



COMMENTARY

UN Committee of Experts on International Cooperation in Tax – 20th Session

Update of the UN Model Double Taxation Convention between Developed and Developing Countries – Proposed changes to the Commentary on Article 5 (Permanent Establishment)

E/C.18/2020/CRP.10

1. General Comments

We note the paper contains the proposed changes to the Commentary on Article 5 (Permanent Establishment) of the Model Double Taxation Convention between Developed and Developing Countries. The proposed changes deal with a number of modifications that were made to the OECD Commentary on Article 5 in 2017 but which, due to time constraints, the former membership of the Committee did not have the opportunity to consider when preparing the 2017 version of the UN Model.

We welcome the opportunity to comment on the proposed changes to the Commentaries on Article 5. However, prior to making the specific comments, we would like to note that Article 5 of the ATAF Model Tax Convention is significantly the same as that of the UN Model Tax Convention; hence there would be very minimal different views. Nevertheless, set out below are some of the specific issues we have above as important for both the provisions for the Article and the Commentary to the same.

2. Specific Comments

2.1. Paragraph 13

We welcome the commentary on Subparagraph (f) paragraph 2 to Article 5, which provides that ... *the expression “any other place of extraction of natural resources” should be interpreted broadly. Some*

have argued that, for this purpose, a fishing vessel could be treated as a place of extraction or exploitation of natural resources since “fish” constitute a natural resource. In their analysis, although it is true that all places or apparatus designated as “permanent establishments” in subparagraphs (a) to (e) in paragraph 2 have a certain degree of permanence or constitute “immovable property”, fishing vessels can be considered as a place used for extraction of natural resources, which may not necessarily mean only minerals embedded in the earth. In this view, fishing vessels can be compared to the movable drilling platform that is used in offshore drilling operations for gaining access to oil or gas. We further note the differing views over the matter and the decision to leave the issue for bilateral negotiations between Contracting States.

We have noted that many African countries have expressed the need for special provisions to address explorations and exploitation of all natural resources. Thus, the Commentaries to Article 5 should consider providing specific provisions for Source States to consider when entering into the bilateral negotiations. Additionally, more guidance on interpretation of such provisions should be provided. Therefore, Commentary 23 should provide the specific provisions for consideration by States.

2.2. Paragraph 68

We note that the Committee discussed the significance of the reference to contracts *“that are routinely concluded without material modification by the enterprise”*, as explained in Paragraph 68 of the Commentary. We consider this as an important issue which needs to be re-evaluated as it may conflict with the initial policy objective of the new Article 5(5). If this phrase is included, enterprises may still artificially avoid Permanent Establishment (P/E) status in the source state by holding that the conditions have not been met as the contracts were materially modified by another part of the enterprise. We thus, hold the view that the Article 5(5) of the UN Model and Commentaries to the same should delete this phrase in order to broaden the Article and to effectively limit the opportunities for avoidance of P/E status.