OECD「Revised discussion draft on Action 6 (Prevent Treaty Abuse) of the BEPS Action Plan (BEPS 行動 6 (租税条約の乱用防止に関する改訂討議草案)」に対するコメント

2015年5月22日、経済協力開発機構（OECD）は標記改訂討議草案を公表し、意見募集を開始した。本改訂討議草案は、BEPS（Base Erosion and Profit Sifting:税源浸食と利益移転）行動計画6で要請されているものである。

本行動計画は、2014年3月に第一次討議草案、同年11月にフォローアップワークの討議草案を公表しており、当会はそれぞれに対して意見提出を行った。今回の改訂討議草案は、前回のフォローアップワークで提示した質問に関する検討状況を示すとともに、一部新たな提案をしており、特に派生的受益者基準に関連する新提案（特別税制レジームの取扱い）についてコメントを求めている。

経理委員会では、本改訂討議草案は、モデル条約における LOB 規定が簡略化された点で柔軟性が高まったが、引き続き LOB と PPT 規定の併用となっており、過度に厳格な規定となることで本来的に条約の恩典を受けるべき納税者への影響が懸念されること、また PPT 規定の定義が広すぎるため、税務当局によって解釈が多岐に亘り、執行に差が出ることが予想されること、そしてフォローアップワークの際に募集されたコメントが十分に反映されておらず、改めて改訂討議草案が公表されることを希望することを総論とし、各論点に関する意見を取り纏め、2015 年 6 月 17 日、OECD 宛提出した。

第一次討議草案に対するコメント（2014年4月9日提出）
http://www.jftc.or.jp/proposals/2014/20140409_1.pdf
フォローアップ版に対するコメント（2015年1月9日提出）
http://www.jftc.or.jp/proposals/2014/20150109_1.pdf

政 発 第22 号
2015 年 6 月 17 日

Ms. Marlies de Ruiter
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経理委員会

BEPS 行動 6「租税条約の濫用防止に関する改訂討議草案」に対するコメント

本レターは 2015 年 5 月 22 日付でリリースされた“Revised discussion draft on BEPS Action 6: Preventing Treaty Abuse”に対する一般社団法人日本貿易会（※）としてのコメントを貴会宛提出させていただくものである。

（※）一般社団法人日本貿易会は、日本の貿易商社及び貿易団体を中心とする貿易業界団体であり、その中で経理委員会は、各種税制に対する意見発信を、主な活動内容の一つとしている（末尾に当会経理委員会の参加会社を記載）。

<全般的なコメント>

1. 条約の恩典を享受することのみを目的とした人工的な取引・取極めに対し、条約の恩典を付与することへの制限や、条約が二重非課税を生じさせるために用いられるべきではないことを明確にする OECD の従前からの取組みを改めて支持する。

2. 然しながら、過度な租税回避防止規定を租税条約や国内法に設定することにより、実態を有している取引や投資形態までが不当な取扱いを受け、租税条約の目的である二重課税の排除及びクロスボーダー取引・投資促進の妨げとなることは避けるべきである。今回の Revised Discussion Draft では、モデル条約における LOB 規定が簡略化された点で、柔軟性が高まったが、引き続き LOB と PPT 規定の併用となっており、過度に厳格な規定となることで本来的に条約の恩典を受けるべき納税者への影響が懸念される。

3. PPT の事例では、地域の一定の業務を統括する会社やその目的で投資又は投資管理を行う会社に対しては事業事由が有れば条約の濫用に抵触しないとされた一方、LOB3a)に照らした場合は、引き続き投資管理業は適格者の要件を充足しない可能性が高く、整合性ある規定が求められる。この実態面を重視する PPT において問題のない事例は、LOB 規定のうち X 条 3a)による能動的活動として認定すべきである。更に、納税者の予見可能性を考慮し、地域統括会社や投資管理会社自体を X 条 2 において適格者として認めることが望ましい。

4. PPT 規定の定義が広すぎるため、税務当局によって解釈が多岐に亘り、執行に差が出ることが予想される。当該規定の判定に関しては、租税条約の特典を得ることがその取引の主要な目的の一つ（One of the principal purpose）である場合は特典を否認されると記載されており、正当な Business purpose があるにも拘らず二重課税が生じることを避けるためにも、単に例示に限らず、その適用要件の厳格化・明確化を希望する。又、Para.86 に於いて LOB 規定の discretionary relief 条項に関しても主要な目的の定義の説明が加えられており、これに関しても同様に、正当な Business purpose があるにも拘らず二重課税が生じることを避ける為に、適用要件が厳格化・明確化されることを希望する。

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5. 今回の Revised Discussion Draft のうち、特に 6 月開催予定の Working Party 1(以下、WP 1）の会合で検討するとしている論点 5、6、10 は follow up work の際に募集されたコメントを十分に反映された proposal になっておらず、7 月以降に WP1 会合の結果を踏まえ、改めて Revised Discussion Draft が公表されることを希望する。

＜個別コメント＞

PART 1 - ALTERNATIVE “SIMPLIFIED” LOB RULE AND PRESENTATION OF THE LOB RULE IN THE OECD MODEL

【Paragraph 3】

- 今回提示された”Simplified” LOB 規定第 4 項（能動的事業活動基準）では、2014 年 9 月公表の paragraph 16 of the Report にて提案された LOB 規定案 Subparagraph 3. c）が反映されておらず、以下条文を追加すべきである。
  “4. … c) For purposes of applying this paragraph, activities conducted by persons connected to a person shall be deemed to be conducted by such person. …（略）… In any case, a person shall be considered to be connected to another if, based on all the relevant facts and circumstances, one has control on the other or both are under the control of the same person or persons.”

A. LOB条項に関する論点 (Issues related to the LOB provision)

【Issue 3 ; Commentary on the discretionary relief provision of the LOB rule】

- Part2-A-3 における Discretionary relief 規定に関するコメンタリーにおいて、納税者は事業目的や事業の実態について権限ある当局に立証責任を負っているが、権限ある当局が当該規定の判断を行う際の明確な指針や納税者の立証手段に関する具体的なガイドラインの提示を求める。

- LOB 規定の不適切な解釈・適用により、当該規定により権限ある当局への救済を求める案件が増大されることへの対処についても同時並行的に議論が行われることを期待する。LOB 規定導入後に当該議論が行われる場合、実務上、権限ある当局による救済が困難になる懸念がある。

【Issue 6 ; Issues related to the derivative benefit provision】

- equivalent beneficiaries による保有割合を 95%以上とする当初案が、今回の LOB 規定における general element では 75%以上に変更されている点は我々のコメントが反映されており歓迎する。

- 一方、equivalent beneficiaries の条件に、源泉地国と第三国間の限度税率が当該条約の限度税率と同等以上とあるが、当該条件を充足しなかった場合、当該受益者は派生的受益者とならないため、源泉地国の国内税率が適用される。これは従来より我々が指摘している点であり、para.49におけるパブリックコメントとしても掲載されているが、proposal として反映がされていないので再度検討願いたい。　仮に当該国内税率が源泉地国と第三国間の限度税率よりも高率である場合、派生的受益者条項は一種の bona fide Provision であることに鑑みると、不合理である。従い、斯様な場合には少なくとも当該国内税率ではなく、源泉地国と第三国間の限度税率が適用されるべきであり、例えば、米英租税条約の technical explanation においても同内容を認容しているように、モデル条約においても対応されるべきである。

- Special tax regimes がモデル条約第3条にて定義付けられた上で、関連する第11,12,21条にて言及されているが、当該 Special Tax Regimes の導入は、派生的受益者条項をモデル条約に盛り込むことを前提とすべきである。また導入にあたっては他の行動計画との整合性・重複に配慮し、慎重に議論されるべきである。

- Proposal 1 における special tax regimes の定義は曖昧かつ広範囲（”including through reductions in the tax rate or the tax base”）であり、健全な経済活動を阻害しかねないため、BEPS 対策の根幹である、”single taxation”の主旨から、”to generate stateless income or double non-taxation”に変更することで明確かつ限定的な内容とすべきである。

- Proposal 2 において、条約締結後に一方の締結国がその居住者の国外源泉所得を実質的にすべて免税とする場合、関連条項は失効するという文言を条約に盛り込むことを提案している。但し、条約締結後の事後的改定による経済的影響は納税者が当初から租税回避目的で実施した取引又は投資ではないため、条約濫用防止の主旨を逸脱することから削除されるべきである。加えて、Proposal 1 の special tax regimes の対象外の一つである“ⅲ）二重課税排除目的”の一つに国外源泉所得免税制度がある点を比較考慮すると、その判断に不確実性が伴うことからも同文は削除されるべきである。

【Issue10. Clarification of the “active business” provision】

1）持株会社の取扱い

- 2015年3月の Working Party 1 会合にて懸念(concerns)が示されている通り、「自己の勘定のために投資を行い又は管理する活動」が一律に「能動的事業活動」の範囲から除外されることに、強い懸念を表明する。ある法人の投資または管理活動が、実質的な経済機能を有し、投資先の価値向上に資する意思決定や支援活動を含む実際の事業を行っているのであれば、当該活動は能動的事業と考えられるべきである。これは、PPT 規定 Para.98 の Example G、H における考え方とも整合しており、投資及び投資管理活動に

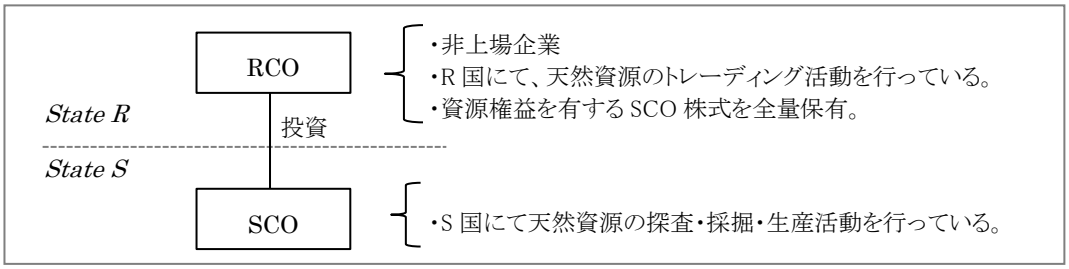
係る租税条約の適用上、LOB と PPT 規定との間で取扱いに差異が生じることは合理的ではない。

- ある事業が能動的に実行されているかどうかは全ての事実関係を考慮して判断すべきであり、業種により機械的に区別することは公平な国際競争を歪めることに他ならない。
- 上記より、Para.72 上の LOB 規定の 3.(a)括弧書きについては、当該括弧書きを削除するか、“other than the passive activity of mere holding investments for the resident’s own account.”との文言に修正することを提案する。

2) 同一法人が投資とその他の能動的事業を行っている場合

- Para.71 にて、例えば同一法人が投資と製造活動を行っている場合の”事業”のコンセプトをコメンタリーの中で明確化すべき点について言及されているが、同一法人が複数事業を行うことは多く、能動的事業を含む複数の事業が相互に関連している場合には、全体として能動的活動が遂行されているものとして取り扱われるべきである。
- 例えば以下の事例において、RCO は R 国内での能動的事業に加え、SCO の株式を保有しているが、RCO の事業遂行上、SCO の株式保有は一体不可分であり、RCO の事業全体として能動的事業を遂行していると判断することが合理的である。

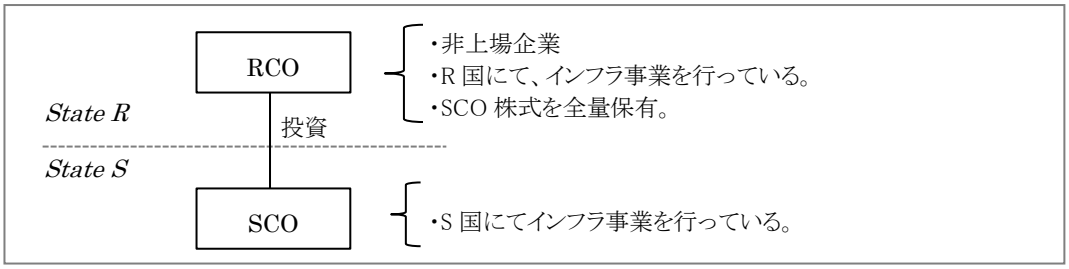
事例1 同一法人がトレーディングと投資を行うケース
（RCOのトレーティング活動とSCOの生産活動とでは事業が異なるが、一体不可分の関係の場合）



- RCO は R 国の居住者であり、非上場企業である。RCO は、洗練された商品取引所の存在、スキルの高い人材の確保可能性、信頼できる法体系、事業を行い易い環境等といった税目的外の明確な事業理由により、R 国にて天然資源のトレーディング活動を能動的に行っており、当該事業を遂行するのに十分な経済実体を有している。
- また、RCO は、S 国にて天然資源の権益を有する SCO の株式 100%を保有し、SCO では当該天然資源の探査、採掘、生産活動を行っている。RCO は、国際市場の状況、顧客のニーズやその他経済的要素を考慮して、生産された資源を RCO が仕入れ、R 国及び第三国の顧客向けに販売するか、商品取引所を通じて販売するか、或いは、SCO より直接顧客に販売するか等の最適化を含む事業戦略を練り、企業グループ全体としての事業価値の向上を図っている。
- RCO の事業遂行にとって、SCO の投資管理は一体不可分である。

事例2 同一法人がインフラ事業と投資を行うケース

（RCOとSCOは其々の国でインフラ事業活動を行い事業体は異なるが、事業に関連性がある場合）



- RCO は R 国の居住者であり、非上場企業である。RCO は R 国においてインフラ事業を行っており、当該事業を遂行するのに十分な経済実体を有している。
- また、RCO は、S 国にてインフラ事業を行う SCO に投資し、その株式 100%を保有している。RCO と SCO はそれぞれのインフラ事業に関する情報やノウハウを相互に共有し、企業グループ全体として事業価値の向上を図っている。
- RCO の事業遂行にとって、SCO の投資管理は一体不可分である。

3）能動的事業活動テストの判定単位（関連者の活動結合）

- 能動的事業活動テストは、個々の事業体ベースではなく「企業グループ単位」で行うべきである。事業リスクの遮断・分散という明確な non-tax business reason により、複数の事業を法的に区分された事業体に細分化せざるを得ない場合がある。また、例えば資源やインフラ事業の場合、事業成否の重要な鍵となるのは、プロジェクトファイナンスを組成できるかどうかという点であるが、当該ファイナンス組成の殆どのケースにおいては、倒産隔離や担保資産の明確な区分の観点から、第三者金融機関より個別事業体の設立が求められる。しかし、事業体を細分化するとしても、企業グループ全体としては、事業運営効率化や事業ノウハウ蓄積の観点から、各事業体に共通の役員を任命し、各事業を一体不可分として運営する体制を構築する場合が多い。
- 上記のような純粋な税目的外事由による事業細分化が現実ビジネスにおいて一般的に行われているということを考慮し、active business test の適用に際しては、各事業体単独ベースでの検証に加え、「居住地国における当該多国籍企業グループ全体で能動的事業を行っているか否かを判定する基準」を追加することを提案する。
- また、同じ観点から、Para.72 で the Delegate of the United States から提案された LOB 条文案 3.(c)については、関連者(connected party)に該当する以上、居住者(resident)と当該関連者(connected party)の事業の間には一定の関連性が有るものと考えられ、2014 年 9 月の the Report Para.16 同様、”only if…such other persons are engaged in the same or a similar line of business”との文言は不要であると考えられる。或いは、コメンタリーにおいて、“If business activities carried on by connected parties constitute complementary functions that are part of a cohesive business operation, for example where a resident and the connected party appoint the same director who designs the business strategy, manages the operations, and makes business decision to enhance the enterprise value of both ones efficiently

and effectively, it is considered to be engaged in the same or a similar line of business”という一文を追記することを提案する。

4)その他

- LOB 条項の導入に伴い、条約上の恩典適用手続きについても資料提出などにおいて納税者に過度な事務負担が生じることがないように、国家間で統一的な対応が行なわれることをガイドライン等により勧告することを求める。

B. PPT 規定に関する論点 (Issues related to the PPT rule)

【Issue 12 ; Inclusion in the Commentary of the suggestion that countries consider establishing some form of administrative process ensuring that PPT is only applied after approval at a senior level】

- PPT 規定は、課税当局に広範な課税権限を付与し、納税者による恩典適用を制限し得る制度である為、その適用に際しては、課税当局における明示的且つ厳格な承認プロセスを経て適用されるべきである。Para.78 にも記載の通り、PPT 適用に係る画一的な承認プロセスを採用することは理解するが、Para.79 にて提案されている新設コメンタリー（Para. 14.1）の最終センテンスを、下記の通り修正することを提案する。

  “States ~~may wish~~ ***are required*** to establish a similar form of administrative process that would ensure that paragraph 7 is only applied after approval at a senior level within the administration ***in accordance with the administrative procedures and organization of each State.***”

【Issue 16 ; Drafting of the alternative “conduit-PPT rule”】

- conduit-PPT rule の説明が具体的事例に変更された点は納税者の予見可能性が高まることから歓迎する。但し、Example D において、“If, however, RCO’s decision to lend to SCO was dependent on TCO providing a matching collateral deposit to secure the loan so that RCO would not have entered into the transaction on substantially the same terms in the absence of that deposit, the facts would indicate that TCO was indirectly lending to SCO by routing the loan through a bank of State R and, in that case, the transaction would constitute a conduit arrangement.”とあるが、” so that RCO would not have entered into the transaction on substantially the same terms in the absence of that deposit“は one of principal purpose for a reduction of the tax という側面ではなく、外部資金調達ソースの拡充や流動性の安定的確保といった、適正なグループファイナンスを遂行する上で必要な金融機関との契約である。また、社内外への Deposit や金銭債務保証行為はグループファイナンスでは通常であることから、一方的な見解である。従い、” If, however, RCO’s decision”以下の文章は削除すべきである。

【Issue 17 ; List of examples in the Commentary on the PPT rule】

- Example H は、TCO は R 国に RCO のみを設立する事例だが、多国籍企業グループにおいては、上記の通り、事業戦略及びリスク管理上、R 国において RCO のみに多岐に渡る事業を集約させることは望ましくないと判断し、RCO の事業を細分化し、R 国にて事業ごとに複数の子会社を設立することがある。従い、Example H の後に、以下の事例を追加することを提案する。

- Example H-2: In contrast with Example H, TCO fragments business in State R and establishes 5 subsidiaries in State R, namely R1CO, R2CO, R3CO, R4CO and R5CO, which carries on wholesaling, retailing, manufacturing, financing and domestic and international investments, respectively. R5CO undertakes the development of new business activities in Sate S, and for that purposes, contributes equity capital and makes loan to SCO. The fragmentation of the business in State R derives purely from non-tax business reasons such as bankruptcy remoteness or simplification of the decision making process and, even after the fragmentation, all business activities constitutes complementary functions that are part of a cohesive business operation. The other facts and assumptions are same as Example H.

- In this example, the only difference with Example H is the fragmentation of the RCO business which is carried on by 5 separate companies, based on clear non-tax business reasons, whereas the other assumptions are exactly same as Example H. Hence, R5CO's financing of SCO through equity and loans should be considered part of RCO's active conduct of a business in State R. In this regard, paragraph 7 would not apply to these transactions, either.

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Japan Foreign Trade Council, Inc.

Comments on Discussion draft on Action 6 (Prevent Treaty Abuse) of the BEPS Action Plan

The following are the comments of the Accounting & Tax Committee of the Japan Foreign Trade Council, Inc. (JFTC) in response to the invitation to public comments by the OECD regarding the "Revised discussion draft on BEPS Action 6: Preventing Treaty Abuse".

The JFTC is a trade-industry association with Japanese trading companies and trading organizations as its core members. One of the main activities of JFTC's Accounting & Tax Committee is to submit specific policy proposals and requests concerning tax matters. Member companies of the JFTC Accounting & Tax Committee are listed at the end of this document.

<Overall Comments>

1. We support measures for denying the benefits of tax treaties to treaty shopping, and artificial transactions and arrangements aimed solely at securing the benefits of a tax treaty. We also support provisions explicitly stating that tax treaties are not intended for use in generating double non-taxation.

2. However, excessively strong anti-avoidance rules introduced into tax treaties and domestic laws may result in unfair treatment of substantive transactions and investments, which should be avoided. In the revised discussion draft, the model tax treaty has become more flexible due to the simplified LOB rule. However, the LOB rule and PPT rule are still used simultaneously and this may result in negative effects for taxpayers who should essentially enjoy the benefits of a tax treaty.

3. In the examples of PPT, so-called “regional headquarters” and companies who provide investment management services to related companies do not contravene the treaty abuse if there are business reasons. However investment management work may not satisfy the conditions for being considered a qualified person for LOB. Consistency between the two rules is required. The examples of cases that present no problem as regards PPT, which emphasizes actual conditions should be listed under the “active business provision” in Paragraph 3 a), Article X of the model tax treaty of the LOB rule. In addition, it would be better for the regional headquarters and investment management companies to be clearly listed under “qualified person” stated in Paragraph 2, Article X.

4. Since the provisions of the definition of PPT are too wide, tax authorities may determine one of the principal purposes of an arrangement in an arbitrary manner without clear criteria or objective analysis, resulting in an excessively restricted application of the treaty. There is a concern that the expression “one of the principal purposes” contained in the examples of a Conduit Arrangement in Part 2-B-16 may leave room for the competent authorities to interpret these purposes at their discretion. In such cases, the treaty benefits may be disclaimed and double taxation may arise in spite of the existence of legitimate business purposes. Therefore, we request a clarification of the conditions in which treaty benefits would apply that goes beyond a simple recitation of examples. Also, the definition of “one of the principal purposes” is newly added in Paragraph 86 regarding the discretionary relief provision of the LOB rule. We request a clarification of the conditions for this case as well to avoid double taxation.

5. The revised discussion draft does not sufficiently reflect the comments of follow-up work, especially with regard to issues 5, 6, and 10, which are expected to be discussed at the meeting of Working Party 1 (hereinafter referred to as “WP1”) in June. Thus, we would like to request a re-publication of the revised discussion draft in July or later that would include the results of the meeting of WP1.

<Specific Comments>

PART 1 – ALTERNATIVE “SIMPLIFIED” LOB RULE AND PRESENTATION OF THE LOB RULE IN THE OECD MODEL

- The alternative "simplified" LOB rule does not reflect Subparagraph 3.c which was proposed in Paragraph 16 of the Report on the Work on Action 6 ("Preventing the Granting of Treaty Benefits in Inappropriate Circumstances") of the BEPS Action Plan (hereinafter "the Report"). Accordingly, the following sentence should be added to Subparagraph 4 of the rule.

  "4. … *c) For purposes of applying this paragraph, activities conducted by persons connected to a person shall be deemed to be conducted by such person… (omitted)… In any case, a person shall be considered to be connected to another if, based on all the relevant facts and circumstances, one has control over the other or both are under the control of the same person or persons.*"

PART 2 – ISSUES IDENTIFIED IN THE NOVEMBER 2014 DISCUSSION DRAFT

A. Issues related to the LOB provision

[Issue 3. Commentary on the discretionary relief provision of the LOB rule]

- In the commentary on the discretionary relief provision in Part 2-A-3, taxpayers are responsible for proving their legitimate business purposes and the substance of these to the competent authorities. In such conditions, we request that clear guidelines be provided by which the competent authorities will judge whether discretionary relief should be applied to taxpayers. We also request guidelines on how taxpayers can prove business purposes and substance to the competent authorities.

- We expect that there will be opportunities for discussions on how to deal with the likely increase in the number of requests to the competent authorities for giving relief in cases of inappropriate applications of LOB, along with discussions regarding the LOB rules. We are concerned that it might be difficult for the competent authorities to discuss relief after the LOB rules have been fixed in Action Plan 6.

[Issue 6. Issues related to the derivative provision]

- We welcome the fact that the portion of shares possessed by equivalent beneficiaries, which was proposed to be at least 95 percent in the initial draft, has now been changed to 75 percent in the general elements of the LOB rule, which we believe reflects our comments.

- On the other hand, one of the conditions for being considered an equivalent beneficiary states that the maximum tax rate between the source country and the third country should be at least equivalent to the maximum tax rate under the relevant treaty. Unless the condition above is satisfied, the said beneficiary will not be regarded as a derivative beneficiary and the domestic tax rate of the source country will be applied. This issue was raised in our previous public comments and has also appeared as a public comment on Paragraph 49. Since these comments have not yet been reflected as proposed, we would like to request a reconsideration of this point. As it stands, the proposed condition would yield an unreasonable outcome, given that the equivalent beneficiary provision is a type of bona fide provision. In such instances, therefore, the tax rate applied should be that of the tax treaty applied in a case where the ultimate beneficial owner has made an investment directly. As an example of this approach, this treatment is accepted in the technical explanations of the US-UK Tax Treaty and in court cases in certain states, and should be appended to the OECD Model Tax Convention.

- "Special tax regimes" are defined in Article 3 of the model tax treaty and mentioned in the related articles 11, 12 and 21. Introduction of this special tax regime should be based on the premise that the derivative beneficiary provision will be included. In addition, consistency and overlap with other action plans must be carefully considered.

- The definition of special tax regimes in Proposal 1 is vague and extensive ("including through reductions in the tax rate or the tax base") and is likely to disturb sound economic activities. To preserve the original intent of single taxation, which is fundamental to the BEPS project, this definition should be revised to read "to generate stateless income or double non-taxation," making it clearer and more specific.

- In Proposal 2, it is proposed to include in the provision a sentence to the effect that related provisions will be ineffective if the other country virtually exempts the foreign source income of residents from taxation after conclusion of the treaty. However, since the economic effect of any amendment made after the conclusion of the treaty is not related to transactions or investments made by taxpayers for the purpose of tax avoidance, this phrase should be deleted as it departs from the main point

of preventing tax abuse. Additionally, when this clause is considered in light of the inclusion of a territorial taxation system in "iii) the purpose of excluding double taxation," as one of the examples of cases where a special tax regime would not apply, the sentence makes judgments more uncertain and should therefore be deleted.

[Issue 10. Clarification of the "active business" provision]

1) Treatment of holding companies (management of investments)

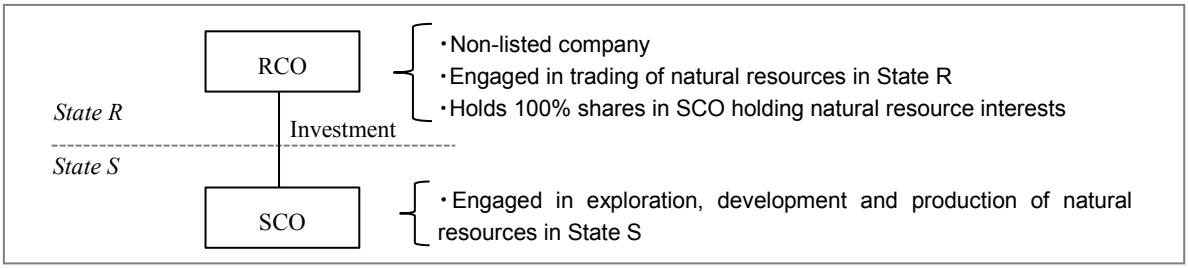
- Following the raising of concerns by some delegates at the March 2015 meetings of WP1, we would like to express strong concerns regarding the automatic exclusion of "the business of making or managing investments for the resident's own account" from the definition and scope of "active business." If the resident's business of making or managing investments involves substantive economic functions and the resident is actually engaged in real business including decision-making or management support which would enhance the investee's enterprise value, such business should be considered as "active business." This treatment is consistent with Example G in Paragraph 98, and it would not be reasonable for the tax treaty's application regarding the business of making or managing investments to differ between the LOB and the PPT rules.
- Any decision on whether a certain business is conducted actively should be made based on all the relevant facts and circumstances. We are concerned that an automatic determination based on industrial categories might distort fair global competition.
- Considering the above, in relation to Subparagraph 3 a) of the LOB rules proposed in Paragraph 72, we suggest either deleting the sentence in parentheses, or revising it to read as follows: "(other than *the passive activity of merely holding investments* for the resident's own account . . .)".

2) Cases where the same company carries on both investment and other active business

- In relation to Paragraph 71, it is quite usual for the same company to carry on several lines of business, and we believe that if these various lines of business, including the active business, are related to one another and constitute a cohesive business operation, the company's activities as a whole should be considered as constituting the "active business."
- In the example below, RCO holds shares in SCO, in addition to its active business in State R. As the investment in SCO is part of the cohesive business activities of RCO, it is reasonable to determine that the overall

activities of RCO as a whole constitute the active conduct of a trade or business.

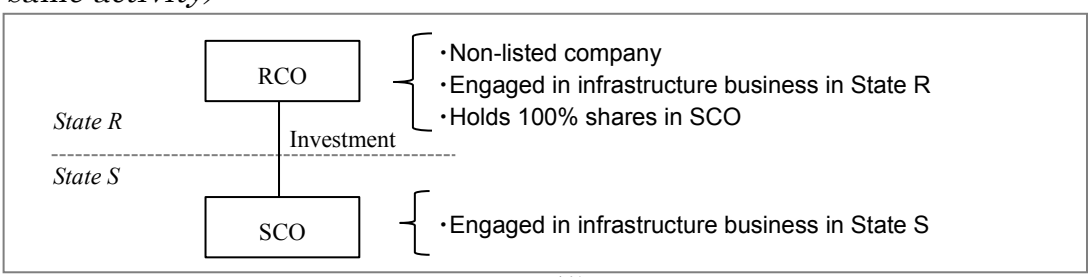
Example 1 *Case where the same company carries on trading and investment (The business of the companies differ, but they are related and inseparable)*



- ✧ RCO, a company resident in State R, is a non-listed company. RCO is actively engaged in the business of trading natural resources with substantial economic substance, and located in State R, for non-tax business reasons such as the existence of a sophisticated commodity exchange, the availability of highly skilled personnel, a reliable legal system, and a business-friendly environment.
- ✧ In addition, RCO holds 100% shares in SCO, which is engaged in the exploration, development and production of natural resources under license in State S. RCO analyzes the status of the international market, the demands of its customers, and other economic considerations affecting natural resources, and develops a business strategy to enhance the RCO group's enterprise value as a whole. Such a strategy includes determining the transaction flow, e.g. RCO purchases products from SCO and sells them to customers in State R or third countries or sells through a commodity exchange, or SCO sells to customers directly.
- ✧ As above, RCO's management activities regarding its investment in SCO should be considered part of the RCO's cohesive business operations integral to its trading business in natural resources.

Example 2 *Case where the same company carries on infrastructure business and investment*

(The companies form individual businesses in each country, but perform the same activity)



- ✧ RCO, a company resident in State R, is a non-listed company. RCO is engaged in the infrastructure business in State R, with substantial economic substance.
- ✧ In addition, RCO holds 100% shares in SCO, which is engaged in the infrastructure business in State S. RCO and SCO share relevant information and know-how regarding the infrastructure business, and collaborate to enhance the group's overall enterprise value.
- ✧ RCO's management activities for its investment in SCO are considered to be part of the RCO's cohesive business operations in the infrastructure business.

3) Level of assessment for the active business provision

- ➢ The active business test should be applied on a corporate group (consolidated) basis, rather than assessing the individual entity on a stand-alone basis. There are cases where legally separate entities need to be incorporated to carry on segregated business, for non-tax business reasons such as diversification and consolidation of business risks. In addition, in fields such as natural resources and infrastructure, in which the organization of project finance is key to the success of the business, third-party financial institutions often request incorporation of a legally separate entity on a project-by-project basis from the perspectives of bankruptcy remoteness or clear distinction of the secured assets. Nevertheless, even if the separated entities are incorporated for finance purposes, in many cases cohesive business operations or structures are implemented, e.g. through appointment of the same directors to each entity, for effective and efficient business operations, and concentration of know-how, etc.
- ➢ Taking into account the actual business practice of business fragmentation motivated purely by non-tax business reasons, when the active business provision is applied, we suggest adding criteria for determining whether a corporate group is engaging in active business in the resident jurisdiction with reference to the entire corporate group, in addition to assessing individual entities on a stand-alone basis.
- ➢ From the same perspectives, in relation to Subparagraph 3. c) of the LOB rules proposed in Paragraph 72, we would like to suggest deleting the sentence that reads "only if…such other persons are engaged in the same or a similar line of business," similar to Paragraph 16 of the Report, on the grounds that some relationship necessarily exists between the businesses of

the resident and the connected party if the "connected party" conditions are met. Alternatively, we suggest adding the following sentence to the relevant Commentary.

"If business activities carried on by connected parties constitute complementary functions that are part of a cohesive business operation, for example where a resident and the connected party appoint the same director who designs the business strategy, manages the operations, and makes business decisions to enhance the enterprise value of both parties efficiently and effectively, both parties shall be considered to be engaged in the same or a similar line of business."

4) Others

- We request guidelines on common procedures among all countries in applying treaty benefits following the introduction of the LOB provisions in the treaties so that tax payers are not subject to an excessive administrative burden.

B. Issues related to the PPT provision

[Issue 12. Inclusion in the Commentary of the suggestion that countries consider some form of administrative process ensuring that the PPT is only applied after senior approval]

- As the PPT rule grants tax authorities broad taxation powers and may restrict taxpayers' use of treaty benefits, an explicit and strict administrative process should be established and implemented by the tax authorities when the PPT rule is introduced. On the other hand, we understand that administrative procedures and organizations relating to taxation differ in each country, making the adoption of a single approach difficult. In this regard, we would like to suggest revising the last sentence of the new Paragraph 14.1 of the Commentary (proposed in Paragraph 79) as below.

  "States ~~may wish~~ *are required* to establish a similar form of administrative process that would ensure that paragraph 7 is only applied after approval at a senior level within the administration *in accordance with the administrative procedures and organization of each State*."

[Issue 16. Drafting of the alternative "conduct-PPT rule"]

- We welcome the fact that the explanation of the conduit-PPT rule has been changed to include concrete examples, since this will increase predictability

for taxpayers. However, in Example D, it is stated that "If, however, RCO's decision to lend to SCO was dependent on TCO providing a matching collateral deposit to secure the loan so that RCO would not have entered into the transaction on substantially the same terms in the absence of that deposit, the facts would indicate that TCO was indirectly lending to SCO by routing the loan through a bank of State R and, in that case, the transaction would constitute a conduit arrangement." However, the comment to the effect that "RCO would not have entered into the transaction on substantially the same terms in the absence of that deposit" relates not to "one of principal purposes for a reduction of the tax," but rather to a contract with a financial institution when carrying out appropriate financing as a group, such as expanding sources of external capital financing and ensuring stable liquidity. Also, since both internal and external deposits and guarantees of monetary liabilities are usual parts of group finance, this explanation in the revised discussion draft is a one-sided opinion. Thus, the sentences following "If, however, RCO's decision" should be deleted.

[Issue 17. List of examples in the Commentary on the PPT rule]

- Example H refers to a case where TCO establishes RCO only in State R. On the other hand, as stated above, many MNE Groups fragment their business into several lines and incorporate separate entities for each business line in State R, as part of their business strategy and for risk management purposes. In this regard, we would like to suggest adding the following "Example H-2", just after Example H.

  Example H-2: In contrast with Example H, TCO fragments business in State R and establishes five subsidiaries in State R, namely R1CO, R2CO, R3CO, R4CO and R5CO, which carry on wholesaling, retailing, manufacturing, financing and domestic and international investments, respectively. The fragmentation R5CO undertakes the development of new business activities in State S, and for that purpose, contributes equity capital and makes loans to SCO. The fragmentation of the business in State R derives purely from non-tax business reasons such as bankruptcy remoteness or simplification of the decision-making process and, even after the fragmentation, all business activities constitute complementary functions that are part of a cohesive business operation. The other facts and assumptions are same as in Example H.

  In this example, the only difference with Example H is the fragmentation of the RCO business, which is carried on by five separate companies, based on clear non-tax business reasons. All the other assumptions are exactly the

same as in Example H. Hence, R5CO's financing of SCO through equity and loans should be considered part of RCO's active conduct of a business in State R. In this regard, Paragraph 7 would not apply to these transactions, either.

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