

Clarification of the Meaning of “Beneficial Owner” in the OECD Model Tax Convention

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Dear Jeffrey,

Just some general observations/comments from out of Hong Kong:

I haven't done an exact analyses but, as far I can see, the amended commentary to the OECD dividend article is exact the same as the amended commentary to the OECD interest and royalties articles. I would however think that maybe certain comments could be more tailor-made. For example, the commentary article 12.4 seems to define a non-beneficial owner as a person with the 'obligation to pass the payment (read 'dividend') received to another person'. Would this not be a comment that (more) belongs to the commentaries to interest and royalties articles? This as it would be (more) back-to-back loans or (sub-) license agreements that would create such obligations whereas such obligation is less likely to happen with dividends. In addition, I am wondering whether the new commentary of paragraph 12.4 which in general states that 'the use and enjoyment of a dividend must be distinguished from the legal ownership, as well as the use and enjoyment, of the shares on which the dividend is paid' is not a comment that also belongs (more) to the commentary to the interest and royalties articles? As a result, it comes across to me that instead of providing guidelines, the above mentioned commentary is unnecessary and the danger of creating limitations (by governments) on the application of the dividend article may be exist.

In respect of the commentary to the interest & royalties article, paragraphs 10.2 last sentence & 4.3 last sentence: it states that 'one has to distinguish from the use and enjoyment of the legal interest & royalty ownership, the use and enjoyment of the debt-claim & right or property to which the interest & in respect of which the royalties are paid'. Within the same paragraphs, the pass-on obligation as referred to already above is also mentioned. I am wondering therefore whether or not the paragraph 10.2 last sentence & 4.3 last sentence have any additional value/does it not create limitations?

Last but not least, the commentary on the dividends, interest and royalties articles (in this case the last sentence of the paragraphs 12.1, 9.1 and 4) all state that 'the domestic law meaning of beneficial owner ...is applicable to the extent that it is consistent with the general guidance included in this Commentary'. I am wondering if it would not be possible to elaborate/extend more on this statement as the commentary seems to be more strict with the 'taxpayers' than the 'governments' involved: I think there is currently a trend that the interpretations of the OECD commentary by the various governments in the world goes much further than should be allowed.

Kind regards,
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