Subcommittee on Article 8: International Transportation Issues

Recommendation of the Subcommittee on possible changes to the Commentary on Article 3 and 8

Subcommittee on international traffic

- The Subcommittee is mandated to report to the Committee, beginning at the Eleventh session, on possible updates to the Commentary on Article 8 of the UN Model Convention, in particular:
  - the issue of the application of Article 8 to cruise shipping (Article 3)
  - the coverage of the concept of “auxiliary activities” (Article 8).
- During the

Proposed Change to Commentary on Article 3 (1) (d)

Commentary to Article 8

According to the updated OECD Commentary, Article 8 now refers to:

- profits ”obtained by the enterprise from the carriage of passengers or cargo” in international traffic and
- profits from activities to permit, facilitate or support international traffic operations:

  9Directly connected with such operations,

  9Not directly connected but “**ancillary**” to such operations.

Commentary to Article 8, para 10

10. The Commentary on the OECD Model Convention notes that the place of effective management may be situated in a country different from the country of residence of an enterprise operating ships or aircraft and that "[…] some States therefore prefer to confer the exclusive taxing right on the State of residence". The Commentary suggests that States may, in bilateral negotiations, substitute a rule on the following lines: "Profits of an enterprise of a Contracting State from the operation of ships or aircraft in international traffic shall be taxable only in that State." The Commentary continues:

> 3. Some other States, on the other hand, prefer to use a combination of the residence criterion and the place of effective management criterion by giving the primary right to tax to the State in which the place of effective management is situated while the State of residence eliminates double taxation in accordance with Article 23, so long as the former State is able to tax the total profits of the enterprise, and by giving the primary right to tax to the State of residence when the State of effective management is not able to tax total profits. States wishing to follow that principle are free to substitute a rule on the following lines:
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> Profits of an enterprise of a Contracting State from the operation of ships or aircraft, other than those from transport by ships or aircraft operated solely between places in the other Contracting State, shall be taxable only in the first-mentioned State. However, where the place of effective management of the enterprise is situated in the other State and that other State imposes tax on the whole of the profits of the enterprise from the operation of ships or aircraft, the profits from the operation of ships or aircraft, other than those from transport by ships or aircraft operated solely between places in the first-mentioned State, may be taxed in that other State.

Commentary to Article 8, new para 10.1

Commentary to Article 8, para 11

11. Applying the principles set out above, the Commentary on the OECD Model Convention deals with a number of activities in relation to the extent to which paragraph 1 will apply when those activities are carried on by an enterprise engaged in the operation of ships or aircraft in international traffic. The Commentary notes as follows:

> 5. Profits obtained by leasing a ship or aircraft on charter fully equipped, and supplied must be treated like the profits from the carriage of passengers or cargo. Otherwise, a great deal of business of shipping or air transport would not come within the scope of the provision. However, Article [12], and not Article 8, applies to profits from leasing a ship or aircraft on a bare boat charter basis except when it is an an enterprise engaged in the international operation of ships or aircraft.

Commentary to Article 8, para 11

international transport. Such containers frequently are also used in inland transport. Profits derived by an enterprise engaged in international transport from the lease of containers

Commentary to Article 8, para 11.1

Commentary to Article 8, para 16

16. The rules set out in paragraphs 8 to above relating to taxing rights and profits covered apply equally to this paragraph.