Summary of Seminar on RECENT DEVELOPMENTS IN INTERNATIONAL TAXATION

Manish Kumar Kanth
Advocate

Agenda (Annual Congress)

- OECD Model 2014 Update
- Impact of OECD Model on domestic systems (AOA)
- Exchange of information : OECD, FATCA
- Recent case law on tax treaties : treaty override or wrong interpretation of treaties?
- Tax policy issues related to international tax planning : recent news

Panel (Annual Congress)

- Daniel GUTMANN, France – Chair
- Monica BHATIA, OECD
- Manish KANTH, India – Secretary
- Yoshi MASUI, Japan
- Manfred NAUMANN, Germany
- Jacques SASSEVILLE, OECD
- Carol TELLO, USA
- Geraldo VALENTIM, Brazil
- Scott WILKIE, Canada

OECD Model 2014 Update

- 2014 Update approved by the Council of the OECD on 15 July 2014
- Reflects work on the Model Tax Convention that was carried out between 2010 and the end of 2013
- Does not include any results from the ongoing work on the BEPS Action Plan

Main parts of the Update

- Changes to Article 26 and its Commentary
- Changes concerning the meaning of “beneficial ownership” (Comm. on Articles 10, 11 and 12)
- Changes to Article 17 and its Commentary
- Changes related to emissions permits/credits (Comm. on Articles 6, 7 and 8)
- Changes on termination payments (Comm. on Article 15)

Not included in the Update

- International traffic changes (2013 discussion draft) except for a change to the Introduction

- Proposals concerning the interpretation and application of Article 5 (2012 discussion draft will not be finalised until the work on Action 7 of the BEPS Action Plan has been completed)

Authorised OECD Approach (AOA)

- The Authorised OECD Approach (AOA) :
  What is it?
- How to attribute profits to a PE?

- Two approaches to PE attribution rules:
  - The Relevant Business Activity Approach
  - The Functionally Separate Entity Approach

Main reasons to use the AOA

- **Consistency** of Article 7 (2) OECD Model and Article 9 OECD Model ("arm's length principle")
- **Equal treatment** of subsidiaries and PE's concerning profit allocation
- **Simplification:** principles prevailing with regard to associated enterprises also apply to PE's
- **Limitation** of domestic concepts which - almost necessarily - give rise to difficult tax conflicts
- **Facilitation for the source State:** the PE's profits are not part of the enterprise's total profit

Principles of the AOA

- Profits attributable to a PE are those that the PE would have earned under the application of OECD TP Guidelines, if it were a separate and independent enterprise

The PE profit has to be calculated in two steps:

First step: Fiction that the PE is a separate and independent enterprise

Second Step: The PE's profits are determined by analogous application of the OECD TP Guidelines

Implementation of AOA in Germany

- New **domestic legal rules** for PE profit allocation following the AOA: New Article 1 paragraph 5 *AStG*
- Amendments to existing Articles 7 in line with the new Article 7 OECD MTC
- new Article 7 OECD MTC in new German DTTs
- Priority to “old” treaties under certain conditions, to avoid any “treaty override”

Implementation of AOA in Japan

- “Force of attraction” under domestic law since 1962
- Discrepancy between domestic law and treaty law
- Commentators urged reform already in the early 1980s
- March 2014 legislation - At last, domestic law adopted the “attributable income principle.”
- Effective from:
  - April 2016 – corporations
  - January 2017 – individuals

Exchange of information : OECD, FATCA

- 2009 – 2014: achieving the end of bank secrecy
  - The financial crisis
  - The Global Forum peer review process
  - Stolen data, UBS, FATCA
- Participation-123 members and 14 Observers
- 14 October 2014 : EU Council agreed on extension of the scope of automatic exchange of information
- 8 October 2014 : Adoption of New Global Standard by Swiss Federal Council for Automatic exchange of information

Implementation Challenges

- Meeting the standard on confidentiality, data safeguards, proper use
  - Bilateral review before exchanges
  - Global Forum peer reviews from 2016
  - OECD refining the Standard and co-ordinating the MCAA
- Benefiting developing countries

FATCA UPDATE

- FATCA became effective 1 July 2014
- IRS announced light enforcement for 2014-2015 but "good faith" efforts required
- Pre-existing obligation: 31 December 2014
- First reporting due 31 March 2015 for 2014
- Over 104,000 FFIs registered with IRS and assigned GIINs as of 24 September 2014
- Registration instructions, user guide, FAQs
- IRS International Data Exchange Service (IDES)

Recent case law on tax treaties

Brazilian examples

- Superior Court of Justice - Special Appeal No. 1.161.467-RS, May 2012
- Issue: Withholding income tax on services
- Held: Favorable to taxpayers regarding the enforcement of Article 7 of the DTTs
- Tax authorities' approach - **Declaratory Act No. 5/2014 + Ordinance PGFN No. 2363/2013**

Recent case law on tax treaties

- **Declaratory Act No. 5/2014 + Ordinance PGFN No. 2363/2013**
- Cross-border remittances for payment of technical services and technical assistance (with or without technology transfer) will be treated as:
  - royalties (article 12),
  - income of independent professions (article 14) in case of technical services and technical assistance related to the qualification of a person or a group of people; or
  - business profits (article 7) if it is not possible to classify the remittance abroad as royalties (article 12) or as a service provided by independent professional (article 14)

Recent case law on tax treaties

- Superior Chamber of Tax Appeals – Decision No. 9202-003.120, of May 2014
- Issue: Time of withholding
- Held: WIT applies only when the amount is effectively sent abroad to the beneficiary of the payments
- Tax authorities' approach - an Act (**Declaratory Act No. 8, of September 2014**) setting forth otherwise, i.e., that WIT is levied as soon as there is the credit (on the accounting books) of the amounts due to a given company or person abroad

Recent case law on tax treaties

Verizon Communication Singapore Pte Ltd

[33taxmann.com70 (MAD)] – [7th Nov 2013]

- Issue – Whether payment received by Verizon amounts to payment for royalty (or not) under the treaty between India and Singapore?
- Held:
  - Payments amount to "royalty" both under domestic law and treaty between India and Singapore
  - Services involves use of equipment and hence triggers equipment royalty
  - Alternatively, it also amounts to royalty for use of process

Recent case law on tax treaties

Viacom 18 Media (P.) Ltd [44 taxmann.com 1 (Mum)] – [28th March 2014]

- Issue: Whether the taxpayer is not liable to withhold tax from the transponder fee to be paid to a US company?
- Held: Follows Verizon judgment and holds payment to be in the nature of royalty
  - Definition of the term "Royalty" under domestic law and treaty are in *pari materia*
  - "Process" not defined under the treaty
  - By virtue of Article 3(2), the meaning as defined in the act would apply as the word "process" has to be construed in a generic sense (not specific)

Recent case law on tax treaties

Critical Analysis

- (Non-) Applicability of unilateral domestic amendments on treaty not considered.
- CONTEXT in which term has been used under Article 3(2) not discussed
- Various earlier rulings like Sanofi (AP), Asiasat (DEL), WNS NA (Mum) not followed
- No dispute by the taxpayer that there is use of equipment

Recent case law on tax treaties

Critical Analysis

- Limited submission made on transaction being in the nature of service
- No submission made on permanent establishment or on the effect of domestic amendments vis a vis treaty law

Recent news on Tax policy issues related to international tax planning

Recent developments on …

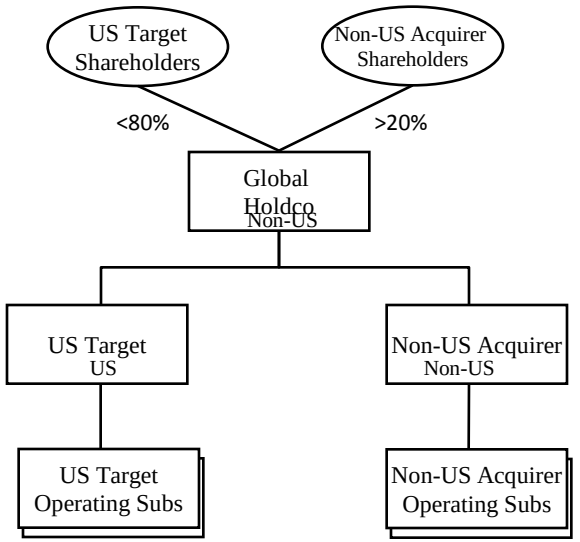
- Inversions
- CFC rules
- Tax competition « hot topics »

Inversions

What is an inversion?

An inversion is a corporate reorganization where a new non-US Global Holdco acquires the stock of both the US Target and the Non-US Acquirer through a shareholder level share exchange

- The shareholders of US Target and Non-US Acquirer exchange their stock in US Target and Non-US Acquirer, respectively, for stock in new Global Holdco
- US Target and Non-US Acquirer continue as subsidiaries of Global Holdco



CFC Rules

- Recent developments: Greece, Israël, Poland and Russia have introduced the rules
- Many different issues
  - CFC rules vs double taxation agreements
  - CFC rules vs constitution

CFC Rules: Recent Brazilian developements

Proceedings No. 2.588 (Federal Supreme Court) (10th February 2014)

- CFC Rules (automatic taxation on 31st December each year) are constitutional and therefore applicable to controlled companies domiciled in tax havens
- CFC Rules are unconstitutional with respect to profits of affiliate companies domiciled in non-tax havens
- The discussion regarding the applicability of CFC Rules vis-à-vis DTTs was not examined by the Federal Supreme Court (it may be later examined in another case or by the lower courts)

CFC Rules: Recent Brazilian developements

- **Proceedings No. 1.325.709-RJ (Superior Court of Justice) (4th September 2014)**
- CFC rules (automatic taxation on 31st December each year) do not apply when controlled companies are domiciled in a country that has entered into a DTT with Brazil
- Rationale: DTTs prevail (Article 98 of the Brazilian Tax Code)

Tax competition « hot topics »

- 30 September 2014 – European Commission publishes non confidential versions of decisions to open investigations into APA's concerning Apple (Ireland) and Fiat Finance (Luxembourg)
- 23 September 2014 – Swiss Federal Government published draft legislation on corporate tax reform
- 14 October 2014 – Mutual Understanding between EU and Switzerland

Tax competition « hot topics »

Swiss reforms (Main aspects) –

- Revenue raising measures : elimination of beneficial tax regimes + introduction of a capital gains tax for individuals
- Attractiveness through :
  - Patent box
  - Notional interest deduction
  - Reduction of corporate tax rates
  - Easier use of losses

Thank you!

For queries, please contact me on manish.kanth@poruskaka.com