Australia: Updated tax guidance for foreign employers related to individuals temporarily in Australia as a result of COVID-19

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In brief

On 11 December 2020, the Australian Taxation Office (ATO) provided new guidance in relation to the employer obligations for foreign employers with respect to employees working remotely from Australia who normally reside in another country.

Under this guidance, the ATO considers that individuals may be taxable in Australia from their initial date of arrival in Australia or from 1 July 2020 if they have been working in Australia due to COVID-19 and:

- they were ordinarily tax resident of a country with which Australia has a Double Taxation Agreement (DTA), but are not eligible for the short-term stay exemption in that DTA; or
- they have become an Australian tax resident.

The application of the above will depend on each individual's personal facts and circumstances.

As a consequence, from the initial date of arrival or from 1 July 2020, foreign employers may need to have commenced Pay-As-You-Go (PAYG) withholding and Single Touch Payroll (STP) reporting for amounts paid to affected employees. They will also need to consider the Fringe Benefits Tax (FBT) obligations for benefits provided to these individuals. Superannuation Guarantee obligations may also apply, even where the individual is not taxable in Australia.

These obligations also apply to foreign employers that do not have any business presence in Australia.

The ATO recommends that employers start withholding as soon as it is reasonable to presume that employees may be taxable in Australia.

In detail

Impact on individuals

Background

On 23 April 2020, the ATO had stated that, for individuals who were previously Australian tax non-residents but were spending time in Australia due to COVID-19, their income earned while in Australia may continue to be considered foreign sourced (and therefore not taxable) if:

- the only thing that has changed about the individual's employment is that they are now doing it from Australia as a result of COVID-19 (i.e. their economic employer is the foreign entity and they are essentially just working remotely from Australia); and
- there are no other connections to Australia; and
- the individual intends to leave Australia as soon as they are able to do so.

At that time, the ATO had not set a time limit on this relief where the above criteria were met.

With respect to individuals who are ordinarily tax residents of a country with which Australia has a DTA (DTA country), the ATO referred employees to the short-term stay exemption which applies in most DTAs and which states that employment income will generally not be taxable in Australia where:

- the individual is a resident of a DTA country; and
- is not present in Australia for more than 183 days in aggregate in either an income year or a 12-month period (depending on the applicable DTA); and
- their salary and wages are paid to them by, or on behalf of, an employer that is not a resident of Australia; and
- their salary and wages are not deductible against the profits of an Australian permanent establishment of their employer.

What's new?

The ATO's latest guidance reflects that many individuals are still stranded or have decided to stay longer in Australia due to COVID-19.

Under this latest guidance, where an individual is ordinarily resident of a DTA country and the short-term stay exemption under that DTA does not apply, then the individual's income may be considered Australian sourced and taxable in Australia. The date from which the income is taxable in Australia will depend on the specific DTA.

The application of the short-term stay exemption must be considered on a case-by-case basis as wording, conditions and time periods differ between DTAs.

Currently Australia has DTAs in force with the following countries:

Argentina	Finland	Japan	Papua New Guinea	Sri Lanka
Austria	France	Kiribati	Philippines	Sweden
Belgium	Germany	Korea (Republic of)	Poland	Switzerland
Canada	Hungary	Malaysia	Romania	Taiwan
Chile	India	Malta	Russia	Thailand
China	Indonesia	Mexico	Singapore	Turkey
Czech Republic	Ireland	Netherlands	Slovakia	United Kingdom
Denmark	Israel	New Zealand	South Africa	United States of America
Fiji	Italy	Norway	Spain	Vietnam

Individuals coming from a non-DTA country

As the new ATO guidance provides additional clarity for individuals who come from a DTA country. For an individual who has arrived in Australia from a non-DTA country and meets the criteria released by the ATO on 23 April 2020 (see above), their income may continue to be considered foreign sourced and not taxable in Australia as long as they remain a tax non-resident of Australia.

It is always necessary to consider the individual's Australian tax residency in light of Australian ordinary domestic residency tests. Moreover, the ATO's guidance states that, if an individual is temporarily in Australia because of COVID-19, they should not become an Australian resident for tax purposes if:

- they usually live overseas permanently; and
- they intend to return there as soon as they are able to.

However, the tax residency issue may be more complicated if the individual:

- stays in Australia for a lengthy period; and
- does not plan to return to their country of residency when they are able to do so.

We note that the ATO has also not explicitly defined the phrases "lengthy period" or "leave as soon as they are able to do so", so there is still some uncertainty surrounding the ATO's application of these conditions.

Impact on foreign employers

It is necessary to consider Australian employer obligations in relation to employees who are taxable in Australia either because:

- they are an ordinarily tax resident of a DTA country but are not eligible for the short-term stay exemption in that DTA; or
- they have become an Australian tax resident.

PAYG withholding and STP reporting

The ATO did not expect employers to register for PAYG withholding if the only reason their employee was working in Australia was because of COVID-19 and it was anticipated the employee would leave before 30 June 2020.

However, from 1 July 2020, employers must consider whether PAYG withholding and STP reporting should apply in relation to their employees working in Australia and receiving employment income that is taxable in Australia.

PAYG withholding applies to:

- employment income earned by Australian residents; and
- Australian sourced income earned by Australian tax non-residents, unless the DTA short-term stay exemption applies.

Fringe Benefits Tax (FBT)

Where an employer has an obligation to withhold PAYG in relation to their employees, FBT obligations must also be considered. FBT applies to some benefits provided to employees (or their family or other associates), unless an exemption or concession applies.

Superannuation Guarantee

Superannuation contributions must generally be made where an employee works in Australia and they do not qualify for an exemption.

Applicable exemptions to consider are:

- where a Certificate of Coverage was obtained in the country from which the individual travelled, for the period the individual is in Australia; or
- where the individual is considered a senior executive and is on a temporary work visa.

If no exemption applies, then superannuation contributions should be made in respect of their Australian workdays. Where contributions are overdue, a Superannuation Guarantee Charge may apply.

Other obligations

State Payroll Tax and Workers Compensation obligations should also be considered in relation to any employees who are working in Australia.

The takeaway

While this latest ATO guidance provides clarity for both employers and employees, this is a significant update, and this can be seen as a tightening of the approach previously taken by the Australian tax authorities.

Individuals working in Australia should consider whether they have become an Australian tax resident or, while remaining a tax non-resident of Australia, whether their employment income is taxable in Australia.

Employers should carefully review the tax situation of their employees working remotely in Australia to ensure they are compliant with all Australian employer obligations.

Let's talk

For a deeper discussion of how this impacts your business, please contact your Global Mobility Services engagement team or one of the following professionals:

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