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HAPPY FRIDAY!

Mayor Pete's on a roll, but **David Bradbury** is the 100 billion dollar man!

Accurate delineation gives the tax authorities **financial creativity** – but don't call it "recharacterisation"!

The **EU** shows **Turkey** a yellow card, but throws the book at the **Cayman Islands** (ah, it's just another **British** territory!)

Altera orders supreme, **Facebook** has a 9 billion dollar headache, **Canada's** GAAR is toothless again, but **Portugal** learns to allow capital to move freely!

But at the end of the week, the most important question is: how will a couple enjoy **Valentine's Day**, if they're both wearing a mask?

Have a great weekend!
Steve

THIS WEEK'S PODCAST

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

1. Transfer Pricing Guidance on Financial Transactions (TPGFT): introduction
2. TPGFT: interaction with the guidance in Section D.1 of Chapter I
3. TPGFT: intra-group loans
4. TPGFT: cash pooling
5. TPGFT: hedging
6. TPGFT: financial guarantees
7. TPGFT: captive insurance
8. TPGFT: risk-free and risk-adjusted rates of return
9. Other news: in brief
 - Pillars One & Two, France DST, Australia, China, Taiwan, ECJ, Canada, US, Treaties

INTERNATIONAL TAX QUIZ

THIS WEEK'S NEW QUIZ

ACo, a company resident in country A, carries on a consulting business. ACo entered into a contract with BCo (a company resident in country B) to undertake a consulting project for BCo. Under the contract, two of ACo's employees would spend a period of time at BCo's office in B, undertaking interviews with BCo's staff and reviewing BCo's systems. The two employees would then return to the ACo office in A to assist in writing the report for BCo.

The plan was that the two employees would spend 4.5 months at BCo's office in B, from 11 March 2019 to 31 July 2019.

However, due to poor planning and other reasons, the employees actually spent 7.5 months at BCo's office, from 11 March 2019 to 30 November 2019. And, due to other client commitments, one of the employees had to return to country A and was (eventually) replaced by a third employee. Thus:

- 11 March 2019 to 31 July 2019: employees 1 & 2 at BCo's office
- 1 August 2019 to 31 October 2019: employee 1 at BCo's office
- 1 November 2019 to 30 November 2019: employees 1 & 3 at BCo's office

The employees occupied a dedicated room at BCo's office for the whole of the 7.5 months.

During the 7.5 months, the employees worked only on Mondays to Fridays. They did not work on country B public holidays (of which there were 9 during the 7.5 months).

B's year-end for corporate income tax purposes is 30 June.

The A/B treaty is identical to the 2011 UN model treaty.

Does the A/B treaty allow B to impose income tax on ACo for the year ended 30 June 2019 and/or the year ending 30 June 2020?

Answer in next week's ITB email alert!

LAST WEEK'S QUESTION

In year 1, XCo, a company resident in country X, formed a branch in country Y to act as a procurement office (PO) for it. The PO occupies leased premises and has 10 employees. The PO's employees (acting with XCo's express authority) identify potential suppliers of goods in Y, conduct due diligence on those potential suppliers, negotiate purchase contracts with the suppliers, and conclude those purchase contracts. All of the contracts require the suppliers to arrange, and pay for, insurance and freight of the goods to XCo in X. The PO's employees perform no activities in regard to payment of the suppliers.

For years 1 to 5, the PO performs the above-mentioned activities solely for XCo.

In year 6, in addition to the activities performed for XCo, the PO starts to also perform the same activities for XSub, which is a company resident in country X and is a 100% subsidiary of XCo.

The X/Y treaty is identical to the 2011 OECD model treaty. The MLI covers the X/Y treaty; however, Arts. 12-15 of the MLI don't apply.

Questions: (1) In year 5, does the X/Y treaty allow Y to tax XCo? (2) In year 6, does the X/Y treaty allow Y to tax XCo and/or XSub?

LAST WEEK'S ANSWER

Question (1):

Art. 5(1): satisfied.

Art. 5(4)(d): All of the PO's activities (identification, due diligence, negotiation, contract conclusion) should fall within "purchasing" – although there is an alternative argument that identification and due diligence are not part of the "purchasing" function (the "purchasing alternative argument"). Thus, Art. 5(4)(d) should be satisfied. The "preparatory or auxiliary character" (POAC) condition does not apply to Art. 5(4)(d): see answer to ITQ29.

Thus, no PE.

Question (2):

(i) XCo:

The "solely" condition in Art. 5(4)(d) is not satisfied. Also, Art. 5(4)(e) & (f) are not satisfied, because (inter alia) of the services performed for XSub.

Thus, XCo has an Art. 5(1) PE in Y.

However, the profits attributable to the PE (which Y is allowed to tax) should be limited to the arm's length fee charged to XSub, less the costs of deriving that fee. No profits should be attributable to the PE in regard to the purchasing activities for XCo: Art. 7(5). Again, the purchasing alternative argument is relevant.

(ii) XSub:

Art. 5(5) is satisfied. The Art. 5(6) exception probably does not apply.

Thus, XSub probably has a PE in Y.

No profits should be attributable to the PE in regard to the purchasing activities for XSub: Art. 7(5). Again, the purchasing alternative argument is relevant.



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