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3 November 2023



HIGHLIGHTS

- GloBE rules
OECD describes topics to be covered in next Administrative Guidance
Continuation of detailed review of STTR
Today: Art. 1(14) on "ex post annualised charge" - compliance issues this will raise
Continuation of detailed review of July 2023 Administrative Guidance on GloBE rules
Today: QDMTTs (part 4)

HAPPY FRIDAY!

Sweden announces that it is not Switzerland; the Beatles got back now and then; Sam is Fried; and be careful of mushrooms in Australia!

Meanwhile, in the tax world...

Jamaica jumps; Finland reserves; India guarantees 1%; Argentina extends price stability; South Africa needs registrations; and Romania turns over new taxes!

But at the end of the week, the most important question is this: "What do you think of Now and Then?"

Have a great weekend!

Steve

THIS WEEK'S PODCAST

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

- 1. GloBE rules
2. STTR (part 3)
3. July 2023 Administrative Guidance on GloBE rules: QDMTTs (part 4)
4. Asia Pacific
5. Europe
6. Africa
7. Middle East & Central Asia
8. Americas
9. Treaty news

ITB series on Pillar One

- Consultation document on Amount B in Pillar One (ITB, 26 July 2023)
Draft MLC provisions for commitments on DDTs 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 6) (ITB, 15, 22 & 29 September; 6 & 27 October; 3 November 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, 16, 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: QDMTTs (Parts 1 & 2) (ITB, 10 & 24 February 2023)
Art. 7.4 on ETR computation for Investment Entities (ITB, 3 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, 8, 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 8) (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):
STTR (Parts 1 to 3) (ITB, 6 & 26 October; 3 November 2023)
Subject to Tax Rule (STTR): overview (ITB, 28 July 2023)

WORTH READING

Oliver Treidler "A Global Conversation on the Amount B Discussion Draft" Tax Notes International, Tax Analysts, 30 October 2023 (subscription service).

Eva Ledercq, Thomas Vanhoes, and Giorgio Beretta "United Arab Emirates: The Corporate Tax Regime for Free Zones" Bulletin for International Taxation, IBFD, 2023 (Vol. 77), No. 11 (subscription service).

David Elkins "Gregory v. Helvering: A Red Herring that Shaped Tax Jurisprudence" freely available on www.ssrn.com.

Ryan Finley "Cost Sharing: Should Cash Really Be King?" Tax Notes International, Tax Analysts, 30 October 2023 (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 is the only Constituent Entity located in jurisdiction A.

The UPE is located in jurisdiction U, which has implemented the GloBE rules.

ACo conducts mining operations in jurisdiction A. Before commencing those operations, ACo signed a "tax stabilisation agreement" with the then government of jurisdiction A. Under this agreement, for a 20-year period from 2015, the government has agreed that the total amount of taxes imposed on ACo's profits for any year shall not exceed EUR 1 million. The agreement was not confirmed in any legislation enacted by jurisdiction A.

Some years after the agreement was signed, the government was defeated in a general election.

Jurisdiction A has introduced a QDMTT.

In 2025, the jurisdiction A tax authorities impose EUR 3 million of taxes on ACo. The EUR 3 million is comprised of: corporate income tax (EUR 0.4 million) and QDMTT (EUR 2.6 million).

ACo has objected to this total amount of taxes. It claims that, under the "tax stabilisation agreement", its taxes on profits for 2025 cannot exceed EUR 1 million. It therefore has asked that the total tax claim be reduced by EUR 2 million.

The jurisdiction A tax authorities have (so far) resisted ACo's claim, on the basis that (1) the "tax stabilisation agreement", which was signed by the previous government, was not properly authorised by the head of State; and (2) the "tax stabilisation agreement" was not confirmed by legislation.

Due to the uncertainty on whether the "tax stabilisation agreement" will be respected, the MNE Group has recorded a tax expense of EUR 1 million in its 2025 consolidated financial statements, and has recognised a contingent liability of EUR 2 million in the notes to those financial statements.

Under the GloBE rules, is there any Top-up Tax for 2025 in respect of jurisdiction A? If so, what is the amount?

Would your answers be different if the MNE Group recorded a tax expense of EUR 3 million in its 2025 consolidated financial statements?

Answer in next ITB email alert!

LAST WEEK'S QUESTION

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 lessors, in return for market-based rent. To facilitate the leasing activity (e.g., negotiate and enter into leases with lessors), 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 XY 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?

LAST WEEK'S ANSWER

(1) Treatment of building / branch under XY double tax treaty

XCo derives income from immovable property situated in Y. Therefore, Art. 6(1) allows Y to impose tax on that income, without limitation.

XCo's management office in the building would constitute a PE, as defined in Art. 5. The offices which are leased to lessors might not be part of that PE, or individual PEs in their own right, on the basis that they are not "at the disposal" of XCo; see para. 36 of 2017 OECD Comm to Art. 5.

In any event, regardless of the scope of the PE, Art. 7 does not apply. Art. 7(4) gives priority to Art. 6(1).

(2) Treatment of building / branch under GloBE rules

Is the definition of "Permanent Establishment" in Art. 10.1.1 satisfied?

Para. (a): no - Y does not tax the income attributable to XCo's place of business "in accordance with a provision similar to Article 7 of the OECD [model treaty]". Art. 6 is not similar to Art. 7.

Para. (b): no - There is an applicable treaty.

Para. (c): no - Y has a corporate income tax system in place.

Para. (d): no - X does not exempt the income attributable to the building / branch in Y.

As the "PE" definition in Art. 10.1.1 is exhaustive ("means"), the conclusion is that the building / branch is not a PE for GloBE purposes.

Therefore, the building / branch is not a "Constituent Entity": Art. 1.3.1.

[Aside: Is it possible that the building / branch is an "Entity", as defined in Art. 10.1.1: "an arrangement that prepares separate financial accounts, such as a partnership or trust"? MHO: no - such a conclusion would make the reference to PEs in para. (b) of Art. 1.3.1 largely redundant. Also, the word, "arrangement", suggests the involvement of one or more other persons, such as in a partnership or trust - a building or branch does not have that attribute.]

(3) QDMTT

Para. 11B.4 (of the Art. 10.1.1 definition of "QDMTT") requires that: "[a] the definition of ... Constituent Entity in the QDMTT [needs] to correspond with the [definition] in the GloBE Rules; and [b] the QDMTT must compute the tax liability for the jurisdiction by taking into account the income and covered taxes of Constituent Entities that are located in the jurisdiction as determined under the GloBE Rules."

As the building / branch is not a "Constituent Entity", there is no income and covered taxes, and therefore no Top-up Tax, for QDMTT purposes.

[Note that XCo is located, for GloBE purposes, in X: Art. 10.3.1. Thus, Y cannot impose QDMTT on XCo as a Constituent Entity.]

Thus, final answer: no, Y is not permitted to impose QDMTT on XCo's Y branch.

Do you agree?



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