



**ABDF 2019**

**IV CONGRESSO  
INTERNACIONAL  
DE DIREITO TRIBUTÁRIO  
DO RIO DE JANEIRO**

Em homenagem ao Professor  
Ricardo Lobo Torres

# A Inserção do Brasil no Cenário Tributário Internacional e sua Admissão pela OCDE

## TAX POLICY DEVELOPMENTS FROM A UN PERSPECTIVE


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## OUTLINE



**ABDF**  
ASSOCIAÇÃO BRASILEIRA  
DE DIREITO FINANCEIRO

- 
- ❖ WHAT THE UN HAS DONE SO FAR WITH RESPECT TO CROSS-BORDER SERVICES
  - ❖ WHAT THE UN IS WORKING ON WITH RESPECT TO DIGITALIZATION AND TRANSFER PRICING



## THE TRADITIONAL APPROACH TO THE TAXATION OF SERVICES



- ❖ UN MODEL MC TRADITIONALLY MORE SOURCE-BIASED THAN OECD MC
- ❖ BUT BASICALLY ALSO FOLLOWED SAME FOUNDINGD PRINCIPLES: NEXUS AND THRESHOLDS
- ➔ ANYTHING NOT SPECIFICALLY COVERED BY MC DISTRIBUTIVE RULES IS BUSINESS INCOME TAXABLE IN SOURCE COUNTRY ONLY IF ATTRIBUTABLE TO A PE THEREIN (exceptions for Director's Fees and Spotsmen and Artistes)



## MODELS APPROACH TO SERVICES



- ❖ UN MC CATERS FOR A SERVICE PE (OR PROFESSIONAL SERVICES FIXED BASE) CONCEPT (ART. 5(3) – ART. 14)
- ❖ BUT EVEN THEN REQUIRES MEETING NEXUS AND THRESHOLD TESTS: SERVICES MUST BE RENDERED WITHIN THE COUNTRY AND SPECIFIED THRESHOLDS MUST BE MET
- ❖ THRESHOLDS INCLUDE GENERALLY MINIMUM PHYSICAL PRESENCE FOR THE SAME OR CONNECTED PROJECTS (AND, PREVIOUSLY, MINIMUM MONETARY VALUE WITH RESPECT TO PROFESSIONAL SERVICES FIXED BASE)



## MODELS APPROACH TO SERVICES

- ❖ OECD MC ONLY RELUCTANTLY ADDED ALTERNATIVE WORDING FOR SERVICE PE CONCEPT BUT ONLY IN COMMENTARY AND SUBJECT TO NEXUS AND THRESHOLD TESTS – TOO LITTLE TOO LATE
- ❖ OECD REAFFIRMED APPROACH IN 2008:  
TAXATION OF SERVICE FEES IN SOURCE STATE BUT:
  - ONLY IF PERFORMED WITHIN THE STATE; AND
  - ONLY IF DEFINED MINIMUM THRESHOLDS ARE MET;
  - IN WHICH CASE ONLY NET TAXATION
- ❖ GLOBALLY BOTH UN MC AND OECD MC REQUIRED NEXUS AND THRESHOLD TESTS FOR SERVICE FEES TO BE TAXABLE IN SOURCE COUNTRY



## PRESSURES ON THE TRADITIONAL APPROACH

ESSENTIALLY THE SAME ISSUES THAT PROMPTED THE CURRENT DISCUSSION ON DIGITALIZATION:

- ❖ EXPANSION OF GLOBAL TRADE IN SERVICES
  - ❖ TECHNOLOGICAL DEVELOPMENTS MAKING IT EASIER TO BE REMOTELY INVOLVED IN A COUNTRY'S ECONOMY WITHOUT ANY PHYSICAL PRESENCE
  - ❖ INADEQUATE RULES TO RECOGNIZE TAXABLE PRESENCE UNDER EXISTING TOOLS
- ➔ LED COUNTRIES TO SEEK MODIFIED NEXUS RULES IN ORDER TO TAX PAYMENTS FOR SERVICES



## COUNTRIES' APPROACHES

VARIOUS APPROACHES TESTED TO TAX SERVICE FEES UNDER MODIFIED RULES LED BY ASIAN COUNTRIES, FOLLOWED BY LATAM COUNTRIES

- ❖ INCLUSION OF SEPARATE TECHNICAL SERVICE FEES ARTICLE IN TAX TREATIES
- ❖ INCLUSION OF "INCLUDED SERVICES" UNDER ROYALTY DEFINITION
- ❖ RELIANCE ON "INFORMATION CONCERNING INDUSTRIAL, COMMERCIAL OR SCIENTIFIC EXPERIENCE"
- ❖ RELIANCE ON OTHER INCOME ARTICLE UNDER UN MC

THEN COMES AFRICA: SADC MC 2005



## UN SOLUTION TO TAXATION OF SERVICES

UN FOLLOWED BY ADOPTING A RADICAL SOLUTION IN 2017 MODEL:

- ❖ INSERTION OF A DEDICATED ART. 12A IN UN MC TO DEAL WITH TECHNICAL SERVICE FEES
- ❖ ELIMINATION OF THE WORDS FOR "THE SAME OR CONNECTED PROJECT" FROM ART. 5(3)(b) UN MC WITH RESPECT TO SERVICE PE



## NEW ART. 12A UN MC

- ❖ INTRODUCES NEW NEXUS RULE: **RESIDENCE OF PAYER AND TAX BASE EROSION**
- ❖ INTRODUCES WHT ON TECHNICAL SERVICE FEES
- ❖ APPLIES REGARDLESS OF PLACE WHERE SERVICES ARE PERFORMED
- ❖ APPLIES REGARDLESS OF ANY PHYSICAL PRESENCE
  - ➔ ANATHEMA TO CONSECRATED OECD RED LINES
  - ➔ HAS IN ADDIITION AN ANTI-BASE EROSION EFFECT



## APPLICATION OF ART. 12A UN MC

- ❖ VERY BROAD DEFINITION OF TECHNICAL SERVICE FEES: PAYMENTS FOR ANY SERVICES OF A MANAGERIAL, TECHNICAL OR CONSULTANCY NATURE
- ❖ COVERS ALL SERVICES INVOLVING THE APPLICATION BY THE SERVICE PROVIDER OF SPECIALIZED KNOWLEDGE, SKILL OR EXPERTISE
- ❖ WHETHER OR NOT CONNECTED TO THE USE OR THE RIGHT TO USE PROPERTY COVERED BY ART. 12 (ROYALTIES)
- ❖ GENERALLY EXCLUDES B2C SERVICES
- ❖ BUT INCLUDES e.g. SHIPPING INCOME OR INCOME OF SPORTSMEN AND ATHLETES TO THE EXTENT NOT COVERED BY ARTS. 8 AND 17
  - ➔ BASICALLY ALL B2B SERVICES WHEREVER PERFORMED AND FOR WHATEVER DURATION



## DEVELOPMENTS IN UN WORK ON DIGITALIZATION



- ❖ APPOINTMENT OF A SUBCOMMITTEE TO ADDRESS TAX CONSEQUENCES OF DIGITALIZED ECONOMY ISSUES OF RELEVANCE TO DEVELOPING COUNTRIES
- ❖ LAST REPORT ISSUED EARLY 2019 ON OCT. 2018 SESSION
- ❖ NEXT MEETING IN APRIL 2019



## DEVELOPMENTS IN UN WORK ON DIGITALIZATION (2)



- ❖ THERE DOES NOT SEEM TO BE OVERALL CONSENSUS ON PATH FORWARD
- ❖ MAJORITY SEEMS TO DISAGREE WITH VALUE CREATION APPROACH AND TO FAVOUR ACTION ON THE BASIS OF ALLOCATING TAX RIGHTS TO MARKET COUNTRY
- ❖ THIS WOULD BE BEST ACHIEVED THROUGH A "SIGNIFICANT ECONOMIC PRESENCE" OR "DIGITAL PE" TEST
- ❖ THUS GIVING RISE TO ATTRIBUTION OF PROFITS ISSUES



## DEVELOPMENTS IN UN WORK ON TRANSFER PRICING



- ❖ UPDATE OF UN MANUAL ON TP FOR DEVELOPING COUNTRIES WITH RESPECT TO VARIOUS ASPECTS INCLUDING ADDITION OF MORE SAFE HAVENS
- ❖ FULL REVIEW OF THE MANUAL WITH RESPECT TO TRANSACTIONAL PROFIT-SPLIT METHODS PROBABLY TOWARDS GREATER RELIANCE ON THIS METHOD



**Muito Obrigado!**

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