

China allows tax treaty concession in COVID-19 period

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In brief

- » State Administration of Taxation (SAT) takes a concessional view on COVID-19-affected tax treaty terms, including:
- A home office does not constitute a permanent establishment (PE).
 - A shutdown time of an entire construction project can be excluded from the PE time.
 - Residency is not affected by the decisions made temporarily outside a habitual location.
 - Dual residency should not occur to an individual stranded in overseas.
 - Mutual agreement procedures can be resorted to in time of disputes.

Feedback

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In detail

China's SAT has recently responded to some hot questions regarding the implementation of tax treaty clauses during the COVID-19 period, as summarized below.

- » **Would a home office in China constitute a permanent establishment (PE) by virtue of the tax treaty clause like "fixed business place where an enterprise conducts all or part of the business" if a home office is temporality adopted during the COVID-19 period?**

No. If it is intermittent or occasional, it will not constitute a PE as "a fixed business place where an enterprise conducts all or part of its business".

- » **Would there be an agent PE - if someone temporarily works from home during the COVID-19 period, represents an overseas corporate employer to sign a contract in the name of the employer, by virtue of the tax treaty clause that "one Contracting State conducts activities on behalf of enterprises of the other Contracting State, and has the right and regularly exercises this right to sign contracts in the name of the enterprise"?**

No. If the activities are occasional and non-recurrent, it will not constitute an agent PE in China.

However, if the individual conducts activities on behalf of an overseas enterprise in China for a long term, or pursues it as a long-term practice to act on behalf of an overseas enterprise in China after the COVID-19 period, and has the right and regularly exercises this right to sign contracts in the name of the overseas enterprise, then the home office will constitute an agent PE.

- » **Can a shutdown period during the COVID-19 period be excluded from the duration of a construction project which has reached the construction PE time threshold?**

No. If a construction project constitutes a PE, its duration should be counted incessantly, and the suspension days should not be excluded.

However, if COVID-19 has led to the evacuation of the entire construction and management crew from the site, and the entire shutdown of the project, resulting in its project period exceeding the PE time threshold, the shutdown days (only due to the COVID-19) can be excluded.

- » **Would an enterprise's effective management body be deemed as re-located and its residency thus be changed, if its executives are making decisions away from their usual venue due to COVID-19?**

No. A decision-making location is determined based on its regular location, but not a temporary one due to such an event as the COVID-19 pandemic. Therefore, a tax residency should not be simply determined by the location of its effective management body at a time.

- » **How would dual residency be dealt with if an individual has to live elsewhere due to COVID-19 control measures and has become a resident in both places due to tax treaty clauses?**

A temporary stay elsewhere due to COVID-19 control measures usually should not cause a person to relocate his or her permanent residence or place of vital interests. Thus, it should not affect the residency under a tax treaty.

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» **Is there any means to resolve double taxation or disputes when the tax authority of a counterparty to a tax treaty has a different view or practice to the above-mentioned questions?**

The taxpayers can apply to SAT to initiate the mutual agreement procedures under the tax treaty, in accordance with the *"Measures for the Implementation of Mutual Agreement Procedures for Tax Treaties"* (Announcement No. 56, 2013, issued by SAT). SAT will lead the negotiation with the tax authority of the counterparty.

WTS observation

Expect the unexpected are the key words. SAT adopts a rather practical and concessional view to the implementation of tax treaty terms in a special period. In principle, it recognizes that force majeure factors should be excluded from *"habitually"* assessment, and should not affect tax treaty terms, except in habitually long-term cases. Thus, taxpayers can still prove their case by their extraordinary situations.

This concessional viewpoint is in line with the practice adopted by many countries (see our global update on *"Managing the impacts of COVID-19"* at <https://wts.com/global/insights/covid19>).

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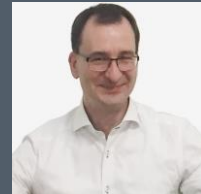
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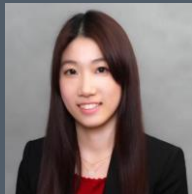
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