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15 October 2021



HIGHLIGHTS

- **Inclusive Framework's final agreement on Pillars One & Two**
 - What's changed from the July 2021 version?
 - What are the significant "open" items?
 - What are the key dates in the detailed implementation plan?
- **Important reactions to IF's final agreement:**
 - US
 - EU
 - Canada
 - Africa

HAPPY FRIDAY!

LinkedIn has no connections in China, Dave Chappelle is too profitable to cancel, and Superman has a boyfriend (no, it's not Robin!)

Meanwhile, in the tax world...

US Republican Senators want to be fully counted, Canada hedges its bets, ATAF has 2 views, Cyprus is in line, DSTs in Europe might soon be history, and we should all be very busy at the end of November!

But at the end of the week, the most important question is this: "Has Dave Chappelle shown us the end of wokeness?"

Have a great weekend!

Steve

THIS WEEK'S PODCAST

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

Pillars One & Two

- Introduction
- Pillar One (including detailed implementation plan)
- Pillar Two (including detailed implementation plan)
- Reactions
- Other comments

ITB series on Pillars One & Two

- **Inclusive Framework's final agreement on Pillars One & Two** (ITB, 15 October 2021)

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)

Pillar Two

- **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)
- **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

Philip Baker

"Multilateral Tax Treaties"

Bulletin for International Taxation, IBFD, 2021 (Volume 75), No. 11/12 (subscription service)

Brian J. Arnold

"The Interpretation of Tax Treaties: Looking to the Future"

Bulletin for International Taxation, IBFD, 2021 (Volume 75), No. 11/12 (subscription service)

INTERNATIONAL TAX QUIZ

THIS WEEK'S NEW QUIZ

XCo, a company resident in X, carries on a business of transporting cargo.

XCo uses one its ships to transport cargo between X and Y. That ship is owned by ZCo (a company resident in Z), which leases the ship on a bare boat charter basis to XCo. ZCo is in the business of leasing ships to ship operators – ZCo does not itself operate ships.

The X/Y and X/Z treaties are identical to the 2017 UN model treaty, with alternative A for Art. 8. There is no Y/Z treaty.

After applying those treaties: (1) which country or countries are permitted to tax XCo on its profits from transporting cargo between X and Y?; and (2) which country or countries are permitted to tax ZCo on the bare boat charter fees which are paid by XCo to ZCo?

Answer in next week's ITB email alert!

LAST WEEK'S QUESTION

XCo, a company resident in X, carries on an insurance business. XCo has no employees or offices in Y.

XCo owns 100% of the shares in YCo, a company resident in Y, which also carries on an insurance business.

XCo provides insurance for many types of risk, including some types of risk which YCo does not insure.

Occasionally, an existing customer of YCo wishes to buy insurance of a type which is provided by XCo, but not by YCo. YCo will act as a communication channel between the customer and XCo. However, it will be clear (including to the customer) that any resulting insurance contract is between XCo and the customer, and that YCo has no authority to conclude that contract on behalf of XCo.

YCo does not provide this "communication service" for any other insurance companies.

YCo charges XCo an arm's length fee for the "communication service", but only if an insurance contract is entered into between XCo and the customer.

Premiums are paid directly by the customer to XCo.

The X/Y treaty is identical to the 2011 UN model treaty.

Does the X/Y treaty permit Y to levy income tax on the insurance premiums paid to XCo?

LAST WEEK'S ANSWER

Art. 5

XCo does not have a PE in Y under either Art. 5(1) or Art. 5(5).

However, does the deemed PE for insurance companies, in Art. 5(6), apply? There are 2 alternative tests: (1) XCo "collects premiums in [Y] ... through a person [other than an independent agent]", and (2) XCo "insures risks situated [in Y] through a person [other than an independent agent]".

The relevant person is YCo (see below in regard to the "independent agent" issue).

Test (1) is not satisfied, because the premiums are paid directly by the customer to XCo.

However, test (2) might be satisfied. Firstly, the risks might be "situated in [Y]" – this should be investigated. Secondly, arguably the insurance is "through" YCo. The word, "through", in this context, is not explained in the UN Comm. Presumably, it means something other than the conclusion of a contract, because that would be covered by Art. 5(5)(a). It is quite possible that a situation where YCo introduces the customer to XCo and acts as the "communication channel" between the two, could be viewed as XCo insuring risks "through" YCo.

Test (2) is subject to the "independent agent" exception in Art. 5(7), which has 2 conditions (both of which must be satisfied to qualify for the exception): (i) the person is "independent" of the enterprise; and (ii) the person is "acting in the ordinary course of their business".

Is YCo "independent" of XCo? Neither XCo's 100% ownership of YCo, nor the fact that YCo provides the "communication service" for no other insurance companies, would definitely lead to a conclusion that YCo is dependent on XCo. As there is nothing else in the facts which suggests dependence, I would conclude that condition (i) is probably satisfied.

In regard to condition (ii), the UN Comm. adopts the view expressed in the 2010 OECD Comm. that "acting in the ordinary course of their business" refers to the activities customarily carried out in the agent's trade, not the other business activities carried out by that agent. Thus, the fact that YCo does not provide this service to other insurance companies is irrelevant. In my view, the issue is: do insurance companies (possibly, restricted to those in Y) customarily provide such a "communication service"?

As YCo charges an arm's length fee to XCo, the second sentence in Art. 5(7) does not apply.

Thus, IMHO: XCo possibly has a PE in Y.

Art. 7

If XCo has a PE in Y, the profits attributable to the PE may be taxed in Y: Art. 7(1).

Under the "authorised OECD approach", as described in the 2008 OECD report on the attribution of profits to PEs, the PE should be hypothesised as a separate and independent enterprise from the remainder of XCo, and the 2-step analysis should be used.

Based on the question, it appears that none of the significant people functions (SPFs) (e.g., deciding on whether or not to accept the insurance risk, deciding on the premiums) are performed by YCo. Thus, the PE should be treated as the service provider. As the question states that YCo is paid an arm's length fee for its services (which would include the potentially valuable "customer introduction" service), and as YCo does not perform any SPFs, it is likely that the arm's length fee would cause the profits attributable to the PE to be very low (or, possibly, nil).



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