Analysis: Denmark – Germany Income and Capital Treaty

See treaty text

Type of Treaty: Income and Capital
Model on which based: OECD
Signed: November 22, 1995
Entry into force: December 25, 1996
Effective date: January 1, 1997

This Analysis was updated in August 2011 by **Arne Riis**, Partner, .Bech-Bruun, Copenhagen, Denmark

Article 1 Purpose of the Convention

See treaty text

This Article deviates from the OECD Model Convention.
The Article prescribes that the Contracting States shall work together under this Convention to avoid double taxation and to safeguard the collection of taxes.

Article 2 Taxes covered

See treaty text

This Convention applies to persons who are residents of one or both States, estates and inheritances where the deceased was resident, at the time of his death, in one or both of the Contracting States, and gifts where the donor was resident, at the time of the gift, in one or both of the Contracting States.
This Convention applies to the following taxes:

- Taxes on total income or total capital, or on elements of income or capital;
- Taxes on gains from alienation of movable or immovable property;
- Taxes on total amounts of wages or salaries; and
- Capital gains taxes
- Wealth taxes; and
- Taxes on estates and inheritances and on gifts, as which shall be regarded taxes imposed by reason of death in the form of taxes on the corpus of the estate, of taxes on inheritances, of transfer duties, or of taxes on donationes mortis causa; or imposed on transfers inter vivos only because such transfers are made for no, or less than full, consideration.

As well as application to the taxes existing at the time the Treaty was signed there is a provision applying the Treaty to any identical or substantially similar taxes which are imposed after the date of signing of this Treaty.

Denmark

- Income taxes to the state (statslig indkomstskat (bund-, mellem-, topskat));
- 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);
- Hydrocarbon Tax (kulbrinteskat);
- Property value tax (ejendomsværdiskat).

- Gift and Inheritance tax (boafgift/gaveafgift).

As well as any identical or substantially similar taxes which are subsequently imposed in addition to, or in place of, the existing taxes.

Germany

- income tax (die Einkommensteuer);
- corporation tax (die K rperschaftsteuer);
- capital tax (die Verm gensteuer);
- trade tax (die Gewerbesteuer);
- land tax (die Grundsteuer)
- solidarity surcharge on income and corporation tax (der Solidarit tszuschlag zur Einkommen- und K rperschaftsteuer);
- inheritance tax and gift tax (die Erbschaftsteuer und Schenkungsteuer)
- turnover tax (die Umsatzsteuer)
- land transfer tax (die Grunderwerbsteuer);
- insurance tax (die Versicherungsteuer);
- motor vehicle tax (die Kraftfahrzeugsteuer)
- church taxes die (Kirchensteuern);
- beverage tax die (Getr nkesteuer);
- entertainment tax (die Vergn gungsteuer);
- surcharge on tax arrears, special charges on overdue taxes, interest, and costs (die Versp tungszuschl ge,
- S umniszuschl ge, Zinsen und Kosten).

As well as application to the taxes existing at the time the Treaty was signed (listed above), there is a provision applying the Treaty to any identical or substantially similar taxes which are imposed after the date of signing of this Treaty.

Article 3 General Definitions

See treaty text

"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.

"Federal Republic of Germany" The area in which the tax law of the Federal Republic of Germany is in force, as well as the area of the seabed, the subsoil and the superjacent waters adjacent to the territorial sea of the Federal Republic of Germany, insofar as the Federal Republic of Germany exercises there, in conformity with international law, sovereign rights and jurisdiction to explore and exploit the natural resources; "Person": An individual, company and any other body of persons.

"Company" means any body corporate or any entity which is treated as a body corporate for tax purposes.

"National": Any individual possessing the nationality of either State or any legal person, partnership and association or other entity deriving its status as such from the law in force in one of the States.

"International traffic": means any transport by a ship, aircraft or vehicle operated by an enterprise which has its place of effective management in a Contracting State, except when the ship or aircraft is operated solely between places in the other Contracting State.

Any terms not defined take their meaning from the law of the State concerned at the time. Meanings specific to tax law take precedence over other meanings.

Domestic Law:

Denmark

"Competent authority" The minister of taxation. In matter relating to international taxation, authority has been delegated to "SKAT", the Danish administrative tax authorities.

Article 4 Residence

See treaty text

"Resident" means any person who is liable to tax in one of the Contracting States by reason of his domicile, residence, place of management or any other criterion of a similar nature. Being liable to taxation only because of a source of income or capital in a State does not by itself result in "residency".

Residence: Individuals

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, he will be deemed to be resident in the State with which his personal and economic relations are closer (centre of vital interests).

- If unable to determine the State where the centre of vital interests lies, then he is a resident of the State in which he has a habitual abode.

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

- If a national of both States or of neither of them, then the competent authorities must settle the question by mutual agreement.

Domestic Law:

Denmark

According to sec. 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 2 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 3 years.

Germany

An individual present in Germany for over six months is considered a resident and is subject to German tax. German domestic law also considers an individual to be resident if he has either a residence or a customary place of abode in Germany. The "residence" of an individual is defined as the place where the individual occupies a residence under circumstances that indicate an intent to remain and not merely to use the residence temporarily. An individual may have more than one residence, and if an individual has residences within, as well as outside Germany, he is considered to be a resident of Germany for German income tax purposes. No distinction is made between first and second residences. Intent is established only by external and recognisable facts and not by declared or undeclared intention. Some of the more important factors in this respect are whether an individual moving to Germany brings his family with him, and whether the apartment or house that he owns or leases is furnished and equipped for his use. An individual ceases to be a resident if the individual leaves Germany in circumstances that indicate that he will not return. For practical purposes, it is helpful if the taxpayer can demonstrate that he has taken up residence elsewhere.

Relocation from Germany is enough to end tax residence, although taxation of German- source income may continue for a non-resident

Residence: Companies

If a company appears resident in both States, e.g. because one determines residence according to the place of legal incorporation and the other according to place of management then the two States will decide in which State it is to be treated as resident by reference to the place of effective management.

Domestic law

Denmark

All companies taxable under sec. 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, sec. 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.

Germany

Companies with a registered office or a place of effective management and control in Germany are deemed to be resident in Germany. Foreign companies that have neither their legal seat nor a place of effective management and control in Germany are deemed to be non-resident.

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.

To the extent that an entity comes under the Treaty definition of "company" its residence is to be determined in the same way as described for companies.

Domestic law

Denmark

Partnerships are not comprised by sec. 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 stille deltager) 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, sec. 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 Denmark, 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).

Germany

Some companies are incorporated as a commercial partnership limited by shares (Kommanditgesellschaft auf Aktien or KGaA). The most common forms of unincorporated firms are the limited commercial partnership (Kommanditgesellschaft or KG), where the liability of at least one partner is unlimited and limited for the other partner(s); and the general commercial partnership (Offene Handelsgesellschaft or OHG), where the liability of all partners is unlimited.
General and limited partnerships (OHG and KG) are not taxable entities for corporate income tax purposes, but they may be taxable entities for trade tax purposes.

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. The list of other types of establishment particularly included includes the usual ones:

- A place of management;
- A branch;
- An office;
- A factory;
- A workshop;
- A mine, an oil or gas well, a quarry or any other place of extraction of natural resources;

Building sites, construction, installation or assembly projects will constitute a permanent establishment if they last for more than 12 months.
According to the OECD Commentary, a "fixed place of business" means 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 permanent establishment for Company A in the country 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 permanent establishment 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.

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 or 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 for collecting information, for the enterprise; and

(e) The maintenance of a fixed place of business solely for the purpose of carrying on, for the enterprise, any other activity of a preparatory or auxiliary character;

(f) The maintenance of a fixed place of business solely for any combination of activities mentioned in subparagraphs (a) to (e), provided that the overall activity of the fixed place of business resulting from this combination is of a preparatory or auxiliary character.

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 function 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 had, 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 those listed in (a) to (f) above. 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 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

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 sec. 2(5) of the CITA and sec. 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 of 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 immovable property

See treaty text

The general rule is that income derived by a resident of a Contracting State from immovable 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. This treatment also applies to income from immovable property used by an enterprise and to income from immovable property used for the performance of independent personal services.
Immovable property is defined as per the domestic law of the State in which the property is located but it will include livestock and equipment used in agriculture, forestry, general property rights and rights for the working of natural resources.

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.

Germany

Capital gains from the sale of real property derived by a non-resident corporation are deemed to be business income taxable at ordinary rates, irrespective of the holding period observed and of whether the non-resident corporation has a PE in Germany.
Capital gains on disposals of shares in German companies by non-resident enterprises are tax free if the seller held at least 1% of the company at any time during the five years before the sale. Sales by individuals of such holdings are liable to tax (at 50% of normal rates).
Capital gains from the sale by a non-resident individual of German real property that are not allocable to a German PE of the non-resident individual, are taxable only if the holding period between acquisition and disposition does not exceed 10 years (on gains exceeding EUR 600 during the tax year). The capital gain is the amount by which the adjusted cost basis, plus selling expenses, is exceeded by the sales price. However, the latter tax is dropped for residential buildings where the taxpayer has lived in the tax year and the two preceding years.
Capital gains derived from the sale of non-business assets are tax-exempt if they are held long enough to be considered non-speculative (e.g. 10 years for real property, one year in most other cases). Germany's tax treaties do not eliminate or reduce the taxation of such capital gains arising to residents of a treaty State.

Article 7 Business profits

See treaty text

Only 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.
"In the case of permanent establishment consisting of construction or assembly sites, only the profits which result from the actual construction or assembly activities are taxable by the State in which the permanent establishment is located. That State is not permitted to attribute additional profits to the permanent establishment on the basis of delivery of merchandise or equipment, whether by the head office or a different permanent establishment of the enterprise."
Generally, 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.
The OECD, in 2008, published its final report on the attribution of profits to permanent establishments (July 17, 2008) and updated the Commentary on Article 7 of the Model Treaty. 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. These notes follow the 2008 version of the Commentary. The "authorised OECD approach" to attributing profits to a permanent establishment now requires that there is 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. The OECD then recommends that "significant people functions" relevant to the attribution of economic ownership of assets are identified to support the attribution of economic ownership of assets of the enterprise to the permanent establishment. Economic ownership is defined 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 borne by the enterprise can be made to the permanent establishment. For instance, road building equipment may be economically owned by a permanent establishment in Country A but the head office, located in Country B, may have the power to determine on which road building projects the equipment is used and hence the head office bears the risk associated with profits or losses arising from the equipment. The more risks that are managed by the permanent establishment, the higher the share of the profit of the enterprise to be attributed to it. The OECD's 2008 Report looks for the place of active decision taking rather than mere "rubber stamping". Note that no such distinction between asset management and risk assumption functions is 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" in OECD terms). 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 OECD 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 OECD's 2008 report suggests the following tests are used when considering whether an internal dealing should have any effect on the profits of a permanent establishment:

- Is the documentation consistent with the economic substance of the internal dealings?

- Are the arrangements 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.

• Are the dealings consistent with the OECD principles for attributing profits to permanent establishments?

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.

The allocation of profits to dependent agent permanent establishments

A dependent agent is not part of the taxpayer enterprise and will file his tax returns independently. Normally the enterprise will make payments to the agent for his services. The question is: Should the host State merely tax the profits of the agent (the "single taxpayer approach") or should there be an additional charge on the enterprise which is using the services of the agent? The amount of the charge would depend on the excess of the enterprise's profits over the amount paid to the agent which was attributable to the activities of the agent. For instance, a dependent agent may be paid for the sales he procures on a commission bases, but the selling enterprise may make a profit on those sales even after taking into account the (arm's length) commission paid to the agent. The OECD recommends that States should always consider whether the enterprise has made a profit in respect of business transacted via the agent which is in excess of amounts paid to the agent. Hence the host State may tax both the dependent agent and the foreign enterprise.

As is usual 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. The same method of attribution is to be used year by year unless there is good and sufficient reason to the contrary.

Domestic law

Denmark

The definition of a Permanent Establishment 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 Permanent Establishment and allocation of profits thereto for Danish tax purposes, most of which are based on actual circumstances. Sec. 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 Permanent Establishment (iii) that profits and losses as well as recaptured depreciation on the sale of goods allocable to the Permanent Establishment is taxable in Denmark. As a significant exception to the main rule that a Permanent Establishment 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 Permanent Establishment to its head office on a "loan" granted to the Permanent Establishment would not be tax deductible for the Permanent Establishment.

Sec. 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 Permanent Establishment is located waive its right of taxation under a tax treaty with Denmark or other international agreement, (ii) income in the Permanent Establishment would have been taxable under Danish CFC tax rules if the Permanent Establishment had been a company, or (iii) the income in the Permanent Establishment is income from the operation of ships or aircraft in international traffic.

Article 8 Shipping and Air transport

See treaty text

This provision relates to income derived from the operation of ships, aircrafts or vehicles in international traffic and the Treaty provides that such income shall only be taxable in the state in which the seat place of effective management of the enterprise is situated. The Article also include income derived by the enterprise from the use, maintenance or rentals of containers (including trailers, barges and related equipment for the transport of containers) used for the transport in international traffic of goods and merchandise if this income is incidental to the profits referred to in the preceding sentence.

The same applies where the enterprise has an agency in the other State for the transportation of goods or persons, but only in direct connection with shipping, aircraft or road-transportation. For purposes of the Treaty, the term "international traffic" is defined in art. 3, par 1(h).

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 3 shall only apply to

such part of the profits as corresponds to the shareholding in the consortium held by SAS Denmark A/S, the Danish partner of Scandinavian Airlines System (SAS).

Article 9 Associated enterprises

See treaty text

This Article deviates from 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.

What is different from the OECD model is where the price agreed between two enterprises has been approved as similar to those which would have been made between independent enterprises. then the other State shall make an appropriate adjustment to the amount of the tax charged therein on those profits, insofar as this is necessary to avoid double taxation. In determining such adjustment, due regard shall be had to the other provisions of this Treaty and the competent authorities of the Contracting States shall if necessary consult each other.

There is no specific provision for the other State to make a corresponding downwards adjustment in taxable profits. However, the mutual agreement procedure provided for in this Treaty can be used to try to prevent double taxation and both States are bound by the provisions of the EU Arbitration Convention (see below).

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.

Effect of the EU Arbitration Convention

The EU Arbitration Convention re-entered into force retroactively from January 1, 2000. Its main purpose is to assist the working of the European Single Market by achieving the elimination of double taxation which may result from one Member State making an upwards adjustment in taxable profits which is not matched by an equivalent downwards adjustment to taxable profits in the other State(s) concerned in the transactions in question.

As Member States of the European Union, both Germany and Denmark are bound by the provisions of the EU Arbitration Convention (90/436/EEC of July 23, 1990). Both States have also ratified the EU Code of Conduct for the effective implementation of double taxation in connection with the adjustment of profits of associated enterprises. Under the Arbitration Convention and the Code of Conduct, a taxpayer company disagreeing with the amount of a transfer pricing agreement or suffering double taxation as a result of an upwards transfer pricing adjustment has three years in which to present its case to the tax administration of the State making the upwards adjustment. Under the Code of Conduct (2006/C176/02) the three years run from the date of first notification of the transfer pricing adjustment. The two Member States involved then have two years in which to reach an agreement which eliminates the double taxation resulting from the upwards transfer pricing adjustment. If they cannot reach agreement within this period then they must set up an advisory commission consisting of representatives of each tax authority and independent persons. This body then has six months to deliver its opinion.

Domestic law:

Denmark

Under Danish domestic law, transfer pricing rules as well as transfer pricing documentation rules apply which provide that Danish taxable persons and Permanent Establishments 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

This Treaty provides for rates of withholding tax on dividends below those which may be charged in the absence of any agreement between the two countries.
This Treaty provides that maximum withholding tax rates are to be:

- 5% where the recipient owns at least 10% of the paying company's share capital; and
- 15% in other cases.

The dividend withholding tax rates do not apply if an exemption exists under the EU Parent-Subsidiary Directive. To enjoy the Treaty rates of withholding tax the recipient must also be the beneficial owner of the dividends. This is an anti-treaty shopping measure.
Paragraph 4 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. The term "dividends" includes likewise in the Federal Republic of Germany income of a sleeping partner from his participation as such, income from a "partiarisches Darlehen", "Gewinnobligationen" and similar profit-depending remuneration as well as distributions on certificates of an investment fund. 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 5 provides that income derived from rights or debt-claims participating in profits (including in the Federal Republic of Germany income of a sleeping partner ("stiller Gesellschafter") from his participation as such or from a "partiarisches Darlehen" or "Gewinnobligationen") that is deductible in determining the profits of the, may be taxed in the Contracting State in which it arises, and according to the laws of that State. However, the tax so charged shall not exceed 25 pct. of the gross amount of this income.
Paragraph 6 provides that where, say, a German company receives a dividend from a Danish company, and that dividend is effectively connected with a permanent establishment which the German company has in Denmark, 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.
Paragraph 7 contains the usual provision that a State does not have the right to levy any tax on a dividend unless either the dividend is paid by a resident company or received by a resident shareholder. Thus the fact that a dividend paid by, say, a German company may be sourced from profits earned by a permanent establishment which that German company has in Germany, does not give Germany any taxing rights over that dividend, unless of course, it is received by German shareholders.

Effect of EU Parent-Subsidiary Directive

Although this Convention provides that the Member State from which the dividend is paid may tax the dividend in the circumstances outlined above, changes to domestic law arising from the implementation of the EU Parent-Subsidiary Directive (90/435/EEC) may override this aspect of the treaty. Note, however, that under domestic law, Germany does not charge withholding tax so the Directive is not on point.

Dividends or other profit distributions paid to a shareholder where both are resident in the EU are not to be subject to withholding taxes. This treatment also applies to dividends received by permanent establishments.
To qualify for this treatment the shareholding must amount to a minimum holding of 15% of the capital (reducing to 10% from January 1, 2009). Previous limits were 25% (from 2003 - December 31, 2004) and 20% (from January 1, 2005 - December 31, 2006).
Member States may impose a two-year minimum ownership period before the exemption provided for in the Directive is granted. However, in its 2009 reforms, Denmark has abolished the statutory holding period (previously enacted as 12 months).
The business entities covered by the Directive are:
Denmark
- Aktieselskab;
- Anpartselskab; and
- Other companies constituted under Danish law subject to Danish corporate tax.

Germany
- Aktiengesellschaft;
- Kommanditgesellschaft au Aktien;
- Gesellschaft mit beschr nkter Haftung;
- Versicherungsverein auf Gegenseitigkeit;
- Erwerbs- und Wirtschafts-genossenschaften;
- Betriebe gewerblicher Art von juristischen Personen des ffentlichen Rechts; and
- Other companies subject to German corporate tax.

The parent company must be subject to tax in its own Member State. Recognised taxes for this purpose are:
Denmark
Selskabsskat.
Denmark will exempt dividends from withholding tax under the Parent-Subsidiary Directive without any minimum holding period for the shares in respect of which it is paid. The minimum shareholding is 10% of the paying company's capital.
Germany
K rperschaftsteuer.
For Germany, the minimum holding period is as under domestic law (minimum one year, but this requirement may be fulfilled after payment of the dividend). The minimum shareholding is as per the Directive (10% as of January 1, 2009).
Domestic law
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 Høje Taastrup), which must contain a statement from the German tax authorities that the beneficial owner of the payment is resident in Germany.
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 Germany, 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 fulfill 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 Germany, 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 Høje Taastrup), which must contain statement from the German tax authorities that the beneficial owner of the payment is resident in Germany.
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 - has not been 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.

Relief under EU law (the EU directives 90/435 and 03/49)

The parent/subsidiary directive does not contain any beneficial ownership provisions. Instead, Article 1 of the parent/subsidiary directive contains a general abuse exception according to which protection under the Dividend Directive may be denied pursuant to domestic or agreement-based (e.g. treaty-based) anti-abuse provisions. We believe that the general anti-abuse exception in Article 1 with almost certainty will be held to reflect the general principle in EU law that abuse of rights is prohibited and that instruments of EU law cannot be extended to cover abusive practices.
Article 1 of the interest and royalty directive sets out a beneficial owner condition. Article 1(4) explains that the receiving company shall be treated as the beneficial owner only if it "receives those interest payments for its own benefit and not as an intermediary, such as an agent, trustee or authorised signatory, for some other person." Beyond this, the interest and royalty directive contains no definition of the concept of beneficial ownership and we have not identified any instruments of EU law which operate with the concept in any way that seems relevant to the interest and royalty directive. It would seem that beneficial ownership is a novel concept in EU law. Thus, the specific meaning of the concept of beneficial ownership in the context of the interest and royalty directive must be held to be uncertain. It will be for the European Court of Justice (ECJ) to determine specifically what it means.
It is conceivable that the ECJ would interpret both the beneficial owner condition and the general anti-abuse exception in light of its extensive case law dealing with abusive practices. Further, it is conceivable, based on the abuse test as it stands after Cadbury Schweppes, that the ECJ would not accept an allegation of abuse under the parent/subsidiary directive or the interest and royalty directive unless it can be established by objective verifiable factors that :

(a) The structure has only been established for the purpose of escaping Danish dividend withholding tax; and

(b) the establishment of the structure constitutes a "wholly artificial arrangement" which does not reflect a "genuine economic activity" carried out in the residence State of the shareholder.

On 16 March 2010 the Danish Tax Tribunal (Landsskatteretten) published a long awaited ruling on beneficial ownership which found in favour of the tax payer in a structure put in place by certain non-Danish private equity funds which had acquired a Danish company by using a Danish-Luxembourg acquisition structure with a Luxembourg top holding company. On distributing dividends to the Luxembourg no Danish tax was withheld on dividends. The dividends were subsequently reinvested by the Luxembourg company by extending a loan to the dividend distributing company, which was ultimately reinvested into the Danish company acquired. The Tax Tribunal stated that the requirement of beneficial ownership is from a Danish perspective applied as an anti-abuse measure. However, as the dividend payment to the Luxembourg company was in the case At hand not paid on to the shareholders therein, the company could not be considered as a flow-through entity and as such would qualify as the beneficial owner of the dividend. As a result, the dividend distributing company was correct in not withholding tax on the dividend paid to the Luxembourg company.

Germany

Individuals

Withholding tax of 25% (26.375%, including the solidarity surcharge) regardless of the holding period. An allowance of EUR 801 (EUR 1602 for married couples) is granted. Taxpayer may request taxation according to the "partial income" system provided the taxpayer holds directly or indirectly at least 25% of the shares in the relevant company (during the entire fiscal year) or holds at least 1% of the shares if employed by the company.

Companies

Withholding tax of 25% (26.4%, including the solidarity surcharge) with a possible 40% refund for nonresident corporations, giving rise to an effective rate of 15.825% on dividends for nonresident corporations in non-treaty/non-EC Directive situations. Under the Parent-Subsidiary Directive, domestic withholding tax will be reduced to zero if dividends are distributed to a qualifying EU shareholder that has held at least 10% of the subsidiary for at least 12 months. The distributing company may only apply the lower rate of withholding tax under a treaty or the Directive if the parent company obtained an exemption certificate from the German Federal Tax Office before the payment is made. Anti-abuse rules apply.

Article 11 Interest

See treaty text

This Article deviates from the OECD Model Convention in the respect that no withholding tax is allowed. Interest is only taxable in the Contracting State in which the beneficial owner is resident. Interest is defined as debt-claims of every kind that are not classed as dividends by virtue of Article 10, whether or not secured by mortgage and whether or not carrying the right to participate in the debtor's profits. The term includes income from government securities, bonds and debentures and premiums and prizes attaching to these securities as well as other bonds and debentures. It includes all items treated as interest under a State's domestic law. Penalties and charges for late payment are not included.

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 and thus escapes withholding tax. Also, interest paid by an enterprise which is borne by a permanent establishment is deemed to arise in the State in which the permanent establishment is situated. Hence, if the permanent establishment and the recipient are in the same State, no withholding tax can arise.

As is usual under the OECD Model Conventions, there is a provision limiting the treaty benefit to an arm's length amount of interest where there is a special relationship between the payer and the beneficial owner.

Effect of the EU Interest and Royalties Directive

Although this treaty provides that the Member State from which the dividend is paid may tax the interest (royalties), the domestic law of the States as altered with respect to the EU Interest and Royalties Directive (2003/49/EEC) may override this aspect of the treaty. The Directive provides that interest and royalty payments from a company in one Member State to a shareholder in another Member State may be exempt from withholding tax providing certain conditions are met.

Germany does not charge withholding tax on payments of interest to non-residents so the protection of the Directive is not normally needed.

The provisions of the Directive were implemented with effect from January 1, 2004 by Denmark. Interest and royalties paid which are in excess of an arm's length amount or to which thin capitalisation rules apply are classed as a constructive dividend. However, such a constructive dividend will be eligible for exemption under the Parent-Subsidiary Directive if the conditions are met.

Denmark would not apply the exemption under the Directive to payments of interest or royalties to a permanent establishment situated outside the EU.

Domestic law

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 (2011) and further provided that it has not entered into a back-to-back loan with an entity that has paid foreign income tax on the interest received at a rate of less than 18.75 percent (2011)

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 "are governed by rules of corporate law, a corporate law agreement or Articles of association".

In practise, 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 percent 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.

Germany

There is no withholding tax on interest paid, except for publicly traded debt, interest received through a German payment agent (usually a bank), convertible bonds and certain profit participating loans where a German resident company is the debtor. In these cases, withholding tax is levied at a rate of 25% (26.4%, including the solidarity surcharge).

Payments to individuals within the EU

Germany has chosen to implement to terms of the EU Savings Directive by charging withholding tax on interest payments to individuals within the EU rather than by automatically exchanging information as to interest paid to persons resident elsewhere in the EU. The rates are:

- 15% until June 30, 2008;
- 20% until June 30, 2011; and
- 35% after June 30, 2011.

An individual can avoid this withholding tax by requesting that his home tax authority be informed of the interest payment or be complying with certification requirements set by the home tax authority.

Article 12 Royalties

See treaty text

There is no withholding tax on royalties providing the beneficial owner is resident in the other State. Royalties are defined as payments of any kind received as a consideration for the use of, or the right to use, any copyright of literary, artistic or scientific work, including cinematograph films and films or tapes for television or radio broadcasting, any patent, trademark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience. It also includes payments for the use of, or the right to use industrial, commercial or scientific equipment, i.e. leasing payments.

There are the usual provisions such that royalties received by a non resident but which relate to a permanent establishment which that non-resident has in the other Contracting State are taxed under Article 7 and thus escape withholding tax.

Where the payer and beneficial owner 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

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 practise, 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 German tax authorities that the beneficial owner of the payment is resident in Germany. 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.

Germany

Withholding tax rate on royalty and lease payments on movable property paid to non-resident corporations of 15% (15.8%, including the solidarity surcharge).
Withholding tax of 30% (31.7%, including the solidarity surcharge) on royalty and lease payments if paid to persons other than corporations (e.g. individuals) and such persons opt for the deduction of business expenses in calculating the withholding tax base.
Withholding tax may be reduced under a tax treaty or the EC Interest and Royalties Directive. The administrative procedure is similar to the procedure for dividends (i.e. an exemption certificate must be obtained before payment).

Article 13 Capital Gains

See treaty text

The usual rule that gains derived by a resident of a Contracting State from the disposal (alienation) of immovable property as defined in Article 6 and situated in the other Contracting State may be taxed by that State applies under this Treaty. In other words, the Contracting State where the property is situated may tax the capital gain. The Article also includes gains from the alienation of shares, rights or an interest in a company, in any other legal person or in a partnership, the assets of which consist principally of, or of rights in, immovable property situated in a Contracting State or of shares in a company the assets of which consist principally of, or of rights in. Such immovable property situated in a Contracting State may be taxed in the State in which the immovable property is situated.
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.
As with all treaty provisions, this Article does not impose a requirement upon either State to tax a capital gain; it merely allocates taxing rights so that the relevant State can tax a gain if it chooses.
The usual rule is present: 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 alienation of the permanent establishment, whether or not as part of the alienation of the whole enterprise. Thus, for example, the sale of a wholly owned company resident in State A and owned by a resident of State A could give rise to a tax charge in State B if that company has a permanent establishment in State B.
This does not include gains on ships and aircraft operated in international traffic nor to other movable property used in such a trade.
Apart from some special rules for international transport assets, all other gains are taxable only in the State where the person making the disposal is tax resident.

Domestic law

Denmark

Under Danish law, only alienation of real estate as well as assets or liabilities attributable to a permanent establishment in Denmark are subject to Danish taxation if 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.

Germany

Individuals are liable to a local real estate tax on immovable property. Other than this there are no wealth taxes. Capital gains are included in taxable income unless exempt under the participation exemption. Generally, all capital gains realized by an enterprise from the disposal of business assets are treated as ordinary business income.
However, gains from the sale of certain fixed assets (eg real property and buildings) may be rolled over if the proceeds are used for reinvestment purposes.
Capital gains derived from the sale of shareholdings between corporations are generally 95% tax-exempt (100% exemption, with a 5% add-back as nondeductible business expenses).

Article 14 Independent Personal Services

See treaty text
Art. 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 than art. 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, a German 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.

Denmark

Reference is generally made to art. 7, above.

Article 15 Dependent personal services

See treaty text

This equates to the "Income from Employment" (Article 15) of the OECD Model and follows the OECD provisions. Salaries, wages and other similar remuneration derived by a resident of a Contracting State in respect of employment are taxable only in that State unless the employment is exercised in the other State. If so, remuneration derived from the other State is taxable in the other State. However, the other State (the source State) will not tax provided:

- The recipient is present in the other State for no more than 183 days during any calendar year - working days and holidays are included;

- The remuneration is paid by, or on behalf of, an employer not resident in the other State; and

- The remuneration is not borne by a permanent establishment or a fixed base which the employer has in the other State.

The purpose of this Article is to ensure symmetry in taxation. If the employer is not taxable in a State, because it is neither resident there nor has a permanent establishment there then it will not receive any tax deduction in that State for wages and salaries paid. Wages and salaries paid by the employer in respect of short term employment postings of employees to that State are correspondingly exempted from tax in that State in the hands of the employees.

Treatment of employee stock options

The treatment of employee stock options is not expressly dealt with and can be difficult as entitlement to the benefit taxable as a result of the option may have accrued partly whilst the employee was working temporarily in one of the States but there may be no taxable event, such as exercise of the option until the employee returns to the other State. A State is permitted to tax that part of the taxable benefit that can be related to the portion of the entitlement period spent working in that State.

Determining the extent to which an employee stock option benefit is derived from employment exercised in a particular State has to be done on a case by case basis, taking into account all relevant facts and circumstances. Whether a period of employment would be considered in allocating taxing rights between two States would depend on whether the entitlement to exercise the stock option was contingent upon continuing employment during that period. If an option was granted with a right to exercise, say, in three years' time, regardless of continuing employment then time elapsing between grant and exercise would not count towards an apportionment of the taxing rights over the benefit in the absence of any other factors.

Periods of employment before the option was granted may be considered in the apportionment of taxing rights if the grant of the option was contingent upon a minimum period of employment or attainment of performance objectives.

Once the option is exercised, any further benefit to the employee, normally in the form of a capital gain on a disposal of the shares at a profit, will be dealt with under Article 13 and so probably only taxable in the State where he is resident.

If the shares do not vest irrevocably on exercise of the option (e.g. because they are liable to forfeiture upon certain conditions) then the increase in value of the shares until they do vest irrevocably will also be dealt with as employment income and subject to the same considerations as the benefit arising between grant and exercise.

The method of apportioning stock option benefits recommended by the OECD is by reference to the proportion of the number of days during which the employment was exercised in one State to the total number of days of employment from which the entitlement to the stock option benefits were derived. Thus if an employee was required to work for an employer for 520 days in total during a particular time period to qualify for the benefits of the stock option and was sent to work in the other State for 260 days out of that period, then half of the stock option benefits would be taxable in each State.
Article 15 should be interpreted in combination with Articles 16, 18, 19 and 20 and the principle behind it is that income derived from an employment is taxed under Article 15 if it does not qualify as income as mentioned under Articles 16, 18, 19 and 20.

Domestic law

Both States have special regimes for expatriate workers: these apply where an individual from one State works in the other State such that he does not qualify for the exclusion from taxation in the State where he is working under the provisions of this Treaty.

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 percent 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 this Treaty.
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 percent, applicable to personal income (such as salaries, etc.), is approx. 56 percent. This rate applies to annual income in excess of DKK 389,900 (about. EUR 52,400) per income year. Salary income lower than this amount is taxable between 0-41 percent. Specific rules on aggregate taxation of income apply to married couples.
Denmark operates a specific expatriation tax regime which provides the possibility of taxation at a flat rate of 25 percent (not including AM-bidrag) for a 3-year period or a flat rate of 30 percent (not including AM-bidrag) for a 5 year period., when certain specific criteria are met. When applying either regime, no deductions are allowed.

Germany

There are no special rules for inward expatriates in German domestic law.

Article 16 Directors' fees

See treaty text

These fees may be taxable in the country in which the company is resident as well as that in which the director is resident.
This treatment extends not only to directors' fees but also to similar payments deriving from duties as an administrator, manager, liquidator or other duties which are considered analogous by the paying State.

Domestic Law:

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 15, above.

Germany

The source State may deduct tax at source. Under the provisions of the Income Tax Act (ITA), section 49(1)(4)(c), the services of a managing director, prokurist or officer of a corporation that maintains its principal place of management in Germany will always be deemed to be performed in Germany.

Article 17 Artists and Athletes

See treaty text

The usual OECD Model rule is almost followed: Income derived by a resident of one State as an entertainer, such as a theatre, motion picture, radio or television artist, or a musician, or as an athlete, from their personal activities as such exercised in the other State may be taxed in the other

State. This also applies where the income accrues not to the entertainer or athlete himself, but to another person, e.g. a management company or a troupe, team or orchestra forming a legal entity or to an artist company.
What is different is that the provisions shall not apply to services of entertainers and sportsmen, if their visit to a Contracting State is supported wholly or substantially, directly or indirectly, from public funds of the other Contracting State. If the performance in question is supported to a significant extent out of public funds or if it is carried out within the framework of a programme of cultural exchange between the two States, then the income will be taxable only where the performer is resident.

Domestic Law:

Denmark

Denmark has - in practise - 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.

Germany

15% tax on income from freelance journalism or writing activities, artistic works or sports as well as income from licenses.
30% withholding tax rate (31.7%, including the solidarity surcharge) applies to individuals who opt for the deduction of business expenses in calculating the withholding tax base.

Article 18 Pensions

See treaty text

The main rule in article 18 is that any pension or annuity paid to a resident of a Contracting State shall be taxable only in that State. However, the main rule is subject to the exception thereto in art. 19, par. 2 (see below).
According to par. 2 pensions and other allowances, periodic or non-periodic, paid under the social security legislation of a Contracting State or under a public scheme organised by a Contracting State in order to supplement the benefits of that legislation shall be taxable only in that State.

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 depends on the type of pension scheme. During the life of the pension scheme, an annual mark-to-market pension yield tax of 15 per cent applies. When the pension is ultimately paid to the pensioner (or beneficiaries) such payments are taxable as personal income (cf. art. 14, above). However, payments from a capital pension scheme are taxable at a flat rate of 40 per cent.
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.

Germany

Personal pension plan contributions are tax exempt, within the limits specified under the pension plan 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, remunerations paid by a country 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 country if the services are rendered by a national of that other country who is a resident there, or by a resident of that country, who, although not one of its nationals, did not become a resident solely to render the services.
Paragraph 2 stipulates that pensions paid by a country or one of its political subdivisions or local authorities, including pension funds incorporated by the aforementioned entities, paid to an individual for services provided for the benefit of that country, are taxable only in that state. An exception applies if the individual is not a resident of the country for whose benefit the services were provided. In that case, the country of residence can tax the pension income.

Paragraph 3 determines that paragraph 1 and 2 of 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 and 18.
Paragraph 4 stipulates that Paragraph 1 and, in the case of subparagraph (a) below shall also apply to payments made:
(a) In respect of the Federal Republic of Germany, by the "Deutsche Post AG", the "Deutsche Postbank AG", the "Deutsche Telekom AG" or the "Deutsche Bundesbahn AG", to civil servants, as well as by the German Central Bank (Deutsche Bundesbank), and in respect of Denmark by the "Post og Telegrafvµsenet", the "De Danske Statsbaner" and the "Danmarks Nationalbank";
(b) By or on behalf of the German Goethe Institute or the Danish Cultural Institute ("Det Danske Kulturinstitut") as well as other similar or comparable institutions determined by the competent authorities of the Contracting States for services rendered to these institutions;
(c) As an equalizing supplement from public funds of one Contracting State to teaching staff temporarily employed in the other Contracting State, and to such payments made directly or indirectly out of public funds by institutions determined by the competent authorities of the Contracting States.

Article 20 Students

See treaty text
As in the OECD Model.

Article 21 Other Income

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).
There is an express provision that income in respect of rights or property which is connected to a permanent establishment is taxed under Article 7 as the income of that permanent establishment or Article 14 (fixed base for independent personal services).
Domestic Law:
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 Capital

See treaty text
Wealth taxes may be imposed on:
- Immovable property according to the State where the property is located; and

- Movable property used by a permanent establishment may be subject to wealth tax in the State where the permanent establishment is located.

Apart from these items and some rules in connection with international transport assets, all other elements of capital may only be subject to wealth taxes in the State where the owner is resident.
Domestic Law:
Denmark
Denmark does not levy general wealth taxes.
However, a partial wealth tax applies in the form of property value tax which is levied at the value of real estate which is the domicile of the owner and/or his family or the summer residence of the owner and/or his family. The tax rates are 1 per cent up to a value of DKK 3,040,000 (2011) and 3 per cent of values in excess thereof. The value is generally determined as the so-called publicly assessed value, but certain modifications may apply.
For Danish tax resident individuals the domestic tax rules apply both to real estate situated in Denmark and abroad. For non-resident individuals, the tax applies to real estate situated in Denmark (in practise primarily Danish summer houses or apartments).
Germany
Individuals are liable to a local real estate tax on immovable property. Other than this there are no wealth taxes. Capital gains are included in taxable income unless exempt under the participation exemption. Generally, all capital gains realized by an enterprise from the disposal of business assets are treated as ordinary business income.
However, gains from the sale of certain fixed assets (eg real property and buildings) may be rolled over if the proceeds are used for reinvestment purposes.

Capital gains derived from the sale of shareholdings between corporations are generally 95% tax-exempt (100% exemption, with a 5% add-back as nondeductible business expenses).

Article 23 Activities in connection with preliminary surveys, exploration or extraction of hydrocarbons

See treaty text

An Article like this does not exist in the OECD model.

The Article stipulates rules about activities in connection with preliminary surveys, exploration or extraction of hydrocarbons.

Article 24 Methods for the Elimination of Double Taxation

See treaty text

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.

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, Sec. 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 Permanent Establishment is located waive its right of taxation under a tax treaty with Denmark or other international agreement, (ii) income in the Permanent Establishment would have been taxable under Danish CFC tax rules if the Permanent Establishment had been a company, or (iii) the income in the Permanent Establishment is income from the operation of ships or aircraft in international traffic.

Germany

Germany will use the exemption method apart from dividend income. The method is exemption with progression so that the amount of exempt income will be taken into accounting determining the tax rates to be applied to income remaining in charge to tax in the State of residence.

However, for dividend and interest income the credit method will be used. No credit is given for corporation tax underlying a dividend.

Effect of the EU Parent-Subsidiary Directive (90/435/EEC as amended)

The treaty provisions as outlined above may leave the recipient of a dividend without credit for underlying foreign corporation tax, for instance, where a German shareholder receives dividends from an a Danish paying company. The Directive provides that the State of the parent company must either refrain from taxing dividends received from certain shareholdings in companies resident in another EU Member State or allow a deduction for underlying corporation tax paid by the subsidiary on the profits now being distributed by way of dividend. As from December 31, 2004, the credit for underlying tax must extend to corporation tax suffered in lower tier companies as well, providing those companies meet the general requirements as to minimum shareholding, residence and type of company.

This treatment also applies to dividends received by permanent establishments.

Effectively, the benefit of the Directive may be claimed from the start of the period of ownership. Full details of the types of bodies to which the Directive applies are given in the analysis of Article 10 (Dividends).

Domestic law

Denmark

Denmark's participation exemption can reduce tax payable where a resident company or permanent establishment of a foreign company receives dividends, currency gains and capital gains on shares. These are exempt from Danish taxation if they arise from a minimum shareholding of 10% in a directly owner subsidiary located within another EU Member State or a state with which Denmark has a tax treaty, provided the tax treaty between Denmark and that state provides for a reduction in the rate of withholding tax. Thus dividends received by a Danish company from an German subsidiary in which there was a minimum shareholding of 10% would be exempt from Danish taxation, although if not covered by the Parent-Subsidiary Directive, they may have suffered German withholding tax.

Article 26 Elimination of double taxation

See treaty text

Germany

Germany will use the credit method to avoid double taxation.

Denmark

Denmark will use the credit method to avoid double taxation.

Article 27 Five-year rule

See treaty text

This Article contains an exception to Article 4.

Paragraph 1 stipulates that if the deceased at the time of death, or the donor at the time the gift was made:

(a) Was a national of one Contracting State without at the same time being a national of the other Contracting State;

(b) Was subject under the tax laws of the first-mentioned State to unlimited tax liability in that State; and (

c) Had been a resident of the other State pursuant to subparagraph (b) of paragraph 1 of Article 4 for a period not exceeding 5 years.

If the five-year period is exceeded the donor shall be deemed, notwithstanding the provisions of Article 4, to be a resident of the Contracting State of which he was a national. Likewise if an heir or recipient of a gift who at the time of the inheritance or the gift fulfils in his person the conditions set forth in paragraph 1

Article 28 Deduction of debts

See treaty text

The Article stipulates the distribution of debts (i henhold til økonomisk tilknytning). The Article is similar Model Double Taxation Convention on Estates and Inheritances and on Gifts 1983, Article 8.

Chapter IV. Assistance in tax matters

Article 29-40 concerns the assistance in tax matters. These articles does not exist in the regular OECD model.

Chapter IV includes all usual taxes related to Chapter II and Chapter III, but Danish County authority - and Muncipal Land value (grundskyld) and Danish tax on motor vehicles are also included.

Article 29 Scope of assistance

See treaty text

Article 29 stipulates that the competent authorities of the Contracting States shall provide each other assistance, and the assistance shall comprise:

(a) Exchange of information;

(b) Assistance in recovery, including conservancy measures; and

(c) Service of documents.

The Contracting States shall provide each other assistance no matter that the assistance will result in an advantage for the taxpayer. However the assistance is not unlimited. See Article 34 and Article 37.

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.

Article 30 Exchange information on request

See treaty text

The competent authority of a Contracting State can give the competent authority of the other Contracting State a request. If so, the competent authority, shall provide the applicant State with any information which is necessary to that State for the assessment and collection of tax or the recovery and enforcement of tax claims or for the application of the provisions of this Convention.

Article 31 Exchange information without request

See treaty text
The competent authority of a Contracting State shall under certain circumstances (see treaty text), without prior request forward information, of which it has knowledge, to the competent authority of the other Contracting State,.

Article 32 Conflicting information

See treaty text
If the competent authority of a Contracting State receives from the competent authority of the other Contracting State information about a persons's tax affairs which appears to it to conflict with information in its possession, then it shall so advise the competent authority of the other State.

Article 33 Recovery of tax claims

See treaty text
The Article stipulates that the Contracting States are pledged to recover each others tax claims.
The competent authority of a Contracting State shall recover tax claims of the other Contracting State as if they were its own tax claim if the second-mentioned State gives a request. The Article does only apply to tax claims which form the subject of an instrument permitting their enforcement in the applicant State and which may no longer be contested.

Article 34 Time limits

See treaty text
The Article provides that questions concerning any period beyond which a tax claim cannot be enforced shall be governed by the law of the applicant Contracting State. The requested Contracting State is not obliged to enforce the claim if it could not be enforced under its own laws.

Domestic law

Denmark

According to sec. 3 of the Danish Law of limitations (forældelsesloven), The Contracting States may lose their rigths to recover tax claims after a period of 3 years.
Notwithstanding sec. 34a of the Danish Tax Administration Act (skatteforvaltningsloven) prescribes that the time limit can be extended on:
a) Issues concerning assessments on income ? or property value tax and tax amount, if the taxation authorities gives a notice before the time limit expire. The law makes a distinguish between ordinary assessments and extraordinary assessments. On ordinary assessments (according to sec. 26 of the Danish Tax Administration Act) the time limit will expire after a period of of 1 year from the ruling of the taxation authorities. On extraordinary assessments (according to sec. 27 of the Danish Tax Administration Act) the timelimit will expire after a period of 10 years.
b) Issues on relation to transfer pricing. The timelimit is 1 May in the sixth income year following the income yeaar to which the adjustment relates.
The Danish Tax at Source Act sec. 67A (kildeskatteloven) prescribes that the time limit on withholding tax is 5 years.

Article 35 Service of documents

See treaty text
A Contracting State shall after request, assist the other Contracting State in service of documents.
The requested State shall effect service of documents:
(a) By a method prescribed by its domestic laws for the service of documents of a substantially similar nature;
(b) To the extent possible, by a particular method requested by the applicant State or the closest to such method available under its own laws.

Article 36 Contents of, and response to, the request for assistance

See treaty text
The Article stipulates what a request for assistance shall indicate and what the request shall be accompanied by, (see treaty text, paragraph 1 and 2).
If the request for assistance is complied, the requested State shall inform the applicant State of the action taken and of the result of the assistance as soon as possible.

Article 37 Limits to the obligation to provide assistance

See treaty text
The Article provides the limits to the Contracting States obligation to provide assistance.

Article 38 Secrecy

See treaty text

Any information obtained by a Contracting State under this Convention shall be treated as secret in the same manner as under the domestic laws of that State, or under the conditions of secrecy applying in the other State if such conditions are more restrictive.

Article 39 Proceedings

See treaty text

Proceedings relating to measures taken under this Convention by the requested State shall be brought only before the appropriate body of that State.

Article 40 Costs

See treaty text

Ordinary costs incurred in providing assistance shall be borne by the requested State. Extraordinary costs shall be borne by the applicant State.

Article 41 Non-discrimination

See treaty text

Nationals of one of the States are not be subjected in the other State to any taxation or any requirement connected therewith, which is other or more burdensome than the taxation and connected requirements to which nationals of the other State in the same circumstances are or may be subjected. This Article deviates from the regular OECD-model because it does not apply to persons who are not residents in one of the Contracting States.

The usual OECD provisions provide that individuals who are nationals of one State do not have the same status as individuals who are nationals of the other State when they are not residents of that State. Hence they need not be granted the personal allowances and similar deductions which are available to residents.

Each State will grant to nationals of the other the same exemptions and personal allowances as it grants to its own nationals. The non-discrimination principle applies to all taxes, not just those covered by this Treaty.

Enterprises of a Contracting State, the capital of which is wholly or partly owned or controlled, directly or indirectly, by one or more residents of the other Contracting State, shall not be subjected in the first-mentioned Contracting State to any taxation, or any requirement connected therewith which is other or more burdensome than the taxation and connected requirements to which other similar enterprises of that first-mentioned State are or may be subjected.

Article 42 Consultation

See treaty text

The Article look like the usual provision found in the OECD-model, Article 25 (3).

Article 42, 43 and 44 must be read consecutively.

The competent authorities of the Contracting States shall endeavour to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of the Convention in general or in any individual case.

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 on relation to transfer pricing and the EU Arbitration Convention, the competent authority is SKAT (Store selskaber), which is resident on the same address.

Germany

The German tax authorities carry out the public administration of all fiscal affairs in the country. There are several levels in the tax authorities: (i) the highest authorities, the Federal Ministry of Finance and the highest authorities of the L nder; (ii) as higher federal authorities, the Federal Monopoly Administration for Spirits and the Federal Central Tax Office.

Article 43 Mutual Agreement Procedure

See treaty text

This Article is similar to the OECD-model, Article 25 (1) and (2).

Article 42, 43 and 44 must be read consecutively.

Where a person considers that the actions of one or both of the States will lead to taxation in conflict with the provisions of this Treaty, the person may present his case to the competent authority of the State of which the person is resident. This is so irrespective of the remedies provided by domestic law. The time limit for presenting the case is restricted to the usual three from the first notification of the action resulting in taxation not in accordance with the provisions of the Treaty.

The tax authorities of the two States 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.
The competent authorities of the Contracting States may consult together under Article 42 or the foregoing provisions of this Article, in particular with a view to reaching agreement.

Article 44 Procedure

See treaty text

This Article is similar to the OECD-model, Article 25 (4). Article 42, 43 and 44 must be read consecutively. When it seems advisable in order to reach agreement to have an oral exchange of opinions, such exchange may take place through a commission consisting of representatives of the competent authorities of the Contracting States.

Article 45 Application of the Convention in special cases

See treaty text

The Article allows the Contracting States to use the credit-method instead of the exemption-method to avoid double taxation if:
(a) The Contracting States income or capital is placed under differing provisions of the Convention or attributed to different persons (except pursuant to Article 9) and this conflict cannot be settled by a procedure in accordance with Chapter V and if as a result of this difference in classification or attribution the relevant income or capital would remain untaxed or be subject only to reduced taxation, or
(b) The State of residence, after proper consultation and subject to the limitations of its domestic law, notifies the other Contracting State through diplomatic channels of other income to which it intends to apply the provisions of this paragraph. The notification shall not take effect until the first day of the calendar year following the year in which the notification was made and all legal requirements under the domestic law of the notifying State for the notification to take effect have been fulfilled.
The Article is used on income from employment, Article 15. That is why the credit-method is used to avoid double taxation on income from employment.

Article 46 Refund of withholding tax

See treaty text

Taxes on dividends, interest, royalties, or other items of income are levied by withholding at source, then the right to apply the withholding of tax at the rate provided for under the domestic law of a Contracting State is not affected by the provisions of this Convention.
Tax so withheld at source shall be refunded on application, with a timelimit of four years from the end of the calendar year in which the income have been received.
The Contracting State in which the income arises may require an administrative certification by the Contracting State of which the taxpayer is a resident, with respect to the fulfilment of the conditions for the unlimited tax liability in that State.

Domestic law

Denmark

The competent authority in Denmark on such matters is Skattecenter Høje-Taastrup, which is resident on postboks 60, 2630 Høje Taastrup.

Article 47 Members of Diplomatic Missions and Consular Posts

See treaty text

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

Article 48 Territorial extension

See treaty text

The article provides that this Treaty may be extended either in its entirety or with any necessary modifications to any part of the territory of Denmark which is not included in the scope of the Treaty and which imposes taxes substantially similar in character to those to which the Treaty applies. Any such extension shall take effect from such date and subject to such modifications and conditions ? including conditions as to termination ? as may be specified and agreed between the Contracting States in notes to be exchanged through diplomatic channels or in any other manner in accordance with their constitutional procedure.

Domestic law

Denmark
For Denmark, this would only be relevant if it were decided to include Greenland and/or the Faroe Islands hereunder.

Article 49 Entry into Force

See treaty text

The Treaty entered into force:
(a) in respect of taxes on income and on capital as per the income year 1997.
(b) in respect of tax on estates and inheritances, for the estates of persons who died on or after 1 January 1997.
(c) in respect of tax on gifts for gifts made on or after 1 January 1997.
(d) in respect of acts of assistance carried out, on or after 1 January 1997,
(e) in respect of taxes withheld at source on dividends, interest and royalties, for amounts paid or credited on or after 1 January 1997.

Article 50 Termination

See treaty text

This provision relates to the termination of this treaty. The Treaty can be terminated after a period of five years and with at written notice. In case of such termination, the Treaty will cease to have effect:
(a) In respect of taxes on income and on capital, for fiscal years current on or beginning on or after 1 January in the calendar year next following the year in which the notification is given.
(b) In respect of tax on estates and inheritances, for the estates of persons who die on or after 1 January of the year following the year in which the notice of termination is given.
(c) In respect of tax on gifts, for gifts made on or after 1 January the year following the year in which the notice of termination is given.
(d) In respect of acts of assistance carried out, on or after 1 January of the calendar year following the year in which the notice of termination is given.
(e) In respect of taxes withheld at source on dividends, interest and royalties, for amounts paid or credited on or after 1 January of the calendar year following the year in which the notice of termination is given.