

Danish High Court Decision on International Holding Structure

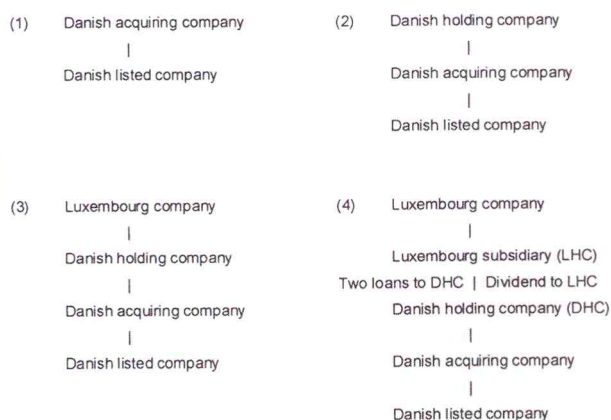
The author provides a summary of a recent decision of the Eastern High Court on taxation of dividends at source in the context of an international holding structure. The scope of the summary focusses on the international tax aspect of the case only.

1. Facts of the Case

In 2005 a Danish company launched a public offer to buy the shares in a Danish listed company, and succeeded. The shares in the Danish company (holding company) were transferred in connection with the establishment of another Danish holding company as a contribution in kind against the issuance of shares. Cash contribution and credit facilities were established in respect of the Danish holding companies. The shares in the ultimate Danish holding company (DHC) were contributed to a Luxembourg company against the issuance of shares, and the Luxembourg company established a new Luxembourg subsidiary through a drop-down including the shares in DHC. DHC decided to pay a dividend to its parent company in Luxembourg (LHC), which in turn issued two loans to DHC, namely a convertible loan and a non-convertible loan. The payments were effected on the same day. On 31 December 2005 the convertible loan was converted into shares. The companies had no employees, as the administration of the companies was carried out by a separate administration company.

The transactions and holding structure can be illustrated as in Figure 1.

Figure 1



In 2008 the Danish tax authorities submitted two memoranda to DHC in the context of a tax audit, the first concerning the two loans to DHC and the second concerning

a possible obligation to withhold dividend tax. The case summarized in this article concerns only the payment of the dividend by DHC to LHC. On 15 May 2009 the Danish tax authorities (as party in this case "the Tax Authorities") decided that DHC was obliged to withhold tax equal to DKK 1,552,376,000 of a dividend of DKK 5,544,200,000 paid to LHC.

The National Tax Tribunal ruled on the case in 2010,¹ followed by a ruling on appeal to the Eastern High Court on 20 December 2011.²

2. Pleadings before the National Tax Tribunal

2.1. The OECD Model Convention

The Tax Authorities argued that the requirement for a tax-exempt dividend under section 2.1.c of the Danish Corporation Tax Act, namely that the dividend withholding tax to be reduced according to the Parent-Subsidiary Directive (90/435) or a tax treaty (in this case, the Denmark-Luxembourg Income and Capital Tax Treaty (1980)), was not fulfilled to the extent that investors that were the beneficial owners were resident in non-treaty jurisdictions. This is because LHC was not considered the beneficial owner of the dividend due to LHC having no activities and no independent right to dispose of the dividend, and due to the absence of a commercial purpose for the insertion of LHC into the structure. Reference was made to the Commentary on Article 10 of the OECD Model and a 2005 decision of the Swiss Supreme Court.³ Specifically, the Tax Authorities argued that the situations where payments were made through a conduit company in paragraph 12.1 of the Commentary on article 10 of the OECD Model were mere examples of instances where the formal recipient will not be considered the beneficial owner. In addition, it likewise contravenes the purpose and intention underlying the rules of the OECD Model to grant relief in these situations, and it is sufficient that the lack of an independent right to dispose of the dividend is related to the channelling of the dividend. The payment back to DHC was ultimately made by the conversion into shares. Thus, LHC did not receive any amount that the company at any time in fact had disposed of.

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1. SKM2010.268.LSR, *Indeholdelse af udbytteskat vedrørende udbytte til udenlandsk moderselskab*, www.skat.dk.
 2. SKM2012.121.ØLR, *Retmæssig ejer – kildeskat på udbytte*, www.skat.dk.
 3. 2A.239/2005 (28 Nov. 2005), *Sammlung der Entscheidungen des Schweizerischen Bundesgerichts*, II. Öffentlich-rechtliche Abteilung.

