



2023 Iberoamerican Tax Moot Court Competition Clarifications to the case

- 1- Under Tacoland domestic rules, are remittances abroad of royalties and compensation for technical services subject to withholding income tax? If yes, what is the tax rate applicable?**

Yes. Under Tacoland's domestic legislation, all payments made to an entity or individual which is not deemed a tax resident in Tacoland is subject to withholding tax at a rate of 15%.

- 2- Under Whitesea and Tacoland domestic rules, are there rules for crediting foreign tax credits? If yes, are both direct and indirect foreign tax credits covered?**

No. All countries eliminate double taxation using the exemption method.

- 3- Under Tacoland domestic rules, do private agreements on bearing tax liability bind the tax administration?**

No.

- 4- Under Tacoland domestic rules, what is the definition of royalties and technical services?**

There is no definition of such terms in Tacoland's domestic legislation.

- 5- Do the two tax treaties mentioned in the case have specific articles for technical services and other income? If yes, what is the wording in the technical services article and is the other income article identical to OECD 2017 Model?**

Please read the case carefully.

- 6- Do Tacoland CFC rules have a look-through rule for recharacterizing income (passive vs. active)? Moreover, are there rules for characterizing otherwise passive income as active income based on the CFC's type of business activities?**

The rules described in the question do not exist in Tacoland.

- 7- Are articles 1 (persons covered), 2 (taxes covered), 5 (permanent establishments) and 7 (business profits) of both the tax treaties mentioned in the case identical to OECD 2017 Model?**

Yes. Article 2 of the treaty between Whitesea and Tacoland lists the tax covered in both jurisdictions. Regarding the taxes covered in Tacoland, the list does not include the DST enacted by Tacoland. It should be noted that the DST was enacted after the treaty was signed and entered into force.

8- What is the method for eliminating double taxation adopted by each of the tax treaties mentioned in the case under article 23, exemption or credit, or a combination of both?

Article 23 of the treaty between Tacoland and Quiche has identical wording as article 23A of the OECD 2017 Model. Article 23 of the treaty between Tacoland and Whitesea has identical wording as article 23A of the OECD 2017 Model.

9- Under Whitesea, Tacoland and Quiche domestic rules, what is the corporate income tax rate the respective corporate tax residents are subject to?

The relevant income tax rate is 25% in Whitesea, 30% in Tacoland, and 27% in Quiche.

10-Do Tacoland CFC rules have a high-tax kick-out rule? If yes, what is the threshold for its application?

No.

11-Can we assume Whitesea, Tacoland and Quiche have no legal and administrative precedents covering the issues in the case?

Yes.

12-Can we assume the OECD Commentaries to OECD 2017 Model are not binding to Whitesea, Tacoland and Quiche?

This is part of the exercise. Note however that all three countries are OECD members.

13-Can we assume any other tax treaty article not mentioned in the case is identical to OECD 2017 Model's?

Yes.

14-Does the court take in consideration legal precedents in order to render its ruling?

Yes. However, the Supreme Court of Tacoland has not yet decided an issue similar to the case.

15-Does Apache have a PE in Tacoland?

No.

16-Can we assume that all domestic legislation applicable was enacted before the tax treaties mentioned in the case, so there is no potential issue of treaty override?

No. Both the CFC and the DST section of Tacoland's Tax Code were enacted after the treaty with WhiteSea was signed and entered into force. Nevertheless, under Tacoland's constitution, domestic law cannot modify or in any way alter Tacoland's obligations under international treaties. The Supreme Court of Tacoland has stated that if in a particular case there is a conflict between a treaty and domestic law, if the conflict cannot be resolved via interpretation, the treaty will prevail.

17-Does Apache Inc. have a permanent establishment, offices, employees, or facilities of any kind in Tacoland?

No.

18-Is there in Tacoland a rule, a law or an Act that states about the general taxation of royalties? If yes, what are the rates?

No, royalties are subject to income tax as any other type of income.

19-Which is SVB bank and SVB-Quiche company type? Are they a limited liability company or corporation? Are they considered public traded corporations or privately held?

They are both corporations. SVB bank is publicly traded in Tacoland. SVB-Quiche is not publicly traded. In fact, it is fully owned by SVB bank.

20-Do SVB-Quiche have any other shareholders other than SVB ? Who are the shareholders of SVB?

Please read the case carefully and see question 19.

21-How can we count the beginning of the 5-year plan of SVB? Does it start at 2019 or from 2020 and up forwards?

The plan started after it was adopted on April 1st, 2019.

22-The first paragraph of section A states that the total revenue of PlacelD exceeded 980 million guilders for the past 5 years. What was the annual breakdown?

It means that every single year, for the past 5 years, PlacelD had revenue that exceeded 980 million guilders.

23-What does the domestic law of Tacoland provide for “just and reasonable” (whether legislation or case law) in relation to the income generated by the users of PlacelD app who have an IP address in Tacoland?

There is no definition of such terms. Further, no court in Tacoland has yet interpreted that provision.

24-What does the domestic law of Tacoland provide for royalties (whether legislation or case law)?

Tacoland’s domestic legislation does not have a definition of royalties. Courts have not defined such term either.

25-What does the domestic law of Tacoland provide for “collective investment vehicles” (whether legislation or case law) regarding the 5-year expansion plan presented by SVB?

Tacoland’s domestic legislation does not have a definition of such terms. Courts have not defined such terms either.

26-Is there any disposition in the Double Tax Convention (‘DTC’) between Quiche and Tacoland regarding “collective investment vehicles”?

No.

27-What are the tax rates in Tacoland and Quiche related to legal entities?

See answer to question 9.

28-What does the domestic law of Tacoland (whether legislation or case law) provide regarding special tax regimes?

Stick to the facts of the case.

29-In addition to Article 260 of Tacoland’s Tax Code, what does the domestic law of Tacoland (whether legislation or case law) provide in relation to interests (tax rates, exemptions, payment, etc.).

Interests are subject to income tax as any other type of income. There are no special relevant provisions for interests other than the one stated in the case. Courts have not yet deal with this issue.

30-What are the terms and conditions of the licensing agreement between SVB and Apache Inc?

Please read the case carefully.

31-Regarding the licensing agreement between SVB and Apache Inc, did Apache Inc render any service to SVB of a technical support service nature or any other kind? If the answer were yes, how frequently did Apache Inc render such services to SVB over the tax period 2022?

No. Although Apache does render these services, SVB has not needed them yet. Therefore, Apache has not provided them to SVB so far.

32-Is there any disposition in Tacoland's domestic legislation (whether legislation or case law) which allows any deferral payment or exemption regarding the reinvest of dividends?

No.

33-What is the definition of the term "interest" under Tacoland's domestic law?

Tacoland's domestic legislation does not have a definition of the term interests. Courts have not defined such term either.

34-How does Tacoland's tax authority know about the revenue that arose in Quiche regarding interest related to the activities developed by SVB- Quiche? Was there a third-party audit involved in the SVB- Quiche activities?

No. Under Tacoland's domestic law, banks that are incorporated in the country have a duty to report to the tax authority the income obtained by their subsidiaries all over the world. In accordance with that duty, SVB timely and accurately reported the income obtained by SVB-Quiche.

35-Are Tacoland, Quiche and Whitesea parties to the Vienna Convention on the Law of Treaties? Are the DTC between Tacoland and Whitesea, and between Tacoland and Quiche covered by the MLI and the BEPS actions?

All three countries are part of the Convention on the Law of Treaties. None of the countries ratified the MLI.

36-Does Apache Inc have employees, offices, or facilities in Tacoland or carry out any other activity there?

No. Apache does not need any of that in order to operate in Tacoland.

37-What is the definition of the term “business profits” under Tacoland’s domestic law?

Tacoland’s domestic legislation does not have a definition of the term business profits. Courts have not defined such term either.

38-Is Apache Inc a software copyright holder or a distribution intermediary?

Apache is the copyright holder of the OpenAgency Writer software. Likewise it directly licenses the software all over the world.

39-Did SVB get their computers from Apache Inc as well or where they acquired elsewhere?

The computers were acquired by SVB from an independent computer retail company located in Tacoland. The retail company is not related to the entities mentioned in the case.

40-Is there any reservation made by Tacoland, Whitesea, or Quiche in regard to the OECD Model Tax Convention on Income and on Capital 2017?

No.

41-What are the requirements for a legal entity to qualify as tax resident in Tacoland, Quiche, and Whitesea under their domestic laws and regulations?

All three nations follow a similar rule. On those countries, legal entities are considered tax residents therein if they have their place of effective management located in the country. PlaceID has its headquarters in Whitesea, and all of its employees reside and work there. SVB-Quiche has offices and employees in Quiche. SVB-Quiche is considered a tax resident in Quiche by Quiche’s tax authority. SVC-Quiche complies with all its legal and tax obligations in Quiche. Tacoland’s tax authority considers that SVB-Quiche is a tax resident in Quiche.

42-How is corporate income subject to taxation in Quiche/Whitesea? Please provide the details of these rules.

Stick to the facts of the case. Both countries tax their residents on a worldwide basis and have no relevant exemptions from taxation. To eliminate double taxation each country uses the exemption method.

43-What was PlacelD's global revenue for the preceding fiscal year?

See the answer to question 22. PlacelD's income for 2022 was 982 million guilders.

44-Is the imposition of DST qualified as income taxation?

This is part of the exercise. See the answer to question 7.

45-Are the conditions set forth by Article 844 cumulative or independent?

The conditions of Article 844 of Tacoland's Tax Code are cumulative.

46-Is the outflow of funds from Tacoland to PlacelD subject to any taxes?
Justification: The DST provides for withholding tax in cases where payment is made by a credit card. According to the facts of the case, 4 million PlacelD users from Tacoland do not use SVB as credit card issuer. For sake of coherence and equity, it is important to understand whether the outflow of the funds paid by these 4 million users is subject to DST or any other taxes, including the withholding of DST.

No. As stated in the case, credit cards are the only available payment method PlacelD has implemented in Tacoland. All the 20 million users PlacelD has in Tacoland pay for the service with a credit card. 16 million users pay for it with a credit card issued by SVB, the other 4 million use credit cards issued by other banks. The payments made with credit cards issued by other banks were not subject to withholding tax either. Those banks are also being audited by Tacoland's tax administration on the same grounds. Nevertheless, those cases have not yet reached the Tacoland's Supreme Court.

47-Where was the agreement between Apache Inc. and SVB executed?
Justification: Under the facts of the case, it is not clear how Apache Inc. operates nor where its representatives, managers, officers, and employees (including software developers) are located. For a better understanding of the applicability of Article 7 of the Tax Treaty between Tacoland and Whitesea, it is important to clarify the aforementioned aspects of Apache Inc.'s operations.

The agreement was signed in Whitesea. SVB's executives travel to Whitesea to meet with Apache's executives, and they negotiated and signed the agreement there. All Apache's employees, including software developers, are residents and work in Whitesea.

48-What are the characteristics of the software licensed by Apache Inc.?

Justification: According to the facts of the case, it seems that the licensing agreement executed between Apache Inc. and SVB grants access to copies of the program limited to those necessary for enabling the operation of the program. Thus, it is not clear if the license of use grants any intellectual property rights for the exploitation of SVB (i.e., reproduction, distribution, copyrights' conferring, amendment of the source code etc.) or has any content of digital services (i.e., qualifies as a Software as a Service, providing cloud computing arrangements as well as other functions). This clarification would be important to understand whether Article 7 or Article 12 would be the ones applicable to the case at hand.

The software is a word processing program. Under the agreement SVB is allowed to access copies of the program and use it. The agreement does not grant SVB any copyright right. Apache does not provide any additional service to SVB.

49-Is there any special bond between Apache Inc. and SVB?

No. Other than the licensing agreement, there is no relationship between SVB and Apache.

50-What are the legal qualifications of the transaction between Apache Inc. and SVB under the domestic legislations of Tacoland and Whitesea? Justification: Under the facts of the case, the legal qualification of the transaction between Apache Inc. and SVB is not apparent. It would be important to understand the details of the domestic legislation on software, including the intellectual property law concepts/qualification applicable to the case at hand, to better understand the ordinary meaning of software transfer and the applicability of Article 12 of the Tax Treaty between Tacoland and Whitesea.

This is part of the exercise. There is no domestic legal definition of software. However, the relevant provisions of the Tacoland's intellectual property legislation include software as a protected literary work. Tacoland recognized Apache as owner of the software and the copyrights attached to it.

51-Who is subject to dividend taxation in Quiche? Is SVB-Quiche tax transparent?

No. SVB-Quiche is subject and liable to tax in Quiche. It is not transparent. Quiche's domestic legislation imposes a withholding tax on dividends of 15%. Nevertheless, the withholding tax is triggered upon actual payment of the dividends. Therefore, SVB has not been subject to such withholding tax in Quiche.

52-What are the concepts of dividends/deemed dividend under the domestic legislations of Tacoland and Quiche?

Tacoland and Quiche do not have a definition of dividends or deemed dividends under domestic law.

53-What was the annual revenue of Place ID INC during fiscal year 2022?

See answer to question 43.

54-Is there any judicial precedent in Tacoland regarding the nature of the Digital Service Tax? Is the Digital Service Tax considered as an indirect or direct tax?

In Tacoland no authority has dealt with the matter. This is part of the exercise.

55-What is the domestic corporate income tax rate for companies under the domestic tax law of Quiche?

See answer to question 9.

56-Is there any judicial or administrative precedent regarding the definition of royalties under the Whitesea – Tacoland Tax Treaty or under any other Tax Treaty in force in Tacoland? Specifically, is there any precedent regarding the application of “literary, artistic or scientific work” to software?

Other than the treaty definition, there is no legal precedent in Tacoland dealing with this issue.

57-What is Apache Inc.’s ordinary course of business in Whitesea and abroad?

Apache business is developing and licensing software. Although it has multiple products, its most popular one is OpenAgency Writer. Most major corporations in the world use that software. The software development occurs in Whitesea, while the licensing takes place all over the globe. Apache has a team of 18,000 software engineers that work in the company’s headquarters located in Whitesea. Apache does not have offices in other places of the world.

58-Who are the owners/majority shareholders of Apache Inc. and what are their country of tax residency? Does any of them hold any kind of right over “Open Agency Writer” which would derive in the enjoyment of a percentage of the income derived from its licensing?

Apache is a publicly traded company. Six major unrelated investment companies own 40% of Apache. The remaining 70% is owned by millions of entities and individuals all

over the world that acquire Apache's stock in one the Whitesea Stock Exchange. Apache is incorporated in Whitesea. Therefore, it is not transparent for tax purposes. Apache is the only owner of the software; its shareholders are not directly entitled to any benefits or rights derived therefrom. The shareholders are, of course, entitled to dividends if the company decides to distribute them.

59-Has Tacoland enacted domestic legislation regarding the taxation of royalties arising in its territory? If so, what is the domestic tax law definition of "royalty" and what is the applicable withholding tax rate to royalty payments made abroad of Tacoland?

See answers to questions 1, 4, and 18. Under Tacoland's domestic legislation, a royalty is sourced in Tacoland if the underlying intangible asset is used by a resident of Tacoland.

60-Does the aforementioned definition include income arising out of a software licensing agreement?

See answer to question 59.

61-Have the competent authorities of Tacoland and Whitesea reached a decision by means of a mutual agreement procedure regarding the application of Article 12(2) of the DTC? Please provide details of that mutual agreed decision if so.

No.

62-Is "Open Agency Writer" a software that runs on servers? If so, where are those servers located and administered? Who operates them?

Yes. The servers are located in Whitesea. Apache's personnel directly operates them.

63-Have SVB's dividends already been made available to shareholders in accordance with the company's articles of incorporation?

Please read the case carefully. SVB has not distributed dividends nor it has declare any dividends.

64-Has any situation arisen that resulted in SVB-Quiche no longer be a subsidiary of the parent company SVB? If so, has the capital of the subsidiary company been reduced for the recipient company?

No.

65-Is there any judicial precedent in Tacoland regarding the application of CFC

rules only to abusive transactions?

No. There is no indication in the law or in case law that CFC rules only apply to abusive transactions. Nevertheless, Roman Roy, an individual resident of Tacoland, independent to all the entities and individuals mentioned in the case, in an independent cause of action challenged the constitutionality of the CFC regime before Tacoland's Supreme Court. The argument of Roy is that the CFC regimen violates Tacoland's constitution because it applies to all transactions, even non-abusive ones. In that case, the Tacoland's tax authority requested a preliminary hearing to dismiss the case for lack of serious legal grounds. At the hearing Tacoland's Supreme Court rejected the motion to dismiss and allowed the case to go on because *"the action poses a controversy on constitutional grounds that can be heard by this Court"*. Therefore, currently the case is pending a final decision from the Supreme Court. Given the current docket of the court, that case will not be resolved before the between SVB and the tax administration (the one in which you will be pleading) is resolved.

66-Is there any judicial precedent in Tacoland regarding the definition of "passive income" under the Tacoland CFC rule?

No.

67-Are there any exceptions provided by the CFC legislation?

No.

68-Was there a formal record of the investments made each year of the "expansion plan" of SVB branches and receipt of the reinvested profits?

Yes. The expansion plan is a written document drafted by SVB's board of directors and approved by its shareholders. As stated in the case, according to the expansion plan, no subsidiary was going to distribute dividends for the five years stated in the expansion plan.

69-How do SVB and SVB-Quiche structure their organization? Since the creation of the subsidiary, was there any involvement of this new company in the payments related to Place ID? If so, what was the revenue earned by SVB in these cases and was it taxed? This is important to define how SVB interferes in its subsidiary.

No. Although SVB and SVB-Quiche are under common control, they are separate entities that conduct their business separately. SVB-Quiche was not involved at all in the transactions between SVB and PlaceID.

70-Are Tacoland, Whitesea and Quiche signatories of the MLI and the VCLT?

See question 35.

71-Are Tacoland, Whitesea and Quiche members of the United Nations, or the World Trade Organization and World Customs Organization?

Yes. All three countries are members of the UN, WTO, and WCO.

72-When were the Double Tax Conventions between (i) Tacoland and Whitesea and (ii) Tacoland and Quiche implemented?

Both treaties were signed in February 2018. Both treaties entered into force in November 2018.

73-What is the hierarchy of tax treaties in relation to the domestic law of Tacoland?

In Tacoland treaties and laws enacted by congress are at the same level. Nevertheless, the Supreme Court of Tacoland has stated that if in a particular case there is a conflict between a treaty and domestic law, if the conflict cannot be resolved via interpretation, the treaty will prevail. See question 16.

74-In the double taxation convention signed between Whitesea and Tacoland, art. 12.5 deals with royalties when there is a special relationship between the payer and the beneficial owner. Which are the requirements for the characterization of a “special relationship”, and how could it be defined?

There is no special relationship between Apache and SVB. There is no special relationship between any of the entities mentioned in the case.

75-How does Whitesea law regulates the taxation of the software’s license use acquisition and which are the requirements of said legislation to frame an activity as a digital service? How is the tax treatment adopted in the export of services?

Under the laws of Whitesea income from the license of any intangible asset is subject to income tax as any other type of income. There are no special relevant provisions for that type of income. From a tax perspective, Whitesea does not treat digital services any different than any other type of service. Whitesea taxes its residents on a worldwide basis. Therefore, if a resident renders services abroad, the income derived from such activity is subject to tax in Whitesea under the same rules as any other income.

76-Did Quiche tax the profits obtained by SVB-Quiche during 2022? If so, did it follow the provisions of Article 10.2 or 11 of the tax treaty between Quiche and Tacoland?

Yes. Quiche taxed SVB-Quiche's profits in accordance with its domestic law. The applicable rate was 27% (see question 9). During 2022, SVB-Quiche only had income sourced in Quiche. To determine its tax liability for 2022 SVB-Quiche followed all the relevant provisions, including Articles 10.2 or 11 of the tax treaty between Quiche and Tacoland.

77-Are there any differences between each countries tax rates?

See question 9.

78-Does Tacoland's domestic legislation, or any of its international agreements, contain any anti-abuse clauses or laws to prevent tax evasion? Such dispositions are essential to determine what may be considered as tax abuse.

Yes. Tacoland domestic legislation contains a general anti-abuse clause that reads as follows *Notwithstanding any provision of any convention in force, a benefit under a convention shall not be granted in respect of an item of income or capital if it is reasonable to conclude, having regard to all relevant facts and circumstances, that obtaining that benefit was one of the principal purposes of any arrangements or transaction that resulted directly or indirectly in that benefit, unless that it is established that granting that benefit in these circumstances would be in accordance with the object and purpose of the relevant provisions of the Convention.*

In addition, all the tax treaties signed by Tacoland include a anti-abuse provision identical to article 29.9 of the 2017 OECD Model tax convention.

79-Are Tacoland, Quiche and Whitesea all located in the Easy-Peasy continent? Do they belong to any common economic bloc?

Tacoland and Quiche are on the same continent. Whitesea is located on a different continent. Tacoland, Quiche, and Whitesea are not a part of an economic bloc.

80-Considering that there was no withholding tax (i) on the proceeds arising from the cardfees transferred from SVB to PlacelD; and (ii) on the royalties paid by SVB to ApacheInc., was there taxation of PlacelD and Apache Inc. in Whitesea?

Yes. Apache and PlacelD pay taxes in Whitesea on a worldwide basis. Therefore, the income obtained by those companies that arose in Tacoland was taxed in Whitesea at a rate of 25% (see question 9).

81-What are the provisions in the internal law of Tacoland on what refers specifically to royalties? Do “royalties” have a specific meaning in the SVB’s business practice?

Royalties do not have a specific meaning in SVB’s business practice. See question 4.

82-Do the countries involved in this case have signed a mutual agreement procedure?

The countries involved in the case have signed several mutual agreement procedures. Nevertheless, none of them deal with the issues stated in the case.

83-Has Place ID’s total global revenue exceeded 750 million guilders in the last fiscal year?

Yes. See question 43.

84-Has Place ID made contracts with SVB or other companies in Tacoland before?

Yes. PlaceID has contracts with all the banks of Tacoland. All the contracts contain similar provisions regarding payments made by PlaceID’s clients in Tacoland with credit cards issued by the banks.

In addition, all PlaceID’s users sign a contract with PlaceID once they download and start using the app. Therefore, PlaceID has a contract with all its users in Tacoland. The provisions of the contract regulate the relation between the users and PlaceID. All those contracts have the same wording.

85-When Apache Inc. allowed SVB to use their processing software, did it make its platform available just in cloud computing or did it offer a whole infrastructure?

SVB downloads the software from Apache’s website on as many computers as SVB wants. No additional infrastructure is provided or needed.

86-How are computers supplied by Apache Inc. shipped and maintained in Tacoland?

The computers were acquired by SVB from an independent computer retail company located in Tacoland. Apache does not provide the computers. SVB maintains the computers. If SVB needs any technical service related to the computers, it has to deal with the local retail company. See question 39.

87-How is Apache Inc. and PlacelD's operating structures organized and what services do they provide in Tacoland?

Apache does not have offices, employees, servers, or facilities in Tacoland. It has several clients in Tacoland that acquired the license to use OpenAgency Writer in the same manner as SVB acquired it, and under similar agreements. Apache does not have any other business in Tacoland.

PlacelD does not have offices, employees, or facilities in Tacoland. The only service it renders in Tacoland is providing access to its app to the users, as described in the case.

88-How SVB accounted for the SVB-Quiche profits from the years between 2019 and 2021?

From a tax standpoint, SVB has not accounted for SVB-Quiche profits from the years 2019 to 2021 because, similar to what happened in 2022, the company took the position that under Article 10 of the tax treaty in force between Tacoland and Quiche, SVB was not required to account for such profits. From an accounting standpoint, SVB did not register SVB-Quiche profits in its accounting books because the company was not required to under the accounting reporting standards applicable in Tacoland.

89-Did SVB-Quiche pay taxes to Quiche regarding its profits in 2022?

Yes. See the answer to question 76.