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24 July 2020



HAPPY FRIDAY!

The **OECD** drafts blueprints; **Australian** tax authorities bend the **TP** rules to keep their jobs; **Poland** goes slim; the **EU** agrees to agree; **Korea** feels public pressure; and **Brazil** finally adds value!

Oman grows a pre-condition; **Samsung** shuffles paper and projects no value; **Yum** comes second, but still wins; the **US** regulates exceptional high tax; and **Russia** tries to grow apples!

But at the end of a week in which everyone seems to be going to **Mars**, do you ask yourself the question: "Do they know something that we don't?"

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
- Asia Pacific
 - Australia, Bangladesh, Fiji, Hong Kong, India, Indonesia, Korea, Taiwan
- Europe
 - Cyprus, EU, Ireland, Italy, Poland, Russia, UK
- Middle East & Central Asia
 - Oman, Saudi Arabia, UAE
- Americas
 - Brazil, US
- Treaties
- Worth reading

WORTH READING

Philip Baker
"International Tax in the Time of COVID-19"
Intertax, Kluwer, Volume 48, Issue 8 & 9 (subscription service)

Andrés Báez Moreno
"Unnecessary and Yet Harmful: Some Critical Remarks to the OECD Note on the Impact of the COVID-19 Crisis on Tax Treaties"
Intertax, Kluwer, Volume 48, Issue 8 & 9 (subscription service)

Jeffery M. Kadet
"BEPS Primer: Past, Present, and Future (Part 1)"
Tax Notes Today International, Tax Analysts, 21 July 2020 (subscription service)

INTERNATIONAL TAX QUIZ

THIS WEEK'S NEW QUIZ

ACo, a company resident in A, owns a patent which is registered in B.
BCo, a company resident in B, wants to use that patent to manufacture certain goods in B.
ACo and BCo are related parties.

ACo sells the patent to BCo, in consideration for an annual fee which is set at 5% of BCo's annual revenue from sale of the goods manufactured by using the patent. The contractual obligation to pay the annual fee is for 10 years. The sale contract calls the annual fee a "royalty".

Under B tax law:

- BCo is able to claim tax depreciation on the 10 years aggregate of the annual fee (which is initially estimated, and then "trued up" each year)
- Outbound royalties are subject to 20% royalty withholding tax on gross (final tax)

The A/B treaty is identical to the 2017 OECD model treaty, except that the source country tax in Article 12 is limited to 10% on gross.

ACo is in an excess foreign tax credit position in A, which means that it cannot obtain an effective credit for the B withholding tax.

Does the A/B treaty permit B to impose tax on the annual fee payments?

Answer in next ITB email alert on 7 August 2020!

LAST WEEK'S QUESTION

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 region of the world. Mr A lives in Y, but frequently travels to other countries in the region, including Z. Mr A has been employed in this role for 10 years.

Under his employment contract with XCo:

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

The X/Z treaty is identical to the 2014 OECD model treaty.

Does XCo have a PE in Z, under the X/Z treaty?

LAST WEEK'S ANSWER

Is Art. 5(5) satisfied?

- "exercises...an authority to conclude contracts"
 - By virtue of the employment, Mr A does not have actual authority, either express or implied, to conclude contracts on behalf of XCo.
 - However, does Mr A have apparent (or ostensible) authority to do so? Apparent authority is recognised in the agency law of common law jurisdictions and also in some civil law jurisdictions. But before considering the facts, there is a threshold issue: which agency law should be applied (X law, Z law or perhaps even Y law)?
 - The facts hint that apparent authority could be an issue: Mr A is the regional sales director; he has been in that role for 10 years; for many years, XCo head office has accepted 100% of the purchase orders which Mr A has sent to it; he has authority to offer discounts; and there is no indication that XCo has alerted the customers that Mr A does not have actual authority.
 - XCo probably has no idea what Mr A says to customers during meetings. It is possible, particularly in the context where Mr A offers a volume discount, that he says to the customers: "If you give me the order for x units, I'll give you a 10% discount. I'll get the formal paperwork done at head office, but if you give me that order by the end of the month, it's a done deal!". There is a history of XCo head office always accepting Mr A's purchase orders. It could be reasonable for the customers to believe that Mr A has actual authority.
 - If Mr A does have apparent authority, he might be seen to accept the customers' orders – for example, by saying or emailing to them that the order has been accepted and that formal paperwork will follow from head office in a few days. That first contract would then probably be superseded by the formal written contract sent by XCo head office.
- "habitually exercises in a Contracting State"
The facts state that Mr A frequently travels to Y. This test is likely satisfied.
- Art. 5(6) exception
Not applicable – Mr A is an employee and therefore cannot be legally independent of XCo



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AskSteve



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