

CONCEPT OF BENEFICIAL OWNER

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9th September 2022

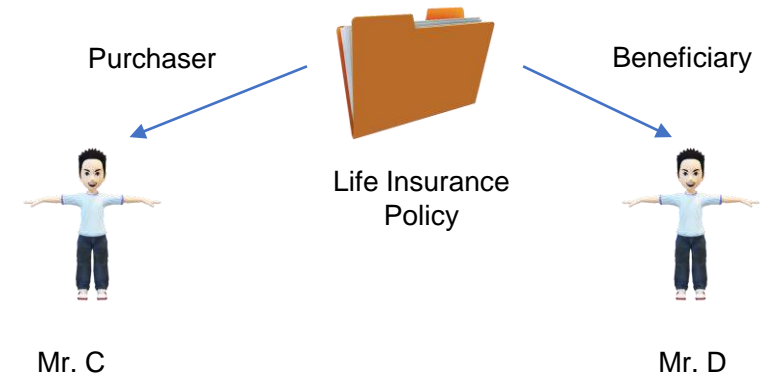
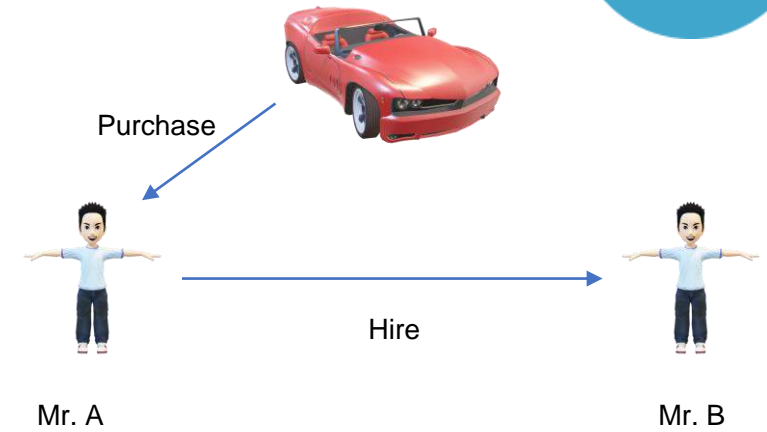


Meaning and Definition

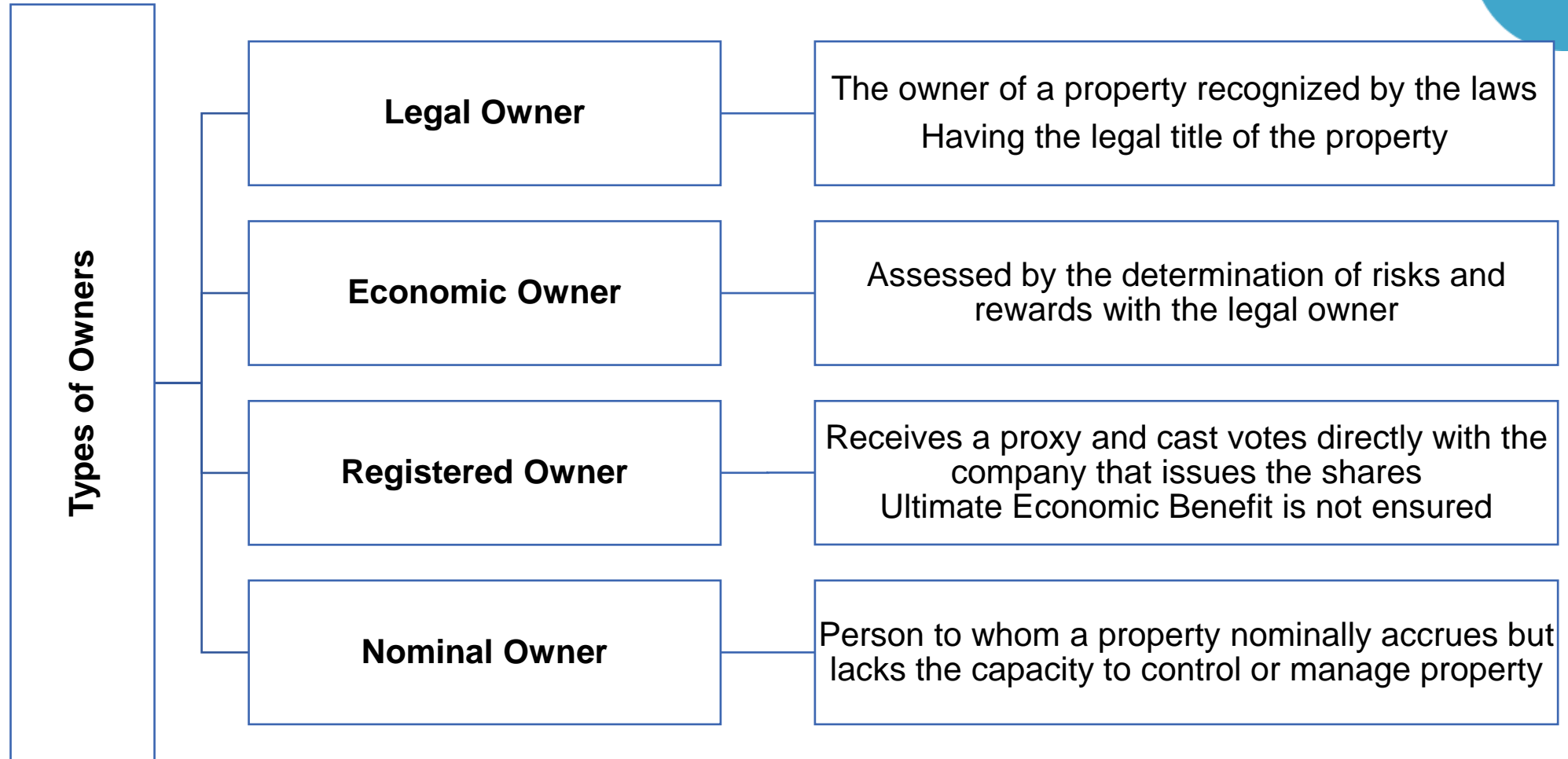
Beneficial Owner: Meaning

Beneficial Owner

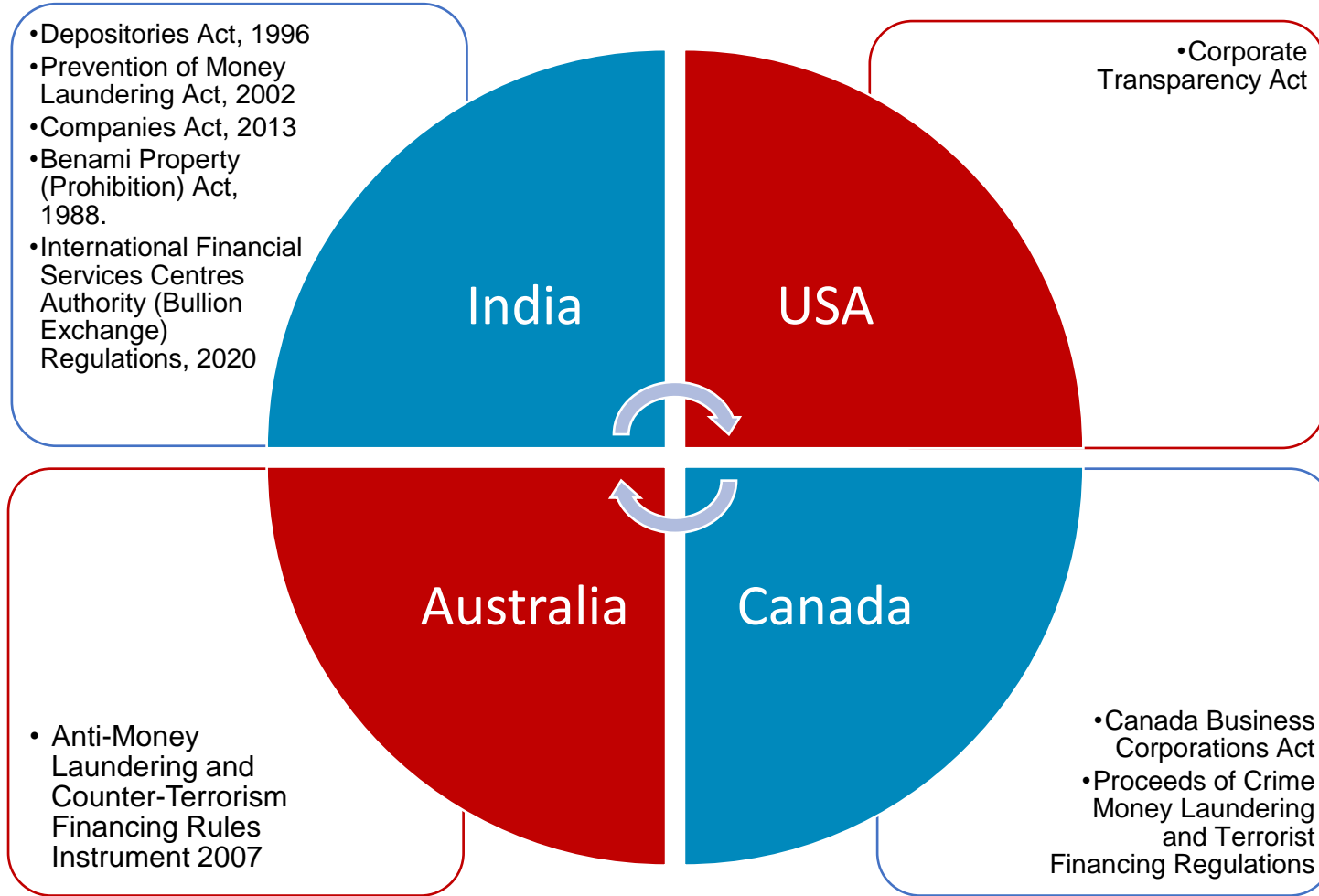
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|---|---|
| <ul style="list-style-type: none"> relating to rights to the use or benefit of property, other than legal title entitling a person to receive the profits or proceeds of property | <ul style="list-style-type: none"> a person who owns something one who has the legal or rightful title to something one to whom property belongs |
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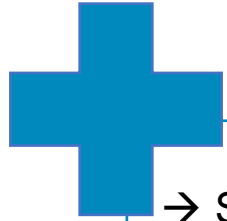
Types of Owners



Beneficial Owner: Definition



Who is a Beneficial Owner?



→ Someone who besides being a legal owner has “dominion and control” over the property

→ An owner of property who holds it for his own benefit

→ Agents, nominees, conduit companies acting as a fiduciary / administrator

→ A person constrained by a contractual or legal obligation to pass on such receipt to another person





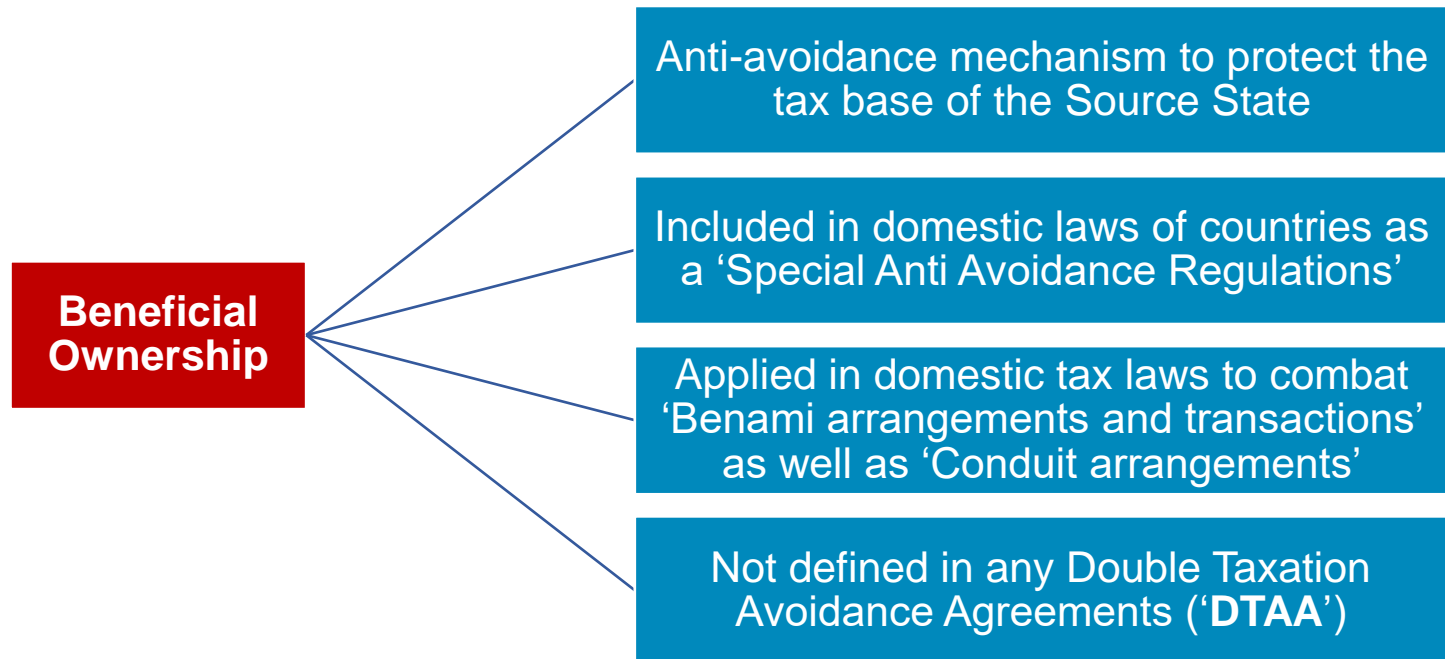
Beneficial Owner as per FATF



"The natural person(s) who ultimately owns or controls a customer and/or the natural person on whose behalf a transaction is being conducted. It also includes persons who exercise ultimate effective control over legal person or arrangement."

"Ultimately owns or controls" and "ultimate effective control" refer to situations in which ownership/control is exercised through a chain of ownership or by means of control other than direct control.

Beneficial Ownership and Tax

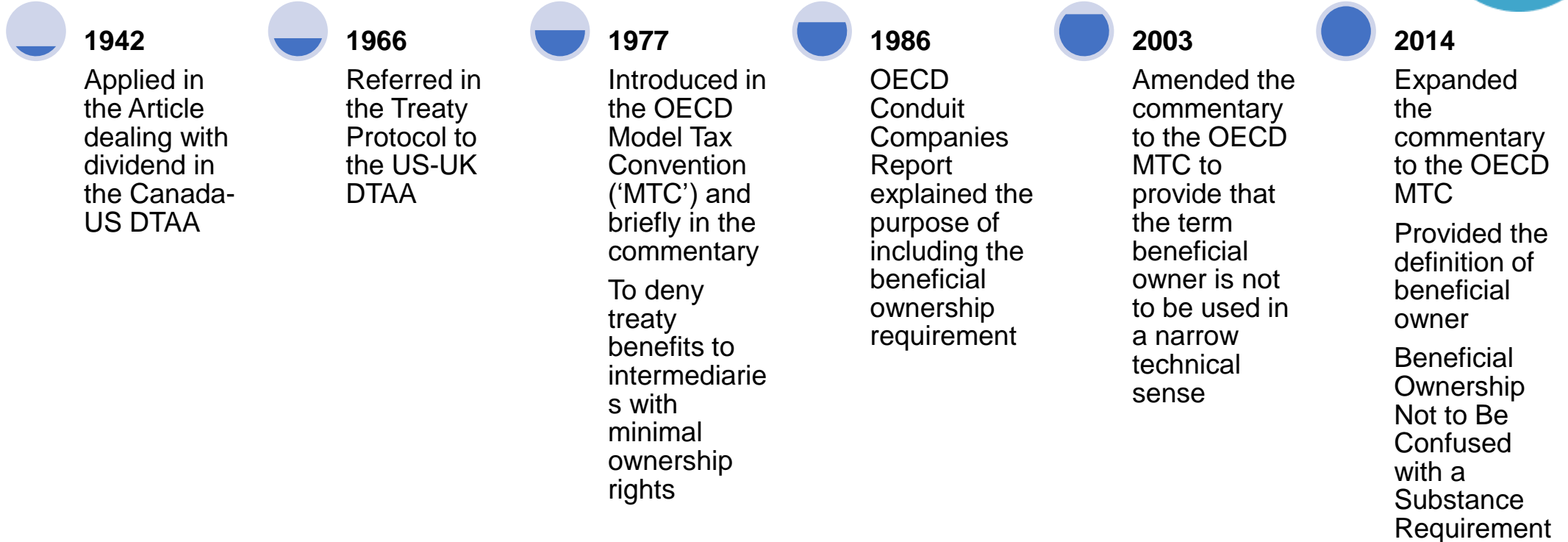


The terms '**Beneficial Owner**' or '**Beneficial Ownership**' are not defined in the IT Act



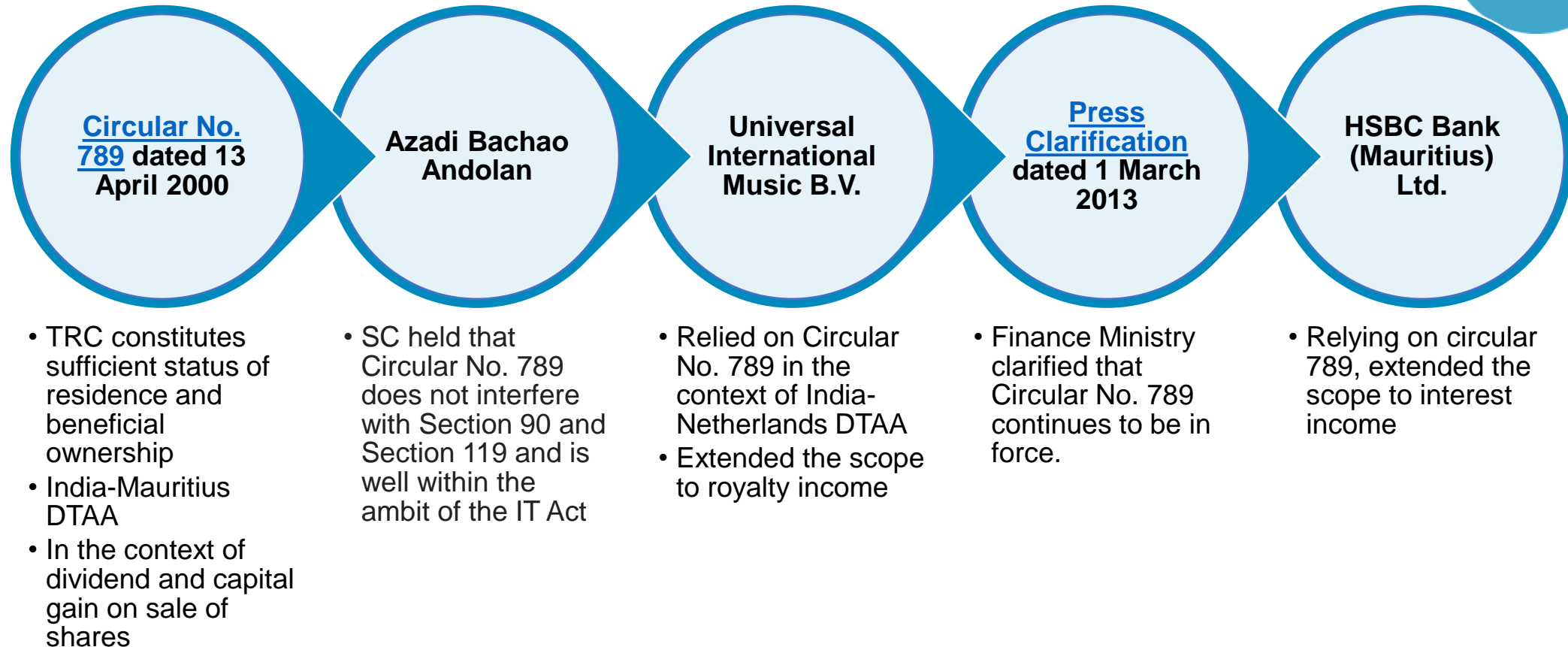
History and Importance for taxation

History of Beneficial Ownership



OECD issued a toolkit on Building Effective Beneficial Ownership Frameworks in 2021

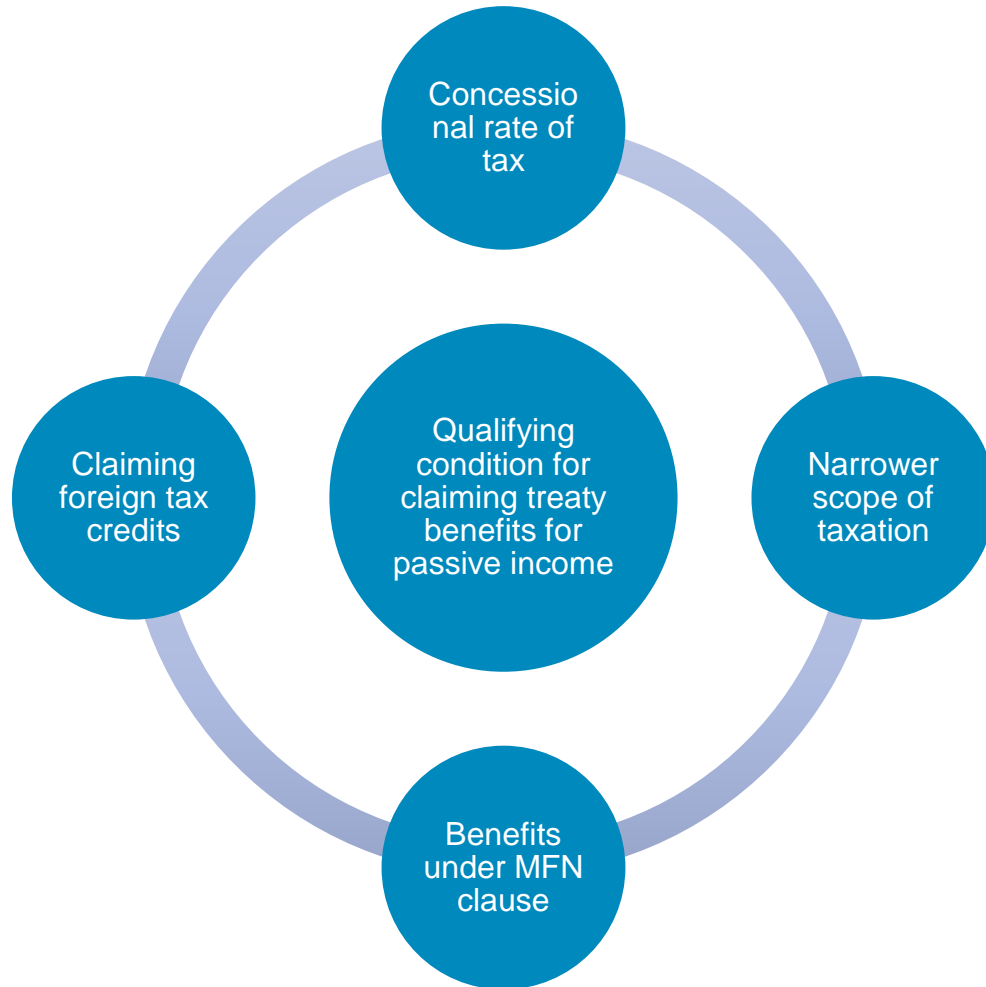
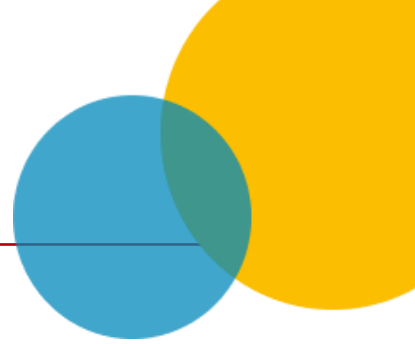
Beneficial Ownership: India perspective



In Ovvio Italia SpA, the Italy HC held that TRC is not a decisive proof of beneficial ownership.



Importance of the concept of Beneficial Ownership



Shift of dividend taxation from payer to payee thereby leading to availability of treaty benefit

Exploitation of treaty benefits by re-characterizing interest as dividend and claiming under double dip structures

Judicial approach making conduit and artificial structures look through for tax levy in the hands of the actual beneficial owner.

Important in fighting financial crimes, such as corruption money laundering, and terrorist financing



Beneficial Ownership in DTAAs

Beneficial Ownership under DTAA

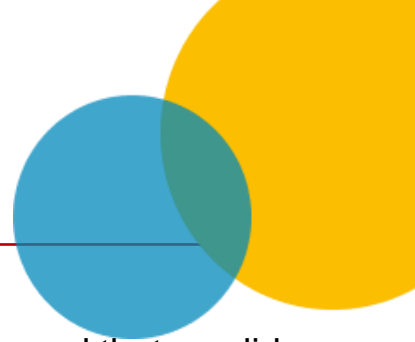


Article	Provisions
10	Dividend – lower rate applied if the recipient is the beneficial owner of dividend
11	Interest – lower rate applied if the recipient is the beneficial owner of interest
12	Interest – lower rate applied if the recipient is the beneficial owner of royalty or FTS
13	Capital gains –lower or no taxation on capital gains in the Source State if the transferors of assets holds specified percentage of holding or voting powers in the company located in the Source State – India-Netherlands.



Interpretation of Beneficial Ownership

Dominion and Control vs. Substance



- The doctrine of substance over form mandates taxing transaction pursuant to its economic effect rather than its form and that a valid transaction must have both a substantial purpose apart from reduction of tax liability.
- Beneficial ownership is not linked to substance or lack thereof in a particular jurisdiction rather it is the determination of dominion and control over the source of income.

Tests of Substance

- Office address, total floor area of the office, go-downs and seeking details of any other premise owned;
- Whether there are multiples companies with common address;
- Employee register with the details of all the employees;
- Whether the directors of the company hold multiple directorships, etc.;
- Bank statements for relevant periods;
- Explanations as to the source of funds out of which investments have been made; and
- Filings with authorities of the home jurisdiction such as financials, tax returns, etc. for relevant periods; etc.

Tests of Dominion and Control

- Formed for business objectives and not to exploit tax benefits alone
- Makes independent decisions vis-à-vis investment, expenditure, etc.;
- Enjoys unrestricted right to use and enjoy income earned by the taxpayer; and
- Bears business risks (such as currency risk, investment risk, etc.) commensurate with its activities and income earned

Direct and Indirect Ownership and Control



- Ownership of Shares
- Ownership of Voting Rights
- Other Ownership Arrangements
- Contractual Associations or Personal Connections with management or directors
- Management Control
- Recipient of loan or other benefit having conditions granting controlling rights
- Other ability to exert significant influence on corporate activity (eg: veto rights, decision rights, right to profit)



Beneficial Ownership vs Beneficial Interest

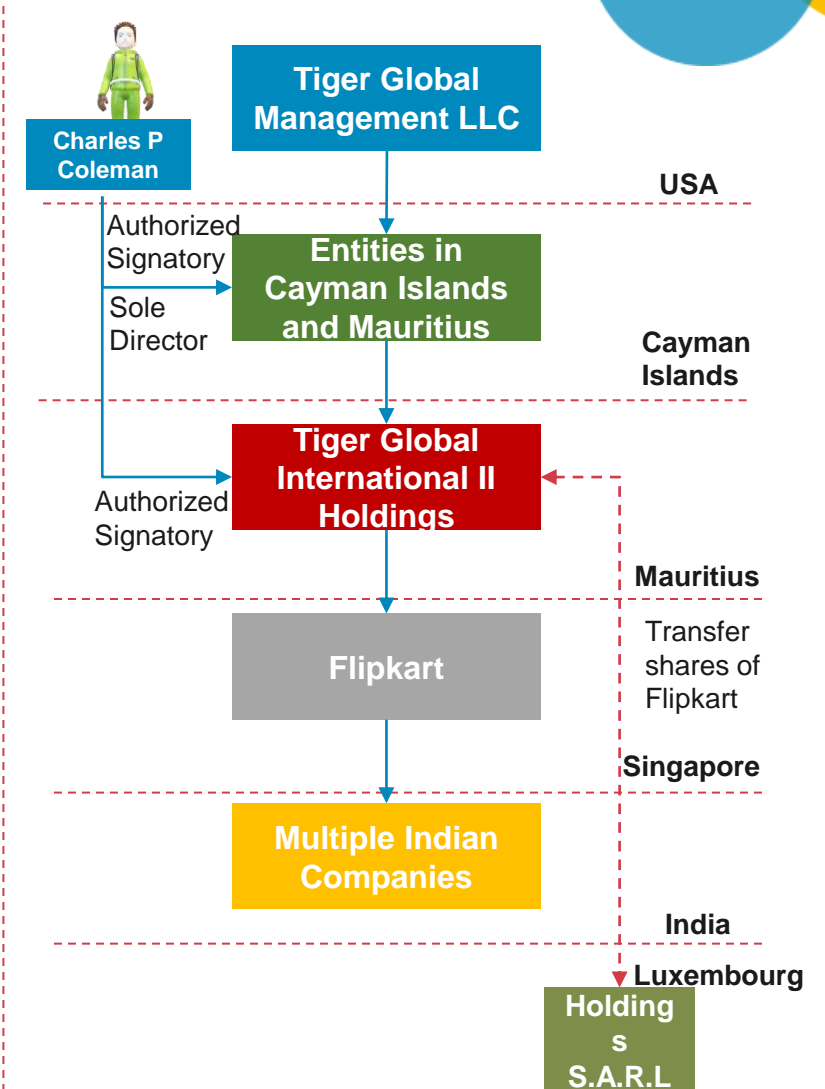
Beneficial Ownership	Beneficial Interest
Refers to ultimate control on the benefits from the property.	Refers to a right to income or use of assets in a trust.
Entitled to the benefit, directly or indirectly	It is distinguished from the rights of a trustee or nominee or such other person who has the responsibility to perform and hold title to the
Beneficial Interest apart from legal interest in the property	Do not own title to the property, but they have some right to benefit from the property

AAR in case of Tiger Global

- The Applicant(s) are private companies from Mauritius, set up with the primary objective of undertaking investment to earn investment income. They were granted a Category-1 Global Business Licence and regulated by the Financial Services Commission in Mauritius. They are tax residents of Mauritius under the laws of Mauritius
- The Applicants have been acquiring shares of the Singapore Co. since October 2011, at different times and in turn, the Singapore Co. has made investments in India. On August 18, 2018, the Applicants transferred its shares of the Singapore Co. to the Luxembourg Co. The said transaction was part of the deal wherein Walmart acquiring a majority stake in Indian e-commerce giant Flipkart from several of its shareholders.

Principle

- Entire transaction of acquisition as well as the sale of shares **"as a whole"** was required to be evaluated
- The **"Head and Brain"** and consequently the control and management of the Applicants was not Mauritius but USA. CEO of the TGM US was having the signing authority to operate bank accounts maintained in Mauritius.
- The Founding Partner, CEO was the beneficial owner of the immediate parent companies of the Applicants and with him, other key personnel of the TGM US were responsible for the entire major decision making by inferring that the Applicant companies were only a **"see-through entity"**

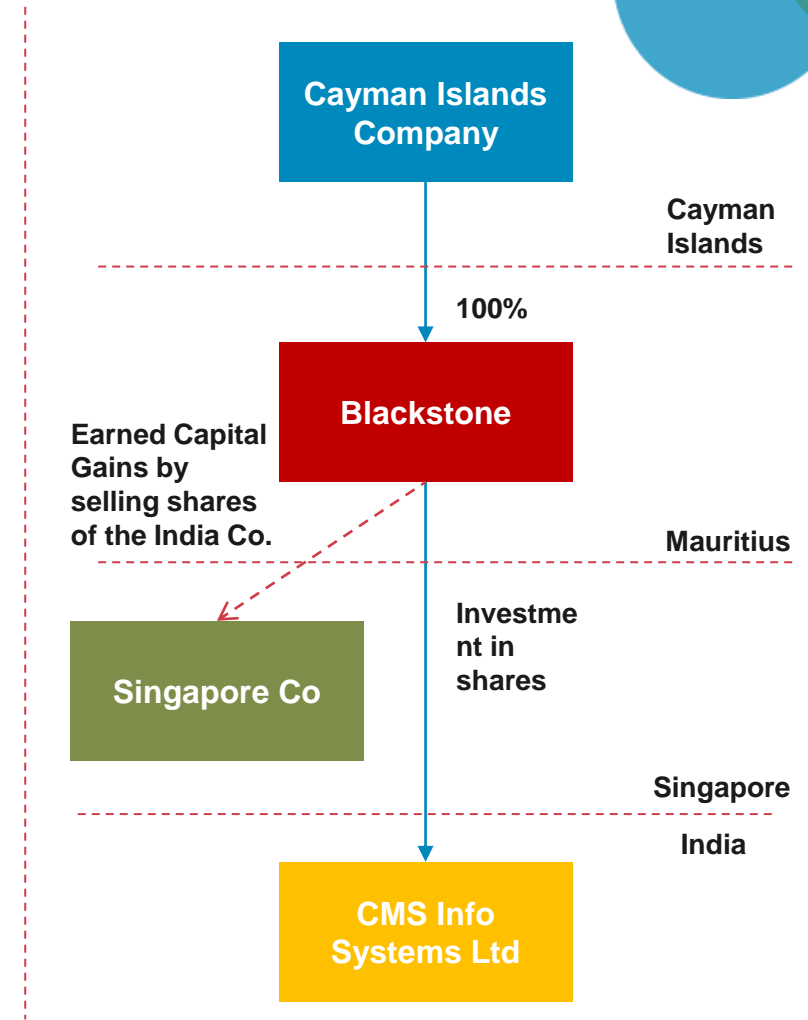



Mumbai ITAT in case of Blackstone

- The taxpayer, a Mauritius-based company, was a wholly owned subsidiary of a Cayman Islands entity. The taxpayer claimed benefit under India-Mauritius DTAA with respect to certain capital gains.
- Department denied claim citing that the beneficial owner of the capital gains was an entity based outside Mauritius

Held

- Beneficial ownership provisions of the India-Mauritius income tax treaty do not necessarily apply to the capital gains article of the treaty.
- The concept of beneficial ownership being a sine qua non to entitlement to treaty benefits cannot, in absence of specific provision to that effect, be inferred or assumed





**Beneficial
owner of
Dividend**

Corning Inc. - Korea SC

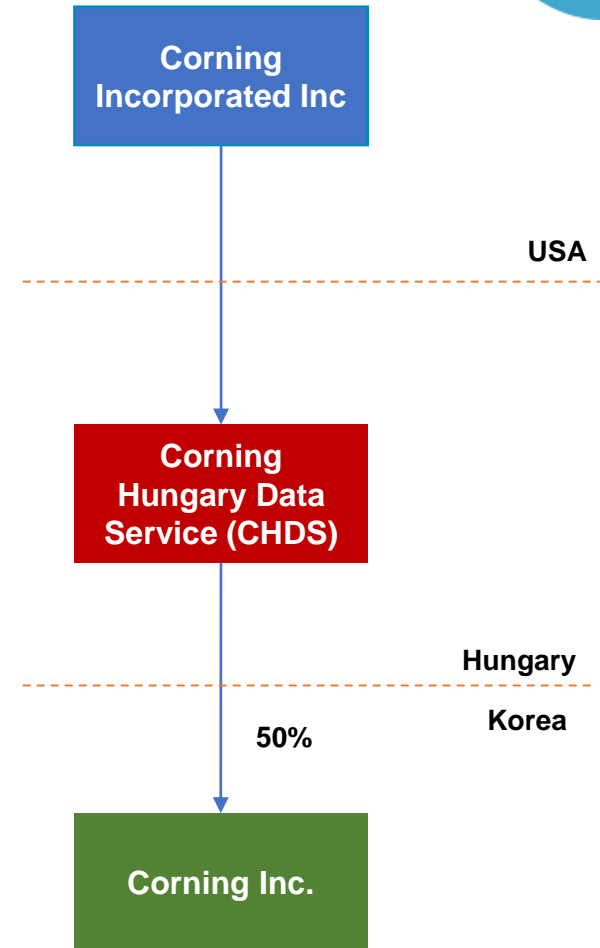
Critical facts

- Functions performed by CHDS:
 - Receipt of dividend from subsidiaries
 - Control of shares
 - Management of investments and funds
 - Exercise of shareholder rights - increase of capital of subsidiaries, appointment of a representative director, approval of the use of paid-in capital, etc.
- CHDS never paid any dividends to the holding company

Principle

Beneficial owner is a person who:

- Entitled to enjoy benefits of dividend
- Not bound by law nor contract to re-transfer the dividend



Citibank Korea Co. Ltd – Korea SC

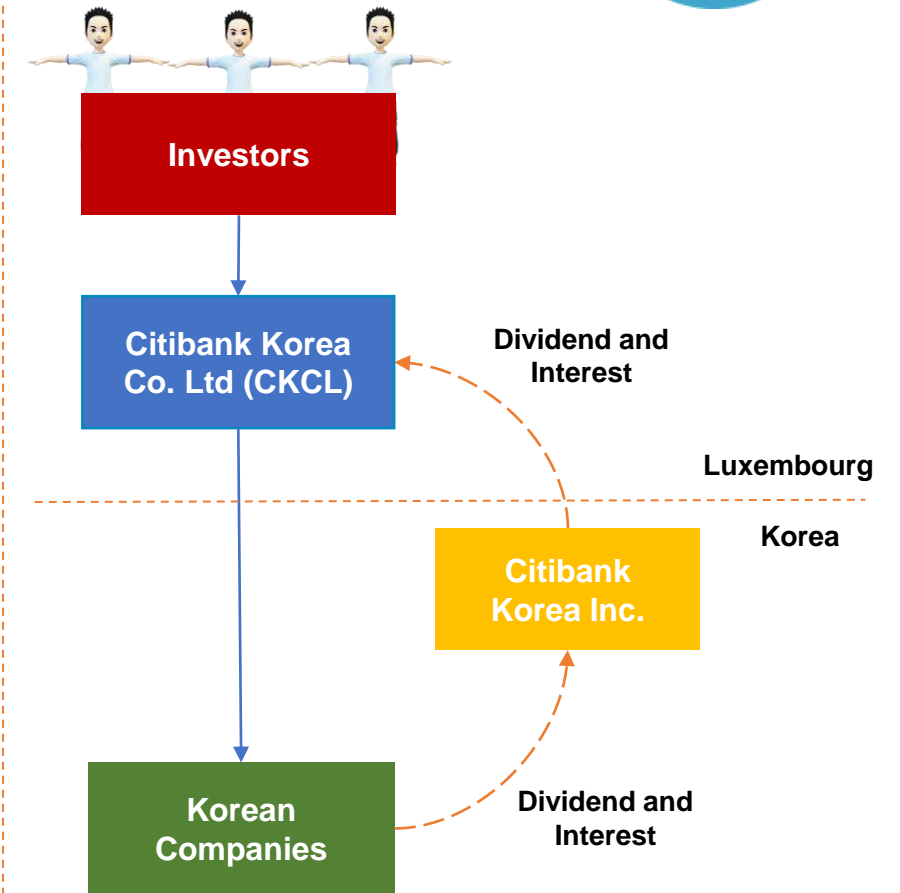


Critical facts

- CKCL is registered as a collective investment scheme
- It made investments in listed stocks of Korean companies
- Control exercised by CKCL:
 - concluded investment contracts, obtained investment assets, without any instructions from investors
 - exercised the right regarding the payment of the dividends and interest
 - performed economic activities such as investment and distribution of investment returns

Held

- Basis the above facts, it was held that CKCL are the beneficial owner of the dividend and interest income received from Citibank Korea Inc.



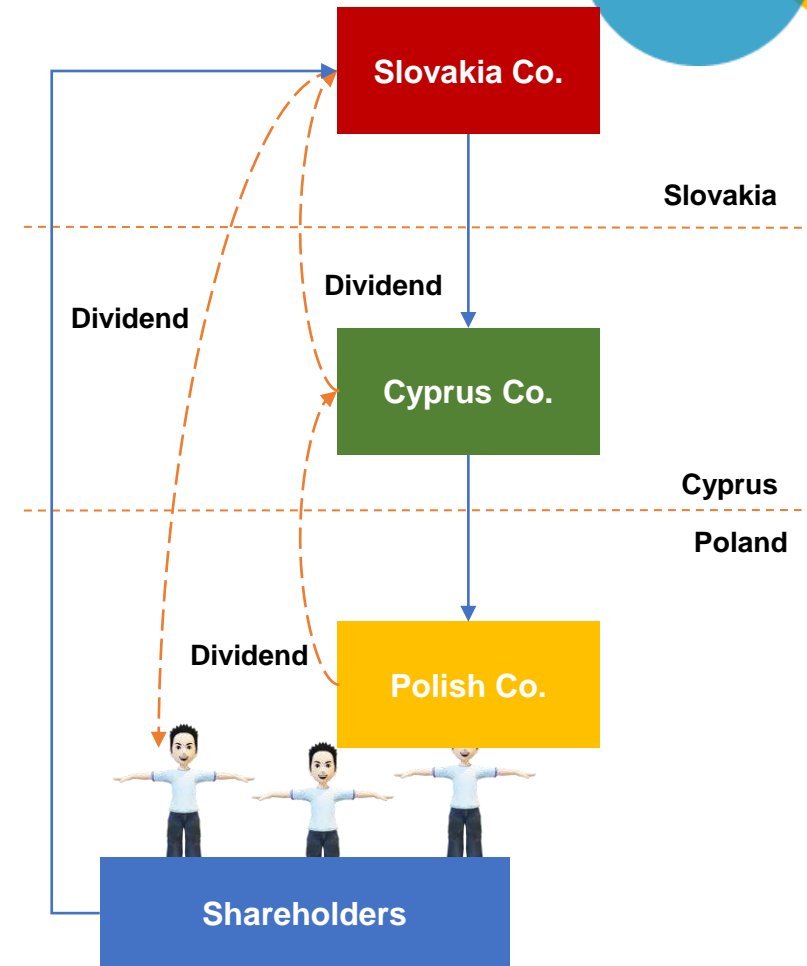
Critical facts

- The Polish shareholders reconstructed and created the holding structure
- Dividend was issued on the same day by the Cyprus to Slovakia to its shareholders
- The companies in Cyprus and Slovakia were inactive companies
- The conduct and key operational activities were still with the individual shareholders

Principle

Recipient should be the de-facto and real recipient of dividend

In NetApp Denmark ApS, the Denmark Eastern HC held that where the amount was redistributed immediately, the arrangement was entirely artificial, and hence the recipient of dividend was not the beneficial owner.



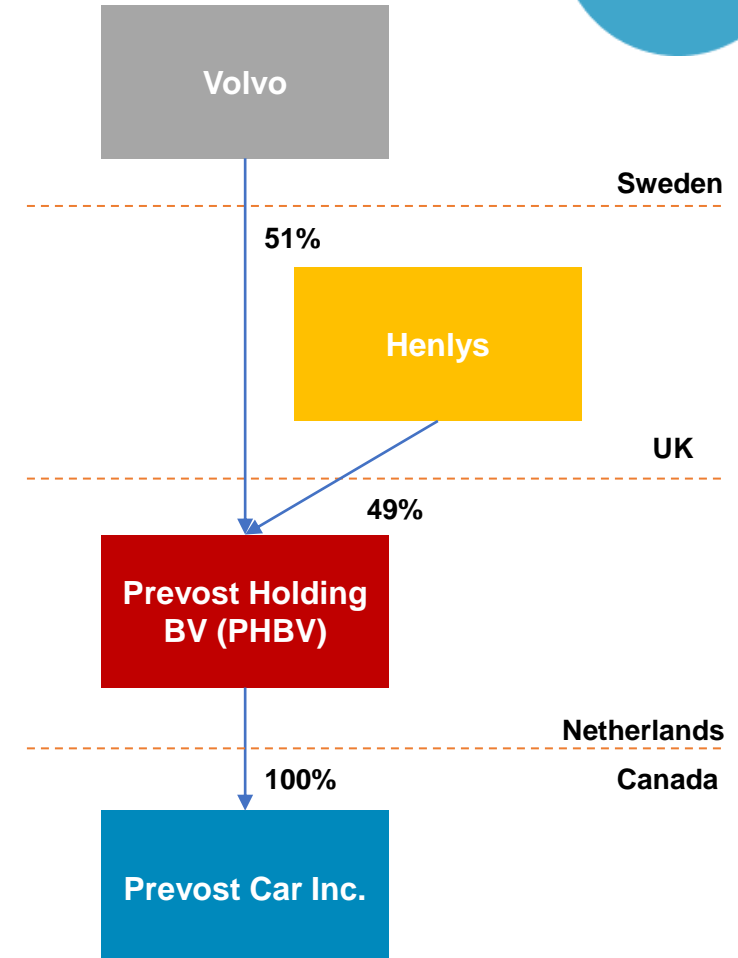


Critical facts

- Deed of Incorporation of PHBV did not obligate it to pay any dividend to its shareholders
- Henlys and Volvo could not take action against PHBV for failure to follow the dividend policy
- PHBV could use the dividends as it wished and was not accountable to its shareholders
- No evidences:
 - Volvo and Henlys ab initio destined for dividend
 - PHBV acting as a funnel of flowing dividends

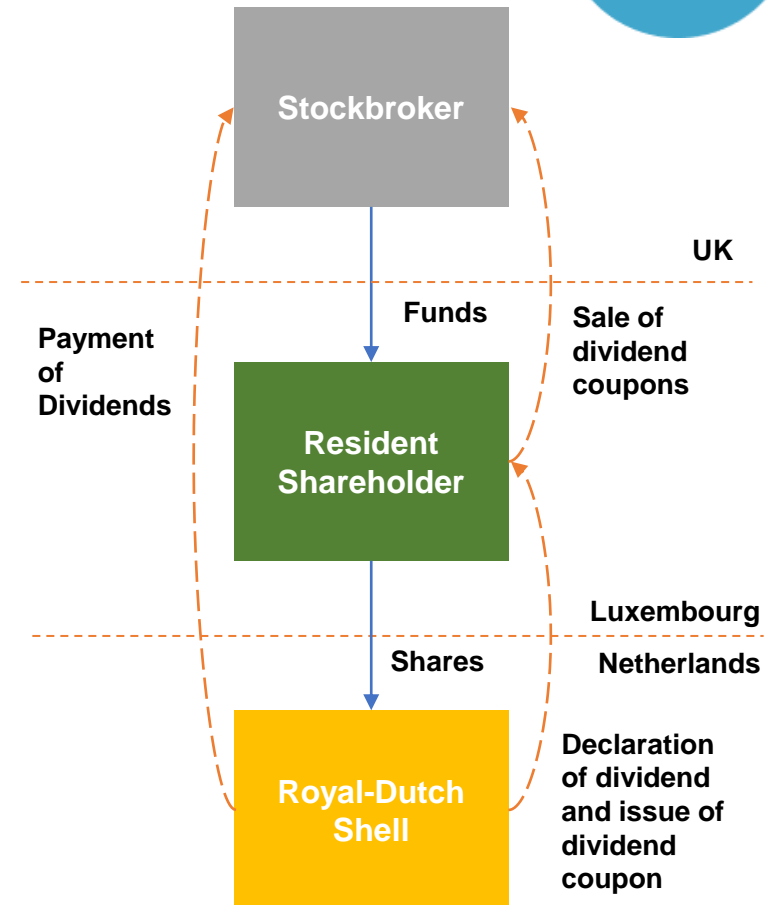
Principle

In the absence of pre-determined remittance of funds to the shareholders, the recipient of such dividend coupons will be the beneficial owner.



Royal Dutch Shell

- For determining beneficial owner of dividend, the treaty does not require that such entity is also owner of the underlying shares.
- By purchasing the dividend coupons, the entity is entitled to the benefits and hence becomes the beneficial owner of those coupons.





**Beneficial
owner of
Interest**

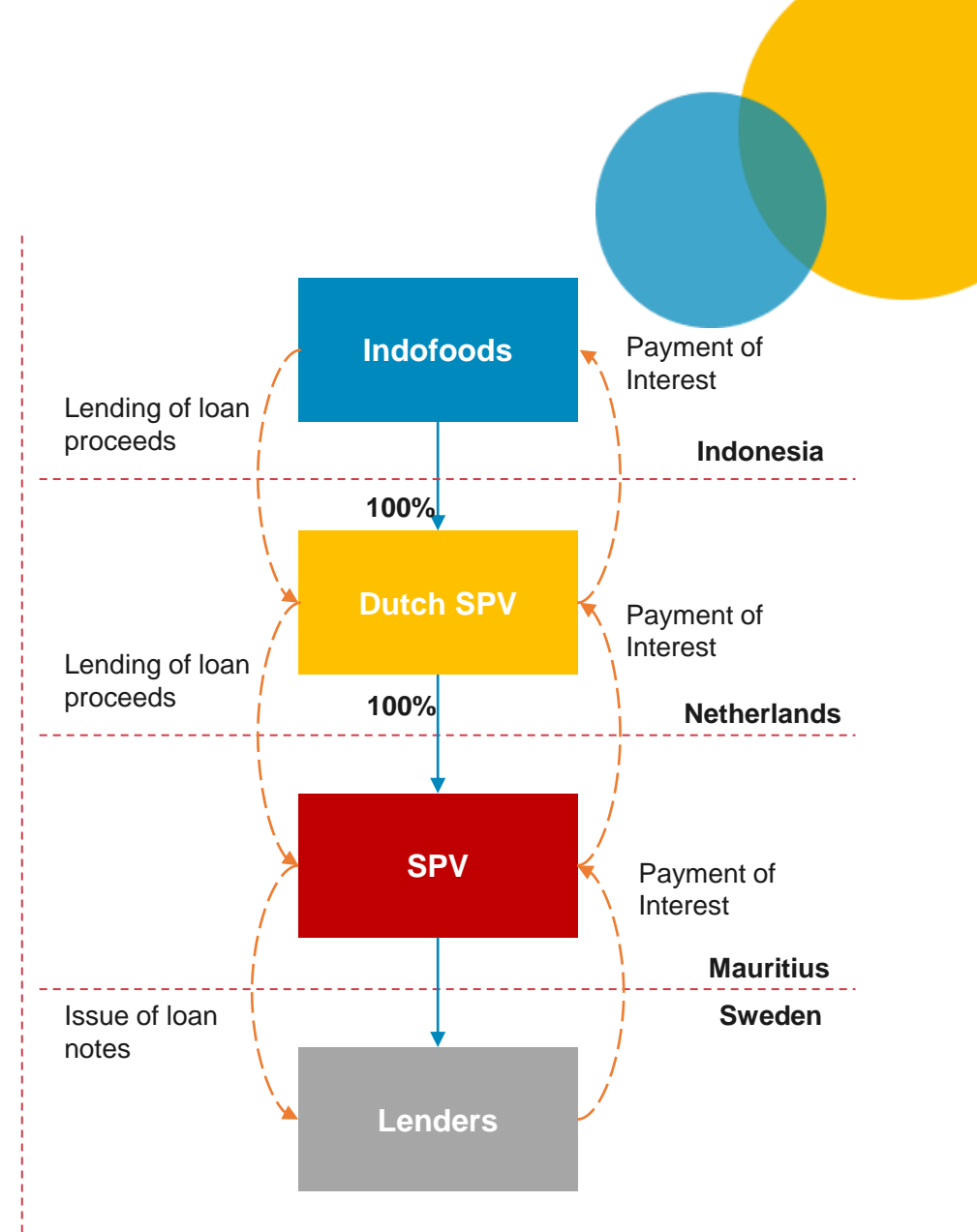
Indofood Ltd

Critical facts

- Under the terms of the loan issue, the SPV could redeem the notes early if the withholding tax exceeded 10 percent
- Consequently, due to the revocation of the Mauritius-Indonesia tax treaty, the SPV sought to redeem the note
- The holders resisted the redemption arguing that Dutch SPV interposed between the parent and the SPV would benefit from a 10 percent rate of withholding tax under the Netherlands-Indonesia tax treaty

Principle

The status of an entity that is unable to derive any 'direct benefit' from interest received, except by funding its liability to the Principal Paying Agent, equates to that of an 'administrator of the income'.



Golden Bella

Critical facts

- Received interest income for its own exclusive benefit, and not for or on behalf of any other entity
- Had absolute control over the funds received from its immediate shareholder
- Wholly assumed and maintained the foreign exchange risk

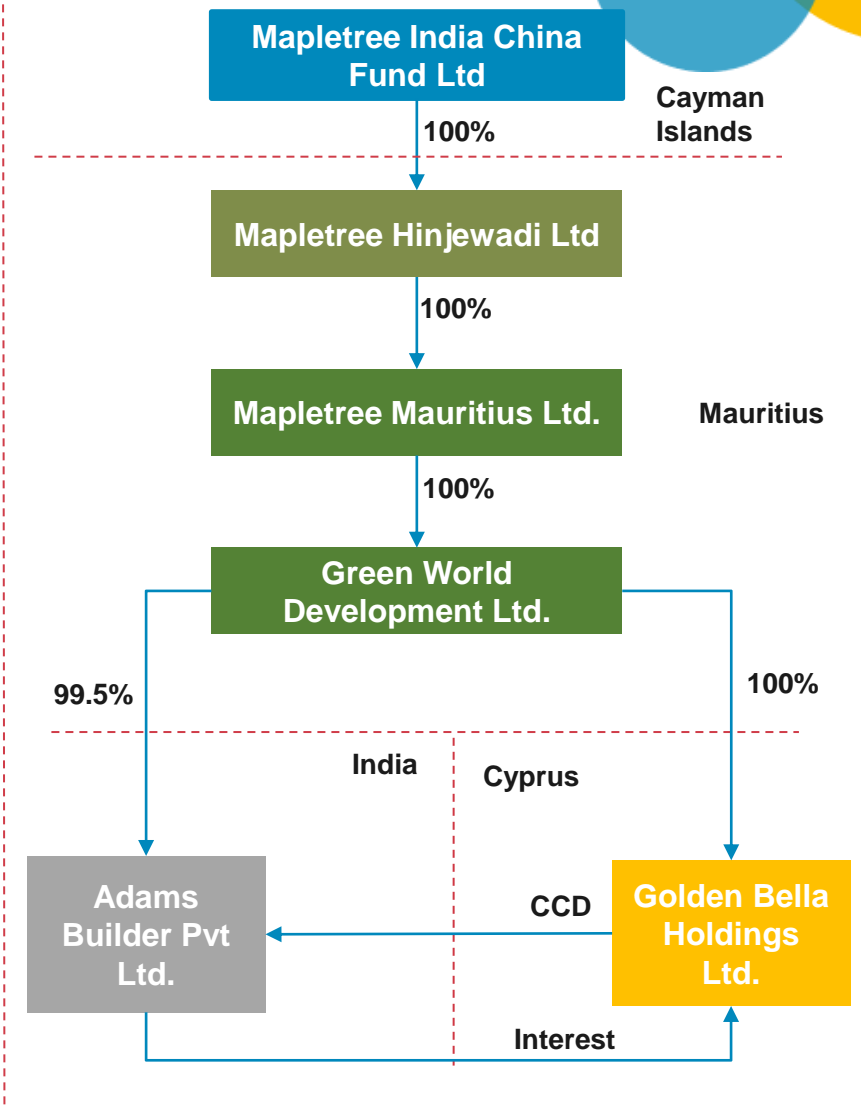
Observation

The AO failed to prove the following:

- No exclusive possession and control over the interest income
- Required to seek approval or obtain consent from any entity to invest, or to utilize the interest income

Principle

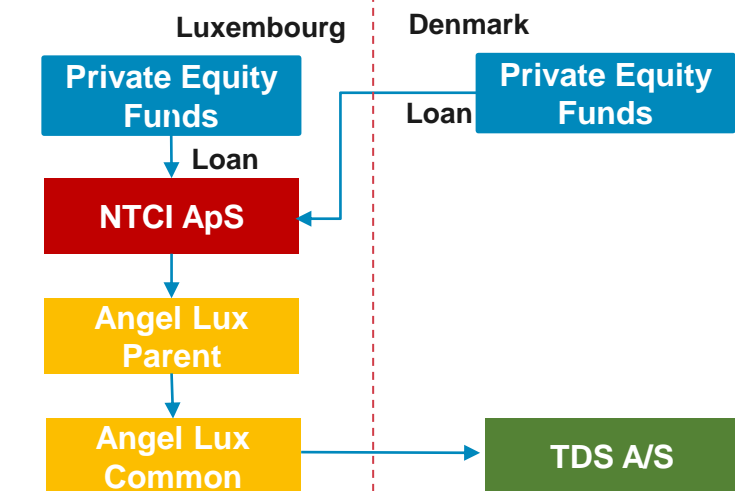
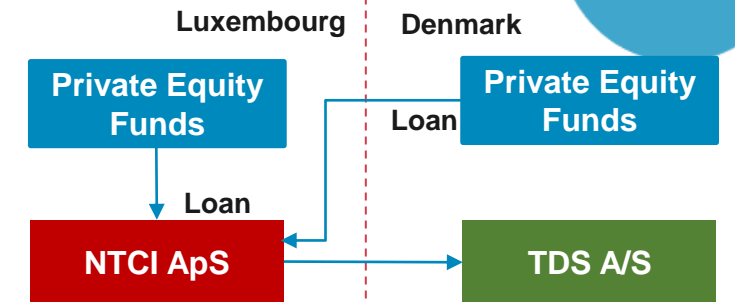
Mere fact that the investment in CCDs was partly funded using an interest-free shareholder loan and share capital does not ipso facto mean that the corporate status may be disregarded so as to consider the immediate shareholder to be the 'beneficial owner' of the assets, including the interest income



Nordic Telephone Company

Held

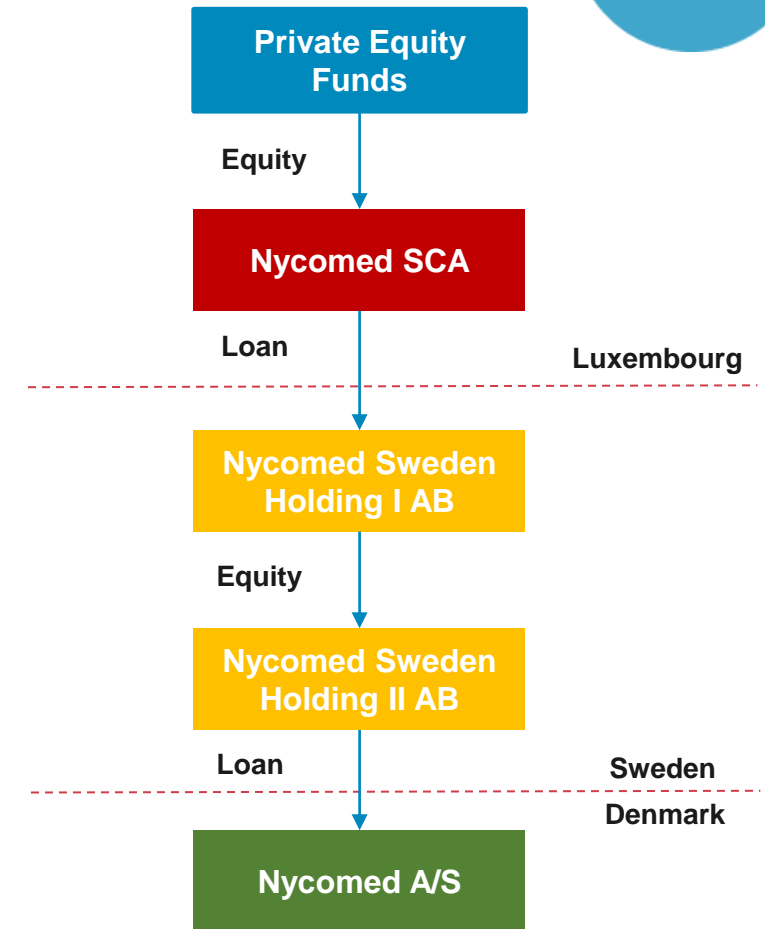
- Role of Angel Lux Parent and Angel Lux Common
 - Did not receive additional funds other than the individual amounts from NTC Parent
 - Did not engage in any significant activity other than managing the loan
- The management of all the companies involved consisted of the same private equity representatives
- The purpose of the transactions in the new company structure does not appear to have justification, but for the sole purpose of avoiding taxation.
- Thus, Angel Lux Parent and Angel Lux Common acted only as flow-through companies.



Nycomed A/S

Held

- The transaction AB must be considered as an overall and pre-arranged event
- Nycomed A/S stated that the purpose of the specific structure was 'to optimize' Nycomed Group's effective tax rate
- The insertion of the two Swedish companies in the event instead of Nycomed SCA, SICAR providing the loan directly to Nycomed A/S had no business justification other than to obtain a possible tax advantage.



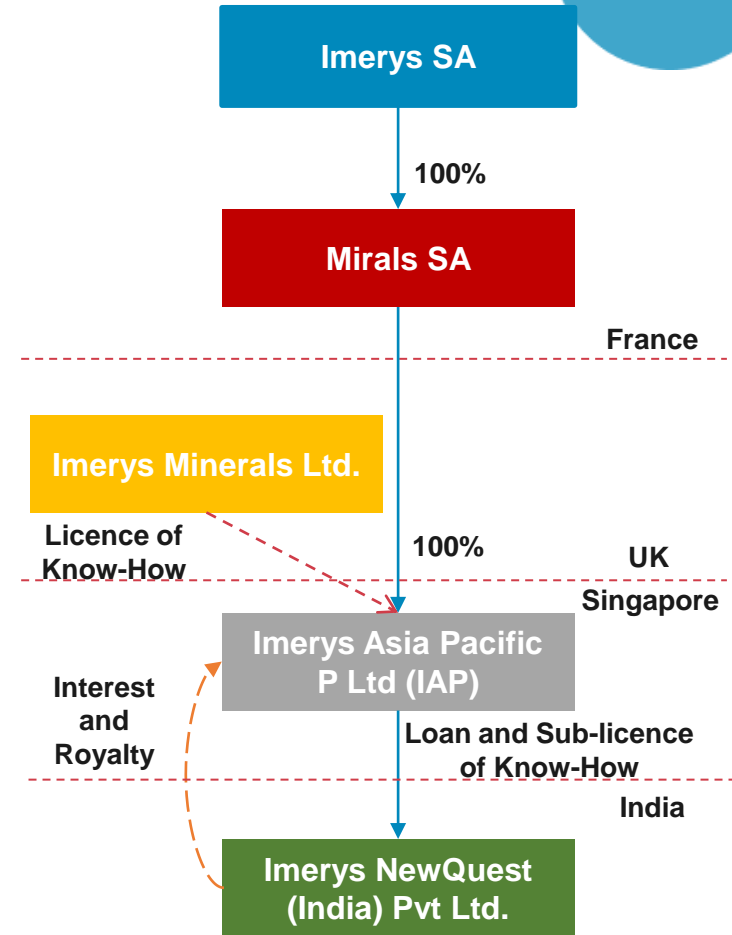
Imerys Asia Pacific

Critical facts

- IAP obtained license of know-how, not to use the know-how itself, but in order to sub-license the know-how to third party customers.
- The interest amount had not been remitted to Singapore in the current fiscal year, but in the subsequent year

Principle

- A person that receives the royalty income on its own right shall be the beneficial owner eligible for concessional tax rate as per DTAA
- Interest income earned as its beneficial owner is taxable at concessional rate of taxes even though it is not remitted in the instant year



**Beneficial
owner of
Royalty**



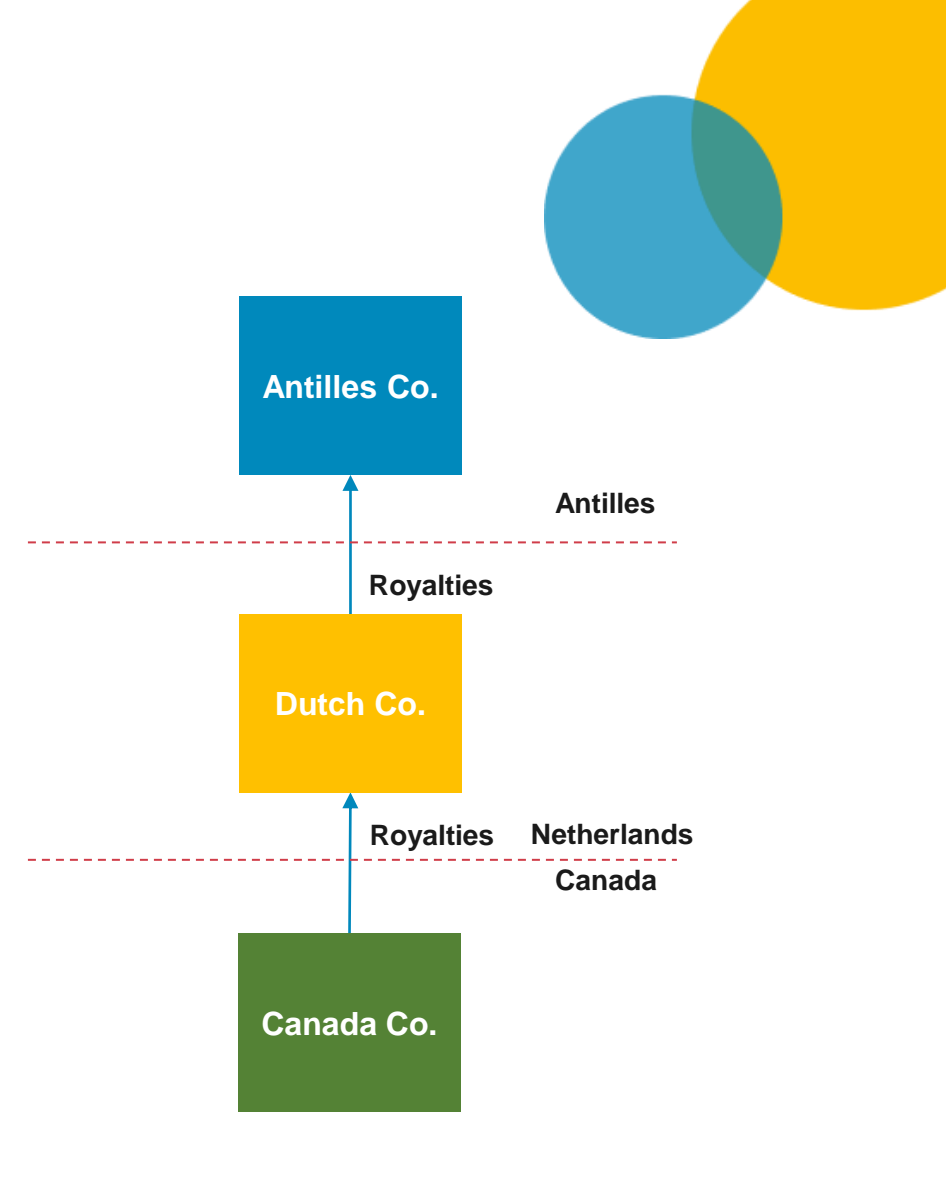
Velcro Canada

Critical facts

- There was no “pre -determined flow of funds” from Canada Co to Antilles Co. despite the contractual obligation between Dutch Co and Antilles Co.
- The royalty payments were intermingled with Dutch Co’s other accounts and used for a variety of purposes, at its sole discretion
- Dutch Co had the “possession, use, risk and control” of the funds

Principle

Despite the contractual obligation between the parties, if there are no ‘pre-determined flow of funds’, the recipient shall be the beneficial owner.



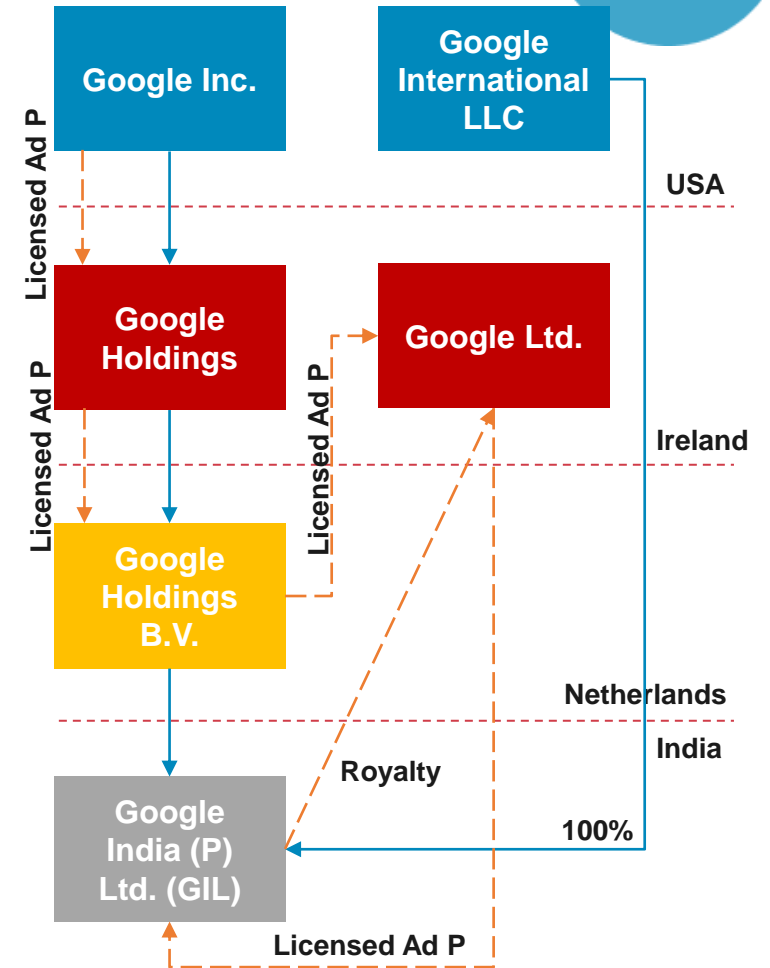
Google India

Critical facts

- Google Inc. is the ultimate body which controls the Google Ad P and share some part of revenue collected on account of Ad P.
- Since other parent holdings of GIL were involved in the Ad P directly or indirectly, they have a right to share the revenue generated under the Ad P Distributor Agreement.
- The revenue distribution was not apparent.

Principle

Is the person that has the ultimate control over the intellectual property and shares a part of the royalty income the beneficial owner of royalty?



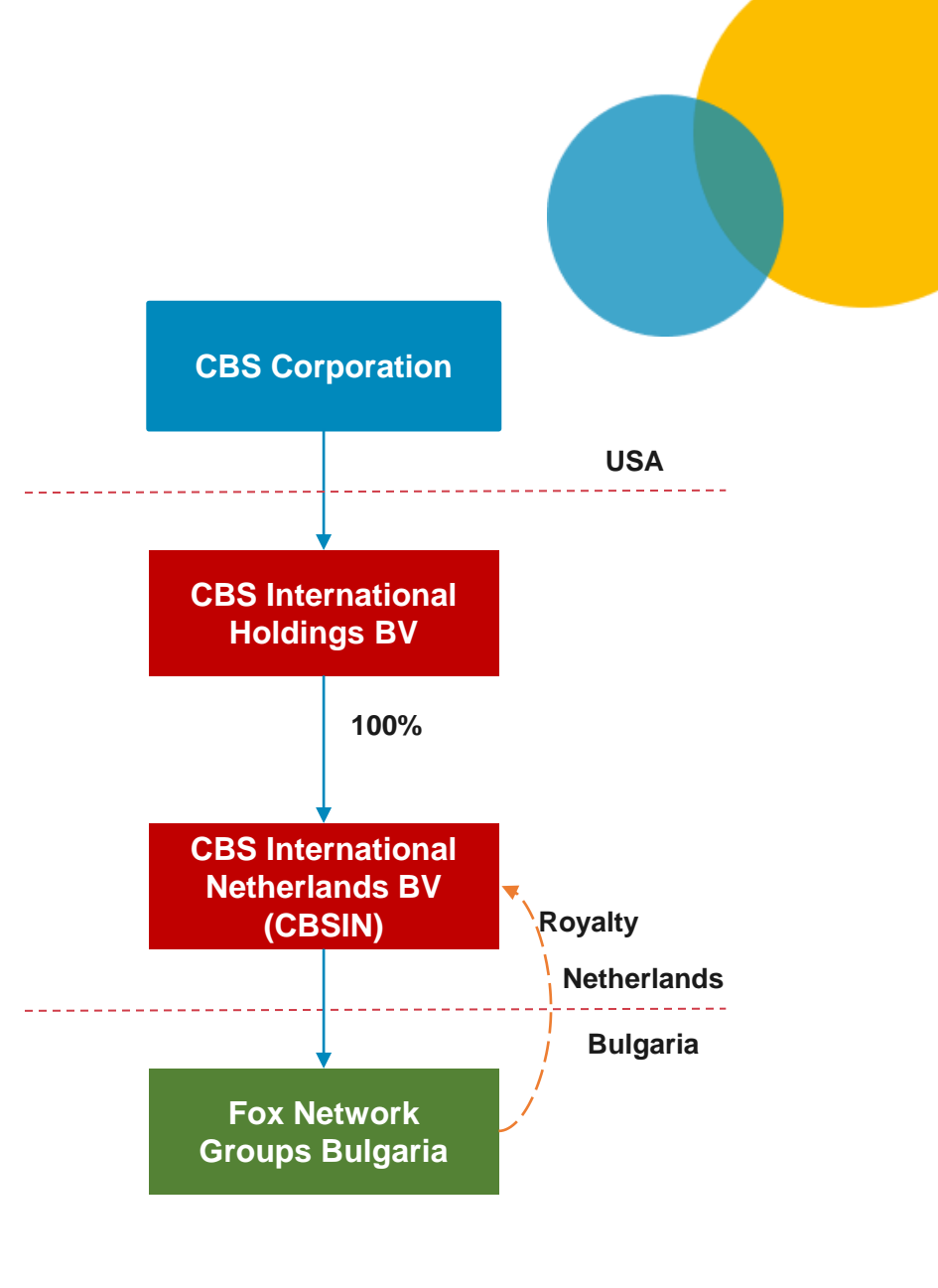
Fox Network Groups

Critical facts

- CBSIN held a valid television licensing right which it sub-licensed to Fox Network
- The various risk like development risk, market risk, currency risk, operating risk and credit risk associated with the licensing activity is borne by CBSIN and is evident from the transfer pricing documentation
- CBSIN had economic substance as it had 22 employees and assets worth USD 72,000 to manage the licensing of television rights

Principle

If the economic substance of the recipient can be established, then in such cases beneficial ownership of income in the hands of the recipient cannot be doubted even though the recipient has acquired the technology in back-to-back transaction.





Beneficial ownership of Capital Gains

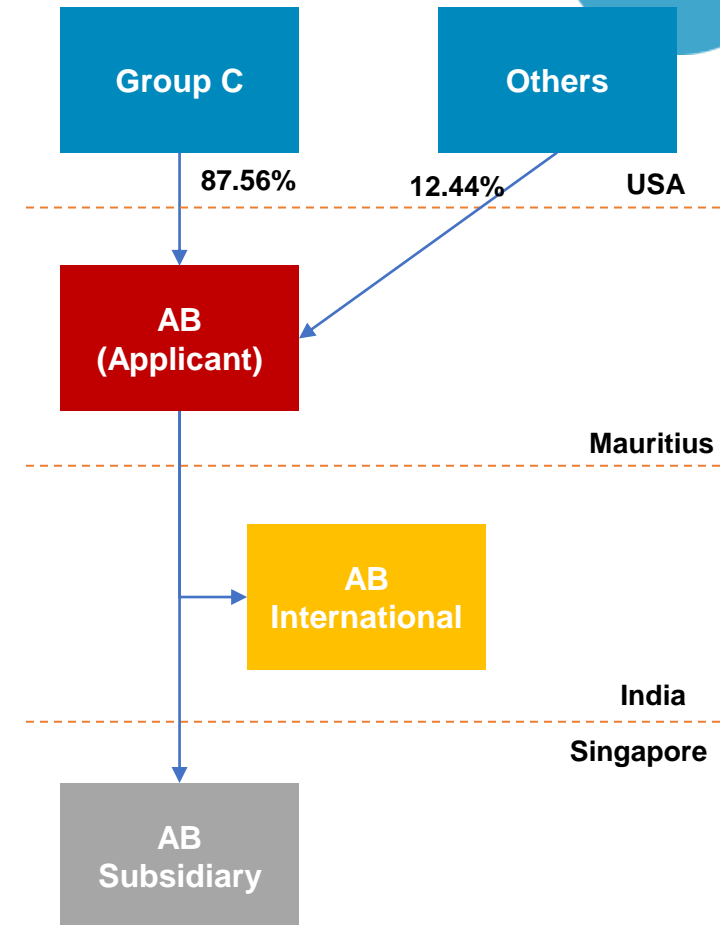
A B Holdings

Role of 'C' Group

- Not involved in any important decision making, be it the funding of the subsidiary company, deciding its objectives, its target markets, and making investments and disinvestments, etc. Not permitted to participate in its affairs in a manner that renders the subsidiary a puppet
- The transfer of shares was done along with shares of other Group companies also, as part of a reorganization, which indicates a long-term business and commercial purpose

Held

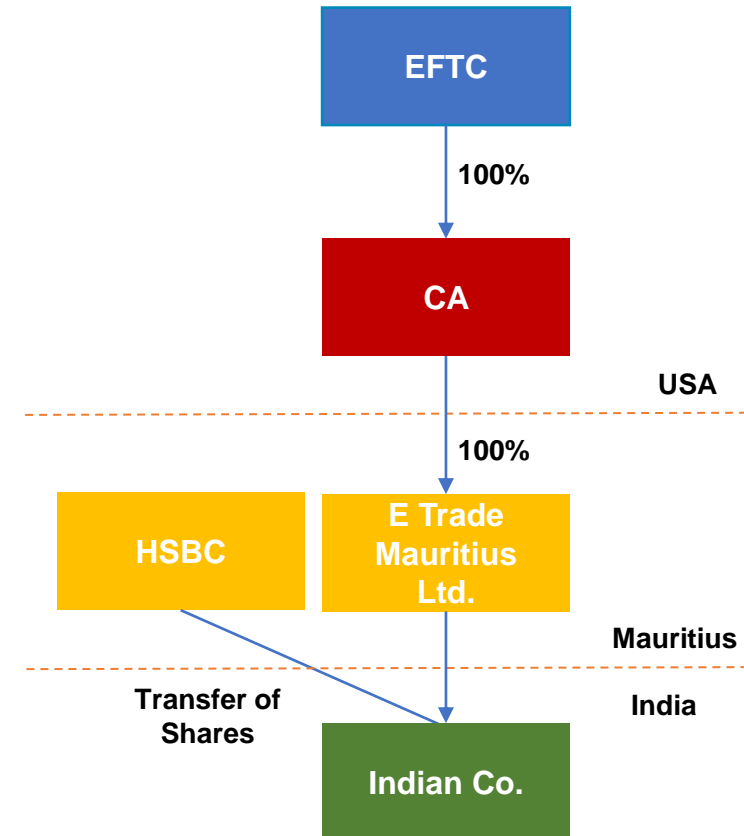
- No other peculiarity or illegality is noticed, especially with regard to the flow of actual funds for investment in 'AB' International.
- Hence, it is the legal and beneficial owner of shares and fully competent to transfer the same.





E Trade Mauritius

- Capital gain on sale of shares shall not be taxed in the hands of the holding company, even if:
 - the source of funds for the purchase of shares is traceable to the holding company
 - it had played a role in suggesting or negotiating the sale
 - the consideration received ultimately goes to the parent company in the form of dividends or the diminution of capital



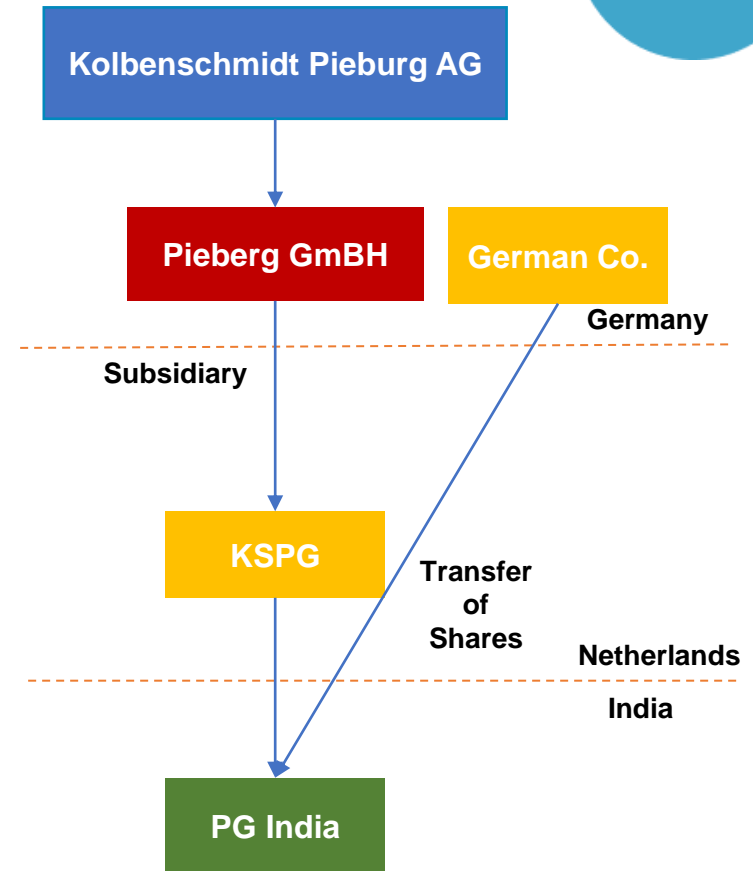
KSPG Netherlands

Facts

- Pieburg India was the wholly owned subsidiary of KSPG Netherlands Holding B.V. (KSPG) and they both belonged to the same group i.e., Kolbenschmidt Pieburg group.
- KSPG was planning to make substantial investment in Pieburg India and was expecting to receive Dividend, to realize capital gain via sale of shares and to accrue capital gain from buy-back of shares offered by Pieburg India.
- KSPG filed an application with the Income tax authority to obtain advance ruling on liability of payment of tax on dividend received and capital gain that may accrue from sale of shares and buy back offer under India-Netherlands treaty.

Principle

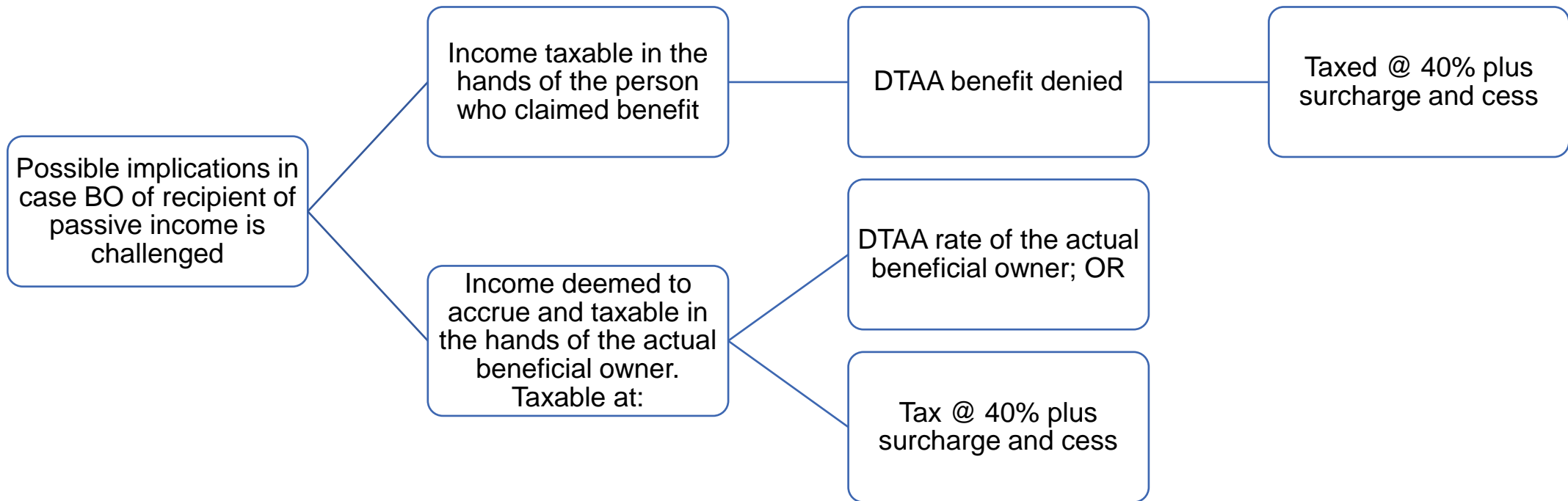
- Merely by it's holding, a company cannot be termed as 'Conduit Company' as both the entities have their own legal entity.





Key aspects

Views being adopted by Indian tax authorities



Key principles

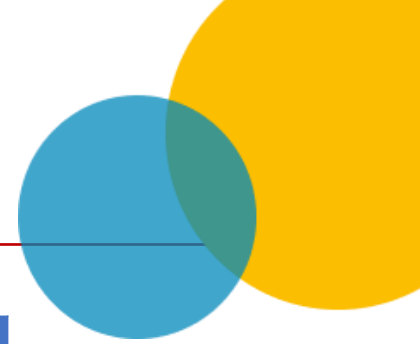
Requirement of
'beneficial ownership' is
met

- An intermediate company is interposed for business reasons
- Complete assumption of risk, dominion and control over the funds by the recipient
- Distribution of the dividend income is without a pre-commitment
- Control over the bank account
- Location of the bank account in another country does not indicate an absence of beneficial ownership

Requirement of
'beneficial ownership' is
not met

- Dividends are received by a person in the capacity of an agent or a nominee
- Recipient acts as a conduit for another person who in fact receives the benefit of the income
- Recipient's right to use and enjoy the dividend is constrained by a contractual or legal obligation to pass on the payment to another person
- The legal owner of the shares is bereft of all the rights which would normally attach to the shares
- The recipient is not in a position to make decisions regarding the utilization of the income

Indicative tests for satisfaction of BO Test



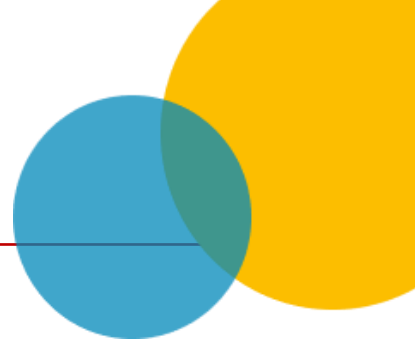
Particular	Indicative factors
Interest	<ul style="list-style-type: none"> • Existence of financing profile • Bears underlying risks, etc.
Royalty	<ul style="list-style-type: none"> • Power of enjoyment of intellectual property substantiated by DEMPE • Power to dictate & determine use of the IP • Existence of similar arrangements with other • Right to exclude others • Power to create charge on the IP
FTS	<ul style="list-style-type: none"> • Existence of underlying skillsets & infrastructure for rendering of services • Existence of similar arrangements with others • Right to terminate the contract, etc.
Dividend	<ul style="list-style-type: none"> • Economic control & command • Power to dictate & determine use of dividend • Power to disposition/ charge it as security, etc
Capital gains	<ul style="list-style-type: none"> • Capital gains clause does not have BO clause – Cannot be imputed
Carry forward of tax losses	<ul style="list-style-type: none"> • Carry forward of tax losses (other than tax depreciation) → continuance of substantial 'beneficial ownership'



OECD



Exchange of information as per Jurisdiction



Global forum for Transparency and Exchange of Information for Tax Purposes aims to provide:

Transparency of Banking and Finance records

Transparency of Ownership titles

Transparency of legal arrangements

Global Forum Mandates

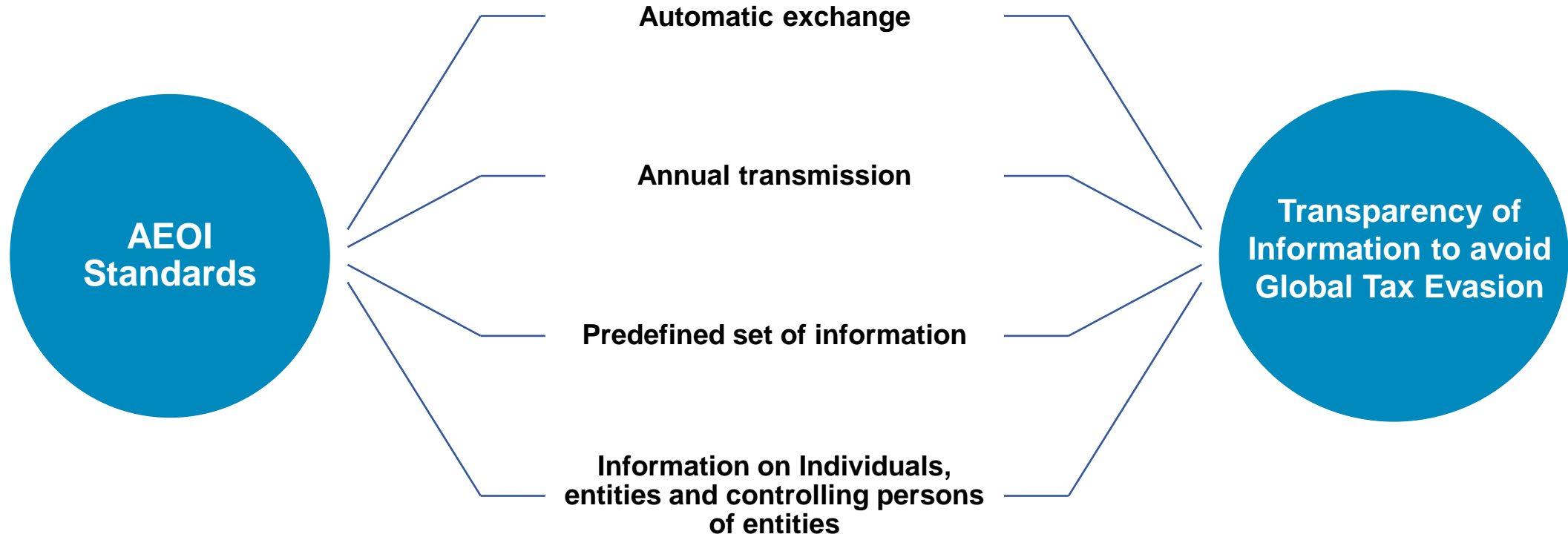
- The Global Forum mandated effective implementation of international tax transparency standards amongst its members and other relevant jurisdictions

EOIR and AEOI

- Required to maintain standards of transparency under:
 - Transparency and Exchange of Information on Request (the EOIR standard)
 - Automatic Exchange of Financial Account Information (the AEOI standard).

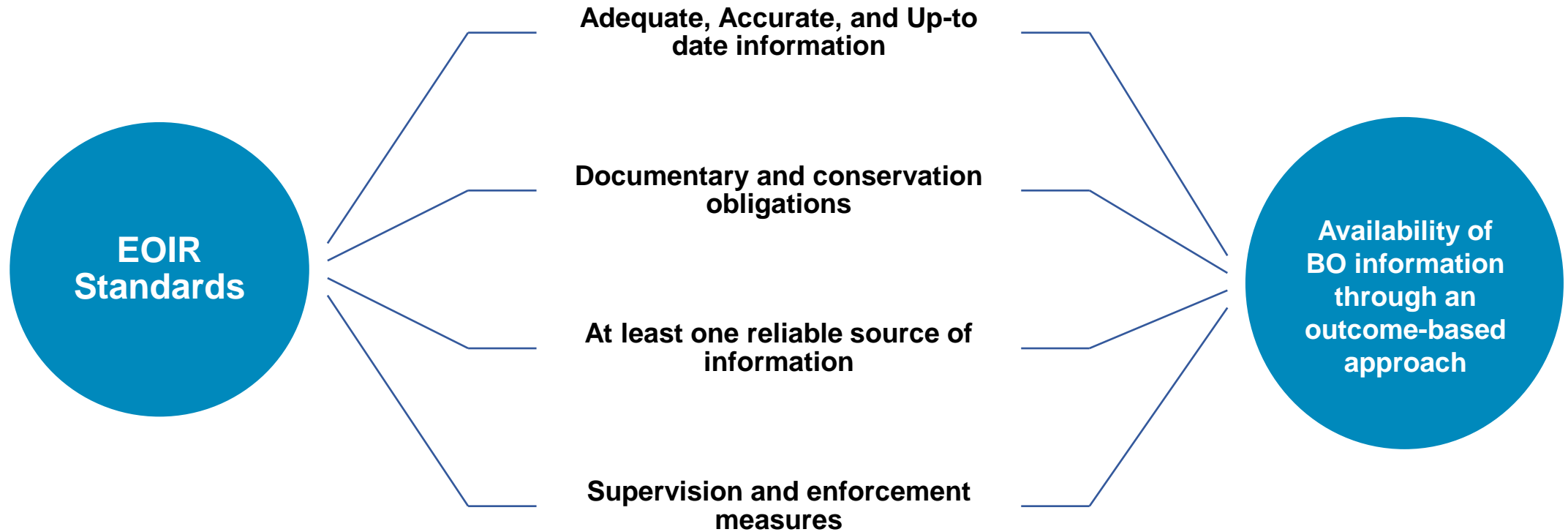
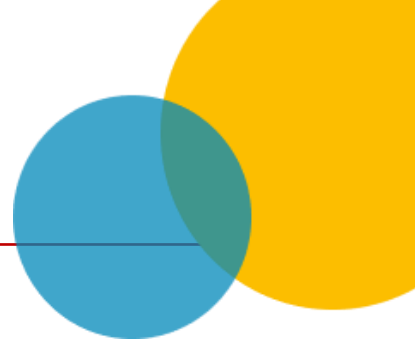


Automatic Exchange of Information (AEOI)





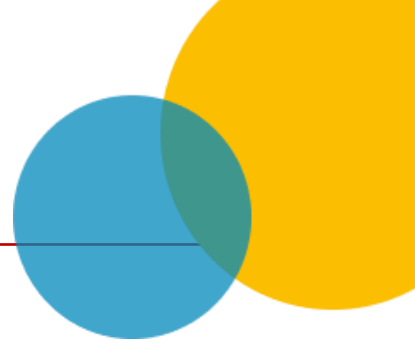
Exchange of Information on Request (EOIR)





Annexures

Excerpts: Circular and Press Release



Circular No. 789, dated 13-4-2000

734. Clarification regarding taxation of income from dividends and capital gains under the Indo-Mauritius Double Tax Avoidance Convention (DTAC)

115A, etc. Doubts have been raised regarding the taxation of dividends in the hands of investors from Mauritius. It is hereby clarified that wherever a Certificate of Residence is issued by the Mauritian Authorities, such Certificate will constitute sufficient evidence for accepting the status of residence as well as beneficial ownership for applying the DTAC accordingly.

FINANCE MINISTRY'S CLARIFICATION ON TAX RESIDENCY CERTIFICATE (TRC)

PRESS RELEASE, DATED 1-3-2013

In the case of Mauritius, circular no. 789, dated 13-4-2000 continues to be in force, pending ongoing discussions between India and Mauritius.

Beneficial Ownership under the IT Act



Section	Provisions
2(22)(e)	Deemed dividend taxation-when a loan/advance (to the extent of accumulated profits) has been made by a closely held Indian Company to a shareholder, being a person who is the beneficial owner of shares, holding not less than 10% of the voting power in the Company.
40A(2)(b)	Transactions with specified persons Explanation to Section 40A (2)(b) of the Act defines the term “substantial interest” in a company to mean “beneficial ownership” of shares carrying not less than twenty percent of the voting power. PE applies “active income” test unless “passive income” is attributable to such PE.
79	Change in the shareholding of a company beyond 51% of the “voting power”
97 read with 102	Transactions that lack commercial substance Person having substantial interest in the business of the other person.
92A	Meaning of Associate Enterprises Person who participates directly or indirectly in the management or control of enterprise of the other person.

THANK YOU

www.elplaw.in
www.taxand.com