

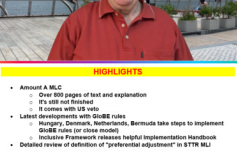
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20 October 2023



HIGHLIGHTS

- **Amount A MLC**
 - Over 600 pages of text and explanation
 - It's still not finished
 - It comes with US veto
- **Latest developments with GloBE rules**
 - Hungary, Denmark, Netherlands, Bermuda take steps to implement GloBE rules (or close model)
 - Inclusive Framework releases helpful Implementation Handbook
- **Detailed review of definition of "preferential adjustment" in STTR MLI**

HAPPY FRIDAY!

Biden blames the other team; wars rage on 2 continents; but in Washington, men in suits argue about who should be in charge of the meeting!

Meanwhile, in the tax world ...

Norway taxes the wind; "War and Peace" is republished as **Amount A; Bermuda models (but does not copy!); the OECD is performative; and Nestlé is not favoured!**

But at the end of the week, the most important question is this: **"Who will win the Rugby World Cup?"**

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. STTR MLI (part 2)
4. Asia Pacific
 - Australia, Hong Kong, India, Malaysia
5. Europe
 - EU, Norway
6. Middle East & Central Asia
 - UAE
7. Americas
 - US
8. Treaty news

ITB series on Pillar One

- **Consultation document on Amount B in Pillar One (ITB, 28 July 2023)**
- **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 2023)**
- **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:**
 - **GloBE Information Return (ITB, 28 July 2023)**
 - **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:**
 - **July 2023 Administrative Guidance on GloBE rules: GDMTTs (Parts 1 to 4) (ITB, 15, 22 & 29 September; 6 October 2023)**
 - **July 2023 Administrative Guidance on GloBE rules: Substance-based Income Exclusion (Parts 1 & 2) (ITB, 16 & 23 August 2023)**
 - **July 2023 Administrative Guidance on GloBE rules: Tax credits (Parts 1 to 3) (ITB, 4, 11 & 18 August 2023)**
 - **July 2023 Administrative Guidance on GloBE rules: overview (ITB, 28 July 2023)**
 - **Administrative Guidance on GloBE rules: Transition (Parts 1 to 3) (ITB, 16 & 23 June; 14 July 2023)**
 - **Administrative Guidance on GloBE rules: Income & taxes (Parts 1 to 6) (ITB, 31 March; 14, 21 & 28 April; 5, 12 May; 2 & 9 June 2023)**
 - **Administrative Guidance on GloBE rules: Scope (Parts 1 to 3) (ITB, 10, 17 & 24 March 2023)**
 - **Administrative Guidance on GloBE rules: Allocation of taxes arising under Blended CFC Tax Regimes (ITB, 3 March 2023)**
 - **Administrative Guidance on GloBE rules: GDMTTs (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 6) (ITB, 11, 18 & 25 February; 29 July; 5, 12, 19 & 26 August; 18 September 2022)**
 - **Computation of GloBE Income or Loss (Parts 1 to 4) (ITB, 7, 14, 21 & 28 January 2022)**
- **Subject to Tax Rule (STTR):**
 - **Subject to Tax Rule (STTR): overview (ITB, 28 July 2023)**
 - **STTR MLI (Parts 1 & 2) (ITB, 6 & 20 October 2023)**

WORTH READING

Raffaele Petrucci and Abhishek Padwalkar
"Pillar One, Pillar Two, Transfer Pricing and the Arm's Length Principle: A Tangled Web of New and Old Taxing Rules"
 Bulletin for International Taxation, IBFD, 2023 (Vol. 77), No. 10 (subscription service).

Dhruv Janssen-Sanghani and Riya Bhat
"Attributing Profits to a Former Permanent Establishment and Other Issues: A Critical Comment on Judicial Propriety and the Interpretation of the India-United Kingdom Income Tax Treaty (1993) in the Case of SIS Ltd (2023)"
 Bulletin for International Taxation, IBFD, 2023 (Vol. 77), No. 10 (subscription service).

Georg Koller
"Curla Locuta, Causa Finita: Some Further Conclusions from W AG"
 EC Tax Review, Kluwer, 2023, Issue 5 (subscription service).

INTERNATIONAL TAX QUIZ

THIS WEEK'S NEW QUIZ

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

ACo conducts a manufacturing business in jurisdiction A. ACo uses its own patents in its manufacturing business.

ACo also owns 100% of the shares in BCo, a company located in jurisdiction B. Jurisdiction B is a "developing country" as defined in the July 2023 Subject to Tax Rule (STTR) Report.

In Year 20X1, ACo licenses its patents to BCo for 10 years, for a royalty of EUR 3 million per annum. The royalty is due and payable on the last day of each year.

The jurisdiction A corporate income tax law does not tax foreign source income unless and until it is repatriated (or deemed to be repatriated) to jurisdiction A. Knowing this, and on the basis that the BCo royalties would be characterised as foreign source income under jurisdiction A law, ACo includes in the terms of the licence agreement a requirement that BCo pay the royalties into ACo's bank account in jurisdiction C. Due to ACo's control over BCo, BCo agrees to that requirement. It is ACo's intention that the royalties will never be repatriated (or deemed to be repatriated) to jurisdiction A.

The A/B treaty is identical to the 2017 OECD model treaty, with the addition of the STTR.

Under the jurisdiction B corporate income tax law, outbound royalties are subject to a 10% final withholding tax.

With respect to the EUR 3 million royalty to be paid in 20X1: (1) Does the treaty permit jurisdiction B to impose withholding tax on the royalty?; (2) if the answer to (1) is yes: (a) what will be the amount of withholding tax?; and (b) when will that withholding tax be required to be paid?; and (3) Also if the answer to (1) is yes: how will the withholding tax be treated under the GloBE rules?

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 operates a cargo air transport business between several jurisdictions in the region, including jurisdiction B.

ACo has a branch in jurisdiction B. The branch, which has 20 employees and operates from an office in an airport in jurisdiction B, enters into cargo air transport contracts with customers which want to export goods from jurisdiction B. In addition, the branch manages the logistics and customs arrangements in regard to such contracts (e.g., presenting the relevant documents to the jurisdiction B customs authorities, receiving the goods from the customers, etc.). The branch also invoices and collects payments from such customers. Finally, the branch manages the logistics and customs arrangements for goods which are imported into jurisdiction B.

The A/B double tax treaty is identical to the 2017 OECD model treaty.

Under the jurisdiction A corporate income tax law, foreign sourced "active income" (i.e., income from the conduct of a business) is exempt.

ACo also owns 75% of the shares in BCo, a company located in jurisdiction B. BCo operates a cargo air transport business within jurisdiction B. The other 30% of the shares are owned by third party investors in jurisdiction B.

Jurisdiction B has implemented a GDMTT.

Is jurisdiction B permitted to impose its GDMTT on (i) BCo, and (ii) ACo's jurisdiction B branch?

LAST WEEK'S ANSWER

BCo

Jurisdiction B is permitted to impose its GDMTT on 100% of the Top-up Tax in respect of BCo, even though the MNE Group owns only 75% of the shares in BCo: para. 118.10 of Comm on the definition of "GDMTT" in Art. 10.1.1 (introduced by Feb 2023 AG).

ACo's jurisdiction B branch

(a) 1st issue: exemption under A/B treaty?

ACo's business is the operation of aircraft in international traffic.

Although the branch would constitute a PE under Art. 5(1), the profits from the operation of aircraft in international traffic would be exempt from jurisdiction B tax under Art. 8(1).

2 sub-issues arise:

1. Would all of the branch's activities fall within the phrase, "the operation of aircraft in international traffic"? Based on the discussion in paras. 4 to 4.2 of the OECD Comm on Art. 8, in my opinion: yes, all of the branch's activities would fall within that phrase.
2. Is jurisdiction B's GDMTT a "covered tax"? In my opinion: yes, GDMTT should be a "tax on income" (Art. 2(1)). Interestingly, the OECD / IP have not yet discussed the question of whether an exemption from GDMTT should be able to be claimed under a treaty.

(b) 2nd issue: is jurisdiction B's GDMTT not permitted to apply anyway?

The branch should be a "permanent establishment" under para. (d) of the definition of that term in Art. 10.1.1. [Para. (a) should not apply, because jurisdiction B does not tax the income attributable to the branch in accordance with a provision similar to Art. 7 of the OECD model treaty.]

The branch is therefore a stateless PE (Art. 10.3.3(d)), and therefore a "Stateless Constituent Entity" (Art. 10.1.1 definition).

Para. 118.8.1 of Comm to definition of "GDMTT" in Art. 10.1.1 (introduced by July 2023 AG):

"In the case of Permanent Establishments that are Stateless Constituent Entities, jurisdictions are free to impose the GDMTT on these Entities provided that the place of business (or deemed place of business) is located therein and either there is no tax treaty applicable or there is an applicable tax treaty and the jurisdiction where the place of business (or deemed place of business) is located has the right to tax in accordance with such treaty."

In ACo's case, there is an applicable tax treaty, but jurisdiction B does not have the right to tax in accordance with such treaty. Thus, the jurisdiction B GDMTT is not permitted to apply to ACo's jurisdiction B branch.

Do you agree?



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