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19 June 2020



HAPPY FRIDAY!

Mnuchin's digital "pause" causes the US to be "pillaried" in the EU!

Meanwhile, **Aberdeen** changes its form, but not its losses; warehouses add value in **Poland**; **China** readies **Hainan** to replace **Hong Kong**; **Seoul** speculates, while **Kim** blows up; and everyone is **carrying back losses** and imposing **VAT on Netflix!**

Pakistan squeezes interest; **Saudi Arabia** maps a plan; **Malaysia** advances; **Korea** goes cryptic; **Boris** doesn't extend; and **Dong Yang** confuses!

But at the end of the week, the 2 most important questions are these: **"Does Donald Trump want to buy Finland from Russia? And is it for sale?"**

Have a great weekend!
Steve

THIS WEEK'S PODCAST

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

- Digital taxation
- Other global developments
- Asia Pacific
 - Australia, China, Hong Kong, India, Korea, Malaysia, Philippines
- Europe
 - Austria, Czech Republic, ECJ, EU, France, Germany / Switzerland, Poland, Portugal, UK
- Middle East & Central Asia
 - Pakistan, Saudi Arabia
- Americas
 - Chile, Costa Rica, Mexico
- Treaties
- Review of tax cases in 1st half of 2020 (so far)
- Worth reading

WORTH READING

Claudio Cipollini
"GloBE Proposal and Possible Carve-Outs: Is There a Future for Preferential Tax Regimes?"

World Tax Journal, IBFD, 2020 (Volume 12), No. 2 (subscription service)

Sébastien Maury
"Applying the Arm's Length Principle to Group Synergies"

International Transfer Pricing Journal, IBFD, 2020 (Volume 27), No. 4 (subscription service)

Krzysztof Lasiński-Sulecki
"Fixed Establishment: From Berkholtz and DFDS to Walmore and Dong Yang"

International VAT Monitor, IBFD, 2020 (Volume 31), No. 4 (subscription service)

Giorgio Beretta
"Dong Yang Electronics (Case C-547/18): Oh Yes, a Subsidiary Can (also) Be a Fixed Establishment under EU VAT, but Information Asymmetries May Save You!"

Kluwer International Tax Blog (free service)

INTERNATIONAL TAX QUIZ

THIS WEEK'S NEW QUIZ

XCo, a company resident in X, carries on a construction business.

It has contracted to undertake a construction project in Y. XCo has estimated that the construction project would take 4 months to complete.

50 of XCo's employees (all of whom are resident in X) travelled to Y, in February 2020, to undertake the project.

The emergence of COVID-19 caused the Y government to order, on 15 March 2020, all work on construction projects to cease, with immediate effect. On the same date, without notice, both X and Y prohibited all international travel. Thus, with effect from that date, the project was halted, and XCo's employees were stranded in Y.

XCo currently expects that work on the construction project will re-commence on 1 July 2020. It estimates that the project will be completed on 30 September 2020.

The X/Y treaty is identical to the 2017 UN model treaty. Y's year-end for income tax purposes is 30 June.

Q1: Assuming XCo derives a profit from the project, does the treaty permit Y to tax all or part of that profit?

Q2: If XCo incurs an overall loss on the project, does the treaty permit Y to tax a profit in regard to the project?

Answer in next week's ITB email alert!

LAST WEEK'S QUESTION

ACo, a company resident in A, in 2019 licensed a patent to BCo, a company resident in B, in return for annual royalties.

Under B law, outbound royalties are subject to a final withholding tax of 20% on gross.

Under the A/B treaty, which entered into force in 2005, the source country tax on royalties is limited by Art. 12 to 15% on gross.

A 2005 protocol to the A/B treaty contains this provision:

"In respect of Article 12, if under any convention or protocol signed after 1 May 2005 between [B] and a third State which is a member of the OECD, [B] limits its taxation at source on royalties to a rate lower than the rate provided for in [the A/B treaty], the same rate as provided for in that convention or protocol on royalties shall also apply under [the A/B treaty], with effect from the date on which [the A/B treaty] entered into force or that convention or protocol enters into force, whichever enters into force later."

That protocol also entered into force in 2005.

Under the B/C treaty, which was signed and entered into force in 2008, the source country tax on outbound royalties is limited to 10% on gross.

C became a member of the OECD in 2017.

Q1: For royalties paid by BCo to ACo in 2020, what tax rate does the A/B treaty permit B to impose?

Q2: Would your answer change if the provision in the protocol instead said this:

"In respect of Article 12, if after the entry into force of [the A/B treaty], any convention or protocol between [B] and a third State which is a member of the OECD limits the taxation at source on royalties to a rate lower than the rate provided for in [the A/B treaty], the same rate as provided for in that convention or protocol shall also apply under [the A/B treaty]."

LAST WEEK'S ANSWER

Preliminary points:

- The 2 provisions are "most favoured nation" (MFN) clauses.
- Note the timing: the B/C treaty entered into force AFTER the A/B treaty (and its protocol) entered into force, but BEFORE C became a member of the OECD.

Q1:

- The wording in this provision suggests that it applies only if the third State is a member of the OECD at the time the convention or protocol between B and the third State is signed or enters into force:
 - "...any convention or protocol signed after 1 May 2005 between [B] and a third State **which is** a member of the OECD" (emphasis added)
 - "...with effect from the date on which [the A/B treaty] entered into force or that convention or protocol enters into force, whichever enters into force later" – this suggests that the third State is a member of the OECD by the time the convention or protocol enters into force
- C became a member of the OECD 9 years after the B/C treaty was signed and entered into force.
- IMHO: The MFN provision is not satisfied – thus, the 15% rate limit should apply.

Q2:

- In contrast, the wording of this provision does not suggest that the third State is a member of the OECD at the time the convention or protocol between B and the third State is signed or enters into force.
- There would therefore be a stronger argument that this provision was triggered when C became an OECD member in 2017. Admittedly, it would be clearer if the provision instead said: "...if at any time after the entry into force..."
- Nevertheless, IMHO: The MFN provision is probably satisfied – thus, the 10% rate limit should apply.



Tax Quiz Archives



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AskSteve



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