

International Trends and Developments in Tax Jurisprudence

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May 12, 2008
2008 Seminar
IFA – Canada branch - Montréal

Beneficial ownership

- Generally no definition in local civil laws of European countries
- Generally no definition in double taxation treaties
- Generally no official guidelines after Indofood
- OECD Commentaries
- EU Directive on interest and royalties/EU directive on the taxation on savings: beneficial owner = company that receives payments for its own benefit and not as an intermediary, such as an agent, trustee or authorized signatory for some other person

Other related concepts

- Substance
- Effective management and control/residency
- Transfer pricing
- Anti-abuse provisions

Case law with respect to beneficial ownership

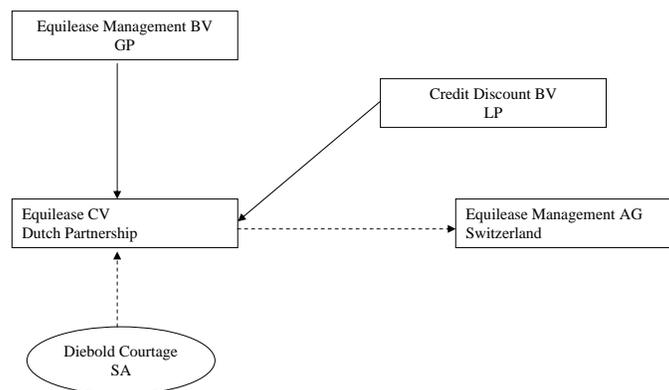
- France: Diebold Courtage (Conseil d'Etat, October 13, 1999)
Bank of Scotland (Conseil d'Etat, December 29, 2006)
- Netherlands: Royal Dutch (Hoge Raad, April 6, 1994, BNB 1994/217)

Case Law in France

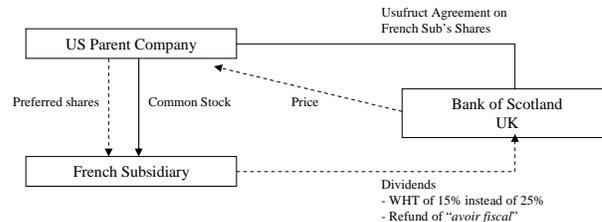
France: Diebold Courtage (Conseil d'Etat, October 13, 1999)

- A French company paid royalties to a Dutch partnership
- The Dutch partnership paid fees to a Swiss company according to a business development agreement (contrat d'apporteur d'affaires)
- The FTA considered the **real beneficiary of royalties to be the Swiss company** and said that the royalties were paid directly to the Swiss company by the French company, a withholding tax under French law would be applicable
- However, the French Supreme Tax Court ruled that, regarding the information provided by the Dutch tax authorities, the Swiss company could not be considered as the real beneficiary of income because the fees paid by the Dutch company to the Swiss company were not viewed as being unusually high
- Therefore, the Court confirmed the application of the tax treaty between France and the Netherlands directly to the partners of the partnership Although the term "**beneficial owner**" is not expressly mentioned in the France-Netherlands tax treaty, the Court made reference to the "real beneficiary" (bénéficiaire réel)

France: Diebold Courtage Case



France: Bank of Scotland case (Conseil d'Etat, December 29, 2006)



- The French Subsidiary issued Preferred shares without voting rights entitling to annual dividend for a determined amount. The Preferred shares were subscribed by the US Parent
- The US Parent then sold the Preferred shares under a Usufruct Agreement to the UK Bank for a 3-year period. Price of the sale = value of the dividends to be received during the 3-year period. UK Bank became the recipient of the dividends instead of the US Parent
- The desired tax effect: UK Bank can benefit from the *avoir fiscal* under the UK-France tax treaty whereas US Parent cannot benefit from the *avoir fiscal* under the France-US tax treaty
- The FTA argued that in reality, the beneficial owner of the dividends was the US Parent and not the UK Bank. Under the apparent Usufruct agreement the parties actually set up a loan agreement by which the UK Bank made money available to the US Parent, this loan being repaid by the dividends of the French Subsidiary and the attached *avoir fiscal*

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France: Bank of Scotland

- The Supreme Tax Court denied the France–UK tax treaty benefits based on the concept of beneficial ownership
- The Court re-characterized the transaction as a loan
 - The temporary sale of the Usufruct to the UK Bank constitutes an arrangement (*montage*) intended solely to obtain the benefit of the *avoir fiscal*
 - The US Parent is the beneficial owner of the dividends. The US Parent just “delegated” to its French subsidiary the payment of the US Parent’s debt to the UK Bank by offsetting dividends from the French subsidiary with the payments otherwise due by the US Parent
- The key factor of the decision of the Supreme Tax Court was the lack of equity risk borne by the UK Bank
Under the agreement, the US Parent agreed to indemnify the UK Bank or to redeem the Usufruct at a predetermined price under certain circumstances, including if the French subsidiary did not pay the expected amount of dividends or if the refund of the *avoir fiscal* was denied by the French tax authorities

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The Netherlands: Royal Dutch (Hoge Raad, April 6, 1994, BNB 1994/217)

- UK stockbroker purchased dividend coupons Royal Dutch for 80% of face value
- 25% withholding tax on dividends
- UK stockbroker filed for refund on the basis of article 10(2) Netherlands-UK income tax treaty

The Netherlands: Royal Dutch (Hoge Raad, April 6, 1994, BNB 1994/217)

- Lower Court: UK stockbroker is NOT the beneficial owner as amounts of dividend claims were entirely certain at the time of purchase & payable few days after
- Supreme Court: UK stockbroker is beneficial owner: became owner at the time of purchase and could as such freely avail of funds. Furthermore, did not act as an agent or nominee

The Netherlands: Royal Dutch (Hoge Raad, April 6, 1994, BNB 1994/217)

General rule according to Supreme Court:

A person is the beneficial owner if

- he is the owner of the dividend coupon
- he can freely avail of the coupon
- he can freely avail of the monies distributed

No beneficial owner if there is a legal obligation to pass on the dividend to the shareholder