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19 February 2021



HIGHLIGHTS

- Software payments: "royalties" definition in UN model treaty
- Germany's extraterritorial taxation of IP
- Beneficial ownership case
- Continuation of in-depth analysis of Pillar One: Nexus

HAPPY FRIDAY!

Japan invites women to meetings, provided they don't talk; Ted chills in Cancun, while Texas freezes; but it's Facebook which is in hot water in Australia!

Meanwhile, in the tax world...

The UN goes soft on royalties; Germany doesn't bluff; India uses Singapore to trump the Netherlands; Ryanair doesn't take off in Luxembourg; Cameco achieves supreme victory; Chile provides indirect guidance; and Poland advertises a change!

But at the end of the week, the most important question is this: "Have you had your job yet?"

Have a great weekend!

Steve

THIS WEEK'S PODCAST

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

1. Software payments: "royalties" definition in UN model treaty
2. Germany's extraterritorial taxation of IP
3. Beneficial ownership case
4. Other global developments
5. Pillar One: Nexus
6. Asia Pacific
 - India, Singapore, Thailand
7. Europe
 - European General Court, EU, Germany, Poland
8. Africa
 - Botswana
9. Americas
 - Canada, Chile
10. Treaties

ITB series on Pillar One

- Scope (Part 1) – ITB (22 Jan 2021)
- Scope (Part 2) – ITB (29 Jan 2021)
- Scope (Part 3) – ITB (5 Feb 2021)
- Nexus – ITB (19 Feb 2021)

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)

WORTH READING

Richard Vann, Stephen Banfield, Manuel Makas, Takeo Mizutani, Clifford Ng, Peter Ni, Eric N. Roose and Jay Shim

"Taxation of Investment Funds in the Asia-Pacific Region"

Tax Notes Today International, Tax Analysts, 10 February 2021 (subscription service)

Mark Bonekamp and Neil Schaatsbergen

"Transfer Pricing Aspects of Real Estate Financing"

International Transfer Pricing Journal, IBFD, 2021 (Volume 28), No. 2 (subscription service)

INTERNATIONAL TAX QUIZ

THIS WEEK'S NEW QUIZ

ACo, a company resident in A, conducts an international shipping business, in which it transports goods for fees.

ACo's ships pick up and deliver goods at the only port in B.

ACo owns an office in B. ACo has numerous employees who are based at the office – some of these employees perform activities such as booking shipments for customers in B, while others conduct maintenance of ACo's ships when they are in B's port.

In addition to its fees for transporting goods, ACo derives 3 types of income / profits from B:

- Interest income from the short-term investment of cash balances
- Fees for maintenance services performed in regard to other companies' ships when they are in B's port
- Profit on sale of ACo's office in B (due to headcount growth, ACo moved into a new office and sold its old office)

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

Does the A/B treaty permit the B tax authorities to levy income tax on the 3 types of income / profits derived by ACo?

Answer in next week's ITB email alert!

LAST WEEK'S QUESTION

YCo, a company resident in Y, has been granted an oil & gas production licence by the Y government. The licence entitles YCo to produce oil & gas from a specific field in Y.

XCo, a company resident in X, has provided YCo with \$50 million of finance, in return for annual payments (for 25 years) equal to 1.5% of the value of oil & gas YCo produces from the field. The contract between XCo and YCo: (i) is not in the form of a loan; (ii) does not require YCo to repay all or part of the \$50 million to XCo; (iii) subjects YCo to several "negative covenants" (e.g., YCo's permitted business activities, YCo's level of borrowing, etc.); and (iv) grants XCo security over YCo's licence.

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

Does the X/Y treaty permit the Y tax authorities to levy income tax on the annual payments made by YCo to XCo? If so, at what rate?

LAST WEEK'S ANSWER

XCo's contract with YCo might constitute a "debt-claim" under Y tax or general law. If it does, all or part of the payments will probably be "interest" under Art. 11(3), after applying Art. 3(2). If it does not, the payments will not be "interest". To the extent that the payments are "interest", Y may tax the payments, but a 10% tax rate limit under Art. 11(2) would apply.

Art. 6:

- i. It is possible (but unlikely) that XCo's contractual rights against YCo constitute "immovable property" under Y law (see Art. 6(2)), due to the security over YCo's oil & gas production licence. If they do, then Art. 6(1) would allow Y to levy unlimited tax on the annual payments.
- ii. Do XCo's contractual rights against YCo constitute "rights to variable or fixed payments as consideration for the working of, or the right to work, mineral deposits, sources and other natural resources" (Art. 6(2))? IMHO: No, they do not – unlike the licence, the contract between XCo and YCo does not grant YCo a right to work natural resources, and therefore the annual payments made under that contract cannot be consideration for such working or right. The opposite conclusion was reached by the UK First-tier Tribunal in the Royal Bank of Canada case in 2020.



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