The *Swiss Swap* Case Revisited

Saurabh Jain[†] and John Prebble[‡]

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1. Introduction

The Swiss Federal Supreme Court decided *Federal Tax Administration v Danish A/S*[1] in May 2015. The case is also commonly referred to as the *Swiss Swap* case. It overturned the decision that the Swiss Federal Tax Administration[2] delivered in March 2012.

[†] B.A. LLB (Hons) National Law Institute University, Bhopal; LLM Aberdeen; PhD Victoria University of Wellington; Lecturer in Law University of New England.
[‡] QC, BA, LLB (Hons) Auckland, BCL Oxon, JSD Cornell, Inner Temple, LEANZF, Barrister, Professor and former Dean of Law, Victoria University of Wellington; Gastprofessor, Institut für Österreichisches und Internationales Steuerrecht, Wirtschaftsuniversität Wien; Adjunct Professor of Law, Sydney School of Law, The University of Notre Dame Australia.

[1] *Federal Tax Administration v Danish A/S* (5 May 2015) Cases No 2C 364/2012, 2C 377/2012 (The Federal Supreme Court, Switzerland).

[2] *Danish A/S v Federal Tax Administration* (7 March 2012) Case No A-6537/2010, (The Federal Administrative Tribunal, Switzerland).

The *Swiss Swap* case is significant for several reasons. It is the first reported case that involved total return swap agreements and hedging transactions. As discussed in section 2, courts have adopted surrogate tests for the actual beneficial ownership test. Further, as discussed in section 2.5, courts have also used the step-transaction doctrine for deciding conduit company cases. Until 2012, courts have used either a surrogate test or the step-transaction doctrine for deciding a conduit company case. However, the Federal Tax Tribunal used all the surrogate tests as well as the step transaction doctrine for deciding the *Swiss Swap* case. The judgment of the Federal Supreme Court is also the first reported decision in which a court has used the step transaction doctrine without restricting its scope.

This article entails a critique of the decisions of the Federal Administrative Tribunal and Federal Supreme Court. It supports the reasoning of the court and argues that a court cannot deliver a logically convincing judgment until it interprets the term "beneficial ownership" in the light of the object and purpose of double tax agreements and takes into account the arrangement as a whole. But before analysing the judgments comparatively, it is helpful to discuss the cause of the problem in interpreting the term "beneficial owner".

2. The problem in interpreting the beneficial ownership test

2.1. Interpretation of double tax agreements

Double tax agreements are international treaties. For this reason, they should be interpreted liberally[3] and in accordance with Article 31(1) of the Vienna Convention on the Law of Treaties,[4] which provides that treaties should be interpreted in the context of their object and purpose.[5]

In addition to the prevention of double taxation of income between contracting states, a significant purpose of a double tax treaty is to restrict its benefits to residents of the contracting states. Cases such as *Re V SA*[6] and *N AG*

[3] See generally *Fothergill v Monarch Airlines Ltd* (1980) AC 251. *Gladden Estate v Minister of National Revenue* (1985) 1 CTC 163, 166.

[4] Vienna Convention on the Law of Treaties 1155 UNTS 331 (signed 23 May 1969, entered into force 27 January 1980), art 31(1).

[5] Ibid, art 31(1). It states: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

[6] *Re V SA* (2001) 4 ITLR 191 (The Federal Commission of Appeal in Tax Matters, Switzerland).

v Regional Tax Officer for Upper Austria[7] show that, in the light of the purpose of limiting treaty benefits, provisions of double tax treaties should be should be accorded a substantive economic interpretation.

Usually, double tax agreements are based on the model tax convention on income and on capital[8] developed by the Organisation for Economic Cooperation and Development, which is also known as the OECD model tax convention. The model tax convention, and most double tax agreements, contain provisions that deal with taxation of dividends, interests and royalties, which are also collectively known as passive income. Where passive income flows from a source in one treaty partner to a resident of another treaty partner, a double tax treaty usually partially or fully exempt the income from withholding tax imposed by the state of source. It is possible, however, for residents of a non-contracting states to obtain treaty benefits by interposing a company in a contracting state, a company that subsequently forwards passive income to the residents of the non-contracting states. Companies interposed in this manner are sometimes called "conduit companies".

In order to limit the benefit of a (withholding) tax reduction, the model tax convention requires the recipient of passive income to be its "beneficial owner". In the light of the purpose of limiting treaty benefits, the term "beneficial owner" indicates that a person should own passive income in a substantive economic sense.

From a substantive economic perspective, companies are not capable of owning income beneficially. The object of a company is to make profits for the benefits of its shareholders. It is simply a vehicle through which shareholders derive income.[9] From this consideration, it follows that an interposed company should never be entitled to treaty benefits.

The problem is that, as a matter of linguistic logic, company law, and economic analysis, the term "beneficial owner" is not capable of fulfilling the anti-avoidance role that the model tax convention assigns to it.

The OECD model tax convention uses the beneficial ownership test with an assumption that companies, at least in some cases, can be considered the beneficial owners of income. This assumption is based on the legal perspective,

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[7] *N AG v Regional Tax Officer for Upper Austria* (2000) 2 ITLR 884 (The Supreme Administrative Court, Austria).

[8] Organisation for Economic Co-operation and Development [hereinafter OECD] Committee on Fiscal Affairs Model Tax Convention on Income and on Capital (2014).

[9] See Victor Thuronyi "The Concept of Income" (1990) 46 TAX L REV 45 at 78.

which, in contrast to the substantive economic perspective, views companies as owners of their assets legally as well as beneficially, simply by virtue of the fact that legal persons separate from their shareholders.

When interpreting the term "beneficial owner" and applying it to cases involving interposed companies, courts often struggle to reconcile the opposing perspectives.[10] Because courts are obliged to determine whether to honour claims to treaty benefits made by a recipient company, they often prefer to employ the legal perspective. They justify their approach by adopting surrogate tests in place of an actual beneficial ownership test. The tests can be categorised as "substantive business activity" and "dominion". Sections 2.2 and 2.3 discusses the surrogate tests.

2.2. Substantive business activity

For determining whether an interposed company is the beneficial owner of passive income, courts have determined whether an interposed company has a substantive business activity.[11] However, their reasoning does not make sense because substantive business activity does not indicate ownership, whether beneficial or otherwise.

Originally, courts developed the substantive business activity test as a substance over form rule for determining whether the law should recognise domestic straw companies and foreign base companies as separate taxable entities.[12] Courts and the OECD have applied substantive business activity to conduit company cases as a decisive test.

Their approach seems illogical. The absence of a business activity indicates that an intermediary lacks substance, and therefore, is not entitled to treaty benefits. The presence of a business activity does not, however, necessarily show that an intermediary is entitled to treaty benefits.[13] For this reason, substantive business activity is not an appropriate test for deciding conduit company cases.

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[10] For example, *In Re XYZ* (1996) 220 ITR 377 (AAR) (The Authority for Advance Rulings, India).

[11] For example, *A Holding ApS v Federal Tax Administration* (2005) 8 ITLR 536 (The Federal Supreme Court, Switzerland). *Northern Indiana Public Service Company v Commissioner of Internal Revenue* 115 F 3d 506 (7th Cir 1997). *Re a Corporation (2002)* 5 ITLR 589 (The Bundesfinanzhof, Germany). *G-group 2005* (31 May 2005) IR 74, 88/04, para 27 (The Bundesfinanzhof, Germany).

[12] For example *Moline Properties Inc v Commissioner of Internal Revenue* 319 US 436 (1943). *Hospital Corporation of America v Commissioner of Internal Revenue* 81 TC 520 (1983).

[13] *Ministre de l'Economie, des Finances et de l'Industrie v Société Bank of Scotland* (2006) 9 ITLR 683 (Conseil d'etat, France).

2.3. Dominion

The term "dominion" represents the right to decide how property shall be used and the right to income from it. That is, dominion is an attribute of legal ownership.[14] However, courts have considered the presence of dominion to indicate the presence of beneficial ownership.[15] They seem to transpose the dominion test from cases involving agents and nominees. Agents and nominees pass on income they receive to their principal or mandatory. Consequently, they lack dominion. For this reason, they cannot be considered to be beneficial owners. As with agents and nominees, conduit companies pass on passive income to the ultimate owners. However, there are two reasons why this similarity does not make dominion a suitable test for deciding conduit company cases, in which recipient companies do not act as agents or nominees. Firstly, interposed companies that do not act as agents or nominees possess dominion by definition.[16] Secondly, although the absence of dominion shows that an intermediary is not the beneficial owner, the presence of dominion does not necessarily make an intermediary qualified for treaty benefits.[17]

2.4. Substance based approach

Although the surrogate tests are based on a substance over form approach, they are not necessarily suitable for deciding conduit company cases. A better approach is to interpret a beneficial ownership clause as if it were a general anti-avoidance rule. That is, courts should keep the scope of beneficial ownership clauses general. They should not assign a criterion, in the presence or absence of which beneficial ownership clauses will operate.

Courts can investigate reasons for the existence of an interposed company in a company structure. The approach involves examining the overt acts by which an arrangement was implemented and determining whether the arrangement was implemented to avoid tax. This approach resembles the predication test adopted by Lord

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[14] See John William Salmond and P J Fitzgerald *Salmond on Jurisprudence* (12th ed, Sweet and Maxwell, London, 1966) at 246. Lawrence C Becker *Property Rights: Philosophical Foundations* (Routledge and Kegan Paul, London, 1977) at 18.

[15] For example, *Royal Dutch Shell* (6 April 1994) Case no 28 638, BNB 1994/217 (the Hoge Raad, the Netherlands). *Prévost Car Inc v Her Majesty the Queen* (2008) TCC 231 (Tax Court of Canada, Canada). *Velcro Canada Inc. v Her Majesty the Queen* (2012) TCC 57 (Tax Court of Canada, Canada).

[16] The *Bank of Scotland* case, above n 13.

[17] *Indofood International Finance Ltd v JP Morgan Chase Bank NA, London Branch* [2006] EWCA Civ 158.

Denning in the Australian case of *Newton v Federal Commissioner of Taxation*.[18]

2.5. The step transaction doctrine

In the United States, courts have also transposed the step-transaction doctrine to conduit company cases from their domestic tax jurisdiction.[19] When the United States courts apply the step transaction doctrine to a series of transactions, they integrate the individual steps into a single transaction. They apply the step transaction doctrine if they find that individual steps are so interlinked that they may be treated as a part of an overall plan. The Dutch courts have also adopted the same approach in certain conduit company cases.[20]

When using the step transaction doctrine, courts base their decision on the presence of a link between transactions. However, their approach differs from the surrogate tests in two respects. Firstly, unlike the surrogate tests, the step transaction doctrine does not treat beneficial ownership test as a test of ownership. Secondly, the courts consider the link between transactions to be related inversely to the beneficial owner. By contrast, when applying the surrogate tests, courts regard the criteria by which the tests operate as positively related to beneficial ownership.

This approach resembles the substance based approach to the extent that courts treat beneficial ownership as an anti-avoidance test, instead of treating it as a test of ownership. However, the problem with their reasoning is that they accord undue significance to the link between those transactions only where the parties have transferred the income generating assets from the ultimate owner to the source state. For this reason, courts narrow the scope of the step transaction doctrine, which also restricts the scope of the beneficial ownership test.

In their domestic jurisdiction, the United States courts have adopted three tests for determining whether individual steps are "substantially linked". One such test is the "mutual-interdependence" test. Pursuant to the "mutual-interdependence" test, courts apply the step transaction doctrine, if "the steps are so interdependent

[18] *N AG v Regional Tax Officer for Upper Austria* (2000) 2 ITLR 884 (The Supreme Administrative Court, Austria), at 900.
[19] For example *Del Commercial Properties Inc v Commissioner of Internal Revenue* 251 F 3d 210 (2001). See also *SDI Netherlands BV v Commissioner of Internal Revenue* 107 TC 161 (1996).
[20] For example, *W-family 1* (18 May 1994) Case no 28 293, BNB 1994/252 (the Hoge Raad, the Netherlands). *W-family 2* (18 May 1994) Case no 28 296, BNB 1994/253 at para 4 (the Hoge Raad, the Netherlands).

that the legal relations created by one transaction would have been fruitless without a completion of the series."[21]

In the *Swiss Swap* case,[22] while the approach that the Federal Supreme Court adopted corresponds completely to the mutual-interdependence test, the reasoning of the Federal Administrative Tribunal resembles the mutual-interdependence test only to the extent that it examines whether the generation of income and the obligation to pass it on were interdependent. The Federal Administrative Tribunal did not consider beneficial ownership as an anti-avoidance test.

The approach adopted by the Federal Supreme Court is better than that adopted by the United States and Dutch courts, and is more appropriate when applying the step transaction doctrine to conduit company cases.

3. The *Swiss Swap* Case

3.1. Facts

From 2006 to 2008, Danish A/S, a bank established in Denmark, entered into several total return swap agreements based on shares of Swiss companies as underlying securities. Counterparties of these transactions were resident in France, Germany, the United Kingdom and the United States. According to each agreement, on maturity of a return swap transaction, Danish A/S was obliged to pay to a counterparty the price gain as well as the full dividends of the underlying shares. In consideration, the counterparty would pay Danish A/S a variable interest compensation as well as a margin.

Danish A/S hedged the swap transactions by purchasing the underlying securities at market price from a share broker. The total return swap agreements and purchasing of the underlying securities were affected before the dividends' maturity. Danish A/S resold the underlying securities after the dividends were distributed or on maturity of a return swap agreement.

The Swiss companies distributed dividends to Danish A/S after deducting withholding tax. Danish A/S applied to the Swiss Federal Tax Administration for a refund of withholding tax under Articles 10 and 26 of the Denmark-Switzerland double tax treaty of 1973.[23]

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[21] *Redding v Commissioner of Internal Revenue* 630 F 2d 1169 (1980) at 1177.

[22] *Danish A/S v Federal Tax Administration* (7 March 2012) Case No A-6537/2010, (The Federal Administrative Tribunal, Switzerland). *Federal Tax Administration v Danish A/S* (5 May 2015) Cases No 2C 364/2012, 2C 377/2012 (The Federal Supreme Court, Switzerland).

[23] Agreement between the Kingdom of Denmark and the Swiss Confederation for the Avoidance of Double Taxation with respect to

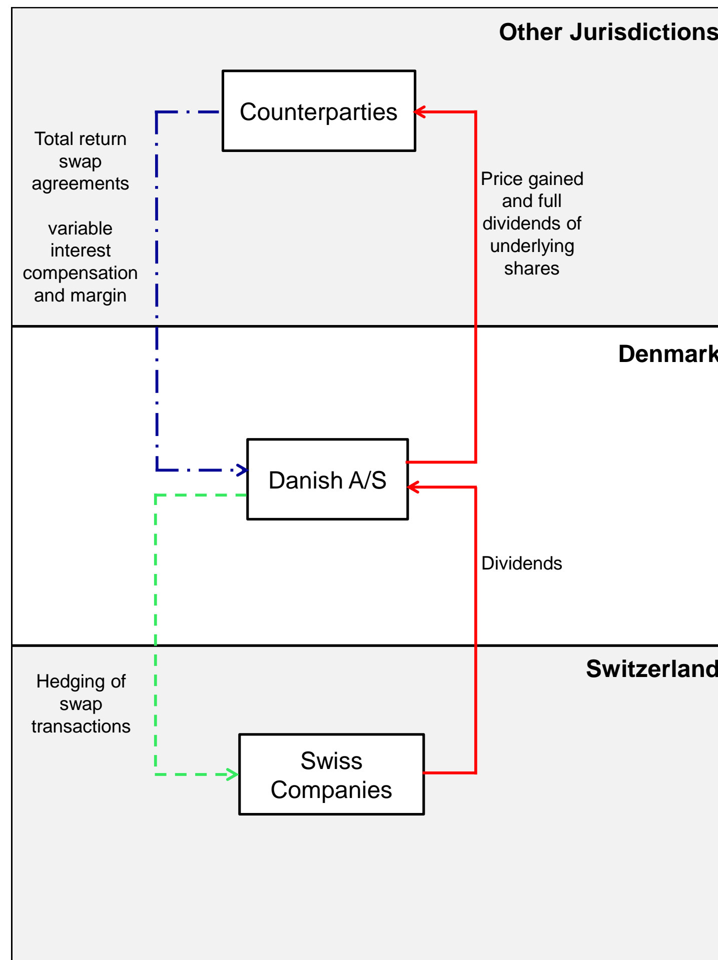

Figure 1: The *Swiss Swap* Case

The Swiss Federal Tax Administration asked Danish A/S to provide information about all return swap agreements, a list of the shares of Swiss companies that Danish A/S bought in order to hedge the swap transactions and names, and addresses of counterparties. Danish A/S provided anonymous copies of the agreements and a list of the shares of Swiss companies. It refused to disclose the identities of the counterparties. It argued that doing so would violate Danish banking law. The only information that it disclosed about the counterparties was that they were corporate entities resident in France, Germany, the United Kingdom and the United States.

The Swiss Federal Tax Administration refused Danish A/S the refund of withholding tax. In its opinion, the transactions were unusual, especially in terms of their structure. It noted that Danish A/S concluded swap agreements and acquired the underlying shares at the same time. As a result, the associated risk and opportunities were transferred from Danish A/S to the counterparties.

Taxes on Income and Fortune Denmark-Switzerland 958 UNTS 27 (signed 23 November 1973, entered into force 23 November 1973).

Danish A/S received a margin (or spread) as a consideration for a transaction. Danish A/S had systematically acquired securities just before the dividends due date with the intention of passing on the entire dividend amount under the term of the swap agreement to unknown third parties without the residual withholding tax or, as applicable basic tax. After the due date of dividends, the parties terminated the swap agreements and Danish A/S sold the underlying securities.

The Swiss Federal Tax Administration found that, by means of swap agreements, the entire change in the value, and in particular, the entire dividends were contractually passed to unknown counterparties. It concluded that the structure of the transactions could not be justified economically. The sole purpose of the transactions was to obtain a fiscal advantage. It ruled that not only was Danish A/S not a beneficial owner, but its actions also constituted an abuse of the double tax treaty between Denmark and Switzerland. The ruling of the Swiss Federal Tax Administration suggests that it did not regard the beneficial ownership test as an anti-avoidance test.

Danish A/S challenged the ruling of the Swiss Federal Tax Administration in the Swiss Federal Administrative Tribunal. It argued that it alone was responsible for the decision to hedge the transactions by acquiring the underlying shares. Under the total return swap transactions, the payments of the amount equivalent to the dividends, which it made to the counterparties, were independent of whether it received the corresponding dividends. Regardless of whether it had an obligation to make a payment to a counterparty at the time, the corresponding dividends were declared. It had the freedom to decide how to use the dividends' income. Further, the duration of the agreement was equal to or more than three months.

Danish A/S also argued that the double tax treaty between Denmark and Switzerland relevant to this case was entered into before the OECD model tax convention was amended in 1977. Consequently, under Article 10 of the treaty, beneficial ownership was not a pre-requisite for the entitlement to treaty benefits.

The Swiss Federal Tax Administration argued that an examination of the situation as a whole was required for determining whether Danish A/S was entitled to a refund of withholding tax or whether it was the beneficial owner of dividends. It acknowledged that, in a legal sense, the situation as a whole involved two separate transactions. It also did not dispute that it was possible for Danish A/S to conclude only one of the transactions. It argued, however, that the two transactions were linked by a causal

connection. That is, without an underlying total return swap transaction, a hedge transaction was not necessary. It also argued that, from an economic perspective, the dividends did not remain with Danish A/S. For this reason, Danish A/S could not be regarded as the beneficial owner of the dividends. It followed that the counterparties were the beneficial owners.

Danish A/S counter-argued that the issue of beneficial ownership was not dependent on the question of whether there was a causal connection between total return swap transactions and hedge transactions. Beneficial ownership depended on whether the obligation to pay an amount equivalent to the dividends was triggered by the receipt of the dividends.

3.2. Can the beneficial ownership test be read implicitly in Double tax treaties?

The Denmark-Switzerland double tax treaty of 23 November 1973[24] is based on the OECD Model Convention. The Swiss Federal Administrative Tribunal and Federal Supreme Court considered the applicability of Article 10 of the treaty to the case. Article 10 did not contain the term "beneficial owner" when the disputed transactions occurred. The term was introduced to the provision by a protocol in 2009.[25]

In order to interpret the provision, the tribunal and the court referred to rules of interpretation under the Vienna Convention.[26] In the context of double tax treaties based on the OECD model tax convention, the tribunal noted that, if required, a term used by such a double tax treaty may be interpreted in a treaty specific manner with the help of the OECD model tax convention and its official commentary. However, in such a case, the convention and commentary should be treated as supplementary interpretation tools of secondary importance.[27]

When examining Article 10 of the Denmark-Switzerland double tax treaty, the tribunal noted that the meaning of the words "dividend paid … to a resident of the other contracting state" was unclear. The provision was particularly silent on the characteristics of the resident

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[24] Denmark-Switzerland double tax treaty, above n 23.

[25] Protocol between the Swiss Confederation and the Kingdom of Denmark Amending the Convention for the Avoidance of Double Taxation with Respect to Taxes on Income and Capital Doc 2009-18971 (signed 21 August 2009, entered into force 22 November 2010).

[26] Vienna Convention on the Law of Treaties 1155 UNTS 331 (signed 23 May 1969, entered into force 27 January 1980) arts 26, 31 and 32.

[27] *Danish A/S v Federal Tax Administration* (7 March 2012) Case No A-6537/2010, (The Federal Administrative Tribunal, Switzerland) at para 3.2.4.

of the other contracting state, nor did the background history of the double tax treaty provide an answer to the issue.

The provision was based on Article 10 of the OECD tax model convention of 1973, which did not use the term "beneficial owner". It acknowledged the existence of the debate on whether the criterion is implicit in every double tax treaty. It also acknowledged the existence of the debate by which the OECD model tax convention and commentary can be referred to for interpreting a provision of a particular double tax treaty, if that treaty predated the OECD model tax convention and its official commentary.

The tribunal was of the opinion that Danish A/S was entitled to a refund of withholding tax regardless of whether the beneficial ownership criterion may be read implicitly in every double tax treaty. For this reason, it refused to address the issue.

Unlike the tribunal, the court began by addressing whether the criterion of beneficial ownership is implicit in double tax treaties. As with the tribunal, the court noted that the majority of Swiss scholars were of the opinion that the criterion of beneficial ownership should be read implicitly in all double tax treaties. Unlike the tribunal, the court emphasised that, in the opinion of these scholars, the criterion applied implicitly to all double tax treaties entered into by Switzerland, which simply refer to a payment to a person resident in the other contracting state.

The court noted that, generally, when interpreting double tax treaties, it has used Articles 26 and 31(1) of the Vienna Convention. Accordingly, certain scholars have interpreted its approach to mean that the principle of good faith, in accordance with these provisions, subjects the result of the interpretation to an "absurdity test". When describing the absurdity test the court observed:[28]

> If the customary meaning of a provision with literal, systematic and teleological interpretation [Article 31 Vienna Convention) and with the supplementary means of Interpretation [Article 32 Vienna Convention] leads in a specific case to an obviously absurd or unreasonable result, which the parties to the treaty did not in good faith want to achieve, then this result is to be corrected on the basis of the [principle of good faith].

According to the court, if courts allow treaty benefits to a purely formal intermediary that is not the "effective beneficial owner" of the dividends, the result shall be obviously absurd or unreasonable. Contracting states do not intend in good faith to bring about such a result. It

[28] *Federal Tax Administration v Danish A/S* (5 May 2015) Cases No 2C 364/2012, 2C 377/2012 (The Federal Supreme Court, Switzerland) at para 4.3.2.

follows that the person who is not a resident of a contracting state may not claim treaty benefits.[29]

The court noted that Swiss as well as Danish tax authorities were also of the view that the beneficial ownership criterion should be read implicitly in double tax treaties in general, and in the Swiss-Denmark double tax treaty in particular. When examining the position of the Swiss tax authority, it referred to the report of the Swiss Federal Council on the 2009 protocol on the Swiss-Denmark double tax treaty. As mentioned earlier, the protocol introduced the term "beneficial owner" to the double tax treaty. It assumed that the double tax treaty was always based on the understanding that the criterion of beneficial ownership was implicit in the treaty. With the amendment of the treaty according to the specification of the OEDC model convention, the assumption was simply made explicit. In the report, the absence of any reference to the insertion of the term shows that the Swiss Federal Council obviously did not regard the amendment as significant.[30]

When examining the Danish position regarding the beneficial ownership criterion, the court referred to Danish scholars. It noted that, according to them the Danish tax authority did not accord significance to the criterion of beneficial ownership. The same result could be achieved by traditionally applicable general legal principles.[31]

Further, the court referred to the *Danish Dividend* case,[32] which was decided in 2012. The court noted that, on order to interpret the term beneficial owner in the Denmark-Luxembourg double tax treaty of 1980, the Danish Eastern High Court referred to the official commentary on the OECD, as it stood in 2012. The Danish court assumed that the latest commentary clarified the beneficial ownership criterion and that the commentary did not result in a material change.

The point that emerges is that, when interpreting Article 10 of the Denmark-Switzerland double tax treaty, the tribunal and court referred to the same provisions of the Vienna Convention; however, they used the provisions for different purposes and came to different conclusions.

The tribunal used the provisions to ascertain the significance of the official commentary on the OECD model tax convention. Consequently, it interpreted Article 10 of the Switzerland-Denmark double tax treaty literally. Further, as a result of its logic, the tribunal did not accord

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[29] Ibid.

[30] *Federal Tax Administration v Danish A/S*, above n 28, at para 4.4.1.

[31] Ibid, at para 4.4.2.

[32] *ISS Dividends* DK: Østre Landsret, 20 December 2011, SKM 2012.121 (Eastern Division of High Court, Demark).

significance to whether the beneficial ownership criterion was implicit in the double tax treaty.

The court, on the other hand, relied on the provisions of the Vienna Convention for referring to the object and purpose of double tax treaties. It found that an object of double tax treaties is to restrict treaty benefits to residents of contracting states. The term "beneficial owner" simply represents this object. For this reason, the court decided to read implicitly the beneficial ownership criterion in Article 10 of the double tax treaty between Denmark and Switzerland.

3.3. The nature of the beneficial ownership test

As discussed in section **Error! Reference source not ound.**, the Federal Administrative Tribunal was of the opinion that Danish A/S was entitled to treaty benefits regardless of whether the beneficial ownership criterion was read implicitly in Article 10 of the Denmark-Switzerland double tax treaty. Before applying the Article 10 to the case as if beneficial ownership was read implicitly, the tribunal examined the object the beneficial ownership concept in the OECD model tax convention as well as the manner in which it should be implemented. The tribunal was of the opinion that the object of the concept should be distinguished from its implementation.[33]

When examining the object of the concept, the tribunal referred to commentaries of several scholars and noted:[34]

> In the [OECD model tax convention], provisions regarding the attribution of dividends, interest income and royalties, the concept of beneficial ownership is a prerequisite of the entitlement to assert advantages under a convention with a view to avoiding potential double taxation. The term serves to determine the intensity of the relationship between a taxpayer and the taxable object from an economic perspective. Beneficial ownership is a 'substance over form' approach based on the underlying economic reality rather than the (civil law) form. As a prerequisite for entitlement it focuses on the scope of the taxpayer's powers to decide on the use of investment income as the key taxable object. The aim is to ensure that a fiduciary or manager acting purely on behalf of the beneficial owner is excluded from the advantages of the Convention.

It further noted:[35]

> One has to bear in mind, though, that the concept of beneficial ownership has been incorporated into the OECD model tax convention for the purpose of preventing 'treaty shopping' … Ultimately the idea was

[33] *Danish A/S v Federal Tax Administration*, above n 27, at para 3.4.1.
[34] Ibid, at para 3.4.1.
[35] Ibid, at para 3.4.3.

to prevent persons, who are not eligible for treaty benefits, from enjoying those advantages by means of middlemen or intermediate structures …"

However, the tribunal differed from the opinion of the scholars and observed:[36]

> Seen in its proper perspective, however, the concept of beneficial ownership is merely a condition of entitlement, such as the concept of residence, rather than a singular abuse clause … Only once all the conditions of entitlement under a double tax treaty are met (including beneficial ownership) does the question of potential abuse of the convention arise.

When justifying its opinion, the tribunal observed:[37]

> There is no international consensus on what constitutes the abuse of a double tax treaty. In Swiss legal literature – based on the practice of the Federal Supreme Court, according to which abuse of law (including at the international level) is found to exist when a legal institute is used contrary to its purpose to further interests that the legal institute does not intend to protect … the view is taken that, although claiming treaty benefits form a purpose alien to the objects of a treaty can be described as an abuse of law, the same is not necessarily true with respect of all the other frowned upon forms of conduct described in the Convention with a view to preventing undesirable recourse to a double tax treaty (known as 'abuse provisions of treaty law') …
>
> ... According to the practice of the Federal Supreme Court, a double tax treaty must be interpreted in accordance with Art 31 et seq. [the Vienna Convention] hence in the light of the principle of good faith … Thus every contracting state may expect the other to interpret the convention in good faith and in accordance with its objectives, which excludes abuse of law, i.e. use legal institute for purposes that such institute does not intend to protect … The prohibition of abuse of law is therefore to be regarded as subsumed in the good faith principle and hence to be taken into account in any application of international conventions …
>
> If a convention does not contain an explicit abuse clause, under the practice of the Federal Supreme Court abuse of law can only be found to exist if the company concerned (in the instant case, the dividend recipient) does not carry on a genuine economic resp. commercial activity …

The observation implies that the tribunal considered the improper use of Article 10 by a person who is not the beneficial owner not to be contrary to the object and purpose of a double tax treaty. In the context of the interpretation the tribunal accorded to the provision, the observation implies that the provision does not reflect the object and purpose of the OECD model tax convention.

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[36] Ibid, at para 3.4.3.

[37] Ibid, at paras 4.1. to 4.3.

The observation does not make sense. It is hard to disassociate a provision of a double tax treaty from its object and purpose. Doing so amounts to taking away the reasoning for which the provision exists. For this reason, it seems illogical not to regard the improper use of Article 10 as contrary to the object and purpose of a double tax treaty.

As discussed in section **Error! Reference source not ound.**, the Federal Supreme Court was of the opinion that the beneficial ownership test be read implicitly in provisions dealing with withholding tax. Allowing withholding tax reduction to a person who is not the beneficial owner may result in granting treaty benefits to residents of third states. Contracting states of a double tax treaty would not be willing to bring about this result. The court explained further:[38]

> From the start, it was accepted by the various states concerned that it cannot be the purpose of double taxation conventions that their benefits are enjoyed by persons resp. companies, which, for example, only had a purely formal relationship to the state of residence, whereby this relationship was only interposed or intermediary. Examples of such interposition were discussed in the early years, especially trusteeships or similar, which were common structures in those days (… nominees, agents, trustees) and not the complex instruments of the international financial markets which were not introduced until later. When the discussions extended to these Instruments and were now conducted in relation to effective beneficial ownership, it remained clear that it was not a matter of the introduction of a new or stricter assessment criterion. Rather, it was a question of a clarification and at most a refinement of the already implicitly existing requirement that a purely formal beneficiary ownership even in international terms could not be classified as sufficient…
>
> It is not necessary at this point to examine the relationship of such a criterion to the reservation of abuse also recognised by the Federal Supreme Court as an implicit Instrument for the Interpretation of double taxation conventions … or to what extent the criterion of effective beneficial ownership is designed to prevent abuse.

The observation shows that, in contrast to the approach adopted by the tribunal, the court read provisions that deal with withholding tax in the light of the object and purpose of limiting treaty benefits to residents of contracting states. In this context, the court inferred that beneficial ownership works as an anti-avoidance test or as a test that prevents the improper use of a double tax treaty.

[38] *Federal Tax Administration v Danish A/S*, above n 28, at paras 4.4.3. and 4.5.

3.4. Definition of beneficial owner

When determining the manner in which the beneficial ownership concept in the OECD model tax convention should be implemented, the Federal Administrative Tribunal relied on the view of Baumgartner.[39] The tribunal noted that the term "beneficial owner" serves to determine the intensity of the relationship between a taxpayer and taxable object from an economic perspective. The beneficial ownership test is a "substance over form" approach. It is based on the underlying reality rather than form. The court agreed with the tribunal on these points.

The tribunal further noted that, as a pre-requisite for the entitlement to a reduction in withholding tax, the beneficial ownership test focuses on the scope of a taxpayer's power to decide on the use of investment income as the key taxable object. As explained in section 3.4, the tribunal did not consider beneficial ownership to be an anti-avoidance test. The tribunal's description of a "beneficial owner" shows that it regarded the presence of the power to decide how to use income as indicating beneficial owner. It may be recalled from section 2.3 that the power to decide how to use income constitutes dominion over property. Dominion is a characteristic of ownership. It follows that, effectively, the tribunal considered beneficial ownership to be a test of ownership. That is, it used dominion as a surrogate test. Section 3.6 shows further that although the tribunal referred the beneficial ownership test as the test of economic ownership, it analysed the facts in a formal legalistic way.

When describing the term "beneficial owner", the Federal Supreme Court differentiated the description of the term in the context of double tax treaties. It explained:[40]

> In general, the right to the characteristic of power of disposal (in this case in relation to the distributed dividends) is classified as the key element of beneficial ownership.
>
> The "effective beneficial owner" ("beneficial owner") of a dividend distributed by a company in the source state is accordingly primarily the party that enjoys the power of disposal over this dividend. This means that the dividend recipient is then the effective beneficial owner if it may fully dispose over the dividend and enjoys the full benefits thereof, without this use being restricted by a statutory or contractual obligation …
>
> As its name in English makes clear, the concept involves properties of ownership and of economic control or of the actually exercised powers … The German term emphasises that the beneficial ownership

[39] *Danish A/s v Federal Tax Administration*, above n Para 3.3.2.
[40] *Federal Tax Administration v Danish A/S*, above n 28, para 5.2.

> is not to be understood in a narrow technical or legalistic sense, but rather taking into account the economic circumstances…
>
> This applies therefore for any restrictions of the entitlement … The invocation of effective beneficial ownership is designed to prevent a person or company with only limited powers being interposed as an intermediary in Order to benefit from the benefits of the double taxation convention … Here it is irrelevant whether the interposition of an intermediary in another state actually results in a tax benefit …

When translated from German, "effektiv Nutzungsberechtigte" means "effective beneficial owner". The observation suggests that the court differentiated the term "beneficial owner" under English law from its description in the context of double tax treaties in general, and double tax treaties entered into by Switzerland in particular. By prefixing "beneficial owner" with "effective", the court seems to emphasise the difference.

The court considered the concept of beneficial ownership to represent certain property of ownership from an economic perspective. The meaning of the beneficial ownership concept in double tax treaties corresponds to its meaning under English law. However, it operates in the light of the treaty policy by limiting treaty benefits. For this reason, in double tax treaties the concept does not work as a test of ownership. It functions as an anti-avoidance test.

It follows that when the court referred to the right of the recipient to dispose dividends and to fully enjoy benefits, it did not refer the right in terms of dominion. Section 3.6 shows that it referred to the right in the context of substantive economic ownership, which should be determined in the light of the circumstances as a whole.

3.5. Indicators of beneficial ownership

When considering factors that may limit the power to decide how to dispose income, the tribunal again relied on Baumgartner.[41] It noted that, if a person is obliged to pass on income to another, that person possesses limited power to decide on the use of the income. The fact that the person has a contractual obligation to pass on income may show that such a person is not the beneficial owner. The fact that the person has a de facto obligation to pass on income may also show that such a person is not the beneficial owner. In both situations, the answer to the issue of whether a person is the beneficial owner will

[41] *Danish A/S v Federal Tax Administration* (7 March 2012) Case No A-6537/2010, (The Federal Administrative Tribunal, Switzerland) at para 3.3.2. See Beat Baumgartner *Das Konzept des beneficial owner im internationalen Steuerrecht der Schweiz* (Schulthess Verlag, Zürich, 2010).

depend on the degree to which the presence of the obligation will limit the power to decide how to use the income. The stronger the mutual or reciprocal dependence or interdependence between the income and the duty to pass it on, the weaker the power to decide on its use. That is, a court should consider the degree to which generating income is dependent on the obligation to pass it on. The court should also consider the degree to which the obligation to pass on the income is dependent on the generation of that income.[42]

As discussed in section 3.4, the tribunal adopted the dominion test in order to apply the beneficial ownership test. Further, as indicated in section 2.3, the dominion test works on the reasoning that a person under an obligation to pass on income lacks dominion over it, and therefore, is not its beneficial owner. Interestingly, the approach suggests that for determining whether the obligation to pass on existed, the tribunal used another test that resembles the "mutual-interdependent" test of the step transaction doctrine. However, this approach resembles the "mutual-interdependence" only to the extent that the tribunal examined whether the generation of income on one hand, and the obligation to pass on the income on the other were interdependent. As discussed in section 2.5, when using the step transaction doctrine, courts have considered beneficial ownership to be an anti-avoidance test. However, the tribunal regarded beneficial ownership as a test of ownership, not an anti-avoidance test. For this reason, its approach does not completely resemble the "mutual-interdependence" test.

According to the tribunal, another possible indicator of beneficial ownership is the assumption of risk associated with income. In the present case, the relevant issue related to risk was: who bears the risk if no dividends were paid? The tribunal also noted that an assessment of beneficial ownership is made when the income is paid. For this reason, the fact that the income is held for a very brief holding period does not preclude beneficial ownership.[43]

Further, the tribunal was of the opinion that subjective factors, such as an intention of abuse, are irrelevant when determining beneficial ownership. Thus, reasons for selecting a particular structure are immaterial. It remains unclear whether the tribunal considered the factors of risk related to income, and the time of payment to be associated with the approach it adopted.[44]

The interpretation that the Federal Supreme Court accorded to Baumgartner differed from tribunal's

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[42] *Danish A/S v Federal Tax Administration*, above n 41, para 3.4.2.
[43] *Danish A/S v Federal Tax Administration*, above n 41, at para 3.4.2.
[44] Ibid.

interpretation. Further, the court differed from Baumgartner on certain points. The court noted that the power of the recipient to decide how to dispose passive income shall be assumed if two conditions are cumulatively fulfilled. They are: firstly, obtaining of income must depend on the obligation to pass it on; and secondly, obligation to pass on income must depend on the income's being obtained.[45]

When describing the obligation to pass on, the court categorised different types of obligations. How the court categorised these obligations to pass on passive income differed from how the tribunal categorised them. Unlike the tribunal, the court expressly recognised "a (direct) legal obligation" to pass on passive income. Further, it categorised a contractual obligation to pass on as a de facto obligation. When describing a de facto obligation the court explained:[46]

> [A de facto obligation] often involves economic indications from which an (indirect) legal (specifically contractual) obligation to pass on the monies can be derived; this is especially the case if the obligation to pass on earnings is not directly stipulated but results from the actual circumstances. According to the literature, the right of disposal does not exist where – taking into account *the legal and also the substantive and economic dimensions* the distributed dividends are again siphoned off from the residence state in a form and to an extent that does not/no longer justify the source state limiting or even surrendering its taxation jurisdiction in favour of the other state …
>
> Taking into account *the circumstances as a whole* (substance over form), the entitlement to claim the treaty benefit does not exist if the return of capital distributed to the recipient of the dividend is not retained by the latter because it is legally or economically obliged to pass the funds on. This is the case if the resident party does not retain the earnings itself but passes these – on the basis of a contractual, company law or business structure of the relationships – onto the real beneficial owner outside the state of residence (and thereby makes these tax free or tax rebated).

It could be inferred that the court used the words "a (direct) legal obligation" to represent the obligation of agents or nominees to pass on income to their principles or mandators. It is clear that the court used the words "an (indirect) obligation" to represent a contractual obligation. Further, the court associated the issue of whether a

[45] *Federal Tax Administration v Danish A/S* (5 May 2015) Cases No 2C 364/2012, 2C 377/2012 (The Federal Supreme Court, Switzerland) at para 5.2.2.
[46] *Federal Tax Administration v Danish A/S*, above n 45, at para 5.2.2. (emphasis added).

recipient of passive income was obliged to pass it on with whether the effect of the arrangement resulted in the violation of the generic treaty policy of limiting treaty benefits to residents of contracting states. For this reason, the court suggested examining the arrangement from legal as well as substantive and economic perspectives. That is, the court suggested taking into account the circumstances as a whole.

The court discussed "direct conduit" and "stepping-stone" conduit strategies. It also differentiated between the bases on which an intermediary passes on passive income to a person in a resident state. It explained that the greater the dependence between income and obligation to pass it on, the weaker the beneficial ownership. It noted that, contrary to Baumgartner, an intermediary may be denied the status of a beneficial owner, even in a case in which the intermediary has not passed on passive income in its unrestricted totality. The position especially applies to cases in which a small percentage of income, which is not forwarded, is classified as remuneration or compensation for passing on the income.[47]

Unlike the tribunal, the court clearly associated the factor of the time of payment with the obligation to pass on. That is, when determining whether an intermediary is obliged to pass on passive income, courts should consider circumstances that existed when payment was received by the intermediary. However, the court interpreted this fact differently from the tribunal. According to the court, if the situation resulting at the date of the distribution of dividends is examined in the context of all relevant circumstances, then these circumstances also include the subsequent passing on of the income, at least insofar as the passing on was already arranged before the date of payment.[48]

When addressing the second condition, the court noted that the condition enables the proper differentiation of corporate circumstances. If the stream of income that an intermediary received is financed by another affiliated company, it does not necessarily mean that an intermediary is not the beneficial owner. The arrangements are problematic only when the consideration for financing is given dependent upon whether and to what extent the dividend income is received.[49]

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[47] *Federal Tax Administration v Danish A/S*, above n 45, at para 5.2.3. Contrast *Del Commercial Properties Inc v Commissioner of Internal Revenue* 251 F 3d 210 (2001). See also *SDI Netherlands BV v Commissioner of Internal Revenue* 107 TC 161 (1996).
[48] *Federal Tax Administration v Danish A/S*, above n 45, at para 5.2.5.
[49] Ibid, at para 5.3.

The court clearly associated the factor of risk with the investigation of the second condition. The court noted that in the present case, beside the risk of the failure of the company in the source state to distribute dividends, the risk factor includes other risks such as credit risk or the risk of a price loss. Moreover, a court should consider situations in which certain risk is compensated in advance to the extent that at least considered sufficient.[50]

3.6. Application

When using Article 10(1) of the Denmark-Switzerland double tax treaty as if beneficial ownership were not read implicitly into the provision, the Federal Administrative Tribunal noted that Danish A/S had its seat in Denmark. It also noted that Danish A/S was liable to pay tax in Denmark. For these reasons, Danish A/S was a resident of Denmark within the meaning of Article 1 of the double tax treaty. Therefore, the double tax treaty applied to Danish A/S in principle.[51]

When using Article 10(1) of the Denmark-Switzerland double tax treaty as if beneficial ownership were read implicitly into the provision, the tribunal started by determining whether Danish A/S was obliged under the total return swap transactions to pass on the dividends to the counter parties. The tribunal found the contractual obligation of Danish A/S involved paying counterparties an amount equivalent to the entire increase in the value of the underlying shares in the duration of the swaps. The value included the dividends. According to the tribunal, the contractual obligation did not constitute a civil law obligation to hedge the swap contracts and/or to purchase the corresponding shares.[52]

Subsequently, the tribunal determined whether a de facto obligation to pass on the dividends existed. The tribunal was of the opinion that for determining the issue, it should adopt a substance over from approach. The answer depended on two concerns. Firstly, whether Danish A/S would have been obliged to pay the dividend amount to the counterparties even if it had not received the dividends. Secondly, whether Danish A/S would have received the dividends even if it had not been obliged to pay the dividend to the counterparties.[53]

The tribunal found that Danish A/S was obliged to pay the counterparties the amounts equivalent to the dividends regardless of whether it received the dividends. Further, Danish A/S was free to decide independently of the swap

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[50] Ibid.

[51] *Danish A/S v Federal Tax Administration*, above n 41, at para 5.3.

[52] Ibid, at para 6.2.1.

[53] Ibid.

contracts, whether to buy the underlying shares and to receive the corresponding dividends.[54]

Based on its finding the tribunal inferred that there was a lack of interdependence on the generating of dividends and the duty to pass them on. The lack of interdependence showed that Danish A/S had power to decide how to use the dividends. Therefore, Danish A/S was under no de facto obligation to pass on the dividends.

The tribunal rejected the Swiss Federal Tax Administration argument that Danish A/S could not be regarded as the beneficial owner because the dividend amount did not remain in its possession. The tribunal ruled that when ascertaining the degree of the power of an immediate recipient, it was incorrect to take a purely ex post facto perspective that focused on whether the dividends remained with the immediate recipient in economic terms.[55]

The tribunal acknowledged that, in this case, the risk associated with the payment of dividends was born ultimately by the counterparties. However, it also noted that the Danish A/S purchased the underlying shares at its own discretion for the purpose of hedging its obligations. For this reason, the tribunal did not accord importance to the fact that the risk associated with payment of dividends was born ultimately by the counterparties.

On the basis of its findings, the tribunal concluded that Danish A/S qualified as the beneficial owner of the dividends, even if the beneficial ownership concept is read implicitly in Article 10 of the Denmark-Switzerland double tax treaty.

The Federal Supreme Court examined the ruling of the tribunal on two points. Firstly, the court investigated the finding of the tribunal that Danish A/S was not obliged to hedge the swap agreements by acquiring the underlying shares. Secondly, the court investigated the finding that Danish A/S was not obliged to pass on to the counterparties the dividends received on the basis of its share transactions.

The court acknowledged that Danish A/S was neither legally nor de facto obliged to hedge the swap transaction; however, in the opinion of court this finding was insignificant.

The court accorded significance to the fact that, despite the absence of an obligation, the Danish A/S entered in each case into a hedging transaction simultaneously with the swap agreement. Further, Danish A/S hedged the swap agreements to their full extent. In each case the Danish

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[54] Ibid.

[55] *Danish A/S v Federal Tax Administration*, above n 41, at para 6.2.1.

A/S dissolved the swap agreements and resold the shares in the same way.

According to the court, it was obviously in the immediate interest of Danish A/S to acquire the underlying shares so that Danish A/S could actually receive the amount which it undertook to pass on to the counterparties under the swap agreements. The form of the swap agreement not only necessitated the acquiring of shares, but also facilitated it. The amount made available to Danish A/S through interest and margin could be used as interest payable for the acquisition of debt, by means of which the purchase of shares and receipt of dividends could be realised. Effectively, the structure of the swap agreements enabled the debt-finance purchase of the underlying shares without creating a legal or de facto obligation. Considering the economic processes, a significant interdependence may be assumed between the financing and the purchase of the underlying shares.

Unlike the tribunal, the court accorded significance to the finding that, from an economic perspective, counterparties bore the risk associated with dividends. Danish A/S argued that, under the swap agreements, it bore the risk that could have arisen in the case of any fall of the underlying shares. The court agreed that Danish A/S had to content itself with an interest and a margin as compensation. The court was of the opinion, however, that Danish A/S was able to do so because its risks were hedged. It observed:[56]

> Without this hedge by purchasing the underlying securities, the swap agreements could not have been entered into according to the accepted specific conditions, this in contrast to an independent operation of business with corresponding risks.

Danish A/S also argued that it bore the risk that could have arisen in a situation in which the counterparties did not fulfil their obligations to pay interest. The court noted that the interest owed in connection with the swap transactions was charged at market rates and the margin easily compensated the credit risk taken. It followed that any residual hedging risk due to services provided by Danish A/S were compensated in a completely adequate manner.[57]

When determining the issue of whether Danish A/S was under an obligation to enter into a share hedging transaction, the court considered the arrangement as a whole. It determined whether from the viewpoint of Danish A/S the swap agreements contained several

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[56] *Federal Tax Administration v Danish A/S*, above n 45, at para 6.3.4.
[57] Ibid, at para 6.3.4.

incentives from Danish A/S to hedge itself. It acknowledged the counterparties were under contractual obligations to provide Danish A/S with interest as a financial basis for acquiring shares and to compensate adequately risk arising from the swap transaction. However, it was of the opinion that Danish A/S was unlikely to hedge transactions in the relevant manner in the absence of swap agreements. To this extent, the share transactions were dependent on the swap agreements.[58]

According to the court, the findings of the tribunal were based on a narrow contract law based perspective. However, this perspective did not adequately take into account the various components of the swap agreements. Firstly, the interest and margin amounts paid to Danish A/S not only allowed the acquiring of the shares but also permitted the receipt of the dividends resulting from it. Secondly, the provisions that dealt with risks in the swap agreements ensured that amounts of the dividends to be passed on to counterparties corresponded in full to the received amount even when no dividends were paid or when prices of the underlying shares fell.[59]

According to the court, from the appropriate "all round perspective",[60] which includes legal as well as economic aspects, the amounts to be transferred on the basis of the swap agreements were not only linked but also matched the dividends received on the basis of the share transactions. It added that the unrestricted match existed de facto as well as was explicitly identified by the swap agreements.

On the basis of the analysis, the court held that the collection of dividends was linked with the contractual obligation to pay the counterparties. For this reason, it assumed that Danish A/S was under a de facto obligation to transfer dividends.

According to the court, the arrangement in this case was a stepping-stone conduit structure. Danish A/S passed on the distributed share income in full to the counterparties as an expense. This passing on of income to parties of non-contracting states was planned even before the dividends' maturity.[61]

> … in the specific context that is relevant to this case, it is irrelevant that the global swap market is large and there may indeed be non-fiscal reasons for share swaps. It may also indeed be the case that [Danish A/S] did not always completely hedge the baskets of shares

[58] Ibid, at para 6.3.5.
[59] *Federal Tax Administration v Danish A/S*, above n 45, at para 6.4.
[60] Ibid, at para 6.4.1.
[61] Ibid, at paras 7.1 and 7.2.

> contained in its swap agreements and that it signed swap agreements throughout the entire year.
>
> In the present case, the issue is exclusively the short-term and completely hedged [total return swap] transactions in connection with shares, within whose maturities the dividend payments fell due; in the relationship between Switzerland and Denmark, the effective beneficial ownership is negated in this case for such swap transactions, which cumulatively exhibit all these features and which were characterised by other specific individual features … Thus it also not possible to say that the refund of withholding tax is to be generally and consistently refused for [total return swap] transactions. What counts is the actual structure of the transactions performed.
>
> For the same reason, it is also not true that effective beneficial ownership in this case has been denied because the amount of the received dividends did not remain with the Respondent in Denmark. In addition to the fact itself of the remittance of these dividends, there was the cumulation of all the aforementioned features of the specific transaction form … ; due to these features, the conclusion is self-evident that the transaction structure created by the Respondent precisely did not coincide with scenarios which the two treaty states consciously provided for exclusive taxation in the state of residence; in this case it is not a question of assertion of [Article 10 of the Denmark-Switzerland double tax treaty] in accordance with the convention, but one which substantially deviates therefrom.

The observation suggests that the court denied treaty benefits not simply because the disputed arrangement arrangements involved hedged total return swap transactions. The court considered the arrangement as a whole. Its judgment emphasised this point repeatedly. It investigated the overt acts, which the parties used to implement the arrangements, and subsequently determined whether the arrangements were for obtaining treaty benefits improperly.

3.7. Substantive business activity

The Denmark-Switzerland double tax treaty did not explicitly contain an anti-abuse clause. For this reason, the tribunal determined whether Danish A/S actively engaged in commercial activity. It noted that Danish A/S was established in 1924. It possessed assets, premises, and employees. Based on its finding, the tribunal concluded that Danish A/S was engaged in a genuine commercial activity. Based on these facts, tribunal ruled that Danish A/S was entitled to treaty benefits.[62] The tribunal followed the approach adopted by the Swiss Federal Supreme Court

[62] *Federal Tax Administration v Danish A/S*, above n 45, at paras 7.1. and 7.2.

in *A Holding ApS v Federal Tax Administration*.[63] In *A Holding ApS*, the court considered the abuse of law doctrine to be separate from the beneficial ownership test. Further, the court used substantive business activity as a decisive test for deciding conduit company cases. As discussed in section 2.2, substantive business activity is not an appropriate test for deciding conduit company cases.

The approach adopted by the Federal Supreme Court in the *Swiss Swap* case seemed to differ from its approach in the *A Holding ApS* case. In the *Swiss Swap* case, the court considered the beneficial ownership test as an anti-avoidance test. Further, the court examined the arrangement as a whole. That is, it did not consider the criterion of substantive business activity as decisive. As indicated in section 3.6, the court found that, effectively the economic process behind the swap arrangement enabled the passing on of dividends from the Swiss companies to the counterparties without creating a formal obligation on Danish A/S. This approach resembles the approach adopted the Conseil d'etat in the *Bank of Scotland* case.[64]

4. Conclusion

Unlike the Federal Administrative Tribunal, the Federal Supreme Court seems to have taken an informed approach for considering beneficial ownership to be an anti-avoidance test, not a test of ownership.

The tribunal acknowledged that the beneficial ownership test required an investigation of facts from an economic perspective; however, because, it considered beneficial ownership as a test of ownership, it seemed not to be able to justify its reasoning. This disconnection shows up in its reasoning regarding the attribution of the risk related to dividends. Its reasoning shows that it considers the assumption of the risk to indicate the presence of dominion, which in turn shows presence of beneficial ownership. However, after finding that, in an economic sense, the risk lies with the counterparties, it refuses to attach significance to this factor.

As with the tribunal, the court also considered that the use of the beneficial ownership test required it to adopt an economic perspective; however, because it considered the test to be an anti-avoidance test, it was able to justify its reasoning. It other words, the court examined the arrangement as a whole in the light of the object and

[63] *A Holding ApS v Federal Tax Administration* (2005) 8 ITLR 536 (The Federal Court, Switzerland).

[64] *Ministre de l'Economie, des Finances et de l'Industrie v Société Bank of Scotland* (2006) 9 ITLR 683 (Conseil d'etat, France).

purpose of the double treaty agreement. For this reason, it determined whether the arrangement justified allowing Danish A/S to mitigate Swiss withholding tax under the Switzerland-Denmark double tax agreement.