Analysis: Denmark – Switzerland Income and Capital Treaty

See treaty text

Type of Treaty: Income and Capital
Model on which based: OECD
Signed: November 23, 1973
Entry into force:(main treaty and contemporaneous Protocols / Exchange of Notes): October 15, 1974
Effective date: See Article 31
Exchange of notes extending the agreement: March 20, 1978
First Protocol signed: March 11, 1997
Entry into force of First Protocol: December 30, 1997
Effective date of First Protocol: Income year 1998. See Article 28.
Second Protocol signed: August 21, 2009
Entry into force of Second Protocol: November 22, 2010
Effective date of Second Protocol: See article XI of the August 21, 2009 Protocol
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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 on elements of income or capital;
- Taxes on gains from alienation of movable or immovable property;
- Capital gains taxes; and
- Wealth taxes

As well as application to the taxes existing at the time the Treaty was signed. Further, the Treaty applies 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).

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

Switzerland

- Income (for individuals) and Profit (for legal entities) taxes levied at Federal, Cantonal and Municipal (Communal) levels;

- Wealth (for individuals) and Capital (for legal entities) taxes are levied at the Cantonal and Municipal (Communal) levels;

- Withholding tax ("WHT") levied at Federal level on return from movable assets, i.e. on return from (article 4 WHTA):

- Securities (rate 35%)

- bonds and similar securities issued by a Swiss resident;

- shares of a corporation (soci t anonyme, Aktiengeselschaft, societ anonima), shares of an LLC (soci t responsabilit limit e, Gesellschaft mit beschr nkter Haftung, societ a garanzia limitata) and share of a Cooperative (cooperative, Genossenschaft, societ cooperative), participation certificate (bon de participation, Partizipationsscheine, Buoni di partecipazione), profit sharing certificates (bon de jouissance, Genussscheine, Buoni di godimento) issued by a Swiss resident;

- share in a qualified as collective placement fund according to the Collective Investement Fund Act ("CIFA") (LPCC, KAG, LICoL) issued by a Swiss resident or jointly by a foreign and Swiss resident.

- interests paid by Swiss banks on deposits.

- Insurance benefits (rate 15% on pension and 8% on other insurance benefits), provided the beneficiary is resident in Switzerland at the time the insured event takes place

- Lottery gains (rate 35%), provided the gain exceeds CHF 50 ad the lottery is organized in Switzerland.

Moreover, the transfer abroad of the legal seat of a Swiss legal entity or Swiss Collective Investement Fund is assimilated to a liquidation subject to Swiss WHT.

Article 3 General Definitions

See treaty text

"Denmark": On the basis of the 1997 protocol, the term "Denmark" means the Kingdom of Denmark including the territorial sea as determined in conformity with international law; the term does not comprise Greenland and its territorial sea, but does include the Faroe Islands as per the 1978 protocol. See article 30 of the treaty.
"Switzerland": The Swiss Confederation.
"Person": An individual, company or any other body of persons.
"Company": Any body corporate or any entity which is treated as a body corporate for tax purposes.
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.
Switzerland
The concept of domicile is crucial in establishing tax residency.
An individual's domicile (and therefore, tax residence) is generally established under article 3 of the Federal Direct Tax Act ("FDTA") and 3 of the Harmonized Direct Tax Act ("HDTA"). These provisions do not refer to 23 al.1 of the Civil Code any more, contrary to former legal provisions. In other words, tax law contains an autonomous definition of the residence. The current provisions stipulate that according to tax law a person has its residence in Switzerland when he stays there with the intention of establishing residence on a long-term basis.
The Swiss Federal Supreme Court ("SFSC") confirmed (StR 200, 509,514, RDAF 2005 II 103) that even if tax law does not refer to article 23 and following of the Swiss Civil Code ("SCC"), a taxpayer leaving Switzerland keeps its domicile and remains fully taxable in Switzerland until he can demonstrate that he has constituted a new domicile abroad. Even if the tax authorities have to demonstrate the constitutive elements of the tax domicile, the taxpayer, who left Switzerland, has to collaborate to prove the existence of close links with the country where he invoked his new domicile (article 24 SCC).
The definition of domicile contains two cumulative conditions, one objective and one subjective:
- Staying in a defined place (objective condition): it implies an effective residence in a precise place, even if such stay is interrupted.
- Intention of becoming an established resident on a long-term basis at that place (subjective condition): tax law gives more weight to effective circumstances rather than formal evidence (e.g. voting right, residence permit, statements made to the authorities, etc. ATF 108 Ia 255).
In other words, the domicile will be established where the person has his center of vital interests. Evidence taken into account will include center of personal and economical relationships (RDAF 2007 II, 11, 116: in this jurisprudence, the SFSC dealt with a conflict of residence with Germany). It is not necessary that the taxpayer wishes to stay in a defined place forever, rather it suffices that he makes of this place a stable centre of his personal and professional relationships (ATF 41 III 51; JdT 1915 II 93).
Moreover, a stay limited in time can also create an unlimited tax liability in Switzerland, provided one of the below situations occurs: (i) individuals carrying out a lucrative activity in Switzerland and staying in the country for a period of time exceeding 30 days; and (ii) individuals that do not carry out a lucrative activity in Switzerland but stay in the country for a period exceeding 90 (art. 3 al.3 FDTA and 3 al.1 HDTA). These alternative conditions are fulfilled if the stay is carried out without noticeable interruptions.

The stay in Switzerland only for educational purposes or in a health care establishment does not constitute a tax domicile, nor a stay and therefore does not create a tax liability in Switzerland (article 3 al.4 DFTA).
Persons domiciled abroad who are fully or partially tax exempt abroad due to a civil service for the Swiss Confederation or other Swiss public bodies, remain subject to Swiss Federal Direct tax in their municipality of origin (article 3 al.5 FDTA).
Formerly, as per art. 23 al. 3 of the treaty, which has been repealed in 1997, Danish nationals becoming tax resident in Switzerland under the specific tax regime so-called "lump sum taxation" remained liable to Danish taxes for a period of four years after their departure.
In case of residence conflict, the tie-breaker rule provided in 4 al. 2 gives priority to the residence in the state with which the taxpayer has the strongest links, according to the tie-breaker rule. That principle has been confirmed by the SFSC (RDAF 2007 II 111: residence(-residence) conflict between Switzerland and Germany).
Once the residence in Switzerland is confirmed, the taxpayer is subject to an unlimited tax liability (worldwide taxation with exemption for permanent establishment and real estate abroad) as opposed to a limited tax liability (limited to income sourced in Switzerland) (article 4 and 5 FDTA and 4 HDTA) which occurs notably in case of a permanent establishment or real estate in Switzerland.

Residence: Companies

In the case of companies apparently resident in both States residence is to be decided by the place of effective management.
Regarding the refund of withholding taxes to Danish or Swiss collective investment vehicles, a memorandum of understanding has been agreed between Denmark and Switzerland on 24 April 2007. Previously the Swiss authorities did not consider collective investment vehicles as entitled to apply the Convention. Therefore refund of the anticipatory tax on dividends and on interest could only be requested by each member individually. This has been changed by the agreed memorandum. It has been agreed that both Danish as well as Swiss collective investment may claim a refund of the withholding tax according to Articles 10 and 11 of the Convention in Denmark or in Switzerland on behalf of the portion of units beneficially owned by persons who are residents according to Article 4 of the Convention of the State in which the investment fund is organized.
The proportional participation of residents on the date of distribution from the fund must be indicated by the manager of the fund and confirmed by the competent authorities of Switzerland or Denmark (depending on place of establishment of the fund).

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.

Switzerland

Are considered as legal entities (article 49 al.1 FDTA and 20 al.1 HDTA):

- Swiss corporations (soci t anonyme, Aktiengeselschaft, societ anonima);

- The Corporation with Unlimited Partners (soci t en commandite par actions, Kommanditaktiengesellschaft, societ in accomandita per azioni);

- LLC (soci t responsabilit limit e, Gesellschaft mit beschr nkter Haftung, societ a garanzia limitata);
- Cooperative (cooperative, Genossenschaft, societ cooperative);
- Association (association,Vereine, associazioni) and Foundation (fondation, Stiftung, fondazione).
- Collective Investement Fund owning directly real estate assimilated according to article 58 of the CIFA to legal entities;

Foreign legal entities and other foreign commercial organizations are assimilated to Swiss legal entities the form of which they are comparable with.
The above mentioned legal entities are subject to unlimited taxation in Switzerland as soon as they have their legal seat or effective management in Switzerland, respectively in the canton and municipality (article 50 FDTA and 20 al.1 HDTA). In a leading court case (StR 2004, 524), the SFSC has confirmed the criteria to determine the place of effective management dated December 4 2003. The SFSC confirmed that the assessment is based on the specific circumstances of each case and the pieces of evidence. Moreover, the court also confirmed that the main criterion to determine the place of effective management is the place where the company carries out its day-to-day management (le lieu o se d ploient les activit s courantes), i.e. the place where the relevant decisions are made which serve the statutory purpose of the company. Emphasize is put on the activity of management, rather than on the activity of execution. Furthermore, according to the court, the place where strategic decisions are taken or the place from where the legal bodies are supervised is of secondary role. As a secondary criterion, the court mentioned the place of administrative transactions, or where the books are kept. By contrast, are not relevant, the place where the Board of Directors hold its meetings or where the shareholders are resident. This jurisprudence is primordial for tax authorities to deal with abusive structures. It constitutes an anti-avoidance measure.
In principle, in case of residence-residence conflict between the place of legal seat and place of effective management, the latter place should prevail. This solution is compatible with article 4 of the OECD Model Convention.
As soon as a legal entity has its legal seat or effective place of management in Switzerland, it is liable to profit and capital tax on an unlimited basis (worldwide taxation with exemption for permanent establishment and real estate abroad) as opposed to a limited tax liability (limited to income sourced in Switzerland) (article 51 FDTA and 21 HDTA) which occurs notably in case of a permanent establishment or real estate in Switzerland.

Treatment of 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.
Notably, the Treaty also include is also personal companies (Personengesellschaften) established or organised in conformity with the law of the Contracting States. By the explicit mentioning of personal companies, a discussion of whether partners of a personal company are able to claim protection under the Treaty, should be avoided.

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).

Switzerland

In principle, partnerships are qualified as persons under article 3 al.1 let.d of the treaty.
The main issue lies in the fact that partnerships are generally regarded as tax transparent under Swiss domestic law, and partnership profits thus being taxable in the hands of the individual partners. Therefore, a literal interpretation of article 4 al. 1 of the treaty, should exclude partnerships as such from the advantages of the treaty and the domicile of the partners should be relevant which may create a conflict of attribution. However, in order to resolve such conflict, the Swiss approach tempts to qualify partnerships having their legal seat in Switzerland (at least the General Partnership - soci t en nom collectif and the Limited Patnership - soci t en commandite) as residents being able to benefit from the double tax treaties ("DTT").
The majority of the Swiss DTTs expressly assimilates partnerships to residents and they can in principle benefit from the DTT. This is the case in the DTT with Denmark, article 3.
If a DTT does not expressly assimilate partnerships to residents, Switzerland refers to the 1999 OECD report on Partnerships, and if Switzerland is the source state of the returns of a partnership, partners of which are domiciled abroad, the DTT is likely to be applicable, provided the other state qualifies the partnership as resident. On the contrary, the partners have the right to invoke the advantages of the DTT between Switzerland and their resident State, provided the income is attributed to the partner according to the domestic laws of the residence state of the partner.

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, a quarry or any other place of extraction of natural resources;

- A construction or assembly project which lasts for more than 24 months

According to the OECD Commentary, a "fixed place of business" means established at a distinct place with a certain degree of permanence, however, it could be a pitch in a market place, or even part of the premises of another enterprise. There is no requirement that the premises be owned. The Commentary offers the example of an employee of Company A who is allowed to use an office at the premises of Company B. This could create a permanent establishment for Company A in the country of Company B if the arrangement persists for long enough and if the employee is carrying out activities which are more than merely "preparatory or auxiliary" (see below).
The OECD considers that to be fixed, a place of business must be at a specific geographic point. However, if the permanent establishment consists of mechanical equipment only, then there is no requirement for mechanical equipment to be fixed to the soil.
As to what constitutes a reasonable period of time to give the necessary degree of permanence, most countries will not consider a presence of less than six months to give rise to a fixed place.
The usual exclusions from the definition of permanent establishment are given so that the following will not constitute a permanent establishment:
(a) The use of facilities solely for the purposes of storage, display or delivery of goods or merchandise belonging to the enterprise;

(b) The maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of storage or display or delivery;

(c) The maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of processing by another enterprise;

(d) The maintenance of a fixed place of business solely for the purpose of purchasing goods or merchandise, or for collecting information, for the enterprise; and

(e) The maintenance of a fixed place of business solely for the purpose of carrying on any other activity of a preparatory or auxiliary character (including advertising and scientific research ;

It should be noted that the OECD Model Convention also contains a litre f) according to which a combination of the litre a-e mentioned enterprises does not constitute a permanent establishment neither. That provision has been left out in this Convention. Despite this omission, it does not cause every combination to be characterised as a permanent establishment. Whether or not a permanent establishment has been constituted, depends on a specific assessment of the combined activities.
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 the purchase of goods or merchandise for the enterprise. Where the agent is an independent agent (e.g. a general commission agent acting in the ordinary course of his business) the presence of the agent will not give rise to a permanent establishment.
The fact that a company has a subsidiary in the other Contracting State does not mean that the subsidiary is a permanent establishment of that company, unless it binds the parent company in contract as per the rule for dependent agents. This rule applies generally to groups of companies.
Concerning attribution of income to a permanent establishment, including the specific provision on allocating income to permanent establishments of insurance companies, see Article 7 below.

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.

Switzerland

Under Swiss domestic tax law, at the federal level, a permanent establishment is defined as a fixed place of business in which the activity of an enterprise or of an independent activity is wholly, or partially carried out.
This definition includes notably branches, manufacturing plants, workshops, sales offices, permanent agencies, mines and other plants for the extraction of mineral resources, as well as building or installation sites with a duration of at least 12 months.
The Swiss definition of a permanent establishment is not fully identical to the definition of article 5 al.5 of the OECD Model Convention, even if in substance Swiss domestic law is comparable to the OECD definition. However, the domestic definition is broader as the negative list is not mentioned. The FDTA has not even incorporated in its wording the criteria of "quantitatively and qualitatively significant activity" developed by the intercantonal tax law jurisprudence. Therefore, the definition of permanent establishment in the international context may be broader than in intercantonal relations.
Moreover, the definition of dependent agent according to article 5 al.5 of the OECD Model Convention is more restrictive in Swiss domestic law. Literal interpretation of articles 4 al.2 and 51 al.2 FDTA confirms that permanent representations constitute a permanent establishment only if it is carried out through a fixed place of business.

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.

Switzerland

Swiss domestic law unilaterally confirms the right to tax income derived from real estate by the state where it is situated. On the one hand, such income is therefore unilaterally exempt if the real estate is located outside of Switzerland (articles 6 and 52 FDTA). However, the income derived from real estate is taken into account in order to determine the income tax rate, which are progressive for individuals. On the other hand, Switzerland keeps full right to tax real estate located in Switzerland and owned by non-residents.
Non-residents are subject to Swiss tax if they are entitled to a receivable guaranteed by a lien on a real estate located in Switzerland (articles 5 al.1 let.c and 51 al.1 let.d FDTA and 4 al.2 let.c and 21 al.2 let. a HDTA). Such income is qualified under Swiss domestic law as real estate income, contrary to the definition of the tax treaty, which qualifies such income as interest income. Therefore, the right

to tax such income under Swiss law is limited by article 11 of the treaty (in particular article 11 al.2 of the treaty).
Moreover, non-residents are subject to Swiss tax if they are active in the field of Swiss located real estate trading or if they act as intermediary in real estate transactions (art. 4 al.1 let.d and 51 al.1 let.e FDTA and 4 al.1 and 21 al.1 HDTA).
Any sale of a real estate company based in Switzerland may be treated, according to the specific cantonal legislation, as a sale of real estate. Such taxation is allowed in a cross-border situation only if the treaty expressly allows it, which is not the case in the DTT with Danemark.
The income derived from real estate is defined under Swiss law as any income sourced from the use and entitlement of a real estate, including the personal use by the owner or usufructuary of the real estate (valeur locative, Eigenmietwert, valore locative) (articles 21 al.1 let.b FDTA and 7 al.1 HDTA).
In principle, interest charges on mortgage are deductible from the real estate income.

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, 11 and 12 of the Treaty and not this Article.
Generally the profits to be attributed to the permanent establishment are the profits that would be expected if the permanent establishment was a distinct and separate enterprise. The starting point for the computation of profits will be the branch accounts, assuming they exist.
The OECD, in 2008, published its final report on the attribution of profits to permanent establishments (July 17, 2008) and updated the Commentary on Article 7 of the Model Treaty. When interpreting a tax treaty, it is generally agreed that the latest version of the OECD's Commentary on the Model Treaty should be used. These notes follow the 2008 version of the Commentary. The “authorised OECD approach” to attributing profits to a permanent establishment now requires that there is a two step process.
Firstly, a functional and factual analysis should be carried out, along the lines set out in the OECD's transfer pricing guidelines, to establish the economically significant activities and responsibilities undertaken by the permanent establishment. This will involve establishing the rights and obligations arising out of transactions between the permanent establishment and third parties, e.g. the sales revenue arising from independent customers generated by the permanent establishment as opposed to by the head office. If the permanent establishment takes the form of a factory, then it would assume the obligation to pay for the raw materials which it uses. The OECD then recommends that “significant people functions” relevant to the attribution of economic ownership of assets are identified to support the attribution of economic ownership of assets of the enterprise to the permanent establishment. Economic ownership is defined as the right to income from an asset or the right to depreciate it. Tangible property should be attributed to the location where it is in use. Economic ownership of intangibles rests with the location in which the risks associated with the intangibles is borne: For instance, if an enterprise owns a patent for a particular drug which is sold by distributor companies in many countries, the economic ownership would rest in that part of the enterprise responsible for commissioning the research to develop the drug and which would bear the losses if medical trials failed. A further set of “significant people functions” are then to be identified: this time, those relevant to the assumption of risks so that an allocation of risks borne by the enterprise can be made to the permanent establishment. For instance, road building equipment may be economically owned by a permanent establishment in Country A but the head office, located in Country B, may have the power to determine on which road building projects the equipment is used and hence the head office bears the risk associated with profits or losses arising from the equipment. The more risks that are managed by the permanent establishment, the higher the share of the profit of the enterprise to be attributed to it. The OECD's 2008 Report looks for the place of active decision taking rather than mere “rubber stamping”. Note that no such distinction between asset management and risk assumption functions 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.

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.

Other provisions
The Treaty contains provisions in par. 5 and 9 which does not exist in the OECD Tax Model Convention. According to par. 5 the profits of insurance enterprises which maintain permanent establishments in both States shall after deduction of a 10 per cent allocation to the State in which the head office of the enterprise is situated, be apportioned in the ratio which the gross premiums of the permanent establishments bear to the total gross premiums of the enterprise.
Par. 9 states that Article 7 also shall apply to income from a disclosed or undisclosed participation in a partnership (informal association, partnership, or limited partnership under Swiss law; partnership (interessentskab) or limited partnership under Danish law).
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.
Switzerland
Switzerland uses either a direct method or an indirect method, to the extent the use of the indirect method is customary and it does not lead to results which are contrary to art. 7 of the OECD MC.
The direct method assumes that the permanent establishment is a distinct and separate enterprise whilst the indirect method involves an allocation of total profits of the enterprise by reference to some kind of formula. Thus under the indirect method, even where branch accounts show a loss, there may nevertheless be an allocation of profits to the branch.
Moreover, the indirect method may lead to double taxation when it is applied in an international context (ATF 73 I 191) rather than in an intercantonal context, because a foreign Head Office's country of residence may not grant a full tax credit for the Swiss taxes imposed on the Swiss PE. Double taxation does not occur if the Head Office's country of residence exempts the income attributable to the foreign PE. The SFSC confirmed that the application of the direct method is more appropriate in an international context, as the application of this method does not imply the need to have access to the financial statements of the foreign entity to perform the income allocation (Circular no 14, dated June 29 1959 of the Federal tax administration).
Since January 1st, 1995, a distinction must be made between (a) enterprises having their seat in Switzerland and (b) enterprises having their seat in Switzerland and enterprises having their seat abroad, in order to determine which income allocation method is appropriate: a) In the first case, the indirect method is applicable with a "praecipuum" attributable to the head office. Losses realized by foreign permanent establishments may be deductible in Switzerland to the extent they are not deductible abroad and a recapture rule applies.
Therefore, if the foreign permanent establishment realizes income during the 7 years following the deductibility of losses in Switzerland, these losses are integrated in the Swiss taxable income. b) In the second case, the direct method is applicable (decision of the Federal Supreme Court dated November 28, 2005 : ATF 2P.140/2005).

Article 8 Shipping and Air transport

See treaty text

This provision relates to income derived from the operation of ships or aircraft in international traffic and the Treaty provides that such income shall only be taxable in the state in which the seat place of effective management of the enterprise is situated. For purposes of the Treaty, the term "international traffic" is defined in art. 3, par 1(g).
Profits from the operation of boats engaged in inland waterways transport are taxable in accordance with Article 7.
By the 1997-Protocol, par. 4 was added. This provision states that with respect to profits derived by the Danish, Norwegian and Swedish air transport consortium the Scandinavian Airlines System (SAS), the provisions of paragraphs 1 and 3 shall apply only to such proportion of the profits as corresponds to the participation held in that consortium by SAS Denmark A/S, the Danish partner of Scandinavian Airlines System (SAS).

Article 9 Associated enterprises

See treaty text

This Article contains a provision regarding transfer pricing, although less detailed than set out in the OECD Model.
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. In the event of an adjustment of taxable income by one state, there is no specific requirement for the other State to make a reciprocal downwards adjustment and as such, double taxation may occur.
The position regarding "secondary adjustments" is also not dealt with in the Treaty. 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.

Article 10 Dividends

See treaty text
Contrary to the OECD Model Convention this Convention does not permit any withholding tax. Therefore, dividends paid by a company, which is a resident of a Contracting State, to a resident of the other Contracting State, may only be taxed in that other State.
A new 2009-protocol has been signed by Denmark and Switzerland but has not yet entered into force. This protocol will cause the provision to be more or less identical to Article 10 of the OECD Model Convention. Thus, when the protocol takes effect, withholding tax will be permitted under certain conditions. The protocol will soonest take effect as of 2011.
Par (2) defines the term "dividends" to include income from shares, jouissance shares or jouissance rights, mining shares, founders' shares or other rights to participate in profits. The definition may be further extended according to domestic law. Jouissance shares or rights are financial instruments which grant rights of the types enjoyed by shareholders but which, in some jurisdictions, are viewed as debt rather than equity.
Paragraph (3) provides that where, say, a Danish company receives a dividend from a Swiss company, and that dividend is effectively connected with a permanent establishment which the Danish company has in Switzerland, 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 (4) 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 a Danish company may be sourced from profits earned by a permanent establishment which that Danish company has in Switzerland, does not give the Swiss any taxing rights over that dividend, unless of course, it is received by Swiss shareholders.
Regarding the refund of withholding taxes to Danish or Swiss collective investment vehicles, a memorandum of understanding has been agreed between Denmark and Switzerland on 24 April 2007. Previously the Swiss authorities did not consider collective investment vehicles as entitled to apply the Convention. Therefore refund of the anticipatory tax on dividends and on interest could only be requested by each member individually. This has been changed by the agreed memorandum. It has been agreed that both Danish as well as Swiss collective investment may claim a refund of the withholding tax according to Articles 10 and 11 of the Convention in Denmark or in Switzerland on behalf of the portion of units beneficially owned by persons who are residents according to Article 4 of the Convention of the State in which the investment fund is organized.
The proportional participation of residents on the date of distribution from the fund must be indicated by the manager of the fund and confirmed by the competent authorities of Switzerland or Denmark (depending on place of establishment of the fund).

Effect of the Swiss-EU Agreement

In return for broadly applying the provisions of the EU Savings Directive (see analysis of the Article concerning interest), the Swiss-EU Agreement (brought to notice in OJ L 385 of December 29 2004, page 30-49) provides for the extension of many of the provisions of the EU Parent-Subsidiary Directive and the Interest and Royalties Directive to payments between Swiss and EU corporations. The agreement came into force on July 1, 2005.
The requirements for exemption from withholding tax on dividends are:

- For at least two years, the parent company has a direct shareholding of a minimum of 25% in the capital of the subsidiary;
- The place of residence for tax purposes of one company is a Member State of the EU while that of the other company is Switzerland;
- The place of residence for tax purposes of neither company is a third State under a double taxation agreement with that third State;
- Both companies pay corporate income tax without being exempt (subject to tax clause); and
- Both companies are limited by shares.

Qualifying corporate forms of entity are:

Denmark

According to the EU Parent-Subsidiary Directive:

- Public company/Aktieselskab (A/S)

- Private limited company/Anpartsselskab (ApS)

Switzerland
- Societe anonyme/Aktiengesellschaft/societ anonima;

- Societe responsabilite limitee/Gesellschaft mit beschr nkter Haftung/societe a responsabilite limitata;

- Societe en commandite par actions/Kommanditaktiengesellschaft/societe in accomandita per azioni.

Domestic law
Denmark
Notwithstanding the fact that Switzerland is not part of the EU, the EU-legislation is a central part of Danish legislation. Because of the Convention between Denmark and Switzerland, the Danish domestic legal matters are almost the same as if Switzerland had been an EU Member State.
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).
On a practical level, the usual withholding tax rate will be retained at the distribution of dividends. Afterwards the company has to seek a refund from the Danish tax authorities of the tax withheld. This is done by completing and filing ready print reclaim form 06.002, 06.002A or 06.003 (available online at www.skat.dk) with the Danish tax authorities (Skattecenter Ballerup), which must contain a statement from the Swiss tax authorities that the beneficial owner of the payment is resident in Switzerland.
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. Since the Treaty between Denmark and Switzerland does not permit withholding tax, a company may reclaim the entire amount retained. 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 Swiss tax authorities that the beneficial owner of the payment is resident in Switzerland. Concerning collective investment funds, see above.
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.

Switzerland

Withholding tax of 35%.

Article 11 Interest

See treaty text

No withholding tax is permitted on interest provided the recipient is the beneficial owner. Interest is only taxable in the State where the recipient is tax resident. However, in the case of Switzerland, the provisions of the 2004 Savings Directive Agreement override this aspect of the Treaty as regards payments to individuals (see below).
"Interest" is widely defined to mean income from government securities, bonds or debentures and debt claims of every kind as well as all other income regarded as akin to interest by the tax law of the State in which the income arises.
There is the usual provision such that interest received by a non-resident but which relates to a permanent establishment which that non-resident has in the other Contracting State is taxed under Article 7 and thus escapes withholding tax. Also, interest paid by an enterprise which is borne by a permanent establishment is deemed to arise in the State in which the permanent establishment is situated. Hence, if the permanent establishment and the recipient are in the same State, no withholding tax can arise.
This Article also in par. (4) deals with the situation where both the recipient and the payer of the interest are resident in the Contracting States but the purpose of the loan was to fund a permanent establishment owned by the payer in the other Contracting State, and the interest on the loan is borne by that permanent establishment. In this case the paying enterprise can pursuant to the Treaty be subject to withholding tax in the State of the permanent establishment.
As is usual under the Model Conventions, there is a provision limiting the treaty benefit to an arm's length amount of interest where there is a special relationship between the payer and the recipient.

The new 2009-protocol that has been signed but not yet entered into force, changes the current wording of Article 11. In line with the OECD Model it specifies that the article may only be relied upon of the recipient is beneficial owner of the payment.

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.

Switzerland

Withholding tax of 35% for payments to corporations. Cantonal withholding taxes may also be payable, particularly on loans secured on immovable property.

Effect of the Savings Directive Agreement between the EU and Switzerland

For payments to individuals, Switzerland will apply the provisions of the Swiss EU Agreement (OJ L 385 of 29 December 2004) and levy withholding tax of:

- 15% (until July 1, 2008);
- 20% (next three years); and
- 35% (i.e. after July 1, 2011)

.

The recipient is granted a tax credit by the State in which he is tax resident, receiving from that State a refund of any amount withheld by Switzerland in excess of the liability in the State of residence. This withholding tax may be avoided if the beneficial owner of the income makes arrangements whereby the paying agent of the interest discloses full details of the payment to the tax authority of the recipient individual.

Article 12 Royalties

See treaty text

Th

is Convention provides for elimination of withholding tax on royalties when paid from a resident in one state to a resident in the other state. "Royalties" is defined to include payments of any kind received as consideration for the use of, or right to use:

- Copyright of literary, artistic or scientific works including cinematographic film;
- Any patent or trade mark, design, or model, plan, secret formula or process;
- Any payment for the use of/right to use industrial, commercial or scientific equipment; and
- Any payment for information concerning industrial, commercial or scientific experience.

Where royalties or fees are effectively earned by a permanent establishment they will be taxed as part of the profits of that permanent establishment. Also, royalties paid by an enterprise which is 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.

The new 2009-protocol, that has been sign but not yet entered into force, changes the current wording of Article 12. In line with the OECD Model it specifies that the article may only be relied upon of the recipient is beneficial owner of the payment.

Effect of the Savings Directive Agreement between the EU and Switzerland

In return for broadly applying the provisions of the EU Savings Directive (see analysis of the Article concerning interest), the Swiss-EU Agreement provides for the extension of many of the provisions of the EU Parent-Subsidiary Directive and the Interest and Royalties Directive to payments between Swiss and EU corporations.

The agreement came into force on July 1, 2005. The requirements for exemption from withholding tax on royalty payments are:

- For at least two years, the associated companies are affiliated by a direct shareholding of a minimum of 25% in the capital or are both held by a third company which has a direct shareholding of a minimum of 25% in the capital of both the paying and the receiving companies;
- The place of residence for tax purposes of one company or situation of a PE is an EU Member State while the place of residence for tax purposes of the other company or PE is Switzerland;

- The place of residence for tax purposes of neither company is a third State under a double taxation agreement with that third State and none of the PEs is situated in that third State;

- Both companies pay corporate income tax without being exempt; and

- Both companies adopted the form of a limited company.

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 Swiss ax authorities that the beneficial owner of the payment is resident in Switzerland. 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.
Switzerland
No federal withholding tax on royalties.

Article 13 Capital Gains

See treaty text
The usual rule that gains derived by a resident of a Contracting State from the disposal (alienation) of immovable property as defined in Article 6 and situated in the other Contracting State may be taxed by that other Contracting State applies. In other words, the State where the property is situated may tax the capital gain.
The term "alienation" is used in connection with events giving rise to capital gains. This will include normal disposals of assets and also events such as exchange of assets, expropriation, gifts and the passing of assets to another on death. Not all States levy tax in all these situations, but the meaning of the term "alienation" is sufficiently wide to give them the right to do so if their domestic law provides for a charge to tax in a particular situation.
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.
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. The assets of transport companies are generally exempt from this rule. This rule 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.
Par. 4 states that with respect to gains derived by the Danish, Norwegian and Swedish air transport consortium the Scandinavian Airlines System (SAS) the provisions of paragraph 3 shall apply only to such proportion of the gains as corresponds to the participation held in that consortium by SAS Danmark A/S, the Danish partner of Scandinavian Airlines System (SAS). This provision was inserted by the 1997-protocol.

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.
Switzerland
Non-resident companies are subject to both federal and cantonal corporate income taxes on gains relating to immovable property and the movable property associated with permanent establishments.

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 Swiss accountant with an office in Denmark will be taxable in Denmark on profits attributable to the Danish office. The attribution of profits is dealt with in the same way as for other business profits under the provisions of Article 7.
The term "professional services" is defined to include especially independent scientific, literary, artistic, educational or teaching activities as well as the independent activities of physicians, lawyers, engineers, architects, dentists and accountants.
Denmark
Reference is generally made to art. 7, above.

Article 15 Dependent personal services

See treaty text
The provision is similar to Article 15 of the OECD Model.
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 the fiscal year concerned;;
- 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.
Notwithstanding the preceding provisions of this Article, where a resident of Denmark derives remuneration in respect of an employment exercised aboard an aircraft operated in international traffic by the consortium the Scandinavian Airlines System (SAS), such remuneration shall be taxable only in Denmark.
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.

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.

Switzerland

Foreign expatriate workers pay the same taxes as Swiss nationals, and like Swiss nationals, are subject to tax at three levels, federal, cantonal and municipal. However, since 2001 certain expatriates have been able to take advantage of provision permitting them to deduct specified costs from their taxable income where these are not reimbursed by the employer. These costs include travel, removals, school fees in some cases, accommodation and so on, with the option of claiming a standard deduction of CHF1,500 per month in lieu of making a detailed claim. The type of employees

covered by this scheme are managers and certain specialists, e.g. IT specialists, seconded to Switzerland.

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 Swiss resident director of Danish company who is based permanently at a Swiss permanent establishment of the Danish company will be taxable in Switzerland.

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

Domestic Law:

Denmark

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

Article 18 Pensions

See treaty text

Pensions are only taxable in the country where the recipient is tax resident. This is the normal OECD treatment.

The 2009 Protocol (not in force) permits the source State to tax payments relating to private and employment pension schemes. The permission of withholding tax contradicts the normal OECD treatment, but is in accordance with treaty practice of Denmark.

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. 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. Remuneration, including pensions, paid by a Contracting State, or a political subdivision, or local authority thereof, or a legal entity incorporated under the public law of such Contracting State, directly or out of a fund, to any individual in respect of services performed shall be taxable only in that State. However, remuneration (except pensions) in respect of services which are performed in the other Contracting State by a national of that State, who is not at the same time a national of the first-mentioned State, shall be taxable only in that other State.

Concerning public employed artists and athletes this provision takes precedence over Article 17.

Article 20 Students

See treaty text

Similar to the OECD Model Convention, payments which a student, business trainee, or other apprentice, who is or was formerly a resident of one of the Contracting States, and who is present in the other Contracting State solely for the purpose of his education or training, receives for his maintenance, education or training, shall not be taxed in that other State, provided that he receives these payments from sources outside that other State.

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

The provision is almost identical to the OECD Model Convention.

Wealth taxes may be imposed on immovable property according to the State where the property is located.

Note that although income from immovable property held indirectly via companies and trusts is subject to tax under Article 6 in the State where the underlying property is located, that underlying property is not subject to wealth taxes.

Permanent establishments of partnerships or civil companies may be subject to wealth tax in the State where the permanent establishment is located.

Furniture may be subject to wealth tax in the State where the home where it is used is located.

Where a person other than the legal owner has the right to enjoy property (i.e. where the property is subject to a usufruct) then the property is only taxable in the State in which the person who enjoys the usufruct is resident. A typical situation here would be where a beneficiary of a discretionary trust is permitted to occupy a house owned by the trustees.

Unlike the OECD Model Convention, the mentioning of boats engaged in inland waterways transport, has been left out of par. 3.

All other assets may only be subject to wealth taxes in the State where the owner is resident.

Domestic Law:

Denmark

Denmark does not levy general wealth taxes. However, a partial wealth tax applies in the form of property value tax which is levied at the value of real estate which is the domicile of the owner and/or his family or the summer residence of the owner and/or his family. The tax rates are 1 per cent up to a value of DKK 3,040,000 (2010) 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).

Switzerland

Periodic taxes on wealth are levied at cantonal but not federal level. Net wealth taxes (Vermogenssteuern) are assessed in accordance with a progressive rate scale, and the resulting base amount is subject to a cantonal multiplier. The rate of tax is low ? usually between 1% and 5% but the rate and permitted deductions vary between the cantons. Assets included usually consist of bank deposits, stocks and shares, cars, value of life assurance policies and houses, although the valuation rules for houses are usually other than open market value.

Article 23 Methods for the Elimination of Double Taxation

See treaty text

This provision relates to determination of methods to avoid double taxation.

Denmark

By the 1997-protocol, the method for Denmark has been changed so that the tax credit method applies. Where a resident of Denmark derives income or owns capital which, in accordance with the

provisions of this Convention, may be taxed in Switzerland, Denmark shall allow as a deduction from the tax on either the income or capital of that resident an amount equal to the tax paid in Switzerland. However, such deduction shall not exceed that part of the income tax or capital tax, as computed before the deduction is given, which is attributable, as the case may be, to the income or the capital which may be taxed in Switzerland In those rare cases where a resident of Denmark derives income or owns capital which is taxable only in Switzerland (governmental functions in Article 19) the exemption method shall applies. This means that Denmark may include this income or capital in the tax base, but shall allow as a deduction from the income tax or capital tax that part of the income tax or capital tax, which is attributable, as the case may be, to the income derived from or the capital owned in Switzerland. Thus, the deduction is independent from the Swiss tax percentage.

Switzerland

According to this Articles par. 2, Switzerland applies the exemption 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.

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.

Switzerland

Switzerland applies the credit method to dividends, interest and royalties. This can take the form of a normal credit (restricted to the amount of Swiss tax on the same income), a lump sum reduction in Swiss tax or a partial exemption of the income via a deduction of French tax from the French income (deduction method).

For persons not entitled to treaty rates of withholding tax on dividends, interest or royalties because they are caught by the limitation of benefit rules set out in Article 14 only the deduction method may be applied.

All other income taxed in France is exempt in Switzerland. The exemption with progression method is used, so that the exempt French income is nonetheless taken into account in determining the rate of tax to be applied to Swiss taxable income and wealth.

Proof of liability to French tax is needed before exemption can be claimed.

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 therewith, which is other or more burdensome than the taxation and connected requirements to which nationals of the other State in the same circumstances are or may be subjected.
Each State will grant to nationals of the other the same exemptions and personal allowances as it grants to its own nationals. The non-discrimination principle applies to all taxes, not just those covered by this Treaty.Enterprises of a Contracting State, the capital of which is wholly or partly owned or controlled, directly or indirectly, by one or more residents of the other Contracting State, shall not be subjected in the first-mentioned Contracting State to any taxation, or any requirement connected therewith which is other or more burdensome than the taxation and connected requirements to which other similar enterprises of that first-mentioned State are or may be subjected.

Article 25 Mutual agreement

See treaty text

The provision is more or less identical to the non-discrimination provision in art. 25 of the OECD Model Tax Convention provision. However, the time limits in par. 1 has been left out. Where a person considers that the actions of one or both of the States result or will result for him in taxation not in accordance with the provisions of this Treaty, he may present his case to the competent authority of the State of which he is resident. This is so irrespective of the remedies provided by domestic law. The time limit for presenting the case is restricted to the usual three from the first notification of the action resulting in taxation not in accordance with the provisions of the Treaty. The 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 Reimbursement Procedure

See treaty text

This Convention shall no affect the Contracting States right to withhold tax at source. If in one of the Contracting States the taxes on dividends, interest, or royalties are withheld at source, it shall be refunded on application if such taxation is limited by the Convention.
The period within which application for a refund must be made in three years from the end of the calendar year in which the dividends, interest, or royalties become due.
Applications must always include an administrative certificate of the State of which the taxpayer is a resident stating that he is subject to unlimited tax liability in that State. The competent authorities shall communicate with each other as to the details of the procedure, in accordance with Article 25.
The OECD Model Convention does not contain a similar provision, but it is assumed that the same procedure is applicable also without such specific provision.

Article 27 Exchange of information

See treaty text

This Treaty provides for a limited exchange of information upon request of information required for the proper application of this Convention (Treaty). Thus the normal extension to information required to carry out the provisions of domestic law is absent, as is the extension sometimes found for information required to prevent fiscal evasion. The very limited scope of this Article is consistent with the reservation made by Switzerland with regard to this provision, cf. the OECD Model Convention comments par. 24.
Any information so exchanged shall be treated as secret and may not be disclosed to persons who are not concerned with assessment, collection, enforcement proceedings, or prosecution, in respect of taxes which are the subject of the Convention.
There is a version of the usual rules restricting the information that must be provided: there is no obligation to supply information where this would mean taking administrative action at variance with a State's own regulations and administrative practices, or with its sovereignty, its security, its general

interests or its public policy. Neither must it transmit information not obtainable under its own laws and those of the State requesting it.

Effect of the EU-Switzerland Savings Directive Agreement

Under this 2005 agreement, Switzerland and the EU Member States undertake to exchange information upon request on conduct constituting tax fraud or "the like". Switzerland is required to negotiate protocols to its bilateral tax treaties with each Member State in order to define the precise scope of the information to be exchanged.

Article 28 Miscellaneous

See treaty text

This provision is not contained in the OECD Model Convention.

It relates to tax administration of an estate of a deceased person. An undivided estate shall be deemed to be resident in the Contracting State in which the deceased was, within the meaning ofArticle 4, resident. Income from an estate and capital forming part of an estate may only be taxed under the provisions of this Convention in the hands of the beneficiary in the other Contracting State if the undivided estate itself is not liable to the tax on the income and capital in question in the Contracting State in which the testator was last resident. In specific cases, the competent authorities of both Contracting States shall, if necessary, consult together with a view to avoiding double taxation.

Payments by Swiss nationals resident in Denmark to the Swiss State old age, dependents' and disablement insurance scheme (Alters-, Hinterlassen- und Invalidenversicherung (AHV)) may be deducted in Denmark from taxable income.

Payments which an individual resident in one of the Contracting States, who is not a national of that State, makes to a personnel fund recognized as such for tax purposes in the other Contracting State, to which he already belonged before he became resident in the first-mentioned Contracting State, may be deducted from taxable income in the first-mentioned Contracting State in the same way as payments to a personnel fund recognized as such for tax purposes in that State; payments by the employer shall not be deemed in this case to be taxable income of the employee.

Article 29 Diplomatic and Consular Officials

See treaty text

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

Opposite the OECD Model Convention, this treaty contains par. 2-4. These 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 30 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.

By an exchange of notes between Denmark and Switzerland on 20 March 1978, this provision was applied to include the Faroe Islands under the Treaty.

Article 31 Entry into Force

See treaty text

The Treaty entered into force as of 15 October 1974. The provisions took effect in accordance with par. 1, litre a-c:

(a) to taxes withheld at source on dividends and interest which become due after December 31, 1973;

(b) to other Danish taxes on income and capital which are levied for the period after December 31, 1974;

(c) to other Swiss taxes on income and capital which are levied for the period after December 31, 1974.

The extension in 1978 entered into force on 20 March 1978, but took effect retrospectively in accordance with par. 1, litra a-c. The 1997-protocol entered into force on 30 December 1997 with effect from the income year 1998.

Article 32 Termination

See treaty text

This provision relates to the termination of this treaty. In the event of the Treaty being denounced before 1 July in any year, the Treaty shall apply for the last time:

(a) to taxes withheld at source on dividends and interest which become due during the calendar year at the end of which denunciation takes place;

(b) to other Danish taxes on income and capital which are levied for the calendar year at the end of which denunciation takes place;

(c) to other Swiss taxes on income and capital which are levied for the calendar year at the end of which denunciation takes place.