ITB International Tax Bytes by Steve Towers

"International tax news, explained"

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

13 November 2020

HIGHLIGHTS

- **Pillar Two detailed analysis: GloBE rules – Income Inclusion Rule**
- **Biden's corporate tax proposals**
- **Cases: Glencore (Australia - TP), BlackRock (UK - interest deductions)**
- **Germany: extra-territorial IP**

HAPPY FRIDAY!

Pfizer's timing is perfect for **Biden**; **Georgia** still counts; but all golden dogs have their day in **Turkmenistan!**

The **UN** agrees to agree; the **EU** loses patience; the trial judge in **Glencore** did not concentrate; **Malaysia** slices; **European** taxpayers abandon, but they still keep value; **Germany** stretches; **Russia** makes CFC taxation valuable for some individuals; while **BlackRock** covenants a just and reasonable win!

But at the end of the week, we do know that: **"The answer is…Alex Trebek!"**

Have a great weekend!
Steve

THIS WEEK'S PODCAST

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

1. Global developments
2. Pillar Two: GloBE Rules – Income Inclusion Rule
3. Asia Pacific
   - Australia, Malaysia, Singapore
4. Europe
   - ECJ, EU, Germany, Russia, UK
5. Treaties

WORTH READING

Vikram Chand and Giovanni Lembo
"Intangible-Related Profit Allocation within MNEs based on Key DEMPE Functions: Selected Issues and Interaction with Pillar One and Pillar Two of the Digital Debate"
International Tax Studies, IBFD, 2020 (Volume 3), No. 6 (subscription service)

Vikram Chand and Kinga Romanovska
"The Pillar Two Mechanism in Light of the Blueprint – A Case Study"
Kluwer International Tax Blog, 6 November 2020 (freely available)

Kristin Resenig
"The Current State of DAC-6 Implementation in the European Union"
European Taxation, IBFD, 2020 (Volume 60), No. 12 (subscription service)

INTERNATIONAL TAX QUIZ

The A/B treaty, which was signed and entered into force in 2005, is identical to the 2001 UN model treaty, with the rate specified in Art. 12(2) being 10%. A 10% rate is used in the royalties article in most of A's double tax treaties.

At the time the treaty was signed, A domestic law did not levy a withholding tax on outbound payments of equipment rentals, although it did levy a 15% withholding tax on all other outbound payments described in the Art. 12(3) definition of "royalties".

In 2010, A changed its domestic law to levy a 10% withholding tax on outbound payments of equipment rentals which are paid to residents of jurisdictions with which A has a comprehensive double tax treaty - that would include residents of B. However, under A domestic law, the withholding tax does not apply to outbound payments of equipment rentals to recipients which are not resident in such jurisdictions.

In other words, a non-treaty resident is exempt from the withholding tax on equipment rentals.

BCo (a company resident in B) has leased an item of equipment to a resident of A, for use in A.

Does the A/B treaty permit the 10% withholding tax to apply to the equipment rentals which are paid to BCo?

Answer in next week's ITB email alert!

LAST WEEK'S QUESTION

The X/Y treaty, which is identical to the 2010 OECD model, was signed and entered into force in 2011.

In 2012, Y changed its domestic law definition of "permanent establishment" to be identical to Art. 5 in the 2010 OECD model.

In 2019, Y changed its domestic law to introduce a provision which deems a non-resident to be carrying on business through a fixed place of business in Y, if the non-resident satisfies a "significant economic presence" (SEP) test. If that deeming provision applies to a non-resident (and if the non-resident's activities are not of a preparatory or auxiliary character), then the non-resident satisfies the domestic law definition of PE and is subject to Y income tax (on a net basis) on income which is derived from that SEP.

XCo, a company resident In X, derives income from online streaming services which are provided to Y residents. Although XCo has no assets or employees in Y, it satisfies the SEP test, and is therefore subject to Y income tax under domestic law.

Is XCo's Y income tax liability permitted under the X/Y treaty?

LAST WEEK'S ANSWER

Before considering the Y domestic law, it is clear that XCo does not have a PE in Y under the X/Y treaty, and therefore it would be exempt from Y tax under Art. 7.

Does the Y tax law's SEP provision change that conclusion?

The SEP provision deems a non-resident to be carrying on business through a fixed place of business in Y, if the SEP test is satisfied. The concept of a fixed place of business is used in the Art. 5 definition of PE. Although the treaty defines PE, it does not define "fixed place of business". Does Art. 3(2) operate to allow the Y law meaning of "fixed place of business" (under the SEP provision) to be used in interpreting Art. 5?

IMHO: No – Art. 3(2) does not automatically "slot in" a domestic law meaning. A domestic law meaning shall not be used if the context otherwise requires. The X/Y treaty is identical to the 2010 OECD model, and was signed shortly after its release. The X/Y treaty's "context" should, in my view, include both the 2010 OECD model and the 2010 OECD Comm., the latter of which sets out a detailed description of the meaning of "fixed place of business" – a description which is contrary to the Y law SEP provision. That being the case, the context prevents Art. 3(2) from using the Y law meaning.

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!

© 2020 International Insights Pte Ltd. All rights reserved.

UNSUBSCRIBE
If you no longer wish to receive emails from us, please click here