

Want to learn more about ITB? Sign up for a free trial by emailing us

Free Trial

Check out our suite of subscription plans: individual (standard), student, university faculty, young professional, and enterprise

Subscribe

26 June 2020



HAPPY FRIDAY!

Segway falls off; **Djokovic** double faults; **Liverpool** learns not to choke; and **Bolton** recollects & collects!

Meanwhile, in the tax world... **Europeans** don't pause; **Hong Kong's** ship comes in; the **Netherlands** excludes tax havens; **Slovakia** bribes the banks; **Thailand** incentivises; but **Altera** loses everything!

Vietnam narrows the range; **Poland** follows **Estonia**; **Spain** puts the **Commentary** in its place; **Bitcoin** loses currency in **Australia**; and **Zambia** gives **Mauritius** a red card!

But at the end of a week in which the **Eiffel Tower** reopened after 3 months of lockdown, the most important questions are these: "To maintain social distancing, would you walk up the stairs? Or just buy a postcard?"

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
- Trade and other global developments
- Asia Pacific
 - Australia, Hong Kong, Malaysia, Taiwan, Thailand, Vietnam
- Europe
 - EU, Germany, Italy / Switzerland, Poland, Slovak Republic, Spain
- Africa
 - Tunisia
- Middle East & Central Asia
 - Saudi Arabia
- Americas
 - US
- Treaties
- Review of tax cases in 1st half of 2020 - Transfer Pricing cases
- Worth reading

WORTH READING

Matt Andrew and Richard Collier
"COVID-19 Challenges for the Arm's-Length Principle"
Tax Notes Today International, Tax Analysts, 22 June 2020 (subscription service)

Svitlana Buriak and Mario Riedl
"Global Transfer Pricing Conference 2020: Transfer Pricing Developments around the World"
International Transfer Pricing Journal, IBFD, 2020 (Volume 27), No. 4 (subscription service)

Robert Goulder
"The Futility of Challenging DSTs Under International Law"
Tax Notes Today International, Tax Analysts, 23 June 2020 (subscription service)

INTERNATIONAL TAX QUIZ

THIS WEEK'S NEW QUIZ

ACo, a company resident in A, owns 100% of the shares in BCo, a company resident in B.

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

BCo operates a business in B. It is registered for VAT purposes in B.

In response to the COVID-19 economic crisis, the B law has been amended to allow taxpayer payments of VAT to the tax authorities to be deferred for 6 months. However, companies which are subsidiaries of companies resident in "low-tax jurisdictions" are excluded from the deferral. A falls within the definition of "low-tax jurisdiction".

Can BCo qualify for the VAT deferral?

Answer in next week's ITB email alert!

LAST WEEK'S QUESTION

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 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?

LAST WEEK'S ANSWER

Q1:

PE existence:

- Key issue: is the 6 months test in Art. 5(3)(a) satisfied?
 - 2017 UN Comm. quotes, with approval, 2014 OECD Comm. which states that "temporary interruptions" should be included in determining time.
 - OECD Secretariat Analysis of Treaties and Covid-19 (3 April 2020) states that COVID-19 is a temporary interruption for this purpose.
 - I agree – the 6 months test should be satisfied (i.e., February – September 2020).
- That raises the issue of the relationship between Art. 5(1) and Art. 5(3)(a): is Art. 5(3)(a) a separate form of PE, or is it merely a qualification on Art. 5(1) (i.e., to find a PE, the other conditions in Art. 5(1) must be satisfied)? Note that the 2017 UN Comm. refers to this issue, but does not determine it.
 - This issue could be relevant in this case, as the project site was possibly not "at the disposal" of XCo from 16 March to 30 June – Y laws might have made entry to the site illegal during that period.
 - Nevertheless, IMHO: Art. 5(3)(a) is a separate form of PE, due to the drafting differences between that provision and Art. 5(3) of the OECD model.
- The fact that the project straddles the Y year-end is irrelevant.
- Thus, XCo has a PE.

Profit attribution:

- The profits attributable to the PE under Art. 7(1) will be based on the assumption that the PE is a separate and independent enterprise: Art. 7(2).
- Based on the limited facts, it appears that the PE should be characterised as a service provider to the head office (with its remuneration probably determined on a cost plus basis), and the head office should be characterised as an entrepreneur taking the substantive risks. The risk of a "black swan" event like COVID-19 (and its financial consequences) should be assigned to the head office. Thus, a profit would likely be attributed to the PE.

Q2:

- The profit attributable to the PE should be determined in the same way, regardless of whether the project has an overall profit or loss (see Q1 above).



Tax Quiz Archives

Email Alert Archives

AskSteve

Referral Program

What is ITB?

If you have a friend or colleague who you think might find this email alert interesting, please forward it to them.

Watch ITB video podcasts anytime, anywhere with our App!



UNSUBSCRIBE

If you no longer wish to receive emails from us, please click [here](#)