

By Email

28 July 2020

Shri Pramod Chandra Mody
Chairman
Central Board of Direct Taxes
Department of Revenue
Ministry of Finance
Government of India

ASIFMA Representation on Tax Implications for Companies Arising from Temporary Remote Working Arrangements due to the COVID-19 Global Pandemic

Dear Shri Pramod Chandra Mody,

At the outset, the Asia Securities Industry & Financial Markets Association (“**ASIFMA**”¹) appreciates the Circular 11 of 2020 “Clarification in respect of residency under section 6 of the Income-tax Act, 1961” (“**Circular**”) published by the Central Board of Direct Taxes (“**CBDT**”) on 8 May 2020 in light of the COVID-19 global pandemic. In view of the fact that the Circular is only focused on the residency of individuals, ASIFMA would like to take this opportunity to add some suggestions for corporates as follows.

In an effort to stem the spread of COVID-19, jurisdictions around the world have taken a host of precautionary measures; limiting domestic and foreign travel, imposing lockdowns or otherwise restricting activities requiring physical contact. Similarly, organisations across the globe have rolled out business continuity plans (“**BCPs**”) which, *inter-alia*, include policies for employees to work from home or a remote location.

As a result of these actions, we note there has been an increase in employees working remotely from a jurisdiction that is not their normal place of work. For example, a person who normally works in their home jurisdiction (“**Home Jurisdiction**”), employed by a company resident in that Home Jurisdiction, may temporarily work remotely from a different jurisdiction (“**Host Jurisdiction**”). Such remote working arrangements may be planned or unplanned². These extraordinary force majeure situations

¹ ASIFMA is an independent, regional trade association with over 135 member firms comprising a diverse range of leading financial institutions from both the buy and sell side, including banks, asset managers, professional and consulting firms, and market infrastructure service providers. Together, we harness the shared interests of the financial industry to promote the development of liquid, deep and broad capital markets in Asia. ASIFMA advocates stable, innovative, competitive and efficient Asian capital markets that are necessary to support the region’s economic growth. We drive consensus, advocate solutions and effect change around key issues through the collective strength and clarity of one industry voice. Our many initiatives include consultations with regulators and exchanges, development of uniform industry standards, advocacy for enhanced markets through policy papers, and lowering the cost of doing business in the region. Through the GFMA alliance with SIFMA in the United States and AFME in Europe, ASIFMA also provides insights on global best practices and standards to benefit the region.

² Unplanned remote working may include a scenario whereby the employee travelled to the Host Jurisdiction for a short-term visit (e.g. vacation or business trip) and due to COVID-19 travel restrictions they are prevented from returning to their country of employment. Planned remote working may include a scenario whereby the employee is temporarily working remotely from the Host Jurisdiction due to public health or other concerns in their Home Jurisdiction.

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are not created by businesses of their own volition, rather they are a result of unprecedented circumstances arising from public health concerns, stringent lockdown conditions and the general suspension of international travel as per directives of the Government of India.

One of the unintended consequences of temporary remote working arrangements as described above may include the creation of a taxable presence, including permanent establishment (“**PE**”), in the Host Jurisdiction for companies resident in the Home Jurisdiction (e.g. an employee may inadvertently create a taxable presence in India for themselves and/or their employer (“**Foreign Company**”) through the temporary presence of the employee in India for reasons related to COVID-19, as outlined above.

The creation of a taxable presence, albeit unintended, could give rise to a number of adverse corporate income tax implications for Foreign Companies (which do not already have a taxable presence in the Host Jurisdiction), including a requirement to i) register with the tax authorities; ii) prepare and submit tax returns; and iii) pay tax. We believe that the constitution of a taxable presence in this context would be an unreasonable burden to impose on Foreign Companies.

We are writing to you to bring these concerns to your attention, with the sincere hope that the aforesaid situations do not result in unintended tax consequences for Foreign Companies. In this connection, we request that CBDT consider issuing guidelines relaxing the rules relating to the constitution of a taxable presence or PE for Foreign Companies in the context of COVID-19. Please see below our recommendations in this regard:

- **Foreign Company:** We recommend that CBDT issue suitable guidelines with respect to the unintended existence of PE / residency for Foreign Companies, where its employees are remotely working in India either unplanned or planned, due to the COVID-19 global pandemic:
 - Where the Foreign Company is not resident in India but the directors of the Foreign Company attend board meetings from India held via electronic means (e.g. via video-conferencing, tele-conferencing, etc.) due to COVID-19 travel restrictions or due to public health concerns regarding COVID-19, in such situation the said Foreign Company should not be regarded as resident in India;
 - Where the Foreign Company did not have a PE in India before the impacts of COVID-19, but its employees are working in India temporarily as a result of COVID-19 travel restrictions or due to public health concerns regarding COVID-19, in such situations (1) the presence of the employee should not result in constitution of a PE or other taxable presence for the Foreign Company in India, and (2) this should not impact characterisation of income as it could otherwise potentially alter the withholding tax rate and consequences of the transaction. For example: income otherwise characterised as fees for technical services should not be recharacterised as business income for the Foreign Company; and
 - Where the Foreign Company has a PE in India even before the impact of COVID-19 and some of the employee of Foreign company are working in India as a result of COVID-19 travel restrictions, in such situations the temporary presence of the such employee should not result in higher attribution of profit for such PE in India.

Furthermore, the Organisation for Economic Cooperation and Development (“**OECD**”) and the tax authorities of several jurisdictions, including Australia, the United Kingdom, the Republic of Ireland, Singapore and Malaysia have in recent months responded to industry concerns and clarified that they will take a flexible approach on a number of these issues where an individual is temporarily working remotely in these jurisdictions due to COVID-19.

ASIFMA has also contacted the International Organisation of Securities Commissions (“**IOSCO**”), Executives’ Meeting of East Asia and Pacific Central Banks (“**EMEAP**”), Securities and Exchange Board of India (“**SEBI**”) and Ministry of Finance (“**MOF**”) to raise awareness of these issues. Please refer to the attachments for your reference.

If you have any follow up comments or questions, please feel free to contact Patrick Pang at ppang@asifma.org or +852-25316520.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Patrick Pang', is centered on a light gray rectangular background.

Patrick Pang
Managing Director and Head of Compliance and Tax, ASIFMA