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NOTE ON A NEW ARTICLE OF THE UN MODEL CONVENTION DEALING WITH THE TAXATION OF FEES FOR TECHNICAL AND OTHER SERVICES

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Summary

This note has been prepared by Mr. Brian Arnold for the secretariat, at the request of the former Subcommittee on Services of the UN Committee of Experts on International Cooperation in Tax Matters, based on the decisions taken by the Committee at its eighth session in 2012. It addresses options for a fees for technical services article in the UN Model Tax Convention.

1. INTRODUCTION

1.1 This note has been prepared at the request of the former Subcommittee on Services of the UN Committee of Experts on International Cooperation in Tax Matters ("the Committee") based on the decisions taken by the Committee at its eighth session in 2012. The relevant paragraph of the Committee's 2012 Report notes:

60. After extensive discussions it was agreed by a majority of members and observers that there would be a new article dealing with technical services. Some of the issues to be addressed in that provision will be:

(a) A definition or a framework of what could qualify as "technical services";
(b) Consideration of the modality of how the service is performed, including whether there is a need for physical presence in the source country. If that is the case, the threshold time for such presence must be determined;
(c) Consideration of whether the fact that the payment for services is simply borne by a resident of the source country or a permanent establishment situated therein should warrant the allocation of taxing rights to the source country.

1.2 This note is the most recent in a series of notes prepared for the Subcommittee on Services and discussed at various sessions of the Committee since 2010. The first notes (E/C.18/2010/CRP.7 and E/C.18/2010/CRP.7/Add.1) discussed the treatment of income from services under the provisions of the UN Model generally and attempted to identify the principles underlying those provisions. See the separate note prepared by the Secretariat summarizing the prior work of the Committee on the Taxation of Services (E/C.18/2013/CRP.16).

1.3 Based on the Committee's discussions of those notes, at its seventh session in 2011 the Committee mandated the Subcommittee on Services to work on the treatment of fees for technical and other similar services under the UN Model. Based on E/C. 18/2012/4, a note prepared for the Subcommittee that set out several options for dealing with fees for technical services, the Subcommittee decided that it supported the option of adopting a new Article dealing with income from technical services.

1.4 Another note prepared for the Subcommittee (E/C. 18/2012/CRP.4) discussed the broad outlines of a new Article on income from technical services and the key issues that would have to be dealt with in adopting such an Article. That note was the subject of extensive discussions by the Committee at its eighth session. As noted in paragraph 1.1 above, the Committee decided to proceed with the preparation of a new Article dealing with income from technical services.

1.5 As discussed below in section 4, no agreement was reached during the Committee's discussions at the eighth session on the key features of a new Article on income from technical services.

1.6 This note identifies the key elements of a new Article on income from technical services and summarizes the views expressed during the eighth session. The note is intended to focus the future deliberations of the Committee on the most important aspects of a new Article so that decisions can be taken as to the shape and structure of the new Article.

1.7 One of the major difficulties in deciding on the structure of a new Article is that the key elements of the Article are inextricably interrelated. For example, if the definition of the services to which the new Article applies is very broad, it may be considered necessary or appropriate to adopt a threshold for source-country taxation of income from technical services or limit the rate of source-country tax. Thus, it would be misleading to analyze each key feature of a new Article on technical services independently; instead, each feature should be analyzed in the context of the overall scope and structure of the new Article. This note attempts to highlight the interrelationships among the key elements of the new Article.

1.8 This note should be read in conjunction with the draft Articles and accompanying notes included in Annex 1.[1] The draft Articles have been prepared to provide a focus for the Committee's discussions and to illustrate the range of possibilities for a new Article. Each draft Article has been prepared on the basis of certain assumptions concerning the key elements of the Article. These assumptions should not be taken as recommendations from Professor Arnold or the Subcommittee on Services as to what the structure of the new Article should be. They have been made in order to provide the Committee with draft provisions so that its discussions can be more focused. This note does not discuss alternatives to a new Article dealing with technical services, such as expanding the scope of Article 12 (Royalties) to include certain payments for technical services.

1.9 A new Article dealing with payments for or income derived from technical services is intended for those countries that want such a provision. The Commentary could make clear that such a provision is not necessarily endorsed by all members of the Committee. Such a new Article could provide standardized wording for those countries seeking greater source taxing rights over technical services in their bilateral treaties. In addition, the Commentary could provide guidance with respect to the interpretation and application of the new Article. In fact, there is no technical reason why different alternatives could not be included in the Commentary for countries wanting different things from the Article.

2. FUNDAMENTAL OBJECTIVE

2.1 The fundamental objective of any new Article dealing with income from technical services is to expand source-country taxing rights with respect to such services as compared to the source-country taxing rights under the current provisions of the UN Model.

2.2 Under the current provisions, income from technical and other similar services is usually taxable in accordance with Article 7 or Article 14. Under Article 7, business profits are taxable by the source country only if a resident of the other contracting state:

a) has a permanent establishment (PE) in the source country and the income is attributable to the PE (putting aside the potential operation of the limited force-of-attraction rule), or
b) furnishes services (any services, not just technical services) in the source country for more than 183 days in respect of the same or connected projects.

[1] It is premature to prepare draft Commentary until the Committee makes decisions with respect to the key features of the new Article. However, the notes accompanying the draft Articles provide an indication of what could be included in the Commentary.

Under Article 14, income from professional and independent services is taxable by the source country only if a resident of the other contracting state:

a) has a fixed base that is regularly available to the resident and the income is attributable to the fixed base, or
b) stays in the source country for 183 days or more.

2.3 Under the current provisions of the UN Model, it is relatively easy for an enterprise resident in one contracting state to earn income from the performance of services in the other contracting state (the source country) without becoming subject to tax by that state. In addition, often the fees paid by a resident of the source country (or a nonresident with a PE or a fixed base in the source country) for services provided by a resident of the other contracting state will be deductible by the payer against the source country's tax base. In particular, a multinational enterprise can use intragroup services (services provided by a group company to another company in the group) of a managerial, technical or consulting nature to strip profits out of the source country.

2.4 Any new Article dealing with income from technical services should allow the source country to tax payments made by a resident of the source country (or a nonresident with a PE or a fixed base in the source country) to a resident of the other contracting state in order to offset the erosion of the source country's tax base caused by the payments.

3. KEY ISSUES FOR DECISION IN THE DESIGN OF A NEW ARTICLE ON INCOME FROM TECHNICAL SERVICES

3.1 There are four key issues that must be resolved in adopting a new Article dealing with income from technical services:

- the definition of the services to which the new Article will apply;
- whether the new Article should apply only to income from technical services performed in the source country or to any payments for technical services irrespective of where the services are provided;
- whether there should be any threshold requirement for source-country taxation of income from technical services; and
- the method of source-country taxation of income from technical services.

3.2 Although there are many other issues that must also be resolved, these four issues are the key issues. They are the issues on which there was a wide divergence of views among the members of the Committee during the eighth session, as discussed below.

3.3 Each of these issues is explained briefly below. For a more detailed discussion of the issues, see the Follow-Up Note on Taxation of Fees for Technical Services in Annex 1 of E/C.18/2012/CRP.4.

3.4 It is generally considered that a new Article dealing with income from technical services should deal with income from "managerial, technical and consulting" services.[2] The

[2] See, however, the note by Tizhong Liao, "Taxation of Cross-Border Trade on Service: A Review of the Current International Tax Landscape and the Possible Future Policy Options," (E/C.18/2013/CRP.16) which raises the possibility of a new article dealing with all services.

problem is how to define such services to be covered by the new Article. The breadth of the services covered by the new Article will have an impact on other key features of the Article.

3.5 Perhaps the most important single issue to be decided is whether the new Article should apply only to income from technical services performed in the source country or to any payment made by a resident of the source country (or a nonresident with a PE or a fixed base in the source country) to a resident of the other contracting state in respect of technical services. If the new Article applies to allow source-country taxation of any payments for technical services irrespective of where the services are performed, the payments for technical services are treated, in effect, similarly to royalties under Article 12. On the other hand, if the new Article is limited to payments for services performed in the source country, the payments are treated, in effect, similarly to payments by an employer resident in the source country to an employee resident in the other contracting state under Article 15.

3.6 It must be decided whether the source country's right to tax should be subject to a threshold requirement and if so, what that threshold requirement should be. If the new Article applies to all payments for technical services made by residents of the source country (or nonresidents with a PE or fixed base in the source country) irrespective of where the services are performed, it must be decided whether the source country should be entitled to tax all such payments or whether there should be a minimum threshold for source-country taxation. For example, a threshold might limit source-country taxation to payments by residents of the source country in excess of a monetary amount during any 12-month period.[3] Similarly, if the source country is entitled to tax income from technical services only if the services are performed in the source country, it must be decided whether the source country should be entitled to tax income from all such services or whether there should be a minimum threshold for source-country taxation. For example, a threshold might limit source-country taxation to income from technical services performed in the source country for more than a specified number of days.

3.7 Finally, it must be determined how the source country should be entitled to tax income from technical services. The fundamental issue in this regard is whether the source country should be required to tax on a net basis (i.e., the source country would be required to allow the deduction of expenses included in earning the income) or allowed to tax on a gross basis (i.e., without the deduction of any expenses). If the source country is allowed to tax income from services on a gross basis, the issue is whether the rate of source-country tax should be limited and, if so, what the maximum rate of tax should be.

4. SUMMARY OF THE DISCUSSIONS OF THE COMMITTEE AT THE EIGHTH SESSION

4.1 Although a majority of the members of the Committee agreed that a new Article dealing with income from technical services should be added to the UN Model, there were different ideas with respect to the key features of the new Article. An unofficial summary of the Committee's discussions on the key issues is provided below.[4] This summary is intended

[3] There are difficulties in establishing an appropriate monetary threshold where different currencies are involved and where inflation may erode the amount of the threshold over the life of the treaty. Detailed issues such as this are beyond the scope of this note.

[4] This summary is based on the consultant's notes of the discussions.

to show the wide range of different views and the need for compromise in order for sufficient levels of agreement to be reached on a new article.

4.2 With respect to the scope of services to which the new Article should apply, the diversity of views included the following:

- all services
- an inclusive definition of technical, management and consulting services
- a definition based on domestic law
- no definition in the Article, but guidance provided in the Commentary
- an exhaustive definition of managerial, technical and consulting services

Several members of the Committee considered that the new Article should not apply to any services covered by Article 7 or 14 of the UN Model.

4.3 With respect to the key issue of whether a new Article should apply only to technical services performed in the source country or to all technical services irrespective of whether or not they are performed in the source country, the views of the members of the Committee were split. Some members thought that the new Article should apply to all payments by residents of the source country for technical services irrespective of where the services are performed. In effect, these members consider that technical services should be treated in the same manner as royalties under Article 12. Other members thought that the new Article should be limited to services performed in the source country. In effect, these members considered that technical services should be treated in the same manner as income from entertainment and sports activities under Article 17. Still other members thought that technical services should be taxable only by the source country if the services are performed in the source country for a minimum period of days or by personnel who are present in the source country for a minimum period. In effect, these members of the Committee consider that technical services should be treated in a manner similar to income from services under Articles 5(3)(b) and Article 7 and Article 14.

4.4 With respect to the method of source country taxation, there appeared to be widespread agreement that taxation on a gross basis was acceptable, especially if the scope of the services covered by the new Article was limited. Similarly, with respect to the rate of source country tax, there appeared to be widespread agreement that the rate should be limited to the same rate applicable to royalties. Of course, the rate of tax applicable to royalties under Article 12 of the UN Model is left to be determined by the contracting states.

ANNEX 1
DRAFT ARTICLES

Introduction

The following three draft Articles dealing with income from technical services are provided for discussion purposes only. They should not be viewed as recommendations. The three Articles reflect a wide range of possibilities for source-country taxation of income from technical services.

- *Alternative A* allows the source country to tax all payments by residents of the source country (and nonresidents with a PE or fixed base in the source country) to residents of the other country for technical services. This treatment is similar to the treatment of royalties under Article 12.
- *Alternative B* limits the source country to taxing income from technical services performed in the source country.
- *Alternative C* limits the source country even further, to taxing only income from technical services performed for more than a minimum period of days and to taxing such income on a net basis.

In all three draft Articles, the income covered by the Article is limited to technical services, which are defined to be "managerial, technical and consulting services." The expression "managerial, technical and consulting services" is not defined in the Article, but guidance as to its meaning would be provided in the Commentary.

Each Article is accompanied by some brief explanatory notes. Finally, the basic structure of the Commentary on the new Article on Income from Technical Services is set out in bullet form. The emphasis is on the definition of managerial, technical and consulting services. These services are sometimes referred to as "management" rather than "managerial" services, and "consultancy" rather than "consulting" services. They are also sometimes described as "services of a managerial, technical and consulting nature." There are no significant differences between these various expressions.

Article 12A – Alternative A
Income from Technical Services

[Article 12A – Alternative A is based on the following assumptions related to the key issues discussed in the accompanying note:

1) *the services covered are defined as managerial, technical and consulting services;*
2) *the source country is allowed to tax any payments for services irrespective of whether the services are rendered inside or outside the source country;*
3) *as a result, there is no threshold for the imposition of source-country tax;*
4) *the source country is limited to taxing the payments for services on a gross basis at a rate to be determined pursuant to negotiations between the Contracting States.]*

1. Payments for technical services arising in a Contracting State and paid to a resident of the other Contracting State who provides those services may be taxed in that other State.

2. However, such payments may also be taxed in the Contracting State in which the payments arise, and according to the laws of that State, but the tax so charged shall not exceed ___ percent of the gross amount of the payment (the percentage to be established through bilateral negotiations).

3. The term "payments 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 of the person making the payments.

4. Paragraph 2 shall not apply if a resident of a Contracting State carries on business in the other Contracting State through a permanent establishment or a fixed base situated therein and the technical services are effectively connected with such permanent establishment or fixed base. In such case, the provisions of Article 7 or Article 14, as the case may be, shall apply.

5. Payments 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 technical fees, 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 technical fees was incurred, and such technical fees are borne by the permanent establishment or fixed base.

[6. Where, by reason of a special relationship between the payer and the person providing the services or between both of them and some other person, the amount of the technical fees paid exceeds the amount that would have been agreed upon by the payer and that person in the absence of such relationship, the provisions of this Article shall apply only to the last-mentioned amount. In such case, the excess part of the payments shall remain taxable according to the laws of each Contracting State, due regard being had to the other provisions of this Agreement.]

Article 12A – Alternative A
Explanatory Notes

Draft Article 12A – Alternative A is modeled on the treatment of royalties under Article 12. Thus, the source country is entitled to tax payments made by a resident of the source country or borne by a PE or fixed base situated in the source country. The source country is entitled to tax payments for technical services on a gross basis at a rate to be agreed on through bilateral negotiations by the Contracting States.

The key feature of Article 12A – Alternative A is the definition of "payments for technical services." The definition in paragraph 3 of Article 12A – Alternative A is broad and general. Importantly, however, this definition establishes that the meaning of technical services is not determined under the domestic law of the Contracting State applying the treaty, and the Commentary can make this point explicitly. Guidance concerning the proper interpretation and application of the treaty definition of technical services would be provided in the Commentary through the use of examples.

The scope of Article 12A – Alternative A is limited by the specific exclusion of any payments for technical services covered by Articles 7, 14, and payments to employees.

Article 12A – Alternative A applies to payments for technical services irrespective of whether the services are performed inside or outside the source country. This aspect of the Article may cause difficulties. First, if services are provided to consumers in the source country who are individuals, it may be difficult for the source country to effectively collect tax on the payments for such services through a withholding obligation imposed on resident individuals. Accordingly, it may be appropriate to limit the source-country tax under Alternative A to payments made by enterprises resident in the source country or carrying on business in the source country through a PE or fixed base.

Second, as it is drafted, Article 12A – Alternative A would apply to technical services performed outside the source country if paid for by a resident of the source country. Thus, it would apply to such payments even if the services are consumed or utilized outside the source country. For example, if a resident of the source country carries on business in the other contracting state and pays a resident of that state for technical services in connection with that business, the payments would be subject to source-country tax under Article 12A – Alternative A. Similarly, any individual resident of a source country who travels to the other state and pays for technical services (e.g., medical tests) while there could be subject to source-country tax in respect of the payments. Consideration might be given to restricting Article 12A – Alternative A to technical services performed in the source country or, if the services are performed outside the source country, to services that are consumed or utilized in the source country. There is no precedent in the existing provisions of the UN Model for the concept of services being consumed or utilized in a country; this is uncharted territory.

Article 12A – Alternative B
Income From Technical Services

[Note: the following draft Article 12A – Alternative B is modeled on Article 17 and based on the following assumptions:

1) *the services covered are defined as managerial, technical and consulting services;*
2) *the source country is entitled to tax income from technical services only if the services are performed in the source country; and*
3) *the source country is allowed to tax income from technical services on a gross basis, but the rate of tax is limited.]*

1. Income derived by a resident of a Contracting State from technical services shall be taxable only in that State unless the income arises in the other Contracting State.

2. Income derived by a resident of a Contracting State from technical services arising in the other Contracting State may be taxed in the Contracting State in which the income arises and according to the laws of that State, but the tax so charged shall not exceed ___ percent (the percentage to be established through bilateral negotiations).

3. The term “technical services” means services of a managerial, technical or consultancy nature.

4. The provisions of paragraph 2 shall not apply if the enterprise carries on business in the Contracting State in which the income arises through a permanent establishment or fixed base situated therein, and the income from technical services is effectively connected with such permanent establishment or fixed base or with business activities referred to in (c) of paragraph 1 of Article 7. In such case, the provisions of Article 7 or 14, as the case may be, shall apply.

5. Income from technical services shall be deemed to arise in a Contracting State if the services are performed in that State by the enterprise through employees or other individuals acting on behalf of the enterprise who are present in that State.

Article 12A - Alternative B
Explanatory Notes

The only significant difference between Alternative A and Alternative B is that under Alternative B the source country (the country in which the income from technical services arises) is entitled to tax the income only if the technical services are performed in the source country. Thus, under Alternative B, a source country is not entitled to tax payments for technical services made by residents of the source country (or nonresidents with a PE or fixed base in the source country) to residents of the other state if the services are performed outside the source country. Income from such services is taxable exclusively by the state in which the service provider is resident.

Income from technical services is considered to arise in the source country under paragraph 3 of Article 12A – Alternative B only if the services are performed by the enterprise in the source country by employees or other personnel who are present in the source country. (See paragraph 3 of the Commentary on Article 5 for an explanation of other personnel providing services on behalf of an enterprise.)

In other respects, Article 12A – Alternative B is the same as Alternative A. Technical services are defined in the same way. The method of source-country taxation – a limited rate on the gross amount – is the same. In addition, the relationship between Article 12A and other Articles, in particular Articles 7 and 14, is the same under Alternative B as under Alternative A.

Article 12A – Alternative C
Income From Technical Services

[Note: the following draft Article 12A – Alternative C is modeled on Article 14 and based on the following assumptions:

1) *the services covered are defined as managerial, technical and consulting services;*
2) *the source country is entitled to tax income from technical services only if the services are performed in the source country for a minimum period of time; and*
3) *the source country is required to tax income from technical services on a net basis, but the rate of tax is unlimited.]*

1. Income derived by a resident of a Contracting State from technical services shall be taxable only in that State unless the income arises in the other Contracting State.

2. Income derived by a resident of a Contracting State from technical services arising in the other Contracting State may also be taxed in the Contracting State in which the income arises and according to the laws of that State if the services continue for more than ___ days in any 12-month period beginning or ending in the year.

3. The term “technical services” means services of a managerial, technical or consulting nature.

4. For the purposes of paragraph 2, in determining the income from technical services arising in a Contracting State, there shall be allowed as deductions any expenses incurred for the purpose of earning such income whether such expenses are incurred in the Contracting State in which the income arises or elsewhere.

5. Income from technical services shall be deemed to arise in a Contracting State if the services are performed in that State by the enterprise through employees or other individuals acting on behalf of the enterprise who are present in that State.

6. The provisions of paragraph 2 shall not apply if the enterprise carries on business in the Contracting State in which the income arises through a permanent establishment or fixed base situated therein, and the income from technical services is effectively connected with such permanent establishment or fixed base or with business activities referred to in (c) of paragraph 1 of Article 7. In such case, the provisions of Article 7 or 14, as the case may be, shall apply.

Article 12A – Alternative C
Explanatory Notes

There are two major differences between Alternative C and Alternative B. First, under Alternative C the source country is entitled to tax income from technical services only if the technical services are performed in the source country for a minimum period of days in any 12-month period. Thus, a source country is not entitled to tax income from technical services performed in the source country by a resident of the other state on a temporary or isolated basis.

The threshold for source-country tax under Alternative C is the performance of services in the source country for a minimum period of days. The minimum period could be set at a variety of levels. However, a number of days ranging between 30 and 120 would be reasonable. If a 30-day threshold is considered to be too high, then it would probably make sense to eliminate any threshold requirement entirely (i.e., adopt Alternative B). Any threshold in excess of 120 days would mean that the additional source-country taxing rights provided by Alternative C would be minimal compared with source-country taxing rights under Articles 7 and 14.

Under Article 5(3)(b) and Article 7, the source country is entitled to tax income from any services if they are provided in the source country for 183 days or more with respect to the same or a connected project. Under Article 14(1)(b), the source country is entitled to tax income from professional and other independent services if the taxpayer is present in the source country for more than 183 days.

The threshold in draft Article 12A – Alternative C is based on the number of days that a resident of the other state performs services in the source country. An alternative threshold based on the number of days of presence in the source country would be problematic for enterprises with large numbers of employees because they would have to keep track of the location of employees, not only when the employees are working but also when they are not working (e.g., weekends and holidays). However, it would be possible to have different thresholds for individuals and enterprises.

The second major difference between Alternative C and Alternative B is that Alternative C requires the source country to tax income from services on a net basis. However, Alternative C does not impose any limit on the rate at which the income may be taxed by the source country. Paragraph 3 of Article 12A – Alternative C requires the source country to allow deductions for any expenses incurred in earning the income whether such expenses are incurred inside or outside the source country. In this regard, paragraph 3 is similar to paragraph 3 of Article 7.

Apart form these two major differences, Alternative C is the same as Alternative A and Alternative B. Technical services are defined in the same way and the relationship between Article 12A and the other distributive Articles of the UN Model (in particular, Articles 7 and 14) is the same.

THE DEFINITION OF TECHNICAL SERVICES

1) The Commentary should clarify that the meaning of management, technical and consulting services is not to be determined under domestic law.

2) The new Article would not apply to:
   - income from services provided through a PE or fixed base in the country in which the services arise
   - income from employment (i.e., payments by an employer to an employee providing technical services) whether or not subject to source-country tax under Article 15
   - amounts paid in reimbursement of a service provider's expenses
   - directors' fees and remuneration of top-level managerial officials under Article 16
   - income of artistes and sportspersons whether or not subject to Article 17.

3) However, the new Article would apply to:
   - income from technical services not subject to source-country tax under Articles 7 or 14
   - income from technical services provided by persons other than artistes and sportspersons in connection with sports and entertainment activities (e.g., income derived by coaches, directors, special-effects personnel, etc.) [Alternatively, such technical services could be expressly excluded from the new Article.]

4) The relationship between the new Article and Article 14
   - some professional and independent services would be within the definition of technical services
   - should these services be excluded from the new Article even if they are not subject to source-country tax under Article 14? For example, if a dentist performs services for residents of the source country (but not through a fixed base in the source country) should the income be subject to source-country tax?

5) The relationship between the new Article and Article 12
   - the Commentary should clarify the relationship between the taxation of royalties under Article 12 and the taxation of income from technical services under new Article 12A
   - The Commentary should explain the difference between payments for the use of or the right to use property or information and payments for services
   - where an enterprise provides both the use of property or information and services pursuant to a single contract (so-called mixed contracts) the Commentary should clarify how the payments should be treated

6) Managerial services
   - the Commentary should provide a general description of what types of services are considered to be managerial services
   - what types of services are considered to be managerial services should be illustrated with a series of examples

7) Technical services
   - the Commentary should provide a general description of what services are considered to be technical services
   - the distinction between technical services and other services should be illustrated with a series of examples

- it might be possible, for example, to clarify that income derived from manual labour is not within the meaning of technical services
- it might be possible to clarify that technical services require the service provider to have and use specialized skills, education or training

8) Consulting services
   - the Commentary should provide a general description of what types of services are considered to be consulting services
   - the distinction between consulting services and other services should be illustrated with a series of examples

9) Types of services
   The following types of services should be considered to determine the circumstances in which they might be included or excluded from the definition of management, technical and consulting services:
   - construction [It would be possible to treat all construction services (not covered by Article 7) as technical services or to exclude all such services from a new Article on technical services. If so, it is necessary to provide guidance concerning the construction services that are to be treated as technical services.]
   - professional services [See the discussion of the relationship between Article 14 and a new Article 12A.]
   - distribution services [Should such services be excluded from the new Article? If not, guidance must be provided with respect to the services that are included.]
   - transport [Possibly exclude?]
   - tourism [Possibly exclude?]
   - health services [Possibly exclude?]
   - educational services [Possibly exclude?]
   - communications
   - financial services [Possibly exclude?]
   - services provided electronically

STRUCTURE OF THE DRAFT COMMENTARY ON ARTICLE 12A – INCOME FROM TECHNICAL SERVICES

Introduction/General considerations

- The rationale for a separate Article dealing with payments for or income from technical services
- A description of the basic features of the new Article
- The relationship with other Articles, especially Articles 7 and 14

Paragraph 1

- Establishes the principle that the country in which the service provider is resident is entitled to tax payments for or income arising in the other contracting state
- Also establishes the principle that, if a payment for or income from technical services arises in the source country, the source country is also entitled to tax the payment or income; in effect, taxation of the payments or income must be shared between the country of residence of the service provider and the country in which the payment or income arises, as provided in paragraph 5 of Article 12A (paragraph 6 of Alternative C)

Paragraph 2

- Establishes the right of the country in which the payment or income arises to tax the payment or income in accordance with domestic law subject to the maximum rate specified in paragraph 2
- The source country's tax may be levied on the gross amount of the payment at a rate to be negotiated (Alternatives A and B)
- Mention the considerations that should be taken into account in negotiating the rate
- Mention the possibility of providing an election for the service provider to pay tax on its net income from technical services
- As drafted, Alternative A does not include any beneficial owner requirement. Such a requirement may be considered appropriate for new Article 12A, especially since it is modeled on Article 12, which contains the beneficial owner requirement. If a beneficial owner requirement is added, the Commentary should contain an explanation of the meaning of "beneficial owner" similar to paragraph 5 of the Commentary on Article 12 of the UN Model, quoting paragraphs 4-4.2 of the OECD Commentary on Article 12.
- If a beneficial owner requirement is not included in Article 12A(2), there should probably be an explanation in the Commentary of why the requirement is unnecessary.

Paragraph 3 (paragraph 4 of Alternative C)

- The Commentary on the definition of technical services should provide extensive guidance concerning the types of services that are covered by the new Article and those types of services that are not covered

1) The Commentary should clarify that the meaning of management, technical and consulting services is not to be determined under domestic law.
2) The new Article would not apply to:

- income from services provided through a PE or fixed base in the country in which the services arise
- income from employment (i.e., payments by an employer to an employee providing technical services) whether or not subject to source-country tax under Article 15
- amounts paid in reimbursement of a service provider's expenses
- directors' fees and remuneration of top-level managerial officials under Article 16
- income of artistes and sportspersons whether or not subject to Article 17.

3) However, the new Article would apply to:
   - income from technical services not subject to source-country tax under Articles 7 or 14
   - income from technical services provided by persons other than artistes and sportspersons in connection with sports and entertainment activities (e.g., income derived by coaches, directors, special-effects personnel, etc.) [Alternatively, such technical services could be expressly excluded from the new Article.]

4) The relationship between the new Article and Article 14
   - some professional and independent services would be within the definition of technical services
   - should these services be excluded from the new Article even if they are not subject to source-country tax under Article 14? For example, if a dentist performs services for residents of the source country (but not through a fixed base in the source country) should the income be subject to source-country tax?

5) The relationship between the new Article and Article 12
   - the Commentary should clarify the relationship between the taxation of royalties under Article 12 and the taxation of income from technical services under new Article 12A
   - The Commentary should explain the difference between payments for the use of or the right to use property or information and payments for services
   - where an enterprise provides both the use of property or information and services pursuant to a single contract (so-called mixed contracts) the Commentary should clarify how the payments should be treated

6) Management services
   - the Commentary should provide a general description of what types of services are considered to be management services
   - what types of services are considered to be management services should be illustrated with a series of examples

7) Technical services
   - the Commentary should provide a general description of what services are considered to be technical services
   - the distinction between technical services and other services should be illustrated with a series of examples
   - it might be possible, for example, to clarify that income derived from manual labour is not within the meaning of technical services
   - it might be possible to clarify that technical services require the service provider to have and use specialized skills, education or training

8) Consulting services

- the Commentary should provide a general description of what types of services are considered to be consulting services
- the distinction between consulting services and other services should be illustrated with a series of examples

9) Types of services
The following types of services should be considered to determine the circumstances in which they might be included or excluded from the definition of management, technical and consulting services:
- construction [It would be possible to treat all construction services (not covered by Article 7) as technical services or to exclude all such services from a new Article on technical services. If so, it is necessary to provide guidance concerning the construction services that are to be treated as technical services.]
- professional services [See the discussion of the relationship between Article 14 and a new Article 12A.]
- distribution services [Should such services be excluded from the new Article? If not, guidance must be provided with respect to the services that are included.]
- transport [Possibly exclude?]
- tourism [Possibly exclude?]
- health services [Possibly exclude?]
- educational services [Possibly exclude?]
- communications
- financial services [Possibly exclude?]
- services provided electronically

Paragraph 3 (Alternative C only)
- an explanation similar to paragraph 16-18 of the Commentary on Article 7(3) of the UN Model

Paragraph 4 (paragraph 5 of Alternative C)
- an explanation similar to paragraph 17 of the Commentary on Article 12 of the UN Model

Paragraph 5 (paragraph 6 of Alternative C)
- an explanation similar to paragraphs 18 and 19 of the Commentary on Article 12 of the UN Model
- it might be useful to clarify how the sourcing rule applies if the article applies where the services are performed outside the source country and are not consumed or utilized in the source country
- if the Article applies only to services performed or consumed or utilized in the source country the Commentary should provide guidance concerning where services are considered to be performed, consumed or utilized including whether this is determined under the domestic law of the source country

Paragraph 6 (Alternative A only)
- an explanation similar to paragraph 20 of the Commentary on Article 12 of the UN Model

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