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International Tax Bytes *by Steve Towers*

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13 March 2020

HAPPY FRIDAY!

COVID-19 closes **Mount Everest** and the **OECD**; but **Donald Trump** fails to find the white stuff!

Meanwhile, **General Motors** receives gross treatment in **India**; **Uber** finds itself with lots more employees in **France**; **BHP** is sufficiently influenced in **Australia**; and **Andrew Davies** learns the magic of deeming!

The **ECJ** shows that there's value added in a cost reimbursement; **Sofina** indirectly wins; goodwill becomes optional in **Uruguay**; and it's full steam ahead for the **UK's DST!**

But, at the end of a tumultuous week of stock market crashes and sub-par performances by world leaders, it's gratifying to know that **Jimmy Page** and **Robert Plant** still have their **stairway to heaven!**

Have a great weekend!
Steve

THIS WEEK'S PODCAST

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

1. COVID-19
2. CbC reporting
3. Asia Pacific
    - Australia, India, Indonesia, New Zealand
4. Europe
    - ECJ, France, Germany, Luxembourg, UK
5. Middle East & Central Asia
    - Bahrain
6. Americas
    - Brazil, Peru, US, Uruguay
7. Treaties
8. Worth reading

WORTH READING

Richard Xenophon Resch
"May Be Taxed for Whatever Reason – Conflicts of Qualification: The Discussion Is Finished"
Intertax, Kluwer, Volume 48 (2020), Issue 2 (subscription service)

Jacques Malherbe,
"The European Union Directive (DAC6) Compelling Advisors to Report Transnational Tax Schemes"
Tax Management International Journal, Bloomberg BNA, 13 March 2020 (subscription service)

INTERNATIONAL TAX QUIZ

THIS WEEK'S NEW QUIZ

XCo, a company resident in X, acts as toll manufacturer (TM) for related party YCo, a company resident in Y. XCo has no activities other than acting as TM for YCo.

Under the TM agreement:

- YCo owns manufacturing moulds, which are physically transferred to XCo for use in the TM process
- XCo receives, directly from third party suppliers, materials which have been sold by those suppliers to YCo. XCo concluded the purchase contracts on behalf of YCo
- XCo uses the materials to manufacture finished goods (FG), in accordance with patents which are owned by YCo and licensed to XCo (royalty-free) solely for the purposes of the agreement
- At all stages of manufacture, the goods are owned by YCo
- At the end of the manufacturing process, the FG are stored by XCo for an average of 10 days, and are then physically transferred to destinations outside X, as directed by YCO
- YCo pays a fee to XCo for the TM and storage services

The physical transfer of the materials from the suppliers to XCo, and the physical transfer of the FG from XCo to destinations directed by YCo, are performed by third party logistics companies, as a service for YCo.

None of YCo's employees ever visit XCo's premises.

The X/Y treaty is identical to the 2014 OECD model treaty. The MLI does not apply to that treaty.

Does YCo have a PE in X?

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 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?

LAST WEEK'S ANSWER

Warehouse:

- Art. 5(1) tests satisfied
- Art. 5(4):
    i. Art. 5(4.1) satisfied: business activities carried on at ACo's warehouse and BCo's business premises "constitute complementary functions that are part of a cohesive business operation": see Example B in OECD Comm., para. 81
    ii. Thus, Art. 5(4) not satisfied
- Thus, Art. 5(1) PE

BCo's premises:

- No indication that ACo's employees 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 OECD Comm., para. 5

Art. 5(5):

- Not satisfied in regard to "flash title" model: see OECD Comm., para. 96

Art. 7(1):

- The profits attributable to the warehouse PE are the profits which an independent warehouse company would derive from performing the warehouse activities: see 2018 OECD guidance

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