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E/C.18/2017/CRP.2

- (b) for services that are ancillary and subsidiary to the rental of ships, aircraft, containers or other equipment used in connection with the operation of ships or aircraft in international traffic;
- (c) for teaching in an educational institution or for teaching by an educational institution;
- (d) by an individual for services for the personal use of an individual;
- (e) to an employee of the person making the payments or to any individual or individuals for professional services as defined in article 14 (Independent Personal Services).

Paragraphs 4, 5 and 6 of Article 12 would be renumbered as paragraphs 6, 7, and 8 respectively.

27. Article 12 includes only certain technical and consultancy services. The term “technical services” in this context means services requiring expertise in a technology. Consultancy services in this context means advisory services. The categories of technical and consultancy services are to some extent overlapping because a consultancy service could also be a technical service. However, the category of consultancy services also includes an advisory service, whether or not expertise in a technology is required to perform it.

28. Under paragraph 4 of the alternative version of Article 12, technical and consultancy services are considered included services only to the extent that: (1) as described in subparagraph 4(a), they are ancillary and subsidiary to the application or enjoyment of a right, property or information for which a royalty payment is made; or (2) as described in subparagraph 4(b), they make available technical knowledge, experience, skill, know-how, or processes, or consist of the development and transfer of a technical plan or technical design. Thus, consultancy services which are not of a technical nature cannot be included services under sub

29. Subparagraph 4(a) of the alternative version of Article 12 refers to technical or consultancy services that are ancillary and subsidiary to the application or enjoyment of any right, property, or information for which a payment described in paragraph 3 is received. Thus, subparagraph 4(a) includes technical and consultancy services that are ancillary and subsidiary to the application or enjoyment of intangible property for which a royalty is received under a license or sale as described in paragraph 3, as well as those ancillary and subsidiary to the application or enjoyment of industrial, commercial, or scientific equipment or information concerning industrial, commercial, or scientific experience for which a royalty is received under a lease as described in paragraph 3.

30. Subparagraph 4(a) is consistent with the interpretation of the definition of "royalty" that is set forth in paragraph 12Above (quoting paragraph 11.6 of the Commentary on Article 12 of the OECD Model Convention). The inclusion of subparagraph 4(a) in the text of a bilateral treaty is particularly beneficial to countries that have concerns about relying only on the interpretation in paragraph 12Above (quoting paragraph 11.6 of the Commentary on Article 12 of the OECD Model Convention). Provisions identical or substantially similar to paragraph 4(a) of the alternative provision are found in several existing bilateral tax treaties concluded by developing countries.

31. In order for a service fee to be considered "ancillary and subsidiary" to the application or enjoyment of some right, property, or information for which a payment described in paragraph 3 is received, the service must be related to the application or enjoyment of the right, property, or information. **In addition, the predominant purpose of the arrangement under which the payment of the service fee and such other payment are made must clearly be the application or enjoyment of the right, property, or information described in paragraph 3.** The question of whether the services are related to the application or enjoyment of the right, property, or information described in paragraph 3 and **whether the predominant** purpose of the arrangement is such application or enjoyment must be determined by reference to the facts and circumstances of each case. Factors which may be relevant to such determination (although not necessarily controlling) include:

the extent to which the services in question facilitate the effective application or enjoyment of the right, property, or information described in paragraph 3;

the extent to which such services are customarily provided in the ordinary course of business arrangements involving royalties described in paragraph 3;

- x whether the amount paid for the services (or the amount which would be paid by parties operating at arm's length) is an insubstantial portion of the combined payments for the services and the right, property, or information^{740a BT/F1-n bD 1/ fpro3(on d1p 4)ve 55a(sc)3 0 1d in pa}

36. Example 2:

A manufacturing company resident in State S produces a product that must be

providing the service does not mean, by itself, that technical knowledge, skills, etc., are made available to the person purchasing the service. Similarly, the use of a product that embodies technology does not mean, by itself, that technology

scientific services; and
technical training.

41. Example 3:

A manufacturing company resident in State R has experience in the use of a process for manufacturing wallboard for interior walls of houses which is more durable than standard wallboard products. A company resident in State S wishes to produce this product for its own use. It rents a plant in State S and contracts with the State R company for the use of the process and for sending experts to State S to show engineers employed by the State S company how to produce the more durable wallboard. The experts supplied by the State R manufacturer work with the employees of the State S firm for a few months.

42. According to the principles set out in paragraph 12A above (quoting paragraphs 11.1, 11.3 and 12A)

43. Example 4:

A manufacturing company resident in State R operates a wallboard fabrication plant outside State R. A company resident in State S enters into a contract with the State R company to produce wallboard for the State S company at that plant for a fee. The State S company provides the raw materials, and the State R manufacturer fabricates the wallboard in its plant, using advanced technology.

44. In Example 4, the payments under the contract to the State R manufacturer would not be fees for included services under the alternative version of Article 12. Although the State R company is performing a technical service, no technical knowledge, skill, etc., is made available to the State S company, nor is there any development and transfer of a technical plan or design. The State R company is merely performing contract manufacturing services for the State S company.

45. Example 5:

A firm resident in State S owns inventory control software for use in its chain of retail outlets throughout State S. It expands its sales operation by employing a team of employees in State R. The firm's software is used in State R to manage the inventory of the retail outlets. The firm's software is used in State R to manage the inventory of the retail outlets. The firm's software is used in State R to manage the inventory of the retail outlets.

46. According to the principles set out in paragraph 12Above (quoting paragraph 14.3 of the Commentary on Article 12 of the OECD Model Convention), in Example 5, the payments by the State S firm for the modification of computer software would be characterized as business profits. However, under subparagraph 4(b) of the alternative version of Article 12, the payments are fees for included services. The State R company [performs/provides] a technical service to the State S company, and it transfers to the State S company the technical plan (i.e., the computer program) that it develops.

47. Example 6:

A vegetable oil manufacturing company resident in State S wants to produce a cholesterol-free oil from a plant which produces oil containing cholesterol. A company resident in State R has developed a process for refining cholesterol out of the oil. The State S company contracts with the State R company to modify the extraction formulas which it owns and uses to eliminate the cholesterol, and to train the employees of the State S company in applying the new formulas.

48. According to the principles set out in paragraph 12Above (quoting paragraphs 11.1, 11.3 and 11.4 of the Commentary on Article 12 of the OECD Model Convention), in Example 6, payments for the modification of the cholesterol extraction formula as well as the payments for the training in the use of the new formulas would be characterized as business profits. However, under subparagraph 4(b) of the alternative version of Article 12, both payments by the company resident in State R are fees for included services. The services are technical, and the technical knowledge is made available by the manufacturing company to the State S company through the training of its employees to apply the modified formulas.

52. In Example 8, the initial installation, inspection, and training services performed for the hospital in State S and the periodic services provided during the warranty period are ancillary and subsidiary, as well as inextricably and essentially linked, to the sale of the X-ray machine because the usefulness of the machine to the hospital depends on this service, the manufacturer has responsibility to service the machine during the warranty period, and the cost of the services is a relatively minor component of the contract. Therefore, under subparagraph 5(a) of the alternative version of Article 12 the payments received by the manufacturer are excluded from the definition of fees for included services, regardless of whether they would otherwise be covered by subparagraph 4(b). However, neither the post-warranty period inspection and repair services, nor the advisory and training services relating to new developments are "inextricably and essentially linked" to the initial sale of the X-ray machine. Absent the alternative version of Article 12, these payments would constitute business profits. However, under the alternative version of Article 12, the payments for the training of the hospital staff on the application of new developments in X-ray technology are covered by paragraph 4(b) and as such, may be taxed as fees for included services.