Int'l Tax Treaties

Prof. McIntyre, Winter, 2009

Notes on the Answers

1a. The matter is dealt with in Article 15 of the treaty. Thomas is engaged in employment in Canada, so he is taxable there on the income earned there, which, according to the facts, is $70,000 ($10,000 per month × 7 months). The question is whether he can avoid being taxed in Canada under the exception in Article 15. The answer is "no" because he misses at least one of the three conditions — being present for less than 183 days in any 12-month period. During the 12-month period, he is in Canada for 210 days. One miss is enough.

Article 15 of the UN and OECD Model Tax Conventions are the same in the relevant respects, so the answer above would be the same under the UN Model.

Note: As discussed below, PCo has a PE in Canada. The facts do not state whether the PE deducted the cost of Thomas's wages from its Canadian income, although we can assume that it did. If so, a second condition is not met.

1b. PCo would not have a PE under the normal OECD treaty. But paragraph V(9)(b) of the U.S.-Canada treaty would deem PCo to have a PE in Canada because Thomas, an employee of PCo, is present in Canada for 183 days or more (210 days) and the services are provided for a Canadian resident (the Ontario Government).

Paragraph V(9)(a) is not applicable because PCo does not meet the 50% test (Canada income of $500,000/total income of $2.5 million = 20%).

Under the UN Model, PCo also would have a PE in Canada. Here is the relevant language from paragraph 3(b) of Article 5:

> 3. The term "permanent establishment" also encompasses:
> (a) * * *
>
> (b) The furnishing of services, including consultancy services, by an enterprise through employees or other personnel engaged by the enterprise for such purpose, but only if activities of that nature continue (for the same or a connected project) within a Contracting State for a period or periods aggregating more than six months within any twelve-month period.

2. The TIEA between the U.S. and The Bahamas seems almost by design to be nearly useless. Here is a short list of ways in which it would be ineffective.

First, it seems to apply only to cases that have already been targeted and developed in some detail by the IRS. The list in paragraph 3 of the information that the U.S. must provide would only be available if a case is well developed. A TIEA that was intended to be useful would provide for automatic information exchange of information on matters such as accounts established by U.S. persons. It would also provide for spontaneous exchanges when incriminating evidence comes to the attention of the tax authorities in The Bahamas.

Second, the limitation that The Bahamas does not need to provide material that is "not obtainable . . . in the normal course of the administration of The Bahamas" is a huge loophole because The Bahamas does not have an income tax and has no reason to be obtaining the information sought by the United States.

Third, the TIEA does not apply to the extent the requested information "constitutes or would reveal a privileged communication". Some provision that would protect the lawyer-client privilege is appropriate. But this language is so broad that it could be used to protect accountants, bankers, and so forth and could go beyond any reasonable lawyer-client privilege to cases in which the lawyer may have participated in the tax fraud. The matter will be decided by the courts of The Bahamas, so it is likely that the privilege will be read broadly.

Fourth, the requirement that the U.S. must exhaust all other reasonable means of obtaining the information before The Bahamas is obligated to provide information is a formula for extended delay. It is reasonable that the U.S. obtain information from its own sources before requesting information from The Bahamas. But that rule should be an informal one, not a rule that allows The Bahamas not t comply with a request.

Fifth, the TIEA does provide for an override of bank and fiduciary secrecy laws in paragraph 8, following the OECD Model TIEA (2002) and Article 26(5) of the OECD Model (2005). However, there is no requirement for the adoption of enabling domestic legislation, so it is unclear how the Competent Authority will be able to act.

Sixth, Paragraph 5 puts severe limitations on the right to obtain information about controlled foreign corporations and other "foreign" taxpayers of the U.S. In particular, the U.S. must show that the requested information is "foreseeably relevant" to the satisfaction of th tax authorities of The Bahamas.