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Committee of Experts on International  
Cooperation in Tax Matters  
Nineteenth session

Geneva, 15-18 October 2019

Item 3 (b) of the provisional agenda

Update of the UN Model Double Taxation Convention between Developed and  
Developing Countries Beneficial Ownership

Summary

The concept of beneficial ownership has been included in the passive income articles of the OECD Model since 1977 and the UN Model since 1980. Its inclusion prevented the granting of the benefit of the source tax limitation on passive income in a treaty where such income was paid to a nominee or agent with merely a legal right to the income.

In 2014, the OECD undertook a project to clarify the meaning of the concept in its model. During the 17<sup>th</sup> Session of the United Nations Committee of Experts on International Cooperation in Tax Matters it was agreed that the topic should be covered as part of the Subcommittee on the UN Model Update's work programme. Members considered it important to identify areas in which the Committee agreed or disagreed with the guidance produced by the OECD on the topic to avoid unintended differences in interpretation.

As a result, [E/C.18/2019/CRP.10](#) was produced and discussed at the April 2019 meeting of the Subcommittee. The Subcommittee agreed that the clarifications made by the OECD are consistent with a UN interpretation of beneficial ownership. Therefore, the Subcommittee proposes that the latest OECD Model commentaries on the concept of beneficial ownership be incorporated into the UN Model as presented in this paper.

Also note this paper seeks the Committee's view on amending paragraphs 2 of Article 10, 11 and 12 to clarify that income paid to an intermediary in a third state does not prevent

## BENEFICIAL OWNERSHIP CLARIFICATIONS

### Comment

The Committee is asked to consider the adoption of the 2014 OECD clarification language on beneficial ownership. Doing so would clarify in the UN Model that:

- x The concept of beneficial ownership does not take its meaning from domestic law or other OECD instrument, but rather has an autonomous treaty meaning;
- x The intention of the beneficial ownership concept was to clarify the use of the words “paid to...a resident” in the Model and so should be read in that context;
- x Beneficial owners are those that have the right to use and enjoy the payment unconstrained by contractual or legal obligations to pass the payment on. Essentially meaning that persons acting as fiduciaries, agents and nominees are not beneficial owners;
- x Use and enjoyment of property that derives the income is distinguished from the legal ownership of the property; and
- x An obligation to pass payments on can be contractual or can be found to exist on the basis of facts and circumstances.

To support the adoption of the revised OECD text, a UN Model headnote has been drafted for inclusion before the relevant quoted passages on beneficial ownership. This headnote makes clear that, in accordance with Article 3(2), the concept of beneficial ownership is to be given a contextual meaning and is not intended to be interpreted with reference to domestic law.

### PROPOSED CHANGES TO THE COMMENTARY ON THE ARTICLES OF THE UN MODEL CONVENTION

Proposed changes are shown as **bold italics** for additions and ~~strikethrough~~ for deletions.

#### COMMENTARY ON ARTICLE 10

13. In its 2014 update the OECD made it clear, following paragraph 2 of Article 3, that the concept of beneficial ownership was intended ~~to be~~ interpreted in the context it appears and not with reference to the domestic law of the Contracting States. The current Committee of Experts agreed with this application of paragraph 2 of Article 3 to the concept of beneficial ownership and in 20xx adopted the revised OECD Model Commentary. The Commentary on the 2010/2017 OECD Model Convention contains the following relevant passages

12. The requirement of beneficial ownership was introduced in paragraph 2 of Article 10 to clarify the meaning of the words “paid ... to a resident” as they are used in paragraph 1 of the Article. It makes plain that the State of source is not obliged to give

up taxing rights over dividend income merely because that income was ~~immediately received by~~ paid direct to a resident of a State with which the State of source had



meaning of “beneficial owner” cannot be applied in the context of the Article. Indeed, that meaning, which refers to natural persons (i.e. individuals), cannot be reconciled with the express wording of subparagraph 2 a), which refers to the situation where a company is the beneficial owner of a dividend. In the context of Article 10, the term “beneficial owner” is intended to address difficulties arising from the use of the words “paid to” in relation to dividends rather than difficulties related to the



conduit for another person who in fact receives the benefit of the income concerned. For these reasons, the report from the Committee on Fiscal Affairs entitled “Double Taxation Conventions and the Use of Conduit Companies”<sup>1</sup> concludes that a conduit company cannot normally be regarded as the beneficial owner if, though the formal owner, it has, as a practical matter, very narrow powers which render it, in relation to the income concerned, a mere fiduciary or administrator acting on account of the interested parties.

1       Reproduced in Volume II of the full version of the OECD Model Tax Convention at page R(6)-1.

10.2 In these various examples (agent, nominee, conduit company acting as fiduciary or administrator), the direct recipient of the interest is not the “beneficial owner” because that recipient’s right to use and enjoy the interest is constrained by a contractual or legal obligation to pass on the payment received to another person. Such an obligation will normally derive from relevant legal documents but may also be found to exist on the basis of facts and circumstances showing that, in substance, the recipient clearly does not have the right to use and enjoy the interest unconstrained by a contractual or legal obligation to pass on the payment received to another person. This type of obligation would not include contractual or legal obligations that are not dependent on the receipt of the payment by the direct recipient such as an obligation that is not dependent on the receipt of the payment and which the direct recipient has as a debtor or as a party to financial transactions, or typical

provisions and principles and must not, therefore, be considered as restricting in any way the application of other approaches to addressing such cases.

10.4 The above explanations concerning the meaning of “beneficial owner” make it clear that the meaning given to this term in the context of the Article must be distinguished from the different meaning that has been given to that term in the context of other instruments.

2. See the Financial Action Task Force's definition quoted in the previous note.

#### COMMENTARY ON ARTICLE 12

5. In its 2014 update the OECD made it clear, following paragraph 2 of Article 3, that the concept of beneficial ownership was intended to be interpreted in the context it appears and not with reference to the domestic law of the Contracting States. The current Committee of Experts agreed with this application of paragraph 2 of Article 3 to the concept of beneficial ownership and in 2014 adopted the revised OECD Model Commentary. The Committee of Experts adopted the revised OECD Model Commentary on 12 June 2014. (Page 5)

4. The requirement of beneficial ownership was introduced in paragraph 1 of

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by paid direct to a resident of a State with which the State of residence has a (d c)-6 (onc)4 (l)-2



the interposition of a recipient who is obliged to pass on the royalties to someone else), it does not deal with other cases of abuses, such as certain forms of treaty shopping, that are addressed by these provisions and principles and must not, therefore, be considered as restricting in any way the application of other approaches to addressing such cases.

4.5 The above explanations concerning the meaning of “beneficial owner” make it clear that the meaning given to this term in the context of the Article must be distinguished from the different meaning that has been given to that term in the context of other instruments that concern the determination of the persons (typically the individuals) that exercise ultimate control over entities or assets. That different meaning of “beneficial owner” cannot be applied in the context of the Convention. Indeed, that meaning, which refers to natural persons (i.e. individuals), cannot be reconciled with the express wording of subparagraph 2 a) of Article 10, which refers to the situation where a company is the beneficial owner of a dividend. The term beneficial owner was intended to address difficulties arising from the use of the words “paid to”, which are found in paragraph 1 of Articles 10 and 11 and were similarly used in paragraph 1 of Article 12 of aph 1 of o-7 M (on)-dticoreerticori (ticor)-4 (d i)2 (n)(h)-4 (i

by general and limited partners. In trusts and foundations, beneficial ownership refers to beneficiaries, which may also include the settlor or founder.

<sup>2</sup> See the Financial Action Task Force's definition quoted in the previous note.



## PROPOSED CHANGES TO ARTICLES OF THE UN MODEL CONVENTION

### ARTICLE 10

2. However, ~~such~~ dividends paid by a company which is a resident of a Contracting State may also be taxed in that State ~~the Contracting State of which the company paying the dividends is a resident and~~ according to the laws of that State, but if the beneficial owner of the dividends is a resident of the other Contracting State, the tax so charged shall not exceed:

- (a) \_\_\_ per cent (the percentage is to be established through bilateral negotiations) of the gross amount of the dividends if the beneficial owner is a company (other than a partnership) which holds directly at least 25 per cent of the capital of the company paying the dividends throughout a 365 day period that includes the day of the payment of the dividend (for the purpose of computing that period, no account shall be taken of changes of ownership that would directly result from a corporate reorganisation, such as a merger or divisive reorganisation, of the company that holds the shares or that pays the dividend);
- (b) \_\_\_ per cent (the percentage is to be established through bilateral negotiations) of the gross amount of the dividends in all other cases.

The competent authorities of the Contracting States shall by mutual agreement settle the mode of application of these limitations. This paragraph shall not affect the taxation of the company in respect of the profits out of which the dividends are paid.

### ARTICLE 11

2. However, ~~such~~ interest arising in a Contracting State may also be taxed in that State ~~the Contracting State in which it arises and~~ according to the laws of that State, but if the beneficial owner of the interest is a resident of the other Contracting State, the tax so charged shall not exceed \_\_\_ per cent (the percentage is to be established through bilateral negotiations) of the gross amount of the interest. The competent authorities of the Contracting States shall by mutual agreement settle the mode of application of this limitation.

### ARTICLE 12

2. However, ~~such~~ royalties arising in a Contracting State may also be taxed in that State ~~the Contracting State in which they arise and~~ according to the laws of that State, but if the beneficial owner of the royalties is a resident of the other Contracting State, the tax so charged shall not exceed \_\_\_ per cent (the percentage is to be established through bilateral negotiations) of the gross amount of the royalties. The competent authorities of the Contracting States shall by mutual agreement settle the mode of application of this limitation.

## PROPOSED CHANGES TO THE COMMENTARIES OF THE UN MODEL CONVENTION

Paragraphs are 2010 OECD Commentary text updated to the 2017 OECD Model.

#### COMMENTARY ON ARTICLE 10

12.27 Subject to other conditions imposed by the Article and the other provisions of the Convention, the limitation of tax in the State of source remains available when an intermediary, such as an agent or nominee located in a Contracting State or in a third State, is interposed between the beneficiary and the payer but the beneficial owner is a resident of the other Contracting State (the text of the Model was amended in 1995 and in 2014 to clarify this point, which has been the consistent position of all member countries)

#### COMMENTARY ON ARTICLE 11

11. Subject to other conditions imposed by the Article and the other provisions of the Convention, the limitation of tax in the State of source remains available when an intermediary, such as an agent or nominee located in a Contracting State or in a third State, is interposed between the beneficiary and the payer but the beneficial owner is a resident of the other Contracting State (the text of the Model was amended in 1995 and in 2014 to clarify this point, which has t o