

Beneficial Ownership: Recent Trends

Editors:

Michael Lang

Pasquale Pistone

Josef Schuch

Claus Staringer

Alfred Storck

LLIU
IBFD

Table of Contents

Preface	v
Chapter 1: Beneficial Ownership: Recent Trends	1
<i>David G. Duff</i>	
1.1. Introduction	1
1.2. The meaning of beneficial ownership in judicial decisions	4
1.3. Beneficial ownership without treaty references	10
1.4. Beneficial ownership as an anti-abuse provision	12
1.5. Beneficial ownership as an allocation of income rule	16
1.6. Beneficial ownership and EU law	17
1.7. Historical context and the OECD Discussion Draft	17
1.8. Conclusions	22
Chapter 2: United Kingdom: <i>Indofood International Finance Ltd v. JP Morgan Chase Bank NA</i>	27
<i>Philip Baker</i>	
2.1. Introduction	27
2.2. The facts of the case	28
2.3. The decisions of the High Court and Court of Appeal	30
2.4. Some comments on the case	31
2.5. The consequences of the decision – HMRC guidance	33
2.6. Concluding comments	38
Chapter 3: The Concept of Beneficial Ownership under Canadian Tax Treaties	39
<i>Brian J. Arnold</i>	
3.1. Introduction	39
3.2. <i>Prevost Car</i>	40
3.2.1. Facts	40
3.2.2. Decision	41
3.2.3. Comments on the decision	42
3.3. <i>Velcro Canada</i>	44
3.3.1. Facts	44
3.3.2. Decision	45
3.3.3. Comments on the decision	46
3.4. Conclusion	48

Table of Contents

Chapter 4: Switzerland: Broad vs Narrow Interpretation of the Beneficial Owner Concept	51
<i>Rene Matteotti and Fabian M. Sutter</i>	
4.1. Introduction	51
4.2. <i>X Holding Aps</i> – Federal Tax Appeals Commission, 3 March 2005, SRK 2003-159	51
4.2.1. Factual background	51
4.2.2. The Commission's findings	52
4.3. <i>A. (in the matter of the UBS Agreement)</i> –Federal Administrative Court, 10 January 2011, A-6053/2010; ASA 79 (2010/2011), pp. 926 et seq.	54
4.3.1. Factual background	54
4.3.2. The Court's findings	54
4.4. <i>Bank A (swap transactions)</i> – Federal Administrative Court, 7 March 2012, A-6537/2010	55
4.4.1. Factual background	55
4.4.2. The Court's findings	57
Chapter 5: The Concept of Beneficial Ownership and Possible Alternative Remedies in Netherlands Case Law	59
<i>Daniel S. Smit</i>	
5.1. Introduction	59
5.2. Beneficial ownership: Netherlands Supreme Court 6 June 1994, BNB 1994/217 (" <i>market maker case</i> ")	62
5.2.1. Facts of the case and dispute	62
5.2.2. Decision of the Court of Appeals of Amsterdam	63
5.2.3. Decision of the Supreme Court	64
5.2.4. Evaluation	65
5.2.4.1. A technical rather than an economic interpretation	65
5.2.4.2. Relationship with the non-statutory <i>fraus legis</i> , <i>fraus conventionis</i> and substance-over-form doctrines	68
5.2.4.2.1. <i>Fraus legis</i>	68
5.2.4.2.2. <i>Fraus conventionis</i>	70
5.2.4.2.3. Substance-over-form doctrine: Recharacterization of the facts	72
5.2.4.3. The aftermath: A new definition of beneficial owner under domestic law: Treaty override?	74
5.2.5. Conclusion	75

5.3.	Possible alternative remedies: Netherlands Supreme Court 28 June 1989, BNB 1990/45	76
5.3.1.	Facts of the case and dispute	76
5.3.2.	Decision of the Court of Appeals of The Hague	78
5.3.3.	Decision of the Supreme Court of 8 January 1986, BNB 1986/127	79
5.3.4.	Decision of the Court of Appeals of Amsterdam	79
5.3.5.	Decision of the Supreme Court of 28 June 1989, BNB 1990/45	80
5.3.6.	Evaluation and conclusion	81
5.4.	Possible alternative remedies: Netherlands Supreme Court 18 May 1994, BNB 1994/252 and BNB 1994/253	84
5.4.1.	Facts of the case and dispute	84
5.4.2.	Decision of the Court of Appeals of Arnhem	85
5.4.3.	Decision of the Supreme Court	86
5.4.4.	Evaluation and conclusion	87
5.5.	General conclusions	88
5.5.1.	Beneficial ownership under Netherlands case law	88
5.5.2.	Possible alternative remedies	89
5.5.3.	Final remarks	89
Chapter 6:	The Notion of Beneficial Ownership in Danish Tax Law: The Creation of a New Legal Order with Uncertainty as a Companion	91
	<i>Jakob Bundgaard</i>	
6.1.	Background	91
6.2.	The Danish withholding tax regime on dividends and interest payments	92
6.3.	Traditional starting point in Danish law regarding income allocation	94
6.4.	The first Danish High Court decision in the <i>ISS</i> case – SKM 2011.121 O	94
6.4.1.	Introduction	94
6.4.2.	Facts of the case	95
6.4.3.	The decision of the Eastern High Court	96
6.4.4.	Comments on the Court's reasoning	97
6.5.	The second <i>ISS</i> case – SKM 2010.729 LSR	99
6.5.1.	Introduction	99
6.5.2.	Facts of the case	99
6.5.3.	The decision of the Tax Tribunal	99
6.5.4.	Comments on the Tax Tribunal's reasoning	100

Table of Contents

6.6.	The <i>HHU</i> case – SKM 2011.57 LSR	101
6.6.1.	Introduction	101
6.6.2.	Facts of the case	101
6.6.3.	The decision of the Tax Tribunal	102
6.6.4.	Comments on the Tax Tribunal's reasoning	103
6.7.	The <i>COOK</i> case – SKM 2011.485 LSR	104
6.7.1.	Introduction	104
6.7.2.	Facts of the case	104
6.7.3.	The decision of the Tax Tribunal	105
6.7.4.	Comments on the Tax Tribunal's reasoning	106
6.8.	The <i>Nycomed</i> case – SKM 2012.409 LSR	107
6.8.1.	Introduction	107
6.8.2.	Facts of the case	107
6.8.3.	The decision of the Tax Tribunal	108
6.8.4.	Comments on the Tax Tribunal's reasoning	109
6.9.	On the scope of the Parent-Subsidiary Directive in dividend cases – The <i>NetApp</i> case – SKM 2012.26 LSR	109
6.9.1.	Introduction	109
6.9.2.	Facts of the case	110
6.9.3.	The decision of the Tax Tribunal	110
6.9.4.	Comments on the Tax Tribunal's reasoning	112
6.10.	The reaction pattern of the taxpayers: Binding rulings and tax planning	113
6.11.	Liability issues	114
6.12.	Beneficial ownership in recent legislative measures	115
6.13.	Conclusion	117
Chapter 7: P No 13 of 1995, ABC in re Authority of Advance Ruling		119
<i>D.P. Sengupta</i>		
7.1.	Introduction	119
7.2.	Facts of the case	119
7.2.1.	Issues for determination	119
7.2.2.	Provisions of relevant article of the Tax Treaty	121
7.3.	The ruling of the Authority	123
7.3.1.	Factual background	123
7.3.2.	The essential question and the ruling	123
7.4.	Comments on the AAR's reasoning	124
7.5.	Conclusion	126

Chapter 8: Beneficial Ownership as a Broad Anti-Avoidance Provision: Decisions by Spanish Courts and the OECD's Discussion Draft	127
<i>Adolfo Martín Jiménez</i>	
8.1. Introduction	127
8.2. The <i>Real Madrid</i> cases: "royalty payments" to Hungarian conduits	128
8.3. The case of a UK holding company controlled by a UAE resident	134
8.4. Comments on the Spanish decisions	136
8.4.1. Right decisions but wrong reasoning? Confusion about the correct meaning of beneficial owner?	136
8.4.2. Can the OECD 2011 Discussion Draft justify the decisions of the Spanish courts?	138
8.4.3. Is the broad definition of beneficial ownership "an abuse by tax authorities"?	139
8.4.4. Uncertainty for withholding agents derived from a broad reading of "beneficial owner"	141
Chapter 9: Beneficial Ownership in and outside US Tax Treaties	143
<i>Yariv Brauner</i>	
9.1. Introduction	143
9.1.1. Beneficial ownership clauses in US tax treaties	143
9.1.2. Internal law context	144
9.2. <i>Aiken Industries</i> (1971)	146
9.2.1. Facts	146
9.2.2. In the court	146
9.2.3. Comments on the decision	148
9.3. <i>Northern Indiana</i> (1995)	149
9.3.1. Facts	149
9.3.2. In the courts	150
9.3.3. Comments on the decision	151
9.4. <i>SDI Netherlands</i> (1996)	151
9.4.1. Facts	151
9.4.2. In the court	152
9.4.3. Comments on the decision	154
9.5. <i>Del Commercial</i> (1999)	155
9.5.1. Facts	155
9.5.2. In the courts	156

Table of Contents

9.5.3.	Comments on the decision	157
9.6.	The alternatives	158
9.6.1.	Limitation on benefits clauses	158
9.6.2.	The anti-conduit regulations	159
Chapter 10: Beneficial Ownership without Specific Beneficial Ownership Provision		161
<i>Daniel Gutmann</i>		
10.1.	Introduction	161
10.2.	Facts of the case	161
10.3.	The Court decision	162
10.4.	Comments on the Court's reasoning	163
10.5.	Conclusion	164
Chapter 11: Beneficial Ownership as Anti-Abuse Provision: The <i>Bank of Scotland Case</i>		167
<i>Daniel Gutmann</i>		
11.1.	Introduction	167
11.2.	Facts of the case	167
11.3.	The Court decision	168
11.4.	Comments on the Court's reasoning	170
11.5.	Conclusion	172
Chapter 12: Italy: Beneficial Ownership as Anti-Abuse Provision in International Taxation		175
<i>Pasquale Pistone</i>		
12.1.	Introduction	175
12.2.	The beneficial ownership requirement and the need to counter abusive practices in the OECD Model Convention	175
12.3.	Facts of the case and judgment	179
12.4.	The implications of the judgment for the relation between beneficial ownership and the reaction to anti-abuse practices in the interpretation of Italian courts	183
Chapter 13: <i>Aditya Birla Nuvo Ltd v. DDIT High Court of Bombay</i>		187
<i>D.P. Sengupta</i>		
13.1.	Introduction	187

13.2.	Facts of the case	"	189
13.2.1.	Proceedings before the tax department		190
13.2.2.	Arguments on behalf of the taxpayers		192
13.3.	The Court decision		193
13.4.	Comments on the Court's reasoning		195
13.5.	Conclusion		197
Chapter 14: Beneficial Ownership as an Attribution-of-Income Rule in Spain: Source and Residence Country Perspectives			199
<i>Adolfo Martin Jimenez</i>			
14.1.	Introduction		199
14.2.	Royalties received by societies for the management of author's rights		199
14.3.	Beneficial ownership from the point of view of the country of residence		202
14.4.	Comments on the cases		204
14.4.1.	Beneficial owner as an attribution-of-income rule		204
14.4.2.	Legal or economic interpretation of beneficial owner in the <i>Goldman Sachs</i> cases?		205
14.4.3.	The <i>Goldman Sachs</i> cases and the 2011 OECD Discussion Draft on beneficial ownership		207
Chapter 15: Italy: Beneficial Ownership and the Entitlement to Treaty Benefits in the Presence of Transparent Entities			209
<i>Pasquale Pistone</i>			
15.1.	Introduction		209
15.2.	Facts and judgment		210
15.3.	Reconstructing the entitlement to treaty benefits in the presence of partnerships		211
Chapter 16: Beneficial Ownership and EU Law			215
<i>Juan Lopez Rodriguez and Georg Kofler</i>			
16.1.	Introduction		215
16.2.	Entitlement to the benefits under the Interest and Royalty Directive: "Anti-avoidance measures" in historical context		216
16.2.1.	Overview		216
16.2.2.	Beneficial ownership		218

Table of Contents

16.2.3. "Subject to tax"	222
16.2.4. Exclusion of certain payments	225
16.2.5. Fraud and abuse	226
16.2.6. Non-application in cases of low taxation	230
16.2.7. Conclusions	232
16.3. The "beneficial ownership" requirement	234
16.3.1. Overview	234
16.3.2. Companies as beneficial owners	240
16.3.2.1. "Own benefit"	241
16.3.2.2. "Intermediary, such as an agent, trustee or authorised signatory"	241
16.3.3. Permanent establishments as beneficial owners	245
16.3.3.1. Effective connection	246
16.3.3.2. Subject to tax	246
16.3.4. Conclusions	247
16.4. Summary	247
Chapter 17: Switzerland: Beneficial Ownership and EU Law	249
<i>Rene Matteotti and Fabian M. Sutter</i>	
17.1. Beneficial ownership concept and EU law	249
17.2. <i>Luxembourg Holding</i> – Federal Tax Appeals Commission, 28 February 2001, VPB 65.86	249
17.2.1. Factual background	249
17.2.2. The court's findings	250
Chapter 18: How To Conceptualize Beneficial Ownership	253
<i>Ekkehart Reimer</i>	
18.1. Introduction	253
18.2. Who is the beneficial owner in beneficial ownership?	253
18.3. What kind of norms are the beneficial ownership norms?	255
18.4. Pinpointing legal intuition	256
18.5. Two basic sets of elements: Payment parameters and asset parameters	257
18.5.1. The payment as such	258
18.5.1.1. Pre-payment parameters	258

18.5.1.2.	Payment default risk, payment currency risk	259
18.5.1.3.	After-payment parameters	259
18.5.2.	The income-generating object	260
18.5.2.1.	Irrelevance where split between asset and yields is economically justified	260
18.5.2.2.	Asset ownership	261
18.5.2.3.	Asset-related activities	262
18.5.2.4.	Asset-related risks and gains	263
18.5.3.	Provisional finding	263
18.6.	How do these elements interact?	264
18.7.	Summary and outlook	265
Chapter 19: Beneficial Ownership: What Does History (and Maybe Policy) Tell Us		267
	<i>Richard Vann</i>	
19.1.	Introduction	267
19.2.	League of Nations intimations: Beneficiaries	268
19.2.1.	Intellectual property, movable capital and pensions	269
19.2.2.	Beneficiaries of deceased estates	270
19.3.	The UK influence	271
19.3.1.	Beneficial ownership of subsidiaries'shares	271
19.3.2.	Nominees, agents and trustees	273
19.3.3.	Pre-OECD summary	280
19.4.	OEEC/OECDto 1977	281
19.4.1.	Beneficial ownership	282
19.4.2.	Abuse of treaties	288
19.5.	Making it up: 1977 to 2011	296
19.5.1.	Base and conduit companies	296
19.5.2.	Harmful tax competition	298
19.5.3.	Partnerships and collective investment vehicles	301
19.5.4.	2011 Discussion Draft	304
19.6.	Conclusion	306
Chapter 20: The Beneficial Ownership Concept Was Never Necessary in the Model		333
	<i>John F. Avery Jones</i>	

Table of Contents

Chapter 21: The 2011 Discussion Draft 011 Beneficial Ownership: What Next for the OECD?	341
<i>Daniel Gutmann</i>	
Contributors	345