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HAPPY FRIDAY!

Democrat candidates give **Mike** a really warm welcome!

In the **digital** world, all roads lead to **Riyadh**; but **Spain** and the **Czech Republic** are not moving!

India loses on ocean freight; **Indonesia** finally catches its omnibus; consumption tax sinks **Japan** to a new low; but the **US** tries to correct errors!

Denmark has its royalties blocked; **quasi-equity** gains interest; **Chile** triggers MFN; **Peru** catalogues GAAR; and **South Africa** sees opportunities in thin cap!

But at the end of the week, the most important question is this: **why didn't Mike prepare for the debate?**

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 & other global developments
3. Asia Pacific
 - Australia, India, Indonesia, Japan, Singapore
4. Europe
 - Denmark, EU, Spain
5. Africa
 - South Africa
6. Middle East & Central Asia
 - Bahrain, Qatar
7. Americas
 - Canada, Chile, Colombia, Peru, US
8. Treaties
9. Worth reading

WORTH READING

Sebastien Gonnet, Bert Steens, Christof Beuselinck and Matthias Petutschnig
"Proposed Framework for Foreign Comparables Selection and Adjustment"
Transfer Pricing Economists for Development (TPED) (freely available)

Rita Szudoczky and Balázs Károlyi
"The Troubled Story of the Hungarian Advertisement Tax: How (Not) to Design a Progressive Turnover Tax"

Intertax, Kluwer, Volume 48 (2020), Issue 1

INTERNATIONAL TAX QUIZ

THIS WEEK'S NEW QUIZ

XCo, a company resident in country X, operates a number of large discount stores in X. For a period of 2 years, XCo maintains an office in country Y for the purposes of researching the local market and lobbying the government for changes which would allow XCo to establish stores in Y. During that period: (i) the office has 10 employees; (ii) the office manager routinely enters into various types of contracts (on behalf of XCo) such as employment contracts, office lease contract, office cleaning contract, contracts for electricity and other utilities, contracts for office stationery, contracts for supply of economic and business information on the local market; and (iii) the office manager and other senior employees frequently entertain senior government officials at football games, restaurants, karaoke bars, etc.

The X/Y treaty is identical to the 2017 OECD model treaty. Does XCo have a PE in Y under that treaty?

Answer in next week's ITB email alert!

LAST WEEK'S QUESTION

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, the employees actually spent 7.5 months at BCo's office, from 11 March 2019 to 30 November 2019.

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?

LAST WEEK'S ANSWER

Art. 5(3)(b)

The time test is "more than 183 days in any 12-month period commencing or ending in the fiscal year concerned". I will choose the 12-month period from 11 March 2019 to 10 March 2020, which commences in the fiscal year ended 30 June 2019 and ends in the fiscal year ending 30 June 2020.

In applying the "more than 183 days" test, I must identify those days on which ACo furnished services within B: "but only if activities of that nature [i.e., "furnishing of services"] continue ... within a Contracting State ...". ACo furnished services in B on 180 days during the 12-month period – i.e., all Mondays to Fridays in the period from 11 March 2019 to 30 November 2019 (189 days), less 9 public holidays = 180 days.

Thus, no Art. 5(3)(b) PE in either fiscal year.

Some countries take the view that the time test in Art. 5(3)(b) should be applied without counting the specific days on which services are furnished. Applied to the facts in this case, those countries would say that services were furnished for a 7.5 months period, and there are more than 183 days in 7.5 months. However, that view is at odds with the specific wording in Art. 5(3)(b), particularly with the "183 days" test which replaced the former "6 months" test in the 2011 UN model. Also, see the 2017 OECD Commentary, para. 163.

Art. 5(1)

BCo's office is a specific geographical place through which ACo is partly carrying on its business. It is "at the disposal" of ACo (see 2017 OECD Commentary: "painter example"). The "more or less 6 months" time test, which is not limited to counting working days, is also satisfied. Although the plan was for the employees to be there for 4.5 months, their actual stay was 7.5 months: see 2017 OECD Commentary, para. 34.

Thus, Art. 5(1) is satisfied.

Some have suggested that Art. 5(1) should not apply to the furnishing of services, due to the presence of Art. 5(3)(b). There is no support for that view in the UN Commentary, and it is at odds with the opening words of Art. 5(3): "The term 'permanent establishment' also encompasses:"

Art. 5(4)(d) is not satisfied: ACo's employees are doing more than merely collecting information.

Thus, ACo has an Art. 5(1) PE in both fiscal years – and, therefore, Art. 7 allows B to levy tax on the profits attributable to that PE in both years.



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AskSteve



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