U.S. Chamber of Commerce

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Michael Lennard
Chief, International Tax Cooperation Section
Financing for Sustainable Development Office
Department of Economic and Social Affairs
United Nations Secretariat
Two U.N. Plaza, Room DC2-2172
New York, New York 10017

Re: Proposed Article xx on Dealing with Cross-Border Business Services

Dear Mr. Lennard:

On behalf of the U.S. Chamber of Commerce,[1] I am writing to express our profound concerns with the proposed addition of a new article ("Article xx") to the United Nations Model Double Taxation Convention between Developed and Developing Countries 2021 ("U.N. Model Tax Convention"). Proposed Article xx would combine existing Articles 5(3)(b), 12A, and 14 into a new provision dealing with fees for cross-border business services to provide greater taxing rights to recipients of services supplied by non-residents in the form of a gross-basis withholding tax.[2] As set forth below, we believe this proposal would introduce a dangerous new contagion into the international income tax system and lead to the increased incidence of unrelieved double taxation on cross-border business activities. We strongly oppose this destabilizing proposal and respectfully urge its withdrawal.

Background

As currently drafted, proposed Article xx would allow fees for services arising in a Contracting State and paid to a resident of the other Contracting State to be taxed on a gross basis in that other State, regardless of where the services are performed.

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[1] The U.S. Chamber of Commerce is the world's largest business federation and represents the interests of millions of businesses of every size, industry sector, and region. As a founding member of the Global Business Coalition, the Chamber contributes to all private sector consultations with the G20 and routinely engages on the OECD/G20 Inclusive Framework on BEPS's Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy.

[2] *See* Comm. of Experts on Int'l Coop. in Tax Matters, Co-Coordinators' Rep. on Its Twenty-Eighth Session, U.N. Doc. E/C.18/2024/CRP.8 (Mar. 4, 2024).

The term "fees for services" would be defined broadly for this purpose to mean *any payment in consideration for any service*, unless the payment is made by an employer to an employee, for automated digital services, or to an insurance enterprise for insurance. An exception would apply where the beneficial owner of the fees for services has a permanent establishment in the other jurisdiction with which the fees are effectively connected.

Discussion

Adoption of proposed Article xx would represent a fundamental and destabilizing shift from the traditional, consensus-based international norms governing jurisdictional nexus for the imposition of tax. The physical presence and permanent establishment standard for nexus is a critical part of both the U.S. Model Income Tax Convention and the OECD Model Tax Convention. And it is a well-established international principle that business profits should be taxed in the jurisdiction where the economic activities that generate them are carried out and where value is created.[3] Income taxes are levied at the place of source of income, which for services is the jurisdiction where they are performed—not the jurisdiction where customers or users are located.

The adoption of proposed Article xx would contravene the stated underlying objective of U.N. Model Tax Convention: the elimination of double taxation with respect to taxes on income and on capital. By expressly allowing a jurisdiction to tax income derived from the provision of services performed by a nonresident outside that jurisdiction, proposed Article xx would significantly increase the incidence of unrelieved double taxation on cross-border income. Extraterritorial taxes imposed on the basis of the location of customers or users are not creditable under traditional international norms governing nexus and taxing rights.

Proposed Article xx would also contravene a critical ancillary objective of the U.N. Model Tax Convention, which is to provide a reasonable element of legal and fiscal certainty as a framework within which international operations can confidently be carried on. For instance, the proposed elimination of the physical presence standard in existing Article 5(3)(b) (i.e., the 183-day rule for establishing a so-called "services permanent establishment") would be quite disruptive. Without the certainty provided by Article 5(3)(b), a one-day business trip could potentially create a permanent establishment in the customer or user's jurisdiction, triggering registration requirements and business taxation based on limited in-country activity. This uncertainty would increase administration burden on local-country tax authorities and

[3] *See, e.g.*, OECD, *Addressing the Tax Challenges of the Digital Economy, Action 1 - 2015 Final Report*, OECD/G20 Base Erosion and Profit Shifting Project (2015).

inevitably lead to more disputes with taxpayers, consuming scarce resources in exchange for little (if any) additional tax revenues.

Another critical concern with the extraterritorial taxing right contemplated by proposed Article xx involves the basis on which it would apply—to the *gross* amount of the fees paid. In addition to the risks of double taxation described above, taxing fees for services on a gross basis could easily lead to excessive or over-taxation and would be inconsistent with prevailing principles of international taxation. The imposition of such a gross-basis withholding tax (i.e., one applied solely on revenue before expense deductions) would hamper cross-border trade, increase compliance costs, and impede the growth of start-up businesses.

Finally, it is important to acknowledge the very real risk that the addition of proposed Article xx to the U.N. Model Tax Convention would set a dangerous precedent for less-scrupulous jurisdictions that may be tempted to disregarded international taxing norms to claim additional tax revenue. The result would be a further proliferation of novel extraterritorial taxes that diverge in significant respects from traditional norms of international taxing jurisdiction.

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The preceding comments are by no means exhaustive but represent some of the most acute, widespread concerns among our member companies with respect to proposed Article xx. We would welcome the opportunity to discuss our comments with you or your colleagues in further detail and provide whatever additional information you may require. Thank you for your time and attention.

Sincerely,

Watson M. McLeish
Senior Vice President, Tax Policy
U.S. Chamber of Commerce