

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](#)
**14 August 2020**


## HAPPY FRIDAY!

**President Trump** complains about **Kamala Harris** and the **size of US showerheads** – yes, a **bad hair day!**

But, at least **Canada** and the **US** are now evenly balanced (i.e., both worse off); **India** goes transparent, but faceless; **Unilever** is stuck at home; **Turkey** makes a bit reduction; in **Colombia**, credits jump taxes; **Russia** excels in brinkmanship; **Taiwan** claims benefits; **Ecuador** finally sets the date; and **Kenya** threatens to turn off the internet!

But at the end of another WFH week, the most important question is this: **"Do you listen to fake background office noise to be able to work from home?" Mozart or the photocopier?**

**Have a great weekend!**  
**Steve**

## THIS WEEK'S PODCAST

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

1. Trade & other global developments
2. Asia Pacific
  - Australia, Hong Kong, India, Indonesia, Malaysia, Taiwan
3. Europe
  - Ireland, Netherlands, Turkey, Russia, UK
4. Africa
  - Kenya, Mauritius
5. Middle East & Central Asia
  - UAE
6. Americas
  - Colombia, Ecuador, US
7. Worth reading

## WORTH READING

Nicolaj Bjørnholm

"Denmark – High Court Ruling in the Sandoz Transfer Pricing Matter – TNMM Inclusion of Booked Goodwill When Comparing with Benchmarks?"

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

Leonardo Thomaz Pignatari

"Article 15(2) of the OECD Model and the International Hiring-Out of Labour: New Criteria Required?"

Bulletin for International Taxation, IBFD, 2020 (Volume 74), No. 8 (subscription service)

Sirathorn Dechsakulthorn, Kevin Glenn, Shee Boon Law, Joseph A. Myszka

"Treatment of Losses Under OECD Pillars 1 and 2"

Tax Notes Today International, Tax Analysts, 5 August 2020 (subscription service)

## INTERNATIONAL TAX QUIZ

### THIS WEEK'S NEW QUIZ

ACo, a company resident in A, is the parent company of a multinational group. BCo, a company resident in B, is a member of that group, and is a 100% direct subsidiary of ACo.

BankCo is an unrelated bank resident in B.

BankCo makes a \$100 million "bullet" loan to BCo, at a fixed interest rate of 3% per annum.

The loan is guaranteed by ACo.

BCo pays a guarantee fee of \$0.5 million per annum to ACo.

The facts indicate that the effect of the guarantee is to permit BCo to borrow a greater amount (i.e., \$100 million) than it could in the absence of the guarantee (i.e., \$40 million), but the guarantee has no effect on the interest rate.

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

The A and B domestic law transfer pricing rules both follow the 2017 OECD Transfer Pricing Guidelines.

Q1: What adjustments would the B tax authorities be allowed to make under the A/B treaty and the B TP rules?

Q2 : What adjustments would the A tax authorities be allowed to make under the A/B treaty and the A TP rules?

**Answer in next week's ITB email alert!**

## LAST WEEK'S QUESTION

XCo, resident in X, is a buy-sell distributor of vehicle spare parts. XCo buys the parts from several unrelated suppliers and sells them to unrelated repair shops in X. XCo's annual sales revenue from this activity is \$50 million.

XCo also acts as a contract-concluding sales agent for 2 non-resident vehicle spare parts suppliers: YCo (resident in Y and related to XCo) and ZCo (resident in Z and unrelated to XCo). XCo enters into sales contracts, on behalf of YCo and ZCo (respectively), with unrelated repair shops in X. The annual sales revenue from this activity is \$5 million (i.e., this is the aggregate of YCo's and ZCo's revenue from sales concluded by XCo). 95% of that sales revenue is on behalf of YCo, with 5% on behalf of ZCo. XCo is paid a sales commission by each of YCo and ZCo.

XCo's agency contracts require it to identify new business opportunities in X for YCo and ZCo. This service, which is not commonly performed by similar agents in X, is not separately remunerated (i.e., it's covered by the sales commissions) – and, for that reason, XCo spends little time in performing this service.

The X/Y treaty and the X/Z treaty are both identical to the 2017 OECD model treaty.

Does YCo have a PE in X? Does ZCo have a PE in X?

## LAST WEEK'S ANSWER

There are 2 conditions which must be satisfied for the Art. 5(6) exception to apply to YCo or ZCo: (a) XCo carries on business in X as an independent agent, and (b) XCo acts for YCo or ZCo in the ordinary course of that business.

YCo: is XCo an independent agent?

- Art. 5(6), 2nd sentence: is the "exclusively or almost exclusively" test satisfied?
- OECD Comm.: this test should be interpreted as "90% or more".
- In applying the test, do you consider all of XCo's activities or only the agency activities?
- From the terms of the 2nd sentence, it is clear that you apply the test to the agency activities only
- XCo satisfies this test (95%) and thus it fails the "independent agent" condition.
- Thus, YCo has a PE in X under Art. 5(5).

ZCo: does XCo act for ZCo in the ordinary course of that business?

- The analysis of this condition is made difficult by the 2017 changes to Art. 5(6) and the Commentary. Nevertheless...
- XCo performs 2 agency activities for ZCo: (i) concluding sales contracts, and (ii) identifying new business opportunities. Activity (ii) is not commonly performed by similar agents in X.
- Arvid Skaar, "Permanent Establishment – Erosion of a Tax Treaty Principle" (2nd edition, 2020) states that this condition refers to the typical activities of agents in the relevant industry. On that basis, activity (ii) is not in the ordinary course of XCo's agency business.
- A lack of separate remuneration and little time spent on activity (ii) should, in my view, both be irrelevant.
- IMHO: XCo fails the "ordinary course of business" condition.
- Thus, ZCo has a PE in X under Art. 5(5).



[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!

