

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

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On 9 January 2023, the Danish Supreme Court gave its decision on the cases of *Skatteministeriet v. TDC A/S* (C-116/16) and *Skatteministeriet v. NetApp Denmark ApS* (C-117/16 Y Denmark ApS) regarding beneficial ownership of dividends. Details of the decision are summarized below.

(a) Facts.

The NetApp case involved a structure where the US parent company had a subsidiary in Bermuda. The Bermuda company held all the shares in a Cyprus company, which in its turn held all the shares in a Danish company. The Danish company distributed dividends twice, a distribution of DKK 565 million in 2005 and another distribution of DKK 92 million in 2006. The Cyprus company was granted a loan by its Bermuda shareholder and used the dividends to repay the loan. A few months after the first payment, the dividends were redistributed to the US parent company. The second distribution was also redistributed to the parent company, but only in 2010.

The TDC case involved a structure in which a Denmark company was owned by a Luxembourg company and various other shareholders. The company in Luxembourg, in its turn, was owned by two other Luxembourg companies. The ultimate parents in the group structure were equity funds, which were controlled by private investors. In 2011, the Denmark company distributed dividends amounting to USD 290 million, which were paid to the Luxembourg entities and subsequently to the equity funds.

(b) Issue.

As Denmark had not implemented the anti-abuse provisions in the [Parent-Subsidiary Directive \(2011/96\) \(PSD\)](#) or the [Interest and Royalties Directive \(2003/49\) \(IRD\)](#) into its domestic legislation, it was argued that regardless of the [ECJ decision](#), the Danish Supreme Court should find that the general EU law principle that the benefits of the [PSD](#) cannot be claimed to facilitate abuse or fraud should not apply. Moreover, it was argued that the Danish understanding of the notion of "beneficial owner" was different from the one that follows from the OECD Model Tax Convention.

(c) Decision.

In the NetApp case, the Supreme Court considered that the Danish courts must apply Danish law and the [PSD](#) in line EU law. General EU law principle states that the benefits of the [PSD](#) cannot be claimed to facilitate abuse or fraud.

Moreover, the Supreme Court found that there was no basis for the claim that the Danish notion of "beneficial owner" should be understood differently from the one in the OECD Model Tax Convention.

The Supreme Court subsequently agreed with the High Court's decision that the Cyprus company was not the beneficial owner of the first dividend distribution. The Supreme Court, however, disagreed with the High Court that the US company was the beneficial owner, as the dividend payment remained in the Bermuda company for 5 months, during which it was invested in bonds. Thus, the Bermuda company was free to use the dividend payment for other uses than repatriate it to the parent company. Therefore, Danish withholding tax is due on the first dividend payment of DKK 565 million.

The Supreme Court disagreed with the High Court that the second dividend payment of DKK 92 million triggered Danish withholding tax. As it would have been possible to distribute dividends directly from Denmark to the US parent company without – effectively – triggering Danish dividend withholding tax, the Supreme Court found that no Danish withholding tax was due on the dividend payment of DKK 92 million.

In the TDC case, the High Court found that there was very little economic substance to support the group structure and that there were no valid business reasons for the interposed entities to exist. As the identity of those that control the equity funds had not been disclosed, neither the [PSD](#) nor the Danish tax treaties applied, which means that Danish withholding tax was due on the dividend payment. The Supreme Court affirmed this decision.

These are follow-up decisions in the so-called beneficial ownership cases, in which the Court of Justice of the European Union delivered its preliminary ruling on 26 February 2019 (for details, see [European Union-50, News 26 February 2019](#) and [European Union-2, News 8 May 2018](#)). For the decision of the High Court and further details of the facts of the case see [Denmark-1, News 11 May 2021](#).

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