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In case no. 2095–2097-19, **Apolus Holding AB** (Appellant) v. the **Swedish Tax Agency** (Respondent), the Supreme Administrative Court delivered the following judgment on 4 December 2020.

RULING OF THE SUPREME ADMINISTRATIVE COURT

The Supreme Administrative Court rejects the claim for a request for a preliminary ruling from the European Court of Justice.

The Supreme Administrative Court grants the appeal in part and declares, by way of amendment to the rulings of the lower courts, that it is the investors in the Triton II fund which are to be regarded as Apolus Holding AB's lenders and that the investors which are companies are associated with the company. The Supreme Administrative Court refers the cases back to the Swedish Tax Agency for continued processing in accordance with the reasons of the judgment.

The Supreme Administrative Court grants Apolus Holding AB compensation for costs in the amount of SEK 700,000.

The Supreme Administrative Court affirms the decision of the administrative court of appeal regarding secrecy.

BACKGROUND

1. The main rule is that a company's interest expenses are to be deducted from its income. A company linked in a group of associated companies, for example companies in the same group may, according to the so-called interest deduction limitation rules, deduct interest expenses in relation to a debt owed to an associated company only under certain specifically stated conditions. The objective of the rules is to prevent tax planning which involves the deduction of

interest expenses while corresponding interest income is not taxed at all or is taxed at a very low rate.

2. Apolus Holding AB (the company) is a wholly owned subsidiary of the Luxembourg company, Alimak Hek HoldCo S.à.r.l. (the parent company). The Luxembourg Trade and Companies Register states that the parent company, in turn, is owned by five so-called limited partnerships (the partnerships) at just under 96 per cent and by another company to just over four per cent.

3. The partnerships were formed on Jersey by approximately 130 investors. A partnership is a contractual construction which in itself is not a legal person or a tax subject. It cannot enter into agreements or have assets or liabilities.

4. The five partnerships constitute a fund, Triton II. The fund is managed by two so-called general partners, Triton Managers II Ltd and TFF Ltd (the GPs). TFF Ltd is general partner for one partnership, while Triton Managers II Ltd is general partner for the other four.

5. The company received a loan from the parent company in order to finance a company acquisition. The parent company thereafter carried out a repurchase of its own shares and paid for the repurchase by transferring the claims against the company to the GPs in their capacity as general partners of ("acting as general partner of") the partnerships.

6. The company claimed a deduction for interest regarding these loans in its tax returns for the 2013 and 2014 tax years.

7. The Swedish Tax Agency decided not to grant the company a deduction for the interest. The Swedish Tax Agency considered that it was the GPs which were the company's lenders and that the company and the GPs were associated with each other.

8. The company appealed to the Administrative Court in Stockholm which rejected the appeal in the part which pertained to interest expenses relating to loans from Triton Managers II Ltd, but granted the appeal in the part which related to interest expenses pertaining to loans from TFF Ltd, and overturned the decision of the Swedish Tax Agency in that part. As reasons for the decision, it was stated that both GPs were lenders to the company, but that only Triton Managers II Ltd was an associated company.

9. Both the Swedish Tax Agency and the company appealed to the Administrative Court of Appeal in Stockholm which rejected the company's appeal and granted the Swedish Tax Agency's appeal. The Swedish Tax Agency's decision was thus affirmed in its entirety. The administrative court of appeal considered that the GPs were the company's lenders and that both GPs were associated with the company since TFF Ltd did not have any independent position relative to Triton Managers II Ltd.

CLAIMS, ETC.

10. *Apolus Holding AB* claims that the Supreme Administrative Court, by way of amendment of the judgment of the administrative court of appeal, is to reverse the decision of the Swedish Tax Agency. The company further claims that a preliminary ruling from the European Court of Justice is to be requested as regards the question of whether it is compatible with EU law to deny the company deductions for the interest expenses. Finally, the company claims compensation for costs in the administrative court, the administrative court of appeal and the Supreme Administrative Court in a total amount of SEK 2,982,336. The company states the following.

11. It is the investors in the fund which are lenders to the company since the parent company has assigned its claims against the company to the fund. In connection with the assignment, the GPs have in their capacity of general partners acted as the counterparties on behalf of the fund's investors. It is therefore the investors

and not the GPs which own the claims, The GP companies have an unconditional obligation to pass on the interest income, after a deduction of the GP companies' fees and other expenses, to the investors. The fund is continuously reported as an unincorporated partnership, and all transactions which take place are ascribed to the investors broken down per investment and asset type such that the investors, in their turn, will be able to report the transactions in accordance with applicable tax and reporting rules.

12. *The Swedish Tax Agency* considers that the appeal and the claim for a request for a preliminary ruling are to be rejected and that reasonable compensation for the company's costs is SEK 475,000 for all instances. The Swedish Tax Agency states the following.

13. It is the GPs which are lenders to the company. The investors are not responsible for the fund's liabilities and obligations, but only for the capital which they have committed to contribute. It is only a general partner which is entitled to represent a partnership. The fact that the fund's assets are reported separately and not in the GPs' accounts does not mean that the GPs are not lenders. The fact that certain investors have an obligation to report income and expenses in the fund as a consequence of legislation in the country in which they are resident does not mean that they are to be regarded as lenders in the application of the Swedish interest deduction limitation rules.

REASONS FOR THE RULING

The questions in the cases

14. The questions in the cases are who is to be considered to be a company's lender when the interest deduction limitation rules are applied and whether the company and its lenders are to be considered to be associated.

Legislation, etc.

15. The interest deduction limitation rules are found in Chapter 24 of the Income Tax Act (1999:1229). The rules are reproduced below in the version applicable during the relevant tax years in the cases, i.e. 2013 and 2014.

16. According to the main rule in Paragraph 10 b, a company linked in a group of associated companies may not deduct interest expenses in relation to a debt owed to an associated company, unless otherwise provided for under Paragraph 10 d or Paragraph 10 e. The first subparagraph of Paragraph 10 a states that the companies concerned are deemed to be associated with each other if, inter alia, one of them, directly or indirectly, through share ownership or otherwise, exercises a significant influence over the other company. The second subparagraph of the paragraph states that *companies* refer to legal persons and Swedish partnerships.

17. According to the first subparagraph of Paragraph 10 d interest expenses relating to the debts referred to in Paragraph 10 b are deductible if the corresponding income would have been taxed at a nominal rate of at least 10 per cent under the legislation of the State in which the company in the group of associated companies actually entitled to the income is established, if that company were to have only that income (the so-called *10% rule*). The last subparagraph provides, however, that no deduction for interest expenses may be made if the main reason for incurring the debt is that the group of associated companies would receive a substantial tax benefit.

18. The first subparagraph of Paragraph 10 e (the so-called *valve*) provides that, even if the conditions of the 10% rule are not met, interest expenses relating to the debts referred to in Paragraph 10 b are deductible if the underlying debt is justified primarily on commercial grounds. However, that holds true only if the company in the group of associated companies that is actually entitled to the

income corresponding to the interest expenses meets certain specifically stated conditions in the paragraph.

The Court's assessment

Starting points for the examination

19. A basic condition in order for the interest deduction limitation rules to be applicable to the company's interest expenses is that they relate to debts to one or more companies associated with the company. *Company* refers only to legal persons and Swedish partnerships. In order to determine whether the interest expenses relate to such debts, a determination is first to be made regarding who the company's lender or lenders are. If the company's lenders are companies, a further determination is to be made as to whether the company and the lender or the lenders are associated with each other.

20. If these examinations conclude that at least one of the company's lenders is an associated company , the question also arises whether the interest expenses relating to the debts to this lender or lenders are nonetheless to be deducted pursuant to the 10% rule or the valve.

Who is or are the company's lender or lenders?

21. The parent company, which was the company's original lender, has assigned the claims against the company to the GPs. According to the assignment agreement, the GPs acquired the claims on behalf of the partnerships, i.e. the fund. This would suggest that it is the fund as such which is the company's lender. However, the fund lacks legal capacity and cannot own assets, as a consequence of which it also cannot be a lender. The same applies to the individual partnerships.

22. The question is then whether it is the GPs or the investors in the fund which are the company's lenders.

23. A contractual fund such as the relevant one, which consists of one or several partnerships, thus does not constitute a legal person but, rather, is a special contractual construction. The fund agreements between the GPs and the investors show that the obligation of the investors is primarily to contribute capital to the fund, but they are not to take part in the management or control of the fund's activities. Each investor's share of the assets is to be reported on a separate account, and the investors are entitled to receive profits generated when the assets are sold off. The GPs manage the fund, represent the investors in relation to outside parties and can bind them to third parties. The GPs are obliged to accept payments of principal and interest on behalf of the fund. The GPs are to act exclusively in the interests of the investors in exchange for payment which is made from the fund's assets. The fund's assets may not be mixed with the GPs' assets or reported in their financial statements. The assets are also protected in rem against the creditors of GPs.

24. Through this special contractual construction, the actual ownership of the fund assets has been separated from the management of the assets. This means that it is the investors which own the assets in the fund together, including the claims against the company, and which are entitled to yields from them in the form of, inter alia, interest income (compare HFD 2020 reported case 31, paragraph 23 and Government Bill 2002/03:150, p. 115 f.). Under these circumstances, the Supreme Administrative Court finds that it is the investors in the fund which may be regarded as the company's lenders.

Are the company and the investors in the fund which are companies associated with each other?

25. The interest deduction limitation rules are, as previously stated, applicable only to interest relating to debts to the investors which are companies. The part of the interest which relates to debts to investors which are not companies is thus not affected by these rules. In order for the part of the interest which relates to debts to investors which are companies to be subject to the regulation it is further

required, as mentioned, that these investors may be considered to be associated with the company. The Supreme Administrative Court will now examine whether this is the case.

26. According to Chapter 24, Paragraph 10 a, first subparagraph of the Income Tax Act, companies shall be considered to be associated with each other, inter alia, where one of the companies, directly or indirectly, through ownership or otherwise exercises a significant influence over the other company.

27. The preparatory works state that the expression *significant influence* means that, in any case, an ownership of just under 50 per cent may be considered. It is further observed that the expression *significant influence* is not new to the Income Tax Act and that previous statements in the preparatory works still apply where applicable. In addition, it is emphasised that, in the assessment of whether significant influence is present, factors other than the amount of the ownership are also relevant (Government Bill. 2012/13:1, p. 239).

28. It may be further noted that, in principle, the same definition of a group of associated companies is found in the so-called *shell company rules* in Chapter 49 a of the Income Tax Act. The preparatory works for that regulation show that the expression *significant influence* is also intended to cover the case that involves a large number of collaborating individuals which owns one and the same shell company through companies owned by each and every one of them. This applies even if the owner companies' respective ownership in the shell company is small (Government Bill 2001/02:165, p. 71). The statement in the preparatory works should be able to serve as guidance also in the interpretation of the definition in the interest deduction limitation rules.

29. As regards the present case, it can be concluded that the company is wholly owned by the parent company, the shares of which are in turn mostly (nearly 96 per cent) included in the fund assets. As set forth above (see paragraph 24), it is the investors in the fund which may be considered to own these shares and

thereby also, indirectly, the shares in the company. The ownership of each and every one of the investors is, however, so small that it does not in itself entail significant influence in the company.

30. However, through the fund agreements, the investors have assigned management of the assets in the fund to the GPs. The influence in the company following from the ownership has thereby been aggregated in the GPs. The GPs may, furthermore, through the chosen contract structure, be considered to collaborate in such a manner that they jointly carry out management of the fund on behalf of all of the investors. The investors and the GPs may therefore be considered to jointly have significant influence in the company, which entails that the investors which are companies may be considered to be associated with the company in the sense referred to in Chapter 24, paragraph 10 a, first subparagraph of the Income Tax Act.

Are deductions for interest expenses to be granted pursuant to the 10% rule or the valve?

31. The Supreme Administrative Court has accordingly found that the investors in the fund are to be considered to be the company's lenders and that the investors which are companies are associated with the company. The company is thereby entitled to a deduction for the interest expenses relating to the debts to these investors only if the conditions therefor are present in accordance with the 10% rule or the valve.

32. The examination by the lower courts of the 10% rule and the valve has been carried out on the basis of the premise that it is the GPs which are entitled to the interest income corresponding to the interest expenses. In the Supreme Administrative Court's assessment, however, it is the investors which are entitled to this income (see paragraph 24). It does not fall on the Supreme Administrative Court, as a first instance, to determine, based on that premise, whether the conditions for a deduction in accordance with these rules are met. Accordingly,

the cases will be referred back to the Swedish Tax Agency for determination of this issue.

Summary

33. It is the investors in the fund which are to be regarded as the company's lenders. The part of the interest expenses which relates to debts to investors which are not companies is not subject to the interest deduction limitation rules but, rather, is fully deductible. The part of the interest expenses which relates to debts to investors which are companies, i.e. legal persons or Swedish partnerships is, on the other hand, covered by these rules since the investors and the company may be considered to be associated with each other. It falls on the Swedish Tax Agency to examine whether these interest expenses are nonetheless to be deducted pursuant to the 10% rule or the valve.

Preliminary ruling from the European Court of Justice

34. The company has claimed that the Supreme Administrative Court is to request a preliminary ruling from the European Court of Justice as regards the issue of whether it is compatible with EU law to deny the company deductions for interest expenses. The question arises, however, only if it is found that the Swedish provisions entail that the company is not to be granted a deduction for a certain part of the interest expenses, which the Supreme Administrative Court does not consider in this judgment. The Union law question raised is therefore irrelevant to the determination of the cases, and the claim regarding obtaining a preliminary ruling must therefore be rejected.

Compensation for costs

35. The company has received a partial grant of its appeal and the cases concern a question which is important for the application of law. There are therefore

conditions for granting the company compensation for costs that are reasonably needed in order to uphold their rights.

36. The company has claimed compensation for costs in the amount of SEK 921,025 in the administrative court, SEK 477,434 in the administrative court of appeal, and SEK 1,598,877 in the Supreme Administrative Court, for a total cost of SEK 2,997, 336. The administrative court of appeal has granted the company compensation in the amount of SEK 15,000 for its costs in the administrative court. The company's remaining cost claim thus amounts to a total of SEK 2,982,336. The Swedish Tax Agency is of the opinion that reasonable compensation for costs is SEK 75,000 in the administrative court, SEK 100,000 in the administrative court of appeal and SEK 300,000 in the Supreme Administrative Court, for a total cost of SEK 475,000.

37. The specification of costs submitted to the administrative court and the administrative court of appeal does not show the time taken for the various work measures, who has carried out the respective measure or how the average hourly rate has been calculated. As regards the costs in the Supreme Administrative Court, the company has, on the other hand, submitted documentation which meets the requirements established for the specification of the costs. It is apparent from the documents that the costs relate to compensation for 448.75 hours of work which has been carried out by counsel at an hourly rate of SEK 4,598 and SEK 4,200 and by assistants to counsel at an hourly rate of SEK 2,616 and SEK 3,000. The average hourly rate for the work performed amounts to SEK 3,560.

38. The nature and degree of difficulty of the case is such that the hourly rates in the Supreme Administrative Court may be considered to be reasonable in themselves and are approved. As regards the reasonableness of the stated time expended in the Supreme Administrative Court, the following should be considered.

39. The company's actions in the lower courts were pursued by one of the counsel. In the Supreme Administrative Court, the company has had two counsel which, in

accordance with the submitted cost specifications, have assisted the company with essentially the same work measures. The new legal representative has, furthermore, put in work studying the cases. It has not been found that the increase in costs resulting from the addition of a new lawyer is justified. The company's submissions contain, furthermore, a fair number of repetitions of what was previously asserted in the lower courts and, in these respects, have not furthered the proceedings. In addition, the time which has been put into the various work measures otherwise appears to be excessive.

40. In summary, it may be observed that the cost bases in the administrative court and the administrative court of appeal are inadequate and that the stated time expenditures in the Supreme Administrative Court appear to be altogether excessive. An overall reasonableness assessment must therefore be carried out. With this assessment, the Supreme Administrative Court finds that the company should be granted compensation in a total amount of SEK 700,000 for the costs in all instances.

Justices Henrik Jermsten, Kristina Ståhl, Anita Saldén Enérus, Ulrik von Essen and Helena Rosén Andersson have participated in the ruling.

Judge Referee: Birgitta Fors Almassidou.