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OECD Secretariat Analysis of Tax Treaties and COVID-19: Useful Guidance in an Unusual Format

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On April 3, the OECD Secretariat published a useful analysis of several tax treaty interpretive issues raised by government-imposed travel restrictions and quarantine requirements implemented in response to the COVID-19 pandemic.[1] The analysis is clear, thoughtful, and undoubtedly useful for taxpayers and tax administrations. Given all the other demands on the Secretariat's time at the moment to work through the technical details of the two-pillar approach to address the tax challenges arising from the digitalization of the economy,[2] it is something of a wonder that the Secretariat was able to publish this document in such short order. Given the unprecedented nature of the global shelter-in-place orders, and that taxpayers need to make immediate decisions on their compliance obligations, the Secretariat's swift action certainly was appreciated.

To my knowledge, this is the first time that the OECD Secretariat has issued this type of issue-specific, time-sensitive treaty interpretive guidance essentially under the Secretariat's own authority. The COVID-19 guidance certainly is useful; the more interesting question from the perspective of the long-term development of international tax law is whether this type of Secretariat communication should continue as a common practice after the pandemic fades away.

First, a brief mention of the topics covered in the Secretariat analysis. The document addresses the impact of the inability of personnel to work from their normal place of activity in four technical areas: (i) the creation of a permanent establishment; (ii) residency status of a company (place of effective management); (iii) taxation of income of cross-border workers; and (iv) residence status of individuals. In very broad terms, the guidance generally provides that a tempo-

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[1] Available at www.oecd.org/coronavirus. U.S. Treasury has issued similar guidance for U.S. taxpayers. *See* Rev. Proc. 2020-20 (providing that, under certain circumstances, up to 60 consecutive calendar days of U.S. presence that are presumed to arise from travel disruptions caused by the COVID-19 emergency will not be counted for purposes of determining U.S. tax residency and for purposes of determining whether an individual qualifies for tax treaty benefits for income from personal services performed in the United States); *see also* Rev. Proc. 2020-27 (providing that qualification for exclusions from gross income under I.R.C. §911 will not be impacted as a result of days spent away from a foreign country due to the COVID-19 emergency based on certain departure dates); *see also* IRS, *Coronavirus Tax Relief: Information for Nonresident Aliens and Foreign Businesses Impacted by COVID-19 Travel Disruptions*, available at: https://www.irs.gov/newsroom/information-for-nonresident-aliens-and-foreign-businesses-impacted-by-covid-19-travel-disruptions (providing that certain U.S. business activities conducted by a nonresident alien or foreign corporation will not be counted for up to 60 consecutive calendar days in determining whether the individual or entity is engaged in a U.S. trade or business or has a U.S. permanent establishment, but only if those activities would not have been conducted in the United States but for travel disruptions arising from the COVID-19 emergency).

[2] OECD (2019), *Programme of Work to Develop a Consensus Solution to the Tax Challenges Arising from the Digitalisation of the Economy, OECD/G20 Inclusive Framework on BEPS*, OECD, Paris, https://www.oecd.org/tax/beps/programme-of-work-to-develop-a-consensus-solution-to-the-tax-challenges-arising-from-the-digitalisation-of-the-economy.htm; OECD (2020), *Statement by the OECD/G20 Inclusive Framework on BEPS on the Two-Pillar Approach to Address the Tax Challenges Arising from the Digitalisation of the Economy — January 2020*, OECD/G20 Inclusive Framework on BEPS, OECD, Paris, https://www.oecd.org/tax/beps/statement-by-the-oecd-g20-inclusive-framework-on-beps.htm.

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rary restriction on the place someone may exercise their employment or management responsibilities due to COVID-19 quarantine requirements should not change a tax treatment that is based on habitual or long-term activity. For example, the guidance provides that teleworking from home as a result of a government directive would not create a PE for the business/employer, either because that temporary condition lacks a sufficient degree of permanence or continuity, or because the enterprise has no access to or control over the individual's home office. Similarly, the activity of an employee or agent working from home for a short period because of a government directive extraordinarily impacting his/her normal routine is unlikely to trigger a dependent agent PE, based on the Commentary under the OECD Model Tax Convention (''MTC'') art. 5, which notes that a PE should exist only where the relevant activities have a certain degree of permanence and are not purely temporary or transitory. Further, the requirement in Article 5(5), that the agent must ''habitually'' exercise an authority to conclude contracts means that the presence maintained by the enterprise, should be more than merely transitory to create a PE.

Similarly, the Secretariat's analysis concludes that a temporary change in the location of the chief executive officer and other senior executives normally should not change the ''place of effective management'' for purposes of determining the residence status of a company, when the change of location is an extraordinary and temporary situation. With respect to subsidies paid by governments to keep employees on the payroll during the crisis, the guidance analogizes those payments to termination payments, and concludes that they should be attributable to the place where the employee otherwise would have worked. Finally, the Secretariat's paper addresses two cases dealing with the application of the treaty tie-breaker test of MTC art. 4 for residence of an individual. While the guidance notes that it is ''unlikely'' that the COVID-19 situation will affect the treaty residence position in most cases, the guidance does note that the analysis can be more complex when the individual returns to a prior home country during the period of travel restrictions, as the individual may have stronger attachments to the prior home country for purposes of applying the tie-breaker rules. In all cases, the analysis assumes that the period of stay at the unexpected place is caused by governmental action, and that the individual would revert to his/her normal location or travel schedule after the restrictions end.

On, then, to the question of whether this type of communication should become a feature of OECD guidance in the future. The document itself is careful to state the limited authority under which it was published. It provides: ''[t]his paper is published under the responsibility of the Secretary-General of the OECD. The opinions expressed and the arguments employed herein do not necessarily reflect the official views of OECD member countries.'' Taxpayers can take from this that the member states did not sign off on the document. That said, there is no reason to believe that member states would disagree with the analysis. The paper expressly notes that the Secretariat acted ''[a]t the request of concerned countries.''

While the OECD exercises great influence over international tax standards and practice through publishing (and revising) the MTC and its Commentary, the OECD itself does not enact law. The text of the MTC itself provides only a model to be adopted (or not) by states negotiating tax treaties. The authority of the MTC derives from the fact that it was issued as an OECD Council Recommendation. A Council Recommendation is a formal member-approved instrument, which is supposed to reflect a political (though not a legal) commitment on the part of the member state governments to follow the recommendations.[3] That agreement is expressed in the introduction to the MTC, where it is stated that member countries, when concluding or revising bilateral treaties, should conform to the MTC as interpreted by the Commentary, and that their tax authorities should follow the Commentary, as amended from time to time, when applying and interpreting provisions of their treaties that are based on the MTC.[4]

In large part because the Commentary indeed is amended from time to time, there is much debate over the status of the Commentary as controlling guidance to interpret treaties, especially where the Commentary has been amended after the treaty had been negotiated. The U.S. approach is not atypical. United States federal courts have referred to the OECD Commentary as guidance to interpret tax treaty provisions.[5] In *Taisei Fire & Marine Ins.*, for example, the Tax Court

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[3] *See* https://legalinstruments.oecd.org/en/general-information. *See also* https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0292 (OECD Council Recommendation on the Model Tax Convention).

[4] OECD (2017), *Model Tax on Income and on Capital: Condensed Version 2017*, I.1 ¶ 3, OECD Publishing.

[5] *Taisei Fire & Marine Ins. Co., Ltd.*, 104 TC 535, 547–548 (1995) (interpreting Japanese treaty with reference to OECD Model Treaty Commentary); *North West Life Assurance Co. of Canada v. Commissioner,* 107 T.C. 363, 378 (1996) (stating that OECD Commentary provides ''helpful guidance'' in interpreting a treaty); Rev. Rul. 86-145 (interpreting U.K. treaty based on commentary on OECD Model Treaty Commentary), Rev. Rul. 75-131 (interpreting French treaty based on OECD Model Treaty Commentary); *see also Nat'l Westminster Bank, PLC v. United States*, 512 F.3d 1347 (Fed. Cir. 2008).

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referred to the 1977 Commentary as interpretative guidance even for a treaty ratified in 1971.[6]

Besides the Commentary, the OECD has published quite a variety of other treaty interpretive materials. Given the nature of the OECD as a multilateral organization operating under consensus principles, but not actually holding legislative authority, there can be considerable room for debate as to the status of OECD statements as falling somewhere along the continuum between, on one end, binding interpretive authority and, on the other end, simply the views of respected tax professionals. This ambiguity has become greater in the era of the Inclusive Framework, as there is even less clarity in the case of Inclusive Framework documents as to what level of consensus had been reached and exactly what authority the Inclusive Framework members intended the documents to carry.

Of the various past types of OECD tax treaty interpretation besides the Commentary, the Transfer Pricing Guidelines (''TPG'') come closest to being a body of authoritative guidance. The TPG themselves are also the subject of an OECD Council Recommendation.[7] The Article 9 Commentary references the TPG and cites it as representing internationally agreed principles and as providing guidelines for the application of the arm's-length principle.[8] Notably, and more significantly, some national legislatures have incorporated the TPG into national law.[9] For example, Irish law makes explicit reference to the TPG, including express references to guidance issued by the OECD in ''Inclusive Framework on Base Erosion and Profit Shifting'' after the publication of the 2017 TPG.[10]

Over the years, the OECD has published numerous reports endeavoring to identify issues and promote the development of consistent treaty interpretations around the world as a consensus view of the member state delegates. Volume II of the MTC contains over 20 reports related to the MTC which were adopted after 1977, generally either by the OECD Council or the Committee on Fiscal Affairs, and which resulted in changes to the text of the Articles of the MTC or the Commentary. The introduction to Volume II says: ''Whilst these reports provide a useful background to the Articles and the Commentary, it should be noted that, unlike these, they are not periodically updated and may therefore no longer reflect the views of the Committee on Fiscal Affairs.'' These reports fall somewhat lower in the hierarchy of precedential guidance than does the Commentary.

In some cases, those reports do not necessarily interpret the then existing MTC, but guide changes to the MTC and the interpretation of the new standards once they are adopted by states in their bilateral treaties. In that case, depending on how direct the line is drawn between the report and eventual Commentary changes, they might be regarded as ''supplementary means of interpretation'' under general principles of international treaty interpretation.[11] One example of this might be the Report on the Application and Interpretation of Article 24 (Non-Discrimination), adopted by the CFA on June 20, 2008, which discussed issues and recommended specific Commentary changes, which were adopted as part of the 2008 update to the Model.

In all of the cases of OECD guidance mentioned so far, the documents were issued by the Committee on Fiscal Affairs and/or the OECD Council after full deliberation and endorsement by the member states. In the absence of expressed alternative positions or reservations, taxpayers could understand that the positions expressed had been accepted as a consensus view of the OECD member state delegates.

In some other cases, the OECD has issued very substantive reports that have not gone through the full process of deliberation and endorsement by all member state delegates. Due to the absence of full delegate review, these documents would fall further down the spectrum of interpretive guidance in the nature of ''soft law.''

These reports typically express the Secretariat's or some other group's interpretation of how OECD standards apply to particular issues. One example was Chapter 4 of the 2005 paper ''The Taxation of Em-

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[6] The issue in *Taisei Fire & Marine Ins*. was whether the U.S. agent was an ''agent of an independent status'' and, therefore, the U.S. agent's activities should not give rise to a U.S. PE. The U.S.-Japan Tax Treaty did not define ''agent of an independent status.'' The court found ''the relevant provisions of the convention are not only based upon, but are duplicative of, Article 5, comments 4 and 5, of the 1963 O.E.C.D. Draft [model] Convention.'' The court took note of evidence relating back to the League of Nations's work on some of the first international tax treaty models in which an ''agent of independent status'' was understood to be independent from both a legal and an economic perspective, and on that basis the court relied on similar text in the 1977 MTC Commentary to interpret the 1971 U.S.-Japan tax treaty.

[7] https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0279.

[8] OECD (2017), *Model Tax on Income and on Capital: Condensed Version 2017*, C(9)-1, ¶ 1, OECD Publishing.

[9] The OECD publishes country-specific transfer pricing profiles (*see* https://www.oecd.org/tax/transfer-pricing/transfer-pricing-country-profiles.htm) which specify whether a country's domestic law specifically references the TPG.

[10] Section 835C(4) of the Taxes Consolidation Act 1997 (as amended by Finance Act 2019). The Act also allows for additional subsequent guidance ''published by the OECD'' (no mention of the Inclusive Framework here) to supplement the legislation by Ministerial Order.

[11] The Vienna Convention on the Law of Treaties (United Nations Treaty Series, vol. 1155, p. 331, art. 32).

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ployee Stock Options,'' which covered transfer pricing issues and was written by the Secretariat after discussion with delegates, but was published as part of a Secretariat document.[12] Chapter 3 of the paper, which dealt with treaty issues, presumably was grounded in country views, in that its content was approved by the Committee on Fiscal Affairs in 2004 and its conclusions led to actual changes to the MTC.

Somewhat similar was the 2005 report, ''E-commerce: Transfer Pricing and Business Profits Taxation.''[13] Part I discussed the application of the TPG to e-commerce situations and was prepared by a subgroup of WP6. Part II incorporated the final report of the Technical Advisory Group on the application of treaty provisions to e-commerce activities, which was a group comprised of member state delegates, nonmember state delegates, and business representatives. While the publication of these documents communicates a degree of endorsement by the OECD, in neither case was the report itself subject to a full member state review and debate process similar to what is required for Commentary changes.

The COVID-19 analysis document is different from all of these examples. Compared to the other Secretariat documents mentioned above, this analysis must necessarily have gone through less review and endorsement by member state delegates given the speed with which it was issued. So if this is law, it is ''soft law'' of the most gentle and billowy variety.

U.S. tax practice includes a variety of official statements of varying degrees of authority or binding effect, but none of them is a particularly good analogue for the OECD COVID-19 analysis document. A revenue ruling is an ''official interpretation by the IRS of the Internal Revenue Code.''[14] The courts have ''mapped out a position that considers revenue rulings, but does not afford them binding precedence.''[15] However, while revenue rulings may not be used as binding precedent, the Internal Revenue Manual suggests that IRS employees are bound by these rulings,[16] and procedural Treasury Regulations state that revenue rulings ''are published to provide precedents to be used in the disposition of other cases, and may be cited and relied upon for that purpose.''[17] The body of guidance provided to taxpayers through the long history of revenue rulings is a core part of U.S. tax administration. A revenue ruling thus is given more precedential weight in U.S. tax jurisprudence than the Secretariat COVID-19 document can carry.

Determinations issued with respect to a specific taxpayer may be a better analogue. In general, while a private ruling, determination letter, technical advice memorandum, or Chief Counsel Advice may not be used or cited as precedent, a court is ''entitled to give them persuasive authority because they do reveal the interpretation put upon the statute by the agency charged with the responsibility of administering the revenue laws.''[18] These private determinations are not intended to provide the same general interpretive guidance as the Secretariat's COVID-19 analysis, however.

At the most modest end of the formality spectrum, IRS Announcements and Notices don't carry the weight that the Secretariat presumably expects the COVID-19 analysis to carry.[19]

Should the OECD develop a practice of issuing this sort of Secretariat-originated guidance? The COVID-19 analysis is coherent, and one certainly hopes it will be persuasive. If a principal role of the OECD is to encourage voluntarily harmonized approaches by governments, this sort of document may be useful for that purpose, even if it does not rise to the level of constituting a supplementary means of interpretation under international tax treaty law. Despite the central role that treaties play in the international tax framework, there is remarkably little guidance under U.S. law on treaty interpretation issues, and I suspect the same is true in the domestic laws of many other major trading nations. Accordingly, another point of view could be that any guidance is better than no guidance, even if the analysis is not technically binding precedent.

Whether establishing a regular practice of issuing this sort of guidance is conceivable depends on what types of topics, and their degree of difficulty, the Secretariat would be willing to tackle. If the Secretariat would consider it appropriate to give this sort of guid-

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[12] https://www.oecd-ilibrary.org/taxation/the-taxation-of-employee-stock-options_9789264012493-en.

[13] https://read.oecd-ilibrary.org/taxation/e-commerce-transfer-pricing-and-business-profits-taxation_9789264007222-en#page2.

[14] https://www.irs.gov/newsroom/understanding-irs-guidance-a-brief-primer.

[15] *Vons Companies Inc. v. United States,* 51 Fed. Ct. Cl. 1 (2001), *citing Int'l Bus. Mach. Corp. v. United States*, 38 Fed. Cl. 661, 675 (1997); *Ridenour v. United States*, 3 Cl. Ct. 128, 137 (1983) (''Although revenue rulings do not constitute 'binding precedent,' they provide some guidance as to the correct interpretation of the Internal Revenue Code'').

[16] IRM 32.2.2.10 (08-11-04) (''Revenue rulings provide precedents to be used in the disposition of other cases and may be cited and relied upon for that purpose.'').

[17] Treas. Reg. §601.601(d)(2)(v)(d).

[18] *Davis v. Commissioner*, 716 F.3d 560 (11th Cir. 2013), n.26, *citing Hanover Bank v. Commissioner*, 369 U.S. 672, 687 (1962); *see* I.R.C. §6110(k)(3).

[19] An ''Announcement'' is a public pronouncement that has only immediate or short-term value which can be used to summarize the law or regulations without making any substantive interpretation. A ''Notice'' is a public pronouncement that may contain guidance that involves substantive interpretations of the Internal Revenue Code or other provisions of the law.

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ance only on the most obvious cases, sort of an OECD Secretariat equivalent to the IRS ''comfort ruling'' which the Service no longer will issue, it may not be worth diverting the Secretariat's time and attention from other more important projects. On the other hand, if the issues addressed are more challenging, and would act to resolve real uncertainties (whether digital services taxes are ''covered taxes'' under MTC Article 2, for example), there could be real value to the OECD Secretariat seeking to develop that body of soft law.

On the harder questions, of course, the Secretariat will be constrained in offering interpretive guidance without consultation with country delegates. Further, one suspects that guidance would not advance the interests of the orderly administration of the international tax law if it were susceptible to disavowal by member states on the basis that it was issued without a consensus endorsement of the relevant member state delegates (the roster of which itself is a question in the Inclusive Framework era).

The best guidance on treaty interpretation connects the treaty text with the policy underlying the treaty provision, in order to apply an interpretation that implements the policy intention of the treaty negotiators (or at least the MTC draftspeople). Taxpayers value guidance on which they can rely — i.e., guidance which also binds (or as close to that as possible) tax administrations as well. For those cases, it would seem that the OECD's practice of periodically revising the Commentary to address emerging and challenging issues will remain at the core of the OECD interpretive process.

For now, taxpayers can express gratitude to the Secretariat for providing useful guidance on an important topic in, most importantly, a timely manner.

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