

**UKRAINIAN TAX
REFORM 2020:
BEPS IMPLEMENTATION
IN UKRAINE**

GOLAW

BEPS ACTIONS AND THEIR IMPLEMENTATION IN UKRAINE

Coherence

Action 2. Hybrid mismatch arrangement

Action 3. Controlled foreign companies

Action 4 . Limitation on interests deduction

Action 5. Harmful tax practices

Essence and content

Action 6. Prevention of tax treaty abuse

Action 7. Permanent establishment status

Actions 8-10. Transfer pricing

Transparency and certainty

Action 11. BEPS data analysis

Action 12. Mandatory disclosure rules

Action 13. Country-by-country reporting

Action 14. Mutual agreement procedure

Action 15: Multilateral instrument

Action 1: Digital economy



TAX ON TRANSACTIONS BETWEEN

**UKRAINIAN COMPANIES
AND NON-RESIDENTS**

BUSINESS PURPOSE OF THE TRANSACTION

Business purpose of the transaction (sound economic reason) means that the company intends to receive income from the business operation.

The transaction with non-resident **does not have** a business purpose if:

- **the main purpose or result** of the transaction is **tax evasion**;
- in comparable conditions, **the person would not purchase** (sell) such services/goods from **unrelated persons**.

WHAT ARE THE CONSEQUENCES OF NON-COMPLIANCE WITH BUSINESS PURPOSE TEST?

Law No. 466-IX

1. The expenses for **all transactions with non-residents are non-deductible.**
2. Tax adjustment of the price of controlled transactions and tax liabilities for TP purposes.

Draft bill No. 4065

1. **Expenses** in the **acquisition transactions** with non-residents from low-tax jurisdictions and non-residents with special legal forms **are non-deductible.**
2. Tax payer shall increase its income for the cost of goods/services **supplied** to non-residents from low-tax jurisdiction and non-residents with special legal forms.
3. **The expenses for paying royalties** to all non-residents are non-deductible.
4. Tax adjustment of the price of controlled transactions and tax liabilities for TP purposes.

APPLICATION

OF DOUBLE TAX TREATIES

What has changed in application of benefits under Double Tax Treaties?

- **Introduction of the “principle purpose test”**: tax benefits are not provided if the main purpose of the business transaction is to receive tax benefits. Example: Convention with Great Britain, Art. 23 “Right to benefits”.
- **The concept of the beneficial owner of income has been changed**: the beneficial owner of income is a person which has the right to receive income and is the **beneficiary** regarding it (has the right to actually dispose of such income).

How to prove that a non-resident is the beneficial owner of income?

The beneficial owner characteristics:

- the person has the right to **use** and **dispose of** the income;
- the person **does not transfer** the received income or the significant part of it in favor of another person;
- the person **bears significant risks** in connection with the receipt of income or its transfer;
- the person **has the appropriate resources** (qualified personnel, fixed assets, sufficient equity capital).

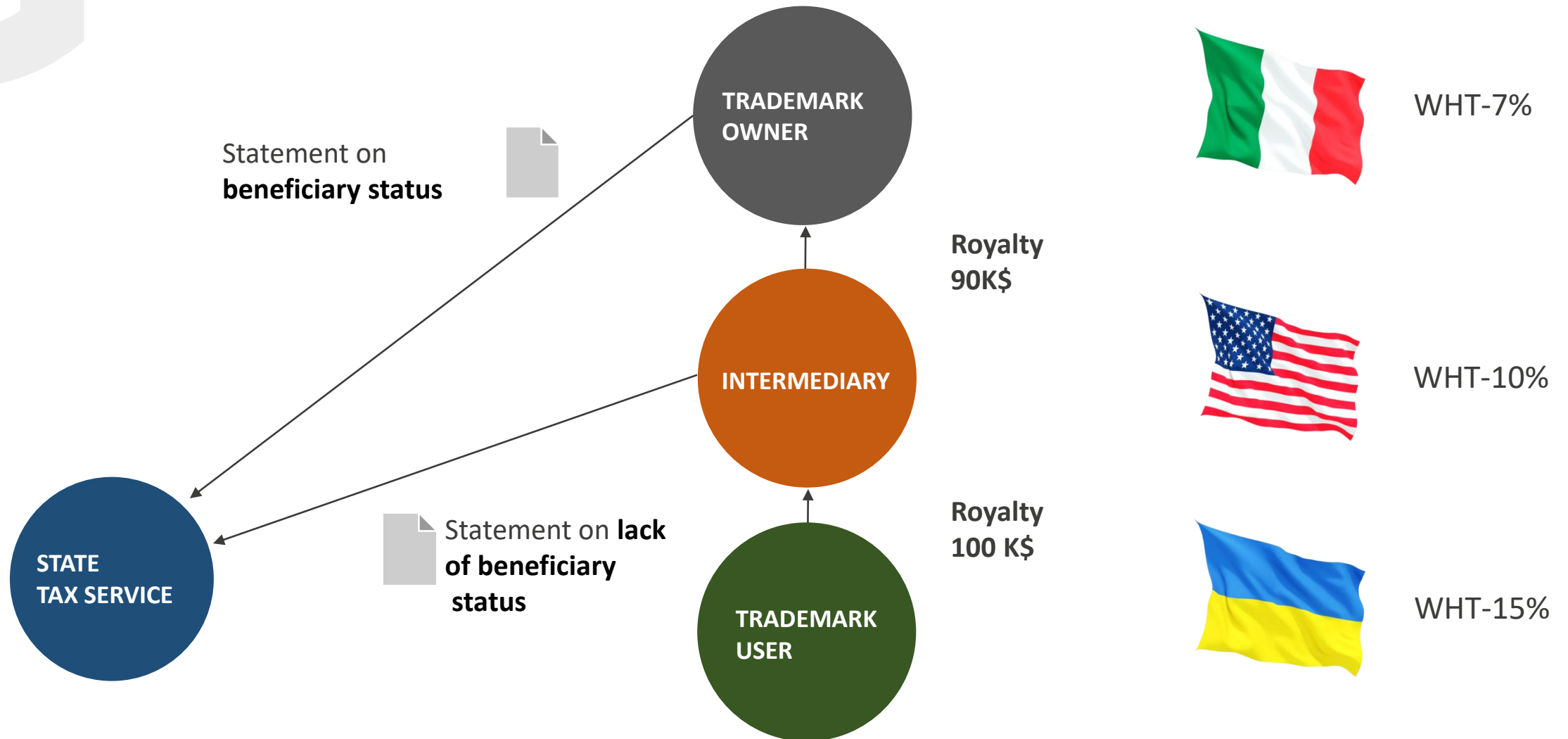
“Look-through approach” introduction

The “look through approach” has been introduced: if a non-resident which receives certain income is not its beneficial owner, the payer of the income may apply the Double Tax Treaty with the real beneficial owner subject to certain conditions.

What is required to apply this concept:

- **a statement in arbitrary form from the recipient of income** regarding absence of a beneficial owner status, as well as on the existence of such status in another non-resident;
- **a statement in arbitrary form from the real beneficiary of income** confirming its status as a beneficial owner, along with the documents evidencing this.

“LOOK-THROUGH APPROACH” FOR DETERMINATION OF THE BENEFICIAL OWNER OF INCOME



Mutual agreement procedure introduction

- **The application** on commencement of mutual agreement procedure **may be submitted by residents and non-residents;**
- The application may be filed only if such a **right is provided for by the respective Double Tax Treaty**. Example: Convention with the UK, Article 26 “Mutual Agreement Procedure”;
- The competent authority which will consider the application is the **Ministry of Finance;**
- The competent authorities of Ukraine **shall consult with the competent authorities of a foreign state;**
- **Until the end of the mutual agreement procedure the obligation to pay tax does not arise;**
- The Cabinet of Ministers of Ukraine has already prepared a draft resolution on the procedure for the MAP (published on 09.24.2020).

PERMANENT

Establishment of non resident

The PE term was amended

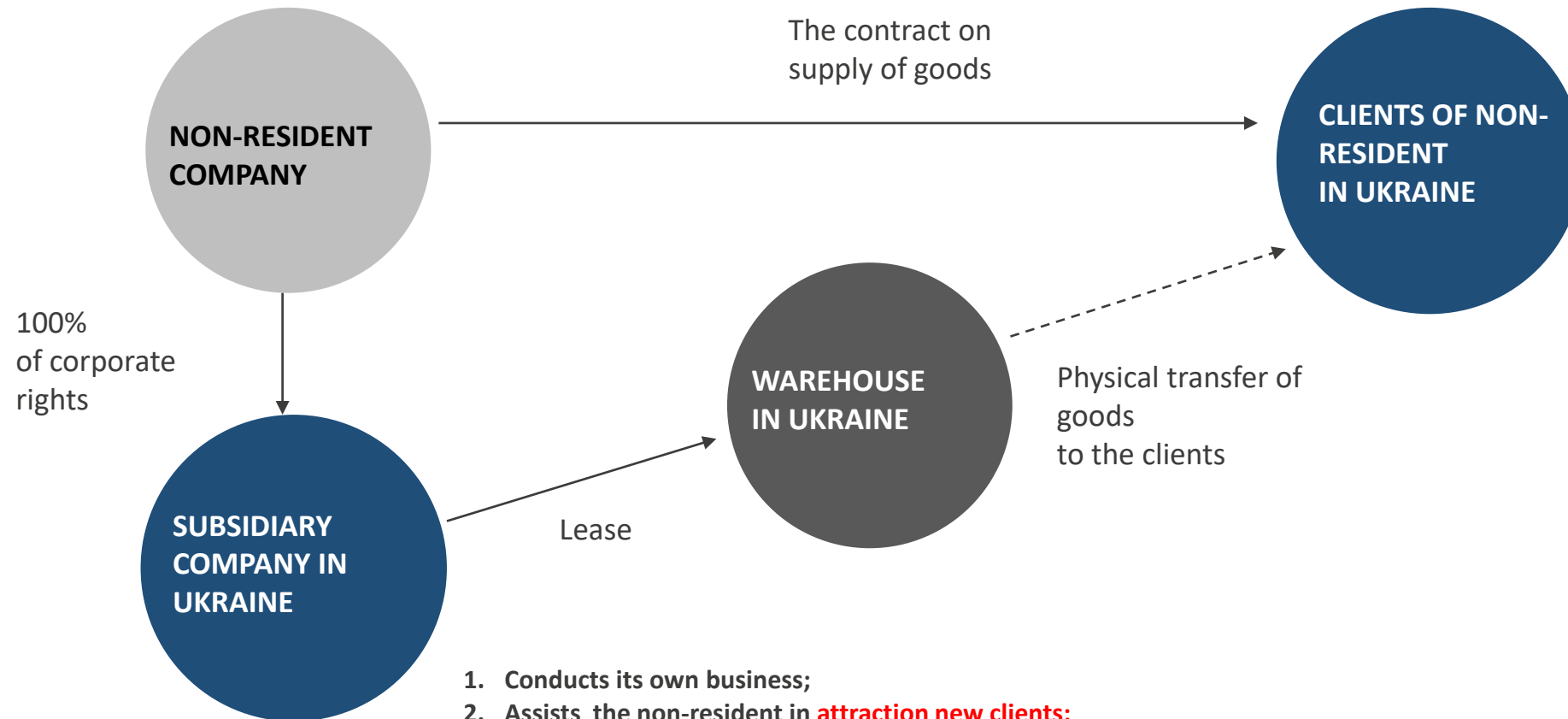
The permanent establishment includes:

- Construction site, related supervision activities [...] if the total duration of the work exceeds **12 months**;
- **Provision of services by a non-resident through employees hired by him** for such purposes, if such activities are carried out in Ukraine for longer **than 183 days in any 12 month period**;
- **Persons negotiating the essential terms of transactions where a non-resident enters into contracts without significant changes of such terms afterwards**;
- **Persons who**, on the basis of an agreement or without it are actually authorized and usually **exercise powers to maintain (store) of stocks (goods) belonging to a non-resident, from the warehouse of which the supply of stocks (goods) is carried out on behalf of a non-resident.**

The evidence of permanent establishment

- Provision by a non-resident of **binding instructions to the resident of Ukraine.**
- **A person has and uses the non-resident's corporate e-mail address for its business activity.**
- **Exercise by a person of right to own or dispose of stocks (goods) or other assets of a non-resident in Ukraine or their significant part on the basis of the respective non-resident's instructions.**
- **A person who has premises or leases the premises on its own behalf for storing goods acquired at the expense of a non-resident or owned by a non-resident where such person supplies the goods to third parties under the non-resident's instructions.**

RISKS OF A PERMANENT ESTABLISHMENT APPEARANCE



1. Conducts its own business;
2. Assists the non-resident in **attraction new clients**;
3. Leases a warehouse in Ukraine **for its own goods and non-resident's goods**;
4. Carries out **legal examination of contracts of the non-resident**;
5. Discusses and **negotiates** on behalf of the non-resident **certain terms of contracts**.

**INDIRECT SALE
OF REAL ESTATE**



WHAT IS THE INVESTMENT ASSET?

1. Corporate rights of **foreign legal entities**, if:
 - a. the value of shares of a foreign company is for 50 % or more formed by the shares of a **Ukrainian company** at any time during 365 days preceding the transaction **and**
 - b. the value of shares of a Ukrainian company is for 50 % or more **formed by real estate located in Ukraine** at any time within 365 days preceding the transaction. Such property can be owned, leased or financially leased.
2. Corporate rights of **Ukrainian legal entities**, if the value of shares is for 50 % or more **formed by real estate in Ukraine, that is owned, leased, or used under the financial lease terms** at any time during 365 days preceding the transaction.

WHAT ARE RESPONSIBILITIES OF THE INVESTMENT ASSET BUYER?

The non-resident buyer is obliged to:

1. **Register within the tax authority** at the location of the Ukrainian legal entity, which corporate rights form the value of the investment asset that is the subject of such a transaction. It is necessary to register not later than the date of **the first payment for the investment asset**.
2. **Withhold the tax on repatriation in the amount of 15%** at the expense of the non-resident seller, unless another rate is provided for by international treaties.

HOW IS THE PROFIT OF THE NON-RESIDENT SELLER DETERMINED?

Profit is defined as the **positive difference** between income received from sale or other disposal of the investment asset and the **documented costs** for acquiring such an asset.

If a non-resident, disposing an investment asset, **does not provide the documents** confirming the costs for acquiring it, the base for taxation of profit is **the value of the transaction on the investment asset disposal**.

TAX AUDITS

OF NON-RESIDENTS

RISKS FOR NON-RESIDENTS

1. **From July 1, 2021, tax audits of non-residents** conducting their commercial activities through permanent establishments in Ukraine **will be allowed for carrying out** (Draft bill No. 4065).
2. **By January 1, 2021, non-residents** operating in Ukraine, including through permanent establishments, are obliged to register in Ukrainian tax authorities (**Draft bill No. 4065**).
3. The draft of procedure for conducting tax audits of non-residents has already been prepared.
4. The tax office may register a non-resident in the tax authorities without the receipt of objections from the non-resident to the tax audit act and without appealing against tax decision by the non-resident.



IRYNA KALNYTSKA

Partner, Head of Tax practice, Restructuring,
Claims and Recoveries practice, Attorney at
law

i.kalnytska@golaw.ua

+38 093 07 10 984

[LinkedIn](#)

Thank you for attention!