

I write on behalf of PwC.

Thank you for the opportunity to provide comments on the revised discussion draft entitled 'OECD Model Tax Convention: Revised Proposals Concerning the meaning of "Beneficial Owner" in Articles 10, 11 and 12' ("the revised discussion draft").

In response to the request for drafting comments only we have not repeated the substantive comments which we have already made on the OECD's work relating to clarifying the meaning of the beneficial owner concept.

There are two areas in which we wish to make comments in relation to the revised discussion draft.

### **Paragraph 12.1**

The point we wish to make relates to the deletion of the last sentence from the earlier version of the paragraph. Based on the comments made in the OECD paper released on 19 October 2012, it does seem clear that an autonomous treaty meaning is intended. However, the deletion of the last sentence in paragraph 12.1 is in that context somewhat confusing. We agree that the last sentence is potentially ambiguous but we are concerned that, simply deleting it is not sufficient to clarify the intended approach to interpretation of the term "beneficial owner". We would therefore suggest a clear statement be included in the paragraph to the effect that an autonomous treaty interpretation is intended.

### **Paragraph 12.4**

Our primary concern on the drafting in relation to the OECD's work on this topic relates to para 12.4. This paragraph, setting out guidance on the standard that is required to be a beneficial owner, is of course of central importance to the beneficial owner concept. Whilst there are some areas relating to the Model in which some level of imprecision or lack of certainty may be acceptable (e.g. the "acceptable range" concept in transfer pricing), this is not desirable in relation to the beneficial owner concept. The scale of global cash flows of dividends, interest and royalties coupled with the existence of vast numbers of withholding tax obligations (which vary according to beneficial owner status) in states around the world means a high level of certainty is required.

In this context, we remain concerned in relation to the drafting of paragraph 12.4 as the existing text which we, and many other commentators, identified as problematic in responding to the earlier discussion draft (specifically the references to "facts and circumstances" and "in substance") has been retained in the current version of this paragraph. Our strong preference is for it to be removed. It seems evident from the comments in paragraph 17 of the OECD paper of 19 October 2012 that the Working Party has accepted the concerns on the original drafting and therefore recognised that there is a need to clarify the text. However, the solution that is now proposed - specifically involving the "related"/"unrelated" test in relation to on-payments - does not seem adequate for this purpose given the scale of difficulties potentially raised by the wording that is referred to above and which has been retained. In particular, there is no indication how this newly introduced test of "related"/"unrelated" should be assessed or applied. It is therefore not clear that this drafting delivers against the need identified by the OECD itself to "better identify the kind of obligations that would mean that the recipient of a dividend would not be considered to be the beneficial owner".

We would suggest that the position could be addressed in various alternative ways.

One possibility is to insert the wording "making the recipient, in substance, an agent or nominee receiving the item for or on behalf of another company" after the word "person" at the end of the first sentence of the revised paragraph 12.4. It would also seem necessary to delete the second reference to "unrelated" in the sentence beginning "Examples of such unrelated obligations are those unrelated obligations ..." as otherwise the clarification is circular and potentially meaningless.

We are also aware of - and would support - other suggestions being made to the OECD on this point which would lead to a re-drafting of paragraph 12.4 without the use of the "related"/"unrelated" wording or the inclusion of a footnote to bring out the point that a narrow interpretation is intended of the comments in paragraph 12.4 to the effect that beneficial owner status is lost by an obligation to pass on the payment.

We trust the above comments are of assistance.

With kind regards

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