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\* The proposed United Nations commentary on article 26 (proposed 2007) of the United Nations Model Convention is contained in documents E/C.18/2007/10 (commentary on paras. 1-3) and E/C.18/2007/11 (commentary on paras. 4-7) and inventory of exchange mechanisms.

## **I. Revision of article 26 (Exchange of information)<sup>1</sup>**

1. At the second session of the Committee of Experts, on International Cooperation in Tax Matters, the Coordinator of the Subcommittee on the Exchange of Information, José Antonio Bustos Buiza (Spain), presented a position paper prepared by the Subcommittee (E/C.18/2006/6) containing proposed changes to article 26 of the United Nations Model Double Tax Convention between Developed and Developing Countries (ST/ESA/PAD/SER.E/21). Considerable discussion ensued. After discussion, the Subcommittee was asked to prepare a report for the third session of the Committee that made recommendations for amending article 26 and the accompanying United Nations commentary in the light of the discussions at the second session.

2. Section I of the present note proposes revisions to article 26 (Exchange of information). Section II makes recommendations with respect to changes in the United Nations commentary. The expectation is that the Committee will conclude its work on amendments to article 26 at its third session but will not conclude its work on the United Nations commentary. The proposed amendments to article 26 are provided in section III. Sections IV and V, respectively, compare article 26 (proposed 2007) to the current article 26 (2001) and to the 2005 OECD revision of article 26.

3. Owing to the resignation of Bustos Buiza from the Committee, Michael J. McIntyre was appointed on 20 June 2007 as Interim Coordinator to serve in that position until the Committee can consider the appointment of a permanent Coordinator at its third session. The present note has been prepared by the Interim

5. Four issues need to be addressed in seeking agreement on a new paragraph 1. The first issue is the proper replacement for the word “necessary” in the first sentence. At the second session of the Committee (see E/2006/45-E/C.18/2006/10, para. 38 (a)), there was a consensus for the words “may be relevant”. Alternative language is addressed in the proposed United Nations commentary. OECD also replaced the word “necessary” in its 2005 revision but substituted the words “foreseeably relevant”. The OECD language was not accepted by the Subcommittee. The three reporting members all support the use of “may be relevant”.

6. The second issue is whether the exchange of information should be restricted, as in the current provision, to matters relating to taxes covered by the convention. The consensus was not to so limit the exchange of information (see E/2006/45-E/C.18/2006/10, para. 37). How the scope of information exchange should be extended is not entirely clear, but the majority view is that the exchange of information should be extended to all taxes, including subnational taxes. The proposed article 26 reflects that position. An alternative view, which is addressed in the proposed United Nations commentary, is that the scope should be extended to the value-added tax (VAT) but not to all taxes. The OECD extended article 26 of its Model Convention to cover all taxes in its 2005 revisions. Two of the reporting members fully support this change. One has reservations, which are reflected in the proposed United Nations commentary.

7. The third issue is whether the words “combating tax avoidance” should be included as an explicit goal of article 26. At the second session of the Committee (see E/2006/45-E/C.18/2006/10, para. 39), there was “extensive support” for including those words in paragraph 1. The current United Nations commentary indicates that combating tax avoidance is a goal of article 26. In addition, the language in part 3 of the current paragraph 1, which would become paragraph 7 in the revised article, charges the competent authorities with the obligation to develop procedures to combat tax avoidance. Mentioning tax avoidance in proposed paragraph 1 simply confirms a position long taken by the Committee. OECD does not mention the goal of combating tax avoidance in its article 26. OECD also has no equivalent to paragraph 7 of the proposed revision to article 26. Two of the reporting members support the inclusion of the words “combating tax avoidance” and the other reporting member is not sure the language is necessary but has no strong objections to its inclusion.

8. The proposed revision of part 1 of paragraph 1 also includes a minor drafting change to break up what had become an excessively long sentence in paragraph 1.

9. The fourth issue with respect to paragraph 1 is whether the scope of information exchange should be constrained by either articles 1 or 2. The consensus was that it should not (see E/2006/45-E/C.18/2006/1(se wo)-lege is ne7 Tc 02pos102 Tw T\*40296 Tw T\*[-

**Paragraph 2  
Confidentiality**

11. The only proposed changes in this paragraph from the current article are minor style changes and changes needed to conform to the changes made in paragraph 1. The language in this paragraph differs slightly from the language in the OECD Model Convention. One reporting member suggested that this language change does not improve clarity and that the OECD language might be preferable.

12. OECD included a provision that would allow the sharing of information obtained under article 26 with persons charged with the oversight of the persons allowed to obtain such information. This provision is not included in the proposed article 26, owing to opposition from some members from developing countries who feared that the oversight bodies would not be subject to the same strict rules of confidentiality as tax officials. At its second session (see E/2006/45-E/C.18/2006/10, para. 38 (b)), the Committee was undecided on the matter and indicated that, whatever approach eventually was adopted, the alternative view should also be represented in the United Nations commentary. One reporting member would prefer that the ability to share information with an oversight body be included in the text, whereas the other two pr

part in the commentary on paragraph 3 and in part in the commentary on paragraph 5. In brief, the proposed United Nations commentary makes clear that there is no blanket override of the lawyer-client privilege but that the privilege cannot be misused to protect information from disclosure merely because it has been disclosed to legal counsel.

16. The OECD commentary has interpreted subparagraph (b) as introducing a reciprocity requirement. As discussed in the proposed United Nations commentary, that requirement is not mandated by the language of that paragraph. Such a requirement would reduce article 26 to a nullity in many treaties between developed and developing countries. Moreover, a reciprocity requirement serves no useful purpose and is inconsistent with the goal of paragraph 1. To avoid any ambiguity, subparagraph (b) might be amended as follows:

“(b) To supply information that cannot be obtained in the normal course of the administration of that Contracting State or is not obtainable under the laws of that Contracting State or of the other Contracting State;”

**Paragraph 4**  
**No domestic interest**

17. OECD added paragraph 4 to its Model Convention to make clear that a Contracting State cannot avoid its obligations under paragraph 1 simply because it has no domestic interest in the information requested. The exact language added by OECD is included in paragraph 4 of the proposed article 26. The report of the Committee on its second session does not address new paragraph 4, presumably because the matter was not addressed at that session. A major point of the revision of article 26 of the United Nations Model Convention, however, is to include paragraphs 4 and 5 of the 2005 OECD revision in the United Nations Model Convention. The Subcommittee endorsed both of those paragraphs in its 2006 position paper (E/C.18/2006/6) and the reporting members continue to endorse the inclusion of those paragraphs.

18. In its position paper (see E/C.6/2006/6, para. 20), the subcommittee also suggested the possible addition of the following language to paragraph 4, although it did not actually recommend such an addition:

“Extraordinary costs incurred in providing information shall be borne by the Contracting Party which requests the information. The competent authorities of the Contracting Parties shall consult with each other in advance if the costs

**Paragraph 5**  
**Bank secrecy**

20. OECD added paragraph 5 to its Model Convention to make clear that a Contracting State cannot avoid its obligati

avoidance. *The exchange of information or documents shall be either on a routine basis or on request with reference to particular cases, or otherwise. The competent authorities of the Contracting States shall agree from time to time on the list of information or documents which shall be furnished on a routine basis.*”

24. One of the reporting members strongly favours the inclusion of language specifically authorizing automatic exchanges of information in the text of the United Nations Model Convention. The other two reporting members are not sure the language is needed but do not have strong objections to its inclusion. The matter is addressed in the proposed United Nations commentary.

## **II. Revision of the commentary on article 26 (Exchange of information)**

25. The major changes proposed in the text of article 26 require significant changes in the United Nations commentary on that article. Changes in the United Nations commentary also are required to respond to the significant changes made in 2005 to the OECD commentary on its version of article 26, at least in part because 2005 touched the Nfritie Nati



the paragraphs in the proposed United Nations commentary are taken almost



relation to, the taxes referred to in paragraph 1. Such persons or authorities shall use the information only for such purposes. They may disclose the information in public court proceedings or in judicial decisions.

3. In no case shall the provisions of paragraphs 1 and 2 be construed so as to impose on a Contracting State the obligation:

(a) To carry out administrative measures at variance with the laws and administrative practice of that or of the other Contracting State;

(b) To supply information which is not obtainable under the laws or in the normal course of the administration of that or of the other Contracting State;

(c) To supply information which would disclose any trade, business, industrial, commercial or professional secret or trade process, or information, the disclosure of which would be contrary to public policy (ordre public).

4. If information is requested by a Contracting State in accordance with this article, the other Contracting State shall use its information gathering measures to obtain the requested information, even though that other State may not need such information for its own tax purposes. The obligation contained in the preceding sentence is subject to the limitations of paragraph 3 but in no case shall such limitations be construed to permit a Contracting State to decline to supply information solely because it has no domestic interest in such information.

5. In no case shall the provisions of paragraph 3 be construed to permit a Contracting State to decline to supply information solely because the information is held by a bank, other financial institution, nominee or person acting in an agency or a fiduciary capacity or because it relates to ownership interests in a person.

6. The obligation to exchange information arises under paragraph 1 whether or not a person under investigation is suspected of criminal activity. In no case shall the provisions of this Article be construed to permit a Contracting State to decline to supply information solely because the conduct being investigated would not constitute a crime under the laws of that Contracting State if such conduct occurred in that Contracting State.

7. The competent authorities shall, through consultation, develop appropriate conditions, methods and techniques concerning the matters in respect of which exchanges of information under paragraph 1 shall be made, including, where appropriate, exchanges of information regarding tax avoidance. The exchange of information or documents shall be either on a routine basis or on request with reference to particular cases, or otherwise. The competent authorities of the Contracting States shall agree from time to time on the list of information or documents which shall be furnished on a routine basis.

#### **IV. Comparison of article 26 (proposed 2007) with current article 26 (2001)**

36. The following is a comparison of article 26 (proposed 2007) with current article 26 (2001):

**Article 26**  
**Exchange of information**

constitute a crime under the laws of that Contracting State if such conduct occurred in that Contracting State.

7. The competent authorities shall, through consultation, develop appropriate conditions, methods and techniques concerning the matters in respect of which ~~such~~ exchanges of information under paragraph 1 shall be made, including, where appropriate, exchanges of information regarding tax avoidance.

The exchange of information or documents shall be either on a routine basis or on request with reference to particular cases, or otherwise. The competent authorities of the Contracting States shall agree from time to time on the list of information or documents which shall be furnished on a routine basis.

## V. Comparison of article 26 (proposed 2007) with OECD version (2005)

37. The following is a comparison of article 26 (proposed 2007) with the OECD version (2005):

### Article 26

#### Exchange of information

1. The competent authorities of the Contracting States shall exchange such information as ~~is foreseeably~~ may be relevant for carrying out the provisions of this Convention or to the administration or enforcement of the domestic laws of the Contracting States concerning taxes of every kind and description imposed on behalf of the Contracting States, or of their political subdivisions or local authorities, ~~insofar in so far~~ as the taxation thereunder is not contrary to the Convention. In particular, information shall be exchanged that would be helpful to a Contracting State in preventing fraud or evasion of such taxes or in combating tax avoidance. The exchange of information is not restricted by articles 1 and 2.

2. Any information received under paragraph 1 by a Contracting State shall be treated as secret in the same manner as information obtained under the domestic laws of that State ~~and~~. However, if the information is originally regarded as secret in the transmitting State, it shall be disclosed only to persons or authorities (including courts and administrative bodies) concerned with the assessment or collection of, the enforcement or prosecution in respect of, ~~or~~ the determination of appeals in relation to, the taxes referred to in paragraph 1, ~~or the oversight of the above~~. Such persons or authorities shall use the information only for such purposes. They may disclose the information in public court proceedings or in judicial decisions.

3. In no case shall the provisions of paragraphs 1 and 2 be construed so as to impose on a Contracting State the obligation:

~~(a) to~~ To carry out administrative measures at variance with the laws and administrative practice of that or of the other Contracting State;

~~(b) to~~ To supply information which is not obtainable under the laws or in the normal course of the administration of that or of the other Contracting State;

~~(c)~~ ~~to~~ To supply information which would disclose any trade, business, industrial, commercial or professional secret or trade process, or information, the disclosure of which would be contrary to public policy (ordre public).

4. If information is requested by a Contracting State in accordance with this article, the other Contracting State shall use its information gathering measures to obtain the requested information, even though that other State may not need such information for its own tax purposes. The obligation contained in the preceding sentence is subject to the limitations of paragraph 3 but in no case shall such limitations be construed to permit a Contracting State to decline to supply information solely because it has no domestic interest in such information.

5. In no case shall the provisions of paragraph 3 be construed to permit a Contracting State to decline to supply information solely because the information is held by a bank, other financial institution, nominee or person acting in an agency or a fiduciary capacity or because it relates to ownership interests in a person.

6. The obligation to exchange information arises under paragraph 1 whether or not a person under investigation is suspected of criminal activity. In no case shall the provisions of this Article be construed to permit a Contracting State to decline to supply information solely because the conduct being investigated would not constitute a crime under the laws of that Contracting State if such conduct occurred in that Contracting State.

7. The competent authorities shall, through consultation, develop appropriate conditions, methods and techniques concerning the matters in respect of which exchanges of information under paragraph 1 shall be made, including, where appropriate, exchanges of information regarding tax avoidance. The exchange of information or documents shall be either on a routine basis or on request with reference to particular cases, or otherwise. The competent authorities of the Contracting States shall agree from time to time on the list of information or documents which shall be furnished on a routine basis.

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