

# Washington International Law Journal

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Volume 32 | Number 2

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5-22-2023

## Substantial Presence in COVID: Rethinking Relief Under Internal Tax Laws for a Changing World

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### Recommended Citation

Kate Moyer, Comment, *Substantial Presence in COVID: Rethinking Relief Under Internal Tax Laws for a Changing World*, 32 Wash. Int'l L.J. 169 (2023).

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# **SUBSTANTIAL PRESENCE IN COVID: RETHINKING RELIEF UNDER INTERNAL TAX LAWS FOR A CHANGING WORLD**

Kate Moyer

*Abstract:* At the onset of Covid in early 2020, the world shut down, and people everywhere found themselves stuck in new places and unable to travel. Aside from the logistical nightmares and anxiety, forced lockdowns created different tax implications. Depending on the length of a stay, individuals may be subject to a country's internal tax code, triggering double taxation or taxation on income not previously taxed. As a result, countries implemented different relief policies exempting certain days from the calculation of these tests. Reports have been done to examine general policies with Covid-19, but there is a gap in closely examining multiple policies, begging the question that with the likelihood of Covid-19's continuance, are the current tax codes and accompanying Covid-19 relief enough to for a future of Covid-19 and remote work? This article seeks to expand the conversation and point out the logistical and structural issues with current tax code and substantial presence exemptions that need to be addressed as Covid-19 continues and the future of the workforce goes remote. By examining the United States ("U.S.") and India's policies, this article explores the strengths and weaknesses of medical exemptions and what is needed for the future to provide support for individuals in a changing world.

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## INTRODUCTION

In December of 2019, and early January 2020, the first cases of Covid-19 appeared in Wuhan City, China.<sup>1</sup> By the end of 2020, the World Health Organization (“WHO”) received reports of nearly 10 million cases and half of a million deaths from Covid-19.<sup>2</sup> In response to the rapid transmission rate, many countries implemented social distancing guidelines, and workers throughout the world transformed their homes into offices. One study found that in 2020, 42% of Americans were working from home.<sup>3</sup> While many adjusted to a remote workforce, Covid-19 impacted other aspects of life and challenged how countries and their respective governments viewed residency.

With high transmission rates of Covid-19, travel restrictions worldwide increased and many people were left stranded. When Ashu Mahajan cared for his father in India, he was separated from his family in the U.S for more than

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<sup>1</sup> World Health Organization [WHO], *Origin of SARS-CoV-2* (2020), [https://apps.who.int/iris/bitstream/handle/10665/332197/WHO-2019-nCoV-FAQ-Virus\\_origin-2020.1-eng.pdf](https://apps.who.int/iris/bitstream/handle/10665/332197/WHO-2019-nCoV-FAQ-Virus_origin-2020.1-eng.pdf).

<sup>2</sup> WHO, COVID-19 PREPAREDNESS AND RESPONSE TO PROGRESS REPORT (2020).

<sup>3</sup> May Wong, *Stanford Research Provides a Snapshot of a New Working-from-Home Economy*, STANFORD NEWS (June 29, 2020), <https://news.stanford.edu/2020/06/29/snapshot-new-working-home-economy/>.

a year.<sup>4</sup> Mahajan was traveling on an H1-B employment visa, and to return to the U.S he needed his passport reviewed by the U.S. Consulate in India.<sup>5</sup> Unfortunately, due to Covid-19 restrictions and the forced closure of American embassies and consulates, the earliest appointment Mahajan could make was in February of 2022.<sup>6</sup> Mahajan returned to the U.S. in May after his New Jersey Senator contacted the state department and managed to secure an expedited appointment.<sup>7</sup> Patrick Landers and his family met a similar fate when they were forced to stay in a Dallas Hotel room when India closed its borders in early April.<sup>8</sup> At the time the article was originally written<sup>9</sup>, Patrick and his family were still stranded in the U.S.<sup>10</sup>

The travel restrictions caused more than just emotional issues, they also raised concerns of taxation for individuals stuck in different countries.<sup>11</sup> Each country has different standards for taxing individuals and usually focuses on an individual's physical presence or citizenship.<sup>12</sup> However, Covid-19 presented a new world order in which physical presence is not as easily changed. The question then becomes, if an individual is stuck in a country due to Covid-19 or travel restrictions related to Covid-19, how will this impact their taxation in that Country?

This article compares the approaches taken by the U.S. and India. The U.S. implemented a more general approach based on an existing exemption in its internal laws while India's response was newly created to offer short assistance. However, this article contends that neither of these responses are sufficient to handle the long-term impacts of Covid. This Article proceeds as follows. Section I focuses on the general tax structures and Covid-19 policies provided by the U.S. and India. Part A focuses on the U.S. response to Covid-19 tax issues by outlining the general tax structure, the physical presence standard, and how the IRS took an existing medical exemption to provide relief to those impacted by Covid-19. Part B discusses India's tax structure by briefly introducing its policies, the relevance of physical presence, and the

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<sup>4</sup> Alsha Ebrahimji, *He Flew to India Because his Dad was Sick with Covid-19. He Almost Got Stuck There until 2022 Because of Tightening Travel Restrictions*, CNN (May 25, 2021), <https://www.cnn.com/2021/05/25/us/covid-nj-stuck-india-trnd/index.html>.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *How workers stranded by the crisis are creating inadvertent tax issues*, ERNST & YOUNG (July 28, 2020).

<sup>9</sup> Winter of 2021

<sup>10</sup> *Id.*

<sup>11</sup> The Org. for Econ. Coop. and Dev. [OECD], *Updated Guidance on Tax Treaties and the Impact of the COVID-19 Pandemic* (Jan. 21, 2021), [https://read.oecd-ilibrary.org/view/?ref=1060\\_1060114-o54bvc1ga2&title=Updated-guidance-on-tax-treaties-and-the-impact-of-the-COVID-19-pandemic](https://read.oecd-ilibrary.org/view/?ref=1060_1060114-o54bvc1ga2&title=Updated-guidance-on-tax-treaties-and-the-impact-of-the-COVID-19-pandemic).

<sup>12</sup> *Id.*

exemption created specifically in response to border closure and travel restrictions. Part C outlines the international tax agreement between the U.S. and India and discusses how this impacts the policies implemented to address Covid-19. Section II evaluates the effectiveness of each of these approaches, concluding that they made provide some relief in the short term. Still, if Covid-19 continues as it has, each country may need to adopt more long-lasting exemptions. Section III provides general recommendations for how countries may approach these tax issues based on guidance from the OECD and the issues presented with the approaches of the U.S. and India. They are not meant to be prescriptive but to help frame future conversations about the taxation of workers dealing with the long-lasting implications of Covid-19. Section IV of the article concludes with predictions regarding the longevity of Covid-19 and the future of remote work.

## I. THE IMPACT OF SUBSTANTIAL PRESENCE ON AN INDIVIDUAL'S TAX STATUS

Countries have varying systems that determine an individual's tax status, but generally deem an individual's residency to be relevant. An individual's tax status will determine on what income they will be taxed, and an individual may pay more taxes to a particular country when they trigger residency requirements. Regardless of an individual's citizenship<sup>13</sup>, an individual's physical presence in a country for a certain period can trigger residency status, which changes the way an individual is taxed in that country. This article will focus on individuals who – due to the Covid-19 restrictions – may find themselves subject to another country's tax system because of an unplanned, prolonged stay. Section A will focus on the U.S. and Section B will focus on India. These countries were selected because they each implemented some relief regarding physical presence in Covid-19; however, one was adapted from an existing exemption, while another was drafted newly in response to the pandemic. Examining these two countries will provide better insight into the effectiveness of each and what is needed for a longer lasting policy.

### A. *The U.S*

While the U.S. may be a popular tourist destinations and business hub, individuals have to be careful about how long they stay in the U.S because an

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<sup>13</sup> INTERNAL REVENUE SERV., SUBSTANTIAL PRESENCE TEST (2022), <https://www.irs.gov/individuals/international-taxpayers/substantial-presence-test>.

extended presence that passes the physical presence test threshold can trigger tax residency for individuals.<sup>14</sup> For example, suppose an individual is present for 183 days that are non-exempted.<sup>15</sup> They will be subject to the tax standards of the U.S., which may include worldwide taxation. In that case, this individual will become a resident alien subject to the U.S. worldwide income tax structure.<sup>16</sup> While there are several methods for becoming a U.S. resident for tax purposes, this paper will focus on the substantial presence test, which examines an individual's time in the country and preceding years.<sup>17</sup>

### 1. *General U.S. Tax Structure*

While international tax treaties play a part in the U.S. tax structure, these agreements still depend upon the general structure and internal tax code. In the U.S., the federal government and individual states have concurrent jurisdiction in a number of areas, including tax – taxes are imposed at the federal level and at the state level within each of the 50 states.<sup>18</sup> For purposes of clarity, this article will focus on federal tax laws.

The main tax law governing federal taxes is the Internal Revenue Code (“I.R.C.”) which codifies all areas of federal taxes, including income, estate, gift, excise, alcohol, tobacco, and employment.<sup>19</sup> In addition to the I.R.C., the Secretary of Treasury publishes treasury regulations that interpret the code rules and offer examples for complex sections.<sup>20</sup> The Internal Revenue Service (“IRS”) administers the tax system by enforcing the law and collecting taxes. It also issues guidance in the form of Revenue Rulings, Revenue Procedures, Private Letter Rulings, Notice, and Announcements.<sup>21</sup> The judicial system may also interpret the code, and Congress may pass legislation impacting portions of the code. This article will focus on Section 7701 of the I.R.C, which defines residents and non-residents and outlines the test for physical presence. These sections guide tax residency determinations and outline exemptions, including those altered to create the Covid-19 exemption. After a general outline of tax residency, the article will move to

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<sup>14</sup> *IRS Issues Relief to Foreigners Stranded in the United States Due to Coronavirus*, WITHERSWORLDWIDE BLOG (Apr. 22, 2020), <https://www.withersworldwide.com/en-gb/insight/irs-issues-relief-to-foreigners-stranded-in-the-united-states-due-to-coronavirus>.

<sup>15</sup> This means that all 183 days present in the United States count towards the physical presence test.

<sup>16</sup> Worldwide income is income from any source, not just from the country of residency. For example, United States citizens may be taxed on foreign bank accounts.

<sup>17</sup> IRC § 7701 (1992).

<sup>18</sup> BLOOMBERG LAW, COUNTRY GUIDES, THE AMERICAS (UNITED STATES OF AMERICA).

<sup>19</sup> *Id.*

<sup>20</sup> INTERNAL REVENUE SERV., *Tax Code, Regulations, and Official Guidance* (Jan. 18, 2023), <https://www.irs.gov/privacy-disclosure/tax-code-regulations-and-official-guidance>.

<sup>21</sup> *Id.*

the exemptions under these definitions and how the IRS changed these in response to Covid-19.

## 2. *Physical Presence and Tax Residency in the U.S*

### i. *The General Tax Structure and Tax Brackets*

The U.S tax structure taxes worldwide income (income from all sources) on a number of individuals such as U.S. citizens, Resident Aliens under the I.R.C., certain former U.S. citizens, and long term-permanent residents.<sup>22</sup> The significance of these designations is that individuals who fall into any of these categories are taxed on their worldwide income regardless of the source.<sup>23</sup> This means that income which may come from another country and has no other connection to the U.S. except by the person receiving it, will be subject to the U.S. tax code.<sup>24</sup> More succinctly, income from any source is taxable in the U.S. once one becomes a U.S. taxpayer. The current structure taxes individuals at different rates depending on their income, creating different bands whose rates increase with an increased income.<sup>25</sup> For example, Table 1 has the marginal tax rates for the year of 2022 as provided by the IRS<sup>26</sup>:

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<sup>22</sup> CHARLES GUSTAFSON ET AL., TAXATION OF INTERNATIONAL TRANSACTIONS 41–49 (2011).

<sup>23</sup> INTERNAL REVENUE SERV., SUBSTANTIAL PRESENCE TEST (2022), <https://www.irs.gov/individuals/international-taxpayers/substantial-presence-test>.

<sup>24</sup> *Id.*

<sup>25</sup> INTERNAL REVENUE SERV., IRS PROVIDES TAX INFLATION ADJUSTMENT FOR TAX YEAR 2022 (2021), <https://www.irs.gov/newsroom/irs-provides-tax-inflation-adjustments-for-tax-year-2022>.

<sup>26</sup> *Id.*

**Table 1: Tax Rates for 2022**

<b>Rate</b>	<b>Single</b>	<b>Married Filing Jointly</b>
35%	\$215,951+	\$431,901+
32%	\$170,051-215,950	\$340,101-431,900
24%	\$89,076-170,050	\$178,151-340,100
22%	\$41,776-89,075	\$83,551-178,150
12%	\$10,276-41,775	\$20,551-83,550
10%	\$0-10,275	\$0-20,550

These brackets show how income will be taxed with every next dollar. If an individual taxpayer makes \$40,000 – the first \$10,275 (which encompasses the 12% bracket) will be taxed at 12% and the remaining income will be taxed at 22%.

Citizens are always US taxpayers. A non-citizen individual can trigger resident alien status for taxation and subject themselves to the above brackets in three different ways: (1) if the individual is a permanent resident – for example, through a green card, (2) through a first-year election in which an individual chooses to be a resident alien for tax purposes, and (3) if the individual is present long enough to trigger “substantial presence” in the country.<sup>27</sup> While each of these mechanisms can create issues, and certainly U.S. citizens themselves were impacted by Covid, the substantial presence test, which focuses on physical presence, raised the most pressing concerns due to the travel restrictions and border closures countries implemented across the world.<sup>28</sup>

### *ii. The Substantial Presence Test*

The substantial presence test implicates not only the tax year in question but the preceding years. An individual will meet this test if they are present within the U.S during the tax year on at least 31 days and were present in the U.S for 183 days during the tax year and the two preceding years.<sup>29</sup> The calculation for this test gives weight to the years as follows: for the current year, one day is counted as one day, for the first preceding year, one day is

<sup>27</sup> I.R.C. § 7701 (1992).

<sup>28</sup> OECD, *supra* note 11.

<sup>29</sup> I.R.C. § 7701 (1992).



1/3 of a day, and for the second preceding year, one day is 1/6 of a day. For example, a calculation of one's physical presence test could look as follows:

**Tax year (1) + 1<sup>st</sup> Preceding Tax Year (1/3) + 2<sup>nd</sup> Preceding Tax Year (1/6)**

With numbers added in for explanation, if an individual spent 150 days in the U.S. in the current tax year, 30 days in the first preceding year, and 120 days in the second preceding year, the calculation for their substantial presence would look like:

**150 (1) + 30 (1/3) + 120 (1/6)**

**150 + 10 + 20**

**180 days – which does not meet the substantial presence test.**

Part of the justification for this process from Congress was that “an average of 122 days over a three-year-period is a significant amount of time to impose U.S. tax in such circumstances.”<sup>30</sup> The following example provides an application of this test.

Suppose that Sven, a nonresident alien under the immigration law, is present within the U.S on 120 for each of three consecutive years. He will be considered present for purposes of the test for 180 days (120 days for the current year plus 40 days for last year plus 20 days for the prior year). Accordingly, Sven will not be characterized as a resident for alien tax purposes. However, should Sven be present within the U.S for 125 days during the current year he would be characterized as a resident alien (the formula now yields 185 days) for the current year despite the fact that his immigration status has not changed.<sup>31</sup>

As this illustrates, this test focuses on physical presence. While COVID restrictions raised new issues when an individual's choice of location was substantially limited, the Code and Regulations carve out other less novel exceptions that recognize that an individual may not be free to leave.

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<sup>30</sup> J. Scott Kircher, *The Substantial Presence Test Exceptions: Taxing Problems for the Alien*, 24 SAN DIEGO L. REV., 531 (1987).

<sup>31</sup> CHARLES GUSTAFSON ET AL., *TAXATION OF INTERNATIONAL TRANSACTIONS* 44–45 (2011).

*iii. Exceptions to the Substantial  
Presence Test*

To add complexity to the substantial presence test, the exceptions for which days present may not count towards the substantial presence test. The code provides general exceptions for days, including a medical exception, a transit exception, and a regular commuter exception as well as an exempt individual status. For example, “if an individual regularly commutes to employment (or self-employment) in the [U.S] from a place of residence in Canada or Mexico, such individual shall not be treated as present in the [U.S] on any during which he so commutes.”<sup>32</sup> And suppose an individual is in transit between two points outside of the U.S and is physically present in the U.S for less than 24 hours. In that case, this individual shall not be treated as physically present in the U.S.<sup>33</sup> Additionally, it is also possible that an individual may be able to avoid the substantial presence test if they can establish a tax home in a foreign country to which they have a closer connection than the U.S.<sup>34</sup>

While each of these exemptions may come into play for an individual stuck in the U.S, this paper will focus on the medical exemption as that section was used to accommodate individuals trapped because of Covid-19. The exemption procedure under the medical exemption provided the general framework for the IRS to expand upon exemptions related to Covid-19. Individuals that can qualify for the medical exemption are those that are physically unable to leave the U.S. because of medical conditions that arose. In contrast, in the U.S, if an individual qualifies for a medical exemption, an individual will not be “present” on the days they intended to leave but cannot due to a medical condition or problem that arose while the individual was present in the U.S.<sup>35</sup> If the individual had a medical condition or problem that existed before entering the U.S. and the individual was aware of such condition or problem, it will not be considered to arise while the individual is present in the U.S.<sup>36</sup> The exempted time also includes what the treasury considers a reasonable period of time for making arrangements to leave the U.S.<sup>37</sup> If individual wishes to claim this exception, they must file a form 8843 – a Statement for Exempt Individuals and Individuals With a Medical Condition.<sup>38</sup>

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<sup>32</sup> *Id.* at § 7701(b)(7)(A) (1992).

<sup>33</sup> *Id.* at § 7701(b)(7)(B) (1992).

<sup>34</sup> *Id.* at § 7701 (1992).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> 26 C.F.R. § 601.602 (1981).

With this general framework, an individual who contracted Covid-19, sought treatment, and was prevented from leaving may be exempt under this exception. Say, for example, an individual came to the U.S. to visit family just before lockdown, contracted Covid-19, and found themselves stuck in a U.S. hospital for treatment. Under the medical condition exemption, the days the individual was prevented from leaving the U.S. because of their hospital stay would not be counted towards their physical presence determination. But what about those who did not contract Covid-19 but still found themselves residing in the U.S. longer than expected?

### *3. Revamping the Medical Exemption for Covid-19*

The medical exception under the substantial presence test provided a general structure for a Covid-19 response. However, it wasn't enough to account for unforeseen issues such as travel that arose from the viral outbreak. As the IRS recognized, even those individuals who did not contract the virus may have been prevented from leaving the U.S. due to canceled flights, border closures, and shelter in place orders, or the psychological effects of Covid-19 making people feel uncomfortable about traveling and not having the ability to do so.<sup>39</sup> Recognizing travel disruptions and unforeseen tax implications, the IRS published Rev. Proc. 2020-20 providing guidance and rules for the substantial presence test in Covid-19.<sup>40</sup> This document specifically outlined the expanded Covid-19 exception, including definitions and procedures.

Under the expanded covid exemption, an individual who was prevented from leaving during their covid emergency tax period because of the Covid-19 travel disruptions may exclude this tax period when calculating their substantial presence test.<sup>41</sup> There is a presumption that an individual intended to leave the U.S. during any day during one's emergency period unless they have applied for or taken steps to become a lawful permanent resident of the U.S.<sup>42</sup> The IRS defines the emergency period as "a single period of up to 60 consecutive calendar days selected by an individual starting on or after February 1, 2020 and on or before April 1, 2020 during which the individual is physically present in the [U.S.] on each day."<sup>43</sup>

Individuals claiming this exemption may be required to file a Form 1040 NR (an income tax return form), along with the form for regular medical

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<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

exemptions, Form 8843.<sup>44</sup> Individuals filing these forms do not need to provide a physician's statement, but just identify the start and end dates of the emergency period.<sup>45</sup> However, if an individual does not have to file a Form 1040, they do not need to file a Form 8843, but are required to retain all relevant records to support their claim to submit to the IRS – note, however, the IRS may still require them to file a Form 8843.<sup>46</sup> Suppose an individual fails to file a statement. In that case, they may still be eligible for relief if there is clear and convincing evidence that they took reasonable action to become aware of the filing requirements and took significant steps to apply.<sup>47</sup> Individual relief may also be given at the discretion of the secretary of treasury based on the facts and circumstances of the case.<sup>48</sup>

An individual is eligible to claim this exemption if (1) they are not a resident at the end of the 2019 tax year, (2) they are not a lawful permanent resident at any point in 2020, (3) they are present in the U.S. on each of the days in their Covid-19 Emergency Period, and (4) they do not become a resident in 2020 due to days of presence in the U.S. outside of the Emergency Period.<sup>49</sup> In addition, if an individual qualifies for the regular medical exemption, they may claim this in addition to relief from Covid-19 as well as other exceptions such as the closer connection exemptions and any exemptions under qualifying tax treaties.<sup>50</sup>

The exempted time for substantial presence also carries into the use of international tax treaties. The days that an individual spent in the U.S. during their Emergency Covid-19 period will not be counted towards an individuals' eligibility for treaty benefits.<sup>51</sup> Additionally, the same presumption of an intention to leave will also apply.<sup>52</sup>

Travelers to the U.S. must always be cautious of the potential tax consequences that may be triggered by a prolonged stay, but this became an even bigger issue at the onset of Covid-19. One way an individual may trigger non alien residency and face worldwide taxation is through the substantial presence in the U.S. The general tax code provided for exceptions based on medical emergencies, regular commuting, transit periods, etc.; however, this

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<sup>44</sup> *Id.*

<sup>45</sup> Kimberly Lavilla, *Tax impact of COVID-19 on nonresidents stranded in US*, PWC (Feb. 4, 2021), <https://www.pwc.com/ph/en/tax/tax-publications/taxwise-or-otherwise/2021/tax-impact-of-covid-19-on-nonresidents-stranded-in-us.html>.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

wasn't enough to cover all those impacted by Covid-19 and resulted in lockdowns. Families traveling to see loved ones found themselves without a way to get home with border closures and canceled flights. In response, however, the U.S. expanded upon their existing medical exemption to provide relief for those physically trapped in the U.S. due to travel restrictions and fears because of Covid-19, and continued to offer treaty benefits for qualifying individuals facing double taxation.

### *B. Physical Presence and Tax Residency in India*

Like the U.S, travelers to India need to be careful about longer stays that could trigger additional tax consequences. India's tax structure separates the power to tax by different governments; however, the most important tax for the purposes of this article is the income tax, a direct tax collected by the Central Government. The type of income an individual may be taxed on varies by their residency and is impacted by their presence in the country. If an individual is physically present for more than 182 days, they can become a resident, which would subject them to taxes on their income worldwide. Additionally, suppose an individual used to be a resident or previously spent time in the country. In that case, a shorter amount of time may trigger resident status and the individual may be taxed on income that was previously exempt. As a result, individuals of many different backgrounds found themselves subject to different rules depending on the unexpected amount of time spent in India. This section will focus more generally on the impacts that extended time can have on different individuals and their tax status.

#### *1. India's General Tax Structure*

India's tax structure divides the power of taxation between the Central, State, and local governments, allowing each body the power to collect certain types of taxes.<sup>53</sup> For example, the income, customs duties, and good and services taxes are levied by the Central Government. In contrast, State governments handle more intra-state taxes, and local bodies handle taxes on utilities.<sup>54</sup> It also distinguishes between direct and indirect taxes – direct taxes are levied on the income an individual or corporate entity receives and includes income tax, corporation tax, dividend tax, capital gains tax, gift tax,

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<sup>53</sup> BLOOMBERG TAX, COUNTRY GUIDES, INDIA (OVERVIEW), <https://www.bloomberglaw.com/product/tax/document/25591111208>.

<sup>54</sup> *Id.*

and estate tax.<sup>55</sup> Indirect taxes are levied on the sale and provision of goods and services, including customs and export duty.<sup>56</sup> The primary document outlining income tax, enacted by the Central Government, is the Income Tax Act (“ITA”), which addresses the scope and machinery on which income tax is levied.<sup>57</sup>

However, in the last decade, the Central Government has initiated reforms to rationalize and clarify the current taxation system and reduce litigation.<sup>58</sup> In 2017, a new task force was tasked to draft a new tax code that would replace the ITA (even though Government Sources suggest that it would not fully replace the code but rather amend it), and while a draft report was submitted in 2019, a copy has not been made public.<sup>59</sup> This article will focus mainly on Article 6 of the ITA pertaining to the rules and definitions regarding residency because this section was directly impacted the most by travel restrictions and border closures. The residential status of an individual will impact what income they are taxed on, so any residency change can be very impactful for tax purposes.

## 2. Residency

Under Article 6 of the ITA, tax residency in India is based on the tax year, which is the year prior to the assessment year. An individual may be designated as one of three options (1) a resident (or resident and ordinarily resident (ROR)); (2) a resident but not ordinarily resident (RNOR); (3) a non-resident (NR) and will receive different tax treatment based on this designation.<sup>60</sup>

An individual qualifies as an ROR if (1) they stay in India during that year for an aggregate period of 182 days or more; *or* (2) they stay in India that year for more than 60 days and their total stay for the preceding four years is equal to 365 days or more.<sup>61</sup> However, this 60 day period may also be extended for a number of reasons relating to one’s citizenship or place of

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<sup>55</sup> *Id.*

<sup>56</sup> S. M. Alagappan, *Indian Tax Structure – An Analytical Perspective*, 10 INT’L J. OF MGMT, 36 (2019).

<sup>57</sup> *Introduction and Basic Concepts of Income Tax*, INDIAN INSTITUTE OF LEGAL STUDIES, [https://www.iilsindia.com/study-material/130743\\_1585893404.pdf](https://www.iilsindia.com/study-material/130743_1585893404.pdf).

<sup>58</sup> BLOOMBERG TAX, COUNTRY GUIDES, INDIA (OVERVIEW), <https://www.bloomberglaw.com/product/tax/document/25591111208>.

<sup>59</sup> *Id.*

<sup>60</sup> BLOOMBERG TAX, COUNTRY GUIDES, INDIA (PERSONAL TAXES), [https://www.bloomberglaw.com/product/tax/document/XNQLIKH8?bc=W1siRG9jdW1lbnQvMjU1OTExMTEyMDgiXV0--9bce1a54b8ef329fdee4ed4abc06d5e985a39b3d&jcsearch=bna%2520gtg2%2520in%2520%25286%2529%25281%2529#section\(2\)\\_0](https://www.bloomberglaw.com/product/tax/document/XNQLIKH8?bc=W1siRG9jdW1lbnQvMjU1OTExMTEyMDgiXV0--9bce1a54b8ef329fdee4ed4abc06d5e985a39b3d&jcsearch=bna%2520gtg2%2520in%2520%25286%2529%25281%2529#section(2)_0).

<sup>61</sup> *Id.*

origin.<sup>62</sup> An individual qualifies as a RNOR if they (1) have been a resident of India in nine of the ten preceding years, or (2) has been in India for a period equaling to 729 days or less in the seven preceding years, or (3) it is a citizen or of Indian origin with Indian sourced income exceeding 1,500,000 rupees during the previous and has been in India for more than 120 days but less than 183 days or (4) is it a citizen on the qualifications above and it not liable to pay taxes in any other country by reason of domicile or residency.<sup>63</sup> These days do not need to be continuous because they are taken in the aggregate.<sup>64</sup> And finally, a nonresident is someone who is not a resident of India.<sup>65</sup> And this residency designation impacts what kind of income an individual may be taxed on.<sup>66</sup>

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<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> PWC, INDIA: INDIVIDUAL—TAXES ON PERSONAL INCOME (2022), <https://taxsummaries.pwc.com/india/individual/taxes-on-personal-income>.

Below, Table 2 outlines the different residency designations for individuals in India.

**Table 2: Residential Status in India**

The following types of residential status are envisaged for an individual:

- Resident in India, which is further divided into the following two categories:
  - Resident and ordinarily resident (ROR).
  - Resident but not ordinarily resident (RNOR).
- Non-resident in India (NR).

Under Indian tax laws, the scope of taxation differs as per the residential status of an individual:

- RORs are subject to tax in India on their worldwide income, wherever received.
- RNORs are subject to tax in India only in respect to income that accrues/arises or is deemed to accrue/arise in India, or is received or deemed to be received in India, or is from a business controlled in or a profession set up in India.
- NRs are subject to tax in India only in respect to income that accrues/arises or is deemed to accrue/arise, or is received or deemed to be received in India.

RNOR and NR individuals are not subject to tax in respect to their income earned and received outside of India.



The individual tax rates for individuals are captured in slab rates, and for the assessment year<sup>67</sup> 2020-21 are as follows in Table 3:

**Table 3: Tax Rates in India for 2020/21**

**Personal income tax rates**

The slab rates applicable to individuals for tax year 2020/21 are as follows:

Taxable income (INR)		Tax on column 1 (INR)	Tax on excess (%)
Over (column 1)	Not over		
0	250,000	-	0
250,000	500,000	-	5
500,000	1,000,000	12,500	20
1,000,000		112,500	30

The basic exemption limit for resident individuals who are 60 years of age or more but less than 80 years of age at any time during the tax year is INR 300,000. For resident individuals who are 80 years of age or more, it is INR 500,000.

(PWC)<sup>68</sup>

Note, however, that individuals over a certain age are subject to a different rate, and there are options for optional regimes and additional surcharges based on the total income an individual receives.<sup>69</sup> Table 4 outlines the optional tax regime.

<sup>67</sup> The tax year begins on April 1<sup>st</sup> and ends on March 31<sup>st</sup> of the following year. The assessment year begins on the day after the end of the tax year and ends on March 31<sup>st</sup> of the following year. For example, income that is earned in the tax year of April 1, 2020 – March 31, 2022, will be assessed in the assessment year April 1, 2021 – March 31<sup>st</sup>, 2022.

<sup>68</sup> PWC, INDIA: INDIVIDUAL—TAXES ON PERSONAL INCOME (2022), <https://taxsummaries.pwc.com/india/individual/taxes-on-personal-income>.

<sup>69</sup> BLOOMBERG TAX, COUNTRY GUIDES, INDIA (OVERVIEW), <https://www.bloomberglaw.com/product/tax/document/2559111208>.

**Table 4: Optional NPTR Tax Regime**

**New personal tax regime (NPTR)**

Effective 1 April 2020, an optional NPTR, devoid of any deductions or exemptions, has been introduced with lower tax rates spread across six income levels as provided below:

Taxable income (INR)		Tax on column 1 (INR)	Tax on excess (%)
Over (column 1)	Not over		
0	250,000	-	0
250,000	500,000	-	5
500,000	750,000	12,500	10
750,000	1,000,000	37,500	15
1,000,000	1,250,000	75,000	20
1,250,000	1,500,000	125,000	25
1,500,000		187,500	30

(PWC)<sup>70</sup>

This article will focus on each of these designations as the number of days unexpectedly present can impact one's status, however other residential distinctions can be impacted based on Covid-19 restrictions.

### 3. Covid-19 Response

While there are several ways an individual may invoke the Indian taxation, the section regarding a stay of 182 days is the largest issue regarding

<sup>70</sup> PWC, INDIA: INDIVIDUAL—TAXES ON PERSONAL INCOME (2022), <https://taxsummaries.pwc.com/india/individual/taxes-on-personal-income>.

Covid-19. Like the substantial presence test in the U.S, an extended stay may trigger unintended tax status. In India, the purpose of one's presence within the country does not make a difference – one day for business counts equal to one day for tourism or visiting family.<sup>71</sup> There are more lenient exceptions for citizens and those whose place of Origin is India and who work abroad. However, the Central Board of Direct Taxes (“CBDT”) did clarify that the NRIs would not receive relief and have been forced to appeal to the Supreme Court of India.<sup>72</sup> And, unlike the U.S., prior to Covid-19, there were no medical or emergency exceptions with regards to 182 days presence requirement.

However, the government learned that several individuals, who planned a trip to India during 2019-2020 and intended to leave before their residency status would be altered, had to prolong their stay because of long delays and canceled flights.<sup>73</sup> On March 22, 2020 the Government announced a voluntary curfew, and three days later, it announced a nationwide lockdown and all international flights were canceled.<sup>74</sup> Accordingly, to prevent cases of genuine hardship, the CBDT adopted the following policies for an individual who came to visit India before March 22, 2020 to determine residency under Section 6 of the ITA:<sup>75</sup>

- (a) Has been unable to leave India on or before 31<sup>st</sup> March, 2020, his period of stay in India from 22<sup>nd</sup> March, 2020 to 31<sup>st</sup> March, 2020 shall not be taken into account; or
- (b) Has been quarantined in India on account of Novel Corona Virus (Covid-19) on or after 1<sup>st</sup> March, 2020 and has departed on an evacuation flight on or before 31<sup>st</sup> March, 2020 or has been unable to leave India on or before 31<sup>st</sup> March, 2020, his period of stay from the beginning of his quarantine to his date of departure or 31<sup>st</sup> March, 2020, as the case may be, shall not be taken into account; or

<sup>71</sup> PWC, INDIA: INDIVIDUAL—RESIDENCE (2022), <https://taxsummaries.pwc.com/india/individual/residence>.

<sup>72</sup> India Ministry of Finance, Clarification in respect of residency under section 6 of the Income-tax Act, 1961 (Issued on May 8, 2020), [https://www.incometaxindia.gov.in/communications/circular/circular\\_no\\_11\\_2020.pdf](https://www.incometaxindia.gov.in/communications/circular/circular_no_11_2020.pdf)

<sup>73</sup> *Id.*

<sup>74</sup> Deepashree Shetty, *COVID-19 update—Supreme Court directs taxpayer to approach the CBDT and seek relaxation in residency norms on account of COVID-19*, BDO TAX NEWS (Mar. 2021), <https://www.bdo.global/en-gb/microsites/tax-newsletters/ges-news/march-2021-issue/india-covid-19-update-supreme-court-directs-taxpayer-to-approach-the-cbdt-and-seek-relaxation-in>.

<sup>75</sup> *Id.*

(c) Has departed on an evacuation flight on or before 31<sup>st</sup> March, 2020, his period of stay in India from 22<sup>nd</sup> March, 2020 to his date of departure shall be taken into account.<sup>76</sup>

More succinctly, Table 5 shows the variation in relief for different individuals based on the Covid-19 diagnosis and ability to evacuate<sup>77</sup>:

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<sup>76</sup> *Id.*

<sup>77</sup> Deloitte, *Post COVID-19 changes and transformations in the operating model: A focus on China and India* (Aug. 18, 2022), <https://www2.deloitte.com/content/dam/Deloitte/in/Documents/tax/in-tax-dbriefs-aug-post-covid-changes-and-transformations-gst-video-noexp.pdf>.

**Table 5: Relief Structure in India for FY 2019-20**

Situation for FY 2019-20	Period of stay in India to be excluded
<ul style="list-style-type: none"> <li>Unable to leave India on or before 31 March 2020</li> </ul>	<ul style="list-style-type: none"> <li>22 March 2020 to 31 March 2020</li> </ul>
<ul style="list-style-type: none"> <li>Quarantined in India due to COVID-19 on or after 1 March 2020 and either departed by evacuation flight or unable to leave India on or before 31 March 2020</li> </ul>	<ul style="list-style-type: none"> <li>Date of quarantine to date of departure or 31 March 2020 as the case may be</li> </ul>
<ul style="list-style-type: none"> <li>Departed on evacuation flight on or before 31 March 2020</li> </ul>	<ul style="list-style-type: none"> <li>22 March 2020 to his date of departure</li> </ul>

This circular only applies for fiscal year 2019-2020, and there has been no relaxation for 2020-2021.<sup>78</sup>

As a result of the lack of guidance on the continuation of relief, the Supreme Court has passed the issue to the CBDT. An individual in India who had sought a writ from the Supreme Court directing that he should be considered a non-resident for the 2020-21 fiscal year, based on the precedent of the 2019-20 circular.<sup>79</sup> This individual was an NR, but because of an overextended stay in India they also risked being taxed on overseas income as a resident. The taxpayer pointed out that the pandemic continued past the dates in the circular and many people have been stranded because of the lockdown.<sup>80</sup> As the original relief was issued by the CBDT, the court held that it would be appropriate for the taxpayer to approach the CBDT regarding the issue.<sup>81</sup> Following this directive, the CBDT communicated that they would not provide relief for NRIs, compelling the taxpayer to re-approach the Supreme Court for relief.<sup>82</sup> is that if an individual is an NRI they will only be taxed on income earned in India – and not that from another country

<sup>78</sup> Deepashree Shetty, *COVID-19 update—Supreme Court directs taxpayer to approach the CBDT and seek relaxation in residency norms on account of COVID-19*, BDO TAX NEWS (Mar. 2021), <https://www.bdo.global/en-gb/microsites/tax-newsletters/ges-news/march-2021-issue/india-covid-19-update-supreme-court-directs-taxpayer-to-approach-the-cbd-t-and-see-relaxation-in>.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> Sugata Ghosh, *CBDT note to face fresh Supreme Court Challenge from NRI*, ECONOMIC TIMES (Mar. 6, 2021), <https://economictimes.indiatimes.com/news/economy/policy/cbd-t-note-to-face-fresh-supreme-court-challenge-from-nri/articleshow/81354433.cms?from=mdr>.

(which may not be subject to a direct tax) - but because of an extended stay they could face now face taxes on this income.

In response to concerns over the 2020-21 fiscal year, the CBDT did, however, issue clarification to the effect that a short stay in India is not likely to render one a resident in India for the purposes of taxation.<sup>83</sup> Further, the CBDT noted that the presence of tax treaties should resolve issues of double taxation.<sup>84</sup> After considering the guidance provided by the OECD and the policies of other countries, the CBDT found that the internal tax laws read in accordance with the tax treaties (by filing a form NR) should be able to provide the relief necessary to avoid double taxation.<sup>85</sup> In addition, it allowed an opportunity for individuals who may have specific concerns to submit information to the CBDT by March 31, 2021 for possible relief on case-by-case basis. For those that faced double taxation, the CBDT allowed them to submit a Form-NR<sup>86</sup> by March 31, 2021, and after that the CBDT may consider: (1) whether the particular situation warrants relaxation and (2) if yes, is there a general relaxation required for a certain class of individuals?<sup>87</sup> Has there been any discussion of these submissions, what they look like, what relief is like?

Unlike the U.S, India did not have previous exemptions that would provide relief to individuals in emergency situations that may unexpectedly trigger residency status. Instead, in an attempt to provide temporary relief, the CBDT issued new exemptions related specifically to Covid-19 for 2019-2020. Unfortunately, without a continuance and further guidance from the CBDT, the status of this relief remains unknown. Table 6 summarizes the key differences in the policies originated in the U.S. and India.

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<sup>83</sup> Bharathi Krishnaprasad et al., *Managing the impact of COVID-19: Navigating cross-border tax questions in India*, ITR (May 19, 2021), <https://www.internationaltaxreview.com/article/b1rw3c45x670n3/managing-the-impact-of-covid-19-navigating-cross-border-tax-questions-in-india>.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> This form addresses questions concerning residency, country or origin, income, Covid-19 delays, and the issue of double taxation.

<sup>87</sup> *CBDT to examine cases of double taxation to provide relief to individuals stranded in India during the COVID-19 pandemic*, ERNST & YOUNG (Mar. 4, 2021), [https://assets.ey.com/content/dam/ey-sites/ey-com/en\\_in/alerts\\_pdf/2021/03/ey-cbdt-to-examine-cases-of-double-taxation-to-provide-relief-to-individuals-stranded-in-india-during-the-covid-19-pandemic.pdf?download](https://assets.ey.com/content/dam/ey-sites/ey-com/en_in/alerts_pdf/2021/03/ey-cbdt-to-examine-cases-of-double-taxation-to-provide-relief-to-individuals-stranded-in-india-during-the-covid-19-pandemic.pdf?download).

**Table 6: Comparison of Relief Between the U.S and India**

	<b>U.S</b>	<b>India</b>
<b>Days Exempted from Physical Presence</b>	60-day period of the taxpayers choosing in the designated time period	Depends based on quarantine status/can be as short as 9 days (see table 5)
<b>Method of Claiming Exemption</b>	May be required to file Form 1040 NR, and Form 8843.	Unclear
<b>Tax Years Applicable</b>	2019-20	2019-20
<b>Method of Appeal</b>	Treasury Secretary	Unclear, appeals still in the Supreme Court

Additional Relief	International Treaty, Medical Exemption	International Treaty
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*C. International Income Tax Treaties and Their Impact on Covid-19 Responses*

*1. Introduction*

International income tax treaties are important agreements between two sovereign nations that help to facilitate trade and provide tax benefits to the citizens of the contracting states.<sup>88</sup> One of the most important factors in the agreement is the elimination of double taxation for citizens of one of the contracting states.<sup>89</sup> Double taxation is defined, generally as the imposition of comparable taxes in two or more states on the same individual for the same subject matter and identical periods.<sup>90</sup> Countries recognized that this practice may have harmful effects on trade, the movement of capital, and development of technology.<sup>91</sup> If income from a cross-border transaction or investment could be taxed by two or more countries, individuals may be deterred from engaging in these transactions.<sup>92</sup> Accordingly, many countries have adopted bilateral countries with other countries that provide clarification and tie-breaking grounds for individuals that may be subject to taxation by more than one jurisdiction. A lot of these treaties have been based, at least in part, by The Organization for Economic Cooperation and Development (“OECD”) model treaties for double

<sup>88</sup> Georgetown Law Library, *International and Foreign Tax Law Research Guide*, <https://guides.ll.georgetown.edu/c.php?g=363487&p=2455836> (last updated Nov. 1, 2022).

<sup>89</sup> Brian Arnold, *An introduction to tax treaties*, [https://www.un.org/development/desa/financing/sites/www.un.org.development.desa.financing/files/2020-06/TT\\_Introduction\\_Eng.pdf](https://www.un.org/development/desa/financing/sites/www.un.org.development.desa.financing/files/2020-06/TT_Introduction_Eng.pdf).

<sup>90</sup> OECD, *Model Tax Convention on Income and on Capital: Condensed Version 2017* (2017), [https://read.oecd-ilibrary.org/taxation/model-tax-convention-on-income-and-on-capital-condensed-version-2017\\_mtc\\_cond-2017-en#page11](https://read.oecd-ilibrary.org/taxation/model-tax-convention-on-income-and-on-capital-condensed-version-2017_mtc_cond-2017-en#page11).

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*



taxation and helpful commentary.<sup>93</sup> And while there are a number of other international tax agreements that cover things like information exchanging, this article will focus on income tax treaties that are intended to eliminate double taxation. Specifically, this article will look to the agreement between the U.S. and India as an example for basic principles and the effectiveness in regards to tax issues faced in Covid-19 closures.

*i. Tax Convention With The Republic of India*

Enacted in 1989, with the specific purpose of combatting double taxation and fiscal evasion, the U.S. and India entered into the bilateral agreement, Tax Convention With The Republic of India.<sup>94</sup> The agreement applies to persons who are residents of one or more the contracting states, which in this case refers to the U.S. and India.<sup>95</sup> And the term “persons” refers to individuals, estates, trusts, partnerships, companies, or other taxable entities.<sup>96</sup> For the purposes of the this article’s scope, persons going forward refers to individuals. Residency, defined in Article 4, is a person who is liable for a tax based on his domicile, residence, citizenship, place of management, place of incorporation.<sup>97</sup> Based on this definition, this would encompass those individuals that were stuck in a country due to closures from Covid-19, and triggered substantial presence provisions in either the U.S. or India’s internal tax structure. Accordingly, in order to fully evaluate the effectiveness of each country’s responses to Covid-19 tax related issues, the impact of international tax agreements must be taken into consideration.

*a. Tie Breaking Provisions for Residents of Both Contracting States*

In the event that an individual qualifies as a resident of both contracting states, the agreement provides for a number of factors to determine which country’s tax they will be liable for. The second paragraph of Article 4 of the agreement outlines each of these factors:

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<sup>93</sup> CHARLES GUSTAFSON ET AL., TAXATION OF INTERNATIONAL TRANSACTIONS 64 (2011); Note that while representatives from the U.S. have from time-to-time expressed disagreement with certain provisions in the OECD model, the model has greatly influenced international tax policy in the U.S. and many treaties. *Id.*

<sup>94</sup> Tax Convention with the Republic of India, India–U.S., Sept. 12, 1989.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at art. 4.

- (a) He shall be deemed to be a resident of the state in which he has a permanent house available to him; if he has a permanent home available to him in both states, he shall be deemed to be a resident of the State with which his personal and economic relations are closer (centre of vital interests);
- (b) If the state in which he has his centre of vital interest cannot be determined, or if he does not have a permanent home available to him in either state, he shall be deemed to be a resident of the state in which he has a habitual abode;
- (c) If he has a habitual abode in both states or in neither of them, he shall be deemed to be a resident of the State in which he is a national;
- (d) If he is a national of both states or of neither of them, the competent authorities of the Contracting States shall settle the question by mutual agreement.<sup>98</sup>

The facts to which these rules apply, and will be considered in determining tax liability are those existing during the period when the residence of the taxpayer affects tax liability; this may be shorter than the entire taxable period.<sup>99</sup> Here is an example to illustrate this point:

In one calendar year, an individual is a resident of State A under that State's tax laws from 1 January to 31 March, then moves to State B. Because the individual resides in State B for more than 183 days, then individual is treated by the laws of State B as a state B resident for the entire year. Applying the special rules to the period 1 January to 31 March, the individual was a resident of State A. Therefore, both State A and State B should treat the individual as a State A resident for that period, and as a state B resident from 1 April to 31 December.<sup>100</sup>

Additionally, according to the commentary by the OECD, this article gives preference to the Contracting State in which the individual has a permanent home available to him, and this is generally sufficient to decide between the two states.<sup>101</sup> Regarding the concept of the home, any form of a home may be taken into an account – a home or apartment that is owned or being rented by the individual; the essential component

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<sup>98</sup> *Id.*

<sup>99</sup> OECD, *Model Tax Convention on Income and on Capital: Condensed Version 2017* (2017), [https://read.oecd-ilibrary.org/taxation/model-tax-convention-on-income-and-on-capital-condensed-version-2017\\_mtc\\_cond-2017-en#page11](https://read.oecd-ilibrary.org/taxation/model-tax-convention-on-income-and-on-capital-condensed-version-2017_mtc_cond-2017-en#page11).

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

of this factor is its permanence.<sup>102</sup> For a home to be considered a permanent residence, it must be available to the individual at all times, not just for a short duration.<sup>103</sup> However, if an individual owns a home but it is being rented out, this would not be considered a permanent residence.<sup>104</sup>

However, if an individual has a permanent home in both of the contracting states, preference goes to the state in which the individual's personal and economic relations are closer – this is known as the centre of vital interests.<sup>105</sup> This will include considerations of the individual's family and social relations, occupations, political and cultural activities, and where they administer their property and affairs.<sup>106</sup>

### *b. Utilization of Agreement Benefits*

#### *1. U.S*

The IRS has provided guidance for individuals claiming benefits under this agreement in the section of their website under International Taxpayers. This guidance suggests that individuals inform the payor of their income of their foreign status in order to claim the benefits of the treaty.<sup>107</sup> This notice can be given by filing Form W-8BEN, Certificate of Foreign Status of Beneficial Owner for United States Tax Withholding or W-8BEN-E, Certificate of Status of Beneficial Owner for United States Tax Withholding and Reporting (Entities) or Form 8233, Exemption from Withholding on Compensation for Independent (& Certain Dependent) Personal Service of a Nonresident Alien Individual with the withholding agent.<sup>108</sup>

#### *2. India*

In order to claim treaty benefits in India, individuals must obtain a tax residency certificate from their country of residence.<sup>109</sup> This

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<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> IRS, CLAIMING TAX TREATY BENEFITS, <https://www.irs.gov/individuals/international-taxpayers/claiming-tax-treaty-benefits> (last reviewed Nov. 7, 2022).

<sup>108</sup> *Id.*

<sup>109</sup> India Filings, Guide to Double Taxation Treaty in India, <https://www.indiafilings.com/learn/guide-to-double-taxation-treaty-in-india/> (last visited Nov. 7, 2022).

certificate can vary by country, but an example of a certification from the U.S. can be found in Form 8802.<sup>110</sup>

While each international tax treaty may contain specific provisions unique to that agreement, each is based generally on the sections outlined by the OECD and the principle of preventing double taxation as a means of increasing international trade. The example provided, the bilateral treaty between the U.S. and India outlines the general definitions of individuals covered and provides tie-breaking factors to assist individuals facing double taxation. The general provisions in these agreements can be effective, but the following section will examine how additions may be necessary to cover more expansive issues that resulted from Covid-19 closures. The next section will explore the effectiveness of the U.S. and India's policies as the world enters its third year of covid and remote work seems destined to be the new normal.

## II. EVALUATING THE EFFECTIVENESS OF THE U.S' AND INDIA'S TAX EXEMPTIONS IN COVID-19

The U.S. and India, like many countries, have a physical presence determination that can subject unintended individuals to their tax structure, as seen above with Patrick Landers stuck in the U.S. and the NRI stuck in India. In response to lockdowns and canceled flights from Covid-19, both countries allowed exemptions of days in the country for the physical presence test for those impacted by Covid-19. While the policies from the U.S. and India provided some temporary relief, they are not likely to be effective for the long-term impacts of Covid-19 and the future of remote work. The policy from the U.S. is only temporary, and the policy itself has a number of drawbacks, including the time period in its exemption and its logistical barriers. And the policy from India, though it seems more streamlined, also has a number of logistical barriers and differentiates based on a diagnosis of Covid-19.

To better understand why each of these policies can be improved, this section will explore the effectiveness of the U.S. and India's Covid-19 exemptions for the time period they were enacted. Then it will examine the

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<sup>110</sup> IRS, FORM 8802, APPLICATION FOR UNITED STATES RESIDENCY CERTIFICATION, <https://www.irs.gov/individuals/international-taxpayers/form-8802-application-for-united-states-residency-certification-additional-certification-requests>

possibility of their effectiveness in the future, drawing on opinions from companies dealing with remote work, as well as considerations from the OECD. Section A will focus on the exemption offered in the U.S. its logistical barriers, and how it may be adapted for a longer lasting policy. Section B will focus on the minimal relief provided by India, focusing heavily on the barriers for those hoping to appeal decisions. Section C will draw conclusions based on comparisons of internal laws and Section D will evaluate the effectiveness of the international tax agreements in light of these internal laws. After this analysis, the next section will move into policy recommendations for a world still impacted by Covid-19 and an increase in remote work.

### A. *The U.S and the Medical Exemption Expansion*

In response to travel and safety concerns from Covid-19, the U.S. expanded its existing medical exemption under the physical presence test. This allowed individuals impacted by Covid-19 to not count a period of up to 60 days towards their physical presence test – which triggers taxation at 183 days. However, there has been no indication that this relief will be extended for the following years. This is concerning given the increase in Covid-19 variants across the world. Based on the indications that the U.S. will not extend the medical exemption under the physical presence test, below is an analysis that outlines the positives and negatives of the policy in the U.S., incorporating general logistical considerations and the accessibility of the tax code.

#### 1. *Issues Related to the Expanded Medical Exemption*

From the outset, it is important to recognize that the tax code, especially the sections pertaining to federal income tax, can be complicated. The Taxpayer Advocate Service (“TAS”), an independent branch of the IRS dedicated to helping ensure individuals are treated fairly under the tax system and their rights, has recognized the dense and unclear nature of the tax code.<sup>111</sup> TAS cited the tax code's complexity as one of the most serious problems facing taxpayers. TAS identified several features in the code that make it more complex and difficult for taxpayers:

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<sup>111</sup> TAXPAYER ADVOCATE SERVICE, 2012 ANNUAL REPORT TO CONGRESS, <https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/Most-Serious-Problems-Tax-Code-Complexity.pdf> (last visited Nov. 7, 2022).

- Making compliance difficult, requiring taxpayers to devote excessive time to preparing and filing their returns;
- Requires the significant majority of taxpayers to bear the monetary costs to comply, as most taxpayers hire preparers and many other taxpayers purchase tax preparation software;
- Obscure comprehension, leaving many taxpayers unaware how their taxes are computed and what rate of tax they pay;
- Facilitates tax avoidance by enabling sophisticated taxpayers to reduce their tax liability and by providing criminals with opportunities to commit tax fraud;
- Undermines trust in the system by creating an impression that many taxpayers are not compliant, thereby reducing the incentives that honest taxpayers feel to comply; and
- Generates tens of millions of telephone calls to the IRS each year, overburdening the agency and compromising its ability to provide high-quality taxpayer service.<sup>112</sup>

Form 1040 is an individual income tax return form, which includes a calculation of income and other earnings as well as deductions. An individual filling a medical exemption may not need to file a 1040 – implicating some of the issues mentioned here – however, it is still important to recognize that there can be dense standards and documentation. For example, if an individual is not required to fill out a form 1040, and a form 8843 for the medical exemption, they are still required to retain all relevant records and be prepared to fill out a Form 8843 if requested to do so.

These forms are difficult to understand, even for U.S. citizens more familiar with the tax code, or those who frequent the U.S. and are aware of the taxation standards. For those completely unfamiliar with the tax code, it may be more difficult. While the IRS has improved their accessibility – in terms of documents in different languages<sup>113</sup> – this is still another barrier for those traveling from outside of the U.S. It is important to note these logistical issues and barriers existed prior to Covid-19. However, given the heightened stress of displacement and sickness these issues may have been compounded. Accordingly, even though it is just one part of the policy, it is important to recognize the inaccessibility of the relief that may be provided as it was based on an already complicated tax code. Aside from the logistical difficulties that may arise from any policy, portions of the policy have provided relief for a

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<sup>112</sup> *Id.*

<sup>113</sup> Taxpayer Advocate Service, TAS Tax Tip: Accessible tax forms and language options, <https://www.taxpayeradvocate.irs.gov/news/tas-tax-tip-accessible-tax-forms-and-language-options/> (last visited Nov. 8, 2022).

wider range of individuals impacted by Covid-19. The following section will look more closely at the details of this relief.

## *2. The Breadth of Individuals Covered Under the Relief*

One of the more effective parts of the Covid-19 relief, was the wide array of individuals it encompasses. Recognizing that even if individuals did not contract Covid-19, they might still face travel-related issues or concerns. As such, an individual could claim the 60-day period regardless of the Covid-19 diagnosis. While the code in general may not be user-friendly, eliminating the need for a Covid-19 diagnosis makes this relief more accessible to everyone. And this accessibility would make it more effective in the long run, but the relief has yet to be extended.

Even though it has been a few years since the original Covid-19 variant, more variants are popping up and causing delays in travel. For example, in December of 2021, rising cases of Covid-19 amongst airline employees in combination with weather delays caused hundreds of delayed flights and cancellations – leaving individuals across the U.S stuck in their travel destinations longer than expected.<sup>114</sup> As variants arise – even with boosters – it is important to have a plan in place that takes into account the travel issues, even for those who never contract Covid-19. The original relief plan would have provided for these circumstances, but without an extension, its rendered meaningless for those still impacted.

Another beneficial portion of the physical presence relief is the period of 60 days that is exempt from an individual's time in the U.S. Without the exemption, these days would normally be counted against an individual. Now an individual may select a 60-day period to be exempt, and may also qualify for the original medical exemption, which does not contain a limit on a specific number of days. In the circulation that outlines the relief, the IRS did not indicate the reasoning behind the choice of 60 days, although designating one period does provide some logistical efficiencies. Verifying the exact number of days for each impacted individual would require more work on the side of the individual and more work on the side of the IRS for verification purposes. However, it is entirely possible that an individual could be stuck for more than 60 days.

Patrick Landers, the stranded individual mentioned earlier, was stuck in Dallas from at least April – July, a time totaling over 60 days. If he

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<sup>114</sup> Mina Kaji, *Bad weather, COVID cases fuel 6th day of mass flight cancellations*, ABC NEWS (Dec. 29, 2021), <https://abcnews.go.com/Politics/bad-weather-covid-cases-fuel-6th-day-mass/story?id=81986047>.

contracted Covid-19 he may have been able to request the regular medical exemption along with this 60-day exemption, but if not, he is limited to that 60-day period. Given the variation of days stranded, it is concerning there is not a more simplified process for those stuck longer than 60 days. The medical exemption itself seeks to designate days when an individual may not be able to leave due to an illness, as well as a reasonable amount of time for accommodations. Given that there is leeway in allowing an impacted individual to get their affairs in order and plan a trip home, it is interesting there is less leeway here. Since the Government has already recognized the logistical issues associated with Covid – for those diagnosed and those not – it seems they could recognize that each individual’s situation may not fit squarely into the 60-day period. The relief procedure notes it is possible that improperly filed forms may still be granted – but requires a determination by the secretary treasury. This suggests that there is some flexibility in the determination of the exemption, but only with relief granted by the Secretary Treasury. If the U.S. decides to extend an exemption for days in the country, it should consider an option that allows a taxpayer to request additional days.

As a whole, the U.S.’s extended exemption due to Covid-19 has a helpful structure, but not without its drawbacks. The 60-day exemption under the substantial presence test took important considerations into account, but its accessibility and temporary status make it ineffective in the long run. Although somewhat simplified by not requiring additional documentation, the tax code in and of itself can be dense material that is not easily understood. And because of the 60-day period designation, the relief fails to take into account those that may have been stranded for longer and may not qualify for the general medical exemption. However, it has not been extended and Covid-19 continues to produce new variants impacting one’s ability to travel.<sup>115</sup>

Based on my analysis of the U.S.’s extended medical exemption for Covid-19, the U.S. should (1) extend the exemption passed June (when it is set to expire) given that the current state of Covid-19 continues or increases in variants, (2) allow an option for those experiencing travel related issues due to Covid-19 and easy option to extend the 60 day period, (3) provide more resources to individuals in and outside of the U.S explaining the process of the medical exemption and the extended Covid-19 exemption, (4) consider an expansion of tax relief to individuals not normally covered under bilateral treaties.

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<sup>115</sup> *Supra* note 38.



*B. India's Covid-19 Exemption for Substantial Presence*

In response to growing concerns from individuals stranded in India due to Covid-19 lockdowns and border closures, the CBDT announced residency relief for individuals from the time of March 22, 2020, to March 31, 2020. And, for clarification regarding relief in the following year, the CBDT clarified that tax treaties and individual petitions should be sufficient to prevent double taxation on individuals stranded due to Covid-19. The original relief provided, unlike that in the U.S., was not based on an existing medical exemption which also suggests general insufficiencies in the tax code. Even with the temporary exemption, the treaties, and the opportunity for individual petitions, the relief provided is not likely effective in the long term.

*1. Issues related to India's Substantial Presence Test Covid-19 Exemptions*

*i. Logistical Barriers*

First, it is important to recognize the logistical barriers existent existing in the tax code and in the “solutions” proposed by the CBDT. As previously mentioned, there have been attempts to simplify the existing code to make it less dense and more accessible to citizens – however, the results of this process have not been made public. Accordingly, it is fair to suggest that as a baseline, similar to the U.S. tax code, it may not be easy to interpret. The CBDT has also suggested that the existence of tax treaties and the opportunity to come to them for specific concerns should alleviate the issues presented by Covid-19 travel limitations. This premise is based on several assumptions, that individuals trapped have a knowledge of international treaties that try and prevent double taxation and that individuals (especially those that are not normally residents of India) can approach the CBDT with general concerns. The individual (mentioned earlier in this article) who asked for an extension of the original relief had to petition the Indian Supreme Court before they were directed to petition the CBDT and were still granted no relief. The petitioner is now forced to go back to the Supreme Court for relief. While this may not be the case for each taxpayer – and certainly not every taxpayer can dedicate the time and energy to pursue this cause of action – the CBDT’s proposed solution may not be effective as they believe it is. And without an extension or a resolution of the case from the Supreme Court, individuals like that taxpayer may be without a resolution.

*ii. Scope of the Relief*

In addition to the logistical issues presented, the differing exemptions based on a Covid-19 diagnosis fail to recognize the issues faced by those without a diagnosis. Unlike the U.S. which recognized that travel may still be impacted for those without Covid-19, the exemption in India for those without Covid-19 is limited to the period of March 22, 2020, to March 31, 2020. This fails to take into account individuals who may have a fear of flying in Covid-19 or other travel related concerns that are not directly related to a Covid-19 diagnosis.

Further, without an extension and an existing medical exemption, this policy is not effective in the long run with variants arising. A negative Covid-19 test is still required for entry and exit of India<sup>116</sup>, and without some sort of relief, an extended trip due to Covid-19 could count towards one's substantial presence and impact their residential status. While the CBDT believes that individuals are protected by the double taxation relief in international treaties, this relief does not cover every impacted individual.

*2. Positive Aspects of the Substantial Presence Test Exemption*

The circular issued illudes to a simplified process for gaining relief from the specified dates of March 22 – March 31. The information presented by the CBDT was fairly short compared to the directives of the U.S, and hopefully, this means a simplified process for individuals hoping to claim this exemption. Without more information, however, it is difficult to say exactly how one can claim this, especially an individual. But, if there is no formal process and these days are just given to each individual, the process could be easier than that provided to through the U.S.

Pursuant to its Substantial Presence Test Exemption in Covid-19, India should (1) provide more information regarding the process for claiming this exemption, (2) create a streamlined process that does not involve continuous petitions between the Supreme Court and the CBDT, (3) extended relief as variants arise.

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<sup>116</sup> Note that this is still the case as of 2023. U.S. DEP'T OF STATE, U.S. EMBASSY AND CONSULATES IN INDIA: COVID-19 INFORMATION (2023), <https://in.usembassy.gov/covid-19-information/>.

*C. The Expanded Medical Exemption as the Superior Relief*

The expanded medical exemption provided by the U.S. is not without its logistical barriers and setbacks, but compared to the relief provided by India, it is likely more effective now and for modification in the future. For one, that U.S. chose to extend relief, at least through June, recognizing the ongoing issues related to Covid-19, while India believes tax issues may be resolved through international treaties. Additionally, the U.S.'s relief does not distinguish between those directly diagnosed with Covid-19 in terms of days allowed for exemption which is necessary to provide equitable relief to all individuals. And finally, although the process for granting relief in each of these countries is not perfect nor easy, the U.S. has not created a roundabout system that India has between the CBDT and Supreme Court. Accordingly, plans moving forward should keep these characteristics in mind and be wary of paralleling the relief provided in India.

*D. International Tax Treaties as Effective Means for Some, But Not All.*

The definition of residence and tie-breaking factors present in the international tax treaties may be helpful for most individuals, familiar with tax law, navigating the issue of double taxation, but it does not resolve all of the tax related issues created by Covid-19 closures and travel restrictions. Similar to the internal tax laws, use of these treaties presents logistical barriers for those not familiar with international tax law. For example, the IRS provides information regarding tax treaties, but, if individuals are not familiar with the necessary forms or put on notice that they need to file with another country, they may not be able to take advantage of this treaty benefit. Individuals that frequently travel between countries and conduct business in various places may be more familiar with tax requirements, but those stuck in the U.S. just as a result of Covid-19 may not be aware of this necessity. And, some countries, like India require residency certification which is another logistical hoop that individuals need to be aware of and prepare for.

Additionally, the treaties do not redress all of the tax issues associated with residency in Covid-19. The treaties seek to prevent the issue of double taxation. However, if an individual is not subject to double taxation, but has not had to pay income tax in the past based on their usual residency, this treaty will not prevent them from having to pay a tax that they not normally would. For example, the treaty between the U.S. and India will cover individuals who may be subject to taxation in both countries by determining their residency

through the tiebreaking clause and reducing their liability. However, if an individual is normally a resident in a country without a treaty, or a country in which they do not normally pay income tax, they will still be subject to a new tax.

Based on this analysis and comparison, the final section will take a broader look at Covid-19, exemption policies, and commentary from the OECD to make a more general recommendation in the future of Covid-19 and increased remote work.

### III. RECOMMENDATIONS FOR A CHANGING WORLD

As illustrated by the prior case studies, the U.S. and India differ in their treatment of Covid-19 status. However, these cases also showed the limitations of the policies and the ongoing need for relief. From what happened in these cases, this section will focus on recommendations for a changing world

#### A. *Covid-19 Tax Related Recommendations*

After a couple of years since the onset of Covid-19, variants continue to arise and there doesn't appear to be a clear timeline of when they will stop. The CDC still predicts that we will continue to see variants that may vary in their potency and ability to spread.<sup>117</sup> Even if variants are not as deadly, there is still the possibility they can overwhelm healthcare systems and cause travel delays, as we saw with numerous flight cancellations in December. With these considerations in mind, it is important to consider the need for long-term policies. This article has focused on the policies implemented by the U.S. and India, but it is still important to take a wider glance to suggest a more global approach.

In early 2021, the Organization for Economic Co-operation and Development (OECD) issued a report on updated guidance concerning policies related to Covid-19.<sup>118</sup> In this report, the OECD recognized concerns related to substantial presence triggering tax liability based on countries' internal tax laws and corresponding income from employment.<sup>119</sup> Generally, the OECD believes that the international treaties should solve issues of double

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<sup>117</sup> CDC, COVID-19: VARIANTS (2023), [https://www.cdc.gov/coronavirus/2019-ncov/variants/about-variants.html?s\\_cid=11720:how%20many%20covid%20strains%20are%20there:sem.ga:p:RG:GM:gen:PTN:FY22](https://www.cdc.gov/coronavirus/2019-ncov/variants/about-variants.html?s_cid=11720:how%20many%20covid%20strains%20are%20there:sem.ga:p:RG:GM:gen:PTN:FY22).

<sup>118</sup> OECD, *supra* note 11.

<sup>119</sup> *Id.*

taxation, and at the same time it is unreasonable to count days when one cannot leave due to Covid-19 towards a substantial presence test. In fact, it was this guidance regarding international treaties that led the CBDT in India to conclude that a continuance of an exemption would not be necessary. Based on this consideration and examination of the policies analyzed earlier, I believe a few general recommendations are necessary for the future.

While countries may have international tax treaties, they are not a substitute for more substantial relief, and countries should consider expanding treaty benefits to those not faced with double taxation. As seen with the NRI's in India, a double taxation treaty may not resolve every issue and can still allow for an individual to be taxed on income they normally would not have except for an extended stay. A driving force behind the implantation of these treaties is that double taxation may inhibit international trade or movement of capital. This principle of deterrence could still be applied to individuals that may not normally face income tax based on their pre-covid residence. While the treaties are also intended to prevent fiscal evasion, extended relief does not necessarily have to counter this principle. Just as countries were able to implement emergency procedures for other individuals, it seems possible that similar relief could be extended to those in this particular circumstance. Countries should seek to implement relief for those who will not fall under the general medical exemption and bilateral treaty benefits. This could include similar processes for residency verification, but expand it to those who are not normally taxed.

Countries should also allow for exemption of all days impacted by Covid-19, not just a set time period as both the U.S. and India did, and a streamlined process for doing so. At the very least, each country should work to implement clear guidelines and resources for assistance and completing the process – especially for those who are not residents of the country. These recommendations, however, are only applicable for those impacted by Covid-19 and are not likely to transition to an increasingly remote workplace.

Overall, the internal laws and international tax agreement provide some relief for individuals that may find themselves exposed to new tax liability because of their inability to leave a country as a result of Covid-19, but they still fall short in accessibility and scope. Knowledge of these laws and the exceptions applicable to those trapped because of Covid-19 is still not a completely accessible and efficient process. Individuals that travel between countries on a regular basis may have notice of these regulations and agreements and the ability to apply for them and receive the benefits, but that may not be the case for every individual impacted by Covid-19. The international tax agreements do provide some fallback, but this does not

provide relief for every individual and if Covid-19 continues to be an issue in the future, countries should consider a more streamlined process in tandem with expansions of internal laws.

### *B. Applicability to Remote Work*

In addition to lockdowns and border closures, a number of workplaces decided to go remote at the beginning of the pandemic. While some areas of the workforce moved back in person as vaccinations became available, a number of companies have chosen to move permanently online.<sup>120</sup> For example, Ireland has considered moving to a mostly remote workforce.<sup>121</sup> With a physical location becoming less important in some areas of work, the question arises if this will impact the mobility of individuals across countries? And are the exemptions enough to deal with increased mobility? While certain sectors have moved online, it is still early to tell when and how each sector could change. However, based on the exemptions now, the general exemptions provided by the U.S. and India, will not be effective in curtailing any tax issues that may arise. Each of these exemptions are based on the idea that one's mobility is impacted because of Covid-19, and without Covid-19, they would not be facing such issues. The issue of remote work brings in the additional factor of an individual's choice to go to another place and moves further away from the paradigm of a stranded individual unable to travel even if they wanted to. Accordingly, the issue of remote work will likely need to be handled as a separate issue, perhaps even at the level of adaptations to international treaties.

## IV. CONCLUSION

The world saw the first outbreak of Covid-19 in January of 2020, leaving people everywhere stranded in places outside of their homes and unable to travel. Nearly three years later and while vaccines have reached the market, new variants arise, and people are still facing travel issues. Outside of the general concerns of delayed travel, this also implicates tax concerns. Each country has some regulation – varying in detail, exemptions, and length of

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<sup>120</sup> Kristin Stoller, *Never Want to Go Back to the Office? Here's Where You Should Work*, FORBES (Jan. 31, 2021), <https://www.forbes.com/sites/kristinstoller/2021/01/31/never-want-to-go-back-to-the-office-heres-where-you-should-work/?sh=33dfc8136712>.

<sup>121</sup> Martin Wall, *Government wants remote working to become 'permanent fixture' as workplaces prepare to reopen*, IRISH TIMES (Sept. 19, 2021), <https://www.irishtimes.com/news/ireland/irish-news/government-wants-remote-working-to-become-permanent-fixture-as-workplaces-prepare-to-reopen-1.4678069>.

stay – under which an individual who is physically present in a country for a certain amount of time may be subject to the countries tax laws. And when Covid-19 emerged and began to spread, countries implemented different forms of relief to discount those days individuals were stranded. Is this relief enough for a future compromised of Covid-19 variants and remote work? In response to this question, I argued that while the relief provided by the U.S. was more comprehensive and effective for the continuing threat of Covid-19, revisions are necessary in order to make it a longer term of permanent option.

The U.S. and India's internal tax code and appeals process are not entirely accessible to the common public or those stuck in the country. This is a logistical issue that needs to be addressed, along with the longevity of the relief. While the U.S. expanded their Covid-19 physical presence exemptions through 2022, as variants arise this will need to be extended again and most likely will need to be permanent to accommodate the new normal. Additionally, if the workforce moves remote, these provisions are not enough to combat any physical presence issues related to remote work. With the emphasis on the unexpected presence related to Covid-19, the regulations are intended only to protect those who had no choice in being stuck in a country. If remote work expands and individuals find themselves no longer confined to the country of their employer, that choice will not qualify under these exemptions. Accordingly, it is time to reconsider our notion of substantial presence in new world with Covid-19 and remote work becoming commonplace.