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4 September 2020



HAPPY FRIDAY!

The **UN** goes hard on **software**; **Cambodia** speculates on capital gains; context trumps literalism in **India**; **Korea** **Netflixes** its muscles; and the **Netherlands** spares **Brazilian** credits!

Ghana defames **Jersey**; the **US** keeps the beat; tax losses are not presumptuous in **Sweden**; **Apple & Google** pass the buck; **Barbados** aggravates **Canada**; and the **UK** looks askance at **Skandia!**

But at the end of another week, the most important question is this: **"Will Messi stay or go?"**

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
- Other global developments
- Asia Pacific
 - Australia, Cambodia, India, Indonesia, Korea, Singapore
- Europe
 - Europe, Brexit, EU, Netherlands, Malta, Sweden, Turkey, UK
- Africa
 - Ghana, Nigeria
- Americas
 - Canada, Colombia, Ecuador, US
- Treaties
- Worth reading

WORTH READING

J. Gregory Ballentyne

["Under Arm's-Length Buy-Ins, Taxpayers Will Not Cost-Share R&D"](#)

Tax Notes Today International, Tax Analysts (27 August 2020) (subscription service)

Jens Wittendorff

["Transfer Pricing Oddity: The OECD's New Guidelines on Financial Transactions"](#)

Tax Notes Today International, Tax Analysts (27 August 2020) (subscription service)

Melina Rocha Lukic and Ana Carolina Monguilod

["Will Brazil Finally Adopt a Modern VAT?"](#)

Kluwer International Tax Blog (28 August 2020) (freely available)

INTERNATIONAL TAX QUIZ

THIS WEEK'S NEW QUIZ

ACo, a company resident in A, sells "Group X" electronic products.

BCo, a related company resident in B, is a buy / sell distributor of the "Group X" electronic products, which it purchases from ACo on a "consignment" / "flash title" basis.

BCo has several retail stores in B, at which it displays the full range of "Group X" electronic products. At those stores, BCo's employees spend most of their time demonstrating the products to potential customers. Customers who decide to purchase "Group X" electronic products, can do so in either of 2 ways: (i) purchase from BCo at a retail store in B; or (ii) purchase from ACo on ACo's website (the product would then be delivered to the customers by a logistics company). The price for (ii) is lower than the price for (i).

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

Does the treaty permit B to levy income tax on ACo's profits from the sale of the "Group X" electronic products?

Answer in next ITB email alert on 18 September 2020!

LAST WEEK'S QUESTION

ACo, a company resident in A, makes an interest-free loan to BCo, a related loss-making company resident in B.

The A tax authorities decide not to impute interest on the loan, because they take the view that the loan is quasi-equity under A's TP rules.

However, the B tax authorities impute interest on the loan under B's TP rules, and claim that ACo is liable for 10% interest withholding tax (IWT) on the imputed interest (the B domestic law IWT rate is 25% on gross, but Art. 11 of the A/B treaty limits the B tax to 10% on gross). The A/B treaty is identical to the 2017 UN model treaty.

Does the A/B treaty permit B to impose tax on the imputed interest? If so, at what rate?

LAST WEEK'S ANSWER

MAP:

MAP under Art. 25 might result in no imputed interest in B.

However, I will assume that MAP is not initiated or does not result in that outcome.

Art. 11:

Art. 11(2) allows B to impose 10% tax on "such interest", i.e., the interest described in Art. 11(1).

Art. 11(1) describes interest "arising" in a Contracting State (B) and "paid to" a resident of the other Contracting State (A).

The term, "paid", is not defined in the treaty. UN Comm. : "paid" has a very wide meaning – the concept of payment means the fulfilment of the obligation to put funds at the disposal of the creditor in the manner required by law or by custom.

Art. 11(5) defines "arising", by using terms such as "payer", "the person paying the interest", "the indebtedness on which the interest is paid was incurred", "such interest is borne by such [PE]".

Art. 3(2) allows a domestic law meaning of "paid" to be used, if B law contains such a meaning and if the context does not otherwise require.

IMHO:

- Art. 11(5) assumes that there is an actual amount of interest. It provides a context for Art. 11(1), which then prevents a domestic law meaning of "paid" (assuming one exists) from being used.
- Art. 11(1) is not satisfied, and thus Art. 11(2) does not apply.

Art. 21(3):

Art. 21(3) should generally not apply, as the imputed interest is "dealt with" in Art. 7 (see below).

The term, "arising", as used in Art. 21(3), is not defined. The UN Comm. says that it should take its meaning under domestic law. Thus, it is possible that the "arising" condition in Art. 21(3) is satisfied here. Nevertheless, if Art. 7 applies (see below), Art. 21(3) will not.

Art. 7:

If ACo has no PE in B, then the imputed interest should be exempt under Art. 7(1).

However, if ACo is a special purpose company with only one asset (the loan to BCo), the B tax authorities might argue that ACo does not carry on an enterprise and thus Art. 7 does not apply – in which case, Art. 21(3) becomes relevant.



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