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Tax Residence in the Era of Covid-19

The global spread of the Covid-19 pandemic has caused many individuals to find themselves temporarily staying in Israel until the situation pacifies; Israelis who were on a "homeland visit" and "got stuck", who came to assist or nurse their family members in Israel, and those who preferred to spend the "Corona Days" in Israel rather than in their country of residence. As the pandemic spread around the world, more and more states closed their borders and the interstate traffic had been significantly reduced, causing many individuals arriving in Israel due to the pandemic a difficulty leaving and returning to their home countries. The prolonged stay in Israel might expose the individual to the claim that she or he is a "resident of Israel" for tax purposes, and therefore their entire income, both in Israel and abroad, is subject to tax in Israel.

According to Israeli law, the residency status of individuals for tax purposes should be determined according to the "Center of Life Test", according to which the state of residence is the one with which the individual has the most nexus. When the place of permanent house of the individual, the place of residence of the family, the place of permanent employment, economic interests, where she or he is socially active, and more must be examined. In addition to the "Center of Life Test", there are two rebuttable presumptions, that examine the actual number of days spent in Israel: (i) if during the tax year the individual was in Israel for 183 days or more; and (ii) if the total period of his stay in Israel for the tax year and for the two years preceding it were 425 days or more, and at least 30 days during the tax year (the "**Presumptions**"). In the occurrence of the Presumptions, the individual is presumed to be an Israeli tax resident.

Experience shows that the Israel Tax Authority attributes substantial importance to the number of days the individual spent in Israel in determining his place of residence. The prolonged stay in Israel because of the Covid-19 pandemic therefore raises the concern that these individuals will be considered as Israeli tax residents. There seems to be no reason to consider the days spent in Israel stemming from the Covid-19's limitations, but the Israel Tax Authority has not yet published its position on the issue and it is difficult to predict how it will act.

However, some countries have already addressed the issue and made it clear that a temporary stay stemming from the Covid-19 crisis will not be taken into account. For example, the US Tax Authority has made it clear that in order to determine one's place of residency, stay of an individual who was unable to leave the US due to the crisis limitations during the period from February 1, 2020 until April 1, 2020, will be neutralized for tax residency purposes, subject to a 60-day limit, without the individual having to prove that she or he was health-impaired by the Covid-19 pandemic. In addition, the US Tax Authority requires keeping records showing that the individual relied on the said relief. The UK Tax Authority has also made it clear that for the purposes of determining one's place of residency, an individual's stay for up to 60 days on British soil due to exceptional circumstances, will not be counted. In this context, it is explained that circumstances in which the individual cannot leave the UK, or that his stay in the country is due to a factor beyond his control, will be regarded as exceptional circumstances. A similar approach is being taken in Ireland and Australia, where the Tax Authorities made it clear that it would ignore a stay in their state during the Covid-19 period, provided that force majeure circumstances prevented the individual from leaving the state.

The OECD organization has also addressed the issue and in early April its position on tax implications due to the prolonged stay of individuals in foreign countries caused by the Covid-19 crisis was published. According to the organization's position, the individual's tax residency is unlikely to change in the light of the temporary circumstances that are occurring due to the epidemic. However, the organization distinguishes between a situation where the individual is forced to stay in a foreign country since the epidemic broke out when she or he visited the country, and a condition where the individual had temporarily returned to his former state of residence as the epidemic spread. As for the first situation, the organization assumes that the "Tie Breaker Test" under the relevant tax treaty would mostly award residence to the current state of residence, and probably in these exceptional circumstances, the individual's place of residence is unlikely to change. As for the second situation, the organization makes it clear that the individual's temporary return to his previous state of residence will probably not affect tax residency, and this would probably be the case also based on relevant tax treaty.

In this context it should be noted that the unavoidable stay of individuals in Israel may have additional tax implications (other than determining the residency of the individuals themselves) and can also affect the way in which foreign corporations are taxed. For example, a prolonged stay in Israel of an individual who takes part in a foreign corporation's decision-making procedures, may raise the claim that that foreign corporation is "controlled and managed" from Israel, so that according to Israeli tax law, the foreign corporation must be considered a resident of Israel. In addition, individuals employed by a foreign corporation who work remotely during their unavoidable stay in Israel, may be considered as constituting a "permanent establishment" of the foreign corporation in Israel, causing some of the corporation's profits to be subject to Israeli taxation.

The OECD's fundamental position is that a temporary change arising from the Covid-19 epidemic should not change the place of control and management of a corporation, or result in the creation of a permanent establishment, as long as things return to order after the Covid-19 epidemic and the temporary change will not become permanent.

And in Israel?

We are in a position that generally, an unavoidable and temporary stay of an individual within the borders of Israel during the Covid-19 period, should not result in Israeli tax implications. This can be based, *inter alia*, on the **Kenig** court ruling, which stated that an unavoidable stay in Israel by virtue of an exit prohibition order issued during a homeland visit to Israel will not be considered as part of the count for the Presumptions, as long as the individual had left Israel immediately upon removal of the exit prohibition order. Furthermore, the rationale of the residency regulations, which determine that the period of an individual's hospitalization in a hospital or in another rehabilitation institution in Israel, will not be considered as part of the count for the Presumptions. However, it will only be proper for the Israel Tax Authority to publish its position on the matter as soon as possible, as already done in other countries.

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