

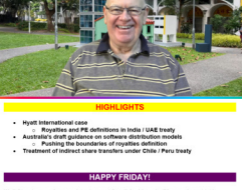
Want to learn more about ITBT? Sign up for a free trial by emailing us

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

Free Trial

Subscribe

26 January 2024



HIGHLIGHTS

- Hyatt International case
 - Royalties and PE definitions in India / UAE treaty
- Australia's draft guidance on software distribution models
 - Pushing the boundaries of royalties definition
- Treatment of indirect share transfers under Chile / Peru treaty

HAPPY FRIDAY!

Wall Street soars; Amazon intrudes; and Saudi Arabia waits 70 years for a drink!

Meanwhile, in the tax world...

Hyatt knows how; Australia pushes royal boundaries; for extractives, 30 days is not long enough; Fox goes live; India has double margins; Malta increases expenses; and everyone is waiting for Amount B!

But with Chinese New Year fest approaching, the most important question is this: "Will you be Spring cleaning this weekend?"

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 B
- Hyatt International case
- Australia: software distribution models and "royalties" definition
- Other global developments
- Asia Pacific
 - India, Philippines
- Europe
 - Malta
- Americas
 - Peru
- 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, 8 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)
 - Hexus 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:
 - December 2023 Administrative Guidance on GloBE rules: Transitional CbCR Safe Harbour (Part 1) (ITB, 19 January 2024)
 - GloBE rules commence operation in 2024 (ITB, 12 January 2024)
 - December 2023 Administrative Guidance on GloBE rules: overview (ITB, 22 December 2023)
 - July 2023 Administrative Guidance on GloBE rules: Transitional UTPR Safe Harbour & Summary of Safe Harbours (ITB, 8 December 2023)
 - July 2023 Administrative Guidance on GloBE rules: QDMTT Safe Harbour (Parts 1 & 2) (ITB, 10 & 17 November 2023)
 - July 2023 Administrative Guidance on GloBE rules: QDMTTs (Parts 1 to 4) (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, 15, 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.A on ETR computation for Investment Entities (ITB, 2 December 2022)
 - Corporate Restructurings and Holding Structures (Parts 1 to 7) (ITB, 23 & 29 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; 28 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 (Part 4) (ITB, 15 December 2023)
 - STTR (Parts 1 to 3) (ITB, 6 & 26 October; 3 November 2023)
 - Subject to Tax Rule (STTR): overview (ITB, 28 July 2023)

WORTH READING

Susi Baerentzen
"The Significance of Corporate Losses in Transfer Pricing – The Danish Supreme Court Ruling in the *Mærsk Oil / Total Energies case*"
International Transfer Pricing Journal, IBFD, 2024 (Vol. 31), No. 2.

Paul W. Costerhuis
"Revisiting an Age-Old Issue: What Taxes Should Be Treated as Income Taxes?"
Tax Notes International, Tax Analysts, 22 January 2024.

Yariv Brauner
"A UN Down for the International Tax Regime?"
Intertax, Kluwer, 2024 (Vol. 52), Issue 2.

Allison Christians
"Score One for the Treaty Makers and One for the Treaty Shoppers: Canada's Husky Energy Case"
Tax Notes International, Tax Analysts, 22 January 2024.

INTERNATIONAL TAX QUIZ

THIS WEEK'S NEW QUIZ

ACo 1 and ACo 2 are both Constituent Entities in an MNE Group which is "within scope" of the GloBE rules. They are both located in jurisdiction A.

ACo 1 and ACo 2 are the only partners in a partnership formed under jurisdiction B law. They each have a 50% interest in the partnership. The partnership is tax-transparent in both jurisdiction A and jurisdiction B.

The partnership conducts a trading business in jurisdiction B.

In the 2020 fiscal year, the partnership has these financial numbers:

- GloBE income: 100
- Adjusted Covered Taxes (i.e., jurisdiction B taxes): 5
- Payroll costs of employees: 40
- Carrying value of tangible assets: 60

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

The MNE Group has no operations in jurisdiction B, other than the partnership.

Based on this limited information, what will be the amount (if any) of jurisdiction B Top-up Tax for the MNE Group for the 2020 fiscal year?

Answer in next ITB email alert!

LAST WEEK'S QUESTION

XCo (a company located in jurisdiction X) and YCo (a company located in jurisdiction Y) are Constituent Entities in an MNE Group which is "within scope" of the GloBE rules. Each of XCo and YCo is the only Constituent Entity located in its respective jurisdiction. XCo, YCo and the MNE Group use the calendar year as their Fiscal Year.

In January 2022, the UPE injected EUR-denominated share capital into XCo, XCo made a EUR-denominated loan to YCo, and YCo used the borrowed funds for working capital purposes in its business. This was done to allow YCo to claim a tax deduction on the interest expense, and to allow XCo to use its carryforward tax losses to avoid a tax liability in jurisdiction X.

The loan is repayable on demand, carries an interest rate of €STR (Euro Short-Term Rate) + 300 basis points, and the interest is payable (in cash) quarterly in arrears. Please assume that the interest rate satisfies the arm's length principle. The €STR is an overnight (i.e., floating) rate.

In 2024, the loan is still outstanding. In 2024, it is expected that the interest on the loan will be EUR 0.3 million.

It is expected that, in the MNE Group's CbC Report for 2024, these financial numbers will apply:

- XCo: (i) Total Revenue: EUR 5 million; (ii) Profit (Loss) before Income Tax: EUR 0.5 million (this includes the EUR 0.3 million of interest income).
- YCo: (i) Total Revenue: EUR 8 million; (ii) Profit (Loss) before Income Tax: EUR 0.9 million (this is after deducting the EUR 0.3 million interest expense).

At the beginning of 2024, XCo has EUR 2 million of carryforward tax losses. Tax losses can be carried forward indefinitely in jurisdiction X, subject to compliance with ownership and business continuity tests. A deferred tax asset for the tax losses is not recognised in XCo's financial statements or in the MNE Group's consolidated financial statements.

Based on this limited information, will jurisdiction X and jurisdiction Y each qualify for the Transitional CbCR Safe Harbour in 2024?

LAST WEEK'S ANSWER

Subject to one issue (see below), both jurisdiction X and jurisdiction Y will satisfy the "de minimis test" and therefore the Transitional CbCR Safe Harbour in 2024.

The issue concerns whether the loan is a Hybrid Arbitrage Arrangement which was entered into after 15 December 2022: see paras. 74.25 to 74.31 of the "Safe Harbours and Penalty Relief" report, as added by the December 2023 AG.

That raises 2 sub-issues.

(1) Is the loan a Hybrid Arbitrage Arrangement?

Probably yes. It is probably a "deduction / non-inclusion arrangement": para. 74.27. The critical question is whether the Constituent Entity counterparty (i.e., XCo) "is not reasonably expected over the life of the arrangement (i.e., loan) to have a commensurate increase in its taxable income".

Under para. 74.30(d)(i), that assessment is to be made by ignoring any amount of taxable income which is offset by XCo's tax losses. Having regard to the fact that the loan is repayable on demand, the expected quantum of the interest income and XCo's other profits in 2024, and the quantum of XCo's carryforward tax losses, XCo should not be reasonably expected over the life of the loan to have a commensurate increase in its taxable income.

(2) Was the loan entered into after 15 December 2022?

Prima facie: no – it was entered into in January 2022.

But does para. 74.30(c) deem the loan to have been entered into after 15 December 2022?

The only relevant provision in para. 74.30(c) is clause (ii): "the performance of any rights or obligations under the arrangement differs from the performance prior to 15 December 2022".

What does "performance ... differs" mean in this context? Does it mean that the rights and obligations remain the same, but the result (i.e., performance) of those rights and obligations "differs"?

Note that the interest rate is a floating rate, on a daily basis. Thus, the interest rate each day will generally "differ" (be higher or lower) than the interest rate for the day earlier. Therefore, the quantum of interest payable each quarter would generally "differ". Is this sufficient to conclude that clause (ii) is satisfied?

I don't know the answer. It would be surprising if the loan in the present case were caught by clause (ii) – however, what does "performance ... differs" mean?

What do you think?

I should add: if clause (ii) is satisfied, then jurisdiction Y will fail the "de minimis test" (the Profit (Loss) before Income Tax would not be less than EUR 1 million), and therefore would fail the Transitional CbCR Safe Harbour; however, there would be no adverse impact on jurisdiction X.



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!



UNSUBSCRIBE

If you no longer wish to receive emails from us, please click [here](#)