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GMS Flash Alert

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Australia – Updated Guidance on Temporarily Displaced Employees Working in Australia

The Australian Taxation Office (ATO) has provided updated guidance on the tax implications for temporarily displaced employees and their employers due to the COVID-19 pandemic.[1]

The updated guidance outlines factors that should be considered in determining the source of an employee's employment income. These factors will be crucial in establishing whether employees are subject to Australian income tax on that employment income, and consequently what the tax reporting and withholding obligations will be for employers.

Where it is determined that the employment income is not Australian source, the employment income will not be taxable in Australia provided the individual is not an Australian tax resident.

WHY THIS MATTERS

Organisations that have employees who are temporarily present in Australia due to COVID-19 need to understand what roles those employees have and what services they are performing in Australia, in order to determine whether or not they are taxable in Australia. As outlined in the ATO guidance, this analysis is fact-dependent and focused on the underlying principles of the source of the income, with the overlay of double taxation treaties potentially overriding and changing the outcome in certain cases.

Employers need to familiarise themselves with the new guidance and seek advice to understand and manage their employment tax and reporting obligations for each impacted employee. This includes not only PAYG tax withholding, but other related employer obligations such as Single-Touch Payroll reporting, Fringe Benefits Tax, Superannuation Guarantee, State Payroll Tax and Workers Compensation.

Context

The COVID-19 pandemic has caused many Australians who had been living overseas to return to Australia temporarily.

For employees who are working remotely in Australia solely as a result of COVID-19, the ATO issued initial guidance on their taxability in Australia in March.[2] This guidance provided that where a **non-resident** employee who usually works overseas but is performing that **same employment** in Australia as a result of COVID-19 for a short-term period (three months or less), the employment income will not be taxable in Australia.

With the current policy measures in place to combat the pandemic, many employees are approaching, or have crossed, the three-month threshold. In consequence, on Thursday, 23 April, the ATO released further commentary building on the earlier guidance concerning these employees who are not considered tax residents of Australia.

Determining Source of Employment Income

Earning Employment Income while in Australia Temporarily

For remote working arrangements that last longer than three months, the ATO has advised that to determine if the employment has a **connection to Australia,** all the employee's facts and circumstances will need to be considered. The ATO have outlined the key factors most relevant in determining the source of employment income. Per the guidance, this requires specific consideration as to whether:

- the terms and conditions of the employment contract change;
- the nature of the employee's employment activities change;
- the employee commences performing some work for an Australian entity affiliated with his or her employer;
- the economic impact or result of the employee's work shifts to Australia;
- the employee's economic employer – the entity to which he or she is providing services – is in Australia (as detailed in Taxation Ruling 2013/1);
- the employee performs work with Australian clients;
- the performance of the employee's work is otherwise wholly or partly dependent upon the employee being physically present in Australia to complete it;
- the employee's permanent place of work becomes Australia; and
- the employee's intention towards Australia changes.

The updated guidance outlines how in some, albeit limited, situations, the ATO is open to considering that an employee's employment income can continue to be foreign sourced. For such employees, this would be the case in the following scenario:

- the only thing that has changed is that they now exercise their employment from Australia as a result of COVID-19;
- there are no other connections to Australia; and
- they intend to leave Australia as soon as they are able to do so.

The guidance also refers to Australia's double taxation agreements, and specifically the 183-day exception in the Dependent Personal Services Article, with a focus on the economic employer concept as requiring careful consideration.

KPMG NOTE

Implications of This Guidance

The guidance from the ATO may be welcome by organisations that are struggling to apply fundamental sourcing rules to the current extra ordinary circumstances. While minor and incidental work for a related Australian entity may be tolerated, anything above this could be considered an integration of that employee within the Australian business. This would expose the employee to the risk that his employment income may be considered Australian sourced.

The guidance may also have implications for employees based overseas who have historically carried out a portion of their work for an Australian entity within the group, such as a Global or Regional executive role. In circumstances such as these, there may be uncertainty as to whether or not income is sourced to Australia. For further clarity the ATO is encouraging taxpayers to apply for a Ruling from the ATO for confirmation.

Further, employers should also consider how the application of the sourcing principles in this guidance may impact workers displaced outside of Australia. In some instances this may lead to ongoing Australian tax obligations for employees working remotely overseas for their Australian employers due to COVID-19.

Other Employer Obligations

While the guidance from the ATO on individual income taxation is timely, employers of displaced employees in Australia are yet to receive guidance concerning other related employer obligations such as:

- Superannuation Guarantee
- Payroll Tax; and
- Workers Compensation

For superannuation obligations, employers may be entitled to an exemption if the employee's usual country of residence has a totalisation agreement with Australia regarding social security. If contributions to that country's social security system continue while the employee is working temporarily in Australia, a Certificate of Coverage should be requested from the relevant home country tax authorities to document this.

Steps to Consider

Applying the ATO guidance is not straightforward and is very much dependent on the facts. Employers will need to thoroughly understand the circumstances of their displaced employees in Australia in order to meet their employer obligations.

The KPMG global mobility team in Australia remains in discussions with the ATO and the respective tax authorities on the application of guidance to date. The ATO is open to providing further clarity on other employee-related COVID-19 issues such as residency, as well as updating existing guidance based on feedback on common scenarios being faced by displaced individuals and their employers.

FOOTNOTES:

1 More information is available on the ATO website: https://www.ato.gov.au/general/covid-19/covid-19-frequently-asked-questions/individuals-frequently-asked-questions/ .

2 For prior coverage, see GMS *Flash Alert* 2020-098 (23 March 2020). Also see the following issues of GMS *Flash Alert*: 2020-113 (25 March 2020) and 2020-112 (25 March 2020).

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