REPUBLIC OF THE PHILIPPINES
DEPARTMENT OF FINANCE
BUREAU OF INTERNAL REVENUE

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August 17, 2020

REVENUE MEMORANDUM CIRCULAR NO. 83-2020

Subject: Tax Implications of Measures Being Implemented to Prevent the Spread of New Coronavirus Disease 2019 (COVID-19) on Cross-Border Matters

To: All Internal Revenue Officials and Others Concerned

I. Objective

The government has been undertaking measures to prevent the spread of COVID-19, including but not limited to the imposition of quarantine measures such as the Enhanced Community Quarantine (ECQ), Modified Enhanced Community Quarantine (MECQ), and General Community Quarantine (GCQ), and travel restrictions. The continuing implementation of these measures has raised many international tax issues related to cross-border workers or individuals who are stranded or quarantined in a country that is not their country of residence, and to unintended creation of permanent establishment (PE) of foreign enterprises as a consequence of the extended stay of their employees in the Philippines. These issues have an impact on the application of the relevant treaty provisions and, ultimately, on the allocation of taxing rights between treaty partners.

This Circular is, therefore, issued to address the issues and concerns of taxpayers, especially the unplanned tax implications and potential new burdens, arising from the effects of COVID-19.

II. Guidelines

Income from Employment

Under the effective tax treaties of the Philippines with other countries, the residence State has an exclusive right to tax the employment income derived by its resident taxpayers except when the employment is exercised in another Contracting State, in which case, the latter State may tax the employment income subject to the provision of relief by the former State.

However, even if employment is exercised in the Philippines, the employment income will not be subject to tax in the Philippines if the following conditions concur:

1. the employee has *not* been present in the Philippines for more than 183 days (more than 120 days for residents of Poland; at least 90 days for residents of the United States of America) in aggregate in the year of income, fiscal year, calendar year, or any twelve-month period, depending on the applicable DTA;
2. his/her remuneration is paid to him/her by, or on behalf of, an employer that is *not* a resident of the Philippines; and

3. his/her remuneration is *not* deductible against the profits of a permanent establishment which the foreign employer has in the Philippines.

Conversely, the Philippines **may** tax the employment income of an individual who is a resident of another contracting state only if **any** of the following three tests is met:

1. the employee is present for more than 183 days (more than 120 days for residents of Poland; at least 90 days for residents of the United States of America) in the Philippines; or
2. the employer is a resident of the Philippines; or
3. a non-resident employer has a permanent establishment in the Philippines which bears the remuneration.

Special Tax Residency Rules

Due to continuing implementation of measures to prevent COVID-19, treaty provisions will not be strictly applied to mitigate potential tax burdens related to compliance with certain reporting and filing obligations, and the satisfaction of tax-related conditions.

Thus, where an individual is prevented from leaving the Philippines on his or her scheduled day of departure as a result of the travel restrictions imposed by the government as a safety measure to contain COVID-19, the individual will not be regarded as being present in the Philippines for tax residence purposes for the period after the scheduled day of departure. The Bureau will consider this as "force majeure" for the purpose of establishing such individual's tax residence, provided that he or she leaves the Philippines as soon as the circumstances would permit, such as when the travel restrictions and/or quarantine measures have been lifted.

Whether a taxpayer is a resident for tax purposes in the Philippines is a question of fact that requires consideration of all surrounding circumstances. Each case will be assessed and evaluated independently based on factual and unaltered evidence.

Illustrations

1. On January 1, 2020, Mr. X, a non-resident alien, was sent by his Singaporean employer to the Philippines to work for a domestic company for a period of 90 days. He was supposed to return to Singapore on March 31, 2020 but due to the travel restrictions and quarantine measures imposed by the Philippine government, Mr. X was prevented from leaving the country. He has since been renting an apartment in Makati City.

   Under the Philippines-Singapore tax treaty, the State where the employment is exercised may tax the employee on his or her employment income if the employee is present for more than 183 days in the host State.

   Given the exceptional nature of this case, the Philippines will relax the application of the relevant treaty provisions on employment income.

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Therefore, even if Mr. X is stranded in the Philippines for at least 94 days, thereby making his period of his stay in the Philippines more than 183 days, Mr. X's tax residence will not change due to such temporary dislocation. Singapore shall still exercise its exclusive right to tax the employment income of Mr. X, except when the domestic company appears to be the real employer of Mr. X or when his remuneration is borne by a permanent establishment of the Singaporean employer in the Philippines.

2. Ms. X is quarantined in Indonesia, her country of residence, and is temporarily out of work due to the COVID-19 crisis. She has a pending contract with her employer in Indonesia and was supposed to be in the Philippines starting 17 March 2020 for a seven-month audit and advisory assignment for a local client. However, due to the travel restrictions imposed by the Philippine government banning flights to the Philippines, she was unable to fly on the scheduled day of departure. Though not working, she continues to receive a wage subsidy from her employer in the Indonesia, which is equivalent to her monthly remuneration.

   Suppose the travel restrictions continue until the end of June 2020, the income of X, including paid leave, will still be subject to tax in the Philippines. In this case, the Bureau will consider the circumstances that would have occurred absent such travel restrictions.

3. Mr. Z was on holiday vacation in the Philippines when COVID-19 broke out and was thus prevented from leaving the country on the day of her scheduled departure. He usually works in the United Kingdom (UK) and has been on leave since arriving in the Philippines. During his extended stay in the Philippines, he received his monetized leave credits from his employer in the UK. Does Mr. X have to declare such income for income tax purposes in the Philippines?

   Since Mr. Z usually works in the UK and has only been on leave when he arrived in the Philippines, the income he receives from his foreign employer for paid leave is not from a Philippine source so he does not have to declare it in the Philippines.

   The same is true if he happens to be stranded in the Philippines for more than 183 days but gets paid while working remotely for his foreign employer, provided the following conditions are met:

   1. there are no other connections to the Philippines; and
   2. he should leave the country as soon as the circumstances would permit him to do so.

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Inadvertent Creation of PE

Home Office PE

Relevant Commentaries of the Organisation for Economic Co-operation and Development (OECD) on Article 5(1) of the OECD Model Convention explains that for a PE to exist, there must be a place of business with some degree of permanency (not merely temporary or transitory), and through which the business of an enterprise is wholly or partly carried on. The words "through which" must be given a wide meaning so as to apply to any situation where business activities are carried on at a particular location that is at the disposal of the enterprise for that purpose. Whether a location may be considered to be at the disposal of an enterprise in such a way that it may constitute a "place of business through which the business of that enterprise is wholly or partly carried on" will depend on that enterprise having the effective power to use that location as well as the extent of the presence of the enterprise at that location and the activities that it performs there.

Due to the COVID-19 pandemic crisis, employees of a foreign enterprise in the Philippines may have to work at home in compliance with government's imposition of strict home quarantine measures and not in compliance with the enterprise's requirement. The Bureau is, therefore, of the view that working from home would not create a PE of the foreign enterprise in the Philippines because the conduct of business activities thereat lacks a certain degree of permanency and the home office is not at the disposal of the foreign enterprise. The intermittent conduct of business of the foreign enterprise at the home office of its employees in the Philippines due to COVID-19 will not, in any way, make such home office a location at the disposal of the enterprise.

If, however, the home office is used on a continuous basis for carrying on the business activities of the foreign enterprise even after the COVID-19 crisis, and it is clear from the facts and circumstances that the enterprise has required the individual to use that location to carry on its business, the home office may be considered to be at the disposal of the enterprise.

Construction PE

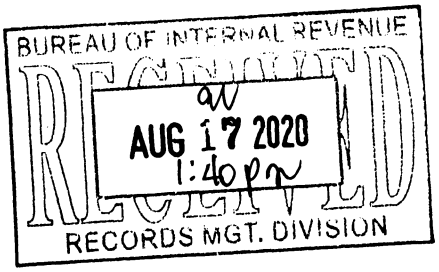
Paragraph 55 of the Commentary of the OECD on Article 5(3) of the OECD Model Convention states that a site should not be regarded as ceasing to exist when work is temporarily discontinued.

Therefore, temporary interruptions of construction activities due to the COVID-19 pandemic should be included in computing the duration of a site and in determining whether such construction site constitutes a PE.

Dependent Agent PE

Based on the Commentary of the OECD on Article 5(5) of the OECD Model Convention, for a "dependent agent PE" to apply, the following conditions must be met:

1. a person acts in a Contracting State on behalf of an enterprise;
2. in doing so, that person habitually concludes contracts, or habitually plays the principal role leading to the conclusion of contracts that are



routinely concluded without material modification by the enterprise (Note: it must be established that the presence of a foreign enterprise in the Philippines is *not* merely transitory), and
3. these contracts are either in the name of the enterprise or for the transfer of the ownership of, or for the granting of the right to use, property owned by that enterprise or that the enterprise has the right to use, or for the provision of services by that enterprise.

Thus, where an employee, partner or agent of a non-resident foreign corporation continues to be present in the Philippines and that presence is shown to result from travel restrictions related to COVID-19, the Bureau shall disregard such presence in the Philippines for income tax purposes for the company on whose behalf the employee, partner or agent has been acting. In other words, the extended period of stay of the employee, partner or agent shall not be considered in counting the taxable presence of the non-resident foreign corporation in the Philippines.

In sum, the effects of COVID-19 will not result in the creation of a PE if the following requirements are met:

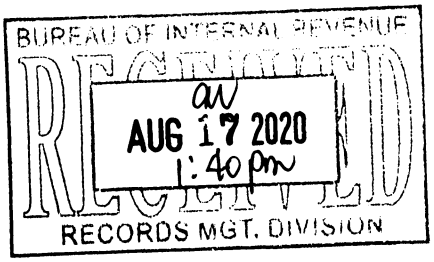
1. the non-resident foreign company did not have a permanent establishment in the Philippines before the effects of COVID-19;
2. there are no other changes in the company's circumstances save for the extended stay of its employee, partner or agent in the Philippines because of travel restrictions; and
3. the employee, partner or agent should leave the country as soon as the circumstances would permit.

A different approach will be applied, however, if the employee, partner or agent was habitually concluding contracts on behalf of enterprise in the Philippines before the COVID-19 crisis.

Illustration

Mr. X is an employee of ABC Company, a foreign corporation incorporated and based in Japan. He was in the Philippines for two-week vacation when the Philippine government imposed travel restrictions and was thus prevented from leaving the country. Part of his duties and obligations includes concluding contracts on behalf of his foreign employer. While in the Philippines during the travel restrictions, he would habitually conclude contracts on behalf of his employer. Does this result in the creation of a permanent establishment in the Philippines?

No. Where an employee of a foreign company would not have been present in the Philippines save for COVID-related travel restrictions, and in the performance of his/her duties in the Philippines, he/she might inadvertently create a permanent establishment of the foreign company that would be subject to corporate tax (e.g. by habitually concluding contracts on behalf of the foreign company in the Philippines and during the quarantine period), the Bureau is of the view that no such permanent establishment would be created. In this case, Mr. X's extended stay in the



Philippines is only a result of the COVID-19 pandemic, therefore, his habitual conclusion of contracts in the Philippines on behalf of ABC Company cannot be deemed to constitute a PE of such foreign company in the Philippines. Had it not been for the travel restrictions, Mr. X would have been regularly performing his duties in Japan.

The result would have been different had Mr. X previously concluded contracts in the name of ABC Company in the Philippines even before the COVID-19 crisis, or if Mr. X continues to do so after the lifting of travel restrictions and quarantine measures.

III. Documentary Requirements

In all cases where restrictions imposed by COVID-19 affect the applicability of Philippine tax laws and tax treaties on a taxpayer's tax position, records shall be maintained outlining the circumstances and submitted to the Bureau in support of the taxpayer's application for relief from double taxation.

In order to prove that the extended presence in the Philippines was due to COVID-related travel restrictions, the concerned individual or company shall submit to the satisfaction of the Bureau relevant documents, including but not limited to:

1. Authenticated sworn certification stating the relevant facts and circumstances of the bona fide presence of the employee in the Philippines;
2. Duly executed contract/s (must be consularized or apostillized if executed/signed in a foreign country);
3. Certified true copy of the confirmed booking or flight itinerary for the *original* flight;
4. Certified true copy of the confirmed booking or flight itinerary for the *re-booked* flight;
5. Certified copy of the travel advisory on the cancellation of flight issued by the airline company;
6. Certified true copy of boarding pass;
7. Certified true copy of the employee's passport, including blank pages thereof; and
8. Other documents that the Bureau shall deem necessary depending on the circumstances.

IV. Effectivity

This Circular shall take effect immediately.

All internal revenue officers and others concerned are hereby enjoined to give this Circular the widest dissemination and publicity possible.

CAESAR R. DULAY
Commissioner of Internal Revenue

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