

Paris, 14 December 2012

Object: BIAC response to the OECD Model Tax Convention: Revised Discussion Draft on the Meaning of “Beneficial Owner” in Articles 10, 11 and 12

Dear Pascal,

BIAC welcomes the opportunity to provide comments on the revised Discussion Draft entitled OECD Model Tax Convention: Revised Proposals Concerning The Meaning Of "Beneficial Owner" in to Articles 10, 11 And 12 (the revised Discussion Draft), outlined as follows:

General

BIAC has reviewed the revised Discussion Draft with interest, and we welcome the various changes intended at improving clarity and the additional guidance provided. We do have a small number of drafting suggestions that we believe will enhance the clarity of the draft. Before getting to those – and recognizing that you have not asked for substantive comments – there is, however, one significant concern that we would like to reiterate from our earlier comments because of its possible effect on the entire project. This relates to paragraph 12.4 and the withholding tax obligations that are imposed in very many countries around the globe. The nature of a withholding tax (and particularly the different rates of withholding that may apply by reference to the beneficial owner status of the recipient of income) means that a high level of certainty needs to be available in relation to the application of that beneficial owner test. In this context, we remain concerned that any test that includes a “facts and circumstances” or “substance” component will not achieve this required level of certainty, and, thus, may impede cross-border trade and investment. While we make no specific drafting comments on this, we would ask you to consider whether further changes could be made which would add to certainty in this area.

Specific Drafting Comments

Paragraph 12.1

We note that the majority of comments made on the Discussion Draft of 29 April 2011 support the conclusion that an autonomous treaty meaning should be given to the term "beneficial owner". However, in the revised Discussion Draft, the last sentence of the paragraph which had attempted to deal with the domestic meaning of the term has been deleted. We understand that the previously included sentence may have contradicted the intended conclusion that an autonomous meaning should be preferred to a domestic law interpretation. In our view, the deletion of this sentence does not wholly deliver the intended support of an autonomous meaning to the term "beneficial owner". For that reason, we suggest the existing text be amended to make it expressly clear that an autonomous treaty meaning is intended and is to be preferred.

In the case of paragraph 12.1, it might be possible to achieve the result suggested with the following changes to the draft language (with additions in bold and underlined and deletions struck through):

12.1 Since the term “beneficial owner” was added to address potential difficulties arising from the use of the words “paid to ... a resident” in paragraph 1, it was intended to be interpreted in this context and not to refer to any technical meaning that it could have had under the domestic law of a specific country (in fact, when it was added to the paragraph, the term did not have a precise meaning in the law of many countries). The term “beneficial owner” is therefore not, absent explicit incorporation, **given the meaning it has under domestic law** ~~a used in a narrow technical sense (such as the meaning that it has under the trust law of many common law countries¹)~~. Rather, it should be understood in its context **in the Commentary**, in particular in relation to the words “paid ... to a resident”, and in light of the object and purposes of the Convention, including avoiding double taxation and the prevention of fiscal evasion and avoidance.*

** We shouldn't give the impression that countries can't do that if they want to in a DTT – and that would still have to be a bilateral understanding.*

Paragraph 12.4

In the comments accompanying the revised paragraph 12.4, which are included in the revised Discussion Draft, there are helpful indications that the intention of the OECD, in framing the terms of paragraph 12.4, was to exclude a number of situations in which the proposed drafting could have unintended effects. This includes capturing cases where income received is used to meet other costs, such as interest that the recipient has to pay to a creditor. Such a fact pattern is especially common when considering the activities of banks and financial institutions; holding companies; etc. Whilst we are strongly of the view that the revised drafting should not lead to these unintended effects, concern remains that the revisions made to paragraph 12.4, will not yet deliver that result. This is primarily due to the introduction in the revised draft of a test as to whether any on-payment is "related" or "unrelated" to income received. The revised text provides no explanation of what "related" or "unrelated" mean, or how these terms should be interpreted. Without clear guidance on interpretation we consider that such terms could contribute to significant uncertainty and dispute.

Given this concern over the potential lack of clarity in relation to the newly-introduced concepts of “related” and “unrelated”, we suggest the following redraft of paragraph 12.4. This, we hope, will more clearly reflect the intended results of the OECD's recent draft. Our proposed wording is provided below (with additions in bold and underlined and deletions struck through):

*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's right to use and enjoy the dividend is constrained by a contractual or legal obligation to pass on the payment received 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 right to use and enjoy the dividend unconstrained by a contractual or legal obligation to pass on the payment received to another person. ~~This type of obligation must be related to the payment received;~~ This obligation ~~it would therefore not include contractual or legal obligations of the recipient unrelated to the payment received even if~~ **merely because** those obligations could effectively result in **be satisfied out of the payment to** the recipient ~~using the payment received to satisfy those obligations. Examples of such unrelated obligations are those unrelated~~ **obligations circumstances in which the recipient would have the full right to use and enjoy the dividend despite the obligation to make payments to another person include** situations where the recipient may **be obligated to make debt payments** ~~have as a debtor or as~~ **payments pursuant** ~~a party to~~ financial transactions or typical distribution obligations of pension schemes and of collective investment vehicles entitled to treaty benefits under the principles of paragraphs 6.8 to 6.34 of the Commentary on Article 1. Where the recipient of a dividend does have the right to use and enjoy the dividend*

unconstrained by a contractual or legal obligation to pass on the payment received to another person, the recipient is the "beneficial owner" of that dividend. It should also be noted that Article 10 refers to the beneficial owner of a dividend as opposed to the owner of the shares, which may be different in some cases.

Alternatively, if our preferred approach above is not acceptable to you, then a footnote could be introduced along the lines of:

For the avoidance of doubt, the statement above that the recipient of a dividend is not the beneficial owner of the dividend if the recipient's right to use or enjoy the dividend is constrained by a contractual or legal obligation to pass on the payment, is intended to be read narrowly. Thus, for example, under derivatives contracts, a recipient of a dividend that retains shareholder rights to vote the underlying shares or to use the dividend for any purpose would be considered the beneficial owner of the dividend since the recipient would enjoy voting privileges or the ability to use the dividend for any purpose.

If neither of these changes is acceptable, we would strongly recommend efforts to achieve a different route to greater clarity in relation to paragraph 12.4 if the objective of clarifying the meaning of "beneficial owner" is to be achieved.

Paragraph 12.5

We believe that paragraph 12.5 of the commentary would be improved by the addition of a final sentence which would read: "Conversely, the concept cannot be interpreted in such a way as to substitute for such broader anti-avoidance rules and doctrines when they do not appear in treaties or domestic law".

Again, we thank you for the opportunity to comment on this draft, and for the many improvements that it contains. We would reiterate again, however, the importance for both taxpayers and governments of providing clarity in this area to reduce the potential for uncertainty and dispute. We trust that the above comments are of assistance. If it would be useful, BIAC representatives would be pleased to meet with representatives of the OECD CFA Working Party 1 to assist in furthering the attempt to clarify the concept of "beneficial owner" in treaty situations based on the experience of business.

Sincerely,



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Chair, BIAC Tax Committee

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