



INTERNATIONAL FISCAL ASSOCIATION



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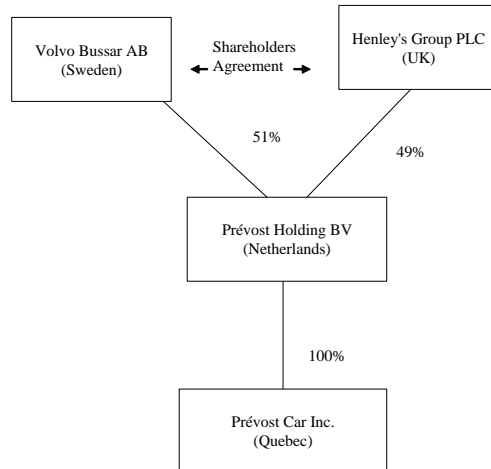
International Trends and Developments in Tax
Jurisprudence

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Beneficial Owner Prévost Car Corporate Structure



Beneficial Owner

- *Prévost Car*, decided on April 22, 2008, is the only Canadian case, so far, interpreting the treaty term beneficial owner.
- The decision is consistent with *L'Industrielle Alliance, Assurance et Service* decided on January 10, 2008, although the case was not cited by Rip, ACJ.

Application of Article 3(2) and Section 3 ITCIA

In *Prévost Car*, Rip ACJ found:

- There is no meaning of the English term *beneficial owner* in the Act which can be applied under Article 3(2) or Section 3 ITCIA to interpret the Treaty term. The same is true of the French treaty term, *le bénéficiaire effectif* as this term is not used in the Act.
- The Dutch term used is *uiteindelijk gerechtigde*, which obviously is not used in the Act.

Meaning as Explained in the OECD Commentaries

- Only 1977 Commentaries seem to have been relied on (because it is a 1986 Treaty)
- Those Commentaries explain: an "intermediary, such as an agent or nominee ... interposed between the beneficiary and the payer [is not entitled to treaty relief]" unless the beneficial owner is resident" in the other State.
- The Court referred to the modifications to the Commentary in 2003, as well as the Conduit Companies Report of 1987 but seems to have given these expanded explanations little or no weight although the Court referred to agents, nominees and *conduits* as not being beneficial owners.
- The experts, Stef van Weeghel (Holland) and Daniel Lüthi (Switzerland and WPI member) gave strong evidence of the interpretation and application of the treaty in Holland and the intentions of the OECD in 1977 in introducing the term "beneficial owner" into the Model .

Arguments by CRA

- The same or similar French and English terms used in the Act have multiple and irreconcilable meanings.
- No treaty meaning can be given to the English language or the French language treaty terms by reference to the use of similar terms in the Act.
- The meaning based on trust law or the meaning in equity should not be applied.
- The term, beneficial owner, therefore should be given the meaning that is recognized internationally.
- The meaning should be based on a factual (economic substance) determination, not based on a narrow legal analysis, and this is consistent particularly with both the Dutch language term and the *Indofood* case.

Decision of Rip, ACJ

- *Indofood* was distinguished, but on less than convincing grounds, as being inconsistent with the views of the Hoge Raad in the *Royal Dutch* case of April 6, 1994, BNB 1994/217.
- Agents, nominees and conduit companies are not beneficial owners as such persons "never [have] any attribute of ownership".
- "when a property is held by a nominee, agent or trustee [in both common law and civil law] that person ... is not actually the owner of the property".
- "A trustee does not personally enjoy the attributes of ownership, possession, use, risk and control" and "the someone else" [beneficiary] has the use, risk and control of the property"!!
- The corporate veil is not pierced unless the corporation is a "conduit" with "absolutely no discretion as to the use or application of funds put through it as a conduit".

Decision of Rip, ACJ (cont'd)

- Holdings BV was not a "conduit", in the sense of acting as a "funnel" as the directors or shareholders had to declare the dividends before they were paid to Volvo and Henleys.
- Holdings BV was not party to the shareholders' agreement and was not bound by it, nor did the Deed of Incorporation obligate it to pay any dividends.
- Until the management board of Holdings BV declared and the shareholders approved the dividend, the monies received by Holdings BV as a dividend from Prévost Car were solely owned by Holdings BV.

Summary

- The Commentaries current when the Treaty was concluded seemed to be the controlling interpretative document.
- The English Court of Appeal decision cited (*Indofood*) was not followed but the trial judge's decision may have been influential.
- A legal meaning, not an economic or factual meaning was applied.
- There was no application of an international tax meaning.
- The expanded meaning in later Commentaries was not applied.
- The interpretation of a similar Treaty provision in the Netherlands-UK Treaty by the Dutch Supreme Court in 1994 was given weight.
- The intention of the CFA members in 1977 as explained by Lüthi supported the result.