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Comments on E/C.18/2019/CRP.10 -Beneficial Ownership

Summary

The present Note contains the comments that were submitted by one Member of the Subcommittee on the UN Model Update on the paper E/C.18/2019/CRP.10 on the issue of beneficial ownership, which it was agreed were best included as a separate CRP for discussion at the same time as E/C.18/2019/CRP.10 during the 18th Session of the United Nations Committee of Experts on International Cooperation in Tax Matters.

interpretation of term BO in existing treaties. Whether this would work for interpretation of existing treaties not having BO definition cannot be assured, though it may to some extent work as per ambulatory approach. In any case, it would be a solution at par with proposed clarification in Art 10(2)-12A (2) Commentaries.

6. Suggested definition of 'Beneficial owner': Definition can be modelled on basis of ingredients in para 19 of Paper and any other relevant aspects in OECD MTC 2014 Commentary. Related Commentary can be accordingly drafted. UN Subcommittee on Model Update can work on this.

7. In case, the above suggestion on defining BO is not found acceptable by Committee and OECD approach is decided to be followed, there would still be needing to explain basis for not following Article 3(2) in the approach adopted by OECD of international fiscal meaning. This is taken up in following paragraph.

8. Basis for not following Article 3(2): What is the basis for discarding Article 3(2) is not explained in OECD Commentary. This can be a major litigation issue in developing countries, since normally terms not defined in treaty should have meaning as per domestic law of State applying the Convention/treaty. Reason for being able to adopt international fiscal meaning as against domestic law meaning is as stated in Phillip Baker's comments in his Report to UN Committee in Geneva in 2008, i.e. this a case "where context otherwise requires" Article 3(2) not to apply. It is hence suggested to elaborate on this aspect in UN Model Commentary if a d

formulation of Art10(2)/11(2) be as per existing UN MTC and clarify in Commentary on UN MTC on Art 10(2)/11(2) etc that ‘paid to’ in para 1 of Art 10(1)/11(1) covers beneficial owner for purpose of Art 10(2)/11(2).

12. Other issue is in respect of taxing rights of country of residence of direct recipient in a three-country scenario. Condition of beneficial ownership is only for limiting source country taxation. As such, it should not have any bearing on taxation by country of residence of direct recipient of income in a third country. Last sentence of para 12.2 of OECD MTC 2014 Commentary on Art 10 conveys that direct recipient would be regarded as a resident but it would not be treated as owner of income for tax purposes in State of residence. It is