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**Committee of Experts on International
Cooperation in Tax Matters
Twenty-first session**

Virtual informal meetings of 20-29 October 2020

Item 3 (b) of the provisional agenda

**Update of the UN Model Double Taxation Convention between Developed and
Developing Countries – Minority view dealing with the application of Art. 13(5) to
transparent entities**

**Note by the Subcommittee on the UN Model Tax Convention between Developed and
Developing Countries**

Summary

Note [E/C.18/2020/CRP.8](#) on the Application of Article 13(5) of the UN Model Double Taxation Convention between Developed and Developing Countries (UN Model) to transparent entities was approved at the 20th session of the Committee. During the discussion of that note, one member indicated that she wanted the inclusion of a minority view on that topic.

At its online meeting of 30 August to 2 September 2020, the Subcommittee discussed the draft minority view proposed by that member and agreed on the wording of the minority view included in this note. During that discussion, the Subcommittee also identified a potential drafting difficulty with the wording of paragraph 6 of Article 13 of the UN Model and discussed a suggested change that would address that difficulty.

At its twenty-first session, the Committee is invited to discuss the proposed minority view in light of the decisions concerning minority views that it may reach under item 3(a) of its agenda and to approve the inclusion of the minority view in the UN Model. It is also invited to discuss whether paragraph 6 of Article 13 of the UN Model should be amended as suggested in this note.

1. At its twentieth session (online meeting held on 22-26 June 2020), the Committee discussed and approved note [E/C.18/2020/CRP.8](#) on the Application of Article 13(5) to transparent entities. During the discussion of that note, one member indicated that she wanted the inclusion of a minority view on that topic.

2. At its online meeting of 31 August to 2 September 2020, the Subcommittee discussed the draft minority view proposed by that member and, after discussion, agreed on the following wording, which would be included in the Commentary on Article 13 (Capital gains) of the UN Model:

Add the following new paragraph 12.6 immediately after new paragraphs 12.1 to 12.5 of the Commentary on Article 13 (Capital gains) of the UN Model proposed in note [E/C.18/2020/CRP.8](#):

[One Member of the Committee] *[that wording might need to be amended based on the number of members who would support that view and of any decisions concerning minority views that may be reached by the Committee under item 3(a) of its agenda]* did not agree with paragraphs 12.2 to 12.4 above. Th[at member] held the view that the legal form of enterprises in bona fide transactions should be respected so as to provide legal certainty to the enterprises concerned, other than in cases of treaty abuse which are more appropriately addressed under paragraph 9 of Article 29 of the Convention. Th[at member] also noted that the approach in paragraphs 12.2 to 12.4 to treat a transparent entity as an “alienator” does not cohere with paragraph 6 of Article 13, which provides for taxing rights to be allocated to the Contracting State of which the alienator is resident and may lead to conflicting results under paragraphs 5 and 6 of Article 13 when applied to the same transparent entity. The mentioned approach may also result in fundamental mismatches with domestic tax laws, as transparent entities are not treated as legal persons in some states, and would not be a resident of a contracting state in any circumstances. As a consequence of this approach, there could also be uncertainty on how double taxation, if any, would be eliminated.

3. During the discussion of the draft minority view, the Subcommittee identified a potential drafting difficulty with the wording of paragraph 6. The wording of that paragraph differs from that of the other paragraphs of Article 13, none of which makes reference to the “alienator” when identifying the person entitled to treaty benefits and the State to which the taxing right is recognized. These paragraphs use the following wording:

- Paragraph 1 refers to “gains derived by a resident of a Contracting State from the alienation...”, the right to tax being that of the State in which the immovable property is situated.
- Paragraph 2 refers to “gains from the alienation”, the right to tax being that of the State in which is situated the relevant permanent establishment of an enterprise of a Contracting State or the relevant fixed base of a resident of a Contracting State.
- Paragraph 3 refers to “gains that an enterprise of a Contracting State... derives from the alienation...”, the right to tax being that of the State of the enterprise.
- Paragraph 4 refers to “gains derived by a resident of a Contracting State from the alienation...”, the right to tax being that of the State in which the relevant immovable property is situated.

- Paragraph 5 refers to “gains... derived by a resident of a Contracting State from the alienation”, the right to tax being that of the State of residence of the company (or entity) whose shares (or interests) have been alienated.

4. By contrast, paragraph 6 refers to “gains from the alienation” and allows taxation by the “Contracting State of which the alienator is a resident”. While that wording does not seem to have raised practical difficulties, it is potentially misleading where the alienator is different from the resident who derives the gain and who is taxed on that gain. For instance, before the introduction, in 2017, of the transparent entity provision of paragraph 2 of Article 1 and the saving clause of paragraph 3 of Article 1 (which has been introduced as a clarification), this wording could have been misinterpreted as preventing the State of residence of a taxpayer from taxing the share of that taxpayer in a gain realized upon the alienation of an asset by a transparent entity (such a partnership or trust treated as such by the State of residence of the taxpayer) established in the other State.

5. It was suggested that any such misinterpretation might be avoided by aligning the wording of paragraph 6 with that of the other paragraphs of Article 13 so that it would read as follows (changes to the existing version of paragraph 6 are shown in ~~strikethrough~~ for deletions and ***bold italics*** for additions):

Gains ***derived by a resident of a Contracting State*** from the alienation of any property other than that referred to in paragraphs 1, 2, 3, 4 and 5 shall be taxable only in ~~the Contracting~~***that State of which the alienator is a resident.***

6. It was also observed that such changes, which the Commentary would present as a mere clarification, would make the wording of the residual rule of paragraph 6 of Article 13, which applies to gains not otherwise covered by the other provisions of Article 13, more similar to that of the residual rule of paragraph 1 of Article 21, which applies to income not otherwise covered by Articles 6 to 20.

7. While the Subcommittee did not reach a decision as to whether these changes should be made to paragraph 6, it agreed to present that proposal to the Committee for a first discussion. If these changes were made, consequential changes would need to be made to the Commentary on Article 13 and to the proposed minority view in paragraph 2 above.

8. At its twenty-first session, the Committee is invited to discuss that proposed minority view in light of the decisions concerning minority views that it may reach under item 3(a) of its agenda and to approve the inclusion of the minority view in the UN Model. It is also invited to discuss whether paragraph 6 of Article 13 of the UN Model should be amended as suggested above.