

# COVID-19: Impact of Travel Restrictions on Foreign Companies

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COVID-19 outbreak came in a flash! Many are caught unprepared, flights are grounded and many industries are affected in a span of a few months. To tackle the COVID-19 situation, many if not all countries have imposed entry restrictions and border closures to contain the spread of the virus.

With the border control measures, employees of foreign companies may be stranded in Singapore and one could potentially see the creation of a tax issue: permanent establishment (“PE”).



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## WHAT IS A PE? HOW WOULD THE PRESENCE OF EMPLOYEE OF A FOREIGN COMPANY RISKS CREATING A PE IN SINGAPORE?

Briefly, the concept PE is to provide taxing right to a Contracting State (*Singapore*) on the profits of an enterprise of the other Contracting State. In other words, a Contracting State (*Singapore*) cannot tax the business profits of an enterprise of the other Contracting State unless the foreign company carries on its business through a PE situated in Singapore.

A PE means a fixed place of business through which the business of an enterprise is wholly or partly carried on, and normally includes a place of management, a branch, an office, a factory, a workshop and a place of extraction of natural resources, etc.

The Double Taxation Agreement also provides that the existence of a PE will be determined by the existence or extent of certain specified activities in the state where the activities are carried out. Such activities include, amongst others, the following:

- a. A building site or a construction, assembly or installation project that lasts more than a specified period;
- b. Supervisory activities connected with a building site or a construction, assembly or installation project that lasts more than a specified period;
- c. Services (including consultancy services) furnished by an enterprise through its employees that continue for more than a specified period;
- d. The presence of a dependent agent (i.e. not an agent of independent status) who has, and habitually exercises, a general authority to negotiate and conclude contracts on behalf of an enterprise.



# TAX GUIDANCE ON PE IN VIEW OF THE COVID-19 SITUATION

To prevent causing unfair taxation during this period of restricted international traffic, the Inland Revenue Authority of Singapore ("IRAS") will consider no PE as being created due to the presence of these employees if all the following conditions are met (referred to as "COVID-19 no-PE treatment"):

- a. The foreign company does not have a PE in Singapore for YA 2020 (i.e. basis period 2019);
- b. No change to the economic circumstances of the company (i.e. principal activities, business model, nature of business operation, conduct of business in Singapore and elsewhere, usual locations relating to the company's operation);
- c. Employees stay are unplanned and due to travel restriction from COVID-19 and their physical presence is generally not more than 183 days in the calendar year 2020; and
- d. Activities performed (if any) in Singapore would not have been performed if not for the travel restriction.

To support a claim that there is no PE in Singapore, the company must keep appropriate documentation and records, and provide the relevant information to the IRAS upon request.

## POINTS OF THOUGHT

- ▶ The tax guidance was indeed timely to alleviate the foreign companies' concerns over their tax obligations in Singapore due to their employees' unplanned prolonged stay in Singapore. The conditions spelled out above clearly limit the "COVID-19 no-PE treatment" to foreign companies that genuinely do not currently have nor have any intention to carry on their business activities in Singapore through a PE in Singapore.
- ▶ Foreign companies with existing PEs in Singapore for YA 2020 will continue to be assessable to Singapore tax if their PEs continue to exist for YA 2021.
- ▶ Due to travel restrictions, the employees stranded in Singapore may be required by their employers to perform certain activities in Singapore beyond their original purpose of travelling to Singapore, which would have, if not for this guide, created a PE in Singapore under the normal PE test. To avoid abuse, the IRAS has introduced the conditions "if not for travel restrictions" and "no change to the economic circumstances". As usual, the onus of proof rests with the taxpayers. To substantiate that these conditions have been met can be challenging, especially the latter condition - "no change to the economic circumstances", where businesses are constantly evolving to keep up with the fast changing world. We hope to the extent the employees' activities in Singapore have not changed even though the economic circumstances of the foreign company may change back home, the IRAS should consider this condition as having been met.





- ▶ Nevertheless, the affected foreign companies should keep records of all documentation and correspondence in relation to their employees' activities in Singapore. Singapore taxpayers, acting as withholding tax agents, are also required to assess if PE exists to determine whether withholding tax should apply on certain payments made to foreign companies.
- ▶ Efforts to stem the spread of COVID-19 continues to be in place, with extended circuit breaker period in Singapore and border restrictions in many countries, uncertainties abound! The time test of 183 days may have to be adjusted if travel restrictions are not lifted. Overall, this PE guidance may need to be updated as the situation develops.

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