Analysis: Denmark – Russia Income and Capital Treaty

See treaty text

Type of Treaty: Income and Capital
Model on which based: OECD
Signed: February 8, 1996
Entry into force: April 27, 1997
Effective date: January 1, 1998. See Article 28

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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;

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

Denmark

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

Russia

- Tax on profits of enterprises and organisations (including the tax on salaries which exceed the fixed amounts of salaries);
- Income tax of individuals;
- Tax on capital of enterprises; and
- Tax on capital of individuals.

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

Article 3 General Definitions

See treaty text

"Denmark": The Kingdom of Denmark including its exclusive economic zone and the continental shelf defined in accordance with the United Nations Convention on the Law of the Sea of December 10, 1982; the term does not include the Faroe Islands and Greenland.
"Russia": The national territory of the Russian Federation and includes its exclusive economic zone and the continental shelf defined in accordance with the United Nations Convention on the Law of the Sea of December 10, 1982.
"Person": An individual, company and any other body of persons.
"Company" means any legal person or any entity which is treated as a legal person 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.
"Enterprise of one of the Contracting States": respectively an enterprise carried on by a resident of one of the Contracting States.
"International traffic" means transportation with any means of transport.
Any terms not defined take their meaning from the law of the State concerned at the time. Meanings specific to tax law take precedence over other meanings.

Domestic Law:
Denmark

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

Article 4 Fiscal Domicile

See treaty text

Residence: Individuals

"Resident": Any person who is liable to tax in one of the Contracting States by reason of his domicile, residence, place of registration, 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.

Russia

With effect from January 1, 2007 an individual is considered tax resident in Russia if he is present for more than 183 days in any consecutive 12-month period. (The previous rule was based on the number of days present within a calendar year). However, it appears from letters issued by the Ministry of Finance that presence within a particular calendar year is still the working rule, with the change to "12 consecutive months" being merely an aid to agents when deciding on the correct rate of withholding tax to apply to payments at various stages in the year. No factors other than time spent in Russia are considered when determining tax 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 place of management, then it will be deemed resident in the State where its place of effective management is located.

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.

Russia

The criterion used is that a company incorporated in Russia is considered tax resident. However, note that there are published plans (Main Guidelines for Russian Tax Policy for 2008?2010) to move to rules which determine company residence according to the place of management and the place where the shareholders are resident. This is in line with the general strategy within Russia of aligning the tax system more closely with OECD taxation principles.

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.

These will be resident in a State if the place of effective management is located there and if the shareholders, partners or other members are personally liable for tax on their share of the profits in that State under its domestic laws.

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).

Russia

Some types of partnerships are treated as taxable entities rather than as transparent entities. Both full and limited partnerships are treated as taxable entities whilst silent partnerships and simple are treated as transparent.

Article 5 Permanent Establishment

See treaty text

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

Fixed place of business

A fixed place of business through which the business of the enterprise is wholly or partly carried on will constitute a permanent establishment. The list of other types of establishment particularly included includes the usual ones:

- A place of management;
- A branch;
- An office;
- A factory;
- A workshop;
- A mine, an oil or gas well, a quarry or any other place of preliminary surveys, exploration or extraction of natural resources;
- A building site or assembly project which lasts for more than 12 months (transitional provisions from the former treaty have been agreed); and
- A drilling rig if its activity is carried on for a period or periods exceeding 365 days in any 18 month period.

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 had, has, and habitually exercises, in a Contracting State an authority to conclude contracts in the name of the resident, that resident is deemed to have a permanent establishment in that other State, unless the activities of the agent are limited to those listed in (a) to (f) above. Where the activities of the agent are merely preparatory or auxiliary, or where the agent is an independent agent (e.g. a general commission agent acting in the ordinary course of his business) the presence of the agent will not give rise to a permanent establishment.
The fact that a company has a subsidiary in the other Contracting State does not mean that the subsidiary is a permanent establishment of that company, unless it binds the parent company in contract as per the rule for dependent agents. This rule applies generally to groups of companies.

Domestic law

Denmark

The Danish domestic law definition of a permanent establishment is more or less identical to the definition under Article 5 of the OECD Model Tax Convention. A number of decisions have been made by the Danish tax authorities and Danish courts considering the existence of a Danish permanent establishment.
In sec. 2(5) of the CITA and sec. 2(9) of the Danish Source Tax Act (kildeskatteloven), however, a specific provision excluding the existence of a permanent establishment in the event of "distance selling". Hereunder, a permanent establishment in Denmark shall not be deemed to exist for a foreign

principal, even if a Danish tax resident representative as such has power of attorney to bind the foreign principal, when carrying out distance selling. Distance selling shall for the purpose of these provisions mean the passive receipt of orders from Danish or foreign customers via telephone, telefax, telex, EDI, internet, mail or similar. However, it is further a condition that (i) the representative is not employed with the principal and that (ii) neither the foreign principal not any of his/her close relatives or a group related entity of the principal carries out business activities which has ties to the activities of the representative.

Russia

The Tax Code defines "permanent establishment" as having a branch, representative office division, bureau, office, agency or any other separate fixed place of activity, through which a foreign company regularly engages in business activity in Russia.

The following areas of activity are expressly listed as giving rise to the creation of a PE:

- Exploration for, or extraction of, natural resources

- Construction, installation, assembly, adjustment, maintenance and operation of machinery and equipment, including gambling equipment

- Sales from warehouses owned or rented by a foreign legal entity in Russia

- Provision of services or performance of any other activity, apart from "preparatory and auxiliary" activities or activities explicitly defined as not creating a PE

A foreign legal entity FLE may also be considered as having a PE if it conducts the activities listed above through a dependent agent.

A dependent agent represents an FLE in Russia under a contract, acts on its behalf, and has and regularly exercises the right to sign contracts on behalf of the FLE, or negotiates their significant terms. R
ussian tax law specifically provides that the gathering and distribution of information, marketing, advertising, market research and the import and export of goods by a foreign company should not by themselves lead to the creation of a PE.

Article 6 Income from immovable property

See treaty text

The general rule is that income derived by a resident of a Contracting State from immovable property in the other State may be taxed in that other State. Thus, for instance, if a resident of one State owns a building in the other State and receives rent, that rent may be taxable in the other State. This treatment also applies to income from immovable property used by an enterprise and to income from immovable property used for the performance of independent personal services.

Immovable property is defined as per the domestic law of the State in which the property is located but it will include livestock and equipment used in agriculture, forestry, general property rights and rights for the working of natural resources.

Domestic Law:

Denmark

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

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

Russia

Foreign entities which act through permanent establishments in Russia or own immovable property in Russia are subject to property tax with the maximum rate set by the Tax Code at 2.2%.

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.

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.

Russia

Profit tax applies to:

- Russian legal entities

- FLEs carrying out activities in Russia through a permanent establishment or receiving income from Russian sources

The maximum profit tax rate is 20%, comprising 2%, payable to the Federal budget and 18%, payable to the Regional budget.

Article 8 Shipping and Air transport

See treaty text

This provision relates to income derived from the operation of any means of transportation in international traffic and the Treaty provides that such income shall only be taxable in the state in which the operating enterprise is resident. This is different from the OECD Model Convention. For purposes of the Treaty, the term "international traffic" is defined in art. 3, par 1(e).

Covered by this Article is also profits from the use, maintenance, or rental of containers and similar transport facilities used for the transport in international traffic and supply-activities in connection with extraction of hydrocarbon.

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.

There is a requirement for the other State to make a reciprocal downwards adjustment but only where the other State considers this to be justified.

The position regarding "secondary adjustments" is not dealt with. If one State makes an upwards adjustment of taxable profits and the other makes an exactly equal corresponding downwards adjustment, then the tax revenues of the two States might still be different to what they would have been had arm's length pricing been applied in the first place. This is because higher profits in the State where the upwards adjustment took place might well have given rise to higher dividends or interest payments, on which withholding taxes might have been chargeable. So even though the State making the upwards adjustment has retrieved the tax deficit on the enterprise resident there, it has still not retrieved any deficit in withholding taxes. Whether it makes a secondary upwards adjustment to make good this deficit in withholding tax receipts depends on whether this is provided for in domestic law. If it does so, then double taxation will be the result which will not necessarily be relieved by the normal treaty Article on elimination of double taxation and it may be necessary to invoke the mutual agreement procedure.

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.

Russia

Russia's transfer pricing rules are currently under review. A draft law containing significant changes to the Tax Code has been under consideration by the State Duma since early 2010.

Article 10 Dividends

See treaty text

This Convention provides for rates of withholding tax on dividends below those which would be charged in the absence of any agreement between the two countries. In all cases, to enjoy the Treaty rates, the beneficial owner of the dividends must be a resident of the other State.

Rates of maximum withholding tax under this Treaty:

10%

There is no limitations in this right to taxation in relation to parent/subsidiary companies.
Paragraph (3) defines the term "dividends" to include income from shares or other rights (which are not debt-claims) which participate in profits. Also included is income from other corporate rights which is treated as income from shares under the law of the State in which the distributing company is tax resident.
Paragraph (4) provides that where, say, a Russian company receives a dividend from an Danish company, and that dividend is effectively connected with a permanent establishment which the Russian 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 Articles 7 or 14 dealing with the attribution of business profits will apply.
Paragraph (5) contains the usual provision that a State does not have the right to levy any tax on a dividend unless either the dividend is paid by a resident company or received by a resident shareholder. Thus the fact that a dividend paid by, say, a Russian company may be sourced from profits earned by a permanent establishment which that Russian company has in Denmark, does not give Denmark any taxing rights over that dividend, unless of course, it is received by Danish shareholders.

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 Russian tax authorities that the beneficial owner of the payment is resident in Russia.
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 Russia, the final tax rate is 10%.
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. This means that a Russian corporate shareholder in a Danish company would at the be entitled to exemption from Danish withholding tax on dividends when holding at least 10% of the nominal share capital in the Danish company, without having to reclaim any tax initially withheld, provided the beneficial ownership requirement, cf. below, is met.

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.
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.
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.

Russia

15% for dividends paid by Russian companies to foreign companies, 9% for dividends paid by foreign companies to Russian companies (unless the 0% rate below applies).
0% for dividends paid by either a Russian or foreign company to a Russian company, provided that the Russian company has owned no less than 50% of the company for at least 365 consecutive days.

Article 11 Interest

See treaty text

No withholding tax may be levied provided the recipient is also the beneficial owner of the interest. It is only the State in which the receiver of the interest is resident, which may tax.
Interest is defined as income from debt-claims of every kind that is not classed as dividends by virtue of Article 10, whether or not secured by mortgage and whether or not carrying a right to participate in the debtor's profits. The term includes income from government securities, bonds and debentures and premiums and prizes attaching to these securities as well as other bonds and debentures. Penalty charges for late payment are not classed 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.
As is usual under the OECD Model Conventions, there is a provision limiting the treaty benefit to an arm's length amount of interest where there is a special relationship between the payer and the beneficial owner.

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.

Russia

15% tax on interest on state and municipal bonds.
20% tax on interest (other than that received from state and municipal bonds).

Article 12 Royalties

See treaty text

There is no withholding tax on royalties providing the recipient is also 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 other recordings or sounds or images), any patent, trade mark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience. Leasing is also covers by the provision.

There are the usual provisions such that royalties received by a non-resident but which relate to a permanent establishment, which that non-resident has in the other Contracting State are taxed under Article 7 and thus escape withholding tax. 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 beneficial owner are connected and the amount of royalties exceeds an arm's length amount, the excess amount paid will not enjoy the treaty benefits and will be liable to tax in the payer's State at the normal domestic rate of withholding tax.

Domestic law

Denmark

Danish withholding tax applies to payments (i) qualifying as royalties for Danish tax purposes, (ii) which are not exempt under the EU interest/royalty directive or a tax treaty. If applicable, royalties paid from a Danish company to a foreign company is subject to 25% withholding tax. The tax is withheld at source by the Danish company and settled with the tax authorities.

In relation to (i), it is noticeable that the term “royalties” according to Danish law is narrower than the definition applied in both Article 12 of the OECD Model Tax Convention and the Interest and Royalties Directive. Indeed, the Danish royalty definition only includes industrial and commercial royalties (i.e. mainly payments for use or right to use patents, trademarks, patterns or models, drawings, secret formulas or production methods information on industrial, commercial or scientific knowhow) and does not include “artistic” royalties. Artistic royalties are described as payments for using or buying the right to use copyrights to literary work, artistic work or scientific work, e.g. author royalties or royalties for the use of music, films, etc.

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

In practise, if the payment is a royalty, a 25 percent tax is to be withheld at source and the recipient will need to reclaim the withholding tax by completing reclaim form 06.015 with the tax authorities including a statement from Russia tax authorities that the beneficial owner of the payment is resident in Russia. 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.

Russia

20% withholding tax on royalties

Article 13 Capital Gains

See treaty text

As with all treaty provisions, this Article does not impose a requirement upon either State to tax a capital gain; it merely allocates taxing rights so that the relevant State can tax a gain if it chooses.

The usual rule 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.

This rule is extended to gains by a resident of one State on the disposal (alienation) of shares where the company's assets consist principally of immovable property situated in the other State.

The term “alienation” is used in connection with events giving rise to capital gains. This will include normal disposals of assets and also events such as exchange of assets, expropriation, gifts and the passing of assets to another on death. Not all States levy tax in all these situations, but the meaning of the term “alienation" is sufficiently wide to give them the right to do so if their domestic law provides for a charge to tax in a particular situation.

The usual rule is present: that gains on alienation of movable property forming part of the assets of a permanent establishment may be taxed by the Contracting State where the permanent establishment is situated, including gains from the alienation of the permanent establishment, whether or not as part of the alienation of the whole enterprise. Thus, for example, the sale of a wholly owned company resident in State A and owned by a resident of State A could give rise to a tax charge in State B if that company has a permanent establishment in State B.
This does not include gains on ships and aircraft operated in international traffic (see Article 8) nor to other movable property used in such a trade.
All other gains are taxable only in the State where the person making the disposal is tax resident.
Domestic law
Denmark
Under Danish law, only alienation of real estate as well as assets or liabilities attributable to a permanent establishment in Denmark are subject to Danish taxation if the alienator is not a Danish tax resident person. Shares, receivables and intellectual property rights are generally exempted from Danish capital gains tax under Danish domestic law when not attributable to a permanent establishment in Denmark (as Denmark would normally also be prevented from taxing such income under its tax treaties). However, as a very narrow definition of interest applies under Danish domestic law, a specific provision applies according to which any capital gains on receivables in the form of a difference between the nominal amount of the receivable and the amount actually borrowed which is agreed in advance between the debtor and the borrower will be subject to tax in the hands of a non-Danish creditor, if such payment would also be taxable in Denmark to the creditor if it had been an interest.
Russia
Russia imposes a withholding tax on capital gains from the sale of immovable property located in Russia or shares in a real property holding company if more than 50% of the assets consist of real property located in Russia. The tax can be with either 20% of gross sales proceeds, or, provided that the acquisition expenses of such property or shares are acceptable and properly documented for tax purposes: 24% on the margin (i.e. sales minus acquisition and other expenses).

Article 14 Independent Personal Services

See treaty text

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

Article 15 Income from Employment

See treaty text

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

- The recipient is present in the other State for no more than 183 days during any calendar year;;
- 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.

Remuneration derived in respect of an employment exercised aboard a transportation vehicle operated in international traffic may be taxed in State where the operating company is resident. For

employment in connection with a building site or construction or installation project, remuneration shall be taxable only in the State in which the employee is resident.
The purpose of this Article is to ensure symmetry in taxation. If the employer is not taxable in a State, because it is neither resident there nor has a permanent establishment there then it will not receive any tax deduction in that State for wages and salaries paid. Wages and salaries paid by the employer in respect of short term employment postings of employees to that State are correspondingly exempted from tax in that State in the hands of the employees.

Treatment of employee stock options

The treatment of employee stock options is not expressly dealt with and can be difficult as entitlement to the benefit taxable as a result of the option may have accrued partly whilst the employee was working temporarily in one of the States but there may be no taxable event, such as exercise of the option until the employee returns to the other State. A State is permitted to tax that part of the taxable benefit that can be related to the portion of the entitlement period spent working in that State.
Determining the extent to which an employee stock option benefit is derived from employment exercised in a particular State has to be done on a case by case basis, taking into account all relevant facts and circumstances. Whether a period of employment would be considered in allocating taxing rights between two States would depend on whether the entitlement to exercise the stock option was contingent upon continuing employment during that period. If an option was granted with a right to exercise, say, in three years' time, regardless of continuing employment then time elapsing between grant and exercise would not count towards an apportionment of the taxing rights over the benefit in the absence of any other factors.
Periods of employment before the option was granted may be considered in the apportionment of taxing rights if the grant of the option was contingent upon a minimum period of employment or attainment of performance objectives.
Once the option is exercised, any further benefit to the employee, normally in the form of a capital gain on a disposal of the shares at a profit, will be dealt with under Article 13 and so probably only taxable in the State where he is resident.
If the shares do not vest irrevocably on exercise of the option (e.g. because they are liable to forfeiture upon certain conditions) then the increase in value of the shares until they do vest irrevocably will also be dealt with as employment income and subject to the same considerations as the benefit arising between grant and exercise.
The method of apportioning stock option benefits recommended by the OECD is by reference to the proportion of the number of days during which the employment was exercised in one State to the total number of days of employment from which the entitlement to the stock option benefits were derived. Thus if an employee was required to work for an employer for 520 days in total during a particular time period to qualify for the benefits of the stock option and was sent to work in the other State for 260 days out of that period, then half of the stock option benefits would be taxable in each State.
Article 15 should be interpreted in combination with Articles 16, 18, 19 and 20 and the principle behind it is that income derived from an employment is taxed under Article 15 if it does not qualify as income as mentioned under Articles 16, 18, 19 and 20. No specific provisions are included in the Treaty, which considers hiring out of labour

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.

Russia

Non-residents pay tax at 30% on income from working in Russia, as opposed to the rate of 13% applied to residents.

Article 16 Directors' fees

See treaty text

These fees are taxable in the State in which the company is resident rather than that in which the director is resident. There is an exception to this rule for persons performing actual function on a permanent basis at a permanent establishment of the company in the State where the director is resident. Thus a Russian resident director of Danish company who is based permanently at a Russian permanent establishment of the Danish company will be taxable in Russia.
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.

Article 17 Artists and Athletes

See treaty text

The usual OECD Model rule is followed: Income derived by a resident of one State as an entertainer, such as a theatre, motion picture, radio or television artist, or a musician, or as an athlete, from their personal activities as such exercised in the other State may be taxed in the other State. This also applies where the income accrues not to the entertainer or athlete himself, but to another person, e.g. a management company or a troupe, team or orchestra forming a legal entity or to an artist company. However, if the activities are funded as to more than 50% from public funds of the State where the performer is resident, the income is taxable only in that State, not where the activities are performed.

Domestic Law:

Denmark

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

Article 18 Pensions

See treaty text

This Article deviates from the normal OECD treatment. Under this Treaty pensions, annuities and other similar payments received by an individual form sources of a Contracting States shall be taxable only in that State. This is the case both with private, public and social pensions.

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 19 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 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.

Artists and sportsmen employed be the a State will be tax under the Article and not Article 17.

Article 20 Payments to Students, Business Apprentices, Teachers and Researchers

See treaty text

Payments which a student or business apprentice 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.

The provision concerning students are extended to cover Teachers and Researchers. Teachers and Researchers in one State can, under certain conditions, work in the other State for a period of up to two years and remain taxable only in the State of residence. They must work at a university or other officially recognised teaching institution.

Article 21 Other Income

See treaty text

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

Domestic Law:

Denmark

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

Article 22 Capital

See treaty text

Wealth taxes may be imposed by State of residence only, except in the case of immovable property/property used in business by a permanent establishment.

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).

Russia

There are no taxes on net wealth but foreign residents are subject to certain taxes on real property.

Article 23 Methods for the Elimination of Double Taxation

See treaty text

Denmark

Denmark generally applies the tax credit method under its domestic rules, unless another method follows from a tax treaty or is specifically provided for under domestic law.

The credit is the lesser of either (a) the foreign tax actually paid on the income, and (b) the proportionate amount of the overall Danish tax payable which can be allocated to the foreign income. However, according to the Danish Tax Assessment Act (ligningsloven), a net income calculation

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

Russia

Russia uses the credit method, without any credit for underlying Danish tax on profits used to pay dividends.

Article 24 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.
Individuals who are nationals of one State do not have the same status as individuals who are nationals of the other State when they are not residents of that State. Hence they need not be granted the personal allowances and similar deductions which are available to residents.

Article 25 Mutual agreement

See treaty text

The usual provision found in the OECD Model is used but with different time limits. 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 Russia, 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 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.

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 26 Exchange of information

See treaty text

This Article provides for the exchange of such information "as is necessary" for carrying out the provisions of this Treaty or of the domestic laws of the two countries and is not restricted by Art. 1 (Personal scope) of this Treaty, but is restricted by art. 2 (Taxes Covered).
Article 26 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).

Denmark and Russia have entered into a separate exchange of information and cooperation agreement dated January 21, 2002. This agreement provides among other things for automatic exchange of information in respect of matters covered by Articles 10, 11 and 12.

Article 27 Other Fiscal Privileges

See treaty text

Nothing in this Convention shall affect the fiscal privileges for persons who are provided with such privileges under the general rules of international law or under the provisions of special agreements.

Article 28 Entry into Force

See treaty text

The Treaty entered into force as of April 27 1997 with effect from the income year 1998.

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.