

Conceptualizing Remote Worker Permanent Establishment

By Radhakishan Rawal *

Abstract

COVID-19 impacted humanity in many ways and one such impact is wide acceptance of the concept of Work From Home (WFH) by the corporate sector. Previously, WFH did exist in some countries, perhaps at a much smaller scale, but compulsions of COVID-19 have made WFH a new normal. This new normal also creates new tax challenges for the Multinational Enterprises (MNEs). Does the employee create a taxable presence in the countries where they are working remotely through a "permanent establishment" and if yes what are the profits attributable to such permanent establishment?

The existing treaty provisions are likely to result in widespread litigation on these issues. It is desirable that a new provision is introduced in the tax treaties to tackle these issues. The suggested remote worker permanent establishment provision adopts a very simple measurable threshold for determination of permanent establishment and also attempts to balance taxing rights of the country of source as well as residence. A simple standardised approach could be adopted for determining the profits attributable to such permanent establishment.

La pandémie de COVID-19 a eu de nombreuses répercussions, dont l'une a été pour le secteur des entreprises à recourir largement au télétravail. Certes, le télétravail existait déjà dans certains pays, quoique à une échelle beaucoup plus réduite, mais les contraintes liées à la pandémie ont contribué à ce qu'il soit devenue la norme. Cette nouvelle normalité comporte des enjeux nouveaux sur le plan fiscal pour les entreprises multinationales. L'employé crée-t-il une présence imposable dans les pays où il travaille à distance par le biais d'un « établissement permanent » et, dans l'affirmative, quels sont les bénéfices attribuables à cet établissement permanent ?

Les dispositions conventionnelles existantes risquent de donner lieu à de nombreux litiges sur ces questions. Il est souhaitable qu'une nouvelle disposition soit introduite dans les conventions fiscales pour les traiter. La disposition proposée en matière d'établissement permanent pour les employés travaillant à distance adopte un seuil mesurable très simple pour la détermination de l'établissement permanent et tente également d'équilibrer les droits en matière d'imposition entre le pays d'origine et le pays de résidence. Une approche simple et normalisée pourrait être adoptée afin de déterminer les bénéfices attribuables à cet établissement permanent.

La COVID-19 ha afectado a la humanidad de muchas maneras, una de las cuales ha sido la aceptación generalizada del concepto de trabajo a domicilio por parte del sector empresarial. Anteriormente, el trabajo a domicilio sí existía en algunos países, quizá con una presencia mucho menor, aunque las obligaciones que acarreo la COVID-19 han convertido a esta práctica en una nueva normalidad. Esta nueva normalidad también plantea nuevos desafíos fiscales para las empresas multinacionales. ¿Crea el empleado una presencia fiscalmente imponible en los países donde se encuentra trabajando a distancia a través de un "establecimiento permanente"? De ser así, ¿cuáles son los beneficios atribuibles a ese establecimiento permanente?

Es probable que las disposiciones de los tratados existentes den lugar a litigios generalizados en relación con estas cuestiones. Sería conveniente que se introdujera una nueva disposición en los tratados de tributación para abordar estos temas. La propuesta de disposición relativa al establecimiento permanente del trabajador a distancia adopta un umbral mensurable muy simple para determinar el establecimiento permanente y, por otro lado, intenta equilibrar los derechos de imposición del país de origen así como la residencia. Se podría adoptar un sencillo enfoque normalizado para determinar los beneficios atribuibles a ese tipo de establecimiento permanente.

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Introduction

The concept of Permanent Establishment (PE) has been in existence for several decades, yet what constitutes a permanent establishment is often difficult to state because the thresholds used for its definition are not objective and clearly measurable. The concept is also under significant stress due to the advancement of technology and resultant new business models.

The concept of “work from home” creates challenges for multinational enterprises (MNEs) as they need to constantly determine whether one or more employees working from a different country results in a permanent establishment and what could be the attributable profits. In the absence of a measurable threshold for determination of a fixed place of business, protracted litigation on the issue looks obvious.

This Policy Brief suggests a new provision of “Remote Worker Permanent Establishment” and a simple standardised profit attribution approach, which can be included in the tax treaties. A specific provision with simple and clearly measurable thresholds could be a win-win situation for all the stakeholders.

1. What is the new normal?

COVID-19 impacted humanity in many ways and one such impact is wide acceptance of the concept of Work From Home (WFH) by the corporate sector. Previously, WFH did exist in some countries, perhaps at a much smaller scale, but compulsions of COVID-19 have made WFH a new normal. Some employers are also making huge investments in Information Technology (IT) systems and technology to enable work from home. From the employer’s perspective WFH reduces expensive commercial real estate and related overhead costs and from the employee’s perspective the advantages of WFH include more personal time, reduced travel fatigue, comforts of working from home or flexibility of Working From Anywhere (WFA).

While the population of the world continues to increase, skilled labour continues to be in short supply and resultant competition amongst employers compels the MNEs to allow employees to WFH or WFA even in the absence of pandemic compulsions. Under the new normal the employees work (perform their official duties) from their own home or from any other premises not provided by the employer.

2. What are the tax issues with the new normal?

WFH / WFA is a new business model and its tax implications need to be examined, especially for cross border situations where the employee is working from a different country. The direct tax issues can be broadly in the following categories:

- Issues related to employees
- Issues related to the employer

- Issues related to the persons availing services from the employer

2.1 Issues related to taxation of employees

Article 15 of the United Nations (UN) Model Tax Convention (MTC) as well as the Organisation for Economic Co-operation and Development (OECD) MTC is a specific provision dealing with taxation of cross-border employees. Given that Article 15 of both the Model Conventions, as the wording is identical (henceforth referred to only as ‘Article 15’ unless specified otherwise), is a specific provision dealing with such situations, this brief proceeds on the basis that no major new issues arise due to WFH / WFA and Article 15 also results in a fair distribution of taxing rights.

However, the condition laid down in clause (c) of Article 15(2) [i.e. remuneration of the employee should not be borne by the PE of the employer] may become critical. If this condition is not satisfied, the benefit of Article 15(2)¹ will not be available to the employee. Creation of a PE due to WFH / WFA is examined subsequently as a tax issue related to the employer.

2.2 Issues related to taxation of employer

The issue for the employer is whether the work performed by the employee remotely from another country results in creation of a PE in that country?

The UN Commentary 2021,² as well as the OECD Commentary 2017,³ give guidance on this issue. OECD also addressed this issue and gave additional guidance as a part of the Guidance issued on various tax issues arising from COVID-19⁴.

While some guidance exists on the issue, it is not clear and adequate and how to deal with WFH/WFA may give rise to numerous disputes. The MNEs, as well as countries, are concerned with the disputes which may arise due to WFH/WFA. The disputes could be related to creation of PE and then related to attribution of profits to PE. WFH/WFA undoubtedly represents a new business model that was not contemplated a few decades back when Article 5 and Article 7 of the UN and OECD MTCs were conceptualised. New business models of e-commerce were also not contemplated decades back when these articles were conceptualised.

3. Recent documents recognising the issues

3.1 United Kingdom Office of Tax Simplification (OTS) Policy Paper

In December 2020 the UK’s OTS, which gives independent advice to the government on simplifying the UK tax system to make things easier for taxpayers, released a policy paper titled “*Hybrid and distance working report: exploring the tax implications of changing working practices*”. This paper⁵ identifies various tax and non-tax issues arising from remote workers and takes note of the issues raised by the industry.

The UK paper identifies the following categories of

workers:

- Hybrid workers – who work from office some days and home some days in the same week. The home and office could be in different countries (key problem in Europe where borders can be crossed easily). Sometimes people fly too from one country to other if they have dual residency (common to fly to work for 2 or 3 days and return home for the rest of 4 or 5 days).
- Remote working for short term – these are people who want to work for some time from another country either for personal reasons or when they want to combine it with a holiday. This could vary from a few weeks to 3 months.
- Short term secondments (generally between 3 to 6 months) – this may be mostly to locations where the company has an office.
- Long term secondments (from 6 months to 2 years) – generally here the employees are officially seconded to the host location and their expenses reimbursed.

3.2 UN developments

The UN Tax Committee⁶ is working on “Taxation issues related to the digitalized and globalized economy” and one of the workstreams is considering the function and relevance or otherwise of physical presence tests (such as under “permanent establishment” rules) in the context of an increasingly digitalized and globalized economy. At the twenty-sixth session of the UN Tax Committee a detailed paper⁷ was discussed dealing with remote workers.

4. Ideal approach

WFH / WFA is a new business model and application of old tax provisions for such business models would result in disputes and protracted litigations. The MNEs are already facing the heat of tax uncertainties resulting from issues related to WFH / WFA.

An ideal approach would be to have a new set of tax provisions for the new business model. Accordingly, specific provisions in Article 5 and Article 7 of the MTCs for WFH / WFA would be ideal.

5. Old normal and old issues – Business Travellers

Before attempting a solution to the tax issues related to this new business model, it would also be relevant to take note of the old business model and related issues. Employees of an MNE may have to travel to different countries for various business-related activities such as attending meetings, conferences, seminars etc. These employees (Business Travellers) visit other countries for the specified business activities and go back to their home country. It is possible that for various reasons these employees stay in the other country even for days other than the day of the meeting and operate from that

country.

Illustration A

Ms. A is an employee of Country A and has to attend business meetings on Monday and Friday of a week in Country B. To reduce travel, Ms. A continued her normal duties from a hotel in Country B on Tuesday, Wednesday and Thursday.

Illustration B

Ms. G is an employee of Country A and had attended business meetings on 1st and 2nd of the month in Country B. Ms. G’s parents are in Country B and Ms. G decides to operate from her parents’ house for the entire month.

Illustration C

Ms. GA is an employee of Country A and had attended business meetings on 1st and 2nd of the month in Country B. Ms. GA likes the climate of Country B and decides to operate from an apartment booked on AirBnB.

Illustration B and C can be said to be akin to Remote Worker but Illustration A requires attention. There may be several such occasions where the employees of one country would operate from another country for short durations. Such Business Travellers would typically be eligible for the benefit of short stay exemption under Article 15(2) of the MTCs.

From the perspective of company taxation, it needs to be determined whether the operations of such Business Travellers result in a fixed place PE⁸. Ordinarily, such short stays could go unnoticed. Further, the general interpretation could be that considering the threshold of six months, the concept of geographical coherence etc. for a fixed place PE under Article 5(1), such short stay will not result in a fixed place PE. However, with the advanced technology such short stays could be more productive and PE status needs to be re-evaluated from a policy perspective especially when the new rules are drafted around Remote Worker PE.

The following approaches may be considered:

Approach 1

No need to change the position as regards these Business Travellers and maintain status co by applying the existing provisions of Article 5(1), Agency PE and Service PE provisions of the MTCs.

Approach 2

Treat the Business Travellers at par with Remote Workers on the basis that although these employees do not operate from a traditional office provided by the employer, due to the advancement of technology they are able to produce the same economic output operating from a remote location.

Conceptually, whether an employee shifts his base to Country X and works as a typical Remote Worker for a relatively longer period or works from Country X for a few days during a business travel, ideally should not

make a difference from the perspective of ability of Country X to exercise taxing rights. In both situations, an employee of a foreign company is performing economic activities from the territory of such country. Further, creation of categories of employees⁹ would lead to more disputes as there would always be overlap in the categories, an employee may fall in more than one category during a year, etc.

Approach 3

Treat the Business Travellers at par with Remote Workers but give basic exemption to reduce compliance. For example, a Business Traveller may not be treated as a Remote Worker till the number of days spent working in a country as an employee do not exceed 15 days in a fiscal year.

Approach 3 may be a balanced approach which ensures that the source country is not deprived of taxing rights when significant time is spent by Business Travellers in a country and at the same time the MNE is not burdened for short trips of the employees.

6. The proposed provision – Creation of a Remote Worker PE

The author suggests two alternative provisions to address the issues:

6.1 Alternative 1

The following new paragraph may be added in Article 5 after paragraph 7:

7.1 (1) Notwithstanding the provisions of paragraphs 1, 2 and 5 but subject to paragraph 7.2, where one or more remote workers are working in a Contracting State as an employee of an enterprise of the other Contracting State, such an enterprise shall be deemed to have a permanent establishment in that State in respect of the work performed by such remote worker(s) if such work continues for period or periods aggregating more than 183 man days in any 12-month period commencing or ending in the fiscal year concerned.

7.1(2) A remote worker is an individual who performs his official duties as an employee:

- in a Contracting State other than the Contracting State in which his employer enterprise is situated and

- the work is performed from a place other than a place provided by the employer or the ordinary place of business of the enterprise.

Provided that an individual shall not be treated as a Remote Worker unless the physical presence of such individual in a Contracting State exceeds 15 days in any 12-month period commencing or ending in the fiscal year concerned.

7.2 The work performed by one or more remote worker shall not constitute a permanent establishment where:

- the nature of work performed is preparatory or auxiliary in nature and

- the aggregate number of days for which such preparatory or auxiliary work is performed in a Contracting State does not exceed 300 man days in any 12-month period commencing or ending in the fiscal year concerned.

6.2 Alternative 2

The following new paragraph may be added in Article 5 after paragraph 7:

7.1 (1) The term “permanent establishment” also encompasses the performance of official duties by one or more remote workers in a Contracting State, but only if the activities of that nature continue within a Contracting State for a period or periods aggregating more than 183 man days in any 12-month period commencing or ending in the fiscal year concerned.

7.1(2) A remote worker is an individual who performs his official duties as an employee:

- in a Contracting State other than the Contracting State in which his employer enterprise is situated and

- the work is performed from a place other than a place provided by the employer or the ordinary place of business of the enterprise.

Provided that an individual shall not be treated as a Remote Worker unless the physical presence of such individual during which official duties are performed in a Contracting State exceeds 15 days in any 12-month period commencing or ending in the fiscal year concerned.

7.2 The work performed by one or more remote workers shall not constitute a permanent establishment where:

- the nature of work performed is preparatory or auxiliary in nature and

- the aggregate number of days for which such preparatory or auxiliary work is performed in a Contracting State does not exceed 300 man days in any 12-month period commencing or ending in the fiscal year concerned.

7. Analysis of the proposed provisions

- Alternative 1 is designed on the lines of paragraph 5 of Article 5 of the UN Model dealing with dependent agent PE. Alternative 2 is designed on the lines of paragraph 3(b) of Article 5 of the UN Model dealing with Service PE. However, in substance both the provisions have the same effect.
- It is possible that a remote employee makes several trips to a country and performs his official duties as an employee from such country. The employee may operate from different cities of a country. In such situations all the days spent by a remote worker in a country need to be aggregated to determine existence of a Remote Worker PE.

- The concept of geographical coherence in the OECD Commentary¹⁰ on Article 5 can be said to be outdated considering the technological advancements. Further, the UN Commentary¹¹ already notes that this concept is of lesser significance.
- It is possible that more than one employee of an enterprise will qualify as a remote worker working from a particular country. At a policy level it would not be appropriate that several employees of an enterprise operate from different locations in a particular country and that country is deprived of taxing rights. Accordingly, the number of days for which work is performed by all the employees at the same or different locations is required to be aggregated.
- Article 5(4) of the OECD and UN Model contains an exception for the preparatory and auxiliary activities. Such an exception can be extended to the Remote Worker PE as well. However, a threshold of 300-man days is prescribed. This threshold aims to avoid the situation where an unlimited number of remote workers work from a country without creating a Remote Worker PE on the basis that the work performed is preparatory or auxiliary in nature. With the threshold, if they exceed 300 man-days, even if the work is of a preparatory or auxiliary nature, it would create a Remote Worker PE. At a policy level it may not be reasonable to deny taxing rights to a country, even when the work performed is preparatory or auxiliary in nature, if such work is performed over a longer period of time. Accordingly, exception for preparatory and auxiliary work with a threshold of 300 man days represents a balanced approach.
- Some commentators believe that with the advancement of technology the concept of preparatory and auxiliary activities is outdated. Further, this is very subjective in nature. If that approach is adopted then there would be no exclusion for preparatory and auxiliary activities.

8. Issues to be clarified in the Commentary

The issues which need to be clarified in the Commentary include the following:

- An employer is “situated in a Contracting State” in which the legal entity (i.e. the employer) is a tax resident.
- The concept of “man days” may be clarified in the Commentary. For example, if five remote workers are working in a Contracting State on a single day, it shall be counted as five-man days. If five individuals work for three days each, the work is performed for 15 man-days.
- The remote employee may operate from his own home, home of his family or friend or other plac-

es such as a hotel room or other rented place in a business center¹².

- Where the employer pays rent for the hotel room or other place which is not an ordinary office of the employer and from where the remote worker operates, the work performed at such place shall be included while determining Remote Worker PE.
- Where the worker is allowed to operate from an office of an affiliate enterprise of the employer, the work performed at such an office will be included for the purpose of Remote Worker PE determination. Such office of the affiliate will not be treated as an office provided by the employer.
- It is possible that a remote employee spends only part of time (say 100 out of 200 days) on preparatory and auxiliary activities. It is possible that only some remote employees (say 7 out of 10) are engaged in preparatory or auxiliary activities. It may be clarified that in all such situations the fact that some work was preparatory or auxiliary in nature may be ignored while determining a Remote Worker PE.
- Where the employer whose employees are working remotely in a country has a PE or a Connected Person in that country, the approach adopted in para. 4.1 of Article 5 of the UN Model¹³ needs to be adopted. Similar approach is required when a Connected Person of such an employer has PE or remote employees in that country.
- The weekends and statutory holidays will be included for the purpose of determining a Remote Worker PE but the vacations taken by the remote employees will not be included.

9. Attribution of profits to a Remote Worker PE

Attribution of profits to a Remote Worker PE will be critical. To avoid disputes related to attribution of profits a simple cost-plus method can be adopted.

Activities performed by the remote worker can be divided into various categories based on the functions performed by such worker. The categories could include:

- Sales and marketing
- Contract research and development
- Back office
- Front office
- Management consulting
- Others

Further standardised mark-up may be upfront agreed by the treaty partners and a table containing mark-up % and category of work may be included in the tax treaty as a Protocol.

While determining the % of mark-up, the following

aspects may be considered:

- The home / hotel room, from where the remote employee operates, would not belong to the employer and would also not have the standardised branding etc. of the employer organisation. Should such facts trigger a lower mark-up?
- Whether the level of mark-up should be higher when the goods / services sold by the employer are also available in the country in which the remote workers are operating.
- Whether the level of mark-up should be higher when the remote worker interacts with the clients of the employer in the country in which he operates and such interaction does not result in Service PE or Agency PE.

Further, cost plus mark-up method may not be an appropriate method in a situation where the activities performed by the Remote Employees result in revenue generation for the employer either from the country in which the Remote Employees operate or from some other country. Similarly, if the employee is a Key Managerial Person, cost-plus may not be the appropriate method.

Specific guidance on the level of % mark-ups may be provided in the UN / OECD Commentary on the basis of transfer pricing norms. Based on this guidance, a matrix may be adopted in the Protocol to the tax treaty through the UN Multilateral Instrument (MLI) mechanism.

10. Implementation

10.1 Domestic law provisions

The domestic law provisions are generally worded very broadly. This would ordinarily give taxing rights to a country when economic activities are performed in that country but the quantification of income attributable to the operations carried out in a country may be difficult. Accordingly, to avoid quantification related complexities and disputes a better approach could be to include a specific provision in the domestic law to levy tax on the profits attributable to the Remote Worker PE. This could be same as the provision adopted in the tax treaties.

10.2 Tax Treaties

The new provisions for Remote Worker PE may be inserted in the existing tax treaties through a UN MLI. The UN Tax Committee has already started work on the development of the MLI / Fast Track Instrument.

11. Remote Worker PE from the perspective of various stakeholders

11.1 From the perspective of the tax authorities

The proposed Remote Worker PE provision contains an objective and measurable threshold. Accordingly, the implementation of this provision would be easy. Fur-

ther, if the mark up matrix is also pre-agreed and included in the treaty protocol, the chances of attribution disputes would also be significantly low except in situations where the remote workers are engaged in core revenue generating activities for the enterprise.

11.2 From the perspective of employer / MNE

Number of days can be the simplest objective and measurable threshold. It would be easy for the MNE to compile the basic data about the travel details of the employees. This will give the much-desired certainty to the employers.

The approach of aggregation of days spent by all the employees in a country to determine existence of a Remote Worker PE will make it easy for the MNE to do such a determination. An approach which requires determination of Remote Worker PE separately for each employee would be cumbersome for the employer.

Para. 12 below contains an example explaining how the data for Remote Worker PE will look like and how attributable profits would be determined.

11.3 From the perspective of employees

With the desired level of certainty on the tax front, the employers would be more comfortable permitting WFH / WFA and this would help the employees.

In some cases, the benefit of short stay exemption contained in Article 15(2) would be denied to the employees as a result of aggregation of number of days of presence of all the employees. Such aggregation could lead to Remote Worker PE and net basis of taxation for the employer which will breach the condition contained in Article 15(2). However, this would not result in higher tax liability for the employee as credit for the taxes paid in the source country will be allowed by the country of residence.

If taxing several employees in the source country is seen as burdensome then the employer may decide not to claim deduction for employee's salaries as expenditure. This will enable the employees to claim short stay exemption. Taxation of profits attributable to the PE need to be differently determined in such cases.

11.4 Revenue sharing between the countries

Remote worker PE would result in fair distribution of taxing rights between the countries. The aggregation of number of days worked by one or more employees (i.e. the Man-day approach) ensures that the country in which the worker is operating is not denied taxing rights due to outdated concepts.

12. Remote Worker PE Example

The details of number of days spent by various employees of A Ltd., a tax resident of Country A in Country B are tabulated hereunder:

Remote Worker PE data
Number of days of physical presence in Country B

Sr. No.	Emp l Id	Name of the employee	No. of days of presence in Country B	No. of days on which the employee was on leave	Net work-ing days includ-ing week ends	Busi-ness Travel-ler/ basic exemp-tion	Net num-ber of days in the country	Is the employ-ee en-gaged in prepara-tory ac-tivity?	Category of work ¹⁴
1		A	100	10	90	15	75	N	L3
2		B	25	1	24	15	9	N	L2
3		C	40	3	37	15	22	N	L3
4		D	200	9	191	15	176	Y	L5
5		E	15	0	15	15	0	N	L1
6		F	12	0	12	12	0	N	L1
7		G	10	0	10	10	0	N	L1
8		H	300	15	285	15	270	N	L4
9		I	75	4	71	15	56	N	L3
10		J	95	7	88	15	73	Y	L5
11		K	120	10	110	15	95	Y	L5
12		L	60	2	58	15	43	N	L2
13		M	75	3	72	15	57	N	L3
14		N	95	4	91	15	76	N	L4
15		O	40	3	37	15	22	N	L4
	Total		1262	71	1191	217	974		

Exemption for Preparatory and Auxiliary Activities

No. of man-days for preparatory and auxiliary activities 344

Total number of man-days on preparatory and auxiliary activities exceed the threshold of 300 days and hence exemption is not available.

Category	Man-days	Salary and other cost for the days spent in the country ¹⁵	Mark up %	Profits attributable to the Remote Worker PE
L1	0	0	15	-
L2	52	28493.15	12.5	3,562
L3	210	57534.25	10	5,753
L4	368	75616.44	7.5	5,671
L5	344	47123.29	5	2,356
Total	974			17,342

Analysis

In this example total man days spent by the employees of A Ltd. exceeds the threshold of 183 days hence this results in a Remote Worker PE.

While some employees are engaged in preparatory and auxiliary activities, the exemption for such activities is not available as such activities exceed 300 days.

It may be open for the countries to set a higher or a lower limit for man-days resulting in Remote Worker PE in a bilateral negotiation. Similarly, threshold for preparatory and auxiliary activities, or whether or not to retain the exemption, can also be negotiated.

It can be observed that when the number of employees is high, the Business Travel exemption of 15 days reduces taxing rights of the country. For example, if 100 employees work from Country B, Country B will be deprived of taxing right over 1500 man-days. The alternatives to address this could include the following:

- The number of employees for which this exemption can be given can be capped.
- The total number of days for which an exemption can be given for an employer can be capped.
- Apply this exemption to only those employees who are Business Travellers. In other words employees who visit a country and extend their stay by 3-4 days would only be entitled to such exemption.

Conclusion

It is most desirable that tax certainty is offered by adopting a specific Remote Worker PE provision. This Policy Brief contains initial thoughts on the issue and could be subject to further improvement to make it acceptable to all. Additionally, approach for attribution in cases where the cost-plus method may not be appropriate also need to be further developed.

The author invites comments from various stakeholders for improvement of the Remote Worker PE concept articulated in this brief.

Endnotes:

¹ Article 15(2) gives short stay exemption and the employee is not liable to pay tax in the source country in which the employment is exercised for a short duration.

² Para. 6 of the UN Commentary 2021 on Article 5.

³ Paras. 18, 19 of the OECD Commentary 2017 on Article 5.

⁴ See <https://www.oecd.org/coronavirus/policy-responses/updated-guidance-on-tax-treaties-and-the-impact-of-the-covid-19-pandemic-df42be07/>.

⁵ See <https://www.gov.uk/government/publications/ots-report-on-hybrid-and-distance-working>.

⁶ Committee of Experts on International Cooperation in Tax Matters

⁷ E/C.18/2023/CRP.1

⁸ Creation of Agency PE and Service PE is equally relevant. However, this Policy Brief does not deal with these issues.

⁹For example, the UK Report creates categories such as Hybrid Workers, Remote working for short-term, Short-term secondment, Long-term secondment etc.

¹⁰Para. 25 of the OECD Commentary 2017.

¹¹Para. 9 of the UN Commentary 2021 on Article 5.

¹²For example We Work type arrangements.

¹³Para. 4.1 of Article 5 is essentially an anti-abuse provision which prevents misuse of the benefit granted by para. 4 for auxiliary and preparatory activities.

¹⁴As per the internal Human Resources (HR) policy of the organisation the employees may have been divided into different levels indicating the hierarchy / career progression / seniority. These levels will help in attribution of profits. The senior level employees will attract higher profit attribution.

¹⁵For the purpose of determining profit attribution, in addition to the proportionate salary cost of the employee, other costs related to stay etc. also need to be considered.

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