Digital Re-Imaging

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Penal Discussion : 1730-1930 Day 1 (Option A)

Taxable Presence

Significant Digital Presence

- “Significant digital presence”, criteria to include:
  - Revenues from supplying digital services,
  - Number of users of digital services
  - Number of contracts for a digital service (EU)
- Other factors that may evidence a “purposeful and sustained interaction with the economic life a country through digital means”
  - Non-resident enterprise proactively takes steps to create and manage ongoing interaction with users and customers (OECD summary)

Significant Economic Presence

- India: “significant economic presence”, determined based on:
  - transactions in India if payments exceed prescribed amount
  - “Systematic and continuous soliciting of business activities or engaging in interaction with such number of users as may be prescribed, in India through digital means”
- EU Commission Proposed Directive: Significant Digital Presence:
  - supply of digital services through a digital interface, with (i) revenues over 7m euros, or (ii) over 100k users, or (iii) 3k business contracts

Significant Economic Presence

- Israel: “significant economic presence”
  - Applies only to countries with no DTA in place
  - Relies heavily on administrative guidelines
  - Digital presence factors include: online contract conclusion; use of digital products & services; localized web site; multi-sided business model
- Slovakia: expanded definition of “fixed place of business” for some digital platforms

Validity under Tax Treaties

- Model UN: service PE
  - Interpret as not requiring physical presence?
  - Saudi Arabia: virtual service PE
  - India?

Principles for allocation of income

EU Proposals

- Arm's Length + Functional Analysis, but
  - activities via a digital interface shall be considered economically significant, involving risks & economic ownership of assets
  - due account of DEMPE activities related to intangibles
  - economically significant activities include (i) data, (ii) user-generated content, (iii) sale of advertising space, (iv) making 3rd party content available, (v) supply of digital service;
- Profit split method (unless rebutted by taxpayer), using factors e.g. expenses for research, development, marketing & number of users / data collected

Formulary Apportionment Approaches

- Treat multinational enterprise as unitary entity
- Residual profit formulary apportionment
  - Allocate profits in excess of routine returns based on relative 3d party sales in each jurisdiction
  - Consider other factors in apportionment
- Consider UN Model Art. 7(4)

UK: Focus on Users

- Ensure that the rules for determining the profits of companies within a group reward the value that those companies might generate from user participation
- Give countries a right to tax the profits of foreign companies that derive value from a material and active user base within their jurisdiction, even in the absence of those companies having a permanent establishment
- Allocate an amount of profit of those foreign companies to the countries in which they have such a user base, based on a metric that approximates the value that the user base generates e.g. monthly active users