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21 April 2023



HIGHLIGHTS

- **Latest developments on Pillar Two**
 - Nigeria comes in from the cold
 - Vietnam will introduce QDMTT, effective 1 January 2024
- **2 important decisions in India**
 - Supreme Court significantly widens scope of High Court appeals on determination of arm's length price
 - Special Bench of Mumbai ITAT: dividend distribution tax is not subject to treaty limitations
- **Detailed review of Administrative Guidance on GloBE rules**
 - Today: **Accrued Pension Expenses**

HAPPY FRIDAY!

Murdoch pays for his dominion; the Pope is unverified; and Musk goes to war with Microsoft!

Meanwhile, in the tax world...

Nigeria comes in from the cold; Vietnam is keen to start; Australia does not incentivise; India creates much more work for its High Courts; Italy imports a hybrid and exports a deduction; the Netherlands sees PEs everywhere; and Total Oil provides the total answer on DDT!

But at the end of the week, the most important question is this: "Should we be excited or worried by AI?"

Have a great weekend!

Steve

THIS WEEK'S PODCAST

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

1. Pillar Two
2. Administrative Guidance on GloBE rules: Income & taxes (part 3)
3. Asia Pacific
 - Australia, China, India, Korea
4. Europe
 - EU, Italy, Netherlands, Norway, Turkey, UK
5. Americas
 - US
6. Treaty news

ITB series on Pillar One

- **Draft MLC provisions for commitments on DSTs and other relevant similar measures (ITB, 8 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: income & taxes (Parts 1 to 3) (ITB, 31 March; 14 & 21 April 2023)
 - Administrative Guidance on GloBE rules: Scope (Parts 1 to 3) (ITB, 16, 17 & 24 March 2023)
 - Administrative Guidance on GloBE rules: Allocation of taxes arising under Blended CPC Tax Regimes (ITB, 3 March 2023)
 - Administrative Guidance on GloBE rules: QDMTTs (Parts 1 & 2) (ITB, 19 & 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

Mindy Herzfeld
"A Pillar 2 Tour Around the World"
Tax Notes Today International, Tax Analysts, April 17, 2023 (subscription service) (posted on LinkedIn by Steve Towers).

Bodil Tolstrup and Nikolai Bjørnholm
"Final Danish Decision on Beneficial Ownership with Respect to Dividends Following the ECJ Decision in the Danish Cases"
European Taxation, IBFD, 2023 (Vol. 63), No. 5 (subscription service).

Lowell D. Yoder, David G. Noren, Jonathan D. Lockhart, and Elizabeth C. Lu
"Whitpool's Subpart F Position Was Consistent With Congressional Intent"
Tax Notes Today International, Tax Analysts, April 19, 2023 (subscription service).

INTERNATIONAL TAX QUIZ

THIS WEEK'S NEW QUIZ

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

XCo has established a "defined benefit" Pension Fund in jurisdiction X to provide retirement benefits for most of its employees.

XCo's most senior employees, however, are not covered by the Pension Fund. Instead, their individual employment contracts require XCo to pay "defined benefits" directly to them after they leave XCo's employment (provided they satisfy a "minimum employment period" condition).

In Year 1:

- XCo has an accounting profit of 200 (before tax and before pension expenses)
- XCo accrues 30 of pension expenses: (1) 20, in regard to contributions to the Pension Fund; and (2) 10, in regard to the benefits to be provided to the senior employees
- XCo makes no "pension related" payments
- The jurisdiction X corporate income tax law (20% tax rate) allows deductions for: (1) contributions paid to pension funds; and (2) pension benefits paid directly to pension beneficiaries – in both cases, the deduction is allowed in the fiscal year in which the payment is made

In Year 2:

- XCo has an accounting profit of 300 (before tax and before pension expenses)
- XCo does not accrue either of the 2 pension expenses – instead, XCo pays (1) a contribution of 12 to the Pension Fund; and (2) pension benefits of 8 directly to (former) senior employees

Based on this limited information, what is XCo's GloBE Income for Year 1 and Year 2?

Answer in next ITB email alert!

LAST WEEK'S QUESTION

A Holdco, A Sub 1 and A Sub 2 are companies located in jurisdiction A. A Holdco is a direct 100% subsidiary of the UIPE of an MNE Group, which is "within scope" of the GloBE rules. A Holdco directly owns 100% of the shares in each of A Sub 1 and A Sub 2 (i.e., A Sub 1 and A Sub 2 are sister subsidiaries). A Holdco, A Sub 1 and A Sub 2 are the only Constituent Entities located in jurisdiction A. None of the companies is an Investment Entity.

Jurisdiction A has implemented a QDMTT, which is effectively identical to the GloBE rules.

The MNE Group's tax director estimates that, absent planning, the group will incur a significant QDMTT liability in the next fiscal year. In particular, the director estimates that the following numbers will apply for the next fiscal year:

- A Holdco:
 - GloBE Income: Nil
 - Adjusted Covered Taxes: Nil
- A Sub 1:
 - GloBE Income: 500
 - Adjusted Covered Taxes: 50
- A Sub 2:
 - GloBE Income: 400
 - Adjusted Covered Taxes: 48

The tax director proposes this plan: (1) A Sub 2 would subscribe for redeemable preference shares (RPS) in A Sub 1; (2) A Sub 1 would use the cash from the RPS to buy-back some of its common shares from A Holdco; (3) A Holdco would use the cash from (2) to subscribe for new common shares in A Sub 2; (4) the terms of the RPS would be drafted such that the RPS would be treated as a liability for A Sub 1 under the Acceptable Financial Accounting Standard applicable in jurisdiction A; and (5) those terms of the RPS would also require ACo 2 to treat the RPS as equity under the same Acceptable Financial Accounting Standard.

The RPS would carry a coupon dividend of 100 in the next fiscal year (the dividend would be due and payable on the last business day of that fiscal year).

The tax director explains that there will be no impact on corporate income tax, because the RPS will be treated as equity for jurisdiction A corporate income tax purposes by both A Sub 1 and A Sub 2: thus, A Sub 1 would not obtain a deduction for the coupon dividend, and A Sub 2 would qualify for a 100% exemption under the jurisdiction A corporate income tax law.

The tax director asks you whether this plan will cause a reduction in the group's QDMTT liability in the next fiscal year.

LAST WEEK'S ANSWER

A.Sub.1

If the coupon payment is an expense in calculating A Sub 1's Financial Accounting Net Income or Loss, no adjustment (in regard to the coupon payment) will be made in computing A Sub 1's GloBE Income. In particular, Art. 3.2.7 will not apply, as both A Sub 1 and A Sub 2 are located in jurisdiction A.

Thus, no adverse GloBE impact.

A.Holdco

The profit (if any) which A Holdco derives on the buy-back of common shares will qualify as "Excluded Equity Gain or Loss" (defined in Art. 10.1.1), and thus will be excluded from A Holdco's GloBE Income.

Thus, no adverse GloBE impact.

A.Sub.2

Preliminary issue: Ignoring the Administrative Guidance (AG), would the coupon receipt qualify as "Excluded Dividends"? The definition in Art. 10.1.1 (excludes dividends or other distributions in respect of a "Portfolio Shareholding" (defined in Art. 10.1.1)).

The RPS is probably not a "Portfolio Shareholding": that term is defined in Art. 10.1.1 to mean "Ownership interests in an Entity that are held by the MNE Group" – this indicates that the RPS should be considered together with the common shares in A Sub 1 held by A Holdco. Those 2 shareholdings together would carry 100% rights in regard to A Sub 1.

Thus, ignoring the AG, the coupon receipt would probably qualify as "Excluded Dividends", and would thus be excluded from A Sub 1's GloBE Income.

Impact of AG: Section 2.3 of the AG adds new Commentary to the definition of "Ownership Interest" in Art. 10.1.1: "To the extent (two) Constituent Entities have classified (an) instrument differently under the relevant accounting standard(s), the classification adopted by the issuer should be applied by the issuer and the holder for GloBE purposes".

Thus, the RPS will be treated as debt for GloBE purposes – the RPS will not be an "Ownership Interest", and the coupon receipt will not be "Excluded Dividends".

This is an adverse GloBE impact – i.e., the tax director's plan will not cause any reduction in the QDMTT position in jurisdiction A.

Do you agree?



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