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International Tax Bytes by Steve Towers

"International tax news, explained"

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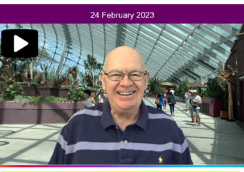
24 February 2023



HIGHLIGHTS

- **Latest developments on Pillars One & Two**
  - **Implementation of GloBE rules announced by several governments in Asia and elsewhere**
- **EU's ECOFIN updates lists of non-cooperative tax jurisdictions**
- **Administrative Guidance on GloBE rules**
  - **Completion of detailed review of QDMTTs**

HAPPY FRIDAY!

Biden goes to the war zone; **Sunak** tries to push the Northern Ireland camel through the eye of a needle; and it looks like **China's weather balloon** was, um, a weather balloon!

Jason Smith is deleted from **Mathias Cormann's** Christmas card list; the **Luxembourg** whistle-blower wins; **Gallagher** realises a loss; **Hong Kong** must gain more; **Kenya** derives withholding tax; **South Africa** needs more power; and the **GloBE rules** suddenly become fashionable!

But at the end of the week, the most important question is this: **"Do you think that the Luxembourg whistle-blower's victory was the right decision?"**

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. Administrative Guidance on GloBE rules: QDMTTs
4. Asia Pacific
   - Australia, Hong Kong, New Zealand, Singapore
5. Europe
   - ECHR, ECJ, EU, Finland, France, Turkey, UK
6. Africa
   - Kenya, Nigeria, South Africa
7. Americas
   - US

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, 8 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:**
  - **Administrative Guidance on GloBE rules: QDMTTs (Parts 1 & 2) (ITB, 10 & 24 February 2023)**
  - **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)**

WORTH READING

Michael Lennard
"Customary International Law and Tax – The Fog of Law"
Tax Notes Today International, Tax Analysts, 15 February 2023 (subscription service)

Thomas Kollruss
"The Concept of Final Losses under EU Law and its Scope of Application"
European Taxation, IBFD, 2023 (Vol. 63), No. 2/3 (subscription service)

Ryan Finley
"*3M* and the Renaissance of the Commensurate With Income Standard"
Tax Notes Today International, Tax Analysts, 21 February 2023 (subscription service)

INTERNATIONAL TAX QUIZ

THIS WEEK'S NEW QUIZ

Jurisdiction X has implemented the GloBE rules.

Jurisdiction X has a corporate income tax with a 25% tax rate. Jurisdiction X also has a minimum tax with a 20% tax rate. The computation of the minimum tax is identical to the computation of Top-up Tax under the GloBE rules, with 2 exceptions: (1) the Top-up Tax formula for the minimum tax does not subtract a QDMTT (to avoid circularity); and (2) there is no jurisdictional blending of income and taxes – i.e., each company's minimum tax liability (if any) is calculated separately. If there is a minimum tax liability for a company, that is a current tax liability for the company, even if it exceeds the amount of Top-up Tax which would otherwise apply under the GloBE rules – i.e., no part of the minimum tax is carried forward or back to other years.

XCo, a company located in jurisdiction X, is a Constituent Entity within an MNE Group which is "within scope" of the GloBE rules. XCo is the only Constituent Entity located in jurisdiction X. XCo carries on a major manufacturing business in jurisdiction X, and therefore it qualifies for a 100% exemption from jurisdiction X corporate income tax. However, XCo is subject to the jurisdiction X minimum tax.

For a Fiscal Year, XCo (1) has GloBE Income of 3,000; (2) has Substance-based Income Exclusion of 1,800; and (3) does not qualify for a safe harbour or de minimis exclusion (either under the GloBE rules or under the minimum tax).

Based on this information:
Q1: Does the jurisdiction X minimum tax qualify as a QDMTT?
Q2: Assuming the answer to Q1 is "yes", what amount of QDMTT will be imposed on XCo?
Q3: Assuming the answer to Q1 is "no", what amount of Top-up Tax (under the GloBE rules) will arise for jurisdiction X?

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.

ACo owns 90% of the shares in BCo, a company located in jurisdiction B. The other 10% of the shares in BCo are owned by third parties. BCo is the only member of the MNE Group located in jurisdiction B.

BCo owns 100% of the shares in CCo, a company located in jurisdiction C.

Jurisdictions A and B have implemented the GloBE rules (both IIR and UTPR), and they have also each implemented a QDMTT.

For a Fiscal Year:

- ACo is subject to 4 jurisdiction A taxes: (1) Corporate income tax: 100; (2) CFC tax (in respect of BCo's CFC taxable income of 1,400, which includes 400 of Passive Income): 150 (before credit for BCo's taxes), 30 (after credit for BCo's taxes); (3) IIR tax (in respect of the jurisdiction B Top-up Tax): to be determined ("TBD"); and (4) QDMTT: TBD.
- For purposes of both the GloBE rules and the QDMTT, ACo's GloBE Income is 2,000, and its Substance-based Income Exclusion ("SBIE") is 1,200.

For the same Fiscal Year:

- BCo is subject to 3 jurisdiction B taxes: (1) Corporate income tax: 50; (2) CFC tax (in respect of CCo's CFC taxable income, which does not include any Passive Income): 120 (before credit for CCo's taxes), 80 (after credit for CCo's taxes); and (3) QDMTT: TBD.
- For purposes of both the GloBE rules and the QDMTT, BCo's GloBE Income is 1,400 (including 400 of Passive Income), and its SBIE is 800.

Based on this information:
Q1: What is ACo's IIR tax liability in respect of the jurisdiction B Top-up Tax?
Q2: What is ACo's QDMTT liability?
Q3: What is BCo's QDMTT liability?

LAST WEEK'S ANSWER

(1) Art. 4.3.3 calculation for BCo

Art. 4.3.3, para. (a): ACo's CFC tax with respect to BCo's Passive Income = 30 x 400 / 1,400 = 8.57 (i.e., I have applied a proportionate approach – see my comment below).

Art. 4.3.3, para. (b):
ACo's residual CFC tax = 30 – 8.57 = 21.43 (see my comment below)
BCo's Covered Taxes = 21.43 + 50 = 71.43
BCo's ETR = 71.43 / 1,400 = 5.1%
BCo's Top-up Tax Percentage = 9.9%
Para. (b) amount = 9.9% x 400 = 39.6

Thus, Art. 4.3.3 amount = 8.57

[Note that Example 4.3.3-1 (in the Inclusive Framework's Examples document) considers a situation where 100% of the CFC taxable income comprises Passive Income. In that situation, all of the CFC tax is "with respect to such Passive Income", as referred to in Art. 4.3.3(b). In contrast, in the current question, the CFC taxable income is 1,400, of which the Passive Income is only 400. The Top-up Tax Percentage in para. (b) is calculated "without regard to the Covered Taxes incurred with respect to such Passive Income by [ACo]" – i.e., without regard to 8.57. Thus, the Adjusted Covered Taxes for the ETR calculation takes into account the CFC tax on the non-Passive Income (i.e., the residual CFC tax of 21.43.]

(2) ACo's QDMTT

GI = 2,000
SBIE = 1,200
ACT = 100 (ACo's CFC tax is not taken into account – see Administrative Guidance (AG), para. 118.28)
ETR = 100 / 2,000 = 5%
TUT% = 10%
EP = 2,000 – 1,200 = 800
QDMTT = 10% x 800 = 80

(3) BCo's QDMTT

GI = 1,400
SBIE = 800
ACT = 50 (see AG, paras. 118.28 & 118.30; and see my comment below.)
ETR = 50 / 1,400 = 3.57%
TUT% = 11.43%
EP = 1,400 – 800 = 600
QDMTT = 11.43% x 600 = 68.58

[Note that BCo's CFC tax in respect of CCo is 100% allocated to CCo, by Art. 4.3.2(c). As CCo has no Passive Income (stated in the question), then the cap in Art. 4.3.3 does not apply. As the CFC tax is allocated to CCo, it is not included in BCo's ACT.]

(4) Jurisdiction B GloBE Top-up Tax

GI = 1,400
SBIE = 800
ACT = 50 + 30 = 80
ETR = 80 / 1,400 = 5.71%
TUT% = 9.29%
EP = 1,400 – 800 = 600
TUT = (9.29% x 600) – 68.58 = 55.74 – 68.58 = 0

(5) ACo's IIR tax (with respect to jurisdiction B Top-up Tax)

Nil.

Thus, my answers:
Q1: 0
Q2: 80
Q3: 68.58
Do you agree?

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