

# Denmark and France Sign Long-Awaited New Income Tax Treaty

**In this note, the author outlines the position of French and Danish taxpayers following the termination, in 2009, of the former Denmark-France Income and Capital Tax Treaty (1957) and under the newly signed Denmark-France Income Tax Treaty (2022).**

## 1. Introduction

After 13 years without an income tax treaty, which was an odd circumstance for two EU Member States, the new Denmark-France Income Tax Treaty (2022) [hereinafter the New Treaty]<sup>1</sup> was finally signed by the respective Ministers of Finance on 4 February 2022. By way of background, Denmark unilaterally terminated (together with the Denmark-Spain Income Tax Treaty) the former Denmark-France Income and Capital Tax Treaty (1957) [hereinafter the Former Treaty]<sup>2</sup> so as to be able to tax the pensions of non-resident Danes.

Indeed, on 10 June 2008, the Kingdom of Denmark, through its Minister of Taxes at the time (Kristian Jensen, Venstre), notified France of its decision to terminate the Former Treaty. Under that treaty, significant French real estate investments were made through Danish holding companies, as there was a loophole in respect of income and capital gains from real estate investments. Indeed, according to the Former Treaty, neither Denmark nor France had the right to tax the income and capital gains. Of course, some of the companies' structures were challenged by the French tax authorities due to a lack of substance. This loophole, however, was more prejudicial to France than Denmark. The interesting point is that it is not France, but Denmark, that terminated the Former Treaty. Further, it was not due to this loophole that the Danish tax authorities cancelled the treaty; it was to be able to tax pensions paid to tax residents of France and prevent Danes from moving to France to enjoy low taxation on their pensions.

Nevertheless, the absence of an income tax treaty for 13 years has created an unprecedented situation, resulting in double taxation for individuals and companies of the two European countries (for pensioners, as well as French and

Danish companies). It was a rather backwards and rare situation. It was also surprising for France and Denmark, which have many tax treaties with other countries in their tax treaty portfolio. The New Treaty is, therefore, welcome news for Denmark and France, although it is not yet in force.

## 2. Termination of the Favourable Former Treaty: Effective Date of Denunciation and Consequences

The Former Treaty was signed in Paris on 8 February 1957 with a view to avoiding double taxation with respect to taxes on income and on wealth and establishing rules for reciprocal administrative assistance. Law No. 58-184 of 21 February 1958<sup>3</sup> authorized the ratification of this agreement, which was published by Decree No. 58-702 of 7 August 1958.<sup>4</sup>

By diplomatic note of 10 June 2008, Denmark notified France of its decision to terminate the Former Treaty. This termination was published by Decree No. 2009-46 of 13 January 2009.<sup>5</sup>

In accordance with the provisions of article 28 of the Former Treaty, either state may notify the other party, in the first half of each year, of its intention to terminate the treaty. In this instance, the treaty ceases to produce its effects from 1 January of the year following the date of notification. The Former Treaty, therefore, ceased to produce its effects as of 1 January 2009.

The termination of the Former Treaty produced different effects depending on the type of taxation and income concerned. Below are some examples of the effect on different types of income:

- With regard to taxes levied by way of a withholding at source on income from movable capital, the Former Treaty no longer applies to the taxation of income paid from 1 January 2009. Conversely, the Treaty remains applicable to the taxation of income from movable capital that was paid during the year of termination, namely 2008.
- With regard to taxes on other income, the Former Treaty no longer applies to the taxation of income relating to the 2009 and subsequent taxation years, or to fiscal years ending on or after 1 January 2009.

\* French qualified Lawyer, Copenhagen. The author can be contacted at [info@mpconseil.org](mailto:info@mpconseil.org).

1. *Convention between the Government of the French Republic and the Government of the Kingdom of Denmark for the Elimination of Double Taxation with Respect to Taxes on Income and for the Prevention of Tax Evasion and Avoidance* (4 Feb. 2022), Treaties & Models IBFD.  
2. *Convention between Denmark and France for the Avoidance of Double Taxation and the Establishment of Rules for Reciprocal Administrative Assistance with Respect to Taxes on Income and Capital* (8 Feb. 1957), Treaties & Models IBFD.

3. FR: Law No. 58-184 of 21 February 1958, Official Journal of France, p. 1924 (22 Feb. 1958).  
4. FR: Law No. 58-184 of 21 February 1958, Official Journal of France, p. 7519 (10 Aug. 1958).  
5. FR: Decree No. 2009-46 of 13 January 2009, Official Journal of France, p. 793 (15 Jan. 2009).

However, income in respect of which the chargeable event occurred before 1 January 2009 remained subject to the Former Treaty, even if taxation of this income occurred after this date. This provision does not apply to income associated with a fiscal year that closed after 31 December 2008, even if the event that generated the income occurred earlier.

- With regard to the French wealth tax, the Former Treaty ceased to produce its effects in respect of the taxation of wealth effective 1 January 2009.

With regard to the specific case of the taxation of profits of shipping companies, which is quite an important business in Denmark, the agreement by way of an exchange of notes of 28 January 1930 (French reference BOI-ANX-000297) between the French and Danish governments mentioned in paragraph 2 of article 6 of the Former Treaty became operative again once the Former Treaty ceased to apply, i.e. 1 January 2009. Consequently, shipping companies that have their place of effective management in France are exempt from taxes in Denmark on profits derived from navigation carried out in Denmark. This exemption applies reciprocally to profits earned in France by shipping companies with their place of effective management in Denmark. An exchange of letters (French reference BOI-ANX-000296) between the competent French and Danish authorities specifies that the stipulations of this agreement apply to both maritime and air navigation activities.

Unilateral termination of the Former Treaty, however, has created uncertainties for taxpayers in both countries. Denmark wanted to tax individuals residing in France – whether of Danish or French nationality – receiving pensions from Danish sources, although it was, above all, tax optimization linked to real estate in France that seemed the most pressing to amend. The absence of a tax treaty, however, has created an uncertain tax situation, generating double taxation for companies and for retirees with connections to France or Denmark. The taxation of all types of income in respect of which the Former Treaty provided for an exemption or reduced rate, has been seriously impacted by the termination of the Treaty (for example, pensions).

Indeed, Danish tax residents, whether natural or legal persons (Danish or French nationals with regard to natural persons) with income in France have since been subject to French taxation on income that was not taxed in France under the Former Treaty, including private pensions, as well as other income, such as interest, royalties, dividends and capital gains on the sale of assets. Fortunately, a French tax instruction limits the negative effects of the absence of a tax treaty, but it was not published until 2016.<sup>6</sup>

6. FR: BOI-INT-CVB-DNK-20160728 (28 July 2016), available at <https://bofip.impots.gouv.fr/bofip/987-PGP.html/identifiant%3DBOI-INT-CVB-DNK-20160728>.

### 3. Overview of the French Instruction (Guidelines from the French Tax Authorities)

As soon as the provisions of the Former Treaty were cancelled, the French tax authorities clearly specified, in their 2016 guidelines, that the rules of domestic law were applicable without restriction.

The consequences of this guideline differ according to the nature of the income concerned. The main consequences are mentioned below.

On the one hand, the absence of a tax treaty does not affect the taxation in France of income in respect of which the treaty granted France an unlimited right of taxation. With regards to business income earned in France by a resident of Denmark, the income is taxable in France under ordinary law, provided that the business constitutes an autonomous operation, a complete commercial cycle of activity or dependent agent activity within the meaning of the provisions of article 209(I) of the French Tax Code<sup>7</sup> (the scope of taxation of a permanent establishment (PE) is obviously broader than when a tax treaty is in force). On the other hand, the taxation of all income in respect of which the Former Treaty provided for an exemption or a reduced rate is affected by the termination of the Former Treaty. Thus, with regard to income tax, the amounts referred to in article 182 A of the French Tax Code, received by persons who are not domiciled in France for tax purposes, are subject to the withholding tax provided for by this article. Similarly, when paid by a debtor who exercises an activity in France to persons or companies who do not have a permanent professional establishment in France, the payments referred to in article 182 A bis and 182 B of the French Tax Code are subject, without restriction, to the withholding tax provided for by these articles.

Until 31 December 2008, residents of Denmark receiving private pensions from French sources were exempt from tax in France. In the absence of a treaty, regardless of the nature of the pension paid (public or private), natural persons resident in Denmark receiving such income were taxable in France according to the provisions of articles 182 A, 197 A and 197 B of the French Tax Code.

With regard to interest, royalties and dividends from French sources received by Danish residents, the Former Treaty provided for exemptions from withholding tax in the source country. In the absence of a tax treaty, this type of income is taxable under the provisions of common law (French domestic tax legislation), in particular, those provided for in articles 119 bis (2), 119 ter, 125 A, 119 quater, 131 quater, 182 B and 182 B bis of the French Tax Code.

Regarding the taxation of capital gains realized by residents of Denmark on the sale of real estate located on French territory, the Former Treaty attributed taxation to the state of residence of the seller, namely Denmark. Following the termination of the Former Treaty, transfers on or after 1 January 2009 by Danish residents relating to buildings located on French territory were taxable in

7. FR: General Tax Code (*Code général des impôts*), Primary Sources IBFD.

France without restriction (article 244 bis A of the French Tax Code). This aspect closed the loophole that existed with respect to French real estate under the Former Treaty.

The French tax instruction outlines the consequences of the absence of a tax treaty between France and Denmark and provides for very useful clarifications and domestic law solutions regarding problems of double taxation resulting from the absence of a tax treaty (tax credit system). Danish tax legislation also offered a system of tax credits for different types of income despite the absence of a tax treaty, but the lack of clarity was a challenge for taxpayers from both countries. Therefore, the signing of the New Treaty is a welcome development in respect of management of the problem of double tax taxation and provides guidelines to both taxpayers and the respective tax authorities of both states.

## 4. The New Treaty

### 4.1. In general

On 4 February 2022, France and Denmark signed, following a 13-year gap, the New Treaty. It should be noted that the New Treaty does not address wealth taxation.

### 4.2. Retirement pension

The New Treaty mostly follows the OECD Model (2017),<sup>8</sup> but also includes a long paragraph on pensions, allowing for the application of withholding tax on pensions paid to persons who were previously Danish residents and benefited from a tax deduction on their pension contributions. The Danish Ministry of Finance has affirmed that there is no tax advantage to settling in France, since the pension will continue to be taxed in Denmark (under the application of article 17 of the New Treaty).

### 4.3. Company taxation

Aside from pensions, the signing of the New Treaty was welcome, especially for Danish companies (France being an important country for investment by Danish companies). Indeed, the absence of a treaty was detrimental because French and Danish domestic tax law was, therefore, applicable. For example, article 182 B of the French Tax Code applied to services (that fell within the definition of the article) provided by Danish companies. Article 182 B, which puts the responsibility for tax collection on the French debtor paying for the service provided by the Danish company, has generated numerous disputes with the French tax authorities.

The signature of this new tax agreement resolves the problem of withholding tax in France on supplies of services provided by Danish companies and will prevent (once the New Treaty is in force) the application of article 182 B of the French Tax Code to Danish companies operating in France. This agreement should also facilitate and strengthen exchanges between Denmark and France for the benefit of the Danish business community. As a result

8. OECD Model Tax Convention on Income and on Capital (21 Nov. 2017), Treaties & Models IBFD.

of the New Treaty, Danish companies in France will have a significantly reduced administrative burden and will benefit from improved trading conditions with French companies.

### 4.4. PEs

The New Treaty clarifies PE taxation (the concept of which is similar to the notion of a complete commercial cycle) and the taxation of real estate income, which reaffirms the principle of taxation in the country of situs (property). There is also an article concerning associated companies and transfer pricing (to avoid fraud and tax evasion between associated companies). Article 10 of the New Treaty, which was inspired by the EU Parent-Subsidiary Directive (2011/96),<sup>9</sup> deals with the taxation of dividends and their potential exemption from withholding tax in the state of payment (source state).

### 4.5. Miscellaneous

Interest (article 11), royalties (article 12), capital gains (article 13) and fees (board meeting attendance fees) of company directors (article 15) are, of course, treated the same as under the OECD Model (2017). Article 19 of the New Treaty clarifies the taxation of the income of public officials. There is also an article (general clause) that provides for the right of each state (Denmark and France) to tax income that is not specifically dealt with by the other articles of the Treaty (typical of treaties based on the OECD Model). Finally, double taxation is mitigated through the tax credit or exemption system (in one of the two states), depending on the type of income (article 22).

## 5. Conclusion

In summary, the New Treaty clarifies direct taxation between France and Denmark for individuals and businesses of the two signatories.

It is hoped that the New Treaty will enter into force in 2023; this will depend on the efficiency of the legislative processes of both states. It will be interesting to see what interpretations the respective tax authorities will release.

It should also be noted that few French and Danish tax treaties address inheritance and gift tax. Denmark and France do not have one, and the New Treaty, as noted, does not cover these taxes. The fact that the New Treaty has been signed is, however, a major achievement and is a very positive development for Danish and French taxpayers operating in the two countries.

9. Council Directive 2011/96/EU on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States, OJ L 345/8 (2011), Primary Sources IBFD.