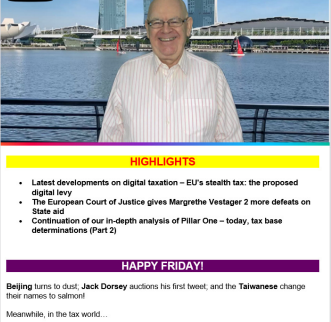
ITB International Tax Bytes by Steve Towers

"International tax news, explained"

19 March 2021



HIGHLIGHTS

- **Latest developments on digital taxation – EU's stealth tax: the proposed digital levy**
- **The European Court of Justice gives Margrethe Vestager 2 more debates on State aid**
- **Continuation of our in-depth analysis of Pillar One – today, tax base determinations (Part 2)**

HAPPY FRIDAY!

Beijing turns to dust; **Jack Dorsey** auctions his first tweet; and the **Taiwanese** change their names to salmon!

Meanwhile, in the tax world…

The **EU** goes in parallel, but still creates friction; in **South Africa**, ignorance is bliss; **Poland, Hungary and Argentina** are progressive; **Australia** exits the grey zone; **India** gains interest in monitoring; **Saudi Arabia** goes for zero; **Google** acknowledges royalty; **Taiwan** speculates on capital gains tax; and **Kenyans** are told to stop crying about taxes!

But at the end of the week, the most important question is this: **"Do you think that I can sell an NFT of my picture for ฿฿฿?"**

Have a great weekend!
Steve

THIS WEEK'S PODCAST

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

1. Digital taxation
2. ECJ's cases on EU State aid
3. Other global developments
4. Pillar One: Tax base determinations (Part 2)
5. Asia Pacific
   - Australia, India, Taiwan
6. Europe
   - France, Ireland, Luxembourg, Spain, UK
7. Africa
   - South Africa
8. Middle East & Central Asia
   - Oman, Saudi Arabia
9. Americas
   - Argentina, Google, US
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)**
- **Revenue sourcing rules (Part 1) – ITB (26 Feb 2021)**
- **Revenue sourcing rules (Part 2) – ITB (5 Mar 2021)**
- **Tax base determinations (Part 1) – ITB (12 Mar 2021)**
- **Tax base determinations (Part 2) – ITB (19 Mar 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

Lucas de Lima Carvalho
"Tax Treaties and Real Income From a Virtual World"
Tax Notes Today International, Tax Analysts, 11 March 2021 (subscription service)

Bruno Cesar Fettermann Nogueira dos Santos
"BEPS Action 2 and the Non-Discrimination Rule Under the GATS"
Intertax, Kluwer, Volume 49 (2021), Issue 4 (subscription service)

INTERNATIONAL TAX QUIZ

THIS WEEK'S NEW QUIZ

ACo, a company resident in A, manufactures and sells pharmaceutical products.

For the market in B, ACo sells the products to several unrelated distributors which are resident in B. These distributors sell the products to hospitals and medical clinics in B, at prices recommended by ACo.

In order to increase its sales in B, ACo employs 2 retired doctors to conduct marketing activities with doctors in those hospitals and medical clinics. The marketing activities involve face-to-face meetings with those doctors, to explain the benefits and price list of ACo's products and answer any technical questions.

The 2 retired doctors perform all of their marketing activities in visits to the hospitals and medical clinics (their visits are arranged by ACo head office staff in A). However, they also perform some employment activities (e.g., writing reports to ACo, liaising with ACo in regard to hospital and clinic visits) from their home offices. ACo does not provide them with office facilities.

The 2 retired doctors have no interaction with the distributors in B.

The A/B treaty is identical to the 2014 OECD model treaty.

Does ACo have a PE in B under the A/B treaty?

Answer in next week's ITB email alert!

LAST WEEK'S QUESTION

RCo 1, a company resident in R, owns 30% of the shares in BCo, a company incorporated in B (a tax haven).

BCo's only asset is a parcel of land in S.

During S's 2020 tax year, RCo 1's 30% shareholding appreciated in value. RCo 1 did not dispose of any shares during that year. However, during that year, RCo 1 did grant a call option to RCo 2 (an unrelated company resident in R) in respect of all of its shares in BCo – RCo 2 paid a fee to RCo 1 for the grant of the option.

RCo 1 had no other financial connections with S during that year.

The R/S treaty is identical to the 2014 OECD model treaty. There is no treaty between B and S, or between B and R.

Does the R/S treaty permit S to levy income tax on RCo 1?

LAST WEEK'S ANSWER

The key issue is whether Art. 13(4) applies to: (i) the appreciation in value of RCo 1's shares in BCo, or (ii) RCo 1's option fee. If it does, the R/S treaty would permit S to levy tax on RCo 1's gain.

Threshold point: Art. 13(4) can apply to the alienation of shares in BCo, even though BCo is not resident in S.

Appreciation in value of RCo 1's shares: Is this an "alienation"? The term is not defined in the treaty. The OECD Comm. suggests (without being definitive) that mere appreciation in value (possibly reflected in a book revaluation of the asset) would be covered by "alienation". If the S domestic tax law deems an appreciation in value to be an alienation, then possibly Art. 3(2) would enable that meaning to apply for the purposes of Art. 13(4).

Of course, this discussion is moot unless the S domestic tax law taxes RCo 1's gain on appreciation in value – but, if it does, it's possibly the case that Art. 13(4) would allow it to do so. The alternative view (i.e., that this is not an "alienation") would mean that both Art. 13(4) and Art. 13(5) would not apply – in which case, RCo 1 would be exempt from S tax (Art. 7 and Art. 21).

Option fee: Is the grant of the call option an "alienation of shares"? Ordinarily no – but what if the option were "deep in the money" by year-end, and the S tax law treats such call options as deemed alienations of the underlying property? Again, an argument can be made (based on the lack of definitive guidance in the OECD Comm., and Art. 3(2)), that that would also fall within Art. 13(4).

If you have a friend or colleague who you think might find this email alert interesting, please forward it to them.