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10 July 2020



HAPPY FRIDAY!

The **OECD** has studied the evidence and has concluded that the predominant business activity in **investment hubs** is...**investment** (well, knock me over with a feather!)

Meanwhile...**Bhutan** joins the club; **Indonesia** collects unpaid collectors; **Russia** goes flat; **Spain** does it the wrong way; **Bulgaria** values royalties; the levee is dry in **Mauritius**, but the pubs are not in the **UK**; **Cameco** keeps the tax man at arm's length; and in the **US**, 295 pages is barely enough!

But if you think you're having a bad day...spare a thought for champion sprinter **Noah Lyles**, who briefly thought this week that he had smashed **Usain Bolt's world record for 200 metres**...and then he was told that he'd started in the **wrong place** and he'd run only **185 metres**!

Have a great weekend!

Steve

THIS WEEK'S PODCAST

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

1. OECD developments
2. Asia Pacific
 - Bhutan, Hong Kong, India, Indonesia
3. Europe
 - Belgium, ECJ, EGC, EU, Russia, Spain, UK
4. Africa
 - Mauritius
5. Americas
 - Canada, US
6. Treaties
7. Review of tax cases in 1st half of 2020 - EU and EEA law (other than VAT) cases
8. Worth reading

WORTH READING

Michael N. Kandev and Jesse A. Boretsky

["Canadian Appeal Court Rejects Government's Treaty Shopping Arguments Against Luxembourg Holding Company"](#)

Tax Notes Today International, Tax Analysts, 2 July 2020 (subscription service)

Carlo Galli

["Italy's Supreme Court Snubs EU Parent-Subsidiary Directive – But For How Long?"](#)

Daily Tax Report: International, Bloomberg BNA, 3 July 2020 (subscription service)

Jefferson VanderWolk

["The Anatomy of an Impasse – The Taxation of the Digital Economy"](#)

Daily Tax Report: International, Bloomberg BNA, 7 July 2020 (subscription service)

INTERNATIONAL TAX QUIZ

THIS WEEK'S NEW QUIZ

ACo, a company resident in A, owns a building in A. ACo leases the units in the building to third party lessees.

BCo, a company resident in B, owns a significant amount of government securities.

ACo and BCo enter into a total return swap (TRS) in regard to the building and the cash. Thus, each quarter, a payment is made between ACo and BCo (in one direction only), which reflects the following components (simplified):

- Rent received by ACo (less related expenses incurred by ACo)
- Increase or decrease in assessed market value of the building
- Interest received by BCo (less related expenses incurred by BCo)
- Increase or decrease in assessed market value of the government securities
- Changes in the A/B exchange rate

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

Q1: If a payment is made (under the TRS) from ACo to BCo, does the A/B treaty permit A to impose tax on the payment?

Q2: If a payment is made (under the TRS), from BCo to ACo, does the A/B treaty permit B to impose tax on the payment?

Answer in next week's ITB email alert!

LAST WEEK'S QUESTION

XCo, a company resident in X, is the parent company of a global group.

One of its subsidiaries is YCo, a company resident in Y. YCo carries on a manufacturing business in Y.

XCo opens a liaison office ("L.O.") in Y. The L.O. has its own leased office, and has one employee (Ms. A, a national of X, but resident in Y).

Ms A's role is to:

- Identify possible business opportunities for XCo in Y and nearby countries, and communicate these to XCo
- Promote technical cooperation between XCo and its subsidiaries in Y and nearby countries, and also between such subsidiaries themselves
- Act as communication channel between XCo and its subsidiaries in Y and nearby countries

The X/Y treaty is identical to the 2017 OECD model treaty.

Does the treaty permit Y to levy income tax on XCo?

LAST WEEK'S ANSWER

Existence of PE:

1. Art. 5(1) satisfied
2. Art. 5(4):
 - i. Subject to one qualification, Ms A's role probably falls within para. (e) or para. (f), on the basis that the activities are of a preparatory or auxiliary character in regard to XCo.
 - ii. The qualification concerns promoting technical cooperation between XCo's subsidiaries themselves. That aspect of her role is arguably not preparatory or auxiliary from the perspective of XCo, but instead it is a service performed by XCo for those subsidiaries. If that is the case, then Art. 5(4) is not satisfied, due to the "solely" requirement in para. (e) and para. (f).
 - iii. Even if Art. 5(4) is satisfied, Art. 5(4.1) must be considered. YCo, a closely related enterprise, has a PE in Y (its manufacturing premises). The issue is: are the business activities carried on by Ms A at the L.O. and YCo's activities at its manufacturing premises "complementary functions that are part of a cohesive business operation"?
 - iv. Note that part of Ms A's role involves promoting technical cooperation between XCo and YCo – would that connection cause Art. 5(4.1) to be satisfied? That's a difficult question to answer. However, it seems from the drafting that, to trigger Art. 5(4.1), all of the activities at the 2 places must satisfy the test, "complementary functions that are part of a cohesive business operation" – not just some (as is the case here). On balance, I think that Art. 5(4.1) is not triggered.
 - v. IMHO: Art. 5(4) is not satisfied, due to the above-mentioned service element in Ms A's role.
3. Thus, IMHO: the L.O. is a PE.

Profits attributable to PE:

1. Art. 7(1) would allow Y to levy income tax on the profits attributable to the L.O., determined on the assumption that the L.O. is an independent enterprise and dealing at arm's length with the other parts of XCo (Art. 7(2)). Note that the profits attributable to the L.O. would reflect all of the L.O.'s activities, not merely the above-mentioned service element in Ms A's role.
2. In determining the profits attributable to the L.O., the services performed by the L.O. for XCo's subsidiaries (even those subsidiaries which are not resident in Y), would be deemed to be for arm's length consideration: OECD Comm. on Art. 7(2) – unless (generally) they are duplicate services (2017 OECD TPG).



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