15 December 2012
Taxand

Tax Treaties, Transfer Pricing and Financial Transactions Division
OECD/CTPA
taxtreaties@oecd.org

Dear Sir / Madam,

Re: Taxand Comments on the Revised Proposals concerning the Meaning of 'Beneficial Owner'

Further to the recent revised discussion draft concerning the meaning of beneficial owner in articles 10, 11 and 12 of the OECD Tax Model Convention, Taxand is honoured to provide comments.

We have previously provided comments on the first discussion draft. Our comments at the time focussed on our concern that a broad definition of a beneficial owner may result in additional uncertainties for taxpayers instead of achieving the goal of the OECD to promote certainty in international tax matters. We also asked for more real life and concrete examples to clarify the wording of the discussion draft.

In order to provide you with a global perspective on the discussion paper, we asked Taxanders from around the world to provide their comments.

Our comments on the revised discussion paper

- Overall we are positive about the clarifications given in the initial and revised draft documents. For example, we welcome the changes to the meaning of “beneficial owner” that move away from reliance on domestic law to a more clear treaty based approach.
- The Commentary on the term “beneficial owner” should remain focussed on mere agents, nominees and conduit companies instead of broadening the scope of the definition. In order to avoid uncertainties with regard to particular legal institutions (e.g. usufruct), we suggest limiting the definition of “beneficial ownership” specifically to agents, nominees and conduit companies acting as a fiduciary or administrator.
- The proposed wording on the "obligation to pass on the payment" in paragraph 12.4 of the Commentary does not meet the OECD’s goal to create certainty and should be reconsidered.
- Various commentators on the first draft noted that normal business transactions may be impacted by the proposed wording of the "obligation to pass on the payment." The

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revised draft moves the debate in the right direction and takes away some of the concerns, but does not sufficiently offer guidance, especially for financial institutions and transactions.

- The wording that beneficial ownership is not met if there is an "obligation to pass on the payment" is retained in the revised draft. Whether such an obligation exists needs to be reviewed based on "the facts and circumstances," which show that, "in substance," the recipient does not have the "right to use and enjoy" the income. The revised draft offers little guidance on how to approach this review and what "in substance" means.
- In response to comments from the first draft, the OECD attempted to provide some clarity on these terms by including wording on "related" and "unrelated" payments. However, rather than providing clarity, these new terms create another layer of uncertainty as they are not defined and are open for inconsistent interpretation.
- We feel that the revised wording may result in a more aggressive and arbitrary approach by the tax authorities in applying a much broader anti-abuse concept in connection with the interpretation of the terms.
- Financial transactions are increasingly complex and beneficial ownership issues are difficult to cover in a general definition. Our concern is that stacking clarifications as done in the revised draft may result in further uncertainty and complexity.
- In our comments on the previous draft, we suggested that the inclusion of examples may provide more clarity. The OECD decided not to include examples, but in I.31 it is explained that the changes made to paragraph 12.4 should provide some comfort. The wording of "should" and "some comfort" reflects that the Working Party already accepts that uncertainty will remain on the wording of paragraph 12.4. We regret this approach.
- Considering the concern of various parties about the proposed wording of paragraph 12.4 of the Commentary, we feel that the OECD should consider excluding the proposed wording of paragraph 12.4.

Taxand's Take

International companies need to deal with complex international and domestic tax rules. In the current economic climate, businesses are under increasing scrutiny over their tax structures. Therefore, it is more important than ever to provide clarity and guidance regarding the rules that these companies must adhere to. The term "beneficial owner" is a very important element which companies need to consider in their day to day operations. As a result, it would be unfortunate if the OECD accepts or settles for rules or guidance that leaves uncertainty about the definition of this key term.

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.

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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,

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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 2013, 43 Taxand locations were commended. 35 countries were voted top in the ITR Transaction Tax Survey 2012 and in the ITR Tax Planning Survey 2012. Taxand has received 48 national awards and 15 regional awards in the ITR European, Americas and Asia Tax Awards since 2009. These include European Private Equity Tax Firm of the Year, European Indirect Tax Firm of the Year, European Tax Policy Firm of the Year, Asia Transfer Pricing Firm of the Year, Asia Tax Policy Firm of the Year, North America Indirect Tax Firm of the Year, and Latin America Tax Disputes Firm of the Year. Full details of awards can be viewed at www.taxand.com/media/factsheet.

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