Net App Case, Danish Supreme Court 9 January 2023

Case 69/2021

(First Chamber)

Ministry of Taxation

(Søren Horsbøl Jensen and Tim Holmager, lawyers) v

NetApp Denmark ApS

(Lasse Esbjerg Christensen and Søren Lehmann Nielsen, lawyers) and

Case 79/2021

NetApp Denmark ApS

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

The Ministry of Taxation

(Søren Horsbøl Jensen and Tim Holmager, lawyers) and

Case 70/2021

TDC A/S

(Arne Møllin Ottosen, lawyer) v

The Ministry of Taxation

(Søren Horsbøl Jensen and Tim Holmager, lawyers)

Judgments given by the 13th Chamber of the Eastern Regional Court on 3 May 2021 (B-1980-12 and B-2173-12) and 2 July 2021 (B-1980-12). The judgment of 2 July 2021 concerns only the question of interest on the tax authorities' claim against NetApp Denmark ApS, which was deferred for subsequent decision.

The cases were heard together pursuant to Article 254(1) of the Code of Judicial Procedure.

Six judges took part in the judgment: Jens Peter Christensen, Hanne Schmidt, Oliver Talevski, Jan Schans Christensen, Anne Louise Bormann and Jørgen Steen Sørensen.

Allegations

Case 69/2021

The appellant, the Ministry of Taxation, claims that the Court should

1. the respondent, NetApp Denmark ApS, acknowledge that it was obliged to withhold dividend tax in the amount of DKK 158 450 880, corresponding to 28 % of the dividend of DKK 565 896 000 declared on 28 September 2005 by NetApp Denmark, and that it is liable for payment of the amount not withheld

2. Sets aside the judgment of the Regional Court in so far as it acquits NetApp Denmark and refers the case back to the Regional Court for it to rule on the separate claims for interest.

3. The remainder of the judgment of the Regional Court is upheld.

4. NetApp Denmark shall pay DKK 2,500,000 with interest from 28 May 2021.

NetApp Denmark claims that the Court should uphold claim 1 of the Ministry of Taxation and dismiss claims 2-4.

NetApp Denmark further claims that the Ministry of Taxation should recognise that NetApp Denmark was not obliged to withhold dividend tax of DKK 25,763,360, corresponding to 28% of the dividend of DKK 92,012,000 declared on 13 October 2006 by NetApp Denmark, and - in any event - that NetApp Denmark is not liable for payment of the amount not withheld.

Case 79/2021

The appellant, NetApp Denmark ApS, claims that the respondent, the Ministry of Taxation, should recognise (i) that no interest should be paid on the withholding tax claim of DKK 25,763,360 for the period from 17 December 2011 until 17 May 2021, and (ii) that no interest should be paid on the withholding tax claim of DKK 158,450,880 for the period from 17 December 2011 until 17 May 2021. December 2011 and until 14 days after the delivery of a judgment by the Supreme Court that might uphold the Tax Ministry's main claim in Case 69/2021, alternatively that to the extent that

interest is to be paid on the withholding tax claim for the period after 1 August 2013, the interest shall be paid solely in accordance with Section 7 of the Collection Act (alternatively the Interest Act), and thus that the claim shall not be included in the tax account in accordance with the rules on one tax account in Chapter 5 of the Collection Act.

The Ministry of Taxation claims that the decision should be upheld or, in the alternative, that the amount for which NetApp Denmark is liable should be subject to interest in accordance with Section 7 of the Collection Act with effect from 1 January 2013. October 2010 until the date on which the Supreme Court finds that interest cannot be claimed under Section 7 of the Collection Act, from which date procedural interest under Section 8(1) of the Interest Act shall be added, and, in the alternative, that procedural interest under Section 8(1) of the Interest Act shall be added to the amount for which NetApp Denmark is liable for payment from the date on which the proceedings were brought on 14 March 2012.

In the event that the Supreme Court finds that NetApp Denmark's main claim (ii) can be upheld, the Ministry of Taxation has claimed that the amount of DKK 158,450,880 should be subject to interest pursuant to Section 7 of the Collection Act with effect from 1 October 2010, or, in the alternative, that the amount for which NetApp Denmark is liable should be subject to interest pursuant to Section 7 of the Collection Act with effect from 1 January 2012. October 2010 until the date on which the Supreme Court finds that no interest can be claimed under Paragraph 7 of the Collection Act, from which date procedural interest shall be added in accordance with Paragraph 8(1) of the Interest Act, and, in the alternative, that procedural interest shall be added in accordance with Paragraph 8(1) of the Interest Act to the amount for which NetApp Denmark is liable for payment, from the date on which the proceedings were brought on 14 March 2012.

Case 70/2021

The appellant, TDC A/S, claims that the Court should

1. the respondent, the Ministry of Taxation, acknowledge that the answer to question 1 of the Tax Court's order of 13 March 2012 is 'yes', in the alternative, that the answer to question 2 of the order is 'yes', in the further alternative, that the dividends distributed by TDC to NTC Holding G.P. & Cie S.C.A. is taxable only to the extent that the dividend has been passed on to shareholders who are taxable in Denmark on the dividend, and so that the tax liability is then calculated in relation to each shareholder, and in the further alternative that the case be referred back to the Tax Agency for an assessment of the dividend shares which are taxable.

2. The Ministry of Taxation shall pay DKK 2,504,000 with interest from 31 May 2021.

The Ministry of Taxation claims that TDC's principal and subsidiary claim 1 should be upheld, or in the alternative that TDC should acknowledge that questions 1 and 2 of the Tax Court's order of 13 March 2012 are inadmissible. As regards TDC's more subsidiary claim 1, the Ministry of Taxation claims that it should be dismissed, in the alternative, and as regards the most subsidiary claim 1, that it should be dismissed.

The Ministry of Taxation claims that TDC's claim 2 should be dismissed.

Additional facts

Cases 69/2021 and 79/2021

New information has been submitted to the Supreme Court.

A presentation made in October 2005 by the finance department of NetWork Apppliance Inc (NetApp USA) states, inter alia:

"Foreign Cash Repatriation Opportunity.

- The American Jobs Creations Act of 2004 permits NetApp to repatriate foreign earnings to the US at a significantly reduced tax rate

...

- Cash repatriation must occur by end of fiscal 2006

...

Next Steps

- Finalize decision on whether or not to borrow in order to take advantage of the entire repatriation opportunity (model of EPS impact in Appendix)

- Dividend Reinvestment Plan to be finalized to reflect following intended uses of repatriated cash:

- R&D

- Acquisitions

- Capital and infrastructure investments

- Marketing and advertising

- Non-executive employee compensation and training

- Dan and Board approval of repatriation and Dividend Reinvestment Plan would occur during Q3 or Q4 (after Q2 earnings release and after December 12 Deloitte Signoff on Q)

- Actual cash repatriation would occur during Q3 and Q4 after approval of repatriation and Dividend Reinvestment Plan by Dan and Board"

Minutes of the NetApp USA Board of Directors meeting on March 22, 2006 include:

"3. Mr. Moore provided an update of the special meeting of the Audit Committee convened to discuss repatriation of foreign earnings and associated borrowing. The Committee recommended and the Board unanimously approved a repatriation dividend of $550,000,000 and the borrowing by the Company of $300,000,000 to pay such dividend."

From the excerpt of the accounting for net income in the official financial reporting as of April 27, 2007 for NetApp USA, the figure "0" appears as "Cumulative FY06" for NetApp Denmark ApS. From a note to this it appears:

"Because of the section 965 repatriation in FY06, no prior cumulative earnings"

Transfer notes from Nordea Bank Danmark A/S state that on 3 May 2010 the bank transferred USD 18,630,759 from NetApp Denmark to NetApp Holdings Ltd, Cyprus (NetApp Cyprus).

The transfer note from JPMorgan Chase Bank N.A. shows that on 3 May 2010 NetApp Cyprus received USD 18 630 759 from NetApp Denmark ApS and that on the same day the bank transferred a corresponding amount from NetApp Cyprus to Network Appliance Global Ltd (NetApp Bermuda).

NetApp Denmark's audit report for the 2009/10 annual report states, inter alia:

"NetApp Denmark proposed a dividend of DKK 92 million in 2005/06 to NetApp Holdings Ltd, Cyprus. The dividend could not be paid before NetApp Holding and Manufacturing BV paid a consideration of EUR 14 million for the shares in NetApp BV, which has happened in 2009/10. An interest of 3.2 percent has been charged in 2009/10."

Sag 70/2021

New information has been submitted to the Supreme Court, including lists of investors in the private equity funds behind the Luxembourg companies in question.

Explanations

Johannes Gillis has explained, inter alia, that from 2004 to 2019 he was European Tax Manager for NetApp USA. He has a background in international tax and studied tax at the University of Amsterdam. Today, he works in Volvo's North American division.

NetApp had a "check the box" structure, where foreign companies were viewed as one company for tax purposes from a US perspective. This was needed because payments would otherwise be "caught" in the US tax system before they were actually paid to the US company. They chose to use the scheme so that the US company's tax position was not affected by payments in foreign companies.

NetApp USA owned a low-tax foreign company, NetApp Bermuda. NetApp Bermuda did not operate itself, but instead entered into a licensing agreement with two Dutch companies, NetApp Holding and Manufacturing B.V. and NetApp B.V. NetApp Bermuda was a top holding company.

company".

The US tax system was structured as a "credit system" rather than an "exemption system" as in most European systems. The credit system meant that if NetApp Bermuda distributed dividends to NetApp USA, they would be taxed at 37%, and then underlying corporate taxes could be credited against that tax. Any dividend in a normal period would therefore be taxed at a very high rate.

The Bermuda company was operated and managed by a Bermuda management company, which provided an address and ensured that all formalities were complied with and that the company complied with local law. Basic decisions such as paying dividends were taken in the US company.

It was quite common to use the "check the box" system. Every listed company in the US had a similar or almost similar system. The effect of the scheme was that all the funds ended up in NetApp Bermuda. If all the funds in NetApp Bermuda went to the US company, they would be taxed at 37%. Therefore, the funds were accumulated in NetApp Bermuda. The reason why the Danish NetApp company was just below NetApp Bermuda was that the European dividend could be paid to the Bermuda company without taxation. These were the rules at the time, regardless of where the dividends were paid to.

In 2004 came the American Jobs Creation Act. The problem in the US was that companies never brought their profits back to the US because of the high tax burden. So the law was changed to allow US companies, for a temporary period, to take their foreign profits home at a low tax rate of 5% or 6% and invest them in the US. NetApp USA had a lot of profits in Bermuda and other companies, so it decided to repatriate. He was not so involved in the decision to repatriate profits, but he was involved in executing it. It was a one-off opportunity to repatriate. He is convinced that the vast majority of companies used the opportunity to repatriate.

His job at NetApp was to manage the European part of the business, and he had to deal with the take-back project, among other things. In this context, he had two weekly calls with his PwC partner in the Netherlands. NetApp Denmark was in the wrong place in their structure, so they were considering options, including putting a company in one place to avoid changing the whole structure, which would be cumbersome. The simpler it could be done, the better. The structure they had was in all other respects very good.

He got advice from PwC in the Netherlands and a Danish specialist in PwC Luxembourg. They talked about what needed to be done to complete the repatriation. The advice they got was that the repatriation should be feasible using a new holding company.

The problem with paying directly to NetApp Bermuda from the Danish company was that a practice had emerged whereby a company could only avoid withholding tax if it was dealing with countries with which agreements had been concluded. Therefore, the owner of the Danish company had to be changed to a company in another country, and that is what they ended up doing. They had some telephone conversations with the PwC specialists and they were told that the legislative preparatory works had some examples that allowed them to transfer the shares of the Danish company to a new company in Cyprus. A scheme similar to the one they wanted to introduce had been discussed during the reading of the draft law.

The general advice they received from PwC was enough for them to believe that they could make the arrangement they used to implement the repatriation. This was advice that extended over a

period of emails back and forth, and it is likely to have been in writing. He has been unable to find anything in writing in his files about the advice and his mailbox at the company has been deleted.

They considered whether the Danish company should be owned directly by the US company so that the dividend could be transferred directly. If they had changed the ownership of the Danish company, there would have been no international impediment. However, from the perspective of the US company, such a change would involve a lot of work. The structure they already had with NetApp Bermuda worked. Therefore, they wanted to keep the structure.

It was the finance department that decided how much to transfer in dividends to the US company. His department gathered material and then the task was to transfer as much as possible to the US company. When profits were repatriated to the US as part of the scheme, certain investment conditions had to be met. A plan had been drawn up which had to be signed off by an accountant, but he had nothing to do with that.

The planning of when and how the transfers would take place was not his concern. If tax had to be withheld, it came across his desk so that it was done correctly, but the actual payments were made by the accountant.

About the second dividend payment in 2006, he knows it was not part of a larger strategy, but he does not know why it was made. He believes it was more an independent act by the European accountants. He was not involved in the payout and as it was not that big, nobody really cared about it. He sees no other possibility than that the dividend was paid to NetApp Cyprus, which must have paid it to NetApp Bermuda. He was only involved in whether the payment could be made, and he said yes to that.

There was not much interest in getting the payout completed. The paperwork for the payout itself had already been done, so he is not surprised that it could sit for so long without being dealt with.

Additional legal basis

Administrative practice, etc.

Law No 1184 of 12 December 2005 on the application of the double taxation agreement concluded between the Danish business organisations' office in Taipei and the Taipei representative office in Denmark stipulated in Article 1(1) that the double taxation agreement applies in Denmark.

Article 26 of the Double Taxation Agreement reads as follows: 'Article 26

Limitation of contractual benefits

...

2. Notwithstanding the provisions of Articles 10, 11 and 12, a territory may, according to its law, tax dividends, interest and royalties paid by a company resident in that territory to a company, trust, partnership or other body corporate resident in the other territory, where

(a) more than 50 per cent of the capital or voting rights in the company, trust, partnership or other legal person beneficially interested in the dividends, interest or royalties is owned or controlled, directly or indirectly, by a person or by an associated company, trust, partnership or other legal person not resident in either territory or in the European Union or the European Economic Area; and

(b) the profits, interest and royalties would not have been subject to a reduced rate of tax or to an exemption from tax in the territory in which they arise under the provisions of any double taxation convention or other agreement concluded between that territory and other territories or jurisdictions, if they were paid directly by the company of the first-mentioned territory to any person or associated companies, trusts or partnerships or to any other legal person who directly or indirectly shares in the ownership or control of the company to which the dividends, interest or royalties are paid.

..."

The preparatory works to the Act state the following about the provision (Folketingstidende 2005-06, tillæg A, lovforslag nr. L 43, p. 1160):

"The purpose of [paragraph 2] is to prevent Taiwan from being used as a tax-free 'transit camp' for payments between a Danish company and one or more persons resident in a country with which Denmark does not have a double taxation agreement. It is noted that dividends from a Danish subsidiary to a foreign parent company are not taxed under domestic law in Denmark if the tax is to be waived or reduced under a double taxation agreement."

Act No 308 of 19 April 2006 amended Section 2(1)(d)(1) of the Corporation Tax Act on the tax liability of companies, etc. referred to in Section 1(1) of the Act, established abroad, which receive interest from sources in this country. A letter of 24 February 2006 from the Association of State-Authorised Accountants to the Tax Committee of the Folketing concerning the draft law (draft law No L 116 of 14 December 2005) and the Minister's comments of 3 March 2006 state, inter alia:

"In a letter dated 24 February 2006, the Association of State-Authorised Accountants (FSR) addressed the Tax Committee of the Folketing. The request relates to the part of Bill L 116 concerning the adjustment of the group definition in various protection rules.

...

FSR: The FSR is aware that a few other countries have withholding tax on interest. In these cases, the equity and debt investments of private equity funds are made through holding companies in other EU countries, such as Luxembourg.

This is also likely to be the situation if Denmark introduces a withholding tax on interest. The consequence would then be that interest payments would be subject to thin capitalisation. Furthermore, the consequence would be that dividends could be distributed on an ongoing basis, which is precisely not the case today because Denmark has a coupon tax on dividends.

Comment: The limited tax liability for interest under Section 2(1)(d) of the Corporation Tax Act covers foreign companies receiving intra-group interest from Denmark. This limited tax liability lapses if the taxation of the interest is to be waived or reduced under the Interest/Royalty Directive or under a double taxation convention.

In this context, it should be noted that, in relation to Article 2(1)(d) of the Corporation Tax Act, the determination of the recipient of the interest must be based on the principle that the recipient of the interest is the rightful owner of the income.

The withholding tax on interest is only waived under the conventions if the beneficial owner of the interest is resident in the other State. The same applies to the Interest/Royalty Directive, see Article 1(1) of the Directive. Furthermore, the benefits of the Directive may be denied in the case of transactions for which tax evasion, tax avoidance or tax abuse is the principal motive or one of the principal motives.

If the private equity funds make equity and debt investments through holding companies, it will have to be assessed whether the holding company is the beneficial owner of the interest income. In my view, a pure flow-through holding company in Luxembourg, for example, can hardly be the beneficial owner of the interest income. The Swiss Supreme Court has concluded that a pure flow-through holding company in Denmark was not the beneficial owner of dividend payments under the Danish-Swiss agreement."

Interest calculation etc.

Question No 527 of 3 May 2022 (part one) to the Minister of Taxation states:

"Question

There is currently no legal basis for a taxpayer who has been fully vindicated in an appeal before the Tax Court or Skatteankenævn and which the Ministry of Taxation has brought before the courts to pay the disputed tax claim to the tax administration while the case is pending before the courts. Similarly, there is no legal provision for the disputed claim to be paid if the taxpayer has won the case in court and the Ministry of Taxation then chooses to appeal the judgment to a higher court. In the light of the above, will the Minister answer the following questions?

A. Does the Minister agree that the inability to pay is a significant difference from civil cases where a debtor can always choose to pay a claim under protest to avoid interest accrual while the case is pending?

B. Does the Minister agree that the inability to pay shifts the risk of interest from the Treasury as creditor to the taxpayer as debtor, noting that in civil cases a creditor cannot refuse to accept payment from the debtor and must accept repayment with interest if the claim made by the creditor itself turns out not to exist?

C. Does the Minister agree that the absence of interest risk for the Treasury entails a risk that more cases will be brought than if it cost the Treasury interest to lose the case again in the next instance?

D. Does the Minister agree that the taxpayer is disadvantaged in terms of interest in situations where the taxpayer has lost the case and is appealing it, compared to cases where the taxpayer has won and the Department is appealing it?

E. Does the Minister agree or disagree that there is a legal concern if the State charges interest after the taxpayer has offered to pay the disputed claim to the tax administration while the case is pending before the courts?

F. Will the Secretary of State indicate whether he intends to bring forward legislation to allow the payment of the tax which the Inland Revenue believes the taxpayer should pay?"

The Minister of Taxation's reply of 24 May 2022 states, inter alia, "A.

I can only comment on litigation within the remit of the Treasury. I can inform you that the regional courts have ruled in several cases that there is no legal basis for the taxpayer to voluntarily pay the disputed amount in order to avoid business while proceedings are pending if the taxpayer has previously been successful in the administrative system or before a lower court.

Most recently, however, in its judgment of 31 March 2022 concerning Heavy Transport Holding ApS, the Supreme Regional Court held that the Ministry of Taxation was precluded from claiming interest on the disputed amount during the period from the taxpayer's success before the Tax Court until the judgment of the Regional Court, because during that period the company was not able to voluntarily deposit the amount in order to avoid interest.

It should be noted that the judgment has been appealed to the Supreme Court by both parties and that I do not generally comment on pending litigation.

B. and C.

A taxpayer may pay a disputed amount to the Tax Administration even if the taxpayer disputes the Tax Administration's decision. The question before the regional courts, on the other hand, concerns the specific situation where an administrative decision has been taken stating that the claim does not exist.

...

D.

I do not think that this question can be answered unequivocally. If a taxpayer is unsuccessful in a tax case, the taxpayer can either pay the amount in dispute or apply to the Tax Administration for a stay of proceedings. A request for deferral will normally be granted. During the deferral period, interest will continue to accrue on the disputed tax claim, but the deferral will also include the accrued interest. However, as mentioned above, the taxpayer may also choose to pay the disputed tax claim, thereby avoiding the accrual of interest, which will be of importance if the taxpayer is unsuccessful. A taxpayer thus has two options here - to pay to avoid interest accrual or to request a deferral.

If, on the other hand, a taxpayer is successful, for example in a case before the Tax Court, and the Tax Ministry chooses to take the case to court, the Tax Ministry considers that the taxpayer will not be able to pay the disputed amount, because in this situation the Tax Administration is not entitled to receive the payment. Interest will therefore accrue from the date of the last timely payment of the disputed tax claim until the final judgment.

E. and F.

I fully understand the considerations that may militate in favour of introducing an option to voluntarily pay or deposit the disputed amount. On the other hand, consideration should be given, inter alia, to whether a deposit scheme allowing the current interest on the disputed amount to be suspended would entail any secondary consequences for public finances."

Additional pleas in law

Cases 69/2021 and 79/2021

The Ministry of Taxation has submitted, inter alia, that the dividends from NetApp Denmark are channelled via NetApp Cyprus, a pass-through company, to NetApp Bermuda, a tax shelter company. Therefore, strict requirements must be applied to the proof that the main purpose has not been to abuse the Danish-Cypriot Double Taxation Convention and the Parent/Subsidiary Directive, see paragraph 110 of the judgment of the Court of Justice of the European Union of 26 February 2019. Here, the Court states, inter alia, that it cannot be "excluded" that there is no abuse of rights in cases where the dividend would have been exempt from tax if it had been distributed directly to a company in a third state.

There is now evidence that NetApp USA had not decided on repatriation when NetApp Denmark approved the distribution of dividends of DKK 565 896 000 to NetApp Cyprus on 28 September 2005, as repatriation was only decided at the NetApp USA Board meeting on 22 March 2006. This is reflected in the presentation made by NetApp USA's Finance Department in October 2005 and in the minutes of the Board meeting held on 22 March 2006. As regards the dividend of DKK 92,012,000, there is no evidence that the amount was channelled to NetApp USA at all, and Johannes Gillis has explained to the Supreme Court that the distribution was not part of a larger strategy, that he does not know why it was made, and that he believes it was more an independent act on the part of the European accountants. In any event, NetApp Denmark has therefore not discharged its burden of proof.

NetApp Denmark has still not demonstrated that there is a retroactive tightening of the tax authorities' practices. In this respect, no weight can be given to the preamble to the 2005 Act on a double taxation agreement between the Danish business organisations in Taipei and the Taipei representative office in Denmark, as the drafts cannot be taken as an argument that ordinary double taxation agreements do not contain safeguards against abuse. Nor can any weight be attached to the preparatory works for the 2006 amendment of Article 2(1)(d) of the Corporation Tax Act, which states precisely that a pure flow-through holding company in, for example, Luxembourg can hardly be the proper recipient/legal owner of the interest income in question.

It is not contrary to administrative law principles or other rules that the tax authorities refused NetApp Denmark's request for voluntary payment of the disputed amount, see UfR 2023.307 H, and the request cannot therefore be given any weight in the calculation of the amount of interest due. Nor is the award of interest contrary to Article 6 of the European Convention on Human Rights, since tax proceedings are not covered by that provision, nor does the award of interest imply an accusation of a crime within the meaning of that provision. Nor can Article 47 of the Charter of Fundamental Rights of the European Union be applied in a case such as the present, which involves fraud and abuse. Moreover, there is no reason why a system whereby interest on late payment is added from the date on which the debt became due until payment is made pursuant to a binding decision or an admission of liability should be contrary to the provision.

NetApp Denmark further submits, inter alia, that, according to Mr Gillis's statement to the Supreme Court, it must be assumed that the reason for setting up NetApp Cyprus as an intermediate holding company was to find a structure which made it possible to repatriate dividends to NetApp USA under the favourable tax conditions laid down in the American Jobs Creation Act. It must be assumed that the structure established was considered the simplest and there is no basis for assuming that an abuse of the Parent/Subsidiary Directive or the Danish-Cypriot Double Taxation Convention was intended.

With regard to the distribution of DKK 565,896,000 to NetApp Cyprus, it must be considered established that the amount was transferred to NetApp USA and that this had been planned all along. It must also be considered established that NetApp Bermuda did not have real power of disposal over the amount, since it was necessary for NetApp Bermuda to contribute to the total repatriation of NetApp USA. It is therefore irrelevant that the final decision on the repatriation to NetApp USA was only taken at the NetApp USA board meeting on 22 March 2006.

With regard to the distribution of DKK 92,012,000, it can be assumed that this amount was included in the total transfer of USD 550 million from NetApp Bermuda to NetApp USA on 3 April 2006. The amount of the distribution was derived from the sale of NetApp Denmark's shares in the Netherlands in 2005, and the negative equity of approximately USD 18 million that arose in NetApp Bermuda upon the transfer in April 2006 to NetApp USA was only possible because NetApp

Bermuda knew well in advance that the sale of the Dutch shares had created additional free reserves in NetApp Denmark that could be transferred. This is also supported by the fact that the official financial report as at 27 April 2007 for NetApp USA states that there were 'no prior cumulative earnings'. The distribution amount could have been transferred immediately to NetApp Cyprus and then to NetApp Bermuda and NetApp USA, but this was not necessary as NetApp Bermuda already had to take out substantial loans to finance the transfer of the USD 550 million to NetApp USA. It is immaterial what happened to the amount after it was transferred in 2010 from NetApp Denmark to NetApp Cyprus and then to NetApp Bermuda, as the amount was simply to offset the negative equity of NetApp Bermuda.

Further evidence of the tax authorities' practices up to 2008 is now available. For example, the drafting of the 2005 Act on a Double Taxation Agreement between the Danish Business Organisations' Office in Taipei and the Taipei Representative Office in Denmark indicates that there is no safeguard in the term "beneficial owner" in the general double taxation agreements. The preparatory works for the 2006 amendment of Article 2(1)(d) of the Corporate Income Tax Act show that at that time the tax authorities continued to equate the terms 'beneficial owner' in the DTAs with 'proper recipient of income' in Danish tax law.

The Ministry of Taxation's interest claim implies that the total interest claim as of 31 January 2023 will be approximately DKK 362 million, of which approximately DKK 155 million will be due to the interest provision in Section 16c(1) of the Collection Act. This should be seen in relation to the total tax claim of the Ministry of Taxation of approximately DKK 184 million. These are disproportionately large amounts of interest which seriously impede a party's ability to bring an action against the tax authorities, and this must be seen in the light of the fact that NetApp Denmark has not been given the opportunity to deposit the disputed amounts with the tax authorities. There is a violation of Article 6 of the European Convention on Human Rights and Article 47 of the Charter of Fundamental Rights of the European Union.

The scope of Article 47 of the Charter, unlike Article 6 of the ECHR, does not depend on the existence of a dispute over civil rights and obligations or on the existence of a criminal charge.

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TDC also submits, inter alia, that the judgment of the Court of First Instance correctly noted that TDC did not argue before the Court of First Instance that the capital funds behind NTC Holding and the other Luxembourg companies would have been able to obtain tax exemption on the dividends if TDC had instead transferred the dividends to them. However, there must be legitimate owners of the dividends and lists of ultimate investors have now been submitted to the Supreme Court. In any event, it must be possible to establish that the dividend is taxable only to the extent that it is passed

on to shareholders who are liable to tax on the dividend in Denmark, so that the tax liability is calculated in relation to each shareholder separately.

Alternatively, the case should be referred back to the tax authorities for determination of the dividend shares that are taxable.

The Ministry of Taxation has additionally stated, inter alia, that following the judgment of the Court of Justice of the European Union of 26 February 2019, TDC had special reason to provide information on what happened to the dividends after the transfer in 2011 to NTC Holding, but TDC has not done so. It must therefore continue to be assumed that the main purpose of NTC Holding and the other companies in Luxembourg was to redistribute the dividends from TDC to, inter alia, private equity funds in the Cayman Islands. There is no evidence that the beneficial owners of the dividends are resident in countries with which Denmark has concluded double taxation agreements and that these owners would be exempt from tax liability under Article 2(1)(c) of the Corporation Tax Act.

TDC's more subsidiary claim should be rejected as it lacks clarity and precision and is therefore unsuitable for inclusion in a judgment.

Reasons and findings of the Supreme Court

1. Background to the case and issues

The present cases concern the taxation of dividends distributed by Danish subsidiaries to foreign parent companies. The cases must be assessed under Danish tax law, the EU Directive on the common system of taxation applicable in the case of parent companies and subsidiaries of different

Member States and double tax treaties between Denmark and Cyprus, Luxembourg and the United States.

In Supreme Court cases 69/2021 and 79/2021, SKAT ruled on 17 September 2010 that NetApp Denmark ApS was obliged to withhold tax on dividends of DKK 565,896,000 and DKK 92,012,000, which NetApp Denmark distributed to NetApp Holdings Ltd, Cyprus (NetApp Cyprus) on 28

September 2005 and 13 October 2006, respectively, pursuant to section 65(1) of the Withholding Tax Act, cf. section 2(1)(c) of the Corporation Tax Act.

On 16 December 2011, the Tax Court ruled that NetApp Denmark was not obliged to withhold tax on the dividends.

The cases concern whether NetApp Denmark was obliged to withhold tax. If so, the cases also concern the liability of NetApp Denmark for the payment of the withholding amounts, pursuant to Section 69(1) of the Withholding Tax Act, and the interest on the claims of the tax authorities against NetApp Denmark, pursuant in particular to Section 7(1) and Section 16c(1) of the Collection Act.

In Supreme Court case 70/2021, on 21 June 2011, the Tax Council issued binding answers to two questions from TDC A/S concerning the taxation of a proposed distribution of dividends from TDC to its parent company NTC Holding G.P. & Cie S.C.A., Luxembourg (NTC Holding). The Tax Council answered "No" to the fact that the distribution would be tax exempt under Article 2(1)(c)(3) and (5) of the Corporation Tax Act.

On 13 March 2012, the Tax Court confirmed the Tax Council's answer concerning Section 2(1)(c)(5) of the Corporation Tax Act, but upheld TDC's claim that the distribution would be tax-free under Section 2(1)(c)(3).

The case concerns the correct answer to TDC's question.

The cases raise general issues concerning Section 2(1)(c) of the Corporation Tax Act, Directive 90/435/EEC on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (the Parent-Subsidiary Directive), the Double Taxation Convention Denmark and Cyprus, Luxembourg and the USA respectively, and the practice of the tax authorities in this area (point 2 below).

In addition, there are specific questions concerning NetApp Denmark (point 3) and TDC (point 4). The Supreme Court's conclusion is set out in point 5.

2. General issues concerning the rules on dividend taxation

2.1. Section 2(1)(c) of the Corporation Tax Act

At the time of NetApp Denmark's distributions to NetApp Cyprus and the Tax Council's binding reply to TDC on the proposed distribution to NTC Holding, it followed from Section 2(1)(c)(1) of the Corporate Income Tax Act that the distributions would in principle trigger tax liability for NetApp Cyprus and NTC Holding. This would imply that NetApp Denmark and TDC would be obliged to withhold the relevant tax under Section 65(1) of the Withholding Tax Act.

The provision also provided for exceptions to the principle of tax liability. In particular, it was a condition for tax exemption that tax had to be waived or reduced under the Parent/Subsidiary Directive or under a double taxation agreement with the State of the parent company, cf. the fourth paragraph of the provision (third paragraph in 2011). Point 5 of the provision further provided that the tax liability did not extend to members of certain parent companies included in the list of companies referred to in Article 2(1)(a) of the Directive.

For the reasons stated by the Regional Court, the Supreme Court accepts that the fifth indent of Article 2(1)(c) of the Corporation Tax Act must be understood as meaning that exemption from tax liability presupposes that the condition that taxation be waived or reduced under the Parent-Subsidiary Directive or a double taxation convention is also met.

The general issues then relate to what the reference in Article 2(1)(c) to the Parent/Subsidiary Directive and double tax treaties with other States actually means (points 2.2 and 2.3). The significance of the tax authorities' practice in this area is a question in this context (point 2.4).

The Parent/Subsidiary Directive and the case law of the Court of Justice

Article 1(1) of the Parent-Subsidiary Directive provides that each Member State shall apply the Directive to, inter alia, profits distributed by companies of that Member State to companies of other Member States of which they are subsidiaries. According to paragraph 2 of this provision, the Directive shall not prevent the application of domestic provisions or agreements necessary to prevent fraud and abuse.

Article 5(1) provides for the exemption from withholding tax of dividends distributed by a subsidiary to its parent company.

The Directive has been implemented in Danish law by requiring, as a condition for tax exemption, that the tax be waived or reduced in accordance with the provisions of the Directive. Under the Corporation Tax Act, it thus depends on the Directive whether tax exemption is to be granted.

The Court of Justice of the European Communities has ruled on 26. The Court of Justice has ruled on 26 February 2019 (Joined Cases C-116/16 and C-117/16) that the general principle of EU law, according to which citizens may not rely on provisions of EU law in order to enable fraud or abuse, must be interpreted in this way, that, in the event of fraud or abuse, the national authorities and courts must refuse to grant a taxpayer the exemption from withholding tax provided for in Article 5 of the Directive, even in the absence of national or collective provisions providing for such a refusal (paragraph 95). In this respect, the Court refers to previous case law on the above principle, including the judgment of 5 July 2007 in Case C-321/05 Kofoed, on the EU Merger Directive (paragraphs 86-89).

NetApp Denmark and TDC have argued that the judgment of the Court of Justice of the European Union of 26 February 2019 cannot be attributed significance in Danish law for the understanding of the Directive and thus of Section 2(1)(c) of the Corporation Tax Act. February 2019, it must be a prerequisite for establishing fraud or abuse that there are rules in Danish law as referred to in Article 1(2) of the Directive, that there were no such rules at the relevant times and that the principle of prohibition of fraud and abuse set out in the judgment cannot have direct effect on citizens and companies. In this regard, the companies referred to the Supreme Court's judgment of 6 December 2016 in the so-called Ajos case (UfR 2017.824) and to the Act on Denmark's Accession to the European Union.

As stated by the Regional Court, under Article 267 of the Treaty on the Functioning of the European Union, it is for the Court of Justice of the European Union to rule on questions of interpretation of EU law, including the Parent/Subsidiary Directive. Danish courts must therefore enforce the understanding of the Directive, and thus of Section 2(1)(c) of the Corporation Tax Act, as set out in the judgment of the Court of Justice of the European Union of 26 February 2019, unless - as in the Ajos case - something else might follow from the Act on Denmark's Accession to the European Union, because Danish courts, by following the judgment of the Court of Justice of the European Union, would be acting outside the scope of their powers as a judicial authority.

In the Ajos case, the starting point of the issue was that there was a contra legem situation, as it was not possible to interpret the relevant provision of Danish law (the former provision of § 2a(3) of the Danish Act on Public Employees) in line with the relevant EU rules (the EU Employment Directive). In the present cases, as mentioned above, it follows directly from Section 2(1)(c) of the Corporation Tax Act that tax exemption can only be granted if dividend tax is to be waived or reduced under the Parent/Subsidiary Directive. The Danish Corporate Income Tax Act thus refers to

the Directive, and as a result there is no conflict between Danish legislation and the Directive as interpreted by the European Court of Justice. There is therefore no contra legem situation.

Accordingly, Danish courts must apply Section 2(1)(c) of the Corporation Tax Act in accordance with the Parent/Subsidiary Directive as interpreted by the judgment of the Court of Justice of the European Union of 26 February 2019. It is therefore irrelevant whether - as stated by the Ministry of Taxation - at the relevant times in the cases at hand there were Danish provisions on fraud and abuse as referred to in Article 1(2) of the Directive.

The double taxation conventions with Cyprus, Luxembourg and the United States

The Danish double taxation conventions with Cyprus, Luxembourg and the United States correspond in substance to the 1977 OECD Model Tax Convention as regards the provisions relevant to the present cases.

Article 10(2) of the Conventions contains largely identical provisions, according to which dividends paid by a company resident in one Contracting State to a person resident in the other Contracting State may be taxed in the first State only at a certain percentage of the gross amount of the dividend, provided that the recipient is the "beneficial owner" of the dividend. The Conventions also contain, in Article 3(2), substantially identical provisions according to which, unless the context otherwise requires, any term not defined in the Convention shall be given the meaning which it has under the law of the Contracting State concerning the taxes to which the Convention applies.

The term "beneficial owner" is not defined in the Conventions. Since the term delimits the taxing powers of the Contracting States, the Supreme Court considers that it follows from the context that the meaning cannot depend on the respective legislation of the Contracting States.

The Supreme Court agrees that the term "beneficial owner" must be understood in the light of the OECD Model Tax Convention, including the 1977 OECD Commentary on Anti-Abuse. According to these commentaries, the purpose of the term is to ensure that double tax treaties do not encourage tax avoidance or tax evasion through "artifices" and "artful legal constructions" which "enable the benefit to be derived both from the advantages conferred by certain national laws and from the tax concessions afforded by double tax treaties." The 2003 Revised Commentaries have elaborated and clarified this, stating 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 person who is resident of a Contracting State, other than as an agent or intermediary, merely acts as a conduit for another person who actually receives the income in question."

NetApp Denmark and TDC submit that it is apparent from the preparatory works for the 2001 amendment to Paragraph 2(1)(c) of the Corporation Tax Act that the legislature has assumed an understanding of the concept of 'beneficial owner' which is not based on the OECD Model Tax Convention with

but on the term 'proper recipient of income' in Danish tax law.

The purpose of the abovementioned amendment to the law was to prevent the abuse of the hitherto applicable tax exemption for dividend payments resulting from the establishment of Danish holding companies whose sole purpose was to avoid taxation in other countries, while at the same time taking account of the exceptions to the general rule of withholding tax which Denmark is obliged to have under, for example, double taxation conventions, cf. the reply of 24 November 2000 by the Minister for Taxation to a question from the Folketing's Tax Committee (L 99 - Annex 2). Against this background, there must be a clear presumption that the legislative amendment provided for a different understanding of the term 'beneficial owner' in the relevant double taxation conventions than that provided for in the OECD Model Tax Convention with commentary, so that tax exemption would be granted to a greater extent than required by the conventions.

As stated by the Regional Court, the preparatory works for the 2001 amendment do not contain any reference to the term "beneficial owner" (or "rightful income recipient"). The Supreme Court considers that there are no other grounds for a different understanding of the term "beneficial owner". What the Minister of Taxation said in his replies to Parliament about the possibilities of restructuring and transferring intermediate holding companies, among other things, cannot be understood as meaning that the intention was to allow abuses in the form of 'artifice', etc., which, according to the Model Tax Convention and the commentaries thereto, justify the absence of tax exemption.

2.4. Administrative practice etc.

NetApp Denmark and TDC argue that the understanding of Article 2(1)(c) of the Corporation Tax Act, the Parent/Subsidiary Directive and the DTCs invoked by the Ministry of Taxation is a retroactive change in administrative practice, inter alia because until 2008 the tax authorities considered the term 'beneficial owner' in the DTCs to be the same as the term 'proper recipient of income' in Danish tax law. NetApp Denmark and TDC argue that the evidence for this change in practice is not the fact that the tax authorities have not intervened in cases such as the present one in the past, but the statements made by the Ministry of Taxation to Parliament until 2008, including in connection with the 2001 amendment of Article 2(1)(c) of the Corporation Tax Act.

As stated in section 2.3, the Supreme Court considers that there is no evidence in the preparatory works for the 2001 amendment to the Act that a different understanding of the term "beneficial owner" was assumed in the relevant double taxation conventions than that which follows from the commentaries to the OECD Model Convention.

Following the 2001 amendment, the Ministry of Taxation has in some cases provided answers to Parliament which can be understood as meaning that, in the Ministry's view, there is a coincidence between the terms "beneficial owner" in the DTCs and "proper recipient of income" in Danish tax law. The Supreme Court considers that such statements, which are contrary to the above understanding, cannot be given decisive weight. The Supreme Court adds that, during the period in question, there were a number of conflicting statements, inter alia in July 2003, where it is stated, with reference to the OECD 2003 commentaries, that the concept of "beneficial owner" is not to be understood in a narrow technical context, but rather from an interpretation of the purpose of the conventions, including the consideration of avoiding or evading taxation.

3. Specifically on NetApp Denmark

3.1. First distribution - DKK 565,896,000

For the reasons stated by the Regional Court, the Supreme Court agrees that there is in principle no tax exemption under the Double Taxation Convention between Denmark and Cyprus or under the Parent/Subsidiary Directive. The Supreme Court thus considers that NetApp Cyprus must be regarded, in relation to its subsidiary NetApp Denmark and its parent company NetApp Bermuda, as a through-flow company which does not enjoy protection under the Convention or the Directive.

The question is whether it can lead to a different result that NetApp Denmark - if the parent company at the time of the distribution had been NetWork Appliance Inc (NetApp USA) and not NetApp Cyprus - could have distributed the dividend to NetApp USA with the effect that the dividend would have been exempt from tax liability under the Double Taxation Convention between Denmark and the USA.

On this issue, the CJEU's judgment of 26 February 2019 states that it is irrelevant for the purposes of examining the group structure that some of the beneficial owners of the dividends transferred by flow-through companies are resident for tax purposes in a third State with which the source State has concluded a double tax treaty. According to the judgment, the existence of such a convention cannot in itself rule out the existence of an abuse of rights and cannot therefore call into question the existence of abuse of rights if it is duly established by all the facts which show that the traders carried out purely formal or artificial transactions, devoid of any economic or commercial

justification, with the principal aim of taking unfair advantage of the exemption from withholding tax provided for in Article 5 of the Parent-Subsidiary Directive (paragraph 108). It also appears that, having said that, even in a situation where the dividend would have been exempt if it had been distributed directly to the company having its seat in a third State, it cannot be excluded that the objective of the group structure is not an abuse of law. In such a case, the group's choice of such a structure instead of distributing the dividend directly to that company cannot be challenged (paragraph 110).

The Supreme Court then observes:

No details are available as to why it was decided in 2005 to set up a corporate structure whereby NetApp Cyprus would be incorporated as a new parent company of NetApp Denmark - and then be part of a single dividend transaction from NetApp Denmark to NetApp Bermuda and NetApp USA - instead of making NetApp USA the parent company of NetApp Denmark, so that the dividend could be distributed directly to NetApp USA. No information has been provided on the advice from PwC which, according to Johannes Gillis' statement to the Supreme Court, formed the basis for the decision.

In these circumstances, the Supreme Court considers that clear evidence is required in order to assume that there was no abuse of rights under the Directive in the distribution to NetApp Cyprus - where the tax liability under section 2(1)(c) of the Corporation Tax Act arose as a starting point.

The Supreme Court considers that there are no such elements and emphasises that the final decision to repatriate the dividend to NetApp USA was not taken until 22 March 2006, that prior to that the dividend remained in NetApp Bermuda for approximately five months, where it was invested in bonds, and that it must be assumed that the NetApp group could freely have decided to use the dividend for purposes other than repatriation to NetApp USA during that period.

In view of the above, the Supreme Court further finds that NetApp USA cannot be regarded as the beneficial owner of the dividend under the Double Taxation Convention between Denmark and the United States of America, cf. Article 10(2) of the Convention.

The Supreme Court therefore finds that NetApp Cyprus is liable to tax on the dividend under Article 2(1)(c) of the Corporation Tax Act and that, as a result, NetApp Denmark was obliged to withhold tax on the amount under Article 65(1) of the Withholding Tax Act.

3.2. Other distribution - DKK 92,012,000

By agreement dated 25 October 2005, NetApp Denmark sold its shares in NetApp B.V., Netherlands (NetApp Netherlands) to NetApp Holding & Manufacturing B.V. (NetApp Holding Netherlands) for EUR 14 million. According to the agreement, the purchase price was to be paid by 30 April 2006.

NetApp Denmark's annual report for 2005/06 of 13 October 2006 (financial year ended 30 April 2006) indicates that a dividend for the financial year of approximately DKK 92 million was proposed. Related to this, NetApp Denmark's audit report for the 2009/10 annual report states that NetApp Denmark proposed a distribution of approximately DKK 92 million to NetApp Cyprus in its 2005/06 annual report, but that this distribution could not be paid until NetApp Holding Netherlands had paid the purchase price of EUR 14 million for the shares in NetApp Netherlands, which occurred in the 2009/10 financial year. An amount of approximately USD 18.6 million corresponding to the dividend of approximately DKK 92 million was transferred on 3 May 2010 to NetApp Cyprus and reportedly from there to NetApp Bermuda.

NetApp Denmark has argued that the dividend of approximately DKK 92 million from NetApp Denmark to NetApp Cyprus was included in the dividend of USD 550 million that NetApp Bermuda transferred to NetApp USA on 3 April 2006. According to NetApp Denmark, this means that the dividend of approximately DKK 92 million is exempt from taxation under Section 2(1)(c) of the Danish Corporate Income Tax Act in conjunction with the Danish-American Double Taxation Convention.

The Supreme Court then observes:

On 22 March 2006, the board of directors of NetApp USA decided to distribute a dividend of USD 550 million from NetApp Bermuda to NetApp USA, including by NetApp Bermuda taking out a loan of USD 300 million. According to the information, the reason was that American Jobs Creation Act 2004 allowed US companies to repatriate dividends from foreign subsidiaries at a special reduced tax rate in return for a commitment to use the dividends for specific purposes in the US. The dividends had to be repatriated by the end of fiscal year 2006, which for NetApp USA was April 30, 2006. The dividends were distributed on 3 April 2006 and taxed in the US. NetApp Bermuda's 2005/06 accounts show that a dividend of USD 550 million was declared.

NetApp USA's 2005/06 consolidated financial statements state that "as a result of this dividend, there was no significant unremitted earnings held by our foreign subsidiaries at April 30, 2006". Accordingly, NetApp USA's accounting for net income in its official financial reporting as of April 27, 2007, indicates that after the repatriation of dividends from NetApp Denmark in 2006, there were no unrestricted earnings in the Danish subsidiary.

In light of the above, the Supreme Court finds that the dividend of approximately DKK 92 million from NetApp Denmark was included in the dividend of USD 550 million that NetApp Bermuda transferred to NetApp USA on 3 April 2006. The Supreme Court further finds that the sole legal owner of that dividend was NetApp USA, where the dividend was also taxed. This is the case notwithstanding the fact that an amount of approximately DKK 92 million. - corresponding to the dividend - was not transferred to NetApp Cyprus until 2010 and from there to NetApp Bermuda. NetApp Bermuda had thus, as mentioned above, taken out the loan which provided the basis for distributing approximately DKK 92 million to NetApp USA in dividends from NetApp Denmark in 2006.

Accordingly, the dividend of approximately DKK 92 million is exempt from taxation under Section 2(1)(c) of the Danish Corporate Income Tax Act in conjunction with the Danish-American Double Taxation Convention. NetApp Denmark has therefore not been required to withhold dividend tax under Section 65(1) of the Danish Withholding Tax Act.

3.3. Liability under Section 69 of the Withholding Tax Act

NetApp Denmark was aware of the basis on which the distribution of 28 September 2005 to NetApp Cyprus is taxable under Section 2(1)(c) of the Corporation Tax Act.

The Supreme Court therefore finds that NetApp Denmark is liable for payment of tax in respect of the distribution under Section 69(1) of the Withholding Tax Act.

3.4. Interest issues

As stated in paragraphs 3.1 and 3.2, there are only questions of interest with regard to NetApp Denmark's obligation to withhold tax in respect of the distribution on 28 September 2005 of DKK 565,896,000.

In the judgment of the District Court of 3 May 2021, NetApp Denmark was acquitted in respect of this distribution, and the District Court therefore did not address the issue of interest on the amount subject to withholding in the judgment of 2 July 2021. Both judgments have been appealed to the Supreme Court and the Supreme Court can now rule on the issue.

For the reasons given by the Regional Court regarding the understanding of Sections 5(1) and 7(1) of the Collection Act, the Supreme Court considers that the last due date for payment of the amount due was 14 days after the demand for payment issued by SKAT on 17 September 2010, i.e. 1 October 2010. The Ministry of Taxes' claim must be interest-bearing from that date, and it is not contrary to principles of administrative law or other rules in this respect that the tax authorities refused NetApp Denmark's request of 4 December 2015 to deposit the disputed amounts, cf. the Supreme Court's judgment of 18 October 2022 (UfR 2023.307).

Chapter 5 of the Collection Act contains the rules on a single tax account. In particular, Section 16a(4) of the Act states that claims for payments from companies affect (are debited to) the balance sheet from the last due date for payment of the amount, and the Supreme Court accepts that the last due date for payment under this provision was also 1 October 2010. Section 16c(1) of the Act provides that a debit balance on the account shall bear interest at the rate laid down in section 7(1), see subsection (2), and that interest shall be calculated daily and accrued monthly, i.e. at compound interest. The single tax account rules entered into force on 1 August 2013.

According to the wording of the law, the amount owed must then bear interest as claimed by the Ministry of Taxation.

The Supreme Court is aware that an understanding of the Collection Act in accordance with its wording implies that the total interest claim of the tax authorities against NetApp Denmark is very large in relation to the amount to be withheld. A substantial part of the claim is due to the mentioned provisions in Section 16a(4) and Section 16c(1) of the Act on interest. This has to be seen in the context that NetApp Denmark - as a result of having been successful in the Tax Court and partly in the Regional Court - has not had the possibility to deposit the disputed amounts, e.g. by depositing them in the tax account, thereby avoiding interest until such time as the courts would rule in favour of the Ministry of Taxation in the present cases.

The Supreme Court considers that there is no sufficient basis in the preparatory works of the Collection Act for an interpretation of the Act contrary to the wording of § 16a(4) and § 16c(1). Nor is there any basis for assuming that interest under the provision entails a violation of NetApp Denmark's rights under Article 6 of the European Convention on Human Rights or Article 47 of the EU Charter of Fundamental Rights.

The Supreme Court therefore finds that the tax authorities' claims against NetApp Denmark should be subject to interest as claimed by the Ministry of Taxation.

The Supreme Court also considers that there is reason for the legislature to consider whether consequences of the Collection Act such as those at issue, which must be seen in the context of the question of the right to deposit the disputed amounts, are desirable.

4. TDC in particular

As stated in point 2.1, the provision in Section 2(1)(c)(5) of the Corporation Tax Act must be understood as meaning that exemption from tax liability presupposes that the condition that tax be waived or reduced under the Parent/Subsidiary Directive or a double taxation convention is also met.

TDC has not provided the Supreme Court with information on the fate of the dividends to which the request for a binding reply related and which TDC distributed to NTC Holding in Luxembourg in August 2011. Accordingly, and for the reasons stated by the Regional Court, the Supreme Court accepts that questions 1 and 2 of the Regional Tax Court's order of 13 March 2012 must both be answered in the negative.

The Supreme Court considers that TDC's more subsidiary claim is too vague in its content to be admissible. Furthermore, there are no grounds for upholding TDC's most subsidiary claim.

5. Main conclusions and costs

NetApp Denmark is liable for withholding tax in respect of the distribution of DKK 565,896,000 to NetApp Cyprus on 28 September 2005.

NetApp Denmark is not liable to withholding tax in respect of the distribution of DKK 92 012 000 to NetApp Cyprus on 13 October 2006. The Supreme Court therefore sets aside the Regional Court's judgment of 2 July 2021 on interest.

NetApp Denmark shall pay interest on the amount subject to withholding pursuant to section 7 of the Collection Act with effect from 1 October 2010 and also pursuant to Chapter 5 of the Act on one tax account with effect from 1 August 2013.

The Ministry of Taxation has complied with the decision of the Regional Court of 3 May 2021 and, following the outcome of the proceedings before the Supreme Court, must repay the amount to NetApp Denmark.

Questions 1 and 2 of the Tax Court's order concerning TDC must both be answered in the negative.

In the cases concerning NetApp Denmark, the costs of the proceedings before the Regional Court and the Supreme Court have been fixed at DKK 3.5 million for legal fees and DKK 10,000 for court fees, totalling DKK 3,510,000. The Supreme Court has given weight to the outcome, scope and nature of the case. The amount also includes costs relating to the Regional Court's judgment of 2 July 2021 on interest.

The case is adjudicated:

NetApp Denmark ApS shall acknowledge that there is an obligation to withhold dividend tax in the amount of DKK 158,450,880, corresponding to 28% of the dividend of DKK 565,896,000 declared on 28 September 2005 by NetApp Denmark ApS, and that the company is liable for payment of the amount not withheld.

NetApp Denmark ApS shall acknowledge that the unwithheld amount of DKK 158,450,880 shall be subject to interest pursuant to Section 7 of the Collection Act with effect from 1 October 2010.

The Ministry of Taxation shall acknowledge that NetApp Denmark ApS was not obliged to withhold dividend tax in the amount of DKK 25,763,360, corresponding to 28 % of the dividend of DKK 92,012,000 declared on 13 October 2006 by NetApp Denmark ApS.

NetApp Denmark ApS shall pay DKK 2,500,000 to the Ministry of Taxation with interest from 28 May 2021.

The judgment of the Regional Court of 2 July 2021 is set aside.

The judgment of the Regional Court of 3 May 2021 is upheld in so far as it concerns TDC A/S. Dismisses TDC A/S's further alternative claim 1.

Dismisses TDC A/S's most subsidiary claim 1 and claim 2

NetApp Denmark ApS is ordered to pay DKK 3 510 000 in costs to the Ministry of Taxation.

TDC A/S is ordered to pay DKK 500 000 in costs to the Ministry of Taxation. The amounts ordered must be paid within 14 days of the date of delivery of this judgment.

The amounts of costs shall bear interest in accordance with Article 8a of the Danish Interest Act.