

UNITED KINGDOM

Danish Tax Agency Pays £46 Million Of Legal Costs in U.K. Case

by William Hoke

The Danish Customs and Tax Administration (SKAT) said it paid £46 million of its opponents' legal fees after losing a U.K. lawsuit alleging the defendants fraudulently claimed tax refunds to which they were not entitled.

In his April 27 judgment in *Denmark v. Solo Capital Partners LLP*, Justice Andrew Baker of the High Court of England and Wales, Queen's Bench Division, dismissed SKAT's claims that Dubai-based Sanjay Shah used his U.K. company, Solo Capital Partners, and other entities to file fraudulent claims with the Danish authority to obtain withholding tax refunds totaling DKK 12.5 billion (around \$2 billion) between August 2012 and July 2015. Baker said that English law does not allow its courts to entertain a claim that would require it to extraterritorially enforce Denmark's sovereign power of taxation.

On May 6 Baker allowed SKAT to appeal the decision to the extent it applied to defendants who were resident in the United Kingdom and the EU, but denied the tax agency's request as it pertained to other parties. "Following this ruling, the Danish Tax Agency sought the Court of Appeal for permission to appeal the judgment in its entirety," the agency told *Tax Notes* June 10. "The decision from the Court of Appeal is still pending."

On May 11 Baker issued his decision about whether SKAT should be ordered to pay the defendants' legal fees on either the standard basis, which puts the burden on the winning side to prove the reasonableness and proportionality of the amounts claimed, or the indemnity basis, which requires the loser to prove that the costs claimed by the victor are unreasonable. Baker ruled that the costs should be assessed on the indemnity basis.

Baker had approved a total of £72 million in legal costs, with £46 million of the total due on June 7. SKAT said it paid the amount required on a timely basis. "The final decision on the total amount of the costs has been postponed pending the decision on the appeal," it said in an email.

Baker said the indemnity basis is likely to result in a greater recovery of costs than the standard basis. "I understand the typical difference between the two is not so great as is often supposed," he said. "Still, it can be expected to make a material difference, and some of the costs' bills in the present case are large so that even a small percentage difference in recovery may be a significant sum in absolute terms."

Baker described the lawsuit as "extraordinary," saying that if SKAT's claims were true, they could seriously damage professional reputations. "The litigation was brought and aggressively pursued by a sovereign state with a willingness to expend effectively unlimited resources, as much to set an example to the world and make an example of all those involved (whether said to be guilty of dishonesty or not), that where it believed it had been the victim of dishonest wrongdoing there would be consequences, as to make a financial recovery," he said. "It was litigation that was politically as well as financially motivated."

He also criticized the way prominent political figures in Denmark spoke out publicly about the case. "The litigation was the subject of ill-judged public statements by senior Danish politicians appearing to pre-judge the factual issues that would have fallen to be determined by the court," Baker said. "They both confirmed, or reinforced, the impression that there was a substantial political dimension to the bringing and vigorous pursuit of the claims brought here, in particular that their purpose was punishment and deterrence as much as it was financial recovery for the Danish taxpayer, and also involved a degree of 'playing to the gallery' in response to the significant media interest this affair has generated in Denmark."

Baker rejected a claim by SKAT's lawyer that such statements should not be held against his client, which he said was neither the Danish government nor parliament. "That was unrealistic and unattractive in circumstances where SKAT has accepted that it is not a separate legal entity from the Kingdom of Denmark, and where the public statements effectively claimed ownership of, and credit for, the litigation activity of SKAT, as part of the Danish state's response to a loss of

tax revenue that has been a significant public scandal in Denmark," Baker said.

The judge said SKAT joined many defendants to the litigation beyond those alleged to be central or necessary to the case, "without seeming concern as to whether they had the means to afford legal representation to mount a fully effective defense, let alone make a meaningful contribution to repairing the £1.5 billion hole in SKAT's dividend tax accounts." Baker said the addition of defendants unable to pay for an adequate defense placed "an unusual and disproportionate burden" on those who could.

SKAT was entitled to bring litigation on the scale that it did, Baker said. "But having lost, and even though the loss was not because its allegations of serious wrongdoing have been found wanting on the facts, in my judgment it would not be fair for SKAT to be allowed to limit its liability in costs by arguing that costs incurred by defendants had been disproportionate, and it would be only just to make the rebuttable presumption in the defendants' favor that what they and those acting for them, where that applies, chose to do in defending the claims was reasonably done at reasonable cost," he said.

Baker said SKAT has the onus of proving that the legal costs claimed by the defendants were unreasonably incurred or unreasonable in amount. "But it is fair to presume in all the defendants' favor that admissible cost in fact occurred was reasonable, requiring SKAT to show otherwise for any item or amount of cost to which it objects," he said.

Michael Gibbon, a barrister with Maitland Chambers and chair of the International Committee of the Chancery Bar Association, told *Tax Notes* that the assessment of costs will likely be a complex process given the number of defendants involved in the case. There were over 30 lawyers representing approximately 15 defendants at the hearing on costs.

Gibbon said that while the case was, in substance, about the recovery of tax, it was brought as a fraud claim in the High Court. "SKAT disavowed that they were seeking to recover tax as such," he said. "They did so because they were aware of the rule of English law which prevents recovery of foreign tax in the English courts. However, the judge held against SKAT. In effect he decided that the fraud claim

was an impermissible attempt to get around the rule of law."

Gibbon said that while there have been other High Court cases resulting in larger awards of legal costs, he could not remember any that primarily involved tax issues. "Moreover, the bill is very substantial indeed when it is seen in the context of the fact that the case in effect fell at the first hurdle," he said.

While cost awards are appealable, the Court of Appeal would deal with the underlying principle instead of the details of the amounts involved, Gibbon said. "As SKAT's case failed comprehensively, the chance (on a costs-only appeal) that costs would not be awarded would be nonexistent," he said in an email. "So the principal real debate on a costs-only appeal would be over whether costs should be on the standard basis or the indemnity basis. My understanding is the judge explained the difference in the decision and gave very persuasive reasons why the indemnity basis applied."

The courts of most Western democracies follow the so-called English Rule, which effectively means that the loser pays an opponent's legal fees. The alternative is the American Rule, which is generally applied in U.S. courts (other than Alaska's) and requires litigants to absorb their own legal costs unless there is a statutory or contractual provision to the contrary. Litigation that is determined to be frivolous can also result in the awarding of attorney fees in U.S. courts.

The alleged dividend overpayments were the result of cum-ex trading, which typically involves the cross-border sale or swap of shares around the time a dividend is to be paid out on the shares. A hedge fund, brokerage firm, or bank agrees to sell or lend the shares to a buyer in a second country immediately before the dividend payout. Depending on the timing of the sale or loan and the dividend payment, a party to the transaction claims credit for taxes paid on the dividend even though no tax was withheld in that country on the dividend income.

In April Danish prosecutors charged three U.S. nationals and three U.K. nationals for their alleged roles in a cum-ex dividend trading scheme that they claimed defrauded the national treasury out of DKK 1.1 billion. ■