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26 March 2021



HIGHLIGHTS

- **Margethe Vestager** sells the EU's proposed digital levy
- **Biden administration** plans significant corporate income tax increases, to pay for a trillion dollar infrastructure initiative
- Continuation of my in-depth analysis of Pillar One – today: the profit allocation formula

HAPPY FRIDAY!

Merkel is not Thatcher; Banksy changes games; but Ever Given needs a lift!

Meanwhile, in the tax world...

China expands, while **Hong Kong** deducts; there's no option to discriminate with the **ECJ**; **Sweden** shows red cards; **Canadian** carbon tax survives the heat; **Ghana** slugs the banks; the **Netherlands** draws the line at 9%; and **Hotel California** opens in **Gibraltar!**

But at the end of the week, the most important point is this: **as everyone knows, you're in real trouble when you have blocked Suez!**

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. US corporate income tax increases
3. Other global developments
4. Pillar One: Profit allocation (Part 1)
5. Asia Pacific
 - China, Hong Kong, India, Singapore
6. Europe
 - ECJ, EU, Germany, Italy, Netherlands, Turkey, UK
7. Africa
 - Ghana
8. Americas
 - Canada, US
9. 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)**
- **Profit allocation (Part 1) – ITB (26 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

Ilaria Panzeri
"Tax Treaties Versus EU Law: Which Should Prevail?"
European Taxation, IBFD, 2021 (Volume 61), No. 4 (subscription service)

Steven N.J. Włodychak
"Why Aren't U.S. States Subject to International Tax Treaties?"
Tax Notes Today International, Tax Analysts, 22 March 2021 (subscription service)

Mukesh Butani, Seema Kejriwal and Ajitesh Dayal Singh
"India's Supreme Court finally settles a two decades old dispute on software taxation"
Kluwer International Tax Blog, 24 March 2021 (freely available)

INTERNATIONAL TAX QUIZ

THIS WEEK'S NEW QUIZ

XCo, a company resident in X, manufactures and sells goods.

YCo, a company resident in Y, is a 100% subsidiary of XCo. YCo provides marketing services to XCo. Those services include: identifying potential customers for XCo, showing the potential customers XCo's standard contract and price list, convincing potential customers to make orders for XCo's goods, and receiving orders from customers. The orders are not accepted by YCo (which has been given no authority by XCo to accept orders) – instead, YCo sends the orders to XCo, for XCo's approval (or otherwise). On almost all occasions, XCo accepts the order.

YCo plays no role in regard to the delivery of goods to the customers or in regard to billings and collections.

XCo pays a fee to YCo equal to YCo's costs plus 5%.

The X/Y treaty is identical to the 2014 OECD model treaty.

Does XCo have a PE in Y under the X/Y treaty? If so, how would its taxable profit in Y be determined?

Answer in next ITB email alert on 9 April 2021!

LAST WEEK'S QUESTION

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.

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 and telephone discussions with those doctors, to explain the benefits and price list of ACo's products and answer any technical questions. The performance evaluations of the 2 retired doctors, and therefore their bonuses, place a strong emphasis on increases in ACo's sales in B.

The 2 retired doctors perform their marketing activities in visits to the hospitals and medical clinics, and also via telephone discussions from their home offices. They also perform some other 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?

LAST WEEK'S ANSWER

The doctors' home offices probably satisfy the conditions in Art. 5(1). In regard to the "at the disposal" condition, the fact that ACo has not provided office facilities to the doctors, and yet the doctors conduct some of their marketing activities via telephone, indicates that ACo probably requires that the home offices be used: para. 18, 2017 OECD Comm. (IMHO: this view is relevant also to the 2014 OECD model treaty). In contrast, the hospitals and medical clinics would not satisfy the "at the disposal" condition: adapting para. 4.2, 2014 OECD Comm.

The key issue is whether the doctors' activities at the home offices are solely of a preparatory or auxiliary character (POAC), from ACo's perspective: exception in Art. 5(4)(e). It is true that the doctors have no interaction with the distributors, and are thus not part of the selling process. However, they do perform an important marketing activity: if they generate interest in ACo's products amongst the hospitals and medical clinics, ACo's sales to the distributors will likely increase. Nevertheless, the 2014 OECD Comm. lists as an example of POAC a place which is used for the purpose of advertising – that would seem to cover the doctors' activities in this case.

In a recent Danish case (SKM2021.118.SR), the National Tax Board ruled that similar activities qualify as POAC.

In regard to the "solely" requirement of POAC, the "other employment activities" performed by the doctors in their home offices, IMHO, are incidental to the doctors' marketing activities, and thus they should have the same character as those marketing activities.

IMHO: Art. 5(4)(e) is probably satisfied in regard to all of the activities performed in the home offices – thus, no Art. 5(1) PE.

And, of course, Art. 5(5) is not satisfied.



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