



TaxNewsFlash

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KPMG report: FAQs for determining U.S. trade or business or permanent establishment (COVID-19)

The IRS on April 21, 2020, released a set of “frequently asked questions” (FAQs) providing that the performance of services or other activities in the United States by a nonresident alien individual, foreign corporation or a partnership in which either is a partner (Affected Person) will not be counted for up to 60 consecutive calendar days (beginning on or after February 1, 2020, and on or before April 1, 2020, with the precise period to be chosen by the Affected Person) in determining whether the individual or entity is engaged in a U.S. trade or business or has a U.S. permanent establishment (PE).

This rule only applies, however, if those activities would not have been conducted in the United States but for travel disruptions arising from the COVID-19 emergency, and the activities are conducted by one or more individuals “temporarily present” in the United States.

An individual is temporarily present in the U.S. during the relevant 60 day period only if the person is either a nonresident alien or a U.S. citizen or lawful permanent resident who has a tax home outside the United States in 2019 and expects to have a tax home outside the United States in 2020.

The [FAQs](#) provide guidance and relief from the effects of the coronavirus (COVID-19) pandemic.

Considering the FAQs in light of OECD, other countries’ guidance

The guidance from the IRS is generally consistent with an [analysis](#) released by the Organisation for Economic Cooperation and Development (OECD) Secretariat on April 3, 2020, with respect to a range of tax treaty-related matters arising from the impact of COVID-19. Specifically, in its analysis, the OECD Secretariat expressed its view that:

...considering the extraordinary nature of the COVID-19 crisis, and to the extent that it does not become the new norm over time, teleworking from home (i.e. the home office) would not create a PE for the business/employer, either because such activity lacks a sufficient degree of permanency or continuity or because, except through that one employee, the enterprise has no access or control over the home office.

The OECD Secretariat's analysis further stated that "[a]n employee's or agent's activity in a State is unlikely to be regarded as habitual if he or she is only working at home in that State for a short period because of force majeure and/or government directives extraordinarily impacting his or her normal routine."

Other countries have also issued similar guidance. For example, the Australian Taxation Office (ATO) issued [guidance](#) on March 20, 2020, stating that the impact of COVID-19 will not, by itself, result in a foreign company having an Australian PE if it meets all of the following: (1) the foreign incorporated company did not have a PE in Australia before the impacts of COVID-19; (2) there are no other changes in the company's circumstances; and (3) the unplanned presence of employees in Australia is the short-term result of them being temporarily relocated or restricted in their travel as a consequence of COVID-19.

Singapore's tax authority issued [guidance](#) essentially identical to that of the ATO on April 20, 2020. Likewise, on April 9, 2020, HM Revenue & Customs (HMRC) in the United Kingdom [published its views](#) regarding whether a non-UK tax resident individual or company may inadvertently create a UK PE by reason of individuals subject to COVID-19 related travel restrictions carrying out their duties in the UK. HMRC indicates that a non-resident company should not have a UK PE after a short period of time, as a degree of permanence or habit is required.

KPMG observation

The views expressed by tax authorities may provide taxpayers with helpful assurances, and tax professionals expect other countries to issue similar guidance in short order. Nonetheless, it remains to be seen how these issues will be addressed if COVID-19-related travel restrictions continue to remain in place for a longer period. Moreover, it is unclear how countries may handle these issues if travel is still limited in various ways as a result of the impact of COVID-19 after mandatory travel restrictions are lifted.

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