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20 January 2023



HIGHLIGHTS

- **Danish beneficial ownership cases**
 - "Look through" approach applied in context of conduit companies
- **OECD releases updated estimates of tax revenue gains from implementation of Pillars One & Two**
- **Interesting double tax treaty case from India**
 - Surprising view taken of "arising" definition in royalties article

HAPPY FRIDAY!

China is moving 2 billion times, but **Covid-19** is not leaving; **Jacinda** has nothing left in the tank; and **Tim Cook** takes a pay cut!

Meanwhile, in the tax world...

The **OECD** counts its money, but **Colombia** is not happy; the **EU** lacks incentives; **China** rewrites VAT; **India** deems arising to be not exhaustive; **Belarus** increases rates; **Hungary** sees windfalls everywhere; and **Kazakhstan** raises the bar!

But this week's most surprising news: **Joe Manchin** admits that, when writing the **Inflation Reduction Act of 2022**, he didn't realise that there was no **EU / US** free trade agreement!

Gong Xi Fa Cai!

Have a great weekend!

Steve

THIS WEEK'S PODCAST

(For ITB video subscribers, please log in to access the video and documents/reports)

1. Danish beneficial ownership cases
2. Pillars One & Two
3. Trade & other global developments
4. Asia Pacific:
 - China, India
5. Europe:
 - Belarus, Belgium, ECJ, Hungary, UK
6. Africa:
 - Namibia, South Africa
7. Middle East & Central Asia:
 - Kazakhstan

ITB series on Pillar One

- **Draft MLC provisions for commitments on DSTs and other relevant similar measures (ITB, 6 January 2023)**
- **Consultation document on Amount B in Pillar One (ITB, 16 December 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 from scope (ITB, 22 April 2022)
 - Scope (ITB, 9 April 2022)
 - Tax base determinations (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)**

ITB series on Pillar Two

- **GloBE Implementation Framework:**
 - Tax Certainty for the GloBE rules (ITB, 13 January 2023)
 - GloBE Information Return (ITB, 13 January 2023)
 - Guidance on Safe Harbours and Penalty Relief (ITB, 6 January 2023)
- **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 4) (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)

WORTH READING

Grace Perez-Navarro
"What Does Pillar Two's Global Minimum Tax Mean for Tax Incentives?"
Interfax, Kluwer, Volume 51 (2023), Issue 2 (subscription service)

Khrystyna Franchuk
"The Assistance of Examples of the Application of the Principal Purpose Test in the Commentary on Article 29(6) of the OECD Model in Establishing the Legal Certainty of the Test"
International Tax Studies, IBFD, 2022 (Volume 5), No. 11 (subscription service)

Andrea Purpura
"DAC9: Some (potential) Incompatibility Profiles with Article 8 ATAD"
Interfax, Kluwer, Volume 51 (2023), Issue 1 (subscription service)

INTERNATIONAL TAX QUIZ

THIS WEEK'S NEW QUIZ

XCo, a company located in jurisdiction X, is a Constituent Entity in an MNE Group which is "within scope" of the GloBE rules. XCo, a small manufacturing company, is the only Constituent Entity located in jurisdiction X.

YCo, a company located in jurisdiction Y, is also a Constituent Entity in the MNE Group. YCo is the only Constituent Entity located in jurisdiction Y.

The UPE is located in jurisdiction U.

For 2024, the GloBE rules are in effect in jurisdictions X and Y (for both jurisdictions, both the IIR and UTPR are in effect, but not a QDMTT); however, the GloBE rules are not in effect in jurisdiction U or in any of the other 8 jurisdiction in which the MNE Group has Constituent Entities.

For 2024, XCo has the following financial information (determined in accordance with the Acceptable Accounting Standard used by the UPE in preparing its consolidated Financial Statements) (all in EUR millions):

1. Profit before Income Tax: 1.4
2. Revenue: 9
3. Income tax expense (100% Covered Taxes, no "uncertain tax positions"): 0.2
4. Negative adjustments (i.e., reductions) (under Art. 3.2 and following) in computing GloBE Income (note: there are no positive adjustments): (0.5)
5. Adjusted Covered Taxes: 0.1
6. Substance-based Income Exclusion: 0.6

And for 2024, YCo has the following financial information (determined in accordance with the Acceptable Accounting Standard used by the UPE in preparing its consolidated Financial Statements) (all in EUR millions):

1. Profit before Income Tax: 1.2
2. Revenue: 15
3. Income tax expense (100% Covered Taxes, no "uncertain tax positions"): 0.1
4. Net positive adjustments (i.e., add-back) (under Art. 3.2 and following) in computing GloBE Income: 2.0
5. Adjusted Covered Taxes: 0.3
6. Substance-based Income Exclusion: 0.4

Based on this information, will either or both of XCo and YCo have a tax liability under the GloBE rules for 2024?

Answer in next ITB email alert!

LAST WEEK'S QUESTION

ACo, a company located in jurisdiction A, is a Constituent Entity in an MNE Group which is "within scope" of the GloBE rules. ACo is the only Constituent Entity located in jurisdiction A. Jurisdiction A has a corporate income tax rate of 20%.

The UPE is a large manufacturing company which is located, and has significant manufacturing operations, in jurisdiction U. The UPE has 3 subsidiaries (including ACo) located outside jurisdiction U. The 3 subsidiaries are low-risk buy / sell distributors of the UPE's goods: they own no valuable IP, they own no inventory (they buy goods from the UPE on a "flash title" basis), and they operate from leased premises.

For the 2024 fiscal year, jurisdiction A is the only jurisdiction (in which the MNE Group operates) for which the GloBE rules are in effect (IIR, UTPR, and QDMTT).

UPE enjoys a tax incentive in jurisdiction U, causing its ETR (calculated under the GloBE rules) to be 10% in 2024. The UPE's GloBE Income in 2024 is EUR 200 million. The UPE's Substance-based Income Exclusion is EUR 80 million.

For 2024, ACo has the following financial information (determined in accordance with the Acceptable Accounting Standard used by the UPE in preparing its consolidated Financial Statements) (all in EUR millions):

1. Profit before Income Tax: 0.5
2. Revenue: 15
3. Income tax expense (100% Covered Taxes, no "uncertain tax positions"): 0.08
4. Net positive adjustments (i.e., add-back) (under Art. 3.2 and following) in computing GloBE Income: 0.6
5. Adjusted Covered Taxes: 0.08
6. Substance-based Income Exclusion: 0.4

Based on this information, will ACo have a tax liability under jurisdiction A's GloBE rules (IIR, UTPR and/or QDMTT) for 2024?

LAST WEEK'S ANSWER

1. Juris. A: de minimis exclusion (Art. 5.5)

Not applicable, as ACo's GloBE Revenue is not less than EUR 10m and its GloBE Income is not less than EUR 1m (see the Commentary's discussion on how to determine the "average" numbers in the first year when GloBE rules apply).

2. Juris. A: transitional CbGR safe harbour

Not applicable, as less than the 3 tests is satisfied: (1) de minimis test failed, because Total Revenue is not less than EUR 10m; (2) simplified ETR test failed, because computation is: 0.08 / 0.5 = 12%, which is less than Transition Rate of 15%; and (3) routine profits test failed, because Profit (Loss) before Income Tax is not equal to or less than SBIE amount.

3. Juris. A Top-up Tax

ACo's ETR: 0.08 / 1.1 = 7.2727%.

Thus, Top-up Tax Percentage = 7.2727%.

Excess Profit: 1.1 - 0.4 = 0.7

Thus, Top-up Tax = (7.2727% x 0.7) - QDMTT = 0.054 - QDMTT

Thus, jurisdiction A QDMTT = EUR 0.054m.

4. Juris. U Top-up Tax

UPE's ETR = 10%.

Thus, Top-up Tax Percentage = 5%.

Excess Profit: 200 - 80 = 120.

Thus, Top-up Tax = 5% x 120 = EUR 6m.

Jurisdiction A is the only jurisdiction (in which the MNE Group operates) for which the GloBE rules are in effect in 2024. Thus, 100% of the Top-up Tax, prima facie, should be allocated to jurisdiction A as UTPR. Note that the allocation percentage would be 100% only if ACo has at least one employee in jurisdiction A, and at least one "Tangible Asset" in jurisdiction A (e.g., office furniture); see the formula in Art. 2.6.1.

However, Art. 9.3 (exclusion from the UTPR of MNE Groups in the initial phase of their international activity) should apply here – which would mean that no Top-up Tax would be allocated to jurisdiction A under the UTPR.

5. Final answer

The only Top-up Tax which will be imposed for 2024 will be EUR 0.054m of jurisdiction A QDMTT.

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