ITB International Tax Bytes *by Steve Towers*

"International tax news, explained"

23 September 2022

HIGHLIGHTS

- **International tax cases**
  - **Indian case on "most favoured nation" provision in India / Netherlands treaty**
  - **Belgian case on DAC6 and legal professional privilege**
  - **European Court of Justice case on final losses incurred by PE in another EU Member State – showing significant impact of double tax treaty**
- **Continuation of detailed review of GloBE model rules**
  - **Today: Art. 6.1 on application of consolidated revenue threshold to group mergers and demergers**

HAPPY FRIDAY!

The **British** show how to queue; everyone's leaving **Russia**; and a cheating scandal rocks **chess**!

Meanwhile, in the tax world…

Biden emphasizes **US** support for the **GloBE rules**; **Philips** is favoured, but **Belgium** does not feel privileged; **Germany** is allowed to discriminate; the **Netherlands** seeks to protect its real estate; **Nigeria** introduces yet another levy; and the **US** goes easy on **Puerto Rico**!

But at the end of the week, the most important question is this: **"How do you cheat at chess?"**

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. Other global developments
4. GloBE model rules: detailed review
5. Asia Pacific
   - Australia
6. Europe
   - Belgium, ECJ, Finland, Netherlands, UK
7. Africa
   - Nigeria
8. Americas
   - US
9. Treaty news

ITB series on Pillars One & Two

- **GloBE model rules:**
  - **Art. 6.1: application of consolidated revenue threshold to group mergers and demergers (ITB, 23 September 2022)**
  - **Scope: Art. 1.5 (definition of "Excluded Entity") (ITB, 1 July 2022)**
  - **Scope: Arts. 1.1 to 1.4 (ITB, 24 June 2022)**
  - **Charging Provisions (parts 1 to 5) (ITB, 6, 13 & 20 May; 10 & 17 June 2022)**
  - **Computation of Effective Tax Rate and Top-up Tax (Parts 1 to 6) (ITB, 18 & 25 March; 1, 8, 22 & 29 April 2022)**
  - **Flow-through Entities and Hybrid Entities (ITB, 4 March 2022)**
  - **Computation of Adjusted Covered Taxes (Parts 1 to 9) (ITB, 11, 18 & 25 February; 29 July; 5,12,19 & 26 August; 16 September 2022)**
  - **Computation of GloBE Income or Loss (Parts 1 to 4) (ITB, 7, 14, 21 & 28 January 2022)**
- **Progress Report on Amount A in Pillar One (ITB: 22 July 2022)**
- **Draft model rules for Amount A in Pillar One:**
  - **Tax certainty (ITB, 10 June 2022)**
  - **Regulated Financial Services exclusion from scope (ITB, 13 May 2022)**
  - **Extractives exclusion (ITB, 22 April 2022)**
  - **Scope (ITB, 8 April 2022)**
  - **Tax base determination (ITB, 25 February 2022)**
  - **Nexus and revenue sourcing (ITB, 11 February 2022)**
- **Inclusive Framework's final agreement on Pillars One & Two (ITB, 15 October 2021)**

WORTH READING

Heydon Wardell-Burrus
"Pillar Two and Developing Countries: The STTR and GloBE Implementation"
Oxford University Centre for Business Taxation, 16 September 2022, freely available at www.ssrn.com (and posted by the author on LinkedIn)

Reuven S. Avi-Yonah and Mohanad Salaimi
"Minimum Taxation in the United States in the Context of GloBE"
Intertax, Kluwer, Volume 50 (2022), Issue 10 (subscription service)

Savvas Kostikidis and Florian Striefler
"Fictitious Interest and Dividends Under Tax Treaties and the EU Directives"
EC Tax Review, Kluwer, Volume 31 (2022), Issue 5 (subscription service)

INTERNATIONAL TAX QUIZ

THIS WEEK'S NEW QUIZ

ACo Group (with ACo as its parent company) and BCo Group (with BCo as its parent company) are not under common control. Neither Group has ever been "within scope" of the GloBE rules.

The 2 Groups report these consolidated revenues in Years 1 to 4 (all in EUR millions):

- Year 1:
  - ACo Group: 450 (including revenue of 150 from sales to BCo Group)
  - BCo Group: 350
- Year 2:
  - ACo Group: 300
  - BCo Group: 400
- Year 3:
  - ACo Group: 300
  - BCo Group: 420
- Year 4:
  - ACo Group: 360
  - BCo Group: 500

At the start of Year 5, ACo acquires all of the shares in BCo, for cash consideration.

In Year 5, the ACo Group reports consolidated revenue of EUR 900 million.

At the start of Year 6, ACo distributes all of the shares in BCo, to ACo's shareholders.

In Year 6:

- ACo Group reports consolidated revenue of EUR 200 million
- BCo Group reports consolidated revenue of EUR 760 million

Based on these facts, is the ACo Group and/or the BCo Group "within scope" of the GloBE rules in Years 1 to 6?

Answer in next ITB email alert!

LAST WEEK'S QUESTION

ACo is the only Constituent Entity (within an in-scope MNE Group) which is located in jurisdiction A. The Fiscal Year for the MNE Group is the calendar year. The MNE Group has Constituent Entities which are located in 10 jurisdictions.

Jurisdiction A imposes a corporate income tax with a 10% rate.

In 2023:

- ACo incurs a tax loss (for jurisdiction A corporate income tax purposes) of 100, which it can carry forward indefinitely
- If the GloBE rules were applicable to ACo in 2023, ACo would have incurred a GloBE Loss of 70 in 2023. The difference between the tax loss (100) and the notional GloBE Loss (70) is due to a "double deduction" for certain expenditure, which is allowed under the jurisdiction A corporate income tax law
- The GloBE rules are not effective, in 2023, in any jurisdiction where the MNE Group operates

In 2024:

- ACo derives taxable income (for jurisdiction A corporate income tax purposes) of 100, before deducting (in full) the carry-forward tax loss
- If the GloBE rules were applicable to ACo in 2024, ACo would have derived GloBE Income of 100 in 2024
- The GloBE rules are effective in jurisdiction B, from the start of 2024. The MNE Group includes BCo, a Constituent Entity which is located in jurisdiction B (BCo does not own, directly or indirectly, any shares in ACo)
- The GloBE rules are not effective, in 2024, in any other jurisdiction where the MNE Group operates

In 2025:

- ACo derives taxable income (for jurisdiction A corporate income tax purposes) of 100
- If the GloBE rules were applicable to ACo in 2025, ACo would have derived GloBE Income of 100 in 2025
- The GloBE rules are effective in jurisdiction U (where the UPE is located), from the start of 2025
- The GloBE rules are not effective, in 2025, in any jurisdiction where the MNE Group operates, other than jurisdictions B and U

Based on these facts, and ignoring the Substance-based Income Exclusion and Qualified Domestic Minimum Top-up Tax, does ACo have Top-up Tax in 2023, 2024 or 2025?

LAST WEEK'S ANSWER

(1) Introduction:

The GloBE rules are first effective, in any jurisdiction where the MNE Group operates, in 2024 – i.e., in jurisdiction B.

Therefore, 2024 is the "Transition Year" (defined in Art. 10.1.1) for the MNE Group, in regard to all jurisdictions (including jurisdiction A) where the MNE Group operates in 2024.

Thus, ACo's deferred tax balances at the beginning of 2024 must be determined: Art. 9.1.1.

(2) 2023:

No Top-up Tax in 2023.

(3) 2024:

The first step is to determine the opening balance in the deferred tax asset for the 2023 tax loss. Prima facie, the deferred tax asset = 100 x 15% = 15 (with 15% recast: Art. 9.1.1). However, under Art. 9.1.2, 30 of the tax loss (i.e., the amount which is referable to the "double deduction" for certain expenditure), is excluded. Thus, the opening deferred tax asset is: 70 x 15% = 10.5

Next, the Adjusted Covered Taxes, ETR and Top-up Tax are calculated:

- Adjusted Covered Taxes: 0 (current tax expense) + 10.5 (Total Deferred Tax Adjustment Amount – i.e., reversal of deferred tax asset) = 10.5
- GloBE Income: 100
- ETR: 10.5 / 100 = 10.5%
- Top-up Tax: 4.5% x 100 = 4.5 – which would be imposed in jurisdiction B as UTPR.

(4) 2025:

- Adjusted Covered Taxes: 10 (current tax expense) + 0 (Total Deferred Tax Adjustment Amount) = 10
- GloBE Income: 100
- ETR: 10 / 100 = 10%
- Top-up Tax: 5% x 100 = 5 – which would be imposed in jurisdiction U as IIR (nil would be imposed in jurisdiction B as UTPR: Art. 2.5.2).

Do you agree?