Analysis: Denmark – Poland Income Tax Treaty

See treaty text
Type of Treaty: Income and Capital
Model on which based: OECD
Signed: December 6, 2001
Entry into force: December 31, 2002
Effective date: January 1, 2003.
Subsequent Protocol signed: December 7, 2009
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Article 1 Personal Scope

See treaty text
Persons who are residents of one or both States

Article 2 Taxes covered

See treaty text

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

Denmark

- Income taxes to the state (statslig indkomstskat (bund-, mellem-, topskat));
- Municipal income tax (kommunal indkomstskat);
- Church Tax (kirkeskat);
- Since 2008: labour market contribution (AM-bidrag)
- Health contribution (sundhedsbidrag)
- Share income tax (aktieindkomstskat)
- CFC tax (CFC-skat);
- Pension yield tax (pensionsafkastskat);
- Hydrocarbon Tax (kulbrinteskat);
- Property value tax (ejendomsværdiskat).

Poland

- The personal income tax (podatek dochodowy od osob fizycznych); and
- The corporate income tax (podatek dochodowy od osob prawnych).

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.
The Convention covers taxes on income and property regardless of the method of taxation prescribed by domestic provisions.

Article 3 General Definitions

See treaty text

“Denmark”: means the Kingdom of Denmark, when used in a geographical sense, means all the territory in which the Danish tax laws are in force; the term does not include the Faroe Islands and Greenland.
“Poland”: means the Republic of Poland, when used in a geographical sense means all the territory in which the Polish tax laws are in force. “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.
“Enterprise of a Contracting State” and “enterprise of the other Contracting State”: Respectively an enterprise carried on by a resident of a Contracting State and an enterprise carried on by a resident of the other Contracting Sate.
“International traffic”: Any transport by ship, aircraft or vehicle engaged in inland waterways transport operated by an enterprise that has its place of effective management.
“National”: Any individual possessing the nationality of one of the States or any legal person, partnership and association deriving its status as such from the law in force in a 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.

Poland

According to the standpoint presented by the Polish administrative courts, both the OECD Model Convention and the Commentary to the Convention should not be considered as a source of law. However, they should be taken into account when interpreting double tax treaties to which Poland is a party. This approach was proved by recent individual tax law interpretation issued by the Director of Tax Chamber in Warsaw on 12th of April 2011 (IPPB5/423-47/11-2/PS) in which tax authorities clearly based their interpretation on OECD Model Convention and on the Commentary to the Convention.

Article 4 Fiscal Domicile

See treaty text

Residence: Individuals

“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. It does not include a person liable to tax in a State only in respect of income from sources of income or capital situated in that State.
In the case of individuals apparently resident in both Contracting States, the usual tiebreaker tests apply:

- He will be deemed to be a resident of the State in which he has a permanent home. If he has a permanent home in both States, he will be deemed to be resident in the State with which his personal and economic relations are closer (centre of vital interests).

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

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

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

Domestic Law:

Denmark

According to sec. 1(1) of the Danish Tax at Source Act (kildeskatteloven), tax liability on its global income applies to (i) persons who are resident in Denmark, (ii) persons without Danish residence who stay on Denmark for at least six months, (ii) Danish nationals employed on vessels which with home port in Denmark, unless it is substantiated that they are tax resident outside of Denmark, and (iv) Danish nationals, who are civil servants deployed for duty abroad. Tax liability under (ii) applies as of the initiation of the stay in Denmark. However, persons visiting Denmark as tourists or students, who remain liable to tax in their home State and are not carrying on business in Denmark will only be considered as tax residents if the stay exceeds 365 days within a 2 year period.

Residence in a foreign State for foreign tax purposes does not preclude residence in the Denmark for Danish tax purposes. Dual residence, often resulting in double taxation of the individual's worldwide income, is generally resolved under the terms of an applicable tax treaty. When a Danish tax resident individual moves out of Denmark, the individual will generally still under Danish domestic law be considered tax resident in Denmark as long as he/she or his/her family still has a house suitable for year-round residence. A house owned by the Danish emigrant will generally be considered as being available unless it is let out on a lease which is not terminable for at least 3 years.

Poland

An individual is considered to be a resident of Poland for income tax purposes if a place of domicile (miejsce zamieszkania) is in Poland. From 1 January 2007, an individual is considered to have a place of domicile in Poland when economic or personal interest (a centre of vital interest is in Poland), or when the individual stays in Poland for more than 183 days in a given tax year.

It is clear from this provision that two factors are decisive as to the place of residence: one objective, i.e. the fact of abiding; and one subjective, i.e. the intention to remain permanently. These factors must appear simultaneously in order for a place of residence to exist. However, a temporary interruption (for example, connected with travel) does not affect an individual's place of residence.

Residence: Companies

If a company appears resident in both States, e.g. because one determines residence according to the place of legal incorporation and the other according to the place of management then residence is to be decided by reference to the place of effective management.

Domestic law

Denmark

All companies taxable under sec. 1 of the Danish Corporate Income Tax Act (CITA)(selskabsskatteloven) are considered as Danish taxable corporate entities. This list primarily entails, “aktieselskaber” (A/S) and “anpartselskaber” (ApS), which are required to be registered in the Danish Commerce and Companies Agency (Erhvervs- og Selskabsstyrelsen). Further, companies and cooperatives with similar corporate characteristics as the above company types and which have a Danish tax resident management will be considered as taxable in Denmark. Management will normally be considered as resident in Denmark if Denmark is the seat of the daily management. This would generally be the seat of management rather than the board of directors. However, if the board of directors take very active part in the daily management decisions, the venue of the board may depending on the circumstances be considered as the seat of management for tax purposes. In all other cases than aktieselskaber and anpartselskaber, it is recommendable to obtain local advice.

As a noticeable potential exception to the rule that the above entities are considered to be taxable entities, sec. 2A of the CITA provides that if any of the above entities are considered to be tax transparent under foreign tax law to the effect that income in such Danish entity is taken into account in foreign income, then the otherwise taxable corporate entity is for Danish tax purposes considered tax transparent and potentially not protected by the tax treaty. The reclassification rule is an anti-abuse rule aimed at the US check-the-box rules to avoid creating a possibility of double-dip of primarily financing expenses in both Denmark and the US, but it applies equally to other rules with the same effect.

Poland

Companies having their registered offices (seats) or management office in Poland are subject to tax on worldwide income, regardless of where the income is derived. This is referred to as “unlimited income tax liability” (Art. 3(1) of Polish Corporate Income Tax).

Polish commercial law provides that a company that registers in the court registry in Poland must have a registered office or management office in Poland. The location of either is determined by the company's statute or articles of association.

A company can only have one registered location of a seat. Transfer of the seat abroad means that the company may no longer be registered in the court registry in Poland, i.e. the company is deleted from the registry of companies.

Literally, under the CIT Act, taxable on worldwide income in Poland are taxpayers (e.g. Companies) having seat or place of management in Poland.

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. Residence is therefore to be determined as for companies.

Domestic law

Denmark

Partnerships are not comprised by sec. 1 of the Danish CITA and therefore generally not recognised as separate taxable entities.
A partnership is either a general partnership (interessentskab (I/S), a limited partnership (kommanditselskab (K/S) or partnerselskab / kommanditaktieselskab (P/S)). The general partnership is the ordinary form of commercial partnership, all partners being jointly and severally liable for the partnerships' debts and obligations. Under current Danish law, a partnership is not a separate legal entity, but is transparent with respect to its (tax) liability. A general partnership is normally not subject to taxation; instead, the individual partners are taxable on their share of the partnership's profits.
With respect to a K/S, separate rules for the tax treatment (transparent or non-transparent) apply. A K/S generally has partners having limited liability (limited partners) and one or more partners having unlimited liability (general partners).
A limited partner (kommanditist or stille deltager) is liable only to the extent of his capital contributions or commitments. Under Danish corporate law, it is a requirement that the general partner (komplementaren) has both administrative and economical rights in the K/S.
A P/S is a limited partnership where all limited shares are divided into actual shares. The affairs of the P/S are, however, governed by the Danish Corporate Act, despite being transparent for tax purposes.
As a noticeable exception to the rule that the above entities are considered to be tax transparent, sec. 2C of the CITA provides that if there are participants in an otherwise tax transparent entity (or a permanent establishment in Denmark) which are resident in a state which considers the entity to be a taxable entity or in a state which does not have a tax treaty or information exchange treaty with Denmark, and such participants hold more that 50 percent of the votes or the capital in the entity/permanent establishment, the entity/permanent establishment will be considered a separate taxable entity for Danish tax purposes. The reclassification rule is an anti-abuse rule aimed at the US check-the-box rules to avoid creating a "reverse hybrid" and thereby the possibility of double non-taxation in a situation where Denmark would (without this rule) consider income to be earned by the partnership participants, while the jurisdiction where the partners are resident would consider the same income as earned by the partnership.
With respect to foreign entities, whether or not they are treated as taxable or transparent depends on how closely they correspond to the abovementioned Danish partnership forms. If they are significantly different then the general test is that an entity will be considered taxable if none of the participants have unlimited liability for the debts and obligations of the enterprise. In practise another significant criteria has been whether or not the entity has its own corporate bodies (board of directors or management).
Poland
Partnerships are not taxable entities and, as such, partners are taxed individually on their share of the profits. Polish partnerships include the general partnership, the limited partnership, the partnership limited by shares and the professional partnership. Foreigners resident in another EU Member State, or in an EFTA country that signed the agreement on European Economic Area are allowed to participate in any form of a Polish partnership.
Non-residents from other countries may only set up a limited partnership or a partnership limited by shares. Non-residents participating in a Polish partnership are subject to tax on income allocated under the terms of a partnership agreement. In general, taxable income is determined on the basis of accounting books kept in Poland, by allocating the proportion of the gross income and deductible costs. If, however, it is not possible to determine the non-resident's taxable income on the basis of the accounting books, taxable income is determined by applying a profit ratio to the proportion of the gross income.
Taking into account the transparency of the Polish partnerships, in case of the non-Polish tax resident partners, (although the Polish income tax provisions do not expressly address that issue), the partnership's income attributable to a Polish permanent establishment of each partner (the existence of which would be claimed as a result of being the partner in the Polish partnership) would be subject to tax. It should be also noted that, generally, both in the treaty and non-treaty situations, partners' income from sharing the interest in profits of the partnership would be taxed accordingly to the business profits regime (pro rata to partner's share in the partnerships' profits, or in equal parts if not agreed otherwise).
It needs to be stressed that the participation of the non-resident limited partner and non-resident shareholder in respectively the Polish limited partnership or joint limited partnership should be considered as a permanent establishment provided that certain conditions are fulfilled i.e. there is a fixed place of business through which the business of the enterprise is wholly or partly carried on.

Consequently, income derived on the share in a limited partnership by non-resident limited partner and in joint limited partnership by non-resident shareholder should be subject to taxation in Poland. Such approach was also approved by the Polish tax authorities in the rulings issued by the Tax Office in Warsaw dated 10 January 2006 no. 1471/DPD1/423/103/05/MK and 22 March 2005 no. 1437/US37/ZI/35/MJ/05 and, more recently, in individual tax law interpretations. IPPB5/423-339/11-2/AJ published by the Director of Tax Chamber in Warsaw on 26th of May 2011.
It is also worth mentioning that this rule works in both ways. The participation of Polish resident in foreign partnership, that is tax transparent, should be, provided that conditions mentioned above are met, considered as a permanent establishment. This approach was recently approved by the Director of Tax Chamber in Katowice in the advance tax ruling sygn. IBPBI/2/423-202/11/AK issued on 16th of May 2011.

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. A "place of production" is specifically included in the definition of "place of business". 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, an oil or gas well, a quarry or any other place of extraction of natural resources; and
- A building site, construction or assembly project which lasts for more than 12 months.
- An installation or drilling rig or ship used for the exploration of natural resources ? but not extraction ? if it lasts for more than 90 days.

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;

(f) Any combination of the above provided that the overall activity of the fixed place of business is of a preparatory or auxiliary character.

To apply this Article, it is necessary to be able to make a distinction between functions that are core to a business and those that are merely preparatory or auxiliary. What constitutes core functions will vary from one business to the next. However, any fixed place of business from which the business is partly managed will constitute a permanent establishment even if its function otherwise appear to be preparatory or auxiliary. Also, if services are rendered to other companies within the corporate group or to third party customers then this would not be preparatory or auxiliary because activities only count as preparatory or auxiliary if they are carried on "for the enterprise" itself.

Agency permanent establishment

Dependent agents may constitute a permanent establishment. Where a person is acting on behalf of a resident of a Contracting State and has, and habitually exercises, in a Contracting State an authority to conclude contracts in the name of the resident, that resident is deemed to have a permanent establishment in that other State, unless the activities of the agent are limited to those listed in (a) to (f) above. Where the activities of the agent are merely preparatory or auxiliary, or where the agent is an independent agent (e.g. a general commission agent acting in the ordinary course of his business) the presence of the agent will not give rise to a permanent establishment.

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

Domestic law

Denmark

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

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

Poland

As of 1 January 2007, Polish domestic tax law contains the definition of "foreign permanent establishment". The {CITL} generally follows Art. 5 of the OECD Model Convention and defines a permanent establishment as:

- a fixed place of business undertaking all, or part, of the business of an enterprise, specifically, a branch, representative office, bureau, factory, workshop or place of natural resource extraction;

- a building site, construction, assembly, or installation project performed in one country by another country;

- a person that acts in one country for the entity that is based in another country, if the person has a power of attorney and, in fact, uses it,

unless the relevant tax treaty to which Poland is party states otherwise.
Under the general rule, non-residents are taxable only on Polish-source income (in contrast to the worldwide taxation of resident taxpayers). Therefore, no threshold is provided on the quantity and quality of a business of a non-resident that would mean a taxable presence of a non-resident in Poland.
According to the position of the Polish tax authorities, in principle a branch is not a permanent establishment if its registration documents indicate that it was established for the purpose of conducting, and habitually conducts, auxiliary and preparatory activities. However, if registration documents indicate that the branch was set up for the purpose of conducting, even if only in part, business activities of a foreign enterprise, then it does not matter if the branch performs auxiliary and preparatory activities. The definition of "permanent establishment" which Poland adopted in its tax treaties generally follows Art. 5 of the OECD Model Convention and provides that a permanent establishment is a fixed place of business through which the business of an enterprise is wholly or partly carried on.
The term "place of business" covers any premises, facilities or installations used for carrying on the business of the enterprise whether or not they are used exclusively for that purpose. A place of business may also exist where no premises are available or required for carrying on the business enterprise and it simply has a certain amount of space at its disposal. No formal legal right to use that place is required. The above standpoint was also approved by the Polish tax authorities in the ruling issued by the Director of the Tax Chamber in Warsaw dated 7 January 2008 no. IP-PB3-423-294/07-3/IK.

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.
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 or interest unconnected with the permanent establishment, then the dividends or interest may only be taxed in accordance with Articles 10 and 11 of the Treaty and not this Article.
Generally the profits to be attributed to the permanent establishment are the profits that would be expected if the permanent establishment was a distinct and separate enterprise. The starting point for the computation of profits will be the branch accounts, assuming they exist.
The OECD, in 2008, published its final report on the attribution of profits to permanent establishments (July 17, 2008) and updated the Commentary on Article 7 of the Model Treaty. When interpreting a tax treaty, it is generally agreed that the latest version of the OECD's Commentary on the Model Treaty should be used. These notes follow the 2008 version of the Commentary. The "authorised OECD approach" to attributing profits to a permanent establishment now requires that there is a two step process.
Firstly, a functional and factual analysis should be carried out, along the lines set out in the OECD's transfer pricing guidelines, to establish the economically significant activities and responsibilities undertaken by the permanent establishment. This will involve establishing the rights and obligations arising out of transactions between the permanent establishment and third parties, e.g. the sales revenue arising from independent customers generated by the permanent establishment as opposed

to by the head office. If the permanent establishment takes the form of a factory, then it would assume the obligation to pay for the raw materials which it uses. The OECD then recommends that "significant people functions" relevant to the attribution of economic ownership of assets are identified to support the attribution of economic ownership of assets of the enterprise to the permanent establishment. Economic ownership is defined as the right to income from an asset or the right to depreciate it. Tangible property should be attributed to the location where it is in use. Economic ownership of intangibles rests with the location in which the risks associated with the intangibles is borne: For instance, if an enterprise owns a patent for a particular drug which is sold by distributor companies in many countries, the economic ownership would rest in that part of the enterprise responsible for commissioning the research to develop the drug and which would bear the losses if medical trials failed. A further set of "significant people functions" are then to be identified: this time, those relevant to the assumption of risks so that an allocation of risks borne by the enterprise can be made to the permanent establishment. For instance, road building equipment may be economically owned by a permanent establishment in Country A but the head office, located in Country B, may have the power to determine on which road building projects the equipment is used and hence the head office bears the risk associated with profits or losses arising from the equipment. The more risks that are managed by the permanent establishment, the higher the share of the profit of the enterprise to be attributed to it. The OECD's 2008 Report looks for the place of active decision taking rather than mere "rubber stamping". Note that no such distinction between asset management and risk assumption functions is required in the case of enterprises in the financial sector, because it is considered highly likely that these functions would be carried out by the same people.

Secondly, taking into account the picture built up in the functional and factual analysis, the profits of the permanent establishment must be determined. Although this is relatively simple in the case of transactions with third parties, transactions and dealings with other parts of the enterprise must be determined using the rules laid down in the OECD's Transfer Pricing Guidelines. This means that goods and services provided by head office must carry an arm's length mark up. Pricing policies should be properly documented, which in practice may prove troublesome as firms may not take the same care in documenting the terms of transactions within the firm as they would with third parties. In determining the profits attributable to the permanent establishment, part of the enterprise's interest costs on its borrowings should be allocated to the permanent establishment. The amount of capital needed to support to functions carried out by the permanent establishment on the assumption that it is a separate entity must be calculated. Then, this total theoretical capital must be broken down into debt and equity (or "free capital" in OECD terms). The greater the risks undertaken by the permanent establishment, the higher the proportion of its notional capital that will be regarded as "free capital". Several methods of establishing the split between "free capital" and debt capital are suggested, including the use of thin capitalisation practices in the State in which the permanent establishment is located. Once the amount of notional debt capital has been determined, an allocation of the enterprise's interest liabilities can be made to the permanent establishment. Note that only actual interest liabilities can be allocated. If the enterprise as a whole has paid no interest to external lenders, then there can be no allocation of interest liability to the permanent establishment. The only exception to this rule is where the permanent establishment is involved in treasury dealings with other parts of the enterprise. Whilst this may well be the case in banking enterprises, it would be unusual in other enterprises. Generally, the interest rates used and the terms of the notional loans to the permanent establishment must be such as would be found between parties dealing at arm's length. When deciding what transactions should be recognised between the permanent establishment and other parts of the enterprise, the OECD recommends that the only internal transactions which can be recognised in arriving at the permanent establishment's profits are those which relate to real and identifiable events. These would include the physical transfer of goods, the provision of services, the use of intangibles and the transfer of financial assets. Whilst the internal records (e.g. the branch accounts) are the starting point for identifying these transactions, the true test is whether there has been an internal dealing of economic significance. The OECD's 2008 report suggests the following tests are used when considering whether an internal dealing should have any effect on the profits of a permanent establishment:

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

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

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

Allocations of head office expenses, e.g. for strategic management or centrally managed support functions such as payroll may be set against the profits of the permanent establishment, but the arm's length principle must be observed.

The allocation of profits to dependent agent permanent establishments

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

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.

Poland

The rules for calculating the taxable income of a permanent establishment are, in principle, the same as for resident taxpayers. According to the Polish Corporate Income Tax, both residents and non-residents are obliged to keep proper accounting books in Poland. If a non-resident taxpayer does not do so, he is assessed to corporate income tax under the rules for imputing income. If the accounting books are kept in Poland, taxable income is calculated based on the entries in the taxpayer's accounting records.

Art. 7.3.2. of the Polish Corporate Income Tax explicitly provides that income (e.g. interest and royalties) derived by a non-resident through a permanent establishment in Poland from the sources

referred to in Art. 21 of the CIT are taxed therein to the extent that they are attributable to the activities of the permanent establishment. Furthermore, also expenses incurred in respect of generating the income referred to in Art. 21 of the Polish Corporate Income Tax are deductible for tax purposes to the extent they relate to the activities of the permanent establishment.

It should be noted that, under the Polish corporate income tax, net income is not determined by making adjustments to the net accounting profit realized by the taxpayer in a tax year. Instead, net income is the difference between the items classified by corporate income tax as categories of gross income and items that are regarded as tax-deductible costs. Therefore, to calculate the actual corporate income tax liability for the year, a taxpayer must determine:

- which categories of accounting revenues derived in the accounting year (equal to the tax year) should be classified as categories of gross income and which should not; and
- which categories of gross income derived in the tax year were not included in the relevant accounting year as revenues.

A branch or a representative office that has taxable income must pay ordinary corporate income tax at the normal corporate tax rate in the same way as a subsidiary. If the income of a taxpayer branch or representative office cannot be determined based on the financial records maintained, such income will be determined based on a profit rate as a percentage of total gross income as follows:

(i) 5% in the case of a wholesale or retail trade;
(ii) 10% in the case of construction or assembly activities, or transportation services;
(iii) 60% in the case of agency activities, if earnings are derived in the form of a commission;
(iv) 80% in the case of services or expertise of an attorney; and
(v) 20% in the case of other sources of income. (Act on Corporate Income Tax, Article 9, section 2a)

As per interpretation by the Polish tax authorities, income of a foreign person obtained through his permanent establishment and generated before the PE is registered as a branch in the entrepreneur register and for tax purposes (i.e. before the branch becomes a Polish taxpayer), should nevertheless be recognised as income subject to corporate income tax in Poland (ruling of the First Mazovian Tax Office in Warsaw dated February 9, 2006, no. 1471/DPD1/423-122/05/KK).

Article 8 Shipping and Air transport

See treaty text

This provision relates to income derived from the operation of ships or aircraft or vehicles in international traffic and the Treaty provides that such income shall only be taxable in the state in which the seat place of effective management of the enterprise is situated. For purposes of the Treaty, the term "international traffic" is defined in art. 3, par 1(h).

Covered by this Article is also 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.

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, 2 and 3 shall only apply to such part of the profits as corresponds to the shareholding in the consortium held by SAS Denmark A/S, the Danish partner of Scandinavian Airlines System (SAS).

Article 9 Associated enterprises

See treaty text

This Article 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 other State is required to make an appropriate downwards 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 Poland and Denmark are bound by the provisions of the EU Arbitration Convention (90/436/ EEC of July 23, 1990). Both States have also ratified the EU Code of Conduct for the effective implementation of double taxation in connection with the adjustment of profits of associated enterprises. Under the Arbitration Convention and the Code of Conduct, a taxpayer company disagreeing with the amount of a transfer pricing agreement or suffering double taxation as a result of an upwards transfer pricing adjustment has three years in which to present its case to the tax administration of the State making the upwards adjustment. Under the Code of Conduct (2006/C176/02) the three years runs 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.

Poland

According to Polish administrative courts, in order to make the adjustment, the tax authority should prove that the special conditions of the transaction should be considered as an effect of the relations between the parties. It is not sufficient to prove that the margin on transactions with related parties is lower than with unrelated parties. It is also required to prove that both groups of transactions were comparable (ruling of the Administrative Court in Cracov of June 3, 2009, no. I SA/Kr 1374/08). In other words, it can be indicated that "conditions" created or imposed between two related parties include not only the price but all elements of the transaction which may have influence on the price (e.g. ruling of the Supreme Administrative Court of July 4, 1996, no. I SA/Kr 33/96).

According to Polish courts, the burden of proof in the adjustment proceedings is on the side of the tax administration. Namely, the tax authorities should prove that all the conditions to apply the adjustment proceeding were met and all these conditions should be reflected in the evidence gathered

by the administration (ruling of Administrative Court in Lublin of November 4,2005, no. I SA/Lu 227/05).
It should be noted that there is no established standpoint of Polish courts as regards the possibility of making the adjustments in case when the taxpayer is not aware that the transaction is not concluded in line with the arm's length principle (i.e. when the taxpayer has no intention to transfer the profits). In some rulings it is stated that the correction is possible irrespective of the awareness or will of the taxpayer (e.g. ruling of the Supreme Court of April 22, 1999, no. III RN 184/98). In other rulings it is stated that the correction is possible if the transfer of profits is made intentionally (e.g. ruling of the Supreme Administrative Court of December 15, 1997, no. SA/Rz 1254/96).

Article 10 Dividends

See treaty text

This Treaty provides for rates of withholding tax on dividends below those which would be charged in the absence of any agreement between the two countries. However, if the domestic law as amended to reflect the provisions of the EU Parent-Subsidiary Directive applies, there will be zero withholding tax.
Rates of withholding tax under this Treaty:

- 0% where the recipient owns at least 25% of the paying company's share capital and has done so for one year;;

- 5% where the recipient is the beneficial owner is a pesion fund or other similar institution ; and

- 15% maximum in all other cases.

Other points on this Article

Again, the beneficial owner must be resident in the State in which the dividend is paid.
Paragraph (3) defines the term “dividends” to include income from shares, “jouissance” shares or certificates, mining or founders shares or other rights to participate in profits (but not debt claims). 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. The definition may be further extended according to domestic law.
Paragraph (4) provides that where, say, a Polish company receives a dividend from a Danish company, and that dividend is effectively connected with a permanent establishment which the Polish company has in Denmark, then the dividend income will be deemed to be part of the income of the permanent establishment and the provisions of Article 7, dealing with the attribution of business profits will apply.
Paragraph (5) provides that where, say, a Polish company derives profits from sources within Denmark, Denmark may not impose taxes on either the dividends paid by the Polish company, other than on persons resident in Denmark, or on the undistributed profits of the Polish company, except to the extent that they arise from a Danish permanent establishment or where dividends are paid to Polish residents. This is the normal rule. Paragraph (6) contains a time-limit for refund which is not contained in the OECD Model Convention. It provides that in case a State has levied tax at source in excess of the amount chargeable under this Convention, an application for refund must be ledged within three years.

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 to a shareholder where both are resident in the EU are not to be subject to withholding taxes. This treatment also applies to dividends received by permanent establishments.
To qualify for this treatment the shareholding must amount to a minimum holding of 15% of the capital (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). Denmark
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). Poland requires a 15% minimum shareholding which must have been held for at least two years, falling to 10% by January 1, 2009. If the holding period is not fulfilled by the time the dividend is paid, tax is withhold and may be reclaimed upon fulfilment of the minimum holding period.

The business entities covered by the Directive are:
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:
Poland
- Joint stock company (spolka akcyjna or S.A.);

- Limited liability company (spolka z ograniczona odpowiedzialnoscia or Sp. z o.o.)

The recipient company must be subject to tax in its own Member State. Recognised taxes for this purpose are:
Denmark
Selskabsskat.
Denmark will exempt dividends from withholding tax under the Parent-Subsidiary Directive without any minimum holding period for the shares in respect of which it is paid. The minimum shareholding is 10% of the paying company's capital.
Poland
Corporate income tax (podatek dochodowy od osob prawnych).
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 Polish tax authorities that the beneficial owner of the payment is resident in Poland.
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 Poland, 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 Poland, 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 Polish tax authorities that the beneficial owner of the payment is resident in

Poland. 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.

Poland

Withholding tax rate is 19% but zero under the Polish participation exemption if the dividend is paid to a parent company in an EEA Member State provided that:

- The company that pays dividends or similar payments is a Polish taxpayer with its seat or management board in Poland;

- The entire income of the recipient of dividends or similar payments, regardless of where it is obtained, is taxable in the EU, or from January 1, 2007 in the EEA (the EU plus Norway, Liechtenstein and Iceland);

• The minimum shareholding is 10% as of January 1, 2009. Pursuant to transitional provisions, the minimum shareholding is 20% from January 1, 2005, through December 31, 2006, and 15% from January 1, 2007, through December 31, 2008; and

• The recipient of the dividend must be (a) A company of which the entire income, regardless of where it is obtained, is taxable in the EEA; or (b) A foreign branch of the company defined in i. above, located in the EEA, if the income of that branch is taxable in the country in which this branch is located; and

• The shares must have been held for a continuous period of at least two years. This condition is fulfilled also if the two-year period terminates after the day on which the company receives dividends.

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 the domestic law, as amended to reflect the provisions of the EU Interest and Royalties Directive applies, there will be reduced or zero withholding tax.
To qualify for reduced rates of withholding tax under this Treaty the recipient or the beneficial owner of the interest must be resident in the State in which it is paid.
Rates are:
(i) 0% for interest paid:
• To the Government of Poland or of Denmark;

• On any loan of whatever kind granted by a financial institution owned or controlled by a Contracting State;

• In connection with the sale on credit of any industrial, commercial or scientific equipment; or

• In respect of a bond, debenture or other similar obligation of the government of a Contracting State and:

(ii) 5% (maximum) in all other cases.
Interest is defined as debt-claims of every kind that are not classed as dividends by virtue of Article 10, whether or not secured by mortgage. The term includes income from government securities, bonds and debentures and premiums and prizes attached to such securities as well as other bonds and debentures. Penalty charges for late payment do not count as interest.
There are the usual provisions such that interest received by a non-resident but which relates to a permanent establishment which that non-resident has in the other Contracting State, is taxed under Article 7 and thus escapes withholding tax. Also, interest paid by an enterprise which is borne by a permanent establishment is deemed to arise in the State in which the permanent establishment is situated. Hence, if the permanent establishment and the recipient are in the same State, no withholding tax can arise.
This Article does not deal with the situation where both, the recipient and the payer of the interest are residents in the Contracting States but the purpose of the loan was to fund a permanent establishment owned by the payer in a third State, and the interest on the loan is borne by that permanent establishment. Because under this Treaty, the bearing of interest by a permanent establishment rather than the payer only applies where the permanent establishment is one of the two Contracting States, the paying enterprise will be subject to withholding tax under this Treaty in the State where it is resident. This leaves open the possibility that under another treaty, the interest might be treated as arising in the State where the permanent establishment is situated and also subject to withholding tax there under the terms of a treaty between the State where the permanent establishment is situated and the recipient's State, or simply under domestic law.
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 beneficial owner.

Effect of the EU Interest and Royalties Directive

Although this Treaty provides that the Member State from which the dividend is paid may tax the interest (royalties), the 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 provided certain conditions are met.

Denmark

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.

Denmark would not apply the exemption under the Directive to payments of interest or royalties to a permanent establishment situated outside the EU. In both Denmark and Poland, interest paid which is in excess of an arm's length amount or to which thin capitalisation rules apply is classed as a constructive dividend. However, such a constructive dividend will be eligible for exemption under domestic law, as amended to reflect the provisions of the Parent-Subsidiary Directive if the conditions are met.

Poland

Poland has negotiated two transitional periods: withholding tax on interest will continue to be charged at 10% from July 1, 2005 until June 30, 2009 and then until June 30, 2013 at 5% (interest and royalties). The minimum shareholding is a direct holding of 25% for a period of at least two years. The holding period may be fulfilled after payment of the interest. Only a direct holding where one company holds at least 25% of the other or a third person company holds 25% of payer and recipient is permitted. The interest must be subject to tax in the hands of the recipient.

To sum up, under the domestic law implementing the EU Interest and Royalties Directive (2003/49/EC), final withholding at a rate of 5% on interest and royalties is applied, provided that the recipient is an associated company of the paying company and is resident in another EU Member State. Two companies are "associated companies" if (a) one of them holds directly at least 25% of the capital of the other or (b) a third EU company holds directly at least 25% of the capital of the two companies. The 25% holding is required for an uninterrupted period of at least 2 years. From 1 July 2013, the rate of withholding tax will be 0%.

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.

Poland

Under domestic law, interest paid to non-resident companies and individuals is subject to a final withholding tax of 20%. Interest paid to resident individuals is subject to a final withholding tax at the rate of 19%.
Under the Polish Corporate Income Tax with effect from 1 July 2005, tax rates specified in Polish-Denmark DTA are available if the following conditions are all satisfied:
- the interest is payable by a company that has its registered office, or a place of management in Poland, or by the permanent establishment of an EU-based company that is taxed in a Member State on its worldwide profits, if the interest paid by the permanent establishment is treated as being a tax-deductible cost in assessing the income taxed in Poland;
- the interest is payable to a company that is taxed on its worldwide income (regardless of the source of income) in an EEA State or to the permanent establishment of such a company taxed in an EEA State in which the permanent establishment is located;
- the company paying interest holds directly at least 25% of the shares of a company to which the interest is paid or vice versa, or a company that is taxed on its worldwide income (regardless of the source of income) in an EEA State that holds directly at least 25% of the shares of both of the companies referred to previously; or the company receiving interest does not benefit from a tax exemption on its income (regardless of source) and submits a declaration to this effect;
- the recipient holds shares in the paying company based on ownership title; and
- the companies hold the shares for an uninterrupted period of 2 years.

If the 2-year holding period is breached, the company receiving the interest must pay 20% tax together with interest on tax arrears.

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 domestic law, if amended to reflect the provisions of the EU Interest and Royalties Directive (see below), may reduce or remove any liability to withholding tax.
This Treaty limits the withholding tax to 5% provided the recipient is the beneficial owner.
Royalties are defined as payments of any kind received as a consideration for the use of, or the right to use, any copyright of literary, artistic or scientific work, including cinematograph films and recordings for television or radio, any patent, trade mark, design or model, plan, secret formula or process, or information (know-how) concerning industrial, commercial or scientific experience. Also

included are payments for the use of, or the right to use, industrial, commercial and scientific equipment (i.e. leasing payments). There are the usual provisions such that royalties received by a non-resident (a resident of the other Contracting State) but which relate to a permanent establishment, which that non-resident has in the other Contracting State are taxed under Article 7 and thus escape withholding tax. Also, royalties paid by an enterprise which are borne by a permanent establishment are 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

Although this Convention provides that the Member State from which the royalties are paid may tax the royalties, 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 provided certain conditions are met.

Denmark

See under Article 10

Poland

Poland has negotiated two transitional periods in the implementation of the Directive. Withholding tax on royalties will continue to be charged at 10% from July 1, 2005 until June 30, 2009 and then until June 30, 2013 at 5% (interest and royalties). The minimum shareholding is a direct holding 25% for a period of at least two years. The holding period may be fulfilled after payment of the royalties. Only a direct holding where one company holds at least 25% of the other or a third person company holds 25% of payer and recipient is permitted. The royalties must be subject to tax in the hands of the recipient.

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 Poland tax authorities that the beneficial owner of the payment is resident in Poland. 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.

Poland

Under domestic law, a 20% withholding tax applies to income derived by non-resident companies and individuals from copyrights, trademarks, patents, designs or models and know-how. The tax also applies to income arising from the sale of such rights which is derived by non-resident companies and individuals.

Under the domestic law implementing the EU Interest and Royalties Directive (2003/49/EC), final withholding at a rate of 5% on interest and royalties is applied, provided that the recipient is an associated company of the paying company and is resident in another EU Member State. Two

companies are “associated companies" if (a) one of them holds directly at least 25% of the capital of the other or (b) a third EU company holds directly at least 25% of the capital of the two companies. The 25% holding is required for an uninterrupted period of at least 2 years. From 1 July 2013, the rate of withholding tax will be 0%.
The Provincial Administrative Court in Warsaw issued a judgment in respect of the interpretation of software payments under the Poland-Belgium DTT. The court presented the view that it was not possible to classify software payments with any of the groups provided in the definition of royalties if such payments were not explicitly listed in the definition of royalties provided in the Poland-Belgium DTT. Consequently, such payments are not subject to the withholding tax in Poland (final judgment of the Provincial Administrative Court in Warsaw dated January 24, 2007, case no. III SA/Wa 3483/06).
In the view of the Polish tax authorities, rent due under a machinery and equipment lease agreement concluded by a Polish company with a Belgian contractor falls under the definition of royalties according to article 12(3) of the Poland-Belgium DTT. The tax authorities noted that the definition of royalties included payments for the use of, or the right to use, industrial, commercial or scientific equipment. Article 13 Capital Gains

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.
There is an extension of this rule so that gains from the alienation of shares in a company whose assets consist principally of immovable property situated in one of the States may be taxed by that State, regardless of whether the alienator is a resident. Immovable property forming the company's premises is not counted when deciding whether a company's assets consist primarily of immovable property.
The term “alienation” is used in connection with events giving rise to capital gains. This will include normal disposals of assets and also events such as exchange of assets, expropriation, gifts and the passing of assets to another on death. Not all States levy tax in all these situations, but the meaning of the term “alienation" is sufficiently wide to give them the right to do so if their domestic law provides for a charge to tax in a particular situation.
As with all treaty provisions, this Article does not impose a requirement upon either State to tax a capital gain; it merely allocates taxing rights so that the relevant State can tax a gain if it chooses.
The general principle is that gains, other than those relating to immovable property and relating to assets which belong to a permanent establishment, are taxable only in the State where the seller is resident. There are the usual special provisions for ships, boats and aircraft - see under Article 8 for a special provision concerning profits deriving from SAS Airlines.
Also applicable is the usual rule that gains on alienation of movable property forming part of the assets of a permanent establishment may be taxed by the Contracting State where the permanent establishment is situated, including gains from the entire disposal of the permanent establishment 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.

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.

Poland

A gain arising to a foreign entity from the sale of real property located in Poland is subject to corporate income tax on general principles. The amount of the gain is equal to the amount received

for the sale minus the expenditure incurred on the purchase of the real property, reduced by the depreciation write-offs and any capital invested in the real property during the period of ownership. Foreign corporations are also taxable on gains on other Polish assets such as shares in Polish companies whose main assets directly or indirectly consist of real properties. There is a limited exemption under the Polish tax law which applies to interest or discount on State Treasury bonds offered on foreign markets, and to income from paid alienation of those bonds. Note that share redemptions are treated as dividends and may thus qualify for the participation exemption according to the Parent-Subsidiary Directive.

Individuals are taxed on gains on disposals of Polish property including shares in Polish companies whose main assets directly or indirectly consist of real properties.

The Polish tax authorities have recently issued a ruling to the effect that income obtained by a Belgian tax resident from a disposal of shares to a non-resident is not subject to taxation in Poland. Furthermore, if such income is obtained in Poland, it will be treated as a gain from alienation of property under article 13 section 5 of the Poland-Belgium DTT and, consequently, will be taxed only in Belgium.

Article 14 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 in any consecutive 12 -month period commencing or ending during the fiscal period in question;

- 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.
The general rule is that employment income is taxable in the State where it is actually exercised. This general rule is subject to exception - i.e. no tax is levied in the State where employment is exercised - when three conditions provided in paragraph 2 are jointly satisfied.

Hiring-out of labour

The term "employer" used in paragraph 2 of this Article has been defined neither in the treaty nor in the OECD Model Convention. Therefore, in the context of the practice of international hiring-out of labour, one should refer to the Commentary on the OECD Model Convention. In this respect it should be noted that the term "employer" is to be understood as the person having rights to the produced work and bearing the related responsibility and risks. When workers are hired internationally, these functions are to a large extent exercised by the user of the labour. In this context, the competent authorities may examine each case separately to establish who in fact is the actual employer and therefore refer to a number of circumstances connected with employment:

- who bears the responsibility or risks for the results produced by the employee's work;
- who has the authority to instruct the workers;
- whether the work is performed at a place which is under the control and responsibility of the user of labour;
- how the remuneration paid to the hirer is calculated;
- whether the tools and materials are essentially put at the employee's disposal by the user of labour;
- whether the number and qualifications of the employees are solely determined by the hirer.

Domestic law

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

Denmark

Under Danish domestic rules, Denmark can tax non-resident employees on income from employment when work is carried out in Denmark. The Danish domestic rules apply to all forms of payment and irrespective of when payment is made. The provision specifically includes severance payments and payment during a termination period when such payments attributable to employment in Denmark. Further, the Danish domestic law provides for a 30 percent tax on hiring out of labour when work is carried out in Denmark.
In a ruling from 2006 by the Danish Tax Council (Skatterådet) the Danish tax authorities confirms that it considers stock options granted as remuneration for employment was comprised by Article 15 of this Treaty.
When taxable in Denmark, a person will generally be taxable pursuant to the same rules as a Danish tax resident employee. When only working in Denmark for part of the income year (normally the calendar year for individuals), specific calculation rules apply to ensure that the progressive Danish tax system applies to the income from Denmark. In very general terms, the marginal tax rate, including labour market contributions (AM-bidrag) of 8 percent, applicable to personal income (such as salaries, etc.), is approx. 56 percent. This rate applies to annual income in excess of DKK 389,900 (about. EUR 52,400) per income year. Salary income lower than this amount is taxable between 0-41 percent. Specific rules on aggregate taxation of income apply to married couples.
Denmark operates a specific expatriation tax regime which provides the possibility of taxation at a flat rate of 25 percent (not including AM-bidrag) for a 3-year period or a flat rate of 30 percent (not including AM-bidrag) for a 5 year period., when certain specific criteria are met. When applying either regime, no deductions are allowed.

Poland
Generally, there are no special tax provisions for expatriates working in Poland on an employment contract basis.

Article 15 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.
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.
Poland
There are special rules for taxation of expatriates' income from board duties. Income from board duties earned by foreign nationals with limited tax liability in Poland may be taxed at 20% fixed rate. In such cases, no deductions are available. Income from board duties earned by residents of the EU, EEA or Swiss Confederation may also be taxed - under certain conditions - according to the progressive scale. In such cases, certain deductions are available.

Article 16 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, e.g. a management company or a troupe, team or orchestra forming a legal entity or to an artist company. If the activities are supported mainly out of public funds (this Convention specifically mentions "cultural exchange programme approved by the State"), then only the State where the performer is resident may tax the income.
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 17 Pensions

See treaty text
This Article deviates from the OECD Model Conventions provisions concerning Pensions.
Pensions and other allowances paid under the social security legislation of a Contracting State or under a public scheme organised by a Contracting State in order to supplement the benefits of that legislation shall be taxable only in that State.
Private pensions and similar payments in respect of past employment are taxable only in the State where the recipient is resident. This is the normal OECD rule. However, the State from where the payments derive that may tax in cases where contributions to the pension sheme were deducted from the beneficiary's income, or contributions paid by an employer were not taxable income for the beneficiary.
Denmark
Under Danish domestic law, Denmark is entitled to tax payments from Danish pension schemes to non-resident persons. The Danish pension tax system is relatively complex and a detailed description thereof is not made herein. Generally, tax deductibility for pension contributions is allowed irrespective of whether the pension scheme is established in Denmark or elsewhere in the EU when certain criteria are met. The deductible annual amount depends on the type of pension scheme. During the life of the pension scheme, an annual mark-to-market pension yield tax of 15 per cent applies. When the pension is ultimately paid to the pensioner (or beneficiaries) such payments are taxable as personal income (cf. art. 14, above). However, payments from a capital pension scheme are taxable at a flat rate of 40 per cent.

In 1998, the Danish ministry of taxation issued a statement regarding the application of the Danish tax treaties to payments under the Danish social legislation, which contains guidance on how to apply the Danish tax treaty to various types of payments under the Danish social legislation.

Article 18 Government Service

See treaty text

This Article contains rules for the taxation of a remuneration paid in respect of government service.

Based on par. 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.

Par. 2 determines that par. 1 Article 19 do not apply to remuneration for services rendered in connection with the carrying on of a business. Such income will be dealt with under Articles 14, 15, 16 and 17.

Article 19 Students

See treaty text

Payments which a student or an intern 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 20 Other Income

See treaty text

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

There is an express provision that income in respect of rights or property, other than income from immovable property, which is connected to a permanent establishment, are taxed under Article 7 as the income of that permanent establishment.

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 21 Capital

See treaty text

Capital taxes may be imposed as follows:

- Immovable property may only be subject to capital taxation in the State in which the property is situated;

- Movable property forming part of the business property of a permanent establishment can be subject to capital taxation in the State in which the permanent establishment is situated;

- Ships, aircraft and rail and road vehicles operated in international traffic are taxable only in the Contracting State in which the enterprise's effective management is situated; and

- All other elements of capital are taxed only in the Contracting State where the owner is resident.

Domestic Law:

Denmark

Denmark does not levy general wealth taxes.

However, a partial wealth tax applies in the form of property value tax which is levied at the value of real estate which is the domicile of the owner and/or his family or the summer residence of the owner and/or his family. The tax rates are 1 per cent up to a value of DKK 3,040,000 (2011) and 3 per cent of values in excess thereof. The value is generally determined as the so-called publicly assessed value, but certain modifications may apply.

For Danish tax resident individuals the domestic tax rules apply both to real estate situated in Denmark and abroad. For non-resident individuals, the tax applies to real estate situated in Denmark (in practise primarily Danish summer houses or apartments).

Article 22 Methods for the Elimination of Double Taxation

See treaty text

Note that the treaty provisions described below for the granting of credit for foreign corporation tax on profits out of which dividends have been paid, may be overridden by the domestic law as amended to reflect the provisions of the EU Parent-Subsidiary Directive. Details are given at the end of the analysis for this Article.

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

An additional Protocol dealing with exchange of information was signed on December 7, 2009. This protocol only has effect in relation to the Polish method to eliminate double taxation. Poland shall apply the exemption with progression method on income taxable in Denmark under this Treaty. However, as regards dividends, interest and royalties, Poland shall continue to apply the credit-method.

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.

Poland

Poland uses the credit method with credit for Denmark corporation tax underlying dividends.

Where, under this Treaty, income or capital is taxable only in Denmark, Poland will exempt it from tax but will nevertheless take into account the income or capital exempted when determining the rates of Polish tax to be applied to income or capital remaining in charge to Polish tax.

According to decisions issued by Polish courts, the phrase "may be taxed" used in conventions on preventing double taxation is not intended to give a taxpayer an option to choose a country in which income should be taxed. Conversely, this phrase should be construed as meaning that such income is taxed in the country of origin and in accordance with the laws of this country, and at the same time this income is also taxable in the country where the taxpayer has his tax residency (see the judgment of the Supreme Administrative Court of August 12, 2008, case no. II FSK 782/2007, passed in relation to the Polish-Dutch DTT).

Effect of the EU Parent-Subsidiary Directive (I90/435/EEC as amended)

In certain circumstances, the treaty provisions as outlined above may leave the recipient of a dividend without credit for underlying foreign corporation tax, for instance, where a Poland shareholder receives dividends from an a Danish paying company. The Directive provides that the State of the parent company must either refrain from taxing dividends received from certain shareholdings in companies resident in another EU Member State or allow a deduction for underlying corporation tax

paid by the subsidiary on the profits now being distributed by way of dividend. As from December 31, 2004, the credit for underlying tax must extend to corporation tax suffered in lower tier companies as well, providing those companies meet the general requirements as to minimum shareholding, residence and type of company. This treatment also applies to dividends received by permanent establishments. Effectively, the benefit of the Directive may be claimed from the start of the period of ownership. Full details of the types of bodies to which the Directive applies are given in the analysis of Article 10 (Dividends).

Domestic law

Denmark

Denmark 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 a Polish 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 Polish withholding tax.

Article 23 Non-discrimination

See treaty text

The usual OECD provisions, that nationals of one of the States shall not be subjected in the other State to any taxation or any requirement connected with tax, 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.

The provisions of this Article 24 apply to the taxes in Article 2 of this Convention.

Article 24 Mutual agreement

See treaty text

The usual provision found in the OECD Model is used. 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 or if not resident in either Denmark or Poland, to the competent authority of which he is a national. This is so irrespective of the remedies provided by domestic law. The time limit for bringing a claim is three years from the date of first notification of the action resulting in the disputed tax liability.

The two tax authorities will try to resolve the case by mutual agreement. They will also try to agree on definitions of terms not specifically defined in the Treaty and on general matters of interpretation of the Treaty.

Thus, this Article removes the need for the tax authorities in each State to go through diplomatic channels: They may simply contact each other directly. The mutual agreement procedure is commonly used to decide matters concerning income and expense allocations and transfer pricing. As both States are Member States of the EU, the provisions of the EU Arbitration Convention will also apply.

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 25 Exchange of information

See treaty text

This Article provides for the exchange of such information "as is necessary" for carrying out the provisions of this Convention or of the domestic laws of the States concerning taxes covered by the Convention. This implies marginally less cooperation under exchange of information arrangements than would be found under the relevant Article in the current OECD Model Convention which provides for information "foreseeably relevant for carrying out the provisions of this Convention or to... etc."

Article 29 contains 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 or in the normal course of the administration 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).

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 26 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 27 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 28 Entry into Force

See treaty text

The Treaty entered into force on December 31, 2002 and started to be effective from January 1, 2003. An exemption exists relating to Article 14, paragraph 3, which provides for retrospective effect.

Article 29 Termination

See treaty text

In the event of the Treaty being denounced before 1 July in any year, the Treaty shall cease to have effect as respects income for any taxable year beginning on or after January 1 in the first following calendar year.