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18 September 2020



HIGHLIGHTS

- **UN**: computer software
- **UK**: treaty breaches
- **Irish Bank case** (profits attributable to PE)
- **Biden's corporate tax proposals**

HAPPY FRIDAY!

The **US** runs out of names for hurricanes (have they used **Steve?**); **Trump** "up-plays" (or should that be "Trump plays up"?); and **Boris** reneges!

Meanwhile in the tax world...

BMW makes a costly gift; the **US** is foiled by **Canada**; **Fruco** loses on principal; **Poland** taxes the wrong taxpayer; and the **EU** does mind the gap!

The **UAE** recreates substance; the **Netherlands** has a rate reversal; the **OECD** was only 32 years late; **Sweden** beats up small islands; but **Joe Biden** stays onshore!

But at the end of the week, the most important question is this: **"If you're caught speeding in the UK, can you say to the police officer that you breached the law only in a very specific and limited way?"**

Have a great weekend!

Steve

THIS WEEK'S PODCAST

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

1. Digital taxation
2. Trade
3. UN: computer software
4. UK: treaty breaches
5. Asia Pacific
 - Australia, Indonesia, New Zealand, Philippines, Singapore
6. Europe
 - Brexit, EU, France, Netherlands, Poland, Sweden, UK
7. Africa
 - Nigeria
8. Middle East & Central Asia
 - UAE
9. Americas
 - Chile, US
10. Treaties
11. Worth reading

WORTH READING

Frank P. G. Pötgens and Paula I. M. Geerse

["Netherlands: Withholding Tax Act 2021: A Split From Historical Trends"](#)

European Taxation, IBFD, 2020 (Volume 60), No. 10 (subscription service)

Jens Wittendorff

["Denmark's Supreme Court Accepts CUP in Royalty Case"](#)

Tax Notes Today International, Tax Analysts (4 September 2020) (subscription service)

INTERNATIONAL TAX QUIZ

THIS WEEK'S NEW QUIZ

XCo, a company resident in X, owns 100% of the shares in YCo, a company resident in Y.

YCo carries on a manufacturing business in Y.

XCo makes a loan to YCo, for use in its business. The loan carries an arm's length interest rate. Under Y tax law, the interest is fully deductible for YCo. The Y corporate income tax rate is 30%.

Under X tax law, YCo is treated as a branch of XCo.

YCo is therefore a hybrid entity: it's treated as a taxable entity (a resident company) in Y, and as a transparent entity (a branch) in X.

Under domestic law, Y imposes a final withholding tax of 20% on gross outbound interest payments.

The X/Y treaty is identical to the 2017 OECD model treaty.

What tax treatment does the X/Y treaty permit or require, in each of X and Y, in regard to the interest payments from YCo to XCo?

Answer in next week's ITB email alert!

LAST WEEK'S QUESTION

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 via its website (the products would then be delivered to the customers, directly from offshore, 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 "Group X" electronic products?

LAST WEEK'S ANSWER

[Art. 5\(4\)](#)

ACo owns the products while they are on consignment with BCo at BCo's retail stores. It is possible that the exceptions in Art. 5(4)(a)&(b) are not satisfied, on the basis that the activity (i.e., BCo's maintenance and display of the products) is not of a preparatory or auxiliary character, from ACo's perspective. It is also possible that Art. 5(4.1) prevents Art. 5(4) from being satisfied, on the basis that each of BCo's retail stores is a PE of BCo and the business activities carried on by ACo and BCo at those stores "constitute complementary functions that are part of a cohesive business operation".

However, even if Art. 5(4) is not satisfied, ACo will not have a fixed place of business PE in B unless the tests in Art. 5(1) are satisfied (see below).

[Art. 5\(1\)](#)

The key issue is whether the "at the disposal" test is satisfied.

It is possible that ACo, pursuant to its distribution contract with BCo, is permitted to (and does) dictate the layout and style of the retail stores, and the day-to-day activities of BCo's employees, to such an extent that ACo is seen to exercise practical control over the stores and/or the employees – in which case, BCo's retail stores could be considered to be "at the disposal" of ACo.

[Art. 5\(5\)\(a\)](#)

BCo's employees do not conclude contracts "in the name of" ACo. Also, the fact that BCo is a buy/sell distributor in regard to ACo, and takes "flash title" to the products sold via the stores, should not cause Art. 5(5)(a) to be satisfied: para. 96, OECD Comm.

However, the fact that the employees demonstrate the products to potential customers, some of whom purchase the products from ACo online, might cause the "habitually plays the principal role..." limb in Art. 5(5)(a) to be satisfied: para. 88, OECD Comm.

[Conclusions on PE](#)

ACo might have a PE in B under Art. 5(1) or Art. 5(5)(a) or both.

[Art. 7\(1\)](#)

If ACo has an Art. 5(1) PE, the profits attributable to the PE would cover the store sales (from ACo to BCo), but would possibly not cover the online sales from ACo to B customers. However, the "modified force of attraction" (MFOA) rule in Art. 7(1) would probably "catch" the profits attributable to the online sales.

If ACo has an Art. 5(5)(a) PE, the profits attributable to the PE would cover the online sales, but would possibly not cover the store sales. However, the MFOA rule would probably "catch" the profits attributable to the store sales.



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