

# Beneficial ownership: in search for an international tax treaty law meaning

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# 1. Introduction

## **Some preliminary questions:**

1. What is the function of beneficial ownership in tax treaties?
2. Is it an anti- tax avoidance clause?
3. Does the OECD MC define the concept of beneficial ownership?
4. Is there an international tax meaning of beneficial ownership across tax treaties based on the OECD MC?
5. Are non-OECD countries to take into account the outcome of this reconstruction?

## **Some preliminary remarks:**

- ▶ Beneficial ownership should not be interpreted in a narrow meaning
- ▶ Beneficial ownership only applies to Articles 10 (2) (a), 11 (2) and 12 (3)

## 2. Beneficial ownership in the OECD MC and Commentaries across the years

- ▶ Beneficial ownership is included in OECD MC since 1977
- ▶ French wording: *bénéficiaire effectif*
- ▶ Object and purpose: preserving taxing powers of source State and securing lower withholding taxes on intercompany dividends only for companies that can actually dispose of income
- ▶ Term is not defined
- ▶ Context of Articles 10-12 suggests not to rely of narrow interpretation based on domestic law
- ▶ Elements for general rule of interpretation, supplementary, or mere soft law?
  - ▶ OECD Report on Conduit Companies
  - ▶ OECD MC Commentary 1977, with significant changes in 1995, 2003, 2014

## 2. Beneficial ownership in the OECD MC and Commentaries across the years

- ▶ Commentary on beneficial ownership: it is more than clarification
- ▶ 1977: the limitation of tax in the State of source is not available when an intermediary, such as an agent or nominee, is interposed, unless the beneficial owner is a resident of the other State
- ▶ 2003: to be interpreted in the light of object and purpose of convention; para 12.1 - difficulties from “paid to...a resident”
- ▶ 2014: “a conduit company cannot normally be regarded as the beneficial owner if, though the formal owner, it has, as a practical matter, very narrow powers, which render it, in relation to the income concerned, a mere fiduciary or administrator acting on account of the interested parties”; “existence of a contractual or legal obligation to pass on the payment received to another person”; “whilst the concept of beneficial owner deals with some forms of tax avoidance, it does not deal with other cases of treaty shopping”

### 3. The relations with domestic tax law and the reaction to tax avoidance

- ▶ 2003 OECD MC on Article 1:
  - ▶ States do not have to grant the benefits of a DTC in the presence of arrangements that abuse the convention
  - ▶ the benefits of a double taxation convention should not be available where a main purpose for entering into certain transactions or arrangements was to secure a more favourable tax position and obtaining that more favourable treatment in these circumstances would be contrary to the object and purpose of the relevant provisions
  - ▶ States should not lightly assume that a taxpayer enters into abusive transactions => no carte blanche!
- ▶ 2003-2014 amendments to OECD MC Commentary on Articles 1 and 10-12 => Possible application of treaty and domestic anti-avoidance rules to income received by beneficial owner

## 4. An insight in bilateral treaties: the example of the Cyprus-Russia double tax treaty

- ▶ Large number of cases on beneficial ownership in Russian tax treaties, mostly concerning the Cyprus-Russia DTC
- ▶ 1998 Cyprus-Russia DTC (trilingual, but with English prevailing)  
РУ: если лицо, имеющее фактическое право на дивиденды
- ▶ 2010 Protocol added Article 29 introduced GAAR in DTC (effective since 2013)
- ▶ *“1. ...a resident of a Contracting State shall not be entitled to any reduction of, or exemption from taxes provided for in this Agreement on income derived from the other Contracting State if, as a result of consultations between the competent authorities of both Contracting States, ...the main purpose, or one of the main purposes of the creation of existence of such resident was to obtain the benefits under this Agreement that would not otherwise be available.*
- ▶ *2. The provisions of paragraph 1 shall only apply to companies that are not registered in a Contracting State but claim the benefits of the Agreement.”*

## 5. Conclusions

- ▶ Clear judicial trend worldwide acknowledging international tax meaning of beneficial ownership in tax treaties, connected with power to freely dispose of income at time of payment
- ▶ Different function and boundaries as compared to actual, ultimate or final beneficiary
- ▶ OECD MC Commentary is important (but not indispensable) to reconstruct context
- ▶ Possible influence also on treaties with and between non-OECD countries
- ▶ Clear boundaries of beneficial ownership have only become clear in connection with 2014 Update of OECD MC Commentary
- ▶ Since 2003 OECD indicates that beneficial ownership does not prevent the application of other domestic and treaty anti-avoidance measures, but the latter should not be lightly assumed

**Спасибо!**

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