ITB International Tax Bytes by Steve Towers

"International tax news, explained"

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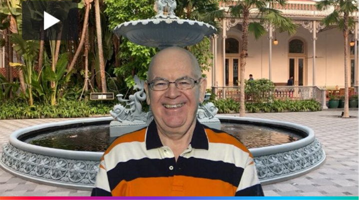

HAPPY FRIDAY!

The **OECD** releases the **Pillar 2** consultation document; **Dominican Republic** announces a **DST**; but **India** and **Switzerland** don't like the numbers!

Kenya wants to get its money upfront; **South Africa** rethinks incentives; **Mexico** passes its Budget (despite international lobbying); but **Taiwan** has its head in the **clouds!**

G9 wants to increase **aviation pricing** in **Europe**; **Norway** wants to increase taxes on **salmon**; and the **US** wants to get tough on **transition tax!**

But at the end of the week, the most important question is this: "Where were you when **the Wall** came down?" **OK, boomer!**

Have a great weekend!
Steve

Curious about ITB? Watch this video!

#AskSteve

Episode 8
What are your favorite topics in international tax?

Episode 7
Why did you stay at Deloitte for the whole of your career?

IN TODAY'S VIDEO PODCAST

(For ITB video subscribers, please log in to access the video and documents/reports)

1. Digital taxation
2. Trade & other global developments
3. Asia Pacific
   - Australia, India, Singapore, Taiwan, Thailand
4. Europe
   - Denmark, EU, Germany, Italy, UK
5. Africa
   - Kenya, Nigeria, Morocco, South Africa
6. Americas
   - Argentina, Colombia, Mexico, Peru, US
7. Treaties
8. Worth reading

WORTH READING

Emilien Lebas
"Recent Amendments to EU, Luxembourg and US Tax Laws, and Their Implications for US Holding and Financing Branch Structures"
Bulletin for International Taxation, IBFD, 2019 (Volume 73), No.11 (subscription service)

Bob Michel
"The French Crusade to Tax the Online Advertisement Business: Reflections on the French Google Case and the Newly Introduced Digital Services Tax"
European Taxation, IBFD, 2019 (Volume 59), No. 11 (subscription service)

INTERNATIONAL TAX QUIZ

XCO is a company resident in country X. It owns a small parcel of shares in YCO, a company resident in country Y. YCO's shares are listed on the country Y stock exchange.

YCO declares a dividend, and issues dividend vouchers to its shareholders. The dividend vouchers are transferrable and are not registered. YCO will redeem the dividend vouchers, for cash, on presentation after 30 days. On presentation, YCO does not require evidence that the holder of vouchers is a shareholder in YCO.

XCO sells its dividend vouchers to ZCO, a company resident in country Z, for a price equal to 95% of the face value of the vouchers. The sale is unconditional – in particular, XCO does not guarantee that YCO will redeem the vouchers for face value or indemnify ZCO if YCO does not. No shares in YCO are sold by XCO to ZCO.

The X/Y treaty and the Y/Z treaty are identical to the 2014 OECD model treaty, except that the tax limit in Art. 10(2)(b) is 20% (X/Y treaty) and 10% (Y/Z treaty). Under domestic law, country Y levies a withholding tax of 30% on outbound dividends.

In regard to the vouchers which are issued to XCO, and assuming the MLI does not apply to the 2 treaties: (i) what rate of country Y tax will apply; and (ii) who is the relevant taxpayer (XCO or ZCO)?

Would your answers be different if the MLI did apply to both treaties?

Answer in next week's ITB email alert!

Last week's question & solution

ACO, a company which is resident in country A, owns the global copyright to a film.

ACO sells that global copyright to BCO, a company which is resident in country B.

The sale contract states that the consideration has 2 components: (i) a lump sum of $10 million (payable upfront), and (ii) a royalty of 3% of annual revenue which is derived by BCO from commercial exploitation of the copyright (payable annually for 10 years).

2 years later, BCO discovers that ACO is deriving revenue from the copyright from third parties in country A. BCO sues ACO, in a country A court, for breach of copyright. The court awards damages to BCO of $2 million.

The A/B treaty is identical to the 2011 UN model treaty, and it is not covered by the MLI.

What is the treatment, under the treaty, for the 3 payments?

(i) Lump sum of $10 million (payable upfront):

1. This amount will fall within Art. 13(6) (capital gains – residual paragraph). Thus, it will be exempt in country B.
2. This amount will not be "royalties" within the definition in Art. 12(3), because it is not consideration for the use of, or the right to use, any copyright.

(ii) Royalty of 3% of annual revenue which is derived by BCO from commercial exploitation of the copyright (payable annually for 10 years):

1. These 10 annual amounts should also fall within Art. 13(6) (and not be "royalties" within the Art. 12(3) definition), and therefore should be exempt in country B, for the same reasons as stated in (i) above. Regardless of the calculation of the amounts and regardless of the name given to the amounts in the sale contract, their character is of payments for the sale of the whole copyright.
2. See paragraphs 15 & 16 in the OECD Commentary on Art. 12 (reproduced in the UN Commentary on Art. 12). India and Colombia do not accept the positions stated in those 2 paragraphs.

(iii) Damages of $2 million paid by ACO to BCO, for breach of copyright:

1. This amount should be treated as "royalties" within the Art. 12(3) definition
2. See paragraph 8 in the OECD Commentary on Art. 12 (reproduced in the UN Commentary on Art. 12):
   "The definition covers both payments made under a license and compensation which a person would be obliged to pay for fraudulently copying or infringing the right."
3. Thus, country A would be entitled to tax the amount up to the limit described in Art. 12(2) (assuming BCO is the beneficial owner of the amount and does not have a PE in country A). Country B would be required to give a foreign tax credit under Art. 23A(2) or Art. 23B(1).

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