Deloitte & Touche LLP
Certified Public Accountants
Unique Entity No. T080LL0721A
6 Shenton Way #32-00
DBS Building Tower Two
Singapore 068809

Tel: +65 6224 8288
Fax: +65 6538 6166
www.deloitte.com/sg

Our Ref: 2944/MD

13 July 2011
Mr Jeffrey Owens
Director, CTPA
OECD
2, rue Andre Pascal
75775 Paris
FRANCE

By email: Jeffrey.Owens@oecd.org

Dear Mr Owens

Comments on Public Discussion Draft: Clarification of the Meaning of "Beneficial Owner" in the OECD Model Tax Convention

It is with pleasure that we submit comments[1] on the OECD's public discussion draft *Clarification of the Meaning of "Beneficial Owner" in the OECD Model Tax Convention* (the "Discussion Draft"). We welcome the efforts of the OECD Committee on Fiscal Affairs to further clarify the Commentary on the concept of "beneficial owner" as found in Articles 10, 11 and 12 of the OECD Model Tax Convention. We provide the following comments to assist in further elucidating this concept.

As the amendments in the revised Commentary relating to Articles 10, 11 and 12 of the Model Tax Convention are substantially identical, our comments apply equally to the proposed amendments in the Discussion Draft for each of those Articles. For convenience, where we have referred to a proposed amendment below, we have used only the references relating to Article 10 (Discussion Draft proposed paragraphs 12.1 – 12.7).

Executive Summary

1. General interpretation principles – proposed paragraphs 12.1 and 12.6:
    - We agree with the proposed amendments to the Commentary relating to the technical legal meaning the term "beneficial ownership" may have under domestic law and the consideration of the term in its context.
2. Application of beneficial owner test to agents, nominees and conduit companies acting as a fiduciary or administrator – proposed paragraphs 12.3 and 12.4:

[1] The significant contribution of Ms Melissa Dejong (Deloitte Singapore) in preparing these comments is gratefully acknowledged.

- The Commentary should clarify whether the existing examples in proposed paragraph 12.3 (agent, nominee and conduit company acting as a fiduciary or administrator) limit the circumstances in which a recipient would be held not to be the beneficial owner, and that proposed paragraph 12.4 is merely a description of those circumstances; or whether the categories of agent, nominee and conduit company acting as a fiduciary or administrator are only examples of the general principle stated in paragraph 12.4 which may apply more broadly.

3. Availability of limitation of tax when interposed intermediary is a conduit company – proposed paragraph 12.7 (existing paragraph 12.2):

    - Proposed paragraph 12.7 should be amended to clarify that tax administrators should look-through intermediary entities which are not the beneficial owner (such as conduit companies acting as a fiduciary or administrator), such that the limitation of tax in the State of source remains available notwithstanding the interposition of such look-through entity.

4. Ascertaining the contractual or legal obligations to pass a payment received to another person and the examination of the substance – proposed paragraph 12.4:

    - The third sentence of proposed paragraph 12.4 should be clarified as to whether the reference to "in substance" is (i) a search for the true contractual or legal obligation (such as by examining other documents and the conduct of the parties); or (ii) it envisages the identification of an in-substance obligation, not based on any contractual or legal obligation.

    - The Commentary should explicitly allocate the burden of proof in the event of an examination of the substance of the obligations. In our opinion, the burden of proof should lie with the taxation authority.

    - Guidance should be provided by way of examples as to when a taxation authority should investigate whether there is an in-substance arrangement beyond the written terms of a contract or where no contractual or legal obligation exists.

5. Language clarifications – proposed paragraph 12.4:

    - To avoid ambiguity, the phrases used in the first sentence of proposed paragraph 12.4 should mirror those used in the second sentence.

    - The phrase "pass the payment" should be amended to account for situations where the precise amount or nature of the payment received is not exactly the same as that which is passed on to another person.

1. General Interpretation Principles – Proposed paragraphs 12.1 and 12.6

a) Background

Paragraph 12.1 of the Discussion Draft clarifies that the interpretation of "beneficial ownership" is not to be constrained by the technical legal meaning the term may have under domestic law, such as that deriving from principles of trust law. The Discussion Draft notes that such domestic legal principles may, however, be of assistance in interpreting the term "beneficial ownership," to the extent consistent with the OECD Commentary.

Paragraph 12.6 further adds that the meaning given to the term is to be considered in the context of Articles 10, 11 and 12, without importing other interpretations of the term that may be used in different contexts (such as in the context of tracing the effective control of an entity).

b) Our comments

We agree with the proposed amendments in the Discussion Draft. In our view, the proposed drafting effectively conveys its meaning and assists in the interpretation of "beneficial ownership."

2. Application of beneficial owner test to agents, nominees and conduit companies acting as a fiduciary or administrator – proposed paragraphs 12.3 and 12.4

a) Background

Paragraph 12.3 discusses the application of relief under a Double Tax Convention to agents, nominees or conduit companies that are acting as a fiduciary or administrator. Paragraph 12.4 begins: "*In these various examples (agent, nominee, conduit company acting as a fiduciary or administrator), the recipient of the dividend is not the beneficial owner because …*" The first sentence of paragraph 12.4 thus refers back to paragraph 12.3. The first and second sentences of paragraph 12.4 go on to describe the features of an entity that is not to be regarded as a beneficial owner, and those features of an entity that is to be regarded as a beneficial owner (such as the presence or absence of constraints on the recipient's freedom to deal with the income received).

b) Our Comments

The wording of paragraph 12.4 creates uncertainty as to the types of entities that would not be regarded as the beneficial owner. This uncertainty arises as paragraph 12.4 is capable of two interpretations.

The first is that the opening phrase of paragraph 12.4, by referring to the previous examples of agent, nominee or conduit company acting as a fiduciary or administrator, fixes the boundary of the scope of the paragraph, placing a limitation on the types of situations where an entity would be regarded as not being the beneficial owner. The description of the features of beneficial ownership that follows (such as being constrained because of a contractual duty to pass the payment to another person) is therefore merely an illustration of the nature of the relationship between an agent, nominee or conduit company acting as a fiduciary or administrator and the beneficial owner of the income. The consequence of this interpretation is that the types of entities that will not be regarded as the beneficial owner of the income are limited only to agents, nominees and conduit companies acting as a fiduciary or administrator. Therefore, a conduit which is not a company, and a conduit company acting otherwise than as a fiduciary or administrator, would fall outside the scope of the paragraph and would be regarded as the beneficial owner of the income.

The second interpretation is that the inclusion of the reference to agents, nominees and conduit companies acting as a fiduciary or administrator is a list of examples within a broader class of entities that could potentially be regarded as not being the beneficial owner of the income. In that case, the second sentence, commencing *"The recipient of a dividend is the 'beneficial owner' of that dividend where…"* is a statement of the general principle capable of application to any factual scenario and any type of entity; it is the test of beneficial ownership for the purposes of the Model Tax Convention.

The intended interpretation should be clarified. If it is intended that the exclusion from beneficial ownership is limited specifically to agents, nominees and conduit companies acting as a fiduciary or administrator, then we propose the following amendments be made to the first two sentences of paragraph 12.4:

> *12.4 In these* **specific situations described in paragraph 12.3** ~~*various examples*~~ *(agent, nominee, conduit company acting as a fiduciary or administrator), 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; the powers of that recipient over the dividend are indeed constrained in that the recipient is obliged (because of a contractual, fiduciary or other duty) to pass the payment received to another person.* **In other words,** *the recipient of a dividend is the "beneficial owner" of that dividend where he has the full right to use and enjoy the dividend unconstrained by a contractual or legal obligation to pass the payment received to another person.*

Alternatively, if it is intended that the test of beneficial ownership may apply more broadly than only to agents, nominees and conduit companies acting as a fiduciary or administrator, we propose that the first two sentences of paragraph 12.4 be amended as follows:

> *12.4 In these various examples (agent, nominee, conduit company acting as a fiduciary or administrator), 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; the powers of that recipient over the dividend are indeed constrained in that the recipient is obliged (because of a contractual, fiduciary or other duty) to pass the payment received to another person.*
>
> **12.4A The general principle is this***: the recipient of a dividend is the "beneficial owner" of that dividend where he has the full right to use and enjoy the dividend unconstrained by a contractual or legal obligation to pass the payment received to another person.* **The examples used in paragraph 12.3 (agent, nominee and conduit company acting as a fiduciary or administrator) are examples only and do not limit the situations in which the general principle may apply to determine that an entity is not the beneficial owner**.

3. Availability of limitation of tax when interposed intermediary is a conduit company – proposed paragraph 12.7 (existing paragraph 12.2)

a) Background

The application of Double Taxation Conventions to conduit companies was reported on by the OECD in 1986 ("*Double Taxation Conventions and the Use of Conduit Companies*"). In 2003, paragraph 12.1 of the Commentary was amended to take account of the role of conduit companies, stating that "…*a conduit company cannot normally be regarded as the beneficial owner if, though the formal owner, it has, as a practical matter, very narrow powers which render*

it, in relation to the income concerned, a mere fiduciary or administrator acting on account of the interested parties."

Existing paragraph 12.2 follows this statement, providing that the limitation of tax in the State of Source under a Double Tax Convention remains available when "*an intermediary, such as an agent or nominee located in a Contracting State or in a third State, is interposed between the beneficiary and the payer but the beneficial owner is a resident of the other Contracting State…*"

The Discussion Draft does not include any proposed amendments to the text of these paragraphs.

b) Our comments

There is uncertainty as to whether existing paragraph 12.2 is intended to include conduit companies acting as a fiduciary or administrator. Further, in light of the uncertainty as to the breadth of the application of the Commentary in proposed paragraph 12.4 (see Part 2, above), any clarification of that paragraph necessitates complementary clarification of proposed paragraph 12.7.

On a broad reading of paragraph 12.2, the words "an intermediary, ***such as*** an agent or nominee" could be interpreted as "an intermediary, including but not limited to, an agent or nominee". However, in using the example of only agents or nominees, it is arguable that the Commentary intentionally confines the application of this paragraph to certain types of intermediary. The type of intermediary contemplated may be only those having a similar legal relationship with a beneficiary as an agent or nominee has, being legal authority to act on the beneficiary's behalf. On this view, paragraph 12.2 does not apply to a wider range of intermediaries that have a different type of legal relationship with a beneficiary, such as conduit companies.

This latter view is supported by the inherent difference in character of the payment streams flowing through an agent/nominee and those payment streams flowing through a conduit company, as discussed below.

Paragraph 12.2 begins "*Subject to other conditions imposed by the Article…*" Taking Article 10, those conditions include:

- Article 10(2) provides that tax may be imposed in the Contracting State in which the dividend-paying company is resident; however, the rate of tax is limited where the beneficial owner of the dividend is resident in the other Contracting State.
- Article 10(2) begins "*However, such dividends…*" Thus the scope of Article 10(2) is the dividends previously described in Article 10(1).
- The description of the dividends in Article 10(1) includes a nexus requirement: the dividend is (i) paid by a resident of one Contracting State; and (ii) the dividend is paid to a resident in the other Contracting State.

A similar construction is found in Article 11. In Article 11, the conditions are as follows:

- Article 11(2) provides that tax may be imposed in the Contracting State in which the interest arises; however, the rate of tax is limited where the beneficial owner of the interest is resident in the other Contracting State.
- Article 11(2) begins "*However, such interest…*" Thus the scope of Article 11(2) is the interest previously described in Article 11(1).
- The description of the interest in Article 11(1) includes a nexus requirement: (i) the interest arises in a Contracting State; and (ii) the interest is paid to a resident in the other Contracting State.

Thus, Articles 10 and 11 require a direct identity between the dividend being paid by the resident of one Contracting State and the dividend which is paid to the beneficial owner being resident in the other Contracting State; or a direct identity in regard to the interest which arises in one Contracting State and the interest which is paid to the beneficial owner being a resident of the other Contracting State.

In Article 12, a simpler construct is found, as the Article in the Model Tax Convention exempts royalties from tax in the source country. The nexus, however, remains present: (i) royalties arise in a Contracting State; and (ii) the royalties are beneficially owned by a resident in the other Contracting State. Article 12 therefore operates on a slightly different but similar basis, requiring a direct identity between a royalty arising in a Contracting State and the royalty being beneficially owned by a resident of the other Contracting State. In each case, Articles 10, 11 and 12 require a single income stream.

In the case of a payment being made to an agent or nominee, the payment is in law owned by the beneficiary directly but physically received by the agent or nominee. Therefore, consistent with the analysis above, there is only one income stream. For that reason, as is stated in existing paragraph 12.2 of the Commentary (and existing paragraphs 11 and 4.2 of the Commentary in relation to Articles 11 and 12 respectively), the beneficiary can claim the benefits under a Double Tax Convention between his resident state and the source state, even if the agent or nominee is located in a third State.

However, in the case of a conduit company, the dividend is "paid" from the Contracting State to the conduit company (or interest or royalties "arise" in the Contracting State and they are paid to the conduit company). That payment stream is a stand-alone income flow and the payment is legally owned by the conduit company. There is then a second and separate (albeit related) payment flow whereby the conduit company pays an amount to the beneficial owner in the other Contracting State, not as the beneficial owner's representative but as a separate entity. There is no direct identity between the dividend being "paid" (or the interest or royalties "arising") in the first Contracting State and the beneficiary receiving a payment in the other Contracting State. There is nothing in the Commentary which suggests that the two separate income flows can be regarded as one, such that a Double Tax Convention could apply as between the Contracting State in which the income originates and the other Contracting State in which the beneficial owner is resident.

This fact was recognised by the Canadian tax authorities in the case of *Prevost Car Inc. v Canada* 2009 FCA 57, a case heard before the Canadian Federal Court of Appeal. In this case, the existence of an intermediary company in the Netherlands broke the nexus between the dividend paid by the Canadian resident company and the dividend received by the UK and Swedish resident companies. The tax authorities commented that as a result, the Canada-UK and Canada-Sweden Double Tax Conventions had no application. However, as a concession to the taxpayer, the tax authority chose to apply the reduced dividend withholding rates provided for under the Canada-UK and Canada-Sweden Double Tax Conventions, notwithstanding that they were not required to.

Proposed paragraph 12.3 makes it clear that a conduit company acting as a fiduciary or administrator "cannot normally be regarded as the beneficial owner", and consequently cannot claim relief under a Double Tax Convention. However, that should not automatically mean that the beneficial owner should also be precluded from claiming relief under the relevant Double Tax Convention. In our view, it is inappropriate that a person who utilises an agent or nominee should continue to enjoy the relevant Convention benefits, while another person who is the beneficial owner of a payment but who utilises a conduit company acting as a fiduciary or administrator to

receive that payment should be precluded from enjoying the same benefits. Although the legal steps involved in each process are different, the economic substance of the transaction is the same for the beneficial owner in each case.

The uncertainty as to the application of existing paragraph 12.2 to conduit companies acting as a fiduciary or administrator should be resolved. In our view, tax administrators should "look-through" agents and nominees as well as conduit companies acting as fiduciaries or administrators, such that the beneficial owner of the payment would be entitled to claim relief under a Double Tax Convention between its State of residence and the State in which the income originates.
Any amendment to proposed paragraph 12.7 must be consistent with the scope of the Commentary contained in proposed paragraph 12.4. If the first interpretation of paragraph 12.4 is adopted, limiting the application of the beneficial owner test to agents, nominees and conduit companies acting as a fiduciary or administrator, we submit that paragraph 12.7 of the Discussion Draft be amended paragraph to read:

> *Subject to other limitations imposed by the Article, the limitation of tax in the State of source remains available when an intermediary, such as an agent or nominee located in a Contracting State or a third State, is interposed between the beneficiary and the payer but the beneficial owner is a resident of the other Contracting State.* **The limitation of tax in the State of source is also available where an intermediary located in a Contracting State or a third State is interposed between the beneficiary and the payer and the intermediary is a conduit company acting as a fiduciary or administrator.** …

If instead the second interpretation of paragraph 12.4 discussed above is preferred, broadening the application of the beneficial owner test beyond agents, nominees and conduit companies acting as a fiduciary or administrator, our suggested amendment to paragraph 12.7 would instead read:

> *Subject to other limitations imposed by the Article, the limitation of tax in the State of source remains available when an intermediary, such as an agent or nominee located in a Contracting State or a third State, is interposed between the beneficiary and the payer but the beneficial owner is a resident of the other Contracting State*. **The limitation of tax in the State of source is also available where an intermediary located in a Contracting State or a third State is interposed between the beneficiary and the payer and the intermediary is not the beneficial owner of the income.** …

For the reasons given above, we recognise that both versions of the second sentence inserted above do not mesh well with the terms of Articles 10, 11 and 12. However, there is precedent for the Commentary to adopt an interpretation that seeks to take a purpose-based interpretation of particular provisions. For instance, we refer you to paragraph 6.4 of the Commentary on Article 1, which adopts a practical solution in respect of payments to a partnership, notwithstanding that it may not in all cases be a technically accurate interpretation of the payment stream contemplated.

4. Ascertaining the contractual or legal obligations to pass a payment received to another person and the examination of the substance – proposed paragraph 12.4

a) Background

The third sentence in proposed paragraph 12.4 states, in reference to an obligation to pass a payment received on to another person:

> *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 dividend…*

b) Our comments

This sentence has two possible interpretations.

First, it may be read as meaning that in ascertaining the extent of the legal obligations of a recipient to pass on a payment, regard may be had to both the legal documents and the surrounding facts and circumstances, including the conduct of the parties. In so doing, the taxation authority or court might find that the agreement between the parties is in fact as per the plain reading of the legal documents; or alternatively it might find that the parties' conduct and the surrounding circumstances indicate that the parties' true legal obligations in fact diverge from the plain reading of the documents. An example of this would be a where a written contract has been concluded between related parties which states the parties' obligations, but the parties have consistently ignored the written contract and acted on the basis of some other agreement (perhaps reached orally or on the basis of company practice or found in other written documents amending the terms of the contract). The task of the taxation authority or court is to identify the scope of the obligations as agreed between the parties, whether wholly contained in a written contract or not.

This approach is similar to guidance contained in the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations. At paragraph 1.53, those Guidelines state (in relation to agreements between related parties):

> *…it is therefore important to examine whether the conduct of the parties conforms to the terms of the contract or whether the parties' conduct indicates that the contractual terms have not been followed or are a sham. In such cases, further analysis is required to determine the true terms of the transaction.*

The second possible interpretation is that a taxation authority may conclude that an obligation in substance exists, even where there is no contractual or legal agreement to that effect. This interpretation arises based on the phrase in the third sentence: "*Such an obligation will normally derive from relevant legal documents* ***but may also be found*** *to exist on the basis of facts and circumstances…"* This phrase suggests that notwithstanding the non-existence of legal obligations, an obligation may be discovered from an examination of the surrounding facts. This interpretation authorises a tax authority or court to examine the factual scenario and deem an obligation to exist, even if the parties did not (subjectively) intend to be legally bound. A taxation authority would be able to then apply the relevant Double Tax Convention, or refuse to apply the Double Tax Convention, on the basis of the deemed obligation. This scenario could arise, for example, where even through there is no legal obligation on the parties, they act as if there were.

It is also possible to take the view that the second interpretation incorporates the first and that either interpretation may be applied where the facts require. That is, where there is a legal agreement, it is to be construed in light of the surrounding facts; and where there is no legal agreement, one may be found or deemed to exist based on the surrounding facts.

The practical implication of these two interpretations can be demonstrated by applying each to the facts in *Prevost Car Inc. v Canada*, noted above. In that case, a Canadian company paid a dividend to a Dutch company. The Dutch company was owned by two unrelated companies, tax resident in the United Kingdom and Sweden respectively. The Dutch company had no business

substance – it had no office, employees or assets (other than the shares in the Canadian company) and did not undertake any business activities. As a matter of practice, each quarter the Dutch company paid a dividend to its two shareholders of an amount substantially the same as the dividend received from the Canadian company. However, the Court of Appeal found that there was no legal obligation on the Dutch company to do so. The Court held that this was not a case where the Dutch company had "absolutely no discretion" in dealing with the dividends and the UK and Swedish shareholders had no enforceable right to receive the dividend (from the Dutch company). Accordingly, the Dutch company was held to be the beneficial owner of the dividend (paid by the Canadian company).
This decision can be considered to be consistent with the first interpretation above: the Court considered the legal documents and the surrounding facts, including the practice of the Dutch company to pass on the dividends each quarter. In other words, the surrounding facts did not lead to the conclusion that the Dutch company had a legal or other obligation to declare its own dividend every quarter.

However, if the second interpretation were applied, the court may have come to a different conclusion. That is, even if it were accepted that there was no legal obligation on the Dutch company to pay its own dividend, it acted as if it did have such an obligation. The court could then have held that the UK and Swedish companies were the beneficial owners of the dividend paid by the Canadian company, rather than the Dutch company. If this interpretation were to be applied, proposed paragraph 12.4 may result in an altered category of taxpayers being considered to be the beneficial owner than has previously been the practice.

The appropriate interpretation that is to apply should be clearly stated in the revised Commentary. In particular, given the potential reach of the second interpretation, if that interpretation is intended by the OECD, paragraph 12.4 should explicitly state that in considering the facts and circumstances, taxation authorities may deem a legal obligation to exist where there otherwise is none.

In either case, both interpretations in the proposed paragraph give considerable leeway to taxation authorities to consider a wide range of factors in coming to an assessment of whether a recipient has an obligation to pass a payment on. Given this breadth of authority, the revised Commentary should include further guidance as to whether the taxation authority or the taxpayer bears the burden of proof in establishing (or disproving) that the agreement is not as per the legal documents (or that an obligation exists at all). In light of the inherent practical difficulty in trying to prove a negative, we believe that the burden of proof should lie upon the taxation authority.

Further, the proposed paragraph states that the obligation will "normally" derive from the relevant legal documents. This suggests that it is only the unusual cases in which regard would be had to the surrounding facts, and perhaps even more unusual that an obligation would be deemed to exist without the existence of legal documents. However, there is currently no guidance as to when a case would be considered to fall outside the normal situation, triggering an investigation into the surrounding facts and circumstances. While we appreciate that this will always be a matter of the particular facts of each case, further guidance should be provided as to when a taxation authority should consider examining the facts and circumstances beyond the legal documents. Such guidance may best be provided by the inclusion of examples of cases where such an investigation should be undertaken.

5. Language clarifications – proposed paragraph 12.4

a) Background

As stated above, proposed paragraph 12.4 includes additional guidance relating to when a recipient is to be considered the beneficial owner of a payment. The first two sentences provide:

> *In these various examples (agent, nominee, conduit company acting as a fiduciary or administrator), 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; the powers of that recipient over that dividend are indeed constrained in that the recipient is obliged (because of a contractual, fiduciary or other duty) to pass the payment received to another person. The recipient of a dividend is the "beneficial owner" of that dividend where he has the full right to use and enjoy the dividend unconstrained by a contractual or legal obligation to pass the payment received to another person.*

b) Our comments

The first sentence is expressed in the negative: a recipient *is not* the beneficial owner where the stated facts apply. The same concept is expressed in the second sentence as a positive statement: a recipient *is* the beneficial owner where the stated facts apply.

We assume that the OECD intends these two statements to be mirror images of each other, having the same meaning but in the reverse. However, different language is used in these two statements. If the two sentences are intended to convey the same meaning, then for the avoidance of doubt identical language should be used. If the two statements are intended to convey different tests to be applied when a recipient is not a beneficial owner as opposed to when a recipient is a beneficial owner, then further elaboration is required to illustrate the significance of the intended difference.

Specifically, the phrase "*and this dividend is not its own"* appears in the first sentence but not the second. In our view, this phrase does not add any additional guidance and should be removed. Alternatively, the phrase should be added to the second sentence.

Further, the phrase "*the recipient is obliged (because of a* ***contractual, fiduciary or other duty****) to pass the payment…"* is used in the first sentence, but in the second sentence the phrase "*unconstrained by a* ***contractual or legal obligation*** *to pass the payment..."* appears [emphases added]. For the sake of clarity, the same description of the obligation should be used. In our view, the phrase "contractual, legal or fiduciary obligation" is preferable over the phrase "contractual, fiduciary or other duty" as the concept of "other duty" is potentially unclear and unintentionally broad (for example, an "other duty" could be interpreted as including a moral duty to pass on a payment to a family member). The use of the word "duty" should in this context generally only apply to fiduciary duties. If the description of the obligation in both sentences is replaced with "contractual, legal or fiduciary obligation", then the words "other duty" are unnecessary.

Secondly, the phrase "*pass* ***the*** *payment*" is used in both sentences. In our view, the use of "the" may be interpreted as limiting the application of the paragraph to a situation where the exact payment amount from the identical source of funds is to be passed on. Thus, an intermediary which did not earmark the funds but used its own pool of funds to pass on an equivalent amount of the original payment, or a conduit company that passed on a substantially similar but not identical amount of the payment (such as a smaller amount, having withheld its own margin from the original payment) may not be considered to "pass **the** payment". In practice, this may exclude a substantial number of cases from the application of the paragraph.

In addition, the phrase "pass the payment" could also be interpreted as being limited to payments having the same character, such as where interest is paid to a conduit company and interest is then paid to the beneficial owner. Arrangements are foreseeable where, for example, a payment of a dividend is made to a conduit company, but the nature of the payment made by the conduit company to the beneficial owner is in fact interest. In such a case, it would be possible to argue that the conduit company was not obliged to pass ***the*** payment; it instead passed on a different kind of payment.

We submit that the phrase "*pass the payment*" be amended to read "*pass a payment of an equivalent or substantially equivalent amount*". In our view, this is sufficient to capture back-to-back payment arrangements, while accounting for situations where different payment mechanisms, payment amounts or payment characters are used.

We trust that the above comments are of assistance to the OECD. We look forward to reviewing future developments on this issue.

Please do not hesitate to contact me on +65 6216 3227 should you wish to discuss any aspect of our comments.

Yours faithfully

Steve Towers
Tax Partner