Analysis: Australia – Denmark Income Tax Agreement

See treaty text
Type of treaty: Income
Based on the OECD Model Treaty
Signed: April 1, 1981
Entry into force: October 27, 1981
Effective date: In Australia: income subject to withholding tax, from January 1, 1982; other provisions, from July 1, 1982. In Denmark, from January 1, 1982. See Article 27
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Article 1 Personal Scope

See treaty text
Persons who are resident of one or both States.

Article 2 Taxes Covered

See treaty text
Australia
- Commonwealth income tax.

Denmark
- Income taxes to the state (*statslig indkomstskat* (*bund-, mellem-, topskat*)).

As well as any identical or substantially similar taxes which are subsequently imposed in addition to, or in place of, the existing taxes. This primarily comprises:
- Municipal income tax (*kommunal indkomstskat*);
- Church Tax (*kirkeskat*);
- Since 2008: labour market contribution (*AM-bidrag*)
- Health contribution (*sundhedsbidrag*)
- Share income tax (*aktieindkomstskat*)
- CFC tax (*CFC-skat*);
- Pension yield tax (*pensionsafkastskat*); and
- Hydrocarbon Tax (*kulbrinteskat*) any

identical or substantially similiar taxes which are subsequently imposed in addition to, or in place of, the existing taxes.
Since the Convention does not cover wealth taxes, property value tax (*ejendomsværdiskat*), which is considered a partial wealth tax, is not within the scope of the Convention.

Article 3 General Definitions

See treaty text
"Australia": The territory of Australia including:
- The Territory of Norfolk Island;
- The Territory of Christmas Island;
- The Territory of Cocos (Keeling) Islands;
- The Territory of Ashmore and Cartier Islands;
- The Territory of Heard and McDonald Islands; and
- The Coral Sea Islands Territory,

including any territory beyond the territorial seas which, under Australian law and in accordance with international law, has, or may be designated as an area within which Australia may exercise rights with respect to the seabed and subsoil and their natural resources.
"Denmark": The Kingdom of Denmark including any area outside the territorial sea of Denmark, within which Denmark may exercise, under its law and in accordance with international law, rights with respect to the exploration and exploitation of the natural resources of the Continental Shelf; the term does not include the Faroe Islands and Greenland.
"Company": Any body corporate or any entity which is treated as a body corporate for tax purposes.
"enterprise of one of the Contracting States": respectively an enterprise carried on by a resident of one of the Contracting States.

Denmark

The term "Denmark" includes any area outside the territorial sea of Denmark which in accordance with international law has been or may hereafter be designated under Danish laws as an area within which Denmark may exercise sovereign rights with respect to the exploration and exploitation of the natural resources of the sea-bed or its subsoil and the superjacent waters and with respect to other activities for the exploration and economic exploitation of the area.
The term does not comprise the Faroe Islands and Greenland, but the Convention can, pursuant to Article 29 be extended to cover the Faroe Islands and Greenland.
"Competent authority" is in the Convention stated to be the minister of taxation. In matters relating to international taxation, authority has been delegated to "SKAT", the Danish administrative tax authorities.

Article 4 Residence

See treaty text

Residence: Individuals

Treaty

A person is a resident of Australia for the purposes of Australian tax (provided they are not only subject to Australian tax on income which is from sources in Australia).
In the case of Denmark, if the person is liable to tax therein by reason of his domicile, residence or any other criterion of a similar nature but not if he is liable to tax in Denmark in respect only of income from sources therein.
In the case of individuals apparently resident in both Contracting States, the usual tiebreaker tests apply:

- He will be deemed to be a resident of the State in which he has a permanent home;

- If he has a permanent home in both States, then he is a resident of the State in which he has a habitual abode

- If he has a habitual abode in both Contracting States, or if he does not have a habitual abode in either of them, he will be deemed to be resident in the state with which his personal and economic relations are closer (centre of vital interests);

Domestic law

Australia

Generally, you are an Australian resident for tax purposes if you can be said to be "residing in Australia". It covers persons who ordinarily live in Australia and those persons who have retained foreign nationality, citizenship or domicile but whose usual place of residence is Australia.
You may be deemed to be a resident if:

- your domicile is Australia (regardless of any physical presence in Australia) unless you can prove that you have established a permanent place of abode elsewhere; or ;

- you are present, continuously or intermittently, in Australia for a total of more than one-half of the year of income, unless you establish both that you have a usual place of abode outside Australia and do not intend to take up residence.

Denmark

Individuals

According to section 1(1) of the Danish Tax at Source Act (*kildeskatteloven*), tax liability on its global income applies to (i) persons who are resident in Denmark, (ii) persons without Danish residence who stay on Denmark for at least six months, (ii) Danish nationals employed on vessels which with home

port in Denmark, unless it is substantiated that they are tax resident outside of Denmark, and (iv) Danish nationals, who are civil servants deployed for duty abroad. Tax liability under (ii) applies as of the initiation of the stay in Denmark. However, persons visiting Denmark as tourists or students, who remain liable to tax in their home State and are not carrying on business in Denmark will only be considered as tax residents if the stay exceeds 365 days within a two year period.
Residence in a foreign State for foreign tax purposes does not preclude residence in the Denmark for Danish tax purposes. Dual residence, often resulting in double taxation of the individual's worldwide income, is generally resolved under the terms of an applicable tax treaty. When a Danish tax resident individual moves out of Denmark, the individual will generally still under Danish domestic law be considered tax resident in Denmark as long as he/she or his/her family still has a house suitable for year-round residence. A house owned by the Danish emigrant will generally be considered as being available unless it is let out on a lease which is not terminable for at least three years.

Companies

In the case of companies apparently resident in both States residence is to be decided by the state in which it was created.

Domestic law

Australia

A company is resident in Australia if the following is satisfied:

• It is incorporated in Australia (irrespective of where central management and control is exercised). Once a company has been incorporated in Australia it can never lose its Australian residence for tax purposes.

• Central management and control is exercised in Australia (irrespective of which country the company was incorporated in) and the company carries on business in Australia.

• The company is neither incorporated in Australia nor is its central management and control exercised there but carries on business in Australia and its voting control is in the hands of resident Australian shareholders.

Denmark

All companies taxable under section 1 of the Danish Corporate Income Tax Act (CITA) (*selskabsskatteloven*) are considered as Danish taxable corporate entities. This list primarily entails "*aktieselskaber*" (A/S) and "*anpartselskaber*" (ApS), which are required to be registered in the Danish Commerce and Companies Agency (*Erhvervs- og Selskabsstyrelsen*). Further, companies and cooperatives with similar corporate characteristics as the above company types and which have a Danish tax resident management will be considered as taxable in Denmark. Management will normally be considered as resident in Denmark if Denmark is the seat of the daily management. This would generally be the seat of management rather than the board of directors. However, if the board of directors take very active part in the daily management decisions, the venue of the board may depending on the circumstances be considered as the seat of management for tax purposes. In all other cases than *aktieselskaber* and *anpartselskaber,* it is recommendable to obtain local advice.
As a noticeable potential exception to the rule that the above entities are considered to be taxable entities, section 2A of the CITA provides that if any of the above entities are considered to be tax transparent under foreign tax law to the effect that income in such Danish entity is taken into account in foreign income, then the otherwise taxable corporate entity is for Danish tax purposes considered tax transparent and potentially not protected by the tax treaty. The reclassification rule is an anti-abuse rule aimed at the US check-the-box rules to avoid creating a possibility of double-dip of primarily financing expenses in both Denmark and the US, but it applies equally to other rules with the same effect.

Partnerships and fiscally transparent enterprises

There are no definitions given in the Treaty as to which bodies may be treated as transparent. Article 3 merely states that the term "company" designates any body corporate or any entity which is treated as a body corporate for tax purposes. Australia treats partnerships as transparent consistent with OECD principles.

Domestic law

Australia

Partnerships are regarded as transparent, with partnership profits being taxable on the individual partners except for limited partnerships that are treated as companies.

Denmark

Partnerships are not comprised by section 1 of the Danish CITA and therefore generally not recognised as separate taxable entities.
A partnership is either a general partnership (*interessentskab* (I/S), a limited partnership (*kommanditselskab* (K/S) or *partnerselskab / kommanditaktieselskab* (P/S)). The general partnership is the ordinary form of commercial partnership, all partners being jointly and severally liable for the partnerships' debts and obligations. Under current Danish law, a partnership is not a separate legal entity, but is transparent with respect to its (tax) liability. A general partnership is normally not subject to taxation; instead, the individual partners are taxable on their share of the partnership's profits.
With respect to a K/S, separate rules for the tax treatment (transparent or non-transparent) apply. A K/S generally has partners having limited liability (limited partners) and one or more partners having unlimited liability (general partners).
A limited partner (*kommanditist* or *stilledeltager*) is liable only to the extent of his capital contributions or commitments. Under Danish corporate law, it is a requirement that the general partner (*komplementaren*) has both administrative and economical rights in the K/S.
A P/S is a limited partnership where all limited shares are divided into actual shares. The affairs of the P/S are, however, governed by the Danish Corporate Act, despite being transparent for tax purposes.
As a noticeable exception to the rule that the above entities are considered to be tax transparent, section 2C of the CITA provides that if there are participants in an otherwise tax transparent entity (or a permanent establishment in Denmark) which are resident in a state which considers the entity to be a taxable entity or in a state which does not have a tax treaty or information exchange treaty with Demark, and such participants hold more that 50 percent of the votes or the capital in the entity/permanent establishment, the entity/permanent establishment will be considered a separate taxable entity for Danish tax purposes. The reclassification rule is an anti-abuse rule aimed at the US check-the-box rules to avoid creating a "reverse hybrid" and thereby the possibility of double non-taxation in a situation where Denmark would (without this rule) consider income to be earned by the partnership participants, while the jurisdiction where the partners are resident would consider the same income as earned by the partnership.
With respect to foreign entities, whether or not they are treated as taxable or transparent depends on how closely they correspond to the abovementioned Danish partnership forms. If they are significantly different then the general test is that an entity will be considered taxable if none of the participants have unlimited liability for the debts and obligations of the enterprise. In practise another significant criteria has been whether or not the entity has its own corporate bodies (board of directors or management).

Article 5 Permanent Establishment

See treaty text

This Article defines the term "permanent establishment". The profits of an enterprise of one of the Contracting States can only be taxed on an arising basis in the other Contracting State to the extent that they are attributable to a permanent establishment in that other State.
This Treaty broadly uses the OECD definitions. Two types of permanent establishment are set out: A fixed place of business and a dependent agent.

Fixed place of business

A fixed place of business through which the business of the enterprise is wholly or partly carried on will constitute a permanent establishment. Types of establishment particularly included involve the following:

- A place of management;
- A branch;
- An office;
- A factory;
- A workshop;
- A mine, a quarry or any other place of extraction of natural resources;
- An agricultural, pastoral or forestry property; and

- A building site, construction or assembly project which exists for a period of more than 12 months.

According to the OECD Commentary, a "fixed place of business" means to be established at a distinct place with a certain degree of permanence, however, it could be a pitch in a market place, or even part of the premises of another enterprise. There is no requirement that the premises be owned. The Commentary offers the example of an employee of Company A who is allowed to use an office at the premises of Company B. This could create a PE for Company A in the State of Company B if the arrangement persists for long enough and if the employee is carrying out activities which are more than merely "preparatory or auxiliary" (see below).
The OECD considers that to be fixed, a place of business must be at a specific geographic point. However, if the PE consists of mechanical equipment only, then there is no requirement for mechanical equipment to be fixed to the soil.
As to what constitutes a reasonable period of time to give the necessary degree of permanence, most countries will not consider a presence of less than six months to give rise to a fixed place.
Paragraph 4 is not contained in the OECD Model Convention. This provision states that an enterprise will constitute a permanent establishment and business will be carried through that permanent establishment if:
(a) it carries on supervisory activities in that State for more than twelve months in connection with a building site, or a construction, installation or assembly project which is being undertaken in that State; or
(b) substantial equipment is being used in that State for more than twelve months by, for or under contract with the enterprise in exploration for, or exploitation of, natural resources, or in activities connected with such exploration or exploitation.
The usual exclusions from the definition of permanent establishment are given so that the following will not constitute a permanent establishment:
(a) The use of facilities solely for the purposes of storage, display or delivery of goods or merchandise belonging to the enterprise;
(b) The maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of storage, display or delivery;
(c) The maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of processing by another enterprise;
(d) The maintenance of a fixed place of business solely for the purpose of purchasing goods or merchandise, or of collecting information, for the enterprise;
(e) The maintenance of a fixed place of business solely for the purpose of carrying on any other activity of a preparatory or auxiliary character; and
(f) The maintenance of a fixed place of business for any combination of the above, so long as the overall activity remains preparatory or auxiliary.
To apply this Article, it is necessary to be able to make a distinction between functions that are core to a business and those that are merely preparatory or auxiliary. What constitutes core functions will vary from one business to the next. However, any fixed place of business from which the business is partly managed will constitute a permanent establishment even if its functions otherwise appear to be preparatory or auxiliary. Also, if services are rendered to other companies within the corporate group or to third party customers then this would not be preparatory or auxiliary because activities only count as preparatory or auxiliary if they are carried on "for the enterprise" itself.

Agency permanent establishment

Dependent agents may constitute a permanent establishment. Where a person is acting on behalf of a resident of a Contracting State and has, and habitually exercises, in a Contracting State an authority to conclude contracts in the name of the resident, that resident is deemed to have a permanent establishment in that other State, unless the activities of the agent are limited to the purchase of goods or merchandise for the enterprise. Where the activities of the agent are merely preparatory or auxiliary, or where the agent is an independent agent (e.g. a general commission agent acting in the ordinary course of his business) the presence of the agent will not give rise to a permanent establishment.
The definition is also extended as regards business insurance: an agent who is acting exclusively on behalf of one or, at the most, two insurance enterprises and who habitually exercises an authority to conclude contracts in the name of the enterprise(s) will give rise to a permanent establishment for the enterprise(s).

The fact that a company has a subsidiary in the other Contracting State does not mean that the subsidiary is a permanent establishment of that company, unless it binds the parent company in contract as per the rule for dependent agents. This rule applies generally to groups of companies.

Domestic law

Australia

Under Australian domestic law, jurisdiction to tax depends on residence and source and the PE concept is only relevant at other stages of the taxing process (such as making adjustments under subsection 136AE(4) of the Income Tax Assessment Act 1936 (ITAA 1936) or exemption of foreign branch profits under section 23AH of the ITAA 1936).

Where a tax treaty exists it would be usual for the Commissioner to raise a profit reallocation adjustment under both section 136AE of the Income Tax Assessment Act 1936 (ITAA 1936) and the Business Profits Article of the relevant tax treaty. There should be no fundamental inconsistency between the results under section 136AE and the Business Profits article of the tax treaty since both are based on the "arm's length" principle, though due regard should be given to the precise wording of the tax treaty being applied. In the event of any inconsistency, the treaty provisions will prevail unless the treaty itself gives precedence to the domestic law (see Section 4(1) of the IT(IA)A).

The "arm's length" principle provides the economic foundation for taxation of PEs and the interpretation must be consistent with that principle as embodied in Australian law.

Denmark

The Danish domestic law definition of a permanent establishment is more or less identical to the definition under Article 5 of the OECD Model Tax Convention. A number of decisions have been made by the Danish tax authorities and Danish courts considering the existence of a Danish permanent establishment.

In section 2(5) of the CITA and section 2(9) of the Danish Source Tax Act (*kildeskatteloven*), however, a specific provision excluding the existence of a permanent establishment in the event of "distance selling". Hereunder, a permanent establishment in Denmark shall not be deemed to exist for a foreign principal, even if a Danish tax resident representative as such has power of attorney to bind the foreign principal, when carrying out distance selling. Distance selling shall for the purpose these provisions mean the passive receipt of orders from Danish or foreign customers via telephone, telefax, telex, EDI, internet, mail or similar. However, it is further a condition that: (i) the representative is not employed with the principal, and that (ii) neither the foreign principal not any of his/her close relatives or a group related entity of the principal carries out business activities which has ties to the activities of the representative.

Article 6 Income from Real Property

See treaty text

The general rule is that income derived by a resident of a Contracting State from real property in the other State may be taxed in that other State. Thus, for instance, if a resident of one State owns a building in the other State and receives rent, that rent may be taxable in the other State.

Note that agricultural, pastoral or forestry property is covered by Article 5 and therefore taxable as a permanent establishment.

Domestic law

Denmark

Under Danish domestic law, profits from sale of real estate specifically comprises capital gains under the Danish Capital Gains on Property Tax Act (*ejendomsavancebeskatningsloven*) and recaptured tax depreciation under the Danish Tax Depreciation Act.

Danish tax law generally provides for possibility of deducting financing costs on real estate/property under the same circumstances in income and profit thereon as Danish owners of property/real estate. However, in administrative practise it has been determined that for tax purposes it is only possible to allocate financing costs corresponding to debt financing of 80 percent of the value of the real estate to the Danish real estate for Danish tax purposes. Further, foreign currency exchange gains and losses on real estate financing are not deemed to be allocable to the Danish real estate for Danish tax purposes.

When Denmark is the source state, which it is when the immovable property is located in Denmark, there is legal basis in national tax law for taxing operating profits relating to the property in the Danish Tax at Source Act (kildeskatteloven), sections 1, (1), (5) and in the CITA section 2, (1), (b).

Since the Convention does not cover wealth taxes, property value tax (ejendomsværdiskat), which is considered a partial wealth tax, is not within the scope of the Convention.

Article 7 Business Profits

See treaty text

Article 7 has been rewritten in the Model Convention (adopted on 22 July 2010) to give effect to the 2008 OECD final report on the attribution of profits to permanent establishments (July 17, 2008). When interpreting a tax treaty, it is generally agreed that the latest version of the OECD's Commentary on the Model Treaty should be used. However, the Commentary as it read before 22 July 2010 has been preserved as an historic reference which "will continue to be relevant for the application and interpretation of bilateral tax convention concluded before" 22 July 2010. Despite this the Australian Government has indicated that it will apply the 2010 OECD Commentary to existing treaties, unless that interpretation conflicts with the wording of the article in the agreement.

The allocation of profits

The profits that are exclusively taxable in the country of source are the business profits that are "attributable to" a PE. Under this rule of attribution, the profits that are attributable to a PE are the profits that it might be expected to make in the country in which it is located if it were a separate enterprise engaged in similar activities under similar conditions dealing independently or at arm's length with the parent enterprise of which it is a PE. Generally, amounts may be attributed whether they are from sources within or outside the country in which the PE is situated.

The significance of the application of the attribution rule is that the business profits are calculated on a net basis. That is, expenses, wherever incurred, that are reasonably connected to those profits are deductible, provided they are incurred for the purposes of the PE and pass the independent entity test.

If there is no PE in the country of source there can be no taxation of business profits in that country. This is precisely what transpired in the High Court decision in *Thiel v FCT 21 ATR 531*.

Only the profits actually arising from a permanent establishment may be taxed by the source State. If an enterprise has both a permanent establishment in a State and also derives other income, say, dividends or interest unconnected with the permanent establishment, then the dividends or interest may only be taxed in accordance with Articles 10 and 11 of the Treaty and not this Article.

The profits to be attributed to the permanent establishment are the profits that would be expected if the permanent establishment was a distinct and separate enterprise. The starting point for the computation of profits will be the branch accounts, assuming they exist.

Under the 2010 version of the Commentary the approach to attributing profits to a permanent establishment requires a two step process.

Firstly, a functional and factual analysis should be carried out, along the lines set out in the OECD's transfer pricing guidelines, to establish the economically significant activities and responsibilities undertaken by the permanent establishment. This will involve establishing the rights and obligations arising out of transactions between the permanent establishment and third parties, e.g. the sales revenue arising from independent customers generated by the permanent establishment as opposed to by the head office. If the permanent establishment takes the form of a factory, then it would assume the obligation to pay for the raw materials which it uses.

"Significant people functions" relevant to the attribution of economic ownership of assets need to be identified to support the attribution of economic ownership of assets of the enterprise to the permanent establishment. Economic ownership is defined in the 2008 OECD Report as the right to income from an asset or the right to depreciate it. Tangible property should be attributed to the location where it is in use. Economic ownership of intangibles rests with the location in which the risks associated with the intangibles is borne: For instance, if an enterprise owns a patent for a particular drug which is sold by distributor companies in many countries, the economic ownership would rest in that part of the enterprise responsible for commissioning the research to develop the drug and which would bear the losses if medical trials failed.

A further set of "significant people functions" are then to be identified: this time, those relevant to the assumption of risks so that an allocation of risks born by the enterprise can be made to the permanent establishment. The OECD's 2008 Report recommends looking for the place of active decision taking rather than mere "rubber stamping". Note that no such distinction between asset management and risk assumption functions are required in the case of enterprises in the financial sector, because it is considered highly likely that these functions would be carried out by the same people.

Secondly, taking into account the picture built up in the functional and factual analysis, the profits of the permanent establishment must be determined. Although this is relatively simple in the case of transactions with third parties, transactions and dealings with other parts of the enterprise must be determined using the rules laid down in the OECD's Transfer Pricing Guidelines.

This means that goods and services provided by head office must carry an arm's length mark up. Pricing policies should be properly documented, which in practice may prove troublesome as firms may not take the same care in documenting the terms of transactions within the firm as they would

with third parties. In determining the profits attributable to the permanent establishment, part of the enterprise's interest costs on its borrowings should be allocated to the permanent establishment. The amount of capital needed to support to functions carried out by the permanent establishment on the assumption that it is a separate entity must be calculated. Then, this total theoretical capital must be broken down into debt and equity (or "free capital"). The greater the risks undertaken by the permanent establishment, the higher the proportion of its notional capital that will be regarded as "free capital". Several methods of establishing the split between "free capital" and debt capital are suggested, including the use of thin capitalisation practices in the State in which the permanent establishment is located. Once the amount of notional debt capital has been determined, an allocation of the enterprise's interest liabilities can be made to the permanent establishment. Note that only actual interest liabilities can be allocated. If the enterprise as a whole has paid no interest to external lenders, then there can be no allocation of interest liability to the permanent establishment. The only exception to this rule is where the permanent establishment is involved in treasury dealings with other parts of the enterprise. Whilst this may well be the case in banking enterprises, it would be unusual in other enterprises. Generally, the interest rates used and the terms of the notional loans to the permanent establishment must be such as would be found between parties dealing at arm's length.
When deciding what transactions should be recognised between the permanent establishment and other parts of the enterprise, the 2008 OECD Report recommends that the only internal transactions which can be recognised in arriving at the permanent establishment's profits are those which relate to real and identifiable events. These would include the physical transfer of goods, the provision of services, the use of intangibles and the transfer of financial assets. Whilst the internal records (e.g. the branch accounts) are the starting point for identifying these transactions, the true test is whether there has been an internal dealing of economic significance.
The Commentary notes that there is no intention to impose "burdensome documentation requirements" and suggests that the tax administrations would give effect to documentation to the extent that:

- the documentation is consistent with the economic substance of the internal dealings

- the arrangements are such that they are not too different from dealing which one group company might have with a fellow group company? For instance, credit periods should be similar in similar circumstances.

- the dealings presented in the documentation is consistent with the OECD principles for attributing profits to permanent establishments set out in the 2008 OECD Report.

Under Article 7 of this Treaty, allocations of head office expenses, e.g. for strategic management or centrally managed support functions such as payroll may be set against the profits of the permanent establishment, but the arm's length principle must be observed.
No profits shall be attributed to a permanent establishment by reason of the mere purchase by that permanent establishment of goods or merchandise for the enterprise.

Other provisions

The Treaty contains a specific provision in paragraph 6 and 8 which does not exist in the Model Treaty. If the information available to the competent authority in Denmark or Australia is inadequate to determine the profits to be attributed to the permanent establishment of an enterprise, nothing in Article 7 shall affect the application of any domestic law relating to the determination of the tax liability of a person provided that law shall be applied, so far as the information available to the competent authority permits, in accordance with the principles of this Article.
Profits from insurance are dealt with in paragraph 8. It states that nothing in this Article shall affect the operation of any domestic law relating to taxation of profits from insurance with non-residents provided that if the relevant law in force in either State at the date of signature of this Agreement is varied (otherwise than in minor respects so as not to affect its general character) the Contracting States shall consult with each other with a view to agreeing to any amendment of this paragraph that may be appropriate.

Domestic law

Denmark

The definition of a PE for Danish domestic law purposes as well as the allocation of profits thereto generally follows that of the OECD Tax Model Convention. A number of decisions consider the existence of a PE and allocation of profits thereto for Danish tax purposes, most of which are based on actual circumstances. Section 2 of the Danish Corporate Income Tax Act (*selskabsskatteloven*)

specifically states (i) that permanent establishment building and construction sites which constitute a permanent establishment are considered as established on the first day thereof (ii) that shares can be allocated to a permanent establishment if such shares constitute a part of the core capital of the PE (iii) that profits and losses as well as recaptured depreciation on the sale of goods allocable to the PE is taxable in Denmark. As a significant exception to the main rule that a PE is from a Danish tax perspective considered to be a separate entity, a Danish Supreme Court ruling from 1993 determined that "interest" payments from a Danish PE to its head office on a "loan" granted to the PE would not be tax deductible for the PE.
Section 8 of the Danish Corporate Income Tax Act lies down a territorial principle for certain corporate activities as it states that if a Danish enterprise has a permanent establishment abroad Denmark will exempt income allocable to such permanent establishment abroad, unless (i) the state in which the PE is located waive its right of taxation under a tax treaty with Denmark or other international agreement, (ii) income in the PE would have been taxable under Danish CFC tax rules if the PE had been a company, or (iii) the income in the PE is income from the operation of ships or aircraft in international traffic.

Article 8 Shipping and Air Transport

See treaty text

Profits from the operation of ships or aircraft are taxable in the country of residence of the provider. They may be taxed in the other State for profits from operations confined solely to places in that State (i.e., shipped in a State for discharge in that State). This principle applies also to joint transport operating organisation or international operating agency. A cap as to the taxable base in the country other than the one of residence generally applies.
With respect to profits derived by the Danish, Norwegian and Swedish air transport consortium, known as the Scandinavian Airlines System (SAS), the provisions of paragraphs 1 and 2 shall only apply to such part of the profits as corresponds to the shareholding in the consortium held by Det Danske Luftfartsselskab (DDL), the Danish partner of Scandinavian Airlines System (SAS).

Article 9 Associate Enterprises

See treaty text

This Article contains the usual OECD provisions regarding transfer pricing. Associated enterprises must adopt the arm's length principle in their dealings with each other, and to the extent that they do not, a Contracting State may make an upwards adjustment to taxable profits.
There is a requirement for the other State to make a reciprocal downwards adjustment but only where the other State considers this to be justified.
The position regarding "secondary adjustments" is not dealt with. If one State makes an upwards adjustment of taxable profits and the other makes an exactly equal corresponding downwards adjustment, then the tax revenues of the two States might still be different to what they would have been had arm's length pricing been applied in the first place. This is because higher profits in the State where the upwards adjustment took place might well have given rise to higher dividends or interest payments, on which withholding taxes might have been chargeable. So even though the State making the upwards adjustment has retrieved the tax deficit on the enterprise resident there, it has still not retrieved any deficit in withholding taxes. Whether it makes a secondary upwards adjustment to make good this deficit in withholding tax receipts depends on whether this is provided for in domestic law. If it does so, then double taxation will be the result which will not necessarily be relieved by the normal treaty article on elimination of double taxation and it may be necessary to invoke the mutual agreement procedure.
As is the case with business profits in Article 7, there is a special provision in paragraph 2. If the information available to the competent authority in Denmark or Australia is inadequate to determine the profits to be attributed to the permanent establishment of an enterprise, nothing in this Article shall affect the application of any domestic law relating to the determination of the tax liability of a person provided that law shall be applied, so far as the information available to the competent authority permits, in accordance with the principles of this Article.

Domestic law

Australia

Where a tax treaty exists, the Commissioner would usually raise a transfer pricing or profit reallocation adjustment under both Division 13 of the Income Tax Assessment Act 1936 (ITAA 1936) and the Associated Enterprises article (usually Article 9) of the relevant treaty. The Associated Enterprises article contains its own provisions to deal with profit shifting arrangements and also mandates the "arm's length" principle for international dealings between associated enterprises.

Denmark
Under Danish domestic law, transfer pricing rules as well as transfer pricing documentation rules apply which provide that Danish taxable persons and PEs in Denmark which carry out business transactions with group related entities are treated for tax purposes as if such transactions are carried out at arm's length. The definition of group related transactions is relatively wide under Danish tax law as it applies to transactions with a party, which controls or is controlled by another party. "Control" means direct or indirect legal ownership of more than 50 % of the shares or legal control over more than 50 % of the voting rights. Ownership or control has not been conferred from a pledgor to a pledgee solely as a result of a pledge over shares.
When determining whether a party *controls* the Danish borrower (or vice versa), votes and shares held by group-related entities are considered. Votes and shares held by non-related shareholders may also be considered if an agreement has been made between a party and non-related shareholders for the purpose of *"exercising a common controlling influence"* over the Danish borrower. A shareholders agreement may in this context constitute an agreement to *"exercise common controlling influence"* over the other party.
Not only taxable legal entities are considered as entities for purposes of control; also fiscally transparent entities may be considered if they are *"are governed by rules of corporate law, a corporate law agreement or articles of association"*.
"Group related" means two or more entities which (i) directly or indirectly are controlled by the same group of shareholders or (ii) which are under common management.
Two parties may be considered to be group related by virtue of common management if they have the same manager or if they have different managers that have entered into an agreement providing for a common management of the lender and the borrower.
In determining an arm's length price the approach taken in the OECD transfer pricing guidelines is generally applied.

Article 10 Dividends

See treaty text

Article 10 permits the country of source to impose only a limited tax on dividends on a gross basis (usually by a withholding tax procedure) where the income is not "effectively connected" to a PE in the country through which the person beneficially entitled to the income is carrying on business.
When dividends are effectively connected to a PE in the country of source, it may be taxed by that country free of limitation, often on a net basis as business profits. (see also section 17A(4) and (5) of the Australian Agreements Act.)
Precisely what is meant by "effectively connected" is not defined in the DTAs, nor in the OECD Model Convention commentaries.
The tax payable is required to be deducted from the remittance by the Australian resident liable to make the payment, but in such cases the non-resident has the right to lodge a return or income and claim a deduction of those expenditures which are directly applicable to the earning of the income and a proportion of those deductions that might be collectively termed "general administration expenses". The proportion in the latter case would be related to the income derived from sources in Australia to total world income. Usually, these matters are the subject of negotiation and agreement with the Commissioner as to the arbitrary proportion that may be deducted.
If a person is not effectively connected to a fixed base, the typical 15% limit will apply.
Paragraph (3) defines the term "dividends" to include income from shares, jouissance shares or jouissance rights, mining shares, founders' shares or other rights to participate in profits. Also included is other income subjected to the same tax treatment as income from shares under the domestic laws of a State. Jouissance shares or rights are financial instruments which grant rights of the types enjoyed by shareholders but which, in some jurisdictions, are viewed as debt rather than equity.
Paragraph (4) provides that where, say, a Danish company receives a dividend from an Australian company, and that dividend is effectively connected with a permanent establishment which the Danish company has in Australia, then the dividend income will be deemed to be part of the income of the permanent establishment and the provisions of Article 7, dealing with the attribution of business profits will apply.

Domestic law

Australia
Withholding tax at a rate of 30% on unfranked dividends and 0% on franked dividends Franked dividends are essentially dividends paid out of profits that have been subjected to 30% corporate tax.

Denmark

Individuals
The distribution of dividends from a Danish company to a non-resident individual is generally subject to withholding tax at the rate of 28% (27% as of 2012). The shareholder may seek a refund from the Danish tax authorities of the tax withheld in excess of 15%. In practise this is done by completing and filing ready print reclaim form 06.003 (available online at www.skat.dk) with the Danish tax authorities (*Skattecenter Ballerup*), which must contain a statement from the Australian tax authorities that the beneficial owner of the payment is resident in Australia.
If the shareholder (in aggregate with shareholders group related to the shareholder) holds less than 10% of the nominal share capital in the Company and the shareholder is tax resident in Australia, the final tax rate is 15%.
In addition it is possible for the Danish Securities Centre or the dividend distributing company to enter into an arrangement with the Danish tax authorities according to which the obligation to withhold tax is reduced to the tax rate stipulated in the double taxation treaty with the relevant State.
Companies, etc.
Dividends from subsidiary shares (i.e. shares which constitute at least 10% of the share capital in the issuing company) are exempt from Danish withholding tax provided the taxation of dividends is to be waived or reduced in accordance with the Parent-Subsidiary Directive (90/435/EEC) or in accordance with the Treaty. Further, dividends from Group Shares (i.e. share in a company in which the shareholder of the company and the issuing company are subject to Danish tax consolidation or fulfil the requirements for international tax consolidation under Danish law) are exempt from Danish withholding tax provided the company investor is a resident of the European Union or the European Economic Area and provided the taxation of dividends should have been waived or reduced in accordance with the Parent-Subsidiary Directive (90/435/EEC) or in accordance with a tax treaty with the State in which the company investor is resident had the shares been Subsidiary Shares.
Dividends from Portfolio Shares (i.e. shares which are not Group Shares or Subsidiary Shares) will be subject to taxation irrespective of ownership period.
Dividend payments on Portfolio Shares will be subject to a withholding tax of 28% (27% as of 2012) irrespective of ownership period. The final tax may be reduced pursuant to the Treaty. If the shareholder holds less than 10% of the nominal share capital in the Company and the shareholder is tax resident in Australia, the final tax rate is 15%, also under Danish domestic law. In practise reclaim of Danish withholding tax is done by completing and filing ready print reclaim form 06.003 (available online at www.skat.dk) with the Danish tax authorities (*Skattecenter Ballerup*), which must contain statement from the Belgian tax authorities that the beneficial owner of the payment is resident in Australia. According to a statement from the Danish ministry of taxation in 2000 the Danish tax authorities will confirm that also pension funds and investment funds are considered as tax residents in Denmark, irrespective of the fact that they do not pay corporate tax on their income.
Beneficial ownership
Until recently, the requirement of beneficial ownership (and the content of this term) - although formally existing under the Danish withholding tax rules - were not subject to real attention from the Danish tax authorities and still no clear guidance on the application thereof by the Danish tax authorities currently exist. However, the Danish Supreme Court has confirmed that specific provisions of Danish tax treaties should generally be interpreted in accordance with the OECD Commentary (to the extent applicable). The tax authorities have also referred to the OECD Commentary whenever (vaguely) commenting on the concept of beneficial ownership.

Article 11 Interest

See treaty text

This Treaty provides that interest is as a main rule taxable in the Contracting State in which the beneficial owner thereof is resident. However, the Contracting State in which the payer of the interest is resident is also entitled to tax such interest. The maximum rate of withholding tax on these payments is 10%.
"Interest" is widely defined to mean income from government securities, bonds or debentures, secured or not by a mortgage and interest from any other form of indebtedness as well as all other income assimilated to interest by the taxation law of the Contracting State in which the income arises. Interest that is assimilated to dividends under Article 10(3) is excluded from the definition.
There are the usual provisions such that interest received by a non-resident but which relates to a permanent establishment which that non-resident has in the other Contracting State is taxed under Article 7.
According to Article 11(5), interest shall be deemed to arise in a State, when the payer is that State itself or a political subdivision of that State or a local authority of that State or a person who is a

resident of that State for the purposes of its tax. However, when the payer is a resident of the other State or outside both States interest is deemed to arise where the payer has a permanent establishment when the indebtedness is connected to the permanent establishment and the interest is borne by the permanent establishment. The same applies when the person paying the interest is not a resident of either of the States but has a permanent establishment in one of the States (provided the indebtedness is connected to that permanent establishment and the interest is borne by the permanent establishment.

Domestic law

Australia

In the case of interest, the withholding tax rate is 10% in most instances.

Denmark

No withholding tax applies to interest paid to individuals whether resident inside or outside EU/EEA.

No Danish withholding tax will apply on interest paid from a Danish corporate entity to a person or entity which does not qualify as a controlling or group related entity foreign lender (subject to definition, cf. below).

Interest paid from a Danish corporate entity to a controlling or group related entity foreign lender will be subject to Danish withholding tax, unless:

(a) the foreign controlling or group related lender has a permanent establishment in Denmark to which such interest income is attributed (in this case the interest is subject to normal corporate tax in Denmark – also at 25 percent) or

(b) the foreign controlling or group related lender is entitled to claim reduction or elimination of Danish withholding tax under the Interest and Royalty Directive (no tax is levied and no withholding tax applies) and the relationship with the Danish borrower is upheld for an minimum period of 1 year, or

(c) the foreign controlling or group related lender is protected under a tax treaty with Denmark (irrespective of treaty rate) and the relationship with the Danish borrower is upheld for an minimum period of 1 year, or

(d) the foreign controlling or group related lender is controlled (as defined under the Danish tax consolidation rules) by a Danish entity, or

(e) the foreign controlling or group related lender is controlled by a party resident in a State that has concluded a tax treaty with Denmark, and further that such State may tax the related foreign lender (specifically defined) on such interest payments pursuant to CFC taxation rules of that State, or

(f) the foreign controlling or group related lender can demonstrate that it has paid foreign income tax on the interest received at a rate of at least 18.75 percent (2013) and further provided that it has not entered into a back-to-back loan with an entity that that has paid foreign income tax on the interest received at a rate of less than 18.75 percent (2013)

In order to qualify for reduction or elimination of withholding tax under a tax treaty or the Interest and Royalties Directive, it is a general requirement that the recipient qualifies as beneficial owner of the interest. Reference is made to the specific comments made on the Danish interpretation of this term under Article 10, above.

For purposes of the Danish interest withholding tax rules, "control" means direct or indirect legal ownership of more than 50% of the shares or legal control over more than 50% of the voting rights. Ownership or control has not been conferred from a pledgor to a pledgee solely as a result of a pledge over shares.

When determining whether the lender *controls* the Danish borrower (or vice versa), votes and shares held by group-related entities are considered. Votes and shares held by non-related shareholders may also be considered if an agreement has been made between the lender and the non-related shareholders for the purpose of *"exercising a common controlling influence"* over the Danish borrower. A shareholders agreement may constitute an agreement to *"exercise common controlling influence"* over the Danish borrower.

Not only taxable legal entities are considered as entities for purposes of control; also fiscally transparent entities may be considered if they are "*are governed by rules of corporate law, a corporate law agreement or articles of association*".

"Group related" means two or more entities which (i) directly or indirectly are controlled by the same group of shareholders or (ii) which are under common management.

The lender and the Danish borrower may be considered to be group related by virtue of common management if they have the same manager or if they have different managers that have entered into an agreement providing for a common management of the lender and the borrower.

Not only taxable legal entities are considered as entities for purposes of group relation; also fiscally transparent entities may be considered if they are governed by rules of corporate law, a corporate law agreement or articles of association".
In practice, no filing claims apply to be exempt from withholding tax if the recipient is not group related with the borrower or if the recipient can claim exemption pursuant to (b) or (c), above. In the cases (d)-(f) a 25% tax is to be withheld at source and the recipient will need to reclaim the withholding tax by completing reclaim form 06.026 with the tax authorities enclosed with such documentation which substantiates eligibility for exemption under the relevant exception. According to a statement from the Danish ministry of taxation in 2000 the Danish tax authorities will confirm that also pension funds and investment funds are considered as tax residents in Denmark, irrespective of the fact that they do not pay corporate tax on their income.

Article 12 Royalties

See treaty text

Royalties arising in one of the States that are royalties to which a resident of the other State is beneficially entitled may be taxed in that other State. They may also be taxed in the country in which they arise; however at a rate not exceeding 10% of the gross amount.
In paragraph (3) "royalties" is defined to include payments of any kind received as consideration for the use of, or right to use:

- Copyright, patent, design or model, plan, secret formula or process; trade-mark or other like property or right, or industrial or commercial knowledge or information, or for the supply of any assistance of an ancillary or subsidiary nature furnished as a means of enabling the application or enjoyment of such items.

It also includes payments made as consideration for the use or the right to use in connection with television or tapes for use in connection with radio broadcasting.
Where royalties or fees are effectively earned by a permanent establishment they will be taxed as part of the profits of that permanent establishment (i.e. in the State in which they arise) (Article 7).
According to Article 12(5), royalties shall be deemed to arise in a State when the payer is that State itself or a political subdivision of that State or a local authority of that State or a person who is a resident of that State for the purposes of its tax. However, when the payer is a resident of the other State or outside both States royalties are deemed to arise where the payer has a permanent establishment when the liability to pay the royalties was incurred by the permanent establishment and the effective payment is borne by the permanent establishment. The same applies when the person paying the royalties is not a resident of either of the Contracting States but has, in one of the States, a permanent establishment in connection with which the liability to pay the royalties was incurred (provided the royalties are borne by the permanent establishment).
Where the payer and recipient are connected and the amount of royalties exceeds an arm's length amount, the excess amount paid will not enjoy the Treaty benefits and will be liable to tax in the payer's State at the normal domestic rate of withholding tax.

Domestic law

Australia

Withholding tax at a rate of 30%.

Denmark

Danish withholding tax applies to payments: (i) qualifying as royalties for Danish tax purposes, (ii) which are not exempt under the EU interest/royalty directive or a tax treaty. If applicable, royalties paid from a Danish company to a foreign company is subject to 25% withholding tax. The tax is withheld at source by the Danish company and settled with the tax authorities.
In relation to (i), it is noticeable that the term "royalties" according to Danish law is narrower than the definition applied in both Article 12 of the OECD Model Tax Convention and the Interest and Royalties Directive. Indeed, the Danish royalty definition only includes industrial and commercial royalties (i.e. mainly payments for use or right to use patents, trademarks, patterns or models, drawings, secret formulas or production methods information on industrial, commercial or scientific knowhow) and does not include "artistic" royalties. Artistic royalties are described as payments for using or buying the right to use copyrights to literary work, artistic work or scientific work, e.g. author royalties or royalties for the use of music, films, etc.
In relation to (ii) in order to qualify for reduction or elimination of withholding tax under a tax treaty or the Interest and Royalties Directive, it is a general requirement that the recipient qualifies as beneficial owner of the royalty. Reference is made to the specific comments made on the Danish interpretation of this term under Article 10, above.

In practice, if the payment is a royalty, a 25 percent tax is to be withheld at source and the recipient will need to reclaim the withholding tax by completing reclaim form 06.015 with the tax authorities including a statement from the Belgian tax authorities that the beneficial owner of the payment is resident in Australia.
According to a statement from the Danish ministry of taxation in 2000 the Danish tax authorities will confirm that also pension funds and investment funds are considered as tax residents in Denmark, irrespective of the fact that they do not pay corporate tax on their income.

Article 13 Alienation of Property

See treaty text

The Contracting State where the real property is situated may tax the capital gain. Real property includes lease of land, the right to exploit or explore for natural resources and shares or comparables interest in a "real property" company.
The term "alienation" is used in connection with events giving rise to capital gains. This will include normal disposals of assets and also events such as exchange of assets, expropriation, gifts and the passing of assets to another on death. Not all States levy tax in all these situations, but the meaning of the term "alienation" is sufficiently wide to give them the right to do so if their domestic law provides for a charge to tax in a particular situation.
The general principle is that gains, other than those relating to immovable property and not relating to assets which belong to a permanent establishment, are taxable only in the State where the seller is resident.
Also applicable is the usual rule that gains on alienation of movable property forming part of the assets of a permanent establishment may be taxed by the Contracting State where the permanent establishment is situated, including gains from the entire disposal of the permanent establishment.

Domestic law

Australia

Alienation of property is a complex area and has been dealt with by the Australian Federal Court.
In *FCT v Lamesa Holdings BV* (1987) 36 ATR 589, the Full Federal Court held that Article 13 of the Netherlands agreement (the "Alienation of Property" Article) did not apply to profits realised by a Netherlands company on the sale of shares in an Australian subsidiary. The Netherlands company held an Australian subsidiary which was the parent of another Australian company which, in turn, held a 100% interest in an Australian mining company. The Netherlands company sold its shares in the Australian holding company. Initially, the Commissioner sought to assess the profits from the sale of shares to capital gains tax. However, assessments were subsequently issued contending that the profits were ordinary income of the Netherlands company. Article 13 permits Australia to tax income from the alienation of real property situated in Australia. The question was whether it permitted Australia to tax profits realised indirectly through a share sale, or whether the protection of the business profits article, Article 7, was available to the Netherlands company. The court held that it was not permissible to "look through" the corporate entities and that Article 13 had no application to the profits realised from the share sale. Consequently, the Netherlands had the exclusive right to tax the profits. As it happened under Netherlands domestic law such gains were exempt and even though this meant that there was effectively double non-taxation the Court held that that of itself was not a reason that justified the imposition of Australian tax.
In response, section 3A of the Agreements Act was enacted to ensure that, as from April 27, 1998, profits arising from the indirect alienation of real property situated in Australia by a non-resident are subject to tax in Australia.

Denmark

Under Danish law, only alienation of real estate and assets or liabilities attributable to a permanent establishment in Denmark is subject to Danish taxation in the situation where the alienator is not a Danish tax resident person.
Shares, receivables and intellectual property rights are generally exempted from Danish capital gains tax under Danish domestic law when not attributable to a permanent establishment in Denmark (as Denmark would normally also be prevented from taxing such income under its tax treaties). However, as a very narrow definition of interest applies under Danish domestic law, a specific provision applies according to which any capital gains on receivables in the form of a difference between the nominal amount of the receivable and the amount actually borrowed which is agreed in advance between the debtor and the borrower, will be subject to tax in the hands of a non-Danish creditor, if such payment would also be taxable in Denmark to the creditor if it had been an interest.

Article 14 Independent Personal Services

See treaty text
Article 14 was taken out of the OECD model in its 2000 revision as a separate provision as it was generally deemed not to be different in substance from Article 7. However, this Treaty still has separate Articles governing the taxation of income from permanent establishments (see Articles 5 and 7) and income from professional services. This Article provides that where a resident of one of the States has a "fixed base" in the other State, income in respect of professional services attributable to that fixed base may be taxed in the State in which it is situated. Thus, an Australian accountant with an office in Denmark will be taxable in Denmark on profits attributable to the Danish office. The attribution of profits is dealt with in the same way as for other business profits under the provisions of Article 7.
The term "professional services" is defined to include especially independent scientific, literary, artistic, educational or teaching activities as well as the independent activities of physicians, lawyers, engineers, architects, dentists and accountants.

Article 15 Dependent Personal Services

See treaty text
In principle, salaries, wages and other similar remuneration derived by an individual are taxable in his country of residence unless the employment is exercised in the other state.
When exercised in a country that is not the country of residence, the remuneration may still be taxed in the country of residence if: (i) the individuals are present for a period not exceeding 183 days in the year of income or in the taxable period, and (ii) the remuneration is paid by or on behalf of an employer that is not a resident where the employment is exercised, and (iii) the remuneration is not deductible from the profit of a permanent establishment of the employer in the country of exercise. Special provisions apply for employment exercised aboard a ship or aircraft operated in international traffic.

Australia

Commissioner will adopt a substance over form approach to determine whether the Australian user entity is in fact the "economic employer", i.e. whether it exercises the main functions of an employer: Ruling TR 2003/11.

Denmark

Under Danish domestic rules, Denmark can tax non-resident employees on income from employment when work is carried out in Denmark. The Danish domestic rules apply to all forms of payment and irrespective of when payment is made. The provision specifically includes severance payments and payment during a termination period when such payments attributable to employment in Denmark. Further, the Danish domestic law provides for a 30 % tax on hiring out of labour when work is carried out in Denmark.
In a ruling from 2006 by the Danish Tax Council (*Skatterådet*) the Danish tax authorities confirms that it considers stock options granted as remuneration for employment was comprised by Article 15 of the Denmark-UK tax treaty, which in this respect is similar to Article 15 of the Convention.
When taxable in Denmark, a person will generally be taxable pursuant to the same rules as a Danish tax resident employee. When only working in Denmark for part of the income year (normally the calendar year for individuals), specific calculation rules apply to ensure that the progressive Danish tax system applies to the income from Denmark. In very general terms, the marginal tax rate, including labour market contributions (AM-bidrag) of 8 %, applicable to personal income (such as salaries, etc.), is, in 2013, approximately 56%. This rate applies to annual income in excess of DKK 421,000 (about EUR 56,440) per income year. Salary income lower than this amount is taxable between 0-44%. Specific rules on aggregate taxation of income apply to married couples.
Denmark offers a special tax regime to highly paid inbound expatriates and researchers recruited from abroad (subject to criteria). Employees may elect to be taxed at a rate of 26 % in up to 60 months. All other income, including benefits-in-kind other than company car and free telephone, are taxed at the ordinary rates. Such income includes any private income received by the expatriate from outside Denmark.
In addition to the 26% tax, AM-contribution of 8% must be paid.

Article 16 Directors' Fees

See treaty text
Director's fees and similar payments derived in the capacity of member of the board of a company resident in the other State may be taxed in that other State.

Denmark

Under Danish domestic rules, Denmark can tax fees paid for membership a board of directors, a commission, a committee, a council or similar when payment is made from a Danish company or entity. The payment is taxable as personal income, cf. in further detail Article 15, above.

Article 17 Entertainers

See treaty text

With respect to public entertainers, such as theatre, motion picture, radio or television artists, musicians and athletes, the source of their income is the place where the activities take place, irrespective of the period of time involved in carrying out those activities. Paragraph (2) confirms that the source state is not limited in taxing the person where his services are provided in the source state via a company.

There is an exemption from these rules where the entertainer or athlete is financed predominantly from public funds. In these cases, only the State where the person is resident may charge tax.

Denmark

Denmark has, in practice, limited access to tax such income as Danish domestic tax law does not have specific provisions on this type of income and therefore only allows taxation when the nature of the payment is payment from employment in Denmark, cf. also Article 15 above.

Article 18 Pensions and Annuities

See treaty text

The main rule in Article 18 is that any pension or annuity paid to a resident of a Contracting State in consideration of past employment shall be taxable only in that State. However, the main rule us subject to the exception thereto in Article 19, relating to income from government service.

According to paragraph (2), the term “annuity” means a stated sum that is paid periodically during life or a period of time.

Pensions paid by one of the Contracting States or a political sub-division or local authority of that State to any individual in respect of services rendered to that State, political sub-division or local authority, as the case may be, and pensions paid under the social security scheme of one of the Contracting States may be taxed in that State. The provisions of this paragraph shall apply only to individuals who are citizens of the Contracting State from which the payments are made.

Denmark

Under Danish domestic law, Denmark is entitled to tax payments from Danish pension schemes to non-resident persons. The Danish pension tax system is relatively complex and a detailed description thereof is not made herein. Generally, tax deductibility for pension contributions is allowed irrespective of whether the pension scheme is established in Denmark or elsewhere in the EU when certain criteria are met. The deductible annual amount will depend on the type of pension scheme. During the life of the pension scheme, an annual mark-to-market pension yield tax of 15 % applies. When the pension is ultimately paid to the pensioner (or beneficiaries) such payments are taxable as personal income (compare article 15, above).

However, payments from a capital pensions scheme are taxable at a flat rate of 40%. In 1998, the Danish ministry of taxation issued a statement regarding the application of the Danish tax treaties to payments under the Danish social legislation, which contains guidance on how to apply the Danish tax treaty to various types of payments under the Danish social legislation.

Article 19 Government Service

See treaty text

This Article contains rules for the taxation of a remuneration paid in respect of government service. Based on paragraph (1), salaries, wages and other similar remunerations, including pension payments, paid by a State or one of its political subdivisions or local authorities will generally be taxable only in that State.

However, such remuneration will be taxable only in the other State if the services are rendered by a national of that other State who is a resident there and who is not concurrently a national of the first State.

Paragraph (2) determines that paragraph (1) Article 19 do not apply to remuneration for services rendered in connection with the carrying on of a business. Such income will be dealt with under Articles 15, 16, 17 and 18.

Article 20 Students

See treaty text

This Article provides for the exemption of income derived by a student who is present solely for the purpose of her or his education. The exemption is restricted to income paid for the purposes of the student's maintenance or education, and the payment must originate from sources outside the country

in which the student is temporarily resident. The exemption does not extend to income derived from sources in the country or to income that is unrelated to the student's maintenance or education.

Denmark

The student allowance, which is the amount deemed by the tax authorities to be necessary for the maintenance and education of the foreign student is fixed at DKK 42,000 in 2013.

Article 21 Income not Expressly Mentioned

See treaty text

Any income not dealt with in the preceding Articles is taxable only in the State of residence, provided that the income is subject to tax in that state (subject-to-tax-test).

Denmark

The provision is deemed to have only very little practical impact. Taxation hereunder requires – similar as the other provisions of the Treaty – that Danish domestic law contains a right to tax income hereunder. This would only exceptionally be the case.

Article 22 Source of Income

See treaty text

Income derived by a resident of Denmark which may be taxed in Australia shall be deemed to be income from sources in Australia and vice-versa.

Article 23 Methods to Eliminate of Double Taxation

See treaty text

As the foregoing principles indicate, it is useful to distinguish the rules that allocate exclusive rights to tax from those that permit both countries to tax, albeit with limits in case of dividends, interest and royalties. Where the right to tax is shared between the countries, the country of residence is required to give relief in order to avoid double taxation. The two main methods are the exemption method and the foreign tax credit method. As mentioned, these are typically employed where:

- A resident of country A derives income through a permanent establishment in country B: country A taxes its resident on worldwide income and country B taxes the income attributable to the PE on an unrestricted net basis; and

- A resident of country A derives dividends, interest or royalties from a source in country B, not effectively connected to any PE in country B: country A taxes its resident on worldwide income and country B imposes a withholding tax (or withholding obligations), limited by the DTA to 10-15% of the gross amounts paid.

Under the “principle of exemption”, country A may grant a full exemption in respect of the income sourced in country B, i.e. no tax is payable to country A and the exempt foreign income is not taken into account in determining the tax imposed by country A on the remaining income of the resident. Alternatively, country A may grant “exemption with progression”, i.e. no tax is payable to country A on the foreign income, but that income is taken into account when determining the tax payable country A on the resident's other income.

Under the “principle of credit”, the tax payable to country A is first calculated on the worldwide income of the resident (including the income sourced in country B), then country A grants a deduction from the gross tax otherwise payable with respect to the tax paid to country B. Country A may allow a full credit, i.e. a deduction may be allowed for the full amount of the tax paid to country B. More commonly, the deduction permitted by country A is restricted to the amount of country A tax referable to the country B income, termed an “ordinary credit” in the OECD commentary. (If a full credit is granted where the country B tax is higher than the country A tax, the credit can have the effect of lowering the country A tax on country A income below what it would be if an exemption with the progression were granted for the country B income). The OECD Model Convention provides only for the exemption with progression and the ordinary credit method. As Australia's foreign tax rules clearly demonstrate, the exemption and credit methods are not mutually exclusive and both may be used for different categories of income.

Denmark

Denmark generally applies the tax credit method under its domestic rules, unless another method follows from a tax treaty or is specifically provided for under domestic law. However, the exemption method applies on income included by Article 18 (new rule). Matching credit is given: at the rate of 10% in the case of dividends, to which the provisions of paragraph 2 of Article 10 apply; and at the rate of 10% in the case of interest to which the provisions of paragraph 2 of Article 11 apply; and at the rate of 20% in the case of royalties to which the provisions of paragraph 2 of Article 12 apply.

The credit is the lesser of either (a) the foreign tax actually paid on the income, and (b) the proportionate amount of the overall Danish tax payable which can be allocated to the foreign income. However, according to the Danish Tax Assessment Act (*ligningsloven*), a net income calculation principle applies in internal Danish law when determining the amount of tax credit available. Under this principle any expenses directly relating to foreign source income initially eligible for a tax credit ("related expenses") should be deducted from such income when computing the Danish tax credit. Further, when calculating the Danish tax credit any expenses which are not immediately allocable either to the taxpayer's foreign source income or Danish source income (unallocated expenses) should be allocated proportionally (pro rata) to the foreign and Danish source income (i.e. in proportion to the foreign and Danish gross income). To which extent an expense is a related expense or a general expense must be determined on a case by case basis.
As regards participants in partnerships, Denmark allows Danish partners therein a tax credit, also for tax levied on the partnership as such when the partnership is considered tax transparent in Denmark.
An exemption method applies pursuant to sec. 33A of the Danish Tax Assessment Act to income from employment abroad when the employment exceeds 6 months and the employee only has limited stays in Denmark during the foreign employment period as further specified therein.
Further, section 8 of the Danish Corporate Income Tax Act lies down a territorial principle for certain corporate activities as it states that if a Danish enterprise has a permanent establishment abroad Denmark will exempt income allocable to such permanent establishment abroad, unless (i) the state in which the PE is located waive its right of taxation under a tax treaty with Denmark or other international agreement, (ii) income in the PE would have been taxable under Danish CFC tax rules if the PE had been a company, or (iii) the income in the PE is income from the operation of ships or aircraft in international traffic.

Article 24 Mutual Agreement Procedure

See treaty text

"Mutual agreement procedure" is the term given to the provisions that are designed to provide a method of resolving difficulties arising out of the application of a particular agreement, and to provide for consultation with a view to reaching a satisfactory solution where a taxpayer is subject to taxation contrary to the provisions of the agreement. Typical examples of circumstances within the procedure are given in the OECD commentary to Article 25 of both the 1977 and 1922 OECD Model Conventions.
Where a person considers that the actions of one or both of the States result or will result for him in taxation not in accordance with the provisions of this Treaty, he may present his case to the competent authority of the State of which he is resident. If not resident in either State (but a national of one of them) the case must be presented to the State of which he is a national. This is so irrespective of the remedies provided by domestic law.
The two tax authorities will try to resolve the case by mutual agreement. They will also try to agree on definitions of terms not specifically defined in the Treaty and on general matters of interpretation of the Treaty.
Thus this Article removes the need for the tax authorities in each State to go through diplomatic channels; they may simply contact each other directly. The mutual agreement procedure is commonly used to decide matters concerning income and expense allocations and transfer pricing.

Domestic law

Denmark

The competent authority in Denmark on matters of tax treaties is SKAT (Legal Center), which is resident on Østbanegade 123, DK-2100 Copenhagen. On issues relating to transfer pricing and the EU Arbitration Convention, the competent authority is SKAT (*Store selskaber*), which is resident on the same address.

Article 25 Exchange of Information

See treaty text

This Article provides for the exchange of such information "as is necessary" for carrying out the provisions of this Treaty or of the domestic laws of the two countries and is not restricted by Article 1 (Personal scope) of this Treaty, but is restricted by Article 2 (Taxes Covered).
Article 26 includes the usual exemptions from the information exchange obligation, thus relieving the States from any obligation to:

- Carry out administrative measures at variance with the laws or administrative practices of either State;

- Supply information which is not obtainable under the laws of either State (although the obligation may go beyond information available in the normal course of administration); and

- Supply information which would disclose any trade, business, industrial commercial or professional secret of trade process, or information the disclosure of which would be contrary to public policy.

Article 26 Diplomatic and Consular Officials

See treaty text

Nothing in this Agreement shall affect the fiscal privileges of diplomatic or consular officials under the general rules of international law or under the provisions of special international agreements.

Article 27 Entry into Force

See treaty text

This provision relates to the entry into force of this treaty.

Article 28 Termination

See treaty text

This provision relates to the termination of this treaty.