

NEW ARTICLE XX
Fees for Technical Services

Draft Article XX and Commentary

- Outline of presentation:
 - Process since Tenth Session
 - Comments received on the draft Article and Commentary
 - Review of the changes to Article XX and the Commentary since the Tenth Session
 - Identification of the outstanding issues for decision

PROCESS

- Meeting of the members of the Committee of Experts in New York in April, 2015
 - Discussions focused primarily on comments received and the minority position
- Revised draft of Article XX and Commentary circulated to members of the Subcommittee in late August, 2015
- Comments received and further revisions made for Eleventh Session (October draft with track changes)

COMMENTS

- Comments received on draft Article and Commentary presented at the Tenth Session
- Minority position and comments received discussed at the meeting in New York in April
- Comments received on possible compromise emerging from the April meeting
- Comments received on August, 2015 draft

COMMENTS

- All comments were carefully considered by the Subcommittee
- Several revisions to the draft Article and Commentary were made in response to the comments received
- Some suggested changes have not been made for various reasons
- Thanks to all who provided comments

Changes to the Text of Article XX from the 10th Session

- Article XX(1):
 1. ~~Payments~~ Fees for technical services arising in a Contracting State and paid to a resident of the other Contracting State ~~who furnishes [in consideration of] those services~~ may be taxed in that other State.

Changes to the Text of Article XX from the 10th Session

- Article XX(2):

2. However, notwithstanding Article 14 and subject to the provisions of Articles 8, [17 and 20,] ~~such payments~~ fees for technical services arising in a Contracting State may also be taxed in the Contracting State in which they ~~the payments~~ arise and according to the laws of that State, but if the beneficial owner of the fees is a resident of the other Contracting State, the tax so charged shall not exceed ___ percent of the gross amount of the fees ~~payments~~ (the percentage to be established through bilateral negotiations).

Changes to the Text of Article XX from the 10th Session

- Article XX(3):
 3. The term “~~payments~~ fees for technical services” as used in this Article means any payment in consideration for any service of a managerial, technical or consultancy nature, unless the payment is ~~the reimbursement of actual expenses incurred by the person providing the service or is made to an employee, director or top level managerial officer of the person making the payments.~~ made:

Changes to the Text of Article XX from the 10th Session

- Article XX(3):
 - (a) to an employee of the person making the payment;
 - (b) to a director or top-level managerial official of a company making the payment that is a resident of the Contracting State in which the fees arise;
 - (c) for teaching in or by educational institutions;
or
 - (d) by an individual for services for the personal use by an individual.

Changes to the Text of Article XX from the 10th Session

- Article XX(4):
 4. The provisions of paragraphs 1 and 2 shall not apply if the beneficial owner ~~recipient of payments~~ fees for technical services ~~[person who furnishes the technical services]~~, being a resident of a Contracting State, carries on business in the other Contracting State in which the ~~payments~~ fees for technical services arise through a permanent establishment situated in that other State, or performs in the other Contracting State independent personal services from a fixed base situated in that other State, and the fees for technical services ~~[in respect of which the payments are made]~~ are effectively connected with
 - a) such permanent establishment or fixed base, or
 - b) business activities referred to in (c) of paragraph 1 of Article 7.In such cases the provisions of Article 7 or Article 14, as the case may be, shall apply.

Changes to the Text of Article XX from the 10th Session

- Article XX(5):
 5. For the purposes of this Article, subject to paragraph 6, ~~payments~~ fees for technical services shall be deemed to arise in a Contracting State if the payer is a resident of that State or if the person paying the fees ~~making the payments for technical services~~, whether that person is a resident of a Contracting State or not, has in a Contracting State a permanent establishment or a fixed base in connection with which the obligation to pay the fees ~~make the payments for technical services~~ was incurred, and such ~~payments~~ fees are borne by the permanent establishment or fixed base.

Changes to the Text of Article XX from the 10th Session

- Article XX(6):
 6. For the purposes of this Article, ~~payments~~ fees for technical services shall be deemed not to arise in a Contracting State if the payer is a resident of that State and carries on business in the other Contracting State or a third State through a permanent establishment situated in that State or the third State, or performs independent personal services through a fixed base situated in ~~the~~ that other ~~Contracting~~ State or a the third State and such ~~payments~~ fees are borne by that permanent establishment or fixed base.

Changes to the Text of Article XX from the Tenth Session

- Article XX(7):
 7. Where, by reason of a special relationship between the payer and the beneficial owner of the fees for technical services or between both of them and some other person, the amount of the fees, having regard to the services for which they are paid, exceeds the amount which would have been agreed upon by the payer and the beneficial owner in the absence of such relationship, the provisions of this Article shall apply only to the last-mentioned amount [the amount that would have been agreed upon in the absence of such relationship]. In such case, the excess part of the fees shall remain taxable according to the laws of each Contracting State, due regard being had to the other provisions of this Convention.

Summary of Changes to the Text of Article XX

- “payments” changed to “fees”
- Reference to “beneficial owner” added
- Reference to reimbursement of expenses deleted from definition of “fees for technical services”
- New exclusions from definition of “fees for technical services” added
- Article XX(7) added concerning excessive fees because of a special relationship

Changes to the Commentary on Article XX from the Tenth Session

- General Considerations:
 - Clarify that paras. 5 – 14 refer to provisions of UN Model before the addition of Article XX
 - Omit reference to OECD BEPS project
 - Add a new justification for Article XX – eliminate competitive advantage for nonresident service providers
 - Add minority position – arguments against Article XX

Minority Position

- Draft by Henry Louie dated August 25, 2015 (revised October 7, 2015) to add 7 paras. to Commentary
- Sets out arguments against Article XX:
 - Only State where services are performed has right to tax and only if services are performed through a PE or fixed base
 - Taxation on a gross basis will result in double taxation

Minority Position

- Arguments against Article XX:
 - Fees for services provided by nonresidents will be grossed up putting nonresident service providers at a competitive disadvantage
 - Distortions because trade in services treated differently from trade in goods
 - Uncertainty and increased disputes because of definition of technical services

Minority Position

- Alternative provision added to the
Commentary on Article 12: Fees for Included
Services

Changes to the Commentary on Article XX from the Tenth Session

- “performs” changed to “provides” except in the context of Article XX(4) and (6) which refer to “performs” services
- All references to “source country” eliminated
- Relationship between Articles 17 and XX and between Articles 20 and XX clarified in Commentary not in Article XX(2)
- Inconsistent with the treatment of the relationship between Articles 8 and XX?

Changes to the Commentary on Article XX from the Tenth Session

- Addition of 8 paragraphs dealing with “beneficial owner” similar to provisions in Commentary on Article 11 with minor modifications
- Addition of paragraph about mode of taxation by State in which fees for technical services arise and procedural issues

Changes to the Commentary on Article XX from the Tenth Session

- Commentary on Article XX(3):
 - Paragraphs of Commentary on Article XX(3) reordered
 - New paragraphs added to deal with the exclusions in Article XX(3)(a)-(e)
 - New paragraphs added to deal with the treatment of the reimbursement of expenses incurred in providing technical services

Changes to the Commentary on Article XX from the Tenth Session

- Commentary on Article XX(3):
 - Examples have been revised to reflect the exclusions from Article XX
 - Examples 1 and 2 with respect to heart surgeon show fees paid by individual for personal use are not fees for technical services, but fees paid by hospital or clinic to independent surgeon would be fees for technical services

Changes to the Commentary on Article XX from the Tenth Session

- New example 6 added dealing with mixed contract for use of intellectual property and services
- Example dealing with use of satellites deleted
- Commentary on paragraph 7 of Article XX added; (this new Commentary goes beyond the similar Commentary on Articles 10 – 12)

Outstanding Issues

The Text of Article XX

- Should Articles 17 and 20 be referred to in Article XX(2) or just in the Commentary?
 - If Article 8 and Article XX both apply, Article 8 prevails
 - If Article 17 or 20 and Article XX both apply, which should prevail? And should this priority be explicit in Article XX?

Outstanding Issues

The Text of Article XX

- Exclusions from the definition of fees for technical services:
 - Fees for teaching in or by educational institutions?
 - Should the exclusion be restricted to degree programs?
e.g. should fees for executive programs be excluded?
 - Fees for services for personal use?
 - Fees for services intimately connected to the sale of property?

Outstanding Issues

The Text of Article XX

- Should the source rule in Article XX(6) apply to a PE or fixed base in a third State?
 - If the fees are borne by a PE or fixed base in a third State, should the country in which the fees arise under Article XX(5) be entitled to tax those fees or not?
- Is the wording of Article XX(7) acceptable?

Outstanding Issues

The Commentary

- Minority position:
 - Wording of arguments against Article XX
 - Alternative provision: inclusion of “Fees for Included Services” in Article 12

Outstanding Issues

The Commentary

- Should priority of Articles 17 and 20 over Article XX be dealt with in Article XX(2) or in the Commentary?
 - If dealt with in the Commentary, there will be inconsistency with the priority rule for Article 8
 - Is this inconsistency acceptable?
- Addition of Commentary on beneficial owner

Outstanding Issues

The Commentary

- Exclusions from definition of fees for technical services:
 - Should examples be added to illustrate the exclusions for teaching in and by educational institutions and technical services closely connected with the sale of property?
 - Exclusion of fees paid by individuals for services for personal use is illustrated by Example 1

Outstanding Issues

The Commentary

- Reimbursement of expenses:
 - Distinction between an allowance and reimbursement
 - Commentary deals with 3 examples:
 1. Reimbursement of expenses; no fees
 2. Reimbursement of all expenses plus fees
 3. No reimbursement but fees
 - No single rule would be appropriate
 - Therefore, left to countries to deal with

Outstanding Issues

The Commentary

- Explanation of definition of fees for technical services:
 - Application of specialized knowledge, skill or expertise on behalf of client or transfer of specialized knowledge, skill or expertise to client
 - Is this approach appropriate?
 - Are the examples appropriate?
 - Are additional examples necessary?

Outstanding Issues

The Commentary

- Source rules in Articles XX(5) and (6):
 - Are the examples illustrating the application of these provisions appropriate?
 - Alternative source rule in para. [104] – place of use: is this rule appropriate for services?
 - Other alternatives in para. [105]: are these alternatives appropriate?

Outstanding Issues

The Commentary

- Article XX(7):
 - Draft Commentary is based on Commentary on similar provisions in Articles 10 – 12
 - Are additional paras. [111] – [113] appropriate?
 - Those paras. deal with the relationship between Article XX(7) and Article 9 and the determination of whether fees are excessive where Article 9 does not apply
 - If these paras. are added to the Commentary on Article XX, should they also be added to the Commentary on Articles 10 – 12?