

June 1, 2020

Comments on CRP 12 (Technical Changes) by Committee Member, Stephanie Smith

My comment relates to Section N in the note “The source rule for Article 18 Alternative B (Pensions and social security payments), which starts on page 27 of the document.

In addition to the issue proposed to be addressed in the 2021 update to the Model, and as set out in paragraph 32 of the note, a second possible problem with the formulation was identified. That is, by not using the concept of “arising in” as is done in Articles 11, 12 and 12A, paragraph 2 of Article 18 Alternative B could leave open the possibility that a Contracting State might argue that Article 21(3) of the UN Model allows it to tax pension payments that are not made by a resident or a permanent establishment of that State but that otherwise arises in that State.

As stated in paragraph 33 of the note, the Subcommittee concluded that the second issue was not a practical problem because Art. 21(3) did not apply to items of income not dealt with in other articles of the UN Model. This is a very technical issue and, in my view, the Subcommittee did not have sufficient time to fully analyze the issue. It seems to me that a pension payment that is not made by a resident or borne by a PE in the source State is not “income dealt with in” paragraph 2 of Article 18 B since no part of the paragraph applies to that pension. Further, a recent decision of the Income Tax Appellate Tribunal (India) – Volkswagen Finance Pvt Ltd (March 2020) - has indicated that this is in fact an issue in practice. The Income Tax Appellate Tribunal (India) held that Article 21(3) applied to allow source taxation even though no part of Article 17 applied to the item of income in question.

Because of the technical nature of the issue, I do not propose trying to address this issue in the 2021 update to the UN Model. Instead, I would recommend that this issue be added to the list of issues for consideration by the next membership. This would ensure that the issue is not lost and is recorded for future consideration when the Committee has more time to fully analyze the issue.