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27 November 2020



HIGHLIGHTS

- [2020 IFA Congress](#)
- [Coca-Cola TP case: further comments](#)
- [Pillar Two detailed analysis: GloBE rules – Undertaxed Payments Rule \(Part 2\)](#)

ITB series on GloBE rules

- [Scope – ITB \(9 Oct 2020\)](#)
- [Calculating the ETR \(Part 1\) – ITB \(16 Oct 2020\)](#)
- [Calculating the ETR \(Part 2\) – ITB \(23 Oct 2020\)](#)
- [Carry-forwards – ITB \(30 Oct 2020\)](#)
- [Carve-out, and computation of the ETR and top-up tax – ITB \(6 Nov 2020\)](#)
- [Income Inclusion Rule – ITB \(13 Nov 2020\)](#)
- [Switch-Over Rule, and Undertaxed Payments Rule \(Part 1\) – ITB \(20 Nov 2020\)](#)
- [Undertaxed Payments Rule \(Part 2\) – ITB \(27 Nov 2020\)](#)

HAPPY FRIDAY!

Coca-Cola's flaw in the field is incomparable; **Malaysia** branches into discrimination; the **Philippines** literally taxes itself; **Belgium** has second thoughts; the **EU** will soon run out of DACs; **Nigeria** minimally trims; **BEPS** becomes less harmful; while **Pascal** shares his 5 frontiers!

But at the end of the week, the most important question is this: "Will France really ban discrimination based on regional accents? Mon Dieu!"

Have a great weekend!

Steve

THIS WEEK'S PODCAST

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

1. International Fiscal Association (IFA): 2020 Congress
2. Other global developments
3. Coca-Cola TP case: further comments
4. Pillar Two: GloBE Rules – Undertaxed Payments Rule (Part 2)
5. Asia Pacific
 - Australia, Malaysia, Philippines
6. Europe
 - Belgium, EU, Germany
7. Africa
 - Nigeria
8. Treaties

WORTH READING

Philip Baker

["Subsequent changes to the OECD Commentaries"](#)

British Tax Review, 2020, No. 4 (subscription service)

Daniele Frescurato and Velio Alessandro Moretti

["The Carve-out of Financial Services from Pillar One: Good times for a Step Further?"](#)

Kluwer International Tax Blog, 23 November 2020 (freely available)

INTERNATIONAL TAX QUIZ

XCo makes a loan to YCo, at an arm's length interest rate.

YCo uses the borrowed money to acquire commercial real estate (in Y), from which it derives rent under a long-term lease to ZCo (resident in Y).

YCo gets into financial difficulties – it defaults on some interest payments and principal repayments.

YCo assigns to XCo its right to receive rent under the lease, in satisfaction of its obligations to make overdue and future interest payments and principal repayments. Assume that the assignment is legally effective.

The X/Y treaty is identical to the 2010 OECD model treaty, except that Art. 11 provides an exemption from source country tax on interest (provided the conditions in Art. 11 are satisfied).

Does the X/Y treaty permit Y to levy tax on the rent payments made by ZCo to XCo?

Answer in next week's ITB email alert!

LAST WEEK'S QUESTION

ACo (a company resident in A) carries on a business of collecting, organising and maintaining various databases, to which it grants access in return for fees.

ACo has 2 clients in B.

The first client (BCo 1) pays a fee to ACo to access its various databases.

The second client (BCo 2) pays a fee to ACo for ACo to create a specialised database customised for BCo 2's use only. Some of the information in the database is provided by BCo 2, and the remainder is collected by ACo.

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

ACo has no tangible assets, employees or agents in B.

Does the A/B treaty permit B to levy income tax on the fees paid by BCo 1 and BCo 2 to ACo?

LAST WEEK'S ANSWER

This question is based on Example 3 in the 2017 UN Comm. on Art. 12A.

The question raises issues under Art. 12 and Art. 12A. It is clear that ACo does not have a PE in B.

Art. 12A

Art. 12A(3) relevantly defines "fees for technical services" (FTS) to mean any payment in consideration for any service of a managerial, technical or consultancy nature. According to the UN Comm.: "...the fundamental concept underlying the definition of [FTS] is that the services must involve the application by the service provider of specialized knowledge, skill or expertise on behalf of a client or the transfer of knowledge, skill or expertise to the client, other than a transfer of information covered by the definition of 'royalties' in [Art. 12(3)]. Services of a routine nature that do not involve the application of such specialized knowledge, skill or expertise are not within the scope of [Art. 12A]."

According to the UN Comm.'s analysis of Example 3:

- BCo 1's fees are not covered by Art. 12A, because "[although ACo] used its knowledge, skill and expertise in creating the database, the services that [ACo] provides to BCo 1 – access to the database – are routine services that do not involve the application of [ACo's] knowledge, skill and expertise for [BCo 1's] benefit."
- BCo 2's fees are covered by Art. 12A, because "[ACo] would be applying its knowledge, skill and expertise for the benefit of [BCo 2]."

Art. 12

The Art. 12(3) definition of "royalties" includes payments "for information concerning industrial, commercial or scientific experience".

The OECD Comm. (which is relevantly repeated in the UN Comm.) infers that this phrase is limited to information which is not in the public domain and which has significant value. However, there is no clear statement to that effect. Also, it is known that many developing countries use a wide interpretation of this phrase.

The question does not indicate whether the information in ACo's databases is or is not in the public domain and whether or not it is significantly valuable. If the information is not in the public domain and is significantly valuable, BCo 1's fee should be covered by the "royalties" definition.

The question does not suggest that ACo grants BCo 1 a right to use copyright in the database material.

Conclusion

The A/B treaty allows B to levy tax on BCo 2's fees (Art. 12A), and might allow B to levy tax on BCo 1's fees (Art. 12).



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