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17 December 2021



### HIGHLIGHTS

- Latest developments on Pillars One & Two
  - Canada releases draft legislation for digital services tax
  - Model rules for Pillar Two will likely include deferred tax accounting
- Recent international tax cases
  - Finnish case on PE definition in Nordic tax treaty
  - Swedish case on EU freedom of establishment
  - US case on CFC rules
- US international tax changes
  - Senate Finance Committee's proposed text

### HAPPY FRIDAY!

**Mr Big falls off his bike; Bruce Springsteen sells out; and beware of otters in Singapore!**

Meanwhile, in the tax world...

**Pascal sets the date; Canada raises the Pillar One stakes; Japan uses a tax carrot and stick; Fiat has powerful friends; the Netherlands strips away avoidance; Spain wants to start-up; and electric vehicles create sparks in North America!**

But at the end of the week, the most important question is this: **"If the Japanese government so strongly wants to increase wages, why doesn't it simply impose a payroll tax on employers and then pay the tax to the employees?"**

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. Trade and other global developments
5. Asia Pacific
  - Australia, Japan, Philippines
6. Europe
  - ECJ, EU, France, Netherlands, Spain
7. Middle East & Central Asia
  - Bahrain
8. 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

Magdalena Schwarz  
["Can the Switch-Over Rule and the Role of Permanent Establishments be Considered the Neglected Stepchildren of the GloBE Proposal?"](#)

Intertax, Kluwer, 2021 (Vol. 49), Issue 12 (subscription service)

Roberto Iola  
["Article 6 ATAD and 'Non-genuineness' of Arrangements"](#)

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

### INTERNATIONAL TAX QUIZ

#### THIS WEEK'S NEW QUIZ

ACo, a company resident in A, carries on an engineering consulting business.

ACo has won 3 consulting contracts for 3 different clients, in 3 cities in B. The contracts will be performed in 2022. Each contract will require ACo to send one or more professional engineers (ACo's A-resident employees) to B for several months to supervise a construction project. Specifically: (1) contract #1 will require 2 engineers for February and March; (2) contract #2 will require 1 engineer for May, June and July; and (3) contract #3 will require 3 engineers for July, August, September and October. All of the work by the engineers will be performed "on site".

ACo has no offices or premises, or employees permanently based, in B.

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

Question 1: Does the treaty allow B to levy income tax on the fees which will be paid by the clients to ACo?

Question 2: Does the treaty allow B to levy income tax on the salaries which will be paid to the engineers by ACo, during the period they are in B?

Answer in next ITB email alert on 7 January 2022!

### LAST WEEK'S QUESTION

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?

### LAST WEEK'S ANSWER

#### 1. Shareholders resident in X

Application of X/Y treaty:

After the relocation and the Y law change, XCo satisfies the residence definition in Art. 4(1), in regard to both X and Y. However, under the residence tie-breaker rule in Art. 4(3), XCo is deemed to be a resident of X only (based on place of effective management), for the purposes of the X/Y treaty.

Art. 10(1) & (2) will not apply to allow Y tax; and the dividends will be exempt from Y tax under Art. 10(5) and Art. 21(1).

Thus, no Y tax.

#### 2. Shareholders resident in Z

##### 2.1 X/Y treaty:

XCo is deemed to be a resident of X only, for the purposes of the X/Y treaty (see above). Thus, the X/Y treaty should ensure that XCo is not taxable in Y on foreign sourced income: Art. 7(1), etc. Note that, even if Art. 11 of the MLI applies to the X/Y treaty (i.e., the so-called "saving clause"), XCo will still be exempt in Y on foreign sourced income – due to the fact that XCo's residence status in X only, will mean that Art. 11 has no effect on Y tax.

##### 2.2 Y/Z treaty:

XCo is excluded from the definition of "resident of [Y]" in Art. 4(1) by the second sentence. The OECD Comm.: "[The second sentence] excludes companies and other persons who are not subject to comprehensive liability to tax in a Contracting State [i.e., Y] because these persons, whilst being residents of that State under that State's tax law, are considered to be residents of another State [i.e., X] pursuant to a treaty between these two States. [i.e., X/Y treaty]"

Thus, Art. 10(1), (2) & (5) will not apply to the dividends paid by XCo; and the dividends will be exempt from Y tax under Art. 21(1).

Thus, no Y tax.

Note: If, contrary to the above, the view is taken that the second sentence in Art. 4(1) of the Y/Z treaty does not apply to exclude XCo from being a resident of Y for the purposes of the Y/Z treaty, then Art. 10(2) would allow Y to impose 15% tax on the dividends paid to Z-resident shareholders.

#### 3. Shareholders resident in non-treaty country

XCo's residence status under the X/Y treaty is irrelevant to shareholders who are resident in countries with no treaty with Y.

Thus, 25% Y tax will apply



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