ITB International Tax Bytes by Steve Towers

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HIGHLIGHTS

- **Blueprint reports on Pillar One & Pillar Two**
- **Pillar Two detailed analysis: GloBE rules – calculating the ETR**
- **UN: proposed Art. 12B on "automated digital services"**
- **Art. 10(2) & India's DDT**

HAPPY FRIDAY!

Barrett and **Biden** refuse to answer; **Trump** fans the flames; and **CR7** tests positive!

Meanwhile, in the tax world…

The **OECD** sees its glass as **half full**, but it's **Pascal's cat** which steals the show; the **G20** moves the goalposts (what alternative did they have?); but it's **Pillar Two** which has all the cash!

India is creative with treaty benefits; **Singapore** provides token advice; **Romania** is allowed to discriminate; **France** digs in; **Oman** finally presses the button; and the **US** consolidates!

But at the end of the week, the most important question is this: **"If BTS is valued at USD 4 billion, what value would you put on a really talented group like, say, The Rolling Stones?"**

Have a great weekend!
Steve

THIS WEEK'S PODCAST

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

1. Pillars One & Two: blueprint reports and economic impact analysis
2. Other global developments
3. Pillar Two: GloBE Rules – Calculating the ETR (Part 1)
4. Asia Pacific
   - India, Indonesia, Singapore
5. Europe
   - ECJ, France
6. Middle East & Central Asia
   - Oman, UAE
7. Americas
   - US
8. Treaties

WORTH READING

Antony Ting
"Intangibles and the Transfer Pricing Reconstruction Rules: A Case Study of Amazon"
British Tax Review (2020), Issue 3 (freely available on the SSRN website)

Vassilis Dafnomilis
"Dividend Distributions to and from Gibraltar Companies: The ECJ Decision in GVC Services (Case C-458/18) and Its Consequences"
European Taxation, 2020 (Volume 60), No. 11 (subscription service)

INTERNATIONAL TAX QUIZ

XCo, a company resident in X, has a branch in Y.

The branch conducts a manufacturing business in Y.

Excess cash generated by the branch is "deposited", on a short term basis, with the XCo head office in X. When the cash is needed by the branch, it is "repaid" by the head office to the branch.

The branch's financial statements and income tax return do not recognise any interest income on these "deposits".

The Y tax authorities impute arm's length interest income to the branch under the Y domestic law transfer pricing rules. Those rules apply to "transactions" between a branch and head office, where one is located in Y and the other is located in another country. Those rules do not apply if the branch and head office are both located in Y.

The X/Y treaty, which was signed and entered into force in 2009, is identical to the 2008 OECD model treaty.

Does the treaty permit the Y tax authorities to impute arm's length interest income to the branch?

Answer in next week's ITB email alert!

LAST WEEK'S QUESTION

In 2015, ACo, a company resident in A, formed a new subsidiary called CCo, a company resident in C. ACo funded CCo with 100% share capital.

CCo lent the funds to BCo, a company resident in B.

The 3 companies are members of an MNE group.

The loan from CCo to BCo carries an arm's length interest rate. BCo is entitled to income tax deductions for the interest paid to CCo.

Under C law, CCo is entitled to a notional interest deduction (NID) in regard to its share capital. The NID has the effect of significantly reducing CCo's taxable profits.

The B/C treaty (which entered into force in 2012) is identical to the 2010 OECD model treaty, except that the rate in Art. 11(2) is 5%. The MLI applies in regard to the B/C treaty, with both Art. 7(1) & Art. 7(4) (MLI) being applicable.

The A/B treaty (which entered into force in 2018) is identical to the 2017 OECD model treaty, except that the rate in Art. 11(2) is 15%. There was no previous treaty between A and B.

There is no A/C treaty.

B levies a withholding tax of 20% (final tax) on gross outbound interest payments.

What rate of tax is B permitted to impose on BCo's interest payments which are made in 2020?

LAST WEEK'S ANSWER

Beneficial ownership

- CCo should be considered the "beneficial owner" of the interest, under Art. 11(2) of the B/C treaty. The NID would not be regarded as a payment by CCo which could cause it to be characterised as a conduit company acting as a fiduciary or administrator.

Art. 7(1), MLI, as impacting B/C treaty

- At the time CCo was formed and the loan was made to BCo (2015), the B tax rate on interest paid to ACo was 20% - which is significantly higher than the 5% rate under the B/C treaty.
- Based on that differential and the other stated facts, it is likely that Art. 7(1) would be triggered in regard to CCo's 5% rate. That would have the effect of increasing the rate which B can levy on CCo, to 20%.
- The relevant "arrangement or transaction" was entered into several years before the MLI entered into effect in regard to the B/C treaty. However, there is no "grandfathering" rule in regard to Art. 7(1).

Art. 7(4), MLI, as impacting B/C treaty

- Art. 7(4) does not require B to levy a lower rate (than 20%) on CCo. If the relevant transaction or arrangement had not occurred, BCo would not have paid any interest to CCo.

Domestic law GAAR

- It is possible that the B tax law contains a GAAR which is applicable to treaty shopping. If so, the GAAR might operate by "reconstructing" the facts. In the present case, the "reconstructed" facts would likely be that ACo made a loan (with arm's length interest) to BCo. In that situation, ACo would have been entitled to a 15% rate under the A/B treaty, and CCo would not be liable for any B tax.
- Two related questions arise: (i) does the existence of Art. 7(1), MLI exclude the separate operation of the GAAR to the same arrangement or transaction?; and (ii) if not, can the taxpayers "force" the B tax authorities to pursue the GAAR route, instead of Art. 7(1), MLI?
- Question (i) depends on the status of treaties vs. domestic legislation under B law, and on the judicial attitude to "specific vs. general" provisions. However, in regard to question (ii), even if the B tax authorities can separately apply the GAAR, it is unlikely that they can be "forced" to do so (on the assumption that the GAAR provides a discretion to the tax authorities).

Conclusion

- B can levy 20% tax on interest paid to CCo, by virtue of Art. 7(1), MLI.

Tax Quiz Archives

Email Alert Archives

AskSteve

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