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28 May 2021



### HIGHLIGHTS

- **Likelihood of a global agreement on Pillars One & Two took one step forward – and one step back**
- **The European Commission has released a consultation document on ATAD 3 – the proposal to neutralise the misuse of shell companies for tax purposes**
- **Continuation of in-depth analysis of Pillar One – today: Tax Certainty (Part 2)**

### HAPPY FRIDAY!

007 is in his **Prime**, but the chips are down in **Taiwan**, and **Shell** feels the heat in **The Hague!**

Meanwhile, in the tax world...

The **G7** gets warm and cosy with the **US**, but **Mike Crapo** is not happy; **Brazil** stops double counting; the **EU** targets shells; **Kenya** makes it tougher to claim treaty benefits; **India** denies withdrawing cash; while **Korea** wants to order chips with everything!

But at the end of the week, the most important question is this: "Do you think that old-fashioned audio calls are much better, and much more civilised, than video calls? In other words, are you sick of Zoom?"

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. Other global developments
3. Pillar One: Tax Certainty (Part 2)
4. Asia Pacific
  - Australia, India, Korea
5. Europe
  - EU, Greece, Russia
6. Africa
  - Kenya, South Africa
7. Americas
  - Brazil
8. 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)**
- **Tax Certainty (Part 1 & 2) (ITB, 21 & 28 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

Hans van den Hurk

"Tax Treaties and Abuse – The Effectiveness of the Principal Purpose Test and Some of its Shortcomings"

Bulletin for International Taxation, 2021 (Volume 75), No. 6 (subscription service)

Jonathan Schwarz

"Credit for foreign tax: The LOB and domestic relief"

Kluwer International Tax Blog, 24 May 2021 (freely available)

### INTERNATIONAL TAX QUIZ

#### THIS WEEK'S NEW QUIZ

ACo, a company resident in A, wants to make a loan to a related company, BCo, resident in B.

However, B domestic law imposes a 30% withholding tax on outbound interest, and there is no A/B treaty.

ACo therefore forms a new 100% subsidiary, CCo, in C. CCo is resident in C, but it has very little substance.

ACo injects share capital into CCo, which makes an interest-bearing loan to BCo (the interest rate is an arm's length rate).

The B/C treaty is identical to the 2017 OECD model treaty, with the PPT (Art. 29(9)) but not the LOB.

The C corporate income tax rate is 15%.

There is no A/C treaty. The A corporate income tax rate is 25%.

After applying the B/C treaty, what will be the aggregate tax liability on the interest paid by BCo to CCo?

**Answer in next week's ITB email alert!**

### LAST WEEK'S QUESTION

XCo, a company resident in X, is the ultimate parent of an MNE group.

XCo owns 100% of the shares in YCo, a company resident in Y. YCo is a holding company with very little substance.

YCo owns 100% of the shares in ZCo, a company resident in Z. Under Z domestic law, a withholding tax ("WHT") of 20% applies to outbound dividends.

ZCo is a major operating company which generates significant profits. To achieve 2 tax objectives (i.e., (1) to extract dividends from ZCo with zero Z WHT, and (2) to avoid X tax on dividends paid directly to XCo), YCo was interposed in the shareholding structure many years ago. Since then, ZCo has paid significant dividends to YCo. YCo has invested the cash elsewhere in the group in the form of intragroup loans (with arm's length interest).

The Y/Z treaty is identical to the 2008 OECD model treaty, but with zero source country tax on dividends on substantial shareholdings.

The Y domestic law provides an exemption for foreign sourced dividends, and it does not impose tax on outbound dividends.

There have been 3 recent developments: (1) The MLI has commenced operation in regard to the Y/Z treaty (the "PPT only" option has been adopted by both Y and Z); (2) X and Z have entered into their first double tax treaty, which is identical to the 2017 OECD model treaty, but with zero source country tax on dividends on substantial shareholdings (the treaty has become effective); and (3) X has changed its law to introduce an exemption for foreign sourced dividends.

XCo now wants to implement this plan: ZCo would pay a large dividend to YCo, and YCo would immediately use the cash to pay the same amount of dividend to XCo.

Will Z WHT apply?

### LAST WEEK'S ANSWER

(1) Y/Z treaty:

Due to the "conduit" nature of the 2 payments, YCo is probably not the beneficial owner of the ZCo dividend, under the pre-2014 version of the OECD Comm's discussion of beneficial ownership. The 2014 amendments to the OECD Comm probably do not apply to the Y/Z treaty (identical to 2008 OECD model).

Also, YCo would probably fail the PPT, 1st limb: the arrangement or transaction (i.e., interposition of YCo) occurred "many years ago" for a principal purpose of achieving the Z WHT in accordance with the object and purpose of the Y/Z treaty, merely because the new X/Z treaty provides for a zero WHT on dividends. Note that none of the examples in the 2017 OECD Comm on Art. 29(9) is applicable. Also note that Art. 7(4), MLI is inapplicable.

(2) X/Z treaty:

Is XCo the beneficial owner of the ZCo dividend paid to YCo, such that XCo can claim zero Z WHT under the X/Z treaty? The OECD Comm on Art. 10 allows a "look through" to the beneficial owner in agency and nominee situations, but it does not refer to "conduit company" situations. Note that the "look through" argument, as applicable to "conduit companies", has been enhanced by the amendment of Art. 10(2) in the 2014 OECD model treaty: after the amendment, there is no connection between paras. (1) & (2) of Art. 10.

IMHO:

YCo cannot claim under Y/Z treaty. XCo can possibly claim under X/Z treaty.



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