

Post-COVID-19: Impact on cross-border employees, its imperatives and tax dynamics

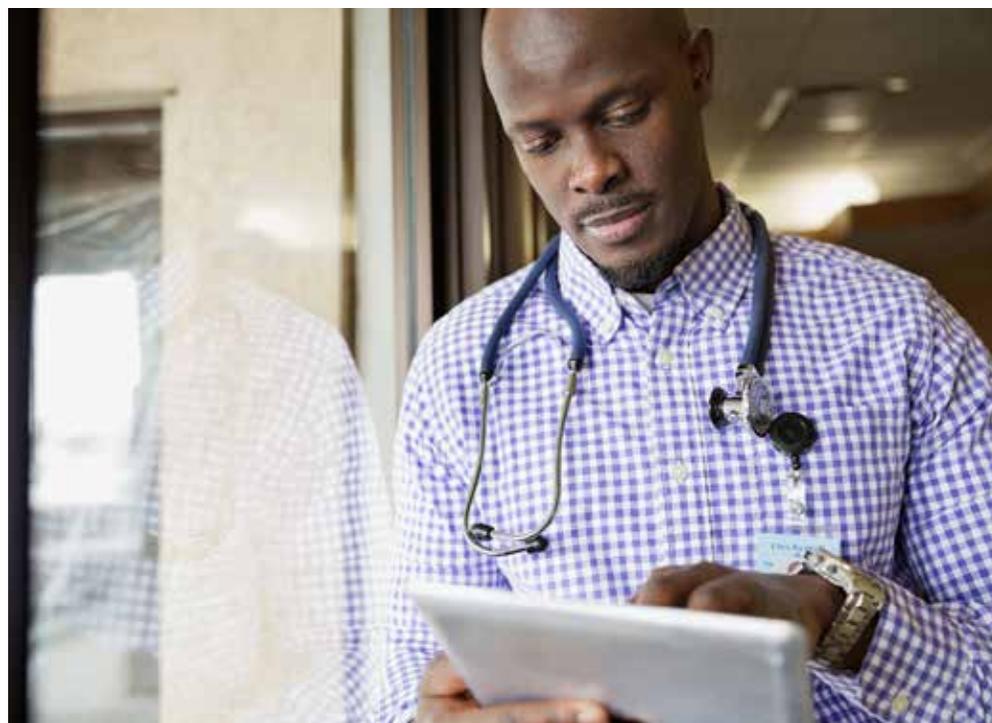
The COVID-19 Pandemic is not just a global public health crisis, it has also severely affected the global economy and financial markets, disrupting lives, communities, governments and businesses at large. For instance, governments and businesses have adjusted their outlook for 2020, with many taking aggressive measures to stay afloat. Despite the efforts, many businesses were unable to survive.

To cushion the impact of the Pandemic, the Federal Government of Nigeria (FGN) and other agencies of government have been providing stimulus packages and palliative measures. Specifically, in the tax landscape, measures like deferment of tax payment, the extension of filing timelines, waiver of penalties/interest have been provided to businesses. While these measures have helped manage the impact of the crisis, more action is required if businesses in Nigeria are to recover sustainably.

From a personal income tax perspective, the Organisation for Economic Co-operation and Development (OECD) has encouraged countries to work together to assuage the unplanned tax implications and potential new tax burdens created by the current crises such as employees overstaying in foreign countries due to the shutdown of national borders. Employees working outside their host countries are expected to work remotely for business continuity purpose.

This article looks at the tax implications that have been created by the prolonged stay of foreign tax resident employees in Nigeria and Nigerian tax resident employees temporarily working remotely in other countries as a result of the Pandemic. It also examines current efforts by the tax authorities to address these issues and recommends measures that may also be introduced by the Nigerian tax authorities.

For individuals under global mobility, tax residency varies from jurisdiction to jurisdiction. While some countries determine individual residency based on physical presence, others use a combination of factors such as the location of permanent home, economic interests and family. In Nigeria, residency is a key criteria in determining the taxability of expatriate



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employees.

The legal framework for the administration of personal income tax in Nigeria is the Personal Income Tax Act (PITA). PITA provides that an individual would not be tax resident in Nigeria where the following three conditions are jointly met:

- The remuneration of the employee is not borne by a fixed base of the employer in Nigeria
- The employee is not in Nigeria for a period amounting to 183 days (inclusive of annual leave or temporary period of absence in any calendar period)
- The remuneration of the employee is liable to tax in another country with which Nigeria has a double tax agreement

This may mean that foreign nationals, who would have otherwise not been taxable in Nigeria, might become taxable because they have overstayed their presence in Nigeria due to travel restrictions. In the same vein, PITA also addresses the tax implication for Nigerian residents that were stranded in other countries as a result of the pandemic and thereby working remotely from such locations. PITA provides that, "The gain or

profit from an employment shall be deemed to be derived from Nigeria if the employer is in Nigeria, or has a fixed base in Nigeria". This implies that such categories of people will remain taxable in Nigeria following the exceptional circumstance posed by travel restrictions during the pandemic. Similarly, the domestic laws of the foreign jurisdictions may apply to Nigerian tax residents in this situation.

OECD, in its publication "Analysis of tax treaties and the impact of COVID-19 crisis", expressed that the exceptional and temporary change of location, giving rise to cross-border employees working remotely should not create a new permanent establishment for businesses. OECD also advised tax authorities to provide guidance on ways to manage the tax compliance requirements in view of this situation.

Tax authorities in most jurisdictions understand that the extended-stay by cross-border employees is exceptional and have come up with guidelines to address tax and immigration consequences of this extension. In particular, tax authorities in Australia,

India, Ireland, United Kingdom and the United States of America have at various times released guidelines, based on the OECD recommendations, on measures to relax the tax rules on cross-border employees affected by COVID-19. Whilst the OECD merely provides guidelines and its recommendations are not binding on member countries, it serves as a useful guide for non-member countries like Nigeria.

Many businesses may have to cope with several cross-border employee related tax issues in the post COVID-19 period. These tax issues will become obvious based on the outcome of the review of the filed annual returns or audits by tax authorities for the COVID-19 period. It is our expectation that in order to confirm the actual position of each employee, tax authorities will review relevant documents from organisations to get an overview of cross-border tax issues. Businesses should be prepared to deal with these issues by substantiating the intentions of the employees affected by the lockdown. Therefore, it is critical that employers track their employees, keep appropriate immigration documentation such as valid visitor's pass/residence permits, confirmed return

ticket amongst others; to demonstrate employee intentions, and track developments in the regions where their employees were stranded because of the Pandemic.

Furthermore, we await specific guidelines from the tax authorities' on these cross-border tax issues as this will help resolve the inherent ambiguity as to whether these employees should be subject to tax or not? Our expectation is that a circular or public notice will be issued to address personal income tax implications of the exceptional circumstances caused by COVID-19. We also anticipate there will be greater collaboration between the tax authority and other relevant regulatory authorities, for instance, the Nigerian Immigration Service, who have issued several guidelines on their approach to addressing immigration gaps during the Pandemic.

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