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8 May 2020



### HAPPY FRIDAY!

So who played "Live and Let Die" on the PA system when **President Trump** visited a factory in Arizona this week?

Meanwhile, in the tax world... the **OECD** sticks to its timetable; **China** extends westward; prepayments are expensive in **Australia**; **Pepsi** causes mutual problems in **India**; **Wells Fargo** is shammed; and **accountants** don't rule in the **UK**!

**Italy's FTT** survives, but **Italian nationality** is costly in **Portugal**; **Margrethe** looks even closer at **IKEA**; **Hungary** really doesn't want you to pay tax; **Dong Yang** establishes a win; **Poland** and **Brazil** switch to digital; and **Whirlpool's Mexican subsidiary** faces an identity crisis!

But at the end of another lockdown week, do you fondly remember those innocent days when we thought that **PPE** stood for "Property, Plant & Equipment"?

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. Digital taxation
3. Trade
4. Asia Pacific
  - Australia, China, Hong Kong, India, Japan, New Zealand, Singapore
5. Europe
  - Czech Republic, ECJ, EU, Hungary, Italy, Netherlands, Norway, Poland, Sweden, UK
6. Africa
  - Kenya
7. Middle East & Central Asia
  - Israel, Pakistan, UAE
8. Americas
  - Brazil, Colombia, Mexico, US
9. Treaties
10. Worth reading

### WORTH READING

Michael Lang  
"The Signalling Function of Article 29(9) of the OECD Model – The Principal Purpose Test"  
Bulletin for International Taxation, IBFD, 2020 (Volume 74), No. 4/5 (subscription service)

Ruth Mason  
"What the CJEU's Hungarian Cases Mean for Digital Taxes"  
Tax Notes Today International, Tax Analysts (1 May, 2020) (subscription service)

### INTERNATIONAL TAX QUIZ

#### THIS WEEK'S NEW QUIZ

XCo, a company incorporated in X, conducts its business through a branch in Y. XCo has no assets, operations or employees in X. XCo's senior management and board of directors are based in Y.

Under X tax law, XCo is a resident (based on incorporation). Under Y tax law, XCo is a resident (based on central management and control).

XCo lends money to ACo, an unrelated company resident in X.

The corporate income tax rate in both X and Y is 30%.

X levies an interest withholding tax of 20% (on gross) on outbound interest payments.

The X/Y treaty is identical to the 2017 OECD model treaty, with Art. 23A.

What rates of X and Y tax does the treaty allow to be imposed on the interest paid by ACo to XCo?

Answer in next week's ITB email alert!

### LAST WEEK'S QUESTION

ACo (a company resident in A) and BCo (a company resident in B) are sister subsidiaries in the global XYZ group. ACo carries on a mining business in A. It sells (and exports) minerals to BCo for prices which the XYZ group believes comply with the arm's length principle ("ALP").

A's tax law includes transfer pricing provisions which deem the price of exported minerals according to a schedule. The scheduled prices for ACo's mineral exports exceed the prices which would be determined under the ALP.

The A tax authorities increase ACo's taxable profits to reflect the scheduled prices for mineral exports.

Q1: The A/B treaty is identical to the 2014 OECD model treaty. Does the A/B treaty prevent A from applying the scheduled prices to ACo's mineral exports?

Q2: Would your answer change if the A/B treaty were identical to the 2017 OECD model treaty?

### LAST WEEK'S ANSWER

Q1:

- Threshold issue: what is the effect of Art. 9(1) on cross-border transactions between associated enterprises? Is it:
  - i. "permissive" only – i.e., it permits Contracting States (CS) to apply domestic law to adjust taxable profits to satisfy the ALP; or
  - ii. "restrictive" only – i.e., it prohibits CS from applying domestic law to adjust taxable profits to an amount which exceeds the arm's length profit; or
  - iii. both "permissive" and "restrictive"?
- This is a controversial issue. However, the majority support (case law, academic articles, tax administrations, and the OECD Commentary) is for either (ii) or (iii). That majority support is catalogued in a recent article: Georg Kofler & Isabel Verlinden, "Unlimited Adjustments: Some Reflections on Transfer Pricing, General Anti-Avoidance and Controlled Foreign Company Rules, and the 'Saving Clause' ", Bulletin for International Taxation, IBFD, 2020 (Volume 74), No. 4/5.
- Adopting that majority view: Art. 9(1) would prevent A from adjusting ACo's taxable profits to an amount which exceeds the arm's length profit.

Q2:

- Another controversial issue: what is the interaction between Art. 9(1) and Art. 1(3), in view of the fact that Art. 9(1) is not listed in the exceptions to Art. 1(3)?
- Arguably, Art. 1(3) prevents the "restrictive" operation of Art. 9(1) in regard to residents. This point is discussed in the above-mentioned article by Kofler & Verlinden.
- If that view is correct, Art. 9(1) would not prevent A from adjusting ACo's taxable profits to an amount which exceeds the arm's length profit.



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