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International Tax Bytes *by Steve Towers*

"International tax news, explained"

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30 July 2021

HIGHLIGHTS

- **Latest developments on Pillars One and Two**
    - **The "vaccine dividend": will big pharmaceutical companies be excluded from Pillars One & Two?**
    - **What impact will Pillar Two have on tax incentives?**
    - **Who will pay Amount A?**
    - **Will we end up with 2 international tax systems (one for the big companies, and another for everyone else)?**
- **EU's CBAM**
    - **Debate and objections have started**
- **Recent international tax cases and interesting double tax treaty provisions**

HAPPY FRIDAY!

The world watches **Tokyo**, but the **Black Widow** doesn't like streaming!

Meanwhile, in the tax world…

Pharma companies ask for an exclusive deal; **tax incentives** survive **Pillar Two** (so far!); **Indian importers** don't have a duty to incur AMP expenses; **China** and **Russia** object, but the **US** tries a carbon copy; **CAs** are creative with **Brexit**; the **UN** works only with government; and **Saudi Arabia** doesn't withhold guidance!

But at the end of the week, the most important question is this: **"Do you remember those pre-Covid days when the only folks who wore masks were surgeons, dentists, and bank robbers?"**

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. CBAM
3. Cases
4. Interesting treaty provisions
5. Other global developments
6. Asia Pacific
    - Korea, Philippines, Vietnam
7. Europe
    - EU, Spain
8. Middle East & Central Asia
    - Saudi Arabia
9. Americas
    - Colombia
10. Treaty news

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

Deepak Kapoor
"An Albatross Around the Neck of Developing Nations – MFN Clause in Tax Treaties"
Tax Cooperation Policy Brief, South Centre (freely available at www.southcentre.int)

Otto Marres and Isabella de Groot
"Combatting Abuse by Conduit Companies: The Doctrine of Abuse under EU Law and Its Influence on Tax Treaties"
European Taxation, IBFD, 2021 (Volume 61), No. 8 (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.

All of BCo's assets consist of land situated in B.

ACo entered into exclusive negotiations with CCo, a company resident in C, in regard to the sale of ACo's shares in BCo. All of the negotiations were held in A. As a condition for conducting the negotiations on an exclusive basis, CCo was required to pay ACo a significant, non-refundable deposit – i.e., if the negotiations did not result in a sale contract, the deposit would be forfeited by CCo.

That's exactly what happened: no sale contract was entered into, and ACo therefore kept CCo's deposit.

The A/B treaty and the A/C treaties are both identical to the 2017 UN model treaty.

Does the A/B treaty allow B, and does the A/C treaty allow C, to levy income tax on ACo in regard to the deposit?

Answer in next week's ITB email alert!

LAST WEEK'S QUESTION

XCo, a company incorporated and resident in X, owns some land in Y.

XCo sells the land to YCo, a related company incorporated and resident in Y, for a price of $Z. XCo does not own any shares in YCo.

Under the corporate income tax laws of both X and Y, a company is resident only if its central management and control is located in X or Y, respectively.

In accordance with Y stamp duty law, XCo pays 5% "seller's stamp duty" on the price of $Z, and then transfers the balance of the sale price to its bank account in X. Under Y law, seller's stamp duty is imposed only on sellers which are foreign-incorporated companies.

Some months later, the Y tax authorities claim that the price of $Z was less than the arm's length price (ALP) of the land. They therefore claim that XCo owes additional stamp duty on the excess of the ALP over $Z.

XCo currently owns no assets in Y.

The X/Y treaty is identical to the 2017 OECD model treaty.

Will XCo be required to pay the additional stamp duty?

LAST WEEK'S ANSWER

(1) Art. 24:

The non-discrimination rules in Art. 24 apply to all taxes, regardless of whether or not they are "taxes covered" under Art. 2: Art. 24(6). Thus, Art. 24 is applicable to stamp duty.

XCo is a "national" of X, based on incorporation: Art. 3(1) definition of "national".

Thus, Art. 24(1) potentially applies to XCo. The comparator in Art. 24(1) is "nationals of [Y] in the same circumstances, in particular with respect to residence". The concept of "residence" probably refers to the definitions in Art. 4. If so, then the comparator would be a company which is incorporated in Y (and is therefore a "national" of Y), but which has its central management and control in X (and is therefore, like XCo, not resident in Y, under Art. 4). Such a comparator would not be liable for the Y seller's stamp duty (because it is incorporated in Y), and therefore Art. 24(1) is breached in regard to XCo.

Thus, subject to the "force of law" issue (see below), XCo would have a right to avoid paying the Y seller's stamp duty on the excess of the ALP over $Z; it would also have a right to obtain a refund of the seller's stamp duty it had already paid on the $Z, subject to time limits under Y law.

(2) Art. 27:

If the conclusion on Art. 24 is incorrect, Y would be able to obtain the assistance of the X tax authorities to collect the outstanding amount of Y seller's stamp duty from XCo. Note that Art. 27 is not limited to the "taxes covered" under Art. 2: Art. 27(1).

(3) Force of law:

Some countries give the force of law to tax treaties for only limited purposes – e.g., for the purposes of the "taxes covered" in Art. 2.

If Y is such a country, that limited force of law for the X/Y treaty might mean that XCo could not claim the benefit of Art. 24 to defend against the Y seller's stamp duty.

In that case, an interesting question would be whether the Y tax authorities could obtain the assistance of the X tax authorities to collect the stamp duty under Art. 27. A threshold issue would be whether the Art. 27 right given to the Y tax authorities is dependent on X giving the force of law to Art. 27 – arguably, it is not so dependent, because Art. 27 is a "country-to-country" obligation under international law. The substantive issue is whether the X tax authorities would (or legally could) refuse to provide the assistance, due to Y's breach of Art. 24.

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AskSteve

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