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July 15, 2011

By E-Mail:

To: Mr. Jeffrey Owens
Director, Center for Tax Policy and Administration
OECD
2, rue André Pascal
75775 Paris, France

From: Kyung Geun Lee
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Re: Comments on the OECD Discussion Draft re the Meaning of “Beneficial Owner”

Dear Mr. Owens,

Yulchon appreciates this opportunity to submit the following comments on the public discussion draft dated April 29, 2011 (“**Discussion Draft**”), proposing to clarify the interpretation that should be given to the concept of “beneficial owner” in the context of the OECD Model Tax Convention (“**Model Convention**”).

Given the confusion that has arisen over the term because the rules of treaty interpretation allow source countries to use domestic law in defining terms not otherwise defined in a treaty, we appreciate the efforts undertaken by the OECD in this area and believe that the Draft Discussion’s proposed clarification represents a step towards achieving an international consensus on the scope and meaning of the term “beneficial owner.”

While we concur on many points addressed in the Discussion Draft, we believe that further consideration and practical guidance is necessary regarding the term “beneficial owner” in the contexts of multi-tiered fund structures, in order to prescribe appropriate treatment of such funds receiving passive investment income for the reasons set forth below.

The Discussion Draft provides that the recipient of a dividend, interest or royalty payment is the “beneficial owner” of the subject payment where the recipient has the “full right to use and enjoy the dividend, interest or royalty unconstrained by a contractual or legal obligation to pass the payment received to another person.” The proposed commentary notes that such an obligation will normally derive from relevant legal documents but may also be found to exist on the basis of facts and circumstances showing that, in substance, the recipient clearly does not have the full right to use and enjoy the payment.¹ The Discussion Draft also clarifies that the mere fact that the recipient of a payment is considered to be the beneficial owner of that payment does not mean that the recipient is entitled to treaty benefits with respect to the payment; rather, the proposed language explicitly states that treaty benefits should not be granted in cases of abuse and refers to other methods of combating treaty shopping situations, including specific treaty anti-abuse provisions, general anti-abuse rules and substance-over-form approaches.²

We generally agree with the foregoing approach but believe that further clarification is necessary with respect to application of the concept of beneficial ownership especially in the context of a multi-tiered fund structure, which seems to lack consensus across countries. We believe this is particularly significant given the vast number of cross-border investments structured in such a manner in practice.

By way of example, assume that a German fund (the “**Fund**”) organized as a limited partnership (i.e., KG) under German law incorporated two wholly owned subsidiaries in Germany (collectively referred to as “**German Sub Holding Cos**”; organized as GmbHs), which were tax resident in Germany for German tax purposes. Each German Sub Holding Co owns 50% of the shares in a Korean company (“**Korea Co**”). All the investors in the Fund are German corporations. With respect to dividends distributed by Korea Co, who should be treated as the beneficial owner under the proposed commentary as put forth by the Discussion Draft?

We include an example here not to seek a specific answer for this particular case but to highlight the point that further clarification on the beneficial ownership concept is

¹ Proposed Commentary on Article 10 (Dividends) of the Model Convention, paragraph 12.4.

² Proposed Commentary on Article 10 (Dividends) of the Model Convention, paragraph 12.5.

needed in the case of multi-tiered funds. Given the importance of this issue, we think it would be very helpful if the Commentary can provide some typical examples where a fund can be viewed as having the “full right to use and enjoy the dividend, interest or royalty unconstrained by a contractual or legal obligation to pass the payment received to another person.” That would provide much needed practical guidance on this topic, which would be appreciated by the industry and tax practitioners across the world.

We strongly support further action by the OECD to conclude this work and would be pleased to answer any questions or discuss the views outlined in this letter.

With best regards,

Yulchon, Attorneys at Law

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