Notes on Selected Flaws of the Global Minimum Tax

WIRTSCHAFTS UNIVERSITÄT WIEN VIENNA UNIVERSITY OF ECONOMICS AND BUSINESS

IFA Austrian Branch

6 March 2023

Valentin Bendlinger

Minimum Tax Liability Without Profits?

WIRTSCHAFTS UNIVERSITÄT WIEN VIENNA UNIVERSITY OF ECONOMICS AND BUSINESS

The case of Art 4.1.5. MR and Art 21(5) Directive:

	Domestic CIT	GloBE
Profit/Loss Y1	-200	-100
Tax Rate	24 %	15 %
Deferred Tax Asset (to be recasted at the minimum rate at 15 %)	30	15
Expected Amount of ACT		-15
Actual Amount of ACT		-30
Additional Current Top-up Tax	**15**	

OECD Excess Negative Tax Expense Carry-forward: **15**
(avoids Top-up Tax in the year in which loss occurs, but reduces ACT in the years the domestic loss-carry forward is finally used)

Issue addressed in OECD Administrative Guidance 2023

- Revised paras. 19-21 and added paras. 21.1 to 21.8 to Commentary on Art 4.1.5. MR (pp. 49-54)
- jurisdictions shall adopt an „administrative procedure" that „will allow MNE Groups to avoid Additional Current Top-up Tax under Art 4.1.5 in the year in which it has a GloBE Loss and Top-up Tax Percentages in excess of the Minimum Rate"
- So-called „Excess Negative Tax Expense Carry-forward"
  - Obligatory application if Top-up Tax Percentages are excess of the Minimum Rate
  - Otherwise, provided as an annual election
- Newly added Example 2.7.4. for the Example catalogue

Which Nominal Tax Rate is Enough?

WIRTSCHAFTS UNIVERSITÄT WIEN VIENNA UNIVERSITY OF ECONOMICS AND BUSINESS

$$Effective\ Tax\ Rate = \frac{Adjusted\ Covered\ Taxes\ of\ the\ CEs\ per\ jurisdiction}{Net\ GloBE\ Income\ per\ jurisdiction}$$

Differences of domestic tax base and GloBE base that impact the ETR calculation (selection):

- Portfoliodividends (exempted under domestic law but not under GloBE)
- Equity losses (might be included in domestic base but excluded under GloBE)?
  - In the meanwhile excluded equity losses have been addressed in the **OECD Administrative Guidance 2023, pp. 61 et.seq.** which provide for a so-called „Equity Investment Inclusion Election".
- R&D Credits and Superdeductions (QRTC and Non-QRTCs)

Tax Policy Inconsistencies of the SBIE

WIRTSCHAFTS UNIVERSITÄT WIEN VIENNA UNIVERSITY OF ECONOMICS AND BUSINESS

Substance-based-income-exclusion = free amount for substance

- Payroll component (total amount of payroll costs) x fixed percentage
- Tangible asset component excluding investment property (total amount of payroll costs) x fixed percentage

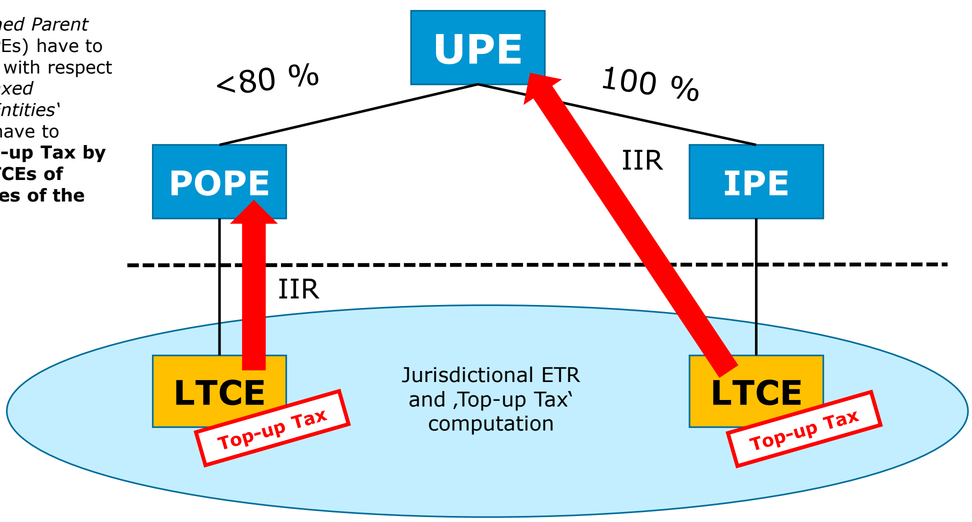
How to reduce the risk of ‚Top-up Tax' arising in a jurisdiction with a low nominal tax rate?

Tax Policy Inconsistencies of the SBIE

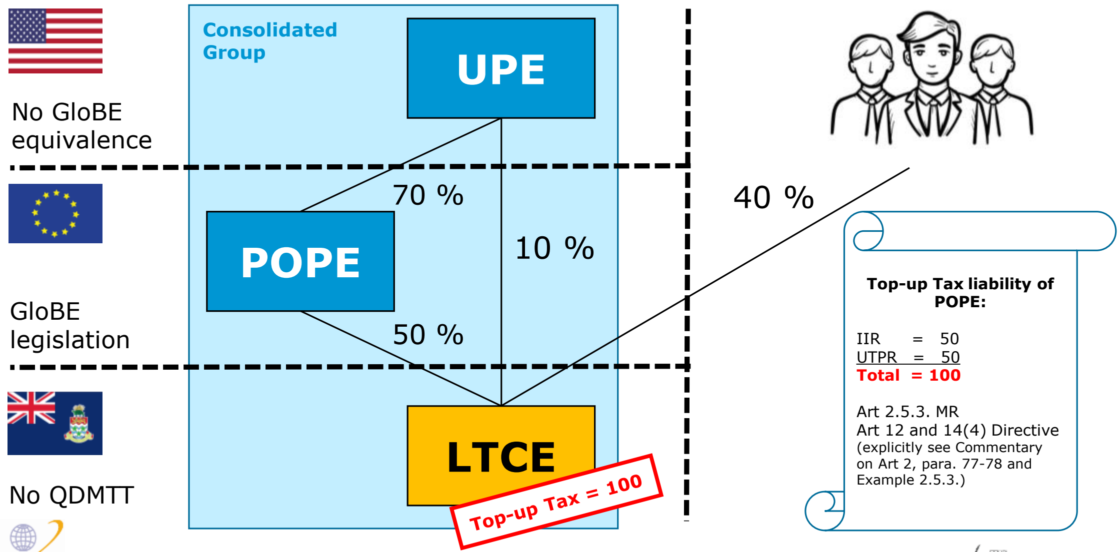
Employ a manager, raise the payroll and buy him a Porsche!

The Curiosity of Jurisdictional Blending

‚Partially Owned Parent Entities' (POPEs) have to apply the IIR with respect to its *‚Low-Taxed Constituent Entities*' (LTCEs) but have to compute **Top-up Tax by including LTCEs of different lines of the MNE Group!**



Minimum Tax Liability for Minority-Shareholders?

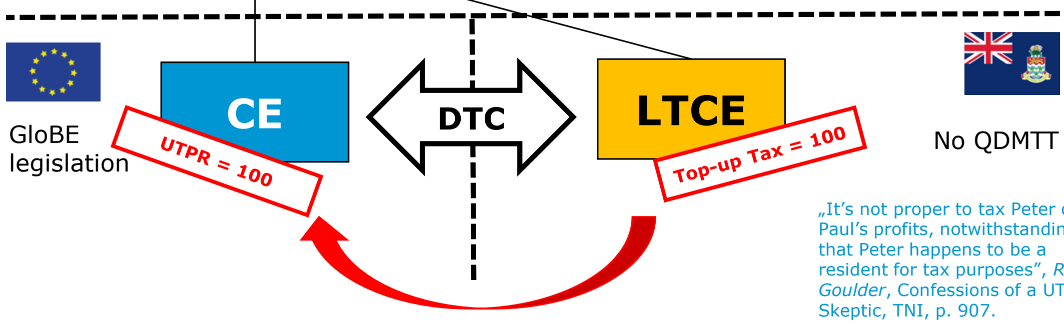


Treaty (In)Compatibility of GloBE

Do tax treaties permit to tax profits of a different taxpayer?

- Art 1(3) – ‚saving clause'
- Art 1 and 7 OECD MC

OECD Administrative Guidance 2023, p. 6: „Consistent with the intention of the Inclusive Framework, the GloBE Rules (including the IIR and the UTPR) are desigend so that the imposition of top-up tax in accordance with those rules" will be compatible with the UN and OECD MCs



„It's not proper to tax Peter on Paul's profits, notwithstanding that Peter happens to be a resident for tax purposes", *R. Goulder*, Confessions of a UTPR Skeptic, TNI, p. 907.

Concluding Remarks

- **Establishment of a „common approach" of more than 140 jurisdictions to implement a global minimum tax within 4 years is a significant achievement**
- **Nevertheless:**
  - The "hasty" construction of GloBE's framework brings to light various flaws that would have required more in-depth investigation beforehand
  - The final conclusion of the „Global Tax Deal" reveals not only technical but also tax policy inconsistencies
    - DTC compatibility contrary to the believes of the OECD/IF far from secured
    - SBIE is vulnerable to abuse and undermines (by the way questionable) policy goals of minimum tax
    - Several unanswered questions of interpretation that have not been clarified yet
  - Significant amount of potential and unsolved normative conflicts leads to uncertainty not only for tax payers but also for implementing jurisdictions
  - **Final question:** Is the compliance burden caused by GloBE proportionate to the tax revenue generated?

Final Statement

The more quickly a major wave of regulatory change happens, the more traces it leaves. And now that the waters around the Pillar II project are calming down for the first time, these traces are becoming visible.