



FACULTY OF LAW  
Lund University

Fredrik Hagmann

# Beneficial Ownership - a concept in identity crisis

JURM02 Graduate Thesis

Graduate Thesis, Master of Laws program  
30 higher education credits

Supervisor: Mats Tjernberg

Semester of graduation: Period 2 Spring semester 2017

# Contents

Summary.....	1
Sammanfattning.....	3
Abbreviations.....	5
<b>1 Introduction.....</b>	<b>7</b>
1.1 Background.....	7
1.2 Purpose .....	8
1.3 Delimitations .....	8
1.4 Method and material .....	9
1.5 Disposition.....	10
1.6 Remarks.....	11
<b>2 Background.....</b>	<b>12</b>
<b>3 The concept of beneficial ownership.....</b>	<b>15</b>
3.1 Introduction.....	15
3.2 Historical outlook.....	15
3.3 In the OECD Model treaty .....	17
3.4 In EU law.....	18
<b>4 The OECD approach .....</b>	<b>22</b>
4.1 Introduction.....	22
4.2 The commentaries .....	22
<b>5 Case law .....</b>	<b>26</b>
5.1 Introduction.....	26
5.2 Indofood .....	26
5.2.1 Background.....	26
5.2.2 The Court of appeal’s verdict.....	28
5.3 Prévost .....	30
5.3.1 Background.....	30
5.3.2 The verdict.....	32
5.4 Royal Bank of Scotland.....	33
5.4.1 Background.....	33
5.4.2 The French Supreme Administrative court’s decision .....	34
5.5 Short note on a few more cases .....	36
5.5.1 The Carnegie Case .....	36
5.5.2 The Real Madrid Cases .....	37
5.6 Comments and interim conclusions based on presented case law .....	38
<b>6 BO and the notion of abuse of law .....</b>	<b>40</b>
<b>7 Conclusions.....</b>	<b>44</b>
<b>Bibliography.....</b>	<b>49</b>
<b>Table of Cases .....</b>	<b>51</b>

# Summary

The aim of this thesis is to analyze and determine the meaning of the term “Beneficial Owner”, in the model treaty of the OECD and therefore its meaning in bilateral negotiated treaties based on the model treaty. The term’s legacy and application is presented. While the meaning and application of the term is being presented, its application as, as well as border to, anti-abuse rules are examined. The concept establishes that certain tax treaty benefits are only available to a direct recipient of the incomes dividend/interest/royalty, if the direct recipient is also the beneficial owner of the income, that is if he beneficially owns the income. The legal and factual circumstances relevant for assessing who the beneficial owner is, are scrutinized.

Traditionally, there has not been much case law on the term’s meaning, but lately increasingly more cases have dawned around the world. While several of these cases claim to apply an internationally coherent and autonomous concept, they are surprisingly diverse in their outcome. At the same time, the concept of Beneficial Ownership is getting its own meaning and impact in the EU-legal sphere. EU law is however something that is largely left out of this thesis.

The commentaries to the OECD model treaty form an important aid of interpretation when studying the model treaty, additionally, case law from around the globe has been utilized in an effort to shed light on the concept and its application.

The author can conclude that the concept, despite being an internationally coherent concept, is unclear and diverse in its application and the sources for interpreting it, such as the commentaries from the OECD fiscal committee, are vague and ambiguous.

While the concept of “Beneficial Ownership” shares some traits with anti-abuse rules, the concept is fundamentally different. The author can determine that different approaches are apparent in jurisprudence. What seems to be most supported in the sources is that that the direct recipient’s power over a

received income is the only consideration relevant when assessing whether he is the beneficial owner.

In some cases, a wider approach, assessing the situation from a helicopter view has been utilized, effectively doing other largely unsupported considerations in the assessment. The author criticizes the blurred line to anti-abuse rules and carefully tries to explain the tendencies from the authorities as a mean for them to circumvent strict legality requirement and tax payer protection in an increasingly challenging globalized world.

# Sammanfattning

Syftet med denna uppsats är att analysera och fastställa innebörden av termen ”Beneficial Owner” (löst översatt till rättmätig ägare) i OECD:s modellavtal och därmed dess betydelse och innebörd i bilaterala, förhandlade, skatteavtal som baserats på modellavtalet. Begreppets historia och tillämpning presenteras. Medan begreppets innebörd och tillämpning presenteras, undersöks dess tillämpning som, såväl som gräns mot, skatteflyktsregler (antimissbruksregler). Konceptet fastställer att vissa fördelar i skatteavtal bara är tillgängliga för en direkt (omedelbar) mottagare av utdelning/ränta/royalty om den omedelbare mottagaren också är ”The Beneficial Owner” till inkomsten, det vill säga om han ”beneficially owns” inkomsten. De relevanta juridiska och faktiska omständigheterna för att kunna fastställa vem ”the Beneficial Owner” är, granskas.

Historiskt sett har det inte funnits mycket rättsfall på begreppets innebörd men på senare tid har flera rättsfall uppkommit i olika rättsordningar. Medan det i flera av dessa hävdas att ett internationellt koherent och självständigt begrepp tillämpas så är de överraskande olika i sina utgångar. Samtidigt har konceptet ”Beneficial Owner” fått sin egen betydelse och verkan i en EU-rättslig sfär. EU-rätt behandlas emellertid inte ingående i arbetet.

Kommentarerna till OECD:s modellavtal är ett viktigt tolkningsstöd när modellavtalet studeras, vidare har rättsfall från olika rättsordningar använts i strävan att belysa konceptet och dess tillämpning.

Författaren kan dra slutsatsen att konceptet, trots att det är ett internationellt koherent koncept, är oklart och spretande i sin tillämpning och att källorna för att tolka det, såsom kommentarerna framtagna av OECD:s kommitté för fiskala ärenden, är vaga och mångtydiga.

Även om konceptet ”Beneficial Ownership” delar vissa beskafterheter med antimissbruksregler så är konceptet fundamentalt annorlunda. Författaren kommer fram till att olika tillvägagångssätt och angreppsvinklar är tydliga i rättspraxis. Källorna verkar främst visa stöd för metoden att den omedelbare

mottagarens makt över mottagen inkomst är den enda bedömningen som är relevant vid fastställandet av om han är ”the Beneficial Owner”.

I vissa rättsfall har en bredare approach, där situationen studeras och bedöms från ett helikopterperspektiv, använts, innebärande att andra skäl utan stöd läggs till grund för bedömningen. Författaren kritiserar den oskarpa gränsen mellan konceptet och antimissbruksregler och försöker försiktigt förklara tendenserna från skattemyndigheter, som ett sätt för dem att kringgå stränga legalitetskrav och skydd för skattebetalare i en ständigt mer utmanade och globaliserad värld.

# Abbreviations

AG	Advocate General
AN	Audiencia Nacional (Supreme Court of Spain)
BO	Beneficial Owner/ Beneficial Ownership
CFA	Committee on Fiscal Affairs (OECD)
DTC	Double Taxation Convention
ECJ	European Court of Justice
ECLI	European Case Law Identifier
EU	European Union
EWCA	England and Wales Court of Appeal
GAAR	General Anti-Avoidance Rule
IBFD	International Bureau of Fiscal Documentation
IP	Intellectual property
IRD	Interest-Royalty Directive Council Directive 2003/49/EC of 3 June 2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States, [2003] OJ L 157, 26.6.2003, p.49.
LOB	Limitation on Benefit
MC	Model Convention
NA	National Association, prefix for federal banks in the US
OECD	Organization for Economic Co-operation and Development
PSD	Parent-Subsidiary Directive Council Directive 2011/96/EU of 30 November 2011 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (recast), [2011] OJ L 345, 29.12.2011, p.8

SAAR	Special Anti-Avoidance Rule
TCC	Tax Court of Canada
TFEU	Treaty on the Functioning of the European Union
UK	United Kingdom of Great Britain and Northern Ireland
US	United States of America
VCLT	Vienna Convention on the Law of Treaties
WHT	Withholding Tax



# 1 Introduction

## 1.1 Background

In a globalized world, there are plenty of transactions crossing borders every day. A transaction that, narrowly defined, originates, transports and ends solely within one state typically does not raise any international tax law issues. A transaction, originating from a payer in one state, transferred to a payee in another state, may however bring taxation claims from more than one state. Since many states levy withholding taxes on dividends, interest and royalties, there is a continuous risk of double taxation for subjects interacting in a not purely national environment.

In double tax treaties, states have in order to facilitate international trade, agreed with each other to retract domestic tax claims in certain situations. A commonly used practice is to limit the WHT in the source state to stipulated rates.

The Organization for Economic Co-Operation and Development has produced a model tax treaty recommending a certain division or allocation of taxing rights for different income, including a cap on these mentioned withholding taxes. The model serves as a starting point for many negotiated tax treaties.

The limitation on the WHT rates are in the model treaty, and thereby in many negotiated treaties, only applicable if the direct recipient of the incomes is also the Beneficial Owner of the income. The treaty with the state where the beneficial owner is resident, if such a treaty exists, will have to be studied for any renunciations of taxing rights. Since it is only for the benefit of beneficial owners resident in the other contracting state that the state of source has agreed to any limits its taxation rights. Due to the limitation of tax treaty benefits only for the situation that the beneficial owner is a resident in the other contracting state, it is essential to distinguish who the beneficial owner is and how his identity is determined.

## 1.2 Purpose

The purpose of this thesis is to analyze the meaning of the term beneficial owner in the model treaty of the OECD and therefore its effect on bilateral negotiated treaties. The author by asking, how to determine who the beneficial owner is and what considerations to include in the assessment, will define the concept in international fiscal law. The concept's diverse interpretation and application will be highlighted. By investigating the concept's legacy, the idea is to clarify the origin of the today's perception of the concept.

The studying of the OECD commentaries to the model treaty alongside case law, acknowledging the commentaries, will shed light on how the commentaries can be interpreted and how the concept is applied. The concept's application as an anti-abuse or substance-over-form provision will be analyzed and criticized. It will be asked if the concept is possible to apply as an anti-abuse rule and what the boundaries to such provisions are. An analyze of the terms application and considerations for application will make it possible to scrutinize the reasons for its diverse interpretation.

## 1.3 Delimitations

In EU law the concept of beneficial ownership is getting increasingly more important; its application and meaning is however uncertain. In this thesis and for the fulfillment of its purpose, the EU law perspective is of secondary importance. While it is important to separate the concept in international fiscal law from the term in EU law, they do share a common history and area of application. Studying one of them might give guidance when assessing the other. The concept in EU law will be studied as a step in determining the meaning of the concept in the model treaty but this thesis does not claim to offer a thorough presentation of the EU-legal version of "Beneficial Owner.

Neither is a chapter in this thesis the right forum to discuss if the commentaries to the OECD MC should be interpreted statically or ambulatory. Such a question has no simple answer and investigating it in a

satisfactory way would require sources and notions beyond the scope of this thesis.

Some knowledge in legal science in general, and in international law and tax law specifically, is assumed with the reader.

The discussion of what a dividend is and how it relates to certain hybrid-instruments and income therefrom is outside the scope of this thesis. I have been required to exclude some areas that are close to the topic at hand, delimitations are always necessary and with the purpose in mind the chosen structure ought to be functional. See section 1.4 for the details and reasons on the structure of the thesis.

## **1.4 Method and material**

In order to fulfill the purpose of the thesis, the traditional legal method has been utilized when studying case law and other sources of law. Doctrinal sources have been used to add perspective for interpreting and determining the definition of the concept of Beneficial Ownership. The commentaries to the Model Treaty has been studied when interpreting the articles in the treaty. The commentaries, while sometimes a product of compromise sourced in discussion drafts, explain stances and reasons for certain insertions. Due to the ordered absence of resort to domestic law in the commentaries, the interpretation procedure of the article text starts in the literal wording, as guided by the VCLT. By scrutinizing the commentaries, it is possible to do a thorough analysis of the concept's definition and content. The method will include studying the legal material and its argumentation and reasoning, when applicable.

Perhaps especially tax law is an area of law that is highly political and it is important to separate legal science and legal politics. In all the doctrinal sources the value of the text is in the strength of the argumentation, even if experience and evidenced expertise is something to take into consideration. I have used sources from verified tax experts, highly skilled and well known within the field. I have had a critical view on all texts.

When it comes to case law, traditionally there has not been much on the beneficial ownership but there is increasingly more. Both in an EU law context and outside of it. This thesis does not claim to be a presentation of all international case law in the field, there are better formats for that. I have tried to find central cases with nuance differences in circumstances in order to investigate the concept of BO and its borders.

Some cases studied are written in a language I do not read; that can be an issue when one wants to study international case law, legal text and other sources of law. A translation always contains a certain amount of valuation and compromising, intentional or not. This is something I have had kept in mind when studying material originally written in a language other than Swedish or English, such as with the *Real Madrid cases* and *The Royal bank of Scotland case*. In these situations, I have been compelled to use secondary sources in order to analyze the cases and their impact. I have also used the IBFD Case Law database in which several tax cases of international relevance are reproduced and commented in English. I have tried to use more than one source and be extra attentive in passages more at risk for opinions.

The text is written in a tax treaty law perspective, or an international fiscal law perspective, hopefully without too much bias to any specific domestic legal order but instead to all.

## **1.5 Disposition**

In chapter 2, I present the background and framework necessary to be able to understand and contemplate over this thesis and its topic. In chapter 3 I explain where the concept of Beneficial Ownership came from and where it went. The term's legacy is being analyzed and its today existence in different legal orders is highlighted.

In chapter 4 I attempt to establish the meaning of the concept in tax treaty law by analyzing OECD material and by doing that determining the OECD's view on the concept and its application. Chapter 5 is devoted to case law, investigating how the concept is applied in reality and how diverse the outcome can be when international concepts like BO are given an international coherent meaning. This is a step in determining the concept's

meaning and significance. In chapter 6 a discussion on the concept's existence and application as an anti-avoidance rule is discussed and criticized. The concept's similarities and differences, as well as relationship, to substance over form rules are looked into.

While discussions and interim conclusions are done throughout, the final conclusions, thoughts and analyzes are collected in the final chapter 7.

## 1.6 Remarks

In order not to burden the text of this essay with writing that conclusions and reasoning are valid for all the income types of dividends, interest and royalties, simply the term "income", is used plenty. Sometimes one of the types of income is written but unless it is clear from the text or context that only the mentioned form of income is covered; the conclusions are valid for all three. The concept of beneficial Ownership is essentially the same for all three types of income.

Anti-abuse is used plenty in the thesis, anti-abuse provisions are measures to prevent tax abuse. Tax abuse can be defined as when the tax payer improperly receives tax savings by circumventing the spirit or purpose of the law. Such provisions can contain a purpose test, controlling whether there are other than tax motives for a certain way of acting. Anti-abuse rules can allow tax authorities to disregard certain formalities and instead assess the situation differently, commonly referred to as substance-over-form. Rules targeting abuse can be general in nature (GAAR) or specific (SAAR), the latter targeting special situations or arrangements otherwise prone to abuse. In many states, there are safety nets for the tax payers preventing arbitrary use of these kinds of provisions.<sup>1</sup>

---

<sup>1</sup> Piantavigna, Paolo: Tax Abuse and Aggressive Tax Planning in the BEPS Era: How EU Law and the OECD Are Establishing a Unifying Conceptual Framework in International Tax Law, despite Linguistic Discrepancies, *World Tax Journal*, 2017, p. 56 ff., (e-version).

## 2 Background

The right for states to tax within their territory is internationally accepted.<sup>2</sup> As mentioned earlier, overlapping tax claims risk making tax payers liable to tax in multiple states. In general, there can be said to be certain limitations to sovereign taxation powers. In order for a tax claim to be recognized by other states, there must be some form of nexus between the one being taxed and the state executing its sovereignly decided taxes.<sup>3</sup>

There can, for example, be two states with tax claims in the situation of a company, in one state, doing a distribution of profits through a dividend to a shareholder, in another state. The State where the company is located, the state where the payment originates, may be referred to as the “source state” whereas the state where the shareholder is resident may be referred to as the “residence state”.<sup>4</sup> The source state may levy some sort of source tax or withholding tax on the dividend. Typically, the recipient is liable to income tax in his state of residence as well. This phenomenon is referred to as juridical double taxation; the taxation of the same person, of the same income more than once, in more than one state.<sup>5</sup> Many domestic tax systems have withholding taxes on dividends, interest and royalties, resulting in a potential threat of double taxation.

This double taxation might erode profits and value, created through cross-border engagement. In order to limit the potentially hazardous effect on international trade, many states have divided the taxation rights between them for different situations, through bilateral or, in some cases, multilateral treaties.<sup>6</sup>

---

<sup>2</sup> See eg. Pelin, Lars: Internationell Skatterätt, chapter 5, p. 84.

<sup>3</sup> Lang, Michael: Introduction to the Law of Double Taxation Conventions, chapter 1.1, (e-version).

<sup>4</sup> Vogel, Klaus & Rust, Alexander: Klaus Vogel on Double Taxation Conventions, p. 12, para 2.

<sup>5</sup> Lang, Michael: Introduction to the Law of Double Taxation Conventions, chapter 1.1, (e-version).

<sup>6</sup> OECD, Model Tax Convention on Income and on Capital: Condensed Version 2014, OECD Publishing, p. 7.

The treaties are called Double Tax Treaties or Double Taxation Conventions and are instruments of international law. The treaties are entered into by states voluntarily and individually. The contracting states are thereafter bound by the content on an international law basis.<sup>7</sup> In general, one contracting state is indifferent to how the other contracting state implements the treaty in its domestic legal order, since that is a matter for that other state alone.<sup>8</sup> That sovereign states are bound by accessed treaties flow from art. 26-27 in the VCLT and international customary law.

In addition to the model treaty by the OECD recommending a certain allocation of the right to tax, some other organizations or even states have their own models; these alternative models are often to some extent based on the one from the OECD.<sup>9</sup> The OECD committee on Fiscal Affairs have moreover published comments to all articles in the model, serving as an aid of interpretation. The OECD recommends that treaties based on the model are read in the light of these commentaries.<sup>10</sup>

As regards the division of taxing rights for dividends, interest and royalties, which form the center of interest for this thesis, they are in the MC placed in art. 10, 11 and 12. The removal of double taxation for these incomes follow the idea of limiting the WHT in the source state to a predetermined rate, perhaps even nil, regardless of the rates in domestic legislation. The overall structure of the articles may be adopted in a bilateral treaty, while the rates are negotiated, to mention an example of a method. The residence state then usually has to take the already taxed part into consideration somehow, usually through allowing credit from its tax claim for tax already paid, in the form of WHT, partially or in full.<sup>11</sup> The obligation, under a treaty, for the source state, to limit its WHT only applies for remittances to taxpayers that are residents

---

<sup>7</sup> Pelin, Lars: Internationell Skatterätt, chapter 6, p. 87 – 89.

<sup>8</sup> Ibid. chapter 6, p. 89.

<sup>9</sup> Lang, Michael: Introduction to the Law of Double Taxation Conventions, chapter 2.2 – 2.3, (e-version).

<sup>10</sup> OECD, Model Tax Convention on Income and on Capital: Condensed Version 2014, OECD Publishing, p. 7.

Pelin, Lars: Internationell Skatterätt, chapter 6, p. 87.

<sup>11</sup> Lang, Michael: Introduction to the Law of Double Taxation Conventions, chapter 9.4.2, (e-version).

in the other contracting state.<sup>12</sup> Only if the beneficial owner to the income is a resident in one of the contracting states to Tax Treaty X may Tax Treaty X be applied. At first glance, it might appear that the recipient is the BO. It may be simplified as that Tax Treaty BO always should be applied; if a tax treaty even exists with the state where the BO is resident. Due to differences in e.g. tax treaties, the holding of shares, debts or other rights on behalf of someone else might be lucrative, if it allows a lower tax burden on certain payments on these instruments. Hence, the importance of who the BO is makes itself apparent.

The beneficial ownership doctrine may allow a lifting of the corporate veil. Lifting of the corporate veil is the wider notion of looking past the formal circumstances, such as the existence of a corporation. In tax law for the beneficial ownership that could, for example, be that a remittance is taxed and assessed as if it was paid directly to the shareholders of a company, even though it from a civil law perspective is paid to the held company. In tort law the lifting of the corporate veil could e.g. include to hold certain shareholders liable for damages formally caused by a held limited liability company.<sup>13</sup> The possibility of lifting the corporate veil, could potentially be more or less clearly defined and regulated in written law. There is also the possibility in cross-border situations, that some states are lifting the corporate veil while others do not. Naturally, such inconsistency might be burdensome for the taxpayers, not the least in that it might make it hard to offset any double taxation that then occur.

---

<sup>12</sup> Kemmeren, Eric: Klaus Vogel on Double Taxation Conventions, p. 715-716, para 19-20.

<sup>13</sup> Farat, Anna & Michon, Denis: Lifting the corporate veil: limited liability of the company decision-makers undermined? Analysis of English U.S., German, Czech and Polish Approach, *Common Law Review*, 2008, p. 21-22, (e-version).



# 3 The concept of beneficial ownership

## 3.1 Introduction

As already mentioned in chapter 2, the beneficial ownership concept exists in many tax treaties as a clarification or limit to when a DTC:s threshold on WHT is applicable. One decisive factor for the source state to take into consideration, when assessing whether the WHT limits need to be applied on its domestic rates, is if the one receiving the payment is the beneficial owner. If the one receiving the payment indeed is a resident of a state, with which the source state has agreed to limit WHT claims on outgoing payments, this person's residency is irrelevant if he is not the beneficial owner. The recipient is often but not always the beneficial owner.<sup>14</sup> In this chapter I will present how the concept grew out of the civil law sphere into the international tax law sphere. The background is a key factor in understanding how the term's legacy might give it different interpretation and meaning in different states. A more thorough analysis of the concept's content and application as law today is found in chapter 4 and 5.

## 3.2 Historical outlook

In order to better understand the concept of beneficial ownership and its distinction to legal or formal ownership, a historical overview is in place. The concept originates, not in a tax law sphere, but in civil law.<sup>15</sup> It has roots in a common law legal tradition and it is therefore a legal figure that largely has no tradition in many EU states.<sup>16</sup>

The concept originally thus had the function of separating the formal ownership from that of beneficial ownership, in conjunction with foundation

---

<sup>14</sup> OECD, Model Tax Convention on Income and on Capital: Condensed Version 2014, OECD Publishing, p. 188-189.

<sup>15</sup> Kleist, David: Begreppet beneficial owner och dess relevans i svensk skatterätt, *Svensk Skattetidning*, 2013 p. 34, (e-version).

<sup>16</sup> Gunne, Cecilia: Beneficial owner i svenskt individperspektiv, *Svensk Skattetidning*, 2016, p. 265 -267, (e-version).

or trust structures; structures in which the beneficial owner to a varying degree is connected to the underlying assets, which are formally being held and managed by a formal owner. If a situation requires separation of the two categories of owners, regardless of reason, the concept can prove effective. To keep this initial function in mind might prove useful when analyzing the multi-faceted concept, we have today.

The first appearance, in a tax treaty, of anything similar to the concept we have today was in the 1942 treaty between Canada and The United States. The mentioned treaty contained, albeit not a full participation exemption a reduced tax rate on intra-group dividends when paid by a “subsidiary corporation”. The “subsidiary corporation” was then defined as a corporation whose shares with full voting rights were beneficially owned by another corporation and that maximum 25 percent of its income was passive income from other sources than, its in turn, subsidiary corporations.<sup>17</sup> As Vann acknowledges, the beneficial ownership requirement focused on that the shares needed to be held by the beneficial owner and the notion does not seem to have related to the usufruct of the shares, as opposed to how the concept is perceived today in the mentioned articles of the model treaty.<sup>18</sup> Interestingly, the article in addition had a separate anti-abuse function, potentially signaling that the beneficial ownership part was not seen as having an anti-avoidance purpose but perhaps rather just a clarification purpose, see further chapter 6.

The protocol to the 1966 treaty between the United Kingdom and the United States was the first appearance of the doctrine of beneficial ownership focusing on that the beneficial owner must have the right to the income derived from the rights (equity, debt, IP etc.)<sup>19</sup> The United States added for its own sake in an explanatory memorandum that for dividends, the dividend must be beneficially owned by a resident to qualify for the provisions in the treaty. However, that this had already been implicitly assumed in former

---

<sup>17</sup> Vann, Richard: Beneficial Ownership: Recent Trends, chapter 19 p 271-272. See there cited “Canada-United States 1942 Treaty, art. XI(2), protocol para. 6”.

<sup>18</sup> Ibid., chapter 19 p 272.

<sup>19</sup> Du Toit, Charl: The Evolution of the Term “Beneficial Ownership” in Relation to International Taxation over the Past 45 Years, *Tax Treaty Monitor*, 2010, p. 502, (e-version). See also there cited the United Kingdom – The United States 1966 protocol.

treaties and that the adding of the concept therefore did not bring anything new to the table, or more accurately there was no reduction in the scope of the dividend article intended. Furthermore, the United States expressed that a trust is not by definition excluded from being the beneficial owner of dividends since it can receive and retain them and there does not need to be a formal or real obligation to distribute them to another person.<sup>20</sup> A question that arises is what kind of restrictions a recipient must have to the received dividends to disqualify as the beneficial owner, this will be further explained and discussed in chapter 4 when certain central case law is being presented. As I perceive it, the time also ought to be a factor. The fact that the US found trusts to not be automatically disqualified, seems to tell that even if the income is managed for someone else's ultimate benefit, time in between payout and redistribution, is including the assumption of risk for the trust or the formal owner.

The argumentation shows that the concept already initially was not clear in its definition and application. Something that, as will be elaborated further on in this thesis, despite efforts to clarify is still the case.<sup>21</sup>

### **3.3 In the OECD Model treaty**

The concept of Beneficial Ownership made its first appearance in the MC in the 1977 revision. As in the case of its early appearance in negotiated treaties prior to it occurring in the model treaty, it was an Anglo-Saxon initiative to clarify that the relief or reduction should not be available in cases where residents in third countries could put the income in hands of nominees or conduits in treaty states.

It was by the UK emphasized that this surely must have been the intended meaning of the articles on dividends, interest and royalties.<sup>22</sup> While this

---

<sup>20</sup> Vann, Richard: Beneficial Ownership: Recent Trends, chapter 19 p 275 and there cited "United States, Technical Memorandum of Treasury Department Concerning Proposed Protocol Amending the Income Tax Convention between the United States and the United Kingdom, (1996), Document 93-30729B".

<sup>21</sup> See e.g. OECD Clarification of the meaning of the "Beneficial Owner" in the OECD Model Tax Convention discussion draft 29 April 2011 to 15 July 2011.

<sup>22</sup> OECD: TFD/FC/216 (1967), Observations of member countries on difficulties raised by the OECD draft convention on income and capital p .14.

intention could be satisfied with a subject to tax clause, that is that the remittance would only be relieved from WHT if it was taxed in the other contracting state, that does not seem to have been the preferred test. Even though the doctrine is not explained as an anti-abuse provision, it seems to be indicated that the absence of such a clarification or interpretation of the articles would allow abusive practices.<sup>23</sup> Vann argues that the abuse perspective was toned down in the final instalment, many members likely saw the insertion as a clarification.<sup>24</sup> Whether that was a needed clarification or a product of compromise is not entirely clear, although Vann seems to lean towards the latter.<sup>25</sup> That could explain the uncertainty shrouding the concept and its application. Some members might have seen the addition as something more than a pure clarification or maybe it has just been a convenient way of tackling tax avoidance and evasion since the concept is an international accepted one, although without a properly defined and uniform meaning. The concept can then become a way to circumvent strict legality requirements, by referring to a concept that ought to be clear but in reality, is not.

### **3.4 In EU law**

The concept of beneficial ownership has a role in an EU law context. In this section I will briefly explain the term's existence in EU law, in an effort to shed light on the concept of Beneficial Ownership.

No distinction between an ultimate holder or a beneficial owner on one side and the formal or legal owner, direct recipient, on the other side is required when it comes to assessing whether an owner should have the right to (tax) advantages provided for in the TFEU. The constitutional rights emanating from the TFEU form fundamental rights to uphold the single market. That the beneficial owner is resident in a state, which would not allow it to benefit from the fundamental freedoms, does not make the direct recipient, resident in the EU lose its right to rely on the same freedoms. There is no such

---

<sup>23</sup> OECD: TFD/FC/216 (1967), Observations of member countries on difficulties raised by the OECD draft convention on income and capital p .14.

<sup>24</sup> Vann, Richard: Beneficial Ownership: Recent Trends, chapter 19 p 283 & 287.

<sup>25</sup> Ibid. chapter 19 p 286.

assessment and even if the freedoms do not extend to persons resident in third states, there seems to be no room for denial based on the beneficial ownership doctrine.<sup>26</sup>

In his opinion to the case *Felixstowe*, the case where the ECJ by following the AG concluded the above mentioned position of BO in a fundamental freedom context, AG Jääskinen developed the issue a bit further.<sup>27</sup> When it comes to the freedom of establishment there is, according to AG Jääskinen, nothing in jurisprudence or the treaties that would support a limitation on the treaties benefits for a corporation due to it being controlled by persons resident in third states. He continues and states that if a contrary approach would be chosen, many companies would be excluded from the benefits of the internal market.

Two things may be concluded from this. That the beneficial ownership as a way of denial does not have a given position in EU law unless included in the granted benefits somehow and that there from the outset is no presumption for dividing of formal and beneficial ownership in EU law. At least in a constitutional EU law environment. The case does not seem to completely disqualify usage of the BO concept as a denial of benefit in abusive situations however. That could more accurately be described as the notion that EU law cannot be relied upon for fraudulent ends rather than a general BO limitation acknowledgement in EU law.<sup>28</sup> More about the BO concept and its utilization as a remedy against abuse in chapter 6. However, a person controlling a corporation in a treaty state does not mean that the corporation is not the beneficial owner. Being foreignly controlled does not really say much about the control over the income vested in the corporation and therefore maybe not so much about whether the income can be or is beneficially owned.

The position in secondary EU law is somewhat different. The actual importance of the differences, and if this is an intended divergence is somewhat unclear. The Parent- Subsidiary Directive<sup>29</sup> and the Interest

---

<sup>26</sup> C-80/12 *Felixstowe* para 38-40.

<sup>27</sup> C-80/12 *Felixstowe*, AG-opinion 58-62.

<sup>28</sup> The ECJ has on several occasions reached the conclusion that EU law may not be relied upon for fraudulent ends, see e.g. C-196/04 *Cadbury-Schweppes* para 35, C-255/02 *Halifax* para 68-69, C-367/96 *Kefalas and Others* para 20.

<sup>29</sup> Parent-Subsidiary Directive

Royalty Directive<sup>30</sup> contain provisions to strengthen the single market by allowing distributions and certain payouts to flow between member states; this is partly achieved by abolishing WHT on payouts between entities in an intra EU context.<sup>31</sup> The benefit for the taxpayers is the limits or exceptions on WHT, that the directives require member states to include in their respective domestic WHT provisions. The exceptions in the IRD only have to be granted if the beneficial owner, of the income, is resident in the EU. The PSD conversely has no explicit requirement that the parent company must be the beneficial owner of the dividend. It is uncertain whether the absence of the concept in the PSD is to be given much significance or if it can be assumed that the parent company must be the beneficial owner to the dividend. The exact borders and application of the concept is not certain. In the IRD the recipient shall receive the payment for his own benefit.<sup>32</sup> I refrain from equalizing the concept's meaning in EU law with the concept in tax treaty law automatically, they might very well differ even though fundamental traits ought to be the same. Fact is that they are probably different, as has been mentioned and will be mentioned again the term in international fiscal law is its own with its own meaning. Without more guidance from the ECJ, the concept and its application and coverage in EU law in general and its existence in the PSD is debatable, and with that its connection to anti-abuse measures. E.g. what should be focused on when assessing whether a person is receiving something for his own enjoyment or benefit. Should a direct recipient, completely without power over the income, channel the income out of the EU it is probably a fraudulent use of EU law. A BO assessment might then not be necessary but it is clear that there is some connection between the

---

Council Directive 2011/96/EU of 30 November 2011 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (recast), [2011] OJ L 345, 29.12.2011, p.8.

<sup>30</sup> Interest-Royalty Directive

Council Directive 2003/49/EC of 3 June 2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States, [2003] OJ L 157, 26.6.2003, p.49.

<sup>31</sup> PSD art 1 and 5 see also preamble para 3

IRD art 1 see also preamble para 3-5.

See also Helminen, Marjaana: EU Tax Law – Direct Taxation Chapter 3, (e-version).

<sup>32</sup> IRD art 1 para 4.

doctrine and anti-abuse ideas. In reality, the situations of channeling are probably not as obvious or clear as in my example.

Lastly can be mentioned that the member states are obligated to follow EU law regardless of the term's meaning in tax treaty law. This is potentially an issue to OECD efforts to a uniform term, one word is then used for two concepts that have different applications but in otherwise similar situations; differences can be depending both on involved states but also if minimum holding requirement etc. in the directives are fulfilled. The PSD and the IRD are generally perceived as minimum directives however.<sup>33</sup>

---

<sup>33</sup> Ståhl , Kristina et al.: EU Skatterätt, Chapter 7 p 247.

# 4 The OECD approach

## 4.1 Introduction

In chapter 3, I have explained the origin of the concept of beneficial ownership and how it has made its way into an international fiscal law context. As has been elaborated in chapter 3.3 for the creation of the concept in an international fiscal law sphere, different states may have had different agendas behind the introduction. In this chapter, I will attempt to pinpoint the current stance of the OECD by analyzing the commentaries to the model treaty. In chapter 5, central international case law will be presented in an effort to show the complexity of the concept. The discussion on the concept's relation to abuse of law is briefly touched upon but is returned to in chapter 6.

## 4.2 The commentaries

The OECD approach, to the concept of beneficial ownership is in principal identical for the incomes dividend, interest and royalties. The commentaries state, that the beneficial ownership requirement was added for the purpose of clarifying what is meant by “paid.... to a resident” in the context of article 10 regarding dividends.<sup>34</sup>

“Dividends *paid* by a company which is a resident of a Contracting State *to a resident* of the other Contracting State may be taxed in that other state”<sup>35</sup>

The adding of the beneficial ownership requirement in the second paragraph, which is regulating in which situations the source state has to reduce its WHT, therefore serve to explain when the first paragraph is applicable and when the state of residency is allowed to tax. It is only when the state of residency is allowed tax the dividend, that the source state is obligated to limit its WHT

---

<sup>34</sup> OECD, Model Tax Convention on Income and on Capital: Condensed Version 2014, OECD Publishing, p. 188 para 12.

<sup>35</sup> OECD, Model Tax Convention on Income and on Capital: Condensed Version 2014, OECD Publishing, art. 10 para 1. Emphasize added.



and that is only the case when the beneficial owner of the dividends is a resident in the state of residence. As already emphasized, it is not enough that the direct recipient is a resident in that state if he is not also the beneficial owner.<sup>36</sup>

What seems to be central in the commentaries, is that, it is not the payout as such and where it goes that should be given the most focus but rather importance should be given to who is the actual owner of the income. It is stated that the beneficial owner terminology should be detached from any legal figures in domestic law.<sup>37</sup> The commentaries state, although somewhat between the lines, that it is the only logical interpretation of the article with or without the clarification, since it would be contrary to the purpose of the convention to let the treaty benefits apply in a situation where the direct recipient acts as an agent or nominee. The relief would be granted simply because the direct recipient is a resident in the other contracting state, while at the same time no double taxation will occur, since he is not treated as the owner for tax purposes (but perhaps for civil law purposes) in the other contracting state (the state of residence).<sup>38</sup>

This is a variety of a “subject-to-tax” reasoning and I am not convinced that a subject to tax clause is something that should flow naturally from the purpose of the model convention. Moreover, the actual treatment in the other state (state of residence) should be of less importance if, as stated by the CFA, the term is an autonomous one, but instead there seems to be a requirement to assess the application of the other state’s income tax law. Overall the importance of the concept seems to be toned down in the commentaries so far.

In the next paragraph the focus is on the right of the income in the hands of the direct recipient, perhaps more an economic approach than a legal one. Even if it is not an agent, but indeed a conduit that has limited power over the received income (dividend) the recipient may disqualify as the BO.<sup>39</sup>

---

<sup>36</sup> OECD, Model Tax Convention on Income and on Capital: Condensed Version 2014, OECD Publishing, p. 188 para 12.

<sup>37</sup> Ibid. p. 188 para 12.1.

<sup>38</sup> Ibid. p. 189 para 12.2.

<sup>39</sup> Ibid. p. 189 para 12.3.

However, the commentaries discuss a legal or contractual obligation to pass on the income and that an agent or conduit in general has such an obligation. In addition, “facts and circumstances” can show a reduced right to the income for the direct recipient.<sup>40</sup> Agent or conduit companies are mentioned as examples of persons that under certain circumstances might be excluded from being the BO.<sup>41</sup> This ought to mean that any direct recipient that are under equal or similar constraints are possible to disqualify as the BO. The CFA emphasizes that not all restrictions and limitations are liable to disqualify as status of BO. General obligations to pay another person is not what is intended in the commentaries.<sup>42</sup> It might therefore both be a question of identification, whether it is the same payout being distributed, and of proximity, how close in time the distribution is. As Baker points out, corporations in general exist to eventually do redistributions to its stakeholders.<sup>43</sup>

That a direct recipient has costs or debts that he pays, cannot in its own merit disqualify him as the beneficial owner. If that would be the case, which purpose would the treaty even serve?

This is an essential separation. Whereas some costs and redistributions clearly are of such nature to disregard as having an effect on the recipient’s power over the income, others might be harder to assess. The obligation to pass on the payment, must according to the commentaries, be dependent on the receipt of the income.<sup>44</sup> The receipt then, is some form of triggering event. A person managing funds ultimately for someone else, might under such definition, as I have previously stated, be able to qualify as the BO if he assumes enough power over the income and perhaps assumes the risk in connection with managing, such as reinvestment. The obligation to redistribute must have a connection to the receipt of the income. In the next chapter, a case law analysis might shed light on how to interpret this phrasing. To summarize, the concept should be interpreted independently from

---

<sup>40</sup> OECD, Model Tax Convention on Income and on Capital: Condensed Version 2014, OECD Publishing, p. 189 para 12.4.

<sup>41</sup> Ibid. p. 189 para 12.3 -12.4.

<sup>42</sup> Ibid. p. 189 para 12.4.

<sup>43</sup> Baker, Philip: Beneficial ownership: after *Indofood*, *GITC review*, 2007, p. 16, (e-version).

<sup>44</sup> OECD, Model Tax Convention on Income and on Capital: Condensed Version 2014, OECD Publishing, p. 189 para 12.4.

domestic law, it is not the ownership of the shares that is the central but rather whom the income is paid to (who owns the income) and if parts of a chain of transactions can be disregarded.<sup>45</sup> This indicates an anti-abusive approach, this is an aspect that will be elaborated in chapter 6.

Worth noting is, that the OECD approach has not been exactly static throughout the years. Quite a substantial change occurred in 2003. The group of recipients potentially not qualifying as the BO was then extended to the above presented recipients with limited power over the income. No longer were only pure agents mentioned in the commentaries<sup>46</sup>. Even though, as has been stated in chapter 1.2, this thesis will not discuss whether the commentaries can be interpreted as ambulatory, treaties pre-2003 have the potential to be read quite differently from newer treaties, which certainly is worth noting.

---

<sup>45</sup> OECD, Model Tax Convention on Income and on Capital: Condensed Version 2014, OECD Publishing, p. 190 para 12.6.

<sup>46</sup> Baker, Philip: Beneficial ownership: after Indofood, *GITC review*, 2007, p. 17, (e-version).

# 5 Case law

## 5.1 Introduction

In this chapter, I present central case law in an effort to investigate the meaning of the term beneficial owner in tax treaty law. A selection had to be made and the cases chosen are all significant. The cases are presented in an order I found logical and therefore not necessarily in chronological order. In section 5.5 I in addition present a case that is somewhat peripheral, more summarily.

## 5.2 Indofood

### 5.2.1 Background

*Indofood*<sup>47</sup> is a central and fairly groundbreaking case within the field of beneficial ownership.<sup>48</sup> The case was heard in UK courts and was regarding a private law matter. Even though the case is not a tax law case, it is important since it does forcibly deal with whether a recipient is the beneficial owner.

An Indonesian company, “Indofood”, had a need for capital. There were potential lenders in the UK.<sup>49</sup> At the time Indonesia had a 20 percent WHT on interest.<sup>50</sup> The Indonesian WHT was reduced in several DTC:s between Indonesia and other states, the UK not being one of them. The DTC between Mauritius and Indonesia capped the Indonesian WHT on interest to 10 percent. Indofood established a subsidiary in Mauritius, the subsidiary borrowed from the creditors in the UK and then re-lended the funds to its parent Indofood.<sup>51</sup> The loan from the UK was administrated by JP Morgan, a

---

<sup>47</sup> *Indofood International Finance Ltd. v. JPMorgan Chase Bank N.A., London Branch (Formerly J P Morgan Chase Bank, London Branch) Case No: A3/2005/2497 [2006] EWCA Civ 158.*

<sup>48</sup> Baker, Philip: *Beneficial Ownership: Recent Trends*, chapter 2 p 27.

<sup>49</sup> *Indofood International Finance Ltd. v. JPMorgan Chase Bank N.A., London Branch (Formerly J P Morgan Chase Bank, London Branch) Case No: A3/2005/2497 [2006] EWCA Civ 158 para 1.*

<sup>50</sup> Baker, Philip: *Beneficial Ownership: Recent Trends*, chapter 2 p 28.

<sup>51</sup> *Indofood International Finance Ltd. v. JPMorgan Chase Bank N.A., London Branch (Formerly J P Morgan Chase Bank, London Branch) Case No: A3/2005/2497 [2006] EWCA Civ 158 para 1.*

bank. The two loans were practically identical and also contained the same rate of interest. These kinds of loans are called back-to-back loans, the interest was payable shortly after each other and at the same rate. The purpose of the Mauritian company, was to borrow on the market and then fund the parent. Evidently, the subsidiary's only source of income was supposed to be interest from the parent.<sup>52</sup> The interest payable on the funds borrowed on the market and collected by JP Morgan was to be paid to JP Morgan at set out dates guaranteed net, meaning that the interest to be put in JP Morgan's hand was predetermined to the rate regardless of any taxes and fees withheld at source. Any increases in WHT would require the subsidiary, and the parent in turn, to pay larger amounts compensating for the increase in WHT and vice versa.<sup>53</sup>

Effective from 1<sup>st</sup> of January, circa two years after the structure was set up in 2002, the DTC between Indonesia and Mauritius was terminated on Indonesian initiative.<sup>54</sup> Allegedly, the termination was due to increased possibilities for tax planning through letterbox corporations in Mauritius.<sup>55</sup> Effective from 1<sup>st</sup> of January 2005 the full WHT rate of 20 percent in domestic law would apply for interest paid from Indofood to its subsidiary; somewhat cynically, the structure no longer served any purpose.

In addition, ultimately the interest payments to JP Morgan had to be increased in order to live up to the obligations in the bond contract.<sup>56</sup> Included in the terms of the credit was an option for the obligor to prior to the loan's final date repay any outstanding balance and terminate the loan prematurely. This option was available if the de facto interest to pay was to increase due to taxes or levies, requiring increased interest payments. If there were any

---

<sup>52</sup> Indofood International Finance Ltd. v. JPMorgan Chase Bank N.A., London Branch (Formerly J P Morgan Chase Bank, London Branch) Case No: A3/2005/2497 [2006] EWCA Civ 158 para 12 -13.

Baker, Philip: Beneficial Ownership: Recent Trends, chapter 2 p 28.

<sup>53</sup> Indofood International Finance Ltd. v. JPMorgan Chase Bank N.A., London Branch (Formerly J P Morgan Chase Bank, London Branch) Case No: A3/2005/2497 [2006] EWCA Civ 158 para 12.

<sup>54</sup> Ibid. para 15.

<sup>55</sup> Ibid. para 15.

<sup>56</sup> Baker, Philip: Beneficial Ownership: Recent Trends, chapter 2 p 29.

remedies reasonably available to the obligor as to remain at the capped WHT rate, no premature termination was allowed.<sup>57</sup>

According to Baker, there were credits on more favorable terms available on the market to the Indonesian conglomerate at the time; therefore Indofood had an interest in arguing for premature termination.<sup>58</sup> Accordingly, a premature termination was of no interest to JP Morgan and the creditors. The parties were unable to agree to whether a new link in the chain, namely a Dutch Holding company, would be able to uphold status quo. A question the UK judge consequently had to settle.

The question to be answered by UK courts thus was how this potential Dutch company, being placed under the Indonesian parent, would be assessed under Indonesian law. One of the questions that had to be answered, was whether the Dutch company (NewCo,) would be the Beneficial Owner under the Dutch-Indonesian DTC.<sup>59</sup>

Background to the question being that The Netherlands had a DTC with Indonesia capping Indonesian WHT at 10 percent, similar to the late DTC with Mauritius.

## **5.2.2 The Court of appeal's verdict**

The court of appeal had to closely scrutinize what is meant by the beneficial owner, how the term should be interpreted and if NewCo could be the BO in the case before it. Focus was put on the power the recipient had over the received income, in this case interest. A person having as a main function to hold assets and consequently receiving income was not according to the court's interpretation of the concept enough to automatically deem this person an intermediary.<sup>60</sup> The court was also discussing on ways to assess to whom the income really belongs to.

---

<sup>57</sup> Baker, Philip: Beneficial Ownership: Recent Trends, chapter 2 p 29.

<sup>58</sup> Ibid.

<sup>59</sup> Indofood International Finance Ltd. v. JPMorgan Chase Bank N.A., London Branch (Formerly J P Morgan Chase Bank, London Branch) Case No: A3/2005/2497 [2006] EWCA Civ 158 para 7.

<sup>60</sup> Ibid. para 42.

Pedagogically, the judge clearly stated that the term is to be given an international fiscal meaning independent from domestic law.<sup>61</sup> This means two things, firstly that the case is of international relevance and secondly that the commentaries are being adhered to. It is however not possible to know, whether another court in another state would disagree to this conclusion or to the following assessment in part or in full. The clear international fiscal law approach seems to support a common interpretation of the concept of BO in all treaties based on the MC.

The judge upheld, that such a Dutch company, certainly would lack certain privilege to the income, it would be required to pay the interest which it in turn will receive two days before its due, from further up in the chain. Furthermore, there was no “direct benefit” or enjoyment for the NewCo.<sup>62</sup> The Judge, was in this passage looking to what is really occurred in the arrangement, rather than a pure reading of the contract. The Judge was even stating that NewCo might be labeled as an administrator of the income. The court finds that under these circumstances, NewCo is not likely to be the beneficial owner under the relevant tax treaty. The conclusion was also based on the previous limit for the NewCo, to not receive income from other sources.

All in all, the judgment does not clarify as much as might be perceived at first. There is no real guidance to what kind of power a recipient must have over the income, merely that the channeling apparent in the case, the short deadlines combined with that it was essentially the same income being transferred, is liable to disqualify the recipient from being the beneficial owner. It did however, confirm the BO as an autonomous concept.

---

<sup>61</sup> *Indofood International Finance Ltd. v. JPMorgan Chase Bank N.A., London Branch*(Formerly J P Morgan Chase Bank, London Branch) Case No: A3/2005/2497 [2006] EWCA Civ 158 para 42.

<sup>62</sup> *Ibid.* para 43-44.

## 5.3 Prévost

### 5.3.1 Background

The *Prévost* case<sup>63</sup> is an important case for several reasons. Firstly, in its framework it is relatively faithful to the OECD and the commentaries to the model treaty. Secondly, the judge discusses what role the direct recipient must play and what kind of power over the income he must have, to be able to qualify as the beneficial owner. Thirdly, the judge brings up the *Indofood* case and studies it and the argumentation there.

The Canadian manufacturing company Prévost Canada, was owned by a Dutch Holding company. The Dutch holding company was owned by a Swedish company (Volvo) and a British company (Henley). Volvo and Henley biwanted to expand their operations and therefore acquired Prévost, but chose to acquire it through a holding company based in the Netherlands. Several reasons to why an acquisition through a holding company in the Netherlands was preferred to a direct acquisition was later to be presented in front of the Canadian court. Among the reasons to have a holding company, was that the holding company would be useful in future expansion on the North American market, in addition to avoid tax claims from the parents' states, a holding company was purposeful. The Netherlands was allegedly a good choice due to it being neutral, neither being UK or Sweden, allowing business in English and being in the EU.<sup>64</sup> The Dutch Holding company had no employees and no other economic engagements.<sup>65</sup>

Profits in Prévost was distributed to the parents, through dividends to the Dutch Holding company. According to facts in the case, one dividend in 1997 amounted to 9 000 000 USD.<sup>66</sup> With such amounts, the WHT can reach quite substantial amounts. The two shareholding parents had, in-between them, agreed, in a shareholders' agreement, that at least 80 percent of the profits in the Dutch Holding company and its subsidiaries, were to be distributed to the

---

<sup>63</sup> *Prevost Car Inc. v. The Queen*, 2008 TCC 231.

<sup>64</sup> *Ibid.* para 3-11.

<sup>65</sup> *Ibid.* para 25.

<sup>66</sup> *Ibid.* para 18.



shareholders, assuming that the conglomerate was able to meet its obligations to third parties and thus still running the business.<sup>67</sup>

The dividend article in the DTC between Canada and The Netherlands capped the Canadian WHT at 5 percent, compared to the rates of 10 and 15 percent respectively in the treaties with Sweden and the UK.<sup>68</sup> Intra group dividends are in general free from WHT under the Parent-Subsidiary Directive<sup>69</sup>, when both the receiving and the distributing corporation are resident in the EU, this would make any redistribution from the Dutch Holding company to its parents easier.

Eventually, the Canadian tax authority made the assessment that, the Dutch Holding company, was not the beneficial owner, of the dividends distributed by Prévost. Effectively disregarding the Dutch holding company, Prévost was instructed to withhold tax on the dividends' nominal value with the rates agreed upon in the treaties in the treaties with Sweden and the UK even if the dividends, civil law wise, was received by the Dutch company.<sup>70</sup> The Canadian authorities reached this decision when studying the treaty between the Netherlands and Canada, namely the dividend article. Since the Dutch holding company was not the beneficial owner of the dividends, the treaty did not apply, the ultimate shareholders were the beneficial owners why the treaties with their respective state had to be inspected for any limitations in the Canadian right to tax. The group disagreed and the issue had to be resolved in Canadian court.

---

<sup>67</sup> *Prevost Car Inc. v. The Queen*, 2008 TCC 231 para 12.

<sup>68</sup> Arnold J, Brian,; *Beneficial Ownership: Recent Trends*, chapter 3 p 40.

<sup>69</sup> Parent-Subsidiary Directive

Council Directive 2011/96/EU of 30 November 2011 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (recast), [2011] OJ L 345, 29.12.2011, p.8.

<sup>70</sup> Arnold J, Brian,; *Beneficial Ownership: Recent Trends*, chapter 3 p 40.

### 5.3.2 The verdict

The Judge in the case was scrutinizing the wording of the term, seeking to establish its literal meaning, this part of the interpretation process included comparing different language versions.<sup>71</sup>

The previously presented case *Indofood*, was being brought up. Since the parties to the case agreed that the holding company was not an agent, the key issue was regarding its power over the received dividend and whether it could enjoy the income.<sup>72</sup> The judge reaffirmed that focus should not be put on the ownership of the shares but on the ownership of the actual dividends.<sup>73</sup>

The beneficial owner was according to the Judge the one “...*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*”.<sup>74</sup> The person should be able to enjoy the benefit and not have any obligations or duties regarding the income. Furthermore, the judge disregarded the lifting of the corporate veil theory in the way that he stated that, just because the one who can ultimately exercise his right over the income is the BO, it does not mean that ultimate shareholders are the BO per necessity. He took another approach than the lifting of the corporate veil and assessed the power the direct recipient has without assuming anything because of ownership structures. The Judge continued and distinguished the BO as the recipient who can do what he desires with the income and is not acting on someone else’s behalf.<sup>75</sup>

Taking a somewhat legalistic approach, the Judge mentioned that the Holding company would have to make a decision regarding distribution of dividends, after receiving dividends from Prévost. The amount possible to distribute would, in addition be limited by Dutch civil law. Thus, there was no predestined flow from Prévost to the ultimate parents.<sup>76</sup> However, one could in my opinion question how such an “automatic flow” would be composed without, primarily, making a scheme obvious, as well as risking

---

<sup>71</sup> Prévost Car Inc. v. The Queen, 2008 TCC 231 para 60-73.

<sup>72</sup> Ibid. para 93.

<sup>73</sup> Ibid. para 99.

<sup>74</sup> Ibid. para 100.

<sup>75</sup> Ibid. para 100.

<sup>76</sup> Ibid. para 102.

breaching Dutch company law; in fact, the ownership structure was very closely held.

A shareholders' agreement is a contract that in most legal orders bind the shareholders only and not the company.<sup>77</sup> The agreements were therefore left without much consideration.<sup>78</sup> Since for the Holding company it was not something to consider, or in other words it did in no way render its power over the dividends from Prévost less substantial, from the Holding company's viewpoint. This is in line with the aforementioned method of assessing the direct recipient's power over the income, rather than doing a substance over form analysis based on all available data. The final conclusion is that the Dutch Holding company is the beneficial owner.

The case is in my opinion a correct assessment de lege, I am not convinced that there is room for a more de facto regard. Critically it can be argued that there perhaps was some sort of flow from Prévost to the parents even though it was not a legal one. Tax payer protection is given high regard in this case.

## 5.4 Royal Bank of Scotland

### 5.4.1 Background

The *Royal Bank of Scotland case*<sup>79</sup> actually places itself before *Prévost* in time. I chose to present it after *Prévost* however due to a certain connection between *Prévost* and *Indofood*. In *Royal Bank of Scotland* as opposed to, for example, *Prévost* the courts have more of an anti-abuse approach and look at the situation as a whole.

A pharmaceutical company, residing in the United States, sold usufruct rights for three years to the Royal Bank of Scotland for a one-time payment. The right was for the usufruct in its subsidiary with residency in France.<sup>80</sup> These kinds of transactions are sometimes referred to as repurchase agreement or dividend washing, since they convert dividend income to capital

---

<sup>77</sup> See e.g. *Nerep & Samuelsson, Aktiebolagslag (2005:551) 3 ch. 1 §, Lexino 2013-12-01.*

<sup>78</sup> *Prevost Car Inc. v. The Queen*, 2008 TCC 231 para 103.

<sup>79</sup> *Bank of Scotland v. Ministre de l'Economie, des Finances et del'Industrie*, Conseil d'Etat Case 283314 (29 Dec. 2006).

<sup>80</sup> Gibert, Bruno & Ouamrane, *Yacine: Beneficial Ownership – A French Perspective, European Taxation*, 2008, p. 6 (e-version).

gain.<sup>81</sup> The dividends falling under the usufruct agreement would be subject to a lower WHT under the Franco-UK treaty, compared to the standard WHT under French domestic law (15 percent instead of 25 percent). The Royal Bank of Scotland would also get the credit “avoir fiscal”, effectively setting the WHT at 5 percent. The Royal Bank of Scotland could, based on these premises, get a higher amount net than the parent company would be able to acquire. The amount to be distributed in the form of dividends by the subsidiary was predetermined. This made it possible to pay, for the usufruct right, an amount higher than the parent company would receive net, but lower than itself can receive, resulting in a mutual-gain outcome.

The French authorities, challenged the layout, finding it abusive. Finding the payment, for the usufruct right, to be a credit to the parent company and concurrently the dividends from the subsidiary to be amortization and interest on the loan, on behalf of the parent. Thus, putting the parent company as the beneficial owner rather than the Royal Bank of Scotland. With the parent company as the beneficial owner and by applying the Franco-US treaty instead in addition to excluding the right to the “avoir fiscal” the amount that France is allowed to withhold at source was increased. The taxpayer disagreed and the case was eventually resolved by the French Supreme Administrative court in Paris.<sup>82</sup>

#### **5.4.2 The French Supreme Administrative court’s decision**

The court by taking an overall approach to the facts available, stated that the parent company had indemnified the bank for any default by the subsidiary. Furthermore, there was a possibility to terminate the contract prematurely for the bank in case the subsidiary’s financial results were inadequate. So, the combination of predetermined rates to be distributed and guarantees, resulted in a low risk assumed by the bank. Eventually siding with the authorities, the court found the parent, rather than the bank, to be the beneficial owner. Not

---

<sup>81</sup> Gutmann, Daniel: *Beneficial Ownership: Recent Trends*, chapter 11 p 167.

<sup>82</sup> Gibert, Bruno & Ouamrane, Yacine: *Beneficial Ownership – A French Perspective*, *European Taxation*, 2008, p. 6-7 (e-version).

only finding the arrangement to be a loan, it was also found to be contrary to the purpose of the treaty between France and the UK. The court found the layout to be abusive under a national GAAR.<sup>83</sup>

The court thus gave focus to risk assumed. Clearly the bank had power over the received dividend so to disqualify it as the BO for lacking power would not be possible. The denial therefore seems to not fully correspond to the previously presented position of the OECD and previously presented case law. The Bank must have been the one who enjoyed the dividend and surely there was a benefit. Furthermore, there is no sign of conduit or agent scheme in the way that the bank is under some form of obligation to pass the income on.

However, one maybe has to look at it backwards. For instance, it might be seen as that the bank already passed on the income to the parent company prior to even receiving it, therefore it is a loan. Alternatively, that the risk assumed is identified as the focal point in the case; the bank cannot be the one that has the right to the income, since it does not assume the risk that one that usually has that right do. The latter argument is somewhat weak. Can that approach be in line with the OECD material and the background of the concept; if one really has the right to the income? It is one thing that assumed risk is a factor and another that it is the decisive factor able to disqualify a person as the BO, even in the absence of only narrow powers (and therefore in the presence of more substantial power) over the received piece of income. In my opinion that gives the concept a role that was not initially intended in the stride to stem abuse. The authorities and eventually the courts certainly take an overall approach and move things around when “retelling” how the situation really is to be seen. Is that really a part of the beneficial ownership doctrine as described? It is one thing that certain abusive practices would be readily available without the doctrine (e.g. intermediaries with narrow powers) and another thing whether the doctrine therefore would be able to stem also other forms of abuse automatically, even when the recipient has fully-fledged powers over the income.

---

<sup>83</sup> Gibert, Bruno & Ouamrane, Yacine: Beneficial Ownership – A French Perspective, *European Taxation*, 2008, p. 6-7 (e-version).

The concept and its history presented, seems to focus on how the income is owned rather than at favorable result from schemes, the same result for France could have been reached by other measures but as I have already argued maybe those other measures would not be politically possible to create. The concept of beneficial ownership, somewhat vague, then becomes a possibility to apply.

## 5.5 Short note on a few more cases

### 5.5.1 The Carnegie Case

This case<sup>84</sup> was regarding the application of the anti-abuse rule in the Swedish withholding tax act<sup>85</sup>. In short, a Swedish bank borrowed the shares in a Swedish company from a foreign investor over the dividend day. The dividend would have been burdened with Swedish WHT, would it be paid directly to the foreign investor, but since the dividend was distributed to a Swedish resident (the bank) no WHT was withheld from the outset. The administrative court of appeal however, agreed with the tax authorities and applied the SAAR in the Swedish Withholding Tax Act; resulting in that the distribution to the Swedish bank should be burdened with WHT. The Swedish bank was deemed to hold the shares under circumstances, resulting in that someone else unduly was relieved from WHT and was therefore itself liable to the WHT.

Now this was not the application of a BO rule as such but is nevertheless regarding a “decoy” or “nominee“ situation and there are some parallels to be seen with the *Royal Bank of Scotland* case. Worth noting is, that neither the provision, nor the case were focusing on who had the right to the income underlying the asset. Even though this is more clearly anti-abuse provisions being applied rather than a pretention to apply a BO concept there is still relevance. One can ponder over whether the Swedish bank is or would be the BO. It seems to have power over the dividends at least. With this approach, the state of source can secure taxation without having to risk tax treaty

---

<sup>84</sup> Kamarrättens i Sundsvall dom den 15 juni 2007 i mål nr 575-05.

<sup>85</sup> Kupongskattelag (1970:624).

override and can in addition apply national anti-abuse provisions hopefully accepted and debated in parliament. A resident corporation formed with the intention of channeling dividends through a state to which distributions are not burdened with WHT, when the conduit lack power over the income, is probably likely to lose the relief under both a BO reasoning and the SAAR in the Swedish Withholding Tax Act.<sup>86</sup>

## 5.5.2 The Real Madrid Cases

The Real Madrid cases are a series of cases<sup>87</sup> from Spain, regarding royalties for certain IP rights relating to players, paid by the soccer club Real Madrid to companies in Hungary. Almost all royalties received by the Hungarian companies, were redirected to residents in other countries (Cyprus and the Netherlands). Hardly surprising, the tax treaty between Spain and Hungary was uniquely beneficial at the time and no WHT burdened the royalties. The Spanish tax authority and eventually the Supreme Administrative Court of Spain found the Hungarian companies to not be the beneficial owners and thus WHT was eventually withheld on the royalties.<sup>88</sup> The main points between the cases, for the purpose of this thesis, are similar.

The Court concluded that the main purpose of the BO concept is to deny tax treaty benefits to residents in third states. The court goes further and equalizes the concept of BO with domestic GAARs and therefore considers Spain free to deny treaty benefits based on the BO doctrine, that is to find the direct recipient to not be the BO, whenever avoidance cannot be excluded.<sup>89</sup> Strangely enough, the court claims the concept to be an independent concept of international law much in line with the OECD while at the same time they describe it erroneously or at least not in line with material previously analyzed

---

<sup>86</sup> Compare Sandström, K.G.A.: Aktieutdelning samt utdelning från ekonomisk förening, p 312-313 where a predecessor to the Swedish rule is being analyzed, the text is old but some notions are still of relevance.

<sup>87</sup> Judgement of the ES: AN 18 July 2006, JUR/2006/204307. JUR/2007/8915, 1110/2003 and JUR/2007/16549, AN, 10 NOV 2006, JUR/2006/284679, AN, 20 July 2006, JUR/2007/16526, AN, 13 Nov 2006, JUR 2006/284618 and AN, 26 Mar. 2007, JUR/2007/101877.

<sup>88</sup> Jimenez, Adolfo Martin,: Beneficial Ownership: Recent Trends, chapter 8 p 128-130.

<sup>89</sup> Judgement of the ES: AN 18 July 20061110/2003.

in this thesis. The anti-abuse provision being central to the court, it adapts a purpose test. If there is a legitimate business reason to have a direct recipient, that is not the same as the ultimate recipient other than access to Spain's tax treaty network, the direct recipient is the BO. I do not manage to see support for this view anywhere. Besides, it does not solve any fundamental interpretation issues with the concept of BO, what redistributions are liable to disqualify the direct recipient as the BO. That there is even talk of a final recipient shows that this is a discussion on another level. According to this line of argumentation the recipients power over the income is perhaps of less importance. Also, this piercing of the corporate veil, holding shareholder's liable or at least compelling them to justify the residency of a subsidiary seems to go beyond the clarification intention of BO presented by the OECD. The immediate focus on surrounding corporations, rather than on the receiver and his powers over the income, also signals a different mindset and approach to the concept of BO.

With this interpretation Spain goes far. Such a narrow interpretation of who the BO is, both risk making the concept into something it is not as well as risking making tax treaty override more accepted. According to the Supreme Court the denial of WHT relief flow from the treaty, rather than from domestic law, which then happens to be interpreted the same even though the former is given an independent international fiscal meaning. The verdict is clearly a stand against treaty shopping and a narrow interpretation of the concept of BO, possibly at the cost of legal certainty for taxpayers.

## **5.6 Comments and interim conclusions based on presented case law**

I have been making comments and analyzed throughout in conjunction with presenting the cases but here I will give some general comments and thoughts. The cases presented, have come to partially different conclusions and on different grounds. This is not necessarily that surprising, albeit unsatisfying, since several of the courts claim to establish a common unified concept of Beneficial Ownership, independent from domestic law. Several of the cases



argue for an independent international meaning of the concept but still come to different conclusions or focus on different parameters. In both *Royal Bank of Scotland* and the *Real Madrid cases* the recipients power over the income seems to be largely disregarded even if this is central in the OECD approach. Whereas the former case at least looks at the risk assumed however.

In *Prévost* on the other hand, the direct recipient was deemed the beneficial owner. The direct recipient did not have much of a premise and no employees but it exercised such power over the income as to qualify as the BO. This was a legalistic and formal conclusion. The Judge discussed that the recipient was the master over its own will, but a legal person can only be so independent from its shareholders, it is a figure of law. That does not mean that there are any general reasons to not uphold this agreed upon figure.

In addition, certainly the law should be able to be dynamic to some degree but the legality requirement must be preserved for the taxpayers. An alternative would be to include LOB:s in tax treaties, one problem still remain for states in that case however; the inability to parry for changes in the other contracting state's internal law and potential existence of long transaction chains. Pure subject to tax clauses is another option.

*Prévost* was a largely legalistic view while the *Real Madrid Cases* were all on the other side of the spectrum with a full substance-over-form approach. At least initially, it is the former one that seemed endorsed by the OECD and what is supported by the term's legacy. It goes back to the question if other factors than legal and contractual restrictions over the income should be allowed consideration when assessing if the direct recipient is the BO and if so how much. The issue of the overall approach is further elaborated in the next chapter.

## 6 BO and the notion of abuse of law

The factual and legal factors relevant for assessing whether the direct recipient is the beneficial owner seem to be somewhat unclear. Initially it was the power over the income that was central, maybe only contractual and legal restraints were relevant. The discussion draft clarifications, later inserted in the commentaries, are also rather vague. As has been discussed in chapter 4.2 the intended meaning is slightly ambiguous and the clarification can be read in different ways.

*“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. 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;..”<sup>90</sup>*

It can be read as that to be the BO there must be an absence of any obligation to pass the income on to someone else. This obligation may exist in a contract or by law. Circumstances might, in some cases, be needed to confirm this legal or contractual obligation. The passage can also be read as that circumstances can show the obligation without the obligation being enshrined in law or contract. That is a question of how formal the obligation to pass on must be. The ambiguity partly lays in that the second part of the paragraph refers back to the “contractual or legal obligation” while at the same time stating that facts and circumstances in substance (reality?), show that the direct recipient lacks the full right to enjoy the dividend. The conclusion in *Prévost* for example is more in line with the former interpretation. Whatever

---

<sup>90</sup> OECD Clarification of the meaning of the “Beneficial Owner” in the OECD Model Tax Convention discussion draft 29 April 2011 to 15 July 2011 p. 4 para 12.4. Emphasize added.

the answer to this question is, how formal the obligation to pass the income on is, I do not see support for a full, overall approach with substance over form view in this passage. The passage could, hypothetically, be read as that any facts and circumstances can show that the (direct) recipient does not have sufficient right to enjoy the dividend; that the facts and circumstances can show this on their own merit. Potentially signaling and endorsing a substance over form approach. A more thorough reading however, shows that, this is not what is said; the passage is entirely focusing on the obligation to pass on or redistribute the income, or more accurately, the absence of such an obligation.

That treaty shopping occurs, does not necessarily mean that the recipient did not receive an income for its own use, if the recipient has full power over the received income and no obligation to redistribute exists in an initial phase. To have an intermediary with limited power can of course be abusive in the way that it is done to avoid WHT artificially. An initial question can be if there even always is a need to go into an anti-abuse discussion. If an alleged or perceived recipient is part of an abusive scheme his powers over the income can be inspected. There is no reason to mix the doctrines in all cases. Either the recipient is the BO or he is not, he cannot be excluded from being one due to adjacent circumstances, if he actually is the BO. What I am trying to express here is that the anti-abuse discussion and BO discussion are separate, parallel perhaps, but separate. Is an abuse discussion needed or can it merely, in some situations, be concluded that the recipient is not the one who beneficially owns the dividends? For more “sophisticated” forms of avoidance or when the direct recipient does not have narrow power but can actually exercise power over the income, it is questionable if the BO doctrine is suitable. This was e.g. the situation in *Royal Bank of Scotland*. While the *Prévost* case is covered by the anti-abuse provisions as well, the *Royal Bank of Scotland* case is most likely covered by anti-abuse rules only. The conclusion can therefore be that anti-abuse provisions, as a group, are wider than the concept of BO even if they at times are overlapping in their area of impact. In the *Real Madrid Cases*, for example, was an abuse discussion even

needed or could the assessment have zeroed in on the obligation to forward the income from the Hungarian companies?

This also seems to be the OECD stance when the commentaries say that the concept of BO deals with some forms of tax avoidance, as inserting a direct recipient that is not the BO, but does not deal with other forms of abuse.<sup>91</sup> This is reasonable, the holding of certain instruments, rights etc. on behalf of someone else might, depending on a large range of factors, be more or less abusive. It can include elements of abuse or avoidance but it does not have to do so. It ranges from a complete letterbox company with zero power over the income to a legitimate holding company managing assets that eventually do benefit its stakeholders but still have wide powers over the income it receives. That the latter holding company is placed in a state that is logical from a tax perspective can hardly be reprehended. This does not mean that the concept of beneficial ownership is suitable to “deal” with all of these situations. Possibly it is this overlapping that has led many states to believe that the concept of BO is in general an anti-abuse notion or perhaps the vague and somewhat complex wording of the commentaries. The inclusion would then clarify that the benefits are not available in some situations, perhaps that “clarification” made nothing clearer.

If the concept is used, with focus on the direct recipient’s power over the income, merely to assess whether the right tax treaty is applied the concept is not as wide as one might think. Fact remain, that the clarification, with support from the above quoted passage, does necessarily focus on the power to enjoy the received dividends, that is also a logical way to distinguish the one who owns the income, it is not about who owns the asset to which the income is underlying. Some states are maybe of the opinion that such a limitation is self-evident and that since the concept is there it must carry more meaning. Possibly the debate and “clarifications” surrounding the concept have contributed to shrouding the meaning, that after all maybe is not that complicated. The possible compromise between states at the beginning of the concept’s existence in tax treaty law might have bloated its importance.

---

<sup>91</sup> OECD, Model Tax Convention on Income and on Capital: Condensed Version 2014, OECD Publishing, p. 190 para 12.5.

In today's globalized world, where perhaps tax authorities are grasping at straws to impede sophisticated international tax planning the concept might just be a convenient provision with just the right amount of ambiguity.

## 7 Conclusions

One of the issues with the concept of Beneficial Ownership is if only legal and contractual limitations, on the power over the income, are relevant or if an overall approach is needed. The view and approach does not seem to be static and in case law we have seen different attitudes. In some cases, e.g. *The Royal Bank of Scotland* an assessment included an investigation over how much risk the direct recipient carried. Assumed risk does not mean that power over an income follows along automatically.

My conclusion from the OECD commentaries and some international case law is that the term, when appearing in treaties in articles corresponding to art. 10-12 in the MC, regardless of the concepts history and implementation in national law should be interpreted the same.

Another interesting approach is the existence of the concept nowadays in EU law, creating potentially three different interpretations, the EU legal one, the tax treaty one and a differing strictly domestic one, perhaps historical. The EU law mandatory to be followed by the member states might effectively override other meanings at least in an EU context and when EU law and treaties are applied alongside each other. The treaties are from the outset able to lessen the burden of taxation even further than EU law, if EU law has obligatory denial for certain circumstances the situation can however be very complex. It is essential that it is clear which concept is being applied, the term is the same but not the concepts.

The concept of Beneficial Ownership has become a way for authorities to tackle different forms of abuse and avoidance. This is liable to explain the, sometimes, perceived leniency with the borders of the concept. Unlike more obvious anti-abuse provisions, the concept of BO lacks protections and guarantees for the taxpayers. This can likely be explained with that the doctrine had a different intention, at least initially, as supported by this thesis.

While I understand and accept the constant struggle between legality and effectiveness in tax governance, I get the perception that some states and authorities attempt to circumvent the discussion surrounding this balance by

resorting to the doctrine of beneficial ownership and slowly but steadily distorting its meaning. The ambiguity decreases the legal certainty, however at the same time it is claimed, by the authorities and courts in some of the referred cases, that a concept of international fiscal law with uniform meaning is being applied.

Naturally, there are difficulties with a concept that, according to clarifying commentaries, is to be interpreted uniformly internationally and have a common meaning without resorting to domestic law and legal figures. But it is done so in different court systems, with different circumstances and no real constitutional or supreme court overlooking. I still believe that the issues with the interpretations are avoidable to a higher degree than history shows. The issue seems to be sourced in different goals that states want to achieve. That the concept is getting an increased anti-avoidance perspective in the EU legal order can indeed affect how the concept is perceived also outside of an EU legal context, additionally situations might occur where benefits will be denied regardless of the accepted interpretation of the concept in international fiscal law, this depends on the situation however. If the “EU-version” of the concept would contain a higher degree of substance-over-form or anti-abuse approach than the concept in international fiscal law the two concepts should then still be kept apart, considering the disconnection to the term in national law as said in the commentaries. When advantages in EU law must be denied under the EU law concept of beneficial ownership, if there is an obligation to deny in abusive situations, the advantages should not be given. If the advantages in EU law are then overlapping with tax treaty benefits, perhaps to the degree that the advantages cannot in some cases be distinguished from each other, denial will probably occur but is this the correct method? The two concepts of terms might then be mixed with each other, when two concepts built with the same words are being applied simultaneously in an intra EU-context but suddenly will have to be used outside of an EU-legal context. Perhaps the increased anti-abuse considerations in EU-law color off on the international fiscal law term when sometimes the underlying benefits are indistinguishable. For legal certainty, among other things, this is not desirable.

As have been discussed in chapter 6, there are several similar features between the concept of Beneficial Owner and anti-avoidance rules, perhaps this is one of the explanations to why the concept is going in the direction of an anti-abuse notion.

Until a clearer take on the concept has been established in tax treaty law taxpayers have to conduct their businesses unsure if they will be entitled to treaty benefits. Such uncertainty is clearly a step back for promotion of international trade but perhaps a step forward in battling international tax evasion.

That there is no guaranteed right to be relieved of double taxation might also make the situation more complex for two reasons. Firstly, there might be a perception that a lower degree of legal certainty is tolerable; since the legal certainty requirement lies in the domestic legal orders, that actually create taxation. That the tax treaty law then would lay as a second step as an extra advantage and that double taxation would be the norm. Whether that is the case I am not sure, it would however be liable to explain the occasional low degree of legal certainty within the field of tax treaty in general and maybe in the field of BO especially. Secondly, there might not in the domestic legal systems, in one or both of the contracting states, be the same access to legal recourse when there is disagreement in tax treaty interpretation. Furthermore, it can, when the contracting states come to different conclusions, be an unfortunate outcome for the taxpayer, this is something that I have already mentioned.

When assessing a recipient, it is important to separate the beneficial owner to the instruments (e.g. shares) from the beneficial owner to the income (e.g. dividends). What is relevant is the right to the income as opposed to the right to the instrument. The, at least theoretical disregarding, of who owns the instrument might set the notion of BO aside from certain substance over form provisions. It is largely uninteresting who owns the shares, what is important is who owns the income. Considered this, the typical approach of assessing if the shareholder and whether he is a real owner of an instrument is not really needed. Instead, as described, his right to the income is assessed. That the owner of the shares usually is the one that has the right to the income as well,



is a generalization that cannot be done. Perhaps the starting point is the owner of the instrument alongside an assessment of who is the direct recipient.

The legacy of the concept in common law trust structures is evident. The beneficiary, might not have owned the property but would eventually come to benefit from the profit therefrom. With this legacy in mind the similarities with anti-abuse provisions are perhaps not so apparent, the concept has a reason to exist just in clarifying and explaining who is the owner to a piece of income as different to the instrument. Also in legal contexts that has less tradition of separating ownership to instruments and underlying assets.

While some situations will clearly fall within the application of the concept of beneficial ownership, that is that the direct recipient is not the beneficial owner, other situations clearly fall outside. Some uncertainty probably will have to be accepted for the concept to have any effectiveness whatsoever, this must be the view also in states where legal certainty is highly regarded. It is when the number of uncertain situations becomes increasingly large and irregular that the concept and its application becomes tangibly problematic. The effectiveness of tax treaties and their intended beneficial effects on international trade might then suddenly be threatened. It cannot be demanded that the exact “amount” of power vested in a recipient must be determined from the outset. There is some room for judgement to if he owns the income.

In the end, the doctrine of beneficial ownership should not be exaggerated. The concept being a bit unclear and a product of compromise might render its borders somewhat loose which might open it for meanings and interpretations that with a narrower view falls outside of the concept’s area of impact. Unilateral expansion of the doctrine’s borders can however render the concept evermore unclear, diluting its purpose and by make transactions more uncertain thwarting the original reasons for adapting the voluntary tax treaty. Reading in too much in the concept will make it become something that it is not and it will have to deal with situations that it is ill-equipped to do so with. This despite the convenience for tax authorities to use an unclear and multifaceted term wrapped as an internationally accepted uniform term.

My opinion is still that the concept of Beneficial Ownership is something else than a true anti-abuse provision despite some similar traits. As the

commentaries say, the concept may deal with some forms of abuse but not with others. The concept in international fiscal law can only be used to deny treaty benefits to the direct recipient if the direct recipient is not the beneficial owner. If he is, it is largely uninteresting how complex and beneficial the surrounding ownership structures are. At least for “the concept of Beneficial Owner”, such structures might be a target for criticisms based on other sources of law. That, as opposed to perceived popular belief in tax authorities, can never change the content and application of the concept of beneficial owner.

# Bibliography

Baker, Philip: *Beneficial ownership: after Indofood*, GITC review, 2007, Vol VI, no ,1 p. 15-28, in GITC through Live@Lund, internet fetched 2017-01-24.

Also available at [http://taxbar.com/wp-content/uploads/2016/01/Beneficial\\_Ownership\\_PB.pdf](http://taxbar.com/wp-content/uploads/2016/01/Beneficial_Ownership_PB.pdf) on 2017-06-14.

Du Toit, Charl: *The Evolution of the Term “Beneficial Ownership” in Relation to International Taxation over the Past 45 Years*, 2010 volume 64 No. 10, p 500 – 509, in IBFD Tax Research Platform, internet fetched 2017-06-12.

Farat, Anna & Michon, Denis: *Lifting the corporate veil: limited liability of the company decision-makers undermined? Analysis of English U.S., German, Czech and Polish Approach*, Common Law Review, 2008 volume 8 issue 9, p. 21-25, in HeinOnline, internet fetched 2017-03-17.

Gibert, Bruno & Ouamrane, Yacine: *Beneficial Ownership – A French Perspective*, European Taxation, 2008 volume 48 issue 1, p. 1-9, in IBFD Tax Research Platform, internet fetched 2017-03-17.

Gunne, Cecilia: *Beneficial owner i svenskt individperspektiv*, Svensk Skattetidning, 2016 issue 4, p. 265-269, in Zeteo, internet fetched 2017-05-09.

Helminen, Marjaana: *EU Tax Law -Direct Taxation*, Amsterdam: IBFD Publishing, 2016, in IBFD Tax Research Platform, internet fetched 2017-07-04.

Kleist, David: *Begreppet beneficial owner och dess relevans i svensk skatterätt*, Svensk Skattetidning, 2013 issue 1, p 34-59, in Zeteo, internet fetched 2017-05-09.

Lang, Michael: *Introduction to the Law of Double Taxation Conventions*, 2 ed., Amsterdam: IBFD Publishing & Wien: Linde Verlag, 2013, in IBFD Tax Research Platform, internet fetched 2017-04-21.

Lang, Michael et al. (eds.): *Beneficial Ownership: Recent Trends*, 1 ed., Amsterdam: IBFD Publishing, 2013.

OECD Clarification of the meaning of the “Beneficial Owner” in the OECD Model Tax Convention discussion draft 29 April 2011 to 15 July 2011.

OECD: *Model Tax Conventions on Income and on Capital: Condensed Version 2014*, Paris: OECD Publishing, 2014, in OECDiLibrary, internet fetched 2016-03-31.

OECD: TFD/FC/216 (1967), Observations of member countries on difficulties raised by the OECD draft convention on income and capital p. 14, on [www.taxtreatieshistory.org](http://www.taxtreatieshistory.org), internet fetched 2017-06-13.

Piantavigna, Paolo: *Tax Abuse and Aggressive Tax Planning in the BEPS Era: How EU Law and the OECD Are Establishing a Unifying Conceptual Framework in International Tax Law, despite Linguistic Discrepancies*, World Tax Journal, 2017 Volume 9 No. 1, p. 47-98, in IBFD Tax Research Platform, internet fetched 2017-08-03.

Pelin Lars: *Internationell Skatterätt i ett svenskt perspektiv*, 5th ed., Lund: Studentlitteratur, 2011.

Rust, Alexander & Reimer, Ekkehart (eds.): *Klaus Vogel on Double Taxation Conventions, Volume 1*, 4th ed., Alphen aan den Rijn: Kluwer Law, 2015.

Sandström, K.G.A: *Aktieutdelning samt utdelning från ekonomisk förening*; 1st ed., Stockholm Norstedts & Söners Förlag, 1962.

Ståhl, Kristina et al.: *EU-Skatterätt*: 3rd ed., Uppsala: Iustus Förlag, 2011.

# Table of Cases

## EU

C-367/96 (*Kefalas and Others*) Alexandros Kefalas and Others v Elliniko Dimosio (Greek State) and Organismos Oikonomikis Anasygkrotisis Epicheiriseon AE (OAE)  
ECLI:EU:C:1998:222

C-255/02 (*Halifax*) Halifax plc, Leeds Permanent Development Services Ltd and County Wide Property Investments Ltd v Commissioners of Customs & Excise  
ECLI:EU:C:2006:121

C-196/04 (*Cadbury Schweppes*) Cadbury Schweppes plc and Cadbury Schweppes Overseas Ltd v Commissioners of Inland Revenue  
ECLI:EU:C:2006:544

C-80/12 (*Felixstowe*) Felixstowe Dock and Railway Company Ltd and Others v The Commissioners for Her Majesty's Revenue & Customs  
ECLI:EU:C:2014:200

## EU AG-opinions

C-80/12 (*Felixstowe*) Felixstowe Dock and Railway Company Ltd and Others v The Commissioners for Her Majesty's Revenue & Customs  
ECLI:EU:C:2013:699, Opinion of AG Jääskinen

## Canada

Prevost Car Inc. v. The Queen, 2008 TCC 231.

## France

*Bank of Scotland v. Ministre de l'Economie, des Finances et del'Industrie*,  
Conseild'Etat Case 283314 (29 Dec. 2006).

## Spain

Judgement of the ES: AN 18 July 2006, JUR/2006/204307, JUR/2007/8915, 1110/2003 and JUR/2007/16549, available in IBFD Case Law Database.

Judgement of the ES: AN, 10 NOV 206, JUR/2006/284679.

Judgement of the ES: AN, 20 July 2006, JUR/207/16526.

Judgement of the ES: AN, 13 Nov 2006, JUR 2006/284618.

Judgement of the ES: AN, 26 Mar. 2007, JUR/2007/101877.

**Sweden**

Kammarrättens i Sundsvall dom den 15 juni 2007 i mål nr 575-05.

**UK**

Indofood International Finance Ltd. v. JPMorgan Chase Bank N.A., London Branch (Formerly J P Morgan Chase Bank, London Branch) Case No: A3/2005/2497 [2006] EWCA Civ 158.