

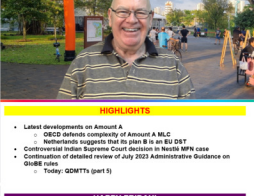
Want to learn more about ITB? Sign up for a free trial by emailing us

Free Trial

Check out our suite of subscription plans: individual (standard), student, university faculty, young professional, and enterprise

Subscribe

27 October 2023



HIGHLIGHTS

- **Latest developments on Amount A**
 - OECD defends complexity of Amount A MLC
 - Netherlands suggests that its plan B is an EU DST
- **Controversial Indian Supreme Court decision in Nestlé MFN case**
- **Continuation of detailed review of July 2023 Administrative Guidance on GloBE rules**
 - Today: QDMTTs (part 5)

HAPPY FRIDAY!

Hamas buys time; and the US finally puts its House in order!

Meanwhile, in the tax world...

The **OECD** defends complexity and "loopholes"; **Australia's High Court** cuts taxes on EVs; the **Netherlands** identifies plan B; **Hong Kong** is patently clear; **Sweden** is unconvinced; and for the **Marshall Islands**, GloBE is not plain sailing!

But, on the eve of the Rugby World Cup final, all I can say is: "Go All Blacks!"

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. Nestlé MFN case
3. Other global developments
4. July 2023 Administrative Guidance on GloBE rules: QDMTTs (part 5)
5. Asia Pacific
 - Australia, Hong Kong
6. Europe
 - ECJ, France, Ireland, Italy, Russia, Sweden, Ukraine
7. Middle East & Central Asia
 - UAE

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 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:**
 - 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: QDMTTs (Parts 1 to 5) (ITB, 15, 22 & 29 September; 6 & 27 October 2023)
 - July 2023 Administrative Guidance on GloBE rules: Substance-based Income Exclusion (Parts 1 & 2) (ITB, 18 & 25 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 8) (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 CPC Tax Regimes (ITB, 3 March 2023)
 - 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)
- **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

Robert Goulder
"Taiwan and Taxes: Don't Call it a Treaty"
Tax Notes International, Tax Analysts, Vol. 112, 16 October 2023 (subscription service).

J. Clark Armitage, H. David Rosenbloom and Arjun N. Ghosh
"Is ICAP a Viable Alternative to APAs?"
International Transfer Pricing Journal, IBFD, 2023 (Vol. 30), No. 5 (subscription service).

Ryan Finley
"Maersk Rejects Formalistic Approach to Intangible Transfers"
Tax Notes International, Tax Analysts, Vol. 112, 16 October 2023 (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. In particular, the UPE of the MNE Group is not an "Excluded Entity", as defined in Art. 1.5.1 of the GloBE rules.

XCo operates in several different sectors, including real estate. One of its real estate investments is an office building located in jurisdiction Y. All of the offices in the building are leased by XCo to unrelated lessees, in return for market-based rent. To facilitate the leasing activity (e.g., negotiate and enter into leases with lessees), and to manage the maintenance of the building, XCo employs 5 employees who are permanently located in a management office in the building. For regulatory purposes in jurisdiction Y, the leasing activity and the building are registered as a branch in jurisdiction Y.

The X/Y double tax treaty is identical to the 2017 OECD model treaty (with Art. 23B). Under the jurisdiction X corporate income tax law, the income derived in jurisdiction Y is taxable, with a credit for any jurisdiction Y tax paid.

Jurisdiction Y has implemented a QDMTT.

Is jurisdiction Y permitted to impose QDMTT on XCo's jurisdiction Y branch?

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 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.

At the beginning of 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 characterized 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?
3. Also if the answer to (1) is yes: how will the withholding tax be treated under the GloBE rules?

LAST WEEK'S ANSWER

Q.1) Art. 12(1) provides an exemption from jurisdiction B tax on the royalty.

However, does the STTR apply?

The key issue is whether the exemption from jurisdiction A tax (for as long as the royalty is not repatriated or deemed to be repatriated to A) is a "preferential adjustment", as defined in Art. 1(8)(a). That in turn raises the issue of whether that exemption is a "permanent reduction", which is defined in Art. 1(8)(b)(i).

ACo "has control over the point at which that income is recognised for tax purposes" in A, and (I assume) the royalty is not repatriated (or deemed repatriated) within 3 years following the end of 20X1. Therefore, Art. 1(8)(b)(i) will deem the exemption to be a "permanent reduction", at the expiration of 20X4.

[Two other points to note on the "permanent reduction" definition:

1. The fact that ACo controls the terms of the licence agreement is irrelevant: para. 62 of STTR Report.
2. The fact that ACo's intention is that the royalties will never be repatriated (or deemed repatriated) to jurisdiction A might allow an argument that the reduction is "not expected to reverse over time" – which would mean that the definition is satisfied in 20X1. What do you think?

The other 2 conditions in Art. 1(8)(a) will be satisfied: there is a full exemption from income, that is directly linked to the item of covered income (i.e., the royalty).

Thus, the "tax rate" on the royalty will be 0% (Art. 1(5)(a)), and the "materiality threshold" is satisfied (Art. 1(12)(a)).

Therefore, Art. 1(1) allows jurisdiction B to impose tax on the royalty.

Q.2(a)

The rate will be 9%: Art. 1(2). Thus, the jurisdiction B tax will be EUR 270,000.

Q.2(b)

The treaty conditions allowing the jurisdiction B tax to be imposed will not be satisfied until the expiration of 20X4: see above.

Therefore, I expect that the tax will be paid in 20X5, pursuant to the administrative arrangements agreed between the 2 competent authorities under Art. 1(14).

Note, however, that for jurisdiction B domestic law purposes, the tax is imposed for 20X1.

Q.3)

The jurisdiction B tax will qualify as ACo's "Covered Tax" for GloBE purposes.

In regard to timing, the tax should relate to 20X1. However, as the adjustment is an increase in ACo's liability for Covered Taxes for a previous Fiscal Year, it should be treated as ACo's "Covered Tax" in 20X5: Art. 4.6.1 (GloBE rules).

Do you agree?



Tax Quiz Archives



Email Alert Archives



Ask Steve



Referral Program



What is ITB?

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

Watch ITB video podcasts anytime, anywhere with our App!

