論　説

第２回ＩＦＡ日中韓セミナー

―セミナー議題３（「送金と源泉税」）を巡る議論―

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◆SUMMARY◆

平成 20 年 6 月 12 日及び 13 日の両日、IFA（International Fiscal Association、国際租税協会）日中韓三カ国国際租税セミナーがソウルにおいて開催された。本セミナーで採り上げられたのは、議題 1「中国・日本・韓国における最近の税務の動向」（Recent Tax Developments in Chain, Japan and Korea）、議題 2「移転価格と恒久的施設課税」（Transfer Pricing and PE Taxation）、議題 3「送金と源泉税」（Remittance and Withholding Tax）であった。

本セミナーの議題 3 に関しては、日本からの発表者として、国税庁・税務大学校を代表して松田教授が出席し、プレゼンテーション・ディスカッションを行った。

本稿は、主に、同教授の発表内容と質問への回答の概要を報告するものである。

（税大ジャーナル編集部）

目　　次

１．セミナーの議題・参加者等

平成 20 年 6 月 11 日から 13 日の間、ソウルで IFA（International Fiscal Association、国際租税協会）日中韓セミナーが開催された。IFA 日中韓セミナーは、平成 18 年に東京で開催されたのが最初であり、今回が二回目である[1] 。今回のセミナーの主な議題、議長、発表者及びパネリスト等は、以下の表の通りである。今回のセミナーでは、前回の東京でのセミナーと異なり、各議題の発表者は、発表を行うだけでなく、各議題に係るパネル・ディスカッションにも参加し、パネリストや会場の参加者からも質問に回答することを通じて、発表内容を補足することによって、議論を深めることが求められた。

本稿では、本セミナーの議題 3（「送金と源泉税」）について、パネル・ディスカッションにおける議論のポイントや日本の制度等に対する質疑応答を纏めたものと日本の発表者を務めた筆者の発表資料（英文のものと日本語要約）を掲載している[2]。議題 3 に関する発表・ディスカッションでは、主に、①外為規制緩和措置の進展と税務行政への影響、②非居住者が得る金融所得に係る源泉税率の趨勢、③所得分類と国際的租税回避、④租税条約と受益者概念等の問題が採り上げられ、これらの問題に関する各国の最近の状況についての発表・報告と活発な討議・質疑応答が行われた。

セミナーの日程、議題及び発表者等

6月11日　各議題の打合せ

6月12日　**議題１：「日本、中国及び韓国における最近の主な税務上の諸問題」**

議　長：Woo Taik Kim（IFA 韓国）

発表者：青山慶二（筑波大学大学院ビジネス科学研究科教授）、
Xia Lin（国家税務総局所得税管理司、中国）、
Kyung-Hee Kim（戦略財政部租税条約課、韓国）

パネリスト：Patrick van Oppen（日本）、Andi Baik（韓国）、
In-Hwa Chung（パートナー、Shin & Kim法務法人、韓国）、
Tae Hoon Kwon（パートナー、KPMG Samjong Accounting Corp.、韓国）

6月13日　**議題２：「移転価格とPE課税」**

議　長：宮武敏夫（弁護士）

発表者：飯守一文（国税庁調査課調査管理官）、
Wang Xiaoyue（Director, Anti-Avoidance Division, International Tax Department、中国税務当局）
Seong-Kwon Song（Director, International Cooperation Division、韓国税務当局）

パネリスト：赤松晃（税理士）、Pranav Sayta（インド会計事務所）、
Henry An（韓国会計事務所）、Tae-Hyung Kim（韓国会計事務所）、
Il-Suk Chung（韓国関税庁）

議題３：「送金と源泉税」

議　長：Kyung Geun Lee（弁護士、Yulchon法律事務所、韓国）

発表者：松田直樹（税務大学校教授）、
Fu-Shulin（Director, International Taxation Department、中国税務当局）
Jin-Oog Suh（Director, International Tax Resource Management Division、韓国税務当局）

パネリスト：Jeroen van Mourik（ロイエンス&フォルクマーズB.V.東京支店）、
Li Rongfa（弁護士、JunZejun法律事務所、中国）、
Sunyoung Kim（弁護士、Kim & Chang法律事務所、韓国）、
Keon-Ho Lee（パートナー、Bae, Kim & Lee税務・会計事務所、韓国）、
Alex Joong-hyun Lee（パートナー、Samil Pricewaterhouse Coopers、韓国）

２．議題３に関する日本の発表内容のポイント

日本からは、まず、平成 10 年度の外為法改正によって国際投資等に係る規制緩和が大幅に進展し、税制面でも、例えば、平成 11 年度に適格外国仲介業者制度が創設され、また、平成 20 年度税制改正では、海外の投資ファンドの日本の独立代理人を通じて得る所得に対して源泉税が課されないように措置される予定であることなどを説明した[3]。次に、主な諸外国における対内国際投資の促進に繋がる税務上の措置・動きの具体例に言及し、我が国でも、同様な動きが進展することが想定されるが、それに伴って活発化するであろう国際的租税回避行為への対応も益々重要な課題となることは、現行制度の下でも、既に、匿名組合を利用した条約漁りが問題となった東京地裁平成 17 年 9 月 30 日判決及び国境を跨いだ贈与税の負担回避が問題となった東京高裁平成 20 年 1 月 23 日判決等からも示唆されるとして、これらの判決のポイントを紹介している。

上記の二つの判決で問題となった国際的租税回避行為に対処するための措置は、既に、一部の租税条約や相続税法で手当てされており、また、最近改正された日米租税条約や日英租税条約等では、LOB 規定や導管取引防止規定等が採用されていることから、上記の課題への取組みもある程度進展しているという点を指摘し、これらの措置の特徴を説明したが、これらの措置・規定等にも一定の限界があり、例えば、受益者概念の適用という問題については、我が国では具体例が少なく、また、主な諸外国における代表的な裁判例（英国の Indofood 事件控訴裁判所判決（[2006] EWCA Civ 158）やカナダの Prévost 事件租税裁判所判決（[2008]TCC 231）等）からも示唆されるように[4]、不透明性・不確実性が伴う場合もあることから、これらの規定の有用性の程度に関しては、今後の動き・裁判所の判断等を待って見極める必

要があろうと述べた。

３．議題３のパネル・ディスカッションにおける主な質問・回答等

(1) 近年、日本、中国及び韓国では、いずれも、非居住者による対内国際投資を促進するための措置が積極的に講じられており、このような措置が手当てされる場合には、源泉徴収制度のあり方が一つの重要なポイントとなることが少なくないことから、その各国における制度の現状、課題及び改正の方向性等を巡って議論が行われたが[5]、かかる議論との関連から、日本に対しては、非居住者の対内国際投資に係る所得に関して源泉徴収義務者が負っている負担はどのようなものとなっているのか、例えば、源泉徴収義務者が、納税者である非居住者から源泉税の徴収を行っていないような場合、源泉徴収義務者は、税務当局に対し、どのような義務を負うのかという質問があった[6]。

上記の質問に対しては、源泉徴収義務者が源泉徴収していない場合、原則として、理由の如何を問わず、源泉税の納付を行う必要があること、また、所得税法基本通達221-1では、例えば、源泉徴収義務者が納税者から源泉徴収しなかった理由が、納税者との契約において、源泉徴収義務者が源泉税を負担するよう定められていることによる場合や、源泉徴収義務者が納税者に源泉税を請求しないこととした場合等には、所得税法基本通達181～223共-4（源泉徴収の対象となるものの支払額が税引手取額で定められている場合の税額の計算）に基づいて源泉税額を逆算する（例えば、利子80、源泉税20の場合、源泉徴収義務者が源泉税20を納税者に請求しなければ、逆算した納付すべき源泉税は25になる。）こととなっていることなどを説明した。

(2) また、非居住者が国境を跨いで得る金融所得に対する源泉地国課税が軽減されるという今日的な趨勢がグローバルな規模で認められ、日中韓のいずれにおいても、今後、同様な動きが更に顕著なものとなるものと想定されるという観点から、非居住者による国内株式の譲渡に係る課税の現状と制度改正の方向性を巡って議論があり、かかる議論に関連して、例えば、韓国では、非居住者による韓国企業株式の譲渡益は、証券取引所を通じた譲渡によるものでない場合や、非居住者及びその関係者の上場株式所有割合が25%以上の場合に課税の対象となるが、日本の場合、非居住者による日本法人株式の譲渡所得には、どのような課税がされているのかという質問があった。

上記の質問に対しては、国内にPEを有する非居住者による株式等の譲渡所得については、15%（平成19年12月までは上場株式等については7%）の税率で申告分離課税の対象となること、また、国内にPEを有しない非居住者による株式等の譲渡所得については、日本では原則として課税されないが、所得税法施行令291条や法人税法施行令187条等が定める場合（株式保有割合が25%以上で5%以上を譲渡する場合や日本の不動産の総資産に対する割合が50%以上である法人株式を譲渡するようなケース等）には、15%の申告分離課税の対象となると回答した。

(3) さらには、受益者概念については、その実際の適用に不透明性・不確実性が伴うことから、かかる不透明性・不確実性という問題を緩和するためにどのような手段（税務当局による指針等の発表）が講じ得るかなどの点が議論されたが、この点から投げ掛けられた日本に対する質問は、受益者であることを証明するには、如何なる書類の提出が必要となるのかという趣旨のもの

であった。この質問に対しては、例えば、以下の 4（日本の発表内容）の Graph 7 の投資家（investor）B のケースや Graph 8 の能動的事業活動基準（Active Business Test）をクリアーするようなケースでは、租税条約に関する届出書のほかに、租税条約実施特例法に従い、様式 16（外国法人の株主等の名簿兼相手国団体の構成員の名簿）や様式 17（特典条項に関する付表）の提出が必要になると説明した。

４．日本の発表内容（英文）

Remittance and Withholding Tax

Naoki Matsuda
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1. Foreign Exchange Deregulation and Its Implication

(1) 1998 Overhaul of Foreign Exchange and Trade Law

As one of the first steps of the financial deregulation of the Japanese economy, which is called Japanese Big Bang, Japan's Foreign Exchange and Trade (Control) Law was overhauled significantly in 1998. This overhaul has liberalized many cross-border transactions by Japanese nationals by doing away with the need for a prior notice to the government or an approval from the government of such transactions by Japanese nationals as the opening of bank accounts abroad, investment in foreign stocks, loan to and from residents in foreign countries. This overhaul was also a big step for the opening up the Japanese market for foreign investors, now that, for example, it has become no longer necessary for foreign investors that make investments to Japan to use any designated securities firms and submit a prior notice of the investment plan to the Japanese government.

Naturally this overhaul of the law has tax implications. It was apprehended at that time that this overhaul would lead to an increase in such bad practice as money laundering and cross-border tax evasion/avoidance, so a law was enacted to require financial institutions to make an identification of the customer and send to the tax office a notice of remittance of the customer's money whenever it exceeds 5 million yen. The minimum amount of money remittance that triggers the requirement of sending this notice to the tax office was lowered to 2 million yen in 2002 and will further go down to 1 million yen from April. 1. 2009. This helps the tax authority get a grip on a large flow of money in and out of the country, giving clues to the source of income and cross-border income shifting that might be undetected otherwise, while this rule should not in itself deter the sound flow of money in and out of the country[7].

(2) Promotion of Inward Portfolio Investment — No Withholding Tax

In spite of various measures taken to clear impediments for cross-border flow of money after the 1998 overhaul of the Foreign Exchange and Trade Law, there still remain some restrictions on investment from abroad. Among them, there are some that have significant tax implications. For example, amount of non-residents' portfolio investment

to Japan could be affected not only by the applicable administrative procedures but also by the applicable withholding taxes on its returns. In a case of a non-resident's interest income from the portfolio investment in the government bond, the withholding rate is 15% if it does not have PE in Japan and there is no applicable reduced withholding rate by the relevant tax treaty. If it has a PE in Japan, the tax withheld is creditable against its corporate tax payable in Japan.

Now that a large number of government bonds have been issued lately and there is a need for them to be subscribed for by non-residents as well, the above treatment was modified in 1999 in such a way that, if a non-resident receives the interest from his government bond entrusted via those domestic financial institutions (the local custodians) participating in the transfer settlement system to an account opened in the Bank of Japan, there is no withholding tax on it and further in 2001, this treatment was also extended to a non-resident's interest from the government bond held by way of the global custodians that are approved by the Bank of Japan and the tax authority as qualified intermediaries (See **Graph 1**)[8].

Further In 1999 and 2004, measures were taken so that no withholding tax on interest from the government bond held in the above-mentioned manner could also be extended to the gain of a foreign corporation from the redemption of the Treasury Bill and the Financing Bill respectively, which would be withheld otherwise at the rate of 18%. In 2005, the procedural requirement for the qualified intermediaries to manage each investor's account separately and report to the local custodians every time transactions take place was simplified in such a way that the qualified intermediaries could do the omnibus management of the accounts and file the reports on a quarterly basis.

(3) Promotion of Inward Portfolio Investment — No PE Risk

In spite of such measures as mentioned above, there still remains some criticism at the Japanese tax system that is allegedly working as the significant impediment to the investment from abroad. One example of this impediment is said to be related to the article 186 of the Corporate Tax Enforcement Law. Now that the article differs from the majority of Japan's tax treaties and the Article 5-4・5-6 of the OECD Model Tax Convention in that the article does stipulate the types of agent PEs in Japan while there is no express stipulation on independent agents that are not a PE[9]. Therefore, as illustrated in the **Graph 2**, there is a risk that even if an overseas investor enters into a discretionary investment contract with an investment fund and the fund invests in Japan, the fund might be deemed to have an agent PE in Japan under the corporate income tax law and its dividend is to be subject to a withholding tax in Japan.

As shown in the **Graph 3**, 2008 tax reform is to deal with this so-called PE risk by expressly defining independent agents that are to be excluded from the other agents that are to be deemed a PE under the corporate income tax law. Especially, this reform is expected to increase the investment from investment funds located in tax haven countries with which Japan has a policy of not concluding a tax treaty. Actually the impact of this

reform is not considered insignificant in general in view of the fact that a large number of investment funds are located in tax haven countries and is also evaluated as a big step forward in opening up the Japanese market for hedge funds.

2. Lowered Withholding Tax on Financial Income earned by Non-resident

(1) Global Trend

Now that financial income is an unearned income, it could have, under the conventional tax theory, a bigger tax bearing capacity than labour income and therefore it might as well be subject to a higher tax rate. However, in reality, it has become difficult particularly lately to impose a high tax rate on financial income because of its high mobility. Also, now that major regulations on cross-border transactions have already been lifted in major countries, an option to impose a heavy burden on financial income has become an unattractive one from the viewpoint of investment promotion and of international competition. In fact, such a view tends to dominate recent tax reform in many countries.

For example, in some European countries, there has been a move toward dual income tax and separate withholding taxation on capital income. Among EU countries, the European Commission's Parent-Subsidiary Directive is set to expand gradually the scope of a subsidiary's dividend to its parent that is to be exempted from the withholding tax. Also, the ECJ recently ruled, in such cases as Denkavit (Case C-170/05) and Amurta (Case C-379/05), against the withholding tax on distribution of profit that would lead to the less favorable tax treatment to an investor in the other Member countries. In this respect, US is no exception because the option of adopting a flat tax and a foreign income exemption method on dividend has been discussed hotly at the Congress in search of measures to promote savings, investment and international tax competitiveness.

(2) Trend in Japan

Japan with the separate withholding tax system for various types of financial income is also not an exception in this regard. Ministry of Economy, Trade and Industry is said to ask soon the Treasury for the adoption of the foreign income exemption method based on its observation and finding that the ratio of Japanese foreign subsidiaries' income expatriated to its parents has lately been on the dramatic decline. Also, the Financial Services Agency has been calling for the reduction of tax burden on certain types of financial income in view of such facts that Japan's tax on income from securities is generally higher than that in other major Asian financial centers and the ratio of assets held as securities in Japan remains quite lower than that in most major countries.

On the other hand, there is a conspicuous move among the recently-renewed tax treaties of Japan with major countries toward lowering or exempting withholding tax on financial income. For example, Japan-US tax treaty renewed in 2003 was an evidence of change in Japan's treaty policy on royalties. In the treaty, the withholding tax on royalties is abolished in principle while formerly Japan used to adhere to the position of reserving the right of taxation on royalties as the source country. This change of treaty

policy on royalties has also been adopted in the Japan-UK tax treaty renewed in 2006 and in the Japan-France tax treaty that changed its Protocol in 2007. It is expected that the trend of lowering or exempting the withholding tax on financial income accelerated by these new treaties will be generally followed by the future treaty renegotiations.

(3) CIV and Treaty Benefits

In order for the lowered withholding tax on financial income to be very effective in promoting cross-border investment, it should be applicable to the investment made via CIVs as well. Under the OECD Model Tax Treaty, however, only a resident taxpayer of the treaty partner is entitled to receive the treaty benefit (Article 1, 3 and 4) and in the case of dividend it must be a beneficial owner if it is to receive the treaty benefit for the dividend (Article 10). Therefore, investment made via a transparent CIV might not receive a treaty benefit of reduced withholding tax if such CIV is not deemed a resident and a beneficial owner under the relevant tax treaty. Investment via a CIV also has a problem that a non-resident of the treaty partners may also receive the treaty benefit for his income gained through his investment via a transparent CIV.

In order to avoid the possibility of the income of a resident of the Contracting States gained by the investment via a transparent CIV failing to receive the treaty benefit, for example, the Article 29 of the Japan - France Tax Treaty and the Article 15 of its Protocol provide that a French joint investment fund FCP (Fonds Communs de Placement) and Japan's loan trust and joint management trust are to be regarded as the authorized transparent investment funds, and they can claim on behalf of their resident investors the application of the treaty benefit. However, in practice, now that the treaty benefit is given in an omnibus fashion, it could be also be given to non-residents of the Contracting States investing via these transparent CIVs as illustrated in the **Graph 4** [10].

3. Income Classification and Tax Avoidance

(1) Business Income v. Other Income

As is evident from the above, under the conventional tax treaties, investment through a transparent CIV could be in some cases a tax disadvantage for some and a tax advantage for others. There are also other cases where transparent CIVs are utilized for gaining tax advantage that might be unavailable otherwise. One example is the case ruled by the Tokyo District Court on Sep. 30, 2005. In this case, as illustrated in the **Graph 5**, at first, an U.S. corporate group A set up a corporation B in Netherlands and a corporation C in Japan, then sold all of the corporation C's stock to the corporation B. Next, the corporation B entered into a partnership contract with the corporation C in which the corporation C is the operator and the corporations B is the partner. After this, the plaintiff (a Dutch corporation D) succeeding the status of the corporation B received the profit distribution from the corporation C. The point of contention at the court was how this income should be treated under the Japan-Netherlands tax treaty.

In the above case, the plaintiff argued that the corporation C's distribution of profit to

the plaintiff was based on the Tokumei Kumiai (silent partnership, hereinafter called "TK") contract that falls under the "other income" provided for by the Article 23 of the Treaty and therefore taxable only at the state of residence (in this case Netherlands)[11]. While the tax authority maintained that the contract in question is a voluntary partnership contract and fails in meeting the requirement for TK because it lacks the benefit of anonymity of the investor and the relationship of dominance between the operator and the investor, making this income in question as the income of the enterprise provided for by the Article 8 (1) through the plaintiff 's PE in Japan and therefore subject to tax in Japan.

In the above case, the Tokyo District Court expressed a view that, even if the contract's main purpose is tax avoidance, the nature and form of the contract is to be respected in principle and it is not right to decide the legal nature of the contract based on the judgment of whether or not the contract is a normal one and there is a rationale for it to be selected as a way of transaction. Then the Court ruled that, in order for the contract to be a voluntary partnership contract, the plaintiff and the corporation C should be engaged jointly in the sales activities in Japan, while this is not the case observable from the content of the contract and the actual operation, so that the income in question is not what is expressly provided for by the Treaty and therefore not taxable in Japan. This ruling was upheld by the Tokyo High Court on June 28, 2007[12].

(2) TK under new Japan-US treaty

The problems concerning the treaty benefit application mentioned in 2 (3) & 3 (1) stem from the lack of provisions under the conventional tax treaties to cope appropriately with various types of CIVs. The above-mentioned new Japan-US treaty has made progress in this regard. For example, the Article 13 of the Protocol of the Treaty denies the application of the treaty benefit to the investors in US who receives the profit distribution from TK that does not have a PE in Japan by imposing on the TK the withholding obligation at the rate of 20% on the profit to be distributed to the investors in US, so that it prevents Japan from failing to gain any tax in such a case as the above on which the Tokyo District Court handed down its ruling on Sep. 30, 2005. Concurrently Japan's income tax law was revised in such a way that the profit distributed by TK that runs business in Japan is income subject to the withholding tax at the rate of 20%. These treatments are illustrated in the **Graph 6**.

4. Application of Tax Treaties and Beneficial Ownership Concept

(1) Transparent CIV under New Japan-US Treaty

The Article 4 of the new Japan-US treaty is also novel in clarifying the treaty's tax treatment of the transparent CIVs. The Article 4 provides for ways to avoid such problems as the double non-taxation of and the non-application of the treaty benefit to the income from the investment via transparent CIVs. Now that these problems might often result from the difference in tax treatment of CIVs between the Contracting States, the

Article sets a rule that the source country accepts the tax treatment of CIVs and its investors in the resident country in making the judgment of the applicability of the treaty benefit to the income.

For example, the **Graph 7** shows a case where investors A in Japan, B in US and C in a third country make investment via a CIV located in US. The ratio of investment among them is 10, 70 and 20 respectively. In this case, the CIV is an entity like LLC which is deemed a taxpayer from the Japanese side while in US it is to be treated as a transparent entity and the investor B is a taxpayer. Under the new Japan-US treaty, the treaty benefit to the CIV is not to be given on a blanket basis but it is given only to the investor B who is the only qualified resident among the investors and is to be granted to the extent that the investor B has invested to the CIV[13].

(2) LOB Clause under New Japan-US Treaty and Japan-UK Treaty

The new Japan-US treaty also represents a change in Japan's conventional tax treaty policy on international tax avoidance as it is manifested most conspicuously in the adoption of the Article 22 on LOB. The new Japan-US treaty adopted the LOB clause for the first time in the history of Japan's tax treaties. As can be seen from the **Graph 8**, under the LOB clause, the treaty benefit is given to those who clear either one of the three tests; ①qualified resident test[14], ②active business test, and ③Competent Authority (CA) test. In addition, the new Japan-US treaty also has anti-abuse (anti-conduit) provisions in the Articles on dividend, interest, royalties and other income.

The LOB clause restricts the application of the treaty benefit based on the attributes of the entities while these anti-abuse provisions restrict the application of the treaty benefit based on the structures of transactions. In essence, these anti-abuse provisions are intended for the denial of the application of the treaty benefit to the case of abuse by employing a conduit transaction in which a resident of the Contracting States is interposed in a transaction with a resident in a third country whose relevant tax treaty does not grant equally beneficial treaty benefit[15].

The Japan-UK treaty revised in 2006 basically followed the path paved by the new Japan-US treaty by reducing significantly the applicable withholding tax rates on financial income, adopting the LOB clause imposing the qualified resident requirement for the treaty benefit entitlement, anti-abuse provisions and so forth. Nevertheless, the LOB clause adopted by the new Japan-UK treaty differs from the one in the new Japan-US treaty in that under the new Japan-UK treaty the "base erosion test" provided for in the paragraph (c) of the Article 22 of the new Japan-US treaty is not adopted while the derivative benefit test is adopted for the first time in the history of Japan's tax treaties. These would make the LOB clause less stringent for investors. A series of tests to judge whether the treaty benefit is available or not are shown in the **Graph 9**.

Under the derivative benefit test which is adopted in the paragraph 3 of the Article 22 of the new Japan-UK treaty, treaty benefits are also given to a company in a Contracting State which is controlled by residents in a third country so long as shares representing at

least 75% of the voting power of the company are owned directly or indirectly by seven or fewer persons who are equivalent beneficiaries". Equivalent beneficiaries are residents of such third countries that are considered to be unlikely to abuse the treaty provisions. To be more specific, they are residents of those countries with which a source country (Japan or UK) has a treaty that contains provisions for effective exchange of information, and also qualified residents under this treaty that provide for treaty benefits which are no less restrictive than those under the new Japan-UK treaty.

(3) Anti-conduit clauses and the main purpose test

The new Japan-US treaty and the new Japan-UK treaty are also identical in that they both have anti-conduit provisions in the Articles on financial incomes and the ways they are written are almost the same. For example, the Article 12 of the new Japan-US treaty has a paragraph 1 that provides: Royalties arising in a Contracting State and beneficially owned by a resident of the other Contracting State may be taxed only in that other Contracting State. It also has a paragraph 5 that provides: "A resident of a Contracting State shall not be considered the beneficial owner of royalties in respect of the use of intangible property if such royalties would not have been paid to the resident unless the resident pays royalties in respect of the same intangible to a person: (a) that is not entitled to benefits with respect to royalties arising in the other Contracting State which are equivalent to, or more favorable than those available under this Convention to a resident of the first-mentioned Contracting State; and (b) that is not a resident of either Contracting State. ".

Therefore, as illustrated in the **Graph 10**, when (i) the royalty contract ① and the royalty contract ② are equivalents, (ii) the company in the third country is not entitled to with respect to the royalty paid by the company A in Japan treaty benefit that is equivalent to or more favorable than that is granted under the Japan-US treaty, and (iii) it can be recognized that the company C in the third country enters into a royalty contract with the company B in US on the equivalent intangible should be a precondition for the royalty contract on the intangible between the company B in US and the company A in Japan, the company B in US is judged not to be a beneficial owner that should be entitled to receive the benefit under the Japan-US treaty.

Lastly, the new Japan-UK treaty and the new Japan-US treaty are different in another important point. The new Japan-UK treaty has adopted for the first time the main purpose test[16]. The test is applicable to financial income and other income. For example, the new Japan-UK treaty's Article 10 has a paragraph 9 that provides: "No relief shall be available under this Article if it was the main purpose or one of the main purposes of any person concerned with the creation or assignment of the shares or other rights in respect of which the dividend is paid to take advantage of this Article by means of that creation or assignment". The main purpose test was also adopted by the new Protocol of the Japan-France treaty.

It is true that the anti-abuse provisions and the main purpose tests are useful tools but

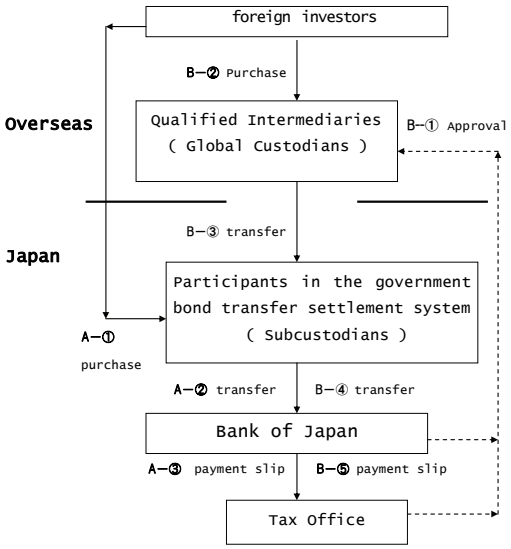
might not greatly reduce the difficulty of deciding whether they should apply or not in some cases. This difficulty often arises from the ambiguity of such terms as "equivalent" and "beneficially owned". There has been a controversy over how the beneficial owner concept under tax treaties is to be interpreted. It is maintained that, now that tax treaties do not give a clear definition, it should be interpreted in accordance with domestic laws of contracting states. While the paragraph 4 of the Commentary on Article 12 of the OECD Model Convention states: "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.".

There are also variations among the views shown by courts. There are some that interpret the beneficial owner concept under tax treaties differently from that under domestic laws[17]. One example of this is the UK Court of Appeal case on the Indofood International Finance Ltd v JP Morgan Chase NA ([2006] EWCA Civ 158). In this case, as shown in Graph 11, an Indonesian company, instead of raising capital by the issue of loan notes on the international market which would incur 20% withholding tax of the interest payable to the noteholders, set up in Mauritius a wholly-owned subsidiary that issued loan notes to the market and on-lent the capital so raised to the parent who would guarantee the issuer's loan notes. However, the treaty between Indonesia and Mauritius happened to be terminated in 2005 making the treaty's withholding tax of 10% unavailable. So, the trustee claimed that a SPV should be created in Netherlands so that the withholding rate of 10% or less under the Indonesia and Netherlands treaty would become applicable.

Now that the Indonesian company refused this claim, this case was to be heard at UK courts in accordance with the trust deed on the loan agreement governed by English law. Taking into account the guidance supplied by the Indonesian Tax Authority and its Circulars to the effect that accession to treaty benefits to the financing structures whose main purpose is to take advantage of the tax treaty of another country would be denied, the UK Court of Appeal ruled that the legal, commercial and practical structure behind the loan notes was inconsistent with the concept that the issuer or, if interposed, the newly-incorporated company in Netherlands could enjoy 'the full privilege to directly benefit from the income'. This wider interpretation of the beneficial ownership limitation requiring the beneficial owner of the interest for the purposes of a tax treaty to have the full privilege to directly benefit from the income is to give effect to the "international fiscal meaning" of beneficial ownership and the UK tax authority maintains in the draft guidance issued in 2006 that it is now practically a part of UK law[18].

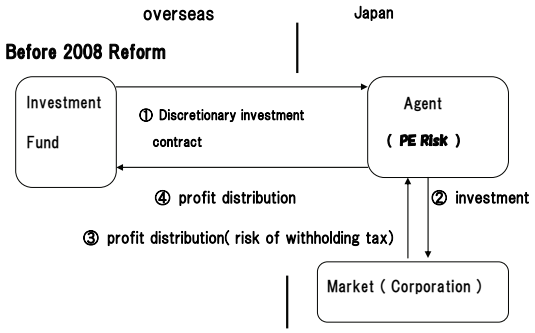
(Graph 1)

No Withholding on Foreign Investor's Interest from Government Bond and Redemption gain from TB and FB



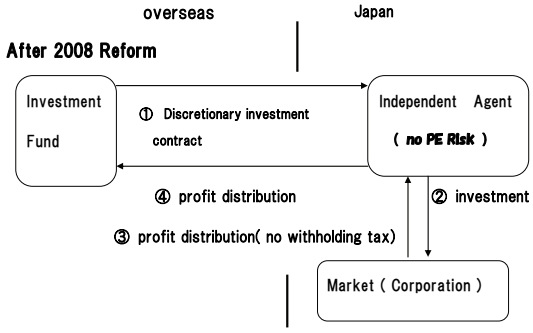
(Graph 2)

Promotion of Inward Portfolio Investment - PE Risk



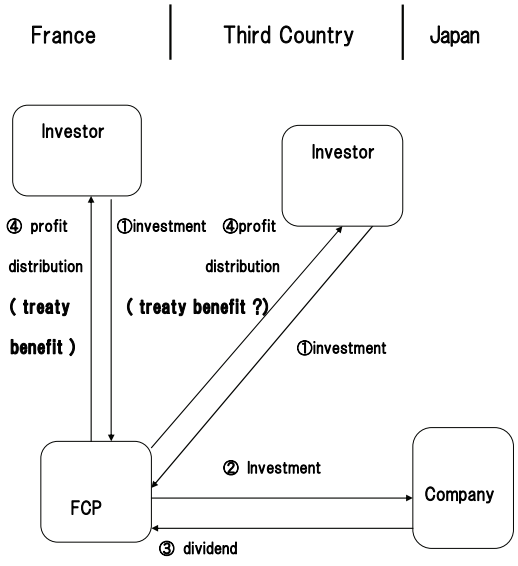
(Graph 3)

Promotion of Inward Portfolio Investment - No PE Risk



(Graph 4)

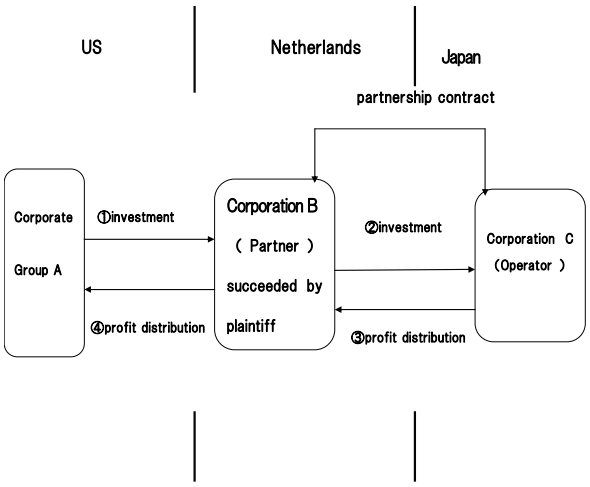
CIV and Treaty Benefits



(Graph 5)

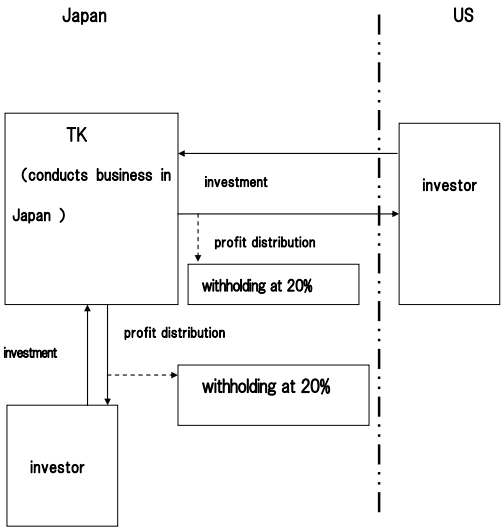
Income Classification and Tax Avoidance

Business Income v. Other Income



(Graph 6)

TK Under New Japan-US Treaty

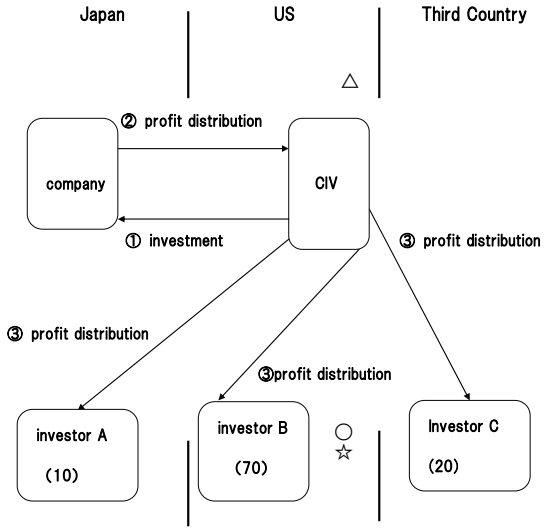


(Source: Tax Committee Document released on Nov. 14, 2003)

(Graph 7)

Application of Tax Treaties and Beneficial Ownership Concept

(1) Transparent CIV Under New Japan-US Treaty



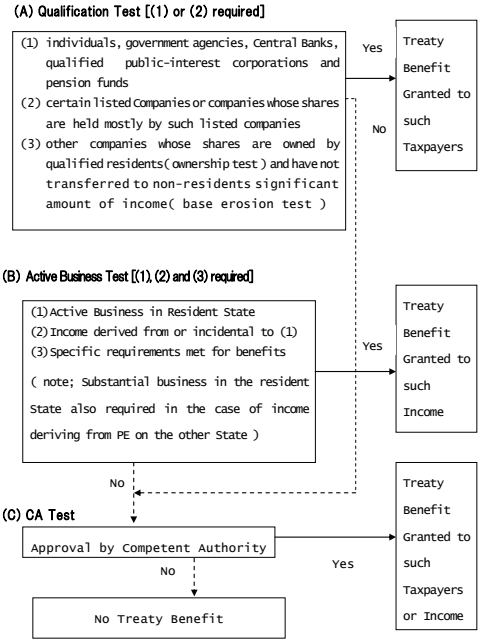
《 △… taxpayer from Japanese side、○… taxpayer from US side、

☆… qualified resident 》

(Source: Tax Committee Document released on Nov. 14, 2003)

(Graph 8)

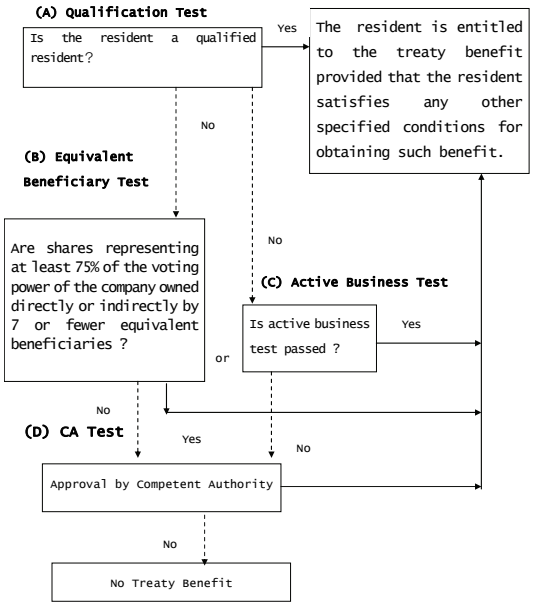
(2) LOB Clause under New Japan-US Treaty



(Source: Tax Committee Document released on Nov. 14, 2003)

(Graph 9)

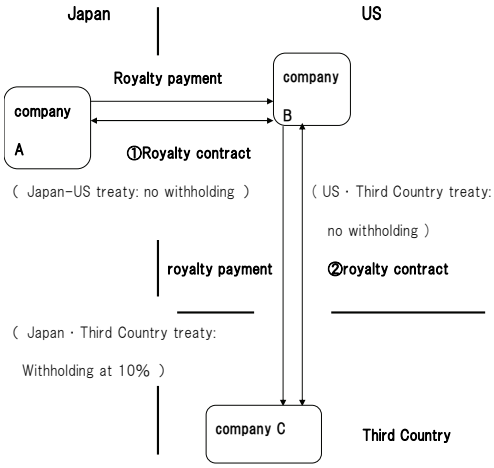
(3) LOB Clause under New Japan-UK Treaty



(Source: KPMG Japan Tax News Letter / February 2006)

(Graph 10)

(4) Anti-conduit Clause (ex. Paragraph 5 of Article 12 of new Japan-US Treaty)

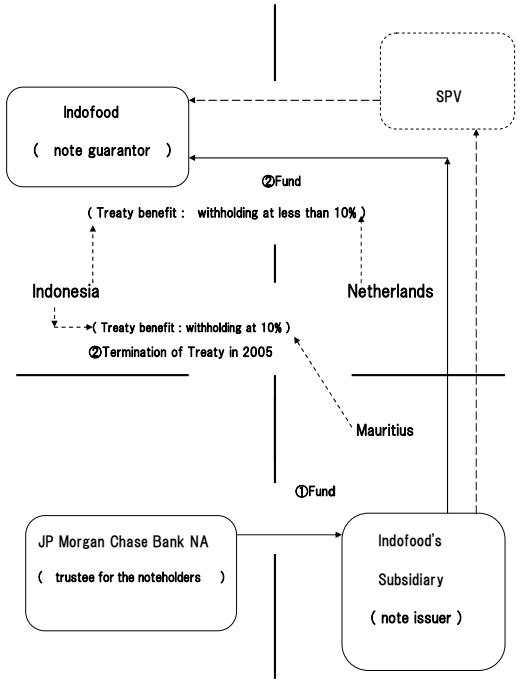


(Source: Tax Committee Document released on Nov. 14, 2003)

When (i) the royalty contract ① and the royalty contract ② are equivalents, (ii) the company in the third country is not entitled to with respect to the royalty paid by the company A in Japan treaty benefit that is equivalent to or more favorable than that is granted under the Japan-US treaty, and (iii) it can be recognized that the company C in the third country enters into a royalty contract with the company B in US on the equivalent intangible should be a precondition for the royalty contract on the intangible between the company B in US and the company A in Japan, the company B in US is judged not to be a beneficial owner that should be entitled to receive the benefit.

(Graph 11)

Indofood International Finance Ltd v. JP Morgan Chase Bank Case NA



[1] 第一回目の IFA 日中韓セミナーでは、議題 1 が「海外直接投資に対する課税」、議題 2 が「国際課税を巡る最近の諸問題」、議題 3 が「移転価格課税及び事前協議」であった。セミナーの概要については、松田直樹「IFA（国際租税協会）日中韓三ヵ国国際租税セミナー―最近の国際課税を巡る諸問題と日中韓の税務当局の取組み状況―」税経通信 Vol.61, No.7（平成 18 年）190～196 頁参照。

[2] 各議題についての発表内容の概略・ポイントについては、青山慶二他「第 2 回 IFA 日中韓セミナーの概要」国際税務 Vol.28 No.8（平成 20 年）40～49 頁参照。

[3] 独立代理人とは、具体的には、四つの条件（①国内運用業者が実質的に運用の意思決定をしている、②運用業者の役職員の半数以上は海外ファンドなどと兼務していない、③海外投資家と運用業者が成功報酬契約を結んでいる、④運用業者が特定の海外投資に依存せず、多角的な経営ができる）をクリアーする者であるというような定義がされるようである。

[4] Indofood 事件控訴裁判所判決では、租税条約上の受益者概念は、国際的な課税上の意味を付与されなければならないとして、同概念の適用範囲が制限的に解されたのに対し、Prévost 事件租税裁判所判決では、国内法上の受益者概念の適用が妥当であるという判断が下された。これらの判決のポイントについては、Louise Summerhill, Jack Bernstein, and Barb Worndl, Taxpayer Prevails in Canadian Beneficial Ownership Case, Tax Notes International, Vol.50, No.5 (2008) pp.363-368 参照。

[5] 例えば、韓国では、平成 19 年、所得税法§156 及び法人税法§98 が改正され、非居住者に支払われる韓国ウォン建ての株式や国債の利子に対する源泉税率が 25%（住民税も含めると 27.5%）から 14%（住民税を含めると 15.4%）に引き下げられ、また、平成 20 年には、韓国政府が、法人税率を 27.5%から 20%へと段階的に引き下げるという方針を発表している。

[6] 因みに、中国の場合、非居住者が中国で得た所得に係る源泉税を源泉徴収義務者が徴収しなかった場合には、中国の税務当局は、当該非居住者に対して源泉税の納付を求め、当該非居住者の中国でのその他の源泉所得から当該源泉税が徴収されることもあるとの説明が Fu-Shulin 課長からあった。

[7] In addition to income shifting to foreign countries to reduce income and corporation tax burden, there is also a significant increase in cases of large assets reallocation to foreign countries to avoid inheritance and gift tax. The Tokyo High Court judgment on Jan. 23, 2008 was especially a noteworthy case in which the amount of reassessed gift tax was as large as 130 billion yen (about 1.3 billion US dollars) and the residence of a taxpayer was decided by placing not a little emphasis on such factors as the subjective intent of the resident, location of the assets, etc., instead of simply comparing the number of days stayed in and out of Japan.

[8] Qualified intermediaries are those ① designated as an account management institution by the Law on the Transfer of Stocks, ②approved by the Bank of Japan as indirect participants in the transfer settlement system, and ③approved by the tax office as the global custodian with a headquarter or a main office in a country with which Japan has a tax treaty that contains a provision on the mutual assistance in the provision of information on the imposition and collection of tax (Article 5-2 of the Law on Special Tax Measure).

[9] The article provides that the types of agent PEs include ① agents that habitually concludes contracts for the non-resident, ② agents that keep a storage of commodities on the non-resident's behalf and provide them on

demand to the customers, ③agents that play important roles in activities leading to the contract conclusion for the non-resident. While, the OECD Model Tax Convention deems some of them independent agents and some of Japan's treaties (such as those with india, China and so forth) deem some of them independent agents and others not independent agents.

[10] Before the Japan-UK Tax Treaty was renewed in 2006, there was a similar provision (Article 28 A) in the treaty providing for entitlement of the UK's unit trusts and Japan's securities investment trusts to claim the treaty benefit on behalf of their resident investors.

[11] Article 23 of the treaty provides, "Items of income of a resident of a country which are not expressly mentioned in the foregoing Articles of this Convention shall be taxable only in that country." There are identical provisions in Japan-UK treaty before it was revised in 2006 and in some other treaties. These Articles are based on the Article 21 of the OECD Model Tax Treaty but the Model Treaty's Commentary paragraph 1-3 on Article 21 also mentions: "In order to avoid non-taxation, Contracting State may agree to limit the scope of the Article to income which is taxed in the Contracting State of which the recipient is a resident and may modify the provisions of the paragraph accordingly."

[12] There is a similar case where the Morgan Stanley group tried to send tax free to US the profit made in connection with the purchase and sales of non-performing loans of the financial institutions in Japan through its Dutch company while in this case the tax authority made a disposition that the purchase and sales was a joint operation of the Dutch company and its related company in Japan and they have a PE in Japan.

[13] Special Law for the Treaty Implementation was revised concurrently and it requires the CIV to submit, in addition to the Application Form for Income Tax Convention, such documents (such as Form 16) that show who are the investors behind the CIV and who are eligible for the treaty benefit.

[14] For a corporation to be a qualified resident, "the ownership test" ((i) corporations whose principal class of shares and any disproportionate class of its shares are listed or registered on a recognized stock exchange and traded regularly, or (ii) at least 50% of each class of shares in the company is owned directly or indirectly by five or fewer residents entitled to benefits under clause (i)) should be cleared. Otherwise, it should be a corporation whose at lease 50% of each class of the shares or other beneficial interests should be owned directly or indirectly by individual residents of the Contracting States, a government agency, a Central bank, a pension fund, or a company whose principal shares are listed on stock exchanges, etc. and the "base erosion test" (corporation whose less than 50% of the it's gross income for the taxable year is paid or accrued by it in that taxable year, directly or indirectly, to persons who are not residents of either Contracting State in the form of payments that are deductible in computing its taxable income in the Contracting State of which it is a resident.) should be cleared.

[15] For example, the Article 12 on royalties has in the paragraph 5 a provision stipulating that; "A resident of a Contracting State shall not be considered the beneficial owner of royalties in respect of the use of intangible property if such

royalties would not have been paid to the resident unless the resident pays royalties in respect of the same intangible property to a person: (a) that is not entitled to benefits with respect to royalties arising in the other Contracting State which are equivalent to, or more favorable than, those available under this Convention to a resident of the first-mentioned Contracting State; and (b) that is not a resident of either Contracting State ."

[16] The main purpose test was not adopted under the new Japan-US tax treaty because it was thought to give rise to administrative difficulty on the part of the Japanese tax authority with respect to the burden of proof on taxation.

[17] On the other hand, the Tax Court of Canada's decision on Prévost Car Inc. v. The Queen, 2008 TCC 231 (Apr.22, 2008) was a case in which the court ruled that the relevant provisions of the Canada Netherlands tax treaty required the court to look primarily to the domestic meaning of beneficial ownership in applying the dividend article.

[18] The French Conseil d'Etat's decision on Dec. 29, 2006 on the Bank of Scotland case (CE no. 283314), in which the court ruled that the transaction in question had a sole purpose of gaining the treaty benefit and constitutes an abuse of law as well, is also an example of the wider interpretation of the beneficial ownership limitation concept and restriction in its scope of application to counter treaty shopping.