ITB International Tax Bytes *by Steve Towers*

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HAPPY FRIDAY!

Greta Thunberg trademarks her name – but has she breached **Harry & Meghan's** patent on that idea?

Peace breaks out between **France** and the **US** ("Louis, I think this is the beginning of a beautiful friendship") – but **American knives** are sharpened for **Italy, the UK, the Czech Republic**, …

The **US** thinks that a **safe harbour** is not **optional**, but it might be **optimal**; **Australia** gets tough on **DEMPE**; **Thailand** acts with the speed of a glacier; **Argentina** suspends knowledge; the **Philippines** reignites **REITs**; but **Zimbabwe** just wants your US dollars!

Ursula offers a carrot and a stick (but is that just a carbon copy?); the **ECJ** closes its door on **Spain**; **Royal Mail** forgets to invoice; and **Brexit** finally happens – but what's changed?

And if, at the end of the week, you have a feeling of **déjà vu** - don't worry, Sunday really is **Groundhog Day!**

Have a great weekend!
Steve

THIS WEEK'S PODCAST

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

1. Digital taxation
2. Trade
3. Asia Pacific
    - Australia, India, Philippines, Taiwan, Thailand
4. Europe
    - Austria, Denmark, ECJ, EU, Brexit, UK
5. Africa
    - Zimbabwe
6. Middle East & Central Asia
    - Bahrain, Oman
7. Americas
    - Argentina, Chile, US
8. Treaties
9. Worth reading

WORTH READING

Harm van den Broek
"European Union – Final Losses in Respect of Cross-Border Mergers: Memira (Case C-607/17) and Holmen (Case C-608/17)"
European Taxation, IBFD, 2020 (Volume 60), No. 2/3 (subscription service)

George Callas and Mark Prater
"Is GILTI Operating as Congress Intended?"
Tax Notes Today International, Tax Analysts, 22 January 2020 (subscription service)

INTERNATIONAL TAX QUIZ

THIS WEEK'S NEW QUIZ

ACo, a company resident in country A, conducts a business of selling its goods through its website. Under the sales contracts, ACo is required to deliver the goods to its customers' addresses. A critical success factor for ACo's business is its ability to deliver the goods to the customers, within a relatively short time period after the sale contract is made.

ACo has customers in several countries, including country B. To enable it to quickly deliver goods to customers in country B, ACo owns and operates a warehouse in country B. The warehouse contains stocks of ACo's goods. When a contract is made, ACo's head office in country A instructs ACo's employees who are based at the warehouse to select the relevant goods and deliver them to the customer's address in country B.

ACo's warehouse employees play no role in the marketing process or in concluding the customer contracts.

The A/B treaty is identical to the 2014 OECD model treaty. The MLI does not apply to the A/B treaty.

Does ACo have a PE in country B, under Art. 5 of the A/B treaty?

Answer in next week's ITB email alert!

LAST WEEK'S QUESTION

In year Z, XCo, a company resident in country X, purchased a 5% shareholding in YCo, a publicly listed company resident in country Y, for $1 million. At the time of that purchase, YCo's assets did not mainly consist of immovable property in country Y.

In year Z + 5, X and Y entered into their first double tax treaty. That first X/Y treaty was identical to the 1997 OECD model treaty.

In year Z + 15, X and Y replaced that treaty with a second treaty. The second X/Y treaty is identical to the 2014 OECD model treaty. The MLI does not apply to the second X/Y treaty.

In year Z + 17, XCo sold its shares in YCo, for $20 million. At the time of the sale, YCo's assets were mainly immovable property in country Y.

XCo's profit of $19 million is taxable under country Y domestic law. What is the impact of the X/Y treaties?

LAST WEEK'S ANSWER

The key difference between the two X/Y treaties is that the first treaty does not allow source country taxation of capital gains on sales of shares in companies resident in the source country (whether or not land-rich), whereas the second treaty has a land-rich provision (Art. 13(4)) which does allow such taxation. Based on the facts, Art. 13(4) applies.

However, XCo owned the 5% shareholding for 17 years, which can be divided into 3 periods:

(i) Z to Z+5: no treaty – thus, Y domestic law operates

(ii) Z+5 to Z+15: first X/Y treaty in force – treaty exemption applies

(iii) Z+15 to Z+17: second X/Y treaty in force – Art. 13(4) allows Y domestic law to apply

Para. 3.1, OECD Comm. on Art. 13: "…where [Art. 13] allows a Contracting State to tax a capital gain, this right applies to the entire gain and not only to the part thereof that has accrued after the entry into force of a treaty (subject to contrary provisions that could be agreed to during bilateral negotiations), even in the case of a new treaty that replaces a previous one that did not allow such taxation." Note the comment by Austria and Germany in regard to the reverse situation (para. 32.1).

Thus, the full $19 million will be taxable in Y. X must give relief under Art. 23A / 23B.

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AskSteve

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