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11 June 2021


HIGHLIGHTS

- **G7 communiqué on Pillars One and Two – What's the likely impact? Is it a significant agreement or just good theatre?**
- **Recent international tax cases – including:**
 - **Indian case on treaty treatment of equity derivative (Indian Depository Receipts)**
 - **Decision by European Court of Justice on meaning of "fixed establishment" for VAT purposes**
- **Continuation of in-depth analysis of Pillar One – today: Tax Certainty (Part 4)**

HAPPY FRIDAY!

Macron is slapped; Fastly makes the internet go slowly; and the FBI writes a killer app!

Meanwhile, in the tax world...

The **US** writes the script for the **G7**, but all canals lead to **Venice**; **Morgan Stanley** wins residually; **Titanium's** property is not fixed; **Argentina** scales up; **Russia** finally gives the **Netherlands** a red card; and **CIBC** goes the extra mile to promote itself!

But at the end of the week, the most important question is this: "Why do people conduct those annoying surveys on LinkedIn?"

Have a great weekend!
Steve

THIS WEEK'S PODCAST

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

1. G7 communiqué on Pillars One and Two
2. Pillar One: Tax Certainty (Part 4)
3. Asia Pacific
 - Bangladesh, India
4. Europe
 - ECJ, EU, France, Luxembourg, Russia, Ukraine
5. Americas
 - Argentina, Canada
6. Treaties

ITB series on Pillar One

- **Scope (Parts 1, 2 & 3) – ITB (22, 29 Jan & 5 Feb 2021)**
- **Nexus – ITB (19 Feb 2021)**
- **Revenue sourcing rules (Parts 1 & 2) – ITB (26 Feb & 5 Mar 2021)**
- **Tax base determinations (Parts 1 & 2) – ITB (12 & 19 Mar 2021)**
- **Profit allocation (Parts 1 & 2) – ITB (26 Mar & 9 Apr 2021)**
- **Elimination of double taxation (Parts 1 & 2) – ITB (16 & 23 Apr 2021)**
- **Amount B (Parts 1 & 2) – ITB (30 Apr & 7 May 2021)**
- **Tax Certainty (Parts 1 to 4) – ITB (21, 28 May & 4, 11 Jun 2021)**

ITB series on Pillar Two

1. **GloBE rules**
 - **Scope – ITB (9 Oct 2020)**
 - **Calculating the ETR (Parts 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 (Parts 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

Charlotte Tolman and Michael Molenaars

["Tackling Reverse-Hybrid and Entity Classification Mismatches in the Netherlands"](#)
 Tax Notes Today International, Tax Analysts, 3 June 2021 (subscription service)

Dennis Weber and Jorn Steenberg

["Applying C-JEU Case Law in Tax Treaties with the UK: The Indirect Effect of the EU/UK Trade Agreement"](#)
 Kluwer International Tax Blog, 3 June 2021 (freely available)

INTERNATIONAL TAX QUIZ

THIS WEEK'S NEW QUIZ

ACo, a company resident in A, is an engineering company.

ACo wins 2 contracts in regard to construction projects in B. One contract is with BCo 1 and the other is with BCo 2. BCo 1 and BCo 2 are both resident companies in B, but are unrelated.

Both contracts require ACo to send a senior engineer (employed by ACo) to the respective project site in B, to oversee important aspects of the construction work. The engineer will not be seconded to BCo 1 or BCo 2. The engineer will be in B for a total of 9 months: the first 2 months focusing on BCo 1's project, the next 2 months on BCo 2's project, then the next 3 months on BCo 1's project, and then the final 2 months on BCo 2's project.

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

Will ACo have a PE in B under the treaty?

Answer in next week's ITB email alert!

LAST WEEK'S QUESTION

XCo, a company resident in X, is a major business consulting company. It has a representative office in Y, with one employee (Mr S). Mr S's role is to look for business opportunities in Y for XCo.

Following a suggestion from Mr S, XCo has sought to obtain consulting contracts with several specific companies resident in Y. To secure those contracts, senior executives of XCo have made numerous visits to Y to meet with the Y companies and discuss opportunities. Also discussed at the meetings were the key terms of XCo's proposed contracts. The meetings each lasted up to 3 days and took place at the Y companies' respective offices. The XCo senior executives spent very little time in the premises of the representative office.

Mr S attended all of those meetings, but played no role in the discussions.

Several (assume 4) proposed contracts are now ready for signature by each pair of parties (XCo and the respective Y company). The plan is that each contract will be signed at a "signing ceremony" at the Y office of the respective Y company. It is also planned that the XCo senior executives would not attend those signing ceremonies – instead, XCo would give Mr S a power of attorney to sign those contracts on XCo's behalf.

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

Will XCo have a PE in Y under the treaty? If so, how would the profits attributable to the PE be determined?

LAST WEEK'S ANSWER

1. "Fixed place of business" PE
 1. The representative office would satisfy Art. 5(1). However, it would probably be excluded from PE status under Art. 5(4)(d) (collection of information) or Art. 5(4)(e) (other preparatory or auxiliary activity); see OECD Comm.
 2. The offices of the Y companies would not satisfy Art. 5(1).
 3. Thus, no "fixed place of business" PE.
2. "Contract-concluding agency" PE
 1. Subject to the "habitually" issue, Mr S would satisfy Art. 5(5), if (as is likely) his signature concludes a contract which is binding on XCo under the relevant contractual law.
 2. "Habitually" issue: OECD Comm does not provide a brightline test – it only says that "habitually" means repeatedly, and does not mean merely transitory or in isolated cases. IMHO: 4 cases would likely be sufficient to be "habitually".
 3. Mr S, being XCo's employee, cannot satisfy Art. 5(6).
 4. Thus, a "contract-concluding agency" PE would likely exist. The extent of the PE would be all of the functions performed by Mr S for XCo (not merely the signature function).
3. Profit attributable to PE
 1. The "separate and independent enterprise" assumption applies: Art. 7(2).
 2. Under that assumption, XCo's functions, assets and risks would be allocated to the PE, based on the extent of Mr S's significant people functions (SPFs).
 3. The facts do not indicate that Mr S performs any SPFs. It's possible that Mr S has developed important relationships with the senior management of the Y companies, and these relationships were important in securing meetings with the Y companies – however, the facts don't state that.
 4. If Mr S did not have important relationships with the Y companies, nil (or only nominal) profit should be attributed to the PE. If, however, Mr S did leverage his important relationships to secure meetings with the Y companies, then those relationships should be attributed as an asset to the PE, and that asset should then be rewarded in an allocation of profit to the PE.



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