

2. International Tax Law - Scope of application – The concept of 'beneficial owner' – The anti avoidance rule

16 October 2024

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

Πεδίο εφαρμογής των ΣΑΔΦ

- Άρθρο 1 Πρότυπης Σύμβασης ΟΟΣΑ →
Πρόσωπα
- Άρθρο 2 Πρότυπης Σύμβασης ΟΟΣΑ →
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”*
- who **are residents** → 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»)

- identical or substantially similar taxes that are imposed after the date of signature of the Convention → ουσιαστικά όμοιοι φόροι
- in addition to, or in place of, the existing taxes → 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 Α153/2018 (Ιταλία, Alitalia)

➤ ΣτΕ Α154/2018 (ΗΠΑ, Delta Airlines)

2. Ειδική εισφορά αλληλεγγύης (ά. 29 του Ν
3986/2011, τώρα ά. 43^Α ΚΦΕ)

➤ ΣτΕ 2465/2018 (ΗΒ)

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'
- Άρθρο 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.»

4. Πεδίο εφαρμογής – πραγματικός δικαιούχος

➤ 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.**

4. Πεδίο εφαρμογής – πραγματικός δικαιούχος

➤ 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.

4. Πεδίο εφαρμογής – πραγματικός δικαιούχος

➤ 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.

4. Πεδίο εφαρμογής – πραγματικός δικαιούχος

➤ 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.

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
- The Financial Action Task Force, International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation – The FATF Recommendations (OECD/FATF, 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.”*

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
- 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

-Η Υπόθεση Indofood-

ΤΟΚΟΙ – **20%** παρακράτηση
φόρου στην Ινδονησία



ΔΑΝΕΙΟ

ΤΟΚΟΙ

10% Ινδονησία -Μαυρίκιος



ΤΟΚΟΙ

0% Μαυρίκιος



ΔΑΝΕΙΟ

ΔΑΝΕΙΟ

4. Πεδίο εφαρμογής – πραγματικός δικαιούχος *Indofood*

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

4. Πεδίο εφαρμογής – πραγματικός δικαιούχος *Indofood*

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?

ΤΟΚΟΙ

10% Ινδονησία - Ολλανδία



ΤΟΚΟΙ

0% Ολλανδία



ΔΑΝΕΙΟ

ΔΑΝΕΙΟ

4. Πεδίο εφαρμογής – πραγματικός δικαιούχος *Indofood*

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.*”

4. Πεδίο εφαρμογής – πραγματικός δικαιούχος *Indofood*

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”

4. Πεδίο εφαρμογής – πραγματικός δικαιούχος *Indofood*

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

4. Πεδίο εφαρμογής – πραγματικός δικαιούχος ***PREVOST***

PRÉVOST CAR INC. v. CANADA, 2009 FCA 57

➤ 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

4. Πεδίο εφαρμογής – πραγματικός δικαιούχος *PREVOST*

PRÉVOST CAR INC. v. CANADA, 2009 FCA 57

- 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.

4. Πεδίο εφαρμογής – πραγματικός δικαιούχος *PREVOST*

PRÉVOST CAR INC. v. CANADA, 2009 FCA 57

➤ 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

4. Πεδίο
εφαρμογής –
πραγματικός
δικαιούχος
PREVOST

PRÉVOST CAR INC. v. CANADA, 2009 FCA 57

➤ 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

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

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

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

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.

4. Πεδίο εφαρμογής – πραγματικός δικαιούχος *SEVERSTAL*

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

5. Ο αντικαταχρηστικός κανόνας



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

5. Ο αντικαταχρηστικός κανόνας



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

July 2018

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

5. Ο αντικαταχρηστικός κανόνας

The Principal Purpose Test → “PPT Rule” → Article
29 OECD Model

5. Ο αντικαταχρηστικός κανόνας

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.

5. Ο αντικαταχρηστικός κανόνας

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;



Further Reading

1. **W. Cui.** , Article 2 – Taxes Covered – Global Tax Treaty Commentaries, IBFD (last reviewed: 31 October 2019)
2. **A. J. Martin Jiménez**, Beneficial Ownership – Global Tax Treaty Commentaries, IBFD (last reviewed: 1 August 2020)

