Analysis: Denmark – Italy Income Tax Treaty

See treaty text

Type of Treaty: Income
Model on which based: OECD
Signed: May 5, 1999
Entry into force: January 27, 2003
Effective date: Generally, from January 1, 2004. See Article 31.
This Analysis was updated in March 2011 by **Arne Riis**, Partner, Bech-Bruun, Copenhagen, Denmark

Article 1 Personal Scope

See treaty text

Persons who are residents of one or both States, without any reference to the nationality..

Article 2 Taxes covered

See treaty text

Taxes on total income or capital, or on elements of income or capital;
Taxes on gains from alienation of movable or immovable property;
Taxes on total amounts of wages and salaries;
Capital gains taxes; and
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);

As well as any identical or substantially similar taxes which are subsequently imposed in addition to, or in place of, the existing taxes.
This agreement does not apply to certain charges ("afgifter") levied under The Danish Pension Tax Act (Pensionsbeskatningsloven).

Italy

- Personal income tax (imposta sul reddito delle persone fisiche);
- Corporate income tax (imposta sul reddito delle societ);
- Local income tax (imposta locale sui redditi).

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.
"Italy": Italian Republic and, when used in geographical sense, means its territory, including internal waters, territorial sea and air space over them and includes any area beyond the territorial waters of Italy which, in accordance with international law and the laws of Italy concerning the exploration and

exploitation of natural resources, may be designated as an area within which the rights of Italy, with respect to the sea-bed and subsoil and natural resources, may be exercised.
"Person": An individual, company and any other body of persons.
"Company": Any body corporate or any entity which is treated as a body corporate for tax purposes.
All terms not specifically defined take their meaning from domestic tax law.
"National": Includes individuals possessing nationality and also any body corporate, body of persons or association created under the laws in force in a State.
"International traffic": means any transport by a ship or aircraft 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 Fiscal Domicile

See treaty text

"Resident": 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.

Residence: Individuals

In the case of individuals apparently resident in both Contracting States, the usual OECD Model 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.

Italy

Individuals who are registered as living more than 183 days a year in Italy in the Office of Records of the Resident Population (Anagrafe), or who are resident or domiciled within the territory of the State within the meaning of the Civil Code, are considered to be resident. In this context, resident is interpreted as the place of habitual abode and domicile as the place of the centre of an individual's vital interests (see above for these concepts). Unless proven otherwise, Italian citizens who have

emigrated to jurisdictions that are tax havens, as defined by specific Ministerial Decree will be considered residents.

Residence: Companies

If a company is apparently tax resident in both States, usually because it is resident in one State by virtue of legal incorporation and in the other by reason of place of management, a tiebreaker rule applies, which is to find 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.

Italy

A company is resident if its legal headquarters, place of effective management or main business activity is in Italy for 183 days of the year. Foreign companies holding controlling participations in Italian companies or managed by residents representing the majority of their board of directors are also considered resident, unless the contrary is demonstrated. Resident companies are taxed on world-wide income, no-resident only on Italian source income.

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.

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).

Italy

All domestic partnership profits, whether distributed or undistributed, are attributed to the individual partners in proportion to their shares. In the absence of a document authenticated by a notary containing an indication to the contrary, all partnership shares are deemed to be equal in value by the tax authority.
Note however, that foreign partnerships are subject to Italian corporate income tax.

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 types of establishment particularly included involve the following:

- A place of management;
- A branch;
- An office;
- A factory;
- A workshop;
- A mine, a quarry or any other place of extraction of natural resources; and
- A construction or assembly project which exists for a period of more than 12 months.

According to the OECD Commentary, a "fixed place of business" means 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 any other activity of a preparatory or auxiliary character (including advertising and scientific research).

Note the absence of any exclusion of a combination of activities which together amount to no more than preparatory or auxiliary.
To apply this Article, it is necessary to be able to make a distinction between functions that are core to a business and those that are merely preparatory or auxiliary. What constitutes core functions will vary from one business to the next. However, any fixed place of business from which the business is partly managed will constitute a permanent establishment even if its 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 has, and habitually exercises, in a Contracting State an authority to conclude contracts in the name of the resident, that resident is deemed to have a permanent establishment in that other State, unless the activities of the agent are limited to the purchase of goods or merchandise for the enterprise. Where the 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.
Immovable property is defined according to the laws of the State where said property is located.
Since this Treaty is not concerned with capital, property value tax is not within its scope.

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.

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, royalties or interest unconnected with the permanent establishment, then the dividends or interest may only be taxed in accordance with Articles 10, 11 and 12 of the Treaty and not this Article. 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 are required in the case of enterprises in the financial sector, because it is considered highly likely that these functions would be carried out by the same people.
Secondly, taking into account the picture built up in the functional and factual analysis, the profits of the permanent establishment must be determined. Although this is relatively simple in the case of transactions with third parties, transactions and dealings with other parts of the enterprise must be determined using the rules laid down in the OECD's Transfer Pricing Guidelines. This means that goods and services provided by head office must carry an arm's length mark up. Pricing policies should be properly documented, which in practice may prove troublesome as firms may not take the same care in documenting the terms of transactions within the firm as they would with third parties. In

determining the profits attributable to the permanent establishment, part of the enterprise's interest costs on its borrowings should be allocated to the permanent establishment. The amount of capital needed to support to functions carried out by the permanent establishment on the assumption that it is a separate entity must be calculated. Then, this total theoretical capital must be broken down into debt and equity (or "free capital" 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 Protocol provides that the expenses which are incurred for the pupose of a permanent establishment means the expenses directly connected with the activity of the permanent establishment.

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.

Alternative method of attribution of profits

This Treaty permits an allocation of the profits of the enterprise to a permanent establishment based on an apportionment of the total profits of the enterprise. This is sometimes known as the unitary, or indirect method of apportionment. It is only acceptable to use this method if it has been customary to do so and in any case, the outcome must be in accordance with the result which would be obtained by using the Authorised OECD Approach (AOA) as set out above.

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.

Italy

As well as corporate income tax (IRES) of 27.5%, permanent establishments of foreign companies are also liable for the regional tax on productive activities (imposta regionale sulle attivit produttive or IRAP) on income derived in the various regions of Italy of 3.9%.

Generally, the taxation of a permanent establishment of a foreign company resembles that of an independent subsidiary. There are no rules for apportioning deductions between Italian and foreign-source income, but it is accepted that appropriate deductions are allowable. In the field of licensing, a flat exclusion of 25% is available in lieu of deductions; however, it appears that higher actual deductions may be claimed where they can be proven.

Article 8 Shipping and Air transport

See treaty text

This provision relates to income derived from the operation of ships or aircraft 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. For purposes of the Treaty, the term "international traffic" is defined in art. 3, par 1, litra g.

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).

The contemporary protocol, states that the Article shall include profits from the use, maintenance, or rental of containers (including trailers, barges and related equipment for the transportation of containers) used for the transport in international traffic. It is not required that such activities are related to the operation of ships- or aircrafts.

Article 9 Associated enterprises

See treaty text

This Article contains the usual OECD provisions regarding transfer pricing. Associated enterprises must adopt the arm's length principle in their dealings with each other, and to the extent that they do not, a Contracting State may make an upwards adjustment to taxable profits.

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 Denmark and Italy 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 upward transfer pricing adjustment has three years in which to present its case to the tax administration of the State making the upward 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.

Under this Treaty, maximum withholding tax rates are:

- 0% where the recipient owns at least 25% of the paying company's share capital for 12 months preceding dividend payment date; and

- 15% in other cases.

The dividend withholding tax rates of Paragraph 2 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.

Other points of this Article

Paragraph 3 defines the term "dividends" to include income from shares, jouissance shares or jouissance rights, mining shares, founders' shares or other rights to participate in profits which do not qualify as debt claims. The definition may be further extended according to domestic law. Jouissance shares or rights are financial instruments which grant rights of the types enjoyed by shareholders but which, in some jurisdictions, are viewed as debt rather than equity.

Paragraph 4 provides that where, say, an Italian company receives a dividend from a Danish company, and that dividend is effectively connected with a permanent establishment which the Italian 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 and Article 14 dealing with the attribution of business profits will apply.

Paragraph 5 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 Denmark company may be sourced from profits earned by a permanent establishment which that Denmark company has in Italy, does not give Italy any taxing rights over that dividend, unless of course, it is received by Italian 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, domestic law, as amended to reflect the provisions of the EU Parent-Subsidiary Directive (90/435/ EEC) may override this aspect of the Treaty.

Dividends or other profit distributions paid by a qualified entity to a shareholder where both are resident in the EU and meet the conditions set out by the EU Parent-Subsidiary Directive (90/435/EEC) conditions are exempt from withholding tax.

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 (reduced to 10% as of 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:

Italy

- Societa per azioni;
- Societa in accomandita per azioni;
- Societa a responsibilita limitata;
- Societa cooperative;
- Societa di mutual assicurazione; and
- Private and public entities whose activity is wholly or principally commercial

Denmark

- Aktieselskab;
- Anpartselskab; and
- Other companies constituted under Danish law subject to Danish corporate tax.

The parent company must be subject to tax in its own Member State. Recognised taxes for this purpose are:

Italy

Imposta sul reddito delle persone giuridiche.

Tax resident in its own Member State.
The parent company must hold a minimum shareholding of 10% in the subsidiary.
Previous shareholding thresholds were 25% (from 2003 - December 31, 2004), 20% (from January 1, 2005 - December 31, 2006), and 15% (from January 1, 2007 - December 31, 2008).

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. Domestic law Italy (to be completed by the Italian commentator) Withholding tax of 27%. However, with respect to profits earned after January 1 2008, the rate is reduced to 1.375% on dividends paid to shareholders resident in the EU and (subject to qualification) in the EEA.

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 Ballerup), which must contain a statement from the Italy tax authorities that the beneficial owner of the payment is resident in Italy.
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 Italy, 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 Italy, the final tax rate is 15%, also under Danish domestic law. In practise reclaim of Danish withholding tax is done by completing and filing ready print reclaim form 06.003 (available online at www.skat.dk) with the Danish tax authorities (Skattecenter Ballerup), which must contain statement from the Italy tax authorities that the beneficial owner of the payment is resident in Italy.
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 :
1. The structure has only been established for the purpose of escaping Danish dividend withholding tax; and
2. 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.

Italy

Withholding tax of 27%. However, with respect to profits earned after January 1 2008, the rate is reduced to 1.375% on dividends paid to shareholders resident in the EU and (subject to qualification) in the EEA.

Article 11 Interest

See treaty text

This Convention provides for withholding tax rates below those which would be applied by virtue of domestic law. However, if domestic law, as amended to reflect the provisions of the EU Interest and Royalties Directive (see below) applies, there will be zero withholding tax.
The maximum rate under this Convention is 10%. To qualify for this rate, the recipient must also be the beneficial owner (limitation of benefits provision).
Paragraph 3 and 4 provides specific cases in which interest only may be taxed in the states of resident.
No withholding tax is permitted if the interest is paid to the beneficial owner in the other State in connection with either the credit sale of industrial, commercial or scientific equipment or in connection with the credit sale of goods from one enterprise to another.
Withholding tax will not be applied to payments of interest paid by or to one of the governments or any of their political subdivisions or local authorities.
"Interest" is widely defined to mean income from government securities, bonds or debentures and debt claims of every kind as well as all other income regarded as akin to interest by the tax law of the State in which the income arises.
There is the usual provision 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.
This Article also in Paragraph (4) deals with the situation where both the recipient and the payer of the interest are resident in the Contracting States but the purpose of the loan was to fund a permanent establishment owned by the payer in the other Contracting State, and the interest on the loan is borne by that permanent establishment. In this case the paying enterprise can pursuant to the Treaty be subject to withholding tax in the State of the permanent establishment.
As is usual under the 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 recipient.

Effect of the EU Interest and Royalties Directive

Although this Treaty provides that the Member State from which the interest (royalties) is paid may tax the interest (royalties), domestic law, as amended to reflect 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.
The provisions of the Directive were implemented with effect from January 1, 2004 in both Denmark and Italy.
As Denmark did not apply withholding tax on interest when the Interest and Royalties Directive was adopted, Denmark did not amend Danish tax law to implement the directive. Subsequently, Denmark as introduced withholding tax interest, however, specifically exempting inter alia interest payments eligible for protection under the Interest and Royalties Directive, cf. “Denmark”, below.
In the case of Italy the shareholding requirements are as per the Directive: A 25% minimum direct holding or a third company holding 25% of both payer and recipient. The 25% criterion is applied to voting rights, not merely to capital. There is a one year minimum holding period, although a refund may be claimed by the recipient once the minimum ownership period has been achieved. Italy does use thin capitalisation rules against EU residents but excess interest would normally be classified as a constructive dividend and then possibly exempt from withholding tax under the Parent-Subsidiary Directive, if the conditions of the law implementing that Directive are met.
The Directive also applies to interest paid and received by permanent establishments of companies resident in EU Member States where the permanent establishment is also in an EU Member State. Neither Italy nor Denmark would apply the exemption under the Directive to payments of interest or royalties to a permanent establishment situated outside the EU.
In Italy interest recharacterised as a dividend may qualify for exemption from withholding tax under the Parent-Subsidiary Directive.

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.

Italy

A rate of 27% applies to bank deposits, bonds with maturity date of less than 18 months and certificates of deposit. A 12.5% rate applies to longer bonds, government bonds and interest on loans (except that if paid outside the EU to a resident enjoying a special tax regime). Note that there is no withholding tax on interest paid to non-resident companies on deposit accounts and current accounts held with banks or post offices, or on bonds issued by the Italian Government, banks or listed companies, provided the beneficial owner is resident in a State with which Italy has a formal mechanism for exchange of information, e.g. a tax treaty or an exchange of information agreement (such as with Jersey or Guernsey). All other interest payments are subject to withholding tax at 12.5%.

Article 12 Royalties

See treaty text

This Convention provides for withholding tax rates below those which would be applied by virtue of domestic law. Note that the provisions of the EU Interest and Royalties Directive (see below) may remove any liability to withholding tax.

Withholding tax of 5% can be charged under the terms of this Convention. This treaty rate only applies if the recipient of the royalties is the beneficial owner.

"Royalties" is defined to include payments of any kind received as consideration for the use of, or right to use:

- Copyright of literary, artistic or scientific works including cinematographic film;
- Any patent or trade mark, design, or model, plan, secret formula or process;

- Any payment for the use of/right to use industrial, commercial or scientific equipment; and

- Any payment for information concerning industrial, commercial or scientific experience.

- The use of, or the right to use, industrial, commercial or scientific equipment i.e. leasing. However, leasing of containers will be subjected to Article 8 of this Treaty.

Where royalties or fees are effectively earned by a permanent establishment they will be taxed as part of the profits of that permanent establishment. 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.
Where the payer and recipient are connected and the amount of royalties exceeds an arm's length amount, the excess amount paid will not enjoy the treaty benefits and will be liable to tax in the payer's State at the normal domestic rate of withholding tax. Effect of the Interest and Royalties Directive See above under Article 11.
Effect of the Interest and Royalties Directive
See above under Article 11.
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 the Italy tax authorities that the beneficial owner of the payment is resident in Italy. 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.
Italy
Withholding tax of 30% applied to 75% of the gross payment, giving an effective rate of 22.5%.

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 other Contracting State applies. In other words, the State where the property is situated may tax the capital gain.
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. Also in this Article is the usual rule that gains on alienation of movable property forming part of the assets of a permanent establishment may be taxed by the Contracting State where the permanent

establishment is situated, including gains from the entire disposal of the permanent establishment This will give the State where the permanent establishment is situated the right to tax other assets including licences and goodwill. This is subject to the overriding principle that the Convention cannot give a State the right to tax a capital gain where no such right to tax exists under its domestic law.
Paragraph 5 and 6 are not contained in the OECD Model Convention. These provisions allow taxation of gain from alienation of shares in cases where a resident of one Contracting State moves to the other Contracting State.
Italy has, according to paragraph 5, the right to levy a tax on gains from the alienation of shares and other rights participating in profits of an Italian company derived by an individual who is a resident of Denmark and has been a resident of Italy within the last five years preceding the alienation.
According to paragraph 6, both Contacting States may tax gain on unrealised shares in case of a resident moving directly from on Contracting State to the other.
With respect to profits derived by the Danish, Norwegian and Swedish air transport consortium, known as the Scandinavian Airlines System (SAS), the provisions of paragraph 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).
Apart from some provisions concerning ships and aircraft (which due to the protocol includes containers), all other gains are taxable only in the State in which the seller 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.

Italy

Capital gains are generally treated as ordinary income at taxed at 27.5% corporate income tax rate. Capital gains from the sale of participations are 95% exempt from taxation if the following criteria are met:
a) The participation has been held continuously for at least 12 months;
b) The participation is classed as a financial fixed asset in the first financial statement closed after the participation was acquired;
c) The company in which the participation is held is not resident in a country on the black list of tax havens annexed to Italy's CFC legislation over the last three years (or less if the company is newer);
d) The company in which the participation is held carries out a business activity over the last three years (or less if the company is newer)

Article 14 Independent personal services

See treaty text

Article 14 was taken out of the OECD model in its 2000 revision as a separate provision as it was generally deemed not to be different in substance from Article 7. However, this Treaty still has separate Articles governing the taxation of income from permanent establishments (see Articles 5 and 7) and income from professional services. This Article provides that where a resident of one of the States has a “fixed base” in the other State, income in respect of professional services attributable to that fixed base may be taxed in the country in which it is situated. Thus an Italian 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.

Domestic law:

Denmark

Reference is generally made to Article 7, above.

Italy
Note that under domestic law Italy would apply a 30% withholding tax to such income paid to non-residents.

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 any 12-month period; and
- 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.

There are special provisions, similar the once in Article 8, relating to income deriving from ship or aircraft business in international traffic.

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

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.
Italy
There are no special rules for the employment income of expatriates. Generally, income earned from employment exercised in Italy is taxed in Italy under normal rules.

Article 16 Directors' fees

See treaty text
These fees are taxable in the State in which the company is resident rather than that in which the director is resident. There is an exception to this rule for persons performing actual function on a permanent basis at a permanent establishment of the company in the State where the director is resident. Thus a Italian resident director of Danish company who is based permanently at a Italian permanent establishment of the Danish company will be taxable in Italy.
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.
Italy
Italy applies a withholding tax of 30% to director's fees (and other professional income).

Article 17 Artists and Athletes

See treaty text
The usual OECD Model rule is 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
This treatment is specifically extended to include income from services not independent of a person's professional reputation, e.g. advertising and sponsorship revenue.
There is an exemption from these rules where the entertainer or athlete is financed predominantly from public funds. In these cases, only the State where the person is resident may charge tax.
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.

Article 18 Pensions

See treaty text
Pensions are only taxable in the country where the recipient is tax resident. This is the normal OECD treatment. There is an exception for pensions paid and other payments made under the social security laws of a State, if such payments does not have a contributory nature - the paying State may tax such payments.
The paying state may tax private pensions and contributory social pension in case where an individual who was a resident of a Contracting State for a period of at least five years and has become resident of the other Contracting State. This, however, only applies where the individual is a national of the source State and do not also has the nationality of the other State.
Individuals, who became residents of Italy before October 27 1999, can get a deduction on their taxable income.
For the purpose of this Article "annuities" shall mean a stated sum payable periodically at stated times during life or during a specified or ascertainable period of time, under an obligation to make the payments in return for adequate and full consideration in money or money's worth.

Article 19 Government Service

See treaty text
This Article contains rules for the taxation of a remuneration paid in respect of government service. Based on Paragraph 1, salaries, wages and other similar remunerations, including pension payments, paid by a State or one of its political subdivisions or local authorities will generally be taxable only in that State.
However, such remuneration will be taxable only in the other State if the services are rendered by a national of that other State who is a resident there and who is not concurrently a national of the first State.
Paragraph 3 determines that paragraph 1 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, 17 and 18.

Article 20 Professors and Teachers

See treaty text
Teachers and professors resident in one State can work in the other State for a period of up to one years and remain taxable only in the State of residence.

Article 21 Students

See treaty text
Payments which a student, apprentice or business trainee who is, or was immediately before visiting a Contracting State, a resident of the other Contracting State and who is present in the visited State solely for the purpose of his education or training, receives for the purpose of his maintenance, education or training shall not be taxed in the visited State, provided the payments arise from sources outside that State.

Article 22 Activities in Connection with Preliminary Surveys, Exploration or Extraction of Hydrocarbons

See treaty text
Art. 22 does not exist in the OECD Model Tax Convention. Art. 22 shall apply where activities are carried on in a Contracting State in connection with the exploration for or exploitation of hydrocarbons situated in that State to the extent that those activities are not performed by the person to whom the concession for exploration or exploitation has been granted. The other provision of the Treaty shall apply in respect of activities or income not covered by this Article, which indicates that the Article takes precedence over all other provisions of the Treaty as regards the activities expressly mentioned hereunder.
An enterprise of a Contracting State or a person performing professional services that is a resident of a Contracting State and carries on in the other Contracting State activities referred to in the first sentence of par 1 shall be deemed to be carrying on such activities in that other Contracting State through a permanent establishment or from a fixed base situated therein. However, a carve-out applies in Paragraph 2, which provides that Paragraph 1 shall not apply where the offshore activities are carried on for a period or periods not exceeding 30 days in aggregate in any period of 12 months. Further, Paragraph 3 provides irrespective of Paragraph 2 and 3 that drilling rig activities carried on offshore constitute a permanent establishment only if the activities are carried on for a period or periods exceeding 365 days in aggregate in any period of 18 months. When determining the periods in Paragraph 2-3, activities carried on by an enterprise associated to another enterprise within the meaning of Art. 9 (Interdependent enterprises) shall be regarded as carried on by that other

enterprise if the activities in question are substantially the same as those carried on by the last-mentioned enterprise.
Paragraph 4 contains a carve-out provision to art. 22. Under Paragraph 4 profits of an enterprise of a Contracting State from the transportation of supplies or personnel by a ship or aircraft to a location situated offshore where activities in connection with the exploration for or exploitation of hydrocarbons are being carried on in the other Contracting State and profits of an enterprise of a Contracting State from the operation of tugboats or anchor handling vessels in connection with such activities shall be taxable only in the Contracting State in which the place of effective management of the enterprise is situated. This means that such activities are taxable in the same manner as art. 8 on international shipping business activities. In Paragraph 5 it is further stated that salaries paid to employees for services comprised by Paragraph 4 are taxable in the same state as the activities under Paragraph 4, i.e. in the Contracting State in which the place of effective management of the enterprise is situated. Notwithstanding the provisions of Article 13, capital gains on drilling rigs used for activities, as mentioned in paragraph 3, which are deemed to be derived by a resident of a Contracting State when the rig activities cease to be subject to tax in the others Contracting State shall be exempt from tax in that other State

Domestic law

Denmark

Denmark applies a specific carbon tax regime. The Hydrocarbon Tax Act (kulbrinteskatteloven) provides for taxation of income arising from prospecting, exploration and extraction of hydrocarbons in Denmark including the Danish continental shelf. Non-resident individuals engaged in the hydrocarbon activities are liable to Danish taxation, as well as non-resident foreign companies, even if they do not have a permanent establishment in Denmark. The tax liability in Denmark applies to enterprises and persons that are engaged in work related to preliminary surveys, exploration, and extraction of hydrocarbons in Denmark.The rules are in particular relevant to foreign enterprises and persons that will be liable to tax pursuant to the Hydrocarbon Tax Act.

Article 23 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).

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 24 Methods for the Elimination of Double Taxation

See treaty text

Both Italy and Denmark applies the tax credit method. However, in those rare cases where this Treaty provides for taxation only Italy, Denmark shall use the exemption with progression method.

Italy

The credit method is used with no extension to underlying corporation tax suffered on dividends (but see below for the effect of the EU Parent-Subsidiary Directive).

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.

Effect of the EU Parent-Subsidiary Directive (I90/435/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 French shareholder receives dividends from an Italian 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 Italian 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 Italian withholding tax.

Article 25 Non-discrimination

See treaty text

The usual OECD provisions apply that nationals of one of the States shall 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. There is a extension of this principle to persons who are not nationals of either State.
“Nationals” is defined in this Treaty to include individuals possessing nationality and also any body corporate, body of persons or association created under the laws in force in a State.
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.
Paragraph (3) of this Article specifically provides for the deductibility of interest, royalties and other disbursements paid by non-residents on the same terms as are granted to residents.

Article 26 Mutual agreement

See treaty text

The provision is more or less identical to the non-discrimination provision in art. 24 of the OECD Model Tax Convention provision.
Where a person considers that the actions of one or both of the States result or will result for him in taxation not in accordance with the provisions of this Treaty, he may present his case to the competent authority of the State of which he is resident. This is so irrespective of the remedies provided by domestic law. The Protocol specify that this mutual agreement
The time limit for presenting the case is restricted to the usual three years 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.

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.

Article 27 Exchange of information

See treaty text

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

- Carry out administrative measures at variance with the laws or administrative practices of either State;
- Supply information which is not obtainable under the laws of either State; and
- Supply information which would disclose any trade, business, industrial commercial or professional secret or trade process, or information the disclosure of which would be contrary to public policy (ordre public).

There is no obligation to supply information not available in the normal course of administration.
In February 2009, the EU adopted proposals for two new Directives: On mutual assistance in the assessment and recovery of taxes and on administrative cooperation in the field of taxation. The draft Directive on administrative cooperation will cover all taxes except VAT and excise duties and will improve upon the current Mutual Assistance Directive by setting up common procedures, forms, formats of claims and channels for exchange of information. Tax officials of the requesting state will be permitted active participation in inspections and administrative enquiries. Importantly, banking secrecy may not be invoked as a reason for failing to supply information.

Article 28 Diplomatic Agents and Consular Officials

See treaty text

This provision primarily relates to member of diplomatic missions and consular posts or international organisations (or its staff) and confirms that the Treaty shall not affect any entitlements of this group which may apply under international law or specific treaties thereon.

Article 29 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:

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

Article 30 Refunds

See treaty text

Taxes withheld at the source will be refunded by request of the taxpayer or of the State of which he is resident.

Claims for refund must be produced within the time limit fixed by the law of the Contracting State which is obliged to make the refund.

Article 31 Entry into Force

See treaty text

The Treaty entered into force on January 27, 2003 with effect from January 1, 2004.
However, Article 19 (1)(b), takes effect from January 1, 1993.

Article 32 Termination

See treaty text

The Convention shall remain in force indefinitely unless terminated by one of the Contracting States. Termination must be given by written notice at least six months before the end of a calendar year. In such event, the Convention shall cease to be effective on January 1 in the following calendar year.