FOCUS

NEW CHALLENGES AND UNDERTAKINGS FOR ADMINISTRATIVE AND REGULATORY REFORM: A GLOBAL WATCH WITH CHINESE PERSPECTIVE

EVOLUTION OF THE BENEFICIAL OWNERSHIP CONCEPT: MORE THAN HALF OF CENTURY OF UNCERTAINTY AND WHAT HISTORY CAN TELL US

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Abstract The beneficial ownership concept has constituted for more than half a century one of the most fundamental and debated issues in the application of tax treaties. This article goes back to routes of this term explaining the reason of its original inclusion in the OECD Model Tax Convention and why ultimately such inclusion may have not been necessary. Then it analyses the historical developments of beneficial ownership in the OECD Model Tax Convention. For that purpose it considers different interpretations adopted by jurisdictions (particularly in China) and local courts delving into some of the landmark cases on the subject. Finally it provides a detailed analysis of the current meaning of beneficial ownership considering the most recent developments in the Commentary to the OECD Model Tax Convention.

Keywords beneficial ownership, OECD Model Tax Convention Commentary, interpretation, case-law, China

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INTRODUCTION

Since it was first introduced in 1977 in the OECD Model Tax Convention (OECD MTC) the meaning of beneficial ownership has been surrounded by great uncertainty.\footnote{See for an overview, LI Jinyan, Beneficial Ownership in Tax Treaties: Judicial Interpretation and the Case for Clarity, Comparative Research in Law & Political Economy, Research Paper No. 4/2012, at 188–192, available at http://digitalcommons.osgoode.yorku.ca/clpe/4 (last visited Oct. 5, 2017).} An unknown term in the domestic laws of many jurisdictions, the term has been subject to different interpretations by local authorities and courts. Meanwhile the OECD either through the amendments to the OECD Model Commentary,\footnote{With respect to beneficial ownership, the original 1977 Commentary was expanded and clarified twice: in 2003 and in 2014.} or through other OECD reports tried to provide some guidance about the meaning of beneficial ownership.

In this article I will first look back to the evolution of the beneficial ownership term from an historical perspective. In this context, an analysis will be made to the significant amendments to the OECD Model Commentary and the reports dealing with this issue. Then, a brief description will be made about some of the landmark cases dealing with the interpretation and application of the beneficial ownership and how the term has been understood differently by courts of different jurisdictions.

Finally, it will be analyzed (on the basis of the 2014 Commentary) what the significance is of any particular meaning the term “beneficial owner” has in a treaty state’s domestic law, for the meaning the term may have for treaty purposes. Thereafter, the various elements of the notion “beneficial ownership” as laid down in the 2014 Commentary will be described and analyzed.

I. THE EVOLUTION OF THE MEANING OF THE TERM “BENEFICIAL OWNER” IN THE OECD MTC AND ITS COMMENTARY

The notion “beneficial ownership” was introduced in 1977 in the Articles 10–12 of the
OECD MTC and was accompanied by a very brief Commentary. The text of the OECD Commentary was expanded in 2003 and some years later clarified by the OECD through drafts issued in 2011 and 2012, with a final text published as part of the July 2014 update of the OECD Model and its Commentary. While there are various minor differences between the three successive texts, the substance of the 2011 and 2012 drafts remained unchanged and found its way into the final text of 2014.3

A. The Origins

In accordance, the “beneficial owner” requirement can be found in the dividend, interest and royalty articles. Those provisions seem to be meant to limit treaty relief benefits solely to a beneficial owner who is a resident of the treaty country.

The first reference to beneficial ownership in a treaty arose in the 1966 treaty protocol to the 1945 Double Tax Treaty Agreement concluded between UK and US.4 It covered nominees, agents and trusts and it was subsequently adopted in other treaties that followed.5 The inclusion was made at the UK request motivated by the concern of avoiding abuse by taxpayers who are residents in third countries and could, for instance, put their income into the hands of bare nominees who are resident in the other contracting state and could therefore have access to treaty benefits. This was due to the peculiarities of the UK law at the time which provided a UK resident person acting as agent or nominee for another UK or non-UK person (principal) was taxed by UK on UK source income which the nominee is entitled to receive for its principal, while this agent or nominee would not be taxed on foreign sourced income received for the same principal. In any case, such person would be considered as liable to tax and consequently could qualify as a treaty resident.6 In other words, under 1963 OECD MTC such agent or nominee would be considered as a resident for treaty purposes under Article 4(1) and therefore would be entitled to treaty benefits.

B. The 1977 Amendments to the OECD MTC

The “generalization” of the term occurred with the 1977 amendments to the OECD MTC. Paragraph 12 of Article 10 of the Commentary provided that:

Under paragraph 2, the limitation of tax in the State of source is not available when an

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3 References to the OECD Commentary text in the analysis below will be to the OECD Commentary as it reads after the update of Jul. 2014.


intermediary, such as an agent or nominee, is interposed between the beneficiary and the payer, unless the beneficial owner is a resident of the other Contracting State. States which wish to make this more explicit are free to do so during bilateral negotiations.

The original purpose — clarified in the Commentary — was simply to make it clear that the intermediaries with minimal ownership rights such as agents and nominees should not be recognized as recipients for the purpose of applying reduced withholding tax rates under the tax treaties concerned. Similarly, the 1980 version of the UN Model Tax Convention also included the beneficial ownership reference. The inclusion of this requirement was apparently aimed at preventing that, by using agents or nominees, treaty relief could be achieved.

As referred to, this inclusion in the OECD MTC of 1977 was made upon the UK according to which the source country reduces withholding tax only if the beneficial owner of the income (the principal) is a resident. Such request by the UK aimed at avoiding abuse by taxpayers who are resident in third countries and could, for instance, put their income into the hands of bare nominees who are resident in the other contracting state. Although they were taxed only form income sourced in the UK they would still be considered as residents in accordance with their domestic laws and therefore qualify as residents for the purposes of Article 4(1) of the applicable tax treaty.

However, the OECD MTC 1977 update included also a second sentence to Article 4(1) stating that: This term [resident of a Contracting State] does not include any person who is liable to tax in that State in respect only of income from sources in that State or capital situated therein. According to this sentence, a person considered to be a resident according to the domestic laws but subject only to a taxation limited to the income from sources in that State or to capital situated in that State would no longer qualify as treaty resident for the purposes of claiming treaty benefits.7

Considering the above, this allows for an interesting conclusion: The beneficial ownership requirement was included when actually it was not needed anymore by virtue of the amendment in Article 4(1) second sentence.

C. The 1986 Conduit Companies Report

The OECD report on conduit companies,8 explains the purpose of including the beneficial ownership requirement:

The Commentaries mention the case of nominee or agent. The provisions would, however, apply also to other cases where a person enters into contracts or takes over obligations under which he had a similar function to those of a nominee or an agent. Thus a conduit company can normally not be regarded as the beneficial owner if, though the formal owner of certain assets, it has very narrow powers which render it a mere fiduciary

7 See Para. 8.1 of the Commentaries to Art. 4 of the OECD Model.
or an administrator acting on account of the interest parties (most likely the shareholders of the conduit companies).

[...]

Articles 10 to 12 of the OECD Model deny the limitation of tax in the State of source on dividends, interest and royalties if the conduit company is not its “beneficial owner.” Thus the limitation is not available when, economically, it would benefit a person not entitled to it who interposed the conduit company as an intermediary between himself and the payer of the income. Thus a conduit company can normally not be regarded as the beneficial owner if, though the formal owner of certain assets, it has very narrow powers [...].

As referred to, the original purpose of the beneficial ownership requirement was simply to make it clear that the intermediaries with minimal ownership rights such as agents and nominees should not be recognized as recipients for the purpose of applying the reduced withholding tax rates under the tax treaties concerned. The 1986 conduit report did not appear to materially change this meaning. Such report was intended to address concerns on the improper use of tax treaties. It referred that the use of improper whenever a person acts through a legal entity created in a certain State primarily with the purpose to obtain treaty benefits that would not otherwise be available to that person.9 The main body of this report was to approach possible solutions to the perceived problem of improper use of tax treaties.

The above quoted paragraphs merely refer that the fact that the main function of a company is to hold assets or rights is not in itself sufficient to categorize it as a mere intermediary, although this may indicate that further examination is necessary. Overall those statements appear to demonstrate that the OECD did not perceive the beneficial ownership text as an adequate response to the problem of conduit companies. In other words, the reference of the beneficial ownership requirement in the context of the conduit report was not meant to provide a broad anti-treaty shopping function to the term.10 It appears actually that in the conduit report the OECD merely confirmed the meaning of

9 This typically refers to treaty-shopping situations, where a person “shops” into an otherwise unavailable treaty through the creation of (more or less) complex structures. This form of abuse is commonly perceived as involving persons who are residents of third states attempting to access indirectly the benefits of a treaty between two contracting states. See inter alia, Stef van Weeghel, The Improper Use of Tax Treaties: With Particular Reference to the Netherlands and the United States, Kluwer Law International (London), (1998). Therefore, treaty shopping involves arrangements in which residents of third states make use of legal entities resident in a contracting state with the main purpose of obtaining tax treaty benefits between that state and other state in situations where the residents in those third states do not have substantial reasons as to establish entities in one of the contracting states.

10 Referring that beneficial ownership should be seen as a specific (not broad) anti-abuse tool with respect to treaty shopping structures involving conduit entities, see Luc de Broe & Niels Bammens, Treaty Shopping and Avoidance of Abuse, in Michael Lang et al. eds. Tax Treaties: Building Bridges between Law and Economics, IBFD (Amsterdam), (2010). Dissenting considering that the purpose of beneficial ownership is not anti-abusive although its interpretation may have similar effect, see Francisco Alfredo Garcia Prats, The Abuse of Tax Law: Prospects and Analysis, in G. Bizioli ed. Essays in International and European Tax Law, at 96 (2010).
beneficial ownership as it was already addressed in the 1977 OECD Model: intermediaries with very narrow powers over the income received. And ultimately the conclusion to be withdrawn from this report was that beneficial ownership was not actually the appropriate mechanism to address conduit companies.

**D. The 1999 Partnership Report**

An interesting insight on the (possible) meaning of the term beneficial ownership can be derived from example 9 of the OECD partnership report.\(^{11}\) Such example,\(^{12}\) deals with the situation in which P is a partnership established in State P. A and B are P’s partners who reside in State R. P owns shares in X, a company that is a resident of State S. X pays a dividend to P. State P and State S treat P as a taxable entity while State R treats it as fiscally transparent. The OECD conclusions were as follows:

> 73. This example presents a case where there will be a double entitlement to treaty benefits with respect to the same income. As in the previous example, partnership P is a resident of State P as it is liable to tax therein. P should again be considered by State S to be entitled to the benefits of the S–P Convention in relation with the dividends it derives from that State as it is liable to tax on those dividends and should therefore be considered to be the recipient and beneficial owner of that income. In contrast to the previous example, however, partners A and B should also be considered to be entitled to the benefits of the S–R Convention with respect to the partnership income as they are also liable to tax on that income. In contrast to the previous example, however, partners A and B should also be considered to be entitled to the benefits of the S–R Convention with respect to the partnership income as they are also liable to tax on that income. Thus both the S–P and S–R Conventions will restrict State S right to tax the dividends, regardless of whether State S taxes these dividends in the hands of the partnership or of partners A and B (under its domestic rules applicable to the taxation of partnerships, it will likely tax them in the hands of the partnership). Again, the tax treatment of partnerships in State S will not have any impact on this result so that both conventions would still be applicable if State S treated partnerships as transparent rather than taxable entities.

The meaning of beneficial ownership as provided in this example differs from the ones previously analyzed. Rather than focusing on the attributes over the income by the recipient, the beneficial ownership requirement arises here as linked to the liability to tax.

**E. The 2003 Amendments to OECD MTC Commentary**

When the beneficial ownership requirement was introduced in the OECD Model in 1977, the Commentary did not provide any definition of the term and merely referred to

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\(^{11}\) *The Application of the OECD Model Tax Convention to Partnerships*, Issues in International Taxation no. 6 (1999).

\(^{12}\) See example 9 of the report *The Application of the OECD Model Tax Convention to Partnerships*, Issues in International Taxation no. 6, at 29–30 (1999).
agents and nominees as examples of persons that normally are not to be considered to be
the beneficial owner of income they receive in their representative capacity. At that time,
no effort was made to include a (positive) definition of the notion “beneficial owner.” In
the 2003 update of the Commentary, the Commentary was expanded by the inclusion of
new Paragraphs 12 to 12.2 and conduit companies acting as a fiduciary or administrator
were added as a further example of recipients that should not be considered to be the
beneficial owner of the income they receive in that capacity. In accordance, the
Commentary read as follows:

12. The term beneficial owner is not used in a narrow technical sense, rather it should
be understood in its context in light of the object and purpose of the convention, including
avoiding double taxation and the prevention of fiscal evasion and avoidance.

12.1 Where an item of income is received by a resident of a Contracting State acting in
the capacity of agent or nominee it would be inconsistent with the object and purpose of
the Convention for the State of source to grant relied or exemption merely on account of
the status of the immediate recipient of the income as a resident of the other Contracting
State. The immediate recipient of the income in this situation qualifies as a resident but no
potential double taxation arises as a consequence of that status since the recipient is not
treated as the owner of the income for tax purposes in the State of residence. It would be
equally inconsistent with the object and purpose of the Convention for the State of source
to grant relief or exemption where a resident of a Contracting State, otherwise than
through an agency or nominee relationship, simply acts as a conduit for another person
who in fact receives the benefit of the income concerned. For these reasons, the report
from the Committee on Fiscal Affairs entitled “Double Taxation Conventions and the Use
of Conduit Companies” concludes 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.

The new(ly) added Commentary raised more doubts as to the meaning of beneficial
ownership in what appeared to be an expansion that was giving a new (broader)
dimension to beneficial ownership. The reference to “otherwise than through an agent or
nominee relationship” was read as express statement that the beneficial ownership
requirement was going beyond formal agency and nominee situations. Furthermore, terms
such as “who in fact receives the benefit of the income concerned” and to this being
assessed “as a practical matter” introduced subjectivity in the analysis of the requirement.
In particular it gave some leeway for interpretation of beneficial ownership as a sort of
economic test because the focus on the “benefit of the income” and “practical matter”
appears to focus on an economic analysis rather than looking to the legal powers of the
recipient of the income. The uncertainty and subjectivity in the interpretation of the term
increased also taking into account the lack of guidance as to assess what was considered
as benefit of income and what practical matters were to be considered.

Such interpretation does not seem to match the intended purpose of the beneficial
ownership requirement and a different understanding could be followed as to reconcile the expanded commentary with the original intent of the term.\textsuperscript{13} The new references added to 2003 Commentary should not be considered as introducing a materially different standard to the one of 1977. It should therefore be interpreted by reference to the final sentence of Paragraph 12.1 when it refers to “very narrow powers in relation to the income concerned” and the status of being “a mere fiduciary or administrator acting on account of the interested parties.” In fact the reference of 1977 was not merely limited to agents and nominees but the reference was rather to intermediaries such as agents and nominees. Therefore, the 2003 amendments, when read by reference to the attributes over the income (very narrow powers) would not different functionally and materially from the ones of the original 1977 version.

An additional argument that could be added is the fact that the introduction of a very broad scope of an economic test would likely not be intended without further explanation. As a matter of fact, to maintain and start Paragraph 12.1 with the reference to an agent or nominee would not make much sense given the considerably wider scope of the economic test.

Finally it would be very odd that given some language being imported from the conduit report, it would lead to a result in a Commentary that would be in apparent contradiction with the conclusions of the conduit report itself. As mentioned this report concluded that the approach to conduit companies was not in general properly addressed by beneficial ownership.

\textbf{II. RELEVANCE OF DOMESTIC LAW OR AUTONOMOUS INTERPRETATION?}

Perhaps surprisingly, when the term “beneficial ownership” was introduced in the OECD Model in 1977 the term did not have a specific meaning in the domestic tax law of any of the OECD Member States. In the years thereafter various countries introduced a definition of beneficial ownership in their domestic tax law. Nevertheless, it is highly debatable whether such domestic definitions are of (any) relevance for the interpretation of beneficial ownership.\textsuperscript{14}

\textit{A. Domestic References}

For instance, in the Netherlands, Parliamentary debates on tax treaty policy occurred during the 1980’s, concluded that if the income received is, under a contractual obligation, paid on to a large extent to another party under conditions that are (virtually) identical to those under which the income was received, then the intermediary recipient is not the beneficial owner. Subsequently the 2001 Dividends Tax Act incorporated the beneficial

\textsuperscript{13} See on this Collier, fn. 6 at 689–691.

\textsuperscript{14} For this reasoning some countries are opting to include a definition of the term in their tax treaties. See Francisco Alfredo Garcia Prats, fn. 10 at 101.
ownership requirement in the domestic law stating that a dividend recipient is not the beneficial owner of the dividend if underlying securities have been obtained by virtue of an arrangement under which the securities have been agreed to be resold or re-transferred.

In turn, one can found in the US Model Technical Explanation (2006),\textsuperscript{15} that since the term “beneficial owner” is not defined in the Convention, and is, therefore, defined as under the internal law of the country imposing tax (\textit{i.e.,} the source country). In other words, the beneficial owner of the dividend for purposes of Article 10 is the person to which the income is attributable under the laws of the source State.

\textbf{B. The Development in China}

The term beneficial ownership was first introduced,\textsuperscript{16} in the Chinese tax treaty network with the 1983 Double Tax Treaty concluded with Japan.\textsuperscript{17} However, it was only in 2009 that the State of Administration of Taxation (SAT) released Circular 601,\textsuperscript{18} that was aimed at providing interpretative guidance as to the meaning of beneficial ownership. In order to better understand the policy options adopted in this Circular it is relevant to consider the background in which it was issued. At the time, China had already a considerable tax treaty network. Therefore it was common to make use of jurisdictions with a competitive domestic tax system combined with a favorable tax treaty concluded with China in order to mitigate or minimize withholding taxes and the overall tax burden. Therefore and perhaps unsurprisingly, Circular 601 adopted a wide approach,\textsuperscript{19} to beneficial ownership that is construed as a broad anti-avoidance rule.\textsuperscript{20} Such approach further explained below goes beyond the strict meaning that motivated its inclusion in the OECD MTC and later clarified by the 2014 amendments to the Commentary.

In this context, Circular 601 sets forth a number of criteria which involve examining a number of attributes of the entity receiving the income, including the nature and extent of the entity’s business activities, the extent to which the entity is subject to tax and any contractual obligations of the entity to distribute its income to entities in a third country.\textsuperscript{21}


\textsuperscript{17} Agreement between the Government of the People’s Republic of China and the Government of Japan for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes of Sep. 6, 1983.

\textsuperscript{18} See SAT, Letter no. 601, of Oct. 27, 2009.

\textsuperscript{19} See QIU, fn. 16 at 104.


Concretely, the Circular defines beneficial ownership based on four conditions. Those conditions are: (1) The person is not an agent; (2) the person is not a conduit company; (3) the person has the right to own or dispose of the income and rights or property over the income; and (4) the person is (generally) engaged in substantial business activity.

This concept of beneficial ownership has (rightly so) been defined as a hybrid, combining both the legal assessment of the ownership rights over the income with a substance assessment of the business activity of the recipient of the income. In practice it appears that a broad emphasis has been placed in the substantive business requirement in order for a taxpayer to be qualified as the beneficial owner of the income leading tax authorities to commonly determining beneficial ownership primarily or exclusively, based on business substance rather than focusing (also) on the taxpayer’s ownership attributes over the income received.

The excessive emphasis on the substance requirement — while apparently supported by at least some part of the 2003 OECD MTC Commentary — could be subject to criticism when considered on a more historical perspective: The beneficial ownership requirement was originally introduced not a general substance test but was rather introduced to cover a very limited number of situations. Furthermore, testing predominantly the existence of business activities was something totally unrelated with the attributes of ownership over the income received.

Likely in order to address part of these concerns, the SAT issued clarifications in 2012 through SAT Announcement 30. According to such official explanation:

The determination of beneficial ownership shall rest on the recipient’s right to the income, including the right of ownership, control and disposal based on the “substance-over-form” doctrine. Even if the taxpayer has no tax avoidance motive or does not aim to transfer or accumulate profits, he may be disqualified as a beneficial owner due to the lack of these rights.

The purpose of this announcement appears to have been to limit the former practice which was relying essentially or exclusively on the substantial activities test as the criterion to assess beneficial ownership. With this announcement it is clarified that the assessment involves a comprehensive analysis of all the factors (including substance over form). In my opinion (and rightly so) it appears that the substantive activities test actually loses relevance as the predominant condition with further emphasis actually be given to the attributes over the income as it is mentioned that the determination of beneficial ownership rests on the “recipient’s right to the income.”

23 See QIU, fn. 16 at 99.
24 Id. at 100 and Sharkey, fn. 21 at 657.
25 Id. at 102.
Still, the substance activities test did not entirely lose relevance, as it was clear with the enactment of Circular 165. The purpose of this Circular was to clarify the conditions for dividends distributed to Hong Kong companies. This circular relaxes part of the conditions of Circular 601 in what refers to the substantive activities test criterion. It refers that — for the purpose of assessing this criterion — investment activities should be considered as business activities even if the beneficiary of the income only has one investment. While the need of operational activities is not a necessary condition (meaning that pure holding companies may qualify as beneficial owners if they meet the remaining conditions), still the substantive activities test does not disappear, as Circular 165 continues to require having commensurate personal with the income earned, taking into account the relevant functions performed by the existing staff.

C. (Ir)Relevance of Domestic Law

It has always been questionable whether such definitions have any relevance for the interpretation and application of tax treaties. According to Article 3.2 of the OECD Model any term that is not defined in the treaty itself should be given the meaning the term has under the (domestic) law of the country applying the treaty, unless the treaty context otherwise requires. Nevertheless the fact is that

Without going into a detailed inquiry of the scope of the “context” of a treaty, it is widely recognized that for (the majority of) OECD Member States the OECD Commentary is part of a tax treaty’s context. Consequently, for purposes of a tax treaty the domestic law meanings which the term may have under the domestic tax rules of the two treaty states are of no relevance to the extent those meanings differ from the meaning given to the term in the OECD Commentary. The foregoing is confirmed by the text of — where dividends are concerned — Paragraph 12.1 of the 2014 Commentary on Article 10 where it says that the term “beneficial owner” “was intended…not to refer to any technical meaning that it could have had under the domestic law of a specific country.” Consequently, the domestic definitions of “beneficial owner” that many countries in the past decades have included in their domestic law (including the Netherlands) cannot be applied for tax treaty purposes.

These domestic meanings are sometimes quite broad, apparently with the aim on the side of these countries to enable themselves to deny in a wholesale manner treaty application in cases of international tax avoidance in general and of treaty shopping in particular. They thereby pushed the concept way beyond the original meaning it was

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26 See SAT, Letter no. 165, of Apr. 12, 2013.
27 Some treaties occasionally have a definition of “beneficial owner” such as the 1989 Protocol to the Double Tax Treaty concluded between Germany and Italy 1989 Protocol stating that: “The recipient of the dividends, interest and royalties is the beneficial owner within the meaning of Articles 10, 11 and 12 if he is entitled to the right upon which the payments are based and the income derived therefrom is attributable to him under the tax laws of both States.”
supposed to have had in 1977 when it was introduced to deal with a UK domestic law issue involving agents and nominees. In hindsight it must be acknowledged that the OECD initially went along with the expansion of the meaning of the term (initially in the 1986 Conduit Report, and later in the 2003 update of the OECD Commentary on beneficial ownership). Only at the end of the last decade the OECD became aware that some countries went too far in their domestic law meaning of the term (e.g., by defining it along the lines of a limitation-on-benefits provision). It was then decided to prepare a more precise and detailed addition to the Commentary, which was eventually adopted by the Committee on Fiscal Affairs of the OECD in July 2014. In fact, apparently one of the reasons why the OECD in 2014 introduced a major update to the Commentary on the beneficial ownership requirement in Article 10 was precisely the far reaching meaning that was being given to the term beneficial ownership that went beyond its original purpose.

III. INTERPRETATION BY LOCAL COURTS: RELEVANT CASE-LAW

Throughout the years local courts have been called to solve disputes involving the interpretation of the meaning of beneficial ownership in tax cases. While the purpose of this article is not to assess all leading cases on this subject, still it is relevant to consider some of the most relevant decisions as they contribute to illustrate the different approaches in the interpretation of the beneficial ownership term.

A. Prévost Case

In 2009, a Canadian appeals court decided on the Prévost case involving a dividend payment which a Dutch (parent) company (Prévost Holding BV) received from its Canadian subsidiary Prévost Car Inc. Prévost Car was a Canadian company engaged in manufacturing buses. In the years 1996–1999 and 2001 it paid dividends to its parent, a Netherlands holding company. The shares of the Netherlands holding company were owned as to 51% by Volvo Bus Corporation, a Swedish resident company, and as to 49% by Henlys Group, a UK resident company. Volvo acquired all of the shares of Prévost Car in 1995 and transferred them to the Netherlands holding company; Volvo then transferred 49% of the shares of the Netherlands holding company to Henlys. Prévost Car withheld tax on the dividends paid to the Netherlands holding company at the rate of 5%. Had the payments been made directly by the shareholders the withholding tax rates would have been 10% (to the UK company) and 15% (to the Swedish company).

The Dutch company was found by the Court to be the beneficial owner of the dividend because it was, as the Court carefully determined on the basis of Dutch company

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law, under no legal obligation — contractual or otherwise — to pay out the dividend it had received itself, as a dividend to its shareholders (a UK and a Swedish company that jointly had created the Dutch company which acquired the shares of Prévost Car Inc.). In arriving at its conclusion that the Dutch company was the beneficial owner of the Canadian dividends the Court applied a criterion similar to the one the OECD two years later (in 2011) employed in its first draft for updating the beneficial ownership rules in the OECD Commentary. Some of the most relevant statements of the Court are transcribed below:

[...] in my view the “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. The person who is beneficial owner of the dividend is the person who enjoys and assumes all the attributes of ownership. In short the dividend is for the owner’s own benefit and this person is not accountable to anyone for how he or she deals with the dividend income. When the Supreme Court in Jodrey stated that the “beneficial owner” is one who can “ultimately” exercise the rights of ownership in the property, I am confident that the Court did not mean, in using the word “ultimately,” to strip away the corporate veil so that the shareholders of a corporation are the beneficial owners of its assets, including income earned by the corporation. The word “ultimately” refers to the recipient of the dividend who is the true owner of the dividend, a person who could do with the dividend what he or she desires. It is the true owner of property who is the beneficial owner of the property. Where an agency or mandate exists or the property is in the name of a nominee, one looks to find on whose behalf the agent or mandatory is acting or for whom the nominee has lent his or her name. When corporate entities are concerned, one does not pierce the corporate veil unless the corporation is a conduit for another person and has absolutely no discretion as to the use or application of funds put through it as conduit, or has agreed to act on someone else’s behalf pursuant to that person’s instructions without any right to do other than what that person instructs it, for example, a stockbroker who is the registered owner of the shares it holds for clients.

The Prévost decision is interesting for two more reasons. In the first place, in its judgment the Court noted various instances where the UK and Swedish parents engaged in direct contact with their Canadian sub-subsidiary (Prévost Car Inc.) to discuss the amount of dividend which that company would distribute to the Dutch Prévost Holding BV. This was considered and accepted by the Court as events that are not uncommon within multinational groups. An echo of this perception can be found in a 2011 Danish decision, where the Court observed that:

It cannot be assumed that dividend-receiving holding companies, whose managements in corporate law terms are authorized to control the company, including dividends received from underlying subsidiaries, should not normally be considered beneficial owners. This must also apply in cases where these holding companies are intermediate companies that are interposed in a country with which [the source country] has concluded

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a tax treaty while the underlying owner(s) of the intermediate holding company are resident in a third country with no tax treaty [with the source state].

B. Velcro Case

Also a second Canadian decision in the Velcro case,31 was decided on the basis of an analysis similar to the one in Prévost and later laid down by the OECD in its 2014 updated Commentary.

This case involved royalties received by Dutch resident company VH.bv from (related) Canadian resident company Velcro Canada Inc. (VC.inc). VH.bv obtained the right to receive the royalties in a transaction with VI.bv, another Dutch company, which had assigned to VH.bv its right to receive from VC.inc the royalties which VH.bv as the owner of IP was entitled to receive under a license contract it had concluded with VC.inc. The compensation to be paid by VH.bv to VI.bv amounted to about 90% of the royalties it received from VC.inc. While the payment to be made by VH.bv to VI.bv was determined by reference to the amount of royalties VH.bv was entitled to receive from VC.inc, VH.bv’s contractual obligation to make such payments to VI.bv did not in any way depend on VH.bv itself having received royalties from VC.inc. Also, VI.bv had no claim, directly or indirectly, on the royalties received by VH.bv from VC.inc. The Court therefore concluded there was no “predetermined flow of funds” from VH.bv to VI.bv. VH.bv had the discretion to choose from which income sources it would satisfy its obligation to make payments to VI.bv and it was therefore determined by the Court to be the beneficial owner of the royalties it received from VC.inc.

In this case the Court made reference precisely to the elements of the Prévost case by stating that:

From Prévost there are really four elements in considering the attribution of control. The question therefore is, did VHB have possession, use, risk and control of the royalties from VCI.

It is interesting to note that, while the Prévost decision was made before the OECD released in 2011 its first draft update of the beneficial ownership text in the Commentary, the Velcro decision was issued a few months after the release. Both decisions apply the yardstick proposed by the OECD in the two successive draft updates and incorporated in the July 2014 Commentary.32 Accordingly, in both decisions the taxpayer was found to be the beneficial owner of the payments received because there were “no strings attached” to these payments.33

32 See the requirement as laid down in Para. 12.4 of the 2014 Commentary on Art. 10 as explained below.
33 The same conclusion applies to two other well-known decisions on beneficial ownership: the decisions of the Danish Eastern High Court (14th division), No. B-2152-10, of Dec. 11, 2011, Ministry of Taxation v. FS Invest II S.à.r.l. (formerly ISS Equity A/S) and of the Swiss Federal Administrative Tribunal, ATAF A-6537/2010, of Mar. 7, 2012 (which was overturned in 2015 by the Swiss Supreme Court in its decision of May 5, 2015 (published 28 October 2015), Case 2C 364/2012).
C. Indofood Case

Another landmark case is the 2006 Indofood decision.34 The case,35 involved a classic back-to-back structure. An Indonesian company wished to raise a loan for business purposes. If it had done so directly it would have been subject to a 20% withholding tax on the interest paid. Therefore an alternative structure was implemented: Bonds were issued not directly by Indofood’s Indonesian parent company but through a Mauritius subsidiary set up for this purpose.

The interest to be paid to the bondholders was provided by the Indofood parent to the Mauritius subsidiary which paid (without deducting any margin) the amounts on to the bondholders. Under the Mauritius–Indonesia treaty the Indonesia withholding tax was reduced from 20% to 10%. Soon after the bond issue had taken place, Indonesia terminated its treaty with Mauritius. As a result thereof the withholding tax rate would go up to 20%. To avoid this consequence, Indofood considered to replace the Mauritius subsidiary by a Dutch subsidiary (the Netherlands–Indonesia treaty also provides for a reduction of the Indonesian withholding tax rate to 10%) as reflected in the following structure:

In that context the question came up whether the Dutch subsidiary, which would receive and pay on the interest amounts received from its Indofood parent, would for purposes of the Netherlands–Indonesia treaty be considered the beneficial owner of the interest payments received from its Indonesian parent. As under the applicable loan contracts the Dutch company was required to forward the interest received from its Indonesian parent without any margin and within 48 hours to the bondholders, the Court decided that the Dutch intermediate company would not be the beneficial owner of these flow-through interest payments. The interest received by the Dutch company was in the contracts under which that company received and made the interest payments, legally earmarked to be paid on to the bondholders.

For its relevance, the reasoning adopted by the Court is transcribed below:

The passages from the OECD commentary and Professor Baker’s observations thereon show that the term “beneficial owner” is to be given an international fiscal meaning not derived from the domestic laws of contracting states. As shown by those commentaries and observations, the concept of beneficial ownership is incompatible with that of the formal owner who does not have “the full privilege to directly benefit from the income.”

The legal, commercial and practical structure behind the loan notes is inconsistent with the concept that the Issuer or, if interposed, Newco could enjoy any such privilege. In accordance with the legal structure the Parent Guarantor is obliged to pay the interest two business days before the due date to the credit of an account nominated for the purpose by

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the Issuer. The Issuer is obliged to pay the interest due to the noteholders one business day before the due date to the account specified by the Principal Paying Agent. The Principal Paying Agent is bound to pay the noteholders on the due date.

But the meaning to be given to the phrase “beneficial owner” is plainly not to be limited by so technical and legal an approach. Regard is to be had to the substance of the matter. In both commercial and practical terms the Issuer is, and Newco would be, bound to pay on to the Principal Paying Agent that which it receives from the Parent Guarantor. In practical terms it is impossible to conceive of any circumstances in which either the Issuer or Newco could derive any “direct benefit” from the interest payable by the Parent Guarantor except by funding its liability to the Principal Paying Agent or Issuer respectively. Such an exception can hardly be described as the “full privilege” needed to qualify as the beneficial owner, rather the position of the Issuer and Newco equates to that of “an administrator of the income.”

D. Real Madrid Case

The Real Madrid case, 36 illustrates the broad meaning given to beneficial ownership as interpreted in some States. Real Madrid made payments to a Hungarian company for the use of image rights of some football players. This Hungarian company transferred in the same day almost all the money received to Dutch and Cyprus companies. The goal of this structure was to benefit from the favorable tax treatment provided by the tax treaty concluded between Spain and Hungary providing for no withholding tax on royalty payments.

The Spanish tax authorities challenged this structure by considering that the Hungarian company was not the beneficial owner under Article 12 of the treaty. The beneficial ownership requirement in this case was used and interpreted as an anti-treaty shopping rule (analogous to a GAAR). The reasoning was rooted on the 2003 amendments to the Commentary and a possible economic interpretation to seek the real owner of the income (a substance over form approach). In this case there was no analysis of the legal ownership (powers of the Hungarian entity over the income) performed.

IV. INTERIM CONCLUSIONS

The analysis performed above demonstrates that throughout the years the beneficial ownership meaning has been surrounded by great uncertainty. A longstanding issue is of course the value of the Commentary and which version of the Commentary is relevant.

Then the discussion turns into determining its meaning. Should this term refer to the full attribute of ownership? Or should it rather be understood as linked to liability to tax? Or should beneficial ownership be construed as a general anti-treaty shopping test with economics based interpretation? (substance over form test)? Or in turn should be

The decisions adopted by domestic courts around the world reveal that different meanings have been adopted in the interpretation of this term. At the same time, some tax authorities tend to apply the beneficial ownership test as a general anti-treaty shopping test particularly because most tax treaties do not have limitation on benefits clauses. The fact is that a wide economics-based interpretation of beneficial ownership is a cause of concern since it does not reconcile with the meaning originally assigned to the term, leads to uncertainty and ultimately leads to the ineligibility of the corporate sector from benefiting from tax treaties.

V. THE 2014 AMENDMENTS TO THE OECD MTC

The 2014 amendments to the OECD Model Commentary brought the biggest attempt by the OECD to provide for a clarification on the meaning of the term beneficial ownership. For its relevance the following sections analyze in further detail the new Commentary and its contribution for determining the meaning of beneficial ownership.

A. The 2014 Expanded Commentary

The expanded Commentary reads now as follows:

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 common law countries37). The term “beneficial owner” is therefore not used in a narrow technical sense (such as the meaning that it has under the trust law of many common law countries), rather, it should be understood in its context, 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.

12.2 Where an item of income is paid to a resident of a Contracting State acting in the capacity of agent or nominee it would be inconsistent with the object and purpose of the Convention for the State of source to grant relief or exemption merely on account of the status of the direct recipient of the income as a resident of the other Contracting State. The direct recipient of the income in this situation qualifies as a resident but no potential double taxation arises as a consequence of that status since the recipient is not treated as the owner of the income for tax purposes in the State of residence.

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37 For example, where the trustees of a discretionary trust do not distribute dividends earned during a given period, these trustees, acting in their capacity as such (or the trust, if recognized as a separate taxpayer), could constitute the beneficial owners of such income for the purposes of Art. 10 even if they are not the beneficial owners under the relevant trust law.
12.3 It would be equally inconsistent with the object and purpose of the Convention for the State of source to grant relief or exemption where a resident of a Contracting State, otherwise than through an agency or nominee relationship, simply acts as a conduit for another person who in fact receives the benefit of the income concerned. For these reasons, the report from the Committee on Fiscal Affairs entitled “Double Taxation Conventions and the Use of Conduit Companies” concludes 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.

12.4 In these various examples (agent, nominee, conduit company acting as a fiduciary or administrator), the direct 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 would not include contractual or legal obligations that are not dependent on the receipt of the payment by the direct recipient such as an obligation that is not dependent on the receipt of the payment and which the direct recipient has as a debtor or as 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.

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. This limitation of tax should not be granted in cases of abuse of this provision (see also paragraphs 17 and 22 below). As explained in the section on “Improper use of the Convention” in the Commentary on Article 1, there are many ways of addressing conduit company and, more generally, treaty shopping situations. These include specific anti-abuse provisions in treaties, general anti-abuse rules and substance-over-form or economic substance approaches. Whilst the concept of “beneficial owner” deals with some forms of tax avoidance (i.e. those involving the interposition of a recipient who is obliged to pass on the dividend to someone else), it does not deal with other cases of treaty shopping and must not, therefore, be considered as restricting in any way the application of other approaches to addressing such cases.

12.6 The above explanations concerning the meaning of “beneficial owner” make it clear that the meaning given to this term in the context of the Article must be distinguished from the different meaning that has been given to that term in the context of other instruments that concern the determination of the persons (typically the individuals) that
exercise ultimate control over entities or assets. That different meaning of “beneficial owner” cannot be applied in the context of the Article. Indeed, that meaning, which refers to natural persons (i.e., individuals), cannot be reconciled with the express wording of subparagraph 2 a), which refers to the situation where a company is the beneficial owner of a dividend. In the context of Article 10, the term “beneficial owner” is intended to address difficulties arising from the use of the words “paid to” in relation to dividends rather than difficulties related to the ownership of the shares of the company paying these dividends. For that reason, it would be inappropriate, in the context of that Article, to consider a meaning developed in order to refer to the individuals who exercise “ultimate effective control over a legal person or arrangement.”

B. The Elements of Beneficial Ownership

In the 2014 update for the first time a definition was provided. In the first and fourth sentences of Paragraph 12.4 of the 2014 Commentary on Article 10 the following two elements of the notion “beneficial owner” are laid down:

- the recipient of the income item concerned must have the “right to use and enjoy” that income item, while
- this right may not be “constrained by a contractual or legal obligation to pass on the

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38 Since the first complete overhaul of the OECD Commentary in 1977 the question has arisen as to the relevance of OECD Commentary sections that were expanded or added in a given year to tax treaties that were concluded before the date such sections were expanded or added. The OECD Committee on Fiscal Affairs takes a clear position in that respect. In Paras. 33 and 34 of the Introduction to the OECD Model and Commentary, the OECD Member States, through the Committee on Fiscal Affairs jointly take the following viewpoint:

“When drafting the 1977 Model Convention, the Committee on Fiscal Affairs examined the problems of conflicts of interpretation that might arise as a result of changes in the Articles and Commentaries of the 1963 Draft Convention. At that time, the Committee considered that existing conventions should, as far as possible, be interpreted in the spirit of the revised Commentaries, even though the provisions of these conventions did not yet include the more precise wording of the 1977 Model Convention.

[…]

The Committee believes that the changes to the Articles of the Model Convention and the Commentaries that have been made since 1977 should be similarly interpreted.”

“[…] changes or additions to the Commentaries are normally applicable to the interpretation and application of conventions concluded before their adoption, because they reflect the consensus of the OECD Member countries as to the proper interpretation of existing provisions and their application to specific situations.”

When the later Commentary leads to taxation that is less favorable to the taxpayer, Courts often do not follow the OECD viewpoint, particularly where the new Commentary adds explanations on topics that were not earlier dealt with at all by Commentary. For such restraint courts usually find there is less reason when the changes concern clarifications of — rather than additions to — the existing Commentary or where in the given case the new Commentary is more favorable to the taxpayer. For the discussion on this subject see, inter alia, H. J. Ault, *The Role of the OECD Commentaries in the Interpretation of Tax Treaties*, 22(4) Intertax, 144 (1994); Michael Lang, *Later Commentaries of the OECD Committee on Fiscal Affairs Not to Affect the Interpretation of Previously Concluded Tax Treaties*, 1 Intertax 7 (1997); K. Vogel, *The Influence of the OECD Commentaries on Treaty Interpretation*, 12 Bulletin for International Fiscal Documentation, 614 (2000).
payment received to another person.”

The core feature of “beneficial ownership” therefore is that the person that receives the payment (i.e., the dividend, interest or royalty) and has the right to use and enjoy it, may not be obliged — contractually or legally — to pass on the income item to another person; in other words, the payment received may not be legally “earmarked” for transfer to another person.

In ordinary cases, a person (individual or company) that receives an income item may very well be in a situation where that person also has obligations to make payments. E.g., an individual receiving a salary payment may have a contractual obligation to pay rent or mortgage interest in respect of the home where he is living. And a bank receiving interest on a loan it has issued will typically have a contractual obligation to pay interest on another customer’s deposit. Clearly, in these examples it is beyond doubt that without additional restrictions the individual and the bank are the beneficial owners of, respectively, the salary and interest payments received, as these payments are entirely unrelated to the rent and interest payments they need to make. This would be different if the income items received (salary, interest) would have been legally earmarked by an obligation based on the law or a contract, to be forwarded to another person.

In the second sentence of Paragraph 12.4 of the OECD Commentary on Article 10 it is further explained that the existence of an obligation to pass on the payment received, to another person will normally be based on a legal document (e.g., a contract). In the absence of a contract it is also possible that through facts and circumstances the existence of such an obligation is established. At this point a misunderstanding of the Commentary should be avoided: The wording of the text of this part of the Commentary does not allow to refuse recognizing a person as beneficial owner of a particular income item simply on the basis of facts and circumstances. The facts and circumstances test may be applied only in a case where there are no legal documents available, to establish through other means whether the recipient of an income item is or is not otherwise under a legal obligation to pass on the payment received to another person.

As referred, under the 2014 OECD “beneficial ownership” test, dividends which a company receives are for purposes of the reduction of source state taxation considered to be beneficially owned by that company if the recipient company’s right to use and enjoy the dividends is not constrained by a contractual or legal obligation to pass on the payment received to another person. Funds obtained by an intermediate holding company through dividend receipts and share disposals and which funds it uses, in addition to making dividend payments to its parent, to a substantial degree to provide loans and to make equity contributions to group companies or to be put in reserve, are evidently not “passed on” as such to its parent company.

Overall and while the clarification provided by the OECD Commentary certainly provides no more guidance as to the proper interpretation of the term beneficial ownership, the fact is that some uncertainty as to the meaning of the term still remains.
The language of the Commentary leaves some open issues as to which situations should this requirement is applicable. For instance a first criticism arises from the fact that the Commentary still starts by providing a negative definition of the term beneficial ownership.

Furthermore it provides for some terms that are not entirely clear. What is the meaning of passing the income as referred in the Commentary? What amounts to passing income? For how long much the income remain? How is the amount calculated? Is it by gross amount or percentage? What if one mixes several sources of income in a single account and several transactions? When is there a legal obligation to pass? What is the obligation?

In addition the reference to substance and to facts and circumstances poses additional questions. Are we still referring to a legal interpretation of the meaning of this term? Or instead would this allow a substance based and economics based interpretation? This would mean that facts and circumstances together with substance would allow a very broad approach to beneficial ownership as the right to use and enjoy would be determined based on the them. Certaintly this should not be understood as such. A proper interpretation appears to be that facts and circumstances refer to such obligation and not to right of use and enjoyment. In other words, it is the possibility to assess contractual and legal obligations (determining if they exist) also based on facts and circumstances. This not refers to the characterization of beneficial ownership as such.

C. Beneficial Ownership Not to Be Confused with a Substance Requirement

A fundamental clarification arising from the 2014 amendments is that the broad use of beneficial ownership as an anti-treaty shopping provision is clearly rejected.

It this context it should be clarified that substance and beneficial ownership while in practice often confused or considered to be subject to similar requirements, they refer, however, to fundamentally different concepts. As referred in the preceding paragraphs, beneficial ownership under the OECD Model deals with possible restrictions on a recipient of an item of income with respect to the right to use and dispose of the given income item. In accordance company engaged in ordinary and substantive business activities (and therefore a company that indisputably has substance) which receives payments that under a contractual arrangement it is required to pass on as such to another company, will most likely not be the beneficial owner of the income received while there is no single doubt as to the substance of that same company. Also the reversed situation may occur (but in practice much less frequently): A given company’s (standard) activities may to a very large extent be covered and controlled by guidelines issued by its parent.

See on this in particular, Felipe Vallada, Beneficial Ownership under Articles 10, 11 and 12 of the 2014 OECD Model Convention, in Michael Lang et al. eds. The OECD Model Convention and Its Update 2014, IBFD (Amsterdam), (2014).
company.

For its relevance to this case it is interesting to look to the Italian Supreme Court decisions in the Apart South Europe Case,\(^\text{40}\) which appears to adopt precisely the approach referred in the preceding paragraphs. In such decision the Supreme Court confirmed that a holding company is the beneficial owner of the income when has the right to use and enjoy the income and it is not an artificial arrangement. First of all the Supreme Court appears to follow the OECD commentary interpretation on beneficial ownership referred above when referring that:

> [...] the beneficial owner clause, a general principle from the relevant conventions, namely that the benefits provided in the avoidance of double taxation are only meant to favour the parent company that has a power of disposition over the dividends received, not only in a legal sense but also economically, whereby it must therefore be the real intended recipient.

> [...] the requirement in question prevents, in other words, any benefit from the bilateral agreement against double taxation being derived by a parent company with no economic substance and one that has expeditiously established in the contracting state solely for the purpose of enjoying the advantages of dividends [...] 

> §[...] a decisive aspect of the case, namely the need to check the compatibility of those facts with the special characteristic manifested quite clearly in the nature and function of the taxpayer company (which operates simply as a holding or sub-holding company).

In short, although it is true that for the purposes of the issue under consideration, the “beneficial owner” should be regarded as the entity to which is attributed the use and enjoyment of the dividends arising from the entity subject to taxation, in respect of which it functions as its ultimate recipient (“owner”), and not as a mere intermediary, agent or trustee, it is equally certain that a recipient parent company cannot be considered as the “beneficial owner” of dividends simply because it lacks, being purely an investment vehicle, the typical characteristics (as identified by the trial court) of either an operating company or a mixed holding company.

**CONCLUSION**

The evolution of beneficial ownership has been surrounded by great uncertainty. The amendments to the OECD Commentary and the reports released by the OECD have demonstrated that the OECD has not always been clear on the meaning to be given to the term. Similarly, both courts and authorities from different jurisdictions have reached to divergent interpretations. Still, the fact is that beneficial ownership plays a significant role in the wording of Articles 10, 11 and 12, the Commentary and for courts around the world. Probably more striking it is the fact that the inclusion of beneficial ownership in the Model — in its original intention — arose in a moment when it was no longer

\(^{40}\) See Italian Supreme Court in its decision no. 27113 of Dec. 28, 2016.
necessary considering the second sentence of Article 4(1).

Nevertheless, the 2014 Commentary updated for the first time a definition of beneficial ownership by laying down the following two elements of the notion “beneficial owner”: (i) the recipient of the income item concerned must have the “right to use and enjoy” that income item, while (ii) this right may not be “constrained by a contractual or legal obligation to pass on the payment received to another person.” The Commentary therefore now makes it clear that the core feature of “beneficial ownership” therefore is that the person that receives the payment (i.e., the dividend, interest or royalty) and has the right to use and enjoy it, may not be obliged — contractually or legally — to pass on the income item to another person; in other words, the payment received may not be legally “earmarked” for transfer to another person.

Overall and after more than half of century of uncertainty these amendments are most welcome and hopefully will bring more clarity to the term in the future.