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3 May 2024



HIGHLIGHTS

- **GloBE news**
 - Poland, Netherlands, Canada, Czech Republic, Japan, EU
- **International tax cases**
 - India, Philippines, European Court of Justice, US

HAPPY FRIDAY!

Star Wars has its day; US campuses echo 1968; and Italy bans puppy yoga!

Meanwhile, in the tax world ...

Netherlands carves out a ruling; Clifford Chance knows how to count days; Philippines financial statements are valuable for Siemens; the ECJ shows that free heat can be expensive; and Disney & IBM suffer only incidental discrimination in New York!

But, at the end of the week, my thought for tomorrow is: "May the 4th be with you!"

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 news
2. Other global developments
3. Asia Pacific
 - China, India, Philippines, Singapore
4. Europe
 - ECJ, Finland, Ireland
5. Africa
 - South Africa
6. Americas
 - Canada, US
7. Treaty news

ITB series on Pillar One

- Report on Amount B in Pillar One (ITB, 23 February 2024)
- 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:**
 - December 2023 Administrative Guidance on GloBE rules: Transitional filing deadlines, and Simplified Calculation Safe Harbour (ITB, 26 April 2024)
 - December 2023 Administrative Guidance on GloBE rules: Allocation of blended CFC taxes (Part 1 & 2) (ITB, 5 & 12 April 2024)
 - December 2023 Administrative Guidance on GloBE rules: Additional guidance on application of GloBE rules (ITB, 22 March 2024)
 - December 2023 Administrative Guidance on GloBE rules: Transitional CbCR Safe Harbour (Parts 1 to 4) (ITB, 19 January; 16 February; 1 & 8 March 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 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, 10, 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 (Part 4) (ITB, 15 December 2023)
 - STTR (Parts 1 to 3) (ITB, 6 & 20 October; 3 November 2023)
 - Subject to Tax Rule (STTR): overview (ITB, 28 July 2023)

WORTH READING

Zach Pouga Tinhaga
 "The (Helpful?) World of Elections Under the OECD's Pillar 2 Initiative"
 Tax Notes International, Tax Analysts, 22 April 2024.

Bolisa Ferreira Liotti
 "The Subject-to-Tax Rule under Pillar Two"
 World Tax Journal, IBFD, 2024 (Vol. 16), No. 1.

Michael Birk
 "German Court Rules Anew That Lockers Qualify as a Permanent Establishment"
 Tax Notes International, Tax Analysts, 22 April 2024.

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.

BCo, a company located in jurisdiction B, is also a Constituent Entity in the same MNE Group.

Jurisdiction A has a corporate income tax rate of 20%, and jurisdiction B has a corporate income tax rate of 12.5%.

In the current Fiscal Year, and in the 2 preceding Fiscal Years, ACo's ETR for GloBE purposes is/was 13%, 16%, and 19% (respectively). Also, in the current Fiscal Year, and in the 2 preceding Fiscal Years, BCo's ETR for GloBE purposes is/was 17%, 16%, and 18% (respectively).

BCo provides services to ACo. In the current Fiscal Year, BCo charges ACo 100 for the services. The 100 is recognised as expense and as income in the Financial Accounting Net Income or Loss of ACo and BCo, respectively.

In its jurisdiction B corporate income tax return for the Fiscal Year, BCo makes a book-to-tax adjustment of 10 (i.e., BCo increases its income from the services to ACo by 10), in accordance with the jurisdiction B transfer pricing "safe harbour" rules. No adjustment is made by ACo.

What impact (if any) will Art. 3.2.3 have on ACo or BCo?

Answer in next ITB email alert on 17 May 2024!

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.

YCo, a company located in jurisdiction Y, is also a Constituent Entity in the same MNE Group.

Jurisdiction X has a corporate income tax rate of 20%, and jurisdiction Y has a corporate income tax rate of 25%.

YCo provides services to XCo. In a Fiscal Year, YCo charges XCo 100 for the services. The 100 is recognised as expense and as income in the Financial Accounting Net Income or Loss of XCo and YCo, respectively.

In its jurisdiction X corporate income tax return for the Fiscal Year, XCo makes a book-to-tax adjustment of 10 (i.e., XCo reduces its deduction claim by 10 to 90), in accordance with the jurisdiction X transfer pricing "safe harbour" rules. No adjustment is made by YCo.

Before considering Art. 3.2.3, the GloBE ETR of both XCo and YCo for the Fiscal Year is 15%.

What impact (if any) will Art. 3.2.3 have on XCo or YCo?

LAST WEEK'S ANSWER

The issue is whether adjustments of 10 should be made to the GloBE Income of ACo and BCo (respectively) under Art. 3.2.3.

According to para. 101 of the Comm to Art. 3.2.3:

"[When a unilateral transfer pricing adjustment is made], the transfer price used for taxable income purposes is presumed to be consistent with the Arm's Length Principle. The GloBE Income or Loss should be adjusted accordingly under Article 3.2.3 where necessary to prevent double taxation or double non-taxation under the GloBE Rules. Specifically, a unilateral transfer pricing adjustment will result in a corresponding adjustment to the GloBE Income or Loss of all counterparties under Article 3.2.3, unless the transfer pricing adjustment increases or decreases the MNE Group's taxable income in a jurisdiction that has a nominal tax rate below the Minimum Rate ...".

This means that the GloBE Income of XCo and YCo, respectively, will reflect a deemed transfer price of 90. This will cause XCo's GloBE Income to increase by 10, and YCo's GloBE Income to reduce by 10.

The ETR impact will be: XCo's ETR will decrease below 15%, and YCo's ETR will increase above 15%.

Therefore, the Art. 3.2.3 adjustment will cause a Top-up Tax liability in respect of XCo, but not in respect of YCo.

Accordingly, the MNE Group will be subject to some level of double taxation caused by the unilateral transfer pricing adjustment: (1) XCo's increased corporate income tax liability; and (2) Top-up Tax liability in respect of XCo.

Note: The second sentence in para. 101 (see above) says: "The GloBE Income or Loss should be adjusted accordingly under Article 3.2.3 where necessary to prevent double taxation or double non-taxation under the GloBE Rules." IMHO: the phrase, "double taxation or double non-taxation under the GloBE Rules", does not refer to double taxation between the GloBE rules and the domestic corporate income tax law, which is the situation faced here by XCo.

Do you agree?



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