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**Committee of Experts on International
Cooperation in Tax Matters
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Item 3 (b) of the provisional agenda

**Update of the UN Model Double Taxation Convention between Developed and
Developing Countries**

Summary

The Subcommittee responsible for the update of the United Nations Model Double Taxation Convention between Developed and Developing Countries (Model) was tasked with carrying out a general review of the Model to identify and amend inconsistencies, improve the clarity, and update or remove historic passages that no longer hold relevance.

A list of possible topics that could be addressed as part of the next update of the UN Model was prepared by the Coordinator of the Subcommittee, with inputs from the Subcommittee members and the Secretariat, and circulated among Committee members for comments.

This document and the comments received will be discussed during the forthcoming session of the Committee, with a view to finalizing the list of topics to be addressed in the next update of the Model.

NOTE BY THE SECRETARIAT

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POSSIBLE TOPICS FOR THE NEXT UNITED NATIONS MODEL TAX CONVENTION UPDATE

Note by the Subcommittee on the Updating of the UN Model Convention

The 2017 update of the United Nations Model Convention was largely focused on introducing the Base Erosion and Profit Shifting (BEPS) measures, the changes to international transport provisions, and the new Fees for Technical Services Article.

The next update is intended to introduce changes to the Model arising as result of the work by the subcommittees of the current membership, including the work of the Subgroup on Royalties. There are also a number of unresolved issues carried over from the previous Committee that require resolution, in particular the work on the treatment of collective investment vehicles. In addition, the Subcommittee will discuss the need to look into changes of a more technical nature which build off clarification work carried out previously by the OECD.

Further, it is proposed that a generalized review of the UN Model be carried out. The 2011 and 2017 updates focused on changes arising out of specific projects, a wider review of the Model in terms of its overall coherence has not been completed in some time. For the next update there is an opportunity to identify and amend inconsistencies, improve the clarity, and update or remove historic passages that no longer hold relevance. However, the priority of the Subcommittee's work will be in line with the issues already identified as mentioned below.

This note lists topics the Committee has already agreed should be considered for the next update and, with the intention of facilitating a discussion on other possible work streams, a list of recent changes to the OECD Model that the Committee may wish to consider. For example, a generalized review will offer an opportunity to consider the concept of beneficial ownership throughout the UN Model; it is suggested that this could be a key issue for discussion. Some of these changes (in particular those relating to the MAP Article) will already be within the

scope of work to be carried out by other subcommittees. As part of its work, the Subcommittee will be able to discuss the pros and cons of OECD Model changes with particular focus on the needs of developing countries. Any changes that are considered appropriate for the UN Model will need to be submitted to the Committee by way of a position paper.

WORK STREAMS IDENTIFIED IN THE 15TH AND 16TH COMMITTEE MEETINGS

Subcommittee on the Update of the United Nations Model Convention

1. Treatment of CIVs in the UN Model carried over from previous Committee:
 - i. Treaty characterization and treaty entitlement of CIVs;
 - ii. Application of Article 29 to CIVs;
 - iii. Application of treaties to so-called “non-CIVs”;
 - iv. Practical application of treaty benefits to CIVs;
 - v. Treatment of the remuneration of fund managers; and
 - vi. Consideration of the concept of beneficial ownership to make clear who can be entitled to the treaty benefits.
2. A proposal by a previous member of the Committee to amend Article 13(5).
3. Review of the Article 5(6) definition of a permanent establishment with respect to insurance activities, including the treatment of reinsurance.
4. Changes previously made to OECD Model to reflect the evolution of treaty interpretation and practice.
5. Work of the Subgroup on Royalties, particularly on the tax treatment of software-related payments.
6. Consideration of the effectiveness of the Article 1(2) hybrid rule.
7. Consideration of other consequential changes that might be needed as a result of the 2017 update, including:
 - i. Review of the note at the end of Article 7 on the attribution of profits to a PE by reason of the mere purchase of goods and merchandise by that PE for the enterprise, as such situations would be covered by the expanded preparatory/auxiliary test in Article 5.
 - ii. Consideration of whether the title of Article 1 should be changed from “Persons Covered” to something that better reflects the revised contents of that Article.

Subcommittee on Tax Issues Related to the Digitalization of the Economy

This Subcommittee has a mandate to suggest measures and draft provisions related to the digitalization of the economy with regard to double tax treaties.

Subcommittee on Avoidance and Dispute Resolution

This Subcommittee has a mandate to improve the effectiveness of MAP by building on the work of the previous Subcommittee, including proposing changes to the UN Model and Commentary as appropriate.

May propose addressing issues relating to disputes on tax matters arising under the provisions of non-tax instruments, such as investment treaties and GATS in the UN Model. The OECD is working on this as well.

Subcommittee on Practices and Procedures

The work of this Subcommittee will consider how minority views are expressed in the UN Model Commentary which could result in changes.

OECD MODEL TAX CONVENTION – OTHER 2017 UPDATES

Title and Preamble – Explanations

The OECD provided explanations as to why the preamble and title of the Model have been changed. This is that the new title and preamble clarify the Model was not intended to create opportunities for tax avoidance or evasion (the UN Model does briefly mention this purpose already). It is also clarified that the title and preamble have an important role in the interpretation of the provisions in the Model.

Article 3 – Reference to MAP for interpretation of undefined terms

Paragraph 2 of Article 3 has been amended to clarify that in cases where the competent authorities have agreed to a meaning of an undefined term, any domestic law meaning will no longer apply.

A number of consequential changes were also made to the Commentary on Article 3 and Article 25.

Article 4 – Residence tie-breaker clarifications

Clarification that a house rented to an unrelated party is not a permanent home of the landlord because it is not available to that person.

Clarification that the concept of “habitual abode” in paragraph 2 *b*) requires States to consider more than just a day-count test.

Articles 3 & 4 – Recognized pension funds

Changes to Articles 3, and 4 and related commentaries to ensure that a recognized pension fund is considered a resident of the State in which it is constituted regardless of whether it receives concessionary tax treatment.

Reference to recognized pension funds was also included in Article 29.

Article 5 – Permanent establishment clarification work

The Commentary was updated to establish that registration for VAT/GST purposes alone is not relevant for determining PE status.

The application of the general definition of “Permanent Establishment” was clarified through changes to the Commentary on paragraph 1. These changes address particular issues with the interpretation and application of the definition. In brief the changes to the Commentary included:

- Clarification that determination of whether or not there is a PE must be made independently from the determination of what provisions of the Convention apply e.g. immovable property can constitute a PE even if covered by Article 6.
- Further guidance on the application of the “*at the disposal of*” test used for determining whether a place of business constitutes a PE of an enterprise; including analysis of specific scenarios such as home offices and premises of local (converted) entities.
- Clarification that, generally, shops on ships operated in international traffic do not constitute a PE because a ship navigating international waters is not a fixed place of business for the purposes of paragraph 1.
- The inclusion of examples of “short duration businesses” and “recurrent activities” to illustrate how a temporary business might constitute a PE despite not meeting any minimum time threshold.
- Clarification that Article 15 is to be used in order to determine whether the presence in a country of personnel of a foreign enterprise establishes a PE of that enterprise where that person is, for example, on a secondment to another enterprise. Article 15 is used to determine which enterprise the person performs for in such cases where the employment contract might not reflect the actual situation.

- Clarification that an enterprise which has undertaken a project but subcontracted all aspects of it will still have a PE if the criteria in paragraph 1 are met (the place of business is fixed and is at the disposal of the enterprise).
- Inclusion of a new paragraph on the application of Article 5 to joint ventures. Whether a “joint venture” is a distinct enterprise depends on the particular facts and the applicable domestic law. If it is not a distinct enterprise, then the application of the article should be determined independently for each enterprise involved.
- Clarification on the application of paragraph 3 (building site, construction or installation projects):
 - The application of the time test to fiscally transparent partnerships was clarified: Any paragraph 3-time tests apply to activities at the level of the partnership (e.g. a 12-month time threshold will be considered against the time spent by the partnership on the site/project and not its partners). However, in cases where the partners are residents of different States which have different time thresholds in their respective treaties, the time threshold in each treaty will apply at the level of the partnership only with respect to each partner’s share of the profits covered by that treaty.
 - Clarification added to the Commentary on paragraph 3 as to when work on a construction site should be considered to be completed for the purposes of computing the time threshold – time spent testing after construction is completed would usually be included while repairs would normally not be included.

Articles 7 & 9 – Self-initiated adjustments

- The Commentary on Articles 7 and 9 was amended to allow competent authorities to relieve double taxation by using the MAP process in situations where a taxpayer amends a previously filed return.
- A new paragraph was also added to the Commentaries providing suggested wording for States that wish to put a time limit on adjustments made pursuant to paragraph 1.

Article 10 – Application of reduced rate to partnerships

- Removal of the restriction on partnerships accessing the lower rate on dividends under paragraph 2 of Article 10:
 - Lower rate applicable to partnerships that are treated as opaque in their State of residence (i.e. treated as companies).
 - Lower rate applicable to corporate members of partnerships that are treated as fiscally transparent in their residence state.

Articles 21 & 23 – Technical corrections

- Correction to paragraph 5 of the Commentary on Article 21 to state that 21(2) applies to cases not covered within previous Articles. The final 3 sentences of this paragraph were also moved to paragraph 9.1 of the Commentary on Articles 23 A and 23 B.

Article 25 – Changes to mutual agreement procedure

- Paragraph 1 of Article 25 was modified to allow a taxpayer to start the MAP process by approaching the competent authority of *either* contracting state, rather than only the CA of the State in which they are resident.
- The two-year time bar on arbitration (paragraph 5) was modified to begin from when all information required by the competent authorities has been provided, rather than from the presentation of the case.
- Wording inserted requiring a case to be submitted for arbitration in writing.
- The *Sample Mutual Agreement on Arbitration* was amended.

OECD MODEL TAX CONVENTION – 2014 UPDATES

Articles 10, 11 & 12 – Beneficial owner concept

- The OECD found that the concept of “beneficial owner” in Articles 10, 11 and 12 was giving rise to different interpretations by courts and tax administrations – risking double taxation and non-taxation. Work was undertaken to clarify the interpretation that should be given in the context of the OECD Model.
 - “Beneficial owner” does not take a domestic law or other OECD instrument meaning, but rather has an autonomous treaty meaning. The intention of the beneficial owner concept was to clarify the use of the words “paid to...a resident” in the Model and so the phrase should be read in that context.
- Further clarification was made as to who is a beneficial owner of a payment under Articles 10, 11 and 12:
 - Beneficial owners are those that have the right to use and enjoy the payment unconstrained by contractual or legal obligations to pass the payment on. This rule out the application of the concept to persons acting as fiduciaries, agents, nominees, etc.
 - Use and enjoyment is distinguished from the legal ownership of the property that derives the income.
 - An obligation to pass payments on can be contractual or can be found to exist on the basis of facts and circumstances.

Article 15 – Clarification on treatment of payments related to termination

- Amendments to the Commentary on Article 15 to provide rules for payments associated with the termination of employment that may give rise to treaty issues.
 - The Commentary established that to determine if a payment falls under paragraph 1 it is essential to identify the real consideration for such payments based on all relevant facts and circumstances.

Article 17 – Clarifications on application of the Article

- It was decided that the entertainers and sportspersons article lacked clarity as to what situations it applied to. Work was carried out on the Commentary to fix this by clarifying:
 - The concept of an entertainer or sportsperson (e.g. can be an amateur);
 - The application of Article 17 to car or horse racing prizes - paragraph 2 does not apply to prize money obtained by the owner of the horse or car because this money is not sufficiently related to the personal activities of the jockey or driver;
 - What the personal activities of the entertainer/sportsperson are, and to what extent the article applies to (for example) the activities of promoters, models and public speakers;
 - The allocation rules for activities performed in various countries; and
 - The treatment of special categories of payments (e.g. certain prizes and awards, payments for broadcasting rights made to clubs, payments for the use of images of entertainers/sportspersons).

Tax treaty issues relating to emissions permits/credits

- The OECD identified that emissions trading programmes present a number of tax treaty issues relating to a national or regional authority's issuance of emissions permits, the purchase or sale of permits across borders, and the issuance and trading of credits.
- The OECD amended the Model Commentary to clarify the tax treaty treatment of income from the issuance and trading of permits/credits.
 - Income derived from the issuance or trading of permits/credits is generally covered by Article 7 and 13 but under some circumstances it may be covered by Articles 6, 8 or 21.
 - The Commentaries on Articles 6 and 8 were modified to include income derived from the issuance or trading of permits/credits within the income covered by the Article if such income is an integral part of carrying on those activities (in Article 6 agricultural and forestry activities and in Article 8 activities relating to international traffic).

Other technical changes

- Clarification in the Introduction as to the meaning of “may be taxed”.
- Clarification of the meaning of the phrase “fiscal year concerned” in Article 15.
- Addition to the Commentary on Article 11 dealing with the application of the Article to accrued interest.
- Addition to the Commentary on Article 13 dealing with the application of that Article with respect to capital gains that have accrued before that Article is included in a bilateral treaty.
- Addition to the Commentary on Articles 10 and 13 concerning the application of these articles in the case of a redemption of shares.
- Addition to the Commentary on Article 20 relating to payments to students arising from abroad.
- Removal of the reference to full credit method in paragraphs 48 and 63 of the Commentary on Article 23.
- Amendment to the Commentary on Article 24 relating to its application to “stateless persons”.

OECD MODEL TAX CONVENTION – EARLIER CHANGES

- Addition to the commentaries on Articles 1, 4 and 10 on the application of the Model to sovereign wealth funds (2010).
- Addition to the commentaries on Articles 6, 10, 13 and 23 on the application of the Model to REITS (2008).
- Addition to the Commentary on Article 21 on the application of the Article to income from third States (2008).
- Procedural aspects of withholding tax restrictions in the Commentary on Article 1 (2003).