

Tax Treaty Abuse – video recordings

(January 2018)

A Symposium of International Tax Policy dedicated to “*Tax Treaty Abuse – from Beneficial Ownership to the Principal Purpose Test*” was held on 11 January 2018 at the University of Lausanne. The partners of our firm made several contributions in this framework. The Symposium focused in particular on the practical challenges raised by the Principal Purpose Test (PPT rule) for MNE Groups and on possible ways to achieve increased tax certainty in this area.

Given the interest raised by the issues at stake, video recordings of the discussions were made available. Important take away for multinationals and financial institutions include proposed guidance for the PPT analysis in light of specific business models as well as possible positive impact of these recent developments in relation to the application of tax treaties.

I. From beneficial ownership to the PPT rule in practice

In his presentation, **Professor Robert J. Danon** began by analysing the relevance of the **beneficial ownership** concept in the post BEPS era. Professor Danon demonstrated that, further to the 2014 and 2017 OECD Commentaries, the scope of beneficial ownership has now been significantly reduced. Rather, the policy is that possible **conduit arrangements** are now to be assessed in light of the **PPT rule**. Accordingly, a broad and objective interpretation of beneficial ownership focusing primarily on the criterion of economic interdependence and ignoring the business justification of a structure is not in line with the post BEPS policy. The PPT rule will indeed not simply apply because there is some sort of factual connection between the income received and the item paid to another person, but rather because the purpose of the transaction is abusive. Hence, as shown by the 2017 updated OECD Commentaries, the PPT rule will not apply where, despite the existence of such factual connection, a transaction is conforming to the standard commercial organization and behavior of the group.

In the second part of his presentation Professor Danon focused on the **meaning of substance** in the framework of tax treaty abuse. It indeed flows from the 2017 OECD Commentaries that one important element to take into consideration in the framework of the PPT analysis is the question of whether an “*arrangement is inextricably linked to a core commercial activity*”. In this respect, Professor Danon made several practical recommendations designed to reduce the possible uncertainties related to the PPT rule. These practical recommendations concerned in particular **holding, intellectual property (IP) and financing structures**.

To watch the video recording of Professor Danon’s presentation, please [click here](#).

The foregoing issues are also discussed in details in: [Robert J. Danon, *Treaty Abuse in the Post-BEPS World: Analysis of the Policy Shift and Impact of the Principal Purpose Test for MNE Groups* in: IBFD Bulletin for International Taxation 2018, p. 31 et seq.](#)

II. Financial instruments

Financial institutions such as banks and hedge funds often derive dividends from shares underlying derivatives such as Swaps, futures or securities lending contracts. In some countries such as Switzerland, courts confirmed decisions of the tax authorities which denied treaty benefits to such dividend payments based on a wide interpretation of the beneficial ownership test.

The session of the Symposium dedicated to financial instruments discussed **the possible impact of the 2014 and 2017 update of the OECD Commentaries** on beneficial ownership and concluded that the approach taken by Swiss courts should be revisited. Members of the panel also addressed situations where one main reason for concluding a derivative is a tax arbitrage resulting from the domestic tax laws of the countries involved rather than different treaty positions of the parties to the transaction, which is the object of a case currently pending at the Swiss Supreme Court.

To see the video recording of the panel discussion led by **Mr. Hugues Salomé**, [click here](#) (second half of the video, after the panel on financing structures).

III. Take away

The changes introduced by the OECD/G20 BEPS project in the area of tax treaty abuse are undoubtedly those that will have the most significant practical impact for MNE groups in future years. In particular, the PPT rule, which represents a minimum standard and will be introduced in more than 1'100 tax treaties, raises significant challenges. Therefore, MNE groups are well advised to review, especially in the early implementation phase, that their business structures are in compliance with the PPT rule.

The Firm is actively involved on these issues and assists in particular its clients as regards the application of the PPT rule to their particular business models. We also act alongside local advisers in foreign jurisdictions to provide expert opinions in tax treaty disputes.

IV. Prior coverage of the Firm on the MLI and treaty abuse

[Robert J. Danon, Treaty Abuse in the Post-BEPS World: Analysis of the Policy Shift and Impact of the Principal Purpose Test for MNE Groups in: IBFD Bulletin for International Taxation 2018, p. 31 et seq.](#)

[Publication on the BEPS Multilateral Instrument \(13 October 2017\)](#)

[News Alert of 14 June 2017](#)

[Summary table of the position taken by the 78 signing jurisdictions \(updated 24 January 2018\)](#)

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