15 January 2021

HIGHLIGHTS

- **Development Securities case on the "central management and control" test of tax residence for companies in the UK**
- **Review of the major treaty developments in 2020**
- **Latest news on digital taxation**

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)**
   - **Unresolved issues, GILTI & hub jurisdictions – ITB (18 Dec 2020)**

HAPPY FRIDAY!

Wikipedia turns 20; **SPACs** surge; and the army guards the **Capitol**!

Meanwhile, in the tax world…

The **OECD** wants to simplify; **Argentina** values knowledge, but **Australia** targets integrity; **Uruguay** removes the cap; **Hong Kong** carries interest; **France** privatises tax audits; **Spain** defers; the **Court of Appeal** decides (and doesn't decide) on the merits; and the **US** gives a red card to **Austria**, **Spain** and the **UK** (but doesn't award a penalty)!

But, at the end of the week, it's important to note that **the answer to the question, "Who is in Wuhan?", is "WHO"!**

Have a great weekend!
Steve

THIS WEEK'S PODCAST

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

1. Development Securities case on "central management and control"
2. Review of major treaty developments in 2020
3. Digital taxation
4. Other global developments
5. Asia Pacific
   - Australia, Hong Kong, India, New Zealand, Philippines
6. Europe
   - France, Luxembourg, Spain
7. Africa
   - Egypt
8. Americas
   - Argentina, Mexico, Paraguay, Uruguay
9. Treaties

WORTH READING

Giuseppe Francesco Patti
"Articles 10 and 11 of the OECD Model and the Commentaries on the OECD Model (2017): When Clarifications Raise Further Doubts"
Bulletin for International Taxation, IBFD, 2021 (Volume 75), No. 1 (subscription service)

Andrew Hickman
"Arm's length principle mutations: control of risk in the OECD guidelines and variations in practice"
MNE Tax (13 January 2021) (freely available)

INTERNATIONAL TAX QUIZ

ACo, a company resident in A, has conducted business through a branch in B for many years. The branch qualifies as a PE under the A/B treaty.

Until recently, the B income tax law included these elements:

- Income tax rate on taxable profits of resident companies and branches of non-resident companies: 25%
- Withholding tax on dividends paid to non-residents: 15%
- Tax on profit remittances by branches of non-resident companies: nil

The B income tax law was recently changed to impose a branch profits remittance tax of 20%.

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

Does the treaty allow the B branch profits remittance tax to be levied on profit remittances by ACo's branch? If yes, at what rate?

Answer in next week's ITB email alert!

LAST WEEK'S QUESTION

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

Services are provided to XCo's PE by Parent Co, which is also a company resident in X. Parent Co is the 100% parent of XCo.

The Y tax authorities consider that the fee charged by Parent Co for the services provided to XCo's PE, exceeds the arm's length price. They therefore propose to deny the PE a deduction for the excessive amount of fee, pursuant to Y's transfer pricing rules.

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

Does the treaty permit the Y tax authorities to deny the deduction for the excessive amount of fee? If yes, does the treaty require any actions to avoid double taxation?

LAST WEEK'S ANSWER

i. Application of Y's TP rules:

Art. 9(1) does not apply, as both XCo and Parent Co are enterprises of X.

However, in determining the profits attributable to XCo's PE under Art. 7, Y's TP rules would be applicable (provided those rules comply with the arm's length principle, "ALP"). Specifically, the "separate and independent enterprise" assumption which is made under Art. 7(2), is not limited to intra-entity "transactions" between the PE and other parts of XCo. As shown by the words, "in particular", in Art. 7(2), the assumption would also apply to actual transactions between XCo and other entities, such as Parent Co: see para. 24 of OECD Comm. on Art. 7.

ii. Eliminating double taxation of XCo:

The increased amount of the profits attributable to the PE (after Y applies its ALP-compliant TP rules) and the consequential increase in Y tax, would be required to be used for the relief of double taxation in X, under Art. 23A or 23B: Art. 7(2).

If, after the relief of double taxation under Art. 23A or 23B, it is still the case that there is double taxation of XCo in regard to the deductions disallowed by Y under its TP rules, XCo should be entitled to "an appropriate adjustment" of its X tax, "to the extent necessary to eliminate double taxation": Art. 7(3).

iii. Corresponding adjustment in X for Parent Co:

Parent Co would not be entitled to a corresponding adjustment of its taxable profits in X under Art. 9(2), for the same reason that Art. 9(1) does not apply: both XCo and Parent Co are enterprises of X.

No other provision appears to specifically allow a corresponding adjustment for Parent Co. However, it is possible that Parent Co could seek MAP relief under Art. 25(1), by arguing that it has been taxed "not in accordance with the provisions of this Convention" and pointing to the preamble's reference to "the elimination of double taxation". It's unclear whether that argument would be successful!