Analysis: Denmark – United States Income and Capital Treaty

See treaty text

Type of Treaty: Income and Capital
Model on which based:US
Signed: August 19, 1999
Entry into force: March 31, 2000
Effective date: Withholding taxes, from May 1, 2000; other provisions, from January 1, 2001. See Article 29.
Subsequent Protocol signed: May 2, 2006
Subsequent Protocol entry into force: December 28, 2007
Subsequent Protocol effective date: Income subject to withholding tax, from February 1, 2008; other provisions, from January 1, 2008. See Article V.

Article 1 General Scope

See treaty text

Persons who are residents of one or both States

Article 2 Taxes covered

See treaty text

Denmark

- Income taxes to the state (statslig indkomstskat (bund-, mellem-, topskat));
- Municipal income tax (kommunal indkomstskat);
- Income tax to the county municipalities (den amtskommunale indkomstskat); and
- Hydrocarbon Tax (kulbrinteskat);

United States

- Federal income taxes imposed by the Internal Revenue Code (but excluding social security taxes); and
- Federal excise taxes imposed with respect to private foundations;

Article 3 General Definitions

See treaty text

"Denmark": the Kingdom of Denmark, including any area outside the territorial sea of Denmark which in accordance with international law has been or may hereafter be designated under Danish laws as an area within which Denmark may exercise sovereign rights with respect to the exploration and exploitation of the natural resources of the sea-bed or its subsoil and the superjacent waters and with respect to other activities for the exploration and economic exploitation of the area; the term "Denmark" does not comprise the Faroe Islands or Greenland;
"United States" means the United States of America, and includes the states thereof and the District of Columbia; such term also includes the territorial sea thereof and the sea bed and subsoil of the submarine areas adjacent to that territorial sea, over which the United States exercises sovereign rights in accordance with international law; the term, however, does not include Puerto Rico, the Virgin Islands, Guam or any other United States possession or territory.
"Person": includes an individual, an estate, a trust, a partnership, a company and any other body of persons;
"Company" means any body corporate or any entity which is treated as a body corporate for tax purposes according to the laws of the state in which it is organized;
"Enterprise of a Contracting State" and "enterprise of the other Contracting State": Respectively an enterprise carried on by a resident of a Contracting State, and an enterprise carried on by a resident of the other Contracting State; the terms also include an enterprise carried on by a resident of a Contracting State through an entity that is treated as fiscally transparent in that Contracting State;
"International traffic" means any transport by a ship or aircraft, except when such transport is solely between places in a Contracting State;
"Competent authority" means: (i) in the United States: the Secretary of the Treasury or his delegate; and (ii) in Denmark: the Minister for Taxation or his authorized representative;

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

Domestic Law:

Denmark

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

Article 4 Residence

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, citizenship, place of management, place of incorporation, 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 in that State or of profits attributable to a permanent establishment 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.

Residence: Companies

If a company appears resident in both States, e.g. because one determines residence according to the place of legal incorporation and the other according to place of management, then it will be deemed resident in the State where its place of effective management is located.

Domestic law

Denmark

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

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

United States

A company is treated as resident in the United States if it is created or organised under the laws of the United States or a political subdivision. Such a corporation files a charter or articles of incorporation in a state, a United States possession, or with the United States Government.

"Check-the-box" regulations

For United States Federal tax purposes, certain business entities automatically are classified as corporations. Other business entities may choose how they are classified for United States Federal tax purposes. Except for a business entity automatically classified as a corporation, a business entity with at least two members can choose to be classified as either an association taxable as a corporation or a partnership, and a business entity with a single member can choose to be classified as either an association taxable as a corporation or disregarded as an entity separate from its owner. Soci t Anonyme (public company limited by shares) is classified as a corporation for United States Federal tax purposes. For a discussion of agency in the context of residence, see New York Guangdong Finance Inc. v Commissioner, 5th Cir. No. 08-60792, Nov. 20, 2009; aff'g T.C. Memo. 2008-62, No. 14809-04, March 11, 2008. The decision applies the substance-over-form doctrine in the tax treaty context, holding that a US borrower may not disregard the existence of a Hong Kong lender to which it nominally makes interest payments. The borrower sought unsuccessfully to treat the interest payments as made in substance to the pre-1997 Hong Kong lender's parent corporation, a Chinese government entity exempt from interest withholding tax under the tax treaty. The borrower also failed in its argument that the Hong Kong lender was a mere agent of the Chinese parent, and therefore that the payments should be treated as made to the parent for tax treaty purposes. The Tax Court decision does contemplate a situation in which the Hong Kong subsidiary could be disregarded for tax treaty purposes, requiring significant but not drastic changes to the facts.

Partnerships and fiscally transparent enterprises

There are no definitions given in the Treaty as to which bodies may be treated as transparent. Article 3 merely states that the term "company" designates any body corporate or any entity which is treated as a body corporate for tax purposes.
These will be resident in a State if the place of effective management is located there and if the shareholders, partners or other members are personally liable for tax on their share of the profits in that State under its domestic laws.

Domestic law

Denmark

Partnerships are not comprised by sec. 1 of the Danish CITA and therefore generally not recognised as separate taxable entities.
A partnership is either a general partnership (interessentskab (I/S), a limited partnership (kommanditselskab (K/S) or partnerselskab / kommanditaktieselskab (P/S)). The general partnership is the ordinary form of commercial partnership, all partners being jointly and severally liable for the partnerships' debts and obligations. Under current Danish law, a partnership is not a separate legal entity, but is transparent with respect to its (tax) liability. A general partnership is normally not subject to taxation; instead, the individual partners are taxable on their share of the partnership's profits.
With respect to a K/S, separate rules for the tax treatment (transparent or non-transparent) apply. A K/S generally has partners having limited liability (limited partners) and one or more partners having unlimited liability (general partners).
A limited partner (kommanditist or stille deltager) is liable only to the extent of his capital contributions or commitments. Under Danish corporate law, it is a requirement that the general partner (komplementaren) has both administrative and economical rights in the K/S.
A P/S is a limited partnership where all limited shares are divided into actual shares. The affairs of the P/S are, however, governed by the Danish Corporate Act, despite being transparent for tax purposes.

As a noticeable exception to the rule that the above entities are considered to be tax transparent, sec. 2C of the CITA provides that if there are participants in an otherwise tax transparent entity (or a permanent establishment in Denmark) which are resident in a state which considers the entity to be a taxable entity or in a state which does not have a tax treaty or information exchange treaty with Denmark, and such participants hold more that 50 percent of the votes or the capital in the entity/permanent establishment, the entity/permanent establishment will be considered a separate taxable entity for Danish tax purposes. The reclassification rule is an anti-abuse rule aimed at the US check-the-box rules to avoid creating a "reverse hybrid" and thereby the possibility of double non-taxation in a situation where Denmark would (without this rule) consider income to be earned by the partnership participants, while the jurisdiction where the partners are resident would consider the same income as earned by the partnership.
With respect to foreign entities, whether or not they are treated as taxable or transparent depends on how closely they correspond to the abovementioned Danish partnership forms. If they are significantly different then the general test is that an entity will be considered taxable if none of the participants have unlimited liability for the debts and obligations of the enterprise. In practise another significant criteria has been whether or not the entity has its own corporate bodies (board of directors or management).

Article 5 Permanent Establishment

See treaty text

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

Fixed place of business

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

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

Paragraph 3 adds that a building site or construction or installation project, or an installation used to explore for natural resources, also constitutes a permanent establishment, but only if it lasts more than 12 months.
According to the OECD Commentary (on which the US Model Article 5 is based), a "fixed place of business" means established at a distinct place with a certain degree of permanence, however, it could be a pitch in a market place, or even part of the premises of another enterprise. There is no requirement that the premises be owned. The Commentary offers the example of an employee of Company A who is allowed to use an office at the premises of Company B. This could create a permanent establishment for Company A in the country of Company B if the arrangement persists for long enough and if the employee is carrying out activities which are more than merely "preparatory or auxiliary" (see below).
The OECD considers that to be fixed, a place of business must be at a specific geographic point. However, if the permanent establishment consists of mechanical equipment only, then there is no requirement for mechanical equipment to be fixed to the soil.
As to what constitutes a reasonable period of time to give the necessary degree of permanence, most countries will not consider a presence of less than six months to give rise to a fixed place.
The usual exclusions from the definition of permanent establishment are given so that the following will not constitute a permanent establishment:

(a) The use of facilities solely for the purposes of storage, display or delivery of goods or merchandise belonging to the enterprise;

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

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

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

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

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

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

Agency permanent establishment

Dependent agents may constitute a permanent establishment. Where a person acting on behalf of a resident of a Contracting State 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 activities of the agent are merely preparatory or auxiliary, or where the agent is an independent agent (e.g. a general commission agent acting in the ordinary course of his business) the presence of the agent will not give rise to a permanent establishment.

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.

United States

In June 2010, the Internal Revenue Service confirmed publicly its position that the activities of companies which send agents into the United States to do business can create a permanent establishment, even if the presence of agents does not rise to the level of incorporation or putting in place significant facilities.

The Service described scenarios in which corporations hire agents "to go out and sell in other countries," or do other business, often through branches. A US controlled foreign corporation might locate in one country and "branch through Europe." The taxpayers typically don't have big offices on the ground, but a large number of people will come in and do a "huge amount of business."

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.

Article 6 Income from immovable property

See treaty text

A resident of one State may be subject to tax in the other State on income from real property and royalties in respect of natural resources if the property or natural resource is located in such other State.

A taxpayer may elect to be taxed on income from real property situated in the other Contracting State on a net basis, i.e. as if the real property was a permanent establishment so that the taxable amount will be the rentals after deduction of related expenses. If the election is made, it is binding for the tax year of election and all subsequent tax years unless permission is granted by the competent authorities for its termination.

Domestic Law:

Denmark

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

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

Article 7 Business profits

See treaty text

Profits of a resident of one State are taxable in the other State only if the resident has a permanent establishment in that other State. Where there is a permanent establishment only the profits attributable to the permanent establishment can be taxed by that other State.

Domestic law

Denmark

The definition of a Permanent Establishment for Danish domestic law purposes as well as the allocation of profits thereto generally follows that of the OECD Tax Model Convention. A number of decisions consider the existence of a Permanent Establishment and allocation of profits thereto for Danish tax purposes, most of which are based on actual circumstances. Sec. 2 of the Danish Corporate Income Tax Act (selskabsskatteloven) specifically states (i) that permanent establishment building and construction sites which constitute a permanent establishment are considered as established on the first day thereof (ii) that shares can be allocated to a permanent establishment if such shares constitute a part of the core capital of the Permanent Establishment (iii) that profits and losses as well as recaptured depreciation on the sale of goods allocable to the Permanent Establishment is taxable in Denmark. As a significant exception to the main rule that a Permanent Establishment is from a Danish tax perspective considered to be a separate entity, a Danish supreme court ruling from 1993 determined that “interest” payments from a Danish Permanent Establishment to its head office on a “loan” granted to the Permanent Establishment would not be tax deductible for the Permanent Establishment.

Sec. 8 of the Danish Corporate Income Tax Act lies down a territorial principle for certain corporate activities as it states that if a Danish enterprise has a permanent establishment abroad Denmark will exempt income allocable to such permanent establishment abroad, unless (i) the state in which the Permanent Establishment is located waive its right of taxation under a tax treaty with Denmark or other international agreement, (ii) income in the Permanent Establishment would have been taxable under Danish CFC tax rules if the Permanent Establishment had been a company, or (iii) the income in the Permanent Establishment is income from the operation of ships or aircraft in international traffic.

Article 8 Shipping and Air transport

See treaty text

This provision relates to income derived from the operation of any means of transportation in international traffic and the Treaty provides that each of the Contracting States shall exempt from tax

profits derived by an enterprise of the other Contracting State from the international operation of ships or aircraft.
Covered by this Article is also profits from the use, maintenance, or rental of containers.

Article 9 Associated enterprises

See treaty text

This contains provisions regarding transfer pricing. Associated enterprises must adopt the arm's length principle in their dealings with each other, and to the extent that they do not, a Contracting State may make an upwards adjustment to taxable profits.
Specifically, this Article confirms the power of each government to allocate items of income, deduction, credit, or allowance in cases in which a resident of one State is related to a resident of the other State if such related persons impose conditions between themselves which are different from conditions which would be imposed between independent persons.
A relationship is defined as:

- An enterprise of a Contracting State which participates directly or indirectly in the management, control or capital of an enterprise of the other Contracting State; or

- The same persons participate directly or indirectly in the management, control, or capital of an enterprise of a Contracting State and an enterprise of the other Contracting State.

When a Contracting State has made an adjustment that is consistent with the provisions of paragraph 1, and the other Contracting State agrees that the adjustment was appropriate to reflect arm's-length conditions, that other Contracting State is obliged to make a corresponding adjustment to the tax liability of the related person in that other Contracting State. There is provision for consultation between the two tax authorities on this point.
The position regarding "secondary adjustments" is not dealt with. If one State makes an upwards adjustment of taxable profits and the other makes an exactly equal corresponding downwards adjustment, then the tax revenues of the two States might still be different to what they would have been had arm's length pricing been applied in the first place. This is because higher profits in the State where the upwards adjustment took place might well have given rise to higher dividends or interest payments, on which withholding taxes might have been chargeable. So even though the State making the upwards adjustment has retrieved the tax deficit on the enterprise resident there, it has still not retrieved any deficit in withholding taxes. Whether it makes a secondary upwards adjustment to make good this deficit in withholding tax receipts depends on whether this is provided for in domestic law. If it does so, then double taxation will 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

This Article limits the rate of tax which may be imposed by a State on dividends paid by a company which is a resident of that State for purposes of its tax to a resident of the other State. A dual resident corporation is a resident of each State "for purposes of its tax," but is a resident of neither State for purposes of the Convention.
Paragraph 1 (which is based on the OECD Model) states that such dividends may be taxed in the State of residence of the recipient.
Paragraph 2 provides that such dividends may also be taxed in the State of which the paying company is a resident for the purposes of its tax, but :

- the tax charged shall not exceed 5 percent of the gross amount of the dividends, if the person beneficially entitled to those dividends is a company which holds directly at least 10 percent of the voting power in the company paying the dividends; and

- the tax charged shall not exceed 15 percent of the gross amount of other dividends,

Notwithstanding the above, dividends may not be taxed in the Contracting State of which the payor is a resident if the beneficial owner of the dividends is a resident of the other Contracting State that is a qualified governmental entity that does not control the payor of the dividend.
Paragraph 3 applies the 15% withholding tax to Regulated Investment Companies (RIC) and 5 to 10% to Real Estate Investment Trusts (REIT).
Paragraph 5 defines dividends as income from shares, as well as other amounts which are subjected to the same taxation treatment as income from shares by the law of the State of which the company making the distribution is a resident for the purposes of its tax.

Domestic law

Denmark

Individuals

The distribution of dividends from a Danish company to a non-resident individual is generally subject to withholding tax at the rate of 28% (27% as of 2012). The shareholder may seek a refund from the Danish tax authorities of the tax withheld in excess of 15%. In practise this is done by completing and filing ready print reclaim form 06.003 (available online at www.skat.dk) with the Danish tax authorities (Skattecenter Ballerup), which must contain a statement from the Russian tax authorities that the beneficial owner of the payment is resident in Russia.
If the shareholder (in aggregate with shareholders group related to the shareholder) holds less than 10% of the nominal share capital in the Company and the shareholder is tax resident in Russia, the final tax rate is 10%.
In addition it is possible for the Danish Securities Centre or the dividend distributing company to enter into an arrangement with the Danish tax authorities according to which the obligation to withhold tax is reduced to the tax rate stipulated in the double taxation treaty with the relevant State.

Companies, etc.

Dividends from subsidiary shares (i.e. shares which constitute at least 10% of the share capital in the issuing company) are exempt from Danish withholding tax provided the taxation of dividends is to be waived or reduced in accordance with the Parent-Subsidiary Directive (90/435/EEC) or in accordance with the Treaty. This means that a Russian corporate shareholder in a Danish company would at the be entitled to exemption from Danish withholding tax on dividends when holding at least 10% of the nominal share capital in the Danish company, without having to reclaim any tax initially withheld, provided the beneficial ownership requirement, cf. below, is met.
Further, dividends from Group Shares (i.e. share in a company in which the shareholder of the company and the issuing company are subject to Danish tax consolidation or fulfill the requirements for international tax consolidation under Danish law) are exempt from Danish withholding tax provided the company investor is a resident of the European Union or the European Economic Area and provided the taxation of dividends should have been waived or reduced in accordance with the Parent-Subsidiary Directive (90/435/EEC) or in accordance with a tax treaty with the State in which the company investor is resident had the shares been Subsidiary Shares.

Dividends from Portfolio Shares (i.e. shares which are not Group Shares or Subsidiary Shares) will be subject to taxation irrespective of ownership period.
According to a statement from the Danish ministry of taxation in 2000 the Danish tax authorities will confirm that also pension funds and investment funds are considered as tax residents in Denmark, irrespective of the fact that they do not pay corporate tax on their income.

Beneficial ownership

Until recently, the requirement of beneficial ownership (and the content of this term) - although formally existing under the Danish withholding tax rules - has not been subject to real attention from the Danish tax authorities and still no clear guidance on the application thereof by the Danish tax authorities currently exist. However, the Danish Supreme Court has confirmed that specific provisions of Danish tax treaties should generally be interpreted in accordance with the OECD Commentary (to the extent applicable). The tax authorities have also referred to the OECD Commentary whenever (vaguely) commenting on the concept of beneficial ownership.
On 16 March 2010 the Danish Tax Tribunal (Landsskatteretten) published a long awaited ruling on beneficial ownership which found in favour of the tax payer in a structure put in place by certain non-Danish private equity funds which had acquired a Danish company by using a Danish-Luxembourg acquisition structure with a Luxembourg top holding company. On distributing dividends to the Luxembourg no Danish tax was withheld on dividends. The dividends were subsequently reinvested by the Luxembourg company by extending a loan to the dividend distributing company, which was ultimately reinvested into the Danish company acquired. The Tax Tribunal stated that the requirement of beneficial ownership is from a Danish perspective applied as an anti-abuse measure. However, as the dividend payment to the Luxembourg company was in the case At hand not paid on to the shareholders therein, the company could not be considered as a flow-through entity and as such would qualify as the beneficial owner of the dividend. As a result, the dividend distributing company was correct in not withholding tax on the dividend paid to the Luxembourg company.

Article 11 Interest

See treaty text

Interest arising in a Contracting State and beneficially owned by a resident of the other Contracting State can only be taxed in that other State.
However, this does not apply if the beneficial owner of the interest, being a resident of a Contracting State, carries on business in the other Contracting State in which the interest arises, through a permanent establishment situated therein, or performs in that other State independent personal services from a fixed base situated therein, and the interest is attributable to such permanent establishment or fixed base. In such case the provisions of Article 7 (Business Profits) or Article 14 (Independent Personal Services), as the case may be, shall apply.
“Interest” means income from debt-claims of every kind, whether or not secured by mortgage, and whether or not carrying a right to participate in the debtor's profits, and in particular, income from government securities and income from bonds or debentures, including premiums or prizes attaching to such securities, bonds, or debentures, and all other income that is subjected to the same taxation treatment as income from money lent by the taxation law of the Contracting State in which the income arises. Income dealt with in Article 10 (Dividends) and penalty charges for late payment shall not be regarded as interest for the purposes of this Article.

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.

Article 12 Royalties

See treaty text

Royalties arising in a Contracting State and beneficially owned by a resident of the other Contracting State can only be taxed in that other State.
However, this does not apply if the beneficial owner of the royalties, being a resident of a Contracting State, carries on business in the other Contracting State in which the royalties arise, through a permanent establishment situated therein, or performs in that other State independent personal services from a fixed base situated therein, and the royalties are attributable to such permanent establishment or fixed base. In such case the provisions of Article 7 (Business Profits) or Article 14 (Independent Personal Services), as the case may be, shall apply.
"Royalties" mean any consideration for the use of, or the right to use, any copyright of literary, artistic, scientific or other work (including computer software, cinematographic films, audio or video tapes or disks, and other means of image or sound reproduction), any patent, trademark, design or model, plan, secret formula or process, or other like right or property, or for information concerning industrial, commercial or scientific experience.

Domestic law

Denmark

Danish withholding tax applies to payments (i) qualifying as royalties for Danish tax purposes, (ii) which are not exempt under the EU interest/royalty directive or a tax treaty. If applicable, royalties paid from a Danish company to a foreign company is subject to 25% withholding tax. The tax is withheld at source by the Danish company and settled with the tax authorities.
In relation to (i), it is noticeable that the term "royalties" according to Danish law is narrower than the definition applied in both Article 12 of the OECD Model Tax Convention and the Interest and Royalties Directive. Indeed, the Danish royalty definition only includes industrial and commercial royalties (i.e. mainly payments for use or right to use patents, trademarks, patterns or models, drawings, secret formulas or production methods information on industrial, commercial or scientific knowhow) and does not include "artistic" royalties. Artistic royalties are described as payments for using or buying the right to use copyrights to literary work, artistic work or scientific work, e.g. author royalties or royalties for the use of music, films, etc.
In relation to (ii) in order to qualify for reduction or elimination of withholding tax under a tax treaty or the Interest and Royalties Directive, it is a general requirement that the recipient qualifies as beneficial owner of the royalty. Reference is made to the specific comments made on the Danish interpretation of this term under Article 10, above.
In practise, if the payment is a royalty, a 25 percent tax is to be withheld at source and the recipient will need to reclaim the withholding tax by completing reclaim form 06.015 with the tax authorities including a statement from Russia tax authorities that the beneficial owner of the payment is resident in Russia. According to a statement from the Danish ministry of taxation in 2000 the Danish tax authorities will confirm that also pension funds and investment funds are considered as tax residents in Denmark, irrespective of the fact that they do not pay corporate tax on their income.

Article 13 Capital Gains

See treaty text

As with all treaty provisions, this Article does not impose a requirement upon either State to tax a capital gain; it merely allocates taxing rights so that the relevant State can tax a gain if it chooses. The usual rule that gains derived by a resident of a Contracting State from the disposal (alienation) of immovable property as defined in Article 6 and situated in the other Contracting State may be taxed by that other Contracting State applies. In other words, the State where the property is situated may tax the capital gain.
However, gains derived by an enterprise of a Contracting State from the alienation of ships, boats, aircraft, or containers operated or used in international traffic or personal property pertaining to the operation or use of such ships, boats, aircraft, or containers shall be taxable only in that State. 5. Moreover gains derived by an enterprise of a Contracting State from the deemed alienation of an installation, drilling rig, or ship used in the other Contracting State for the exploration for or exploitation of oil and gas resources may be taxed in that other State in accordance with its law, but only to the extent of any depreciation taken in that other State.
All other gains are taxable only in the State where the person making the disposal is tax resident.

Domestic law

Denmark

Under Danish law, only alienation of real estate as well as assets or liabilities attributable to a permanent establishment in Denmark are subject to Danish taxation if the alienator is not a Danish tax resident person. Shares, receivables and intellectual property rights are generally exempted from Danish capital gains tax under Danish domestic law when not attributable to a permanent establishment in Denmark (as Denmark would normally also be prevented from taxing such income under its tax treaties). However, as a very narrow definition of interest applies under Danish domestic law, a specific provision applies according to which any capital gains on receivables in the form of a difference between the nominal amount of the receivable and the amount actually borrowed which is agreed in advance between the debtor and the borrower will be subject to tax in the hands of a non-Danish creditor, if such payment would also be taxable in Denmark to the creditor if it had been an interest.

Article 14 Independent Personal Services

See treaty text

Income derived by an individual who is a resident of a Contracting State in respect of the performance of personal services of an independent character can only be taxable in that State, unless the individual has a fixed base regularly available to him in the other Contracting State for the purpose of performing his activities.

If he has such a fixed base, the income attributable to the fixed base that is derived in respect of services performed in that other State also may be taxed by that other State.

Article 15 Dependent personal services

See treaty text

The general provisions in relation to the taxation of salaries, wages and other remuneration derived by individuals present in a country provide for exemption from tax in that country where they are present there for a period not exceeding 183 days in the year of income.

Additionally, the remuneration is to be paid by a person not resident in the country in which the services are rendered and must not be borne by a permanent establishment or a fixed base which the employer has in the other State.

Article 15 should be interpreted in combination with Articles 16, 18, and 19

Domestic law

Denmark

Under Danish domestic rules, Denmark can tax non-resident employees on income from employment when work is carried out in Denmark. The Danish domestic rules apply to all forms of payment and irrespective of when payment is made. The provision specifically includes severance payments and payment during a termination period when such payments attributable to employment in Denmark. Further, the Danish domestic law provides for a 30 percent tax on hiring out of labour when work is carried out in Denmark.

In a ruling from 2006 by the Danish Tax Council (Skatterådet) the Danish tax authorities confirms that it considers stock options granted as remuneration for employment was comprised by Article 15 of this Treaty.

When taxable in Denmark, a person will generally be taxable pursuant to the same rules as a Danish tax resident employee. When only working in Denmark for part of the income year (normally the calendar year for individuals), specific calculation rules apply to ensure that the progressive Danish tax system applies to the income from Denmark. In very general terms, the marginal tax rate, including labour market contributions (AM-bidrag) of 8 percent, applicable to personal income (such as salaries, etc.), is approx. 56 percent. This rate applies to annual income in excess of DKK 389,900 (about. EUR 52,400) per income year. Salary income lower than this amount is taxable between 0-41 percent. Specific rules on aggregate taxation of income apply to married couples.

Denmark operates a specific expatriation tax regime which provides the possibility of taxation at a flat rate of 25 percent (not including AM-bidrag) for a 3-year period or a flat rate of 30 percent (not including AM-bidrag) for a 5 year period, when certain specific criteria are met. When applying either regime, no deductions are allowed.

Article 16 Directors' fees

See treaty text

These fees may be taxed in the State in which the company is resident rather than that in which the director is resident.

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

Income derived by a resident of a Contracting State as an entertainer, such as a theater, motion picture, radio, or television artiste, or a musician, or as a sportsman, from his personal activities exercised in the other Contracting State, which income would be exempt from tax in that other Contracting State under the provisions of Articles 14 (Independent Personal Services) and 15 (Dependent Personal Services), may be taxed in that other State, except where the amount of the gross receipts derived does not exceed twenty thousand United States dollars ($20,000) or its equivalent in Danish kroner for the taxable year concerned.

This also applies where the income accrues not to the entertainer or athlete himself, but to another person, e.g. a management company or a troupe, team or orchestra forming a legal entity or to an artist company.

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

Under this Treaty pensions, annuities and other similar payments received by an individual from sources of a Contracting States can only be taxed n that State.

Denmark

Under Danish domestic law, Denmark is entitled to tax payments from Danish pension schemes to non-resident persons. The Danish pension tax system is relatively complex and a detailed description thereof is not made herein. Generally, tax deductibility for pension contributions is allowed irrespective of whether the pension scheme is established in Denmark or elsewhere in the EU when certain criteria are met. The deductible annual amount depends on the type of pension scheme. During the life of the pension scheme, an annual mark-to-market pension yield tax of 15 per cent applies. When the pension is ultimately paid to the pensioner (or beneficiaries) such payments are taxable as personal income (cf. art. 14, above). However, payments from a capital pension scheme are taxable at a flat rate of 40 per cent.

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

Article 19 Government Service

See treaty text

Salaries, wages and other remuneration, other than a pension, paid from the public funds of a Contracting State or a political subdivision or a local authority thereof to an individual in respect of services rendered to that State or subdivision or authority in the discharge of functions of a governmental nature can only be taxed in that State;

Such remuneration, however, can only be taxed in the other Contracting State if the services are rendered in that State and the individual is a resident of that State who: (i) is a national of that State; or (ii) did not become a resident of that State solely for the purpose of rendering the services.

Article 20 Students

See treaty text

This Article provides for the exemption of income derived by a student who is present solely for the purpose of her or his education. The exemption is restricted to income paid for the purposes of the student's maintenance or education only for a period of time not exceeding three years from the date he first arrives in the first-mentioned Contracting State for the purpose of his training, and the payment must originate from sources outside the country in which the student is temporarily resident

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 Limitation of Benefits

See treaty text

The provisions of this Article are intended to prevent residents of third countries from benefiting under this Convention, which is a reciprocal agreement between the two countries

Rather than trying to prove any intention of treaty shopping, the Article aims to restrict treaty shopping via a series of objective tests. Individuals and qualified government entities automatically qualify for treaty benefits but a number of tests are applied to determine whether persons other than individuals (principally companies) qualify for benefits.

In order to qualify for treaty benefits, at least one of these tests must be satisfied by a person other than an individual or a qualified government entity:

- Publicly traded corporations (and their subsidiaries);

- Not for profits organisation/pension fund;

- headquarters companies.

The "publicly traded" test
A company resident in a Contracting State is entitled to all the benefits of the Convention if all the shares in the class or classes of shares representing more than 50 percent of the vote and value are regularly traded on one or more recognised stock exchanges.
A recognised stock exchange for these purposes means (i) NASDAQ System and any stock exchange registered with the Securities and Exchange Commission as a national securities exchange for purposes of the Securities Exchange Act of 1934; (ii) the Copenhagen Stock Exchange and the stock exchanges of Amsterdam, Brussels, Frankfurt, Hamburg, London, Paris, Stockholm, Sydney, Tokyo and Toronto; and (iii) any other stock exchange agreed upon by the competent authorities of the Contracting States.
Alternative "publicly traded" test for subsidiary companies
Also a company resident in a Contracting State is entitled to the benefits of the Convention if five or fewer direct and indirect owners of at least 50% of the aggregate vote and value of the company's shares are publicly traded companies. If the publicly-traded companies are indirect owners, however, each of the intermediate companies must be a resident of one of the Contracting States.
Not-for-profit organisations
The types of organisations defined as residents in Article 4 (1)(b)(i) exclusively for a religious, charitable, educational, scientific, or other similar purposes automatically qualify for treaty benefits.
The multinational corporate group headquarters test
A resident of one of the Contracting States is entitled to all the benefits of the Convention if that person functions as a recognised headquarters company for a multinational corporate group. For this purpose, the multinational corporate group includes all corporations that the headquarters company supervises and excludes affiliated corporations not supervised by the headquarters company. The headquarters company does not have to own shares in the companies that it supervises. In order to be considered a headquarters company, the person must meet the following requirements:
- Must provide a substantial portion of the overall supervision and administration of the group;

- Must consist of corporations resident in, and engaged in active trades or businesses in, at least five countries which in turn contribute substantially (at least 10 percent) to the income generated by the group;

- The business activities carried on in any one country other than the headquarters company's state of residence must generate less than 50 percent of the gross income of the group;

- No more than 25 percent of the headquarters company's gross income may be derived from the other Contracting State; and

- Have and exercise independent discretionary authority to carry out the overall supervision and administration functions;

- Be subject to the generally applicable income taxation rules in its country of residence; and

- The income derived in the other Contracting State be derived in connection with or be incidental to the active business activities referred to above.

Article 23 Methods for the Elimination of Double Taxation

See treaty text

Denmark
Denmark generally applies the tax credit method under its domestic rules, unless another method follows from a tax treaty or is specifically provided for under domestic law.
The credit is the lesser of either (a) the foreign tax actually paid on the income, and (b) the proportionate amount of the overall Danish tax payable which can be allocated to the foreign income. However, according to the Danish Tax Assessment Act (ligningsloven), a net income calculation principle applies in internal Danish law when determining the amount of tax credit available. Under this principle any expenses directly relating to foreign source income initially eligible for a tax credit ("related expenses") should be deducted from such income when computing the Danish tax credit. Further, when calculating the Danish tax credit any expenses which are not immediately allocable

either to the taxpayer's foreign source income or Danish source income (unallocated expenses) should be allocated proportionally (pro rata) to the foreign and Danish source income (i.e. in proportion to the foreign and Danish gross income). To which extent an expense is a related expense or a general expense must be determined on a case by case basis.
As regards participants in partnerships, Denmark allows Danish partners therein a tax credit, also for tax levied on the partnership as such when the partnership is considered tax transparent in Denmark.
An exemption method applies pursuant to sec. 33A of the Danish Tax Assessment Act to income from employment abroad when the employment exceeds 6 months and the employee only has limited stays in Denmark during the foreign employment period as further specified therein.
Further, Sec. 8 of the Danish Corporate Income Tax Act lies down a territorial principle for certain corporate activities as it states that if a Danish enterprise has a permanent establishment abroad Denmark will exempt income allocable to such permanent establishment abroad, unless (i) the state in which the Permanent Establishment is located waive its right of taxation under a tax treaty with Denmark or other international agreement, (ii) income in the Permanent Establishment would have been taxable under Danish CFC tax rules if the Permanent Establishment had been a company, or (iii) the income in the Permanent Establishment is income from the operation of ships or aircraft in international traffic.

United States

The credit method is used. Credit for underlying tax on profits used to pay dividends is given provided the recipient is a US company owning at least 10% of the capital or the voting power of the paying company.

Article 24 Non-discrimination

See treaty text

The usual provisions apply; that nationals of one of the States shall not be subjected in the other State to any taxation or any requirement connected with tax, which is other or more burdensome than the taxation and connected requirements to which nationals of the other State in the same circumstances are or may be subjected. Not all differences in tax treatment, either as between nationals of the two States, or between residents of the two States, are violations of this national treatment standard. Rather, the national treatment obligation of this Article applies only if the nationals or residents of the two States are comparably situated.
Specifically, the States are permitted to levy the branch tax on repatriation of profits and interest as per paragraph 8 of Article 10 (Dividends).
The principle of non-discrimination applies to all taxes imposed by the two States, not merely those covered by this Treaty.

Article 25 Mutual agreement

See treaty text

Where a person considers that the actions of one or both of the States result or will result for him in taxation not in accordance with the provisions of this Treaty, he may present his case to the competent authority of the State of which he is resident or if not resident in either Denmark or United States, to the competent authority of which he is a national. This is so irrespective of the remedies provided by domestic law.
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. Any agreement reached shall be implemented notwithstanding any time limits in the domestic law of the Contracting States.
Thus, this Article removes the need for the tax authorities in each State to go through diplomatic channels: They may simply contact each other directly. The mutual agreement procedure is commonly used to decide matters concerning income and expense allocations and transfer pricing.

Domestic law

Denmark

The competent authority in Denmark on matters of tax treaties is SKAT (Legal Center), which is resident on Østbanegade 123, DK-2100 Copenhagen. On issues on relation to transfer pricing and the EU Arbitration Convention, the competent authority is SKAT (Store selskaber), which is resident on the same address.

Article 26 Exchange of information

See treaty text

This Article provides for the exchange of such information "as is relevant" for carrying out the provisions of this Treaty or of the domestic laws of the two countries and is not restricted by Art. 1 (Personal scope) of this Treaty, nor Art. 2 (Taxes Covered).
Article 26 contains the usual exemptions from the information exchange obligation, thus relieving the States from any obligation to:

- Carry out administrative measures at variance with the laws or administrative practices of either State;

- Supply information which is not obtainable under the laws or in the normal course of the administration of either State; and

- Supply information which would disclose any trade, business, industrial commercial or professional secret or trade process, or information the disclosure of which would be contrary to public policy (ordre public).

Article 27 Administrative Assistance

See treaty text

This Article contains quite wide ranging mutual assistance in the collection of each other's taxes - those in Article 2 (Taxes Covered), together with interest, costs, additions to such taxes, and civil penalties, referred to in this Article as a "revenue claim."

Article 28 Diplomatic Agents and Consular Officers

See treaty text

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

Article 29 Entry into Force

See treaty text

The Treaty entered into force as of March 31, 2000 with effect for withholding taxes, from May 1, 2000; other provisions, from January 1, 2001.

Article 30 Termination

See treaty text

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