

# THE DIVIDEND CONCEPT IN DOUBLE TAXATION CONVENTIONS

How could the dividend concept in tax treaties prevent more effectively cross border double taxation and under taxation?

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## DIVIDEND DEFINITION

### SUBJECTIVE ELEMENTS

### OBJECTIVE ELEMENTS

Dividend-receiving entity

Dividend-distributing entity

Participation on the equity of a company

Participation in profits

TAX TREATY

Autonomous interpretation: Other articles of the treaty, context, etc.

Resident

Resident

Company

Shares

Other corporate rights

Only if it is not a debt claim art. 11 MC

Not excluded by anti-treaty shopping rules

Beneficial owner

ART. 4 MC

ART. 3.1 MC

Subject to the same taxation treatment as income from shares

SOURCE COUNTRY TAX LAW

Definition of residence

Definition of who is the company and what is a corporate right

Thin capitalization rules

Dividend stripping rules

Transfer pricing regimes

Beneficial owner

General anti-avoidance rules

RESIDENCE COUNTRY TAX LAW

Beneficial owner

Definition of residence

Transfer pricing regimes

CFC

General anti-avoidance rules

## RELEVANCE: DOUBLE TAXATION OR UNDER TAXATION DUE TO CONFLICTS OF QUALIFICATION OR ATTRIBUTION

SPECIFIC QUESTIONS

Is the income from rights over shares (like pledge rights, anti-thesis, derivatives, usufruct) a dividend under DTCs? In that case, could the income receiving entity be considered as a beneficial owner of the dividends?

Key words:  
Treaty Shopping

Is the income from partnerships, jointventures, and other business collaboration contracts, a dividend under DTCs?

Key word:  
Hybrid Entities

Can an income characterized as a dividend under domestic (source or residence) law be considered as a dividend in DTCs according to the application of anti avoidance rules (GAARs, CFC, dividend-stripping rules, etc.) or transfer pricing regimes?

Key words:  
Hybrid Financial Instruments; Liquidation of Distributions; Sales of Shares; Constructive Dividends; Fictive Dividends

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## Methodology

The study will be approached from a juridical *lege lata* perspective seeking the positive concept of dividends in Spanish tax treaties and Spanish domestic law. We will look for an autonomous meaning of dividends in DTC and how to extend the domestic concept. That requires a theoretical analysis to determine the interaction between international and domestic legal systems, and to identify the common troubles in tax treaties interpretation. In order to develop this study on international taxation, a review of the works of the League of Nations, UN, OECD, OEEC and IFA becomes mandatory. In addition, the most relevant European and Spanish literature written in English and Spanish will be considered.

However, with a juridical *lege ferenda* approach, best prac

tices in the negotiation of the dividend tax treaty concept will be covered studying other relevant treaties. Considering that the tax treaty dividend concept depends on the source state tax law, a comparative method is necessary. We will look for the best and worst tax policies dealing with double and non taxation of dividends. The comparative method will be restricted to five countries: UK, Colombia, Italy, Spain and US.

Finally, an empirical approach is needed in order to review the most common conflicts of qualification regarding the dividend concept. A review of the Spanish and milestone foreign jurisprudence and administrative resolutions will be carried out in order to propose a set of recommendations.