

Definitions and the beneficial owner

*Dr Alexander Ressos, TEP
Attorney-at-Law (Switzerland), Solicitor (Hong Kong),
Solicitor (England & Wales)*

Article 10 paragraph 3 defines dividends as income from shares, *jouissance* shares, mining shares, founders' shares or other rights participating in profits, as well as income from other corporate rights that is subjected to the same taxation as income from shares under the law of the source state.¹ The reference to domestic law brings within Article 10 the hidden profit distributions (*distribuzioni dissimulate*, *verdeckte Gewinnausschüttungen*) that the Swiss withholding tax treats as taxable dividends. If a Lugano company pays its Italian shareholder excessive consultancy fees, the Federal Tax Administration may treat the excess as a dividend subject to 35 per cent withholding tax, of which the shareholder can recover the excess over 15 per cent. Article 11 paragraph 3 defines interest broadly as income from government securities, bonds and debt-claims of every kind, and Article 12 paragraph 3 covers payments for the use of copyrights, patents, trademarks, designs, models, plans, secret formulae and processes, industrial, commercial or scientific equipment and information concerning industrial, commercial or scientific experience.² The inclusion of equipment leasing in the royalty definition, removed from the OECD Model in 1992, means that Italian payments for the rental of industrial equipment to a Swiss lessor are royalties under the convention, taxable at 5 per cent in Italy.

The articles on dividends, interest and royalties of 1976 do not use the term "beneficial owner". The convention addresses the question in Article 4 paragraph 5 lit. a, which excludes the "apparent beneficiary" from residence status, and through the anti-abuse conditions of Article 23. The Swiss courts nevertheless interpret the treaty as containing an implicit beneficial ownership requirement. In a judgment of 14 August 2023 the Federal Administrative Court rejected the refund application of an Italian resident who had claimed, by Form 95, a refund of CHF 33,132 of withholding tax on dividends and interest. The income had been received by offshore entities and then passed on to her. The court held that the beneficial owner

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is the person who can dispose of the income without a legal or contractual obligation to pass it on. It decided that this question is determined under the law of the source state and that an individual cannot rely on the transparency of a company that she herself had interposed.³ Italian practice equally requires the beneficial owner (*beneficiario effettivo*) to claim treaty relief from Italian withholding tax, and the forms used for that purpose contain a corresponding declaration.⁴

1 Permanent establishments and excessive payments

Each of the three articles contains a permanent establishment proviso. The rate limitation does not apply if the recipient carries on business in the source state through a permanent establishment, or performs independent personal services there from a fixed base, and the holding, debt-claim or right in respect of which the payment is made is effectively connected with that establishment or base. The income is then taxed as business profits or as income from independent services under Articles 7 and 14.⁵ Articles 11 paragraph 6 and 12 paragraph 6 add the classical rule on special relationships. Where, by reason of a special relationship between the payer and the beneficial owner, the amount of interest or royalties exceeds the amount that would have been agreed without that relationship, the treaty applies only to the arm's length amount. The excess remains taxable according to the laws of each state, with due regard to the other provisions of the convention.⁶ An Italian subsidiary that pays its Lugano parent royalties above the market rate will therefore have the excess disallowed as a deduction under the Italian transfer pricing rules and possibly taxed as a hidden distribution.

2 Notes

1. Convention, Art. 10 para. 3, as summarized from the text (above). ↩
2. Convention, Art. 11 para. 3 and Art. 12 para. 3, text (above). ↩
3. Federal Administrative Court, judgment A-4469/2020 of 14 August 2023,
https://entscheidsuche.ch/docs/CH_BVGer/CH_BVGE_001_A-4469-2020_2023-08-14.pdf (in Italian). ↩
4. Migliorini, "Royalties in uscita verso la Svizzera" (above) (beneficial owner requirement for treaty and agreement relief; certified form required). ↩
5. Convention, Art. 10 para. 4, Art. 11 para. 4 and Art. 12 para. 4, text (above). ↩

6. Convention, Art. 11 para. 6 and Art. 12 para. 6, text (above). ↩

For general information only. This article does not constitute legal or tax advice, does not replace advice on an individual case and creates no lawyer-client relationship. It reflects the legal position as of September 2026.

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