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21 August 2020



HAPPY FRIDAY!

The OECD is GILTI that 256 pages is not enough!

Meanwhile, Australia can't freeze China; Singapore gets tough on avoidance; Denmark robs the banks; the Isle of Man flies high; Chile goes into reverse; and the EU Member States are a tad poorly transposed!

A Dutch lawyer is a director in name only; Russia avoids making the Maltese cross; Brazil respects treaties to the finish; Ukraine adds 30%; Canada loses control of GAAR; and the US ships out of Hong Kong!

But the most important question this week is this: "Should all cities follow the lead of Yamoto in Japan and ban smartphone-walking?"

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
- Asia Pacific
 - Australia, Hong Kong, Philippines, Singapore
- Europe
 - Denmark, EU, Finland, France, Greece, Isle of Man, Netherlands, Poland, Portugal, Russia, Ukraine
- Africa
 - South Africa
- Middle East & Central Asia
 - Bahrain
- Americas
 - Brazil, Canada, Chile
- Treaties
- Worth reading

WORTH READING

Nathan Boidman and Jesse Boretzky
"The 'Cameco' Transfer Pricing Sequel: Government's Appeal on Interpretation of Transaction Substitution Rule Rejected"
Taxation International Journal, Bloomberg BNA, Volume 49, Issue No. 8 (14 August 2020) (subscription service)

Guillermo O. Teijeiro
"Automated digital services – The UN Proposal at glance"
Kluwer International Tax Blog, 12 August 2020 (freely available)

Camille Vilaseca
"The thin line between incidental benefits and deliberate concerted group actions"
Kluwer International Tax Blog, 17 August 2020 (freely available)

INTERNATIONAL TAX QUIZ

THIS WEEK'S NEW QUIZ

XCo, a company resident in X, owned a building in Y which it purchased for \$1 million.

XCo derived rent from leasing the building to an unrelated lessee.

Some years later, XCo sold the building, to an unrelated purchaser, for \$1.5 million.

Under X tax law, during its years of ownership of the building, XCo was subject to tax on the rental income, but was able to claim tax depreciation on the building. That tax depreciation aggregated to \$0.3 million over the years of ownership. When XCo sold the building for \$1.5 million, it derived a capital gain of \$0.8 million (i.e. \$1.5 million less the reduced cost base of \$0.7 million).

Under Y tax law, during its years of ownership of the building, XCo was subject to tax on the rental income, but was not entitled to any tax depreciation. When XCo sold the building for \$1.5 million, it derived a capital gain of \$0.5 million (i.e., \$1.5 million less cost base of \$1 million).

Both capital gains are subject to corporate income tax under the domestic tax laws in X and Y.

The X/Y treaty is identical to the 2017 OECD model treaty, with Art. 23A.

Both X and Y use the same currency.

What will be the tax treatment of XCo, in each of X and Y, in regard to the sale of the building?

Answer in next week's ITB email alert!

LAST WEEK'S QUESTION

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?

LAST WEEK'S ANSWER

What is the accurate delineation of the transactions (ADT)?

Based on para. 10.161, OECD TPG, it is likely that the ADT is: (i) loan of \$40 million (3% p.a. interest) from BankCo to BCo; (ii) loan of \$60 million (3% p.a. interest) from BankCo to ACo; and (iii) equity contribution of \$60 million from ACo to BCo.

What are the likely or possible consequences of that ADT?

Q1:

- Guarantee fee paid by BCo to ACo would need to be assessed under the arm's length principle (ALP), on the basis that the guaranteed loan is \$40 million. If the fee exceeds the arm's length price, the excess would likely be non-deductible for BCo and might be treated as a dividend paid to ACo (subject to withholding tax).
- Would BCo's interest payments to BankCo (unrelated party) need to be assessed under the ALP, on the basis that the loan from BankCo is only \$40 million? Strangely, this issue is not mentioned in para. 10.161, OECD TPG, but it would seem to be a logical conclusion. If the interest payments exceed the arm's length price (on a loan of \$40 million), the excess would likely be non-deductible for BCo and might be treated as a dividend paid to ACo (subject to withholding tax), which is paid by direction to BankCo.

Q2:

- If B imposes withholding tax on dividends paid to ACo (see above), A would be required to provide a credit: Art. 23A/B.
- If A tax law taxes dividends paid by BCo to ACo (i.e., no 100% participation exemption), then the deemed dividends from BCo's excessive interest payments might cause an increase in ACo's A tax liability.
- Would A be required to recognise ACo's interest expense on the \$60 million loan from BankCo, in total or to the extent of the deemed dividends? Would ACo obtain a deduction under A law for the interest? Would interest withholding tax apply? And if interest withholding tax applies, would B be required to give BankCo a credit under Art. 23A/B?
- More questions than answers! Sorry!



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Ask Steve



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