



KROMANN REUMERT

BENEFICIAL OWNERSHIP: DEFEAT TO DANISH TAX AUTHORITY

In the first Danish decision on “beneficial ownership” to dividends distributed out of Denmark in a cross-border structure, the Danish Tax Tribunal held against the Danish Tax Authority and recognized a Luxembourg holding company as the beneficial owner of the dividends.

First Danish decision on beneficial ownership

The Danish Tax Tribunal (“Landsskatteretten”) has just published its decision in the first Danish case laying down the Danish tax meaning of “beneficial ownership”.

The Tribunal decided that a Luxembourg holding company that received dividends from its Danish subsidiary was the beneficial owner of the dividends and therefore entitled to the zero rate of withholding tax provided for under the Danish participation exemption regime.

Facts

The Danish subsidiary B distributed dividends to its Luxembourg parent company A. On the same day, a similar – but not identical – amount was lent back from A to B, which on the same day carried out a share capital increase in its Danish subsidiary C. C used the amount to buy the Danish operating company D.

The Danish Tax Authority had argued that A was not the beneficial owner of the dividends paid from B to A, since A did not have any activities other than the holding of the shares in B and since the shareholders of A had in reality in advance to A receiving the dividends decided how A should apply the dividends.

The Tribunal decision

In its decision, the Danish Tax Tribunal first referred to the OECD Commentary to the OECD Model treaty



which states that a conduit company cannot normally be regarded as the beneficial owner if, though the formal owner, it has actually very narrow powers which render it, in relation to the income concerned, a mere fiduciary or administrator acting on account of other parties.

However, since

- A did not pass on the dividend to its parent company, or to the shareholders of the parent company,
- but instead lent it to its subsidiary B,
- which used it to increase the capital of C,
- which ultimately used the amount to buy D,

the Tribunal found that, in these circumstances, A should not in relation to the dividend from B be regarded as a conduit company, but as the beneficial owner of the dividend.

Even though the Tax Tribunal's decision on beneficial ownership was sufficient to settle the matter in favor of the taxpayer, the Tax Tribunal also referred to the Parent/Subsidiary Directive (Directive 90/435/EØF).

Article 1 (2) of the directive provides that the directive does not preclude the application of domestic or agreement-based provisions required for the prevention of fraud or abuse.

The Danish Tax Authority had argued that the insertion of A constituted such abuse and had therefore denied A the benefits of the directive.

However, the Tax Tribunal did not find that there was sufficient legal basis in domestic Danish tax law to set aside the distribution of dividend from B to A and therefore found that A was entitled to the benefits of the directive.

Outlook

The Danish Tax Tribunal is the first instance tax appeals body for Danish companies and the Danish Tax Authority is currently considering whether to appeal the Tribunal decision to the Danish courts.

The Danish Tax Authority has for a couple of years been actively scrutinizing beneficial ownership issues and are preparing a number of further cases on this issue.

The impact of Danish Tax Tribunal's decision on these cases remains to be seen.



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