interpretation and application of tax treaties, which could be taken forward by the Subcommittee the Update of the United Nations Model Double Taxation Convention between Developed and Developing Countries as well as the Subcommittee on Taxation of the Digitalized and Globalized Economy;
 - The application of the arm's length principle, which could be taken forward by the Transfer Pricing Subcommittee.

II. Gaps related to the interpretation and application of tax treaties

3. There has been existing guidance developed by the OECD Secretariat on tax treaties and the impact of the COVID-19 pandemic¹. This guidance covers the application of the existing rules under the OECD Model Income Tax Convention (OECD Model), including its Commentaries on concerns related to:
 - The creation of permanent establishments (i.e. home office, dependent agent PE) and the interruption of activity on construction sites;
 - Changes in residence for entities and individuals and the application of tie-breaker rules to dual residents; and
 - Income from employment i.e. payments under stimulus packages, stranded workers, cross-border (frontier) workers and teleworking from abroad.
4. This guidance represents the OECD Secretariat's views on the interpretation of the provisions of tax treaties based on the OECD Model. It reflects the general approach of some jurisdictions (mainly OECD countries) on how they have addressed the impact of COVID-19 on the tax situations of individuals and employers. Moreover, it mentions that the guidance is temporary in nature and seeks to address the exceptional circumstances of the COVID-19 pandemic only.
5. The OECD Secretariat's guidance does not address several issues that arise under the unique provisions of the United Nations Model Double Taxation Convention between Developed and Developing Countries (the UN Model). Therefore, there are a number of areas where additional clarification may be necessary regarding the effect of the COVID-19 pandemic on the application of the many treaties that are based on the UN Model. Those gaps are related to:
 - The tax covered in tax treaties (Article 2);
 - The time thresholds that rely on physical location in article 5 on permanent establishment, in article 14 on independent personal services and in article 15 on income from employment;

¹ https://read.oecd-ilibrary.org/view/?ref=1060_1060114-o54bvc1ga2&title=Updated-guidance-on-tax-treaties-and-the-impact-of-the-COVID-19-pandemic

- The situation of working from home or remote working in article 5 and in article 15;
 - The application of tax treaty in case a taxpayer claims that force majeure has prevented it from completing a contract in a timely manner.
6. The proposed work of the Subcommittee on the Update of the United Nations Model Double Taxation Convention between Developed and Developing Countries (the UN Model) will touch on some aspects of performing services remotely. However, it is not clear whether they will revisit the fundamental issues that are raised in paragraph 5. The Subcommittee on Taxation of the Digitalized and Globalized Economy has proposed a work program that would include consideration of some of those fundamental issues.

A. Gaps related to taxes covered (article 2):

7. During the pandemic many countries have established new “taxes”, sometimes called solidarity taxes or social contributions, to finance COVID-19 recovery efforts. The base of such taxes varies from country to country. Moreover, some countries have given “subsidies” to individuals and enterprises. The issue is whether those “taxes” and/or “subsidies” are within the scope of tax treaties or not.
1. The UN Model states in paragraph 4 of Article 2 that the Convention should apply to all identical or substantially similar taxes that are imposed after the date of signature of the Convention. Moreover, the commentary on the UN Model mentions that it might be considered justifiable to include extraordinary taxes in a model convention². However, several issues could be raised regarding the text and the commentary of the UN Model. These include:
 - a. What does identical or substantively similar taxes mean? Or what are the criteria or the process to state that the new taxes are similar or identical?
 - b. What are extraordinary taxes? Are they temporary taxes? If it is the case, it is worth mentioning that there are temporarily taxes in many countries that become permanent.
 - c. What is the definition of the term tax? It is worth point out that this term is not defined in the model, neither in the commentaries nor in domestic law of many countries.
 2. Thus, the issue is whether “taxes” created to finance COVID-19 recovery efforts are within the scope of tax treaties may need some clarification.

B. Gaps related to provisions relying on time thresholds

8. The COVID-19 pandemic has pushed governments, around the world, to take unprecedented actions to limit the spread of the virus. Those measures, called in this paper “COVID-19 constraints” include lockdown, curfew, quarantine, social distancing, shutdown of some businesses and limitation of international travel. Those actions may raise issues on provisions in tax treaties that rely on time threshold such as:
- A building site, a construction, assembly or installation project or supervisory activities in connection therewith (paragraph 3(a) of Article 5);
 - The furnishing of services, including consultancy services (paragraph 3(b) of Article 5);
 - Independent personal services (Article 14);
 - Income from employment (Article 15).

i. *Potential issue related to a building site, a construction, assembly or installation project or supervisory activities in connection therewith constitutes a permanent establishment*

² Paragraph 4 of the Commentary on Article 2 of the UN Model, quoting paragraph 5 of the Commentary on Article 2 of the 2017 OECD Model.

1. According to the provision of paragraph 3(a) of Article 5 of the UN Model, a building site, a construction, assembly or installation project or supervisory activities in connection therewith constitutes a PE only if such site, project or activities last more than six months.
2. The Commentary on Article 5 of the UN Model mentions that such site, project or activities exists from the date on which work begins, including any preparatory work, until the date on which the work is completed or permanently abandoned.³ Also, such site, project or activities should not be regarded as ceasing to exist when work is temporarily discontinued by bad weather, a shortage of material or labour difficulties⁴.
3. Yet, in the UN Model there is no guidance on whether the periods of interruption as a result of public health measures imposed or recommended by the government during the COVID-19 crisis should or should not be excluded from the calculation of the time thresholds for such site, project or activities when deciding whether a permanent establishment (PE) has been created or not.

ii. Potential issue regarding the furnishing of services, including consultancy services

1. Paragraph 3(b) of Article 5 of the UN Model imposes a threshold of 183 days in the 12 months period commencing or ending in the fiscal year for the furnishing of services, including consultancy services, by an enterprise through employees or other personnel engaged by an enterprise to trigger the existence or not of PE. However, the Commentary does not provide any guidance regarding how this period should be counted.
2. The COVID-19 pandemic has increased the need for such guidance, especially as some countries have provided some guidance on the way they would apply such provision. Thus, there may be a need for clarification in the UN Model on the way the time period should be determined in an event such as a pandemic.

iii. Potential issue regarding independent personal services

1. According to Article 14 (1)(b) of the UN Model on independent personal services, where a person that is a resident of a Contracting State who performs professional services or other activities of an independent character stays in the other Contracting State for a period exceeding 183 days in the last 12 months commencing or ending in the fiscal year, this person may be taxed in the other Contracting State.
2. However, there is no guidance in the UN Model on how to compute the number of days, especially when a person stays in a country for more than 183 days in the 12-month period due to COVID-19 constraints that may include a quarantine period. Thus, there is a need to clarify how the number of days should be computed for independent personal services.

iv. Potential issue regarding income from employment

1. Article 15 of the UN Model provides rules for distributing taxing rights between an employee's residence jurisdiction and the jurisdiction in which the employee carries out work. Specifically, article 15(2)(a) of the UN Model sets out a 183-day presence test (along with other requirements) to qualify for an exemption to host State taxation. So, if an

³ Paragraph 28 of the Commentary on Article 5 of the UN Model, citing paragraph 55 of the Commentary on Article 5 of the 2017 OECD Model as it relates to paragraph 3(a) of Article 5.

⁴ Paragraphs 28 of the Commentary on Article 5 of the UN Model, citing paragraph 55 of the Commentary on Article 5 of the 2017 OECD Model as it relates to paragraph 3(a) of Article 5.

employee spends more than 183 days in a jurisdiction, any employment-related remuneration would be taxable.

2. During the COVID-19 pandemic, some governments, such as Austria and Canada, have indicated that it is appropriate, given the exceptional circumstances, to disregard days to which these conditions apply when asserting a taxing right under the 183-day test. However, many other governments did not issue any guidance.
3. The Commentary on the UN Model states that although various formulas have been used by member countries to calculate the 183-day period, there is only one way which is consistent with the wording of this paragraph: the “days of physical presence” method. Under this method the following days are included in the calculation: part of a day, day of arrival, day of departure and all other days spent inside the State of activity such as Saturdays and Sundays, national holidays, holidays before, during and after the activity, short breaks (training, strikes, lock-out, delays in supplies), days of sickness (unless they prevent the individual from leaving and he would have otherwise qualified for the exemption) and death or sickness in the family⁵.
4. Also, it mentions that all days of presence count (working days or not) – and provides several examples, one of which is “days of sickness”. However, days of sickness do not count, according to the Commentary, if they prevent the individual from leaving the country if that individual otherwise would have met the requirements of Article 15(2)(a)⁶.
5. As consequence, it may be worth explaining how “COVID-19 constraints” could be taken into account in applying the 183-day test.

C. Gaps related to the situation of working from home or remote working

9. The “COVID-19 constraints” have pushed many individuals to work remotely which may have potential consequences on the interpretation of:
 - Physical presence for furnishing of services, including consultancy services;
 - Working from home for dependent agent;
 - The notion of exercise of employment.

i. Potential issue regarding physical presence for furnishing of services, including consultancy services

1. The Commentary on paragraph 3(b) of Article 5 of the UN Model does not comment whether the physical presence is required in the source State country of individuals, being employees or other personnel of the enterprise furnishing services, in order for a permanent establishment to exist in that State.
2. However, the COVID-19 pandemic has revealed that many businesses can now provide services without a physical presence therein due to the digitalisation of the economy. This raises the question of whether a clarification in the commentary should change with respect to physical presence for the application of article 5(3)(b), especially when the service is not covered by article 12A of the UN Model.

⁵ Paragraph 5 of the Commentary on Article 15 of the 2017 OECD Model, quoted in paragraph 3 of the Commentary on Article 15 of the UN Model.

⁶ Paragraph 5 of the Commentary on Article 15 of the 2017 OECD Model, quoted in paragraph 3 of the Commentary on Article 15 of the UN Model.

ii. Potential issue regarding working from home for dependent agent

1. Under Article 5 paragraph 5 of the UN Model, a dependent agent permanent establishment arises where a person habitually concludes contracts, or habitually plays the principal role leading to the conclusion of contracts, on behalf of a non-resident business.
2. During the COVID-19 pandemic, some employees or agents for non-resident businesses started working from home. The question may arise whether the activities of an individual temporarily working from home for a non-resident employer could give rise to a dependent agent PE.
3. It is worth noting that during the 21st session of the Committee, a footnote was added to paragraph 18 of the Commentary on Article 5 clarifying that where the employer, due to special circumstances (such as a pandemic), requires employees to work from home rather than to report to the offices that it normally provides to these employees, the home office does not create a PE under paragraph 1. A similar clarification could be added with respect to the dependent agent paragraph.

iii. Potential issue regarding the notion of exercise of employment

1. The Commentary on Article 15 of the UN Model mentions that employment is exercised in the place where the employee is physically present when performing the activities for which the employment income is paid.
2. Therefore, according to the Commentary on the UN Model, the employee's physical presence is decisive in determining whether the employment is exercised in the country of work. Moreover, the commentary added:
'One consequence of this would be that a resident of a Contracting State who derived remuneration, in respect of an employment, from sources in the other State could not be taxed in that other State in respect of that remuneration merely because the results of this work were exploited in that other State.'
3. Thus, the commentary contrasts the second quotation with the first one. The relevant criterion for the second rule of article 15(1) of the UN Model is where the employee is physically present when performing the services for which he is remunerated, rather than where the results of the employee's work are exploited.
4. During Covid-19, it was observed that many enterprises have obliged their employees to work remotely. Some work in a country different than the one where the employer resides. This has revealed that many employees can now perform his/her work all over the world without being physically present, especially for digitalized tasks.
5. However, under the UN and OECD Models, the countries where the employees work remotely do not have the right to tax the business income of the employer as far as there is no PE in those countries. Thus, this raises the issue whether the physical presence test is adequate with recent development of remote working.

D. Gaps regarding the application of tax treaties in case of force majeure

10. During Covid 19, force majeure was declared in some countries. This will apply in relation to many commercial contracts signed by enterprises resident in those countries. This declaration presumably insulates the enterprises resident in those countries from claims by foreign companies or countries for non-delivery of products or the non-purchase of product inputs that had been contracted⁷. This fact may trigger a PE of the enterprises resident in those countries that have projects, such as a

⁷ <https://www.iisd.org/system/files/publications/force-majeure-covid-19-en.pdf>

building site, a construction, assembly or installation project or supervisory activities in connection therewith if they exceed the threshold set out in the treaty due to the non-delivery of products or raw materials coming from their countries. Thus, the question of the application of tax treaties may be raised in such scenario.

11. The 1966 Vienna Convention on the Law of Treaties that regulates the way should be interpreted does not define the concept of force majeure. Also, the UN model does not touch on such concept. Thus, the need to clarify the implication of force majeure on the application of tax treaties.

III. Gaps related to the application of the arm's length principle

12. While in the area of transfer pricing guidance has been developed by different organizations, the guidance given does not necessarily offer solutions to problems that taxpayers and tax administrations encounter. There are many questions, that may need some clarification, such as what information a robust transfer pricing documentation should entail in case of COVID-19 related temporary changes to the transfer model of an MNE. Indeed, lack of guidance on documenting transfer pricing in pandemic times could create a climate of uncertainty for both MNEs and tax administrations. Thus, there is the need for transfer pricing documentation to allow tax administration to assess transfer pricing risks and for taxpayers to justify transfer pricing policy. As consequence, guidance on transfer pricing documentation during the pandemic could assist both tax administration in assessing risk and MNEs in managing this risk.
13. The Transfer Pricing Subcommittee has proposed a workstream on transfer pricing aspects of the COVID-19 pandemic, and economic downturn more generally, with the following description: "Economic downturns generate significant issues on MNEs as well as governments. Among these issues, economic downturn may have a relevant impact on the application of transfer pricing rules and the functioning of the arm's length principle. Current guidance on this topic is still scarce. Therefore, this work stream aims at analyzing the impact of economic downturns on transfer pricing and identify possible practical solutions for developing countries.". The Committee may thus approve that the work related to transfer pricing and COVID-19 should be conducted by the Subcommittee.

IV. Matters for Decision

14. As other Subcommittees are taking up some aspects, or work, on these issues as part of their work plan, a decision by the Committee is requested on taking the work forward through the integration of relevant issues identified on taxation and COVID-19 into the work plans of:
 - The Subcommittee on the Update of the United Nations Model Double Taxation Convention between Developed and Developing Countries and the Subcommittee on Taxation of the Digitalized and Globalized Economy for the issues related to the interpretation and application of tax treaties; and
 - The Subcommittee on Transfer Pricing for the issues related to the application of the arm's length principle.
 Should the Committee take this decision, the Committee could then request these Subcommittees to reflect in their reports to the 25th session on gaps and possible means of address.
15. By clarifying gaps not covered by existing guidance and reflecting the realities for developing countries the Committee will contribute in accelerating progress towards the Sustainable Development Goals and help developing countries build resilience to overcome future outbreaks.