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Direction des Affaires Fiscales

MEDEF's position



CLARIFICATION OF THE MEANING OF “BENEFICIAL OWNER” IN THE OECD MODEL TAX CONVENTION

MEDEF supports the project of clarifying the notion of “beneficial owner” (BO). As this term is generally found in articles 10, 11 and 12 of the tax treaties deriving from the OECD Model Tax Convention and may restrict the availability of a reduced withholding tax rate or lead to double taxation, it is of utmost importance that its meaning is indeed clarified.

In this context, our main observations are the following (they all apply to articles 10, 11 and 12 of the OECD Model Tax Convention) :

- We welcome the clarification suggested by the OECD in paragraph 12 of the Commentary: “It makes plain that the State of source is not obliged to give up taxing rights over dividend income merely because that income was immediately received by paid direct to a resident (...). This modification indeed eliminates any ambiguity on the fact that the notion of BO is somehow linked with the timing of the payment. We however believe that such an ambiguity may be restored from the example stated in the footnote to paragraph 12.1, as it might be interpreted as impacting the nature of the BO depending on the timing of a dividend distribution of a discretionary trust.
- We also welcome the intent of paragraph 12 of the Commentary of achieving an international consensus on the meaning of the notion of BO, as this notion should indeed derive from an international meaning and not from the domestic laws of each and all contracting States.
- We finally support the definition of the BO as stated in paragraph 12.4 of the Commentary, which refers to the “full right to use and enjoy the [dividend/interest/royalties] unconstrained by a contractual or legal obligation to pass the payment received to another person”, although we believe that the notion of BO would rather cover situations where the

payment has a “right to use and enjoy” rather than the “full right to use and enjoy”, as full right vs. right may lead some tax authorities to unduly restrict the scope of the BO notion to an entity having full ownership vs. partial ownership (e.g., usufruct).

- We are however of the opinion that where paragraph 12.4 sets out a sound principle (“right to use and enjoy the [dividend/interest/royalties] unconstrained by a contractual or legal obligation to pass the payment received to another person”), it immediately thereafter introduces a great level of uncertainty by tainting this straightforward definition with a substance test. This substance test may allow the tax authorities to raise facts and circumstances deriving from relationships that would go beyond the mere status of the recipient (e.g., its relationships with other parties) to challenge its BO status, whereas, the meaning of BO should be based on an unbiased criterion solely based on its legal or contractual relationship with the paying entity.
 - The current draft may result in shifting the burden of the proof to the taxpayer, which may have to demonstrate that it is making a payment to a BO to benefit from the treaty.
 - We therefore think that, unless it is clearly limited to the definition included in paragraph 12.4 (“right to use and enjoy the [dividend/interest/royalties] unconstrained by a contractual or legal obligation to pass the payment received to another person”), the current draft may add confusion to the concept, as well as it introduces de facto another anti-avoidance provision to the OECD Model Tax Convention, which is already efficient and appropriately protecting the States from treaty shopping, as rightly pointed out by paragraph 12.5 of the Commentary.
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