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22 October 2021



HIGHLIGHTS

- Latest developments on Pillars One & Two
 - Removal of DSTs – US agreement with 5 European countries
 - US political difficulties in amending GILTI
- Review of interesting treaty provisions
 - More examples of poor drafting

HAPPY FRIDAY!

Alec Baldwin takes shooting lessons from Dick Cheney; Apple cooks its own chips; and Greta auditions for Abba!

Meanwhile, in the tax world...

Europe gives unilateral credits; US House Democrats want to pause; Myanmar shows that tax rates can be changed, even in a coup; Thailand and Vietnam show faith in tax incentives; and Italy and Jamaica are indiscriminate!

But at the end of the week, the most important question is this: "Will Greta be singing and dancing in Glasgow?"

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 & Two
2. Trade & other global developments
3. Interesting treaty provisions
4. Asia Pacific
 - Myanmar, Thailand, Vietnam
5. Europe
 - Austria, Belgium, Ireland, Italy, Netherlands
6. Treaty news

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

Porus F. Kaka
"From the Avoidance of Double Taxation to the Avoidance of Double Non-Taxation: The Changing Objectives of Tax Treaties"
Bulletin for International Taxation, IBFD, 2021 (Volume 75), No. 11/12 (subscription service)

Joanna Wheeler
"Tax Treaties: What Are We Going to Do with Them?"
Bulletin for International Taxation, IBFD, 2021 (Volume 75), No. 11/12 (subscription service)

Graeme S. Cooper
"Building on the Rubble of Pillar One"
Bulletin for International Taxation, IBFD, 2021 (Volume 75), No. 11/12 (subscription service)

INTERNATIONAL TAX QUIZ

THIS WEEK'S NEW QUIZ

ACo, a company resident in A, carries on a logistics business on a global basis.

ACo owns a warehouse in B. ACo uses the warehouse to provide logistics services in B.

Under the B domestic tax law, fees paid for logistics services are subject to a withholding tax of 5% on the gross fees. The withholding tax is a final tax – i.e., no deductions are allowed. This final withholding tax regime applies to all logistics services provided in B, regardless of whether they are provided by residents or non-residents.

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

In the current year, ACo's logistics business in B has incurred losses.

Does the treaty allow ACo to be exempt from B withholding tax, on the basis that it incurs losses?

Answer in next week's ITB email alert!

LAST WEEK'S QUESTION

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.

XCo has a small office in Y, with 2 employees based there. The 2 employees solicit orders, and sign contracts, for the transport of cargo between X and Y.

The X/Y, X/Z and Y/Z treaties are identical to the 2017 UN model treaty, with alternative A for Art. 8.

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?

LAST WEEK'S ANSWER

XCo

XCo would have a PE in Y, under both Art. 5(1) and Art. 5(5)(a) of the X/Y treaty.

However, XCo's PE status is irrelevant to XCo's taxation under the treaty: Art. 8(1) would exempt XCo's profits from Y tax, and Art. 7(6) would prevent the application of Art. 7(1). Thus, X would have sole taxation rights.

ZCo

The bare boat charter fees would qualify as "royalties", as defined in Art. 12(3) of both the X/Z treaty and the Y/Z treaty: "payments ... for the use of, or the right to use, industrial, commercial or scientific equipment".

X/Z treaty: The royalties would be deemed to arise in X: 1st sentence in Art. 12(5). The 2nd sentence in Art. 12(5) does not apply, as XCo's PE is not in a Contracting State (it's in Y). Thus, X may tax the royalties, subject to the rate limit in Art. 12(2). Z would be required to provide relief from double taxation under Art. 23A/B.

Y/Z treaty: XCo has a PE in a Contracting State (Y): see conclusion above in regard to XCo's PE under the X/Y treaty. However, based on the facts in the question, it is difficult to conclude whether the 2 tests in the 2nd sentence in Art. 12(5) would be satisfied, if the royalties are deemed to arise in Y under the 2nd sentence in Art. 12(5), then: (i) Y may tax the royalties, subject to the rate limit in Art. 12(2); and (ii) Z would be required to provide relief from double taxation under Art. 23A/B (in addition to the relief it must provide under the X/Z treaty – see above). If the royalties are not deemed to arise in Y under the 2nd sentence in Art. 12(5), then: (a) Art. 12(2) would not apply; and (b) ZCo would be exempt from Y tax under Art. 7.



Tax Quiz Archives



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AskSteve



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