



**14 July 2011**

Mr Jeffrey Owens  
Director, CTPA  
OECD  
2, Rue André Pascal  
75775 Paris  
France

Dear Mr Owens,

**Re: Taxand Comments on the Clarification of the Meaning of 'Beneficial Owner' found in Articles 10, 11 and 12 of the OECD Model Tax Convention**

Further to the recent discussion paper from the OECD Tax Model Convention regarding the clarification of the meaning of 'beneficial owner', Taxand is honoured to provide comments.

First of all, we would like to salute the Committee of Fiscal Affairs for its continual improvement to the efficiency of the Model Convention which is an essential tool for coordinating international taxation in the business community. We welcome the introduction of a treaty based approach as a significant step towards decreasing the confusion in the meaning of the beneficial ownership concept. As noted in our comments, we feel that including examples and "real life" cases will achieve a better understanding of the concept. We also feel that the current wording is too broad and may allow for a more aggressive and arbitrary approach by tax authorities towards structures which are not aimed at the abuse of treaties.

In order to provide you with a global perspective on the discussion paper, we have asked Taxanders from around the world to provide their comments, including Taxand Cyprus, Taxand India, Taxand Luxembourg, Taxand Netherlands, Taxand Spain, Taxand Thailand and our Taxand Global Transaction Tax Service Line.

**Our comments on the discussion paper**

We feel that there are three main topics in the discussion draft. Each topic is addressed below with accompanying comments.

1. A treaty based approach to interpreting the meaning of "beneficial ownership" is used, although it recognises that a domestic law interpretation may be applicable if consistent with the general guidance of the commentary. A narrow technical interpretation of the term based on domestic law is not appropriate.



- ❖ A domestic law approach has the disadvantage of creating differences of the interpretation per country, especially between common law and civil law countries.
  - ❖ Case law and (local) understanding of the beneficial ownership concept is however in general available within a domestic law approach.
  - ❖ A unilateral (domestic law) approach to defining a notion of beneficial ownership has not proven to provide satisfactory answers to the interpretation issue. We therefore in general support a treaty based approach.
  - ❖ The choice for a treaty based interpretation will decrease confusion on the meaning of beneficial ownership but will not fully eliminate discussions.
  - ❖ The treaty based approach in the discussion paper seems however broad and very limited background information or general understanding of this approach is currently available.
  - ❖ The proposed approach may therefore allow further arguments for tax authorities to pierce through the corporate structure and may create more discussions.
  - ❖ The changes proposed in the discussion draft permit that the term beneficial owner may be interpreted in light of guidance available under domestic laws to the extent such guidance is in line with the context, object and purpose of the tax treaty. The exercise of determining whether the domestic law interpretation is in line with the context of the treaty or not, is bound to add a further dimension to the confusion surrounding the interpretation of the term beneficial owner. It can be considered to enable the taxpayer to choose between the domestic law interpretation or the general guidance of the OECD commentary.
  - ❖ The interpretation of the meaning of beneficial ownership in the courts of the countries based on the proposed wording of the report will in general not move quickly. Therefore a period will exist in which uncertainty may exist.
  - ❖ We are therefore concerned that the proposed approach in the discussion paper will not provide much clarity in the near future and may even create more confusion.
  - ❖ We strongly recommend that further wording or concrete examples by the OECD of how the proposed interpretation works in actual cases are included.
2. The recipient of a payment is the beneficial owner if he has the full right to use and enjoy the income unconstrained by a contractual or legal obligation to pass the payment to another person. Such an obligation will normally derive from relevant legal documents but may also be based on facts and circumstances which show that the recipient does not have the full right to use and enjoy the payment. The use and enjoyment of a payment must be distinguished from the legal ownership.
- ❖ The discussion paper seems to be in favour of an economically oriented approach as generally applies in common law countries. Civil law countries would therefore have to apply common law criteria to define the identity of a beneficial owner.
  - ❖ The current wording seems too broad and may result in uncertainty for tax payers since legal documents, facts and circumstances may be relevant in determining the constrained use of the income.



- ❖ We feel that the legal documents should be the prevailing factor in determining who the beneficial owner is. The economic approach should only be relevant for agents, nominees and mere conduit companies.
  - ❖ We suggest referring to the "Double Taxation Conventions and the Use of Conduit Companies" report in further discussion papers or the commentary to the model treaty to clarify certain concepts.
  - ❖ We feel that further guidance is necessary on the phrase 'full right to use and enjoy the income unconstrained by a contractual or legal obligation'. In absence of a precise interpretation, the application of the phrase might extend to cover normal business transactions like payment of dividend by a subsidiary to its parent.
  - ❖ Also, it is possible that domestic laws of some countries require specific classes of taxpayers to distribute their income to stakeholders. An exclusion needs to be provided for such cases as such diversion of income is by reason of operation of law and not because of the fact that the taxpayer is a conduit.
  - ❖ Part of income received by normal holding / finance or headquarter companies will in general be paid to third parties to meet certain (debt) obligations. The current wording may impact these types of normal transactions which are not set up for treaty shopping purposes.
  - ❖ To ensure consistent and equitable application of the concept of 'beneficial ownership', we suggest providing certain illustrations for interpreting the phrase 'unconstrained by a contractual or legal obligation'.
  - ❖ The legal and economic ownership of certain income is sometimes difficult to determine in complex financing vehicles. For example through securitisation, hedging instruments, derivatives, swaps, guarantees etc...The impact of these type of financial instruments requires a detailed analysis to determine the impact on a beneficial ownership discussion. We therefore suggest including wording or examples on how to deal with the impact of these financial instruments in a beneficial ownership discussion.
3. The fact that the recipient qualifies as the beneficial owner does not guarantee reduced withholding tax rate based on the treaty. Other anti-abuse rules can be included in a treaty which may restrict the use of the treaty.
- ❖ Multiple layers of anti-abuse provisions may render a treaty inoperable and will not achieve the goal of a treaty to encourage international business and trade.
  - ❖ The wording of the discussion paper combined with examples should provide certainty on the interpretation of beneficial ownership and should therefore reduce the need for further anti-abuse rules.
  - ❖ We therefore feel that multiple layers of anti-abuse provisions in treaties should be avoided.
  - ❖ It is important to determine whether the beneficial ownership clause works like an anti-abuse clause or an attribution of income. The discussion paper is clear in the sense that it is aimed at clarifying the wording "paid to..." in articles 10, 11 and 12.



This being the rational, we expect that the comments clarify the application of the right treaty to the beneficial owner (similar to the treatment of partnerships). Otherwise, the mere anti-abuse approach of this clause may lead to double taxation.

### **Taxand's Take**

Overall the draft discussion proposed clarification is a step forward in an international consensus on the interpretation of the concept of a beneficial owner. The proposed new wording will however not remove all disputes on the interpretation of the concept. The broad wording will offer arguments for tax authorities to take a more aggressive and arbitrary approach towards conduit companies but also to structures which are not aimed at treaty abuse. The biggest risk is with complex financial transactions, as these will be targeted by tax authorities even though there is no abuse of a treaty. We therefore feel that the OECD should further refine and elaborate the discussion draft so as to bring about more clarity on the interpretation the concept of beneficial ownership.

We appreciate this opportunity to provide comments to the Committee of Fiscal Affairs and would be pleased to discuss this further and / or to participate in any further discussion on these matters.

More information on how to contact me and about Taxand is provided as Appendix I. Taxand is wholly committed to supporting the OECD Committee of Fiscal Affairs and we look forward to contributing to further debate.

Yours sincerely,

Taxand



## APPENDIX I

### CONTACT DETAILS

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### ABOUT TAXAND

Taxand provides high quality, integrated tax advice worldwide. Our tax professionals, nearly 400 tax partners and over 2,000 tax advisors in nearly 50 countries - grasp both the fine points of tax and the broader strategic implications, helping you mitigate risk, manage your tax burden and drive the performance of your business.

We're passionate about tax. We collaborate and share knowledge, capitalising on our collective expertise to provide you with high quality, tailored advice that helps relieve the pressures associated with making complex tax decisions.

We're also independent—ensuring that you adhere both to best practice and to tax law and that we remain free from time-consuming audit-based conflict checks. This enables us to deliver practical advice, responsively.

Taxand has achieved worldwide market recognition. In the International Tax Review's (ITR) World Tax 2011, over 95% of Taxand countries are ranked top. 32 Taxand countries were voted top in the ITR Tax Planning Survey 2011 and 34 countries were voted top in the ITR Transaction Tax Survey 2011. At the ITR European Tax Awards 2011, Taxand won 'European Indirect Tax Firm of the Year 2011' and 'European Tax Policy Firm of the Year'. Taxand also received 5 'National Tax Firm of the Year' awards for Cyprus, Poland, Portugal, Spain and Turkey and Taxand Belgium won 'Best Newcomer'. In 2010, Taxand won 4 regional awards including Asia Transfer Pricing Firm of the Year, Asia Tax Policy Firm of the Year, Latin America Tax Disputes Firm of the Year and European Indirect Tax Firm of the Year, and 10 national awards.

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