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Discussion of substantive issues related to international cooperation in tax matters

General issues in the review of Commentaries

Revision of the Commentaries of the UN Model Convention

**Note by the coordinator of the working group on Commentaries of
the UN Model Convention ***

* This paper was presented by the working group on Commentaries of the UN Model Convention (Coordinator: Ms. Kana). The views and opinions expressed are those of the authors and do not necessarily represent those of the United Nations.

Revision of the Commentaries of the UN Model Convention

The working group on Commentaries was mandated to coordinate possible changes to the Commentaries of the UN Model. During the third session the working group sought guidance from the Committee on some of the issues that could be addressed by this working group. This paper elaborates on those points.

I. General observations

A. Status of the UN Commentaries for interpretation purposes

The Commentaries of the UN Model addresses the issue of the status of the UN Model for tax treaty interpretation in the wording of the Introduction, paragraph 36. *“If the negotiating parties decide to use in a treaty the wording suggested in the UN Model, it is to be presumed that they would also expect to derive assistance in the interpretation of that wording from the relevant Commentary. The Commentaries, which may prove to be very useful in the implementation of a treaty concluded by the negotiating parties and in the settlement of any dispute relating thereto, are not intended to be to be annexed to a treaty, the text of which in itself would constitute the legally binding agreement.”*

In the 2008 OECD Tax Model, the importance of the OECD Commentaries is highlighted in the Introduction, paragraphs 28 to 29.3:

“28. For each Article in the Convention, there is a detailed Commentary that is intended to illustrate or interpret its provisions.

29. As the Commentaries have been drafted and agreed upon by the experts appointed to the Committee on Fiscal Affairs by the Governments of Member countries, they are of special importance in the development of international fiscal law. Although the Commentaries are not designed to be annexed in any manner to the conventions signed by Member countries, which unlike the Model are legally binding international instruments, they can nevertheless be of great assistance in the application and interpretation of the conventions and, in particular, in the settlement of any disputes.

29.1 The tax administrations of member countries routinely consult the Commentaries in their interpretation of bilateral tax treaties. The Commentaries are useful both in deciding day-to-day questions of detail and in resolving larger issues involving the policies and purposes behind various provisions. Tax officials give great weight to the guidance contained in the Commentaries.

29.2 Similarly, tax payers make extensive use of the Commentaries in conducting their businesses and planning their business transactions and investments. The Commentaries are of particular importance in countries that do not have a procedure for obtaining an advance ruling on tax matters from the tax administration as the Commentaries may be the only available source of interpretation in that case.

29.3 Bilateral tax treaties are receiving more and more judicial attention as well. The courts are increasingly using the Commentaries in reaching their decisions. Information collected by the Committee on Fiscal affairs shows that the Commentaries have been cited in the published decisions of the courts of the great majority of member countries. In many decisions, the Commentaries have been extensively quoted and analysed, and have frequently played a key role in the judge’s deliberations. The Committee expects this trend to continue as the world-wide network of tax treaties continues to grow and as the Commentaries gain even more widespread acceptance as an important interpretive reference.”

There are some important differences between the two Models to be considered. First of all the OECD Tax Model is the result of an agreed decision by governments of all member States of the OECD to apply a Model as accepted by a recommendation by the OECD. Furthermore, any member may submit reservations against the provisions of the Model text and also observations on the Commentaries regarding the way that fiscal administration will apply or interpret a provision of an Article (if different to the wording in the commentary). Non-Members may submit “positions” on the Articles and Commentaries also. In consequence the OECD Model

has achieved a degree of acceptance by the international tax community at large. The UN Model is not intended to be binding and is not (contrary to the OECD Model) to be construed as a formal recommendation of the United Nations to its Member States (see paragraph 35 of the Introduction). However, the UN Model Commentary has a very important role to play in explaining and giving guidance on how to interpret the UN Model text especially where that wording is different from the OECD Model wording or where Members of the UN Committee are unable to concur in the interpretation given in the OECD Commentary. The Model Commentaries have become particularly relevant as shown by the recent Canadian case “Knights of Columbus¹” where the Canadian Tax Court recognized the interpretative value of the UN Commentary in particular in relation to clauses not reproduced from the OECD Model. The Court cited extensively the UN Commentary (Paragraph 26 of the Commentary on Article 5 paragraph 6) utilizing it as an interpretative instrument along with the OECD Model commentary in the application of the Double Tax Convention between the US and Canada.

In order to achieve an even more important acceptance by the international tax community it may also be important to implement a procedure whereby UN Member States may formulate observations and comments to the UN Commentary. In this context it is also important to note the Procedural rules applicable to ECOSOC and in particular to the Rules of the participation of Non-Members (see Rule 72).

A procedural rule for the Committee may be decided on as follows:

In order to take advantage of all technical expertise available, the Committee has decided that proposals of observations on the interpretation of the UN Model text from any UN member State may be submitted to the Committee for its consideration.

B. Relation with the OECD Model

The UN Model utilizes the same structure and reproduces many articles and commentaries of the OECD Model. In the Introduction, paragraph 9 there is a view expressed as to the status of the OECD commentaries incorporated in the UN Model.; “*The United Nations Secretariat therefore prepared a draft model convention [...] consisting of articles reproducing the guidelines formulated by the Group of Experts, together with Commentaries thereon incorporating the view of the members of the Group as expressed at its various meetings and also reproducing, where appropriate, the Commentaries on the Articles of the 1977 Model Double Taxation Convention on Income and on Capital of the Organisation for Economic Co-operation and Development, hereafter referred to as the OECD Model Convention. It may be recalled that in preparing the aforementioned guidelines the Group of Experts had decided to use the OECD Model Convention as its main reference text in order to take advantage of the accumulated technical expertise embodied in that Convention and the Commentary thereon, and also for reasons of practical convenience stemming from the fact that the Convention was being used by OECD member countries in the negotiation of tax treaties not only with each other but also with developing countries. However, it was fully understood that there was no presumption of correctness to be accorded to the OECD Model Convention, and that the decisions of the Group were in no way required to be governed by the OECD text.*”

It seems that with this explanation of the view of the Group of Experts in the Introduction the value of incorporating the OECD Commentaries in the UN Model is merely of an illustrative value. In fact the Group of Experts might not have made an evaluation of the OECD Commentaries that have been included. From the actual text it is not always possible to know what consideration has been given to the OECD text, and as the Introduction specifically establishes that the OECD Model Convention (presumably including its Commentaries) is not to be presumed correct, the value of including those Commentaries in the UN Model seem to be very little. The Committee may therefore want to reconsider this position and evaluate the value of having wording taken from the OECD Model Commentary if it has not been specifically considered and agreed upon by its members, or

¹ This case is available on <http://www.fmc-law.com/upload/en/hidden%20files/reasons%20for%20judgement.pdf>

is used as a contrast to the position taken under the UN Model. Wording like “*The OECD Commentary further observes:*” might therefore be best avoided unless contextualised by an assessment of its immediate relevance. However if such consideration has taken place by the Committee it might want to express that by a wording like: “*The Committee is in agreement/disagrees with the interpretation put forward in the OECD Model Commentary 2005, paragraphs XX to XX of Article X*” in order to reflect that fact. To reflect the technical knowledge and helpful analyses contained in the OECD Model but without a specific evaluation by the Committee a new wording might be introduced in the Introduction to the UN Model as follows: “*The Committee and before that the Group of Experts has used the OECD Model Convention as its main reference text, therefore the Commentaries and the reservations and observations made to that Model is of importance for the common understanding of provisions where the text of the OECD and UN Models is the same. However the UN Committee of experts has not expressed a general opinion regarding those Commentaries unless specifically included in part two of the UN Model. Care would of course have to be taken in relation to OECD interpretations adopted following the consideration of existing Commentaries by the Committee, whether or not they are stated to be mere elaborations of the existing Commentaries*”

II. Other issues

Different language and terminology issues of the Commentaries were pointed out in relation to the mandate of this working group.

A. *Should the language of developed and developing countries be maintained or should there be another type of reference?*

The Committee might want to decide on a language in the Commentaries which does not address interpretations as those of either “developed” or “developing” countries. The reasons for this new approach may be that many countries are in a middle ground and cannot easily be labelled into either developed or developing (in fact all countries, hopefully, are developing). Furthermore if it is felt needed to explain a particular view from an angle of a more source based policy (usually a developing country view) perhaps it is better to say so as even some developed countries have such policies and Members of such countries would probably express that view in the Committee work. It is also worth mentioning that the Committee and the Ad Hoc Group were renamed “Committee of Experts on International Cooperation in Tax Matters” and not “Ad Hoc Group of Experts on Tax Treaties between Developed and Developing Countries” as originally in 1968.

It is therefore proposed to use the following wording as of the new commentaries agreed on by the Committee. Examples are taken from actual wording but such “old” wording would not automatically be changed, as follows:

Paragraph 26 Commentaries on Article 5 “~~...Members from developing countries~~ **Members, with a more tax at source based view**, pointed out that if an insurance agent was independent, the profits would not be taxable in accordance with the provisions suggested in Article 5, paragraph 7 of the United Nations Model Convention...” The words “**with a more tax at source based view**” would only be used if it was felt necessary to specifically make the point. In many cases it would probably be enough to say that “**Some Members pointed out ...**”.

Paragraph 15 Commentaries on Article 12. “~~...A member from a developed country~~ **Member, with a more tax at residence based view**, asserted that the problem was that the “royalties” definition makes an imperfect distinction...”. Again the words “**with a more tax at residence based view**” would only be used if it was felt necessary to specifically make the point but as mentioned above it would probably be enough to say “**A Member asserted that...**”

B. How to make reference to Members of the Committee, UN Member States, majority and minority views.

To indicate that a particular view is shared by the members of the committee it is suggested to refer only to the “**Committee**”.

However, when there are different views it should first be remembered that a single expert member of the Committee may require his or her views to be included in the text (see above paragraph 15, Article 12). If that is the case it is suggested to follow the rule in A above and only refer to “**A Member ...**” unless it is felt necessary to add the policy view held by that member. In this context it could also be worth mentioning if there is a majority or minority view on the Committee, for example; “**A majority of Members thought...**” or “**A minority of Members thought...**”.

As mentioned in part I. A it is important to take advantage of the technical knowledge represented by experts from other UN Member States that are not represented on the committee and it is also felt important to be able to refer to such non-members in the commentaries. Wording to reflect such States is suggested as: “**A UN member State thought ...**” or “**Various UN member States thought ...**”.

Furthermore, when in the Commentary a reference is made to States not represented in the Committee of Experts, it is suggested to not use the word “**observers**” but to use that word to represent other persons or organisations participating in the meeting or work undertaken by the committee.

How reference should be made to **Subcommittee work**.

It does not appear to be necessary to make reference to the specific subcommittees in the commentaries but this might need to be revised in light of the discussions and decisions at meetings.

C. Reference to the Committee of Experts

In 2004, the “Ad Hoc Group of Experts on International Cooperation Matters” was abolished and a new agency called “Committee of Experts on International Cooperation in Tax Matters” was created.

In order to avoid confusion in relation to the work carried out by the different bodies, it would be advisable that a new paragraph be included in the Introduction to the UN Model, explaining that the part of the commentaries that refer to comments or decisions taken by the “Ad Hoc Group of Experts on International Cooperation Matters” will be referred to as from “**The Ad hoc group**” and the comments and decisions from the current “Committee of Experts on International Cooperation in Tax Matters” as comments and decisions taken from “**The Committee**”.