ITB International Tax Bytes *by Steve Towers*

"International tax news, explained"

9 December 2022

HIGHLIGHTS

- **Latest developments on Pillars One & Two**
  - **OECD releases consultation document on Amount B in Pillar One**
  - **Hungary still refuses to support proposed EU Directive on GloBE rules**
- **Recent international tax cases**
  - **"Exit tax" case from Germany**
  - **PE case from India**
  - **Transfer pricing case from France**
- **Colombia's tax reform bill passed by Congress**

HAPPY FRIDAY!

Germany dodges a bullet; **Spotify** is a wrap; and **Debra** is suspended for having too many interlinkages!

Meanwhile, in the tax world…

The **OECD** moves from A to B; the **EDF's** bonds are incomparable; **Redington's "Dollar Team"** requires change; **Papua New Guinea** doesn't like banks; **Kenya's** minimum tax is not fair; **Colombia** tries to save non-renewable resources; and **Uruguay** says that royalties have their limits!

But at the end of the week, the most important question is this: **"Cristiano who?"**

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. Asia Pacific
   - China, Papua New Guinea, Singapore
4. Europe
   - Windfall profits taxes, EU, Germany, Italy
5. Africa
   - Kenya, South Africa
6. Americas
   - Colombia, Ecuador, Uruguay
7. Treaty news

ITB series on Pillars One & Two

- **GloBE model rules:**
  - **Art. 7.4 on ETR computation for Investment Entities (ITB, 2 December 2022)**
  - **Corporate Restructurings and Holding Structures (Parts 1 to 7) (ITB, 23 & 30 September; 7, 14 & 21 October; 11 & 18 November 2022)**
  - **Scope (Parts 1 & 2) (ITB, 24 June; 1 July 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
"State Strategic Responses to the GloBE Rules"
Oxford Centre for Business Taxation, 1 December 2022 (freely available on www.ssrn.com)

Robert Goulder
"CJEU to the Rescue: As Goes *Fiat*, So Goes *Apple*"
Tax Notes Today International, Tax Analysts, 6 December 2022 (subscription service)

INTERNATIONAL TAX QUIZ

THIS WEEK'S NEW QUIZ

ACo, a company located in jurisdiction A, is the UPE of an MNE Group which is "within scope" of the GloBE rules. Jurisdiction A has a corporate income tax rate of 25%. ACo has no tax losses.

ACo directly owns 100% of the shares in XCo, a company located in jurisdiction X. Jurisdiction X has a corporate income tax rate of 20%. XCo has no tax losses.

XCo directly owns 100% of the shares in YCo, a company located in jurisdiction Y. Jurisdiction Y does not levy a corporate income tax.

In the current year, YCo derives 200 of profits, comprising (1) 100 of interest income (no related expenses), and (2) 150 of service fees (less 50 of related expenses). YCo does not incur any foreign withholding taxes.

Jurisdiction X has CFC rules. Under those rules, an amount equal to YCo's 100 of interest income is imputed to XCo.

Jurisdiction A also has CFC rules. Under those rules, an amount equal to the whole of YCo's profits (i.e., 200) is imputed to ACo. However, ACo will obtain a credit for the CFC tax paid by XCo on the same amount.

Based on this limited information, what will be YCo's Adjusted Covered Taxes in the current year?

Answer in next ITB email alert!

LAST WEEK'S QUESTION

ACo, a company located in jurisdiction A, is the UPE of an MNE Group which is "within scope" of the GloBE rules.

BCo is a company located in jurisdiction B (which has not implemented a QDMTT). BCo qualifies as an "Investment Fund" (Art. 10.1.1 definition). BCo has one class of issued shares.

ACo owns a 60% Ownership Interest in BCo. The other 40% Ownership Interests are owned by third party investors.

ACo includes BCo's financial results in its consolidated financial statements on a line-by-line basis.

In the current year, BCo reports 200 of pretax profits in its financial statements. Included in those pretax profits are: (1) dividends on long-term (greater than 12 months) portfolio shareholdings: 65; (2) gains on sale of such shareholdings: 35; (3) interest on corporate and government bonds: 60; and (4) gains on sale of such bonds: 40. Please ignore expenses.

BCo is tax-exempt in jurisdiction B. Also, please assume that BCo does not incur any foreign withholding tax, and it does not have any "Eligible Employees" (Art. 10.1.1 definition) or "Eligible Tangible Assets" (Art. 5.3.4 definition). In addition, please assume that no election is made under Art. 7.5 or Art. 7.6.

ACo is subject to CFC tax in jurisdiction A with respect to its investment in BCo. For the purposes of the CFC rules, BCo's interest income and gains on sale of bonds, are taxable. The CFC tax rate is 25%.

Based on this information, what is BCo's Top-up Tax (if any) for the current year?

LAST WEEK'S ANSWER

BCo's GloBE Income = 200 – 65 ("Excluded Dividends": Art. 10.1.1 definition) = 135.

The 35 of gains on sale of long-term portfolio shareholdings are not "Excluded Equity Gain or Loss" (Art. 10.1.1 definition) because of the exception for Portfolio Shareholdings.

For the purposes of Art. 7.4, the MNE Group's Allocable Share of BCo's GloBE Income is: 60% x 135 = 81.

BCo is tax-exempt in jurisdiction B and does not incur any foreign withholding tax. Therefore, subject to Art. 4.3, BCo's Adjusted Covered Taxes would be nil.

However, ACo incurs a CFC tax rate of 25% in regard to BCo's interest income (60) and gains on sale of bonds (40). Thus, ACo's CFC tax is: 25% x 100 x 60% = 15 – i.e., reflecting ACo's 60% Ownership Interest in BCo.

Prima facie, that 15 is allocated to BCo under Art. 4.3.2(c). However, both the interest income and the gains on sale of bonds, fall within the definition of "Passive Income" in Art. 10.1.1. Therefore, the "cap" in Art. 4.3.3 will need to be applied. The amount in para. (a) is 15. The amount in para. (b) is calculated as: 15% x 100 = 15. Accordingly, based on the numbers, the cap does not restrict the tax allocated to BCo. (Note that the 35 of gains on sale of long-term portfolio shareholdings is excluded from the definition of "Passive Income" by the closing words in the definition: "but only to the extent …").

Therefore, BCo's Adjusted Covered Taxes will be 15.

In calculating BCo's ETR, Art. 7.4.2 requires us to use the MNE Group's Allocable Share of BCo's GloBE Income – i.e., 81.

Accordingly, BCo's ETR is: 15 / 81 = 18.5185%. Thus, BCo has no Top-up Tax Percentage: Art. 7.4.5.

Which means that BCo has no Top-up Tax.

Do you agree?

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