

TTN TAX PRIZE 2015



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Essay



“Beneficial Owner, fit for purposes or does it need to be redefined?”

How did I dealt with it?

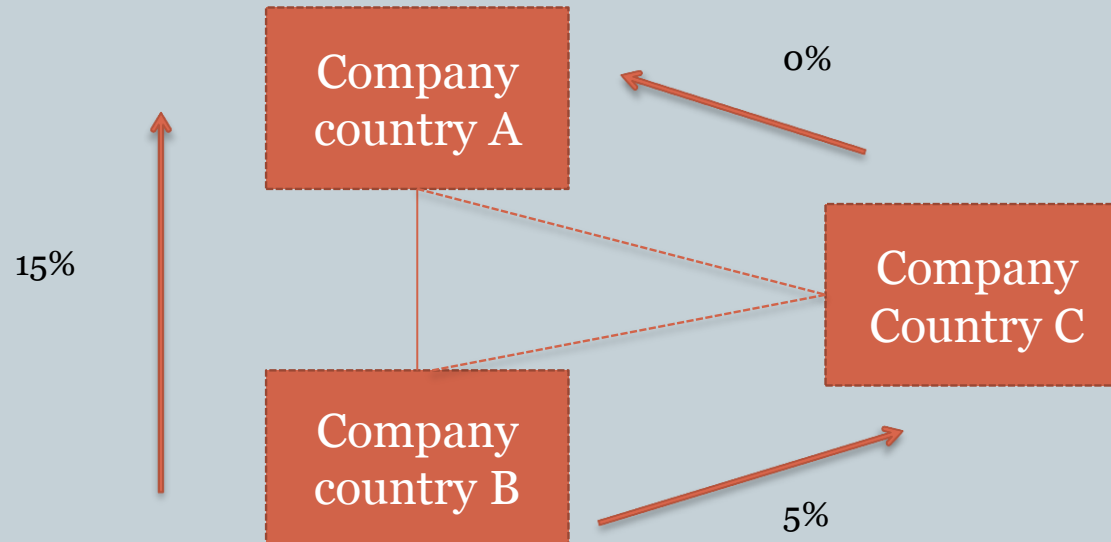


- Beneficial Owner in the OECD Model Tax Convention
- Holding companies and Beneficial Owner
- Case Law on the term Beneficial Owner
- Conclusion

Articles 10-12 OECD Model Tax Treaty



Dividends
Royalties
Interest



MAIN QUESTION:

IS COMPANY C THE BENEFICIAL OWNER?

General background



- **Article 10-12 OECD MODEL TAX CONVENTION**
 - No definition
- **Article 3.2. OECD MODEL TAX CONVENTION**
 - No definition
- **Article 31 – 33 Vienna Convention**
 - Treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the term of the treaty in their context and in the light of its object and purpose

2014 OECD Commentary Update



Beneficial owner:

- has no domestic meaning;
- is related to the words “paid ... to a resident”;
- should be understood in its context;
- also applies to companies; and
- stand-alone approach (article 12.5)

2014 OECD Commentary Update



- One is not the Beneficial Owner if:

The right to use and enjoy the received dividend is **constrained** by a contractual or legal obligation;

- Obligation:
 - Legal documents;
 - Facts and circumstances;
 - Substance.

2014 OECD Commentary Updat



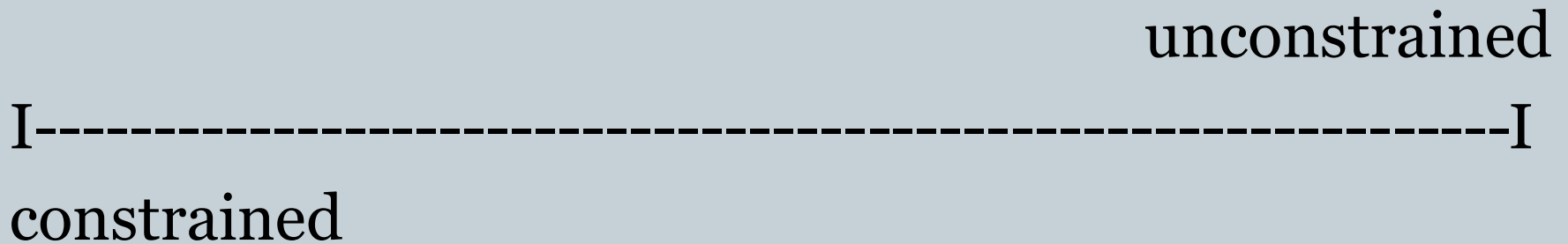
- One is the Beneficial Owner if:

the right to use and enjoy the dividend is **unconstrained** by a contractual or legal obligation to pass on the payment received to another.

Issue

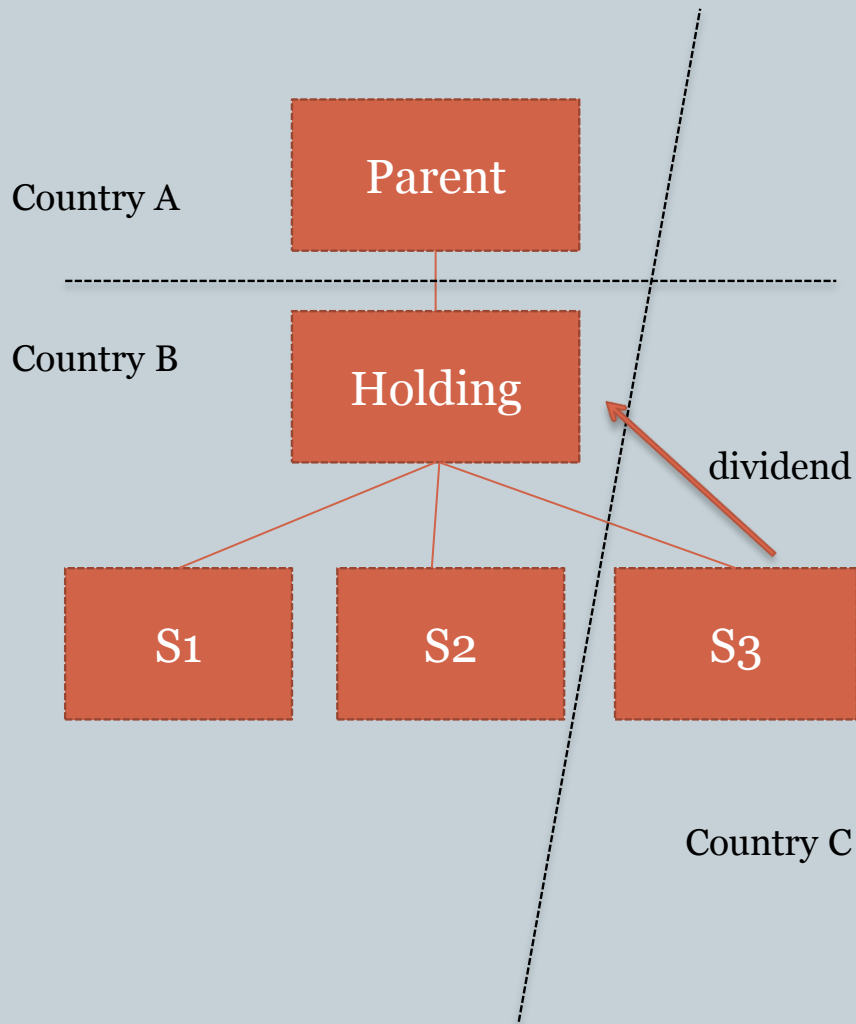


- Wide range of possibilities:



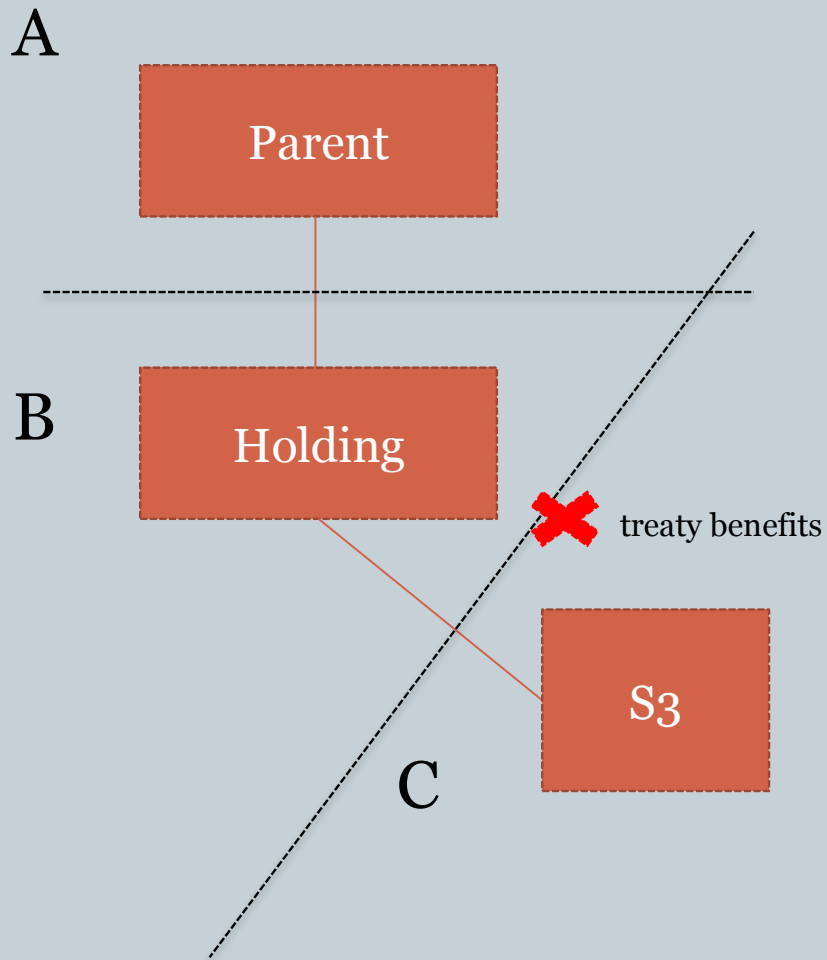
- No examples
- Not very specific and is open to interpretation

Issue



- Parent company has acquired the Holding and S1 and 2 as an acquisition;
- S3 was added as a result of the expanded business;
- S1,S2,S3 are working companies;
- Holding has no employees
- S3 decides to distribute a dividend to Holding

Issue



- Country C is denying treaty benefits
- Reasons given:
 - Holding does not have an operating business;
 - Holding does not have employees;
 - Holding is fully owned by parent company; and
 - When the parent company requires, it will pay dividends to the parent company.

Consequence



- Holding has “on the basis of facts and circumstances, in substance, a constrained right to use and enjoy the dividend.”
- Consequence:
 - Tax authorities are given the possibility to deny treaty benefits on any holding company.

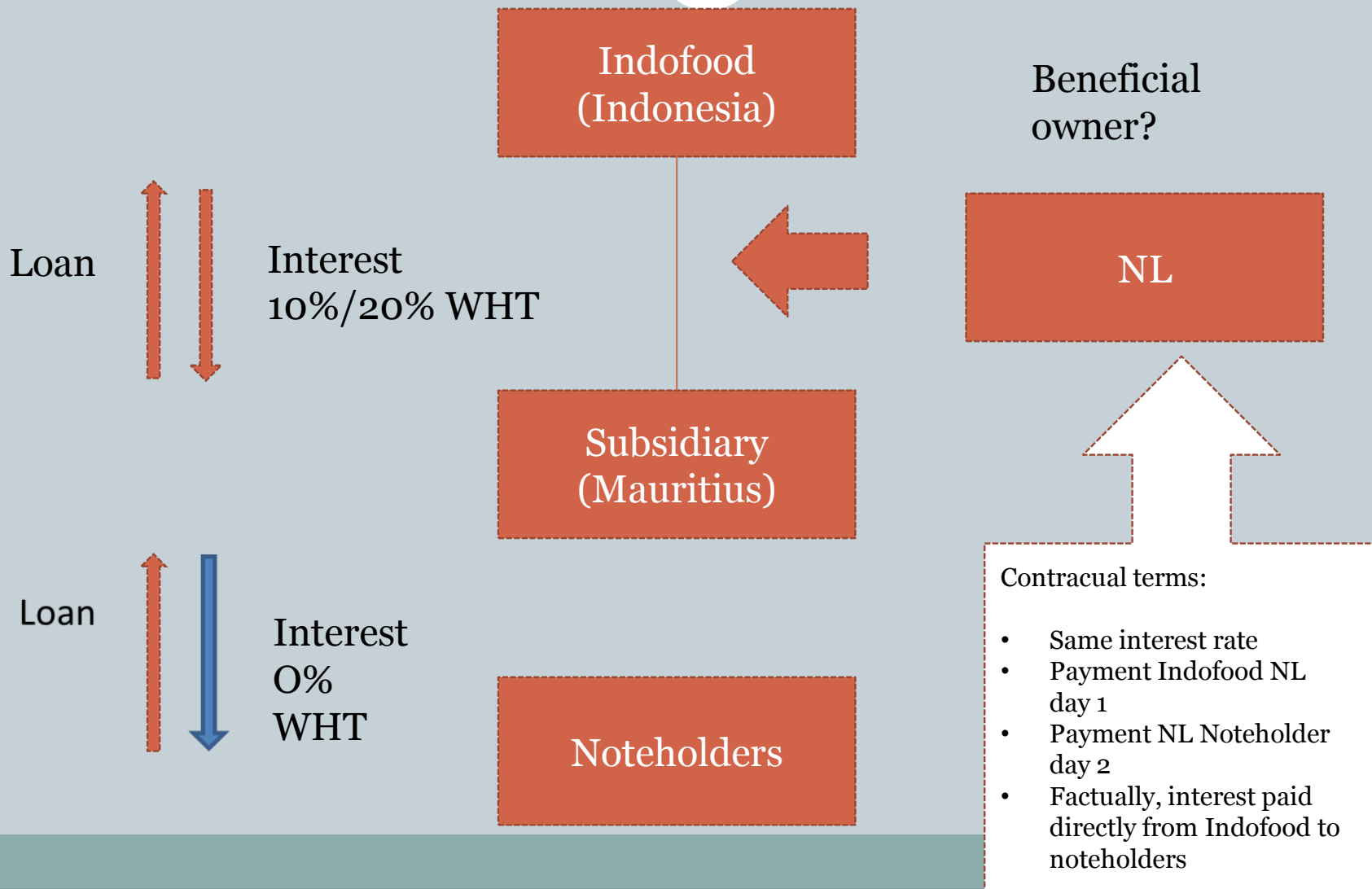
Relevant Case Law



- 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)

14



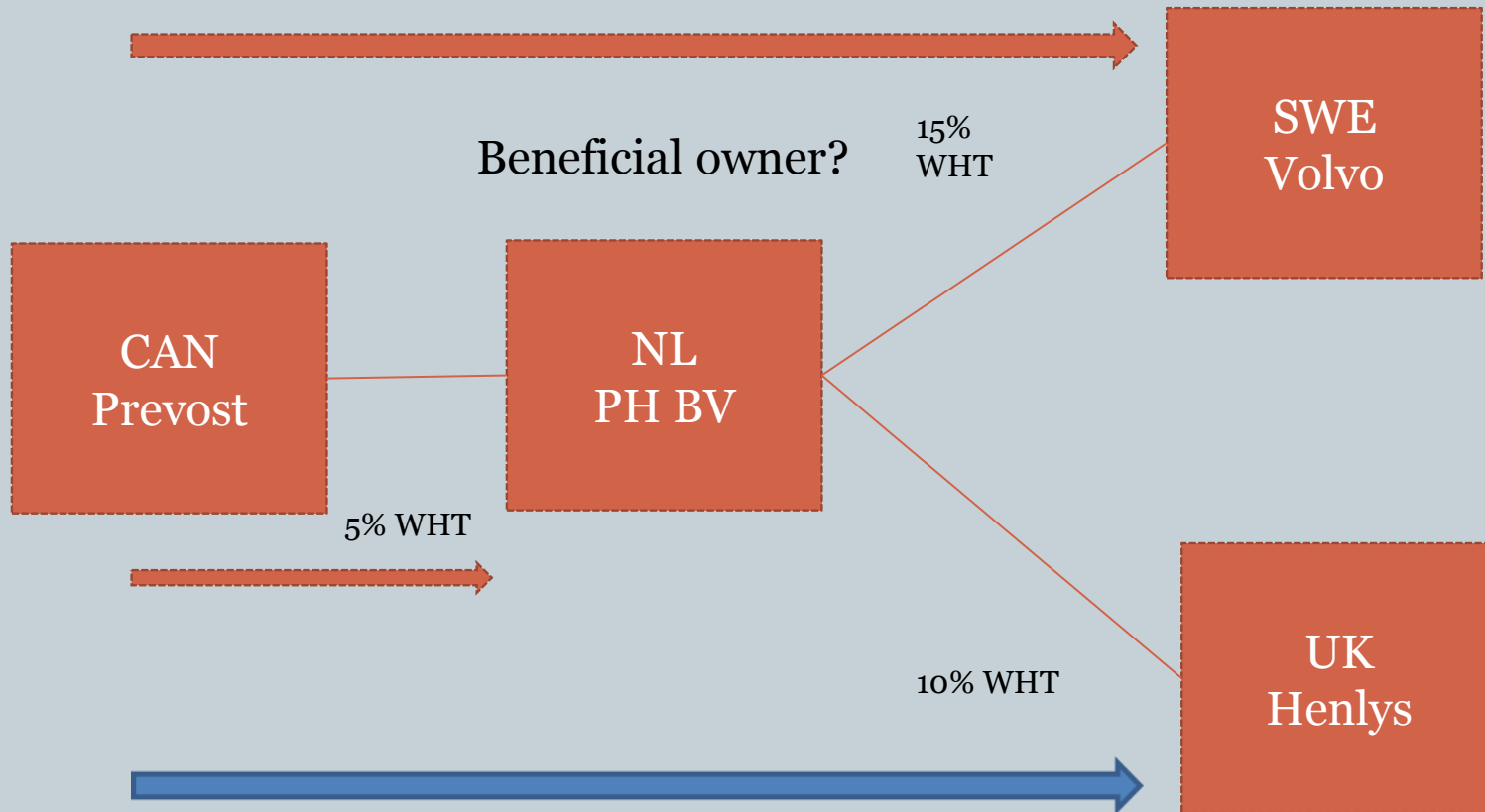
Indofood case (2006)



- Newco is not the beneficial owner:
 - Because the lack of freedom what to do with the interest
- Beneficial Owner should be given an international fiscal meaning

Prevost Car Case (2009)

16

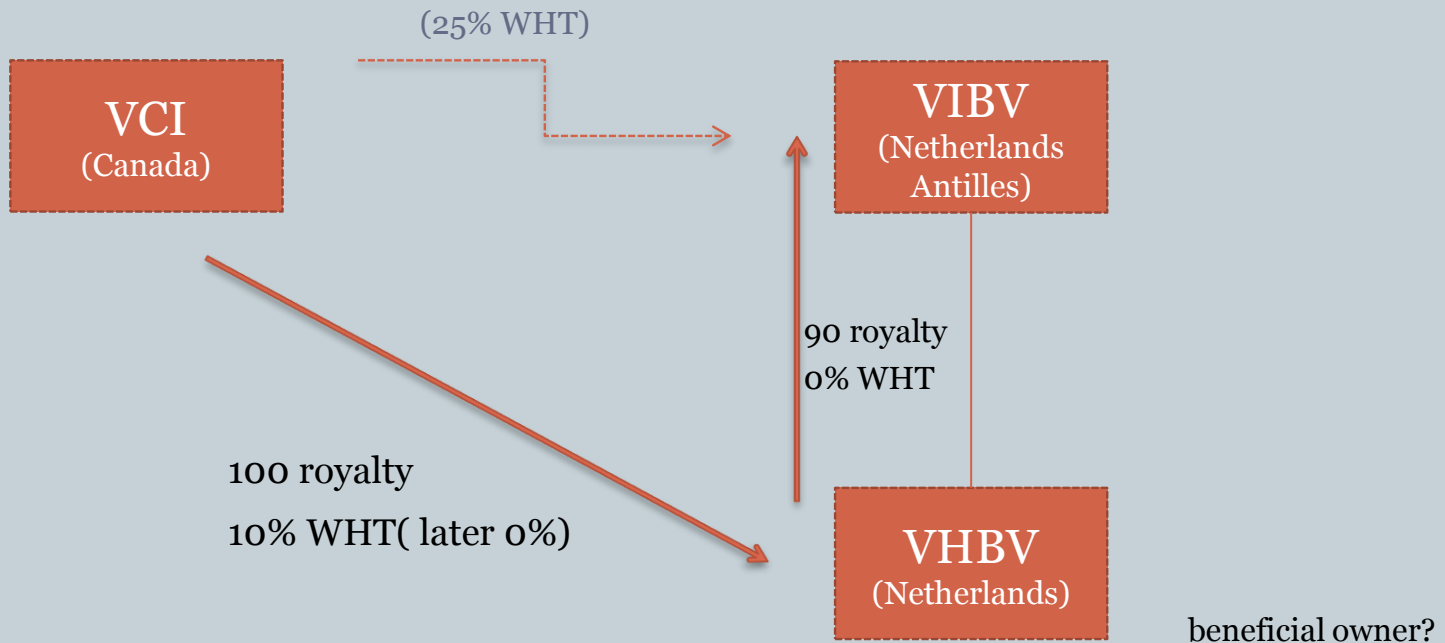


Prevost Car Case (2009)



- The beneficial owner is the person/company who receives the dividends for his own use and enjoyment and assumes risk and control
- **PHBV:**
 - No automatic flow of dividends
 - Available to its creditors
 - Use the dividends as it wishes
 - No party of the shareholders' agreement

Velcro Case (2012)



Velcro Case (2012)



- **Criteria for the meaning of beneficial ownership:**
 - **Possession:** Dividends received in own bank account;
 - **Risk:** The dividends are available to its creditors;
 - **Use and Control:** Pay other outstanding obligations.

Conclusion Case Law



- International meaning
- More specific explanation
- Four elements:
 - Possession;
 - Use;
 - Risk; and
 - Control

Conclusion



- Term B.O causes uncertainty for holding companies;
- It does not fit for purposes;

Redefinition:

- Beneficiary of the dividend, royalties or interest received;
- Strengthened by the four elements from Case Law.

End



Thank you for your attention

-Erik Herkströter-