



# TAX:WATCH

## The Court of Justice of the EU rules in “beneficial owner” cases

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*The Court of Justice of the European Union rules in favour of the Danish Ministry of Taxation in several decisive cases concerning the concept of “beneficial owner”.*

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On 26 February 2019, the Court of Justice of the European Union ruled in several decisive cases concerning the concept of “beneficial owner”.

### The facts of the cases

The cases concern the question of whether Danish companies distributing dividend or paying interest to parent companies located in other EU countries should have withheld tax at source, or whether the payments are exempt from tax according to the rules in the parent-subsidiary directive or the interest & royalties’ directive respectively.

The Danish Ministry of Taxation believes that the dividend or interest recipients are not the beneficial owners of the income, as these companies located within the EU are merely conduit companies through which, the income has been transferred to tax havens.

Consequently, it is the opinion of the Danish Ministry of Taxation that the Danish dividend distributing or interest paying companies should have withheld tax at source, and they are liable to pay the missing withholding taxes.

This is disputed by the companies.

### The rulings of the Court of Justice of the European Union

The Court of Justice of the European Union ruled that a general anti-abuse principle exists in EU law, obligating the EU member states to refuse concessions under EU law in cases of abuse - even if there are no national or agreement-based provisions on abuse.

Consequently, it must be determined whether abuse exists in the cases at hand.

According to the rulings of the Court of Justice of the European Union, abuse is determined based on both objective and subjective circumstances.

The objective element relates to the arrangement being established to obtain improper tax advantages under the directive, whereas the subjective element relates to achieving this as being one of the main purposes of the arrangement.

Whether abuse of EU law exists in the cases in question must be determined by the Danish national courts. However, the Court of Justice of the European Union has contributed several circumstances that would indicate abuse.

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For example:

- when dividend tax is avoided by establishing a conduit company,
- when dividend or interest is passed on immediately after receipt to individuals or companies outside the application of the directive, or
- when changes in national tax legislation timewise is closely connected to introduction of complex financial transactions or provision of inter-group loan(s).

#### Next step

It is now up to the Danish national courts to determine, whether the specific arrangements in each case constitute abuse and can be disregarded for tax purposes.

## Resumption of creditor companies' tax liability on interest income

***Guidelines have been issued for resumption of creditor companies' tax liability on interest income, if a foreign group company's (debtor) right to deduct the interest expenses has been limited as a result of rules on thin capitalization.***

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A ruling from the Court of Justice of the European Union overrule the practice followed by the Danish tax authorities regarding the Danish tax rules on thin capitalization.

The ruling entails that a Danish creditor company must be exempt from taxation on interest income, if an EU/EEA-resident foreign group company's (debtor) right to deduct the interest expenses has been limited as a result of rules on thin capitalization in the state of residence.

The following conditions apply:

- The Danish creditor company has provided loan(s) to a group debtor company.
- The foreign debtor company is located in another EU or EEA country (international joint taxation between the creditor and debtor companies is not required).
- The foreign debtor company has not been granted tax deduction for the interest expenses according to the rules on thin capitalization of the resident state.
- The Danish creditor company has been taxed on the corresponding interest income.

Consequently, on 7 January 2019, the Danish tax authorities published guidelines describing how taxpayers' tax assessments for previous income years can be resumed.

Resumption of tax assessments going back as far as the income year 2006 is possible.

BDO can assist your company in determining whether resumption of previous years' tax assessments is relevant in this respect and - if so - assist in requesting resumption.

Request for resumption must be submitted to the Danish tax authorities within 6 months of the date of publication of the guidelines on 7 January 2019.

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