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INDEPENDENT TAX CONSULTING



Beneficial Ownership - Denmark



Beneficial Ownership – Broad vs. Narrow Interpretation II



Background

- International trend
- Danish Tax Authorities have initiated a number of cases (allegedly 31) involving app. 19 BN DKK regarding the beneficial ownership requirement.
- The notion of beneficial ownership is unknown in a Danish legal context
 - Traditionally considered a matter of formal legal ownership
 - No implementation of specific anti-abuse rules from EU directives

Status

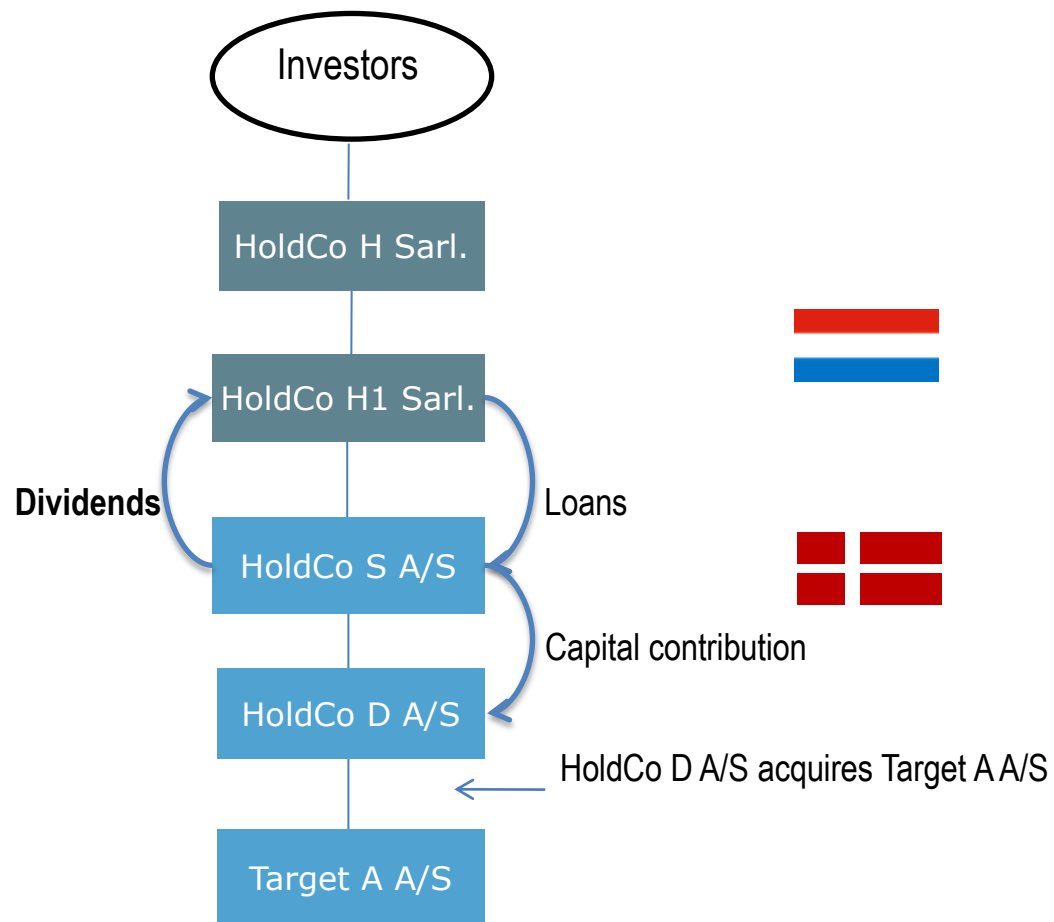
– 5 decisions

- SKM 2010.268 LSR (Taxpayer prevails) – confirmed by the Eastern High Court on 20. December 2011 – SKM 2012.121 Ø
- SKM 2010.729 LSR (Taxpayer prevails)
- SKM 2011.57 LSR (Tax authorities prevail)
- SKM 2011.485 LSR (Tax authorities prevail)
- SKM 2012.26 LSR (Tax payer prevail)

– A number of binding rulings from the Danish Tax Board

- SKM 2011.47 SR
- SKM 2011.142 SR
- SKM 2011.441 SR

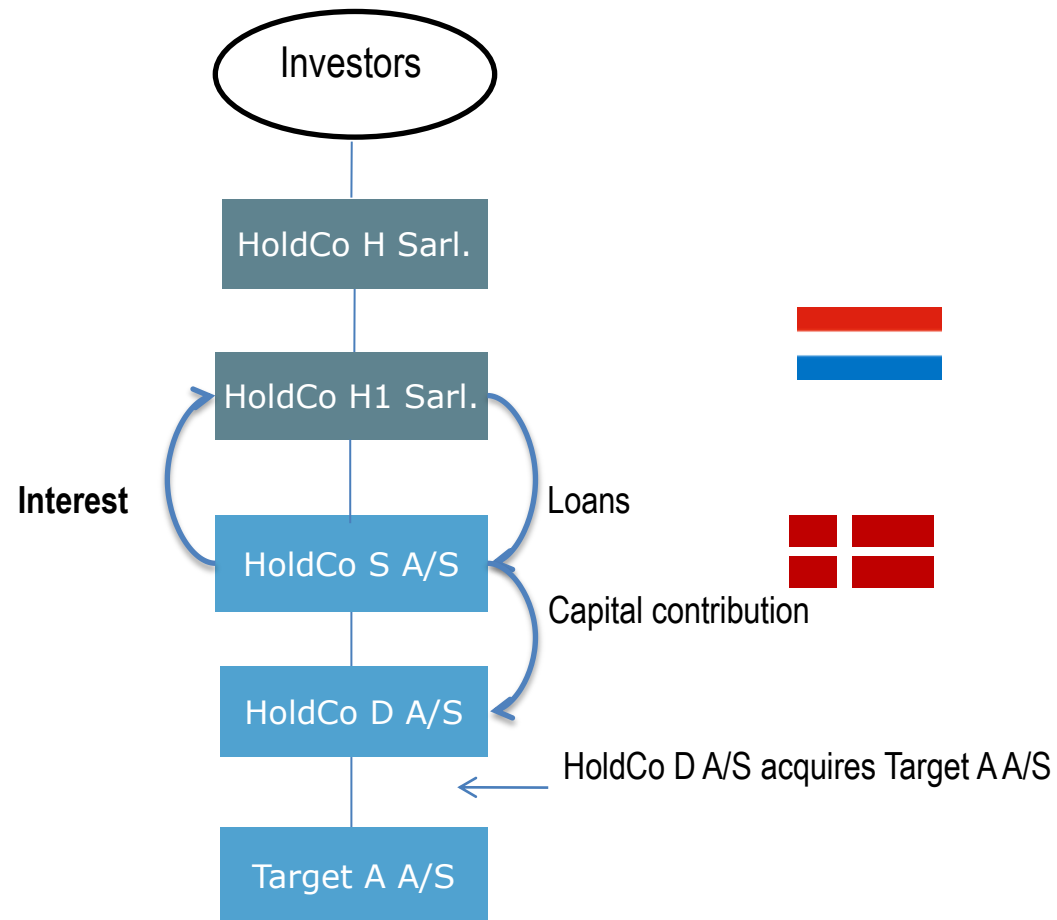
SKM 2012.121 Ø - Dividend case - Taxpayer prevails –"ISS Case 1"



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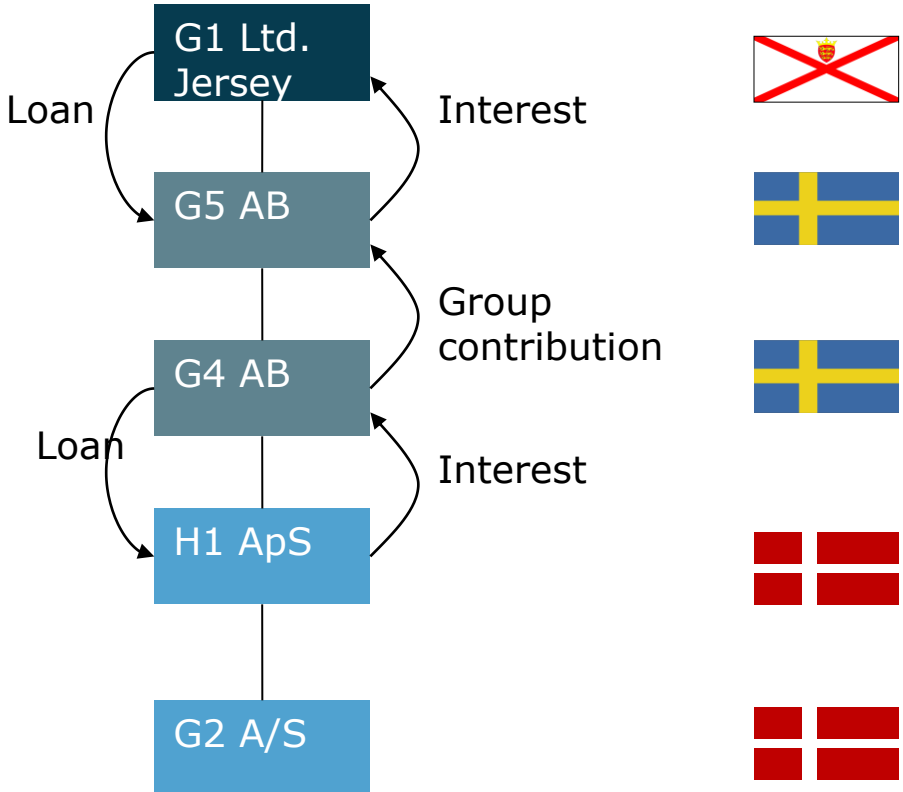
- The reasoning of the Court:
 - The Eastern High Court upheld the Tax Tribunal Decision with a very clear and unambiguous decision.
 - Notion of beneficial ownership to be understood in accordance with an international fiscal meaning (autonomous).
 - Dynamic interpretation of tax treaties
 - Luxembourg holding company should be considered the beneficial owner of the dividends in question:
 - The Court did not consider it relevant to apply the a beneficial owner test in the actual case at hand.
 - The interposed entity should forward the payment in question to the recipient in a non-tax treaty state.
 - This requirement was not fulfilled in this case.

SKM 2010.729 LSR – Interest case - Taxpayer prevails – “ISS Case 2”



- Similar fact pattern as in SKM 2012.121 Ø – interest payments in stead.
- Reasoning of the Danish Tax Tribunal:
 - HoldCo H1 beneficial owner, since interest payments were not in fact forwarded.
 - Notion of Beneficial owner in interest-/royalty directive has the same meaning as in treaty.

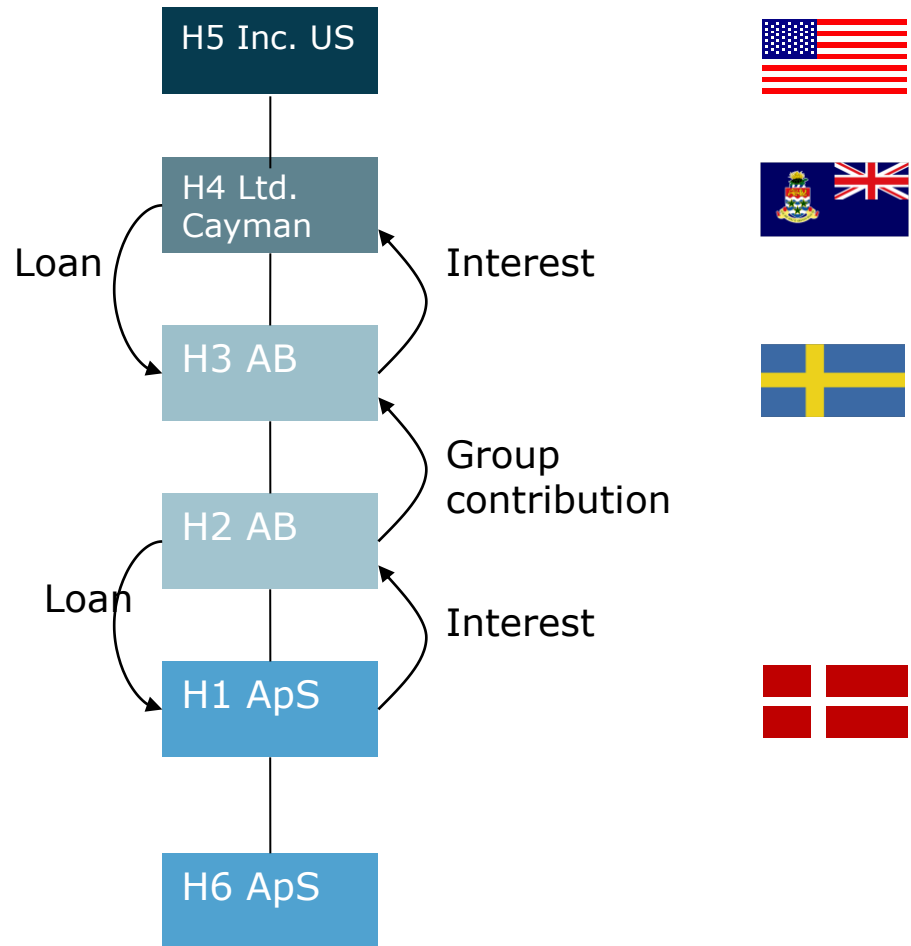
SKM 2011.57 LSR - Interest case – Tax Authorities prevails – “the HHU case”



SKM 2011.57 LSR - Interest case – Tax Authorities prevails – “the HHU case”

- Reasoning of the Danish Tax Tribunal:
 - G4 AB should not be considered the “beneficial owner” for the purpose of the tax treaty or the interest-/royalty directive
 - Tax Tribunal emphasized:
 - The actual construction:
 - G4 AB transfer the received interest payments through the Swedish rules on group contributions – and from G5 AB as deductible interest to G1 Ltd.
 - The timing regarding the introduction of the Interest/-Royalty Directive.
 - No net income in the Swedish companies
 - Accordingly the Swedish companies should be considered conduit companies without any real rights to use and enjoy the income in question.
 - Difficult to see exactly which contractual or factual conditions triggered this assessment.

SKM 2011.485 LSR – Interest Case – Tax authorities prevail – “the COOK Case”



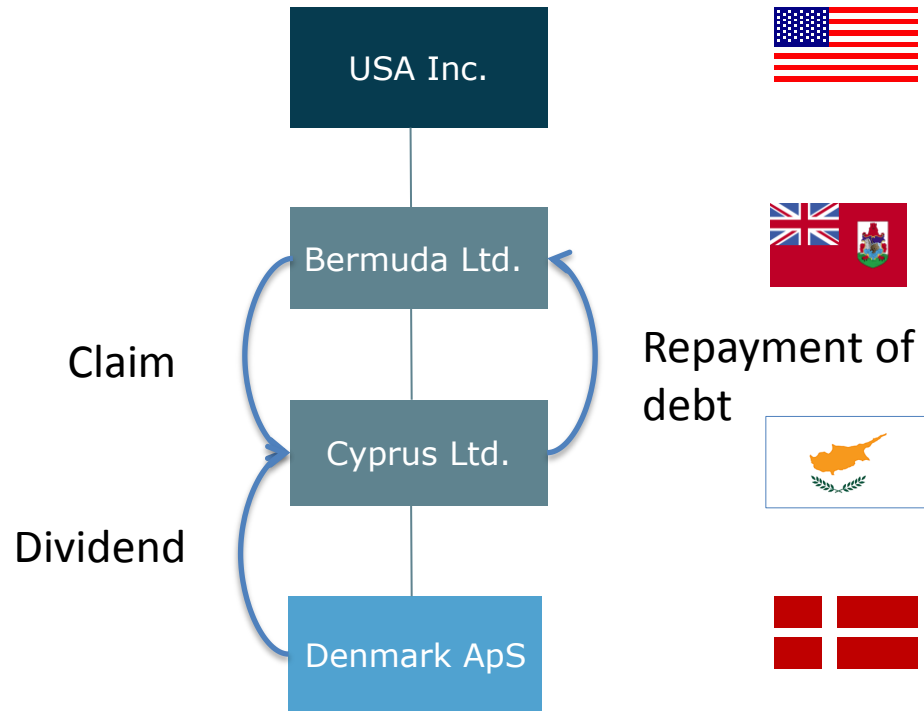
SKM 2011.485 LSR – Interest Case – Tax authorities prevail – “the COOK Case”

- Reasoning of the Danish Tax Tribunal:
 - Autonomous interpretation
 - Tax Tribunal emphasized:
 - Related parties transactions.
 - No net taxation in Sweden.
 - No other income than income from holding activities in any of the established companies.
 - Assumption that the debtor companies should receive capital from other group companies if the debt obligations should be fulfilled.
 - Based on this it is stated without further analysis that H2 AB was a conduit company which could not obtain treaty benefits under the Nordic Tax Treaty or benefits under the Interest-/Royalty Directive.
 - Ultimate owner was a US company – not decisive in the case.
 - Difference between “rightful recipient” under domestic law and “beneficial owner” under tax treaty and the directive.



Beneficial Owner and EU Law





SKM 2012.26 LSR

- Reasoning of the Danish Tax Tribunal:
 - Cyprus Ltd. not the beneficial owner of the dividends.
 - Burden of proof for the status as beneficial owner rested on the companies.
 - Scope of the parent-/subsidiary directive:
 - Article 1(2) of the directive grant the member states the opportunity to deny the benefits of the directive in cases of abuse etc.
 - Denmark has not introduced specific provisions with this aim, but legal basis to disqualify formally legal and correct dispositions exists in the form of general legal principles including case law.
 - The Danish Supreme Court has, however, not allowed a reclassification of an existing company on the basis that the company was established to save tax.
 - Consequently, the Cyprus company of this case, which was legally established and operating, which also owns the shares of the Danish company, should be considered the rightful recipient of the dividends distributed from the Danish company.
 - Consequently, the dividends are exempt from Danish withholding tax according to article 5 of the directive.
 - Obvious basis for a referral to the European Court of Justice.



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