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18 June 2021



HIGHLIGHTS

- Latest developments on Pillars One and Two
 - Countdown towards decisive meetings of Inclusive Framework and G20 finance ministers
 - Is Pillar Two all about corporate tax revenue – or jobs?
- EU
 - Seeks to end debt vs. equity bias
 - Finalises draft text for Directive on public CbC reporting
 - Resolves long-running trade dispute with US
- Final instalment of in-depth analysis of Pillar One – today: Implementation and administration, including new multilateral convention

HAPPY FRIDAY!

Biden and Putin meet in the library, but that's just a Geneva convention; and Ronaldo shows he doesn't like Coke!

Meanwhile in the tax world...

Le Maire starts the French charm (but is he asking for 15% or 21%?); after 17 years, the EU and the US decide to give their consumers a break; Pascal needs sleep; Vietnam hasn't heard of Pillar Two; DEBRA does Brussels; Poland puts on makeup; Ukraine caps; and Israel shows how to really stop treaty shopping!

But this week's prize for the most creative excuse, goes to: "I swear I didn't take performance enhancement drugs – it was the Burrito I had for lunch!"

Have a great weekend!
Steve

THIS WEEK'S PODCAST

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

1. Pillars One and Two
2. Trade
3. Pillar One: Implementation and administration
4. Asia Pacific
 - Singapore, Vietnam
5. Europe
 - ECJ, EU, Finland, Germany, Poland, Spain, Ukraine
6. Middle East & Central Asia
 - Israel / UAE
7. Americas
 - Canada
8. 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)
- Implementation and administration – ITB (18 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)
 - Carry-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

Mary C. Bennett
"Contemplating a Multilateral Convention to Implement OECD Pillars 1 and 2"
Tax Notes Today International, Tax Analysts, 16 June 2021 (subscription service)

Shefali Goradia
"The New Indian Statutory Definition of 'Liable to Tax': Interaction with India's Tax Treaties"
Bulletin for International Taxation, IBFD, 2021 (Volume 75), No. 6 (subscription service)

INTERNATIONAL TAX QUIZ

THIS WEEK'S NEW QUIZ

XCo, a company resident in X, owns 100% of the shares in YCo, a company resident in Y.

YCo manufactures goods in Y and sells them to customers in Y and in other countries.

In Z, YCo's goods are distributed by ZCo, which is unrelated to XCo and YCo. ZCo is an independent sales agent, which acts on behalf of many non-resident vendors. ZCo habitually exercises an authority to conclude sales contracts, with customers in Z, on behalf of (and legally binding on) YCo. YCo pays ZCo an arm's length fee for its services. YCo is not a relatively substantial client for ZCo.

Under Z domestic law, YCo is treated as deriving profits from a source in Z, due to its use of ZCo as its sales agent. The Z-sourced profits are determined on a formulaic basis: 40% of YCo's gross profits (from sales to customers in Z) are deemed to be derived from a Z source.

YCo pays large dividends to XCo.

All 3 treaties (X/Y, X/Z and Y/Z) are identical to the 2017 OECD model treaty.

After applying the relevant treaties, is Z permitted to levy income tax on YCo's profits or YCo's dividends?

Answer in next week's ITB email alert!

LAST WEEK'S QUESTION

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 BCo1 and the other is with BCo2. BCo1 and BCo2 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 BCo1 or BCo2. The engineer will be in B for a total of 9 months: the first 2 months focusing on BCo1's project, the next 2 months on BCo2's project, then the next 3 months on BCo1's project, and then the final 2 months on BCo2's project.

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

Does the treaty allow B to levy income tax on ACo in regard to the engineer's services?

LAST WEEK'S ANSWER

1. Art. 12A / Art. 7(1)
 1. Art. 12A will apply to allow B to levy tax of x% on the gross fees paid to ACo, unless the engineer's activities cause ACo to have a PE in B (see below): Art. 12A(4).
 2. If ACo does have a PE in B, Art. 7(1) will allow B to tax the profits attributable to the PE.
2. Art. 5(1)
 1. Threshold issue: is Art. 5(1) limited by Art. 5(3)(a) or (b)? IMHO: no.
 2. Two possible PEs: BCo1 site and BCo2 site. In regard to each site, all of the Art. 5(1) conditions (other than the time condition) are satisfied.
 3. In regard to the time condition, the engineer's time at each site, from start to finish (including time spent at the other site), aggregates to 7 months – which is just over the 6 months "indicative test" set out in the OECD Comm (and repeated in the UN Comm), if the "recurrent" principle is applied.
 4. IMHO: Each site is a borderline case, but on balance I would conclude that each site is an Art. 5(1) PE.
3. Art. 5(3)(a)
 1. The engineer's activities should be "supervisory activities". Those activities need to be considered in regard to each project separately.
 2. Do those activities "last more than six months"? IMHO: in measuring time for the BCo1 activities, the time spent on the BCo2 activities should not be counted, and vice versa.
 3. Thus, IMHO: the BCo1 activities lasted for 5 months, and the BCo2 activities for 4 months – neither would be a PE under Art. 5(3)(a).
4. Art. 5(3)(b)
 1. Threshold issue: does Art. 5(3)(a) "cover the field", to exclude Art. 5(3)(b)? IMHO: no. This view is supported by the 2017 OECD Comm on Art. 5: see para. 147.
 2. Art. 5(3)(b) was amended in the 2017 UN model to remove the "same or connected project" condition.
 3. The engineer spent a total of 9 months in B performing the services. The time test in Art. 5(3)(b) is "more than 183 days in any 12-month period commencing or ending in the fiscal year concerned". IMHO: only days on which services were performed are counted. Thus, if the engineer did not perform services on weekends or public holidays, or if he took annual leave in B during the 9 months, those days should not be counted. That said, it's likely that the 183 day test is satisfied.
 4. IMHO: Likely PE.



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