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Corporate and Commercial Department

Your ref: **Our ref:** EN/PHA/GEN **Date:** Tuesday, 26 July 2011

Jeffrey Owens
Director CTPA
OECD
2 Rue Andre Pascal
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France

Dear Mr. Owens

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

Many thanks for giving us the opportunity to be of assistance to OECD and in particular its continuous efforts to update the commentary to the OECD Model Tax Convention. Based on our broad practical experience in this area, we consider this effort to be crucial in the direction of streamlining international trade through the application of globally accepted fiscal principles and interpretations.

We would like to welcome the opportunity to comment on the Centre for Tax Policy and Administration's discussion document on the meaning 'beneficial owner'. We agree that this is an important matter that merits sufficient and adequate clarification. The definition of 'beneficial ownership' is particularly problematic in view of the multiplicity of interpretations that may arise in this context at various domestic levels given that it is a term which is borrowed from the corporate and fiduciary services sphere but its meaning in the context of the complex trust world is far from being clear."

As a first point, we are not in principal disagreement with the suggestion that there need be no single agreed definition of 'beneficial owner' that applies in all situations, provided however that each definition is clear and there is also clarity as to which definition applies in which circumstances. However one of the main problems is that there is no sufficient clarity between different jurisdictions and as a result the concept of 'beneficial owner' has in practice given rise to a materially different interpretations by courts and tax offices worldwide something which increases the costs and uncertainty amongst tax payers and therefore hinders international trade.

With that in mind there is an urgent need for a sufficient and conclusive clarification to be made at the level of OECD so as to promote uniformity throughout OECD members and compliant states worldwide. In that respect, the OECD's definition will enable a gradual adoption of more uniform definitions at the national level.

The issue of multiple interpretations was considered in detail in recent court cases in the common law world and most notably in Indofood International Finance Ltd v. JP Morgan Chase Bank NA, E&W Court of Appeal (2006) 8 ITLR 653; (2006) STC 1195 and Prévost Car Inc. v. The Queen (2009), Federal Court of Appeal of Canada 257).

In the Indofood case the English Court of Appeal coined the term "international fiscal meaning" in the context of trusts by deciding that the term 'beneficial owner' should not take a meaning according to national law but that it should be given its international fiscal meaning. This is a landmark case which provides ample evidence of (or simply underpins further) the appeal of international organizations and approaches have in the field of international taxation and the resolution of fiscal problems. For that reason, there is growing consensus that the initiative should be taken at an international level by OECD to "iron out" and expand the concept in such a way so as to promote its consistent adoption by national courts and tax administrations in a global manner something which will assist in coordinating international taxation in the business community.

Moreover, it would be really helpful to see some case-studies or examples as to how the "beneficial ownership" concept can be used in various contexts and scenaria (some suggestions are provided under point 5 below) so as to assist local tax administrations and courts apply the concept in a manner which will be less controversial. This will help in minimizing the risks for tax payers worldwide of unjustified conservatism on the part of a number of national tax authorities who may be unwilling to interpret wide concepts in favour of tax payers (especially amongst the global economic crisis which calls for increasing tax revenues) whereby a wide array of structures may be arbitrarily deemed to constitute treaty abusive structures without any solid justification on the part of the tax authorities. By adopting a more case-specific approach the ambit of the concept will be limited by reference to examples of cases with solid, clear and uncontroversial facts, something which will demotivate tax authorities from acting arbitrarily to a considerable extent.

That being said, we would also like to add the following comments:-

1. A treaty based interpretation of the term will increase clarity on the meaning of beneficial ownership but will of course not be final since the applicability will still be subject to debate given the multiplicity of different jurisdictions and legal regimes, the types of legal entities and systems of taxation worldwide, the types of income generating securities (including hybrids) and in general the complexity of the manner when applied in real life situations. With that in mind and given that an national law approach to defining "beneficial ownership" has proven problematic we are in favour of a treaty based approach which will leave much

lesser room for interpretation on a national level – at least the level of smaller states such as Cyprus .

2. As recommended above, it is strongly suggested for common case examples to be included by the OECD on how the proposed interpretation will be applied in real world scenaria. There is an inherence risk that the proposed approach in the discussion paper is itself not sufficiently clear and may therefore create uncertainty at the level of national courts in case of tax disputes something which may create delays that will count against the tax payers interests given that in most cases the tax payer will be called to pay the tax and claim it back subsequently. If the tax payer will be faced with long lasting battles in court then there may be no real motivation to pursue an appeal against decisions of the authorities. The problem arises from the fact that the treaty based approach in the discussion paper is very wide and generic with little emphasis real life examples as to how the suggested model will work.

3. There should be a more effective and all-encompassing approach to the anti-abuse chapter altogether in the sense that a harmonization of anti-abuse principles should be considered. This is stressed since the requirement for the recipient to be the "beneficial owner" does not in itself constitute the sole ground for ensuring access to a double tax treaty. This is so given that other anti-avoidance or limitation of benefit provisions (i.e generic ones) could be invoked by the national tax authorities for disallowing access to a double tax treaty. This may hinder international trade given that the tax payer is faced with the increased costs and risk of the authorities seeking to rely on generic anti-avoidance provisions so as to entrench a pre-determined decision notwithstanding that the recipient may have invested all efforts necessary to satisfy the treaty based "beneficial ownership" test. Such generic-anti abuse provisions may render more specific tests, including the beneficial ownership test (however precisely or succinctly clarified) redundant given that they may operate in their place so as to block treaty access anyway.

   Moreover, regarding beneficial ownership, one of the thorny issues in attempting to clarify what is currently stated at paragraph 12 of the commentary regarding article 10 (dividends) is that if the main concern is about avoiding treaty abuses, as set out above, then the correct approach could be to ensure that there are suitable and limited in scope anti-conduit provisions.

4. As already suggested, further clarification and examples will be needed so as to clarify the phrase 'full right to use and enjoy the income unconstrained by a contractual or legal obligation'. In absence of a precise interpretation, normal transactions like payments of interest or dividends under "plain vanilla" securities or hybrids such as convertible debentures or even dividends may be caught. For instance income received by holding companies which is normally paid to third parties to meet certain obligations will be caught. As is, the wording in the proposed draft may inadvertently encompass such normal business dealings

which obviously do not constitute treaty shopping practices. This is a very important point which must be considered further.

Moreover, care should be taken to ensure that the tax payer is not put under a costly and cumbersome position whereby it shall be faced with the burden to prove that complex legal, financing or securitization related documents (with inevitable associated cash-flows to third parties) should not fall within the ambit of the said prohibitive provision and should therefore not be denied treaty access. In other words, care must be taken not to over-emphasize the economic dimension of the test but to provide more emphasis on the legal aspect of the test by providing firm and clear-cut examples showing which cases would (i) fail the beneficial ownership test (on the basis of the 'full right to use and enjoy the income unconstrained by a contractual or legal obligation") and (ii) not fail the beneficial ownership test on the same basis.

In view of the above, there is a concern that some features of the proposed changes may not bring about the envisaged results in that they do not decrease uncertainty but rather open the door to further uncertainty by introducing new terms which will themselves call for interpretation. In line with what is stated above, the statement in the Commentary that a recipient subject to an obligation to pass on the income collected will not be the beneficial owner is too generic and absolute. In this case the terms "obligation" as well as the term "passing on" are open to multiple interpretations and will most certainly necessitate to issue of further clarifications e.g through circulars by national tax authorities. Although there will be a need to examine the contractual documentation which creates the "obligation" to pass on the income to examine the existence and extent of such obligation, it is certain that in the case of complex legal instruments creating actual or contingent obligations such analysis may not be straightforward at all. The difficulty is further underscored by the reference in the commentary to the need to also give regard to the "substance" of the underlying transaction and legal documentation something which opens the door wide open as an additional generic anti-abuse provision.

5. That said, certain real life scenaria might prove troublesome to interpret consistently with the fairly broad wording in the commentary. For example:

(a) the joint venture agreement as well as the constitutional documents of joint venture companies usually have provisions providing for an almost automatic or at least prompt payment of distributable proceeds to the joint venture partners as this is an established practice; given the significance of cash flow operations in the context of joint venture companies, it is crucial to ensure that the definition of beneficial ownership will not exclude joint venture companies by virtue of the fact that the joint venture partners may –in economic terms- be deemed to be acting as a quasi-partnership.

(b) how certain sophisticated arrangements such as REPOs and the associated manufactured dividends payable to the seller under a REPO transaction (or payment equivalents under swap transactions entered into by investment banks) may be treated in light of the revised commentary;

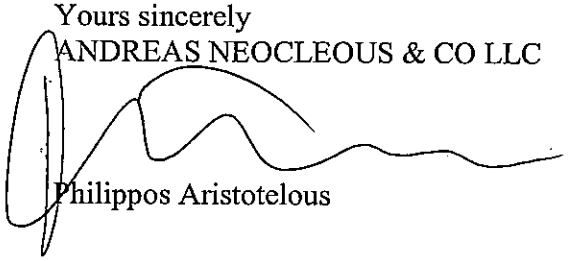
Such analysis on manufactured payments or payment equivalents could be made in the commentary to Articles 10, 11 and 12 on the discussion on on-payments.

(c) a special purpose finance vehicle ("SPV") borrows from banks or other entities and on-lends internally to other group members. The financing documentation may include provisions under which the bank or the third party lender is entitled to the proceeds under such arrangements. Moreover, such an SPV may grant pledges over bank accounts. It remains to be seen as to how an SPV whose bank account is pledged entirely in favour of a bank may be construed in light of the "beneficial ownership" definition;

(d) similar to (c) above, treasury operations using monies representing interest received on monies lent to pay the interest costs of its own funding arrangements.

We sincerely hope that the above is of use and remain at your full disposal to discuss any detail.

Yours sincerely
ANDREAS NEOCLEOUS & CO LLC



Philippos Aristotelous