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10 November 2023



HIGHLIGHTS

- Barbados announces naked QDMTT – a QDMTT without the GloBE rules!
- International tax cases
 - Apple State aid case in EU
 - Participation exemption case in Netherlands
 - Economic substance case in US
- Continuation of detailed review of July 2023 Administrative Guidance on GloBE rules
 - Today: QDMTT Safe Harbour (part 1)

HAPPY FRIDAY!

WeWork doesn't; Sri Lanka is timed out; and Glenn Maxwell releases his greatest hits!

Meanwhile, in the tax world...

Barbados goes naked; the EU is compatible; the Netherlands gains and loses; Canada notifies; Liberty Global must consider all steps; and AG Pitarussella upsets the Apple cart!

But on the eve of Diwali / Deepavali, the most important question is this: "Will India win the Cricket World Cup, or have they peaked too early?"

Have a great weekend!

Steve

THIS WEEK'S PODCAST

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

- GloBE rules and Amount A
- Other global developments
- July 2023 Administrative Guidance on GloBE rules: QDMTT Safe Harbour (part 1)
- Asia Pacific
 - Australia, Japan, Singapore
- Europe
 - ECJ, Netherlands
- Africa
 - South Africa
- Middle East & Central Asia
 - UAE
- Americas
 - Canada, US
- 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 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: QDMTT Safe Harbour (Part 1) (ITB, 10 November 2023)
 - 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, 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):
 - STTR (Parts 1 to 3) (ITB, 6 & 20 October; 3 November 2023)
 - Subject to Tax Rule (STTR): overview (ITB, 28 July 2023)

WORTH READING

Ricardo André Galand Junior
"The Single Top-Up Tax Principle: Justification, Content and Functions upon the Design of QDMTTs"
World Tax Journal, IBFD, 2023 (Vol. 5), No. 4 (subscription service).

Femke van der Zeijden and Hanna Myronichova
"Where and How Do Tax and 'Environmental, Social and Governance' Factors Intersect?"
European Taxation, IBFD, 2023 (Vol. 63), No. 12 (subscription service).

T. Givi Hady Daholl and Andreas Rossi Dewantara
"Indonesian 'Sixth Method' on Intercompany Sales in Coal Mining Industries"
International Transfer Pricing Journal, IBFD, 2023 (Vol. 30), No. 6 (subscription service).

INTERNATIONAL TAX QUIZ

THIS WEEK'S NEW QUIZ

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

The UPE, a company located in jurisdiction U, directly owns 100% of the shares in XCo, a company located in jurisdiction X.

XCo directly owns 100% of the shares in YCo.

Both the U/Y double tax treaty and the X/Y double tax treaty are identical to the 2017 OECD model treaty.

For the 2024 fiscal year:

- Jurisdiction Y has implemented a QDMTT
- Jurisdictions U, X and Y have not implemented IIRs or UTPRs
- No other jurisdiction in which the MNE Group operates has implemented a UTPR

Jurisdiction Y's QDMTT is identical to the GloBE rules, except that it complies with the 2 mandatory variations described in chapter 5 of the July 2023 AG. The QDMTT does not apply to entities in "within scope" MNE Groups if the UPE is located in jurisdiction Y.

YCo forecasts that it will be subject to QDMTT tax for 2024.

YCo has asked you whether it will be able to avoid paying the QDMTT, based on either the U/Y or X/Y double tax treaty.

What is your advice?

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 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 disclosed 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?

For both sets of questions, please ignore the QDMTT Safe Harbour.

LAST WEEK'S ANSWER

Scenario 1: EUR 1 million tax expense, EUR 2 million contingent liability

The fundamental issue is this: what is the "amount payable", under a QDMTT, for the purposes of the Top-up Tax formula in Art. 5.2.3?

Under the general rule, the amount of the "QDMTT payable" "shall be equal to the amount accrued by the Constituent Entities in the jurisdiction for the Fiscal Year", para. 20.1 of Comm to Art. 5.2.3.

Threshold issue: has the contingent liability been "accrued"?

Under IAS 37 (Provisions, Contingent Liabilities and Contingent Assets), an entity shall not recognise a contingent liability (para. 37), but instead shall disclose the contingent liability (para. 86).

Para. 20.1 and related paragraphs do not discuss the meaning of the word, "accrued".

On balance, I think that a contingent liability is not "accrued", for the purposes of para. 20.1.

If that is correct, then the next issue is this: how much of the tax expense of EUR 1 million relates to corporate income tax (CIT) and how much relates to QDMTT?

Again, there is no guidance on this issue in the Comm. I think a reasonable approach would be to pro-rate the EUR 1 million tax expense between the 2 types of taxes. This would mean that EUR 133,333 would relate to CIT and EUR 866,667 would relate to QDMTT.

Under the exception to para. 20.1, the balance of the QDMTT (i.e., EUR 1,733,333) would not be "QDMTT payable". This would mean that the Top-up Tax under Art. 5.2.3 would be EUR 1,733,333.

Scenario 2: EUR 3 million tax expense

We need to work out how much of the EUR 1 million cap under the "tax stabilisation agreement" relates to CIT and how much relates to QDMTT.

Using the same "pro-rating" approach as above, we would compute the same numbers: EUR 133,333 would relate to CIT and EUR 866,667 would relate to QDMTT.

Under the exception to para. 20.1, the balance of the QDMTT (i.e., EUR 1,733,333) would not be "QDMTT payable". This would mean that the Top-up Tax under Art. 5.2.3 would be EUR 1,733,333.

Do you agree?



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