

Want to learn more about ITB? Sign up for a free trial by emailing us

Free Trial

Check out our suite of subscription plans: individual (standard), student, university faculty, young professional, and enterprise

Subscribe

12 November 2021



**HIGHLIGHTS**

- Latest developments on Pillars One & Two
  - Will Pillar Two cause the end of international tax planning for in-scope MNE groups?
- Review of recent international tax cases
  - Germany: transfer pricing case concerning subordinated shareholder loans
  - Australia: case on non-discrimination article in Australia / UK treaty
- US: proposed international tax changes in latest version of draft Build Back Better Act

**HAPPY FRIDAY!**

**Malala gets married; China and the US agree that it's getting too hot; and Elon Musk takes investment advice from his Twitter followers!**

Meanwhile in the tax world...

**Pascal says that international tax advisors will be boring; in Germany, a superior court rules on subordinated loans; Addy suffers discrimination in Australia; Build Back Better is more than 2,000 pages and growing; Malaysia wants you to pay tax only if you receive; the European Court of Justice creates a cash crunch; Ireland invents double non-taxation in regard to dividends; and in the UK, double tax treaties really can apply to the diverted profits tax!**

But at the end of the week, the most important question is this: "Is Pascal right when he says that your job will be boring?"

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. International tax cases
3. US international tax changes
4. Asia Pacific
  - Cambodia, China, Indonesia, Malaysia
5. Europe
  - ECJ, EU, Ireland, Netherlands, Poland, Portugal, Sweden, UK
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 (28 Feb & 5 Mar 2021)
- Tax base determinations (Parts 1 & 2) – ITB (12 & 19 Mar 2021)
- Profit allocation (Parts 1 & 2) – ITB (28 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**

Gary Sprague  
"Further Thoughts on ATO Draft Ruling on Software Revenue Characterization"  
Tax Management International Journal, Bloomberg BNA, 5 November 2021 (subscription service)

All Tse, Jesse Kavanagh and Dane Aronson  
"Hong Kong's Territorial Tax regime under Fire – The Impact of BEPS 2.0, the EU Greylist and Hong Kong's Struggle to Remain Competitive"  
International Transfer Pricing Journal, IBFD, 2021 (Volume 28), No. 6 (subscription service)

Carla Valério  
"Applying the OECD Principal Purpose Test in Accordance with EU Law: An Analysis of the Scope, Burden of Proof and Effects"  
European Taxation, IBFD, 2021 (Volume 61), No. 11 (subscription service)

**INTERNATIONAL TAX QUIZ**

**THIS WEEK'S NEW QUIZ**

For the last 5 years, ACo, a company resident in A, has owned 24% of the shares in BCo, a publicly listed company resident in B.

Under B domestic law, a 20% dividend withholding tax is levied on all outbound dividends, regardless of the level of shareholding.

The A/B treaty, which is the first double tax treaty between A and B, recently entered into force. The A/B treaty is identical to the 2017 OECD model treaty.

For the purpose of qualifying for the 5% dividend withholding tax rate under Art. 10 of the treaty, ACo has recently purchased an additional 1% of shares (giving ACo a total of 25% of BCo's shares).

B introduced into its domestic tax law a GAAR provision (based on the taxpayer's principal purpose) 10 years ago.

BCo will soon pay dividends to all its shareholders.

Questions:

1. What dividend withholding tax rate should apply to the dividend to be paid to ACo?
2. Are the B tax authorities permitted to apply the PPT (Art. 29(9)) to this situation?
3. Are the B tax authorities permitted to apply GAAR to this situation?
4. If the B tax authorities choose to apply GAAR, but not the PPT, to this situation, and therefore they claim that a higher dividend withholding tax rate applies, is ACo entitled to request MAP discussions between the A and B tax authorities?

Answer in next ITB email alert!

**LAST WEEK'S QUESTION**

XCo, a company resident in X, is in the business of generating electricity through wind turbines.

As part of its business, it purchased land in Y, on which wind turbines and related assets ("wind farm") were constructed.

All of the decision-making in regard to the establishment of the wind farm was made by XCo's employees in X. In fact, XCo has no employees who are based in Y, and XCo's employees do not regularly visit Y.

To construct the wind farm, XCo engaged YCo 1, an unrelated company resident in Y, to construct the wind farm as a service for it. The components for the construction were purchased by XCo and physically transferred to YCo 1. Ongoing maintenance of the wind farm is also performed by YCo 1, as a service for XCo. Legal and administrative arrangements for the sale of the electricity into the Y electricity grid, are performed by YCo 2, another unrelated company resident in Y, as a service for XCo – however, YCo 2 does not conclude contracts on behalf of XCo.

The X/Y treaty is identical to the 2014 OECD model treaty.

Questions: (1) Does XCo have a PE in Y?; (2) If XCo does have a PE in Y: in determining the profits attributable to the PE under Art. 7, what functions, assets and risks would be allocated to the PE, on the assumption that it is a "separate and independent enterprise"?

**LAST WEEK'S ANSWER**

Q1:

The wind farm would constitute a "fixed place of business" PE for XCo under Art. 5(1).

Q2:

The allocation of XCo's functions, assets and risks to the PE should be done in accordance with the OECD Comm. on Art. 7 and the OECD's 2010 report on attribution of profits to PEs.

The question indicates that all of the significant people functions (SPFs) are performed by XCo's employees in X, that XCo has no employees who are based in Y, and XCo's employees do not regularly visit Y.

What impact does that have on the determination of the functions, assets and risks allocated to the PE?

(i) Functions:

The only function which would be allocated to the PE would be the physical performance of the wind farm. All of the management functions (including the appointment and monitoring of YCo 1 and YCo 2) are performed by the head office employees.

(ii) Risks:

All of the risks which relate to the wind farm (e.g., market risk, currency risk, credit risk, physical risk) are managed by employees at the head office, and thus those risks would be allocated to the head office.

(iii) Assets:

If the SPF approach were strictly followed in regard to the ownership of tangible assets, then the ownership of the wind farm (including the land) would be allocated to the head office. However, the OECD's 2010 report advocates a "pragmatic solution": ownership of tangible assets (including land) would be attributed based on use (see para. 75). [Note the contradictory statement in regard to the ownership of a computer server: para. 66.]

Thus, despite the absence of SPFs, the PE should be allocated the ownership of the wind farm and land.

In regard to the remainder of "step one" (i.e., hypothesising the PE as a separate and independent enterprise):

(iv) Contractual rights and obligations:

All of XCo's contractual rights and obligations in regard to the wind farm (in particular, the contracts with the Y electricity grid) would be allocated to the head office.

(v) Capital:

As the PE would be allocated ownership of the wind farm and land, its notional capital base (equity and interest-bearing debt) should be sufficient to fund those assets.

(vi) Notional dealings:

Based on the above, the notional dealings between the head office and the PE should be: (a) head office would own equity and interest-bearing debt issued by the PE; and (b) the PE should operate the wind farm as a service for the head office.



[Tax Quiz Archives](#) [Email Alert Archives](#) [Ask Steve](#) [Referral Program](#) [What is ITB?](#)

If you have a friend or colleague who you think might find this email alert interesting, please forward it to them.

Watch ITB video podcasts anytime, anywhere with our App!



[HOME](#) [CONTACT US](#) [TERMS & CONDITIONS](#) [PRIVACY POLICY](#) [FAQS](#) [DISCLAIMER](#)

© 2021 International Insights Pte Ltd. All rights reserved.

**UNSUBSCRIBE**

If you no longer wish to receive emails from us, please click [here](#)