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MASTER THESIS

**THE BENEFICIAL OWNER CONCEPT IN CIVIL LAW COUNTRIES.
SCANDINAVIAN PERSPECTIVE.**

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LIST OF ABBREVIATIONS

BATR	Board for Advance Tax Rulings
CFC	Controlled Foreign Corporations
CIV	Collective Investment Vehicles
EU	European Union
IBFD	International Bureau of Fiscal Documentation
IFA	International Fiscal Association
ITA	Income Tax Act
OECD	Organisation for Economic Co-operation and Development
PSD	Parent-Subsidiary Directive
TFEU	Treaty on the Functioning of the European Union
VCLT	Vienna Convention on the Law of Treaties
WHT	Withholding tax

1. INTRODUCTION

1.1. Preliminary remarks

Free movement of goods, capital, workers and services have stimulated economic and social interaction between Member States of the European Union. At the same time international trade and globalization go far beyond the scope of the EU and have a tremendous impact on various countries in the world. Capital mobility encourages companies to look for business opportunities world-wide in order to meet intense competition and strengthen their own positions both at domestic and international markets. This development over the international economic landscape has effect on national treasuries as multinational enterprises engage in structuring their business in a way that it ultimately has repercussions on taxing powers of different countries.

Due to a great diversity of legal systems both within European countries and world-wide, inevitable conflicts and collisions emerge when a certain situation or a term receives different interpretations and consequently different treatments in different countries. That might lead to situations of double taxation or double non-taxation which either hinders the international economic development by neutralizing incentives for companies to involve into cross-border transactions or results in tax avoidance and tax evasion which erodes tax bases of national states respectively. In order to mitigate this problem countries conclude bilateral tax treaties.

In the field of international tax treaties negotiation the OECD's Model Tax Treaty is not the first and only one of importance. The first Model Tax Convention was developed by the League of Nation in the 1920s and was mainly influenced by the treaty negotiating traditions of the mainland European countries.¹ Nevertheless, over the last 50 years the OECD's Model has proven to be a valuable tool for stimulating international business and global trade and nowadays represents a benchmark in the area of tax treaty negotiations.² At the present moment the OECD comprises 34 member countries from various parts of the globe, including most advanced countries like Germany, France, Denmark, Sweden, United Kingdom, United States, Canada, etc. and emerging countries such as Mexico, Chile and Turkey. The OECD is strongly engaged in cooperation with China, India and Brazil as well as developing economies in Africa, Asia, Latin America and the Caribbean.³

1.2. Background and problem matter

Despite the fact that the OECD is not a law making body, but an organization of government representatives and despite the ongoing debate concerning the legal value of the OECD Commentaries, they still represent useful guidelines in tax treaties interpretation and possess some authoritative power. The fact that the Model Treaty and the Commentaries are commonly used by the countries which are not members of the OECD seems also to confirm the significance of the OECD's voice at the international arena.

¹ John F. Avery Jones et al., *"The Origins of the Concepts and Expressions Used in the OECD Model and their Adoption by States"*, 2006, p.220

² Peter A. Barnes, *"A Model to Celebrate"*, 2008, <http://www.oecdobserver.org/news/fullstory.php/aid/2742/> (accessed March 28st, 10:30 am)

³ OECD's official website: http://www.oecd.org/pages/0,3417,en_36734052_36761800_1_1_1_1_1,00.html (accessed April 1st, 16:30 pm)

Meanwhile, the OECD Model Treaty does contain a number of undefined terms which are being regularly applied in an international context. The concept of beneficial owner is a vivid example of a white spot in the area of taxation. It is generally used in conjunction with payments of dividends, interests, royalties and is commonly employed in international tax treaties. The reason for inserting beneficial owner concept into double tax treaties is to restrain access to treaty benefits only for residents of the other contracting state and to limit opportunities for taxpayers in third countries to indirect enjoy benefit to which they are not eligible by setting up intermediate companies in the resident state. To determine the beneficial owner is a matter of importance since treaty benefits, mainly lower withholding tax rates or exemption from the withholding requirements altogether are granted only to the beneficial owner of such income. The term was first introduced into the OECD Model Convention in 1977 and today, 35 years later, there seems to be the same air of mystery surrounding the beneficial owner concept. The fundamental freedoms laid down in the TFEU accommodate for high mobility of resources within the EU, but at the same time it contributes to the emergence of tax planning schemes taking advantage of inter alia undefined terms, such as beneficial owner. Thus it is a matter of concern for every state to protect its tax base, to prevent tax avoidance and tax evasion in view of the increase in cross-border investments and high value of financial flows between different states.

The absence of a clear-cut definition of the term implies ambiguities arising from a situation when two different legal systems interpret the beneficial owner concept according to their own traditional juridical approaches. The main distinction here lies between common law and civil law countries. As the OECD comprises more than 30 member states, just a few of them are common law systems. John Avery Jones points out “*there is more uniformity in the underlying legal concepts in the United Kingdom, Australia and the common law provinces of Canada than there is between the three main schools in civil law: the French, which has influenced Belgium, Italy and the Netherlands; the German, which has influenced Switzerland, Japan and Italy; and the Scandinavian countries*”.⁴ Due to the fact that the beneficial owner concept originates from the common law countries; the civil law countries do not have an equivalent term in their domestic legislations. Nevertheless, the term is frequently applied both in civil law and in common law countries.

Thus the situation seems to be paradoxical: the beneficial owner term is widely used in double tax treaties and is significant in determining whether treaty benefits would apply, although the uniform definition of the term is missing. It therefore appears to be of interest to investigate into how beneficial ownership is interpreted in civil law countries, such as Denmark and Sweden, since the concept is not familiar to them. Is it more challenging for civil law countries to deal with this concept? What method of interpretation of beneficial owner term is normally used? And does it really matter that the term is alien?

1.3. Purpose

In light of the recent developments in Denmark and in Sweden the topic of beneficial ownership proves to be relevant and deserves attention. The purpose of this paper is to investigate into relevant domestic provisions of Denmark and Sweden and study the case law in order to analyze

⁴John F. Avery Jones et al., “*The Origins of the Concepts and Expressions Used in the OECD Model and their Adoption by States*”, 2006, p.220

how the concept of beneficial ownership is being dealt with in these civil law countries. The paper also strives to assess the role of the OECD Model Convention and the Commentary when it comes to interpretation of the beneficial owner concept, what methods of interpretation are adopted in these two Scandinavian countries and whether there is a hierarchy of the sources of law concerning beneficial ownership: international meaning (if any) versus domestic interpretation.

The choice of countries is not random. Both Sweden and Denmark share a common feature of being attractive as holding companies destination. High activity on behalf of foreign investors in acquiring Danish companies urged Danish tax authorities to investigate into structuring strategies and income flows which brought them to deal with the issue of beneficial ownership. These dynamic developments resulted in a number of cases initiated by Danish tax authorities discussing the term beneficial owner.

The attractiveness of Sweden as a holding company country, apart from an extensive network of double tax treaties, can be explained by existence of such domestic provisions as almost full deductibility of interest expenses, the absence of withholding taxes on interest payments and full participation exemption on dividends and capital gains deriving from business-related shares. Until recently Sweden did not have any thin capitalization rules. All these conditions combined seem to be quite advantageous for foreign investors. The growing amount of aggressive tax planning schemes involving interest deductibility forced the Swedish Government to take measures restricting such possibility only to instances where the receiver of a certain income can be regarded as beneficial owner. The choice of Sweden is also justified by the fact that a good command of the Swedish language by the author of this paper provides for an opportunity to get access to the sources of law and doctrinal material written in Swedish.

Thus both Denmark and Sweden face the challenge of dealing with the concept of beneficial owner which is not familiar in their domestic legal tradition. The choice of a method of interpretation and an approach to deal with the term is therefore of great interest for the current research.

1.4. Method

The present research is based on the traditional legal approach. In order to shed light on the topic of beneficial owner interpretation in two civil law countries – Denmark and Sweden, the following material has been analyzed: the OECD documentation (Model Convention, the Commentaries, the Conduit Companies Report and the Discussion Draft), the domestic sources of law concerning relevant provisions on dividend and interest treatment, case law from both countries discussing the issue of beneficial owner, as well as preparatory works and doctrinal articles devoted to the topic. Special attention has been attached to the methods of interpretation of tax treaties provided by the Vienna Convention and the ongoing debate on the role of the OECD Commentary.

The choice of the Danish case law is motivated by the reason of relevancy, starting with the first case on beneficial ownership and concluding with the last one available. The Swedish case law is not that extensive as the Danish. A most recent advance ruling from the Swedish Board for Advance Tax Rulings is presented where the issue of beneficial ownership is discussed in the context of interest deductibility. The other case included in the current paper represents a series

of cases (nr 1281-02, nr 2886-2890-07, nr 257-10, nr 4127-10, nr 4128-10) where the beneficial owner concept in conjunction with the CFC-legislation is being debated. Most of the cases concern tax-planning schemes involving offshore jurisdictions. The reason for selecting this particular case is that it contains a vivid and detailed argumentation concerning the concept of beneficial ownership.

Due to the insufficient knowledge of the Danish language the Danish cases were not read in the original. Doctrinal articles on the topic of beneficial owner written by the Danish tax experts in English appear to be a reliable source of information. However, provisions on corporate taxation regarding source taxation of dividends and interest payments were verified with the original domestic legislation.

1.5. Delimitations

The focus of the present work is to investigate into the treatment of the beneficial owner concept in civil law countries of Denmark and Sweden; therefore the common law countries (especially the UK) are presented to a limited extent just to provide a general understanding of the meaning of the term in the country where it originated from.

The author of the paper is aware of the great amount of doctrinal articles devoted to the analysis of the beneficial owner concept in such groundbreaking cases as Indofood, Royal Bank of Scotland, Real Madrid and Prévost Car, and chooses not to include them in the present work.

1.6. Outline

In order to answer questions posed in the Introduction and develop a deeper understanding of the concept of beneficial owner the paper is structured in a following way: Chapter 2 gets the reader acquainted with a history of the term, its linguistic etymology and its development in the OECD documentation; Chapter 3 gives an overview of methods of interpretation presented in the Vienna Convention and the role of the OECD Commentary in tax treaty interpretation; Chapter 4 presents a Scandinavian approach to interpretation of the concept, providing first an overview of the relevant domestic provisions and then the relevant case law; Chapter 5 holds the analysis and conclusive remarks. The diagrams over company structures with regard to the presented cases serve illustrative purpose and are presented in the Appendix.

2. HISTORICAL BACKGROUND AND THE DEVELOPMENT OF THE BENEFICIAL OWNER CONCEPT

2.1. Linguistic etymology and historical origin

Etymologically the word “*beneficial*” derives from the Latin language and in a pure linguistic meaning stands for “*pertaining to a favour, privileged*”.⁵ The term has a long history in legislations of common law countries such as the UK, Australia and Canada where it originally could be encountered in agreements concerning the sale of land. The term was used in order to distinguish between a beneficial legal owner and a non-beneficial legal owner. Due to legal

⁵ Etymological Online Dictionary, http://www.etymonline.com/index.php?l=b&p=15&allowed_in_frame=0 (accessed April 2nd, 16:10 pm)

traditions in common law, different functions of the ownership could be split between different persons, which is reflected in such notions as “nominee”, “legal owner”, and “beneficial owner”.⁶ Parallel to this usage the beneficial owner concept was applied in the law of equity where reference was made to the equitable or beneficial ownership as opposed to the legal ownership. The latter meaning coincides with that of a trustee in trust law. As a matter of tradition in England a trustee, the “legal owner” of the trust property, holds it not for his own benefit but for the benefit of beneficiaries. The trustee has fiduciary responsibilities to the beneficial owners of the property, who does not possess title to the property but has rights in the property.⁷ However, when beneficial ownership is applied outside the scope of trusts a correct interpretation of the term becomes rather problematic, even in the common law countries.⁸

The IBFD’s glossary provides that the meaning has mainly been developed by the courts and in circumstances that have been considered important in determining who the beneficial owner is. The explanation in the glossary includes “the right to enjoy the economic benefits of the underlying property” and “control over the disposition of that property”. The term beneficial ownership is significant to differentiate between several aspects of ownership – legal ownership in particular, which is often associated with more formal characteristics, such as registration.⁹ In civil law countries the concept of beneficial ownership is not present, thus appropriate methods of interpretation must be involved in order to identify its meaning. As the glossary suggests the beneficial ownership concept may be compared with the concepts deriving from economic ownership. Thus it becomes obvious that civil law countries firstly face a challenge of constructing a concept that originally is alien to their legislation by means of interpretation (either with help of analogy or through substance-over-form), because the splitting of ownership is not normally recognized.¹⁰ Secondly, due to a great variety of legal traditions among civil law countries: the French, the German and the Scandinavian schools of civil law; this process quickly gains another dimension of complexity. An interesting exception among civil law countries is Japan where the term beneficiary is well settled and has its roots in trust law dating back to 1922. Although the term is not used outside the trust law, a similar concept is applied in the field of tax treaties.¹¹

2.2. Important landmarks in the development of the concept beneficial owner in the OECD documentation

The major developments of the concept are presented in a chronological order making it easier to follow and understand the changes as part of the historical and political context of the time.

⁶ Louan Verdoner, et.al, “A Cross-Country Perspective on Beneficial Ownership – Part 1”, 2010, p.2

⁷ Ayerst (*Inspector of Taxes*) v. C&K (*Construction*) Ltd [1975] STC 345, HL, at 349., from Charl du Toit, “The Evolution of the Term “Beneficial Ownership” in Relation to International Taxation over the Past 45 Years”

⁸ John F. Avery Jones et al., “The Origins of the Concepts and Expressions Used in the OECD Model and their Adoption by States”, 2006, p.246

⁹ IBFD Tax Research Platform, Glossary,

http://online.ibfd.org.ludwig.lub.lu.se/kbase/#topic=doc&url=/highlight/collections/itg/html/itg_beneficial_owner.html&q=beneficial%20owner+owners&WT.z_nav=search (accessed March 27th, 10:01 am)

¹⁰ John F. Avery Jones et al., “The Origins of the Concepts and Expressions Used in the OECD Model and their Adoption by States”, 2006, p.247

¹¹ John F. Avery Jones et al., “The Origins of the Concepts and Expressions Used in the OECD Model and their Adoption by States”, 2006, p.247

2.2.1. 1966 UK-US Tax Treaty

The beneficial ownership notion made its debut in the area of international tax treaties in 1966 when it was included in the protocol to the 1945 United Kingdom-United States tax treaty.

The protocol stated the following: *“relief from tax on dividends, interests and royalties... in the country of origin will no longer depend on whether the recipient is subject to tax in the other country, but will depend on the income being beneficially owned by a resident of the other country”*.¹² Both the UK and the US are common law countries and according to du Toit, the term must have had the same meaning as in the domestic legislations of the two countries.¹³

2.2.2. 1977 Commentaries to the OECD Model Tax Convention on Income and on Capital

In 1977 the term was incorporated in the OECD Model Tax Convention on Income and on Capital, where it was mentioned in Articles 10, 11 and 12 which related to dividends, interests and royalties. Prior to that the beneficial owner concept was implemented into the OECD Report “Revised Text of Certain Articles of the 1963 OECD Draft Double Taxation Convention” published in April 1972.¹⁴ The OECD Model Convention does not provide any definition of the term, but rather a description of who cannot qualify for a beneficial owner. According to the Commentary to Art.11(2) of the 1977 OECD Model the source state has the right to deny treaty benefits when *“an intermediary, such as an agent or nominee, is interposed between the beneficiary and the payer, unless the beneficial owner is a resident of the other Contracting State”*.¹⁵

Due to the fact that beneficial owner concept was inserted among anti-avoidance provisions of the Commentary, the majority of the authors express the opinion that the reason for introduction of this concept into the Model Tax Convention was to combat treaty shopping.¹⁶ This argument can also be supported by a document dating back to 1967 which has been kept in the OECD archives. The document contains a statement from the UK and appears among other material on Art.10 Dividends. According to the UK, treaty benefits should only be granted in the case when *“the beneficial owner of the income in question is resident in the other contracting State, for otherwise the Articles are open to abuse by taxpayers who are resident in third countries and who could...put their income into the hands of bare nominees who are resident in the other contracting State.”*¹⁷

Treaty shopping is usually described as a situation where an individual or a legal person, resident of a treaty country, has been set up there merely for the purpose of channeling income to a

¹² Charl du Toit, *“The Evolution of the Term “Beneficial Ownership” in Relation to International Taxation over the Past 45 Years”*, 2010, p.1

¹³ Charl du Toit, *“The Evolution of the Term “Beneficial Ownership” in Relation to International Taxation over the Past 45 Years”*, 2010, p.1

¹⁴ Louan Verdoner, et.al, *“A Cross-Country Perspective on Beneficial Ownership – Part 1”*, 2010, p.1

¹⁵ Louan Verdoner, et.al, *“A Cross-Country Perspective on Beneficial Ownership – Part 1”*, 2010, p.1

¹⁶ Sander Bolderman, *“Tour d’Horizon of the Term “Beneficial Owner”*, Special Reports, 2009, p.881

¹⁷ Charl du Toit, *“The Evolution of the Term “Beneficial Ownership” in Relation to International Taxation over the Past 45 Years”*, 2010, p.4

person in another state who is not entitled to get the treaty benefits directly.¹⁸ Thus the term beneficial owner was regarded to be a provision of anti-abusive character and therefore it was suggested to interpret the provision strictly. In practice it meant that only transparent construction involving an intermediary party would be able to fit into the concept of beneficial owner as it was described by the Commentary. No consideration was taken either to the amount of substance that the intermediary party contained or to the nature of relations between the intermediary and the ultimate beneficiary. The scope of application of the term was thus rather narrow and constrained.

As du Toit rightly points out at that stage the question whether the beneficial owner concept was a matter of law or a matter of fact was still open. In common law countries beneficial ownership was defined by law. On the other hand, in civil law countries the answer to the question seemed to be less obvious.¹⁹

2.2.3. 1986 Report on “Double Taxation Convention and the Use of Conduit Companies”

The next step in development of the concept evolved through multilateral discussions between OECD Member States and resulted in the Report on “Double Taxation Convention and the Use of Conduit Companies” adopted in 1986.²⁰ The Report made an attempt to extend and at the same time describe the term more precisely. It was noted that it is mostly the source state that endure disadvantages from conduit company constructions as it loses tax revenue by providing lower withholding tax rates on dividends or royalties or by exempting this kind of income from withholding taxes altogether. Treaty benefits agreed between two countries get economically extended to a party in a third state that was not involved in treaty negotiating process. The balance of allocation of taxing powers between the two contracting states is frustrated and the principle of reciprocity (income exempted in one country is taxed in the other country) is undermined. Moreover, a third state where the ultimate beneficiary of the income is resident has little motivation to arrange a tax treaty with the source state as it can get access to treaty benefits without having to provide reciprocal benefits to the source state. In the absence of double tax treaties this situation would not be detrimental for the source state as it normally taxes all non-residents, including the conduit company, according to its domestic tax law. Thus the problem is created by treaties and should be dealt with under the treaty.²¹ The Report also suggests adjusting the relevant provisions of the OECD Model convention.

The Report addresses then anti-avoidance provisions in Art. 10, 11 and 12 which may limit the treaty benefits in case where the conduit company is not the beneficial owner of the income. It explains that *“a conduit company can normally not be regarded as the beneficial owner if, though the formal owner of certain assets, it has very narrow powers which render it a mere*

¹⁸ IBFD Tax Research Platform, Glossary:

http://online.ibfd.org/ludwig.lub.lu.se/kbase/#topic=doc&url=/highlight/collections/itg/html/itg_treaty_shopping.html&q=treaty%20shopping+shoppings+treaties&WT.z_nav=search (accessed April 4th, 23:40pm)

¹⁹ Charl du Toit, *“The Evolution of the Term “Beneficial Ownership” in Relation to International Taxation over the Past 45 Years”*, 2010, p.4

²⁰ Louan Verdoner, et.al, *“A Cross-Country Perspective on Beneficial Ownership – Part 1”*, 2010, p.2

²¹ Double Taxation Convention and the Use of Conduit Companies (adopted by the OECD Council on 27 November 1986), R(6)-6

fiduciary or an administrator acting on account of the interested parties".²² At the same time the Report underlines that in practice it would be difficult for the source state to prove that the conduit company is not the beneficial owner, because its holding functions may only indicate its pure intermediary character and bring along further examination, but such a presumption is not sufficient. These difficulties may even occur in the country of residence of the conduit company as information concerning the company's relationships to the shareholders or other parties or the decision-making process may not be available.

2.2.4. 2003 Amendments to the OECD Commentaries

The conclusions drawn in the Report on Conduit Companies were taken into account during the revision of the 1977 Commentaries and resulted in an adjusted version of the Commentaries to the Model Tax Convention. The Committee of Fiscal Affairs adopted several major changes to Art.10, 11 and 12 in order to clarify the meaning of beneficial owner concept.

The description of the term beneficial owner became more detailed and included apart from agents and nominees, conduit companies that receive income on behalf of the ultimate beneficiary situated in a third state. The changes were introduced in §2 of Art.10 to explain the meaning of the phrase "*paid...to a resident*" mentioned in §1 of the same article. The main idea with this amendment was to demonstrate that the source state is not obliged to provide treaty benefits to the receiver of the dividends only because he/it is a resident of the other contracting state. Further the explanation provides that "*the term "beneficial owner" is not used in a narrow technical sense, rather, it should be understood in its context and in light of the object and purpose of the Convention, including avoiding double taxation and the prevention of fiscal evasion and avoidance*".²³

The 2003 Commentaries reiterate the Report that a conduit company cannot be considered a beneficial owner of the income if, "*as a practical matter*", it has "*very narrow powers*" over the income in question, which makes it "*a mere fiduciary or administrator acting on account of the interested parties*".²⁴ Acting otherwise would be contradictory to the object and the purpose of the Convention. Du Toit underlines the significance of the phrase "*as a practical matter*" that was added in front of "*narrow powers*". The wording has not been used in previous documents, either in the 1977 Commentaries or in the Conduit Report, and addresses the issue of whether beneficial ownership belongs to the legal sphere or is a subject of practical or economic substance test. The expression that the beneficial owner should be interpreted and defined in light of the objects of the treaty to preclude instances of tax evasion and tax avoidance is also new in the Commentary of Art.10, 11 and 12.²⁵

During the revision some of the delegates expressed the opinion that applying the beneficial ownership test requires an individual approach to facts and circumstances of every case, making

²² Double Taxation Convention and the Use of Conduit Companies (adopted by the OECD Council on 27 November 1986), R(6)-10

²³ Reports Related to the Model Tax Convention, Restricting the Entitlement to Treaty Benefits, 2002, §6 Clarification of the concept of "beneficial ownership"

²⁴ Model Tax Convention on Income and on Capital: Condensed Version 2003, Commentary on Article 10, §12.1, http://www.keepeek.com/Digital-Asset-Management/oecd/taxation/model-tax-convention-on-income-and-on-capital-condensed-version-2003_mtc_cond-2003-en (accessed April 7th, 23:53pm)

²⁵ Charl du Toit, "*The Evolution of the Term "Beneficial Ownership" in Relation to International Taxation over the Past 45 Years*", 2010, p.5

it difficult to create a general definition of the concept. On the one hand, it is quite clear that the access to treaty benefits can be denied on the grounds of mere legal ownership. On the other hand, no clarification is provided when the flow of income is controlled by different interested parts that in various degrees possess some attribute of ownership.²⁶

2.2.5. 2010 Indirect explanation on the key characteristics of the beneficial owner concept

A more recent revision of the Commentaries in 2010 contributed to a further expansion of the term beneficial owner. Although no radical changes were made in Art.10, 11 and 12 in connection with the beneficial owner concept some guidelines in determining important attributes of a beneficial owner may be obtained in the commentary to Art.1 regarding the persons covered by the Convention. Even though the Committee on Fiscal Affairs has not been elaborating on the term beneficial owner directly, the indications provided in the description of the CIV that qualify to get treaty benefits seems to shed some light on what characteristics of the beneficial ownership are important in order to correctly determine whether the receiver of income in question is eligible to get treaty benefits. Paragraph 6.14 of the commentaries stipulates that if CIV *“meets the definition of a widely-held CIV will also be treated as the beneficial owner of the dividends and interest that it receives, so long as the managers of the CIV have discretionary power to manage the assets generating such income.”*²⁷ Thus the requirement that a CIV should possess an adequate amount of economic substance in form of, among others factors, significant management of assets appears to be of importance.

2.2.6. 2011 Discussion Draft – further clarifications on the beneficial owner concept in regard to the 2010 OECD Commentaries

In April 2011 a Discussion Draft, developed by the Working Party I of the OECD Committee on Fiscal Affairs containing proposals composed to clarify the interpretation of the beneficial ownership requirements presented in the Commentaries, was made public. The main reason behind the release was the fact that the term received different interpretations by courts and tax administrations which caused state of confusion and disparity between interested parties.

Despite good intentions by the Committee of Fiscal Affairs the Draft has been criticized by many tax experts and scholars.

As Danon points out the main issue with the present state of the affairs concerning beneficial ownership is the question whether this term should be defined by reference to the domestic tax law of the source state or whether it should acquire a contextual meaning under Article 3(2) of the OECD Model of 2010. He develops this statement by observing that majority of scholars advocate for a contextual interpretation because none of the domestic law systems of the OECD Member States can provide for a precise definition of a beneficial owner.²⁸ The need for a uniform contextual meaning also derives from the fact that the Commentary of 2003 declares

²⁶ Reports Related to the Model Tax Convention, Restricting the Entitlement to Treaty Benefits, 2002, §6 Clarification of the concept of “beneficial ownership”, Meaning of beneficial owner

²⁷ OECD Model Tax Convention on Income and on Capital: Commentary on Article 1, § 6.14 (22 July 2010)

²⁸ Prof. Dr. Robert Danon, *“Clarification of the Meaning of “Beneficial Owner” in the OECD Model Tax Convention – Comment on the April 2011 Discussion Draft”*, 2011, p.438

that the term “*should be understood in its context and in light of the object and purpose of the Convention*”.²⁹

First of all paragraph 12.1 of the Draft emphasizes that due to the fact that the term beneficial owner was introduced in regard to the wording “*paid to...a resident*”, “*it was intended to be interpreted in this context and not to refer to any technical meaning that it could have had under the domestic law of a specific country.*” Therefore the term “*is not used in a narrow technical sense (such as the meaning that it has under the trust law of many common law countries)*”. At this point the reader gets an impression that there is, or at least should be, an independent international meaning of the term beneficial owner.

Paragraph 12.4 makes an attempt to give a general definition of the concept stating that “***The recipient of a dividend is the “beneficial owner” of that dividend where he has the full right to use and enjoy the dividend unconstrained by a contractual or legal obligation to pass the payment received to another person***” and further on “*the use and enjoyment of a dividend must be distinguished from the legal ownership, as well as the use and enjoyment, of the shares on which the dividend is paid*”.

However, the confusion is brought back by the following provision: “*This does not mean that the domestic law meaning of “beneficial owner” is automatically irrelevant for the interpretation of that term in the context of the Article: that domestic meaning is applicable to the extent that it is consistent with the general guidance included in this Commentary*”.³⁰

According to Danon, leaving the opportunity for domestic law characterization of the beneficial owner concept would only lead to deviating interpretations and instances of double taxation that the OECD aims to avoid. Moreover expanding the scope of application of beneficial owner to such elaborate structures as CIV, calls for a uniform definition of the term. According to the author the suggested definition should be adopted as it supports the idea that the beneficial ownership requirement is a test focusing mainly on ownership attributes of the receiver of the income and that these attributes are established by means of a substance-over-form method. Thus it is the intensity of the ownership attributes that plays a decisive role in identifying a beneficial owner and not substance requirements, implying that even an intermediary holding company can qualify for beneficial owner.³¹

The IBFD research staff raises their concern about the wording “*unconstrained by a contractual or legal obligation to pass the payment received to another person*”. In their view there is a wide spectrum of obligations many of which should not hinder a person from being a beneficial owner of the income in question and what is important is to consider the nature of an obligation, not the pure existence of one. Here two principally different situations should be distinguished: the first one is an obligation to apply or spend income and the second one – the obligation to pass the income. The Discussion paper however does not focus on highlighting these differences.³² Another suggestion is to reconcile the presented description with the notion of trustee in respect

²⁹ OECD Model Tax Convention on Income and on Capital: Commentary on Article 10, § 2.12 (22 July 2010)

³⁰ Clarification of the Meaning of “Beneficial Owner” in the OECD Model Tax Convention, Discussion Draft, 29 April 2011, Commentary on Article 10, §12.1, §12.4

³¹ Prof. Dr Robert Danon, “*Clarification of the Meaning of “Beneficial Owner” in the OECD Model Tax Convention – Comment on the April 2011 Discussion Draft*”, 2011, p.438-439

³² Aleksandra van Boejen-Ostaszewska, et.al, “*Clarification of the Meaning of “Beneficial Owner” in the OECD Model Tax Convention, Response from the IBFD Research Staff*”, 2011, p.4

of discretionary trust notion, provided in the footnote. The contradiction here lies in the fact that a trustee, per definition, cannot have the right to use and enjoy income, even if this income is not distributed to a beneficiary.³³

If the term beneficial owner is to acquire an independent, autonomous treaty meaning it should be more accurate and precise in order to eliminate the risk of ambiguities. The IBFD research staff recommends to place the definition in the Model itself and not just in the Commentaries as it would provide a better guarantee of a more consistent interpretation of the term, especially for the countries that do not practice dynamic interpretation of the Commentaries.³⁴ At the same time, as Arnold rightly point out “*the relationship between tax treaties and domestic law is a delicate issue and the OECD is understandably reluctant to say that the Commentary displaces domestic law.*”³⁵

2.3. Summary

The purpose of this chapter was to outline the main milestones in the history and the development of the concept beneficial owner for the past 46 years. The concept made its first appearance in the field of tax treaty law in the bilateral treaty between the United Kingdom and the United States in 1966. The term was presumably borrowed from the UK trust law (common law country) and introduced to the OECD Model Tax Convention and its Commentaries in 1977 where it referred to passive income such as dividends, interests and royalties. The reason for inserting beneficial owner concept was to restrain access to treaty benefits only for residents of the other contracting state and to limit opportunities for taxpayers in third countries to indirect enjoy benefit to which they are not eligible by setting up intermediate companies in the resident state. No definition was provided by the OECD Commentaries but a very insufficient description stating that an intermediary, such as an agent or nominee interposed between the beneficiary and the payer cannot qualify for beneficial owner status.

Many scholars express surprise over the choice of the term in the first place, because OECD Member States were predominantly civil law countries and were not familiar with the term beneficial ownership. With quite poor guidelines from the OECD Commentary there was a lot of space for misinterpretation and disagreements. Moreover no certainty was reached on the question of whether the concept should acquire an autonomous international meaning or should domestic interpretations be accepted, while at the same time the Commentary of 1977 encouraged Member states to negotiate on more detailed requirements for beneficial ownership.

Too many uncertainties about the interpretation of the concept led to multinational discussion among members of the OECD and resulted in Conduit Companies Report in 1986. There the scope of application of the term was broadened to comprise conduit companies. The Report highlighted that a conduit company possessing very limited powers over the received income and functioning as mere fiduciary or administrator on behalf of a third party cannot be regarded beneficial owner of such income.

³³ Aleksandra van Boejen-Ostaszewska, et.al, “Clarification of the Meaning of “Beneficial Owner” in the OECD Model Tax Convention, Response from the IBFD Research Staff”, 2011, p.3

³⁴ Aleksandra van Boejen-Ostaszewska, et.al, “Clarification of the Meaning of “Beneficial Owner” in the OECD Model Tax Convention, Response from the IBFD Research Staff”, 2011, p.2

³⁵ Brian J. Arnold, “Tax Treaty News”, 2011, p.556

The conclusions drawn in the Conduit Report were included in the revision of the Commentaries in 2003. The amendments made an attempt to clarify that the approach in dealing with the beneficial owner concept should not be restricted by technical use of this term, but instead should be interpreted in light of the objects purpose of the Convention, including avoiding of double taxation and the prevention of fiscal evasion and avoidance. This can be regarded as an effort to assign the beneficial owner concept with some degree of independency. The tendency carried on with the Discussion Draft which states that the interpretation of the term should derive not from a specific meaning under a domestic law of some country, but rather from the context and the purpose of the Convention. A more general definition is suggested putting forward that ownership attributes of the receiver of the income such as a full right to use and enjoy the income unconstrained by a contractual or legal obligation to pass the payment received to another person are placed in the center of the beneficial owner requirements. According to some experts there is a need to reconcile all the “*definitional baggage*” of this term by inserting the general definition of it in the Model Convention itself, thus assigning to it an autonomous meaning that can be applied in tax treaties. However, this step in the development of the beneficial owner concept is yet to be witnessed.

Meanwhile in the absence of a common definition countries are left with quite a considerable degree of freedom to determine how situations dealing with beneficial owner issue should be resolved. The next chapter will therefore highlight what guidelines are there to follow to ensure consistent interpretation of the term.

3. METHODS OF INTERPRETATION OF INTERNATIONAL DOUBLE TAX CONVENTIONS

Due to the fact that beneficial ownership concept is mostly subject to dispute in the sphere of international tax treaties, the starting point of the discussion in this chapter will be the 1969 Vienna Convention on the Law of Treaties where international rules of treaty interpretation are set out. In order to provide a more complete picture of the interpretational landscape of tax conventions it appears impossible not to touch the debate on the place and status of the OECD Commentary in tax treaty interpretation.

3.1. Vienna Convention on the Law of Treaties

Tax treaties are international agreements concluded between countries under public international law and therefore should be interpreted in conformity with international law principles.³⁶ According to Vogel, a double tax treaty can only be effective if it is uniformly interpreted and applied in both contracting states. In order to create atmosphere of legal certainty both for the contracting states and the taxpayers and to assure non-arbitrary interpretation of an agreement in question, it is essential to have criteria for interpretation that would serve as guidelines and

³⁶ Michael Lang, Florian Brugger, “*The Role of the OECD Commentary in Tax Treaty Interpretation*”, 2008, p.97; Vienna Convention on the Law of Treaties, 1969, Article 2, 1(a)

support in the interpreting procedure.³⁷ The Vienna Convention on the Law of Treaties contains these criteria formulated as rules for the interpretation of international agreements.

Article 31(1) under Section 3 of VCLT sets out general rule of treaty interpretation. It reads as follows: “*A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its objects and purpose*”.³⁸ In other words, this provision calls for a textual, teleological and systematic interpretation.³⁹ Textual interpretation is a starting point in the interpretation process, because the text of the treaty embodies genuine intentions of the contracting parties. Moreover, the principle of good faith implies that the parties put confidence on the words expressed by them.⁴⁰

Interpreter of the tax convention shall pay attention together with the context, to any “*relevant rules of international law applicable in the relations between the parties*”, as well as to the circumstances whether the parties have established a special meaning to a certain term. Article 32 of VCLT stipulates supplementary means of interpretation, such as the preparatory work of the treaty and the circumstances of its conclusion. However, supplementary means of interpretation are only allowed to validate results from application of Article 31 or to determine the meaning when the results of interpretation by Article 31 are obscure or unreasonable.⁴¹

Sweden signed VCLT on April 23rd 1970 and ratified it on February 4th 1975. Denmark signed the Convention on April 18th 1970 and ratified it on February 1976.⁴²

3.2. The role of the OECD Commentary in tax treaty interpretation

According to John Avery Jones, no consensus has yet been reached on the status of the OECD Commentaries in the process of interpretation of double tax treaties. There is no mention of them in VCLT and on the whole there is no equivalent to the Commentaries in treaties.⁴³

Some scholars are of the opinion that the OECD Commentaries constitute part of the context mentioned in Article 31 VCLT,⁴⁴ others express the view that the OECD Model Convention and the Commentary could qualify as supplementary means of interpretation and fall within the scope of Article 32 VCLT, provided that tax treaty negotiations were based of the OECD Model and its Commentaries.⁴⁵ This position gets support from the fact that during the drafting procedure member states have opportunity to note their observations to interpretations expressing their standpoint in a certain question and that the absence of such an observation can

³⁷ Prof. Dr. Klaus Vogel, Dr. Rainer G. Prokisch, *Interpretation of Double Taxation Conventions*, IFA Cahiers, 1993, Vol. 78a, p.55-56, 59

³⁸ Vienna Convention on the Law of Treaties, 1969, Article 31 (1)

³⁹ Wattel, Otto Marres, “*The Legal Status of the OECD Commentary and Static or Ambulatory Interpretation of Tax Treaties*”, 2003, p.225

⁴⁰ Michael Lang, Florian Brugger, “*The Role of the OECD Commentary in Tax Treaty Interpretation*”, 2008, p.99

⁴¹ Vienna Convention on the Law of Treaties, 1969, Article 31 (3)(c), 31 (4), Article 32

⁴² United Nations Treaty Collection

http://treaties.un.org/pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg_no=XXIII~1&chapter=23&Temp=mtdsg3&lang=en (accessed May 9th, 10:15 am)

⁴³ Dr. John F. Avery Jones, “*The Effect of Changes in the OECD Commentaries after a Treaty is concluded*”, 2002, p.102

⁴⁴ Dr. John F. Avery Jones, “*The Effect of Changes in the OECD Commentaries after a Treaty is concluded*”, 2002, p.102

⁴⁵ Michael Lang, Florian Brugger, “*The Role of the OECD Commentary in Tax Treaty Interpretation*”, 2008, p.98

be treated as a silent agreement on interpretation of the agreement in light of the Commentaries.⁴⁶

The process of interpreting a tax treaty touches upon a number of issues that need to be addressed. Wattel and Marres focus attention on following aspects: static vs. ambulatory interpretation of tax treaties, changes of the OECD Model and the Commentaries under static and ambulatory interpretation and relation between the Commentary and Articles 31 and 32 VCLT. The authors comment that central arguments in favour of static interpretation of tax treaties are legal certainty and *pacta sunt servanda*, meaning that later developments are irrelevant and should not be taken into account. An ambulatory interpretation advises a contrary approach arguing that technological and political developments, both at the international and supranational levels, are constantly on the move hence reconstructing circumstances and influencing domestic legislation, tax law in particular. Therefore interpretation based on obsolete references and assumptions is inefficient and can lead to unsatisfactory outcomes.⁴⁷ Moreover, there is no such rule stating that anything occurring after the treaty has been concluded is irrelevant.⁴⁸

Apart from the debate on the legal status of the OECD Commentary, another question becomes relevant – with regard to post-treaty amendments in the Commentaries, which version of the Commentary and even the Model itself should take precedence? Wattel and Marres strongly recommend static interpretation of the Commentary motivating that amended Commentary has not received parliamentary approval of the contracting states and thus cannot be assigned democratic legitimacy. At the same time they agree that later Commentaries can shed some light on “*the ordinary meaning*” referred to in Article 31 VCLT.⁴⁹ John Avery Johns invokes instances when courts made references to later Commentaries without discussing the basis of their choice.⁵⁰

Although the OECD cannot be considered as an impartial body in determining status of the Commentaries, it is worth to take a look at the arguments presented by it. Paragraph 35 of the Introduction to the Commentary of the 2010 Convention states that: “...*changes or additions to the Commentaries are normally applicable to the interpretation and application of conventions concluded before their adoption, because they reflect the consensus of the OECD member countries as to the proper interpretation of existing provisions and their application to specific situations*” and further in paragraph 36: “*Many amendments are intended to simply clarify, not change, the meaning of the Articles or the Commentaries...*”.⁵¹

However, Wattel and Marres agree at the point that even the revised Commentary meets the description of “*supplementary means of interpretation*” mentioned in Article 32 VCLT, while the Commentary at the time of concluding the agreement can constitute “*the context*” with

⁴⁶ Russel R. Young, “*The Use of Extrinsic Aids in the Interpretation of Tax Treaties*”, 1999, p.811

⁴⁷ Peter J. Wattel, Otto Marres, “*The Legal Status of the OECD Commentary and Static or Ambulatory Interpretation of Tax Treaties*”, 2003, p.222-223

⁴⁸ Dr. John F. Avery Jones, “*The Effect of Changes in the OECD Commentaries after a Treaty is concluded*”, 2002, p.103

⁴⁹ Peter J. Wattel, Otto Marres, “*The Legal Status of the OECD Commentary and Static or Ambulatory Interpretation of Tax Treaties*”, 2003, p.224, 226

⁵⁰ Dr. John F. Avery Jones, “*The Effect of Changes in the OECD Commentaries after a Treaty is concluded*”, 2002, p.103

⁵¹ Model Tax Convention on Income and on Capital, Condensed Version, 22 July 2010, Introduction, §§35,36

regard to Article 31. Wattel and Marres as well as Lang arrive at the conclusion that the Commentary has great authority on account of the OECD's outstanding expertise and solid support of the member states.⁵² However when it comes to weight and role of the revised Commentaries the opinions of the experts are less than being unanimous.

3.3. Summary

This chapter gave an overview on the general rules of interpretation of international treaties as they were specified in the Vienna Convention of 1969. The discussion about the role of the OECD Model and the Commentaries was also presented as well as their relation to VCLT.

The general rules of international treaties interpretation were set out in Article 31, 32 of the Vienna Convention. Article 31(1) stipulates the main rule that a treaty shall be interpreted in good faith and in accord to the ordinary meaning assigned to the terms of the treaty with regard to their context as well as object and purpose of the agreement, while 31(2) describes what is meant by context in which the terms of the treaty are to be interpreted. Supplementary means of interpretation are presented in Article 32 and the position of supplementary interpretation is weaker than main one expressed in Article 31.

The interpretation procedure can be approached by two diametrically opposed methods: static and ambulatory interpretations which boil down to the fact whether post-treaty changes are relevant or not. These methods are important when determining how OECD Model and the Commentaries relate to VCLT. According to static interpretation the OECD Model and its Commentaries at the time of treaty negotiations can form context mentioned in Article 31 and therefore play an important role when some treaty provisions need to be clarified. The ambulatory interpretation, on the other hand, emphasizes the importance of political and technological developments taking place after concluding the treaty and consequently the revised version of the Commentaries. Some experts share the opinion that the Commentaries, even the amended versions, fall within the scope of the supplementary means of interpretation. However, many scholars express doubts whether the revised Commentaries qualify for the description of context as they cannot possibly convey intentions of the parties at the moment when the agreement was reached. Moreover, later Commentaries cannot acquire status of being democratically legitimate as they have not been approved by the parliaments of the contracting states and they only can be relevant in connection to double taxation treaties concluded afterwards. This line of argumentation is solid and reasonable and it is difficult not to agree with it. At the same time it is a matter of fact that the majority of double tax conventions were concluded several decades ago and no one would argue that the circumstances and economic reality has changed tremendously since then. Moreover the Commentary is an important source of clarification of many terms, including the concept of beneficial ownership.

The debate on legal status of the OECD Model and the Commentaries is far from being resolved and the purpose of mentioning it was to show divergent points of view on this matter and bring them to readers' awareness. Although neither the OECD Model Convention nor the Commentaries is a legally binding instrument, they still carry significant weight in the

⁵² Peter J. Wattel, Otto Marres, *"The Legal Status of the OECD Commentary and Static or Ambulatory Interpretation of Tax Treaties"*, 2003, p.228

interpretation of double taxation agreements. Their range of application is very broad and is used by numerous non OECD member states.

4. INTERPRETATION OF THE BENEFICIAL OWNER CONCEPT IN SCANDINAVIAN COUNTRIES

A natural question arises as to how the term is being interpreted in countries unfamiliar with the concept of beneficial ownership? What kind of approaches are there to determine beneficial owner status? Is there any specific approach developed and applied in civil law states? And in the end, does it matter that the term originates from the common law tradition?

Consequently, in order to provide answers to these questions it appears necessary to examine judicial practices in interpreting the term. The starting point of the research in this paper is two Scandinavian countries – Denmark and Sweden.

4.1. Denmark

In recent years there has been a widespread trend on behalf of foreign corporate investors and private equity funds to acquire Danish companies. This development urged Danish tax authorities to provide a thorough analysis of structuring strategies and income flows resulting from such transactions which ultimately brought them to deal with the issue of beneficial ownership.⁵³ In 2007-2008 the tax authorities focused their efforts on collecting withholding tax on dividends and interests distributed by Danish companies to their foreign parent companies.⁵⁴ The Danish tax authorities have initiated a number of cases claiming that nonresident holding companies situated either in the EU or in a country that has concluded a double taxation agreement with Denmark do not qualify for beneficial owner status and thus payments in form of dividends, interests and royalties from Danish companies to foreign recipients were subject to Danish withholding tax. The Danish equivalent for the term beneficial owner and the wording used in double tax treaties is “*retmæssige ejer*”, which means rightful/lawful owner.⁵⁵

4.1.2. Relevant domestic provisions

According to the relevant provisions in the Danish domestic tax law, a withholding tax of 27% (28% until January the 1st 2012)⁵⁶ is levied on dividend payments to both Danish and foreign corporate shareholders. However, a direct shareholding of at least 10% of the nominal share capital and group shares grants participation exemption with regard to subsidiary shares. Normally, nonresident companies are subject to withholding tax on dividends, but dividend payments from subsidiary shares or group shares to foreign corporate shareholders can be exempt from the Danish withholding tax when Parent-Subsidiary Directive or a tax treaty can be invoked. It can be mentioned here that the PSD does not contain any beneficial ownership

⁵³ Jens Wittendorff, “*Danish Tax Tribunal Rules in Favor of Taxpayer in Beneficial Ownership Case*”, 2010, p.4

⁵⁴ Anne Becker-Christensen, Bodil Tolstrup, Nikolaj Bjørnholm, “*The Year in Review*”, 2011, p.879

⁵⁵ J. David B. Oliver, Jerome B. Libin, Stef van Weeghel, Charl du Toit, “*Beneficial Ownership*”, 2000, p. 311

⁵⁶ Kildeskatteloven Art.65, 65A, http://www.skm.dk/tal_statistik/satser_og_beloeb/346.html, (accessed May 21st, 14:00 pm)

provisions, but a general anti-abuse provision stating that the Directive benefits may be denied on the basis of domestic or agreement-based measures.⁵⁷

As a rule, no withholding tax is imposed on interest payments. As a matter of exception though, interest payments directed to a foreign lender are charged with 25% withholding tax.⁵⁸ Nevertheless, in cases when the Interest and Royalties Directive is applicable or when a tax treaty convention with a corresponding state is concluded, such interest payments can be exempt from Danish withholding tax. The Interest and Royalties Directive incorporate a beneficial ownership provision, according to which a taxpayer must be treated as the beneficial owner if the interest payments are granted for his own benefit and not “*as an intermediary, such as an agent, trustee or authorized signatory, for some other person*”.⁵⁹ Tolstrup and Bjørnholm emphasize that the definition provided by the Directive is separate from that presented in the OECD Model and its Commentaries. This circumstance is explained by the fact that the explanatory works to the Commission’s proposal to the Directive in question do not refer to the OECD Model or any tax treaties⁶⁰ but nevertheless, the explanation is very similar to the interpretation provided by the Commentaries.

Thus both with dividend and interests payments the recipient of the income is entitled to treaty protection or to the directive exemption only when he is a beneficial owner of the income in question.⁶¹

Danish tax law does not contain any general anti-avoidance provisions, but there is plenty of specific anti-avoidance provisions regulating different spheres of application. The substance-over-form principle (“*realitetsgrundsætningen*” in Danish) is applied to reveal cases of fictitious and artificial character where the main purpose of the transaction is to attain tax advantage. The scope of application of substance-over-form doctrine is rather limited to instances where there is an obvious conflict between form and substance.⁶²

According to IFA report of 2010, specific treaty provisions that would invoke domestic anti-avoidance provisions are not common in Denmark’s treaties. Meanwhile most of Denmark’s tax treaties contain beneficial ownership clauses regarding articles 10, 11 and 12 on dividends, interest and royalties. The Report mentions the fact that under the Danish Minister of Taxation initiative an attempt was made to restrict treaty protections excluding from the beneficial ownership concept conduit companies.⁶³

⁵⁷ Bodil Tolstrup, Nikolaj Bjørnholm, “*Beneficial Ownership – Whithholding Tax on Dividends and Intrerest from the Danish Perspective*”, 2011, p.503-504

⁵⁸ Kildeskatteloven Art. 65D, http://www.skm.dk/tal_statistik/satser_og_beloeb/346.html, (accessed May 21st, 14:00 pm)

⁵⁹ Bodil Tolstrup, Nikolaj Bjørnholm, “*Beneficial Ownership – Whithholding Tax on Dividends and Intrerest from the Danish Perspective*”, 2011, p.503, 505

⁶⁰ Bodil Tolstrup, Nikolaj Bjørnholm, “*Beneficial Ownership – Whithholding Tax on Dividends and Intrerest from the Danish Perspective*”, 2011, p.505

⁶¹ Jens Wittendorff, “*Danish Tax Tribunal Rules in Favor of Taxpayer in Beneficial Ownership Case*”, 2010, p.2

⁶² Tax Treaties and Tax Avoidance: Application of Anti-Avoidance Provisions, IFA Report 2010, Volume 95A, p.263, http://online.ibfd.org.ludwig.lub.lu.se/kbase/#topic=doc&url=/highlight/data/ifacahier/ifacahier_2010/volume1/denmark.pdf&q=Denmark%20beneficial%20ownership+denmarks+ownerships&hlm=altering&WT.z_nav=search (accessed April 2nd, 13:10 pm)

⁶³ Tax Treaties and Tax Avoidance: Application of Anti-Avoidance Provisions, IFA Report 2010, Volume 95A, p.261-262

As most of the Danish tax treaties are based on the OECD Model it is a common practice that in the absence of a treaty definition a term should be given the meaning it has in the source state. Since the beneficial owner term is not defined in Danish law this reference leads to a dead end. Danish tax authorities, on the other hand, refer to the OECD Commentary, including the amended Commentary, as a holder of the meaning of the beneficial owner concept in the Danish tax treaties.⁶⁴ In assessing whether an intermediary parent company situated in another Member State can be considered the beneficial owner of the income, the Danish tax authorities pay attention to following features: position of an intermediary company concerning its ability to dispose of the received income in an independent and free manner, genuineness of the activities run by an intermediary company, meaning that a mail box company cannot be a beneficial owner. Tolstrup and Bjørnholm express the view that the tax authorities attach even more importance to the itinerary of the fund flows and determining whether the income is channeled through the initial recipient. They admit that the tax authorities have taken the position to interpret the term widely, implying that such interpretation is inconsistent with the Commentary. The authors believe that the wording “*very narrow powers...in relation to the income concerned*” should be given more attention and that specific restrictions must be present before it is possible to disqualify an intermediary holding company as the beneficial owner.⁶⁵

Thus in order to be entitled for treaty exemption a taxpayer must qualify to be the beneficial owner of the distributed income. Now it is time to tackle the issue of beneficial ownership from a practical view-point and present Danish cases dealing with this matter.

4.1.3. Danish case law

SKM 2010.268.LSR

On 16 April 2010 the Danish Tax Tribunal published its first decision on a case that introduces a series of cases dealing with the beneficial ownership concept in respect to dividends, interests and royalties paid by Danish companies to nonresident holding companies.

The facts of the case can be summarized as follows: for the purpose of acquiring a Danish listed company a consortium of foreign private equity funds and other investors set up a horizontal acquisition structure (see Diagram 1 in the Appendix) where H, a Luxembourg Sàrl, was the owner of H1, another Luxembourg Sàrl. H1 in its turn owned the Danish company S, which held the Danish company D that finally acquired the Danish target company A. As to the fund flows, a dividend distribution was made from S to H1 followed by two loans from H1 to S. S used the borrowed amount to subscribe for share capital in D, while D purchased shares in A from third parties.⁶⁶ Nearly all transactions, apart from the final acquisition, were performed on the same day and involved the same amount of money. The final purchase of A by D concerned a higher amount and was partly financed by a loan from a third party.⁶⁷ The Luxembourg companies H and H1 did not have any employees, their management boards were identical and everyday

⁶⁴ Bodil Tolstrup, Nikolaj Bjørnholm, “*Beneficial Ownership – Whitholding Tax on Dividends and Intrerest from the Danish Perspective*”, 2011, p.504

⁶⁵ Bodil Tolstrup, Nikolaj Bjørnholm, “*Beneficial Ownership – Whitholding Tax on Dividends and Intrerest from the Danish Perspective*”, 2011, p.503

⁶⁶ Arne Riis, Nikolaj Bjørnholm, “*First Danish Ruling of Beneficial Ownership*”, 2010, p.1

⁶⁷ Jens Wittendorff, “*Danish Tax Tribunal Rules in Favor of Taxpayer in Beneficial Ownership Case*”, 2010, p.3

management services were provided by an administration company established by the private equity funds.⁶⁸

The tax authorities' argumentation was based on the reasoning that H1 cannot be a beneficial owner of the dividends as it is a conduit company that does not perform any real activities and does not possess any power to dispose of the income. The taxpayer did not provide any proof that the decision to lend the dividends proceeds to S was not predetermined in advance by the owner of H1 and the only purpose of inserting H1 was to take advantage of treaty shopping, thus the withholding tax on outbound dividends must be charged.

In reaching its decision the Eastern High Court (the second highest court in Denmark with the Supreme Court as the final court of appeal)⁶⁹ considered that the beneficial owner concept must be interpreted in an international meaning and used the OECD Model and the Commentaries as guidelines for interpreting the term. The High Court points out that the revised version of the Commentaries from 2003 brings clarification of and not a change in the interpretation of Article 10, thus justifying the use of the amended Commentaries which did not exist at the time of Denmark-Luxembourg tax treaty negotiations. According to the High Court the crucial factor in this case which determined the outcome was the fact that the dividends received by H1 were never channeled further to its parent H. Consequently in this situation H1 cannot be regarded as a conduit company and must be acknowledged as the beneficial owner of the income.

The Court used substance-over-form approach and ruled in favour of the taxpayer.⁷⁰ The Danish Ministry of Taxation accepted the decision of the Eastern High Court and decided not to appeal it in the Supreme Court.⁷¹

SKM 2010.729.LSR

On November 17 2010 a second decision on a beneficial ownership case was published by the Tax Tribunal. Just as the previous case the present one was also ruled in favour of the taxpayer. The case concerned a withholding tax on an interest payment made by a Danish company to its parent company situated in Luxembourg and involved the same companies as in case SKM 2010.268.LSR. The structure was therefore identical to the previous one (see Diagram 1 in the Appendix). A Danish holding company which was acquired by a number of private equity funds and other investors, distributed dividends to its parent company and received in return two loans – a convertible and an ordinary one, which corresponded to the amount of the dividend proceedings. At the end of the year in which these loans were lent the convertible loan was converted to shares in the Danish company. The following income year the same procedure was repeated with the other loan.⁷²

⁶⁸ Arne Riis, Nikolaj Bjørnholm, “*First Danish Ruling of Beneficial Ownership*”, European Taxaiton, 2010, p.2

⁶⁹ Lasse Esbjerg Christensen, Jef Nymand Hounsgaard, “*Danish Court Decided First Beneficial Ownership Case*”, 2011, p.1

⁷⁰ Arne Riis, Nikolaj Bjørnholm, “*First Danish Ruling of Beneficial Ownership*”, 2010, p.2

⁷¹ Lasse Esbjerg Christensen, Jef Nymand Hounsgaard, “*Danish Tax Ministry Will Not Take Beneficial Ownership Case to Supreme Court*”, 2012, p.1

⁷² Katja Joo Dyppe,

http://online.ibfd.org.ludwig.lub.lu.se/kbase/#topic=doc&url=/highlight/collections/ttcls/html/cl_dk_2009-11-01_1-summary.html&q=Case%2009-01483%20/%20SKM%20No.%202010.729+cases&WT.z_nav=search (accessed April 16th, 17:10 pm)

The Danish tax authorities claimed that according to the Danish domestic law a withholding tax must be charged on the interest payments from a controlled-debt to a non-resident company. A controlled-debt is a debt to companies that directly or indirectly possess more than 50% shares or voting powers in the debtor company.⁷³ The taxpayer claimed that the Luxembourg company was the beneficial owner of the interest flows thus the participation exemption regime was to be applied, resulting in zero-rated withholding tax.

The reasoning of the National Tax Tribunal's decision was grounded on the dynamic interpretation of the concept beneficial owner presented in the OECD Commentaries of 2003 with no references made to the Danish domestic law. The strongest argument was that the Luxembourg company did not transfer the interests to its direct and indirect shareholders, but reinvested the amount in the shares of the Danish company. Thus importance was attached to the evaluation of the practical powers of the holding company, which correspond to the spirit of the OECD Commentary. The National Tax Tribunal found the Luxembourg holding company to qualify for the beneficial owner status thereby overruling the decision of the tax authorities.⁷⁴

SKM 2011.57.LSR

A third case in a series of cases dealing with beneficial ownership was the first one to be lost by the taxpayer. The decision was released on January 27 2011. The factual landscape of this case is quite different from the previous two cases; it involves a Jersey parent company that in 2002 purchased a Danish group. In 2003 an internal reorganization was put into action whereby the ownership of the Danish group was shifted to two Swedish holding companies (see Diagram 2 in the Appendix). As part of the reorganization process a debt push-down into the Danish group took place. Similar to SKM 2010.268.LRS the two Swedish holding companies performed no activities other than the holding of the shares, they had neither employees nor premises and were managed by an independent management firm which received payment for its services from the Jersey parent company.⁷⁵ On the day of acquisition of the first Swedish holding company, the Jersey company granted it a loan. At the same time the second Swedish holding company lent a loan to the Danish subsidiary. Both loans had the same face value and interest rates. Financial upstream flow can be divided into three segments: 1. interest payments from the Danish company to the second holding company in Sweden, 2. tax-deductible group contribution between the Swedish companies and 3. interest payments from the first Swedish holding company to the Jersey parent company.⁷⁶

The Danish tax authorities argued that a withholding tax must be levied on the interests paid by the Danish company to the Swedish holding company. They assessed that neither of the Swedish

⁷³ Katja Joo Dyppel, http://online.ibfd.org.ludwig.lub.lu.se/kbase/#topic=doc&url=/highlight/collections/ttcls/html/cl_dk_2009-11-01_1-summary.html&q=Case%2009-01483%20/%20SKM%20No.%202010.729+cases&WT.z_nav=search (accessed April 16th, 17:10 pm)

⁷⁴ Jens Wittendorff, "Taxpayer Prevails in Second Beneficial Ownership Case", 2010, p.558 <http://services.taxanalysts.com.ludwig.lub.lu.se/taxbase/tnimag.nsf/96f174fb137caf5185256aae0076a5e7/392c617576d63353852577e3000cb0db?OpenDocument> (accessed April 16th, 18:22 pm)

⁷⁵ Jens Wittendorff, "Danish Taxpayer Loses Beneficial Ownership Case", 2011, p.410

⁷⁶ Katja Joo Dyppel, http://online.ibfd.org.ludwig.lub.lu.se/kbase/#topic=doc&url=/highlight/collections/ttcls/html/cl_dk_2010-12-22_1-summary.html&q=Case%2009-00064%20/%20SKM%20No.%202011.57+cases&WT.z_nav=search (accessed April 16th, 19:20 pm)

companies was the beneficial owner of the transferred income, but rather conduit companies, and that the whole structure was arranged with the sole purpose of circumventing the Danish withholding tax on interest.⁷⁷ According to the taxpayer the second Swedish company should be regarded as the beneficial owner of the interest under Article 11(1) of the Nordic Convention and under the Interest and Royalties Directive, therefore the interest payment should be free from Danish tax.

The Tribunal motivated its decision referring to the OECD Commentaries (Article 11, §§8, 8.1), the Conduit Companies Report, the Interest and Royalty Directive (Article 11) and the Nordic tax treaty (Article 11).⁷⁸ It was established that the Swedish companies were mere conduit companies, as they had very narrow powers in respect to the received income and were acting on behalf of the third party channeling the income to the Jersey company – the ultimate beneficiary. Despite the fact that the Nordic tax treaty was concluded in 1996 i.e. before the release of the Commentary in 2003, the Tribunal advocated for a dynamic interpretation approach and took into consideration both the legal and the economic ownership aspects.⁷⁹ It stated that the term “*must be interpreted in the interest of a harmonized interpretation of the term. The assessment must go beyond the legal ownership and also include other assessments, e.g. in relation to financial ownership, etc*”.⁸⁰ The National Tax Tribunal held that the Swedish holding companies could not be considered beneficial owner of the income, thus the outgoing interest payments were subject to the withholding tax according to the relevant provisions of the national legislation.

SKM 2011.485.LSR

The facts of this case are similar to those presented in the case SKM 2011.57.LSR (see Diagram 3 in the Appendix). The parent company H4 Ltd was situated on the Cayman Islands and until the end of 2004 was the direct owner of the top Danish company H6 ApS which was the parent company of the Danish H-group. During the restructuring in 2004 three holding companies were inserted between H4 Ltd and H6 ApS – two Swedish companies H3 AB and H2 AB and one Danish company H1 ApS, which became the new top parent company of the Danish part of the H-group. As part of the restructuring the Cayman company granted loans to the Swedish H3. In the same manner H2 granted two loans to the Danish H1 identical in face value and terms. The upstream cash flow to the Cayman company took form of interest payments from H1 to H2, tax-free group contribution from H2 to H3 and ultimately interest payments from H3 to H4.⁸¹

The Danish tax authorities took the position that the outbound interest payments must be subject to a withholding tax, because the Swedish holding company H2 does not qualify to be the beneficial owner of the interests received. The National Tax Tribunal held in favour of the tax authorities thus the conclusion was the same. The reasoning however is slightly different. The Tribunal argued that “*The term “beneficial owner” is a common law term that does not exist as an independent term in Danish law. There is also no definition of beneficial owner in the Nordic tax treaty. The term beneficial ownership cannot be assumed to be coincident with the Danish tax law term “rette indkomstmodtager”, see the Nordic Tax Treaty art. 3, paragraph. 2,*

⁷⁷ Jens Wittendorff, “Danish Taxpayer Loses Beneficial Ownership Case”, 2011, p.410

⁷⁸ Arne Riis, “Danish Tax Authorities Prevail in Recent Beneficial Ownership Decision”, 2011, p.186-187

⁷⁹ Jens Wittendorff, “Danish Taxpayer Loses Beneficial Ownership Case”, 2011, p.411

⁸⁰ Thomas Booker, “Recent Developments Regarding Beneficial Ownership in Denmark”, 2012, p.1

⁸¹ Thomas Booker, “Recent Developments Regarding Beneficial Ownership in Denmark”, 2012, p.2

according to which a domestic legal understanding of a term applies when it is established that the term cannot be determined from the context, in which the term occurs.”⁸² The Tribunal made reference to paragraph 12 and 12.1 of the 2003 OECD Commentary and the Interest and Royalty Directive (2003/29). Taken into consideration circumstances that none of the newly established holding companies performed any other activities than holding activities, the only income they could raise was through the holding activities, meaning that they were dependent on each other in fulfilling their obligations as debtors in regard to the Cayman company. Therefore, H2 had no real powers to dispose of the received income, but was expected to channel the income as a conduit company.⁸³

H2 was found not to be the beneficial owner of the interest payments thus the Danish participation exemption regime could not be applied either under the Nordic Treaty or under the Directive.

SKM 2012.26.LSR

A most recent case dealing with beneficial ownership was decided in favour of the taxpayer with a consequence that the dividend proceeds amounting to DKK 658 million were distributed from Denmark tax-free to a Cyprus-based holding company.⁸⁴

The case concerned a Danish subsidiary company (DK Co) which was held by a listed company resident in the US via holding company in Bermuda (B Hold Co). In 2005 B Hold Co set up a subsidiary in Cyprus (C Hold Co) that acquired all the shares in DK Co. Shortly after this restructuring in 2005 DK Co distributed dividends to C Hold Co which were used by the latter to repay a loan to B Hold Co. The loan was lifted in order to purchase the shares in DK Co⁸⁵ (back-to-back structure). In 2006 a similar payment took place: an additional dividend distribution from DK Co to C Hold Co and further similar amounts from C Hold Co to B Hold Co (see Diagram 4 in the Appendix). The Danish tax authorities imposed a withholding requirement on the Danish company, because according to their assessment the Cyprus company could not be regarded the beneficial owner of the income in question.

The Danish Tax Tribunal supported the view of the tax authorities that the Cyprus company did not qualify to the beneficial owner status as it was void of substance, meaning that it was a pure conduit company in the sense of Article 10, §12.1 of the 2001 OECD Commentaries, thus the Cyprus-Denmark treaty exemption could not be invoked. However, the Tribunal admitted that access to the Directive exemptions under the Parent-Subsidiary Directive (90/435/EEC) could not be denied. According to Article 5 of the Directive, dividends paid to non-resident EU company are exempt from a withholding tax on dividends if the non-resident holds at least 10% of the capital in the resident subsidiary and it has been an owner of such a holding for at least

⁸² Thomas Booker, “Recent Developments Regarding Beneficial Ownership in Denmark”, 2012, p.3

⁸³ Katja Joo Dyppel,

http://online.ibfd.org.ludwig.lub.lu.se/kbase/#topic=doc&url=/highlight/collections/ttcls/html/cl_dk_2011-05-25_1-summary.html&q=Case%2009-03189%20/%20SKM%20No.%202011.485+cases&WT.z_nav=search (accessed April 17th, 10:35 am)

⁸⁴ William Sejr-Sørensen, Poul Erik Lytken, Arne Riis, “Danish Tax Authorities Lose Another Dividend Case”, 2012, p.255

⁸⁵ Katja Joo Dyppel,

http://online.ibfd.org.ludwig.lub.lu.se/kbase/#topic=doc&url=/highlight/collections/ttcls/html/cl_dk_2011-12-16_1-summary.html&q=Case%2010-02772%20/%20SKM%20No.%202012.26+cases&WT.z_nav=search (accessed April 17th, 11:26 am)

one year. Article 1(2) specifies that in case of abuse the outcome may be different. Due to the fact that the Danish law implementing the Directive does not include any special anti-avoidance rules in respect with beneficial ownership, the general anti-avoidance rules (substance-over-form and the assignment of income) apply.⁸⁶

The Tax Tribunal observed that the conditions for the substance-over-form and the assignment income doctrines were not met since the Cyprus company was legally established according to the domestic company law and was a functioning company in Cyprus. It owned the shares in the Danish company and therefore was the legal recipient of the dividends. Given the fact that the Directive does not contain any provisions on beneficial ownership this was the only decision to be reached in accord with the Directive. On these grounds the Tribunal stated that the Cyprus company is entitled to the Directive protection in form of exemption from the withholding requirement, even though the company was not the beneficial owner of the dividends.⁸⁷

Danish tax experts believe that the case at issue is most likely to be appealed in the court on the matter of Denmark's implementation of the Parent-Subsidiary Directive.

4.2. Sweden

Until recently Sweden did not have any thin capitalization rules. The national report from 2008 IFA Congress on "New tendencies in tax treatment of cross-border interest of corporations" presented by Lars Jonsson and Peter Melz highlights that nearly all interest is deductible for a borrower who is a resident taxpayer in Sweden. The only exception concerning deductibility is a situation where interest is used to generate income that is tax exempt in Sweden.⁸⁸ The right to deduct interest expenses is granted irrespective of where the lender is being a resident or how the received income is treated in the recipient state. Interest payments to non-residents are not subject to any withholding taxes in Sweden. Moreover, Sweden has refrained from levying WHT on interest in most of its double tax treaties, which is rather "unconventional" as WHT would not lead to an increased taxation of the interest but to a splitting of taxing powers between states.⁸⁹ Thus the situation in Sweden just four years ago concerning taxation of cross-border interest payments can be summarized as following: the absence of thin cap rules, nearly full deduction of interest expenses, the absence of WHT on interest payments and full participation exemption on dividends and capital gains deriving from business-related shares ("näringsbetingade andelar").

⁸⁶ Katja Joo Dyppel, http://online.ibfd.org.ludwig.lub.lu.se/kbase/#topic=doc&url=/highlight/collections/ttcls/html/cl_dk_2011-12-16_1-summary.html&q=Case%2010-02772%20/%20SKM%20No.%202012.26+cases&WT.z_nav=search (accessed April 17th, 11:26 am)

⁸⁷ William Sejr-Sørensen, Poul Erik Lytken, Arne Riis, "Danish Tax Authorities Lose Another Dividend Case", 2012, p.255

⁸⁸ IFA Cahiers 2008 – Volume 93B, New tendencies in tax treatment of cross-border interest of corporations, Sweden National Report, p.703,705
http://online.ibfd.org.ludwig.lub.lu.se/kbase/#topic=doc&url=/highlight/data/ifacahier/ifacahier_2008/volume2/sweden.pdf&q='New tendencies in tax treatment of cross-border interest of corporations'+corporation+interests+taxes+tendency+treatments&hlm=altering&WT.z_nav=search&title=Sweden (accessed April 30th, 13:20 pm)

⁸⁹ IFA Cahiers 2008 – Volume 93B, New tendencies in tax treatment of cross-border interest of corporations, Sweden National Report, p.710

These conditions as well as an extensive double tax treaty network including more than 75 jurisdictions⁹⁰ were quite advantageous for foreign investors and facilitated numerous take-overs of Swedish companies making Sweden as a “*veritable “swing-door” for international holding company investments*”.⁹¹

Due to the growing amount of aggressive tax planning schemes that have been revealed by the Swedish tax authorities involving the possibility to deduct interest expenses certain limitations on the right to deduct were introduced with the aim to combat that form of tax planning known as “*interest spinners*” (“*räntesnurror*”) and prevent serious tax base erosion.⁹² The main components of interest spinners structures comprise the right to deduct interest payments in Sweden while the corresponding interest income is subject to very low taxation if any taxation at all at the level of the receiving party. A company in Sweden takes a loan from a company within the same “*associated group of companies*” (“*intressegemenskap*”) in order to finance the purchase of shares in another company constituting the same group. It then has the right to deduct interest expenses arising from the loan and in this way reduce its taxable amount. Another important aspect in this context is that capital gains on business-related shares are tax-free, due to the amendment that has been introduced in 2003.⁹³ The changes in the legislation were necessary as the general anti-avoidance tax law (“*skatteflyktslagen*”1995:575) could not be applicable to interest spinners structures. The restrictions on the right to deduct address not only internal loans but external ones as well, for example a loan from a bank to finance a purchase of shares within the associated group of companies or if a company has a claim debt on a bank or on a company within the same associated group as the bank.

In March 2012 the government suggested introduction of further restrictions on the right to deduct interest expenses within the associated group of companies. New limitations should cover interest expenses deriving from all kind of loans within the group and the 10 percent rule should be complemented by a “*general reverse valve*” meaning that if the tax authorities can make a plausible assessment that a loan is lifted by the associated group with the purpose of achieving tax benefits the right to deduct should be rejected. The government believes that the suggested measures would be able to strengthen the public finance sector by increasing volume of corporate taxes. This development facilitates lower corporate tax rate.⁹⁴ According to the professor Sven-Olof Lodin – a leading expert on corporate taxes in Sweden – the corporate tax rate can in exchange be lowered to 15 percent.⁹⁵

Despite the fact that Sweden is an attractive country in terms of holding structures the number of cases dealing with the beneficial owner concept is rather limited. This can be explained by the fact that the rules restricting the right to deduct interest expenses are quite new and the

⁹⁰ Carl Pihlgren, “*A Break with Tradition*”, 2007, p.62

<http://web.ebscohost.com.ludwig.lub.lu.se/ehost/detail?vid=3&hid=110&sid=270f40c9-3b10-437f-ae44-c14bd7e7741d%40sessionmgr112&bdata=JnNpdGU9ZWhvc3QtbGl2ZQ%3d%3d#db=bth&AN=25648886> (accessed April 30th, 15:05 pm)

⁹¹ Peter Sundgren, Taxation in Sweden of cross-border interest payments of corporations, 2008, <http://www.skatter.se/?q=node/1341> (accessed April 30th, 13:10 pm)

⁹² Regeringens proposition 2008/09:65, Sänkt bolagsskatt och vissa andra skatteåtgärder för företag, p.1 <http://www.riksdagen.se/sv/Dokument-Lagar/Forslag/Propositioner-och-skrivelser/Sankt-bolagsskatt-och-vissa-an-GW0365/> (accessed April 30th, 15:10 pm)

⁹³ Regeringens proposition 2008/09:65, Sänkt bolagsskatt och vissa andra skatteåtgärder för företag, p.30

⁹⁴ Effektivare ränteavdragsbegränsningar, Finansdepartementet, Skatte- och tullavdelningen, March 2012, p.1

⁹⁵ http://svtplay.se/v/2789572/borg_positiv_till_sankt_bolagsskatt (accessed April 30th, 22:50 pm)

emergence of cases concerning the interpretation of the beneficial owner concept is just the matter of time.

4.2.3. Relevant domestic provisions

According to the general rule of the Swedish Income Tax Act (Inkomstskattelagen (1999:1229), IL) chapter 16, which covers issues of expenses deductibility for business activities, § 1 specifies that interest costs can be deducted from a taxable amount. However, a number of limitations on the right to deduct are presented in chapter 24 10 a-e §§ ITA. In conformity with §10a these restrictions concern companies forming the same associated group of companies. Such associated group is considered to exist when one of the companies, directly or indirectly via ownership or through other means, obtains significant influence over another company or when companies are under a common management.

A general rule in §10 b conveys that from January the 1st 2009 a company constituting a part of associated companies may not deduct interest costs deriving from a debt to another company - being part of the group - to an extent that the loan is used to finance stock of shares purchase in another company constituting the same group. An exception to the general rule is provided by §10 d. The two provisions of the first part of §10 d are generally known as 10 percent-rule and the valve (*“ventilen”*). According to the 10 percent-rule interest costs may be deductible if the expense corresponds to the income that is subject to tax of at least 10 percent in a state where the company receiving this income is resident and **has actually the right to the income in question**, provided that the company could only have this income. The second provision stipulates that the purchase and the loan that triggers interest payments must be mainly business-motivated. The two provisions are not cumulative and the exception can be invoked when requirements in one of the provisions are satisfied.

The wording *“has actually right to the income”* is not specified in the law, but the necessary clarification can be found in the preparatory works. The Swedish Lawyers' Association brings attention to the fact that the term beneficial owner lacks a commonly accepted meaning. The Government suggests that the expression *“has actually right to”* and beneficial owner should be equivalent to each other. The reason for including this expression was to prevent channeling of income to low tax countries where the actual owner of the income is resident.⁹⁶

Dividend payments to non-residents are normally subject to a WHT of 30 percent. However, dividends and capital gains on shares that are business-related are normally exempt from taxation. Provisions in chapter 24 §§13-16 ITA highlight conditions that must be met in order for shares to be classified as business-related. §14 specifies that unlisted shares are always business-related, that the listed shares qualify to be business-related if the aggregate voting rights of the owner constitute 10 percent or more in the other company. §20 states that shares in listed companies must have been held for at least one year from the day they became business-related before tax exemption can be applied. Business-related conditions concern not only Swedish but also foreign companies, meaning that if capital gains on foreign business-related shares are satisfied tax exemption covers them as well.⁹⁷ §16 provide that foreign companies must qualify for the holding requirement of 10 percent and must be equivalent to a Swedish limited liability

⁹⁶ Regeringens proposition 2008/09:65, Sänkt bolagsskatt och vissa andra skatteåtgärder för företag, p.61

⁹⁷ Carl Pihlgren, *“A Break with Tradition”*, 2007, p.63

company to be considered business-related. Chapter 25a §§5, 6 conveys that capital gains deriving from business-related shares are tax-free and if shares are listed the time requirement of a holding period of one year must be met.

According to the PSD 90/435/EEG no WHT can be levied by a source state on dividends paid to companies within the EU that satisfy the holding requirement of 10 percent or more of the distributing company. A minimum holding period is not required.⁹⁸

The Interest and Royalty Directive (2003/49/EG) Chapter 6a, §4 ITA clarifies that outbound royalty payments are exempt from WHT provided that the beneficial owner of the royalty is an associated company in another Member State (“*tar emot ersättning för egen del*”). The beneficial owner requirement was implemented in order to guarantee that only the beneficial owner of the payment is entitled to tax exemption.⁹⁹ The preparatory work clarifies that the wording “*for own benefit*” does not apply intermediaries, such as agents, trustees or authorized signatories acting on somebody else’s account.¹⁰⁰ It can be assumed that this interpretation is based on the explanatory works to the Commission’s proposal to the Directive regarding the concept of beneficial owner.

Sweden has concluded double tax treaties with all other EU Member States and as a rule, all of them follow the OECD Model Convention.¹⁰¹ The implication of this statement is that Sweden accepts the interpretation of the term beneficial owner as it is presented in the Commentaries due to the absence of an original beneficial owner concept in the domestic legislation. The relevance of the OECD Commentaries has been recognized by the Swedish Supreme Administrative Court so that the Commentary available at the time the treaty was signed can serve as guidelines in the treaty interpretation process. The role of the later amendments in the Commentary is however debatable.¹⁰²

4.2.4. Swedish case law

CASE NR 7050-07

In this case the term beneficial owner appears in a totally different context and acquires another interpretation. However, the argumentation presented by the tax authorities and the courts is quite interesting and serves as a good example of how the term beneficial owner can be interpreted and understood. The case reached the Swedish Administrative Court of Appeals in 2008 after the decision of the County Administrative Court had been appealed by the taxpayer Mr. O.

⁹⁸ Carl Pihlgren, “*A Break with Tradition*”, 2007, p.63

⁹⁹ Country Survey – Sweden, Implementation of the Directive, IBFD, December 2005, p.524

¹⁰⁰ Regeringens proposition 2003/04:126, Undantag från skattskyldighet för vissa ersättningar i form av royalty and avgift, p.19

¹⁰¹ Country Survey – Sweden, Implementation of the Directive, IBFD, December 2005, p.514-515

¹⁰² Anders Benktsson, Anna Johansson, IFA Cahiers 2010 – Volume 95A, Tax Treaties and Tax Avoidance: Application of Anti-Avoidance Provisions, National Report, p.759

http://online.ibfd.org.ludwig.lub.lu.se/kbase/#topic=doc&url=/highlight/data/ifacahier/ifacahier_2010/volume1/swe

[den.pdf&q=legal status of the OECD](http://online.ibfd.org.ludwig.lub.lu.se/kbase/#topic=doc&url=/highlight/data/ifacahier/ifacahier_2010/volume1/swe)
[Commentary+commentaries+statuses&hlm=altering&WT.z_nav=search&title=Sweden](http://online.ibfd.org.ludwig.lub.lu.se/kbase/#topic=doc&url=/highlight/data/ifacahier/ifacahier_2010/volume1/swe) (accessed April 30th, 19:30 pm)

The controversy in the present case lies in the ambiguity about the ownership status of Mr. O towards a foreign CFC-company Cactus Ltd situated in Jersey, Channel Islands. The fact that the company is a resident of an offshore jurisdiction obstructed the ability of the Swedish tax authorities to get access to the necessary information about the ownership situation in order to make an accurate assessment of how Mr. O should be taxed.

The registered capital of Cactus Ltd is owned by Herald Trust Ltd and Herald Management Services Ltd in conformity with a nominee-arrangement according to which Mr. O is a beneficial owner of one share; the rest of the shares are owned by some other legal person the identity of which remains unknown. The tax authorities took a position that Mr. O is to be considered a rightful, proper owner of Cactus Ltd and shall be taxed according to the domestic CFC-rules implying that the company's profits shall be taxed at the level of the owner of such company.

While the circumstances and the available facts of the case clearly show that Mr. O is not a formal owner of Cactus Ltd, the tax authorities claim the Mr. O is still to be regarded a rightful owner (*“den verkliga ägaren”*) and shall be taxed thereafter. The fact that the shares are placed at the nominee – who is a formal owner – indicates that the nominee hold the shares for someone else's benefit who is a beneficial owner. The Country Administrative Court points out that in the Anglo-Saxon tradition it is possible to split ownership into a legal owner and a beneficial owner. It then refers to a definition of beneficial owner given by Black's Law Dictionary, which reads as follows: *“Term applied most commonly to cestui que trust who enjoys ownership of the trust or estate in equity, but not the legal title which remains in trustee or personal representative”*.¹⁰³ The Court concludes that a beneficial owner is thus a person who has a genuine interest in the property without being a formal owner of such property. Moreover, the tax authorities support their argumentation with an official letter from the British Treasury and the Board of Trade in which it is stated that *“...Where the legal owner of a share holds that share under a contractual agreement with and on behalf of, another person, then the legal owner is often referred to as a “nominee shareholder”. The legal owner of a share in a company may therefore not necessarily be the beneficial or equitable (i.e. real) owner of the shares”*.¹⁰⁴ According to the tax authorities this information provides evidence that someone who is a beneficial owner is also a rightful, proper owner of a company. The Administrative Court of Appeals accepted this line of reasoning and taking into consideration that Mr. O refused to reveal the identity of the other beneficial owner of the rest of shares in Cactus Ltd, ruled in favour of the tax authorities.¹⁰⁵

DRN 71-10/D

A most recent advance ruling on behalf of the Swedish Board for Advance Tax Rulings concerned quite a complicated company structure which involved Sweden, United States and the Netherlands (see Diagram 5 in the Appendix).

Y AB situated in Sweden – the head of a large group of companies named Y – had two subsidiaries in the US: company Z and company Å. In 2008 it transferred all the shares in Z to company Å which after it had established two subsidiaries in the same country, passed on the

¹⁰³ Mål nr 7050-07, Dom 2008-11-06, p.2 <https://www5-infotorg-se.ludwig.lub.lu.se:2443/rb/MainServlet?query=quick&text=beneficial+owner+&S%C3%B6k.x=0&S%C3%B6k.y=0#> (accessed May 1st, 14:10 pm)

¹⁰⁴ Mål nr 7050-07, Dom 2008-11-06, p.3

¹⁰⁵ Mål nr 7050-07, Dom 2008-11-06, p.10

entire possession of the shares in these subsidiaries and in Z to its another subsidiary – company X AB – situated in Sweden. Remuneration for the shares was an interest bearing promissory note (loan A).

At the same time in the Netherlands Holding AB – a parent company of the Dutch part of Y – owned the entire stock of shares in N BV which in its turn was a parent company to Ä BV. In 2008 Holding AB transformed part of the shares in N BV into a preferred stock which entailed dividend payments corresponding to the amount of interest payments from loan A. Thereafter the preferred stock of shares was without consideration transferred to Ä BV and the common stock to the American company Å which resulted in 90 percent of N BV being owned by Å and 10 percent by Ä BV. The next step was a claim transfer concerning loan A from Å to Ä BV which it handed over to N BV. A consideration for this transaction was another interest bearing promissory note (loan B). In 2009 Å created a new American company Ö and as a contribution passed on to its newly established subsidiary its right to interest payments regarding loan B. At the same time Å undertook obligations to realize interest payments on behalf of Ä BV if the latter would fail to fulfill its liability in that respect.

As a result of these numerous transactions N BV became creditor with the right to claim interest payments from X AB concerning the loan A; and Ö became creditor towards Ä BV in regard to the loan B. According to the check-box rules that Å applied in respect of its holding in X AB, N BV and Ä BV, the interest payments on loan B would not be subject to taxation in the USA. Meanwhile, N BV and Ä BV constituted a consolidated tax entity in the Netherlands which meant that capital gains in from of interest payments received by N BV from X AB and interest costs from Ä BV to Ö could be settled against each other.¹⁰⁶

In connection with the interest payments on loan A, a question whether X AB has the right to deduct this expense in conformity with chapter 16 §1 and chapter 24 §10d ITA becomes relevant. In reaching its decision the BATR focused on the interpretation of the wording “*has actually the right to the income*”. Formally the 10 percent-rule can be applied in this case as the interest income would be taxed in the Netherlands with a tax rate of 25,5 percent. However, the BATR shared the opinion of the Swedish tax authorities that the whole structure was set up in order to be able the channeling of the income from N BV to Ä BV and ultimately to the American parent company Å. Thus it is company Å that is regarded to actually have the right to the income. Furthermore, the Swedish tax authorities considered the transactions to be void of genuine business-relates motives, but rather tax driven, meaning that even the valve-rule cannot be applied. When interpreting the wording “*has actually the right to the income*” the BATR was guided by the Governments Proposition 2008/09:65 where it is stated that in order to qualify for beneficial owner (the term is regarded to be equivalent to the wording “*has actually the right to the income*”) it is not enough to possess only a formal right to such an income. The income must be received for taxpayer’s own benefit implying that the taxpayer is the proper and legitimate owner of the income in question and must be able to enjoy economic benefits of it. If the income is being channeled through the receiving company to another company within the same interest

¹⁰⁶ Skatterättsnämnden Förhandsbesked 2011-09-15, Inkomstskatt 71-10 D, Räntevdragsförbud inom koncern, p.1-3, [https://www5-infotorg-se.ludwig.lub.lu.se:2443/rb/pdfroot/7110D.pdf#search="owner beneficial"](https://www5-infotorg-se.ludwig.lub.lu.se:2443/rb/pdfroot/7110D.pdf#search=) (accessed April 11th, 16:30 pm)

group, the first receiving entity cannot be regarded as a beneficial owner but rather is a conduit company and thus the 10 percent-rule cannot be invoked.¹⁰⁷

The advance ruling from the BATR was therefore decided in favour of the Swedish tax authorities.

In this respect it is interesting to present a divergent opinion of three board members who pointed out that the expression beneficial owner appears in the OECD Model Treaty and restricts the source state's right to levy taxes on outbound dividends, interest and royalty payments. Referring to the OECD Commentary of 2010 they stated that a taxpayer cannot be regarded as a beneficial owner only if he performs as an intermediary or channels through the income and is not therefore able to enjoy the benefits of possessing such income. The members of the Board pointed out that the Interest and Royalty Directive that was transposed in Sweden in 2004 includes a provision in chapter 6a §4.3 ITA that a receiver of the income in question must acquire it "*for its own benefit*" ("*för egen del*"). Hereafter they conclude that according to the presented facts the Dutch company N BV does not seem to have any obligations to transfer this interest income to Ä BV and ultimately to Å and therefore it must be regarded as a beneficial owner of the income in conformity with chapter 24 §10d ITA and tax exemption of 10 percent-rule should be enforced.¹⁰⁸

4.3. Summary

This chapter presented an overview of the treatment of the concept beneficial owner in two Scandinavian countries – Denmark and Sweden. In recent years Danish tax authorities have initiated a number of cases concerning the interpretation of the term beneficial owner as a reaction to a great activity on behalf of foreign investors and private equity funds in acquiring Danish companies and consequently claiming treaty benefits in form of reduced WHT on interest and dividend payments from the acquired Danish subsidiaries. Sweden, on the other hand, is interesting in terms of new developments in the sphere of interest deductibility opportunities which facilitated aggressive tax schemes known as interest spinners and caused Swedish Treasury substantial monetary damages. Until recently Sweden did not have any thin capitalization rules and together with its extensive tax treaty network, the absence of WHT on interest payments and full participation exemption on dividends and capital gains on business-relates shares was an attractive country for international holding company investments. Thus the choice of the countries was not random.

Relevant domestic provisions were included and explained in order to give the reader necessary information to develop understanding of how the beneficial owner concept is integrated in the national legislations. The transposed Interest and Royalties Directive contain a beneficial owner provision in both countries. The definition provided in the preparatory works in Sweden and the explanatory works to the Commission's proposal to the Directive are very similar stating that beneficial owner does not include intermediaries, such as agents, trustees or authorized signatories acting for some other person. Thus in order to qualify for directive exemption the beneficial owner requirement must be met. Tax treaty exemptions, such as reduced WHT on

¹⁰⁷ Regeringens proposition 2008/09:65, Sänkt bolagsskatt och vissa andra skatteåtgärder för företag, p.85-86

¹⁰⁸ Skatterättsnämnden Förhandsbesked 2011-09-15, Inkomstskatt 71-10 D, Ränteavdragsförbud inom koncern, p.8-9

outgoing dividends or the right to deduct interest expenses are granted exclusively to beneficial owner of the income in question.

At last a number of cases dealing with beneficial owner issues were presented in order to exemplify how the term is being interpreted by tax authorities and the courts and to discover potential difficulties in understanding and interpreting this notion. The reasoning of the tax authorities and the courts is of great value as it can also indicate on the sources that are being used as guidelines in the interpretation process.

5. ANALYSIS AND CONCLUSIONS

The purpose of this concluding chapter is to present an extensive analysis of the application of the beneficial owner concept in Denmark and in Sweden in light of the material regarding this concept as well as the methods of interpretation outlined in the previous chapters.

Neither Denmark nor Sweden defines the term of beneficial owner in the domestic legislation. Nevertheless, due to the fact that both countries appear to be attractive destinations for holding structures on behalf of the foreign investors, the necessity to define this notion becomes urgent as both countries are concerned with tax base erosion and take an active position in combating tax avoidance and tax evasion and protecting their taxing powers. The concept of beneficial ownership is alien to these civil law states, therefore the interpretation of the term presents a challenge that has to be dealt with by local tax authorities and courts.

There are quite few sources that can provide insight and understanding when it comes to the interpretation process of the term beneficial owner. OECD has been the only organ constantly working on developing and improving guidelines that would clarify the meaning of beneficial ownership. The OECD Model Convention does not provide any definition of this concept, but the Commentaries to Art. 10, 11 and 12 concerning dividends, interests and royalties as well as the Conduit Report can be regarded as valuable documentation and a reliable source of information. The OECD Commentaries have been revised several times – in 2003, 2010, resulting in amended versions. In 2011 a Discussion Draft on further clarifications of the beneficial owner concept in regard to the 2010 Commentaries was published. The Draft was a long awaited and welcomed document and received a lot of constructive criticism on behalf of scholars and tax experts. The Draft made an attempt to launch an independent international definition of the beneficial owner, but this attempt is weakened by the provisions inviting Member States to interpret the term according to their domestic law. The freedom of choice is therefore left to the Member States which is after all understandable as the OECD Commentaries constitute soft law and the relationship between tax treaties and the domestic law is a *“delicate issue and the OECD is reluctant to say that the Commentary displaces domestic laws”*. However, a common, unanimous interpretation based on the OECD Commentary or the Model itself would resolve many controversies and speculations around the meaning of the beneficial owner concept.

The Vienna Convention on the Law of Treaties sets out methods of interpretation of international treaties, including tax treaties. In the first place it calls for textual interpretation, but at the same time emphasizes that the context in which the treaty was concluded as well as the objects and the

purpose of the treaty must be taken into account. The text of the treaty embodies genuine intentions of the parties which are supported by the principle of good faith. Some scholars express the opinion that the OECD Treaty Model can be classified as context mentioned in Article 31 and the Commentaries as supplementary means of interpretation presented in Article 32. Others argue that both the Model and the Commentaries qualify only as supplementary means of interpretation which considerably weakens the position of the Treaty Model as a reliable tool of interpretation. Another important aspect of tax treaty interpretations is whether the contracting parties embrace static or ambulatory approach to interpretation procedure. Arguments advocating for each position are solid and reasonable: the static approach claims that changes after the treaty negotiations cannot be assigned democratic legitimacy as they could not possibly receive parliamentary approval, while the ambulatory approach states that interpretation based on obsolete references is inefficient and can lead to undesirable outcomes.

Despite the unresolved debate on the legal status of the OECD Model and the Commentaries, these documents still possess significant weight and authoritative power when it comes to the interpretation of double taxation agreements and the Commentaries present a useful source of clarification of many undefined terms, including the concept of beneficial ownership.

Both Denmark and Sweden form their tax treaties after the OECD Model. According to a common practice, in absence of treaty definition the term should be given the meaning it has in the source state.

Since the beneficial owner is not defined in the Danish law, Danish tax authorities refer to the OECD Commentary, including the revised version, as a holder of the meaning of the beneficial owner concept in the Danish tax treaties. This position is clearly exemplified by the reasoning of Danish tax authorities when it comes to the case law. In case SKM 2010.268.LSR the Eastern High Court conveyed that the beneficial owner concept must be interpreted in an international meaning and pointed out that the amended version of the Commentaries from 2003 brings clarification and not a change in the understanding the Article 10, justifying the use of the amended Commentaries which did not exist at the time when Denmark and Luxembourg concluded their tax treaty. In case SKM 2011.485.LSR the Tax Tribunal stated that because the beneficial owner term is a common law term which does not exist as an independent notion in the Danish law and because the Nordic tax treaty does not contain any definition of it either, it cannot be assumed that the beneficial owner coincides with the Danish tax law term "*the rightful recipient of the income*". The reason behind this lies apparently in the method of interpretation that has been adopted by the Danish tax authorities and the courts – to grant the concept of beneficial ownership an independent international meaning that can be clarified by the OECD Commentaries. Moreover, Denmark chooses the dynamic approach in the interpretation process of the Commentaries.

In making the assessment whether the receiving company qualifies for the status of the beneficial owner the Danish Tax Tribunal pays attention to the itinerary of the cash flows, practical powers of a holding company concerning the income in question as well as analysis of both the legal and the economic ownership aspects. Danish tax authorities tend to exclude all conduit companies from the beneficial owner concept which is quite a broad approach and goes beyond the scope of the OECD Commentaries. That position is not supported by the National Tax Tribunal which

attaches importance to factual circumstances and makes an analysis based on the substance-over-form doctrine.

Thus the position taken by Denmark in regard with the treatment of the term beneficial owner seems to be quite clear: the beneficial owner concept possesses an autonomous international meaning and the dynamic interpretation of the OECD Commentaries is exercised in order to receive clarifications concerning the meaning of this term.

Sweden, on the other hand, appears to hold a less clear position on this matter. According to the well-established praxis developed by the Swedish courts and tax authorities the OECD Model and its Commentaries play an important role in understanding and interpreting terms and concepts concerning instances of international taxation. This approach was vividly confirmed by the Supreme Administrative Court in case nr 399-403-10 concerning interpretation of the Article 15 of the OECD Model Treaty. There the court stated that apart from the general rules of interpretation outlined in the Vienna Convention a particular importance should be ascribed to the OECD Model Convention and the Commentaries when a certain situation falls within the area of international taxation. The amended version of the Commentaries in regard to Article 15 would even apply to tax treaties concluded before the changes were introduced. This implies nothing else but the dynamic method of interpretation of the OECD Commentaries.

However, when it comes to the Swedish case law discussing the concept of beneficial owner the references made by the tax authorities and the courts do not directly lead to the OECD Model or the Commentaries. First of all it should be noted that the case law concerning this issue is not that extensive as in the neighbouring Denmark. This circumstance may occur surprising taking into account the fact that Sweden is a good country for holding structures. However, a possible explanation to the lack of vast number of cases may lie in the fact that until recently no thin capitalization rules existed in the domestic tax legislation and at the same time quite general provisions on full participation exemption on dividends and capital gains deriving from business-related shares made it possible to avoid conflicts with the local tax authorities. Another particular circumstance is that a number of cases touching upon the problematic with defining a beneficial owner concern CFC-legislation and not international tax treaties. Thus the sources of interpretation are quite different. As it was illustrated in the case nr 7050-07 the County Administrative Court agreed on the tax authorities' motivation to use the British Black Law Dictionary and an official letter from the British Treasury and the Board of Trade as the points of reference regarding the beneficial owner concept.

A most recent case drn 71-10/D, however, that was decided by the Swedish Board for Advance Tax Rulings is more in line with the Danish judicial practice. The reasoning in this case and especially the divergent opinion of three board members (three out of seven) deserve special attention. In reaching its decision the BATR fetched guidelines from the Governments Proposition 2008/09:65 where clarifications and explanations to amendments in the relevant domestic provisions are presented. Although the explanation to the wording in the proposition concerning beneficial ownership "*has actually right to the income*" is quite similar to that stated in the OECD Commentaries, the reference it nevertheless made to the domestic legislation. It has to be mentioned in this context that the substance-over-form principle is central for the Swedish tax authorities and the courts attach great importance to the factual circumstances in every case-assessment. In light of the dynamic interpretative process the fact that the BATR did not consult

the revised OECD Commentaries appear a bit confusing. At the same time the OECD Model and the Commentaries are no more than soft law. Swedish tax authorities hold very proactive stance in developing their own guidelines (constituting also soft law) which may explain why the OECD's documentation did not receive much space. Another aspect here is that tax authorities usually rely on the OECD Commentaries when forming their own guidelines so in the end the OECD's documentation serves as a starting point in the interpretation process.

The divergent opinion of some members of the Board clearly shows what their argumentation was based on. The reference was made to the amended version of the Commentaries from 2010 and special attention was drawn to the fact that even a conduit company can be regarded as beneficial owner and a more scrupulous analysis in terms of powers and obligations of the receiving holding company is required in order to determine beneficial owner of the income in question. This line of reasoning appears to be more consistent with a general position on behalf of Sweden towards OECD.

On example of two Scandinavian civil law countries this paper made an attempt to establish how the term beneficial owner, originating from the common law tradition, is treated and interpreted in Denmark and Sweden. After analyzing relevant provisions in the domestic legislations as well as the case law it can be stated that both countries embrace dynamic method of interpretation of the OECD Model Convention and the Commentary. The main challenge is however to determine whether the beneficial owner concept has an independent international meaning or whether the term can be interpreted within the scope of the national legislation. Here the position of these two countries is slightly different. Denmark interprets the beneficial owner term as if it was an international notion, while Sweden is a bit ambivalent on this matter.

The answer to whether this concept possesses an autonomous international meaning is not straightforward as no clarity on this matter has been reached by the OECD which can be illustrated by obvious contradictions within the Discussion Draft of 2011. In order to clear up this situation and avoid confusions concerning interpretation of the term a general definition of the beneficial owner concept should be introduced in the Model Convention itself, thus assigning to it an autonomous meaning that can be applied in tax treaties. This outcome would result in eliminating differences between common law and civil law countries and resolve difficulties faced by the civil law countries when dealing with the beneficial owner concept.

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DRN 71-10/D

7. APPENDIX

Diagram 1, case SKM 2010.268.LSR

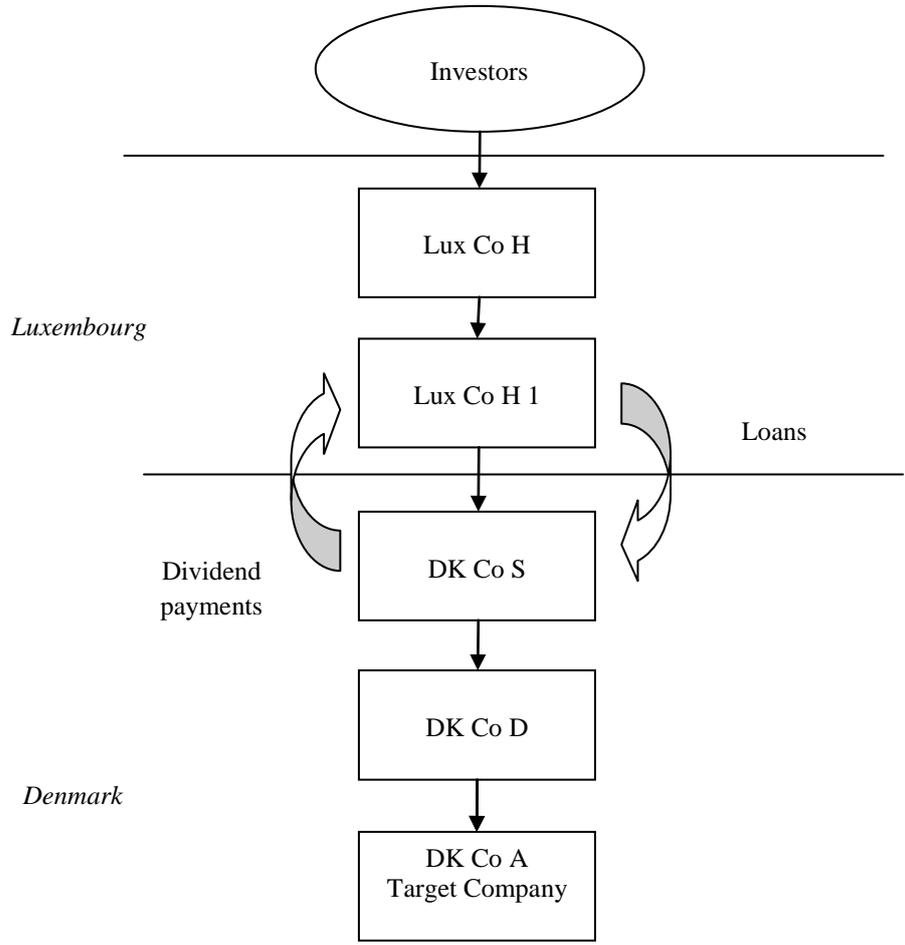


Diagram 2, case SKM 2011.57.LSR

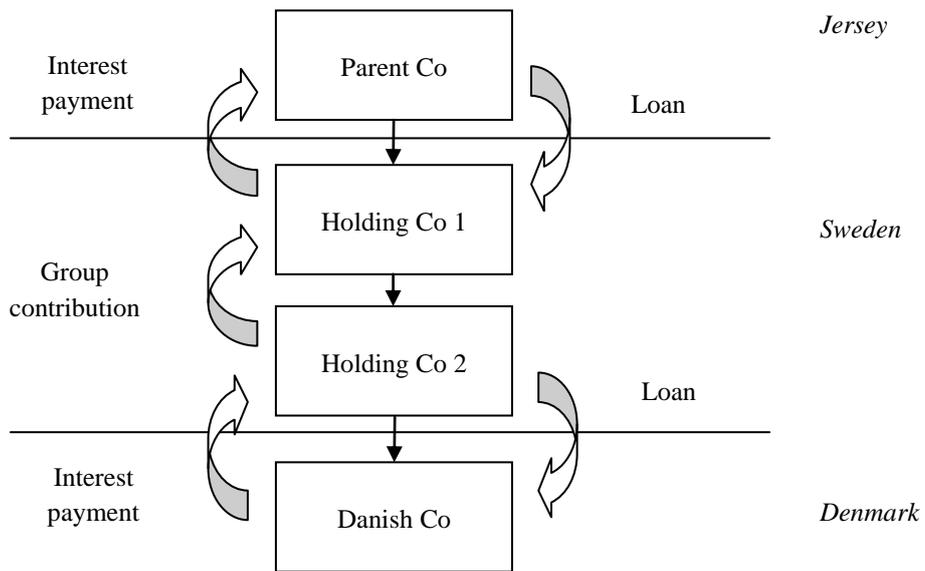


Diagram 3, case SKM 2011.485.LSR

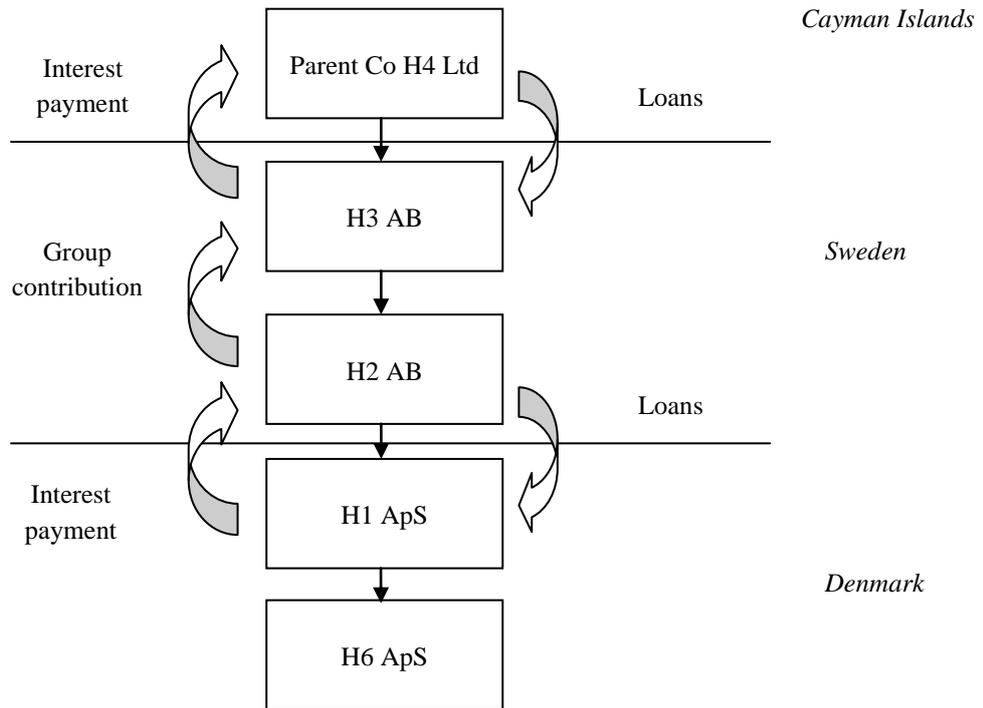


Diagram 4, case SKM 2012.26.LSR

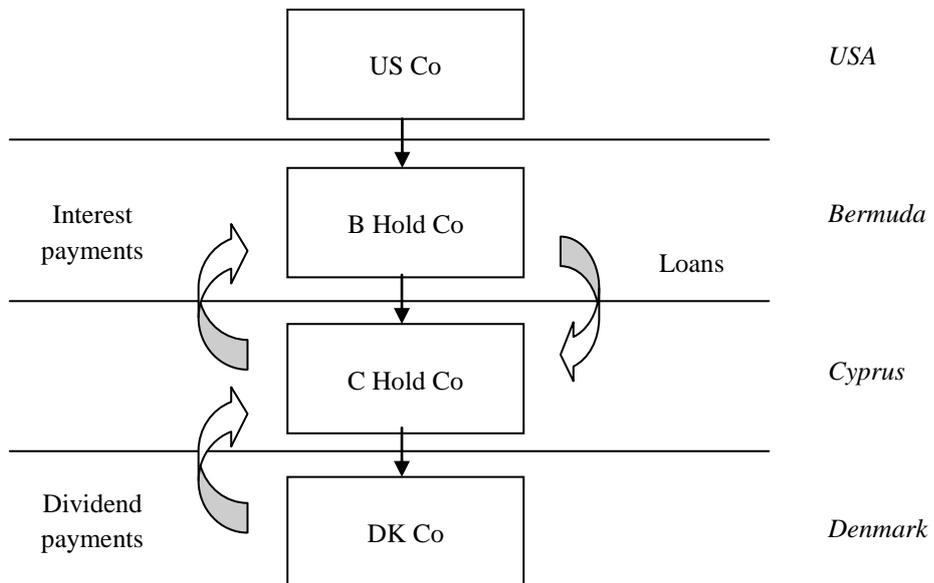
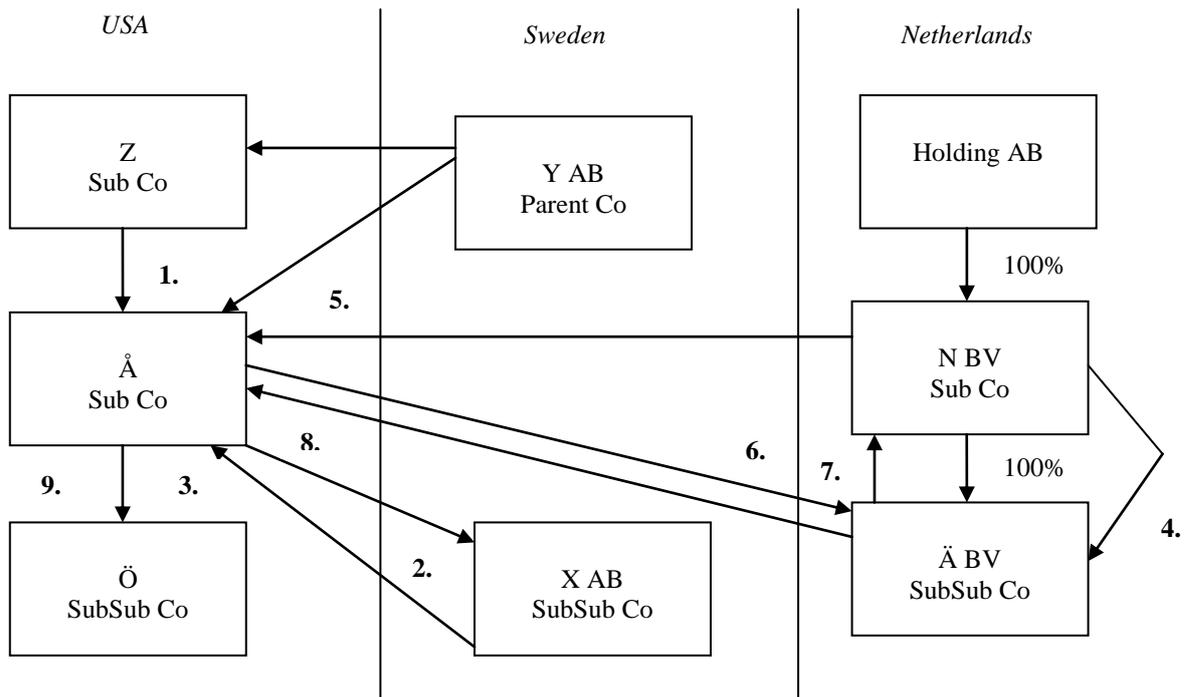


Diagram 5, case DRN 71-10/D



1. Transfer of shares from Z to Å
2. Transfer of shares from Z to X AB
3. Promissory note (loan A)
4. Preferred stock 10%
5. Common stock 90%
6. Right to claim loan A
7. Right to claim loan A
8. Promissory note (loan B)
9. Right to claim loan B