

## DENMARK AS A HOLDING COMPANY JURISDICTION

### Introduction

On 28 May 2009, the Danish parliament adopted a tax reform which significantly improved the Danish holding company regime. Accordingly, dividends and capital gains on shares in subsidiaries and group companies are generally tax exempt with no holding period requirements.

International holding companies are often established with the purpose of avoiding local withholding taxes on distributed dividends, avoiding taxation of capital gains on shares and to obtain dividends from high and low tax countries to utilise tax credits. Naturally, numerous factors are of importance in the decision of placing a holding company, including tax and non-tax factors.

The following provides a brief overview of the most important tax rules for a foreign investor considering investing through a Danish holding company. Furthermore, a comparison is provided between Denmark as a holding company jurisdiction and the traditional holding company jurisdictions within the EU; Belgium, Cyprus, Ireland, Luxembourg, the Netherlands and Sweden.

### General Tax Rules

In Denmark, no special tax regimes for holding companies exist. Thus, the general corporate tax legislation applies, including the EU Parent-Subsidiary Directive, the Interest and Royalty Directive and the Danish Double Tax Treaties.

However, specific legislation exists regarding so-called investment companies. Such investment companies are fully tax-exempt and may be used to invest in securities for foreign investors. Foreign investors will generally not be taxable in Denmark of income from an investment company if certain ownership requirements are met. The investment is not a direct alternative to a holding company.

In Denmark, formation of companies is subject to a capital duty of DKK 670 if the formation is registered online (at [www.webreg.dk](http://www.webreg.dk)) and DKK 2,150 if by analogue means. Changes subject to registration are subject to a duty of DKK 180 (DKK 340). No duties are imposed on the issue of shares, the increase of share capital and the transfer of shares.

Despite of the fact that no favorable tax regimes for holding companies exist, the use of a Danish holding company might be an advantage as the improved (general) tax on div-

dividends and capital gains on shares apply and as no capital duties are imposed in Denmark.

#### *Corporate tax rate and tax base*

Resident companies are subject to Danish corporate income tax. The corporate tax rate on net income is 25%, i.e. no local taxes are levied. Resident companies are not taxed on income from foreign immovable property and income from foreign permanent establishments. All other types of income of resident companies, e.g. dividends, interest, royalties derived directly and CFC income are subject to worldwide taxation.

Public and private companies established (registered) under Danish law are considered resident companies for Danish tax purposes. In addition, foreign-incorporated companies and other entities not registered in Denmark are considered resident in Denmark if their place of management is located in Denmark.

The Danish corporate tax rate is generally competitive.

#### *National and International Joint Taxation*

Danish companies controlled by voting power within the same group are subject to mandatory joint taxation. This rule applies to all Danish companies within the same group, including real estate and permanent establishments located in Denmark. Consequently, tax losses of one company are automatically used by other companies within the same group with positive income.

A Danish company may opt for international joint taxation with non-resident group companies. This choice must include all non-resident group companies for a period of at least 10 years. All group companies will be subject to Danish taxation if international joint taxation is established.

With respect to national and international joint taxation, the use of a Danish holding company is favourable.

#### *Transfer Pricing*

The Danish transfer pricing rules are based on the "arm's length" principle and follow the OECD Transfer Pricing Guidelines and apply to national and cross-border transactions between affiliated Danish and foreign companies.

### **Taxation of Dividends and Capital Gains on Shares**

As of the tax income year 2010, the Danish tax legislation regarding dividends and capital gains on shares has been harmonised. Generally, the tax treatment is now dependent on the classification of the shares in three different categories:

1. **Subsidiary shares:** the parent company owns at least 10% of the shares of the subsidiary. The subsidiary is a company resident in Denmark or Denmark is obliged to give up or reduce taxation under the EC Parent/Subsidiary Directive or under a tax treaty with the country in which the subsidiary is resident.
2. **Group shares:** the parent company and the subsidiary are subject to Danish international joint taxation, i.e. the parent company has a direct or indirect control of more than 50% of the voting power in the group company, or an ultimate parent company has a direct or indirect control of more than 50% of the voting power in the parent company and the group company.
3. **Portfolio shares:** All other shares, including convertible bonds (i.e. non-subsidiary shares and non-group shares).

An anti-avoidance rule applies to avoid fulfillment of the ownership requirement through a chain of companies. According to this anti-avoidance rule, the corporate shareholders of the recipient parent company are considered direct owners of the distributing company (i.e. the subsidiary or group company) if the following cumulative requirements are fulfilled:

1. the recipient parent company's primary function is ownership of subsidiary shares or group shares and
2. the recipient parent company does not exercise real economic business with respect to the shareholding and
3. the recipient parent company does not own the entire share capital of the subsidiary or the recipient parent company owns the entire share capital in a subsidiary, which is not taxable in Denmark, and where the taxation of dividends from the subsidiary would not be reduced or waived under the EC Parent/Subsidiary Directive or under a tax treaty with the country in which the recipient company is resident if the subsidiary was owned directly by the corporate shareholders
4. more than 50% of the share capital in the recipient parent company is directly or indirectly owned by companies that can not receive tax free dividends from the distributing subsidiary or group company if they owned the shares directly and

5. the shares in the recipient parent company are not admitted to trading on a regulated market.

A change in status from portfolio shares to subsidiary or group shares or vice versa, e.g. due to additional acquisitions or disposal, is treated as a taxable disposal at the market value of the existing shares owned.

#### *Capital gains on shares*

Danish companies are not taxable for capital gains on subsidiary and group shares, whereas capital gains on portfolio shares are taxable (25%). Gains and losses on portfolio shares are taxed according to the "mark-to-market" principle. However, the "realisation" principle may apply on gains and losses on non-listed portfolio shares if this principle is chosen as the timing principle for all such shares and the "mark-to-market" principle has not been used earlier with respect to the taxation of gains and losses on portfolio shares.

There are no Danish withholding taxes on capital gains on shares.

#### *Outbound dividends*

Generally, dividends are levied on withholding taxes with a tax rate of 28% (27% as of 1 January 2012). The rate is reduced to 15% if (i) the recipient holds less than 10% of the capital of the resident company and (ii) the tax authorities of the recipient's residence state are obliged to exchange information with the Danish tax authorities by virtue of a bilateral tax treaty, an international treaty or an administrative agreement. However, dividends on subsidiary and group shares are tax exempt if Denmark is obliged to give up or reduce taxation on the dividends under the EC Parent/Subsidiary Directive or under a tax treaty with the country in which the recipient company is resident. If Denmark is obliged to reduce the withholding tax by e.g. 10% according to an applicable Double Tax Treaty, the withholding tax will be waived in full according to the Danish national legislation.

Recently, the Danish tax authorities have challenged foreign holding companies that are established merely to avoid withholding taxes (conduit companies), by arguing that such companies should not be considered as the beneficial owner of dividends and interest payments. Thus, the Danish tax authorities consider the payments to be received directly by the ultimate investors. However, recent case law from the Danish tax tribunal has ruled in favor of the taxpayer in one specific case. A leading case is still awaited.

#### *Inbound dividends*

Danish recipient companies may receive tax free dividends on subsidiary and group shares if the distributing company is unable to deduct the dividend payment. This condi-

tion on non-deductibility does not apply to dividends covered by the EU Parent Subsidiary Directive.

Dividends on portfolio shares are taxable in the year of realisation.

#### *Taxation of liquidation proceeds*

Accumulated profits in a Danish holding company may be distributed as dividends, realised due to disposal of the holding company-shares or by liquidation of the holding company. According to Danish law, no withholding taxes are levied on liquidation proceeds in general, as liquidation is treated as a disposal of shares, provided that the liquidation proceeds are paid in the calendar year in which the liquidation is finalised.

However, if the corporate shareholder owns at least 10% of the share capital and is resident in a non-EU country with which Denmark has not entered a Double Tax Treaty, the liquidation proceeds will be subject to a withholding tax (28%).

According to Danish tax law, the sale of shares to the issuing company is considered a dividend payment.

In situations where an exit may trigger withholding tax, strategies are available to eliminate the taxation.

Conclusively, dividends, capital gains and liquidation proceeds on subsidiary and group shares are generally tax exempt with no holding period requirement. As shown, in regard to resident companies' dividend payments, capital gains on shares are subject to a harmonized tax treatment. Thus, the use of a Danish holding company is very favourable with respect to taxation of dividends, capital gains and liquidation proceeds on subsidiary and group shares.

#### **Withholding Taxes on Interest and Royalties**

Generally, there is no withholding tax on interest. However, interest paid to a foreign related/controlling entity is subject to a withholding tax (25%) if the lending company is not covered by the EU Interest and Royalties Directive or protected by a Double Tax Treaty. A foreign related/controlling entity is defined as an entity owning, directly or indirectly, more than 50% of the share capital or controlling, directly or indirectly, more than 50% of the voting power in the company paying the interest. Withholding taxes on interests paid to affiliated companies is usually only levied if the lending company is resident in a tax haven.

Royalties from Danish companies are subject to a withholding tax (25%). For the purposes of withholding tax, the concept of royalties includes payments for the use of, or the right to use patents, trademarks, designs or models, plans, secret formulas or pro-

cess or information concerning industrial, commercial or scientific experience etc. Payments for copyrights and for the use of industrial, commercial or scientific equipment are not considered royalties. Furthermore, the concept of royalties does not include consideration for the transfer of ownership of the abovementioned rights or information. The withholding tax on royalties may be reduced or exempted under the Interest and Royalties Directive or a Double Tax Treaty.

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The use of a Danish holding company is not the most favoured with respect to withholding taxes on interests for a foreign related/controlling entity if the lending company is not covered by the EU Interest and Royalties Directive or protected by a Double Tax Treaty. In all other situations, the use of a Danish holding company is in line with the use of a holding company resident in Belgium, Cyprus, Ireland, Luxembourg, the Netherlands and Sweden with respect to withholding taxes on interests and royalties.

### **Anti-avoidance Rules**

#### *CFC taxation*

Under the Danish CFC legislation, a Danish resident parent company is liable to tax of the net financial income of a non-resident subsidiary or a foreign permanent establishment to the extent of its participation if:

1. the Danish parent company owns more than 50% of its voting power (other group indicators are available under the broad definition of a group used for CFC purposes),
2. more than 50% of the subsidiary's taxable income derives from financial income and
3. at least 10% of the subsidiary's assets are financial assets.

Financial income comprises dividends, interest, capital gains, royalties, income from financial leases and insurance premiums. An exemption from CFC taxation exists for intermediate local holding companies. In principle, transactions between a subsidiary resident in the same country and the intermediate holding company are disregarded.

Provisions exist to prevent double taxation upon distribution of dividends and realised capital gains on the shares if they originate from income already taxed under the CFC rules.

With respect to CFC legislation, the use of a Danish holding company is not the most favoured. However, similar rules exist in most countries, including countries known for a favourable holding regime for tax purposes.

*Thin Capitalisation and other restrictions on interest deductibility*

1. Thin capitalisation rules apply to Danish companies having a debt exceeding DKK 10 million to a controlling legal person. Control is defined as: direct or indirect ownership of more than 50% of the share capital, or
2. direct or indirect control of more than 50% of the voting power.

Interest expenses relating to controlled debt in excess of a debt/equity ratio of 4:1 are not deductible. A company may avoid the debt/equity ratio limitation to the extent that it demonstrates that a similar loan relationship could exist between unrelated parties.

Anti-avoidance rules exist to prevent (1) the contribution and subsequent withdrawal of equity capital, (2) dilution of the 4: 1 debt/equity ratio through the use of a chain of companies and (3) the use of back-to-back loans through third parties.

Non-deductible interest expenses are not recharacterised as dividends either for purposes of domestic law or tax treaty purposes.

Two additional general restrictions on interest deduction apply. Firstly, the deductibility of net financing expenses is limited to a cap computed by applying a standard rate of 4.5% (for 2011) on the tax value of the company's business assets as listed in the law.

However, expenses below DKK 21.3 million (2011) are always deductible under this rule. Secondly, limitation based on annual profits according to which the net financing expenses may not exceed 80% of earnings before interest and taxes (EBIT) at the debtor company level.

Furthermore, an anti-abuse rule preventing deductibility of interests on hybrid debt exists. Accordingly, interest expenses are non-deductible if the loan is granted by an affiliated company and this affiliated company treats the loan as equity.

Also, with respect to thin capitalization and other restrictions on interest deductibility, the use of a Danish holding company is not the most favoured. However, similar rules

exist in most countries, incl. countries known for a favourable holding regime for tax purposes.

#### *Hybrid entities*

A specific Danish anti-arbitrage provision exists whereby, if a Danish entity is considered a transparent entity in the country in which the parent company is resident, the Danish entity is also considered a transparent entity for Danish tax purposes. Thus, if a Danish check-the-box entity is considered a transparent entity for US tax purposes, the entity is also considered a transparent entity for Danish tax purposes. Consequently, the Danish holding company is no longer separately subject to Danish taxation. Instead the US Company will be taxed as if it has a Permanent Establishment in Denmark.

#### **Binding Rulings**

To obtain full certainty of the tax consequences of specific transactions, it is necessary to apply for a binding ruling from the Tax authorities.

#### **Double Tax Treaties**

Denmark has agreed to a large number of double tax treaties with most potential investor countries.

#### **Accounting, Company Law etc.**

##### *Accounting*

Danish registered companies must prepare an annual financial statement in accordance with the generally accepted Danish accounting principles or the International Financial Reporting Standards (IFRS) as well as a consolidated financial statement. The annual financial statement must be audited by an external and independent auditor, approved by the general meeting and submitted to the Danish Commerce and Companies Agency no later than five months after the end of the financial year (four months for companies with listed shares).

The annual financial statement may be prepared in DKK, EUR, US dollars or other functional currencies, making the Danish accounting requirements flexible.

##### *Company law*

A Danish holding company may be set up as either a public limited company (aktieselskab, A/S) or a private limited company (anpartsselskab, ApS). The setup of a limited company may be performed online (at [www.webreg.dk](http://www.webreg.dk)) and completed within a day. However, if the company is established by a non-Danish company (or person), an increased processing time is to be expected. With respect to the setup, there are no notary requirements. Alternatively, a self-company may be acquired.

An ApS must have a minimum share capital of DKK 80,000, and a public limited company must have a minimum share capital of DKK 500,000. The minimum share capital may be paid by cash or non-cash contributions. Accordingly, assets (incl. shares) may be contributed to the Danish company as a non-cash contribution. Non-cash contributions generally require that an auditor prepares a valuation declaration concerning the value of the assets contributed. Only a partial payment of the capital is required, i.e. it is required that 25% of the nominal share capital is contributed. However, the contributed capital may not be less than DKK 80,000. Any non-cash contribution must be paid in full.

Dividends must be distributed at the annual general meeting in connection with redemption of the share capital following a four-week public notification period or as interim dividends. The share premiums are considered free reserves eligible for dividend contributions. Dividends may be distributed for the first time at the first annual general meeting at which the first annual financial statement is approved.

#### *Tax returns*

Danish registered companies must prepare and file an annual tax return no later than six months after the end of the financial year. The tax return may be prepared in any currency the company chooses. Thus, the tax return is assessed in its functional currency whereafter the net taxable income is converted into DKK by using the average exchange rate for the past year.

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