

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](#)

10 December 2021



### HIGHLIGHTS

- Recent international tax cases
  - CFC case from Canada
  - 2 joined "beneficial ownership" cases from Denmark
- Review of interesting double tax treaty provisions
  - Unique variation of business profits article: Saudi Arabia / Taiwan
  - Extension of treaty benefits to residents of third countries: Kosovo / Netherlands

### HAPPY FRIDAY!

**New Zealand** tries to quit smoking; **camels** take Botox in Saudi Arabia; and **No.10's** lockdown Christmas party seemed like a good idea at the time!

Meanwhile, in the tax world ...

Still waiting for the **model rules**; **Loblaw** keeps Canada at arm's length; **Takeda** accrues, but still loses; **Kosovo** and the **Netherlands** have friends with benefits; **Estonia** and **Hungary** stop the conduct; and the **Netherlands** doesn't want **Shell** to leave without paying the bill!

But at the end of the week, the most important question is this: "Will the **GloBE** rules require international tax advisors to become better accountants?"

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
- International tax cases
- Interesting treaty provisions
- Trade
- Asia Pacific
  - New Zealand
- Europe
  - EU, Netherlands
- 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

Stefanie Geringer  
[Implications of the OECD MTC Commentaries dynamic interpretation in ECJ case law: the OECD as EU legislator?](#)

(written 25 October 2021) (freely available at [www.ssrn.com](http://www.ssrn.com))

Carla De Pietro  
[The GloBE Income Inclusion Rule and Its Global Character: Complexities Underlying Its Fully Effective Application](#)

EC Tax Review (Kluwer), 2021 No. 5 & 6

### INTERNATIONAL TAX QUIZ

#### THIS WEEK'S NEW QUIZ

XCo is a publicly listed company which is incorporated in X, but has its place of effective management in Y.

Under the domestic tax law of X, XCo is non-resident; and under the domestic tax law of Y, XCo is resident.

XCo has numerous small shareholders resident in many countries.

XCo decides to relocate its head office from Y to X. After the relocation, XCo's place of effective management is in X – this makes XCo resident in X under the X domestic tax law.

In response to XCo's relocation, Y changes its law, with this effect: for a period of 10 years after the relocation, XCo will remain resident in Y under the Y domestic tax law.

Y imposes a withholding tax of 25% on outbound dividends. X does not impose a withholding tax on outbound dividends.

The X/Y treaty and the Y/Z treaty are both identical to the 2014 OECD model treaty.

During the 10 years' period, what rate of Y withholding tax will apply to dividends paid to small shareholders who are resident (1) in X; or (2) in Z; or (3) in a country with which Y has no treaty?

**Answer in next ITB email alert!**

#### LAST WEEK'S QUESTION

XCo, a company resident in X, carries on an investment consulting business.

YCo, a company resident in Y, enters into a contract with XCo for XCo to undertake a study of investment opportunities for YCo in several countries, including Z.

As XCo does not have any personnel in Z, XCo sends 2 of its X-based employees to Z to research, analyse and write the Z part of the study. At the start, it was thought that the employees would be in Z for a continuous period of 4 months. However, due to their inefficiency, they actually spent a continuous period of 7 months in Z, working full-time (except weekends and public holidays) on the study for YCo. For the whole of the 7 months, the employees worked in a WeWork co-working space (with hot desking).

The X/Y, X/Z and Y/Z treaties are all identical to the 2017 UN model treaty, with Art. 23B.

After applying the 3 treaties:

- Which countries are permitted to impose income tax on the fees paid by YCo to XCo for the study?
- Which countries are permitted to impose income tax on the salaries paid to the 2 employees?

#### LAST WEEK'S ANSWER

##### 1. Fees paid by YCo

###### 1.1 X/Y treaty:

The fees would qualify as "fees for technical services" (FTS), as defined in Art. 12A(3). Thus, Y may tax XCo on the fees, subject to the rate limit in Art. 12A(2). X must give XCo a credit for the Y tax, under Art. 23B(1).

###### 1.2 X/Z treaty:

The threshold issue is whether XCo has a PE in Z under the X/Z treaty. There probably is no Art. 5(3)(b) PE, due to the fact that the 2 employees do not work on weekends or public holidays, which would make it unlikely that the "183 days" condition is satisfied. However, there is probably an Art. 5(1) PE at the WeWork co-working space, despite the hot desking: this should constitute a specific geographical place, and the employees' use of the space means that it is at their disposal. Although at the start it was thought that the employees would be in Z for a continuous period of 4 months (which would generally be too short for Art. 5(1)), the UN Comm. makes clear that it is the actual time which matters: 7 months should be sufficient for Art. 5(1), despite the weekends and public holidays.

If XCo has a PE in Z, then Z is permitted to tax XCo on the profits attributable to the PE: Art. 7. In determining those profits: (a) the fees referable to the work performed at the PE in Z would need to be identified, from the total fees paid by YCo to XCo; and (b) expenses which relate to the PE (e.g., salaries for the 2 employees while they were at the PE, plus their travel, accommodation and living expenses) would need to be deducted: Art. 7(2). Also, in relation to (b), a "head office" notional charge (set at cost: Art. 7(3)) for head office supervision of the work, should also be deducted.

It is unclear whether, in determining the Z tax on XCo's PE, Z must give a notional credit for the Y withholding tax. Such a notional credit would arise by virtue of Art. 24(3) of the X/Z treaty, the non-discrimination provision in regard to PEs. The 2017 UN Comm. on Art. 24(3) reproduces the 2017 OECD Comm. discussion of this point, but it is limited to dividends, interest and royalties – FTS is not mentioned. If a credit is required, it will be equal to the lower of the Art. 12A(2) tax rates in the X/Y and Y/Z treaties, respectively.

X must give XCo a credit for the Z tax paid: Art. 23B(1).

##### 2. Salaries

Salaries for the 2 employees while they were at the PE, may be taxed by Z: Art. 15(1) & (2), X/Z treaty. X must give the employees a credit for the Z tax paid: Art. 23B(1).



[Tax Quiz Archives](#)



[Email Alert Archives](#)



[AskSteve](#)



[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!



**UNSUBSCRIBE**

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