

Iberoamerican Tax Moot Court 2023
Case Competition

I. Issues

- A. PlaceID is an app that provides music, podcast, and video service in 126 countries and it allows users to share among one another music, podcasts, and video. PlaceID gives its clients access to millions of songs and other content from creators all over the world. The developer and owner of the app is PlaceID parent company, PlaceID Inc., a corporation organized under the laws of Whitesea. PlaceID is a tax resident in Whitesea. For its services, PlaceID charges a monthly fee to its clients. PlaceID's total global revenue has exceeded 980 million guilders for the past 5 years. In order to access PlaceID's services, each user must create an account and add a payment method, which varies from country to country. One of the jurisdictions in which PlaceID has clients is Tacoland, where it has over 20 million users. PlaceID obtains revenue that exceeds 50 million guilders from users that are tax residents in Tacoland, where credit cards are the only available payment method for PlaceID's clients. PlaceID does not have offices, employees, or facilities in Tacoland. It renders its services therein through servers and network infrastructure located in Whitesea. PlaceID does not undertake any other activity in Tacoland.

SVB is banking institution organized under the laws of Tacoland. SVB is the main banking institution in the nation with over 80 million clients therein and operations in several countries of the region. 16 million of the users that PlaceID has in Tacoland pay for PlaceID's service with credit cards issued by SVB. In 2022, SVB made payments to PlaceID of over 48 million guilders due to the fees paid to PlaceID by users located in Tacoland through credit cards issued by SVB. Such payments were not subject to withholding of any kind pursuant to Articles 1, 2, and 7 of the tax treaty in force between Tacoland and Whitesea.

- B. In order to provide all its employees in Tacoland with a word processing software, in January 2022, SVB entered into a licensing agreement with Apache Inc., a resident for tax purposes in Whitesea, whose annual global revenue equals 400 million guilders. In accordance with the agreement, Apache allowed SVB to use Apache's word processing software called OpenAgency Writer. In exchange for the right to use the software, SVB agreed to pay Apache an annual fixed fee of 528,000 guilders. The agreement provides that all SVB's employees will be permitted to use the software throughout laptops owned by SVB which are provided to all the bank's employees in Tacoland. Under the agreement, SVB and its employees are not allowed to alter, sell, or license the software. On December 30th, 2022, SVB paid the agreed upon fee without withholding of any kind invoking Article 7 of the tax treaty in force between Tacoland and Whitesea.
- C. In May 2016 SVB's board of directors decided to start operations in the country of Quiche. SVB decided to incorporate a wholly owned subsidiary in Quiche to undertake banking activities therein. SVB named its subsidiary SVB-Quiche, which started operations on January 22nd, 2017.

On April 1st, 2019, in its general shareholder meeting, SVB's shareholders voted favorably a 5-year expansion plan presented by SVB's board of directors. The objective of the plan was to make SVB the leading banking institution in all the continent of Easy-Peasy. Pursuing to the plan, none of SVB's subsidiaries were going to distribute dividends for the following 5 years. Instead, all the subsidiaries were going to reinvest their profits to accomplish the expansion objective set forth in the plan.

In 2022, SVB-Quiche reported pre-tax profits of 26 million guilders, derived from interests income received as a result of its banking activities in Quiche. Those profits were not distributed as dividends pursuing to the 5-year expansion approved by the parent company in 2019. Therefore, in its 2022 tax return, SVB did not include SVB-related profits in its taxable base.

II. Legal and conventional framework

Double taxation conventions

A. There is a tax treaty in force between Whitesea and Tacoland, which follows the 2017 OECD Model Convention. Article 12 of said convention states:

1. Royalties arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State.
2. However, royalties arising in a Contracting State may also be taxed in that State and according to the laws of that State, but if the beneficial owner of the royalties is a resident of the other Contracting State, the tax so charged shall not exceed 10 per cent of the gross amount of the royalties. The competent authorities of the Contracting States shall by mutual agreement settle the mode of application of this limitation.
3. The term "royalties" as used in this Article means payments of any kind received as a consideration for the use of, or the right to use, any copyright of literary, artistic or scientific work including cinematograph films, any patent, trade mark, design or model plan secret formula or process, or for information concerning industrial, commercial or scientific experience.
4. The provisions of paragraphs 1 and 2 shall not apply if the beneficial owner of the royalties, being a resident of a Contracting State, carries on business in the other Contracting State in which the royalties arise through a permanent establishment situated therein and the right or property in respect of which the royalties are paid is effectively connected with such permanent establishment. In such case, the provisions of Article 7 shall apply.
5. Where, by reason of a special relationship between the payer and the beneficial owner or between both of them and some other person, the amount of the royalties, having regard to the use, right or information for which they are paid, exceeds the amount which would have been agreed upon by the payer and the beneficial owner in

the absence of such relationship, the provisions of this Article shall apply only to the last-mentioned amount. In such case, the excess part of the payments shall remain taxable according to the laws of each Contracting State, due regard being had to the other provisions of this Convention.

B. There is a tax treaty in force between the Tacoland and Quiche, which follows the 2017 OECD Model Convention. Article 23 of said convention follows Article 23A of the 2017 OECD Model Convention. Moreover, Article 10 of such treaty provides:

1. Dividends paid by a company that is a resident of a Contracting State to a resident of the other Contracting State may be taxed in that other State.

2. Such dividends may also be taxed in the Contracting State of which the company paying the dividends is a resident, and according to the laws of that State, but if the beneficial owner of the dividends is a resident of the other Contracting State, the tax so charged shall not exceed:

(a) Dividends whose beneficial owner is a company of the same economic group as the company paying the dividends will be exempt. To apply this exemption, the company receiving the dividends must own at least 80 per cent of the capital of the company paying the dividends throughout a 365-day period that includes the day of the payment of the dividend (for the purpose of computing that period, no account shall be taken of changes of ownership that would directly result from a corporate reorganization, such as a merger or divisive reorganization, of the company that holds the shares or that pays the dividend);

(b) 5 percent of the gross amount of the dividends if the beneficial owner is a company which holds directly at least 25 per cent of the capital of the company paying the dividends throughout a 365 day period that includes the day of the payment of the dividend (for the purpose of computing that period, no account shall be taken of changes of ownership that would directly result from a corporate reorganization, such as a merger or divisive reorganization, of the company that holds the shares or that pays the dividend);

(c) 15 percent of the gross amount of the dividends in all other cases.

The competent authorities of the Contracting States shall by mutual agreement settle the mode of application of these limitations. This paragraph shall not affect the taxation of the company in respect of the profits out of which the dividends are paid.

3. The term “dividends” as used in this Article means income from shares, “jouissance” shares or “jouissance” rights, mining shares, founders’ shares, or other rights, not being debt-claims, participating in profits, as well as income from other corporate rights which is subjected to the same taxation treatment as income from shares by the laws of the State of which the company making the distribution is a resident.

4. The provisions of paragraphs 1 and 2 shall not apply if the beneficial owner of the dividends, being a resident of a Contracting State, carries on business in the other Contracting State of which the company paying the dividends is a resident through a permanent establishment situated therein and the holding in respect of which the dividends are paid is effectively connected with such permanent establishment. In such case the provisions of Article 7 shall apply.

5. Where a company which is a resident of a Contracting State derives profits or income from the other Contracting State, that other State may not impose any tax on the dividends paid by the company, except insofar as such dividends are paid to a resident of that other State or insofar as the holding in respect of which the dividends are paid is effectively connected with a permanent establishment situated in that other State, nor subject the company's undistributed profits to a tax on the company's undistributed profits, even if the dividends paid or the undistributed profits consist wholly or partly of profits or income arising in such other State.

Domestic legislation

A. Tacoland's Tax Code sets forth:

Section CFC

Article 257. The term “controlled foreign corporation” means any non-resident corporation if it is a subsidiary of a resident in Tacoland or if more than 50 percent of the total combined voting power of all classes of stock of such corporation entitled to vote, or the total value of the stock of such corporation, is owned or is considered as owned by residents in Tacoland, on any day during the taxable year of such foreign corporation.

For purposes of this article, stock owned, directly or indirectly, by or for a foreign corporation, foreign partnership, permanent establishment, or foreign trust shall be considered as being owned proportionately by its shareholders, partners, or beneficiaries. Stock considered to be owned by a person by reason of the application of the preceding sentence shall, for purposes of applying such sentence, be treated as actually owned by such person.

Article 258. If a controlled foreign corporation is controlled by one or several Tacoland residents, in the terms of articles 257 and 259, such shareholders shall comply with the controlled foreign corporation rules set forth in Section CFC of the Tax Code.

Article 259. If a foreign corporation is a controlled foreign corporation, every person who is a Tacoland resident and a qualified shareholder owning stock in that corporation shall include in its gross income, as a deemed dividend, the pro rata share of the controlled foreign corporation's net profits derived from passive income.

For purposes of this Article, the term “qualified shareholder” means, with respect to any foreign corporation, a Tacoland resident who owns or is considered to own (within the

meaning of article 257) 10 percent or more of the total combined voting power of all classes of stock entitled to vote of such foreign corporation, or 10 percent or more of the total value of shares of all classes of stock of such foreign corporation.

Article 260. For the purposes of this section, passive income means:

(...)

4. Interests.

Section DST

Article 842. A tax (to be known as “digital services tax” or DST) is charged in accordance with this section on Tacoland digital services revenues arising to a corporation in an accounting period.

Article 843. For the purpose of this section:

1. The digital services revenues of a corporation for a period are the total amount of revenues arising to that corporation in that period in connection with any digital services activity of that corporation.
2. A corporation’s Tacoland digital services revenues for a period are so much of its digital services revenues for that period as are attributable to Tacoland users.
3. Revenues are attributable if they arise in connection with a transaction to which a Tacoland user is a party. Where digital service revenues arise in connection with Tacoland users and others, the revenues are to be treated as attributable to Tacoland users to such extent as is just and reasonable.
4. Digital services activity means providing a social media platform, an internet search engine, or an online marketplace.
5. Social media platform means an online platform which meets at least one of the following conditions:
 - (a) Promotes or enables interaction between users (including interaction between users and content on the platform provided by other users);
 - (b) Enables content to be shared with other groups of users (or with other users); or
 - (c) Provides streaming of audiovisual services (among others, music, videos, films, and games of any kind, as well as the broadcasting of any type of event).
6. Tacoland user means any person who is using an IP located in Tacoland.

Article 844. Corporations, regardless of their tax residence, that meet the following conditions, are subject to the digital services tax provided in this section:

- (a) Their annual revenue for the preceding fiscal year exceeds 750 million guilders.

(b) Their revenue attributable to Tacoland users exceeds 3 million guilders.

Article 845. The tax base for the tax provided in this section is the amount of revenue obtained by a corporation which constitute revenues attributable to Tacoland users. The tax will be equal to 3% of the tax base.

Article 846. If the Tacoland users pay for the digital services by means of a credit card, the bank that issued the credit card shall withhold the total amount of the DST.

III. Pleadings

In May 2023 the Tacoland's tax authority conducted a tax audit regarding SVB's 2022 income tax return. As a result, and in relation to the above-mentioned issues, the Tax Administration issued a tax settlement that states:

- A. SVB should have withheld the digital service tax that arose due to the digital service activities provided by PlaceID with respect to Tacoland users, pursuant to article 846 of the Tax Code.
- B. SVB should have withheld Apache's non-resident income tax over the amounts paid in compliance with the licensing agreement executed between SVB and Apache following to Article 12 of the DTC in force between Tacoland and Whitesea.
- C. SVB should have included in its gross income for 2022 as a deemed dividend the profits obtained by SVB-Quiche during the same year following Section CFC of the Tax Code.

IV. Current procedure

The case is now pending before the Supreme Court of Tacoland, which can rule on any aspect of fact or law, whether it has been raised before during the procedure. The Court in which you are filing the petition (and before which you will later plead orally) only assesses legal arguments. Assume that you are in a rule-of-law country, where rules and general principles of law may be invoked. Please note that the Court will not assess any procedural issue.