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Report of the Ad Hoc Group of Experts Meeting on Exchange of Information (Revision of Article 26 of the United Nations Model Double Taxation Convention between Developed and Developing Countries)*

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Summary

The ad hoc group of experts examined the changes made by the OECD to Article 26 of its Model convention and discussed whether those changes would be appropriate for the comparable provision of UN Model convention. It was guided in that examination by the paper prepared by Mr. David Spencer. The group suggests that the Expert Committee might consider the following points in considering changes to Article 26 of the UN Model convention.

* The present paper was prepared by Professor Michael McIntyre, Professor Avi-Yonah, Professor Francisco Alfredo Garcia Prats, Mr. Bruce Zagaris, Mr. David Spencer and Mr. Suresh Shende. The views and opinions expressed are those of the author and do not necessarily represent those of the United Nations.

1. The group accepts the recommendation in the paper by Mr. David Spencer to use the recent changes by the OECD in Article 26 as the starting point in revising Article 26 of the UN Model Convention.

Article 26, Paragraph 1: Necessary

2. The group believes that the term “necessary” in the first sentence of paragraph 1 of Article 26 is not meant to impose a significant substantive barrier to requests for the exchange of information. (“The competent authorities of the Contracting States shall exchange such information as is necessary for carrying out the provisions of this Convention....”) It also agrees that the word “necessary” may convey to some readers a greater limitation than is intended. Both the UN Commentary and the OECD Commentary (prior to the recent amendment) suggest that the terms “necessary” and “relevant” are intended to convey the same meaning.

3. The Group is undecided as to whether the OECD term “foreseeably relevant” (sometimes spelled “foreseeably relevant”) is an improvement over the current language. It was suggested that the language may be infelicitous, due to the confusion it may create as to which party, the requesting or requested party, is expected to foresee the relevance of the requested information. In fact, only the requesting party is in a position to determine whether the requested information is likely to be relevant. Simply using the term “relevant” might be sufficient and might avoid confusion.

4. The objective of the OECD in proposing the changed language is unclear, given the position it has taken in its Commentary that the terms “necessary” and “relevant” are intended to convey the same meaning. The suggestion was made that the OECD may have been seeking some intermediate position between “necessary” and “relevant,” notwithstanding the position taken in its Commentary that the terms are equivalent in this context. The new OECD Commentary suggests that the language is intended to prevent “fishing expeditions.” It was suggested, however, that the requirement of relevance would rule out a fishing expedition.

5. The group did not believe that the UN Model Convention should be introducing some requirement higher than the requirement currently contained in paragraph 1 of Article 26. In particular, the group does not believe that the UN Model Convention should give support to a Contracting State that wishes to introduce new procedural barriers to the exchange of information article.

6. One participant suggested that there is a trend toward requiring more information from the requesting state when it makes its requests. To facilitate expanded exchanges for broader purposes, the requesting state might be encouraged to provide detailed information to the other state, such as the identity of the person under

examination, the form in which the requested information should be provided, the purpose for which it is sought, the grounds for believing the requesting state could be of assistance, and the efforts made by the requesting state to obtain the requested information within its own territory. Another participant suggested that requesting states ought to be forthcoming in making their requests for assistance but that the requested state should not be allowed to avoid its obligations under Article 26 by raising procedural objections not specified in that article.

7. The group is not aware of the use of the term “foreseeably relevant” as a term of art in contexts other than information exchange. It may be noted that the term appears in a recent protocol to the New Zealand/Poland tax treaty (2005), the Poland/Sweden treaty (2004), and the Jersey/US Tax Information Exchange Agreement (2002). It is also used in the OECD’s Model Agreement on Exchange of Information on Tax Matters and in the Joint Council of Europe/OECD Convention on Mutual Administrative Assistance in Tax Matters.

Article 26, Paragraph 1: Taxes Covered

8. The OECD has extended the taxes with respect to which information may be exchanged to “taxes of every kind and description imposed on behalf of the Contracting States, or of their political subdivisions or local authorities, insofar as the taxation thereunder is not contrary to the Convention.” The UN Model Convention limits exchange to taxes covered by the convention.

9. In general, there was support for the new language. It was noted that the new language would permit the exchange of information on the VAT. Such exchange is important to prevent international tax evasion, since there are no separate VAT conventions.

10. The one concern was about the extension of the exchange to subnational taxes, due to the risk of imposing an excessive burden on the tax departments of developing countries. In response to that concern, it was noted that subnational taxes are already covered by the UN Model Convention in the case of income taxes. It was also noted that the exchange is between the Competent Authorities, so that the national government would serve as gatekeeper for requests for information from subnational governments. Another point was that requests were likely to be too infrequent to create a significant administrative burden.

11. The group endorsed the conforming change — that the exchange of information is not restricted by article 1 (persons covered) or article 2 (taxes covered).

Article 26: Paragraph 1 and New Paragraph 2 (Reformatting)

12. The OECD has broken old paragraph 1 into two paragraphs, the first governing the obligations of the requested state and the other governing the obligations of the requesting state. The group had no difficulties with this change. Although the change is not important, it ought to be made to enhance conformity with the OECD Model convention.

Article 26: New Paragraph 2: Disclosure to Oversight Bodies

13. The OECD has amended its model convention to permit the disclosure of information obtained under Article 26 to oversight bodies, such as a legislative committee. The United States has requested such a provision to allow the disclosure of information to congressional committees involved in tax matters. Several objections were raised to this proposal.

14. One participant expressed concern that oversight bodies in many developing countries would not view tax information the way it is expected to be treated by the tax authorities. It was suggested that individuals in these bodies would be likely to leak the information for political or other purposes. Other participants expressed similar concerns. Although the group understood the possible benefits of the OECD position, they generally felt that it presented some significant risks.

15. The group agreed that an oversight body should not be allowed to receive information obtained through Article 26 unless members of that body are subject to the same controls as are applicable to tax personnel. In addition, the parties need to be assured that those controls will be effective. Given the uncertainty that such conditions would be met in the general case, the group was not prepared to endorse the OECD proposal. It was suggested that the UN Commentary might be amended to suggest that Contracting Parties might consider adding the OECD language regarding oversight bodies on a case by case basis.

Article 26, New Paragraph 4: No Domestic Tax Interest

16. The OECD renumbered old paragraph 2 as paragraph 3 and added the following new paragraph 4:

If information is requested by a Contracting State in accordance with this Article, the other Contracting State shall use its information gathering measures to obtain the requested information, even though that other State may not need such information for its own tax purposes. The obligation contained in the preceding sentence is subject to the limitations of [paragraph 3] but in no case shall such limitations be

construed to permit a Contracting State to decline to supply information solely because it has no domestic interest in such information.

17. The group generally was supportive of adding such a provision to the UN Model Convention. In general, the group felt that the current language in the model does not allow a Contracting Party to avoid an obligation to exchange information based on its own lack of need for the information. It was suggested, however, that if a developed country was making a request that was burdensome to a developing country, some arrangement might be made for providing financial assistance to the developing country.

18. It was noted that the OECD Model TIEA provides that a domestic tax interest requirement does not limit the obligation to exchange information. One member of the group suggested that a TIEA and a general tax treaty have different objectives, so that the provisions included in a TIEA are not controlling in deciding what to put in a general tax treaty. Another member suggested that the TIEA is meant to express the minimum requirements for a country to be a good citizen of the world, so that in some respects the provisions in a TIEA set a floor for a general tax treaty.

Article 26, New Paragraph 5: Overriding Bank Secrecy

19. The OECD has added the following paragraph to its model convention in order to provide for an override of bank secrecy laws:

In no case shall the provisions of [paragraph 3] be construed to permit a Contracting State to decline to supply information solely because the information is held by a bank, other financial institution, nominee or person acting in an agency or a fiduciary capacity or because it relates to ownership interests in a person.

20. The group endorses the addition of a similar paragraph to the UN Model Convention. It was noted that such override of bank secrecy is included in the OECD Model TIEA and in many agreements made in conformity with that model. It is well understood that an exchange of information agreement that does not provide for an override of bank secrecy is ineffective in many cases.

21. The group discussed the suggestion in the paper by David Spencer that information exchange should be *effective*. Several members endorsed Mr. Spencer's suggestion that the Expert Committee should be encouraged to look at the problem of *de facto* bank secrecy. *De facto* bank secrecy arises when a Contracting State arranges

its reporting rules for banks so that it is unable to provide bank information to its treaty partners. It was suggested that the Expert Committee might want to address this serious problem.

22. It was noted that the problem of *de facto* bank secrecy might be addressed through the UN Model Convention in its Commentary or through a code of conduct governing exchange of information. One member suggested that the Expert Committee might want to explore the possibility of developing a code of conduct with respect to information exchange, to be presented to ECOSOC for its consideration. The advantage of a code of conduct on the exchange of information is that it would be addressed to all countries and could be developed with input from all concerned countries.

23. One member of the group suggested that the Expert Committee might want to collect information from its members on various practices that might constitute *de facto* bank secrecy. It was noted that the OECD has not yet addressed this issue, which is of great importance to developing countries.

Article 26, New Paragraph 6: Overriding Dual Criminality Rule

24. Some Contracting Parties will not provide information to the requesting state with respect to a criminal matter unless the alleged violation would constitute a crime under the laws of both the requesting state and the requested state. The OECD has not addressed this issue in Article 26 of its model convention but does override this “dual criminality” requirement in its model TIEA. Mr. Spencer suggested the addition of a new paragraph 6 to the UN Model Convention to deal with this issue, and that recommendation received support from the group. Mr. Spencer’s proposed language reads as follows:

A Contracting State shall exchange information with the other Contracting State pursuant to this Article 26 without regard to whether the conduct being investigated would constitute a crime under the laws of that Contracting State if such conduct occurred in that Contracting State.

Automatic Exchange of Information

25. The group discussed the many advantages of having an automatic exchange of information on various items of income, including bank interest income. In general, the group favored an expansion of automatic exchanges. Several members noted the need for coordination of taxpayer information numbers (TINs) for automatic exchanges to be effective.

26. It was noted that the OECD has been working on the issue of coordination of TINs and on related issues regarding the automatic exchange of information. The group endorsed the recommendation of Mr. Spencer that the Expert Committee establish a subcommittee that would seek to work with the OECD and monitor developments in this important area.
