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25 June 2021



HIGHLIGHTS

- Latest developments on Pillars One and Two
 - Decisive meetings of Inclusive Framework and G20 finance ministers in next 2 weeks
 - How will Amount A nexus and revenue sourcing rules operate in regard to "top 100 MNEs" model for Amount A?
- GE Financial Investments case, which considers interesting issues under UK / US double tax treaty:
 - Definition of "resident" in Art. 4: "any other criterion of a similar nature"
 - Interest article (Art. 11): "carries on business ... through a [PE]"
 - Foreign tax credit provision (Art. 24)
- Total Oil case from India
 - Mumbai ITAT doubts correctness of landmark 2020 decision in Gleesocke & Devrient case (dividend article in India's treaties limits rate of Dividend Distribution Tax)

HAPPY FRIDAY!

Google keeps its cookies; Sweden has more confidence in its football team than its government; and UEFA doesn't like rainbows!

Meanwhile, in the tax world...

It's the calm before the storm for Pillars One & Two; GE is stapled, but sporadic; Total gets referred; Germany and New Zealand go crypto; Poland details its research; South Africa's book deal pays dividends, but it's Maneesh which gets to write off a deduction; and Saudi Arabia reverses the charges!

But at the end of the week, the most important question is this: "If you were a spectator at the upcoming Olympic Games in Tokyo, would you remember not to cheer?"

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. GE Financial Investments case
3. Other global developments
4. Asia Pacific
 - India, New Zealand, Singapore
5. Europe
 - Germany, Poland, Switzerland
6. Africa
 - South Africa
7. Middle East & Central Asia
 - Saudi Arabia
8. Americas
 - Canada
9. 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)
 - 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

Belema R. Oluoforibo
"Brexit and the EU Tax Directives: The Emerging UK Tax Landscape"
European Taxation, IBFD, 2021 (Volume 61), No. 7 (subscription service)

Swapna Marathe
"Engineering Analysis: Implications of the Indian Supreme Court's Ruling on Software Payments"
Tax Notes Today International, Tax Analysts, 25 June 2021 (subscription service)

INTERNATIONAL TAX QUIZ

THIS WEEK'S NEW QUIZ

ACo, a company resident in A, owns 100% of the shares in BCo, a company resident in B.

ACo formed BCo many years ago to hold real estate in a number of countries.

BCo now owns real estate in B and C. The relative market value of the real estate is currently 40% in B, and 60% in C.

BCo owns no other assets and it has no liabilities.

ACo is planning to sell 20% of its shares in BCo. ACo will derive a profit of \$10 million on the sale.

The A/B, A/C and B/C treaties are all identical to the 2017 UN model treaty, with Art. 23B.

Questions:

- (1) Do the treaties permit B and/or C to levy income tax on ACo's profit?
- (2) If so, is the tax permitted to be on the whole, or only part, of the profit?
- (3) Is A required to provide a credit for the tax in B and/or C?

Answer in next week's ITB email alert!

LAST WEEK'S QUESTION

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 (1) YCo's profits or (2) YCo's dividends?

In regard to (2), please assume that Z levies its tax on the dividend-recipient (XCo).

LAST WEEK'S ANSWER

1. YCo's profits (Y/Z treaty)
 1. Although ZCo's actions would satisfy Art. 5(5), the exception in Art. 5(5) should apply to exclude a contract-concluding agency PE.
 2. In the absence of a PE in Z, YCo's profits would be exempt from Z tax under Art. 7(1).
2. YCo's dividends (Y/Z treaty)
 1. Art. 10(1)&(2) do not apply, as the dividend-payer (YCo) is not a resident of Z.
 2. Art. 10(5) is apparently satisfied: YCo (a company resident in Y) derives profits from Z – thus, Z is prevented from taxing the dividends, subject to 2 exceptions (neither of which is relevant here). But the dividends are the income of XCo, and XCo is not a resident of either Y or Z. Can the benefit of Art. 10(5) of the Y/Z treaty be claimed by a taxpayer which is not a resident of either Y or Z?
 3. Art. 1(1) would indicate that XCo cannot claim the benefit of Art. 10(5) of the Y/Z treaty. However, several academic articles and books have stated that Art. 10(5) would apply in this situation, regardless of Art. 1(1). For example, see: Madeira & Neves, "Exploring the Boundaries of the Application of Article 10(5) of the OECD Model", *Interfax*, Vol. 35 (2007), Vol. 8/9.
 4. This point is not directly addressed in the OECD Comm. However, in the course of discussing the interaction between Art. 10(5) and CFC rules, the OECD Comm says that Art. 10(5) "concerns only the taxation of the company and not that of the shareholder".
 5. IMHO: To conclude that Art. 10(5) is an exception to Art. 1(1) requires express words to that effect in either the OECD model or the OECD Comm. In the absence of such express words, my conclusion is that, based on Art. 1(1), Art. 10(5) does not apply to prevent Z tax on YCo's dividends.
3. YCo's dividends (X/Z treaty)
 1. Art. 10(1)&(2), and Art. 10(5), do not apply, as the dividend-payer (YCo) is not a resident of Z.
 2. Either Art. 7(1) or Art. 21(1) applies to provide an exemption for XCo.



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