

IATJ Assembly 4th/5th September 2015

Recent Case Law

Judgments of the Swiss Federal Supreme Court

5 May 2015

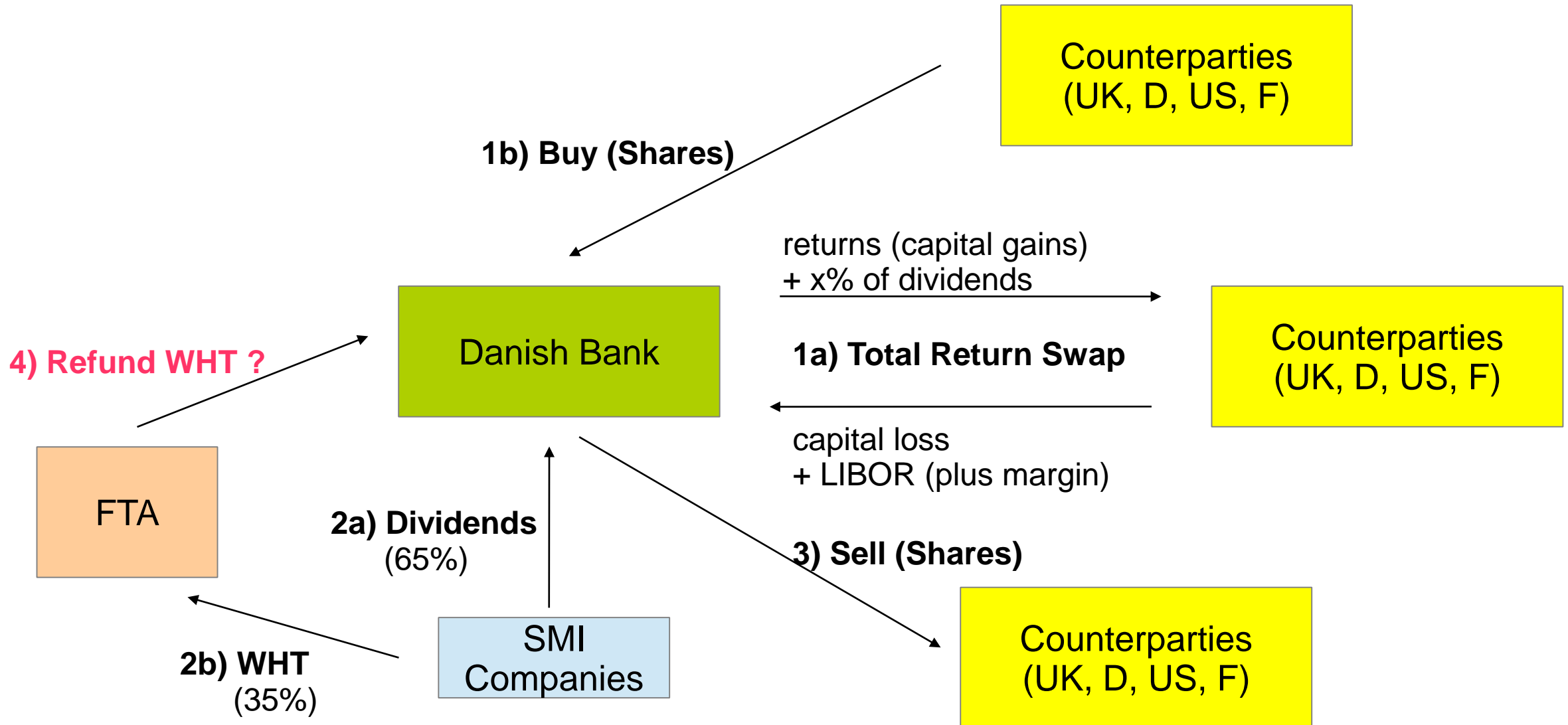
Swiss Withholding Tax Cases

“Total Return SWAP” (2C_364/2012 and 2C_377/2012)

and “Futures Products” (2C_895/2012)

<http://www.bger.ch/index/jurisdiction/jurisdiction-inherit-template/jurisdiction-recht/jurisdiction-recht-urteile2000.htm>

“Total Return SWAP”

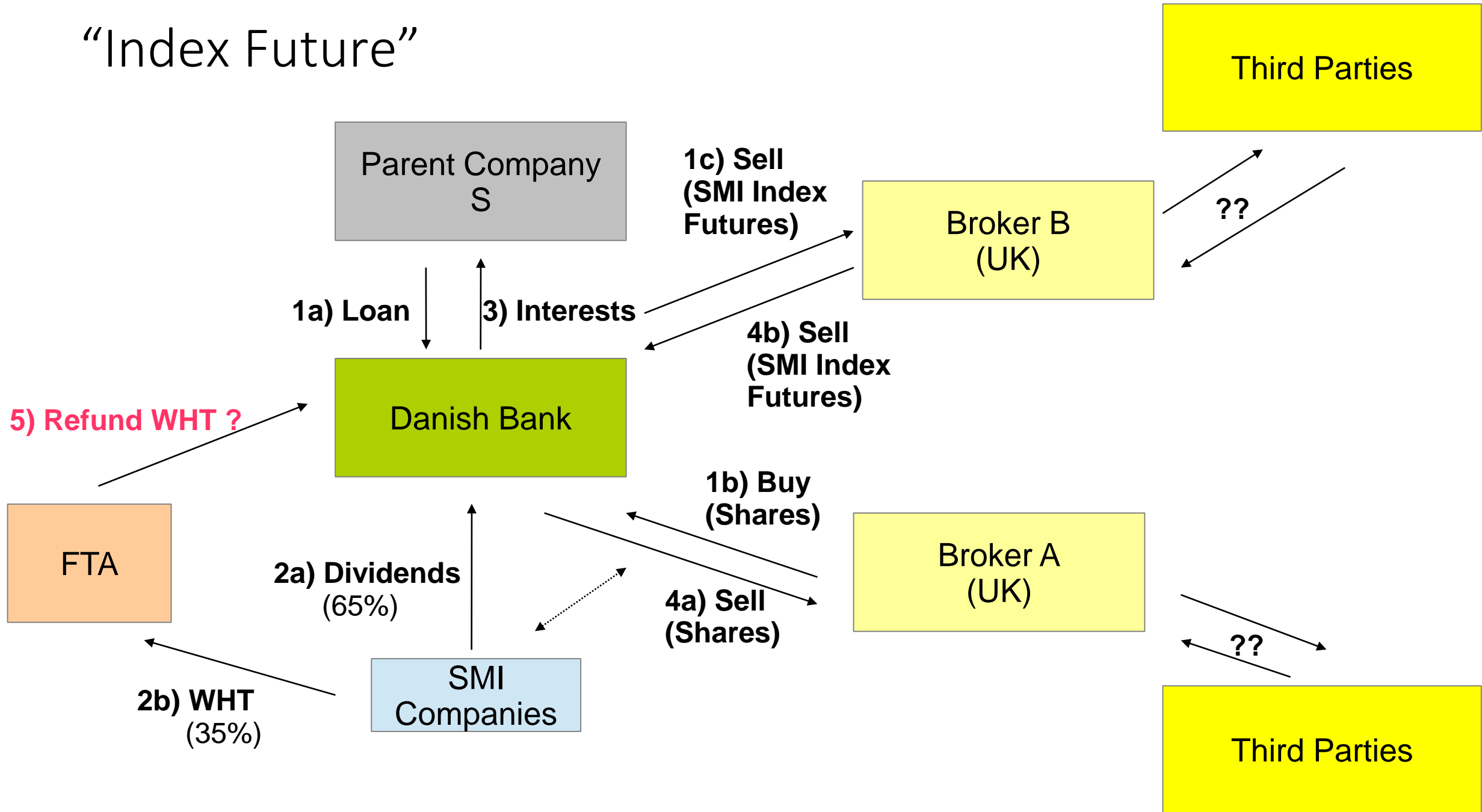


“Total Return SWAP”

- Facts of the Case

- Danish bank issued a “Total Return SWAP” to various counterparties
- Underlying shares were publicly listed Swiss companies
- Bank had to pay an amount equal to the returns generated during the running time of the “TR SWAP” (dividends, capital gains)
- Bank received a fixed interest based on LIBOR (plus margin)
- As a hedge, bank bought the underlying shares of the “TR SWAP” and received dividend payments
- Bank filed request for refund of WHT (35% of gross dividend payment)

“Index Future”



“Index Futures ”

– Facts of the Case

- Danish bank issued index futures contracts to counterparties over broker
- Underlying shares were publicly listed Swiss companies of the Swiss Market Index
- Bank bought underlying shares to hedge the risk of the contracts
- At time of expiry bank repurchased futures contracts and sold the shares
- Bank’s transactions were financed by parent company (not Danish)
- Bank filed request for refund of WHT (35% of gross dividend payment)

Tax Treaty between Switzerland and Denmark

- Dividends are exclusively taxable in Denmark in the present cases (changed in 2010)
- No explicit beneficial ownership requirement in the dividend article
- No specific abuse rule in the treaty

Lower Court Decisions – Important Topics

- Beneficial Ownership

- Crucial is the possibility to decide on the use of the income
- “Substance over form” approach
- In both cases no legal or factual obligation to pass on the income to third parties. Banks had control over the dividend income.

- Treaty Abuse

- Tax treaty benefits may be denied by Switzerland, if the entity in the other state does not exercise any genuine commercial activity

Judgements of the Supreme Court

- Public deliberation on 5 May 2015
- Written judgment not yet available
- Decisions of lower court were overturned
- The judges focused on the on the “beneficial ownership” requirement
 - Beneficial ownership requirement is inherent in the Tax Treaty between Switzerland and Denmark (different reasonings of the judges)
- No significant remarks to the topic of “treaty abuse”

Beneficial Ownership – Link between in- and outflows?

- In principle: Recipient of the dividend is the beneficial owner, as long as he has the authority to (at least partially) decide about the use of the generated income. He lacks this authority if he is obliged to pass the income to a third party or use it a predetermined manner.
- Harmful obligation to pass the income to non-resident third parties?
 - Legal obligation
 - or
 - Factual obligation
 - “Double interdependence” – Link between incoming and outgoing streams
 1. Income would not have been generated without the obligation to pass it on
 2. Obligation to pass on the income depends on the realization of the income

Judgements of the Supreme Court

- “TR SWAP”-Case (4:1 decision)
 - Factual obligation to pass the dividend to the counterparties of the “TR SWAP”
 - Danish bank bore no risk
 - Share transaction was conducted at the same time and only to hedge the “TR SWAP”
 - De facto link between the two transactions. Payment in the amount of 100% of the dividend to the third parties
 - Danish bank is not the “beneficial owner”
 - Difference to Lower Court notably:
LW => no (legal) obligation to buy underlying shares;
SC => de facto connection

Judgements of the Supreme Court

- “Futures”-Case (3:2 decision)

- Factual obligation to pass the dividend on

- Unclear reasons

- Arguments of the majority of the judges:

- Very high volume of the futures contracts; few involved counterparties; distribution of the risk; unclear facts about the financing of the transaction by the parent company (stepping stone structure?); small profit margin; short holding period; unclear relation between bank and broker (arrangement?)

- Minority: 1 => beneficial ownership requirement not inherent in DK-CH Treaty

- 2 => a) lack of double interdependence; no Treaty Abuse