

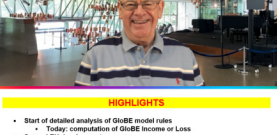
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7 January 2022



HIGHLIGHTS

- Start of detailed analysis of GloBE model rules
 - Today: computation of GloBE Income or Loss
- Several EU developments
 - Proposed directives on GloBE rules and on shell entities
 - Commission's proposal for EU's "own resources"
- SingTel transfer pricing case from Australia

HAPPY FRIDAY!

Kazakhstan follows Myanmar, and Novak Djokovic loses in straight sets to Australian bureaucracy!

Meanwhile, in the tax world...

The GloBE rules impose tax on no income; Australia guarantees a win against SingTel; Malaysia reverses course on dividends; Cyprus decides to change its law (but not just yet); Ireland goes for territorial "lite"; the EU wants to take its cut from everything; and the US is still focused on nexus!

But at the end of the week, the most important question is this: "If you were Novak Djokovic, would you give up and go home?"

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. Other global developments
3. Asia Pacific
 - Australia, Laos, Malaysia
4. Europe
 - Cyprus, EU, Ireland, Turkey
5. Americas
 - US
6. Treaty news

ITB series on Pillars One & Two

- GloBE model rules: Computation of GloBE Income or Loss (Part 1) (ITB, 7 January 2022)
- 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

Richard S. Collier and Ian F. Dykes

["On the Apparent Widespread Misapplication of the OECD Transfer Pricing Guidelines: Risk and Post-BEPS Problems for the Arm's Length Principle"](#)

Bulletin for International Taxation, IBFD, 2022 (Volume 76), No. 1 (subscription service)

Richard Xenophon Resch

["Tax Treaty Interpretation: A Response to Michael Lang"](#)

British Tax Review, Thomson Reuters, 2021, No. 5 (subscription service)

INTERNATIONAL TAX QUIZ

THIS WEEK'S NEW QUIZ

XCo, a company resident in X, is a Constituent Entity within an MNE Group, for the purposes of the GloBE model rules.

XCo has the following financial information for a fiscal year (all numbers are positive, unless indicated otherwise):

- Profit or loss: 20,000
- Other comprehensive income: 3,500
- Income tax expense:
 - In regard to Covered Taxes: 6,000 (including 200 in respect of dividend income minus related expenses)
 - In regard to other taxes: 1,500
- Current and deferred tax shown as a contra to particular revenue items:
 - In regard to Covered Taxes: 800
 - In regard to other taxes: 700
- Accrued dividend income (gross) in respect of:
 - 10% shareholding held for 6 months: 600
 - 5% shareholding held for 18 months: 450
 - 8% shareholding held for 9 months: 1,200
- Received dividend income (gross) (accrued in P&L in preceding fiscal year, received in current fiscal year):
 - 12% shareholding held for 30 months: 700
- Expenses relating to all dividend income: 350
- Gain (included in P&L) on disposal of 12% shareholding: 1,000
- Loss (included in P&L) on disposal of 10% shareholding: negative 600

Based on those numbers, what is XCo's GloBE Income or Loss for the fiscal year?

Answer in next ITB email alert!

LAST WEEK'S QUESTION

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

ACo has won 3 consulting contracts for 3 different clients, each in a different city 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 in the particular city. 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?

LAST WEEK'S ANSWER

1. Fees paid to ACo

1.1 PE?

Under Art. 5(1), each of the 3 construction sites (each in a separate city) must be analysed separately. None of the sites would satisfy the "approximately 6 months" time test for Art. 5(1).

Under Art. 5(3)(a), a PE is deemed if there is "a construction, assembly or installation project or supervisory activities in connection therewith, but only if such site, project or activities last more than six months". Each of the 3 construction projects (each in a separate city and for a separate client) must be analysed separately, and thus the "supervisory activities in connection therewith" should also be analysed separately – which would mean that none of the supervisory activities would satisfy the "more than six months" test.

Art. 5(3)(b) was amended in the 2017 UN model treaty to remove the requirement that the services must relate to the same or a connected project. Thus, for Art. 5(3)(b), the 3 sets of supervisory activities should be analysed together.

However, 2 issues arise with Art. 5(3)(b): (i) does Art. 5(3)(a) constitute a more specific provision – and, if so, does it "cover the field" (i.e., exclude the separate operation of Art. 5(3)(b))?; and (ii) is the "more than 183 days in any 12 month period ..." test in Art. 5(3)(b) satisfied?

Re (i): In my view, Art. 5(3)(a) is a more specific provision: it applies specifically to supervisory services. However, there is no support in the UN Comm. for the "cover the field" argument – in my view, it does not apply.

Re (ii): One or more ACo employees furnish the services for a total of 8 months (i.e., Feb, Mar, May, Jun, Jul, Aug, Sep, Oct). However, it's unclear on how many days during those 8 months the services are furnished. If the employees do not work on weekends or public holidays, it's likely that the "more than 183 days in any 12 month period ..." test in Art. 5(3)(b) is not satisfied.

1.2 Art. 12A:

The fees probably qualify as "fees for technical services" in Art. 12A(3). If so, then B is allowed (in principle) to levy income tax on the fees, subject to the gross rate limit in Art. 12A(2). However, if ACo has a PE in B under Art. 5(3)(b) (see above), then Art. 7 will apply instead of Art. 12A(2) – thereby allowing B to impose income tax on a "net" basis, with no rate limitation.

2. Salaries paid to ACo's employees

Each employee would qualify for the exemption from B income tax in Art. 15(2) if: (i) that particular employee was present in B "for a period or periods not exceeding in the aggregate 183 days in any twelve-month period ..."; and (ii) ACo does not have a PE in B. If either of these 2 conditions is not satisfied, then Art. 15(1) would allow B to impose income tax on the salary which relates to the exercise of the employment in B.

Re (i): If an employee was assigned to 2 or more of the contracts, then it's possible that that employee was present in B for an aggregate period exceeding 183 days. However, if each employee was assigned to only one contract, it's likely that condition (i) would be satisfied.

Re (ii): see Art. 5(3)(b) (above).



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