



सत्यमेव जयते

संयुक्त राष्ट्र स्थित भारत का स्थायी मिशन
न्यूयॉर्क

PERMANENT REPRESENTATIVE OF INDIA
TO THE UNITED NATIONS
235 EAST 43RD STREET
NEW YORK, N.Y. 10017

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The Permanent Mission of India to the United Nations in New York presents its compliments to the Financing for Development Office of United Nations Department of Economic and Social Affairs and has the honour to forward a letter from Mr. Sanjay Kumar Mishra, Joint Secretary (FT &TR-I), Central Board of Direct Taxes, Ministry of Finance, Government of India, addressed to Mr. Alexander Trepelkov, Director, Financing for Development Office of United Nations, conveying Government of India's views on the advance unedited version of the Report on the work of the Committee of Experts on International Cooperation in Tax matters. It is requested that the views of the Government of India may be brought to the attention of all concerned.

The Permanent Mission of India avails itself the opportunity to renew to the Financing for Development Office of United Nations, Department of Economic and Social Affairs the assurances of its highest consideration.



New York 213 March 2012

Financing for Development Office
United Nations Department of Economic &
Social Affairs,
New York.

Sanjay Kumar Mishra

Joint Secretary (FT&TR-I) and
Competent Authority



Government of India
Ministry of Finance
Department of Revenue
Central Board of Direct Taxes
Room No. 803, 8th Floor
Hudco Vishala Building
Bhikaji Cama Place
New Delhi-110066

Ph. : 91-11-26108402

Fax : 91-11-26177558, 91-11-26177990

E.mail : skumar.mishra@nic.in

Dated | 2nd March, 2012

Dear Alexander,

We are really glad to note that the Financing for Development Office of UN-DESA is organizing an expert group meeting on 14th March, 2012 in conjunction with an official meeting of the Economic and Social Council on international co-operation in tax matters on 15th March, 2012. We are also pleased to note that the UN Model Double Taxation Convention, 2011 will also be launched during this event. I am aware that UN is in the process of finalizing the report on Role and work of the Committee of Experts on International Cooperation in Tax Matters as mandated by ECOSOC resolution 2011/23. I am pleased to provide response of India to the advance unedited version of the report as under:

"India in its comments to the United Nations to the Note Verbal 10/340 dated 1st December, 2010, had stated that it will support Inter-Governmental Commission over the existing Committee of Experts on International Cooperation in Tax Matters. India reiterates its stand on this issue.

2. *India would like further to state that the Inter-Governmental Commission with a balanced representation from the Governments of developing and developed countries, could play a crucial role in fostering dialogue and cooperation between national tax authorities and in promoting North-South, South-South and multilateral cooperation.*

3. *The United Nations Model Double Taxation Convention between Developed and Developing Countries (UN Model Convention), while avoiding double taxation, allocate greater share of tax revenue to the source country. Contrary to this, the OECD Model Tax Convention on Income and on Capital (OECD Model Convention) does not recognize the right of taxation of source country in many cases.*

3.1 *In the case of Transfer Pricing, although it is governed by domestic legislation of each country, the OECD countries have agreed on a common transfer pricing guidelines known as OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (OECD Transfer Pricing Guidelines). These guidelines on transfer pricing only reflect the agreements*

amongst Government of those countries that are members of OECD (developed countries) and accordingly tend to take care of interest of only developed countries. The guidelines do not give right of taxation to source countries accordingly eroding taxing rights of developing countries.

3.2 Even though OECD Transfer Pricing Guidelines do not address the concerns of developing countries, paragraph 3 of the proposed UN Model Convention Commentary of Article 9 indicate that former non-governmental Group of Experts (year 1999) had stated that all the countries including developing countries will follow the OECD principles as set out in the OECD Transfer Pricing Guidelines for the reasons that these guidelines represent internationally agreed principles. The former expert group had also recommended that the Guidelines should be followed for application of the arm's length principles. However, it has been clarified in the new commentary that views expressed by the former Group of Experts have not yet been considered fully by the Committee of Experts as indicated in the Records of its annual session. India believes that the Committee of Experts do not have jurisdiction to decide the critical issue of whether the OECD Transfer Pricing Guidelines agreed by Governments of developed countries should be followed by the Governments of the developing countries when these Governments are not party to the OECD Transfer Pricing Guidelines. India does not believe that decision of former Group of Experts can be interpreted that subsequent revision of OECD Guidelines (after 1999) will automatically become the internationally agreed standards and United Nations guidance will automatically change without participation and agreement by non-OECD countries. India believes that taking such decision was not within the purview of non-governmental Committee of Experts (1999) and should be revoked immediately.

3.3 The Committee of Experts has constituted a sub committee consisting of 13 members of the developed and 7 members of the developing countries with a mandate to develop a practical manual on transfer pricing based on the following principles

- (a) That it reflects the operation of Article 9 of the United Nations Model Convention, and the Arms Length Principle embodied in it, and is consistent with relevant Commentaries of the U.N. Model.*
- (b) That it reflects the realities for developing countries, at their relevant stages of capacity development.*
- (c) That special attention should be paid to the experience of other developing countries.*

(mandate as provided by 5th Annual Session of Committee, 19-23 October, 2009)

It is evident from above that mandate does not require that United Nations Guidance should be based on OECD Transfer Pricing Guidelines. However, there is a strong view in the sub-committee that due to decision taken by earlier group of experts in 1999, the sub-committee should not deviate from existing OECD Transfer Pricing Guidelines. India believes that OECD Transfer Pricing Guidelines cannot be imported to UN guidance particularly when such recommendations of the group in 1999 is not considered by the present committee and is beyond the scope of non-governmental committee. It is important to note that contrary to inter-Governmental composition of OECD, at present, all the experts of the UN Committee are working in their individual capacity. Since, majority of members of sub-committee are from OECD countries who are also Government representatives in WP6 of the OECD, there is a tendency to discuss only OECD work ignoring practices in developing countries.

3.4 In view of the above, India requests that the United Nations may consider constituting inter-Governmental Commission (including sub-committees), having representatives from Governments of the developed and developing countries, on various issues relating to International Taxation and Transfer Pricing, to develop guidelines on the basis of consensus amongst Government of all countries which take care of the interests of the developing countries. Further, in developing such guidelines, the recommendations of the Committee of Experts (1999) that the OECD principles as set out in the OECD Transfer Pricing Guidelines should be followed, must be ignored.

4. India further believes that in the revision of UN Model Convention, which is due to be released on 15th March, 2012, concerns of developing countries have not been taken into consideration, as it has been developed by Group of Experts and sub-committees having non-governmental representatives and disproportionate representations from OECD countries. India will submit its detailed comments once the revised UN Model Convention is made public.

5. India is also aware of the concerns of the OECD on the work of the United Nations to develop standards in the areas of international taxation and transfer pricing due to reason that it would be duplication of work. India does not agree to this concern for the following reasons

- (i) OECD Model Tax Convention and OECD Transfer Pricing Guidelines has been developed on the basis of consensus arrived at by the Government of 34 countries (all developed countries). These guidelines only protect the interests of OECD countries which are parties to such convention. Since the Governments of developing countries are not party to the Guidelines, it is improper to suggest that they represent*

international agreed guidance knowing fully well that concerns of developing countries have not been taken care of in the OECD Model Convention and OECD Transfer Pricing Guidelines.

- (ii) It is inconceivable as to how a standard developed by Government of only 34 countries can be accepted by Government of other countries as 'standard' of sharing of revenue on international transactions between source and resident country particularly when it only take care of the interest of developed countries and has seriously restricted the taxing powers of source country.*
- (iii) Views of OECD and UN on sharing of tax revenue by developing and developed countries are not the same and accordingly concerns of duplication of efforts should be ignored.*

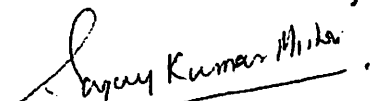
6. The above steps would require additional resources and strengthening the Secretariat. India supports the fundraising efforts for this purpose and is of the view that it should not only be on the basis of voluntary contribution. India further offer technical support by way of experts and staff for the Secretariat.

7. India also offer technical assistance including by way of providing space and resources for training facility in the areas of international taxation and transfer pricing for training the officers and staff from developing countries."

I request you to bring the inputs by India to the notice of the delegates before the commencement of the meeting.

With best regards

Yours Sincerely


(Sanjay Kumar Mishra)

Mr. Alexander Trepelkov
Director, Financing for Development Office
UNDESA
2 United Nations Plaza (DC2- 2170)
New York, N.Y. 10017
Email: trepelkov@un.org