M&O
ABOGADOS

Clarification of the meaning of "beneficial owner" in the OCED Model Tax Convention

-Discussion Draft-

Paragraph 1 of article 10 of the OECD Model Tax Convention on Income and Capital (hereinafter "MC OECD"), states the following words: *"…paid…to a resident…*". The term "beneficial owner" was introduced in paragraph 2 in order to clarify these words and to explain that such "*term is not used in a narrow technical sense, rather, it should be understood in its context and in the light of the object and purpose of the Convention*".

Starting from here, we believe that the proposed changes indeed one step further into the clarification of the term "beneficial owner".

There are three main points of the proposed changes that we would like to point out:

- Paragraph 12.4: "*the recipient of the dividend is not the "beneficial owner" because that recipient does not have the full right to use and enjoy the dividend that it receives and this dividend is not its own*".

  In relation to the first point, we cannot avoid the reference to the Canadian court case *Prevost Car Inc*. which also speaks as beneficial owner: *"of dividends (is) the person who receives the dividends for his or her own use and enjoyment and assumes the risk and control of the dividend he or she received (…) this person is not accountable to anyone for how he or she deals with the dividend income*".

  In this case, the judge identified the holding company as the beneficial owner of dividends distributed by the subsidiary and not the shareholders of the holding company because this last company had no obligation to distribute the dividends to the shareholders –it had the property of the dividends-.

  What we are concerned about is the current and usual business structure of Multinational Companies (hereinafter MNC).

  MNC that operate in different regions (Europe, Asia, America) have in the last few years organized in regional headquarters, acting as holding companies for the affiliates in those regions.

  We cannot ignore that those sub headquarters are dependent of the decisions of the central holding company (usually a quoted company).

  We are concerned a restrictive interpretation of the *full right to use and enjoy the dividend* can lead to practices that hinder the aim of the DTTs, essentially to favor cross border transactions eliminating double taxation.

- Paragraph 12.1: We consider unnecessary and even counterproductive the reference to the internal law regarding the definition of Beneficial Owner.

  In Continental Civil Jurisdictions the rules of interpretation about tax terms usually follows the same procedure: first of all, to seek the definition and interpretation given by tax norms (DTT in this case, Internal tax law,…) and if no such definition or interpretation is found in the tax norms, to seek a definition or interpretation in the rest of the internal legislation.

  Therefore, the reference to internal law in 12.1 can lead to the application of a beneficial owner term that is contrary to the desires of the Commentaries, (despite the inclusion of paragraph 12.6): namely to apply the definition given by other set of rules that have other concerns rather than elimination of the double and nil taxation.

- Paragraph 12.5: "*The fact that the recipient of a dividend is considered to be the beneficial owner of that dividend does not mean, however, that the limitation of tax provided for by paragraph 2 must automatically be granted".*

  In relation to the third point, we agree that there are a variety of anti-abuse measures than should be taken into account when dealing with treaty shopping issues. To prevent tax avoidance, countries have developed a variety of terms that should be considered as a whole and not independently because they have all been developed within the same parameters: avoid treaty shopping.