

Danish Supreme Court Delivers Decision in New Danish Beneficial Ownership Cases – Details

17 May 2023

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The Danish Supreme Court gave its decision on 4 May 2023 in the cases of *Takeda A/S* (Case 116/2021) and *NTC Parent S.à.r.l* (C-117/2021) regarding the taxation of interest in beneficial ownership cases. Details of the decision are summarized below.

(a) Facts.

Takeda A/S (Case 116/2021)

In 2006, the Nycomed Group (ultimately owned by capital funds investors) restructured and interposed two Swedish companies - Nycomed Sweden Holding 2 AB and Nycomed Sweden Holding 1 AB.

After the restructuring, Nycomed A/S (located in Denmark) borrowed DKK 501 million from its parent company Nycomed Sweden Holding 2 AB. 96.85% of Nycomed Sweden Holding 2 AB is owned by Nycomed Sweden Holding 1 AB and 3.15% by the group's management. Consequently, Nycomed Sweden Holding 1 AB borrowed DKK 498.5 million from its parent company Nycomed S.C.A., SICAR (located in Luxembourg). The loan to Nycomed A/S (located in Denmark) was financed by an increase of capital from Nycomed Sweden Holding 2 AB to Nycomed Sweden Holding 1 AB. This led to group contributions being decided based on the interest on the loans from Nycomed Sweden Holding 2 AB to Nycomed Sweden Holding 1 AB in 2007, 2008 and 2009.

In December 2010, the Danish tax authorities (SKAT) decided that Nycomed A/S (later renamed to Takeda A/S) was required to withhold tax on interest from a loan provided between 2007 and 2009 by Nycomed Sweden Holding 2 AB. The tax authorities' decision was based on the intercompany loans in the Nycomed Group, totalling to approximately EUR 501 million, being set up in such a way which effectively led to deduction/no-inclusion transactions. As the interest was deductible in Denmark, the receivable in Nycomed Sweden Holding 2 AB was offset by the interest to Nycomed Sweden Holding 1 AB. Similarly, Nycomed Sweden Holding 1 AB's receivable was offset by the interest expense to Nycomed S.C.A., SICAR, while that interest was entirely tax-free under Luxembourg tax law. Moreover, SKAT argued that, in reality, the shareholders of the Luxembourg company were the beneficial owners. Thus, Danish withholding tax was due.

The case was appealed and was referred to the Eastern High Court in August 2012. After the Court of Justice of the European Union (CJEU) answered prejudicial questions in 2019, the Eastern High Court issued its judgment in November 2021. The High Court held that the Luxembourg holding Nycomed S.C.A., SICAR was the beneficial owner of the interest payments. However, the High Court also held that

the Luxembourg company in question, an S.C.A., SICAR company, is not covered by the Denmark-Luxembourg tax treaty. Therefore, the High Court determined Takeda A/S had to withhold tax on the interest payments between 2007 and 2009.

NTC Parent S.à.r.l (C-117/2021)

In 2006, there was a group restructuring of the Nordic telephone Company group and 2 Luxembourg entities (Angel Lux Common and Angel Lux Parent) were interposed.

The new group's structure was the following: 88.2% of TDC A/S was held by Nordic Telephone Company ApS, which in turn was held by Nordic Telephone Company Holding ApS, which was held by Nordic Telephone Company Finance ApS, which was held by Nordic Telephone Company Administration ApS. Nordic Telephone Company Administration ApS was owned by Nordic Telephone Company Investment ApS, which in turn was held by the newly interposed Luxembourg entity Angel Lux Common S.a.r.l., which was ultimately owned by Angel Lux Parent S.a.r.l.

Once the entities were interposed, loans were set in place between Nordic Telephone Company Investment ApS (now NTC Parent) as a debtor and Angel Lux Common S.a.r.l. as a creditor in the income years 2006-2008.

In 2011, SKAT decided that Danish withholding tax was due on the interest payable by Nordic Telephone Company Investments ApS (NTC) to Angel Lux Common S.a.r.l.. SKAT argued that the Luxembourg companies were conduit companies and as such were not entitled to obtain the benefits of the treaty between Denmark and Luxembourg.

In 2005, five private equity funds established a group of companies to acquire TDC A/S. The private equity funds provided funds to Nordic Telephone Company Investment ApS to acquire TDC A/S by buying corporate bonds known as Preferred Equity Certificates (PECs), issued by NTC in December 2005 and January 2006 for a combined total of approximately EUR 1.8 billion.

The PECs were transferred in April 2006 to a newly established subsidiary in Luxembourg (Angel Lux Parent S.à.r.l), which transferred the loan to subsidiary Angel Lux Common S.à.r.l.). Subsequently, the interest payments due by NTC flowed through the Luxembourg companies to the investors in the private equity funds.

In 2021, the High Court sided with SKAT in that the Luxembourg companies were conduit companies that could not freely use the received interest payments. Moreover, the High Court considered that since no further information had been provided on the private equity funds or what happened to the interest payments after the private equity funds received the interest, they also could not be determined to be the beneficial owners.

(b) Issue.

The issue was whether the Danish companies involved should have withheld tax - following section 65D Withholding Tax Act (*Kildeskatteloven*) and section 2 (1)(d) Corporation Tax Act (*Selskabsskatteloven*) - on interest payments to (intermediate) holding companies residing in other EU member states which are not the beneficial owners.

(c) Decision.

In the Takeda A/S case, the Supreme Court upheld the judgment of the High Court that Danish withholding tax is due on the interest payments. Thus, the Supreme Court also considered that both Swedish intermediary holding companies were conduit companies, and neither was the beneficial owner of the interest payments.

However, the Supreme Court disagreed with the High Court that the Luxembourg company was the beneficial owner of the interests. Instead, the Supreme Court pointed out that Takeda had not provided enough information regarding the agreements between the relevant companies, private equity funds, shareholders, and investors to assess whether the Luxembourg company, or the shareholders in the Luxembourg company were the beneficial owners of the interests. The Supreme Court, therefore, held that the tax arrangement constitutes an abuse. Consequently, the Supreme Court did not determine whether the Luxembourg company was protected by the double tax treaty. Moreover, the Supreme Court held that it is undisputed that the Luxembourg company does not fall under the Interest & Royalty Directive, and therefore cannot enjoy the benefits of the Directive. The Supreme Court, thus, concluded that Danish withholding tax is due.

In the NTC case, a holding company in the TDC group, the Supreme Court affirmed the judgment of the Eastern High Court. Consequently, the Supreme Court held that NTC had failed to demonstrate that the Luxembourg companies, or the investors in the capital funds, were the beneficial owners. The Supreme Court, thus held that the Danish entity was obliged to withhold tax at the source in connection with the interest payments to the Luxembourg holding company.

Denmark - Danish Supreme Court Delivers Decision in New Danish Beneficial Ownership Cases – Details (17 May 2023), News IBFD.

Exported / Printed on 11 Mar. 2024 by hkermadi@deloitte.lu.