

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](#)
11 December 2020


HIGHLIGHTS

- **Royal Bank of Canada case: further comments**
- **Indian case on "capital vs. revenue" distinction regarding royalty payments**
- **Pillar Two detailed analysis: Implementation and Rule Co-ordination**

ITB series on Pillar Two

1. **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)**
 - **Associates, joint ventures and orphan entities; and Simplification options – ITB (4 Dec 2020)**
2. **Other topics**
 - **Subject to Tax Rule – ITB (2 Oct 2020)**
 - **Implementation and Rule Co-ordination – ITB (11 Dec 2020)**

HAPPY FRIDAY!

A small needle for **Maggie**, a giant leap for **mankind**; **Dylan** sells out; and reports say that **Everest** has grown taller – but are they just a **snow job**?

Meanwhile, in the tax world...

Poland rushes and delays; **Kenya** decides that time's up; **Mexico** blinks; **India** sees more tree than fruit; **Margrethe** is back; **New Zealand** has negative interest; **ICAP** flies without a pilot; but **Japan** caps the cap!

But the most interesting news this week is that **Russia** and the **Netherlands** fail to agree on withholding tax changes, and the **Netherlands expels 2 Russian spies**. **Hmm, connected?**

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. Royal Bank of Canada case: further comments
3. Pillar Two: Implementation and Rule Co-ordination
4. Asia Pacific
 - Australia, Hong Kong, India, Japan, New Zealand, Singapore
5. Europe
 - EU, Germany, Netherlands, Poland, Russia / Netherlands, UK
6. Africa
 - Kenya
7. Americas
 - Mexico, US
8. Treaties

WORTH READING

Patrick Marley and Alexandra McLennan Brown

"Supreme Court of Canada to consider Alta Energy treaty shopping case after lower courts find no abuse of domestic General Anti-Avoidance Rule"

Tax Management International Journal, Bloomberg BNA, Volume 49 (2020), No. 12 (subscription service)

INTERNATIONAL TAX QUIZ

Under the X domestic tax law, a resident company which makes income tax deductible payments to a related company which is resident in a designated low-tax jurisdiction, is subject to an adjustment. The adjustment is in the form of deemed income, calculated by a formula which has regard to the amount of deductible payments to the related company. The designation of a jurisdiction as low-tax is made annually in respect of a particular MNE Group, based on the effective tax rate (in that year) of the Group's members which are resident in that jurisdiction.

XCo, a company resident in X, makes income tax deductible payments to YCo, a company resident in Y. Both XCo and YCo are members of an MNE Group. For the relevant year, Y is designated as a low-tax jurisdiction in regard to the MNE Group. Accordingly, an amount of deemed income is included in XCo's taxable profits for that year.

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

Does the treaty permit the inclusion of the deemed income in XCo's taxable profits?

Answer in next week's ITB email alert!

LAST WEEK'S QUESTION

ACo, a company resident in A, has manufacturing and trading branches in a number of other countries.

ACo, through its branch in B, owns inventory (goods) and fixed assets.

Those goods and fixed assets are physically transferred to ACo's branch in C.

Both the goods and the fixed assets have an arm's length value which exceeds their cost.

The A/B treaty, the A/C treaty and the B/C treaty are identical to the 2017 OECD model treaty.

Under those treaties, is B permitted to levy income tax on ACo in regard to the 2 physical transfers?

LAST WEEK'S ANSWER

ACo has a PE in B, and thus Art. 7 is relevant. Under Art. 7(2), the physical transfers of the inventory and fixed assets would likely be treated as sales to the branch in C. When the arm's length principle is applied to those notional sales, it is likely that both transfers would be deemed to produce a profit for the PE in B.

Art. 13(2) is also possibly relevant. Both the inventory and fixed assets are "movable property forming part of the business property of a [PE]". The issue is whether the physical transfers are alienations, which is not defined in the treaty. If the B domestic law treats the physical transfers as alienations, then it is arguable that those physical transfers should be treated as alienations for the purposes of Art. 13(2): either by applying Art. 3(2), or by reference to the OECD Comm. on Art. 13(2).

If Art. 13(2) applies, the "gains" may be taxed in B. However, can the arm's length principle be applied in determining the amount of the gains? In my view: no, as Art. 9(1) is limited to dealings between (actual) separate enterprises.

If both Art. 7 (which would recognise deemed profits) and Art. 13(2) (which would not recognise deemed gains) apply, then Art. 7(4) indicates that Art. 13(2) must prevail – which would lead to the surprising conclusion that B cannot tax the deemed gains!

However, the contrary argument is possibly provided by the OECD Comm. on Art. 13(2): the taxation under Art. 13(2) in regard to intra-entity transfers must be "in accordance with Article 7".



[Tax Quiz Archives](#)



[Email Alert Archives](#)



[AskSteve](#)



[Referral Program](#)



[What is ITB?](#)

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!

