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United Nations Model Tax Convention update

Inclusion of Article 23A (4) of the OECD Model in Article 23A of the UN Model

Summary

1. On 9-10 June, UN-DESA organized an Ad Hoc Expert Group Meeting focusing on the 2011 revision of the UN Model Double Taxation Convention between Developed and Developing Countries (UN Model).

2. During the discussion of Article 23, the Meeting looked at the possibility of including in the 2011 revision of the UN Model paragraph 4 of Article 23 A of the OECD Model (conflicts of interpretation) in order to address situations of "unintended" double non-taxation. Differing views were expressed, however, and it was decided that Ms Devillet would draft for further consideration Commentary relevant for the inclusion of paragraph 4 of Article 23A. A draft Commentary was sent out to the informal group and gave rise to diverging views. Those views could not be reconciled. It was, therefore, decided to submit the issue to the Committee for further consideration and decision.

3. Section 1 of this note briefly describes the issues of conflicts of qualification (paragraphs 32.1 to 32.7 of the Commentary on Articles 23A and 23B of the OECD Model) and conflicts of interpretation (paragraph 4 of Article 23A of the OECD Model).

4. Section 2 proposes four options to deal with the inclusion of Article 23A(4) in the UN Model or in the UN Commentary. Annex 1 includes a tentative redraft of Article 23A(4) and its Commentary.

5. Section 3 presents the various arguments in favour and against the inclusion in the UN Model of Article 23A(4), which were raised by participants to the informal group in the course of the work on this issue.

I. Conflicts of interpretation versus conflicts of qualification

6. The issues of conflicts of qualification (paragraphs 32.1 to 32.7 of the Commentary on Articles 23A and 23B of the OECD Model) and conflicts of interpretation (paragraph 4 of Article 23A of the OECD Model) are closely linked. Both issues are, therefore, shortly presented in the following paragraphs in order to identify the differences and possible overlap.

Conflicts of qualifications

7. Under paragraph 2 of Article 3 any term no defined therein has the meaning it has under the domestic law of the State applying the treaty (the source State where Articles 6 to 21 are applied to a particular item of income and the residence State where Article 23 is applied to the same item of income) unless the context otherwise requires. Taking into consideration the diverging law systems of the source State and the residence State, those States may classify a same item of income differently. One country may classify it in a category which is taxable in the source State according to the treaty and the other in a category which is not taxable in the source State according to the treaty. For this reason, paragraphs 32.1 to 32.7 of the Commentary clarify the interpretation of the provisions of Articles 23A (Exemption Method) and 23B (Credit Method) and provide solutions for the conflicts of qualification. Taking into consideration the phrase *"in accordance with the provisions of this Convention, may be taxed in the other Contracting State"*, the OECD Commentary gives precedence to the qualification under the domestic law of the State of source.

8. Where the source State has taxed an item of income in accordance with paragraph 2 of Article 3, Articles 6 to 21 and its domestic law, the residence State must eliminate double taxation by exempting the item of income or by crediting the tax levied by the source State (even if, in accordance with its domestic law qualification, the item of income would not be taxable in the source State). Conversely, where the source State has no right to tax such income in accordance with paragraph 2 of Article 3, Articles 6 to 21 and its domestic law, the residence State has no obligation to grant exemption for an item of income that is not taxable in the source State (even if, in accordance with its domestic law qualification, such income would be taxable in the source State).

Conflicts of interpretation

9. Paragraph 4 of Article 23A (Exemption method) applies where the source State interprets the facts of a case or the provisions of the Convention in such a way that an item of income or capital falls under a provision of the Convention that does not allow the source State to tax such income or capital while the residence State adopts a different interpretation under which such income or capital falls under a provision of the Convention that allows the source State to tax.

10. The following examples illustrate the issue:

Example 1

An employer terminates the employment of several of its employees who are residents of State A and have been working in State B for three years. He gives those employees an advance notice of termination of three months. He prefers that the employees stop working immediately rather than work during the period of three months covered by the notice. The remuneration for that period is paid in the form of a payment “in lieu” of notice.

Under the domestic law of State B, a payment “in lieu” of notice of termination is a taxable remuneration. A final court decision in State B considers, however, that such payments should be taxable only in State A (the State of residence of the employees) because they cannot relate to activities exercised within State B (application of the first sentence of Article 15(1)). The constant jurisprudence of State A considers, on the other hand, that a payment “in lieu” of notice of termination is made in consideration of the employment exercised when the notice of termination is given to the employee (application of the second sentence of Article 15(1)). According to that jurisprudence, the payment is therefore taxable in State B and State A must exempt the payment under Article 23A(1).

In the absence of Article 23A(4), a payment “in lieu” of notice of termination, which is taxable under the domestic law of both Contracting States, is not taxed in any of the Contracting States. Article 23A(4) avoids such double non taxation by allowing the residence State not to apply paragraph 1.

If State A applies Article 23B, no double non taxation will occur as there will be no foreign tax to credit.

Example 2

An enterprise of State A, Subcontractor SA, works consecutively on 7 different building sites within State B. Those building sites do not constitute connected projects. The activities of Subcontractor SA on each site last less than 6 months but its overall activities on all 7 sites in State B last 14 months. Under Article 5 of the treaty between State A and State B, a building site constitutes a PE only if it lasts more than 6 months.

State A considers that a series of consecutive short-term sites operated by a single contractor would give rise to the existence of a PE in State B and, therefore, that the profits attributable to those sites are taxable in State B. Following Article 23A(1) State A has the obligation to exempt the said profits.

On the other hand, State B follows paragraph [18] of the OECD Commentary on Article 5, which is quoted under paragraph 11 of the UN Model, and considers that the profits relating to the activities exercised by Subcontractor SA on its territory are not attributable to a PE situated on its territory and are therefore not taxable therein.

In the absence of Article 23A(4), business profits, even though taxable under the domestic law of both Contracting States, are not taxed in any Contracting

State. Article 23A(4) avoids such double non taxation by allowing the residence State not to apply paragraph 1.

If State A applies Article 23B, there will be no double non taxation as there will be no foreign tax to credit.

11. Paragraph 4 is only applicable to the extent that the source State applies the provisions of the Convention either to exempt an item of income or to restrict its right to tax under paragraphs 2 of Article 10, 11 or 12. It is therefore clear that paragraph 4 will not apply in cases where the Convention gives an unlimited right of taxation to the source State but that State does not exercise this right pursuant to its domestic law.

12. Paragraph 56.3 of the OECD Commentary clarifies that Article 23A(1) does not impose an obligation on the residence State to give exemption in cases of conflicts of qualification and that, therefore, Article 23A(4) is not necessary to eliminate double exemption in those cases. The residence State could, however, have an obligation to give exemption under paragraph 1 in cases of conflict of qualification if that State does not agree with the OECD Commentary on conflicts of qualification (e.g. because its tax courts do not follow the OECD Commentary in this respect). In such situations, paragraph 4 also ensures that the residence State is not obliged to exempt the relevant income.

III. Possible options

13. The following three options were identified. The Committee should decide, on the basis of this note, which of these options should be followed in the revised UN Model:

Option I: To include paragraph 4 in Article 23 A of the UN Model (see annex 1).

14. Under this option, the following new paragraph 4 would be added to Article 23A of the UN Model:

> *"4. The provisions of paragraph 1 shall not apply to income derived or capital owned by a resident of a Contracting State where the other Contracting State applies the provisions of this Convention to exempt such income or capital from tax or applies the provisions of paragraph 2 of Article 10, 11 or 12 to such income; in the latter case, the first-mentioned State shall allow the deduction of tax provided for by paragraph 2."*

15. Paragraph 4 would also apply where the source State interprets the facts of a case or the provisions of the Convention in such a way that an item of income falls under the provisions of paragraph 2 of Article 10, 11 or 12, which provides for limited taxation in the source State while the residence State adopts a different interpretation and considers that such income falls under a provision of the Convention that provides for unlimited taxation in the source State. The last sentence of paragraph 4, which is not found in the OECD Model, has been added for the sake of certainty in order to make explicit that in such case the residence State will apply paragraph 2 and give a credit for the tax levied in the source State.

16. Where the source State applies the provisions of paragraph 2 of Article 10, 11 or 12 to an item of income, some countries may prefer not to deny the application of the provisions of paragraph 1 despite the fact that the source State must limit its tax on such income. The Commentary on paragraph 4 would allow those countries to limit the scope of paragraph 4 to cases where the source State applies the provisions of the Convention to exempt an item of income or capital from tax and to delete the part of paragraph 4 dealing with Articles 10, 11 and 12.

Option II: To include paragraph 4 in Article 23 A of the UN Model together with a new paragraph in the Commentary indicating that the Contracting States may consider that the inclusion of the provision is not appropriate.

17. Under this option, the following paragraph 24 could be added in the Commentary on Article 23 A:

> *"24. As a matter of policy, some countries consider, however, that, where the State of residence adopts an interpretation under which an item of income or of capital falls under a provision of the Convention that allows the State of source to tax that income or capital, the State of residence should not have the right to take away the exemption provided for under paragraph 1 in a situation dealt with by paragraph 4. Where the State of source adopts a different interpretation, under which the item of income or capital falls under a provision of the Convention that does not allow taxation in the State of source or only allows limited taxation therein, those countries consider that it would be detrimental to the interest of the State of source if the State of residence could arrogate such taxes to its jurisdiction in contradiction with its own interpretation. Those countries should not include paragraph 4 in their tax treaties."*

Option III: To include no paragraph 4 in Article 23 A of the UN Model.

18. Under this option, the Commentary will, however, propose an alternative provision similar to the one proposed under option I for those countries wishing to eliminate the double non-taxation dealt with under paragraph 4.

IV. Pros and Cons of including Article 23 (4) in the UN Model

Arguments raised against including Article 23 (4) in the UN Model

19. Including paragraph 4 in the UN Model would result in including the avoidance of double non-taxation as a treaty objective in the UN Model. Although some countries regard double non-taxation as undesirable, very few countries consider its avoidance as a treaty objective or accept the "single taxation principle", which requires that all income be taxed at least by one State. Double non-taxation may be intended or unintended but does not constitute tax evasion. Double non-taxation should be considered a problem only if it is abusive.

20. There are fundamental differences with respect to tax treaty policy between developed and developing countries. For example:

- While the OECD Model focuses on the avoidance of double taxation, many developing countries consider that the main purpose of a tax treaty is to ensure an equitable allocation of taxing rights.

- The policy underlying the OECD Model is primarily to limit the taxing rights of the source State and to preserve the rights of the residence State. The UN Model should ensure that, once the treaty has allocated taxing rights to the source State, that State is free to use them or not. Any attempt by the residence State to recapture taxing rights that the source State has not used, for whatever reason, would affect the interests of the source State.

- Developed countries are concerned primarily with the avoidance of double taxation (and now double non-taxation) from a purely fiscal perspective. Developing countries negotiate treaties for both fiscal and non-fiscal (e.g. economic, social or political) considerations. It is not uncommon for those countries to grant specific fiscal benefits with a view to promoting their development, which may result in unintended double non-taxation.

21. It would lead the UN Model to be disregarded if it did not meet the interests of the developing countries. Hence, copying the OECD Model (as such or slightly watered) is unlikely to meet the needs of many developing countries. We need to consider the needs of those countries from their own perspective.

22. Developing countries sometimes intentionally enter into treaties including provisions that allow double non-taxation in order to secure their developmental interests. Therefore, it is not proper to let the residence State decide, through paragraph 4, that the view of the source State that it does not have the right to tax implies unintended double non-taxation and hence the remedy is to take away the exemption available under paragraph 1. The source State may have taken note of such double non-taxation while negotiating the treaty and may have agreed on the sharing of taxing rights with due recognition of this situation.

23. Paragraph 4 appears like a “switchover clause", which gives the residence State full rights to take over the taxing rights of the source State where that State does not tax (fully or partially) and the residence State disagrees with the interpretation by the source State of the treaty provisions or the facts of the case. This provision could also apply in case of conflicts of qualification where a Contracting State does not agree with the OECD Commentary on conflicts of qualification. This looks like usurpation of the source State’s rights by the residence State. Paragraph 4 will create an imbalance in taxing rights since the residence State will recapture the taxing rights allocated to the source State without a corresponding taxing right being given to the source State. Thus, paragraph 4 would be detrimental to the interests of the source State.

24. The residence State is free to take over the source State’s taxing right unilaterally without giving any justification. The residence State only has to disagree with the source State on facts or its application of the treaty provisions to disallow exemption. No mutual agreement procedure is required in order to solve the disagreement.

25. Article 23A(4) is not acceptable to the Courts of some countries and may be unconstitutional in some countries (e.g. United Kingdom, Sweden, Greece, Germany, Hungary, Switzerland). It should not be the objective of the UN Model to recommend a provision that does not comply with the domestic laws of countries and affects their sovereign taxing rights. Countries attempt to align their treaties with their domestic law and they are not going to change this just because the UN Model says so. The UN Model should permit each country to retain its fiscal sovereignty and to follow its own domestic law interpretations.

26. The problems solved under paragraph 4 are quite complex and rarely occur in real life. Paragraph 4 should be excluded from the UN Model in order to keep the treaty simple unless the Committee can find more cases involving developing countries. IFA 2004 General Report on double non-taxation notes that, so far, countries have been quite reluctant to introduce the provision of Article 23A(4) in their bilateral treaties. It considers that this reluctance can probably be attributed to the fact that Article 23A(4) of the OECD Model is perceived as not being matured or balanced. Many countries obviously have other priorities than to adopt as soon as possible an OECD proposal for the prevention of double non-taxation. This situation has not evolved and nowadays still very few countries include Article 23A(4) in their treaties.

Arguments raised in favour of including Article 23A(4) in the UN Model

27. Double non-taxation may be perfectly in line with the object and purpose of tax treaties when the source State, which has the right to tax an item of income according to the treaty provisions, does not exercise this right for domestic reasons (e. i. because the income is non taxable or expressly exempted from tax under its domestic law) and the residence State is obliged under Article 23A(1) to exempt such income. One of the objectives of the exemption method is indeed to ensure neutral competition in the source State. If the source State does not tax a certain item of income under its domestic law, then the residents of the other Contracting State who work or invest in the source State will enjoy the same benefit as their competitors that are residents of that State and operate therein. This is a policy issue, which is to be decided by each country and is not related to the fact that a country is a developed or a developing country (some developing countries are very reluctant to accept double non-taxation while some developed countries have chosen to exempt income taxable in the source State without requiring an effective taxation in that State).

28. In cases involving conflicts of interpretation (or of qualification), however, double non-taxation occurs due to the application of different treaty provisions by both States. The source State considers that, under the treaty provisions, it has no right to tax an item of income that is fully taxable under its domestic law. Most often, Article 23A(4) operates in cases that were not identified when negotiating the treaty and double non-taxation is unexpected for both Contracting States. It is difficult to argue that such double non-taxation is in line with the object and purpose of a tax treaty and the intention of the negotiators.

29. For developing countries, tax treaties may be a means of promoting economic development. The UN Model should reflect the specific needs of developing countries and should therefore favour original provisions taking into consideration those

specific needs. In the specific case of Article 23A(4), it is, however, difficult to understand how that provision could be disadvantageous for developing countries. If developing countries wish to promote structural investment in their territory, this can be better done through the negotiation of a mutually acceptable allocation of taxing rights than through the organisation of double non-taxation in unpredictable cases resulting from divergences of interpretation.

30. Under the credit method, double non-taxation is prevented in most cases in which the source State does not exercise the taxing rights it was allocated under the treaty. For this reason, countries willing to avoid double non-taxation provide for the credit method instead of the exemption method in their treaties. Several countries, however, are reluctant to recapture taxing rights where the source State exempts income under its domestic law. Those countries prefer to apply the exemption method. They are, however, willing to recapture taxing rights where the source State considers that an item of income may only be submitted to limited source taxation or is exclusively taxable in the residence State. Those countries may include Article 23A(4) in their treaties in order to switch to the credit method in the specific cases covered by that provision.

31. The exemption method proposed in Article 23A is generally more favourable to the source State than the credit method proposed in Article 23B. Each country is, however, left free under the UN Model to make its own choice between both methods. Consequently, nothing can justify that countries willing to apply the exemption method should be prevented from switching to the credit method where the source State itself considers that it has no right to tax or has a limited right to tax under the treaty provisions. It would be particularly shocking if a Contracting State applying the credit method could rely on the UN Model in order to deny the other Contracting State applying the exemption method the right to include Article 23A(4)within such method.

32. Article 23A(4) allows the residence State not to apply Article 23A(1) in cases where the difference of views is not solved through the mutual agreement procedure (which the taxpayer is unlikely to initiate under Article 25(1) as he benefits from the non-taxation). However, would the residence State apply Article 23A(4) unduly in a case where the source State does not tax an item of income because it is not taxable under its domestic law, the taxpayer may trigger the mutual agreement procedure.

33. IFA 2004 General Report on double non-taxation notes that, under different provisions agreed in treaties, exemption depends on whether the source State actually levies taxes. In several treaties, the provisions apply to certain types of income while in other treaties they apply in a general manner. Most countries continue, generally, to use those provisions, which can have a more extended scope than Article 23A(4). Moreover, Article 23A(4) will not be included in a treaty when both Contracting States apply the credit method.

Conclusion

34. The Committee is invited to examine the different pros and cons identified with respect to the inclusion of Article 23A(4) in the UN Model. Further, the

Committee is invited to choose one of the three proposed options so that the chosen option may be included in the next update of the UN Model.

ANNEX

Paragraph 4 of Article 23 A

"4. The provisions of paragraph 1 shall not apply to income derived or capital owned by a resident of a Contracting State where the other Contracting State applies the provisions of this Convention to exempt such income or capital from tax or applies the provisions of paragraph 2 of Article 10, 11 or 12 to such income; in the latter case, the first-mentioned State shall allow the deduction of tax provided for by paragraph 2."

Commentary on paragraph 4 of Article 23 A

Paragraph 4

17. The Committee considers that the following Commentary on paragraph 4 of Article 23 A of the OECD Model Convention (as it read on 22 October 2010) is applicable to paragraph 4 (the additional comments that appear in italics between square brackets, which are not part of the Commentary on the OECD Model, have been inserted in order to reflect the fact that paragraph 4 also applies where the State of source applies the provisions of paragraph 2 of Article 12 to an item of income):

> [56.1] The purpose of this paragraph is to avoid double non taxation as a result of disagreements between the State of residence and the State of source on the facts of a case or on the interpretation of the provisions of the Convention. The paragraph applies where, on the one hand, the State of source interprets the facts of a case or the provisions of the Convention in such a way that an item of income or capital falls under a provision of the Convention that eliminates its right to tax that item or limits the tax that it can impose while, on the other hand, the State of residence adopts a different interpretation of the facts or of the provisions of the Convention and thus considers that the item may be taxed in the State of source in accordance with the Convention, which, absent this paragraph, would lead to an obligation for the State of residence to give exemption under the provisions of paragraph 1.
>
> [56.2] The paragraph only applies to the extent that the State of source has applied the provisions of the Convention to exempt an item of income or capital or has applied the provisions of paragraph 2 of Article 10, *[…]* 11 *[or 12]* to an item of income. The paragraph would therefore not apply where the State of source considers that it may tax an item of income or capital in accordance with the provisions of the Convention but where no tax is actually payable on such income or capital under the provisions of the domestic laws of the State of source. In such a case, the State of residence must exempt that item of income under the provisions of paragraph 1 because the exemption in

the State of source does not result from the application of the provisions of the Convention but, rather, from the domestic law of the State of source (see paragraph 34 above). Similarly, where the source and residence States disagree not only with respect to the qualification of the income but also with respect to the amount of such income, paragraph 4 applies only to that part of the income that the State of source exempts from tax through the application of the Convention or to which that State applies paragraph 2 of Article 10, *[…]* 11 *[or 12]*.

[56.3] Cases where the paragraph applies must be distinguished from cases where the qualification of an item of income under the domestic law of the State of source interacts with the provisions of the Convention to preclude that State from taxing an item of income or capital in circumstances where the qualification of that item under the domestic law of the State of residence would not have had the same result. In such a case, which is discussed in paragraphs 32.6 and 32.7 above, paragraph 1 does not impose an obligation on the State of residence to give exemption because the item of income may not be taxed in the State of source in accordance with the Convention. Since paragraph 1 does not apply, the provisions of paragraph 4 are not required in such a case to ensure the taxation right of the State of residence.

18. Paragraph 4 applies where the State of source interprets the facts of a case or the provisions of the Convention in such a way that an item of income or capital falls under a provision of the Convention that does not allow the State of source to tax the item while the State of residence adopts a different interpretation under which the item falls under a provision of the Convention that allows the State of source to tax the item. For example, on the one hand, the State of source considers that services performed by an enterprise of the State of residence through employees are not performed, for the same or a connected project, within its territory for more than 183 days within a twelve-month period and, therefore, considers that, according to Articles 5 and 7, it may not tax the income attributable to those services. On the other hand, the State of residence of the enterprise considers that those services are performed, for the same or a connected project, during more than 183 days in the State of source. The State of residence considers therefore that the income attributable to those services is taxable in the State of source in accordance with Articles 5 and 7. In the absence of paragraph 4, the State of residence should, according to its interpretation of the Convention, exempt the income attributable to those services according to paragraph 1. In such case, to the extent that the difference of views is not solved through the mutual agreement procedure (which the taxpayer is unlikely to initiate as he benefits from this difference of views which results in non-taxation), paragraph 4 allows the State of residence not to apply paragraph 1 thereby avoiding double non taxation.

19. Paragraph 4 is only applicable to the extent that the State of source "applies the provisions of this Convention" to either exempt an item of income or to restrict its right to tax under paragraphs 2 of Articles 10, 11 or 12. Clearly, therefore, paragraph 4 will not apply to cases where the Convention gives an unlimited right to tax to the State of source but that State, pursuant to its domestic law, does not exercise this right. For example, both Contracting States consider that services are performed, for the same or a connected project, during more than 183 days in the State of source and

the income attributable to those services is taxable in the State of source in accordance with Articles 5 and 7. Under the domestic law of the State of source, however, non-residents are only taxable on profits attributable to a permanent establishment situated in the State and no tax is therefore payable on the income. In such a case, the State of source cannot be said to have applied the provisions of the Convention to exempt the income since these provisions clearly provide that the income may be taxed by that State. Paragraph 4 therefore does not apply and the State of residence must exempt the income according to paragraph 1.

20. Paragraph 4 also applies where the State of source interprets the facts of a case or the provisions of the Convention in such a way that an item of income falls under the provisions of paragraph 2 of Article 10, 11 or 12 that provides for limited taxation in the State of source while the State of residence adopts a different interpretation and considers that the item falls under a provision of the Convention that allows the State of source to tax the item without any limitation. For example, on the one hand, the State of source considers that royalties paid by one of its resident and beneficially owned by a resident of the other Contracting State are taxable at the limited rate provided for in paragraph 2 of Article 12. On the other hand, the State of residence of the beneficial owner considers that the right in respect of which the royalties are paid is effectively connected with a permanent establishment situated in the State of source through which the beneficial owner carries on business. The State of residence considers therefore that the royalties are taxable in the State of source without any limitation in accordance with paragraph 4 of Article 12 and are exempted under the provisions of paragraph 1. In such case, to the extent that the difference of views is not solved through the mutual agreement procedure, paragraph 4 allows the State of residence not to apply paragraph 1.

21. Where the State of source applies the provisions of paragraph 2 of Article 10, 11 or 12, the State of residence, in order to eliminate double taxation, should grant a credit pursuant to paragraph 2 of Articles 23 A. This should be the case even if the State of residence has interpreted the facts of the case or the provisions of the Convention in such a way that would result in the State of source having an unlimited right to tax the income under the convention, which would mean that the State of residence should normally exempt that income under the provisions of paragraph 1. Applying the credit method in that case is more efficient than trying to determine, pursuant to the mutual agreement procedure how the treaty requires that double taxation be relieved. The last part of paragraph 4, which is not found in the OECD Model, has been added for the sake of clarity in order to make that point explicit. In paragraph 2, some States may require a credit for taxes payable in the other Contracting State to be granted subject to the provisions of their domestic law regarding the allocation of a credit for foreign taxes but without affecting the general principle provided in such paragraph. Such wording would generally allow the application of the credit resulting from paragraph 4. However, where the reference to domestic law is not so limited, the Contracting States should verify during the negotiations that no inconsistency between the domestic law and the treaty rules exist that could prevent the granting of the credit (e.g. the domestic law of the State of residence may not provide for a credit for foreign taxes where an item of income is taxed under its domestic law as a business profit attributable to a permanent establishment and not as a royalty).

22. Where the State of source applies the provisions of paragraph 2 of Article 10, 11 or 12 to an income, some States may prefer not to deny the application of the provisions of paragraph 1 despite the fact that the State of source must limit its tax on such income. Those States may limit the scope of paragraph 4 to cases where the State of source applies the provisions of the Convention to exempt an income or capital from tax and delete the part dealing with Articles 10, 11 and 12.

23. The quoted paragraph [56.3] of the OECD Commentary clarifies that paragraph 1 does not impose an obligation on the State of residence to give exemption in cases of conflicts of qualification and that paragraph 4 is therefore not required to avoid double non-taxation in those cases. The State of residence could, however, have an obligation to give exemption under paragraph 1 in cases of conflict of qualification if that State did not agree with the interpretation given in paragraph 14[1] to the phrase "in accordance with the provisions of this Convention" in Article 23. In such situations, paragraph 4 also ensures that the State of residence is not obliged to exempt the relevant income.

[1] Paragraph 14 is quoting paragraphs [32.1] to [32.7] of the OECD Commentary on Articles 23 A and 23 B relating to the conflicts of qualification. Any issue relating to the omission or inclusion of the parts of the OECD Commentary addressing conflicts of qualification would, of course need to be considered by the Committee.