Review of the IBFD Course on 6 june 2014

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TTN

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GRAHAM SMITH & PARTNERS

Today

1. Developments in the Exchange of Information (EOI)

2. Indentification of parties entitled to intangible related returns

3. Developments in the Beneficial Ownership

Harmful Tax Regimes

OECD (2000) indentified 47 potentially harmful tax regimes.

Some key factors are:

- Low effective tax rates
- Lack of transparency and effective EOI
- Granting tax advantages without real business activity or economic substance

Harmful Tax Regimes

However:

- Fiscal policy is a matter of the state itself
- Tax competition is lawful

EU and OECD:

- Are against *harmful* tax competition.

Measures Against HTRs

EU:

- More than 100 business taxation have been found to be harmful and have been abolished or amended.
- E.g. Dutch intra-group finance, Luxembourg 1929 holding company regime and the Irish IFSC-regime

OECD:

- Since 7 April 2009 no countries on the blacklist

OECD standards of transperancy and EOI.

The key principles of the EOI Standard:

- EOI on request where it is “foreseeably relevant”
- No restrictions caused by bank secrecy or domestic tax interest requirements
- Availability of reliable information and powers to obtain it
- Respect of taxpayer’s rights
- Strict confidentiality of information exchanged

In addition, TIEA and Article 26 OECD Model Convention

OECD New Global Standard (2013)

For automatic exchange of financial information

What financial information is reported?

- Investment income
- Account balances
- Sales proceeds from financial assets
- Income from insurance products

OECD New Global Standard (2013)

Other with automatic exchange of information:

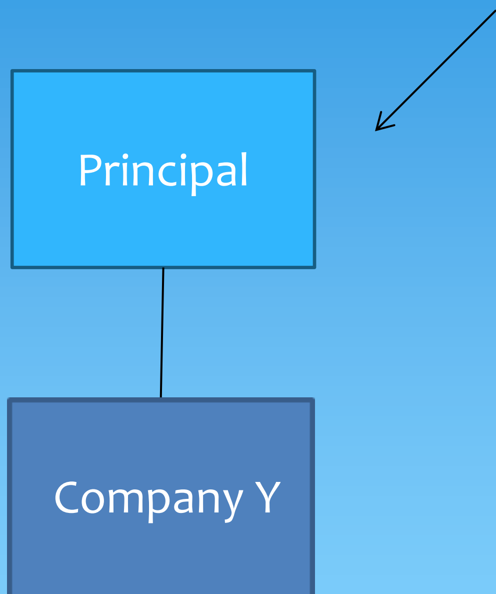
- EU Savings Directive
- Fatca

Transfer Pricing Aspects

Indentification of parties entitled to intangible related returns

Transfer Pricing Aspects

0% tax rate on intangible assets



- Company Y develops R&D on a contract basis on behalf of its Principal
- Apart from compensating Company Y for its costs, the Principal in not actively involved in the R&D process
- Who is entitled to the intangible related returns?

OECD Transfer Pricing Guidelines

Intangibles are:

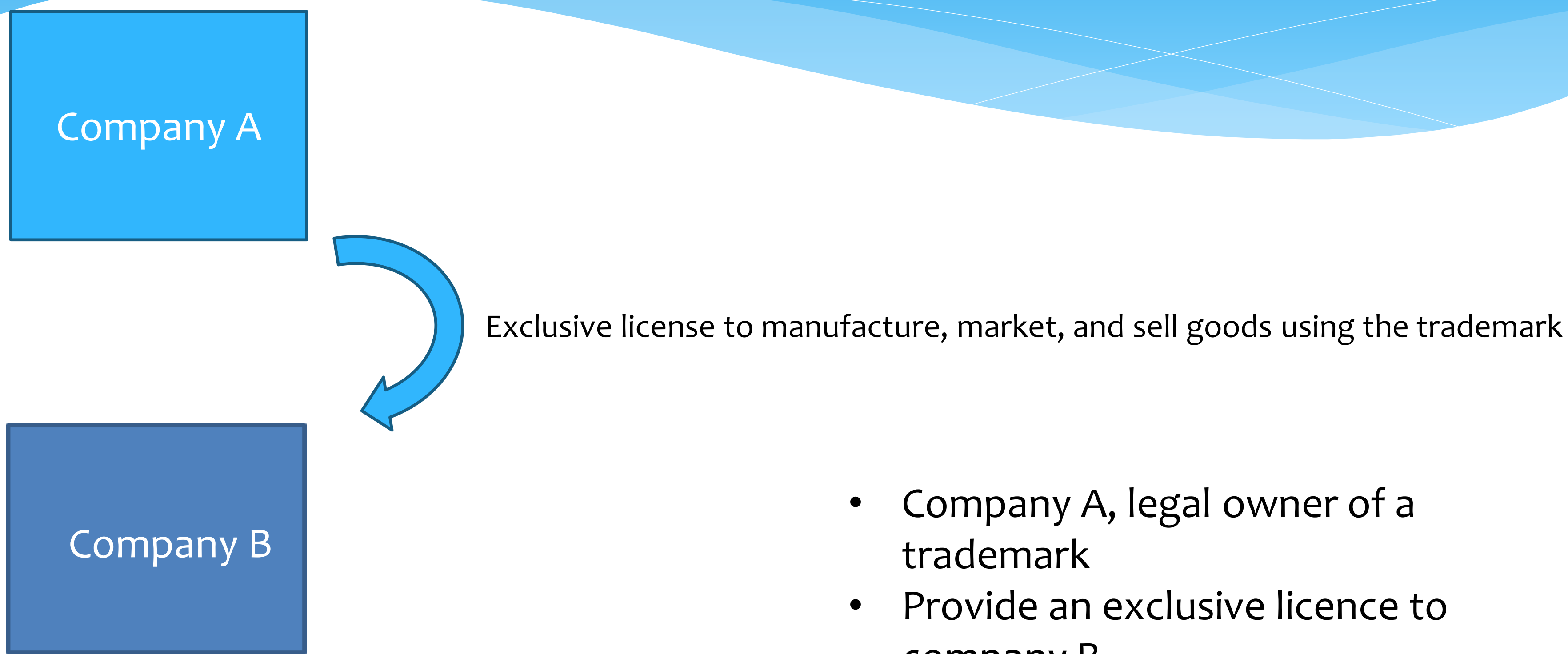
- Not a physical asset;
- Not a financial asset;
- Capable of being owned;
- Capable of being controlled;

OECD Transfer Pricing Guidelines

Intangibles include for instance:

- Patents;
- Know-how;
- Trade secrets;
- Trademarks, trade names and brands;
- Licenses and similar limited rights in intangibles;
- Etc.....

Identifying the legal owner



- Company A, legal owner of a trademark
- Provide an exclusive licence to company B
- Both companies legally own a different intangible

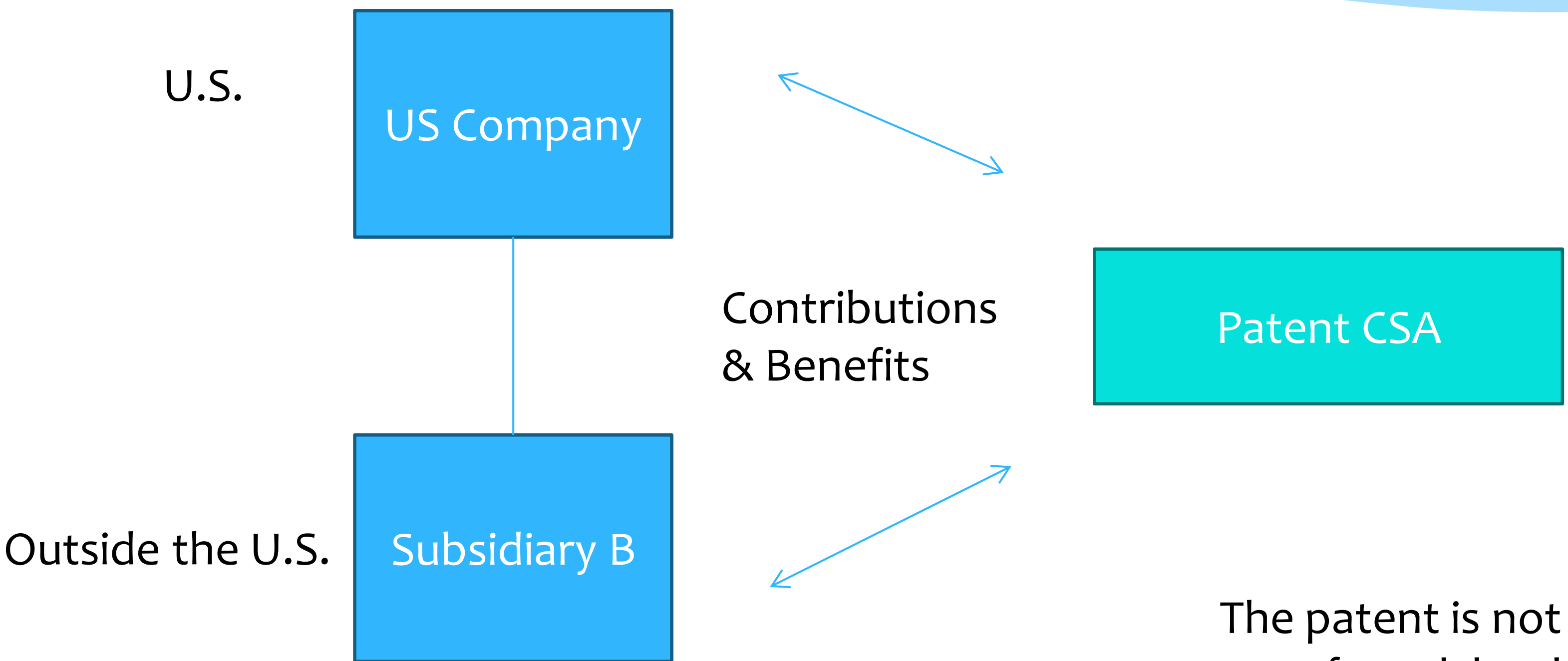
Entitled to the returns of an intangible

OECD Discusion Draft (July 2013)

Whether the legal owner of an intangible is entitled to any returns attributable to the intangible depends on:

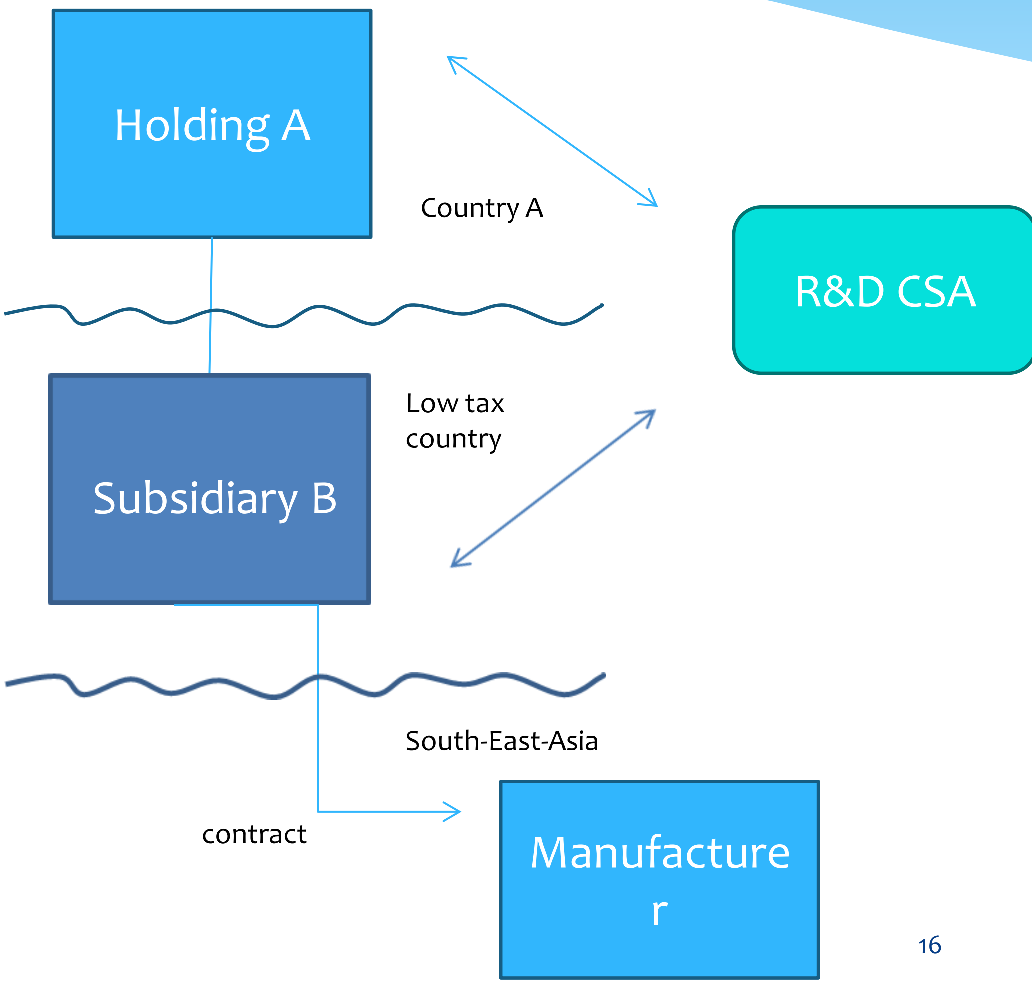
- Functions performed;
- Assets used;
- And risks assumed.

Case study: Cost sharing arrangement (CSA)



The patent is not transferred, but both are entitled to use it.

Case Study: Cost Sharing Arrangement (CSA)



- B contributes in total 4,9 billion (55%)
- A contributes in total 4.0 billion (45%)
- A's earnings are 38.7 billion
- B's earnings are 74.0 billion

Is this at arm's lenght?

Case study: Cost sharing arrangement

OECD Discussion Draft (July 2013):

Allocation of returns depends on the allocation of functions performed, assets used and risks assumed.

Case:

- A majority of products are manufactured in South-East-Asia through a contract between subsidiary B and manufacturers;
- Subsidiary B buys all good intended to be sold through over the world;
- Subsidiary B took initial title of the goods and resold to the distribution entities.

Tax Treaty Aspects

The developments in the concept of “Beneficial Owner”.

Beneficial Owner

12.

(…) The term "beneficial owner" is not used in a narrow technical sense, rather, it should be understood in its context and in light of the object and purposes of the Convention, including avoiding double taxation and the prevention of fiscal evasion and avoidance.

12.1.

Where an item of income is received by 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 immediate recipient of the income as a resident of the other Contracting State.

The immediate 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. 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.….

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

Beneficial Owner

Term interpretation:

- Domestic law?
- International meaning?

US and Dutch government → Domestic tax law.

Beneficial Owner

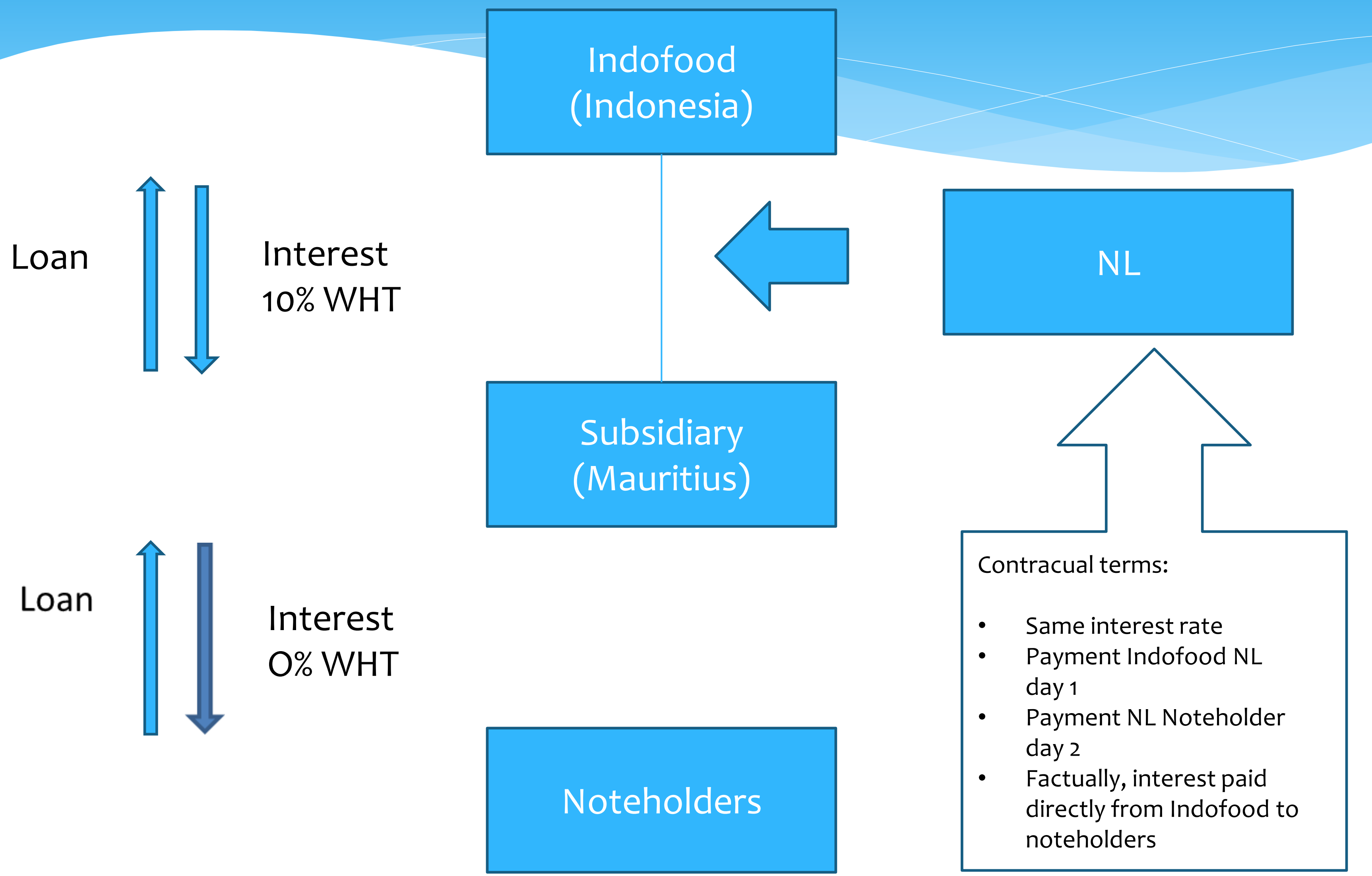
'The Federal Court of Appeal agreed that the Tax Court Judge was entitled to rely on subsequent documents issued by the OECD in order to interpret the OECD Model'

Tax Court of Canada

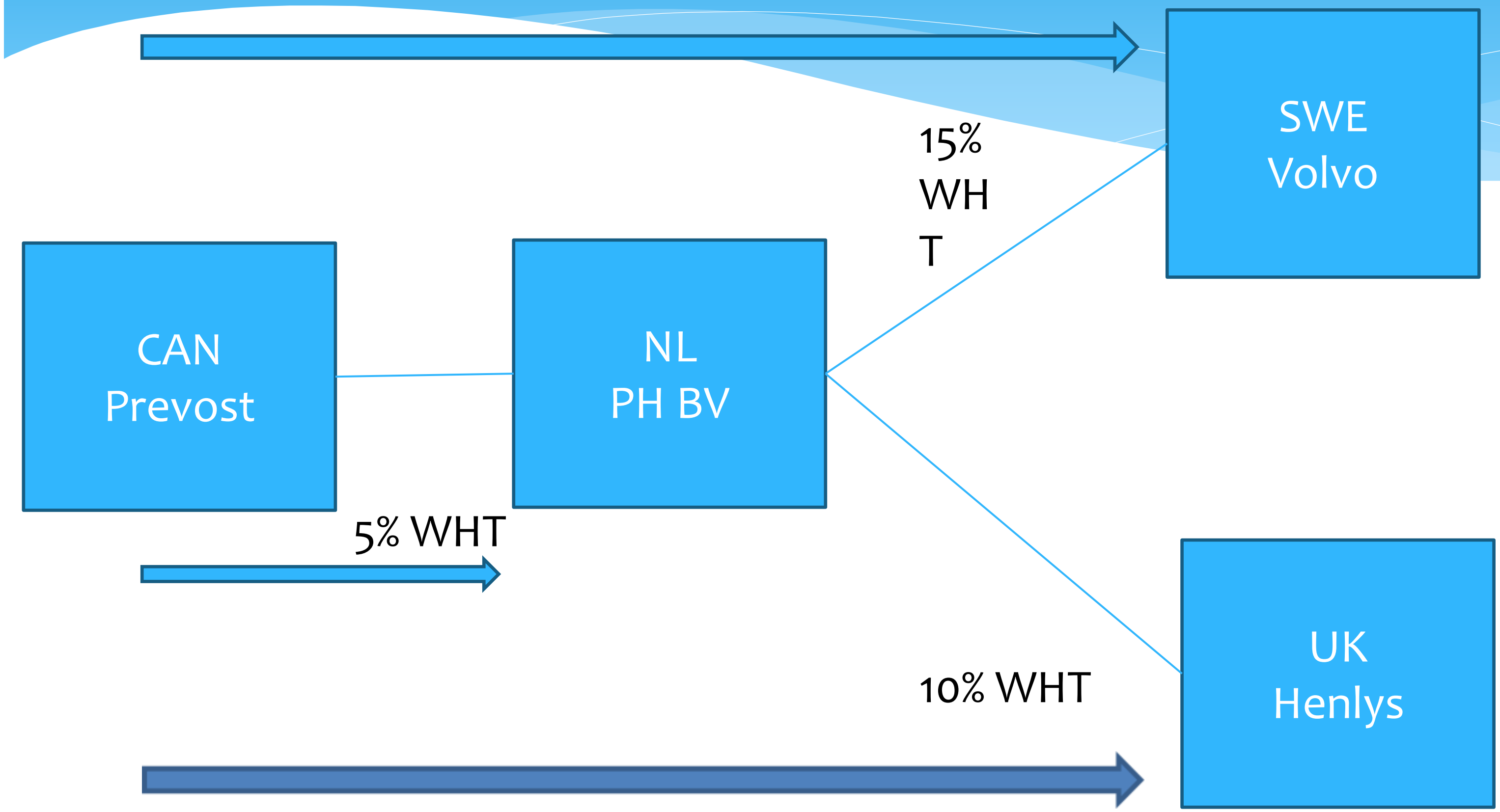
Recent relevant Case Law:

- Royal Dutch Shell Case (1994)
- Bank of Scotland Case (2006)
- Indofood Case (2006)
- Prevost Case (2009)
- Danis Cases (2010,2011)
- A.AS (2012)
- Velcro Case (2012)

INDOFOOD CASE (2006)



Prevost Case (2009)



Criteria for the meaning of beneficial ownership

• Possession:	Dividends received in own bank account.
• Use:	PH BV's deed of incorporation did not obligates it to pay any dividend to shareholders.
• Risk:	The dividends are the property of PH BV and are availabe to its creditors.
• Control:	Neither Henlys or Volvo could take action against PH BV for failure to follow the dividend policiy described as in the shareholders agreement. So, PH BV is in control.

Thank you for your attention.

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