Danish interest case (with Luxemburg) 4 May 2023

Case 116/2021

(1st Chamber)

Takeda A/S in voluntary liquidation

(represented by Lasse Esbjerg Christensen, lawyer, and Søren Lehmann Nielsen, lawyer) v

Ministry of Taxation

(Søren Horsbøl Jensen, lawyer); and

Case 117/2021

NTC Parent S.à.r.l.

(Arne Møllin Ottosen, lawyer) v

Ministry of Taxation

(Søren Horsbøl Jensen, lawyer)

In a previous instance, judgment was delivered by the 13th Chamber of the Eastern High Court on 25 November 2021 (B-2942-12 and B-171-13).

Seven judges have participated in the judgement: Jens Peter Christensen, Vibeke Rønne, Michael Rekling, Lars Hjortnæs, Jan Schans Christensen, Ole Hasselgaard and Rikke Foersom.

Pleas in law

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The appellant, Takeda A/S under voluntary liquidation (formerly Nycomed A/S), claims that the respondent, the Ministry of Taxation, should recognise that Takeda is not liable to withholding tax at source on interest of DKK 115 516 013, DKK 138 380 325 and DKK 115 161 557 respectively,

totalling DKK 369,057,895, corresponding to 25 % of the interest accrued in the years 2007, 2008 and 2009 on the loan from Nycomed Sweden Holding 2 AB at issue in the case, and that Takeda is in any event not liable for the payment of the amounts not withheld.

Takeda has, in the alternative, submitted two parallel claims that (a) the Ministry of Taxation should recognise that the withholding tax requirements for the years 2007, 2008 and 2009 should be reduced by DKK 1 615 932, DKK 1 935 776 and DKK 1 610 973 respectively, and (b) the case should otherwise be referred back to the Tax Agency for reconsideration.

Takeda has also claimed that the Ministry of Taxation must pay DKK 3,000,000 with interest from 17 December 2021. The claim for payment concerns repayment of legal costs that Takeda has paid to comply with the judgment of the High Court.

The Ministry of Taxation has applied for confirmation.

As regards Takeda's claim for repayment, the Ministry of Taxation seeks dismissal of the action.

Case 117/2021

The appellant, NTC Parent S.à.r.l., claims that the respondent, the Ministry of Taxation, should recognise that there is no Danish limited tax liability in respect of interest on loans between Nordic Telephone Company Investment ApS (now NTC Parent) as debtor and Angel Lux Common S.à.r.l. as creditor for the tax years 2006-2008 and that Nordic Telephone Company Investment is not liable for payment of the amounts not withheld.

NTC Parent claims, in the alternative, that the Ministry of Taxation should recognise that the withholding tax claim should be reduced by DKK 574 865 866 or such other amount as may be determined by the court, and, in the further alternative, that the case should be referred back to the Tax Agency for calculation of the interest portions that are taxable.

The Ministry of Taxation claims that the case should be upheld.

Supplementary statement of case

A number of additional documents have been submitted to the Supreme Court in Case 116/2021 (Takeda), including lists of shareholders as at 31 December 2007, 31 December 2008 and 31 December 2009 for Nycomed S.C.A., SICAR.

Furthermore, a decision of 9 October 2015 from SKAT has been submitted on the repayment of a total of DKK 23,103,203 in interest tax to Takeda. The adjustment was due to the fact that, by the decision of 13 December 2010, 30 % interest tax had been imposed, but that the rate of interest tax was correctly 25 % for the years 2007-2009. The interest tax imposed for the years 2007-2009 then totalled DKK 369 057 895.

Pleas in law

Takeda A/S under voluntary liquidation has submitted, inter alia, that there has been no flow of interest from Nycomed Sweden Holding 2 to Nycomed Sweden Holding 1 or to anyone else. Nycomed Sweden Holding 2's payment of group contributions to Nycomed Sweden Holding 1 did not change the existing interest receivable, and the group contributions did not prevent Nycomed Sweden Holding 2 from being able to dispose of the interest by converting it into equity in Nycomed A/S, as was done in connection with the sale of the Nycomed Group in 2011. Thus, there was no effective payment of interest. The group contributions were never paid to Nycomed Sweden Holding 1 and the debt was subsequently cancelled by Nycomed Sweden Holding 1.

Throughout the proceedings, Takeda has argued that Nycomed S.C.A., SICAR must be considered the beneficial owner of the interest if Nycomed Sweden Holding 2 and Nycomed Sweden Holding 1 cannot be considered the beneficial owners of the interest. Payment of interest by Takeda directly to Nycomed S.C.A., SICAR would have been tax exempt under the double tax treaty with Luxembourg and therefore there can be no abuse of right if this company is considered the beneficial owner.

SICARs are not covered by Article 1 of the Final Protocol to the Double Taxation Convention. Nor are SICARs comparable to the holding companies covered by the special Luxembourg legislation of 1929. There is no question of the SICAR law replacing or continuing the 1929 legislation on holding companies.

With reference to the judgment of the Højesteret in UfR 2023.1575, it is not disputed that Denmark is obliged to apply the general EU law principle of abuse and to deny a taxable person the benefit of the exemption from withholding tax on interest under the Interest/Royalty Directive in the case of abuse under that principle, even though there are no national provisions or collective agreements

providing for such a denial. Takeda also no longer claims that SKAT's decision of 13 December 2010 constitutes a retroactive tightening of an established administrative practice.

The Ministry of Taxation has stated, inter alia, that Nycomed Sweden Holding 2 and Nycomed Sweden Holding 1 were both flow-through entities. Nycomed Sweden Holding 2 was not legally obliged to make the annual group contributions to Nycomed Sweden Holding 1, but the group contributions were an assumed and necessary element of the tax arrangement. Without the deductible and thus neutralising group contributions to Nycomed Sweden Holding 1, Nycomed Sweden Holding 2's interest income would have been taxed in Sweden.

It is irrelevant that the interest and group contributions were not effectively paid, but credited to the principal of the loan and posted to suspense accounts. The tax advantage in the form of the exemption from taxation in the source State, which was attempted to be misappropriated, was not conditional on effective payment. None of the tax law effects arising from the Nycomed group's tax arrangement were conditional on the effective payment of the interest or group contributions.

Nycomed S.C.A., SICAR cannot be considered as the beneficial owner of the interest. Even if this company were to be considered as the beneficial owner of the interest, the double tax treaty with Luxembourg would not lead to a waiver of the taxation of the interest simply because the company is considered to be a holding company within the meaning of Article 1 of the Final Protocol.

Article 1 of the Final Protocol is not, by its terms, limited to holding companies governed by the 1929 legislation or any legislation replacing that legislation. A SICAR company acts as a holding company and, like 1929 holding companies, is subject to a special and favourable tax regime.

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NTC Parent S.à.r.l. submits, inter alia, that Angel Lux Common was the beneficial owner of the interest, which already follows from the fact that there was no channelling of the interest.

The vast majority of the interest was attributed by Nordic Telephone Company Investment to its debt to Angel Lux Common, and on 10 July 2008 Angel Lux Common disposed of the attributed interest by converting it into shares in Nordic Telephone Company Investment. The debt and interest have thus "reverted" to Nordic Telephone Company Investment.

The imputation of interest on Nordic Telephone Company Investment's debt to Angel Lux Common had the effect of increasing its claim on Nordic Telephone Company Investment by an amount equal to the interest each time it was imputed. For Angel Lux Common, until the debt conversion in 2008, the accrued interest represented an asset in the form of a claim on Nordic Telephone Company Investment. There was no debt conversion in Angel Lux Common at the same time as the debt conversion in Nordic Telephone Company Investment.

Angel Lux Common's decision to convert the interest into equity demonstrates that it was the only company with the right to dispose of the interest.

The Ministry of Taxation has stated, inter alia, that, when assessing whether there is abuse and whether Angel Lux Common and Angel Lux Parent must be regarded for tax purposes as the beneficial owner of the interest or as flow-through entities, it is irrelevant that only part of the interest has been effectively paid, while the rest was added to the principal of the loan. It is also irrelevant whether the interest was subsequently converted into shares in Nordic Telephone Company Investment.

The tax arrangement was organised in such a way that the tax advantages in the form of Nordic Telephone Company Investment's deduction of the interest and Angel Lux Commons' exemption from withholding tax could be obtained immediately without any liquidity burden for the participating companies. Subsequent payment transfers, conversions into shares or other transactions could then be carried out without any tax being payable.

Since none of the tax effects of the arrangement were conditional on or otherwise related to actual payment, it makes no sense to make the finding of an abuse of rights of the kind in question conditional on actual payment of interest at each stage.

Reasons and result of the Supreme Court

Background and issues in the cases

On 13 December 2010, SKAT decided that Nycomed A/S (now Takeda A/S under voluntary liquidation) under section 65 D of the Danish Withholding Tax Act, cf. section 2(1)(d) of the Danish Corporation Tax Act, was obliged to withhold tax totalling DKK 392,161,097 on interest accrued in 2007, 2008 and 2009 on an intra-group loan granted by Nycomed Sweden Holding 2 AB in December 2006. By decision of 9 October 2015, SKAT reduced the interest tax imposed to a total of DKK 369,057,895.

On 18 March 2011, SKAT ruled in accordance with the same provisions that Nordic Telephone Company Investment ApS (now NTC Parent S.à.r.l.) was obliged to withhold tax totalling DKK 925,764,961 on interest paid or credited in the period from May 2006 to July 2008 on an intra-group loan granted by Angel Lux Common S.à.r.l. in April 2006.

By decision of 5 October 2015, SKAT reduced the interest tax imposed to a total of DKK 817 238 912.

The cases concern, in particular, whether the taxation of the interest is to be waived or reduced pursuant to Directive 2003/49/EC on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States (the Interest/Royalty Directive) or waived pursuant to double taxation agreements with the Nordic countries and Luxembourg, respectively, cf. section 2(1)(d), third sentence, of the Corporation Tax Act.

Section 2(1)(d) of the Corporation Tax Act

It follows from section 2(1)(d) of the Corporation Tax Act that Nycomed Sweden Holding 2 and Angel Lux Common are generally liable to tax on interest received from a company in this country in the case of controlled debt. Triggering of tax liability implies that Nycomed A/S and Nordic Telephone Company Investment would be obliged to withhold interest tax in the relevant years, cf. section 65 D(1) of the Withholding Tax Act.

According to section 2(1)(d), third sentence, of the Danish Corporation Tax Act, the tax liability does not include interest if the taxation of the interest is to be waived or reduced under the Interest/Royalty Directive or waived under a double taxation treaty with the State in which the recipient company is resident.

The Interest and Royalty Directive and the case law of the Court of Justice of the European Union

Article 1(1) of the Interest and Royalties Directive provides that payments of interest arising in a Member State shall be exempt from any form of taxation in that State provided that the beneficial owner of the interest is a company of another Member State. According to Article 1(4), a company is considered to be the beneficial owner of interest only if it receives these payments for its own use and not as an intermediary, including as an agent, mandatary or authorised signatory of another

person. It follows from Article 1(7) that the provision applies only in the case of interest paid between associated companies.

Article 5 states that the Directive does not preclude the application of national or agreement-based anti-fraud or anti-abuse provisions and that Member States may withdraw benefits under the Directive or refuse to apply the Directive in the case of transactions which have tax evasion, avoidance or abuse as their principal motive or as one of their principal motives.

By judgment of 26 February 2019 (Joined Cases C-115/16, C-118/16, C-119/16 and C-299/16), the Court of Justice of the European Union (CJEU) answered a series of questions referred for a preliminary ruling by the High Court in four cases, including the present cases concerning Takeda and NTC Parent. The Court held that Article 1(1) of the Interest and Royalties Directive, read in conjunction with Article 1(4), must be interpreted as meaning that the exemption from all forms of taxation of interest payments provided for therein is reserved exclusively to the beneficial owners of such interest, that is to say, entities which, from an economic point of view, actually receive that interest and which therefore have the power to determine its use freely. The Court also held that the general principle of EU law, according to which individuals must not be able to rely on provisions of EU law in order to enable fraud or abuse, must be interpreted as meaning that, in the event of abuse, the national authorities and courts must refuse to grant a taxable person the exemption from all forms of tax on interest payments provided for in Article 1(1), even in the absence of national or treaty provisions providing for such a refusal (paragraph 122).

In its judgment of 9 January 2023 (UfR 2023.1575), the Supreme Court has considered a number of general issues concerning taxation of dividends under section 2(1)(c) of the Danish Corporation Tax Act, Directive 90/435/EEC on the common system of taxation applicable in the case of parent companies/subsidiaries of different Member States (the Parent-Subsidiary Directive) and double taxation treaties between Denmark and Cyprus, Luxembourg and the United States. In the judgment, the Supreme Court held, inter alia, that Danish courts must apply section 2(1)(c) of the Danish Corporation Tax Act, which contains a reference to the Parent-Subsidiary Directive, in accordance with that Directive as interpreted by the judgment of the Court of Justice of the European Union of 26 February 2019 (Joined Cases C-116/16 and C-117/16), and that, on that basis, it is irrelevant whether Danish provisions on fraud and abuse existed at the times relevant to the taxation.

In accordance with what was stated in the judgment of 9 January 2023, the Supreme Court finds that Danish courts must apply section 2(1)(d) of the Danish Corporation Tax Act on taxation of interest, which contains a reference to the Interest/Royalty Directive, in accordance with that directive as interpreted by the judgment of the Court of Justice of the European Union of 26 February 2019 (Joined Cases C-115/16, C-118/16, C-119/16 and C-299/16).

Specifically on the abuse assessment

In its judgment of 26 February 2019, the Court of Justice of the EU gave its opinion on the elements constituting abuse of rights and the evidence relating thereto. The Court stated, inter alia, that, even if there are a number of elements in the cases before it from which it could be concluded that there has been an abuse of rights, it is nevertheless for the referring courts to verify whether those elements are objective and consistent and whether the taxpayers have had the opportunity to adduce counter-evidence (paragraph 126).

The Court also stated that a group of companies which is not organised for reasons which reflect economic reality, which has a structure which is purely formal and which has as its main purpose or as one of its main purposes the obtaining of a tax advantage which is contrary to the object and purpose of the applicable tax legislation may be regarded as an artificial arrangement. According to the Court, this is the case in particular where the payment of tax on interest is avoided by introducing into the group structure a flow-through entity between the company transferring the interest and the company which is the beneficial owner of the interest (paragraph 127).

Furthermore, the Court held that it is irrelevant, for the purposes of analysing the group structure, that some of the beneficial owners of the interest transferred by flow-through companies are resident for tax purposes in a third State with which the source State has concluded a double taxation convention and that the existence of such a convention cannot in itself exclude the existence of an abuse of rights (paragraph 135). However, according to the Court, in a situation where the interest would have been exempt if it had been transferred directly to a company established in a third State, it cannot be excluded that the objective of the group structure does not amount to an abuse of rights. In such a case, the group's choice of such a structure instead of paying the interest directly to that company cannot be called into question (paragraph 137).

As regards the burden of proof of abuse, the Court stated, inter alia, that, in order to refuse to recognise a company as the beneficial owner of interest or to establish abuse, a national authority is not required to identify the entity or entities which it considers to be the beneficial owner of that interest (paragraph 145).

The double taxation conventions with the Nordic countries and Luxembourg

The Danish double taxation conventions with the Nordic countries (convention of 23 September 1996) and with Luxembourg (convention of 17 November 1980) correspond in substance, as regards the provisions relevant to the present cases, to the 1977 OECD Model Convention.

Article 11(1) of the Conventions contains essentially identical provisions under which interest arising in a Contracting State and paid to a resident of another Contracting State may be taxed in that other State only if that resident is the beneficial owner of the interest.

As stated by the Supreme Court in its judgment of 9 January 2023, the term 'beneficial owner' must be understood in the light of the OECD Model Convention, including the 1977 OECD anti-abuse comments and the 2003 revised comments. These comments state, inter alia, that the term "beneficial owner" is intended to ensure that double tax treaties do not facilitate tax avoidance or tax evasion through "artifice" and "skilful legal constructions" that "permit the enjoyment of both the benefits of certain domestic laws and the tax relief provided by double tax treaties". The 2003 Revised Commentaries, which elaborate and clarify this, state inter alia that it would not be "consistent with the object and purpose of the Convention for the source State to grant relief or exemption from tax in cases where a resident of a Contracting State, other than as an agent or intermediary, acts merely as a conduit for another person who actually receives the income in question".

Nycomed A/S (now Takeda)

The reorganisation of the Nycomed group in 2006 involved, inter alia, the incorporation into the group of two Swedish companies (Nycomed Sweden Holding 2 and Nycomed Sweden Holding 1), the borrowing of EUR 501 million by Nycomed A/S from Nycomed Sweden Holding 2 and the borrowing of EUR 498.5 million by Nycomed Sweden Holding 1 from the Luxembourg company Nycomed S.C.A, SICAR, that the loan to Nycomed A/S was financed by a capital increase in Nycomed Sweden Holding 2 subscribed by Nycomed Sweden Holding 1, and that in 2007, 2008 and 2009 group contributions corresponding to the interest on the loans from Nycomed Sweden Holding 2 to Nycomed Sweden Holding 1 were adopted.

The Supreme Court finds that the purpose of the reorganisation of the group, as described in detail in the High Court's judgment, was to reduce Nycomed A/S' taxable income in Denmark with deductible interest expenses without the offsetting interest income being taxed within the group. The Supreme Court finds that the restructuring must be regarded as a comprehensive and pre-organised tax arrangement.

For the reasons stated by the High Court, the Supreme Court finds that it cannot be assumed that Nycomed Sweden Holding 2 or Nycomed Sweden Holding 1 had the power to freely determine the use of the interest transferred from Nycomed A/S. The Supreme Court therefore accepts that neither of those companies is the beneficial owner of the interest, but that they must be regarded as flow-through companies which do not enjoy protection under the Interest/Royalty Directive.

For the same reasons, the Supreme Court finds that neither Nycomed Sweden Holding 2 nor Nycomed Sweden Holding 1 can be regarded as the beneficial owner of the interest under the double taxation convention with the Nordic countries, and that the companies therefore do not enjoy protection under the convention either.

The Supreme Court finds that, when assessing whether a company is to be regarded as the beneficial owner of the interest or as a flow-through entity, it is irrelevant whether the interest has been effectively paid or whether the interest has been added to the principal of the loan. The Supreme Court notes in this respect that the addition of interest also involves a transfer of a capital asset and that the tax effects with regard to the interest are not conditional on actual payment. Furthermore, it is irrelevant for the assessment whether the interest has subsequently been converted into capital shares, etc. since a conversion presupposes that there has been a prior transfer of the capital asset which the interest constitutes.

What Takeda has stated about the significance of the lack of effective payment of the interest and the subsequent conversion of the interest into equity in Nycomed A/S in 2011 cannot lead to a different assessment of Nycomed Sweden Holding 2 and Nycomed Sweden Holding 1, which, as mentioned, must be considered flow-through companies.

The question is then whether Takeda has established that Nycomed S.C.A., SICAR is the beneficial owner of the interest, cf. also paragraph 145 of the judgment of the Court of Justice of the European Union of 26 February 2019.

Takeda has not produced the agreements concluded between Nycomed S.C.A., SICAR and the underlying private equity funds and between the private equity funds and their shareholders and investors. In this connection, the Supreme Court notes that the "Management Shareholders Agreement" from July 2007, which has been submitted, states, inter alia, that an "Investor Shareholders Agreement" had been entered into. The latter agreement, which could possibly shed light on what was agreed between Nycomed S.C.A., SICAR and the underlying capital funds, including on the company's authorisation to dispose of the interest, has not been produced. Nor has the agreements between the companies, capital funds, shareholders and investors in question been clarified in any other way.

Accordingly, the Supreme Court finds that Takeda has not established that Nycomed S.C.A., SICAR had the power to freely determine the use of the interest that it received from Nycomed A/S via the Swedish flow-through companies. There is therefore no basis for considering Nycomed S.C.A., SICAR to be the rightful owner of the interest.

In view of the above, the Supreme Court finds no reason to consider whether Nycomed S.C.A., SICAR - if this company could be regarded as the beneficial owner of the interest - would be covered by Article 1 of the Final Protocol to the Double Taxation Convention with Luxembourg.

The Højesteret observes that it is undisputed that Nycomed S.C.A., SICAR is not covered by the Interest/Royalty Directive and, for that reason alone, cannot rely on the advantages under that directive, see paragraph 153 of the judgment of the Court of Justice of the European Union.

In support of its claims in the alternative, Takeda submits, inter alia, that the withholding tax liability must, in any event, be reduced in respect of Shareholder No 39 and Shareholder No 41, both of whom are direct shareholders in Nycomed S.C.A., SICAR. Takeda further submits that the case should be referred back to the tax authorities in order to determine whether the other shareholders and investors in Nycomed S.C.A., SICAR can be considered to be the beneficial owners of the interest at the time of the interest accruals.

As stated above, the agreements between the companies, capital funds, shareholders and investors in question have not been clarified, and Takeda has not established that the said shareholders and investors in Nycomed S.C.A., SICAR are the beneficial owners of the interest.

Against that background, the Supreme Court finds that the tax arrangement constitutes abuse. Accordingly, Nycomed Sweden Holding 2 is liable to tax on the interest received from Nycomed A/S in 2007, 2008 and 2009, cf. section 2(1)(d) of the Danish Corporation Tax Act.

The Supreme Court notes that Takeda has not established that the conditions for the cancellation of the tax liability of Nycomed Sweden Holding 2 pursuant to the last sentence of Section 2(1)(d) of the Corporation Tax Act are fulfilled.

As regards Takeda's arguments concerning the difference between the interest rate on the loan to Nycomed A/S granted by Nycomed Sweden Holding 2 and the interest rate on the loan to Nycomed Sweden Holding 1 granted by Nycomed S.C.A., SICAR, the Supreme Court notes that the interest

margin was an integral part of the administration of the tax arrangement constituting abuse. Nycomed Sweden Holding 2 cannot therefore be considered the beneficial owner of any part of the interest that it received from Nycomed A/S.

The Supreme Court agrees that Nycomed A/S was aware of the basis for the interest accrued to Nycomed Sweden Holding 2 being taxable pursuant to section 2(1)(d) of the Danish Corporation Tax Act. No circumstances have been disclosed in this regard that can justify Nycomed A/S having had sufficient reason to believe that the interest accrued was not taxable. Nycomed A/S (now Takeda) is therefore liable for payment of DKK 369,057,895, cf. section 69(1) of the Withholding Tax Act.

Nordic Telephone Company Investment (now NTC Parent)

The reorganisation of the group in 2006 entailed, inter alia, the establishment and contribution of the two Luxembourg companies (Angel Lux Common and Angel Lux Parent) and a number of transactions in respect of the loans totalling EUR 1.8 billion which the capital funds behind Nordic Telephone Company Investment's then parent company in Luxembourg had granted to the company in December 2005 and January 2006.

The Supreme Court finds that the purpose of the reorganisation of the group, as described in detail in the judgment of the High Court, was to obtain tax exemption for interest that would otherwise have been taxable. The Supreme Court finds that the restructuring must be regarded as a comprehensive and pre-organised tax arrangement.

For the reasons stated by the High Court, the Supreme Court finds that it cannot be assumed that Angel Lux Common and Angel Lux Parent had the power to freely determine the use of the interest transferred from Nordic Telephone Company Investment. The Supreme Court therefore accepts that neither of those companies is the beneficial owner of the interest, but that they must be regarded as flow-through companies which do not enjoy protection under the Interest/Royalty Directive.

For the same reasons, the Supreme Court finds that neither Angel Lux Common nor Angel Lux Parent can be regarded as the beneficial owner of the interest under the double taxation convention with Luxembourg and that the companies therefore do not enjoy protection under the convention either.

As stated in the case concerning Takeda, the Supreme Court finds that in this assessment of whether a company is to be regarded as the beneficial owner of the interest or as a flow-through

entity, it is irrelevant whether the interest has been effectively paid or whether the interest has been added to the principal of the loan, just as it is irrelevant whether the interest has subsequently been converted into capital shares.

What NTC Parent has stated about the significance of the fact that only a small part of the interest was effectively paid and the subsequent conversion of the interest into capital shares in Nordic Telephone Company Investment cannot lead to a different assessment of Angel Lux Common and Angel Lux Parent, which, as mentioned, must be considered flow-through companies.

In support of the alternative claim, NTC Parent has stated, inter alia, that the withholding tax requirement must be waived in whole or in part if the investors in the overlying capital funds can be regarded as the beneficial owners of the interest, as several of the investors are resident in countries covered by double taxation agreements with Denmark. In support of its claim in the further alternative, NTC Parent has argued that the case should be remitted to the Danish Tax Agency for the purpose of calculating the taxable interest portions.

NTC Parent has not provided information on what finally happened to the interest after it had flowed through the Luxembourg companies.

Accordingly, the Supreme Court finds that NTC Parent has not established that the investors in the capital funds behind the Luxembourg companies are the beneficial owners of the interest.

The Supreme Court agrees that it has not been established that the taxation of the interest in question pursuant to Article 2(1)(d) of the Corporation Tax Law constitutes a retroactive change to an established administrative practice.

In the light of the foregoing, the Supreme Court finds that the tax arrangement constitutes abuse. Angel Lux Common is therefore liable to tax on the interest that the company received from Nordic Telephone Company Investment in the period from May 2006 to July 2008, cf. section 2(1)(d) of the Corporation Tax Act.

The Supreme Court agrees that Nordic Telephone Company Investment was aware of the basis for the interest payments and interest additions to Angel Lux Common being taxable under section 2(1)(d) of the Danish Corporation Tax Act. No circumstances have been disclosed in this regard that can justify Nordic Telephone Company Investment having had sufficient reason to believe that the interest payments and interest additions were not taxable. Nordic Telephone Company Investment

(now NTC Parent) is therefore liable for payment of DKK 817,238,912, cf. section 69(1) of the Withholding Tax Act.

Conclusion

The Supreme Court upholds the judgement.

The Højesteret dismisses Mr Takeda's claim for reimbursement of legal costs against the Ministry of Taxation.

Finds in favour of Takeda:

The judgment of the High Court is upheld.

The Ministry of Taxation is acquitted of Takeda A/S in voluntary liquidation's claim for repayment.

As costs before the Supreme Court, Takeda A/S in voluntary liquidation must pay DKK 2,000,000 to the Ministry of Taxation.

As costs before the Supreme Court, NTC Parent S.à.r.l. shall pay DKK 2,500,000 to the Ministry of Taxation.

The sums ordered for costs must be paid within 14 days of the delivery of this judgment of the Supreme Court and shall bear interest in accordance with section 8a of the Interest Act.