Subcommittee on Exchange of Information
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Report of the Interim Convener

Michael J. McIntyre
www.law.wayne.edu/tad

Article 26
Exchange of Information

Issues in Paragraph 1
Scope of Exchange

- Break old Para. 1 into 3 parts, new para. 1, new para. 2 (as in OECD), and new para. 7.
- Replace “necessary” with “may be relevant”.
- Extended Article 26 to cover all taxes.
- Add “or in combating tax avoidance” to purposes of an exchange.
- Do not limit scope to Articles 1 or 2.
- Drafting fixes.

Issues in Paragraph 2
Confidentiality of Information Obtained

- Minor style changes to reflect changes in paragraph 1.
- Rejected new OECD language allowing sharing with oversight bodies. Alternative language in proposed Commentary.

Issues in Paragraph 3
Limitations on Exchange

- Conforming change for change in paragraph 1.
- Issue of lawyer-client privilege clarified in Commentary on paragraphs 3 and 5, not by change in treaty,
- Removal of “reciprocity requirement” for information exchange by modifying subparagraph b 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

Proposal is to adopt new paragraph 4 verbatim from the revised (2005) OECD convention. The basic point of the paragraph is that a country cannot refuse to exchange information merely because it has no need for that information for its own tax purposes.

Issue of cost sharing for extraordinary costs addressed in Commentary to paragraph 7.

Paragraph 5
Bank and Fiduciary Secrecy

This paragraph is taken verbatim from the revised (2005) OECD convention. The basic point of the paragraph is that a country cannot refuse to exchange information because of its secrecy laws relating to banks and other financial institutions and to nominees and various fiduciaries.
The point of this paragraph is to make clear that information must be exchanged even if a matter under investigation is a crime in one Contracting State and not a crime in the other state.

In accordance with the discussion at the last meeting, the proposed language is modified to make clear that information must be exchanged whether or not the matter under investigation is a crime in either state.

The alternative of leaving out the paragraph is addressed in the proposed Commentary.

The first sentence of this paragraph is carried over from old paragraph 1.

The old commentary states that a major purpose of this sentence is to authorize the automatic and spontaneous exchange of information. That point is made explicit in paragraph 7 by adding the following:

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.

Commentary reorganized.

Prior organization had some general considerations, including a lengthy Inventory, followed by comments on separate paragraphs.

New organization:
- General Considerations
- Commentary on Paragraphs
- Inventory

The draft commentary does not always follow UN guidelines of the use of the OECD Commentary, which came out too late for this round.

Only limited consultation with the subcommittee.

Discussion of alternatives to “may be relevant” as agreed at 2d Session.

Alternative language for those wishing to limit exchange to certain taxes, as agreed at 2d Session.

Examples: (para. 8.1)
- From OECD: a,b,c,e,f
- New d (related companies), g (characterization of entity), h (whether tax paid).

Examples: (para. 8.2)
- a-c (old), d-f (new), new OECD d should be added.
Commentary, Para. 3

- New material coordinating paragraph 3 with new paragraphs 4-6.
- Requires timely disclosure of clear impediments to exchange of information.
- Clarified OECD comments on privacy.
- Limitation on OECD’s reciprocity rule in 3(b) and alternative language (recommended for UN Model).
- Clarification on lawyer privilege, etc.

Commentary, Para. 4

- Commentary taken nearly verbatim from OECD 2005 commentary. Needs modification to meet style guides.

Commentary, Para. 5

- Mostly taken, with minor changes, from 2005 OECD Commentary.
- Relationship with lawyer-client privilege clarified, with some alternative language suggested.
- Example c in paragraph 25 added (dealing with secret letters of agreement).

Commentary, Para. 6

- Brief explanation of the reason for the dual-criminality paragraph and clarification that it does not mean that criminality is required in at least one state.
- Also a suggestion that the paragraph could be dropped, leaving the matter exclusively for the Commentary.

Commentary, Para. 7

- Notes that the first sentence (which treats combating tax avoidance as a goal) comes directly from old paragraph 1, with a minor edit.
- Language provided for those wishing to require that countries provide funding when they make extraordinary requests for information. “Extraordinary requests” is defined relative to size of the requested tax department.

Inventory

- This inventory was initially developed in the 1980 Manual. Not clear to me that it is appropriate in the Commentary.
- Only minor editing changes made, to conform to changes made elsewhere.
- The Inventory, if retained, should be updated to include recent developments, including work by OECD on uniform TINs.