Evacuated from Africa but Present in Africa's Economy through Telework: Who gets to Tax them?

By:

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Introduction

The world over, governments have been devising policies to protect their citizens from the COVID-19 pandemic. A noticeable policy adopted by most, if not all, global-north countries has been the evacuations of their citizens from zones that do not show a lot of promise to cope with the pandemic. Africa has been profiled as one such zone. Not surprisingly, global-north countries such as the United States, the United Kingdom, Germany, Canada, and France, to name but a few, have been evacuating their citizens from the continent. We have not, however, witnessed parallel evacuations of African citizens from global-north countries. One explanation for this may be that Africans are safer in those countries than home, given the nature of the healthcare infrastructure in the global north. Another is that our governments are unable to carry out evacuations.

The citizens evacuated from Africa included workers, who were either employed or were performing independent services in an African country. Being cross-border workers, as they were deriving income from a country that is not their home country, it has been the arrangement under double taxation agreements to tax such income in the country in which it was earned. We may call this their country of work, an African country in this case.

This taxation arrangement is done subject to certain conditions and it emanates from two Treaty Model Conventions, along the lines of which, globally, double taxation agreements have been crafted. One is the OECD Income and Capital Model Convention, developed by the Organisation for Economic Co-operation and Development (hereinafter OECDModel Convention). The other is the UN Model Double Taxation Convention between Developed and Developing Countries, developed by the United Nations (hereinafter UN Model Convention).

The point that I intend to convey in this blog post is that, under the Model Conventions, each African country has lost taxation rights over cross-border workers who have been evacuated from it but who are still deriving income from it through telework. Telework, a term originally coined by Jack Nilles, is 'the activity of working from home while communicating with your office by phone or email, or using the internet'. The COVID-19 pandemic has made social distancing an imperative and, consequently, we are witnessing an unprecedented reliance on telework. Indeed, many companies have transitioned to a work-from-home set-up. Zoom, a videoconferencing app, for instance, could only have 10 million calls a day at the end of 2019. However, three months later, at the outbreak of COVID-19, this shifted to 200 million calls a day.

To convey my point critically, I begin by analysing the conditions that the UN and the OECD Model Conventions require of a country for it to have taxation rights over a cross-border worker. This analysis shows that such conditions are unfair for African countries amid the COVID-19 pandemic. Then, I provide recommendations for the way forward. I conclude by providing some theoretical grounding for these recommendations.

Conditions for Taxation Rights under the Treaty Model Conventions

The allocation of taxation rights to a country over cross-border workers is covered under Article 14 of the UN Model Convention, which is on independent services. An identical provision was deleted from the OECD Model Convention. The same allocation is covered under Article 15 of the UN Model, which is on employment and which is a replica of Article 15 of the OECD Model Convention.

a) Article 14 of the UN Model Convention

The independent services referred to in Article 14 include 'independent scientific, literary, artistic, educational or teaching activities as well as the independent activities of physicians, lawyers, engineers, architects, dentists and accountants.' Article 14 provides for a disjunctive test. The first limb of this test is the requirement that if a person is providing independent services in a country with which their country has a double taxation agreement, they are to be taxed in that country if, with respect to such services, they have a fixed base in it.

Therefore, a cross-border worker such as a lecturer who teaches at Strathmore University in Kenya and who, because of COVID-19, has been evacuated to their home country, the UK, for instance, has no choice but to keep their job through telework. However, the lecturer can't be taxed in Kenya, despite Kenya having a double taxation agreement with their home country. The reason for this is that teleworking will be done without physically accessing the fixed base that is available to the lecturer at Strathmore. For avoidance of doubt, the Commentary on Article 14 refers to the requirement of 'having a fixed base' as the 'presence test', requiring such lecturer to be *physically* present at their place of work in Kenya. Given this test, Kenya has clearly lost all taxation rights over any income that such a lecturer will keep generating from Strathmore because they are providing teaching services from the UK through telework.

The second limb of the disjunctive test under Article 14 is the requirement that if a person is carrying out independent services in a country with which their country has a double taxation agreement but such person has no fixed base in that country, they are to be taxed in that country if they are physically present in it for at least 183 days, in the aggregate, while carrying out the services. Again, a global-north citizen who has been evacuated from Africa may still be carrying out independent services in an African country through telework for at

least the 183 days. But, this country won't have the right to tax such citizen because they are not physically present in it for at least the 183 days.

b) Common Article 15 of the Treaty Model Conventions

The presence test reoccurs also in Article 15 of the UN Model Convention, which, as aforementioned, is a replica of Article 15 of the OECD Model. Article 15 is on employment. Differing from Article 14 of the UN Model, here the employee must be physically present at their place of work when performing the activities for which the employment income is paid and they must also be at that place for at least 183 days, in the aggregate.

Keeping up with the Strathmore example, even under the OECD Model Convention, the COVID-19 pandemic raises significant fairness questions concerning the taxation of cross-border workers when teleworking is at play. This Model and the UN one as analysed in this part of the post clearly demonstrate that an African country cannot tax global-north citizens who have evacuated from it because of COVID-19 but who are still very much present in its economy through telework. Global-north countries do not find themselves in a similar situation since no cross-border workers have been officially evacuated from them.

Recommendations

Before the COVID-19 pandemic, there have been initiatives at the UN level to eliminate 'physical presence' as a prerequisite to tax a cross-border worker who is earning income from a country without being physically present in it. In 2014, Brian Arnold proposed a draft Article to be inserted in the UN Model in this regard. A year later, the UN Committee on Experts on International Cooperation in Tax Matters agreed with Arnold's draft, subject to continued modifications before inserting it in the UN Model Convention.[1]

Michael Kirsch was one of the first to convincingly conclude that countries would be unwilling to adopt this draft. One of the major drawbacks to adopting it, Kirsch argued, is that it states that taxation rights are to be attributable to the country where the recipient of a cross-border worker's services is from. Although this seems to solve the problem of the Strathmore lecturer

teleworking, placing an emphasis on the 'recipient' as the basis upon which to allocate taxation rights to countries remains very problematic. Kirsch shows us that this is very less likely to be adopted by countries since it also means that any Kenyan who, for instance, travels to the UK for that lecturer's teaching services will make that lecturer's income taxable in Kenya and not in the UK since the recipient of the services is from Kenya. This seems unfair because that lecturer would be dragged into the Kenyan taxation system without their will and the UK would be unwilling to allow this.[2]

In the wake of the COVID-19 pandemic, on 3 April 2020, the OECD issued a guidance 'to address situations where cross-border employees or individuals are unable to physically perform their labour duties in their country of employment, as well as situations where cross-border workers or individuals are stranded in a country that is not their country of residence'. It may help to bear in mind that the mass evacuations of citizens from 'zones' such as Africa was not the motivation behind this guidance. Part of the guidance reads that '*the income that those cross-border employees receive should be attributable to the place where the employment used to be exercised before the Covid-19 pandemic started*'. This particularly applies to Common Article 15 of the Model Conventions, which is on employment. The same may apply to Article 14 of the UN Model, which is on independent services. Germany was the first country to start implementing this guidance. In line with it, it has reviewed its double taxation agreements with Luxemburg and the Netherlands.

Thus far, there is no African country that has reviewed its double taxation agreements, particularly on the question of global-north citizens who have been evacuated from the continent but who are to still derive income from African countries through telework. As of 24 April 2020, the International Monetary Fund (IMF) Policy Tracker — on how governments are coping with the impact of COVID-19 — reveals that all the taxation measures that have been taken by our leaders are limited to the domestic level. They do not involve any renegotiation of double taxation agreements.

My point is not, however, that African countries must solely act on the OECD guidance, which is confined to the COVID-19 pandemic, as Germany has done. My point is rather to claim that, even after the world would have overcome this

pandemic, African countries should critically renegotiate the allocation of taxation rights over cross-border workers when teleworking is involved. The world we lived in before this pandemic will surely be different from the one we will live in after this pandemic. It may be a fair prediction to make that many businesses and organisations might continue relying on teleworking as a way for employment and independent services. Double taxation agreements should adapt to such reality.

Concluding Remarks

Articles 14 of the UN Model Convention and Common 15 of the UN and the OECD Model Conventions that I have analysed in this post have been significantly codified in double taxation agreements that African countries have entered into with global-north countries. In the shadow of COVID-19 evacuations, the wording of these Articles seems to work only for global-north countries. This is due to the fact that, under these Articles, African countries have lost taxation rights over global-north citizens who have been evacuated from the continent but who are still very much present in our economies through telework. Global-north countries are not incurring a similar loss. African citizens who work in these countries as cross-border workers have not been evacuated. They are still within the reach of these countries' tax base.

This particular circumstance should be appreciated in the Model Conventions and in double taxation agreements. Such appreciation would find, I think, some theoretical grounding in Third World Approaches to International Law (TWAIL). TWAIL has been against the universal and uniform application of international law (the international tax system in this case), which fails to appreciate the particular circumstances of third world countries and peoples.

In Africa, there is a divide between scholarship and leadership. It is my hope that the few ideas expressed in this blog post will become a cause in the hearts of African leaders.

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[1] Kirsch M, 'Tax treaties and the taxation of services in the absence of physical presence' *41(3) Brooklyn Journal of International Law*, 2016, 1447.

[2] Kirsch M, ‘Tax treaties and the taxation of services in the absence of physical presence’, 1150.

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