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ITB International Tax Bytes by Steve Towers

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HAPPY FRIDAY!

COVID-19 brings us the **elbow bump**, the **Wuhan shake**, an **infodemic**, **extreme FOMO**, and **way too much toilet paper! James Bond** has decided to come back in November!

Meanwhile, the **European Court of Justice** delivers **Hungarian goulash**, but no free lunch for **DST critics!**

India looks at **Mauritius** and says no; **SICAVs** collectively win in **Korea**; **the Philippines** starts **CITIRA boasting**; **Norway** wants to withhold; **Finland** depreciates; **Argentina** rediscovers knowledge; and everyone is favoured in **Colombia!**

But at the end of the week, the most important question is this: **does toilet paper have a "use-by" date?**

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. Asia Pacific
   - Hong Kong, India, Korea, Malaysia, Philippines
3. Europe
   - ECJ, EU, Finland, Norway, Spain
4. Americas
   - Argentina, Colombia, Peru
5. Treaties
6. Worth reading

WORTH READING

Rasmi Ranjan Das
"The Concept of Value Creation: Is It Relevant for the Allocation of Taxing Rights?"
Bulletin for International Taxation, IBFD, 2020 (Volume 74), No. 3 (subscription service)

INTERNATIONAL TAX QUIZ

THIS WEEK'S NEW QUIZ

This week's quiz uses the same facts as last week's question (see below), but with a change in the treaty.

The A/B treaty is identical to the 2017 OECD model treaty.

Does ACo have a PE in B under the treaty? If so, how would you determine the profits attributable to the PE?

Answer in next week's ITB email alert!

LAST WEEK'S QUESTION

ACo, a company resident in country A, manufactures consumer goods. It owns a warehouse in country B. The warehouse is operated by country B employees of ACo.

BCo is a company resident in B and it is a 100% subsidiary of ACo. BCo is the exclusive distributor of ACo's goods in B. BCo takes relatively little risk; it does not take any market or physical inventory risk. This is achieved by the use of a "flash title" model: the goods are sold by ACo to BCo only when, and to the extent that, BCo has contracts to sell the goods to its customers; and the price is set by reference to the price charged by BCo to its customers, giving BCo a guaranteed gross margin.

Thus:

- Step 1: ACo physically moves the goods from A to the warehouse in B. Importation is subject to customs duty and VAT. ACo is the importer of record.
- Step 2 (days or weeks after step 1): ACo sells some goods to BCo. This sale contract is concluded between BCo and ACo's employees in A. ACo's employees at the B warehouse play no role with regard to the conclusion of the contract. Under the contract, title in the goods passes to BCo when possession of the goods is given to BCo or its agent.
- Step 3 (at same time as step 2): BCo enters into sale contracts with customers. ACo's head office gives instructions to ACo's warehouse employees to release the required amount and type of goods to BCo's third party logistics company (XCo). Acting upon BCo's instructions, XCo picks up the goods at ACo's warehouse (title in the goods passes to BCo at this point), and delivers them to the customers.

The A/B treaty is identical to the 2011 UN model treaty. The MLI does not apply to the treaty.

Does ACo have a PE in B under the treaty? If so, how would you determine the profits attributable to the PE?

LAST WEEK'S ANSWER

Warehouse:

- Art. 5(1) satisfied
- Art. 5(4)(a) & (b):
  - "storage or display" – "delivery" is deliberately omitted from UN model. What is the difference between "storage" and "delivery"? If a facility is used to store goods for delivery, does that qualify as "storage", or is it delivery? The UN Comm. states that a warehouse used for delivery (i.e., storage for delivery) is excluded from paras. (a) & (b).
  - The goods at ACo's warehouse are destined for sale to BCo, and that should qualify as storage for delivery, even though a sale contract for most of the goods has not yet been concluded. Thus, in my view, paras. (a) & (b) should not apply.
  - The "preparatory or auxiliary character" condition should not apply: see answer to ITQ29.
- Thus, Art. 5(1) PE

BCo's premises:

- The facts don't indicate that ACo's employees frequently visit BCo's premises.

VAT registration:

- ACo is probably registered for VAT purposes in B. However, this has no relevance to ACo's PE status: see 2017 OECD Comm.

Art. 5(5)(b):

- Not satisfied: although BCo maintains the goods, it does not deliver them.

Art. 7(1):

- The profits attributable to the warehouse PE are the profits which an independent warehouse company would have derived from performing the warehouse services: see OECD, Additional Guidance on Attribution of Profits to PEs. Those profits do not include any reward for ACo being able to deliver its goods quickly to BCo.

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