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6 August 2021



**HIGHLIGHTS**

- **India decides to scrap retrospective taxation of indirect share transfers**
  - **A victory for common sense!**
- **Germany's new transfer pricing guidance**
  - **Controversial comments on intragroup financing transactions**
- **Recent international tax cases and interesting double tax treaty provisions**

**HAPPY FRIDAY!**

Elaine does a double double. Jacobs is a Bolt from the blue; and Warholm doesn't need 46!

Meanwhile, in the tax world...

India retrospectively removes retrospective taxation; Germany tries to follow the OECD, but it's not risk-free; the Netherlands taxes delayed dividends; for India, Mauritius is the domicile of choice; the OECD cancels FDI; China shows that it too can make exports of iron and steel to the EU more expensive; Poland is the real deal; and Mexico asks everyone to be average!

But at the end of the week, the most important question is this: "Have you really noticed the absence of spectators at the Olympics?"

Have a great weekend!

Steve

**THIS WEEK'S PODCAST**

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

1. India: retrospective taxation of indirect share transfers
2. Germany's new transfer pricing guidance
3. International tax cases
4. Interesting treaty provisions
5. Other global developments
6. Asia Pacific
  - Australia, China, Philippines, Singapore, Vietnam
7. Europe
  - Georgia, Luxembourg, Poland, UK
8. Africa
  - South Africa
9. Middle East & Central Asia
  - Israel, UAE
10. Americas
  - Mexico

**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**

Susi Baerentzen  
"The Danish Beneficial Ownership Cases – Is the European Union Becoming a Common Law Jurisdiction?"  
Talking Points, IBFD, 2021, No. 5, 29 July 2021 (subscription service)

Leonardo Thomaz Pignatari  
"The Qualification of Technical Services in Brazilian Double Tax Treaties and the Possible Impacts of the Adoption of Article 12B, UN Model Convention"  
Intertax, Kluwer, Volume 49 (2021), Issue 8 & 9 (subscription service)

Sarah Khaled Aluqtan  
"Tax Incentives In Three Common Markets"  
23 July 2021 (freely available at [www.ssm.com](http://www.ssm.com))

Johannes Becker & Joachim Englisch  
"Implementing an International Effective Minimum tax in the EU"  
26 July 2021 (freely available at [www.ssm.com](http://www.ssm.com))

**INTERNATIONAL TAX QUIZ**

**THIS WEEK'S NEW QUIZ**

XCo (a company resident in X) has valuable technical knowledge.

YCo (a related company resident in Y) carries on a technical consulting business.

XCo and YCo enter into a contract, under which XCo agrees to provide its technical knowledge to YCo, in consideration for a payment equal to 10% of YCo's gross technical consulting fees.

YCo's consulting business includes the provision of consulting services to clients in Z.

In a particular year, YCo provided consulting services to 20 different clients in Z. The services were mainly provided by YCo's employees being present at the Z business premises of those clients: planning and conducting interviews, writing reports, presenting findings, etc. YCo's employees were present at the Z business premises for an aggregate of 200 business days during the year. However, at no single business premises were they present for more than 50 business days during the year.

All the contracts for the consulting services are negotiated and entered into by the senior management of YCo in Y.

The X/Y treaty is identical to the 2017 UN model (with a 10% rate limit in both Art. 12 and Art. 12A), and the Y/Z treaty is identical to the 2017 OECD model.

Can Z levy income tax on YCo and/or XCo?

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

**LAST WEEK'S QUESTION**

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 treaty 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?

**LAST WEEK'S ANSWER**

(1) Threshold issue:

The term, "alienation", is not defined in either the OECD or UN model treaties. Also, a comprehensive definition is not provided in either the OECD or UN Comm. on Art. 13.

The OECD Comm. (this part is copied into the UN Comm.) states that "alienation" is used to cover various forms of transfer of property. It also says that some countries include, in the term, "alienation", capital appreciation and revaluation of property. The inference is that the term takes its meaning from the domestic law of the source country – i.e., if the source country law treats the transaction as an alienation of property, then that would qualify as an alienation of property for the purposes of Art. 13. This is likely an application of Art. 3(2), although Art. 3(2) is not mentioned.

If that is correct, then the critical threshold issue is: does B law (in regard to the A/B treaty) or does C law (in regard to the A/C treaty) treat the transaction involving the forfeited deposit as an alienation of property?

(2) A/B treaty:

If an alienation is recognised under B law, then Art. 13(4) would allow B to levy income tax on ACo's deposit.

If an alienation is not recognised under B law, then Art. 13 would not apply (all paragraphs in Art. 13 refer to "alienation"). Instead, Art. 7 would provide ACo with an exemption from B tax (if ACo has no PE in B) – subject to one qualification: if B considers that ACo does not carry on an "enterprise" (as defined in Art. 3(1)) (because ACo is a passive holding company), then Art. 21(3) becomes relevant. Under Art. 21(3), the issue is whether the deposit arises in B. According to the UN Comm. on Art. 21, "arises", when applied by B, should be interpreted under B law. Nevertheless, the fact that the payer is not a resident of B (nor has a PE in B), and that the negotiations were held in A, suggest that the deposit does not "arise" in B.

Art. 6 should not apply, as the deposit is not "derived ... from immovable property [in B]" – ACo has no ownership or other legal interest in immovable property in B.

(3) A/C treaty:

If an alienation is recognised under C law, then Art. 13(6) would exempt ACo's deposit from C tax.

If an alienation is not recognised, then Art. 13 would not apply. Instead, Art. 7 would provide ACo with an exemption from C tax (if ACo has no PE in C) – subject to one qualification: if C considers that ACo does not carry on an "enterprise" (as defined in Art. 3(1)) (because ACo is a passive holding company), then Art. 21(3) becomes relevant. Under Art. 21(3), the issue is whether the deposit arises in C. According to the UN Comm. on Art. 21, "arises", when applied by C, should be interpreted under C law. The fact that the payer is a resident of C might point to the deposit "arising" in C, although the fact that all the negotiations were held in A points against this.



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