ITB International Tax Bytes by Steve Towers

"International tax news, explained"

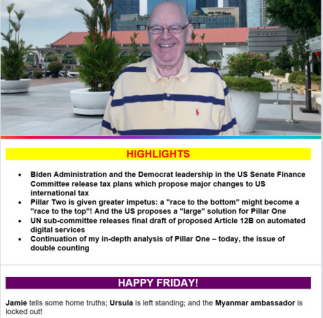
Want to learn more about ITB? Sign up for a free trial by emailing us

Check out our suite of subscription plans: individual (standard), student, university faculty, young professional, and enterprise

Free Trial

Subscribe

9 April 2021



HIGHLIGHTS

- **Biden Administration and the Democrat leadership in the US Senate Finance Committee release tax plans which propose major changes to US international tax**
- **Pillar Two is given greater impetus: a "race to the bottom" might become a "race to the top"! And the US proposes a "large" solution for Pillar One**
- **UN sub-committee releases final draft of proposed Article 12B on automated digital services**
- **Continuation of my in-depth analysis of Pillar One – today, the issue of double counting**

HAPPY FRIDAY!

Jamie tells some home truths; **Ursula** is left standing; and the **Myanmar ambassador** is locked out!

Meanwhile, in the tax world…

Joe Biden goes very big; the **US** takes control of the 2 pillars; **China** unilaterally simplifies; **Duterte** vetoes, but still creates; the **Netherlands** classifies; and **Spain** defers again!

But at the end of the week, the most important question is this: **"Does Biden need to Wyden his tax plan?"**

Have a great weekend!
Steve

THIS WEEK'S PODCAST

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

1. US corporate tax plans
2. Digital taxation
3. UN: proposed Art. 12B
4. Other global developments
5. Pillar One: Profit allocation (Part 2)
6. Asia Pacific
   - China, Philippines
7. Europe
   - Netherlands, Spain, Turkey
8. 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)**
- **Profit allocation (Part 2) – ITB (9 Apr 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

Leopoldo Parada
"Tax Treaty Entitlement and Fiscally Transparent Entities: Improvements or Unnecessary Complications?"
www.ssrn.com (posted 12 March 2021) (freely available)

Bob Michel
"French Supreme Administrative Court Finds Taxpayer in Valueclick Case Used an Agency Permanent Establishment to Sell Online Advertising Services in France through Local Subsidiary"
Bulletin for International Taxation, IBFD, 2021 (Volume 75), No. 4 (subscription service)

INTERNATIONAL TAX QUIZ

THIS WEEK'S NEW QUIZ

ACo is a company which is incorporated in A, a tax haven. ACo carries on business in B through a branch.

The B income tax law is a territorial system: only income which is derived from a source in B is taxable. Under the B income tax law, there is therefore no concept of residence.

ACo invests some of its funds in interest-bearing corporate bonds issued by CCo, an unrelated company resident in C.

Under the C tax law, outbound interest payments are subject to 20% withholding tax.

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

Does the B/C treaty permit C to levy withholding tax on the interest paid by CCo to ACo? If so, at what rate?

Answer in next week's ITB email alert!

LAST WEEK'S QUESTION

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?

LAST WEEK'S ANSWER

(1) PE existence:

The key issue is whether YCo exercises an authority to conclude contracts in the name of XCo (Art. 5(5)). According to the OECD Comm., "in the name of" means "binding on".

XCo has not given authority to YCo to accept customer orders.

Nevertheless, if YCo holds itself out as having such authority, it is possible that a Y court would conclude that, under the relevant contractual law, YCo has ostensible (apparent) authority to bind XCo. However, the facts do not expressly indicate that this is the case.

The French Supreme Court in the Valueclick case (2020) effectively held that paras. 32.1 & 33 in the 2014 OECD Comm. support the view that, if the agent plays the principal role leading to the conclusion of contracts that are routinely concluded by the principal, then Art. 5(5) in the 2014 or earlier OECD model treaties will be satisfied – despite the fact that those words were added only in the 2017 model.

The facts here are similar to those in Valueclick. Thus, there is a risk that a Y court would reach a similar conclusion. Nevertheless, IMHO, those paragraphs in the 2014 OECD Comm. do not support the decision in Valueclick – and, thus, in the absence of actual authority or ostensible authority, Art. 5(5) should not apply.

(2) Profit attributable to PE:

Regardless of whether there is a PE, YCo's fee must be reviewed under Art. 9. As YCo appears to exercise some risk control functions, it is possible that an increase should be made to YCo's fee.

If a PE exists, the profit attributable to the PE must be determined in accordance with the Authorised OECD Approach (AOA), recognising that the PE and YCo are 2 separate taxpayers in Y. If YCo does exercise some risk control functions, it is likely that those functions are "significant people functions" for Art. 7 purposes. However, the OECD's 2018 report on Art. 7 warns against attributing the same functions to both the agent and the agency PE. If YCo's fee is increased under Art. 9, it is therefore likely that the profit attributable to the PE would be low or nil.

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.