

# The beneficial owner cases

## Practice area under Tax

In recent years, the Danish tax administration ("DTA") has launched a large number of tax claims against Danish companies who have either distributed dividends or paid interest to parent companies in other EU Member States or countries with which Denmark has concluded double taxation treaties. Ever since these cases were first initiated back in 2008, Plesner has played a leading role in the proceedings which with the Danish Supreme Court's judgments from January, May and June 2023 are now nearing a final conclusion.

The DTA claims that the parent companies in question are so-called conduit companies because the amounts received, according to the DTA, have been passed on to group related entities in tax haven countries. The parent companies are consequently not the beneficial owners of the dividends or interest received - the Parent-Subsidiary Directive and the Interest and Royalties Directive have been abused - and the Danish subsidiaries should therefore have withheld tax at source in connection with such payments. As they failed to do so, the DTA is of the opinion that the Danish companies are liable for payment of the tax.

The number of cases is substantial, and the values involved are significant.

### **Principal questions in the beneficial owner cases**

In addition to the questions referred to the Court of Justice of the European Union (CJEU) in six pilot cases – which specifically concerned the interpretation of the Parent-Subsidiary Directive and the Interest and Royalties Directive, their interaction with the general EU anti-abuse principle, and their transposition into Danish law as well as of the freedom of establishment of the EC Treaty – the beneficial owner cases raise a wide range of additional questions.

These questions especially concern the interpretation of the relevant double taxation treaties, the significance of the DTA's change in practice and the issue of whether the companies have acted negligently.

In addition, after the judgments of the CJEU it has become a central question of constitutional law whether the Danish courts can or must apply the "general EU anti-abuse principle".

Finally, also questions about how interest on late payment should accrue to a potential withholding tax claim have had a strong presence, see further below.

### **Plesner has conducted and won the ISS cases**

The two first cases that were decided by the Danish courts were the so-called ISS cases – one case involving dividend tax payments and another involving interest tax payments.

Plesner conducted both these cases for ISS A/S, and the court gave judgment in favour of ISS in both cases in 2012, i.e., ruling that no obligation to withhold tax at source existed.

The Danish Ministry of Taxation did not appeal against the judgments, and the outcome is therefore final.

**Plesner conducted a number of test cases, including the only case in which the Supreme Court has not ruled in full favour of the Ministry of Taxation (the NetApp case)**

The other beneficial owner cases are now finding their conclusion at the level where they are pending (the Danish National Tax Tribunal or the ordinary courts).

In six specifically selected test cases (out of which Plesner represented three tax payers), the Danish High Courts in 2016 referred a series of preliminary questions to the CJEU.

In [her opinion](#) Advocate General Kokott - supported by the Commission - expressed that the companies should be supported in almost every issue, but in its [judgments of 26 February 2019](#) the CJEU did not follow the Advocate General.

After the CJEU judgments, the test cases were reassumed at the High Courts, and on 3 May 2021 the two first cases (the NetApp and the TDC cases concerning dividend withholding tax) were decided by the Eastern High Court. TDC lost its case whereas the High Court essentially ruled in favour of Plesner's client, NetApp.

The High Court, thus, held that NetApp had documented that the main dividend was made as part of the Group's planned repatriation of dividends to the Group's parent company in the USA (which could have been done in a tax exempt manner had the dividends been distributed directly), that the dividend was, in fact, distributed all the way up to the US parent company (why this entity was, in reality, the "beneficial owner" of the dividend), and that there consequently - as argued by NetApp - was no abuse of the Double Tax Treaties or of the Parent/Subsidiary Directive. Thus, the fact that the dividend had passed through an intermediary holding company in a state, with which Denmark had not concluded a Double Tax Treaty, was not decisive.

The judgment was appealed by the Ministry of Taxation to the Supreme Court (just as TDC appealed its judgment).

On 25 November 2021, the Eastern Division of the Danish High Court gave judgment in another two test cases (on interest withholding tax) - namely the case concerning Takeda/Nycomed represented by Plesner and NTC's case concerning payment of interest.

Not surprisingly, the Court upheld its interpretation as expressed in the NetApp and TDC cases in terms of a number of issues of principle. The Court ruled in favour of the Ministry of Taxation in both cases. In the Takeda case, the Court agreed with Takeda that there had been no flow of interest through to a country with which Denmark has not concluded a double taxation agreement, since the funds stopped in another EU country, Luxembourg. On the other hand, the Court followed the argument of the Danish Ministry of Taxation that the Luxembourg company in question, an S.C.A., SICAR company, could be compared to a so-called 1929 Holding Company, which is not covered by the Denmark-Luxembourg tax treaty.

The judgments were both appealed to the Supreme Court.

On 9 January 2023, the Supreme Court gave its judgment in the NetApp and TDC cases. The TDC judgment was upheld whereas the Supreme Court turned the judgment of the High Court upside down. Thus, the Supreme Court found that there was an abuse in relation to the main dividend in the case, whereas there was no abuse in respect of the second dividend distribution. In connection with the main dividend, the Supreme Court attached significant importance to the fact that the intermediary holding company - which was resident in a non-treaty state

- was not cut off from disposing of the funds before they were actually passed on to the ultimate shareholder in the USA 5 months after receipt. In relation to the second dividend the intermediary holding company did not have any rights to dispose independently of the funds since the funds had actually been passed on to the US parent company (by way of obtaining a loan) before the company had received the funds as a result of which the Supreme Court found in favour of NetApp, represented by Plesner, and ruled that there was no obligation to withhold dividend tax.

On 4 May 2023, the Supreme Court passed judgments in the two interest withholding tax cases, Takeda and NTC. The Supreme Court fully found in favour of the Ministry of Taxation in both cases. In the NTC case, the Supreme Court was, in general, in agreement with the assessment made by the High Court, whereas the Supreme Court in the Takeda case chose to disagree with the High Court and held that it was not proven that the final recipient of the interest at issue - a Luxembourg S.C.A., SICAR entity - was the "beneficial owner" of the interest. Consequently, the Supreme Court did not need to rule on the principle question as to whether or not a SICAR entity must be equated with a so-called 1929 holding company (which is not covered by the Danish-Luxembourg tax treaty).

Most recently, the Supreme Court has on 30 June 2023 decided a dividend case - the Heavy Transport case - in which the Supreme Court also ruled in favour of the Ministry of Taxation. Heavy Transport was represented by Plesner.

A number of other beneficial owner cases are still pending before the National Tax Tribunal and the courts.

Since the cases have been pending for a number of years, the question about the levying of interest on late payment of the withholding tax claims in the dividend cases (which have been brought before the ordinary courts by the Ministry of Taxation since the companies won the case at the level of the Tax Tribunal) have become an almost just as vital issue in the proceedings. The thing is that the DTA has not accepted that the companies may pay the alleged withholding tax claims (and thereby stop potential interest from accruing to the claims). As the cases now have been lost before the courts, the interpretation of the interest rules made by the Supreme Court in the NetApp case (which, inter alia, has the effect that compound interest accrues) leads to interest claims that are approximately twice as high as the withholding tax itself.

During the Supreme Court proceedings NetApp claimed, among other things, that it was a violation of the right to a fair trial under the European Human Rights' Convention and the EU Charter of Fundamental Rights to levy such exorbitant interest on a tax claim - interest which could only be avoided by way of giving up the court case.

The Supreme Court did not concur with NetApp, but the Supreme Court did, however - quite unusually - urge the Danish Parliament to review the interest rules and assess whether or not these "very significant interest on late payment" were desirable.

In its case, Heavy Transport requested the Supreme Court to make a reference to the CJEU concerning a potential violation of the EU Charter, but the Supreme Court rejected this.

Apart from the mentioned cases, Plesner also represents a number of other clients in this group of cases.

#### **More information**

In May 2020 the International Tax Review has awarded Plesner two "Impact Case Awards" for conducting the "beneficial owner" cases for the Court of Justice of

the European Union.

For a detailed review of the DTA's change in practice and its significance, see [Hans Severin Hansen's](#) article "[The great hypocrisy – the beneficial owner cases](#)" in the Danish Journal for Taxes and Duties.

For a more detailed review of the Danish beneficial owner cases, see Plesner's review article "[Danish beneficial owner cases – a status report](#)" in the Bulletin for International Taxation.

See also [EU tax litigation](#).

## Cases

**Case News** 18.06.2024

Sampo plc announces a public exchange offer to the shareholders of Topdanmark A/S

**Case News** 13.10.2023

The National Tax Tribunal reverses the case law of the Danish Tax Agency on additional taxation of foundations' tied-up funds on dissolution

**Case News** 30.06.2023

The Supreme Court finds in favour of the Ministry of Taxation in another "beneficial owner" case

**Case News** 24.05.2023

Viking Life-Saving Equipment A/S successful in extensive transfer pricing court case

**Case News** 04.05.2023

Danish Supreme Court rules against tax payers in two "beneficial owner" cases regarding interest

**Case News** 24.02.2023

Vækstfonden raises DKK 2.4 billion in Dansk Vækstkapital III

**Case News** 09.01.2023

The Danish Supreme Court has given its judgment in the first two Danish "beneficial owner" cases

**Case News** 20.09.2022

Danish insurance company Codan Forsikring successful in transfer pricing case before the Danish Eastern High Court

**Case News** 31.03.2022

The Eastern High Court reduces the Ministry of Taxation's interest claim significantly in beneficial owner case

**Case News** 04.03.2022

First Danish transfer pricing dispute decided in arbitration under the EU Arbitration Convention

**Case News** 25.11.2021

The Eastern High Court rules against the tax payers in two new "beneficial owner" cases

Case News

03.05.2021

The Eastern High Court rules in favour of NetApp in the "beneficial owner" cases

## Ratings



2024 The Legal 500

Within Tax, Plesner is a first tier firm.

"Their industry and practice knowledge is very strong"

"They have a detailed knowledge of tax and, combined with an incredible business understanding, they are able to turn a complex matter into a simple line of arguments to make a convincing story"

"Very experienced and competent within tax litigation and transfer pricing. Strong mindset around people"

"Responsive, convey technical legal matters well in general business terms"



2024 Chambers Europe

Plesner is listed in "Band 1" as regards Tax.

"The team is very experienced, knowledgeable and proactive in its approach"

"The lawyers are able to understand a problem holistically, and are very knowledgeable regarding practical case handling. They are always responsive and good at explaining complex matters to business teams"



2024 World Tax

Plesner is ranked in Tier 1 in the World Tax ranking as the only Danish firm across the three tax categories (General Corporate Tax, Transfer Pricing and Tax Controversy).



2023 The Legal 500

Within Tax, Plesner is a first tier firm.

"Best track record for tax litigation in Denmark. Highly skilled team"

"Strong analytic skills including the ability to mitigate complex matters"

"Great team work with different skill sets and very strong capabilities within transfer pricing and tax litigation"



2023 Chambers Europe

Plesner is listed in "Band 1" as regards Tax.

"The team at Plesner is excellent - easily the best in tax in Denmark, and one of the best in tax in Europe. The lawyers provide wonderful client service, are responsive and give cutting-edge advice"

"The lawyers are knowledgeable within tax controversy and transfer pricing. They are also very proactive"



2023 World Tax

Plesner is ranked in Tier 1 in the World Tax ranking as the only Danish firm across two tax categories (General Corporate Tax and Tax Controversy).

"Plesner is widely regarded as the leading Danish law firm for all areas of tax law, including tax litigation"



2022 The Legal 500

Within Tax, Plesner is a first tier firm.

"Very strong tax team, and in particular within tax litigation"

"They are truly outstanding, and have the rare ability to completely handle a case and offer very clear strategic advice"

"They have a team that works like clockwork, which supports the overall output of the work product being absolutely best in class and outstanding"

"Impressed by the way the partners work together in teams on large litigation cases. No other Danish law firm can offer such experienced teams to litigate complex tax cases"

"They draw on their superior litigation experience to identify solutions that will withstand governmental as well as public scrutiny, and – when relevant – utilise their vast network within the tax authorities for solution-oriented informal discussions"



2022

Chambers Europe

Plesner is listed in "Band 1" as regards Tax.

"A trusted partner"

"Plesner is deeply aware of technical details on international tax matters and brings to bear experience from a wide range of international clients"

"The Plesner folks are always technically good, creative and very responsive"



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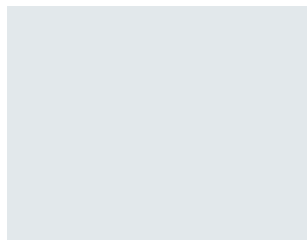
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