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17 November 2023



**HIGHLIGHTS**

- **OECD model double tax treaty**
  - OECD proposes optional "deemed PE" provision, for extractible natural resources
- **SKAT case in UK**
  - Supreme Court reaffirms "revenue rule", but limits its application
- **Continuation of detailed review of July 2023 Administrative Guidance on GloBE rules**
  - Today: QDMTT Safe Harbour (part 2)

**HAPPY FRIDAY!**

Joe wishes Mrs Xi a happy birthday; Netflix goes live; Optus says "No", and Apple changes its message!

Meanwhile, in the tax world...

EU Member States try to beat the clock; the US wants to change the goalposts; 30 days is the new 6 months; Australia tries to stop leaking; SKAT wins on fraud; Brazil simplifies from 5 to 2; and Bulgaria imposes its own pass-through cost!

But on the eve of the Cricket World Cup Final, between Australia and India, all I can say is: "Go Aussies!"

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 and Amount A
2. OECD model treaty: proposed "extractible natural resources" PE
3. Other global developments
4. July 2023 Administrative Guidance on GloBE rules: QDMTT Safe Harbour (part 2)
5. Asia Pacific
  - Australia, Malaysia, Sri Lanka
6. Europe
  - Greece, Hungary, Netherlands, UK
7. Middle East & Central Asia
  - UAE
8. Americas
  - Brazil
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 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, 23 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, 26 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 (Parts 1 & 2) (ITB, 16 & 17 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, 16 & 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, 26 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, 16 & 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)
  - Changing Provisions (Parts 1 to 5) (ITB, 4, 13 & 20 May; 16 & 17 June 2022)
  - Computation of Effective Tax Rate and Top-up Tax (Parts 1 to 6) (ITB, 16 & 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 2022)
  - Subject to Tax Rule (STTR): overview (ITB, 26 July 2023)

**WORTH READING**

Vinay Kapoor, Sayantani Ghose, Hans Gerling, and Sherif Assaf "Transfer Pricing of Financial Transactions – A Challenging Landscape" Tax Notes International, Tax Analysts, Vol. 112, 13 November 2023 (subscription service).

Sri Yatsa Sohra and Apoorv Tiwari "Theoretical Underpinnings and Practical Considerations in Taxing Excess Profits" Bulletin for International Taxation, BFD, 2023 (Vol. 77), No. 12 (subscription service).

Karim Tourmous and Aurelie Soldat "VAT and the Concept of Fixed Establishment: The Cabot Plastics Belgium Case" International VAT Monitor, BFD, 2023 (Vol. 34), No. 6 (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. XCo is the only Constituent Entity located in jurisdiction X.

The UPE is a company located in jurisdiction U, which has implemented the GloBE rules. The UPE's "Ownership Interest" in XCo is 100%.

Jurisdiction X has also implemented the GloBE rules and a QDMTT.

For the purposes of computing GloBE income under the QDMTT, jurisdiction X requires its local accounting standard to be used, instead of the accounting standard which applies for the consolidated group accounts. That local accounting standard is an "Acceptable Financial Accounting Standard" for the purposes of the GloBE rules. Jurisdiction X also requires that local accounting standard to be used for the purpose of computing its corporate income tax.

Apart from that difference in accounting standard and apart from the 2 "mandatory variations" described in chapter 5 of the July 2023 AG, jurisdiction X's QDMTT is identical to the GloBE rules.

For the purposes of the GloBE rules, the jurisdiction X Jurisdictional Top-up Tax (before deducting QDMTT payable) in a fiscal year is EUR 2 million.

The jurisdiction X QDMTT charge imposed on XCo for that fiscal year is EUR 1.4 million.

Q1: Based on this information, what amount of IIR tax is payable by UPE, in regard to jurisdiction X?

Q2: What would be your answer to Q1, if the UPE's "Ownership Interest" in XCo is 80%, but all other facts and figures are unchanged?

Answer in next ITB email alert on 1 December 2023!

**LAST WEEK'S QUESTION**

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:

1. Jurisdiction Y has implemented a QDMTT
2. Jurisdictions U, X and Y have not implemented ETRs or UTPRs
3. 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.

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?

**LAST WEEK'S ANSWER**

1. Art. 2 (U/Y and X/Y treaties)

QDMTT should be a tax "on income", and therefore within the scope of the treaty: Art. 2(1).

2. Art. 4 (U/Y and X/Y treaties)

The question states that YCo is "located" in Y, under the GloBE rules.

I will assume that this means that YCo is resident in Y only, under each of the 2 treaties.

3. Scope of Y's QDMTT

The question states that 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."

This means that Y's QDMTT applies only to Constituent Entities (located in Y) of MNE Groups which are "within scope" of the GloBE rules.

Therefore, Y's QDMTT does not apply to Y-resident companies which are members of groups which are not "within scope" of the GloBE rules – e.g., (i) MNE Groups which fall outside the scope of the GloBE rules, and (ii) 100% domestic groups.

4. Art. 24(5) (U/Y and X/Y treaties)

[Note: (a) Art. 24(1) to (5) apply to taxes of every kind and description, notwithstanding Art. 2: Art. 24(6); and (b) Art. 24 is an exception to the "saving clause" in Art. 1(3).]

Under Art. 24(5) of each treaty, YCo is an "enterprise of a Contracting State, the capital of which is wholly or partly owned or controlled, directly or indirectly, by one or more residents of the other Contracting State".

Therefore, Art. 24(5) requires that YCo not be subjected in Y "to any taxation ... which is other or more burdensome than the taxation ... to which other similar enterprises of [Y] are or may be subjected."

Which companies are the "other similar enterprises of [Y]"?

A possible answer is that "other similar enterprises of [Y]" would include Y-resident companies which are members of groups which are not "within scope" of the GloBE rules – e.g., (i) MNE Groups which fall outside the scope of the GloBE rules, and (ii) 100% domestic groups.

If that were the correct answer, then Art. 24(5) would prevent Y's QDMTT from applying to YCo.

An alternative approach would be to argue that Y's QDMTT is imposed on YCo because it is a member of an "in scope" MNE Group; however, it is not imposed on YCo because its capital is wholly or partly owned or controlled, directly or indirectly, by one or more residents of the other Contracting State. In other words, the ownership or control by UPE or XCo is not the reason for Y's QDMTT to be imposed on YCo. And, therefore, Y's QDMTT imposed on YCo would not be impacted by Art. 24(5).

This alternative approach, although not self-evident on the face of Art. 24(5), is consistent with the narrow view of Art. 24 which has been taken by the OECD Comm.

At present, there is no guidance on the treatment of QDMTTs under Art. 24. On balance, I think that the alternative approach will probably be endorsed by the IF.

**5. Final answer**

YCo will probably not be able to avoid paying the QDMTT, based on either the U/Y or the X/Y treaty.

Do you agree?



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