Answer-to-Question-_7_

The facts of the case are that Mykola:
-left country U to stay in country X on 01/01
- needed to extend stay to 30/06/01
- in 05/06/01 stayed in the appartment they owned in Country X until 31/08/01
- Stayed in hotel 31/08/01-05/09/01 before leaving the country on 05/09/01

The domestic rules of countries are different in terms of residency. However, both treat tax year start as 01/01/xx, so for calculation purposes number of days spent in a given country start 01/01/xx and end 31/12/xx

Country U:
-resident must be absent for 8 months to be non-resident,
-if return within 5 years-- become resident again immediately.

Country X:
- if there is 183 day presence, individual becomes a resident.
- after 365 days of absensce individual can become non-resident again.

On the face value, Mykola will become non-resident of country U, because he has left the country for more than 8 months (9 months in fact, even if in transit stay before flight to Country U is excluded). As Mykola stayed more than 183 days in Country X, he will become resident of Country X for the period 01/01/01-05/09/01. However, Mykola, under country U's laws becomes a resident for period 05/09/01-31/12/01 again, whilst presumably they would be the resident for State X as well, since Country X drops residency status only after 365 day absence.As such Mykola's residence is double residence.

For period 05/09/01-31/12/01 Article 5(2) of tax treaty should be

invoked, which looks how to decide a tiebreaker, which decides in which country an individual will be deemed to be resident. The criteria listed out in 2.1a-d are in terms of priority, so if first criteria is met, then others do not need to be considered. First point is permanent home available, Mykola has home in both states, it is arguable if home in state X is permanantly avilable to him, but the fact that he managed to move in to it in May could point that it is.Secondis vital interests, Mykola has family in state U, but also has family ties in state X and bank account. Even though U is a more likely state of residence, it is possible that this would have to go to MAP, then as per Brien v QUingly, Beng Tan, concepts of home could be interogated further. If countries cannot solve this, and are signed up to Mandatory binding arbitration this could also offer a decisions.

Why does this matter? It is because resident of a country is taxed on worldwide income, whilst source country typically taxes at withholding tax rate whilst and residence country gives credit, or exempts as per treaty.

Need to look at employment article 15(2)c, as Mykola seems to be working through a PE. However, as it is a building site PE, it needs to be determined if it is less than 1 year project.

Answer-to-Question-_3_
Extent to which MAP provides for a definitive solution under Article 25 OECD 2017

Mutually agreed procedure is a way for taxpayer to solve different treatment between two or more tax authorities.

If taxpayer thinks they have suffered double taxation, they can refer matter to tax authorities, who then endeavour to settle the matter within 3 years. The process goes in following manner: taxpayer initiates MAP, provides necessary documents, competent authorities reach a decision and taxpayer is allowed to accept of decline the decision.

Taxpayer's have tried to argue for different MAP decisions by questioning the MAP process in cases like Garland (where judge allowed access to relevant documents), the principles that came out of such cases where that tax authorities will need to weigh negatives of disclosing negotiations between states with public good (not solely impact on the taxpayer).

However, key case demonstrating issues with MAP is GlaxoSmithKline, where US authority investigated pricing of an US company. In this case, UK headed group had a subsidiary in the US, which was selling a product that earned a very large margin of profits. UK parent argued that parent's rights to product and product's IP meant that UK was entitled to a award, whilst US was not awarded as much as the functions, assets and risks were not as high. US overruled this pricing, as a result placing a significant $2bn tax bill, without corresponding adjustment in the UK. Even though MAP was involved, authorities did not reach a conclusion, and court decision did not enforce authorities to make a decision. This case demonstrates how economic double

taxation can be not remedied by MAP.

In 2015 BEPS action as a minimum OECD recommended to implement Article 25(1)-3 as well as asking tax authorities, to provide Advance pricing agreements, and to make MAP easy for taxpayer to access (e.g. ability to ask any of relevant countries to initiate MAP; putting sufficient funding and resources for MAP. OECD also recommended as best practice to provide guidance on MAP, interaction of MLI, MAP and BAPA and Mandatory Binding Arbitration.

Mandatory Binding Arbitration (MBA) is a strong (though at this point optional) measure included in Article 25. If choose MBA, this means if MAP is invoked by the taxpayer and competent authorities do not come at mutually acceptable solution they can refer this issue to MBA. MBA consists of 5 people panel, 2 people chosen by each competent authority and 1 by the panel. MBA can solve the issue in two ways: 1. For panel to give an opinion/solution to double taxation(if one of the authorities chooses, then this is the default option)2. For panel to choose between options offered by each state.

MBA strenghthens MAP, however, it is not completely solving the issue because a lot of countries did not choose to accept MBA through MLI, and also because not all countries are within OECD framework.

Answer-to-Question-_4__
Report considering allocation of taxing rights under Art.10 of the OECD MTC 2017 and UN MDTC 2017

Article 10 of the UN model reporduced OECD's model, with exception to paragraph 2, and paragraphs 4 and 5, which refer to independent personal services from a fixed base.

OECD and UN models on taxation of dividends are similar in many aspects. First starting point is that dividends are investment income and are taxed in a source state, as well as residency state. Dividends are taxed to a limited WHT in source state and residence state either gives a credit (WHT and in some cases Underlying tax), or exempts dividends.

Both models invoke concept of beneficial owner (see provost on case clarifying that). Benficiary owner is an owner that receives the benefits from the dividend and has full control over how to use it. The treaty doesn't apply to resident state recipient if they are not the beneficial owner of the dividend.

In OECD model source state reduces WHT to 5% if beneficial owner is a company owning at least 25% of shares in the company over 365 days, otherwise WHT is restricted at 15% for beneficial owners. UN Model does not set WHT percentages and leaves for the countries to agree them through bilateral negotiations.

Another important part of the article is OECD Art.10(4), which essentially includes a situation where a contracting state is receiving dividends from another country where PE of a company from a third country is based. In such case, this is considered to be taxed under Art.7 (as profits attributed to a PE) with

corresponding adjustments for transfer pricing. UN refers to a company performing independent personal sercvices from a fixed base as well as a permanent establishment.

UN Model Art10(5) bars (just like in OECD model) from taxing dividends paid by company resident in the otehr state merely because the company derives income or profits in the taxing state, except that UN model also refers to fixed base.

Both models may in practice not be important for countries that exempt dividends(EU members, Australia, New Zealand, UK for most dividends).

In case of treaty abuse (such as treaty shopping) denial of treaty benefits is introduced under OECD art.29 under entitlement of benefits.

Answer-to-Question-_6__

First it is important to note what happened:
-Enersub in country B is a subsidiary of Energio Ltd
-Enersub wanted to build a new generator by 01/01/03
-Enersub tried to obtain bank funding but failed
-03/02 Enersub obtained lending from the parent of $30m at IBR+4%, with requirement to use loan for building the generator
-10/03/20022 contract amended to extend the loan to six months and increase interest to IBR+8%
-10/04/2022 $60m interest at IBL+9%

Need to consider Financial transactions report 02/2020 (which relies on BEPS AP 4(interest deductions to reode tax base) and Action points 8-10(TP) and amended OECD transfer pficing guidance Chapeters 1 and 10). According to the report need to consider 2 questions: 1. If and what part of lending is loan or alternatively equity. 2. How this loan would be taxed using transfer pricing principles, which can be found in OECD TP Principles guidance and treaties based on OECD model.

1. Is this equity or capital? Need to look at the qualities of the loan to establish this. For example the amount lent, period of time, size of the loan, size of interest. Given that initial loan was $30m it would be important to establish how the amount was agreed, and on what basis the amount was increased to $60m.

2. Connected parties, pricing between connected parties under Article 9.
-First thing to establish if these are connected parties. Given that this is a parent, Energio Ltd participates directly in the manegemtn, control and capital of Enersub and will be deemed as Associated Enterprise under Art9(1)a.

As per article 9(2) the tax authority will try to determine profits on which tax should be charged. This may result in reduced profit in Country A and bigger profit in Country B. In such case if only one tax authority of country B is working on this there would be a need for appropriate adjustment in Country A.

The pricing will need to be determined looking at functions, assets, risks of both enterprises. Given that banks refused a loan, CUP may not be appropriate. Profit split or TMNE might need to be applied.

The bank rejected lending. The question arises if this was a commercial lending that would have occured under arm's length price. If such lending would have not occured under third party conditions, it is possible that it would be disallowed or overwritten to a different transaction by tax authorities under non-recognition.Tax authorities could argue that lending was uncommercial and treat transaction as something different, for example to treat loan as a capital contribution and interest paid as distributions.

Worth to look at case law DSG retail that looks at IOM reinsurer reinsuring warranties for UK group. The pricing was found to be not according to arm's length and replaced by a low rate.

MAP if adjusted amount and no adjusting amounts in the other country. To avoid that should use Adcanced Pricing Arrangement and involved both tax authorities at the begining.

General antiavoidance measures may apply such as GAAR of s441 CTA09 unallowable purpose challenge in the UK.