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When Workers Permanently Establish Themselves at Home

John L. Harrington[*]
Dentons U.S. LLP
Washington, D.C.

I. INTRODUCTION: 'THE TIMES THEY ARE A-CHANGING'

A variety of tax issues arise when a company employs an individual who works in another country. The company has to consider the impact of its home country tax rules and those of the country where the worker is located. The worker has to take into account the rules of his or her country of residence and the country where the employment takes place, especially if the two differ. Still, in a stable and predictable environment, the company and individual can weigh the costs and benefits of such an arrangement and arrive at an acceptable (or at least tolerable) balance from a compensatory, filing, and tax burden standpoint.

Stability and predictability, however, are so pre-Covid. The traditional way of doing things has been upset in many ways by the Covid-19 epidemic, and the location and activities of a company's workers are one more aspect. Some of the changes in work patterns may be short-term, temporary arrangements, after which companies and workers revert to prior practice as soon as they can. Others may be long-term. For example, even when things have ostensibly returned to normal, many people will want to continue to work from home at least a substantial percentage of the time.

I have seen surveys in which many people claim they work as well, if not better, from home than in the office. I view those assertions the same way I view surveys that show the percentage of people who think they are good at multi-tasking: a helpful indication of the respondents' subjective views as opposed to a reliable indication of objective reality. Personally, I found working from home on a long-term but indefinite basis monotonous; Morrissey's ''Every Day Is Like Sunday'' was stuck in my head for weeks if not months. Even still, lines from Bob Dylan's ''My Back Pages,'' with its recounting of past actions and views with a potent combination of perplexity, chagrin, disdain, doubt, and wistfulness, keep popping into my head. One of the things that ''My Back Pages'' reminds me of is that we have had to cope with periods of large technological and social change before, and being clear-eyed about prior experiences is far better than simply ignoring or copying them.

But back to the subject at hand. Ideally, when a worker who was performing activities for a company in a particular country wants to ''move'' the performance of those activities to another country, the company and worker would undertake a cost-benefit analysis and determine if the change in place of performance warrants a change in duties or compensation. This is more easily remembered and accomplished when the move is intentional and formal, but it is also needed when the move happens due to fortuitous events or a desire to provide flexibility to valued workers. Accordingly, a company needs to monitor how and where its workers are performing their duties. Changes — intentional or not — regarding location of performance should be noted and shared with those who have payroll and tax responsibilities

[*] John Harrington is the co-leader of Dentons' U.S. Tax practice. He advises clients on inbound and outbound transactional and compliance issues; international tax legislative, regulatory and treaty matters; and a variety of domestic tax issues. John has extensive experience in dealing with the foreign tax credit, with Subpart F, and cross-border activities of companies and individuals and with other international tax issues.

as early in the process as possible. Once a working arrangement has been established and accepted by the worker and those with whom he or she works, it can be costly to change that arrangement, financially and emotionally, even if the desired change would have been acceptable to the parties initially.

II. DEALING WITH A CHANGE IN WORKER LOCATION GENERALLY

Once a worker chooses or is forced by circumstances to work in a new location, the company should conduct inquiries as towhat the ramifications will be. Tax consequences to the company will be only one of those considerations. Since TMIJ is an international publication, this article will focus only on the international tax consequences. Similarly, although this article is focused on the tax consequences to the company, it will note some such consequences to the worker as well. Given the complexity of the topic and all of the variations, this article will focus on national-level taxes, and not subnational ones like U.S. state and local taxes, even if those are too noble to neglect.

There is a lot of guidance regarding when a company has a taxable presence or permanent establishment (PE) in a country due to the presence and actions of a worker. Quite understandably, nearly all of that guidance, other than recent temporary relief measures, is premised on the assumption that the worker is in that particular location because the company wanted it so or, in the case of a particularly sought-after employee, determined it was worth having a presence in that location to obtain or retain the employee. Little if any of this guidance has taken into account a remote working world, one in which an employee either chose to work in a particular location and the company accepted it or was forced to work in a particular location due to events beyond both parties' control. These scenarios have always existed, but they were aberrations rather than a ''normal'' way of working.

When a worker's location changes from one country to another, the first line of inquiry should be determining how the tax rules of the new country apply. The company needs to know not just the potential tax burden it faces in the new country but also its filing obligations and the timing of those filing obligations. And the worker will have to determine his or her tax and filing obligations, as will the company too if it has agreed to provide the worker with a tax-neutral compensation package.

The next line of inquiry should be determining whether there are tax treaties or other international agreements that affect (and hopefully mitigate) the potential tax burden imposed by the new country. Although there will be some overlap, the company and worker may need to take into account different agreements. For the company, the relevant agreements would generally be any tax treaty, payroll tax coordination agreement (like a Social Security Totalization Agreement), or other tax-related agreements between its country of residence and the new place of performance of the worker's services. The worker would look to the tax treaty, payroll tax coordination agreement, or other international agreement between the jurisdiction of the worker's tax residence and the new country, if those two differ.

Third, since the country in which the worker was performing services will be seeing a reduction in its tax base, the company will need to determine the tax consequences (e.g., potential termination of a branch or PE), and the worker will need to take into account the effect of the move, especially if the former country is the worker's place of tax residence.

Given all of these issues and implications, the process of deciding whether to let individuals work from home or change locations needs to include the company's tax department. Decisions about whether to open a new office, form a new entity, or do business in a new country are usually recognized as having tax implications, and so the business people involved in the decision usually know that they should seek tax input (although whether they actually do so is another matter). However, whether to let an employee work from home — even when ''home'' is in a different country — may not immediately raise the same kind of tax concerns to business people who are otherwise too serious to fool. Even if tax experts cannot be involved before the decision is made, ttheir involvement soon after implementation will allow for modifications to the new arrangement early in the process. For example, an arrangement that creates tax problems for the company if it is long-term might be modified while the tax provisions applicable to short-term arrangements still apply.

III. DEALING WITH A CHANGE IN WORKER LOCATION MORE SPECIFICALLY

To make this discussion less abstract, let's illustrate the relevant issues through hypotheticals, using these ideas as our maps. Assume that a company (''Company'') is treated as a corporation for U.S. tax purposes. Company has a worker (''Employee'') who currently works in one country (''Previous Country'') and is planning to work from his or her home in a new country (''New Country''). Employee will be performing services on Company's behalf on a full-time basis for the foreseeable future. In the interest of simplicity, this article will not address whether Employee

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is actually an employee under the laws of Previous Country and/or New Country although that is clearly an important issue that Company would need to address in real life. Similarly, except when it matters for purposes of discussion, this article will not distinguish the various reasons why Employee might change the place of performance of services, e.g., whether Employee had a pre-existing residence in New Country from which he or she chooses to (or must) work or whether Employee had to leave Previous Country and set up a new residence in New Country. Except where otherwise noted (e.g., in the discussion of the force of attraction principle), this article also will assume that Company has no existing office or other taxable presence in New Country. Finally, this article will assume that Employee works from his or her own residence and does not work out of premises owned or leased by Company.

A. Tax Obligations in New Country

1. Company

As mentioned above, the first question for Company will be its tax obligations under New Country's tax laws if Employee, who currently works in Previous Country, begins working out of his or her residence in New Country.

a. Absence of a Tax Treaty Between Company's Country of Residence and New Country

In the absence of an income tax treaty (or other tax-related international agreement) between Company's country of tax residence (''Country R'') and New Country, Company will have to comply with the local tax requirements of New Country's tax laws. If Employee's presence in New Country causes Company to have a taxable presence there, then it will have to register for tax purposes in New Country, accordingly filing tax returns and paying income taxes and payroll taxes to New Country with respect to Employee.

Company's obligations will depend on both the specific working arrangement and the specific country.

(1) If New Country Is the United States

In a non-treaty context, if New Country is the United States, the relevant question is whether Employee's activities cause Company to be considered engaged in the conduct of a trade or business in the United States (as defined in §864(b)).[1] Whether Company is engaged in the conduct of a trade or business depends on the specific activities in which Employee and other agents of Company engage. Accordingly, the strength of the conclusion, if not the conclusion itself, will change as the facts change.

The general test for whether a foreign corporation is engaged in the conduct of a U.S. trade or business is whether the corporation's activities fall within the three-word phrase of ''considerable, continuous, and regular.'' Having a person working full-time certainly seems to meet any reasonable definition of ''continuous'' and ''regular''; accordingly, the question is really whether the activities are ''considerable.'' In this regard, the nature of the services performed by Employee are key. If Employee is part of a back-office function or otherwise operates as part of a cost center, rather than a revenue-generating part of the business, Employee's activities could be viewed as ''ministerial'' or ''clerical'' and as not causing Company to be engaged in a U.S. trade of business under the *Scottish American Investment Co. v. Commissioner*[2] and *Spermacet Whaling & Shipping Co. v. Commissioner*[3] line of cases. There are lines of authority for other limited sets of activities, such as acting as a purchasing agent.

The more closely tied Employee is to profit-making activity, however, the harder it will be to argue that the activities do not constitute the conduct of a U.S. trade or business. In particular, if Employee provides services directly to customers or clients as part of Company's business, those activities would almost certainly cause Company to be considered engaged in the conduct of a U.S. trade or business, given that §864(b)(1) generally treats the performance of personal services for a foreign employer as the conduct of a U.S. trade or business, subject to the 90-day and $3,000 thresholds unlikely to be of use in this scenario.

Company would be subject to U.S. corporate income tax under §882, and the branch profits tax under §884, but only on income that is effectively connected with the conduct of the trade or business within the United States (''ECI''). In that regard, whether Company would have ECI triggering U.S. federal corporate income tax filing and payment requirements depends on the nature of the work Employee performs (i.e., whether there is income attributable to Employee's activities). Company will want to err on the side of filing U.S. tax returns because the failure to file will cause it to lose relevant deductions in the event its position is challenged by the IRS.[4]

There is a danger lurking if Company has other U.S.-source income and is not currently engaged in

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[1] All section references are to the Internal Revenue Code, as amended, unless otherwise indicated.

[2] 12 T.C. 49 (1949)

[3] 30 T.C. 618, 633-34 (1958), *aff'd*, 281 F.2d 646 (6th Cir. 1960).

[4] *See* §864(c)(2).

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the conduct of a U.S. trade or business. If Employee's activities cause Company now to be engaged in the conduct of a U.S. trade or business, the residual ''force of attraction'' rule of §864(c)(3) can come into play. Sales income that had been structured not to be ECI may now be ECI due to the U.S. trade or business threshold being tripped. Thus, Company needs to evaluate not just the potential U.S. tax consequences that Employee's activities directly create, but also those that it indirectly creates.

(2) If New Country Is Not the United States

Some countries use the PE threshold in their domestic law, in which case Company's analysis would be similar to that described in III.A.2., below, taking into account the specifics of New Country law. Still other countries are more reliant on withholding taxes, often imposing withholding tax on payments to nonresidents rather than seeking to inquire whether the nonresident physically earned income in that country. In any case, absent a tax treaty or other tax agreement limiting New Country's taxation rights, Company is stuck with whatever filing and payment obligations New Country's domestic law imposes.

b. Tax Treaty Between Country R and New Country

If Company is eligible for the benefits of an income tax treaty between Country R and New Country, it generally should not be subject to New Country tax on the income from Employee's activities — unless those activities result in a PE in New Country. As discussed above in III.A.1., regarding New Country domestic law, it is important to look to the specifics of the Country R-New Country income tax treaty and its definition of a PE. Although most countries' treaties generally follow the OECD Model Tax Convention on Income and on Capital (''OECD Model'') or the United Nations Model Double Taxation Convention between Developed and Developing Countries (''UN Model''), deviations to accommodate particular country concerns are common. Indeed, the models themselves often permit alternative provisions, sometimes with the commentary for the models specifically identifying possible alternative provisions. Further, the language of the models has changed over time, creating variations among treaties of different vintages, even if they carefully followed the OECD Model or UN Model extant at the time.

As a general matter, though, Employee's presence in New Country could cause Company to have a PE under any of three possibilities.

(1) Fixed Place of Business Through Which Company's Business Is Carried On

The PE article in tax treaties typically has language like this: ''For the purposes of this Convention, the term 'permanent establishment' means a fixed place of business through which the business of an enterprise is wholly or partly carried on.''[5] The PE article typically has lengthy elaborations, both expanding and contracting that language, but this language is the basic starting point.

Clearly, if Company rents or owns space that Employee uses, Company would have a fixed place of business. Where the fixed place from which Employee operates is Employee's own residence, however, the question arises as to whether the fixed place of business is Company's. In this case, the interpretations of New Country tax authority are key, at least as an initial matter. For example, the Danish tax authorities appear to have no problem finding Employee's home to be a PE.[6] In contrast, in the United States, the argument is often made that although the residence may be fixed and permanent and Company's business may be conducted there, it is not really at the disposal of Company, any more than a hotel room would be. Regardless of where New Country falls in this spectrum of interpretation, the key is the specific wording of the PE article. Seemingly minor differences in wording can make a big difference in outcomes.

Depending on how much weight the tax authority and courts in New Country give to treaty explanations — especially those issued after the treaty was negotiated — Company and Employee will need to consider the commentary to the relevant model used by New Country or the explanations issued by the New Country tax authority (such as the technical explanations issued by the U.S. Treasury Department). For example, the commentary to the OECD Model has been evolving along with Article 5 of the OECD Model itself to make it easier for countries to find a PE. Indeed, reading through the various changes in commentary is a bit like memorizing the politics of ancient history.

The most recent OECD commentary implies that a company can have a ''place of business'' in a country fairly easily:

> The term ''place of business'' covers any premises, facilities or installations used for carrying on the business of the enterprise whether or not they are used exclusively for that purpose. A place of business may also exist where no premises are available or required for carrying on the business of the enterprise and it simply has a certain amount of space at its disposal. It is immaterial whether the premises, facilities or installations are owned or rented by or are otherwise at the disposal of the en-

[5] Article 5(1) of the U.S. Model, the OECD Model, and the UN Model.

[6] *See, e.g., Denmark Tax Agency Explains Employee Home Office as Permanent Establishment Under DTA With Germany,* Daily Tax Rep. Int'l (Oct. 8, 2019).

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> terprise. . . . As noted above, the mere fact that an enterprise has a certain amount of space at its disposal which is used for business activities is sufficient to constitute a place of business. No formal legal right to use that place is therefore required.[7]

The OECD commentary artfully straddles the fence on the issue of an individual working from his or her residence:

> Even though part of the business of an enterprise may be carried on at a location such as an individual's home office, that should not lead to the automatic conclusion that that location is at the disposal of that enterprise simply because that location is used by an individual (e.g. an employee) who works for the enterprise. Whether or not a home office constitutes a location at the disposal of the enterprise will depend on the facts and circumstances of each case. In many cases, the carrying on of business activities at the home of an individual (e.g. an employee) will be so intermittent or incidental that the home will not be considered to be a location at the disposal of the enterprise. . . .Where, however, a home office is used on a continuous basis for carrying on business activities for an enterprise and it is clear from the facts and circumstances that the enterprise has required the individual to use that location to carry on the enterprise's business (e.g. by not providing an office to an employee in circumstances where the nature of the employment clearly requires an office), the home office may be considered to be at the disposal of the enterprise.
>
> A clear example is that of a non-resident consultant who is present for an extended period in a given State where she carries on most of the business activities of her own consulting enterprise from an office set up in her home in that State; in that case, that home office constitutes a location at the disposal of the enterprise. Where, however, a cross-frontier worker performs most of his work from his home situated in one State rather than from the office made available to him in the other State, one should not consider that the home is at the disposal of the enterprise because the enterprise did not require that the home be used for its business activities. It should be noted, however, that since the vast majority of employees reside in a State where their employer has at its disposal one or more places of business to which these employees report, the question of whether or not a home office constitutes a location at the disposal of an enterprise will rarely be a practical issue. Also, the activities carried on at a home office will often be merely auxiliary and will therefore fall within the exception of paragraph 4.[8]

There is enough in the OECD commentary and analogous authority to justify pretty much any position one wants to take. One might say that they define these terms quite clear, no doubt, somehow. In any case, it means that if the New Country tax authority regularly takes the position that actions similar to those of Employee create a fixed place of business for the employer and there is no mandatory binding arbitration provision in the Country R-New Country tax treaty, then Company may be stuck with a PE due to Employee's activities.

(2) Dependent Agent PE

Although the particular wording will vary slightly depending on the vintage of the treaty, the PE Article in the Country R-New Country income tax treaty should have a paragraph providing that a dependent agent will create a PE for a company in certain circumstances. The specific requirements depend on how recent the treaty was negotiated (or re-negotiated) and whether Country R and New Country have agreed and implemented the Multilateral Convention To Implement Tax Treaty Related Measures To Prevent Base Erosion and Profit Shifting (the ''MLI'').

U.S. income tax treaties will have a provision like this:

> Notwithstanding the provisions of paragraphs 1 and 2 of this Article, where a person — other than an agent of an independent status to whom paragraph 6 of this Article applies — is acting on behalf of an enterprise and has and habitually exercises in a Contracting State an authority to conclude contracts that are binding on the enterprise, that enterprise shall be deemed to have a permanent establishment in that Contracting State in respect of any activities that the person undertakes for the enterprise, unless the activities of such person are limited to those mentioned in paragraph 4 that, if exercised through a fixed place of business, would not make this fixed place of business a permanent establishment under the provisions of that paragraph.[9]

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[7] Paragraphs 10-11 of the OECD Commentary for Article 5.

[8] Paragraphs 18-19 of the OECD Commentary for Article 5.

[9] Article 5(5) of the U.S. Model. Note that the U.S. Model's wording differs slightly from that of the OECD Model, but this distinction makes no difference from a U.S. perspective. The 2006 Technical Explanation to Article 5(5) of the U.S. Model E states: ''The OECD Model uses the term ''in the name of that enterprise'' rather than ''binding on the enterprise.'' This difference is in-

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Non-U.S. income tax treaties that are recent enough to adopt the new OECD Model language, or which have been amended by the MLI, will have a provision like this:

> Notwithstanding the provisions of paragraphs 1 and 2 but subject to the provisions of paragraph 6, where a person is acting in a Contracting State on behalf of an enterprise and, in doing so, 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, and these contracts are
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> a) in the name of the enterprise, or
>
> b) 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
>
> c) for the provision of services by that enterprise,
>
> that enterprise shall be deemed to have a permanent establishment in that State in respect of any activities which that person undertakes for the enterprise, unless the activities of such person are limited to those mentioned in paragraph 4 which, if exercised through a fixed place of business (other than a fixed place of business to which paragraph 4.1 would apply), would not make this fixed place of business a permanent establishment under the provisions of that paragraph.[10]

The UN Model has a slightly broader provision:

> Notwithstanding the provisions of paragraphs 1 and 2 but subject to the provisions of paragraph 6, where a person is acting in a Contracting State on behalf of an enterprise, that enterprise shall be deemed to have a permanent establishment in that State in respect of any activities which that person undertakes for the enterprise, if such a person:
>
> (a) 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, and these contracts are
>
> (i) in the name of the enterprise, or
>
> (ii) 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
>
> (iii) for the provision of services by that enterprise,
>
> unless the activities of such person are limited to those mentioned in paragraph 4 which, if exercised through a fixed place of business (other than a fixed place of business to which paragraph 4.1 would apply), would not make this fixed place of business a permanent establishment under the provisions of that paragraph; or
>
> (b) the person does not habitually conclude contracts nor plays the principal role leading to the conclusion of such contracts, but habitually maintains in that State a stock of goods or merchandise from which that person regularly delivers goods or merchandise on behalf of the enterprise.[11]

The contracts referred to in the dependent agent PE provision are supposed to be those relating to the essential business operations of the enterprise, rather than ancillary activities. For example, if Employee has no authority to conclude contracts in Company's name for, say, the sale of the goods produced by Company, but Employee is permitted to enter into contracts in Company's name for the rental or servicing of its business equipment, such limited contracting authority should not fall within the scope of this provision, even if exercised regularly. On the other hand, a country that reads the dependent agent PE provision more literally may seek to pull in any contract. Arguably, there should not be a practical difference between the two interpretations since a contract that is not income-producing should not result in income being attributable to the dependent agent PE. However, PEs are attractive nuisances, and if a company creates one through a dependent agent entering into contracts, it will have to fight ''attribution of income'' battles with the local tax authorities.

There will also be a provision dealing with independent agents (the ''paragraph 6'' in the U.S. and OECD dependent agent PE language quoted above and the ''paragraph 7'' in the UN dependent agent PE language quoted above). This article will not discuss that provision because in our assumed facts Employee cannot be considered an independent agent.

A person who works exclusively or nearly exclusively for a company is unlikely to be treated as an independent agent. This would certainly be the case under U.S. tax treaties, given that the United States typically requires independence from the company

tended to be a clarification rather than a substantive difference. As indicated in paragraph 32 to the OECD Commentaries on Article 5, paragraph 5 of the Article is intended to encompass persons who have ''sufficient authority to bind the enterprise's participation in the business activity in the State concerned.''

[10] Article 5(5) of the OECD Model and Article 12 of the MLI.

[11] Article 5(5) of the UN Model.

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not just as a legal matter but also as an economic matter. It would also be the case for income tax treaties modified by MLI Article 12 (Artificial Avoidance of Permanent Establishment Status through Commissionaire Arrangements and Similar Strategies) (''Where, however, a person acts exclusively or almost exclusively on behalf of one or more enterprises to which it is closely related, that person shall not be considered to be an independent agent within the meaning of this paragraph with respect to any such enterprise.'').

In real life, however, a company would need to make a determination whether an employee is an independent agent. Taxpayers have a strong incentive to find their agents to be independent agents because it greatly decreases the likelihood the company will have a PE. The country where the worker is located has the opposite incentive for precisely the same reason.

(3) Services PE

Many income tax treaties depart from the OECD model and expand the concept of a PE to include instances in which an enterprise has a physical presence in a country, even in the absence of a fixed place of business or the ability of agents to bind the enterprise. Although there are model ''services PE'' provisions, as discussed below, the language of such provisions varies much in practice. So, the particular text of the treaty must be carefully considered.

Even though the OECD Model's text omits a service PE provision, its commentary includes such a provision:

> Notwithstanding the provisions of paragraphs 1, 2 and 3, where an enterprise of a Contracting State performs services in the other Contracting State
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> > a) through an individual who is present in that other State for a period or periods exceeding in the aggregate 183 days in any twelve-month period, and more than 50 per cent of the gross revenues attributable to active business activities of the enterprise during this period or periods are derived from the services performed in that other State through that individual, or
> >
> > b) for a period or periods exceeding in the aggregate 183 days in any twelve-month period, and these services are performed for the same project or for connected projects through one or more individuals who are present and performing such services in that other State
>
> the activities carried on in that other State in performing these services shall be deemed to be carried on through a permanent establishment of the enterprise situated in that other State, unless these services are limited to those mentioned in paragraph 4 which, if performed through a fixed place of business (other than a fixed place of business to which paragraph 4.1 would apply), would not make this fixed place of business a permanent establishment under the provisions of that paragraph. For the purposes of this paragraph, services performed by an individual on behalf of one enterprise shall not be considered to be performed by another enterprise through that individual unless that other enterprise supervises, directs or controls the manner in which these services are performed by the individual.[12]

The UN Model includes a more streamlined version of a services PE provision:

> The term ''permanent establishment'' also encompasses:
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> > (a) A building site, a construction, assembly or installation project or supervisory activities in connection therewith, but only if such site, project or activities last more than six months;
> >
> > (b) The furnishing of services, including consultancy services, by an enterprise through employees or other personnel engaged by the enterprise for such purpose, but only if activities of that nature continue within a Contracting State for a period or periods aggregating more than 183 days in any 12-month period commencing or ending in the fiscal year concerned.[13]

Although the U.S. Model lacks a services PE provision, several U.S. income tax treaties have a services PE provision. These include the U.S.-Canada income tax treaty:

> Subject to paragraph 3, where an enterprise of a Contracting State provides services in the other Contracting State, if that enterprise is found not to have a permanent establishment in that other State by virtue of the pre-ceding paragraphs of this Article, that enterprise shall be deemed to provide those services through a permanent establishment in that other State if and only if:
>
> > (a) those services are performed in that other State by an individual who is present in that other State for a period or periods aggregating 183 days or more in any twelve-month period, and, during that period or periods, more than 50 percent of the gross active business revenues of the enterprise consists of income derived from the services performed in that other State by that individual; or

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[12] Paragraph 144 of the OECD Model Commentary.

[13] Article 5(3) of the UN Model.

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(b) the services are provided in that other State for an aggregate of 183 days or more in any twelve-month period with respect to the same or connected project for customers who are either residents of that other State or who maintain a permanent establishment in that other State and the services are provided in respect of that permanent establishment.[14]

The U.S.-Barbados income tax treaty and the U.S.-Jamaica income tax treaty:

the furnishing of services, including consultancy, management, technical and supervisory services, within a Contracting State by an enterprise through employees or other persons, but only if

(i) activities of that nature continue within the State for a period or periods aggregating more than 90 days in a twelve-month period, provided that a permanent establishment shall not exist in any taxable year in which such services are rendered in that State for a period or periods aggregating less than 30 days in the taxable year; or

(ii) the services are performed within the State for an associated enterprise (within the meaning of Article 9 (Associated Enterprises)).[15]

The U.S.-Czech Republic income tax treaty and the U.S.-Slovakia income tax treaty:

the furnishing of services, including consultancy services, by an enterprise through employees or other personnel, but only if activities of that nature continue (for the same or a connected project) within the country for a period or periods aggregating more than 9 months within any 12 month period.[16]

The U.S.-India income tax treaty:

the furnishing of services, other than included services as defined in Article 12 (Royalties and Fees for Included Services), within a Contracting State by an enterprise through employees or other personnel, but only if:

(i) activities of that nature continue within that State for a period or periods aggregating more than 90 days within any twelve-month period; or

(ii) the services are performed within that State for a related enterprise (within the meaning of paragraph 1 of Article 9 (Associated Enterprises)).[17]

The U.S.-Indonesia income tax treaty:

the furnishing of services, including consultancy services, through employees or other personnel engaged for such purposes, but only where activities of that nature continue (for the same or a connected project) for more than 120 days within any consecutive 12-month period, provided that a permanent establishment shall not exist in any taxable year in which such services are rendered in that State for a period or periods aggregating less than 30 days in that taxable year.[18]

The U.S.-Kazakhstan income tax treaty:

the furnishing of services, including consultancy services, by residents through employees or other personnel engaged by the residents for such purpose, but only where activities of that nature continue (for the same or a connected project) within the country for a period of more than 12 months.[19]

The U.S.-Philippines income tax treaty, the U.S.-South Africa income tax treaty, and the U.S.-Venezuela income tax treaty:

the furnishing of services, including consultancy services, within a Contracting State by an enterprise through employees or other personnel engaged by the enterprise for such purposes, but only if activities of that nature continue (for the same or a connected project) within that State for a period or periods aggregating more than 183 days in any twelve-month period commencing or ending in the taxable year concerned.[20]

The U.S.-Thailand income tax treaty:

the furnishing of services, including consultancy services, by an enterprise through employees or other personnel engaged by the enterprise for such purpose, but only if

i) activities of that nature continue (for the same or a connected project) within that State for a period or periods aggregating more than 90 days within any 12-month period, provided that a permanent establishment shall not exist in any tax-

[14] Article 5(9) of the U.S.-Canada income tax treaty.

[15] Article 5(2)(k) of the U.S.-Barbados income tax treaty. Article 5(2)(j) of the U.S.-Jamaica income tax treaty is substantially similar.

[16] Article 5(3) of the U.S.-Czech Republic income tax treaty and Article 5(2) of the U.S.-Slovakia income tax treaty.

[17] Article 5(2)(l) of the U.S.-India income tax treaty.

[18] Article 5(j) of the U.S.-Indonesia income tax treaty.

[19] Article 5(3) of the U.S.-Kazakhstan income tax treaty.

[20] Article 5(2)(k) of the U.S.-South Africa income tax treaty. Article 5(3)(b) of the U.S.-Venezuela income tax treaty has substantially similar wording. Article 5(2)(j) of the U.S.-Philippines income tax treaty departs from this wording but has a similar rule.

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able year in which such services are rendered in that State for a period or periods aggregating less than 30 days in that taxable year; or

ii) the services are performed within that State for a related enterprise within the meaning of paragraph 1 of Article 9 (Associated Enterprises).[21]

The U.S.-Turkey income tax treaty:

Income derived by an enterprise of one of the Contracting States in respect of professional services or other activities of a similar character shall be taxable only in that State. However, such income may also be taxed in the other Contracting State if such services or activities are performed in that other State and if:

a) the enterprise has a permanent establishment in that other State through which the services or activities are performed; or

b) the period or periods during which the services or activities are performed exceed in the aggregate 183 days in any continuous period of 12 months. . . .[22]

(4) Other "Services" Provisions

Treaties typically provide special rules for a host of different types of service providers: artists and entertainers, government workers, teachers, students, researchers, trainees, directors, and those involved in air transport or shipping. To the extent that Company or Employee falls within these particular circumstances, those special rules often override the PE and other withholding tax rules.

Further, even outside these special categories, in the absence of a PE some countries impose withholding taxes on services income. Article 12A of the UN Model permits a country to tax fees for "technical services," which Article 12A(3) defines as "any payment in consideration for any service of a managerial, technical or consultancy nature, unless the payment is made: (a) to an employee of the person making the payment; (b) for teaching in an educational institution or for teaching by an educational institution; or (c) by an individual for services for the personal use of an individual." Fees for technical services generally are "deemed to arise in a Contracting State if the payer is a resident of that State or if the person paying the fees, whether that person is a resident of a Contracting State or not, has in a Contracting State a permanent establishment or a fixed base in connection with which the obligation to pay the fees was incurred, and such fees are borne by the permanent establishment or fixed base."[23] Perhaps not surprisingly, Article 12 (Royalties and Fees for Included Services) of the U.S.-India income tax treaty permits India to impose such a tax.

Such a technical services provision would not apply to compensation paid by Company to Employee, at least under a treaty with a definition of "technical services" that includes Article 12A(3)(a) of the UN Model. And, if Employee does not provide services to customers or clients in New Country, the technical services provision (if any) should not be implicated. On the other hand, if Employee was providing services to New Country customers or clients before moving to New Country, the technical services provision (if any) would have already applied to Company. In that case, whether Employee's move results in a change in applicability of any technical services provision would depend on whether Employee creates a PE for Company in New Country. If so, New Country taxation would usually switch from using the technical services provision to taxing the business profits attributable to the PE.

(5) Employment-Related Taxes

Company may owe New Country payroll and other employment taxes as a result of Employee's presence and activities in New Country. These kinds of taxes are beyond the scope of this article, but in a real-life situation Company must understand and comply with them because they can be significant.[24] Similarly, Company likely will have registration and filing requirements, and possibly obligations to withhold on Employee's wages. Although employment taxes are generally not covered by an income tax treaty, they may be addressed in other agreements (e.g., Social Security totalization agreements). Even if a tax treaty provides relief, Company will have to follow the local law requirements to obtain (and demonstrate eligibility for) that relief.

(6) Other Taxes

Other taxes, such as value-added taxes (VAT), may have similar thresholds for subjecting Company to registration and payment obligations. Carefully limiting Employee's activities to prevent (or minimize) a PE for Company may not be enough to prevent (or minimize) VAT or other New Country non-income taxes. As with employment taxes, VAT and other non-income taxes (other than capital taxes) are typically not covered taxes for purposes of an income tax treaty. However, there is soft guidance[25] and there may be international agreements or supernational law

[21] Article 5(3)(b) of the U.S.-Thailand income tax treaty.

[22] Article 14(2) of the U.S.-Turkey income tax treaty.

[23] Article 12A(5) of the UN Model.

[24] *See, e.g., Europe's Cross-Border Commuters Risk a Home-Office Tax Trap*, BNA Daily Tax Rep.: Int'l (Sept. 3, 2020).

[25] *See, e.g.*, the OECD's International VAT/GST Guidelines.

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(e.g., EU rules for VAT) that Company will need to take into account.

2. Employee

a. Taxation as a Resident

The primary question for Employee is whether the he or she is a resident for New Country income tax purposes or will become so as soon as the relevant time thresholds are met). If yes, Employee will file New Country tax returns and pay New Country taxes like any other resident, although Employee will have to deal with Previous Country tax filings and payments required during the period he or she lived or worked there.

In our assumed facts, Employee likely would be treated as a resident in New Country. However, one would need to compare the specific facts of Employee's situation to the particular terms of treaty to see if Employee is treated as a resident (i.e., whether Employee remains a resident of Previous Country or another country under the treaty residence tie-breaker rule). For example, this might be possible if Employee, despite having New Country as his or her base of employment, spends significant time working outside New Country.

b. Taxation as a Nonresident

If Employee is not treated as a resident of New Country, either under its domestic law or due to an income tax treaty residence tie-breaker rule, New Country (if it has an individual income tax) will likely subject Employee to income tax on the portion of compensation it sees as connected to his or her activities in New Country. If Employee is eligible for the benefits of an income tax treaty between New Country and his or her country of residence, the ''Independent Services'' article (if any) or the ''Dependent Services'' article may limit the ability of New Country to tax Employee. Given that these provisions (at least as set forth in the U.S. Model, the OECD Model, or the UN Model) are unlikely to apply to the long-term arrangement in our hypothetical, this article will only briefly discuss them. However, some treaties have provisions more relaxed than those in the models, and so careful review of the treaties at issue is necessary to see if some relief, even if only temporary, is available.

(1) Independent Services Article (If Any)

Although the trend in recent treaties has been to delete the article relating to independent personal services and have only an article dealing with services of an nonresident employee,[26] many older treaties still have a separate article for independent personal services and the UN Model still includes such a provision. Although we have assumed that Employee would not meet the definition of independent agent in this scenario, in a real-life case, the treaty needs to be checked to see if such a provision exists and could apply.

(2) Dependent Services Article

Most treaties have an article addressing the taxation of employees sent from one country to work in the other country on a temporary basis. Article 15 of the OECD Model reads as follows:

> 1. Subject to the provisions of [the Articles dealing with Directors' Fees, Pensions, Social Security, Annuities, Alimony, and Child Support, and Government Service], salaries, wages and other similar remuneration derived by a resident of a Contracting State in respect of an employment shall be taxable only in that State unless the employment is exercised in the other Contracting State. If the employment is so exercised, such remuneration as is derived therefrom may be taxed in that other State.
>
> 2. Notwithstanding the provisions of paragraph 1, remuneration derived by a resident of a Contracting State in respect of an employment exercised in the other Contracting State shall be taxable only in the first-mentioned State if:
>
> > a) the recipient is present in the other State for a period or periods not exceeding in the aggregate 183 days in any twelve-month period commencing or ending in the fiscal year concerned, and
> >
> > b) the remuneration is paid by, or on behalf of, an employer who is not a resident of the other State, and
> >
> > c) the remuneration is not borne by a permanent establishment which the employer has in the other State.
>
> 3. Notwithstanding the preceding provisions of this Article, remuneration derived by a resident of a Contracting State in respect of an employment, as a member of the regular complement of a ship or aircraft, that is exercised aboard a ship or aircraft operated in international traffic, other than aboard a ship or aircraft operated solely within the other Contracting State, shall be taxable only in the first-mentioned State.[27]

Note that, given the 183-day limit in the dependent services article, the provision would not provide relief

[26] *See, e.g.*, Article 14 of the 2006 and 2016 U.S. Model

[27] Article 14 (Income from Employment) of the U.S. Model is substantially the same.

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to a worker working from home permanently, unless the worker traveled outside the country for work-related reasons more than half of the year. Further, the provision is not available to Employee if he or she creates a PE in New Country for Company (or Company otherwise has a PE in New Country) and Employee's remuneration is borne by the PE, which will necessarily be the case if Company's PE in New Country is created solely by Employee's presencethere. Still, treaties are sometimes more generous than this model provision, e.g., excluding compensation below a certain threshold or that meets other specific conditions. In any case, in any real-life situation where Company and Employee believe that they have avoided creating a PE, they should check the applicable income tax treaty to see if this provision would apply.

B. Availability of Temporary Relief

Many countries have adopted, often through administrative announcement, relief from some of the more mechanistic rules in their domestic law and treaties to deal with individuals located (or not located) where they are supposed to be due to the Covid-19 pandemic. These relief measures are generally temporary and would not address the long-term arrangement in our hypothetical. Still, they could impact the counting of days for some purposes and therefore affect when Employee might be treated as a resident or when a PE might begin. So, these temporary rules need to be taken into account in evaluating the potential tax treatment of Company and Employee. Even if they do not change the ultimate conclusion, they may affect when the ultimate conclusion begins to be applicable.

IV. SPECIFIC SCENARIOS

The rules discussed above may best be illustrated through a series of examples.

A. U.S. Company Has a Worker Leaving the United States to Work in Another Country

Suppose Company is a domestic corporation and Employee normally works in the United States but is now working for the foreseeable future in Country B.

1. Company needs to determine whether Employee's presence and activities in Country B create tax and filing responsibilities for Company in Country B. In particular, Company needs to

   a. examine Country B domestic law for filing and taxing thresholds;

   b. identify whether there is a U.S.-Country B income tax treaty and determine whether Company qualifies for the benefits of the treaty; and

   c. if there is such a treaty and Company is eligible for the benefits thereof, evaluate the effect of the treaty provisions, including whether Company has a PE due to Employee's presence:

      (1) Does Employee create a fixed place of business for Company?

      (2) If not, does the treaty have a services PE provision that may create a PE for Company?

      (3) If not, does Employee create a dependent agent PE?

2. If Employee's presence and activities in Country B would subject Company to tax and filing responsibilities in Country B, how should Company deal with this problem?

   a. Establish a new Country B subsidiary to handle payment and payroll responsibilities?

   b. Second Employee to an existing Country B entity (if any)?

   c. Convince Employee to return to the United States or relocate to a third country as soon as possible?

   d. Transform Employee's responsibilities (if possible) so that he or she becomes an independent agent of Company?

3. Employee needs to determine

   a. when his or her presence causes Employee to be a tax resident of Country B;

   b. if not considered a tax resident of Country B (e.g., under an income tax treaty residence tie-breaker rule), the interaction of Country B tax rules with Employee's country of residence;

   c. Employee's filing and payment responsibilities in Country B; and

   d. his or her willingness to accept changes in duties, status, etc. as result of the Country B tax consequences being created for Company.

B. U.S. Company Has a Worker Who Normally Works in a Certain Non-U.S. Country But Is Now in a Different Country

Now, suppose that Company is a domestic corporation but Employee, who normally works in Country B, is now working for the foreseeable future in Country C.

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1. Company needs to determine whether Employee's presence and activities in Country C create tax and filing responsibilities for Company in that country. However, because this involves three countries, Company needs to look at the laws of the United States, Country B, and Country C — and any tax treaties or other tax-related agreements between two or more of the countries. Depending on those countries' domestic laws and the income tax treaties (if any) between the United States and each of Country B and Country C, the change in Employee's location could improve or harm Company's and Employee's tax position. For example, if the U.S.-Country B income tax treaty has a services PE provision but the U.S.-Country C income tax treaty does not have such provision, Employee's move may reduce the chance of Company having a PE in Country C. On the other hand, if the U.S.-Country B income tax treaty does not have a services PE provision but the U.S.-Country C income tax treaty does, then Employee's move may increase the chance of Company having a PE in Country C. Similarly, the move to (or from) a country with a broader dependent agent PE provision could increase (or decrease) the likelihood of a PE.

2. As in IV.A.1., above, Company needs to

   a. examine Country C domestic law for filing and taxing thresholds;

   b. identify whether there is a U.S.-Country C income tax treaty and determine whether it qualifies for the benefits of the treaty; and

   c. if there is such a treaty and Company is eligible for the benefits thereof, evaluate the effect of the treaty's provisions, including whether Company has a PE due to Employee's presence;

      (1) Does Employee create a fixed place of business for Company?

      (2) If not, does the treaty have a services PE provision that may create a PE for Company?

      (3) Does Employee create a dependent agent PE?

   d. examine the effect of Employee leaving Country B (e.g., did Employee create a PE in Country B, with the consequence that Country B may treat Company as terminating such PE?).

3. If Employee's presence and activities in Country B would subject Company to tax and filing responsibilities in Country B, how should Company deal with this problem?

   a. Establish a new Country B subsidiary to handle payment and payroll responsibilities?

   b. Second Employee to an existing Country B (if any)?

   c. Transform Employee's responsibilities (if possible) so that he or she becomes an independent agent of Company?

4. Employee needs to determine

   a. the effect of terminating residence in Country B;

   b. when his or her presence causes Employee to be a tax resident of Country C;

   c. if the Employee is not considered a tax resident of Country C, e.g., under a treaty residence tie-breaker rule, the interaction of Country B and Country C tax rules with Employee's country of residence;

   d. the Employee's filing and payment responsibilities in Country C; and

   e. his or her willingness to accept changes in duties, status, etc. as result of the Country C tax consequences that the Employee is creating for the Company.

C. U.S. Company Has a Worker Who Normally Works in Another Country But Is Now Working in the United States

In this case, Employee, who was working outside the United States, will now be working from home in the United States. Because both Employee and Company are located in the same country now, this scenario is simpler than the preceding two. Indeed, if Employee is a U.S. citizen, or a permanent resident who was treated as a U.S. tax resident under any applicable treaty between the United States and Employee's other country of tax residence, this is relatively straightforward. Other than dealing with the final year of tax filing and payments in the country Employee is leaving, Company and Employee will just need to comply with U.S. tax law.

It is a little more complicated for Employee if he or she is a non-resident who is likely to be treated as a resident for U.S. tax purposes. In that case, Employee will have to comply with the tax laws of a new country (the United States) and also possibly the prior country of tax residence, depending on how a treaty residence tie-breaker rule (if any) applies.

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D. Non-U.S. Company Has a Worker Who Normally Works in the United States But Is Now Working Abroad, in Country D

Beginning with this example, we switch from a U.S. company to a company that is not incorporated in the United States and not otherwise treated as a domestic company (a ''non-U.S. company'').

1. The impact on Company depends on whether it continues to conduct a U.S. trade or business (if there is no U.S.-Country R income tax treaty) or to have a PE (if there is a U.S.-Country R income tax treaty) following Employee's leaving the United States. If Company remains subject to U.S. income tax and filing responsibilities, then it should see little if any change other than perhaps a reduction in responsibilities in the state or locality in which Employee was located. If Employee's leaving terminates Company's U.S. trade or business, then Company will have to deal with that termination in the current and future years to the extent of application of §864(c)(6)-(7), a provision like Article 7(7) of the U.S. Model, or other provisions with lingering effect. Otherwise, Employee's leaving the United States would significantly reduce, if not eliminate, U.S. tax filing and payment responsibilities.

2. Company will have to go through the analysis described above in IV.A.1., above Although the tax filing and payment thresholds will depend initially on Country D tax rules, the Country R-Country D income tax treaty (if any) will be relevant. If that treaty has been updated, e.g., through the MLI, note that the odds of Company having a PE in Country D will be greater. This could be especially relevant if Company concluded that Employee's current level of activities and duties did not cause it to have a PE in the United States.

3. Employee would have to deal with the residency and dual tax issues discussed above in IV.A.3. upon changing location.

E. Non-U.S. Company Has a Worker Who Normally Works Outside the United States But Is in a Different Non-U.S. Country

This scenario does not implicate U.S. tax rules or U.S. income tax treaties, and so this article will not analyze it. Because the analysis and answers depend on the domestic law of the two countries and whether there is a treaty between them, Company and Employee should generally ask the questions and undertake the analysis set out above.

F. Non-U.S. Company Has a Worker Who Normally Works Outside the United States But Is Now Working in the United States

1. If Company has an employee working full-time in the United States, then it likely will be treated as engaged in the conduct of a trade or business in the United States unless it can show that Employee's activities are clerical and ministerial. In a real-life scenario, Company would carefully analyze the facts to see whether any exceptions, such as §864(b)(2) (trading in securities or commodities), may apply. If Employee's activities do cause Company to have a U.S. trade or business, the next question is whether Company can invoke the U.S.-Country R income tax treaty (if any) and assert that it does not have a PE in the United States. That determination, like the U.S. trade or business determination, will depend on the specific facts of the case.

2. Two things are particularly worth noting, however.

a. First, if Company is engaged in the conduct of a U.S. trade or business, it will need to file U.S. income tax returns, even if it believes that it has little ECI or that all of it can be excluded by the absence of a PE. If there is any question at all about the existence of a U.S. trade or business, Company needs to strongly consider filing U.S. tax returns, even if only protective ones.

b. Second, if Company is considered to be engaged in the conduct of a U.S. trade or business (or to have a PE) through Employee's activities, determining the amount of income that is ECI (or that is attributable to the PE) becomes key. Calculation of ECI and/or business profits is beyond the scope of this article. As a general rule, however, the more outward-facing Employee's activities (i.e., if Employee provides services directly to clients or is engaged in sales activities with customers), the greater the gross income likely to be attributed to the U.S. trade or business or PE. Accordingly, given a choice between Employee being central to Company's profit-making activities and an Employee being more removed from such profit-making activities, Company is better off from a U.S. tax standpoint with the latter, even if Employee still causes Company to

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cross the U.S. trade or business or PE threshold.

3. As noted in IV.C.3., above, the impact on Employee depends on whether he or she is a U.S. citizen or permanent resident who was treated as a U.S. tax resident under the applicable treaty or a non-resident who is likely to be treated as a resident for U.S. tax purposes.

V. CONCLUSION

If a company has employees performing services full-time from their homes, it should be prepared for each such arrangement to create a company PE. For such an arrangement not to be a PE, the company has to rebut the fixed place of business and dependent agent PE arguments and the services PE (if any) arguments. The more recently the applicable treaty was updated to reflect the new OECD or UN Model language, the more likely the local tax authority will conclude that the company has a PE. Further, the application of the so-called authorized OECD approach, or ''AOA,'' to attribute profits to such employee-created PEs seems to be far from settled in practice.

How governments, companies, and individuals will react to this fecundity of PEs is a question with a to-be-determined answer. Changes in business models, driven by — or at least made possible by — technology, have permitted companies to deliver services and products to customers by using employees located in multiple jurisdictions. Thinking they had something to protect, governments have sought to change tax rules to address what they perceive as the revenue loss due to companies' ability to ''arrange'' to have income earned in particular locations. That has led to the rules where the presence of an employee conducting the employer's business easily creates a PE for the employer.

This change in employees working remotely is not the same issue that led to the expansion of PEs, however. The working-from-home approach is not being driven by deliberate tax planning; rather, it is in many cases being foisted upon companies and/or employees by events beyond their control. Nor does it have only, or even primarily, tax implications: It will have social, environmental, and economic consequences that are only dimly, if at all, ascertainable right now. It truly is unthought of, though, somehow.

This is not the same as a company seeking to decrease its economic footprint in a country to reduce its taxes. It reflects a new way of working, and it needs to be distinguished from the commissionaire, digitalization of the economy, and other concerns that led to the new PE rules. Indeed, one would hope that tax authorities would be the first to recognize this problem. After all, hasn't the BEPS project been premised on the belief that the old way of looking at things from a tax standpoint no longer fits with the patterns today?

Looked at that way, BEPS did not solve a problem. It was only the most recent attempt to deal with a rapidly changing economic environment. Perhaps the ''new normal'' is no longer having the luxury of adjusting to and settling into a new paradigm. Rather, the new normal requires tax authorities and taxpayers to keep developing and adjusting to new paradigms, like working remotely. As a Nobel laureate said (six times in the same song, depending on which version one listens to): ''Ah, but I was so much older then, I'm younger than that now.''

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