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7 May 2021



HIGHLIGHTS

- The latest on digital taxation, including Pascal Saint-Amans' comments on Pillars One and Two
- Two of the famous Danish beneficial ownership cases return to court in Denmark, with some interesting (and surprising) results
- Continuation of in-depth analysis of Pillar One – today: Amount B (quantum and implementation)

HAPPY FRIDAY!

Warren Buffet picks Greg to be Abel; Janet Yellen says too much; and Bill Gates is (again) half the man he used to be!

Meanwhile, in the tax world...

The EU chases subsidies; NetApp is saved by the US; Pascal wants to segment Amazon; China relies on substance; India states its thresholds; Goldman Sachs chooses; New Zealand goes cryptic; documentation becomes really important in Denmark; Chile loves copper; and Peru takes one year at a time!

But at the end of the week, the most intriguing question is this: "Does the European Commission's plan to release the legal text for the EU's digital levy on Bastille Day, indicate that it will be revolutionary?"

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. Danish beneficial ownership cases
3. Other global developments
4. Pillar One: Amount B (Part 2)
5. Asia Pacific
 - China, India, New Zealand, Singapore
6. Europe
 - Denmark, EU
7. Africa
 - South Africa
8. Americas
 - Chile, Colombia, Peru
9. Treaties

ITB series on Pillar One

- Scope (Part 1, 2 & 3) – ITB (22, 29 Jan & 5 Feb 2021)
- Nexus – ITB (19 Feb 2021)
- Revenue sourcing rules (Part 1 & 2) – ITB (26 Feb & 5 Mar 2021)
- Tax base determinations (Part 1 & 2) – ITB (12 & 19 Mar 2021)
- Profit allocation (Part 1 & 2) – ITB (26 Mar & 9 Apr 2021)
- Elimination of double taxation (Part 1 & 2) – ITB (16 & 23 Apr 2021)
- Amount B (Part 1 & 2) – ITB (30 Apr & 7 May 2021)

ITB series on Pillar Two

1. GloBE rules
 - Scope – ITB (9 Oct 2020)
 - Calculating the ETR (Part 1 & 2) – ITB (16 & 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 & 2) – ITB (20 & 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

Patricia Duarte da Conceição Machado
"Evolution of the Concept of Technical Services and the Policy Considerations Driving Their Development"
International Tax Studies, IBFD, 2021 (Volume 4), No. 3 (subscription service)

Jefferson P. VanderWolk
"Carbon Tax: The Global Perspective"
Bulletin for International Taxation, IBFD, 2021 (Volume 75), No. 5 (subscription service)

INTERNATIONAL TAX QUIZ

THIS WEEK'S NEW QUIZ

ACo, a company resident in A, owns two assets in B: (i) a block of land; and (ii) shares in BCo (a company resident in B). BCo is not land-rich.

During a particular year, ACo sells both assets. It derives a gain on the land, and it incurs a loss on the BCo shares.

Both assets fall within the B capital gains tax rules. Accordingly, under B domestic law, ACo's loss on the sale of the BCo shares can be offset against its gain on the land.

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

Does the A/B treaty prevent ACo from offsetting its loss on the BCo shares against its gain on the land?

Answer in next ITB email alert on 21 May 2021!

LAST WEEK'S QUESTION

XCo, a company resident in X, is the parent of a group which carries on a famous restaurant business in X.

XCo plans to use X-Sub (a newly formed X subsidiary) to open a branch of the restaurant in Z city in country Y for a period of one month, during the Olympic Games in Z city. At the end of the Games, the restaurant will close, and X-Sub will be liquidated.

Under 2 contracts to be signed by XCo and X-Sub in X before the activities at the branch in Z city are commenced: (i) X-Sub will pay XCo arm's length fees for the provision of knowhow and the right to use the restaurant's name in Z city; and (ii) a number of XCo chefs and other restaurant staff will be seconded to X-Sub for the one month, in return for an arm's length fee which is paid to XCo.

The X/Y treaty is identical to the 2017 OECD model treaty, except that Art. 12 allows a source country tax rate of 10%.

Will the X/Y treaty allow Y to levy income tax on XCo or X-Sub?

LAST WEEK'S ANSWER

X-Sub's branch restaurant in Y should constitute a "fixed place of business" PE under Art. 5(1), although it will operate for only one month. This is because the branch will be X-Sub's only place of operation globally: see para. 30, OECD Comm.

Thus, Art. 7(1) will allow Y to levy income tax on X-Sub's profits from the branch restaurant. In determining those profits, deductions should be given for the 2 types of fee paid by X-Sub to XCo.

XCo should not have a PE in Y, for 2 reasons: (i) the branch restaurant would not be at XCo's disposal (its employees are seconded to X-Sub); and (ii) the time test in Art. 5(1) would not be satisfied.

XCo's secondment fee would therefore be exempt under Art. 7(1).

XCo's fee for the knowhow and the use of the restaurant's name might be "royalties" under the Art. 12(2) definition. The knowhow component should be "royalties" if the knowhow is confidential and valuable (e.g., valuable, secret recipes). The restaurant's name component would be "royalties" if the name is protected (in Y) by a trade mark which is owned by XCo.

To the extent that the fee is "royalties", will Y be allowed to tax it? Art. 12 applies to royalties "arising" in a Contracting State. However, "arising" is not defined in the OECD model (cf. UN model); and there is no guidance in the OECD Comm. on this issue. Thus, the Y domestic law meaning should be used, under Art. 3(2). In the present case, there are factors pointing to both X and Y as the State in which the fee arises: (i) the fee is paid pursuant to a contract signed in X; (ii) however, the fee is deductible in computing the profits attributable to the payer's PE in Y.

If Art. 12 applies, Y tax of 10% will be allowed. If Art. 12 does not apply, the fee will be exempt under Art. 7(1).



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