資料Ⅰ－1

Is BEPS Good Policy?

Richard Vann
Challis Professor of Law

Tokyo, IFA, 18 February 2015

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資料Ⅰ－2

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Topics

- Brief background to the Base Erosion and Profit Shifting (BEPS) project
- Action 11 on data (and policy)
  - Seems to be going nowhere
- The big policy picture: Can the corporate tax survive?
  - Questioning of arguments in the economic literature that it is doomed
- The smaller (but still significant) policy picture … does not exist in BEPS

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OECD/G20 BEPS Project 2012-2013

- The Google etc publicity 2010-2012
  - Commencement of work in OECD/G20 countries second half 2012
- OECD Report February 2013
  - Some discussion of policy of corporate income tax, largely of the negative modern public finance kind (see later)
- Action Plan July 2013
  - All action, little policy
  - Organised around three policies/themes
    - Coherence of the corporate income tax (Actions 2-5)
    - Taxing income where value adding activities occur (Actions 6-10)
    - Transparency (Actions 11-14)
  - With two cross-cutting issues
    - Digital economy (Action 1), multilateral treaty (Action 15)

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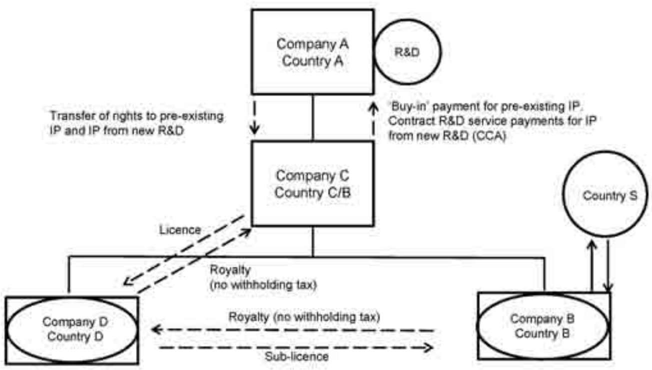
Google (OECD+) A=US, B=IR, C=Bermuda, D=NL, S=sale/customer



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BEPS Action Plan: Bold = DD/Report 2014 out Bold Italics = DD 2015 out, Plain = nothing out

Issue	Action	Output	Deadline
1 Digital economy	Address challenges	Report	**9/14**
2 Arbitrage	Neutralise	Treaty/domestic law	**9/14**
3 CFCs	Strengthen regimes	Domestic law	9/15
4 Interest deductions	Limit base erosion	Domestic law/TPG	***9/15*** 12/15
5 Harmful tax practices	Counter more effectively	Identify OECD/non-OECD/revise criteria	**9/14** 9/15 12/15
6 Treaty abuse	Prevent	Treaty/domestic law	**9/14** ***9/15***
7 PE	Prevent avoidance	Treaty	***9/15***
8-10 TP Intangibles, risk, capital, abnormal contracts	Place of value	Treaty/Guidelines	**9/14** ***9/15***
11-13 Transparency TP Documentation	Disclosure, data & policy analysis	Recommendations/ Guidelines	**9/14** 9/15
14 Dispute resolution	Make effective	Treaty	***9/15***
15 *Multilateral instrument*	Identify issues, draft	Multilateral tax treaty	**9/14** 9/15

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資料Ⅰ−6

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BEPS Project mid 2014-2015

› Brisbane G20 meeting endorsed deliverables published and endorsed in September by Finance Ministers

- Digital economy
- Hybrids
- Harmful tax practices
- Treaty abuse
- Transfer pricing intangibles and documentation
- Multilateral treaty

› Virtually no discussion of policy except:

"No or low taxation is not *per se* a cause of concern but it becomes so when it is associated with practices that artificially segregate taxable income from the activities that generate it" – BEPS Action Plan

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Action 11

› Action 11 is only real effort to address policy (though it reads as if it is all about data)

“Develop recommendations regarding indicators of the scale **and economic impact of BEPS** and ensure that tools are available to monitor and evaluate the effectiveness and **economic impact of the actions** taken to address BEPS on an ongoing basis. This will involve developing an economic analysis of the scale and impact of BEPS (**including spillover effects across countries**) and actions to address it. The work will also involve assessing a range of existing data sources, identifying new types of data that should be collected, and developing methodologies based on both aggregate (e.g. FDI and balance of payments data) and micro-level data (e.g. from financial statements and tax returns), taking into consideration the need to respect taxpayer confidentiality and the administrative costs for tax administrations and businesses.”

- Request for input August 2014, comments published October 2014
- DD January 2015 now delayed to end March 2015: what is happening?

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Can the corporate tax survive?

› Economic literature on mobile income
  - Views in OECD 2012 advice to Canada & Australia (eg increase GST, cut corporate tax rates) continues in 2014 Economic Surveys
  - Recent public reviews accepted literature (Australia 2009, Canada 2008, UK 2011, US 2005)

› BEPS by contrast proposes to reinvigorate the international corporate income tax
  - The arguments are still to be made – an attempt follows

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Focus on corporate income alone

- In a variety of ways the economic models and theories focus on capital income and ignore labour income
  - Widely agreed that taxation of labour income is distortive
    - Untaxed choices: Household production and leisure
    - Optimal tax theory suggests that if distortion in one part of system, it is likely not the optimal policy to remove distortions in another part of the system
    - Work of Apps and Rees

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Capital mobility

- Models often assume:
  - Perfect capital markets and mobility
  - Marginal investor non-resident tax exempt in home country
- Conclusion that source tax impossible
  - Investor will invest elsewhere and/or
  - Tax will be shifted to immobile factors
  - Policy recommendation is to reduce or do away with corporate income tax and taxation of income from capital generally
    - Taxes should be on immobile factors which are taken to be land, average employees, and consumption
- Capital market failures everywhere: global financial crisis or GFC

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資料Ⅰ−11

Segmentation of corporate returns

- Basic risk free rate of return can/should not be taxed
  - Unlimited borrowing/consumption tax style arguments
- Tax return to risk symmetrically > with no net revenue
  - Focus on tax system whereas optimal tax shows need to view tax and transfer systems as a whole; corporates receive large transfers
- Economic rents
  - Immobile can be taxed, mobile cannot be taxed (capital mobility again)
  - Impossible to observe line between risk and rents
  - Corporate returns are mixture of both varying over time (digital economy)
  - Rents are capitalised in prices and significant transitional issues for rent taxes

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資料Ⅰ−12

Model of firm ignores real taxpayers and incidence

- Company (modelled as black box with attributes of welfare maximising individual
- Avoids questions of incidence of corporate tax
  - Is efficiency not affected by incidence
  - See above – incidence a consequence of shifting, not of efficiency
- Avoids issues of internal dynamics of firm
  - Rent-seeking executives
  - Moral hazard
  - Compare corporate literature

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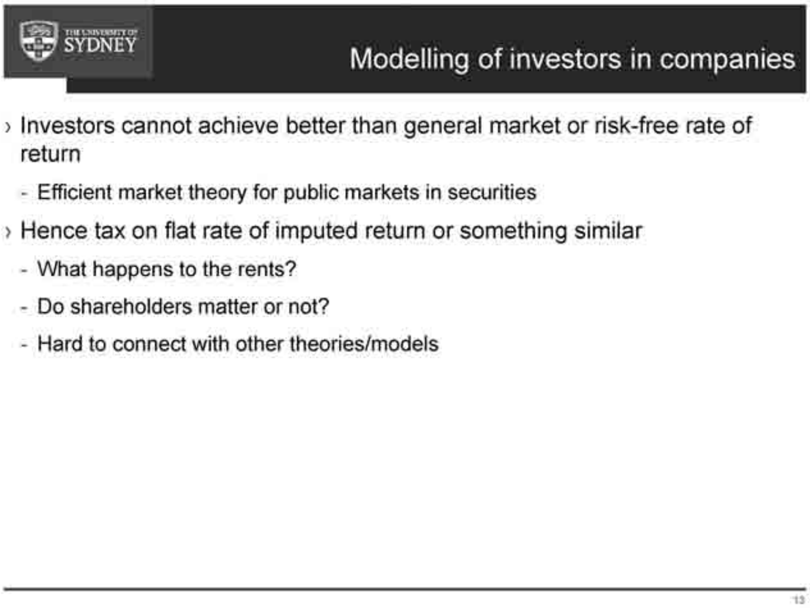
資料Ⅰ−13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Modelling of investors in companies
› Investors cannot achieve better than general market or risk-free rate of return
- Efficient market theory for public markets in securities
› Hence tax on flat rate of imputed return or something similar
- What happens to the rents?
- Do shareholders matter or not?
- Hard to connect with other theories/models
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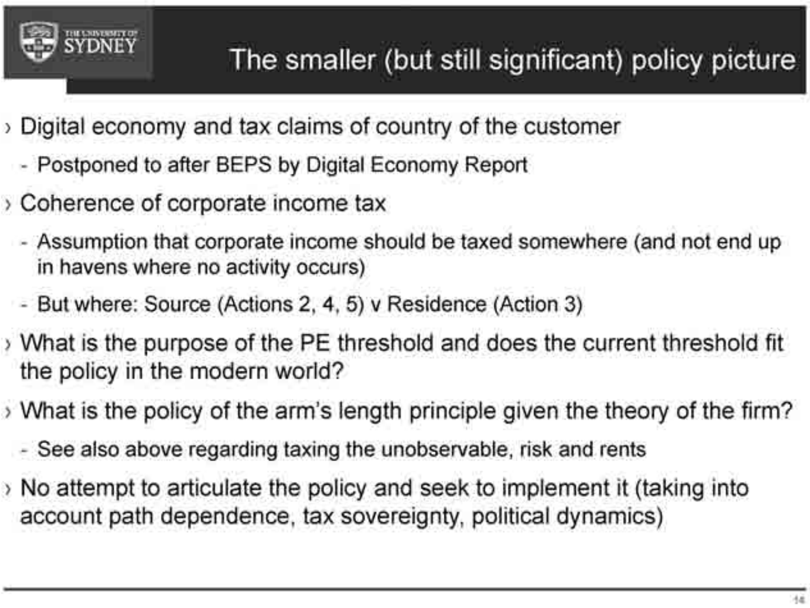
資料Ⅰ−14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The smaller (but still significant) policy picture
› Digital economy and tax claims of country of the customer
- Postponed to after BEPS by Digital Economy Report
› Coherence of corporate income tax
- Assumption that corporate income should be taxed somewhere (and not end up in havens where no activity occurs)
- But where: Source (Actions 2, 4, 5) v Residence (Action 3)
› What is the purpose of the PE threshold and does the current threshold fit the policy in the modern world?
› What is the policy of the arm's length principle given the theory of the firm?
- See also above regarding taxing the unobservable, risk and rents
› No attempt to articulate the policy and seek to implement it (taking into account path dependence, tax sovereignty, political dynamics)
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資料Ⅱ－１

Some thoughts on Action Item 2 - Hybrids

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IFA – Japan branch
18 February, 2015

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資料Ⅱ－２

The underlying problem

- Disagreements can be everywhere
- With us, tax idiosyncrasy is the norm (Australian exceptionalism)
- The 7 Examples reflect disagreements about
    - debt v. equity
        - hybrid financial instruments
        - imported hybrids
    - Transactions – sale v. secured borrowing
        - hybrid transfers
    - existence / number of entities
        - receipts by owner from 'hybrid payer'
        - receipts by 'reverse hybrid'
        - payment by 'hybrid payer'
        - 'dual consolidated' entities

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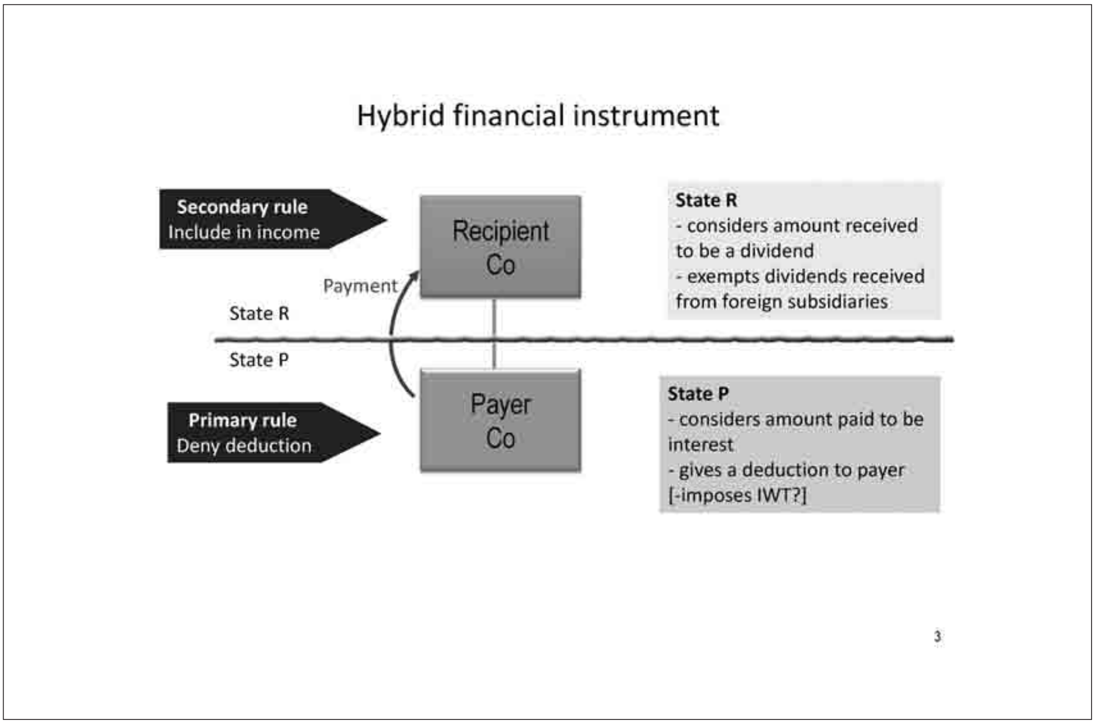
Hybrid financial instrument
Secondary rule
Include in income
Recipient Co
Payment
State R
State P
Primary rule
Deny deduction
Payer Co
State R
- considers amount received to be a dividend
- exempts dividends received from foreign subsidiaries
State P
- considers amount paid to be interest
- gives a deduction to payer
[-imposes IWT?]
3

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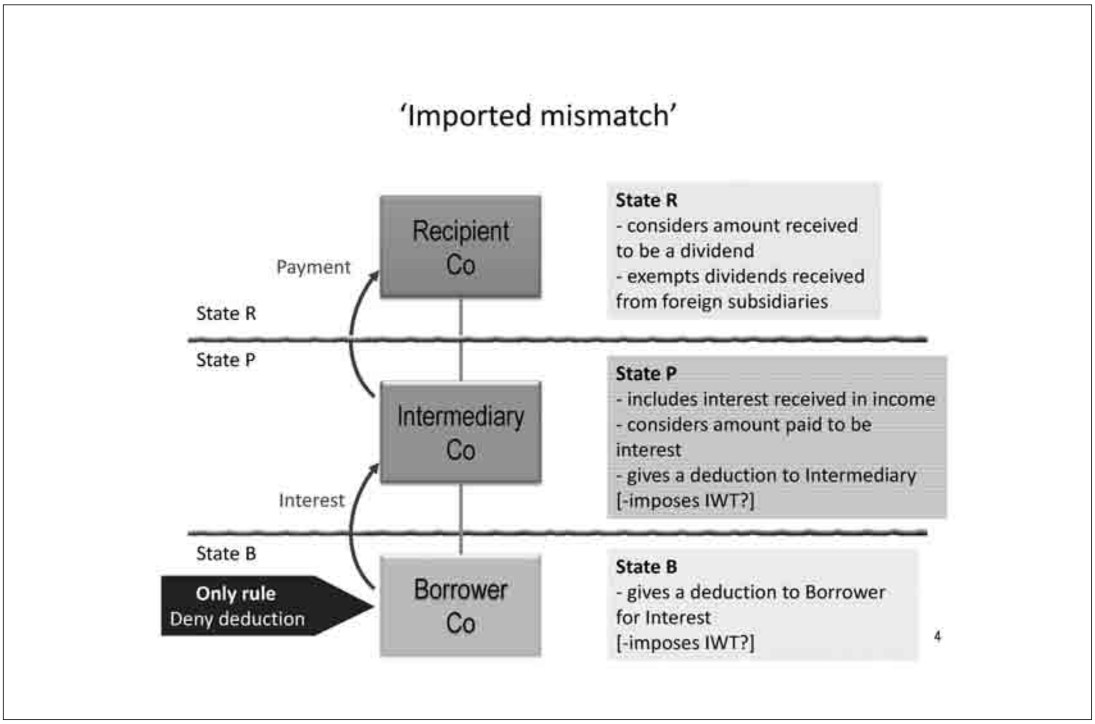
'Imported mismatch'
Recipient Co
Payment
State R
State P
Intermediary Co
Interest
State B
Only rule
Deny deduction
Borrower Co
State R
- considers amount received to be a dividend
- exempts dividends received from foreign subsidiaries
State P
- includes interest received in income
- considers amount paid to be interest
- gives a deduction to Intermediary
[-imposes IWT?]
State B
- gives a deduction to Borrower for Interest
[-imposes IWT?]
4

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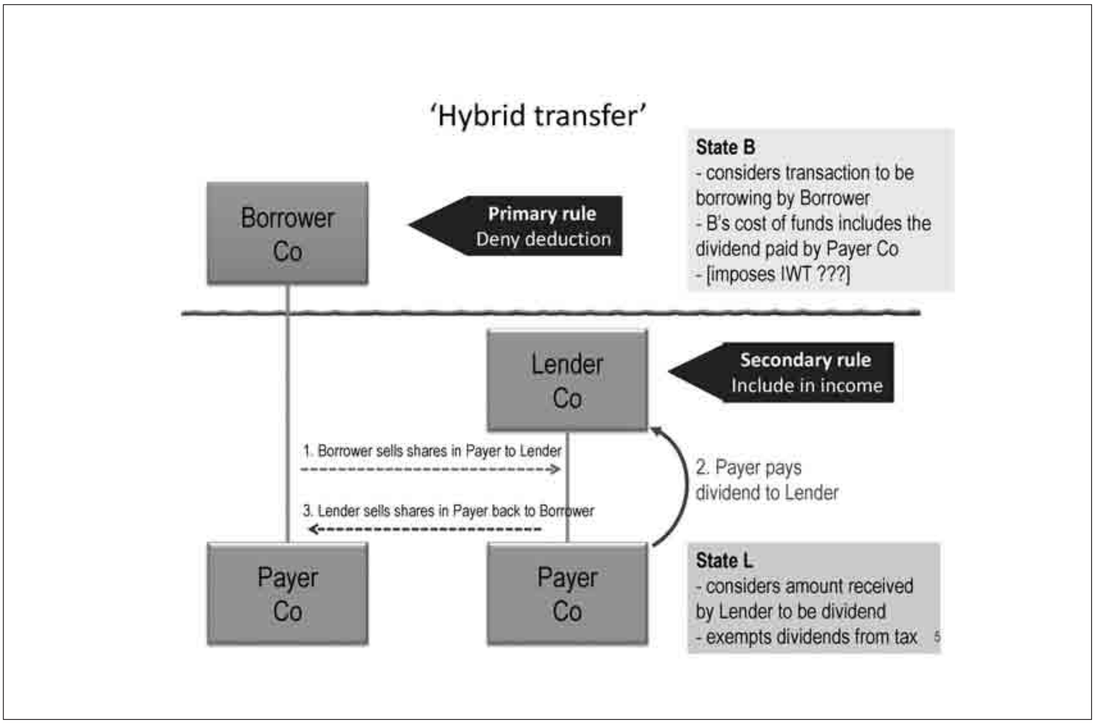

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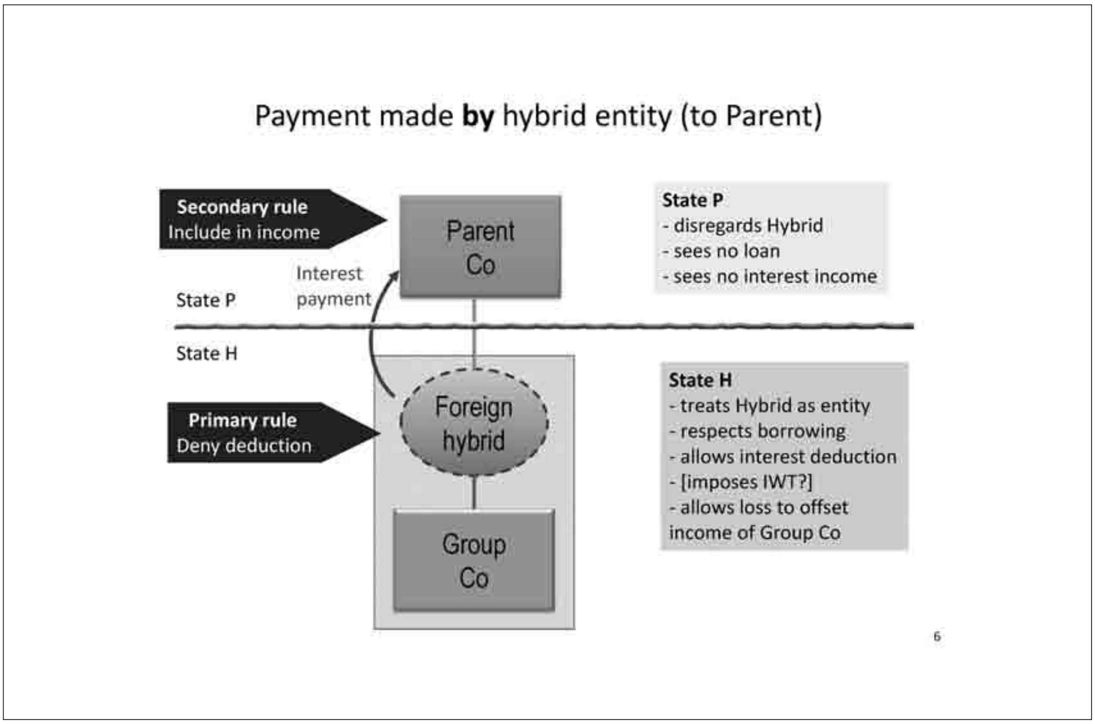

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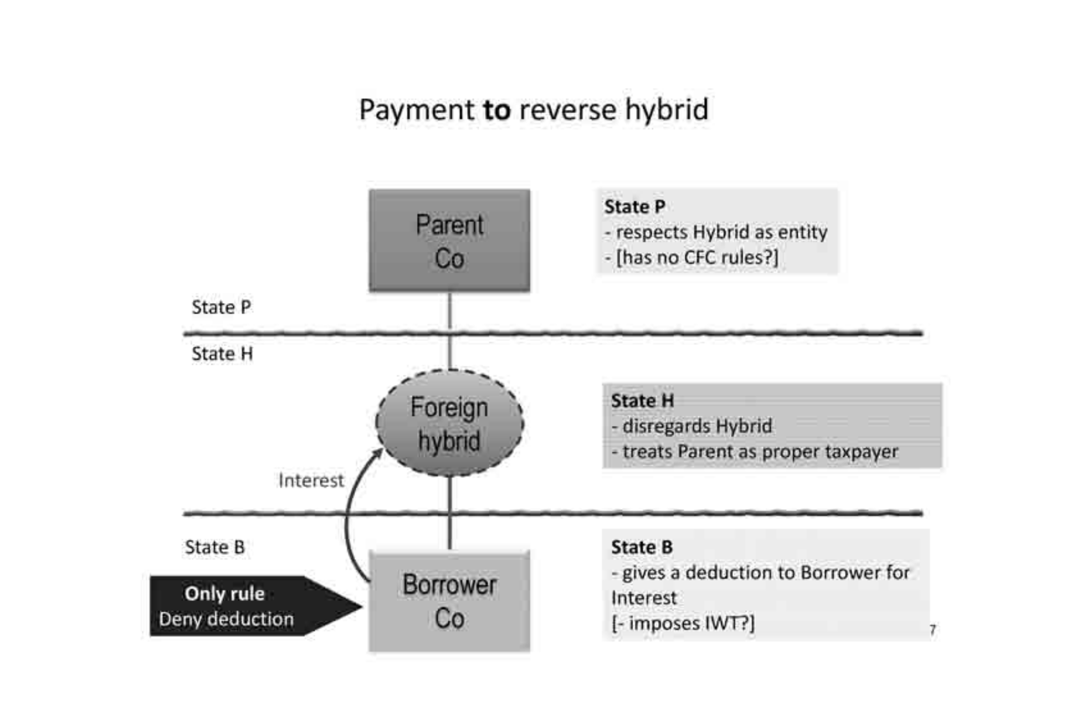

Payment to reverse hybrid
Parent Co
State P
- respects Hybrid as entity
- [has no CFC rules?]
State P
State H
Foreign hybrid
State H
- disregards Hybrid
- treats Parent as proper taxpayer
Interest
State B
Only rule
Deny deduction
Borrower Co
State B
- gives a deduction to Borrower for Interest
[- imposes IWT?]
7

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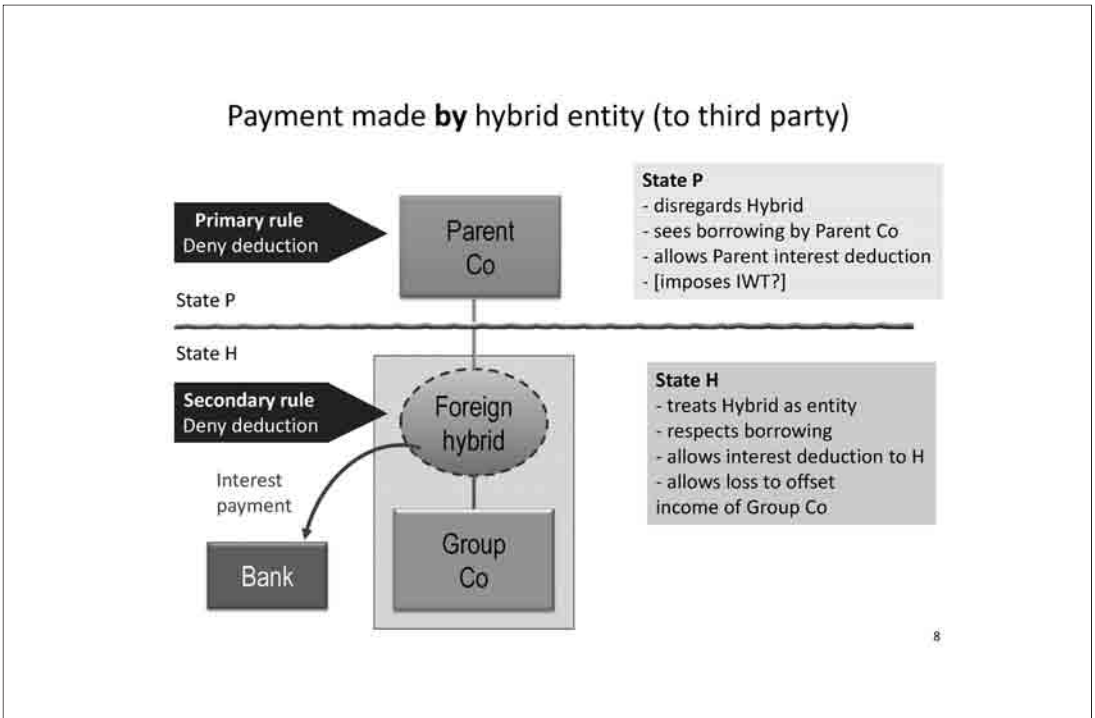
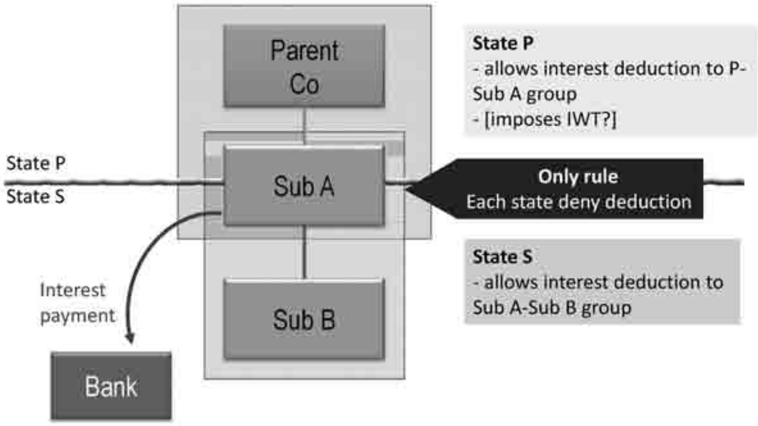


Payment made by hybrid entity (to third party)
Primary rule
Deny deduction
Parent Co
State P
- disregards Hybrid
- sees borrowing by Parent Co
- allows Parent interest deduction
- [imposes IWT?]
State P
State H
Secondary rule
Deny deduction
Foreign hybrid
State H
- treats Hybrid as entity
- respects borrowing
- allows interest deduction to H
- allows loss to offset income of Group Co
Interest payment
Bank
Group Co
8

資料Ⅱ−９

Payment made **by** dual resident entity (to third party)



- Both State P and State S allow consolidation of resident companies only
- Sub A is incorporated in State P; managed in State S

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A small target

- Hybrid outcome
  - affecting instrument that is debt / equity / derivative
- Between related or controlled entities; part of a structured arrangement
  - presumably a marker for avoidance
- involving physical payments
  - between the parties to the arrangement?
- but not timing
- which generates an overall (not individual) revenue loss
  - compared to …?
- resulting a D / NI outcome or a DD outcome
  - but not NI / NI
  - nor FTC / FTC

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Comments

- The remedy is deliberately
  - domestic
    - improve domestic law
    - an anti-hybrid rule that gets turned on
    - and adjusts to get turned off
  - unharmonised
  - agnostic
- So the BEPS policy gets shifted closer to, 'all income must be taxed somewhere'
  - and either country is sufficient
- Becoming dependent upon actions of other countries

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資料Ⅱ−12

- Treating companies as real and final
- Solving every problem by denying deductions
  - what about CFCs / IWT / entity recognition rules
- What happened to withholding taxes
- Consistent with the BEPS paradigm
  - or rules that will be BEPS engines?

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