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International Tax

# Denmark Tax Alert

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## Tribunal rules on beneficial ownership under treaty with US

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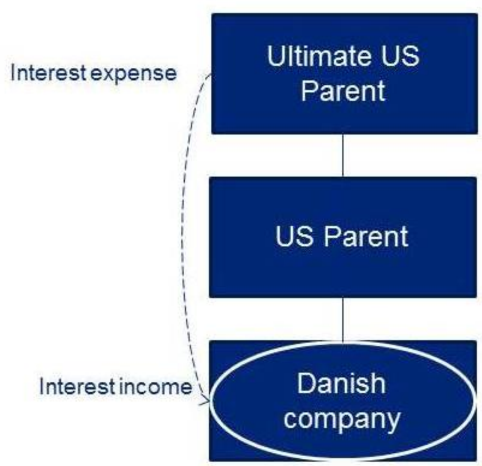
Denmark's National Tax Tribunal has published a ruling dated 30 January 2013, in which it concluded that a US parent company of a Danish check-the-box entity was not taxable in Denmark on interest income derived through the Danish entity. The tribunal found that the US parent should be considered the beneficial owner of the interest income. Since the US parent and the debtor with respect to the interest (an ultimate US Parent) both were resident in the US, the US would have exclusive taxing rights under article 21 (Other income) of the Denmark-US tax treaty, and article 11 (Interest) would not apply.

### Facts of the case

The legal structure and facts of the case were as follows:




Upon submission of its US tax return US in 2003, the US Parent opted to treat the Danish company as a check-the-box entity. The US Parent did not file a tax return in Denmark for 2005-2007 as an entity with limited tax liability because it did not consider that the activities of the Danish entity created a permanent establishment (PE) under article 5 of the Denmark-US tax treaty.

The Danish check-the-box entity had been a holding company until 2005, when it disposed of its shares in three subsidiaries to a third party. The proceeds from the sale of the shares (about USD 3 billion) were lent to the ultimate US Parent under a promissory note. As a result, the Danish company derived interest income and the ultimate US parent had interest expense.

The Danish tax authorities found that the US Parent had a PE in Denmark because an owner of a check-the-box entity under domestic Danish tax law is deemed to have a PE in Denmark and, by lending to the ultimate US Parent, the Danish check-the-box entity would be conducting a business from a fixed place of business within the meaning of article 5(8) of the OECD model treaty. According to the tax authorities, the Danish entity would constitute a fixed place of business since assets were made available through a PE. Consequently, the US Parent should be taxable in Denmark on the interest arising from the debt owed by the ultimate US Parent under the promissory note.

The US Parent argued that Denmark was not entitled to tax the interest because the US would have exclusive taxing rights on interest under article 11 or article 21 of the treaty. During the tax court proceedings, the counsel to the Danish tax authorities and the US Parent agreed that the conditions for creating a PE under article 5 were not satisfied. Accordingly, the key issue in the case was beneficial ownership since both article 11 and article 21 attribute the exclusive taxing rights to the state where the beneficial owner is resident

The National Tax Tribunal ruled that the US parent company was not taxable in Denmark on the interest income derived through the Danish entity because the US parent should be considered the beneficial owner of the interest. The tribunal found it relevant that the interest income derived from an entity (in this case, the ultimate US Parent) that was a US tax resident. Furthermore, because the Danish entity was a fiscally transparent entity, the income derived through this entity should be considered received by its owner, the US Parent. As the state of residence, the US would have the right to tax the interest under article 21. The US Parent and the Danish company were not taxable in Denmark on the interest income.

## Comments

The Danish tax authorities have not commented on the decision or indicated whether it will appeal to the Courts.