



Tax Policy Bulletin

Response to the OECD's discussion draft on the meaning of 'beneficial owner'

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On 29 April 2011, the OECD released a discussion draft on the meaning of 'beneficial owner' in the OECD Model Tax Convention. The concept has given rise to different interpretations by courts and tax administrations, leading to risks of double taxation and non-taxation. The discussion draft contains new wording which aims to clarify and give further guidance around the interpretation of this term. Interested parties were asked to send their comments on the draft to the OECD by 15 July.

PwC's response to the discussion draft is set out in this bulletin along with commentary on the other representations made. For further background information on this topic, please consult our May bulletin which can be accessed at www.pwc.com/tax or by clicking [here](#).

PwC's response

"This submission is made in response to the request for comments in the public discussion draft issued by the OECD on the above topic on 29 April 2011. We are grateful for the opportunity to lodge our comments.

We strongly support the OECD's wish to achieve greater clarity of the meaning of the treaty term "beneficial owner" and to achieve a consistent interpretation of the term by different member states.

However, notwithstanding the OECD's wish for greater clarity of the interpretation of the term (and the urgent need for this given the variety of tax authority approaches we see in practice), we are concerned that some features of the proposed changes will have an effect contrary to that which is intended - i.e. adding further uncertainty of interpretation to the meaning of the term. In particular, the statement in the proposed Commentary that a recipient subject to an obligation to pass on the income collected will not be the beneficial owner is somewhat vague (see e.g. Para 12.4 of the commentary to Article 10). The nature of the requisite "obligation" is left open and there is no attempt to address what

amounts to "passing on" income. In this context, there is admittedly a helpful reference to the need normally to look at legal documents to determine if such an obligation exists but unfortunately this is immediately supplemented by a reference to looking at "facts and circumstances" and the "substance" of the matter.

Based on our broad practical experience of dealing with the interpretation of this treaty term in many jurisdictions across the globe, we are highly doubtful that the proposed language is sufficiently clear and we think it more likely that it will be cited in supporting interpretations of the term "beneficial owner" that are hardly reconcilable with what we take to be the proper treaty meaning of that term.

There are in particular two areas that give recurrent difficulties in practice. First, situations where income collected is used by the recipient to meet other costs of a similar character, e.g. in the situation where a financing/treasury operation uses monies representing interest received on monies it has lent wholly or partly to meet interest costs stemming from its own funding arrangements. Second, situations where income collected is used to meet costs of a different character, e.g. in the situation where an investment bank uses monies representing dividends collected to meet its payment obligations under a swap or other derivative contract. These two situations may be referred to loosely as involving (1) on-payments and (2) payment equivalents. In the proposed revisions to the commentary to Articles 10, 11 and 12, the discussion of on-payments could be made rather more clear and there is no discussion at all of payment equivalents.

As a general matter, we would not expect the existence of either on-payments or payment equivalents to disrupt the beneficial owner analysis so that a recipient of income would normally remain the beneficial owner of that income irrespective of whether such arrangements exist. We believe it would be helpful to state this point expressly in the Commentary, making it clear that the beneficial ownership concept is not addressing ultimate economic ownership (since that would seem to be sharply in contrast to the historical purpose and interpretation of the term and make the concept completely unworkable). It would also help to add to the Commentary clear examples to illustrate what is intended.

We do not disagree with the thrust of the new text in the proposed revisions to Articles 10, 11 and 12 as contained in the public discussion draft, but we do consider that, unless that text is modified along the lines of the manner suggested above to give greater clarity of how (and where) the border line is drawn, we are doubtful that the objective of the OECD will be met."

Other responses

The OECD has published the comments received on the discussion draft on its website (www.oecd.org). These can be accessed by clicking [here](#).

A common theme from many submissions was that the OECD's proposed wording - specifically the reference to the "full right to use and enjoy the dividend unconstrained by a contractual or legal obligation to pass the payment received to another person" - is unlikely to achieve any level of clarity, and is more likely add further uncertainty to the interpretation of the term.

A number of the submissions also focused on the specific problems that could be caused to the derivatives and financial markets by the OECD's proposed wording referred to above. Another common theme was that the beneficial ownership test should not be used as a general anti-treaty shopping provision.

Given the strong level of feedback received on the discussion draft - particularly the concerns over the specific wording referred to above - it will be interesting to see how the OECD responds. It will also be interesting to see to what degree tax authorities are prepared to revert to the original meaning of the term, first introduced in 1977. A number of authorities go far beyond this original meaning in their interpretation of the concept today, with some even seeking to apply some sort of ultimate economic ownership test. In that context, a proper response to the OECD's wish for greater clarity of the beneficial owner test is an important priority.

The OECD's Working Party 1 of the Committee on Fiscal Affairs will examine these comments at its September 2011 meeting.

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