# 1. International Tax Lawa. Introductionb. Scope of application

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## Εισαγωγή

- Θέματα
  - Πώς προκύπτει η διπλή φορολογία διπλή φορολογία και διεθνές δίκαιο
  - Αποφυγή διπλής φορολογίας, ιδίως μέσω διεθνών συμβάσεων (ΣΑΔΦ) εφαρμογή των ΣΑΔΦ
  - Πεδίο εφαρμογής των ΣΑΔΦ

## Αντικείμενο του Διεθνούς Φορολογικού Δικαίου

- Αντικείμενο των κανόνων διεθνούς φορολογικούδικαίου: πώς ασκείται η φορολογική εξουσία ενόςκράτους σε σχέση με τα άλλα κράτη
- "The essence of the subject of international taxation is the issue of whether, and to what extent, a country has a right to tax an individual or a company. In legal terminology, what is the jurisdiction to tax?" (Miller & Oats, 2014)
  - ❖Προσέξτε τη χρήση του όρου «right to tax»

#### Nexus

- ➤ Η θεμελίωση της φορολογικής εξουσίας των κρατών
  - Η επιβολή φόρου = κρατική **KYPIAPXIA** (sovereignty)
  - Η εξουσία αυτή δεν επιβάλλεται ΠΕΡΑΝ των συνόρων
  - Η εξουσία αυτή δεν **ΠΕΡΙΟΡΙΖΕΤΑΙ** στο εσωτερικό
- ΣΥΝΔΕΣΗ ενός ΠΡΟΣΩΠΟΥ με κάποιο ΚΡΑΤΟΣ ("nexus rules") Κριτήρια Nexus:
  - Κατοικία (για ΦΠ) → φόρος στο παγκόσμιο εισόδημα
  - Έδρα (για ΝΠ)
  - Πηγή εισοδήματος → φόρος στο εισόδημα από την πηγή
  - Υπηκοότητα (για ΦΠ)

### Κριτήρια κατανομής της φορολογικής εξουσίας

- ➤ Considerations of economic efficiency and equity
- <u>Efficiency:</u> international allocation of factors of production, especially of capital – aim: the best possible productivity
- Predominant view: Best possible efficiency in allocation is obtainable by WORLDWIDE taxation in the STATE of RESIDENCE and CREDIT for tax imposed in STATE of SOURCE

## Πώς φορολογούν τα κράτη - Δυο βασικές Αρχές

Ουδετερότητα κατά την εξαγωγή κεφαλαίου – Ουδετερότητα κατά την εισαγωγή κεφαλαίου Capital EXPORT Neutrality (CEN) **v** Capital IMPORT

Neutrality (CIN)

CEN → public finance concept to describe the situation where investors are subject to the same level of taxes on capital income, regardless of the country in which income is earned. The credit method of relieving international double taxation is often considered to illustrate this principle

Πώς φορολογούν τα κράτη - Δυο βασικές Αρχές situation where investments within a country are subject to the same level of taxes, regardless of whether they are made by domestic or foreign investor. The **exemption method** of relieving international double taxation is often considered to illustrate this principle.

## Διεθνής Διπλή Φορολογία

#### ≻Διπλή φορολογία στο <u>εσωτερικό</u> της χώρας:

➤Απαγορεύεται; Όχι

#### <u>Διεθνής</u> διπλή φορολογία

- Εφαρμογή ταυτόχρονα και παράλληλα του κριτηρίου της κατοικίας από μια χώρα (φορολογεί το παγκόσμιο εισόδημα) και του κριτηρίου της πηγής από μια άλλη χώρα (φορολογεί το εισόδημα από τη συγκεκριμένη πηγή)
- Απαγορεύεται; Όχι. Περιορίζεται μόνο, στο βαθμό που τα ίδια τα κράτη συμφωνούν σε κάτι τέτοιο.

# Διεθνής Διπλή Φορολογία

≻Πώς προκύπτει η διπλή φορολογία



Ποια χώρα θα φορολογήσει το εισόδημα του Α;

- 1) Η Ελλάδα NAI με βάση το κριτήριο της κατοικίας
- 2) Η Γαλλία, NAI με βάση το κριτήριο της **πηγής**

ΔΙΕΘΝΗΣ ΔΙΠΛΗ ΝΟΜΙΚΗ ΦΟΡΟΛΟΓΙΑ

## Διεθνής Διπλή Φορολογία

- ▶ Διεθνής διπλή (νομική) φορολογία προκύπτει επίσης
- Όταν ένα πρόσωπο θεωρείται ΚΑΤΟΙΚΟΣ δύο (ή περισσότερων) κρατών, με βάση την εσωτερική νομοθεσία καθενός από αυτά
- ➢ Όταν οι κανόνες ΠΗΓΗΣ δύο (ή περισσότερων) κρατών επικαλύπτονται (π.χ. Online διαφημίσεις: πηγή του εισοδήματος η χώρα κατοικίας του διαφημιζόμενου και η χώρα στην οποία προβάλλεται η διαφήμιση)
- ➤Κατά την εφαρμογή από ορισμένα κράτη του κριτηρίου της ΥΠΗΚΟΟΤΗΤΑΣ για να φορολογήσουν το παγκόσμιο εισόδημα προσώπων που δεν είναι ΚΑΤΟΙΚΟΙ (π.χ. ΗΠΑ)

# Διεθνής Διπλή Φορολογία Νομική -Οικονομική

#### >Ορισμοί

- Διεθνής NOMIKH διπλή φορολογία (international juridical double taxation): the IMPOSITION of COMPARABLE TAXES in TWO (or more) STATES on the SAME TAXPAYER in respect of the SAME SUBJECT MATTER and for IDENTICAL PERIODS
- Διεθνής ΟΙΚΟΝΟΜΙΚΗ διπλή φορολογία (international double <u>economic</u> taxation): the SAME economic
   TRANSACTION, item of INCOME or CAPITAL is taxed in
   TWO (or more) STATES during the SAME PERIOD but in the hands of DIFFERENT TAXPAYERS

# Διεθνής Διπλή Φορολογία Νομική -Οικονομική

#### ➤ Διεθνής ΟΙΚΟΝΟΜΙΚΗ διπλή φορολογία – παραδείγματα

- Διόρθωση κερδών ενδοομιλικών συναλλαγών (TP)
- Πάγια (Asset attribution)
- Έκπτωση δαπάνης / φορολογία εσόδου
- Διαφανείς εταιρείες (Transparent legal entities)
- Μερίσματα (αλλά: "κλασσικό σύστημα φορολογίας κερδών επιχειρήσεων»)

# Διπλή φορολογία & Διεθνές Δίκαιο

- Διπλή φορολογία και διεθνές δίκαιο Κατανομή φορολογικήςεξουσίας μεταξύ των κρατών
- Δεν υπάρχει κανόνας ΔΙΕΘΝΟΥΣ ΔΙΚΑΙΟΥ που να απαγορεύει την επιβολή φόρου με βάση το εσωτερικό δίκαιο στο εισόδημα
   ΑΛΛΟΔΑΠΗΣ θα πρέπει ωστόσο να υπάρχει ΕΠΑΡΚΗΣ δεσμός με το κράτος που επιβάλει το φόρο
- Το διεθνές εθιμικό δίκαιο ΔΕΝ ΑΠΑΓΟΡΕΥΕΙ τη διπλή φορολογία το διεθνές δίκαιο μπορεί να **ρυθμίσει ΜΟΝΟ το ΠΟΙΟΣ ΦΟΡΟΛΟΓΕΙ ΤΙ** (κατανομή φορολογικής εξουσίας -distribution of taxing powers)
- Το διεθνές δίκαιο ΔΕΝ ΕΠΙΒΑΛΕΙ την αποφυγή της διεθνούς διπλής φορολογίας αυτό μπορεί να γίνει μόνο οικοιοθελώς από τα κράτη, είτε με κανόνες εσωτερικού δικαίου (μονομερή μέτρα) ή αμοιβαία σε διμερές ή πολυμερές επίπεδο βάσει διεθνών συμβάσεων

# Τι είναι το Διεθνές Φορολογικό Δίκαιο

- ≻Δεν υπάρχει κάποιος «διεθνής φόρος» («international tax»).
- ➤Τι είναι το ΔΙΕΘΝΕΣ ΦΟΡΟΛΟΓΙΚΟ ΔΙΚΑΙΟ;
  - Με τον όρο Διεθνές Φορολογικό Δίκαιο εννοούμε:
  - α. τους Κανόνες των **ΣΑΔΦ** (Double Tax Conventions, κανόνες δημοσίου διεθνούς δικαίου) και
  - **β.** τους Κανόνες **εσωτερικού** δικαίου που ρυθμίζουν διασυνοριακά θέματα (π.χ. έκπτωση φόρου αλλοδαπής)

- ➤Η ανάπτυξη των ΣΑΔΦ
- > Διπλή φορολογία στην Ευρώπη του 19° αιώνα
  - Συνέδριο της Βιέννης (1814-1815) ίδρυση μιας χαλαρής γερμανικής συνομοσπονδίας (αντί ενός ενιαίου γερμανικού κράτους)
  - 1834: τελωνειακή ένωση (Zollverein) των κρατιδίων της Γερμανικής Συνομοσπονδίας
    - Η αύξηση των συναλλαγών και των επενδύσεων μεταξύ των κρατιδίων της Γερμανικής Συνομοσπονδίας προκάλεσε την αύξηση της διπλής φορολογίας. Το Κοινοβούλιο ανέλαβε πρωτοβουλία για την αντιμετώπιση του φαινομένου
  - 16 Απριλίου 1869: η πρώτη Διμερής Σύμβαση για την Αποφυγή της Διπλής Φορολογίας μεταξύ Πρωσσίας και Σαξωνίας
  - 18 Δεκεμβρίου 1869/7 Ιανουαρίου 1870: Διμερής Σύμβαση για την Αποφυγή της Διπλής Φορολογίας μεταξύ Αυστρίας και Ουγγαρίας
  - 21 Ιουνίου 1899: Διμερής Σύμβαση για την Αποφυγή της Διπλής Φορολογίας μεταξύ της Γερμανικής Αυτοκρατορίας (είχε ενοποιηθεί το 1871 από τον Κάιζερ Γουλιέλμο Β΄) και της Αυστρο-Ουγγαρίας.

- Μάρτιος 1922: Η Κοινωνία των Εθνών ρωτά:
  - Ποιες είναι οι **οικονομικές συνέπειες** της διπλής φορολογίας;
  - Μπορούν να διαμορφωθούν γενικές αρχές που θα μπορούσαν να αποτελέσουν τη βάση μιας διεθνούς συνθήκης (εννοεί πολυμερούς) ή πρέπει το ζήτημα να αντιμετωπιστεί σε διμερές επίπεδο;
  - Μπορούν να εφαρμοσθούν οι αρχές που υπάρχουν ήδη είτε σε διεθνείς συμβάσεις μεταξύ ανεξαρτήτων κρατών είτε σε συμβάσεις μεταξύ ομόσπονδων κρατών;
  - Μπορεί να θεσπισθεί ένας **μηχανισμός επίλυσης** διαφορών;
  - Σε ποιο βαθμό θα μπορούσε με μια τέτοια σύμβαση να θεσπισθεί μηχανισμός ελέγχου για την αποφυγή των καταστρατηγήσεων;
- ▶Μάρτιος 1923: Οι απαντήσεις των Εμπειρογνωμόνων στους οποίους ανατέθηκε η μελέτη («Report of the 4 Economists»)
   → ΚΑΤΑΝΟΜΗ φορολογικής εξουσίας

#### Conclusion.

Summing up the preceding discussion, it would be desirable ideally to apportion economic allegiance as between origin and domicile as follows:

PREPON	DERANT
CATEGORY OF WEALTH ELEN	ENT.
Origin	Domicile.
I. Land	
II a. Mines, oil wells, etc x	
II b. Commercial establishments	
III a. Agricultural implements, machinery, flocks and herds x	
III b. Money, jewelry, furniture, etc	X
IV. Vessels	
Va. Mortgages x (prop'y)	x (income)
V b. Corporate shares	æ
V c. Corporate bonds	x
V d. Public securities	X
V e. General credits	X
VI. Professional earnings	X

That is to say, the categories of wealth in which origin is more important are:

I, II a, II b, III a, IV, V a (property).

Those categories in which domicile is more important are:

III b, V a (income), V b, V c, V d, V e, VI.

Putting it another way, all corporeal wealth, including immovables and tangible movables, except III b, would be assigned predominantly or wholly to the place of origin; all intangible wealth, except Va (property) would be assigned predominantly or wholly to domicile or residence.

To allocate the exact proportion of economic allegiance to origin or domicile in each particular category is well-nigh impossible. Such an attempt would savour too much of the arbitrary. But where any two countries desire to make such an allocation, they would do well to be guided, ideally at least, by the above analysis.

Where it would be too complicated to make the exact apportionment between the claims of origin and domicile in each category of wealth, a certain rough justice can be attained by turning over all the categories of the first division completely to the place of origin, and by turning over all the categories in the second division completely to the place of domicile. What each country would lose in the one case it would roughly gain in the other, and there would be the great additional advantage of comparative simplicity.

- ➤ Κοινωνία των Εθνών: εναρμόνιση των υπαρχουσών διεθνών συμβάσεων και ανάπτυξη προτύπων συμβάσεων (1926-1928 και 1933-1935)
  - Ανάπτυξη δικτύου ΣΑΔΦ: 1925: Γερμανία Ιταλία,
     1922/1928: UK Ιρλανδία, 1932: ΗΠΑ Γαλλία , 1936:
     ΗΠΑ Καναδάς, 1939: ΗΠΑ Σουηδία
- Andrew W. Mellon (Υπουργός Οικονομικών ΗΠΑ, 1930): "The objections to this method appear to me to be that the concessions are more likely to be based on bargaining than on sound principles of taxation".

- Μετά τον Β΄ Παγκόσμιο Πόλεμο:
  - Ανάπτυξη δυο ακόμα Πρότυπων Συμβάσεων: Πρότυπη Σύμβαση του Μεξικού του 1943 και Πρότυπη Σύμβαση του Λονδίνου του 1946.
- Από το 1948: Οργανισμός Ευρωπαϊκής Οικονομικής
   Συνεργασίας (ΟΕΕС) και στη συνέχεια Οργανισμός Οικονομικής
   Συνεργασίας και Ανάπτυξης (ΟΟΣΑ/ΟΕCD)
  - ▶ Έμφαση στις ανεπτυγμένες χώρες, διαδοχικές επικαιροποιήσεις από το 1992. Σήμερα ισχύει η πρότυπη Σύμβαση όπως διαμορφώθηκε το 2017.
  - Αντίστοιχη πρωτοβουλία στο πλαίσιο του ΟΗΕ από το 1968 – έμφαση στις αναπτυσσόμενες οικονομίες. Πρότυπη Σύμβαση ΟΗΕ 1980, αναθεώρηση 1999 και πρόσφατη αναθεώρηση 2017.

# Αποφυγή διεθνούς διπλής φορολογίας

#### > Regional Instruments

- Nordic Group
- European Union? Δεν υπάρχει στην ΕΕ μια ενιαία Σύμβαση
   Αποφυγής Διπλής Φορολογίας διμερείς ΣΑΔΦ μεταξύ των ΚΜ

#### > State Models

US Model Convention

#### ➤ Multilateral Agreements

• The *Nordic Convention on Income and Capital* entered into by Denmark, Finland, Iceland, Norway and Sweden, which was concluded in 1983 and replaced in 1987, 1989 and 1996, provides a practical example of a multilateral convention between a group of member countries and follows closely the provisions of the Model Convention.

## Αποφυγή διεθνούς διπλής φορολογίας

#### ➤ Multilateral Agreements

- the Convention on Mutual Administrative Assistance in Tax
   Matters (Council of Europe), entered into force on 1 April 1995.
- Multilateral Convention to Implement Tax Treaty Related
   Measures to Prevent BEPS, drafted in order to facilitate the
   implementation of the treaty-related measures resulting from
   the OECD/ G20 Base Erosion and Profit Shifting Project and
   which was opened for signature on 31 December 2016.
  - «Despite these multilateral conventions, there are no reasons to believe that the conclusion of a multilateral tax convention involving a large number of countries that could replace the network of current bilateral tax conventions could now be considered practicable. The Committee therefore considers that bilateral conventions are still a more appropriate way to ensure the elimination of double taxation at the international level.»

## Κανόνες κατανομής εξουσίας επιβολής φόρου

- > Κανόνες των ΣΑΔΦ και κανόνες ιδιωτικού διεθνούς δικαίου
  - Ομοιότητα: they are both <u>conflict rules\*</u> (\*misleading)
  - Διαφορά: tax treaty rules NEVER lead to the application of foreign law – states always apply their own tax rules
- Οι κανόνες των ΣΑΔΦ ΠΕΡΙΟΡΙΖΟΥΝ (δεν επεκτείνουν) το πεδίο εφαρμογής των κανόνων της εσωτερικής νομοθεσίας των συμβαλλομένων κρατών ΜΕΤΑΒΑΛΛΟΥΝ το αποτέλεσμα της εσωτερικής νομοθεσίας
- ▶ Οι κανόνες των ΣΑΔΦ δεν ΔΗΜΙΟΥΡΓΟΥΝ φορολογητέα ύλη που δεν υπάρχει ήδη με βάση το εσωτερικό δίκαιο έχουν προέλευση και νομική βάση στο δημόσιο διεθνές δίκαιο είναι ΑΝΕΞΑΡΤΗΤΟΙ από το εσωτερικό δίκαιο

#### Η Πρότυπη Σύμβαση του ΟΟΣΑ

- ➤ Uniform basis for the most common problems that arise in the field of international juridical double taxation
- > Σύσταση (Recommendation) του Συμβουλίου του ΟΟΣΑ :
- member countries, when concluding or revising bilateral conventions, should conform to the MC as interpreted by the Commentaries thereon and having regard to the reservations contained therein AND
- their tax authorities should follow these Commentaries, as modified from time to time and subject to their observations thereon, when applying and interpreting the provisions of their bilateral Tax Conventions that are based on Model Convention.

#### Η Πρότυπη Σύμβαση του ΟΟΣΑ

• **RESERVATIONS** → are related to the *NEGOTIATION* of DTCs; although all member countries are in agreement with the aims and the main provisions of the Model Convention, nearly all have entered reservations on some provisions, which are recorded in the Commentaries on the Article concerned. Insofar as a member country has entered reservations, the other member countries in negotiating bilateral conventions with the former, will retain their **freedom of action** in accordance with the principle of reciprocity.

#### Η Πρότυπη Σύμβαση του ΟΟΣΑ

OBSERVATIONS → are related to the INTERPRETATION of DTCs; observations on the Commentaries have sometimes been inserted at the request of member countries that are unable to concur in the interpretation given in the Commentary on the Article concerned. These observations thus do **not** express any **disagreement** with the text of the Convention, but **usefully indicate** the way in which those countries will apply the provisions of the Article in question.

#### Ο κύκλος ζωής μιας ΣΑΔΦ

#### Τα 7 Στάδια της ζωής μιας ΣΑΔΦ

- 1. Αίτημα πρόσκληση από μια χώρα προς μια άλλη για έναρξη διαπραγματεύσεων και Συμφωνία για έναρξη διαπραγματεύσεων
- 2. Διεξαγωγή διαπραγματεύσεων και, σε περίπτωση συμφωνίας, μονογραφή κειμένου από αντιπροσωπείες
- 3. Υπογραφή διεθνούς σύμβασης (με βάση το εσωτερικό δίκαιο) → δέσμευση κράτους σε διεθνές επίπεδο
- 4. Κύρωση διεθνούς σύμβασης (με βάση το εσωτερικό δίκαιο)
- 5. Έναρξη ισχύος (entry into force)
- 6. Έναρξη εφαρμογής (entry into effect)
- 7. Λήξη / καταγγελία

## Το περιεχόμενο των κανόνων της ΣΑΔΦ

- Tax treaty rules do not choose between DOMESTIC or
  FOREIGN tax rules they determine WHO gets to TAX WHAT,
   always according to its DOMESTIC law, as limited by the
   treaty rules → they are DISTRIBUTIVE rules
- Tax treaty rules DO NOT CREATE tax liabilities that do not already exist according to domestic legislation; they DO NOT INCREASE existing tax liabilities – they LIMIT the application or scope of EXISTING taxes or they GRANT BENEFITS (deductions)
- DTCs establish an independent mechanism to avoid double taxation through restriction of claims in areas where overlapping tax claims are expected

# Το περιεχόμενο του κανόνα της ΣΑΔΦ

- Tax treaty rules prevent not only CURRENT but also POTENTIAL double taxation (e.g. modifications of legislation)
- States are free to grant additional benefits or expand the scope of application of DTC benefits unilaterally (domestic legislation).

#### Η εφαρμογή των ΣΑΔΦ

- ➤Τι συνιστά Διπλή Φορολογία και τι όχι δεν είναι σημαντικό για την εφαρμογή των ΣΑΔΦ
- Η εφαρμογή μιας ΣΑΔΦ είναι ζήτημα ερμηνείας της συγκεκριμένης ΣΑΔΦ

## Εφαρμογή ΣΑΔΦ

Δομή και τρόπος εφαρμογής ενός κανόνα ΣΑΔΦ (DISTRIBUTIVE RULE) – 3 βήματα

#### 1° Βήμα: Τυπικές προϋποθέσεις

- Binding effect of the Treaty on the taxing entity (state)
- Treaty entitlement of the taxpayer (Art. 1 MC)
- Applicability of the treaty to the tax in question (Art. 2 MC)

## Εφαρμογή ΣΑΔΦ

#### 2° βήμα: Ουσιαστικές προϋποθέσεις

- Designation of the <u>object</u> to which the rule applies ('income', 'profit', 'capital')
- Designation of the <u>particular requirements</u> under which the rule applies: designation of <u>source</u> and <u>amount</u> of tax liability
- Connection of the tax object with the taxpayer ('attribution', "income derived by")
- Connection of the taxpayer with the taxing state
   ('connecting factor', a characteristic of the taxpayer
   (residence, nationality) or of the transaction or event
   (place of immovable property)

## Εφαρμογή ΣΑΔΦ

#### 3° Βήμα: Νομικές συνέπειες στα δυο κράτη

- The substantive tax law of ONE of the contracting states remains UNAFFECTED; the tax claim is at most limited in amount – this State has Primary Taxation right (source state)
- The other contracting state <u>allows an exemption for the</u>
   situation or it agrees to allow a credit for the tax paid —
   this State has 'Secondary Taxation' right (residence state)
- DTC Article ≠ DTC Rule the elements of a DTC Rule are scattered over several DTC Articles

# Η εφαρμογή των ΣΑΔΦ

#### ▶ Δεν ΞΕΚΙΝΩ ΠΟΤΕ με την ΣΑΔΦ

- ➤ Ακολουθώ τα εξής βήματα:
- 1. Αφετηρία είναι το <u>εσωτερικό δίκαιο</u>
  - Α. Εντοπίζω τις εμπλεκόμενες χώρες
  - Β. Εξετάζω την **εσωτερική** νομοθεσία
  - Γ. Διαπιστώνω **ποια χώρα έχει δικαίωμα** να φορολογήσει
- 2. Εξετάζω το πεδίο εφαρμογής της ΣΑΔΦ (πρόσωπα, καλυπτόμενοι φόροι)
- 3. Εντοπίζω τον εφαρμοστέο κανόνα (distributive rule)
- 4. Επιλύω τυχόν ερμηνευτικά ζητήματα
- 5. Εφαρμόζω τον κανόνα και καταλήγω στην ελάφρυνση της διπλής φορολογίας σύμφωνα με τη ΣΑΔΦ

#### Further Reading:

- OECD Model Tax Convention on Income and on Capital (2017) Articles
- OECD Model Tax Convention on Income and on Capital (2017) Introduction



Το πεδίο εφαρμογής των ΣΑΔΦ – η έννοια του «πραγματικού δικαιούχου»

#### Πεδίο εφαρμογής των ΣΑΔΦ

- Άρθρο 1 Πρότυπης Σύμβασης ΟΟΣΑ <del>></del> Πρόσωπα
- Άρθρο 2 Πρότυπης Σύμβασης ΟΟΣΑ <del>></del> καλυπτόμενοι φόροι

# 1. Πεδίο εφαρμογής – καλυπτόμενα πρόσωπα

#### ARTICLE 1 - PERSONS COVERED

- **1.** This Convention shall apply to **persons** who are **residents** of one or both of the Contracting States.
- 2. For the purposes of this Convention, income derived by or through an entity or arrangement that is treated as **wholly or partly fiscally transparent** under the tax law of either Contracting State shall be considered to be income of a resident of a Contracting State but only to the extent that the income is treated, for purposes of taxation by that State, as the income of a resident of that State.
- **3.** This Convention **shall not affect the taxation**, by a Contracting State, **of its residents** except with respect to the benefits granted under paragraph 3 of Article 7, paragraph 2 of Article 9 and Articles 19, 20, 23 [A] [B], 24, 25 and 28.

## 1. Πεδίο εφαρμογής – καλυπτόμενα πρόσωπα

### ARTICLE 1 - PERSONS COVERED

- ▶ persons → ορισμός στο άρθρο 3: "the term "person" includes an individual, a company and any other body of persons"
- $\rightarrow$  who are **residents**  $\rightarrow$  άρθρο 4: "For the purposes of this Convention, the term "resident of a Contracting State" means any person who…."
- Ειδικός κανόνας για διαφανείς εταιρίες / οντότητες: wholly or partly fiscally transparent
- ➤ Διευκρίνιση για την εφαρμογή των κανόνων των ΣΑΔΦ στ ο εσωτερικό → This Convention shall not affect the taxation, by a Contracting State, of its residents except with respect to the benefits granted under....

## 2. Πεδίο εφαρμογής – καλυπτόμενοι φόροι

### **ARTICLE 2 - TAXES COVERED**

- 1. This Convention shall apply to taxes on income and on capital imposed on behalf of a Contracting State or of its political subdivisions or local authorities, irrespective of the manner in which they are levied.
- 2. There shall be regarded as taxes on income and on capital all taxes imposed on total income, on total capital, or on elements of income or of capital, including taxes on gains from the alienation of movable or immovable property, taxes on the total amounts of wages or salaries paid by enterprises, as well as taxes on capital appreciation.
- **3.** The existing taxes to which the Convention shall apply are in particular:
- a) (in State A): .....
- b) (in State B): .....
- **4.** The Convention shall apply also to any identical or substantially similar taxes that are imposed after the date of signature of the Convention in addition to, or in place of, the existing taxes. The competent authorities of the Contracting States shall notify each other of any significant changes that have been made in their taxation laws.

## 2. Πεδίο εφαρμογής – καλυπτόμενοι φόροι

### **ARTICLE 2 - TAXES COVERED**

- § 1 Πεδίο εφαρμογής
- > taxes on income and on capital
- imposed on behalf of a Contracting State or of its political subdivisions or local authorities,
- > irrespective of the manner in which they are levied.
- § 2. Γενικός ορισμός φόρος εισοδήματος
- > regarded as taxes on income and on capital
- § 3. Ειδική αναφορά στους ισχύοντες φόρους κατά το χρόνο σύναψης της ΣΑΔΦ απαρίθμηση, έχει πανηγυρικό χαρακτήρα
- § 4. Πρόβλεψη που εξυπηρετεί την ομαλή λειτουργία της ΣΑΔΦ στο μέλλον («shall apply»)
- ightharpoonup identical or substantially similar taxes that are imposed after the date of signature of the Convention ightharpoonup ουσιωδώς όμοιοι φόροι
- ightharpoonup in addition to, or in place of, the existing taxes ightharpoonup επιπλέον των φόρων που ισχύουν κατά το χρόνο σύναψης της ΣΑΔΦ ή σε αντικατάσταση αυτών

## 2. Πεδίο εφαρμογής – καλυπτόμενοι φόροι

### ΑΡΘΡΟ 2 – ΚΑΛΥΠΤΟΜΕΝΟΙ ΦΟΡΟΙ

- 1. Έκτακτη εφάπαξ εισφορά κοινωνικής ευθύνης (ά. 5 του Ν 3845/2010)
  - > ΣτΕ A153/2018 (Ιταλία, Alitalia)
  - $\triangleright$  STE A154/2018 (H $\Pi$ A, Delta Airlines)
- 2. Ειδική εισφορά αλληλεγγύης (ά. 29 του N 3986/2011, τώρα ά.  $43^{\rm A}$  ΚΦΕ)
  - > ΣτΕ 2465/2018 (HB)

3. Πεδίο εφαρμογής – έδαφος & χρόνος

Article 30 – Territorial extension

Article 31 – Entry into force

Article 32 – Termination

## 4. Πεδίο εφαρμογής

## πραγματικός δικαιούχος

- ➤ The Concept of 'Beneficial Owner'
- **≻** Άρθρο 10
- 1. 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.
- 2. However, dividends paid by a company which is a resident of a Contracting State may also be taxed in that State according to the laws of that State, but if the beneficial owner of the dividends is a resident of the other Contracting State, the tax so charged shall not exceed:......

## 4. Πεδίο εφαρμογής

## πραγματικός δικαιούχος

- ➤ The Concept of 'Beneficial Owner'
- 冷ρθρο 11 § § 1-2 − Τόκοι: Όμοια προσέγγιση με άρθρο 10
- Άρθρο 12§1 Δικαιώματα: «Royalties arising in a Contracting State and beneficially owned by a resident of the other Contracting State shall be taxable only in that other State.»

## ≻ Άρθρο 10 – Σχόλια, § 12.1

**12.1** Since the term "beneficial owner" was added to address. potential difficulties arising from the use of the words "paid to...a resident" in paragraph 1, it was intended to be interpreted in this context and *not to refer to any technical* meaning that it could have had under the domestic law of a specific country (in fact, when it was added to the paragraph, the term did not have a precise meaning in the law of many countries). The term "beneficial owner" is therefore *not used* in a narrow technical sense (such as the meaning that it has under the trust law of many common law countries), rather, it should be understood in its context, in particular in relation to the words "paid ... to a resident", and in light of the object and purposes of the Convention, including avoiding double taxation and the prevention of fiscal evasion and avoidance.

## ≻ Άρθρο 10 – Σχόλια

➤ Where an item of income is paid to a resident of a Contracting State acting in the capacity of agent or nominee it would be inconsistent with the object and purpose of the Convention for the State of source to grant relief or exemption merely on account of the status of the direct recipient of the income as a resident of the other Contracting State. The direct recipient of the income in this situation qualifies as a resident but no potential double taxation arises as a consequence of that status since the recipient is not treated as the owner of the income for tax purposes in the State of residence.

## ≻ Άρθρο 10 – Σχόλια

It would be equally inconsistent with the object and purpose of the Convention for the State of source to grant relief or exemption where a resident of a Contracting State, otherwise than through an agency or nominee relationship, simply acts as a conduit for another person who in fact receives the benefit of the income concerned. For these reasons, the report from the Committee on Fiscal Affairs entitled "Double Taxation Conventions and the Use of Conduit Companies" concludes that a conduit company cannot normally be regarded as the beneficial owner if, though the formal owner, it has, as a practical matter, very narrow powers which render it, in relation to the income concerned, a mere fiduciary or administrator acting on account of the interested parties.

### Άρθρο 10 – Σχόλια

In these various examples (agent, nominee, conduit company acting as a fiduciary or administrator), the direct recipient of the dividend is not the "beneficial owner" because that recipient's right to use and enjoy the dividend is constrained by a contractual or legal obligation to pass on 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 right to use and enjoy the dividend unconstrained by a contractual or legal obligation to pass on the payment received to another person. This type of obligation would not include contractual or legal obligations that are not dependent on the receipt of the payment by the direct recipient such as an obligation that is not dependent on the receipt of the payment and which the direct recipient has as a debtor or as a party to financial transactions, or typical distribution obligations of pension schemes and of collective investment vehicles entitled to treaty benefits under the principles of paragraphs 22 to 48 of the Commentary on Article 1. Where the recipient of a dividend does have the right to use and enjoy the dividend unconstrained by a contractual or legal obligation to pass on the payment received to another person, the recipient is the "beneficial owner" of that dividend. It should also be noted that Article 10 refers to the beneficial owner of a dividend as opposed to the owner of the shares, which may be different in some cases.

## 4. Πεδίο εφαρμογής

## πραγματικός δικαιούχος

- ➤ SOS! BO under tax treaties MUST NOT be confused with the term "ultimate beneficial owner" ('UBO') used in the AML legislation
- The explanations concerning the meaning of "beneficial owner" that are included in the 2017 OECD Commentary under the article mentioned above make it clear that the meaning given to this term in the context of the Article must be distinguished from the different meaning that has been given to that term in the context of other instruments that concern the determination of the persons (typically the individuals) that exercise ultimate control over entities or assets.

- > SOS! BO under tax treaties MUST NOT be confused with the term "ultimate beneficial owner" used in the AML legislation
- The Financial Action Task Force, International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation – The FATF Recommendations (OECDFATF, Paris, 2012), which sets forth in detail the international anti-money laundering standard and which includes the following definition of beneficial owner (at page 110): "the natural person(s) who ultimately owns or controls a customer and/or the person on whose behalf a transaction is being conducted. It also incorporates those persons who exercise ultimate effective control over a legal person or arrangement." Similarly, the 2001 report of the OECD Steering Group on Corporate Governance, Behind the Corporate Veil: Using Corporate Entities for Illicit Purposes (OECD, Paris, 2001), defines beneficial ownership as follows (at page 14):

## 4. Πεδίο εφαρμογής

## πραγματικός δικαιούχος

- SOS! BO under tax treaties MUST NOT be confused with the term "ultimate beneficial owner" used in the AML legislation
- ➤ "In this Report, "beneficial ownership" refers to ultimate beneficial ownership or interest by a natural person. In some situations, uncovering the beneficial owner may involve piercing through various intermediary entities and/or individuals until the true owner who is a natural person is found. With respect to corporations, ownership is held by shareholders or members. In partnerships, interests are held by general and limited partners. In trusts and foundations, beneficial ownership refers to beneficiaries, which may also include the settlor or founder."

- SOS! BO under tax treaties MUST NOT be confused with the term "ultimate beneficial owner" used in the AML legislation
- > That different meaning of "beneficial owner" cannot be applied in the context of the double tax agreements. Indeed, that meaning, which refers to natural persons (i.e. individuals), cannot be reconciled with the express wording of subparagraph 2 a) of Article 10 of the 2017 OECD Model, which refers to the situation where a company is the beneficial owner of a dividend. In the context of Article 10, 11 and 12 the term "beneficial owner" is intended to address difficulties arising from the use of the words "paid to" in relation to dividends rather than difficulties related to the ownership of the shares of the company paying these dividends. For that reason, it would be inappropriate, in the context of these Articles, to consider a meaning developed in order to refer to the individuals who exercise "ultimate effective control over a legal person or arrangement."

## 4. Πεδίο εφαρμογής

## πραγματικός δικαιούχος

## > Η έννοια του «πραγματικού δικαιούχου»

- 1. Indofood v JP Morgan Chase Bank (UK) 2006
- 2. PREVOST CAR (Canada) 2009
- 3. VELCRO Canada 2012
- 4. PAO Severstal 2016









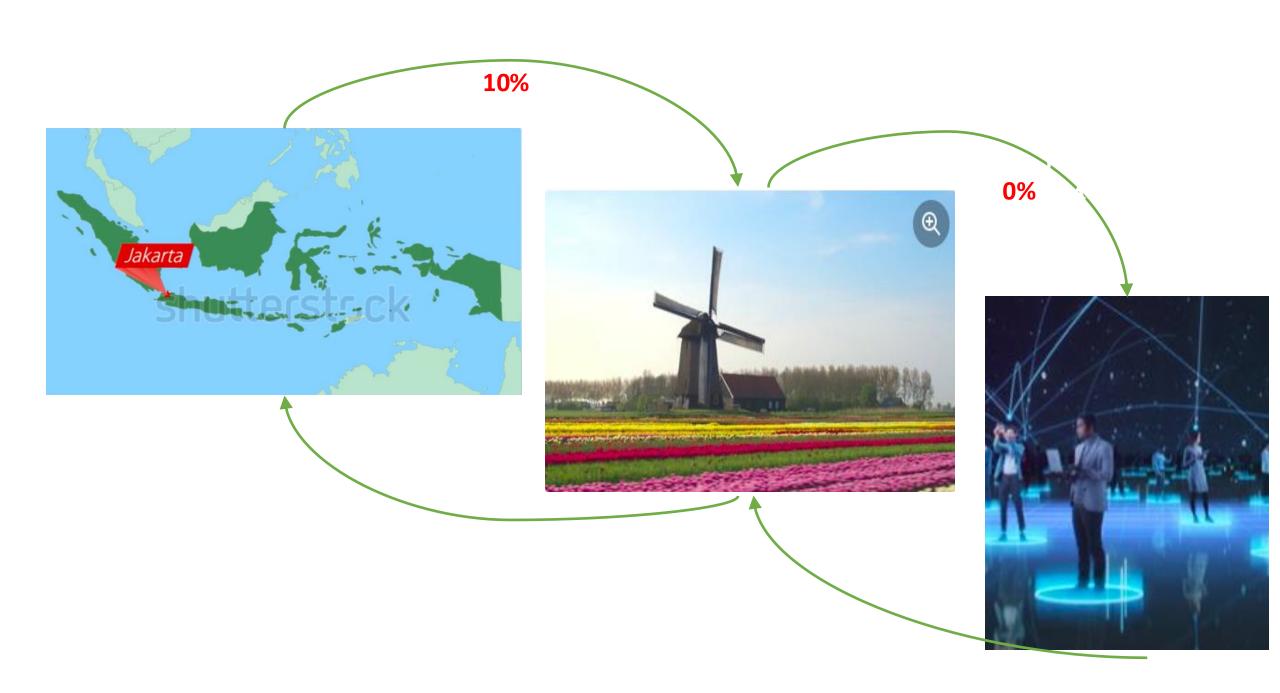
Indofood International Finance Ltd v. JP Morgan Chase Bank, Court of Appeal, 2 March 2006, (2006) 8 ITLR 653

### > Facts of the case

- Indofood Indonesia (parent guarantor) → receives a loan from Indofood Mauritius (issuer) → receives loan funds from international market
- Interest from Indonesia to Mauritius: 10% WHT
- Interest from Indonesia to noteholders: 20% WHT
- Interest from Mauritius: 0% WHT

*Indofood -* Facts of the case – cont.

- Early redemption if WHT % changes and this obligation cannot be avoided by the issuer
- Indonesia terminates DTC with Mauritius!
- Indofood asks for early redemption
- JP Morgan Chase proposes that there is a **viable alternative**: to interpose a Dutch sub (10% WHT on interest from Indonesia to NL)
- BUT: is the Dutch sub the BO of the interest?



## Indofood

> Arguments

Position of the Indonesian Tax Authority: "the term "beneficial owner" means the actual owner of the interest income who truly has the full right to enjoy directly the benefits of that interest income. Consequently, conduit company and nominee such as the NewCo will not be regarded as the actual owner of the income."

## Indofood

- > Reasoning of the court
  - Regard is to be had to the substance of the matter. In both commercial and practical terms the Issuer is, and Newco would be, bound to pay on to the Principal Paying Agent that which it receives from the Parent Guarantor
  - No 'direct benefit' from the interest payable by the Parent Guarantor except by funding its liability to the Principal Paying Agent or Issuer respectively.
  - Such an exception can hardly be described as the 'full privilege' needed to qualify as the beneficial owner; rather the position of the Issuer and Newco equates to that of an "administrator of the income"

## Indofood

### > Comments

- virtually no case law on the meaning of beneficial ownership until the Indofood case (2006)
- a civil case brought between the two parties to a loan agreement
- The interposed entity had no function whatsoever but to receive income and pay on the identical amount of income
- in fact, it had so little function that, according to the Court of Appeal, the actual flows of money missed it out completely.
- Interpretation subject to the purpose and objective of the treaties; aimed at treaty shopping structures

- > Facts of the Case
  - Prevost Canada → dividends → Prevost Holding BV (NL) → dividends → (1) Volvo (S) and (2) Henlys (UK)
  - > 5% WHT from Canada to NL;
  - ➤ 15% WHT from Canada to Sweden;
  - > 10% WHT from Canada to UK

- Reasoning of the Court (para.16).
  - Prévost Holding was the registered owner of Prévost shares, paid for the shares and owned the shares for itself;
  - when dividends are received by Prévost Holding in respect of shares it owns, the dividends are the property of Prévost Holding and are available to its creditors, if any, until such time as the management board declares a dividend and the dividend is approved by the shareholders.

- > Reasoning of the Court (para.16).
  - No agency, mandate or nominee
  - No Conduit, because conduit = absolutely no discretion as to the use or application of funds put through it
  - No pre-determined or automatic flow of funds to Volvo and Henlys
  - Payment of dividends → according to Dutch law
  - No obligation to pay dividends to Volvo and Henlys

- **≻** Comments
  - Agents, nominees and conduit companies with absolutely no discretion over amounts received = are NOT BOs
  - See: OECD clarification of the Meaning of BO in the OECD MC Discussion Draft 29 April 2011 to 15 July 2011 (OECD 2011)
  - See also: 2017 OECD MC Commentary on Article 10, at para. 12

Velcro Canada Inc., Tax Court of Canada, 24/02/2012

- > Facts of the case
  - Velcro Industries BV (NL) → licensing agreement →
     Velcro Canada
  - Velcro Canada → paid royalties → VIBV (10% WHT)
  - VIBV → transferred residence to NL Antilles
  - VHBV (NL) → rights under licensing agreement

## 4. Πεδίο εφαρμογής – πραγματικός δικαιούχος **VELCRO**

### Velcro Canada Inc.

- > Facts of the case
  - VCI (Ca)→ royalties to VHBV (NL)→ royalties to VIBV (NL Ant)
    - Royalties from Canada to NL: 10% WHT
    - Royalties from Canada to NL Antilles: 25% WHT
  - BO test adopted in *Prevost Car*: BO = the person who receives the dividends [royalties, interest] for his or her own use or enjoyment and assumes the risk and control of the funds he or she received
  - BO attributes: POSSESSION, USE, CONTROL, RISK

### Velcro Canada Inc.

- > Reasoning of the Court
  - VHBV received funds in the same bank account as other income
  - VHBV paid a different amount to VIBV than the amount it received from VCI
  - VHBV had some (limited) discretion
  - Conclusion: VHBV is the BO

### > Comments

- Decision Not well founded; Facts misunderstood?
- Velcro and Prevost viewed together establish a very low threshold for BO in Canada

## 4. Πεδίο εφαρμογής – πραγματικός δικαιούχος *SEVERSTAL*

### **PAO Severstal** (Case No. A40-113217/16-107-982)

Moscow Arbitrazh Court, 31 October 2016

- ➤ "Russian Prevost" case BUT: taxpayer lost
- ▶ Facts of the case: In 2011 PJSC Severstal paid dividends to its 4 Cypriot corporate shareholders which repaid them to the corporate shareholders registered on the British Virgin Islands. The tax rate at a source of 5%, applicable to cases when recipient of dividends is a beneficial owner, was applied by JSC Severstal being a withholding agent.
- ➤ The tax audit: On 25.05.2015 the field tax audit of the year resulted in tax adjustment and penalties on the basis of application of 15% withholding tax rate instead of 5%. The taxpayer appealed this additional charge.

### PAO Severstal

### Position of the tax authorities:

- The Cypriot recipients of dividends in fact were the transit companies which were simply re-paying dividends further for BVI companies.
- All actions were under control to PJSC Severstal, and shareholders did not conduct any other activities, except receipt and repayment of dividends to offshore recipients.

## • Position of the taxpayer:

- The legislation didn't contain clear criteria of the beneficial owner in the relevant tax years.
- "Beneficial owner" is simply the legal owner of shares
- Shareholders of PJSC Severstal had no restrictions on determination of the future of dividends and conducted their business independently.

## 4. Πεδίο εφαρμογής – πραγματικός δικαιούχος **SEVERSTAL**

### PAO Severstal

### Arguments used by the court:

- 1. Effectively all received dividends were repaid to the companies in BVI either in the form of dividends, or interest on loans.
- 2. Articles of the Cypriot companies were almost identical and contained crucial restrictions for directors of the Cypriot companies regarding the sale of shares of PJSC Severstal (only specifically named companies were permissible buyers). The directors could not sell shares of PJSC "Severstal" without the approval of shareholders in the BVI.
- **3.** The shareholders did not conduct other activities and did not receive any other income except for dividends.
- 4. Shareholders do not pay any tax in Cyprus.

## 4. Πεδίο εφαρμογής – πραγματικός δικαιούχος **SEVERSTAL**

### PAO Severstal

### Arguments used by the court - cont:

- **5.** Number of companies were registered at the same address, the bank accounts were open in the same bank, the resolutions of Board of Directors of several shareholders was signed by the same person.
- **6.** Letter of the Tax Service of Cyprus (supposedly) confirming the status of the beneficial owners of companies in Cyprus is not binding on Russian Tax Authorities and is refuted considering the circumstances of the case.
- 7. Definition of the beneficial owner may be drawn from Commentaries to the OECD Model Convention.
- **8.** The concept of unjustified tax benefit, which is basically Russian judicial based GAAR, apply to a taxpayer's case

Γιατί έφυγε ο Ρονάλντο από τη Ρεάλ και πήγε στη Γιουβέντους;





«Δυσαρεστημένος από την απόφαση των φορολογικών αρχών να τον κατηγορήσουν για φοροδιαφυγή και αποφασισμένος να φύγει από τη Ρεάλ και την Ισπανία»

16/06/2017

Ronaldo would benefit from a new law in Italy that allows taxpayers moving to the country to pay as little as €100,000 in taxes on earnings outside it.

July 2018

Ronaldo move **motivated by taxes**', says La Liga's
Javier Tebas

*July 2018* 

The Principal Purpose Test → "PPT Rule" → Article 29 OECD Model

## Άρθρο 29 ΣυμβΟΟΣΑ:

**Notwithstanding** the other provisions of this Convention, a benefit under this Convention shall not be granted in respect of an item of income or capital if it is reasonable to conclude, having regard to all relevant facts and circumstances, that obtaining that benefit was one of the principal purposes of any arrangement or transaction that resulted directly or indirectly in that benefit, unless it is established that granting that benefit in these circumstances would be in accordance with the **object and purpose** of the relevant provisions of this Convention.

Μπορούν οι χώρες πηγής των εισοδημάτων (royalties) να επικαλούνται τη διάταξη αυτή και να φορολογούν με βάση την εσωτερική τους νομοθεσία, αγνοώντας τη ΣΑΔΦ με την Ιταλία;

