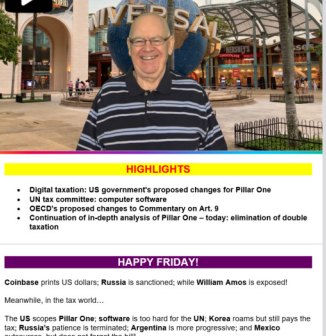
ITB International Tax Bytes by Steve Towers

"International tax news, explained"

16 April 2021



HIGHLIGHTS

- **Digital taxation: US government's proposed changes for Pillar One**
- **UN tax committee: computer software**
- **OECD's proposed changes to Commentary on Art. 9**
- **Continuation of in-depth analysis of Pillar One – today: elimination of double taxation**

HAPPY FRIDAY!

Coinbase prints US dollars; **Russia** is sanctioned; while **William Amos** is exposed!

Meanwhile, in the tax world…

The **US** scopes **Pillar One**; **software** is too hard for the **UN**; **Korea** roams but still pays the tax; **Russia's** patience is terminated; **Argentina** is more progressive; and **Mexico** outsources, but does not forget the bill!

But at the end of the week, the most important question is this: **"With less than 100 days until the Tokyo Olympics, do you think that it will be cancelled?"**

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. UN tax committee
3. OECD public consultation on Art. 9 and related articles
4. Other global developments
5. Pillar One: Elimination of double taxation (Part 1)
6. Asia Pacific
   - Cambodia
7. Europe
   - ECJ, Ireland, Russia
8. Americas
   - Argentina, Mexico, 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)**
- **Profit allocation (Part 2) – ITB (9 Apr 2021)**
- **Elimination of double taxation (Part 1) – ITB (16 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

Moritz Scherleitner
"The Imported Mismatch Rule in Light of the Fundamental Freedoms"
Intertax, Kluwer, Volume 49, Issue 5 (2021) (subscription service)

Mirna Solange Screpante
"The Full Federal Court Rules Against the ATO in the Glencore Case: How Far Can Reconstruction Go under the OECD Guidelines and Domestic Law?"
International Transfer Pricing Journal, IBFD, 2021 (Volume 28), No. 3 (subscription service)

INTERNATIONAL TAX QUIZ

THIS WEEK'S NEW QUIZ

Ms X, a resident of X, is a partner is a major law firm in X. The law firm is in the form of a general partnership. Ms X specialises in estate planning, and she has a growing number of clients in X and some nearby countries, including Y.

Ms X's clients in Y are wealthy individuals, many of whom have built large businesses in Y.

During the 2019 income year, Ms X spent a total of 180 days in Y, which comprised 5 separate visits. On all but 10 of those days, she had meetings with clients and prospective clients – the other 10 days were for rest. During her 5 visits, Ms X stayed at different hotels, and did not use any office facilities. The meetings with clients and prospective clients occurred in their homes or at restaurants.

During those meetings, Ms X signed engagement letters with 10 clients.

The X/Y treaty is identical to the 2017 UN model treaty, with a 10% rate specified in Art. 12A(2).

Ms X's firm receives significant fees from her clients in Y. Does the X/Y treaty permit Y to levy income tax on those fees?

Answer in next week's ITB email alert!

LAST WEEK'S QUESTION

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. There is no A/C 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?

LAST WEEK'S ANSWER

Key issue: does ACo satisfy the definition of "resident of [B]" in Art. 4(1)?

The fact that the B tax law is a territorial tax system does not trigger the second sentence in Art. 4(1): para. 8.3 of OECD Comm.

The first sentence in Art. 4(1) asks whether, under a Contracting State's tax law, a person is (i) "liable to tax", (ii) "by reason of…domicile, residence, place of management or any other criterion of a similar nature".

According to the OECD Comm., the "liable to tax" test refers to persons who are subject to a comprehensive liability to tax (a "full tax liability") in a Contracting State. Under the B tax law's territorial principle, "comprehensive liability to tax" arguably extends no further than tax levied on B-sourced profits. If that is the case, then what difference does it make that ACo is not incorporated in B?

In regard to (ii) (the "by reason of" leg), ACo's branch in B could be described as a "place of management".

A similar situation occurred in the Crown Forest case in Canada (1995). The court held that Art. 4(1) in the Canada / US treaty was not satisfied by a Bahamian company which had an office in the US. However, there was a major difference in that case: the US did not operate a territorial system.

This is a difficult question to answer, because, although my immediate reaction is to think that Art. 4(1) could not possibly be satisfied, it is difficult to pinpoint a reason for that conclusion in either the treaty or the Comm. My best attempt is this: if B were to change its law to replace the territorial principle with global taxation, ACo would probably not be subject to global taxation (under orthodox global tax systems). But that's conjecture – and, in any event, Art. 4(1) requires the test to be applied to the actual B tax law.

Not surprisingly, jurisdictions with territorial systems (e.g., Hong Kong) usually don't use Art. 4(1) from the OECD model!

If it is concluded that ACo is a resident of B under the B/C treaty, it would be entitled to the 10% limit on C tax in Art. 11. If not, the full 20% domestic law rate would apply.