



Committee of Experts on International Cooperation in Tax Matters

Twenty-sixth session, New York, 27-30 March 2023

CRP 1 - Taxation issues related to the digitalized and globalized economy

Interventions by the South Centre

Workstream A – Multilateral Instrument

- South Centre welcomes roll out of a multilateral fast track instrument for speedier implementation into the tax treaties of the source-based rules that are incorporated in the UN Model DTC and supports the views on page 5, which inter alia read as under: *The Secretariat advises that the Committee role at this stage should remain focused on suggesting an approach and text for any proposed instrument.*
- South Centre believes that immediate focus should be on setting-up in earnest a drafting committee to commence formulation of the transnational instrument in a coordinated manner.
- Political support is no precondition for taking forward UNTC work and hence the proposal on gauging support of members should be rejected.
- Support the inclusion of a revised Article 8 for source-based taxation of income from international shipping and aircraft into the instrument.
- Oppose inclusion of UN model arbitration provisions in the instrument. Further, clarification is needed on how the 'same or connected project' provisions are to be utilized.
- With regard to next steps, reference is made to the UN Code of Conduct on Cooperation in Combating International Tax Evasion (E/RES/2017/3) which was recommended by the UN Tax Committee to ECOSOC which then adopted it as a resolution.

Workstream B – Function and relevance of physical presence tests (such as under “PE” rules) in the context of an increasingly digitalized and globalized economy

- Language of 'granting' rights misleading, as tax treaties restrict taxing rights, they do not grant rights.
- Support the comment made by Committee Member from Ecuador that it “doesn't make sense in requiring physical presence for non-physical activities.”
- Framing of the discussion problematic: physical presence deemed an underlying principle for source country taxation and then articles such as 10, 11, 12, 12A, 12B

which do not require physical presence but still provide for source taxation termed as 'exceptions' requiring review.

- Proceeding on these assumptions may lead to re-examining the aforementioned articles, *inter alia*, in a manner which may cause loss of existing source taxing rights
 - Attention is invited to paragraph 4.2.3 on page 55, which reads as under:
4.2.3 The exceptions to the requirement for some type of business activities to take place in a country as a condition for source country taxation are found in Articles 10, 11, 12, 12A and 12B. These provisions deserve special scrutiny in order to determine whether the absence of physical presence can be justified and to determine the underlying principle or principles that justify source country taxation without any physical presence of the nonresident taxpayer in the source country.
 - Attention is invited to paragraph 5.1 on page 57, which reads as under:
*The foregoing analysis of the existing distributive provisions of the UN Model Convention supports the conclusion that physical presence (in the broad sense described in section 2 above) is generally, but not always, a requirement for source country taxation with respect to business income, although the nature and duration of the physical presence required varies widely. **The taxation of fees for technical services and payments for automated digital services are important exceptions.** Physical presence is also an underlying principle with respect to the taxation of income from employment under Articles 15 and 17, although the taxation of directors' fees and salaries of top-level managerial officials, pensions and salaries of government employees under Articles 16, 18 and 19 are important exceptions.*
 - Attention is invited to paragraph 6.7.1 on page 61, which *inter alia* reads as under:
..... Therefore, enforcement concerns should justify denying taxing rights to source countries only where it would be very difficult or impossible for source countries to impose and collect taxes on nonresidents (even in situations where they have the necessary administrative capacity to impose taxes on nonresidents effectively).
 - Attention is invited to paragraph 7.1 on page 61, which reads as under:
The analysis in this note illustrates that there are no consistent principles, including physical presence, underlying all the provisions of the UN Model Convention that provide taxing rights to source countries. Instead, it appears that ad hoc decisions reflecting different principles (or a different balancing of principles) have been made with respect to the various types of income dealt with in the distributive provisions of the UN Model Convention.
 - Proceeding on this basis may lead to work which rolls back existing taxing rights and produces work which may have little relevance in helping countries, both developed and developing, collect taxes and achieve the SDGs.
- Regarding the questions raised in paragraph 7.4 on page 62, which reads as under:
The fundamental tax policy issues that must be considered concerning whether and how to reform the physical presence tests in the UN Model Convention are:

- 1) *Should source countries be granted additional taxing rights based on criteria other than physical presence (i.e., whether the existing physical presence tests should be replaced or supplemented by alternative tests)?*
 - 2) *Should the existing physical presence tests be modified to make them more consistent?*
 - 3) *Should the existing physical presence tests be clarified to improve their certainty and provide additional guidance for taxpayers?*
- Broadly, we support additional source taxing rights based on criteria other than physical presence. The Significant Economic Presence (SEP) test prescribed by the 2015 BEPS Action 1 report is already being used by India, Nigeria and Colombia. This paper does not make reference to such real-world developments and may benefit from doing so.

Workstream C – Cross-border taxation issues involving remote workers

- In regard to paragraph 8.1.5 on page 87, South Centre supports enhancement in exchange of information regarding remote workers (employees and independent contractors) under Article 26 of the UN Model DTC in order to obviate one of the problems that (source) countries encounter in taxing remote workers, which is, lack of information about the presence of such workers in their countries.
- The issue of digital nomads requires attention and may become a growing problem for all countries.
- In regard to paragraph 5 on page 93 (Appendix II to Annex E), South Centre is supportive of the view that allowing countries in which employers are resident to tax their non-resident employees would primarily benefit developed countries, where most large employers are resident, and that would clearly work against the interests of source (developing) States.
- Accordingly, PE creation through remote working in itself may benefit developing countries to some extent, and may not necessarily be a problem. However, profit attribution in practice to such a PE becomes difficult and is what requires further technical work.
- Lastly, Workstream C on remote workers should be a stand-alone project unconnected to the other workstreams.