

Denmark Eastern High Court Accepts Look Through Approach while Applying Beneficial Ownership Criteria

NetApp Denmark ApS [TS-398-FC-2021(DEN)]

Conclusion

Brief Facts

The case involves two taxpayers viz., NETAPP Denmark ApS and TDC A/S. The first case (NETAPP Denmark ApS) dealt with dividend distributions to its parent company in Cyprus, which redistributed a corresponding amount to its parent company in Bermuda. Thereafter, the Bermudan entity distributed the amount almost entirely to its parent company in USA. The second case (TDC A/S) dealt with dividend distributions to its parent company in Luxembourg, which redistributed a corresponding amount to its parent located in Luxembourg itself. Thereafter, the Luxembourg entity distributed the amount almost entirely to companies controlled by equity funds that were likely located outside the European Union (EU)

The taxpayers claimed that they are entitled to withholding tax exemption on distribution of dividends under the EU Parent Subsidiary Directive. However, the tax authorities denied the claim on the ground that the interposed entities are not the beneficial owners and thus, the exemption is not available. The tax authorities/ Danish Tax board did not agree with the view of the taxpayer; however, Danish National Tax Tribunal allowed the appeal of the taxpayers. The said ruling was brought to appeal by the tax authorities before the High Court of the Eastern Denmark.

Issue Before the Court

The issue before the Eastern High Court of Denmark was whether the recipients were the beneficial owner and thus eligible for exemption from withholding tax on dividends distributed by Danish subsidiaries to foreign parent companies under the Parent Subsidiary Directive / tax treaty.

Decision of the Court

The Eastern High Court of Denmark partly allowed the appeal and partly dismissed the appeal as under:

NETAPP Denmark ApS

- The High Court observed that the Cyprus entity did not have authority to actually dispose off the dividends received as the amount was redistributed immediately and thus the arrangement was entirely artificial to achieve the withholding tax exemption. In this background, the Court held that the Cyprus entity cannot be regarded as the beneficial owner and accordingly not eligible for beneficial treatment under Denmark-Cyprus tax treaty.

- The High Court further held that to the extent dividend is ultimately distributed to the USA parent, the benefit of Denmark-USA tax treaty can be availed and no withholding tax is required on the same. In this regard, the Court placed reliance on paragraph 12.2 of OECD 2003 commentary which stated as “the limitation of tax in the State of source remains available when an intermediary, such as an agent or nominee located in a Contracting State or in a third State, is interposed between the beneficiary and the payer but the beneficial owner is a resident of the other Contracting State.” The Court further substantiated its view by holding that this doesn’t amount to conferring undue benefit / abuse of law, as the dividends could have been directly distributed without withholding of tax.

TDC A/S

- The High Court observed that no information/documentation with respect to the decision regarding dividend redistribution was made available. In this background, the High Court arrived at a conclusion that the interposed entities did not have any independent function apart from distribution of dividends in the chain and ultimately to the equity funds/investors and thus, not eligible for exemption from withholding tax. The Court also noted that the taxpayer didn't argue that exemption would have been available had the dividends been directly distributed to the equity funds and thus, the question of exemption either under Parent Subsidiary Directive or tax treaty doesn't arise.

Taxsutra Comments

This is one of its kind decision wherein the Court though disregarded the interposed entities, but conferred treaty benefit considering the ultimate beneficial owner.:FC DEN

Case Law Information

Taxpayer Name: NetApp Denmark ApS

Judicial Level & Location: Foreign Court Denmark

Date of Ruling: 2021-05-03

Ruling in favour of: Both, Partially