

FSR's konference om International skatteret

København 1.- 2. 12. 2011

Beneficial ownership

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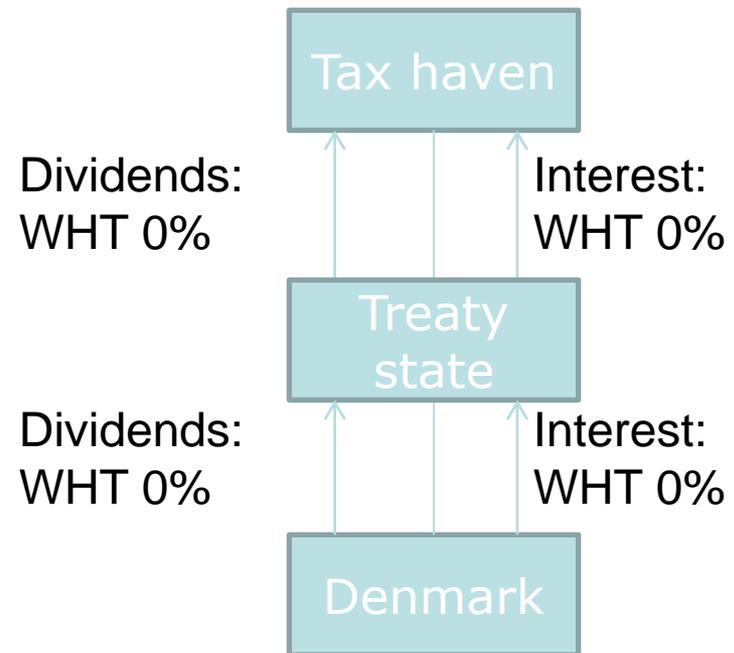
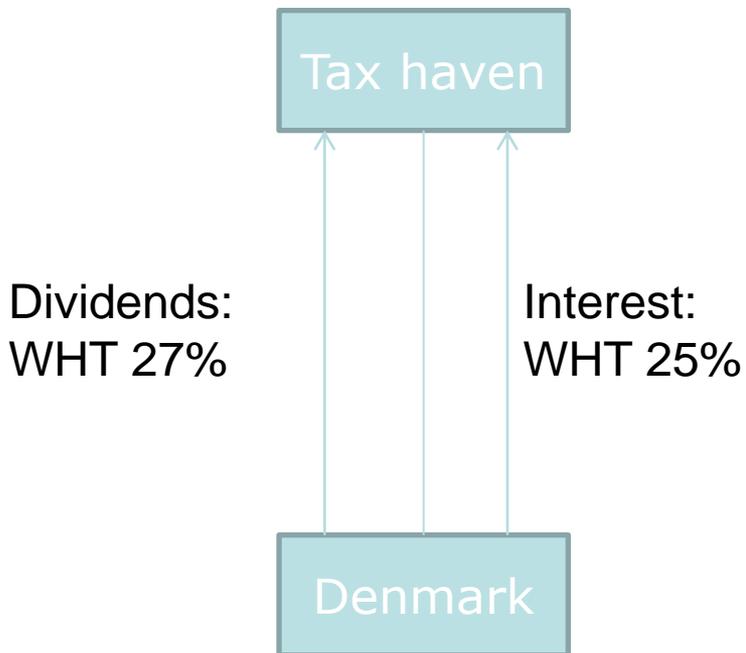
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# Relevance of the concept of Beneficial ownership

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- Traditional scenario: Treaty shopping or conduit companies



- Recent changes in legislation: L 84 (2010)
- Strengthening the Danish WHT on dividends.
- All changes are based on the pending beneficial ownership cases.
- Prevent planning which aims at avoiding Danish WHT on dividends by way of merging a Danish holding company with a foreign parent company.
- Inbound and outbound hybrid finance.

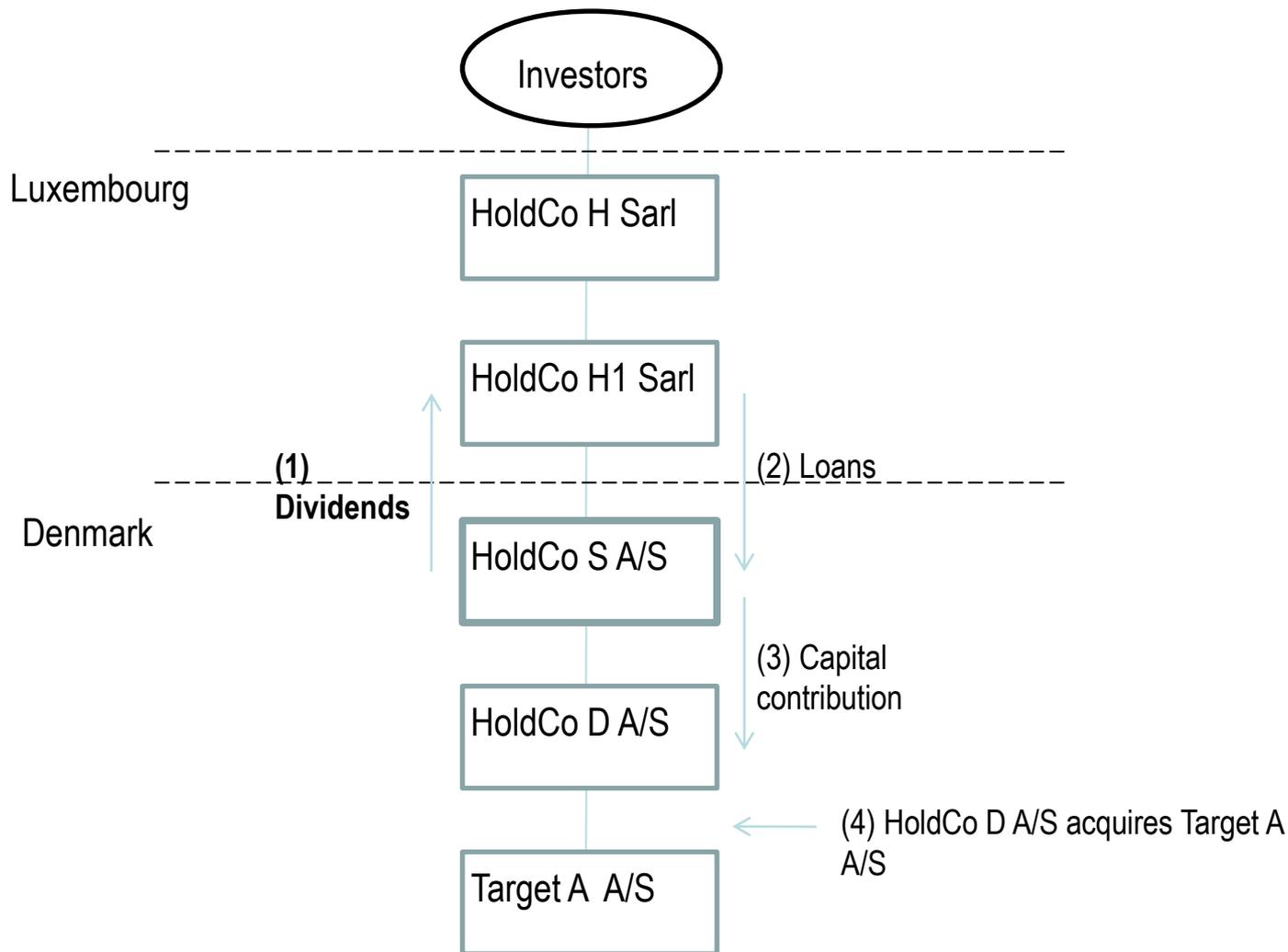
# Developments in Danish Case Law

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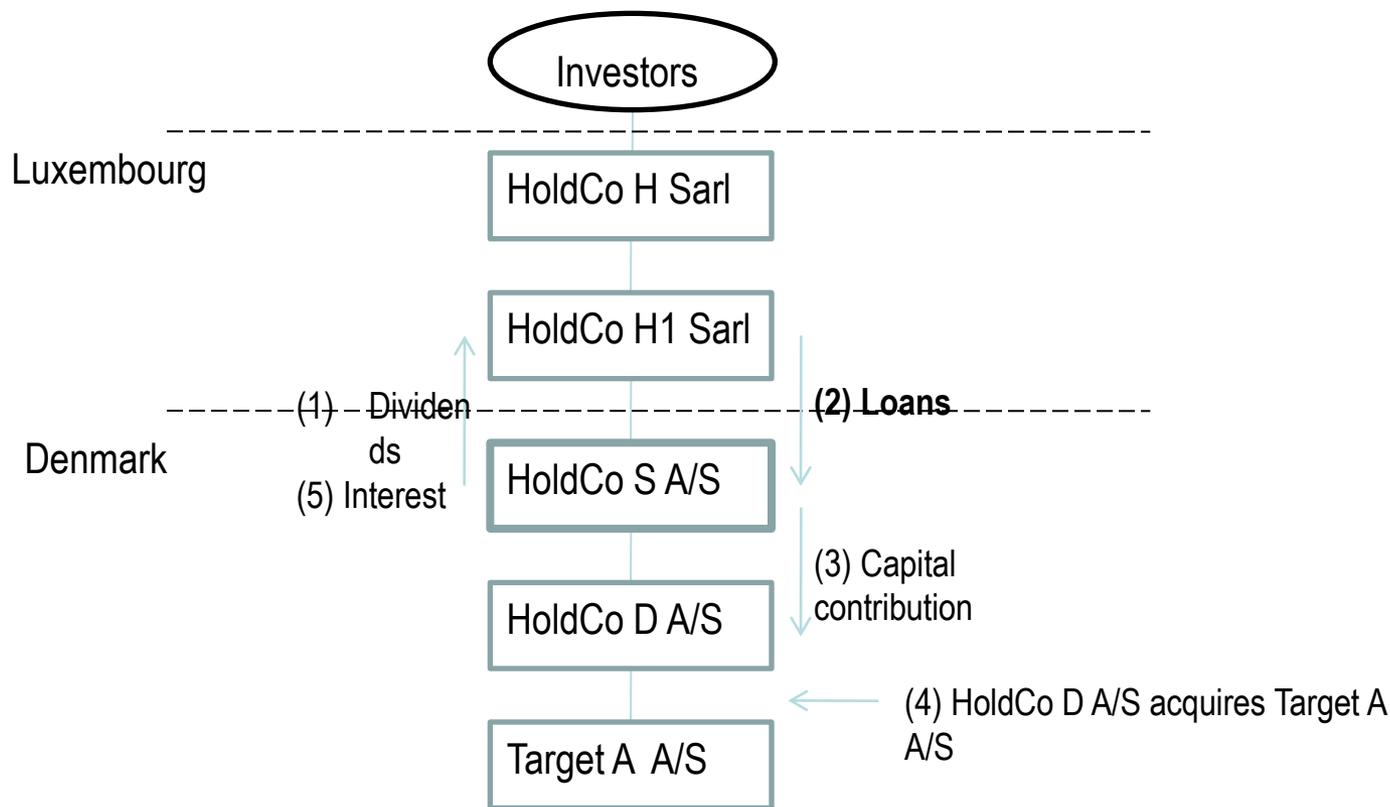
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- International trend
  - Launched by Indofood case in 2005 – others have followed with a different outcome depending on the states involved.
  - Danish Tax Authorities have initiated a number of cases (allegedly 31) involving app. 19 BN DKK regarding the beneficial ownership requirement.
- The notion of beneficial ownership is unknown in a Danish context
  - Traditionally considered a matter of formal legal ownership
    - This opinion was seemingly shared by Danish tax authorities.
  - No implementation of specific anti-abuse rules from EU directives

- Status:
  - 4 decisions from the Danish Tax Tribunal
    - SKM 2010.268 LSR (Taxpayer prevails)
    - SKM 2010.729 LSR (Taxpayer prevails)
    - SKM 2011.57 LSR (Tax authorities prevail)
    - SKM 2011.485 LSR (Tax authorities prevail)
  - 4 binding rulings from the Danish Tax Board
    - SKM 2011.47 SR
    - SKM 2011.142 SR
    - SKM 2011.441 SR
    - SKM 2011.738 SR



- Danish Tax Tribunal
  - Notion of beneficial ownership interpreted in an autonomous, dynamic way
  - Significant impact that dividend was not paid on in the structure.
  - Dividend tax exempt according to the Parent-/subsidiary directive, since neither domestic principles on income allocation or substance over form are applicable.
  - Tax exempt according to the parent-/subsidiary directive as well as the applicable tax treaty.

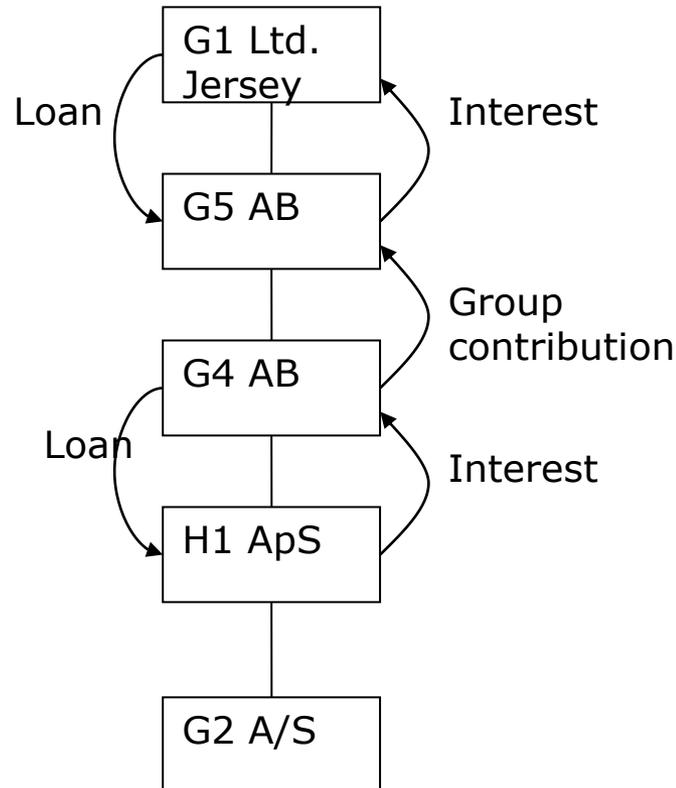


- Similar fact pattern as in 2010.268 LSR – interest payments in stead
- Danish Tax Tribunal
  - HoldCo H1 beneficial owner, since interest payments were not in fact paid on
  - Notion of Beneficial owner in interest-/royalty directive has the same meaning as in treaty

# Beneficial ownership – Interest case – Tax Authorities prevails

- SKM 2011.57 LSR – HHU case

Slide 11

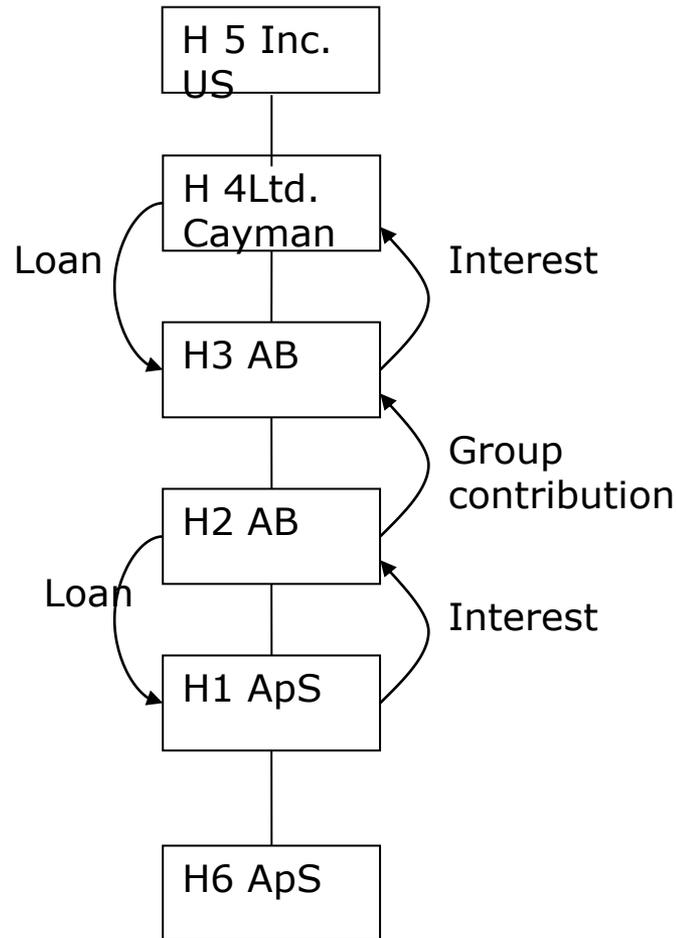


- Danish Tax Tribunal
  - G4 AB should not be considered the “beneficial owner” for the purpose of the tax treaty or the interest-/royalty directive
  - Emphasis on the actual construction – G4 AB transfer the received interest payments through the Swedish rules on group contributions – and from G5 AB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

# Beneficial ownership – Interest Case – Tax authorities prevail

## – SKM 2011.485 LSR – COOK Case

Slide 13



# Beneficial ownership – Interest Case – Tax authorities prevail – SKM 2011.485 LSR – COOK Case

Slide 14

- Danish Tax Tribunal
  - Autonomous interpretation
  - Emphasis: 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.
    - Argument hard to understand.
      - Why is holding income not sufficient to maintain debt service obligations?
  - 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 directive.
- Very difficult to see which actual or contractual conditions were decisive.

# Summary and implications

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- Great uncertainty regarding the exact delineation of the notion of beneficial ownership.
- **Lessons so far:**
  - Notion of beneficial ownership interpreted in an autonomous, dynamic way.
  - Transactional approach.
  - Decisive is the full right to use and enjoy the income in question.
  - Significant impact whether dividend/interest was not paid on in the structure.
  - Automatic transfer of the payment in question.
  - Difference between the domestic concept of a rightful recipient and the notion of beneficial owner.
  - Subjective intent to avoid taxes.
  - Related parties in transactions.
  - Timing overlap.
  - Taxation of the income in another country.
  - Business activities, employees, office or administration in the holding company.

- The Danish Tax Authorities pay attention to the following issues:
  - Agreements regarding the right to use and enjoy the dividends/interest
  - When and how the dividends are expected to be used, including whether it is expected that the formal recipient does not have the right to use and enjoy the dividends.
  - Which costs/claims are expected to be paid with the dividends.
  - The actual business functions of the holding company.
  - Business reason for the location of the holding company.
  - The size of the payments.
  - The financing of the holding company.
  - Identification of the owners and their tax residence at the time of the payment.
- New Requirements: SKM 2011.738 SR
  - Identity in amounts, tax classification and fiscal year.

- Rulings?
  - SKM 2011.47 SR: Denied.
  - SKM 2011.142 SR: No Danish withholding tax in a US owned Danish group. However, the Tax Board did not rule out the possibility of Danish withholding tax on the basis of the notion of beneficial ownership.
  - SKM 2011.441 SR: Not beneficial owner.
  - SKM 2011.738 SR: Beneficial owner, based on:
    - Holding company was similar to investment funds with passive investors.
    - No actual payments from Norwegian and Swedish companies to US investors.
    - Full legal and economic right to shares and yield (dividends).
- Postpone payments?
- Planning?
  - Reinvestment of funds from holding company
  - Capital gains on shares.
  - Repayment of payables/debt.

# OECD clarification – 2011 Discussion Draft

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- Clarification
  - Emphasis on the context: “paid... to a resident”.
  - Little playing field for domestic law – however, not fully excluded.
  - Definition:
    - The recipient of a dividend is the “beneficial owner” of that dividend where he has the full right to use and enjoy the dividend unconstrained by a contractual or legal obligation to pass the payment received to another person.
  - Not merely found in legal documents, but also on facts showing the substance.
- Implications for existing tax treaties?



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