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ELIMINATING DOUBLE TAXATION OF INCOME FROM CROSS-BORDER SERVICES IN THE DIGITAL ERA FROM THE UN MODEL PERSPECTIVE

Abstract. Digitalization challenges international tax law provisions dealing with eliminating double taxation of income from cross-border services. In the paper the following issues are discussed: rules elimination double taxation of income from cross-border services in the pre-digital era from the UN Model perspective as well as the UN Model's response to challenges related to eliminating double taxation of income from cross-border services in the digital era as well as its possible impact on countries' tax treaty practice. Rules governing taxation of income from cross-border services adopted by the UN Model in pre-digital era are outdated. This raises a question whether recently adopted provisions dealing with fees for technical services and automated digital services change the reality in that area.

Keywords: cross-border services, fees for technical services, automated digital services, UN Model

ELIMINACJA PODWÓJNEGO OPODATKOWANIA DOCHODÓW Z TYTUŁU TRANSGRANICZNYCH USŁUG W ERZE CYFROWEJ Z PERSPEKTYWY MODELU KONWENCJI ONZ

Streszczenie. Cyfryzacja rzuca wyzwanie normom międzynarodowego prawa podatkowego w służącym eliminacji podwójnego opodatkowania dochodów z tytułu transgranicznych usług. W artykule omówiono następujące zagadnienia: zasady eliminowania podwójnego opodatkowania dochodów z tytułu usług transgranicznych w erze przed-cyfrowej z perspektywy Modelu Konwencji ONZ oraz odpowiedź Modelu Konwencji ONZ na wyzwania związane z eliminacją podwójnego opodatkowania dochodów z tytułu transgranicznych usług w erze cyfrowej oraz jej możliwy wpływ na praktykę traktatową państw. Przepisy regulujące opodatkowanie dochodów z tytułu transgranicznych usług przyjęte przez Model Konwencji ONZ w erze przed-cyfrowej są przestarzałe. Nasuwa się pytanie, czy nowe uregulowania dotyczące opłat za usługi techniczne i zautomatyzowanych usług cyfrowych zmienią ten stan rzeczy.

Słowa kluczowe: transgraniczne usługi, opłaty za usług techniczne, zautomatyzowane usługi cyfrowe, Model Konwencji ONZ

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1. INTRODUCTION

Expansion of digital business models in the modern world creates new opportunities for all businesses, including furnishing of services. Simultaneously it poses a challenge to international taxation by causing difficulties for applying the existing allocation of taxing rights rules in cross-border income taxation (see also: Litwińczuk 2020, 53–58).[1] Traditional institutions of international tax law based on the concept of a permanent establishment or a fixed base in the case of income from independent personal services (liberal professions) fail to protect tax revenues in the source state against base erosion and profit shifting practices. In parallel, the imposition of withholding tax on certain categories of income from cross-border digital businesses is widely observed. These phenomena apply particularly to the taxation of income from cross-border services (Lipniewicz 2018, 360–369. See also: Kukulski 2022, 80–81).

In the recent years, the OECD/ G20 and the EU are not the only and global norm-setting players with respect to the taxation of digital service providers (Borders, Ballandares, Barake, Baseliga 2023. See also: Becker, Englisch 2018).[2] Also, the UN Committee of Experts on International Cooperation in Tax Matters (hereinafter: UN Committee of Experts) began to be an important actor creating international tax law recommendations in that area. In 2017 and 2021 the two major updates to the UN Model Double Taxation Convention between Developed and Developing Countries (hereafter: the UN Model) were adopted triggering the two new provisions which can be used in bilateral tax treaties to eliminate double taxation of certain types of income from cross-border services (hereafter: DTC/ or DTCs). These are: Art. 12A establishing the pattern for avoiding of double taxation of fees for technical services, added in 2017 to the UN Model[3] (see also: Martin 2018) and Art. 12B dealing with a completely new category of income from automated digital services, added to the UN Model in 2021.[4] Similar changes were

[1] OECD (2015), *Addressing the Tax Challenges of the Digital Economy, Action 1 – 2015 Final Report*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris (accessed: 25.01.2025).

[2] See also: Proposal for a COUNCIL DIRECTIVE laying down rules relating to the corporate taxation of a significant digital presence COM/2018/0147 final – 2018/072 (CNS), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52018PC0147 (accessed: 26.01.2025).

[3] United Nations Model Double Taxation Convention between Developed and Developing Countries 2017 Update (2017). Department of Economic and Social Affairs, United Nations, New York, https://www.un.org/esa/ffd/wp-content/uploads/2018/05/MDT_2017.pdf (accessed: 4.12.2024).

[4] United Nations Model Double Taxation Convention between Developed and Developing Countries 2021 Update (2021). Department of Economic and Social Affairs, United Nations, New York, https://financing.desa.un.org/sites/default/files/2023-05/UN%20Model_2021.pdf (accessed: 4.12.2025).

not introduced by the OECD Model Convention on Tax on Income and Capital (hereinafter: OECD Model) on the in the occasion of its latest update in 2017.[5]

This paper is designed to examine the importance of the UN Committee of Experts efforts to create new allocation rules, which might also be applicable as a tool for eliminating of double taxation of income from cross-border services in the digital era. Special attention is focused on their potential future impact on countries' tax treaty policy and practice, especially when countries importing new technologies and therefore become source-states of this type of income.

The thesis put forward here is that the UN Model's recommendations adopted in Art. 12A and Art. 12B due to their legal construction and therefore a limited scope of application may only to certain extend solve problems related to the elimination of double taxation of income from cross-border services caused by the expansion of digital economy. Therefore, the objective of this paper is to examine the UN Model's recommendations aimed at elimination double taxation of income from cross-border services both in the pre-digital era as well as in the present days.

2. ELIMINATION OF DOUBLE TAXING INCOME FROM CROSS-BORDER SERVICES IN THE PRE-DIGITAL ERA FROM THE UN MODEL PERSPECTIVE

According to the OECD and UN Models taxation of income from cross-border services in the source state required a certain degree of physical presence of a service provider in that state. The diverse nature of cross-border services meant that income obtained by a non-resident service provider might under a bilateral tax treaty primarily be treated for taxation purposes in the country of its source as: 1) business income or income from independent personal services (liberal profession), 2) royalty payments, 3) fees for technical services, and finally 4) income from automated digital services (Kukulski 2022, 81). The last two are present in the UN Model only. Moreover, some services may be performed outside a person's business activities and/or liberal profession, e.g. as a part of employment relationship or any other type of dependent personal service such as independently performed artistic or sports activities, public service, or educational (research) services provided outside the employment relationship by teachers, professors and researchers (Kukulski 2022, 81; Orzechowski-Zöller 2024, 187–195. See also: Sęk 2023, 87 et. seq.). The non-business-related nature of such services means that when they are carried out cross-border, the elimination of double taxation

[5] *OECD Council approves the 2017 update to the OECD Model Tax Convention*, https://www.oecd.org/tax/treaties/oecd-approves-2017-update-model-tax-convention.htm (accessed: 26.01.2025). See also: *OECD and UN updated income and capital Model Tax Conventions provide guidance on BEPS and other issues*, https://www.pwc.com/gx/en/tax/newsletters/tax-policy-bulletin/assets/pwc-oecd-un-updated-income-capital-model-tax-conventions.pdf (accessed: 26.01.2025).

of income derived from such activities entails the application of different tax treaty provisions than those relating to broadly understood income from business activities. The variety of norms allocating taxing rights between the contracting states under a bilateral tax treaty that may apply to income from cross-border services, whether or not provided as part of a business activity, leads to confusion that may result in a classification conflict. This, in turn, may translate into double taxation contrary to the purpose and object of a given DTC (Kukulski 2022, 81).

Taxation of income from cross-border services in the *situs* state requires the existence of a permanent establishment (hereafter: P.E.) located in that state. The definition of a P.E. is contained in Art. 5(1) of the OECD and the UN Models. It is a basic form of a P.E. and therefore is also referred as the *actual P.E.* (Litwińczuk 2020, 189). The concept of P.E. is found in the early model conventions including the 1928 model conventions of the League of Nations. Both the OECD and UN Models reaffirm this concept, the core of which has basically not been changed since then (Lipniewicz 2017, 26–27).

Besides the *actual P.E.,* several other types or sub-types of a P.E. in the OECD and in the UN Models might be distinguished (Litwińczuk 2020, 187). For example, the *construction P.E.* as defined in Art. 5(3) of the OECD Model and with modifications accordingly in Art. 5(3)(a) UN Model. Moreover, both models contain the *agency P.E.* provision (Art. 5(5) OECD and UN Model). What is common to all these types/sub-types of P.Es., regardless of their form, is that the concept of the P.E., as it stands up to now, is based on the physical presence of a foreign enterprise in the other Contracting State (source jurisdiction) as a *sine qua non* condition for the existence of the P.E. (Lipniewicz 2018, 328–332). This inherent feature of the P.E. makes this concept obsolete in the digital era and makes it impossible to apply – in its recent shape – to income from cross-border digital services (Jamroży, Majdowski 2022, 9–35).

The UN Model, contrary to the OECD Model contains a special provision in Art. 5(3)(b) dealing with yet another type of a P.E. – also known as *service P.E.* (Litwińczuk 2020, 210–211. See also: Lipniewicz 2017, 165–184). This typical UN Model recommendation allows the *situs* state taxation of income from cross-border furnishing of services, the performance of which does not, of itself, create a P.E. in the OECD Model. The *service P.E.* is deemed to exist only if the conditions referred to in Art. 5(3)(b) of the UN Model are met. According to Art. 5(3)(b), the term "permanent establishment" also encompasses the furnishing of services, including consultancy services, by an enterprise through employees or other personnel engaged by the enterprise for such purpose, but only if activities of that nature continue within a Contracting State for a period or periods aggregating more than 183 days in any 12-month period commencing or ending in the fiscal year concerned.[6] No doubts that the UN

[6] Commenatry on Article 5 para. 23, p. 200 et seq. in United Nations Model Double Taxation Convention between Developed and Developing Countries 2021 Update (2021). Department of

Model's furnishing of services provision makes it easier for a *situs* state to tax income generated through a *service P.E.* However, due to the fact that the *service P.E.* is *de facto* a sub-type of an *actual P.E.* and it is still based on the 183-days threshold of physical presence of the foreign enterprise's employees or other personnel in the source state, it is difficult to expect that this concept will be useful for furnishing digital services. Therefore, it still will be used in countries' tax treaty practice rather with respect to traditional business models for which it was originally designed.

Contrary to the OECD Model, the UN Committee of Experts decided to retain Art. 14 as a separate allocation rule dealing with independent personal services or other activities of an independent character (liberal professions). The UN Model's Art. 14(1)(a) and (2) reproduce the essential provisions of Art. 14 of the 1997 OECD Model, and they are similar to those for business profits and basically rest in fact on the same principles as those of Article 7 of the OECD/ UN Models.[7] Therefore, as a rule, the source state is entitled to levy a tax on such income only if a person – a sole entrepreneur – performing such services has a fixed base regularly available to them for the purpose of performing their activities located there. Contrary to the 1997 OECD Model, the UN Model, however, allows the source state to tax income from independent personal services in one additional situation that does not require a fixed base located there needed to exist. According to Art. 14(1)(b) of the UN Model, the source-state taxation is allowed if the taxpayer is present in that country for more than 183 days in any 12-month period commencing or ending in the fiscal year concerned (the 183-days threshold). Although this unique UN Model provision is quite popular in countries' tax treaty practice, including the OECD Member States, e.g. Poland, the requirement to fulfill a condition of more than 183 days of physical presence in the source state makes the application of Art. 14(1)(b) of the UN Model meaningless to income from independent personal services performed on-line.

Countries that follow the OECD approach towards the Art. 14 and decide not to include a separate allocation rule dealing with this type of income into their tax treaties may adopt an optional solution proposed in the Commentary to Art. 5(3)(b) of the UN Model.[8] The UN Committee of Experts suggest the two following options: 1) not to include Art. 14 into the tax treaty and to modify the wording of the furnishing of services provision of Art. 5(3)(b) by deleting also the reference to *including consultancy services*; and 2) to insert a new letter (c) to the furnishing of the services provision of Art. 5(3) which would read as follows: "for an individual, the performing of services in a Contracting State by that individual,

Economic and Social Affairs, United Nations, New York, https://financing.desa.un.org/sites/default/files/2023-05/UN%20Model_2021.pdf (accessed: 26.01.2025).

[7] Art. 14 was deleted from the 1997 OECD Model on 29 April 2000. See: Commentary on Article 14, p. 502.

[8] Commentary on Article 14, pkt 39–44, pp. 210–212.

but only if the individual's stay in that State is for a period or periods aggregating more than 183 days within any twelve-month period commencing or ending in the fiscal year concerned."[9] According to the Commentary to the UN Model, the only reason why the notion *including consultancy services* is present in current wording of Art. 5(3)(b) is to avoid unnecessary confusion that such services are included into the furnishing of the services provision.[10] Arguments raised for the second option mainly aim to maintain the coherence of the UN Model by ensuring that any situation previously covered by Art. 14, namely the threshold of more than 183-days of physical presence in the source state, would be addressed by Art. 5 and 7 of the UN Model. Despite such an option being chosen by the contracting states in their tax treaty, its impact on taxation of income from cross-border digital services still remains limited and will have no influence on countries' tax treaty policy and practice in that area.

In the context of the approaches to taxing income from the digital economy envisaged by the OECD and the EU revolving, *inter alia*, around revenue thresholds of digital companies, the UN decision taken in 1999, to delete the third criterion contained in letter (c) of Art. 14(1) allowing the source state to tax income from independent personal services, namely the amount of remuneration received by the services provider, may today seem a bit premature (Jamroży, Majdowski 2022, 9–35).[11] Under that criterion, remuneration for independent personal services could be taxed by the source country if it exceeded a specified amount, regardless of the existence of a fixed base or the length of stay in that country (the amount was to be established through bilateral negotiations).[12] Art. 14(1)(c) was often not present in countries' tax treaty practice (Wijnen, Goede 2014, 135 et. seq.). The advantage of this solution was not only simplicity (classic withholding tax), but above all no requirement for physical presence in the country where services were provided. Of course, in its wording at the time, this provision only applied to natural persons, solo entrepreneurs, so therefore it would have to be changed to meet the challenges raised by the digital economy. And it would not be the first time in history when the UN Model influences the OECD Model (Kukulski 2017, 146–147).[13]

[9] Ibidem, pp. 210–212.

[10] Ibidem, p. 211.

[11] https://www.un.org/esa/ffd/wp-content/uploads/2014/09/DoubleTaxation.pdf (accessed: 26.01.2025).

[12] Commentary on Article 14, paras. 3–4, op. cit., pp. 502–503.

[13] E.g. the immovable property clause in Art. 13(4) of the OECD Model.

3. UN MODEL'S RESPONSE TO CHALLENGES RELATED TO ELIMINATION OF DOUBLE TAXATION OF INCOME FROM CROSS-BORDER SERVICES IN THE DIGITAL ERA AND ITS POSSIBLE IMPACT ON COUNTRIES' TAX TREATY PRACTICE

In the digital era two major updates of the UN Model took place in 2017 and 2021 (Kukulski 2024a, 225–226). As in the case of the changes introduced to the OECD Model, the 2017 UN model's update was focused mainly on incorporating the anti-BEPS measure (Goede 2023, 12–16). Introducing a separate tax treaty provision dealing with fees for technical services (hereafter: FTS) in Art. 12A is the most significant outcome of the 2017 UN Model's update from the point of view of taxing income from cross-border services (Goede 2023, 12–16. See also: Báez Moreno 2015, 267–328). Following the OECD/G20 Inclusive Framework on BEPS on the Two Pillar Approach to Address the Tax Challenges Arising from the Digitalization of the Economy, in 2021 the new Art. 12B dealing with income from automated digital services (hereafter: ADS) was added to the UN Model.[14] Both updates may impact countries' tax treaty practice although to different extend.

Distributive norms governing taxation of FTS and ADS seem to be more attractive for countries rather than importing new technologies, so called developing countries. The common feature of solutions adopted in both cases is undoubtedly a withholding tax levied at the source on FTS and on income from ADS provided respectively in Art. 12A § 2 and in Art. 12B § 3 of the UN Model. However, an important difference between taxation rules applicable to these two types of income is provided in the case of ADS. The UN Model allows the source state, at the request of their beneficial owner being a resident of the other Contracting State, to tax so called "qualified profits from ADS" instead of a gross amount of the payments underlying the income from ADS – the so-called net basis taxation option. This option is allowed by §§ 3 and 4 of Art. 12B.[15] The solution adopted by the UN Committee of Experts is criticised in the literature since it generates asymmetries in the tax treatment of FTS and ASD – gross taxation in the case of FST and net taxation (optional) in the case of ADS (Báez Moreno 2021). A detailed discussion of this issue is beyond the scope of this study.

According to the OECD Model approach, followed by the OECD Members States, including Poland, FTS cannot be classified for tax purposes as royalty payments and therefore must be regarded as business income and treated under art. 7 of the OECD Model or – in case of its presence in DTC – as income from

[14] Statement by the OECD/G20 Inclusive Framework on BEPS on the Two-Pillar Approach to Address the Tax Challenges Arising from the Digitalization of the Economy – January 2020, https://www.oecd.org/en/about/news/announcements/2020/01/statement-by-the-oecd-g20-inclusive-framework-on-beps.html (accessed: 28.01.2025).

[15] See: Commentary on Article 12B Paragraphs 3 and 4, sections 39 et seq. pp. 449–454.

independent personal services under Art. 14 of the UN Model (Cracea 2018, 278–280).[16] This general rule does not apply to so called "mixed contracts", e.g. franchise agreements provided that services rendered by the franchisor are only of *anciliary and largely unimportant character*. In such case, Art. 12 dealing with royalties shall be applicable to the whole amount of the remuneration received by the franchisor (See also: Orzechowski-Zöller 2024, 129–131).[17] This OECD approach may, however, lead to interpretation disputes over the demarcation of the semantic substrate of the terms "royalties" and FSD.[18]

At the same time, a different treaty practice has been adopted, mostly by developing countries. Therefore, two variants of tax treaty provisions dealing with the elimination of double taxation of FTS were present in countries' tax treaty practice long before the Art. 12A – a separate distributive norm dedicated to FTS only – was introduced to the UN Model (Wijnen, Goede, Alessi 2012, 45–46). In the first variant, FTS were covered by the same article as royalties (e.g. the 1989 India–US DTC), in the second in a separate provision (e.g. 2001 India–Malaysia DTC) (Wijnen, Goede, Alessi 2012, 45–46). Both variants are also present in Poland's tax treaty practice, mostly with countries importing capital and new technologies (Kukulski 2022, 87).

Eliminating double taxation of FSD also become an issue in the context of developing the digital economy (Lipniewicz 2018, 327–328). This applies in particular to technical, managerial and consultancy services furnished digitally. The question, whether services provided with no physical presence in the other Contracting State fall under the scope of Art. 12A of the UN Model, is interconnected with the definition of this category of income. The UN Model definition of FTS is exhaustive. According to Art. 12A § 3 of the UN Model, the concept of the FTS encompasses any payment in consideration for any service of a managerial, technical or consultancy nature, unless the payment is made: a) to an employee of the person making the payment, b) for teaching in an educational institution or for teaching by an educational institution, or c) by an individual for services for the personal use of an individual. The Commentary to the UN Model stands on the position that Art. 12A does not apply to payments for all technical services, including those rendered digitally.[19] Payments for services of a routine nature that do not involve the application of a specialized knowledge, skill or expertise are without the scope of Art. 12A.[20] Therefore, only payments for digitalized technical services of a specialized nature that only have more than minimal human involvement furnished in a B2B context fall into the scope of the UN Model's FTS provision (Orzechowski-Zöller 2024, 57). Most authors

[16] See: Commentary on Article 12, paras. 11–19.

[17] Ibidem, pp. 279–280.

[18] See: Commentary on Article 12A para. 85, op. cit., p. 418.

[19] Commentary to Article 12A, para. 62, op. cit., p. 411.

[20] Commentary to Article 12A, para. 62, op. cit. p. 411.

agree that such an approach is restrictive and drastically limits the application of Art. 12A to services constituting the essential core of the digital economy (Báez Moreno 2021; Orzechowski-Zöller 2024, 57; Lipniewicz 2018, 328).

In order to minimize limits arising from a restrictive definition of FTS, the UN Committee of Experts proposed an alternative test for Art. 12A in the Commentary to the UN Model.[21] Under this alternative, a country will be entitled to levy a withholding tax generally on any payment in consideration for any service (fees for services) instead of on FTS paid by its resident or by a non-resident with a P.E. or fixed base located in that country to a resident of the other Contracting State if the fees arise in the first country.[22] No withholding tax should be levied for services furnished by a non-resident in a digital form without any physical presence in the country of the recipient of the service (Goede 2023, 16). However, in the alternative version of Art. 12A § 5, fees for services are deemed to arise in a country if: 1) the services are provided in that country or 2) the services are provided outside that country by a person who is closely related to the payer of the fees within the meaning of Art. 12A § 6 of the UN Model. Following the UN Model Commentary, the alternative provision would eliminate any disputes about whether the relevant services fall into the scope of FTS definition or not, because it will apply to fees for any service except those *expressis verbis* listed in Art. 12A § 3 of the UN Model, e.g. payment is made to an employee of the person making the payment, or for teaching in an educational institution or for teaching by an educational institution, and by an individual for services for the personal use of an individual. Under the alternative provision, the source state is entitled to levy a tax on fees for services rendered outside that state if the services are provided by persons closely related to the payer.[23] Although the alternative text for Art. 12A meets some challenges related to cross-border digital services, but not comprehensively. Still, fees for services of a purely digital nature provided by non-resident third parties are not covered by the alternative version of Art. 12A (Goede 2023, 16). Therefore, it is difficult to expect that Art. 12A in its version adopted in the UN Model or its alternative will contribute to the harmonisation of treaty practice in this area.

Also, the definition of ADS regulated in Art. 12B § 5 is exhaustive. The term "ADS" as used in this Article means any service provided on the Internet or another electronic network, in either case requiring minimal human involvement from the service provider. Moreover, § 6 of Art. 12B lists examples of services that will often constitute ADS.[24] It includes: 1) online advertising services, 2) supply of user data, 3) online search engines, 4) online intermediation platform services, 5) social media platforms, 6) digital content services, as well as 7) online gaming,

[21] Commentary on Article 12A, paras. 26–31, op. cit., pp. 397–400.

[22] Ibidem, pp. 398–399.

[23] Ibidem, p. 399.

[24] Commentary on Article 12B, para. 52, op. cit., p. 454.

8) cloud computing services, and 9) standardized online teaching services. The Commentary to the UN Model explicitly emphasizes that the above-mentioned list of activities that might be qualified as ADS is only of an indicative nature.[25] The requirements set in the in Art. 12B § 5 must be met each time. An important indicator whether an activity, even if listed in Art. 12B § 6, falls into the concept of ADS is a minimal human involvement from the service provider. Therefore, according to the Commentary to the UN Model, the following services rendered digitally are not considered to be automated: 1) customized professional services, 2) customized online teaching services, 3) services providing access to the Internet or to another electronic network, 4) online sale of goods and services other than automated digital services, and 5) revenue from the sale of a physical good, irrespective of network connectivity ("internet of things").[26]

Moreover, some members of the UN Committee of Experts had concerns about the increase of the administrative burdens of Art. 12B application, especially in developing countries, related to small payments and payments by individuals acquiring services for personal use.[27] The majority of them were of the view that payments by individuals for ADS for personal use should be excluded from the definition of the ADS, as it is in case of FTS. In response to this, the Contracting States are suggested – according to the Commentary to the UN Model – to add the following Commentary to the UN Model, including the following phrase "income from automated digital services" into the general definition of the ADS in their DTC wherein "automated digital services" does not include payments made by an individual for services for the personal use of said individual.[28] This could to a certain degree minimize some of the overlapping of semantic ranges of the UN Model's concepts of FTS and ADS.

There is conviction in the literature that Art. 12B of the UN Model will play a complementary function to Art. 12A and its impact on countries tax treaty practice will be rather limited (Orzechowski-Zöller 2024, 139).[29] It is due to the fact that the ADS' definition focuses on non-customized, standardized and routine services involving minimal human involvement while Art. 12A of the UN Model applies to services demanding the application of specialized knowledge, skill or expertise which *per se* assumes a certain degree of human involvement in this process. Moreover, like Art. 12A, Art. 12B also met with justified criticism from both the members of the UN Committee of Experts and the representatives of international tax law doctrine. The majority members of the Committee of Experts claims, *inter alia*, that the term income from automated digital services: used in Art. 12B is not clear, including some terms and concepts used and relevant

[25] Commentary on Article 12B, para. 56, p. 456.

[26] Ibidem, para. 59, p. 462.

[27] Commentary on Article 12B, para. 14, op. cit., p. 439.

[28] Commentary on Article 12B, para. 65, op. cit., pp. 467–468.

[29] See also: Commentary on Article 12B, para. 59 (i) and (ii), op. cit., p. 462.

to the application of the net basis taxation option. Moreover, the gross basis of taxation of income from automated digital services even with the reliance on the profitability ratio for the multinational enterprises group can lead to excessive or even double taxation.[30] In summary, countries sharing these concerns expressed their view not to include Art. 12B in their DTCs.[31] The scholars stand that Art. 12B of the UN Model is not only unnecessary but also disrupting, due to the fact that it generates spillover effects on the interpretation of DTCs containing specific clauses for the taxation of services, exacerbates the qualification problems already raised by the restrictive interpretation of Article 12A contained in the Commentaries to the UN Model and generates asymmetries in the tax treatment of FTS and ADS (see: Báez Moreno 2012; Orzechowski-Zöller 2024, 59). Moreover, it cements different treatment for B2C services under Arts. 12A and 12B (Orzechowski-Zöller 2024, 59).

On the top of that, doubts are raised about the delimitation of the semantic substrate of technical services and ADS. As mentioned above, the UN Model's concept of FTS does not cover fees for services of a routine nature that do not involve the application of a specialized knowledge, skill or expertise, rendered both onsite and online. Needless to say, that certain types of digital services, including automatized ones, require the service provider to have such knowledge, skills and experience, e.g. at the stage of creating the digital content. Therefore, instead of solution more qualification disputes are to be expected.

4. CONCLUSIONS

The impact of the UN on the development of international tax law is recently growing.[32] The times when the OECD or the EU were the only international organizations setting the tone for the discourse on these matters are long gone. One of these areas is undoubtedly the elimination of double taxation of income from cross-border services.

The UN Model since its publication in 1980 contains several provisions dealing with taxation of cross-border services, including *service P.E. provision* in Art. 5(3)(b) and independent personal services provision in Art. 14(1)(a) and (b). Both rules are widely spread in tax treaty practice of mainly developing countries (Wijnen, Goede 2013, 120–122, 135–136. See also: Goede 2023, 11–12). Poland's tax treaty practice does not deviate from this trend (Kukulski 2015, 323–324, 336–337). The concept of *service* P.E. is based on physical presence requirement in the other Contracting State what makes it unsuitable in the digital era. Same,

[30] See: Commentary on Article 12B, paras. 12–15, op. cit., pp. 438–440.

[31] Ibidem, para. 16, p. 440.

[32] E.g. the UN Second Committee (Economic and Financial) resolution approving the Term of Reference for the Framework Convention on International Tax Cooperation adopted on 27 Nov. 2024, https://press.un.org/en/2024/gaef3614.doc.htm (accessed: 30.01.2025).

Art. 14(1)(a) and (b) of the UN Model allowing the source state to tax income from independent personal services to cases where there is a fixed base or after the 183-days threshold is met limits its usefulness in that area as well.

A tax treaty provision dealing with FTS was present in many countries' treaties practice – including Poland – a long time before Art. 12A was introduced to the UN Model. A separate model provision dealing with FTS solves most qualification conflicts discussed above with the concept of royalties as defined in Art. 12 § 2 of the OECD Model and respectively in Art. 12 § 3 of the UN Model and therefore should be assessed as a step forward. It does not change the fact that its legal construction, an especially restricted definition of FTS, is free from defects that may limit its applicability to tax challenges arising in the digital era. A more inclusive definition of such fees, e.g. covering remuneration for all kinds of services rendered, as proposed by the UN Committee of Experts in the Commentary to the UN Model, could be one of several possible solutions.[33] This approach seems to be rather revolutionary and therefore counterproductive.

2021 introduced a separate tax treaty provision dealing with income from ADS into the UN Model that faced – as quoted above – justified critique. Some authors even pointed out its high contentiousness and political sensitiveness for the OECD Member States as well as other members of the Inclusive Framework wishing to follow the so-called Two Pillar approach (Goede 2023, 17–18, 22–24). So far, Art. 12B of the UN Model is not present in countries tax treaty network. Therefore, it is highly unlikely that countries, especially the OECD Members, will accept it in their tax treaty practice.

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