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1.5 This note does not describe the existing provisions of the UN Model dealing with income from services or the special problems posed by fees for technical and similar services. Those background items are dealt with in the 2012 Supplementary Note.

2. DESIGNING A NEW ARTICLE FOR INCOME FROM TECHNICAL SERVICES

2.1 Any new Article dealing with income from technical services should conform to the format and structure of the existing articles of the UN Model. Thus, it should provide that income from services derived by a resident of a Contracting State "shall be taxable only in that country" unless or except if certain conditions are met. If those conditions are met, the income would also be taxable by the source country.

2.2 The new Article should clearly apply to income from technical and other similar services derived by both individuals and enterprises. Consideration must be given to whether separate wording is necessary to deal with individuals and enterprises in this regard, as is done

- services performed in the source country for a certain number of days (less than 183 days) – In effect, this option would adopt the threshold in existing Article 5(3)(b) but lower it from 183 days to, say, 90 days for technical and other similar services.

- physical presence in the source country for a certain number of days (less than 183 days) – In effect, this option would adopt the threshold in existing Article 14(1)(b) but lower it from 183 days to, say, 90 days for technical and other similar services.

2.5 Source of income

2.5.1 Under the existing provisions of the UN Model, income from services is generally considered to have its source, arise, or be derived from the country in which the services are performed. Thus, the source country is entitled to tax:

- under Article 5(1)(b) only if "the activities … continue … within a Contracting State";

- under Article 14(1), "only so much of the income as is derived from his activities performed" in the source country;

- under Article 17, income "from his personal activities as such [artiste or sportsperson] exercised in the source country";

- under Article 15, income from employment only if "the employment is exercised" in the source country.

2.5.2 There are some narrow exceptions to the rule that income from services is sourced in the country in which the Tc0 Tw(-Nie9(l)-3.8(o.3(fro 5cF3(oexa(emrce2(under)5.3e)-5.4(r)-1.arti)1.4(cle)5.3

1) refer to "technical, managerial and consulting services" (or some similar wording) but leave the terms undefined in the Article. Some elaboration of the meaning of "technical, managerial and consulting services" could be provided in the Commentary in order to give some guidance for taxpayers and tax authorities. This type of approach is occasionally used in both the UN Model and the OECD Model (e.g., the concept of employment for purposes of Article 15).

   The problem with this approach is that it will likely be difficult to agree, even in general terms and with the use of examples, on Commentary that provides useful guidance to taxpayers and tax officials. If such guidance is not provided in the Commentary, the meaning of the phrase "technical, managerial and consulting services" would be determined initially by the tax authorities of the source country and then by the courts of the source country. Because of the uncertainty, conflicts between taxpayers and the tax authorities seem inevitable. In addition, conflicts between the tax authorities of the two contracting states on this issue are likely to lead to unrelieved double taxation contrary to one of the fundamental purposes of the UN Model.

   In the absence of any guidance in the Commentary, the terms "technical, managerial and consulting" might be given their meaning under domestic law, subject to the context of the treaty requiring otherwise, in accordance with Article 3(2). It is questionable whether the use of domestic law meaning is appropriate for purposes of the treaty in these circumstances. Many countries treat all income from services in the same way so they have no meaning for technical, managerial and consultancy services in their domestic law.[4] Other countries have broad definitions of technical services in their domestic law. For example, under the domestic law of Brazil, technical services are defined as "work, endeavor, or undertaking of which the execution depends on specialized technical knowledge by its provider."[5] However, since administrative services provided by nonresidents are subject to Brazilian withholding tax in the same way as technical services "most of the services provided by nonresidents qualify as either technical or administrative assistance services" according to the Brazilian tax authorities.[6] Under its tax treaties, Brazil takes the position that technical and administrative services that do not involve the transfer of technology are taxable in accordance with Article 21 as other income. This position is the subject of ongoing litigation in Brazil.

Alternatively, the terms might be given their ordinary meaning in accordance with Article 31(1) of the Vienna Convention on the Law of Treaties. The difficulty is that the ordinary meaning of "technical" is very broad and could encompass all services. For example, the relevant meaning of "technical" in the *Shorter Oxford English Dictionary* is "pertaining to, involving, or characteristic of a particular art, science, profession, or occupation or the applied arts and sciences generally."

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[4] See Ariane Pickering, General Report, in International Fiscal Association, *Enterprise Services,* Cahiers de droit fiscal international, Enterprise Services, vol. 97a, (Sdu, 2012) 17-60.

[5] See Sergio Andre Rocha, "Brazil," in IFA, *Enterprise Services,* Cahiers de droit fiscal international vol. 97a, (Sdu, 2012) 155-167 at 158.

[6] Ibid., at 160.

2) refer to “technical, managerial and consulting services” (or some similar wording)

2.7 Method of taxation

2.7.1 Once the conditions for the source-country taxation of income from technical and other similar services have been determined, it is necessary to establish how the source country should tax such income. There are 3 basic options in this regard:

- taxation of the net income derived. Under this method, the source country would be required to allow the deduction of expenses incurred in earning the income, as under Articles 7 and 14 of the UN Model.

- taxation of the gross revenue derived, but at a maximum rate to be specified in the new Article or left to be established by the negotiations of the parties. Under this method, the source country is not obligated to allow deductions for expenses incurred in earning the income. However, the rate of source-country tax would be

for the new Article to allow the source country to tax payments for technical services that are deductible in computing the income of a PE in the source country of a nonresident. Such a provision would be similar to Article 15(2)(c) with respect to employment income borne by a PE.

2.8.4 Consideration should also be given to whether the new Article should contain an anti-avoidance rule similar to the rule in the OECD alternative services PE provision where the technical services are provided by an individual. Consideration should also be given to whether it is appropriate for the new Article to contain separate provisions for technical services provided by individuals and enterprises, as is the case with the OECD alternative services PE provision. Moreover, it may be appropriate to exclude from the new Article any technical services provided by an enterprise through independent personnel that are not controlled by the enterprise like employees.

2.9 Relationship with other Articles

2.9.1 It would be necessary and desirable to spell out the relationship between a new Article dealing with technical services and the other Articles of the UN Model.

2.9.2 Relationship with Article 7

As a result of Article 7(6), the new Article would take precedence over Article 7 in any case where both Articles apply. It must be considered whether this result is appropriate or whether it is appropriate to have a throwback rule in the new Article similar to those in Articles 10(4), 11(4), 12(4), and 21(2). If the new Article allows source-country taxation on a gross basis, it would appear to be appropriate to allow taxpayers who carry on business in the source country through a PE to be subject to net-basis taxation under Article 7. This would appear to be the case even if the new Article limits source-country taxation to technical services performed in the source country.

2.9.3 Relationship with Article 14

Although Article 14 does not contain a provision similar to Article 7(6), it would seem that the same principles should govern the relationship between Article 14 and a new technical services Article. Thus, the new Article could contain a rule similar to Articles 10(4), 11(4), 12(4), and 21(2) giving priority to Article 14 if a taxpayer carries on business through a fixed base in a source country and derives income from technical or other similar services that are effectively connected with that fixed base. However, such a rule would not deal with the situation where Article 14(1)(b) applies (no fixed base but the taxpayer stays in the source country for more than 183 days). Therefore, it may be more appropriate to make the new Article "subject to Article 14" or add a provision to the new Article indicating that it does not apply in any case where Article 14 applies.

From a fundamental tax policy perspective, the treatment of income from independent personal services covered by Article 14 (or by Article 7 for treaties that have deleted Article 14) and the treatment of income derived from technical services under a new Article should be reasonably consistent. Assuming there is little, if any, difference in kind between independent personal services, such as professional services, and technical services, it is questionable whether it is reasonable to allow source country tax of the former under Article 14 only if the nonresident has a fixed base in the source country or stays in the source country for more than

183 days but to allow source country tax of the latter if any services are performed in the source country or if a resident of the source country pays for the services.

2.9.4 Relationship with Article 12

The relationship between Article 12 and new Article dealing with technical services should be clearly spelled out so that there is no overlap between them. The problem with respect to technical services is that in some situations it is difficult to distinguish between payments for information or experience (royalties) and payments for services. Under Article 12, royalties are taxable by a source country if the payer is a resident of the source country and the payment is consideration for the use of or the right to use the intellectual property. This qualification difficulty is especially pronounced with respect to embedded services and mixed contracts.

Any possible conflict between the two Articles could be avoided by givef th

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Article 7. The definition includes the provision of services by technical and other personnel. In effect, technical services include services provided by technical personnel and other personnel. In other words, whether the personnel providing the technical services are technical or not is irrelevant. If the services provided qualify as technical, managerial, or consultancy services, the Article applies irrespective of who provides those services. Conversely, if the services provided are not technical, managerial, or consultancy services, the Article does not apply even if the services are provided by technical personnel.

4. ALTERNATIVES

4.1 The difficulties presented by the adoption of a new Article and Commentary dealing with income from technical and other similar services should not be underestimated. Any attempt to distinguish between technical and other services seems likely to prove troublesome and a source of ongoing conflict. Therefore, it seems appropriate for the Committee to consider alternatives that do not require a definition of technical and other similar services.

4.2 The objective of introducing a new Article on technical services into the UN Model is to expand source-country taxing rights with respect to such amounts. Fees for technical services may be substantial and usually the source country will be required to allow the resident payer to deduct such amounts in computing its income, resulting in a significant erosion of the source country's tax base.

4.3 It is important to recognize that this objective of increasing source-country taxing rights can be accomplished in a variety of ways. All payments by residents of a source country to nonresidents in consideration for services rendered will be deductible and erode the source country's tax base. Fees for technical, managerial, and consulting services are not special in this regard. Accordingly, it should be carefully considered whether a solution that focuses only on certain technical services is appropriate. It may be more appropriate to adopt a solution that deals with all income from services. This might be accomplished by reducing the threshold requirements for source-country ta

APPENDIX TO ANNEX 1

ARTICLE ___ (INCOME FROM TECHNICAL SERVICES)

1. Income derived [payments received] by a resident of a Contracting State in respect of technical services or other similar activities shall be taxable only in that State unless the income arises in the other Contracting State, in which case such income may also be taxed in the other Contracting State; [however, the tax so charged shall not exceed __ percent of the gross amount of such payments.]

2. Threshold if necessary

3. Deduction for expenses if necessary

4. Income in respect of technical services or other similar activities shall be deemed to arise in a Contracting State [when the services or activities are performed in that State] [when the payer is a resident of that State.]

5. The provisions of paragraphs 1 and 2 shall not apply if the resident carries on business in the other Contracting State in which the income arises, through a permanent establishment situated therein, or performs in that other State independent personal services from a fixed base situated therein, and the income is effectively connected with such permanent establishment or with business activities referred to in (c) of paragraph 1 of Article 7. In such cases, the provisions of Article 7 shall apply.

6. The provisions of this Article shall not apply in any case where the provisions of Article 14[11] [or Article 12] apply.

7. The term “technical services” [“technical services or other similar activities”] [means …] [includes …] [but does not include …]

undertaken by the recipient or consideration which would be income of the recipient chargeable under the head "Salaries". This definition could be considered and meaning could be elaborated in the Commentary or left to be governed by the domestic law.

Para 2.7 & 2.8 of the Note

- Taxation of gross revenue would be preferable as that is the simplest to administer and may possibly be worded on the lines of Article 10, 11 or 12. The rate could be bilaterally settled in the treaty. Giving an option to be taxed on net basis would increase the complexity and may entail disputes
- The beneficial ownership and special relationship provision as featured in Article 10, 11, & 12 should be included in the new Article

Para 2.9 of the Note

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ANNEX 3: COMMENTS BY CLAUDINE DEVILLET ON THE NOTE AT ANNEX 1

At the 7th Annual Session, the UN Committee of Experts on International Cooperation in Tax Matters agreed that the Subcommittee on Services should prepare proposals for the taxation of income from technical assistance for consideration during the 8th

Consequently, only few countries seem to consider that it is necessary to deal specifically with technical services in tax treaties.

Moreover, before trying to set out the possible conditions for source-country taxation of income from technical services, the Committee should first determine what distinguishes technical services from other business.4(n)6.e-t(n)6.7(v)d .first mmiersinc.nes5.8(t.2288 07167.0001 Tc21504 Tw48(other such)6.8(sa)]TJ-2s

If a withholding tax of 10% applied on the gross amount of the fee, the tax in the country of source would amount to 2.000.

If the tax rate in the country of residence of the enterprise was 33%, the tax on the profits attributable to the provision of the services (20.000 – (15.000 + 2.000) = 3.000) would amount to 990. The country of residence would however eliminate the juridical double taxation by exempting the profits of 3.000 or by crediting the source tax on its own tax of 990.

In the absence in the source country of a permanent establishment bearing the remuneration of

imposed on such income with harmful effects on the exchange of technical services and technology and on the development of economic relations between countries.

3. ***The problem may relate to the fact that, while other business activities are generally performed through a fixed place of business (e.g. a place of business maintained for more than six months), technical services are often performed at several places in the territory of a source country and under several unrelated projects, each project requiring activities to be performed during a short period.***

If this is the difference between services and other business activities that the Committee wants to address, it could be addressed through the deletion of the words "(for the same or a connected project)" in the existing Article 5(3)(b). This would allow a source country to tax the income from services performed in its territory as long as activities performed in whatever place and for whatever contract last more than 183 days in any 12-month period.

If it appeared that, due to the nature of services, non-residents would often perform services within a specific country for unrelated projects during periods aggregating less than 183 days in any 12-month period, such issue could be addressed by reducing the period of activities or of presence required under Article 5(3)(b) or Article 14.

However, these difficulties might exist for services generally and might not be specific to technical services. It would therefore nr(b