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17 July 2020



**HAPPY FRIDAY!**

**Margrethe Vestager** is served **apple turnover**; **Louis Vuitton** bags a 6-month sales bonanza from **Robert Lighthizer**; **Pascal** works on the blueprints; but **Australia** has language problems!

In **Europe**, lawyers are active, but all contracts are incomplete; timesheets don't count in **Denmark**; **Korea** loses its bet; but **Tunisia** has a home win!

And at the end of the week, if you're still wondering whether you've achieved **celebrity status**, let me ask you: **"Was your Twitter account hacked?"**

Have a great weekend!

Steve

**THIS WEEK'S PODCAST**

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

1. Apple EU State aid case
2. Digital taxation
3. Asia Pacific
  - Australia, China, India, Korea
4. Europe
  - Belgium, Brexit, Denmark, ECJ, EU, Finland, France, Ireland, UK
5. Treaties
6. Review of tax cases in 1st half of 2020 - other domestic tax law cases
7. Worth reading

**WORTH READING**

Robin Hart and Steven Schwartz  
["COVID-19 May Make Incomplete Contracts Renegotiable"](#)  
Law360 Tax Authority / International / Expert Analysis (23 June 2020)

Thomas Horst  
["Using Partnerships to Avoid U.S. Tax on the Expatriation of Intangibles"](#)  
Tax Notes Today International, Tax Analysts (15 July 2020) (subscription service)

Yue "Daisy" Dai  
["China's Permanent Establishment Rule and the Future of Digital PEs"](#)  
Tax Notes Today International, Tax Analysts, 15 July 2020 (subscription service)

**INTERNATIONAL TAX QUIZ**

**THIS WEEK'S NEW QUIZ**

XCo, a company resident in X, manufactures goods in X for a global market.  
XCo employs Mr A as its regional sales director in a major region of the world. Mr A lives in Y, but frequently travels to other countries in that region, including Z. Mr A has been employed in this role with XCo for 10 years.

Under his employment contract with XCo:

- Mr A is required to frequently visit existing and prospective customers in the region, with the objective of obtaining purchase orders from them (with the prices set according to XCo's then current price list)
- When Mr A does obtain purchase orders, he is required to send those orders to the head office of XCo in X, for its consideration and acceptance (if considered appropriate, after the head office performs a credit evaluation on the customer). If the order is accepted, XCo will send a written confirmation to the customer (with a copy to Mr A)
- Mr A does not have the authority to accept the purchase orders on behalf of XCo
- However, Mr A does have the authority to offer volume discounts to the customers, within parameters set by XCo head office from time to time

For many years, XCo's head office has accepted 100% of the purchase orders which Mr A has sent to it.

XCo holds a stock of goods at a third party logistics company's warehouse in Y. That stock of goods is generally used to satisfy sales contracts in the region. XCo's head office in X liaises directly with the logistics company for order filling and delivery – Mr A has no interaction with the logistics company.

The X/Y treaty and the X/Z treaty are identical to the 2014 OECD model treaty.

- Q1: Does XCo have a PE in Z, under the X/Z treaty?  
Q2: Does XCo have a PE in Y, under the X/Y treaty?

Answer in next week's ITB email alert!

**LAST WEEK'S QUESTION**

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

BCo, an unrelated company resident in B, owns a significant portfolio of B government securities.

ACo and BCo enter into a total return swap (TRS) in regard to the building and securities. 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 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?

**LAST WEEK'S ANSWER**

- Q1:
- Art. 6:
    - Art. 6(2), 1st sentence, allows the A domestic law meaning of "immovable property" to apply. If the A domestic law treats rights under this TRS as "immovable property", in whole or in part, then (to that extent) that meaning applies for the purposes of Art. 6. If that were the case, the whole or part of the payment would be caught by Art. 6(1), which would allow A to tax the payment (to that extent).
    - If that is not the case, then the TRS would not be "immovable property". Also, based on the facts, BCo would probably have no rights in regard to the building (e.g., an ownership or leasehold interest). In that situation, the payment under the TRS should not be "income...from immovable property", although there is no statement in the OECD Comm. to that effect.
  - Arts. 7 & 21:
    - If Art. 6(1) does not apply, the payment would be exempt from A tax, under Art. 7 or 21 – subject to Art. 29(9).
  - Art. 29(9):
    - It's quite possible that Art. 29(9) (the PPT) would be triggered, on the basis that the TRS is a transaction to obtain the Art. 7 or 21 benefit.
    - It's also possible that non-tax reasons could be identified for the parties entering into the TRS – e.g., A law prohibits BCo from owning the building.
- Q2:
- Art. 11
    - The payment should not fall within the definition of "interest" in Art. 11(3), on the basis that the TRS is not a "debt-claim": see OECD Comm.'s brief discussion of interest rate swaps.
    - Thus, Art. 11(2) should not allow B taxation.
  - Arts. 7, 21 & 29(9): same comments as in Q1, mutatis mutandis.

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