“Beneficial Ownership: handle with care”

Mr. W.R. Munting[1]

1. Introduction

This article describes the development and current state of affairs around the meaning of the term “beneficial owner” (hereinafter: BO). The immediate cause for publication of this article is the judgment of the Lower Tax Court of Canada (“TCC”) in the so-called Velcro-case[2].

The first article I wrote on this subject appeared on November 27th, 2008[3]. A central theme in this article was the question whether the concept of BO was awaiting a (r)evolution following the British “Indofood-case[4]” and the Canadian “Prevost case [5]“. In the Indofood-case , the England and Wales Court of Appeal (CA) held that a Dutch conduit company could not be considered as BO of the earned interest. Therefore the reduction of the withholding tax rate to 10% under the Dutch-Indonesian tax treaty could not be applied, and the Indonesian Indofood was confronted with the considerably higher Indonesian domestic withholding tax rate of 20%. The British Court of Appeals took a strong economic approach in this civil case.

In the Prevost case, the TCC concluded that a Dutch holding company holding a Canadian participation could be considered as BO, despite the fact that its shareholders, through a shareholders’ agreement, had made certain agreements concerning the distribution of dividends received from Canadian participation. In this tax case, the TCC took a strictly legal approach. The TCC decision was later affirmed by the Canadian Federal Court of Appeal (“FCA”)[6].

The Indofood decision was generally held to be quite remarkable, as it made clear that a conduit company is to be ignored as the owner of the income in many cases. On the other hand, it did not upset the fiscal world entirely, because tax practitioners at the time often took into account the possibility that a conduit company would not qualify as BO. The Prevost decision gave the necessary "comfort" to those who argued that the BO concept in tax should be approached strictly juridical, not economical. Moreover, it should be taken into account that Indofood was decided by a civil court and Prevost by a tax court, which suggests that the Prevost decision should be awarded higher authority.

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[2] Velcro Canada Inc. v. The Queen, 2012 TCC 57 (February 24, 2012). The text of this judgment can be found via decision.tcc-cci.gc.ca.
[3] W.R. Munting, "Indofood: een steen in de vijver of een storm in een glas water", WFR 2008/1343.
[4] Court of Appeal 2006, EWCA Civ 158 (Indofood International Finance Ltd. vs. JP Morgan Chase Bank N.A., London Branch). The text of this order can be found via www.bailii.org.
[5] Prevost Car Inc. v. The Queen, 2008 TCC 231 (April 22, 2008). The text of this judgment can be found via decision.tcc-cci.gc.ca.
[6] Prevost Car Inc. v. The Queen, Federal Court of Appeal,.26 February 2009, case number A-252-08

Central topics in this article are:

- The affirming judgment of the FCA concerning Prevost[7];
- A recent BO judgment rendered by the TCC, in the so-called Velcro-case[8]. The TCC ruled that a Dutch BV, receiving royalties from Canada and on-paying approximately 90% of royalties received to a related Curacao company, could be considered the BO of the royalty income and thus was eligible for the reduced withholding tax rate under the tax treaty with Canada;
- The Vodafone decision[9] of the Supreme Court of India ("SCI"). The SCI ruled that the Indian internal revenue did not have territorial jurisdiction to tax capital gains realized on an indirect transfer of shares in an Indian company.
- A recent "Discussion Draft" from the OECD "Working Party" on the concept BO, as described in articles 10, 11 and 12 of the OECD-model tax treaty[10]. The Discussion Draft affirms that conduit companies are to be regarded as BO, but on the contrary it states that the BO concept should not be confused with the "Ultimate Beneficial Owner" concept (UBO), which is meant to determine who is regarded as controlling the company.

At the end of this article, two current topics will be discussed:

- News on "Netherlands tax routings" in the (Dutch) press[11];
- European Parliament resolution on combating tax fraud and tax evasion[12].

2. A draft of the BO concept

The term Beneficial Owner may be explained as follows: he (or she) who can count the benefits of a particular transaction or structure to his (or her) own. That is explicitly not the one who, at the time of receipt, is obliged to pass on the benefits to someone else (one can compare it with the word "broker": a person who sells in his own name, but for the risk and account of someone else). Nor is it the person who receives something for someone else (compare with an "agent").

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[7] Canada v. Prévost Car Inc. (2009 FCA 57), A-252-08, February 26, 2009. The text of this judgment can be found via decisions.fca-caf.gc.ca

[8] Docket: 2007-1806(IT)G BETWEEN: VELCRO CANADA INC., Appellant, and HER MAJESTY THE QUEEN, Respondent. Appeal heard on May 17, 2011, at Toronto, Ontario.

[9] Vodafone International Holdings B.V. v. Union of India & Anr. [S.L.P. (C) No. 26529 of 2010, dated 20 January 2012] The text of this judgment can be found via supremecourtofindia.nic.in.

[10] Clarification of the meaning of "Beneficial Owner" in the OECD model tax convention; discussion draft, 29 April 2011, can be obtained via www.oecd.org

[11] An overview of the articles of the "Financieel Dagblad" (Dutch financial daily paper) can be found on fd.nl/ondernemen/topics/belastingroute-nederland.

[12] Resolution of the European Parliament from April 19th, 2012, on the call for fighting tax fraud and tax evasion in a concrete way (P7_TA-PROV(2012)0137)

In Dutch, the term "uiteindelijk gerechtigde"[13] (which literally means person with ultimate entitlement), is also used for the term BO, and this is confusing. If we take this Dutch term literal, it seems to refer to those eventually entitled to income from dividends, interest or royalties, after we ignored one or more direct stakeholders. That is clearly not the intention. The term refers to the person directly entitled to the income (such as the international BO concept also makes clear). Therefore it would be better to use the term "opbrengstgerechtigde"[14] (literally: person entitled to proceeds). The use of this term also makes clear that one not only deals with the owner of a certain possession (a share, a right or a claim), but also that one who holds a derivative right (usufruct, license or coupon) to an asset is entitled to the income[15].

The realization and meaning are not purely of importance in a domestic context, but also internationally, because it is decisive for whether someone is entitled to treaty benefits[16]. Therefore, from the perspective of legal certainty and the avoidance of double taxation, it is preferable that an international consensus exists on the BO concept. However, this is not the case, because the BO concept is usually not defined in a tax treaty. Consequently, the source country applying the withholding tax and the country of residence of the recipient (possibly) crediting the withholding tax against its income tax, can have differing views on the concept.

In the past, countries have attempted to extend the BO concept to something one could call an *economic* owner, i.e. a person with sufficient funds (equity) and supervisory resources ("substance"), to prevent tax payers to apply for refund. This concept of substance has a strong resemblance to the theory of transfer pricing where the principle "risk follows function" is fundamental. However, these attempts have often stranded because the argument that only the economic owner may call himself BO was not accepted by the (tax) courts, since it did not relate to the meaning of BO.

Subsequently, many countries used different means to prevent stakeholders from successfully evading (or reducing) withholding tax, by setting up a corporation as an intermediary holding company in a country which has a (more) favorable treaty with the source country.

A well-known example is the so-called "Limitation on Benefits Provision" (LOB provision), as defined in the treaty with the United States[17], which has had following in many different forms[18]. An LOB provision is actually a more comprehensive BO provision. Under an LOB, a person is in fact only accepted as BO when he meets certain conditions ("qualified person").

[13] In Article 4, paragraph 4 on the law on the dividend tax, the term "uiteindelijk gerechtigde" is used to indicate that only the owner of the dividend yield is entitled to the participation exemption. The term is also used in Article 16 of the Decree on the Prevention of Double Taxation to make clear that only the owner is entitled to credit for foreign withholding tax. Art. 16 only has a negative definition to counteract so-called inserted companies (also known by the term "dividend stripping").
[14] Also used by the legislator in a.o. Article 4.1.a and 4.1.b on the Law on dividend tax to indicate the one entitled to dividend.
[15] As confirmed by the *Hoge Raad* in the "marketmaker"-arrest (HR februari 21st, 2001, nr. 35 415, BNB 2001/196), in which the coupon holder of dividend, who at the same time is not the owner of the shares, was marked as BO.
[16] Lowering of withholding tax by the source country and additional payment by the State of residence.
[17] Article 26 of the treaty with the US.
[18] At this time the Netherlands apply a variation (passively) on this provision in contract negotiations.

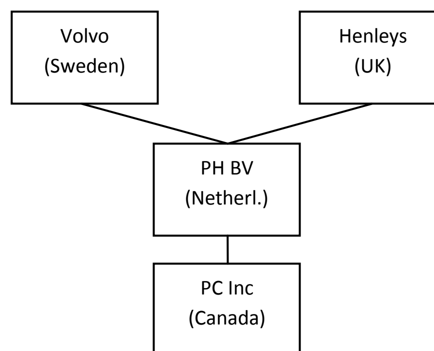
Without discussing all of these conditions here, it can be determined that a person often only qualify as BO when relevant operations are performed[19]. Nevertheless, through application of the LOB provision, the transfer pricing doctrine becomes involved.

Now I will leave the LOB provision aside and further investigate which developments have occurred recently concerning the genuine BO provision to which countries will have to adhere, when qualifying the owner of dividends, interests, and royalties.

3. Prevost[20]

On January 26th, 2009, the FCA ruled that the BO concept should be considered strictly juridical under Canadian law.

The Prevost case concerned the Canada-based Prevost Car Inc ("PC Inc") - established under Canadian law. All its shares were held by Prevost Holding BV (PH BV), a Netherlands-based company, incorporated under Dutch law. The PH BV shares were held by Volvo Bus Corporation ("Volvo"), based in Sweden and Henleys Group plc ("Henleys") based in the UK.



PC Inc. paid a dividend to PH BV and, based on a shareholders' agreement between Volvo and Henleys[21], PH BV was required to pay at least 80% of its profits to Volvo and Henleys. Knowing that under the relevant tax treaties, the Canadian withholding tax on dividends would be reduced to 5% under the tax treaty with the Netherlands, and to 15% and 10% under the tax treaties with Sweden and the UK respectively[22], the Canadian inspector concluded that PH BV was not the BO of the dividends and therefore was not entitled to the reduction of the dividend under the tax treaty with the Netherlands.

[19] Or when made clear that the stakeholder is not (mainly) inserted for acquiring (better) treaty benefits (see the "vangnetbepaling" in the treaty with the US)

[20] Date: 20090226, Docket: A-252-08, Citation: 2009 FCA 57, CORAM: DÉCARY J.A., BLAIS J.A., SHARLOW J.A., BETWEEN: HER MAJESTY THE QUEEN Appellant and PRÉVOST CAR INC. Respondent. Heard at Toronto, Ontario, on February 17, 2009. Judgment delivered at Ottawa, Ontario, on February 26, 2009.

[21] Consideration 12 of the above stated arrest of the lower Canadian Judge

[22] Further distributing by PH BV was exempt under the Parent-Daughter Guide line

At the same time, the inspector argued that the shareholders of PH BV had entered into the above described shareholders' agreement. Accordingly, the inspector believed that *ultimately* PH BV was not the BO of the dividends.

The Canadian courts dismissed this argument, not only at first instance, but also on appeal, on the basis of the following underlying considerations:

"I therefore reach the conclusion, that for the purposes of interpreting the Tax Treaty, the OECD Conduit Companies Report (in 1986) as well as the OECD 2003 Amendments to the 1977 Commentary are a helpful complement to the earlier Commentaries, insofar as they are eliciting, rather than contradicting, views previously expressed (…)"
"(…) the "beneficial owner" of dividends is the person who receives the dividends *for his or her own use and enjoyment and assumes the risk and control of the dividend* (italicizing WM) he or she received (…)".
"Where an agency or mandate exists or the property is in the name of a nominee, one looks to find on whose behalf the agent or mandatory is acting or for whom the nominee has lent his or her name. When corporate entities are concerned, *one does not pierce the corporate veil unless the corporation is a conduit for another person and has absolutely no discretion as to the use or application of funds put through it as conduit, or has agreed to act on someone else's behalf pursuant to that person's instructions without any right to do other than what that person instructs* (italicizing WM) it, for example, a stockbroker who is the registered owner of the shares it holds for clients."
"The (lower, red.) Judge's formulation captures the essence of the concepts of "beneficial owner", "bénéficiaire effectif" as it emerges from the review of the general, technical and legal meanings of the terms. Most importantly, perhaps, *the formulation accords with what is stated in the OECD Commentaries and in the Conduit Companies Report*. (italicizing WM)"[23]

In other words, the Canadian court ruled that, since the Canadian law lacks a domestic definition of the BO concept, he consulted the OECD model convention and commentary, which only deny BO status to agents and / or conduit companies. Prevost did not concern agents or conduits. Therefore, the courts were not willing to follow the inspector in his argument that for the BO concept, the underlying parties should also be considered. Only when the receiving company has no authority at all over the dividends received should such company be disregarded (because then there is a conduit company).

Conclusion: Prevost confirms that the BO concept must be interpreted in such a way that the BO only has to be entitled to the income, and that it does not matter whether or not it is obliged to pay on such income later due to other commitments.

4. Velcro[24]

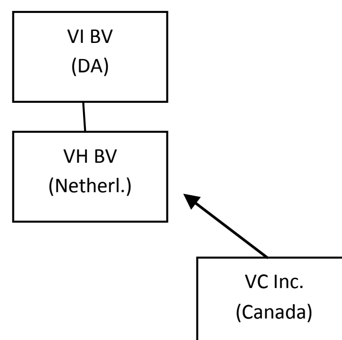
The Prevost case was about the BO-qualification to shareholders in relation to dividend income. Ownership is distinctly different, when the shares are in the hands of the intermediate holding as compared to when they are in the hands of its shareholders. The intermediate holding company holds shares in the operating company and the parent company holds different shares in the intermediate holding.
After Prevost, the question remained how to deal with a situation involving on-payment of interest or royalties by an intermediate holding company. This is a situation where the link between the amounts received and amounts paid are stronger contractually than is case with the clear separation of the distinct entities receiving dividend income.

[23] Consideration 12 till 14 of the above stated arrest of the higher Canadian Judge
[24] Docket: 2007-1806(IT)G, BETWEEN: VELCRO CANADA INC., Appellant, and HER MAJESTY THE QUEEN, Respondent. Appeal heard on May 17, 2011, at Toronto, Ontario.

Therefore, one may ask oneself whether a sub licensor receiving royalties or an on-lender receiving interest can still be considered BO and person entitled to treaty benefits.

This question was judged in the Velcro case. In contrast to the British Court of Appeals in Indo Food, which took an economic approach, on February 24th, 2012 the TCC took a strictly juridical approach in Velcro:

The Dutch company Velcro Holdings BV (VH BV) licensed IP from an affiliated company in the (former) Dutch Antilles (DA), Velcro Industries BV[25](VI BV) and sublicensed this IP to a Canadian company, Velcro Canada Inc. (VC Inc.). VH BV was obliged to pay 90% of the royalties received from VC Inc. within 30 days after receipt to VI BV.



The question was whether VH BV could be qualified as BO and consequently was entitled to application of the tax treaty with Canada, particularly the application of Article 12 of that treaty, which provides a reduction of withholding tax on royalties from 25% (the Canadian domestic rate) to 10% (the rate under the treaty between Canada and the Netherlands). As there is no tax treaty between Canada and DA, withholding tax on royalties paid by Canada directly to DA would be 25%.

In his decision, the Canadian Judge repeated the considerations from Prevost to some extent and singled out four supporting aspects:

- Property
- Use
- Risk
- Control

As long as the (sub)licensor embodies these aspects, he will be entitled BO and the corporate veil will not be pierced.

What actually made the difference?

To begin with, VH BV was legally entitled to the royalties. This was supported by the fact that the royalties were paid with interest to its bank account. Then, the royalties (on the bank account) were "comingled" with other revenues on account of VH BV and the proceeds had to be converted from Canadian dollars to U.S. dollars.

[25] Detail: the actual management of Velcro Industries BV resides in Curaçao, since the BV was moved there from the Netherlands.

The difference was made by the fact that the income was not passed directly - and not in the same form -, but first remained on the bank account of VH BV, which meant that the (other) creditors could claim it. In short, VH BV was no agent and certainly not a conduit company.

Consequently, it is also determined that payments which are linked together in the profit determination (and not in the profit distribution, as is the case with dividends from shares), such as royalty receipts and payments, and interest receipts and payments, the immediate recipient is the BO under certain conditions.

The decision of the TCC conforms to what is mentioned above, under 2:

The use of the term "opbrengstgerechtigde" also makes clear that one not only deals with the owner of a certain possession (a share, a right or a claim), but also that one who holds a derivative right (usufruct, license or coupon) to an asset is entitled to the income.[26]

5. Vodafone[27]

In the above described Canadian cases we repeatedly see that authorities try to stretch their jurisdiction by raising additional requirements to meet the fiscal BO-concept. As yet, the tax courts[28] have not accepted this. Nor did the Dutch tax court accept this in the "Market Maker case"[29], where the coupon holder of dividends was considered the BO. The tax courts adhere to the clear wording of the law (or, when absent, to the internationally accepted texts, such as the OECD model convention and commentary) to ascertain legal certainty.

In the India "Vodafone case", the following occurred:

The listed Hutchison Essar HongKong Ltd. (HK Ltd.) held a 67% stake in an Indian company called Hutchison Essar Ltd. (IND Ltd.) in the Indian telecom market, via a British Virgin Islands company (BVI Co.) and a Cayman Islands company (CI Co.).

The Vodafone Group showed interest in IND Ltd. through its Dutch subsidiary company, Vodafone International Holding BV (BV), and made a bid for shares in CI Co. The bid was formalized in 2007.

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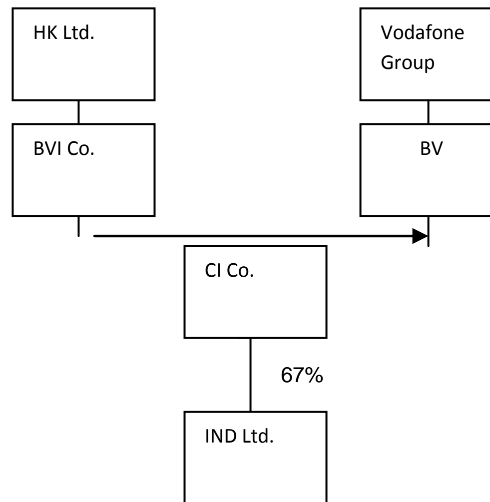
[26] Nevertheless we have to wait what the higher Judge (FCA) will decide

[27] THE SUPREME COURT OF INDIA CIVIL APPELLATE JURISDICTION CIVIL APPEAL NO.733 OF 2012 (arising out of S.L.P. (C) No. 26529 of 2010)

[28] In the Indofood case, in which the Judge came pretty much along with the extension of the BO concept, a civil case was dealt with.

[29] HR April 6th, 1994, nr. 28 638, BNB 1994/217 (m.nt. Brunschot)

The Indian tax inspector imposed a capital gains tax assessment, to be withheld from the purchase price by the acquirer being Vodafone. Below, the simplified structure is shown:



The Indian tax authorities believed that they were entitled to tax because CI Co. had an interest in the underlying Indian company[30].

In this way, the Indian tax authorities actually used a "substance over form" reasoning, which was also used by the Canadian inspector at the Prevost case. The inspector actually ignores the intermediate holding company and thus the national and international principle that a company is an independent bearer of rights and obligations.

The final judgment of the Court was clear: "India had no territorial tax Jurisdiction to tax the offshore transaction". So the Court embraced the legal independence of bodies[31]. The Court ruled explicitly that the words "look through" may not be read in the text of the Law, but (if intended by the legislature) must be explicitly included. Therefore, the Court is a follower of clear and transparent legislation. Also, the Court ruled that CI Co. mainly had a shareholders role, because it did not possess the absolute controlling power. Finally, it was - indirectly - important that the initial structure of which IND Ltd. was part, already existed for a long time and therefore it was not allowed to assume that CI Co. was merely inserted, and that IND Ltd. had contributed a substantial amount to the Indian Treasury over the years, and again, that it could not be said that the structure was merely serving the goal that CI Co. would not (need) to pay tax.

India had to accept the corporate structure and therefore had no authority to tax.

[30] CI Co held 52% of the shares and also held an option on another 15%.
[31] See r.o. 65: “In the thirteenth century, Pope Innocent IV espoused the theory of the legal fiction by saying that corporate bodies could not be ex-communicated because they only exist in abstract. This enunciation is the foundation of the separate entity principle” and r.o. 66: “…It is fairly well accepted that a subsidiary and its parent are totally distinct tax payers.”

Conclusion:

The Vodafone case teaches us that the company / legal design, forms the basis for taxation. Deviation from this can only be allowed when the facts give clear indications that transactions have no other purpose than the tax benefit[32]. Logically, the proof for the latter seems to lie with the tax authorities.

6. OECD Discussion Draft on the term BO[33]

On April 29th, 2011, the "Centre for Tax Policy and Administration" (CTPA) issued a proposal to clarify the BO concept, as can be found in Articles 10 (dividends), 11 (interest) and 12 (royalties) in the OECD model treaty, and presented for comments to the public in the form of a "Discussion Draft"[34].

In the revised text, mainly the following issues are clarified:

- The reason for introducing the concept in the treaty;
- Explanation why an agent and / or conduit company cannot be regarded as BO;
- Explanation of the BO concept in the context of treaty;
- Difference between the BO concept and the Ultimate Beneficial Owner (UBO) concept.

6.1 The reason for introducing the concept in the treaty (paragraph 12 en 12.1)

The BO concept is incorporated in the text of the treaty to make clear who the person is *to whom* the income is paid. After all, this person is entitled to treaty benefits.

According to the OECD, that is why in this proposal, the BO concept must be interpreted in the context of the treaty in the first place, and not according to the meaning of national law[35]. The proposal does not have the consequence that the meaning according to the national law will be completely irrelevant.

6.2 Explanation why an agent and/or conduit company cannot be regarded as BO (paragraph 12.4)

The authors of the discussion draft mention the examples relating to agent and conduit company, as mentioned in the current model treaty, and reason that they cannot be considered as BO because they do not have the full right to use the received income and cannot regard it as their property. Interestingly, the discussion draft now addresses why.

[32] For a case in which the European Judge chose a similar approach, see the Cadburry Schweppes case (HvJ EG September 12th, 2006, case C-196/04 (Cadbury Schweppes), BNB 2007/54 (concl. Léger, note PJ Wattel)
[33] Issue OECD centre for tax policy and administration (TPA) d.d. April 29th, 2011. For comments and news, see: www.oecd.org.
[34] Proposal and comments should have been discussed during the September 2011 meeting of the Working Party. The results have not yet been published.
[35] The Canadian Judge ruled likewise in Velcro, however, based on a different argument: in the absence of a definition of the BO concept in national law, the Judge turned to the OECD commentary.

The conduit company or the agent is obliged to pass on the income received and therefore may not use the income free from contractual or legal obligations[36] to its own benefit. Thus, the recipient of income in a conduit company or agent situation cannot be regarded as BO.

Remarkably, this discussion draft confirms that the recipient of the income should not necessarily be made the same as the owner of the underlying rights (share / debt / intangible asset). It is therefore the person entitled to the income who should be regarded as BO (and should be treaty entitled). The opinion of the authors was confirmed in the Velcro case, which has been discussed above.

6.3 Explanation of the BO concept in the context of treaty (paragraph 12.5)

The authors of the Discussion Draft address the fact that if someone is BO, this does not automatically mean that he is also treaty entitled. This may be refused if there are situations of abuse, which can be contested with "substance over form" approaches. However, in this case, the BO concept may not be used (unless there is an agent / conduit company situation).

If a legislator believes that the BO concept is too limited to protect his withholding tax claims, he will have to take other measures (such as specific limitation on benefits provisions, as we know from the tax treaty with the U.S.).

6.4 Difference between the BO concept and the UBO concept (paragraph 12.6)

The authors make clear that the BO concept is intended to determine the direct owner of the income and not the one who eventually has the actual economic control and / or ownership (e.g. as a shareholder). The latter person is called ultimate beneficial owner ("UBO"), which is involved in regulation used by financial regulators.[37] Thus, "look through" is not permitted, as confirmed in Prevost and Vodafone.

Conclusion

The OECD also uses a definition of the BO concept, where the recipient of the income, who is not restricted entirely to use it freely, qualifies as BO. "Look through" and "substance over form" reasoning are not allowed within the BO framework. However, one who transfers received income to a third party cannot be regarded BO.

Thus, the OECD confirms the case law discussed in this article.

Still unknown is whether for example the Dutch government will comply with the abovementioned reasoning. In particular the fact that, according to the OECD, the BO concept should in the first instance be interpreted according to the provisions in the (OECD model) treaty, would possibly lead to a reservation because the Netherlands wants to decide on its own how to make use of the BO concept.

In my opinion, however, a reservation should not be necessary, because the OECD also favors a strict interpretation of the BO concept.

[36] This obligation can also result from real acts.
[37] In this connection, the OECD refers to anti-money laundring regulation.

The proponents of a more economic interpretation of the BO concept will have to focus on further realization of actual "substance over form" approaches such as the US "limitation of benefits" and the Dutch “fraus legis doctrine”. They will have to register this separately in the treaty, outside the BO concept. Then the BO concept is reserved for its intended purpose: to determine whether someone is entitled to the income and not whether someone should be entitled to the income.

What about the fact that the BO concept can be used to allocate cash flows in such a way that the lowest possible withholding tax rate can be achieved? It may obviously form a problem to the source country that, for closing its budgetary deficit, is counting on the highest withholding tax. However, that country should know better before closing a treaty with another. In my opinion, once the treaty is closed, legal approach and the aforementioned strict interpretation of the BO is preferred.

7. News on “Netherlands tax routings”[38]

In the past year, the Dutch tax treatment of companies that have a (more or less) central position in an MNE appeared in the news several times. In addition, the Netherlands is sometimes criticized for using substance requirements that are too low or too unclear, making it (too) easy for foreign MNE’s to set up a company as BO in the Netherlands.

After examining the interpretation of the term BO above, it is clear that this criticism is wrong. After all, the Netherlands, as an international participant bound by the OECD doctrine, is simply not allowed to set heavier demands on the BO concept. The Netherlands has done only what is allowed, namely defining basic substance requirements in the so called Circular on Financial Service Companies[39] and basic equity requirements in Article 8c of the corporate income tax act [40]. With these two measures, the Netherlands has defined minimum substance and risks. Given the definition of the BO concept that is used by the OECD, the Netherlands can not demand more.

On top of that, if the Dutch authorities would follow the comments about demanding more substance, they would put themselves in a disadvantaged position and outside the international public opinion. This would be harmful, certainly to a country like the Netherlands, which is economically heavily dependent on foreign countries and plays an important logistics function abroad.

Countries ask each other to be increasingly transparent about each other's legal system and the mismatches that may occur within it. I believe that the key here is that, in theory, each country should have access to the data which are needed to (be able to) tax properly, according to that country.

The rules that are used in this international dividing of tax revenue (at least direct taxes), originate from the rules of transfer pricing. Basically, each country should tax its "fair share" of the transaction, which is supported by the "arm's length" principle: parties should act at arm’s length.

[38] www.fd.nl/ondernemen/topics/belastingroute-nederland.
[39] Decision made on August 11th, 2004, nr. IFZ2004/126M, BNB 2004/376
[40] Meaning that a company which is occupied with Intra Group lending, needs to be leveraged with € 2 Mln. Equity or (if lower) 1% of receivables.

The Netherlands should determine the profit of companies which are an interested party in an international (group) transaction, in accordance with the arm's length principle. If the other country cannot agree with the assessment by the Netherlands (or vice versa), it may be discussed in the form of a mutual agreement procedure (MAP). Before starting a - often time consuming - MAP, it is possible to ask the Netherlands tax authorities for certainty in advance[41].

The fact that the Netherlands is particularly successful in making appointments in advance and that this results in a certain international appeal, can obviously not lead to the unfounded conclusion that the Netherlands should be labeled a "tax haven".

8. European Parliament resolution on combating tax fraud and tax evasion [42]

On April 19th, 2012, the European Parliament adopted a resolution in which the European Commission and the European Council are asked to come up with proposals to combat tax fraud (e.g. VAT carousel) and tax evasion (e.g. abuse hybrid loans). A few quotes:

"The European Parliament:

- believes that stricter regulation of company registers and the registration of trusts is a prerequisite to tackle tax evasion;
- urges the Member States to make sure that there is proper cooperation between their fiscal systems to avoid unintentional non-taxation and tax evasion and tax fraud;
- urges Member States to revise the existing bilateral agreements between Member States and third countries, provided they contribute to tax evasion and complicate effective withholding tax in certain Member States;
- urges the Commission to report on the possibility of EU coordination when bilateral agreements between Member States change, to align them to the objectives of the European Council, making tax evasion more difficult. "

Amongst others, the current Euro crisis was a reason for the Parliament to suggest the above proposals, forcing countries even more than before to organize their public finances. This comes with a natural tendency t*o* increase tax revenues by e.g. more efficient measures such as information exchange and the elimination of banking secrecy. Surprisingly, the fact that European companies settle in the most favorable environment (investment climate) is also pointed at. The latter seems to conflict directly with one of the parliament's basic principles: the freedom of establishment.

The proposal to regulate company registers and to register trusts might be important concerning the BO concept. I tend to judge that this is already sufficiently regulated by the (inter)national regulations, introduced by the OECD countries. For instance, the Netherlands has publicly accessible company registers, organized by the Chambers of Commerce. Trusts are supervised by the Central Bank and the Financial Markets Authority (Wwft) and accordingly they are sufficiently visible, making the proposal rather unnecessary.

[41] For which the APA/ATR-team of the tax authorities in Rotterdam is competent
[42] EP meeting of April 19th, 2012

9. Conclusion and recommendations

The recent international jurisdiction and the recent OECD publication made clear that the BO concept should not be used to restrain alleged treaty abuse (there are other means). This is a clear signal to tax authorities: the legal independence is the basis for *the imposing of (withholding) taxes*. This is good news for anyone who, through the establishment of an efficient structure, wants to limit the international taxation of companies.

However, it should be realized that creating conduit companies too easily will not lead to the desired results (whatever that is). This requires (see Velcro above) that the income is not directly - and in the same form - passed on, but should remain (with risk) in the company first, so that the (other) creditors can claim it. To be able to perform these activities, the company needs (licensed) directors capable of acting, and needs carefully to review the legal framework which will have to cover the desired results. In other words, "handle with care".