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Cross-border workers and tax considerations resulting from COVID-19

The COVID-19 Level 4 Alert lockdown has caused uncertainty in many areas of tax, including the taxation and tax residency of individuals who are now highly restricted in their ability to travel internationally to and from New Zealand.

At present New Zealand citizens and residents may return to New Zealand however there are very few foreign citizens able to enter New Zealand. Foreign nationals are able to use international air services to travel home, but as other countries close their borders it is becoming harder to travel. In many countries around the world cross-border workers are finding themselves stranded in a country that is not their country of residence. The latest guidance on New Zealand's international travel restrictions is available here.

As restrictions to our borders and international travel continue to tighten many people will be unable to leave, or return to, New Zealand and as a result the tax residency of these people could be impacted.

Like many countries in the world, New Zealand's tax law includes provisions that deem a person's tax residency status in New Zealand based on the number of days they have spent in or outside of New Zealand during a 12 month period.

This guidance is intended to highlight some of the issues arising for employers and individuals themselves from cross-border workers being **unable to leave New Zealand** due to the Alert Level 4 lockdown.

Individuals - Tax Residency

Broadly speaking there are two types of non-resident cross-border workers that will be in New Zealand and impacted by the Alert Level 4 lockdown and travel restrictions.

Scenario One: Those who are domiciled in another country and have been sent on a short term assignment to New Zealand (i.e. less than 183 days) and would not have ordinarily became a New Zealand tax resident; and

Scenario Two: Those who were originally domiciled in New Zealand, have been on an assignment overseas and are deemed a non-resident of New Zealand; who had temporarily returned for a visit/holiday or due to safety concerns and have found themselves unable to leave New Zealand.

In both of the instances above the individual concerned would be considered a tax resident of New Zealand if they are in New Zealand for more than 183 days during any 12 month period. This becomes particularly relevant for those included in Scenario One above, where the Level 4 Alert lockdown could easily cause a non-resident to cross the 183 days threshold, specifically where their initial cross-border assignment was intended to be just under 183 days (for example 6 months). Those in Scenario Two above, are likely to be impacted if international travel restrictions remain in place or tighten (either in New Zealand or abroad) once the Level 4 Alert lockdown is removed.

Where an individual is impacted by the travel restrictions and becomes a tax resident in New Zealand due to the numbers of days spent here, they will likely still be considered a tax resident in their 'home' country. Where someone is considered a tax resident of two countries a Double Tax Agreement ('DTA') between the two countries concerned may provide the answer. Most DTA's will have a 'tie-breaker' test to determine which country the individual will be a tax resident in.

The OECD Secretariat has released a general view that under DTA's between countries an individual should not become resident in the country they are 'stranded' in.

Example (taken from OECD guidance) Mr. X, is stranded for a period in a country that is not his country of residence due to the travel restrictions and quarantine measures. The challenge here is to determine the place of residence of individuals for tax purposes. In this case, the OECD Secretariat's general view is that, under the bilateral tax treaty between the two countries, Mr. X's residence will not change due to such temporary dislocation. The OECD recommends countries of temporary residence to apply their domestic rules accordingly.

While a DTA between countries may help determine the tax residency status in each country, the person concerned may still be considered a tax resident in New Zealand under domestic law which can have underlying consequences, such as liability to employer withholding obligations, and triggering New Zealand tax obligations in regards to worldwide income or assets.

Employers - Taxation of income

Irrespective of the tax residency status of an individual, New Zealand tax law looks to impose tax on income that is sourced (earned/derived) in New Zealand. Prima facie income earned in New Zealand by a cross-border employee is subject to tax in New Zealand and their employer must account for and withhold PAYE income tax on their income.

New Zealand domestic law however includes a concession that, broadly speaking, deems income derived in New Zealand by a non-resident to be exempt income if their visit to New Zealand is less than 92 days and they are employed by a non-resident employer.

This concession removes the requirement for employers to account for and withhold PAYE income tax on employees making 'short-term visits' to New Zealand. Where an employee of a non-resident employer becomes stranded in New Zealand due to the Level 4 Alert lockdown and international travel restrictions they may cross the 92 day short-visit threshold and the employer will become liable for PAYE income tax in respect of salary and wages made to that employee. The PAYE income tax liability is backdated to the first payment of salary and wages made to that employee in New Zealand. We note that there may be more lenient concessions in certain DTA's, which in effect extend the 92 days short term visit threshold to 183 days.

Where non-resident businesses have employees in New Zealand they will need to consider the above to determine whether any employees are stranded in New Zealand and what withholding tax implications may arise because of this.

From a broader perspective, some businesses have concerns that having employees stranded in New Zealand (or any other country where they don't ordinarily work) may run a risk of that company having a permanent establishment in that country, triggering new filing and tax obligations. The OECD Secretariat has issued guidance on this, and considers that it is unlikely that the COVID-19 situation will create issues given the temporary nature of the situation; but nevertheless individual countries are encouraged to provide guidance on the overlay of domestic laws in order to reduce the compliance burden on taxpayers.

We are aware that Inland Revenue is looking at providing its own guidance.

For more information on individual tax residency or any topics in this article please contact your usual Deloitte advisor. The content of this article is accurate as at 7 April 2020, the time of publication. This article does not constitute tax advice. If you wish to understand the potential tax implications of current events for your business or organisation, please contact your usual Deloitte advisor.

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