Denmark

Poul Erik Lytken & Christopher Erik Oldenburg, Accura Advokatpartnerselskab, Copenhagen, pel@accura.dk / cob@accura.dk

Introduction

Denmark is one of the three Scandinavian countries, is situated in the northern part of Europe and is a member of the European Union.

The last 12 months have seen some significant Danish case law as well as changes in tax law, on both domestic and international levels. This report aims to provide an overview of the following four topics:

1. Supreme Court rulings in the "Danish cases" regarding beneficial ownership
2. Danish real estate taxation developments
3. Implementation of Energy Islands tax measures
4. Tax treaty developments

1 Supreme Court rulings in the "Danish cases" regarding beneficial ownership

Since 2008, the Danish Ministry of Taxation has initiated a large number of cases against Danish companies who have distributed dividends or paid interest to EU parent companies or parent companies in states with which Denmark has a double tax treaty.

In the relevant cases, the Ministry of Taxation claimed abuse of the Parent-Subsidiary Directive, the Interest and Royalties Directive or the applicable double tax treaty as the alleged parent companies, according to the Ministry, are conduit companies and not the beneficial owners of the dividends or interest received. Instead – in the opinion of the Ministry of Taxation – the companies qualifying as beneficial owners were resident in states outside the EU and/or states with no double tax treaty with Denmark. As a result, the Danish subsidiaries had a withholding obligation in connection with the payments.

In 2016, the Danish High Court referred four cases to the EU Court requesting preliminary rulings on the subject of beneficial ownership. In 2019, the Court published it preliminary rulings in relation to the joint cases C-115/16, C-118/16, C-119/16 and C-299/16 (known as the "Danish beneficial ownership cases").

On 3 May 2021 and 25 November 2021, the Danish Eastern High Court issued its rulings in the cases as first instance. Both cases were appealed to the Supreme Court. On 9 January and 4

May 2023, the Supreme Court issued the final rulings in the Danish beneficial ownership cases. The rulings were mostly in favour of the Ministry of Taxation.

1.1 Dividend distribution cases

The Supreme Court has issued two rulings on dividend distribution. Even though both rulings are mostly in favour of the Ministry of Taxation, one of the rulings holds a very noteworthy exception.

1.1.1 NetApp Denmark ApS

The first ruling which concerned dividend distributions from a Danish subsidiary in the US NetApp-group, listed on NASDAQ. The distributions were made due to the American Jobs Creation Act 2004, which provided a tax holiday to companies that repatriated profits from overseas before end of April 2006 and reinvested them in the US economy.

On 25 September 2005, NetApp Denmark distributed dividend of approx. DKK 566 million to its parent company, NetApp Cyprus. NetApp Cyprus used the dividend to pay principal and interest to NetApp Bermuda, with whom Denmark has no double tax treaty. NetApp Bermuda invested the proceeds in bonds for a period of approx. five months before distributing the amount to NetApp US.

On 13 October 2006, NetApp Denmark ApS decided to distributed dividends of approx. DKK 92 million to NetApp Cyprus. However, NetApp Denmark ApS was awaiting payment from an intercompany transaction before having the funds to pay the dividend. The intercompany payment was initially expected in April 2006, but the payment was not made until 2010. As such the dividend was not paid in cash to NetApS Cyprus until 2010, after which it was redistributed to NetApp Bermuda and finally to NetApp US.

On 3 April 2006, NetApp Bermuda made a dividend distribution to NetApp USA of USD 550 million, of which USD 300 million was a loan. NetApp Denmark ApS argued that the two distributions from NetApp Denmark in 2005 and 2006 were part of the USD 550 million distribution from NetApp Bermuda to NetApp US.

The High Court's Ruling

In 2021, the Danish High Court held that NetApp Cyprus was not the beneficial owner of the either of the two dividend distributions as NetApp Cyprus did not serve any relevant commercial purpose and both of the dividend distributions were immediately upstreamed to NetApp Bermuda.

Very noteworthy, the High Court, however, still ruled in favour of NetApp Denmark regarding the DKK 566 million dividend distribution from 2005. The High Court held that this distribution was exempt from Danish withholding tax since it would have been possible for NetApp Denmark to distribute the dividend directly to NetApp US and the holding structure did consequently not imply any tax benefit or abuse in respect of the 2005 dividend distribution. The High Court therefore found NetApp US to be the beneficial owner and NetApp Denmark were entitled to invoke

the Denmark-US double taxation treaty (in respect of a dividend distributed from Denmark to Cyprus).

In terms of the distribution from 2006, the Danish High Court did not find sufficient evidence to conclude that the dividend was included in the dividend of USD 550 million paid by NetApp Bermuda to NetApp US, since this distribution was not settled in case until 2010, and therefore the tax treaty between Denmark and the US was not applicable. Danish withholding tax therefore applied to the 2006 distribution from NetApp Denmark.

The Supreme Court's Ruling

In the final ruling from the Danish Supreme Court, the legal reasoning was in the outset much the same as in the High Court ruling. Still, the outcome was completely reversed.

The Supreme Court held that NetApp Denmark should have withheld dividend tax in respect of the (larger) dividend distribution from 2005 but had no withholding obligation in respect of the (smaller) dividend distribution from 2006.

Regarding the dividend from 2005, the Supreme Court found that NetApp US was in fact not the beneficial owner of the dividend, resulting in a withholding obligation of Danish withholding tax of the dividend for the Danish company. In the Supreme Court's assessment, it was decisive that the distributed founds remained with NetApp Bermuda for approx. five months before it was formally decided to distribute it to NetApp US as part of a larger consolidated dividend distribution from NetApp Bermuda and that the NetApp group therefore in fact had the power of disposition over the dividend (even though it was likely clear from a commercial point of view that the Danish dividend distribution was part of a repatriation of funds to the US triggered by the American Jobs Creation Act 2004 and consequently was destined to end up in the US no later than April 2006). Thus, NetApp US did not qualify as the beneficial owner of the dividend and NetApp Denmark was liable for Danish withholding tax.

In relation to the dividend from 2006, the Supreme Court found that the dividend from Denmark was included in the dividend distribution form NetApp Bermuda to NetApp US based on financial statements, official financial reporting of NetApp US and the fact that NetApp Bermuda had taken out a loan that provided the basis for the dividend distribution. With reference to the tax treaty between Denmark and the US, the dividend distribution did thus not trigger Danish withholding tax. No importance was attached to the fact that the dividend was not paid in cash until several years after the decision to distribute the dividend was made.

1.1.2 TDC A/S

The second ruling concerned a binding ruling issued by the Danish tax authorities in 2011 regarding the withholding obligation of an intended dividend distribution of approx. DKK 6 billion from the Danish company TDC A/S to the parent company registered in Luxembourg as a partnership limited by shares (SCA), which owned 59.1% of the Danish company. The parent company was owned by a Luxembourg public limited company (SA) which was owned by private equity funds.

A dividend distribution of DKK 1,050 million was carried out in August 2011 and the binding ruling issued by the Danish tax authorities found that such distribution would trigger withholding tax.

TDC A/S stated that the parent company had a separate management which solely could make decisions on dividend distributions, and therefore in their view, the parent company qualified as the beneficial owner. No further information was available on the activities of the parent company. No information about the purpose or what the dividend was used for was disclosed.

The High Court's Ruling

The case was brought before the Danish High Court which held that the majority of the dividend distribution was assumed to be redistributed to the private equity funds owning the Luxembourg parent company. Thus, the parent company did not in fact have any power of disposition over the dividend and was therefore not the beneficial owner. Further, no documentation or information was provided regarding the private equity funds and whether they (or their investors) would qualify as beneficial owners and be entitled to rely on a tax treaty. Consequently, TDC A/S had a withholding obligation of the dividend distributed. A statement from the tax authorities in Luxembourg according to which the Luxembourg parent company, based on the information provided, was the beneficial owner of the dividend, was given no weight as an argument.

The Supreme Court's Ruling

The Supreme Court upheld the judgement of the High Court.

1.2 Interest cases

The Danish Supreme Court also issued two rulings in relation to interest payments to foreign group companies.

In both cases, the Court found that the recipients of the interest payments were not the beneficial owners. Therefore, the withholding tax relief in the Interest and Royalty Directive or the relevant tax treaties did not apply, and withholding taxes should have been paid on the accrued interest.

1.2.1 Takeda A/S (previously Nycomed A/S)

A restructuring of the Nycomed group was carried out in 2006. Two Swedish holding entities were established (Nycomed Sweden Holding 2 and Nycomed Sweden Holding 1). Nycomed Sweden Holding 1 was held by a Luxembourg entity, Nycomed S.C.A., SICAR.

The Danish entity raised a loan amounting to EUR 501m from the Swedish parent, Nycomed Sweden Holding 2. Concurrently, Nycomed Sweden Holding 1 raised a loan of EUR 498.5m with the Luxembourg parent company. The loan to the Danish entity was financed via a capital increase in Nycomed Sweden Holding 2 by Nycomed Sweden Holding 1 and by group contributions in 2007-2009 corresponding to the interest.

The Supreme Court established that the purpose of the restructuring was to reduce the Danish taxable income though interest deduction without a corresponding interest income being subject to taxation within the group.

The Court found that the Swedish entities did not have the actual authority and capacity to dispose over the received interest payments. Therefore, the entities were considered conduit companies. In addition, the Supreme Court found that the group did not prove that the Luxembourg entity was the beneficial owner of the interest. Therefore, the Court found that the arrangement was abusive. Therefore, withholding taxes should have been paid in connection with the accrual of interest.

1.2.2 NTC Parent S.a.r.l

Like in the Takeda case, a restructuring of the NTC group was carried out in 2006. Two Luxembourg holding companies were established (Angel Lux Common and Angel Lux Parent), and a series of arrangements were carried out in connection with intercompany loans of EUR 1.8b from the Luxembourg parent company.

The Supreme Court established that the purpose of the restructuring was to obtain a tax deduction in respect of interest without a corresponding interest income being subject to taxation within the group.

Further, the Court found that Angel Lux Common and Angel Lux Parent did not have the actual authority and capacity to dispose over the received interest payments. Thus, the entities were not beneficial owners and should be considered conduit companies. As NTC Parent could not document that the (actual) beneficial owner(s) of the interest were entitled to benefit from a tax treaty, the arrangement was considered abusive. Danish withholding tax should therefore have been paid in connection with the accrual of interest.

2 Developments in Danish Real estate taxation

2.1 Implementation of the new real estate tax rules and valuation principles

The Danish Parliament has passed new Act on real estate taxation and valuation principles, which the Danish Tax Authorities are in the process of implementing.

The new real estate taxes are based on land and property value as determined by the tax authorities. However, developing and implementing a viable system to determine the values – and hence the tax base – has been quite challenging for the tax authorities, and the system is hence not yet fully implemented.

Consequently, the tax base for existing properties is preliminary for the income years ranging from 2021 (2022, for commercial real estate) until 2025 when the final values are expected. This, in turn, means that the taxes paid for these income years are subject to reassessment when the system is place, to the extent that the final values deviate from the preliminary ones on which taxation was based.

2.2 Depreciation rate on buildings and installations is lowered from 4% to 3%

As of 1 January 2023, the maximum depreciation rate on buildings and installations was lowered from 4 % to 3% p.a. meaning that buildings and installations are now fully depreciated over a 33 year period rather than the previous 25 year period.

The depreciation rate on buildings and installations acquired before 1 January 2023 remains 4%. However, the reduced 3%-rate will also apply to additions and modifications made on such buildings, meaning that a differentiated rate of depreciation may apply towards a property acquired before 1 January 2023.

2.3 Proposal of a mark-to-market taxation on commercial rental real estate was abandoned.

A much-discussed Danish mark-to-market taxation on gains on rental real estate was proposed in order to finance a new pension scheme, and a bill was presented in the Danish parliament proposing to implement the taxation.

The taxation was set to include Danish and foreign entities comprised by the Danish Corporate Tax Act that owning real estate of at least DKK 100m subject to letting.

Due to a general election the bill lapsed and was since abandoned by the government assembled following the election.

3 Implementation of measures to tax Energy Islands

The Danish Parliament has passed a bill to align tax liability for people and corporations performing certain energy related activities outside the Danish Exclusive Economic Zone regardless of whether the person or corporation is fully or limited liable to Danish taxation.

The new legislation in effect extends the geographical application Danish tax liability for people and legal entities that are limited tax liable to Denmark when performing certain energy related activities to include the Danish Exclusive Economic Zone. The Exclusive Economic Zone is 200 nautical miles from the Danish coastline as opposed to the territorial waters which end 12 nautical miles from the coastline.

In 2020, the Danish Government and several other parties in Parliament entered into a "climate agreement" in order to develop, extend and integrate green technology in the energy sector and industry. Amongst other, the agreement contained initiatives to establish the world's first energy island and carbon capture storage (CCS).

In this regard, it was pointed out that Denmark did not have the right to tax foreign entities or persons who were limited liable to Danish taxation if they have performed work in the Danish Exclusive Economic Zone, but outside the territorial waters.

In order to align the taxation of fully and limited tax liable subjects, the Danish Parliament extended the term permanent establishment to include certain activities performed exclusively in

the Danish Exclusive Economic Zone. These activities include the establishment, operation and use of e.g. artificial islands and CCS. Thereby ensuring that tax subjects that are limited liable to Danish taxation will be liable to Danish taxation of income created in the Danish Exclusive Economic Zone in connection with the establishment and operation of the energy islands.

The extension will enter into force 1 July 2023.

4 Tax Treaty Developments

4.1 New Tax Treaty in place between Denmark and France

In March 2023, the Danish Parliament passed a bill approving a new double tax treaty between Denmark and France.

In 2008, Denmark terminated the existing double tax treaty because France had exclusive taxation right to Danish pensions paid to pensioner living in France, even though the pensions were financed partly by the Danish state. The termination also prevented certain fund structures from undertaking tax efficient investments in Denmark.

This is sought to be mitigated with the new double tax treaty. As such, the taxation right is split between Denmark and France. Denmark has the right to tax the Danish pensions with respect of the French taxation. I.e. Denmark has the right to the part of the tax that exceeds the French taxation.

Further, the double tax treaty should also prevent tax evasion, and should include procedures for an extended co-operation between the tax authorities.

Provided France ratifies the double tax treaty, it should enter into force 1 January 2024. Currently and until 1 January 2024, no tax treaty is in force.

4.2 Russia "blacklisted"

In February 2023, the EU decided to add Russia, amongst others, to the EU list of non-cooperative jurisdiction for tax purposes, as Russia had not addressed the harmful aspects of a special regime for international holding companies, and as dialogue with Russia on the matters came to a standstill due to the Russian aggression against Ukraine.

Consequently, Danish parliament has approved the termination of the Danish Russian double tax treaty with effect from 15 June 2023, to ensure the possibility for Denmark to implement defensive measures against Russia to help protect against tax evasion etc.

In addition, any payments made to entities or persons registered for tax purposes in Russia by tax subjects that are fully liable to Danish taxation cannot be deducted in the taxable income or in any other way affect the taxable income.