



Emerging tax issues in the funds sector double tax treaty interpretation

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TAX

The importance of Double Tax Treaties in ASPAC

- Withholding taxes on dividends paid to non-residents are common in the Asia-Pacific

Country	WHT Rate on Dividends under Domestic Tax Law	Best Treaty Rate
Japan	20%	0%
China	10%	5%
Korea	25%	5%-10%
Australia	30% (unfranked dividends)	0%

The importance of Double Tax Treaties in ASPAC

- Many Asia-Pacific countries tax non-residents on gains made on the disposal of non-portfolio investments even where no permanent establishment exists

Country	Gains taxed under Domestic Tax Law?	Potential relief under treaty?
Japan	Yes	Yes
China	Yes	Yes
Korea	Yes	Yes
India	Yes	Yes
Australia	Yes	No

- Intermediate holding company structures are common in the Asia-Pacific and may alleviate the taxes imposed under domestic tax law

OECD model

- Asia-Pacific double tax treaties tend to follow the OECD Model Convention on Income and Capital
- There are 4 Asia-Pacific members of the OECD (Australia, New Zealand, Korea and Japan)
- The OECD Model Convention sets out the positions of 6 non-members in the Asia-Pacific (China, India, Malaysia, Philippines, Thailand and Vietnam)
- The OECD plays an active role in the Asia-Pacific through its outreach program to emerging markets, which makes it influential within the region

Conditions for Treaty Relief – dividends

- There are two basic requirements for companies (beneficiaries) to claim treaty relief in respect of dividends under the OECD Model Convention:
 - The company must be resident in a Contracting State; and
 - The company must be the beneficial owner of the income received from the other Contracting State.

Beneficial Owner

Oxford dictionary meaning

- “Beneficial”
 - Advantageous; having benefits
 - Relating to the use or benefit of property; having rights to this use or benefits

- “Own”
 - Have as property; possess

Beneficial Owner

OECD commentary

- “The term ‘**beneficial owner**’ is not used in a narrow technical sense, rather, it should be understood in its context
- It would be...inconsistent with the object and purpose of the Convention to grant relief through an agency or nominee relationship

Conditions for Treaty Relief – Gains

- The OECD Model Convention provides that:
 - Gains from the “alienation” of any property..... shall be taxable only in the in the contracting State

Alienation

Oxford dictionary meaning

- “Alienate”
 - Transfer ownership of (property) to another person

OECD commentary

- “The words ‘**alienation of property**’ cover capital gains resulting from the sale or exchange of property, the transfer to a company in exchange for stock,, the gift and even the passing of property on death”

Discussion Panel

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Three key issues

- Residence
- Beneficial Ownership – dividends
- Treatment of gains

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