Answer-to-Question-_1_

part A

Q1) 1&2)

Dual criminality is when a particular act/conduct is considered to be a criminal offence under both jurisdictions (here: Germany and UK), and hence charged persons might be extradited for a trial, given the facts and circumstances. in the UK dual criminality overrides defense, i.e. if a particular activity is treated as an offence in the UK, however lawful in another jurisdiction, the occurrence of such an ctivity may not result in an offence in the UK, depending on the facts and circumstances.

in the context of COO, the criminal act, that is deliberate and dishonest, of facilitation of tax evasion by an associated person on behalf of the company, where the company fails to prevent it, would be considered a criminal offence under both the UK and other jurisdiction (Germany in this case).

given the case facts, the UK employees were conducting their routine activities in a good faith and were not engaged in criminal acts on behaf of the UK branch. on the other hand, the German branch employees assissted mark, deliberately and dishonestly, to evade his tax liabilities through advising on structures hat allowed him to hide his assets and provided false certification of true account owners and deliberately failed to comply with AML regulations.

according to the german law this would constitute a criminal offence of facilitation of tax evasion, consequently this criminal act on behalf of the company that was deliberately and dishonestly consducted would consititute an offence under CCO

shall the company fail to prevent it.

Goal bank shall be liable in the following situation

1)where an associated person has conducted a criminal act of tax evasion (not avoidance) on behalf of the bank (not personal capacity), as explained above; and

2) where the bank failed to prevent such criminal act through setting adequately documented governance policies and procedures, conducting risk assessment, effectively communicating those policies to all relevant employees and supervising it as well as reviewing and updating that policy on a regular basis. all of that could be used as a defense mechanisim during an audit.

answer to 3&4)

3) an intermediary as per the mandatory disclosure rules (MDR) and DAC6 would be a person who creates and facilitates arrangements/structures that would assist in avoiding mandatory reporting such as CRS avoidance schemes or would help to disguise the identity of the beneficial owner (BO) of a particular assets such as the oppaque offshore structures e.g. having a passive entity resident for tax purposes in one jurisdiction while the BO is tax resident in another.

intermediaries would be either a promoter or a service provider.

a promoter is the person who designs and markets the arrangement (as explianed above) while a service provider is a person who facilitates and provides services or advice for such arrangements. intermediaries could be either legal, financial or tax advisors, or accountants.

intermediaries are required to disclose the relevant information to the relevant tax authorities to the applicable extent. in particular, the promoter will have sufficient knoweldge for such disclosures while a service provider will have disclosure obligations to the extent he has reasonable knoweldge that such arrangement could be used to avoid/evade taxes through implementing his expertise, skills and due diligence.

disclosure by intermediaries shall be done where there is sufficient nexus. in particular where the intermediary operates in a particular jurisdiction through a branch, or resident, organized or managed or incorporated in that jurisdiction. disclosure shall be done to the extent it does not reveal professional secrecy. if it reveals professional secrecy the intermediary shall notify the taxpayer of such and the diclosure obligation shall fall on the taxpayer in order to protect the CRS integrity. where there are more than one intermediary in a particular arrangement, the one making the disclosure shall notify the others in oreder to avoid double disclosures of the same info.

timeline: would be within 30 days since the promoter has made such arrangement ready for implementation and marketed it .. and withing 30 days since the service provider who is facilitating the arrangement had sufficient knoweledge that such arrangements could be used to evade/avoid taxes

information to be disclosed would include: the name, TIN, address, jurisdiction of each: the person making the disclosure, the person using the arrangement, clients, and other intermediaries. also the info would include a description about the arrangement itself and if possible how it could be used to avoid/evade tax.

4)

generic hallmark would include any possible arrangement that could be used to avoid/evade taxes. such as hallmarks related to main benefit test. such as when creating an arrangement for fees.

specific hallmarks are indentified and known arrangements that would be used to evade/avoid taxes such as those hallmarks specific to the main benefit test.

main benefit test is simply where the main benefit or one of the main benefits of undertaking such arrangements is to obtain a tax advantage.

DAC 6 identiefs 5 hallmarks in general:

1) generic hallmarks related to main benefit tests
2) specific hallmarks related to main benefit test
3) hall marks related to transfer pricing such as the use of unilateral advanced pricing agreements (APA) and hard-to-value intageable
4) cross border hallmarks which would include transactions between associated parties
5) hallmarks related to avoiding automatic exchange of information and disguising the identity of account holders such as the conversion of an asset to another that would not be a reportable financial asset or placing it at a non-reporting financial institution or opening the account in a jurisdiction with weak AML/CFT procedures that are weak in identifying the BO.

end of answer 1

---------DO-NOT-EDIT-THIS-DIVIDER----------

Answer-to-Question-_2__

part A, Q2, 1&2

case facts:

bank Alpha is a sub-custodian

the subsidiaries are obliged to have adequate due diligence procedures as per Annex 1 of the FATCA model 1 and 2 and relevant sections from the CRS and its commentaries in addition to other applicable domestic regulations

internal audit for FATCA and CRS revealed that amounts were reported included dividends and income net of any applicable taxes

analysis:

both FATCA model 1 and 2 as well as CRS and its commentaries require reporting, whenever is applicable such is in the case of custodians, the gross amounts of dividend and interest income as well as the proceeds of assets disposition, if any.

reporting the net of dividend and income as explained by the internal audits findings may not be consistent with the FATCA and CRS and hence the reporting financial institution (RFI) may approach the local competent authority (CA) and seek its guidance on whether any corrections of previously submitted accounts would

be required.

as a mitigating action, the audit results as well all the followed procedures and processes of obtaining this advise as well as approaching the CA and any possible required corrections steps should be fully and clearly documented which could be used as a proof of having a co-operative and transparent relationship with the CA as well as a defense mechanisim in case of any imposed penalties or enforcement action.

it is worth noting that under FATCA model 2 this might be reflected as a minor admin error of submitting incorrect information, in such case the IRS normally approaches the RFI directly, and hence the RFI should refer to the FFI agreement and check its terms for the best approach to be followed.

it is also worth noting that CRS would require implementing the domestic regulations for any possible enforcement measures and ensuring overall effective implementation.

the RFIs are most likely correct in generating the the reported amounts by end of day on 31 december of each year as most FATCA and CRS reporting require reporting the year end balances. nevertheless few jurisdictions may require reporting the year average instead, which is allowable under both CRS and FATCA given the domestic regulations require averages instead of year end balances and stipulates the mechanisim for determining such averages.

in general, the RFI holding the reportable financial account would be responsible for the relevant due diligence and reporting requirements under FATCA and CRS. given that bank Alpha is sub-custodian and does not hold the account itself, the reporting obligations would fall on the custodian itself, who in turn is likely to be an RFI. furthermore the custodian might be

classified as an investment entity “managed by” another entity who would have reporting obligations as well, nevertheless there is no sufficient information in the case to determine such plus from the given case facts this is not likely the case.

to conclude, the above analysis is likely to be classified as a minor error and not a material failure given the due diligence and reporting has been done in a good faith. the RFIs are required to review their existing governance, policies and procedures and manuals a=in order to ensure they are consistent with FATCA and CRS requirements and other domestic regulations. approaching the CA for advice on possible required corrections in a co-operative and transparent manner shall support the RFIs good faith position and hence the errors may not be classified as material failure depending on the facts and circumstances and applicable regulations.

end of answer 2

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Answer-to-Question-__3_

part B Q3 1&2

authorised OECD approach (AOA) is the application of OECD MTC 2017, OECD transfer pricing guidelines (TPG) 2017 which was updated in 2020 in relation to financial transaction and OECD 2010 attribution of profits and capital to permenant establishment (PE)

1)

assumption: in general, a bank total capital would constitute 2 parts, free capital and capital other than the free capital. given the case facts, it didn’t specify whether to attribute free capital or other capital however it asked to calculate under the capital attribution approach and thin capitalization approach (which are the 2 AOA approaches) as well as the minimum regulatory approach. it also provided tier 1 info which is most likely related to free capital

a) capital allocation approach (BIS) ratio: allocates a proportion of the total actual/genuine capital of the bank based on the standardised approach (Basel approach)

BIS ratio = capital attributed to PE = % attributed to PE of the RWA * total actual bank capital = (6100M/47000M) * 54000M = 13%*54000M = 7,008.5 Million pounds

b) thin capitalisation: this approach is based on the comparability analysis and hence requires a PE to have an equal amount of free capital that another comparable independent would have, undertaking the same or similar activities and under the same or similar circumstances.

capital attribution to a PE = cpmparable independent tier 1 ratio * RWA = 14% * 47,000M = 6,580 Million pounds

c)regulatory min.: this approach requires the PE at least to have a capital equal to the minimum amount of capital determined by the regulator for a comparable unrelated entity in Utopia (the

host country).

capital attributed to PE = minimum regulatory % * RWA = 9% * 47,000m = 4,230 million pounds

in the case of regulatory minimum approach the capital attributed to the PE may not reflect the arm’s length amount and any excess shall be attributed to the head office by default. in order to avoid over or under allocation to a PE (and for the result not to deviate from the arm’s length principle) the diffrenece might be reflected in the interest expense or income to that PE as appropriate.

2) as per the OECD additional guidance to attribution of profit to PE

the AOA approach (explained above) would apply to a PE in the following manner:

it shall first identify the applicable OECD MTC relevant articles as follows:

articl 5: 5.1 applies to a fixed place, 5.4 stipulates the exceptions to a PE shall be restricted to activities of preparatory and auxiliary nature. 4.(4.1) anti fragmentation rule.

article 5.5. regarding commissionnaire arrangements (service and agency PE), 5.6 regarding independent agent does not give a rise to a PE

article 7. regarding business profits stipulates that a PE shall be treated as a separate and independent entreprise performing the same or similar activities under the same or similar circumstances, for the purpose of attributing profit and capoital

article 9. regarding associated enterprises and that remuneration made shall be at and arm’s length taking into account functions performed, assets used and risk assumed.

step 1 of the AOA:

1. identify the head office activities and activities performed through the PE: perform functional and factual analysis for that in order to hypothesize to the PE the rights and obligations of the head office that would arise from the performed activities through the PE. such as transactions between the parent and final customer and between the parent and dependent agent.

2. identify significant peaople functions, in case of a bank that would be called the key enterpreneurial risk taking activities (KERT) functions. in case of a bank that would reflect activities involving active decision making and assumption of risk (as risk follows capital in order to support the needed functions that would produce that risk). e.g. KERT for a bank would be the creation and management of a financial assets e.g. a loan. for a wholsale bank it would be the sale/trading of that financial asset while for a retail bank it would be the marketing activities.

the PE would be hypothesized to be the economic owner of that financial asset and the part assuming the relevant risk.

3. recognize internal dealings between the head office and PE. e.g. the internal dealing for banking could be hypothesizing the services provided or assets sold by the head office to the PE.

4. attribute the necesary capital to PE based on the above functional and factual analysis to attribute assets and risks as

capital follows risks as explained above.

step 2 of AOA:

1. apply the TPG (as indicated above) by analogy to determine the arm’s length price of the internal dealing between the head office and PE (e.g. for cashpooling or treasury services or any other financial dealing). such pricing would equal to the amount the head office would recieve if it provided such service/product to unrelated party performing the same or similar activities under the same or similar circumstances taking into account functions performed, assets used and risks assumed. care should be applied on choosing the appropriate TP method given the facts and circumstances and the type of service/product (e.g. CUP, yield approach, profi-split, ...etc)

2. in the PE tax computation, the arm’s length expense of the identified internal dealing is deducted, remunertaion to dependent agent will be deducted as well as other expenses incurred for the purpose of the PE.

3. for reasons of admin convenience, the tax admin in the host country may choose to collect taxes only from the PE even though the amount of tax is separately calculated by reference to the liability of the PE and dependent agent.

it is worth noting that the above would be applied fp each identified PE, e.g. agency PE and office PE

end of answer

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Answer-to-Question-_6__

part C

Q6) 1&2)

subsidiaries Vs branches

introduction:

as per the OECD’s report with respect to establishing branches and subsidiaries of non-resident banks, in general, a subsidiary is incorporated under the laws and regulations of the host country, i.e. a legal person while a branch or agency is not incorporated undre the laws of the host country, i.e. not a legal person.

analysis:

in general, the OECD code liberalisation supports the equivalent treatment. i.e. non-discrimination principle, which generally means that the host country should not impose a more burdonesome requirements (treat less favorably) the subsidiary or branch of a non-resident entity than those imposed on a resident entity under the same or similar circumstances undertaking the same or similar activities, this would be in line with art 24 of the OECD MTC. depending on the facts and circumstances, foreign

banks may seek to redress under the code given they prove that they were subject to discrimination, e.g. in the form of more burdonesome requirements that would not be imposed on resident banks in similar circumstances.

however, depending on the facts and circumstances, it is acceptable to impose special requirements on branches and agencies because they are not incorporates in the host country. it is worth noting that the requirement by one country to have a reciprocal treatment on the branches and subsidiries is not consistet with the equivalence test.

similarly, some countries may impose fewer requirements on branches given the parent company meets certain conditions. for example, branches of EU parents might be subject to fewer requirements given the facts and circumstances. some countries may impose fewer prudential requirements on branches like Australia, while some countries may impose fewer governance requirements on branches like Canada.

forms of establishment would be affected by the imposed regulatory measures; the report indicates that some countries would not allow for the establishment of branches such as Mexico. in general, representative offices are not permitted to undertake banking services, rather they might be restricted to conducting market researches. on the other hand, many countries would not allow a branch to cinduct activities related to deposit taking. some countries may impose restrictions o the form of establishment depending on the size (e.g. France) and the systematic importance (e.g. New Zealand) of the foreign entity.

some countries may impose nationality or residenct=y requirements on branches of foreign banks. for example, regulations may require key employees such as senior management to be resident or nationals of the host country e.g. Australia.

the report indicates that post the 2008 financial crisis, many jurisdictions have stregthened their regulatory and/or legal requirements towards branches or subsidiaries of non-resident banks. such reforms included the authorization process, capital requirements, financial and governance requirements, allowed activities to undertaken, operational and ownership and control, ...etc.

as part of the subsiiary authorisation and supervisory, the competent authority may reach its counterpart at the home of the head office for further information and to ensure that adequate supervisory/regulatory requirements are implemented on the parent. this could be done through in place EOI tools such as EOIR, TIEA tax treaties ..etc.

in general, governance requirements on branches are less known as per the report howvevr the most common is the fit and proper test. fianacial and prudential requirements imposed on bramches may vary across countries. some might impose less, more or the same as on a resident entity.

conclusion:

the report indicates that many countries, post the 2008 financial crisis, have introduces more regulatory requirements on branches of non- resident financial institutions (FIs). this would eventually reduce the attractiveness of establishing a branch as opposed to subsidiary. the report also recognizes the trend towards the convergence in requirements imposed on branches and subsidiaries of non-resident banks and those imposed on local banks in general.

end of answer

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Answer-to-Question-_5__

part C, 5

cash pooling

cash pooling in general is only available to companies within a group rather than between unrelated parties. in general, cash pooling arrangement would involve establishing a common account managed by the cash pool leader/operator in which excess chash available in each member entity account would be transfered either physically or electronically to the leader’s account who would be responsible for managing all the accounts and ensuring they don’t fall below a certain limit (e.g. zero balance). the leader shall transfer the excess to those accounts in deficit in order to bring them back to the minimum balance.

cash pooling helps to manage liquidity and optimize financing costs withing the group.

the leader might charge a fee (which should be at an arm’s length) for the provided management services. member entities should also be receiving interest on their excess balnaces which should be at an arm’s length as well.

given the lack of comparability (as cash pooling is not comparable to a regular bank deposit and is not likely to exist between unrelated parties) determining the arm’s length of the interest as well as leader charges should be at an arm’s length

following the transfer pricing (TP) guidelines and applying an appropriate TP method.

given that multinational entities (MNEs) operate cross-borders, cash pooling arrangements might be misused to achieve a tax advantage were the remuneration to the leader and/or the interest received on deposits is not at an arm’s length.

many court cases arised in that regards over the years ,such as the Bombardier case vs the Danish Tribunal.

were the danish subsidiary has not provided TP documentation and hence the tax authority conducted and audit to find out that asj pooling transactions were not at an arm’s length.

the foreign account operator has less credit worthiness than local bank and the group has not provided sufficient ratings or necessary documentation which resulted in that the tax authority had to assess operator’s credit ratings, re-assess the interest rate. this resulted in shifting the burden of proof to the taxpayer.

the court upheld the tax authority assessments but lowered their interet assessment.

credit risk should be taken into account. provided services and interest received on deposits should be at arm’s length to avoid tax avoidance. functional and factual analysis should be performed taking into account functions performed risks assumed and asset used to accurately dillneate a transaction. it should reflect the true commercial substance.

end of answer 5

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Answer-to-Question-___