KROMANN REUMERT

Danish tax year 2020 in review

February 2021

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Welcome to our 2020 Tax Year in Review

Kromann Reumert's tax team looks back on some of the most important Danish tax developments in 2020 that have impact into the new year – legislation, case law, administrative practice, etc.

As always, our tax team is available to elaborate and discuss, of course – see contact details overleaf.

We hope you find our Review useful.

Happy New Tax Year!

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The Multilateral Convention is now fully incorporated in Danish law

On 1 January 2020, the MLI entered into force in Denmark. More than 50 countries have already deposited an instrument of ratification, acceptance, or approval. This means that more and more of the Danish tax treaties are covered by the MLI.

On 30 September 2019, Denmark deposited its ratification instrument for the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (MLI). Based on the date of deposit, the MLI entered into force in Denmark on 1 January 2020.

Although the MLI is in force in Denmark, it will not automatically cover all the Danish tax treaties. The MLI will enter into force with respect to specific tax treaties after both treaty parties have deposited their instruments of ratification, acceptance or approval of the MLI. The MLI will generally enter into force for a particular covered agreement on the first day of the month following a three-month period after both parties to the covered tax treaty have deposited their ratification instruments.

Once in force, the provisions of the MLI will generally apply for a covered agreement from 1 January of the year beginning on or after the date of its entry into force in respect of withholding taxes, and for all other taxes with respect to taxable periods beginning on or after the expiration of a 6-month period following the date of entry into force. However, solely for purposes of Denmark's own application of the MLI for other taxes, Denmark has opted for the MLI to apply from 1 January of the calendar year beginning on or after expiry of the 6-month period.

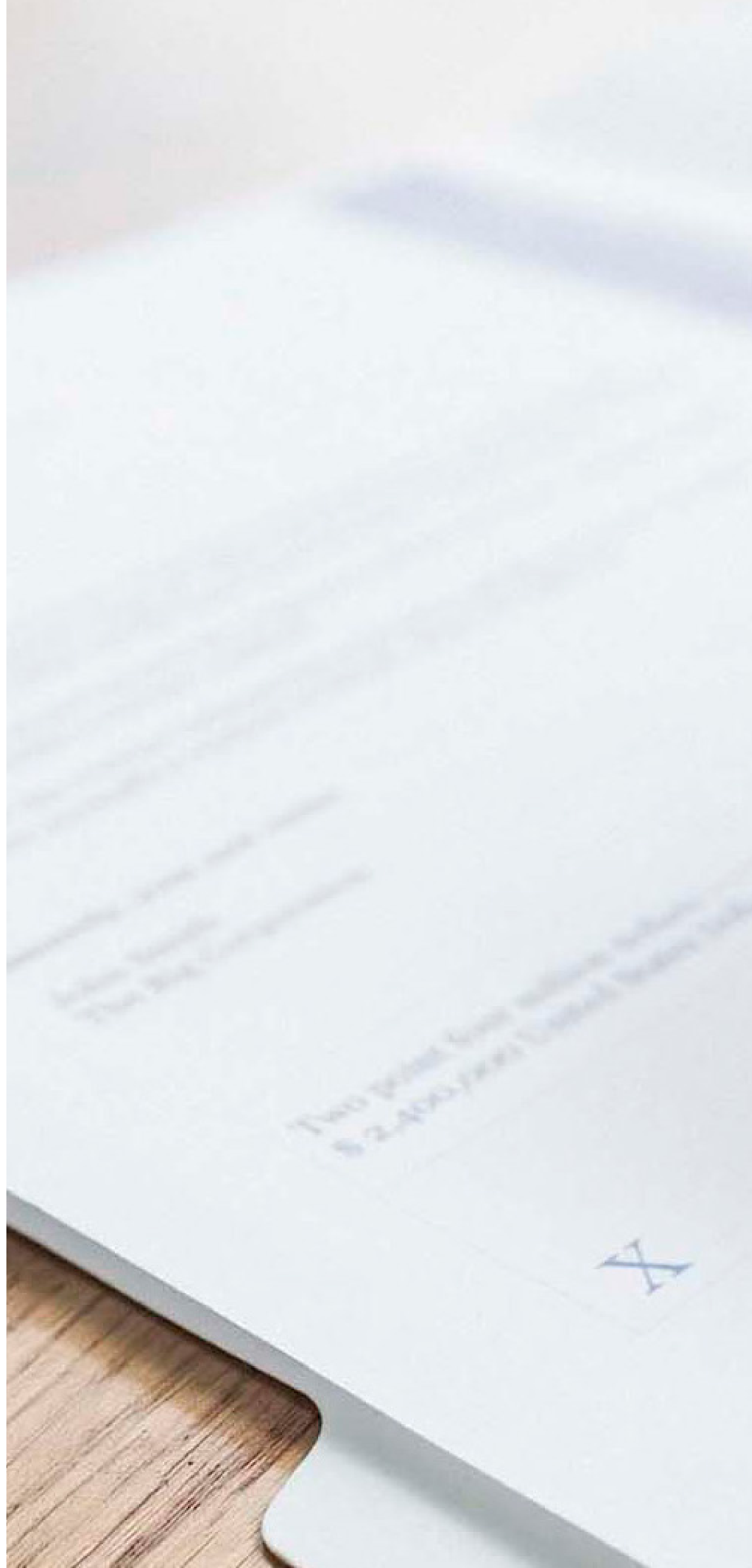
When signing the MLI, Denmark listed almost all its existing tax treaties as covered tax agreements.

Even though Denmark has decided to include all elements of the MLI, several options and reservations still had to be made between the different available alternatives in some of the MLI provisions. For instance, with respect to general anti-avoidance provisions, Denmark has decided to apply the principle purpose test (PPT).

New Danish tax treaties will not be covered by the MLI. The reason for this is that Denmark's point of departure for a negotiation of tax treaties is the 2017 version of the OECD Model Tax Convention on Income and Capital, which includes the measures that the MLI brings to already existing agreements, e.g. the Danish-Japanese tax treaty.

A recap: What is the Multilateral Convention?
In November 2016, over 100 jurisdictions concluded negotiations on the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting ("Multilateral Instrument" or "MLI") that will swiftly implement a series of tax treaty measures to update international tax rules and lessen the opportunity for tax avoidance by multinational enterprises. The MLI already covers 95 jurisdictions and entered into force on 1 July 2018.

The MLI offers concrete solutions for governments to close the gaps in existing international tax rules by transposing results from the OECD/G20 BEPS Project into bilateral tax treaties worldwide. The MLI modifies the application of thousands of bilateral tax treaties concluded to eliminate double taxation. It also implements agreed minimum standards to counter treaty abuse and to improve dispute resolution mechanisms while providing flexibility to accommodate specific tax treaty policies.



Mandatory disclosure rules – DAC6 in Denmark

With the incorporation of DAC6, Denmark is now aligned with the EU Directive. Read on for an overview of when and what to report and, not least, the penalties for failure to comply with the new mandatory disclosure rules.

On 19 December 2019, a bill on implementation of the European Union (EU) Directive on Administrative Cooperation (DAC6) on reportable cross-border tax planning arrangements was adopted in Danish law. The Executive Order setting out the details of the implementation was published 31 December 2019. On 17 April 2020, the Danish Tax Agency published a DAC6 guidance that contains various examples along with the Danish Tax Agency's interpretations of the Directive.

The rules include measures to require the reporting of cross-border tax planning arrangements and the exchange of information reported with other EU Member States. The reporting requirement primarily applies to intermediaries that design, market, organize, or manage the implementation of a reportable arrangement, but may also apply to taxpayers in certain cases, such as when the intermediary is subject to confidentiality obligations or where a taxpayer has designed an arrangement without external intermediaries.

When to report?

There are three basic conditions that must be met for a reporting obligation to occur in accordance with DAC6:

- There must be an arrangement
- The arrangement must be cross-border
- It must meet at least one of the relevant criteria (so-called hallmarks)

To report in a timely manner

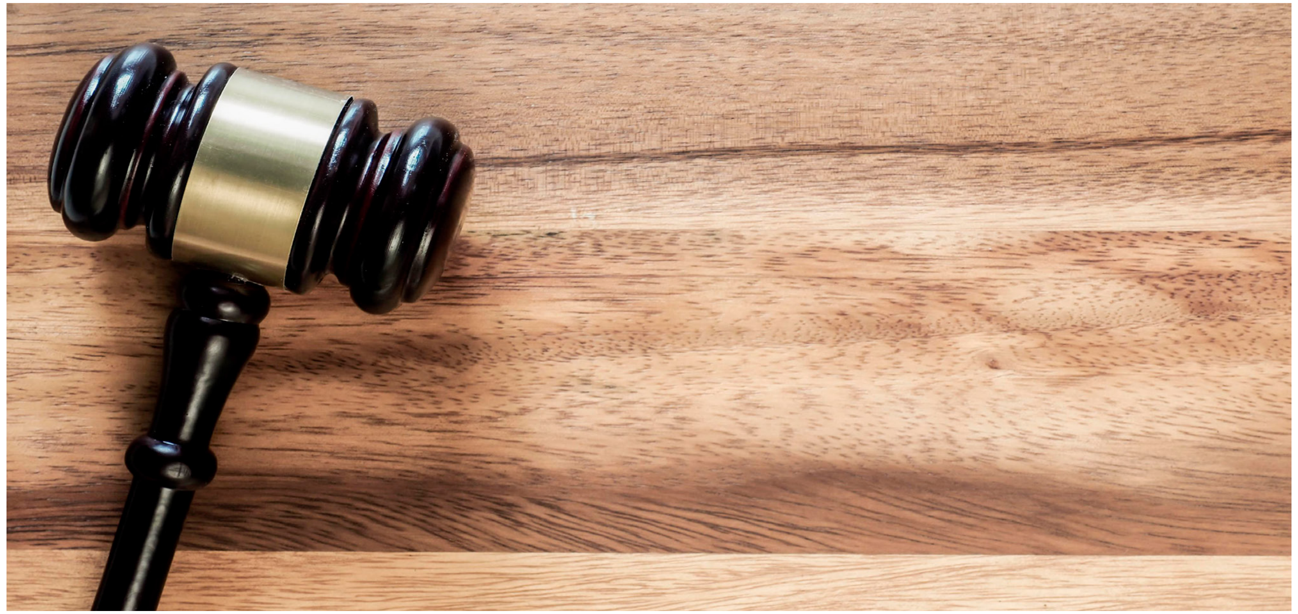
In view of the COVID-19 situation, it has been decided to grant a postponement in regard to the reporting that must be made to the Danish tax authorities. The following deadlines are now in force:

- The deadline for the reporting of reportable cross-border arrangement in the retroactive period 25 June 2018 to 30 June 2020 has been postponed from 31 August 2020 to 28 February 2021.
- The deadline for the reporting of reportable cross-border arrangement in the period 1 July 2020 to 31 December 2020 is 31 January 2021.
- Reportable arrangements from 1 January 2021 onwards must be disclosed within 30 days.

Penalties

The Danish DAC6 legislation provides for penalties for intermediaries and relevant taxpayers that willfully or through gross negligence fail to comply with the reporting requirements, e.g. to provide correct and accurate information or to fulfil the reporting obligations in a timely manner.

The Executive Order does not specify the fine amounts but notes that when determining the fine for offences committed by companies, emphasis will be placed on the company's net sales at the time of the offence and whether it is the intermediaries or the relevant taxpayer who has failed to comply with the legislation.



COVID-19, tax, and international structures and work patterns

The COVID-19 crisis and restrictions on international mobility affected a number of tax rules relating to international structures and work patterns in 2020. As such, The Danish Tax Agency issued guidelines describing how the crisis affects Denmark's interpretation of double taxation treaties in relation to permanent establishment, place of management, natural persons' tax residence, and income from employment earned by natural persons working in more than one country.

The guidelines will have effect as long as COVID-19 affects international mobility.

Permanent establishment

Foreign entities and associations, etc. are liable to tax in Denmark if they carry on business from a permanent establishment in Denmark.

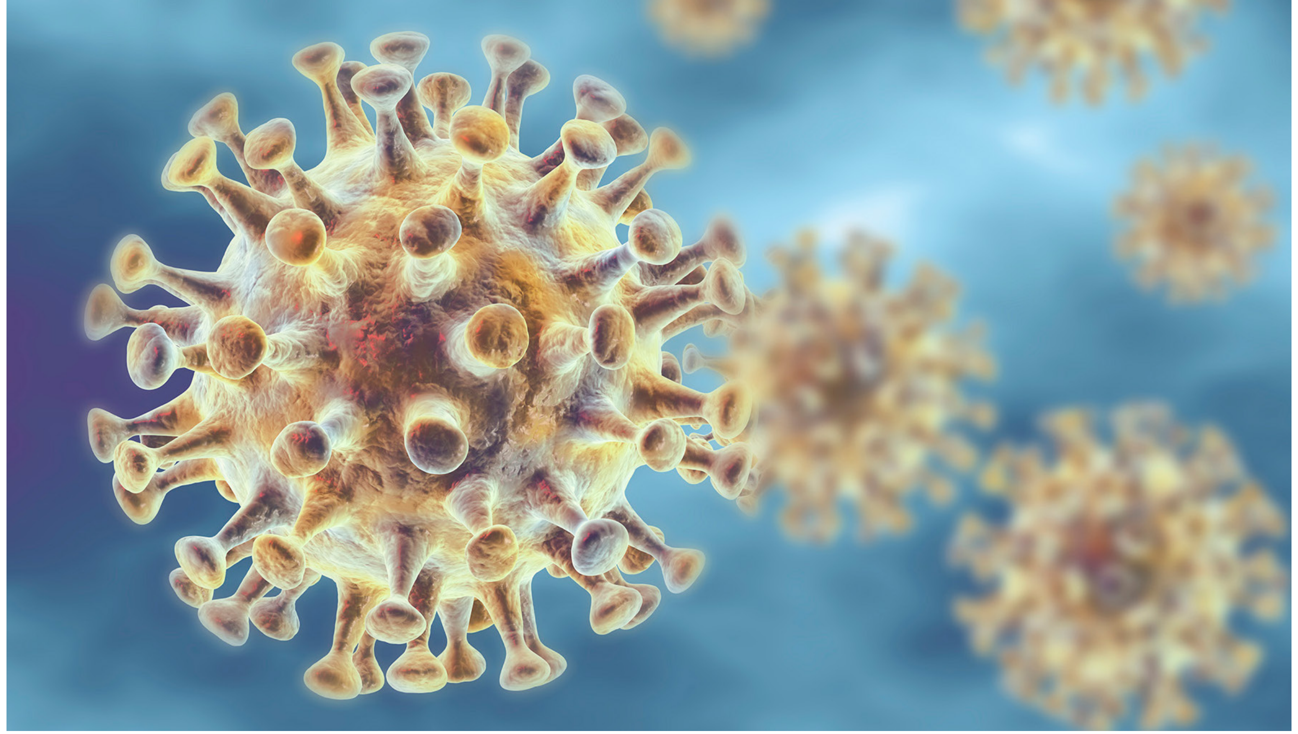
Home office
In the Tax Agency's view, the fact that employees work from another jurisdiction than they normally would as a result of the COVID-19 crisis does not create a permanent establishment abroad if the company does not already have a permanent establishment in the relevant country.

Agent rule
Where a person works as an agent for an undertaking in another jurisdiction than they normally would due to COVID-19, the undertaking will not be deemed to have a permanent establishment abroad, unless the person already met the conditions for a permanent establishment before COVID-19.

Building, construction or installation projects
Generally, building site or construction or installation project constitutes a permanent establishment only if it lasts more than 12 months. According to the Tax Agency, temporary interruptions to a construction site etc. caused by COVID-19 should be included in the total duration of the work and may therefore be taken into account when assessing whether a permanent establishment exists.

Companies – place of management

If, due to COVID-19, a company's effective management is affected by travel restrictions and it temporarily has to make decisions in another jurisdiction than it normally would, then the place of management will, according to the Tax Agency, not be deemed to have been changed considering the temporary and extraordinary nature of the situation.



Natural persons – residence

A natural person has tax residence in a country if that person is liable to pay tax in the country by reason of his domicile, residence or any other similar criterion.

Natural persons with a dual residence who, due to the corona situation, are staying temporarily in a country will, according to the Tax Agency, "probably" not be deemed a tax resident in that country, however it will depend on an assessment of the factual circumstances in the specific situation.

Income from employment

In situations where an employee is resident in one country and works in one or more other countries, it will "depend on the specific circumstances whether the taxation of remuneration for personal work in an employment relationship will be changed in practice as a result of the new work situation caused by the corona virus crisis."

In situations where the employee has been temporarily furloughed due to the corona virus crisis with no right to work and where the employer is reimbursed for part of the salary to avoid a layoff, the income will be taxed as if the employee had been given notice of termination. The right to taxation will then be divided between countries "based on the historical work pattern" in the current employment and the employee's job function at the time when he is furloughed.

If the employee performs work during the furlough period, the general rules will apply.

New measures introduced to curb the use of tax havens

The Danish Tax Authority (DTA) is already focusing on transfer pricing and Danish base erosion, but further measures have just been announced, including additional resources to target transfer pricing and multinational companies' alleged tax evasion and a new centre for international corporate tax.

In April 2020, Danish Parliament unanimously agreed on the first stage of a tax control reform focused on money laundering, VAT, criminal cases, and the fight against tax havens.

An extra 100 officers are now being assigned to working with measures against tax havens and international tax evasion, and some of them will be dedicated to a targeted effort against multinational companies' alleged tax evasion.

To support these measures, a new centre for international corporate tax will be established, one of its focal points being the challenges posed by the increased globalisation for calculation and settlement of corporate tax.

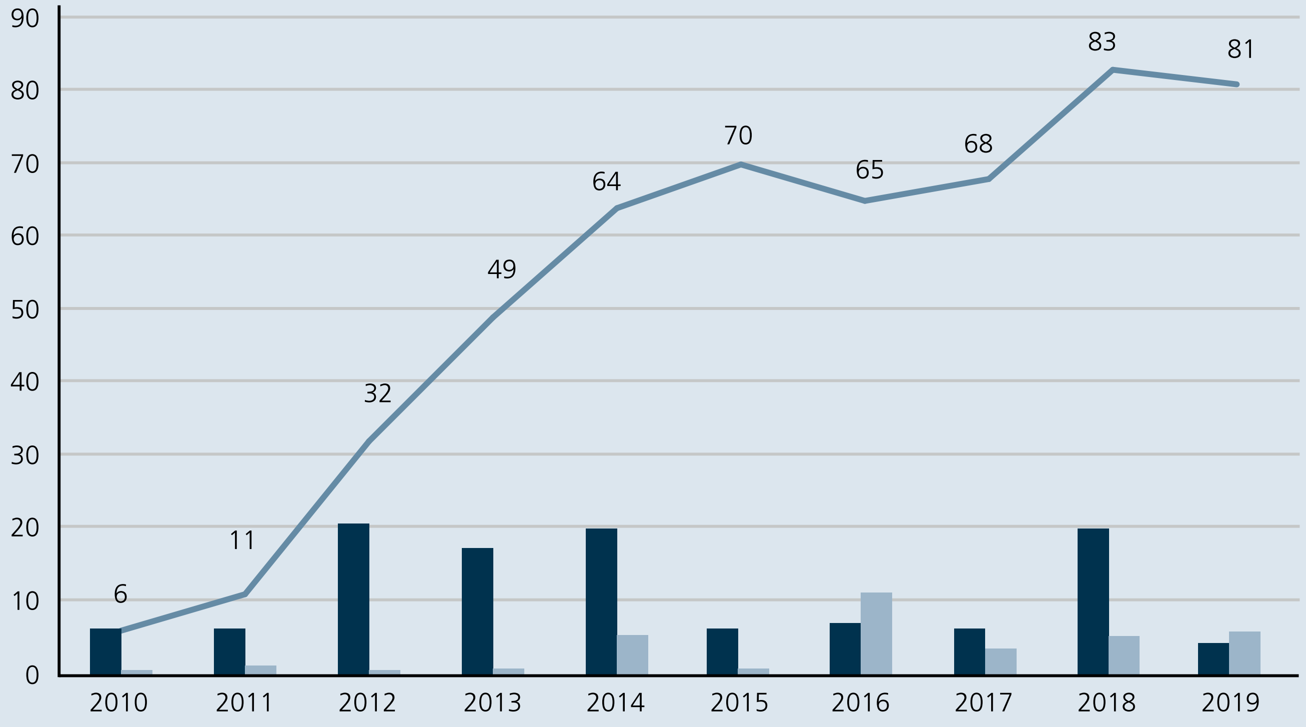
Also, a new specialised unit will be identifying and analyzing the greatest risks within the area of transfer pricing.

The unit will contribute to a targeted control of transfer pricing and help the DTA keep aware of, and on top of, international trends and risks relating to transfer pricing.

Further, the Danish Government wants to strengthen international cooperation on international tax evasion and aggressive tax planning. The EU Member States have agreed on a series of initiatives designed to make it easier and faster to report information and share tax fraud suspicions across all EU member states. One of the EU measures is a Danish proposal for establishing an EU alarmcentral to curb tax fraud, to which information and suspicion of cross-border tax fraud can be reported.

Also, the Government has initiated an analysis to identify the areas where tax control will be further strengthened by 2023 and determine whether additional resources are needed to strengthen efforts against international tax evasion.

The DTA already has a history of aggressive scrutiny of multinationals' transfer pricing policies and in the period 2010-2019 made transfer pricing adjustments resulting in additional Danish taxable income at a total of DKK 80 billion.



- On average 170 cases annually
- The accumulated increases amount to more than DKK 80 billion (approx. EUR 10.7 billon)
- More than 75 % of cases concerns increases of more than DKK 100 million (approx. EUR 13.5 million)

Transfer pricing: Income adjustments for more than DKK 80bn.

The Danish Ministry of Taxation recently published a list of income adjustments (increases) decided in transfer pricing cases in 2010-2019. As a novel feature, the list now shows the net adjustments, i.e. the final outcome of the cases after they were heard by the Danish National Tax Tribunal and the courts and after Mutual Agreement Procedure negotiations.

In June 2020, the Danish Tax Agency published a list showing that in the period from 2010 to 2019 the Agency proposed income adjustments in transfer pricing cases increasing incomes by an aggregate DKK 81.2bn. In November 2020, responding to criticism that the list showed only gross adjustments and did not take into account the final outcome of the cases after hearings in e.g. the Danish National Tax Tribunal, the Ministry published an elaborated version.

The new list shows that in 2010-2019 the Tax Agency increased companies' income by DKK 114.7bn in total. Over the same period of time, there were decreases totalling DKK 33.5bn. In net figures, therefore, the amount of increases during said period is DKK 81.2bn. These net increases consist of the Agency's increases less decreases resulting from MAP (Mutual Agreement Procedure) and other review requests in the same period.

The increases implemented by the Agency in 2010-2019 were *subsequently* decreased by DKK 900bn in total, due to final outcomes of cases settled by the National Tax Tribunal and by the courts. There are presently cases pending before the National Tax Tribunal and the courts over increases for a total up DKK 23.5bn.

The DKK 114.7bn increases in 2010-2019 were *subsequently* decreased by DKK 16.1bn in total as a result of MAP negotiations. Of the Tax Agency's total increases, there are presently MAP negotiations for DKK 26.4bn in all.

In aggregate, therefore, increases worth DKK 49.7bn are currently pending before the National Tax Tribunal, before the courts, or in MAP negotiations.

OECD statistics on MAP cases

The most recent OECD MAP statistics are for 2019. They show that double taxation of the taxpayer was fully solved in around 85 per cent of transfer pricing-related MAP cases. The statistics also show that there were, on average, three new MAP transfer pricing cases opened every day in 2019. The average processing time was 31 months.

Kromann Reumert's comments

The figures from the Ministry of Taxation show that measured by amount, most of the Tax Agency's transfer pricing adjustments have been upheld on appeal to the National Tax Tribunal.

It will be interesting to see how the cases currently pending before the National Tax Tribunal and the courts will end. So far, increases totalling DKK 23.3bn are still in the balance, and much of that amount concern individual, complex cases.

So far, the Ministry of Taxation has generally been ultimately unsuccessful in the high-profile and noteworthy legal actions that have made it all the way to the Supreme Court. A number of those cases were argued by Kromann Reumert. You can read about one of them below.

New Supreme Court ruling in favour of company in transfer pricing case

The Danish Supreme Court ruled on 25 June 2020 in favour of the claimant company in a transfer pricing case regarding trademark royalties, setting aside the Danish Revenue's contention that the royalties were not deductible business expenses and were not on arm's length terms.

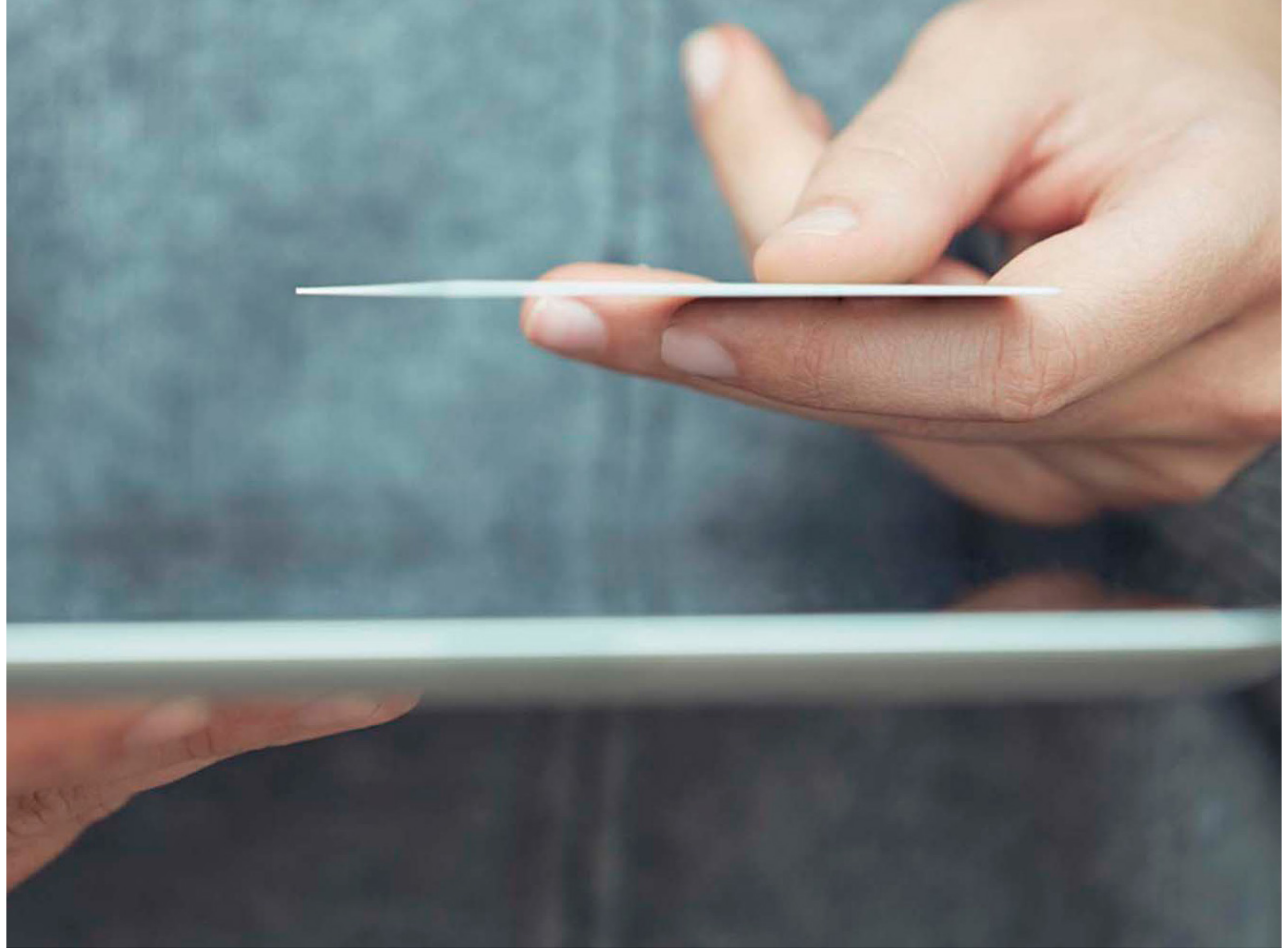
The case regarded royalty payments from a Danish resident company to its Swiss parent company as consideration for the Danish company's use of trademarks, access to knowhow, and customer referrals from the group's international net-work, etc. under a licence agreement with the parent. The Danish company had been loss-making for consecutive years.

The Danish Revenue contended that (i) the royalties did not constitute deductible business expenses, (ii) if they did, they were not on arm's length terms, and (iii) in any event they should be reduced to zero by offsetting a deemed remuneration from the parent to the Danish subsidiary, since the subsidiary was only kept in operation due the group's general interest in maintaining an entity in Denmark.

The Supreme Court held that the payments of royalty for the right to use a trademark, access to knowhow, and customer referrals were sufficiently connected to the subsidiary's acquisition of income, notwithstanding that the company, on the whole, had been operating at a loss during the relevant period. Based on the evidence, the Supreme Court was satisfied that the payments were made in return for genuine services to the subsidiary.

First, on the actual transfer pricing question, the Supreme Court held that the company's transfer pricing documentation for the relevant accounting periods was not so insufficient that it was comparable to lack of documentation. For this purpose, the Supreme Court noted that the fact that the Danish Tax Agency disagreed with the company's comparability analysis did not per se make the documentation highly insufficient. Therefore, the company's income could not be assessed on a discretionary basis.

Second, the Court then investigated whether the royalty rate (2% of revenue) in the licence agreement was at arm's length. The Court noted that the subsidiary had presented licence agreements between the parent and unrelated benchmark companies showing that a royalty rate of 2% was being paid for the right to use the trademark and with no access to knowhow or customer referrals. The Court found that it had not been demonstrated that 2% was not an arm's length payment. The company's consecutive loss-makings did not change that.



Outlook

The new judgment follows other defeats to the Revenue in the first transfer pricing cases to reach the Supreme Court since the present Danish transfer pricing regime was introduced in 1998.

All cases were handled by Kromann Reumert's tax team led by partner Arne Møllin Ottosen, who argued the cases before the Supreme Court.

The Danish Tax Agency is already taking an aggressive approach to transfer pricing, but further measures were recently announced, including additional resources to target transfer pricing and multinational companies' alleged tax evasion, and a new centre for international corporate tax. Read more about this in our article "New measures introduced to curb the use of tax havens" in this publication.

Tax on dividends to charitable organisations incompatible with EU law

The Danish Government has accepted that a tax of 22 % on dividends paid to charitable organisations established in the EU/EEA conflicts with EU law. A bill will be introduced in early 2021 to exempt those organisations from tax on dividends.

In a letter of formal notice to the Danish Government, the European Commission stated that it constitutes an unjustifiable discrimination of non-resident charitable organisations in conflict with the EU treaty when Denmark taxes dividends paid to charitable organisations established in the EU/EEA at a rate of 22%, while exempting Danish charitable organisations from such tax.

The Danish Tax Ministry has acknowledged that the current rules conflict with EU law. Accordingly, a new bill is to be introduced with the purpose of making the necessary amendments to exempt both Danish and foreign charitable organisations from dividend tax.

The European Commission and the Danish Tax Ministry address charitable organisations only. However, several other Danish entities remain exempt from dividend tax, while comparable non-resident EU/EEA entities are subject to tax. This discrepancy will mostly likely be raised during the consultation process preparing the amendment for adoption by Parliament.

The acknowledgment comes in the wake of other Danish rules on dividend taxation conflicting with EU law. In case C-480/16 – Fidelity Funds, the European Court of Justice held Danish tax on dividends paid by Danish companies to EU/EEA based investment funds incompatible with EU law. However, subsequently the Danish High Court held that Fidelity Funds did not qualify for exemption. The case is now awaiting hearing before the Danish Supreme Court.

Mark-to-market taxation on real-estate property owned by companies

As part of the funding of a new early-retirement pension scheme (in Denmark also referred to as the "Arne pension scheme"), the Danish government together with the Danish People's Party, the Socialist People's Party and the Red-Green Alliance agreed on 10 October to introduce mark-to-market taxation of property gains as from 2023. Read more about the new agreement and its significance below.

Already when the Danish Government tabled their proposal, they announced that mark-to-market taxation of property gains would become part of the funding, and the procedure has now been clarified in the new agreement.

According to the wording of the agreement, the mark-to-market taxation regime will apply to all companies covered by the Danish Corporation Tax Act, which will be taxed at the ordinary corporate tax rate of 22 %. Consequently, unincorporated enterprises will not be subject to the new taxation regime.

It also appears from the agreement that "the precise definition of the companies and properties affected by the agreement, the right to relief in case of a drop in value or a sale at a loss, and consequential changes to the mark-to-market taxation regime are to be finally determined in connection with the pre-legislative work."

However, properties used by a company mainly for the purpose of its own operations will be exempt from the mark-to-market taxation. This could for example be properties used by the company or a group company for administration, storage, production or farming.

Furthermore, minor property portfolios will be exempt from the mark-to-market taxation. The threshold for minor property portfolios has been set at a market value of DKK 100 million calculated at group level.

We will continue to monitor developments and will be available if you need advice or have questions about the new agreement.

Defensive measures underway against EU blacklist countries

A new bill on tax sanctions against EU blacklist countries was submitted for consultation on 12 November 2020. The bill proposes both restrictions on deductibility for certain payments and stricter dividend taxation.

Background to the bill

The bill, presented by the Danish Ministry of Taxation, seeks to implement defensive measures against countries on the EU's list of non-cooperative jurisdictions for tax purposes (the blacklist).

It is a result of, among other things, the EU's work to prevent the use of tax havens and to combat tax evasion and tax avoidance. As part of these efforts, the EU – since 2017 – has maintained and published a so-called blacklist of non-cooperative tax jurisdictions that do not live up to international tax standards and good tax practices.

In December 2019, the Council of the European Union decided all Member States must apply, effective from 2021, legislative defensive measure against countries on the blacklist. The objective is that countries on the list should have additional incentive to change their national laws and practices so as to eventually be removed from the list.

Sanctions proposed against blacklist countries

The bill proposes two sets of defensive measures against the countries on the blacklist.

No deductibility

Firstly, the Danish Ministry of Taxation is proposing that persons and enterprises, etc., should not generally be able to deduct a payments to related parties resident or registered in blacklisted countries. Likewise, such payments should not be included in the calculation of taxable income.

The rules are based on the notion of 'beneficial owner', requiring the paying company to assess whether the recipient of the payment is the beneficial owner of it. This as a way to prevent the establishment of conduit companies. Thus, it will not be possible to achieve deductibility, etc., on payments to a recipient in a country which is not on the list, if the intended ultimate recipient resides in a blacklisted country.

It can be seen from the preparatory works behind the bill that the payments that will be comprised are any remuneration paid in connection with acquiring title to or right of use in an asset, payment or right, including consideration for monetary loans or credits.

The proposed rule thus covers any form of consideration paid as a purchase sum to acquire an asset, whatever the type of that asset. It will comprise also any consideration – rent, leasing charge or royalty – paid in return for the right to dispose of real property, chattels, or intangible assets.

Stricter taxation of dividends

Secondly, the Danish Ministry of Taxation is proposing stricter taxation of dividends. In this way, persons and enterprises resident in blacklisted countries, if they receive dividend on shares in a Danish company, will generally be subject to a 44 per cent final gross tax on such dividends. The company paying the dividend will be obliged to withhold the tax.

It is a condition that the person or enterprise is the beneficial owner of the dividend.

It is proposed that the new rules will take effect 1 July 2021.

As of 6 October 2020 the following tax jurisdictions are on the EU blacklist:

- American Samoa
- Anguilla
- Bangladesh
- United States Virgin Islands
- Fiji
- Guam
- Palau
- Panama
- Samoa
- Trinidad and Tobago
- Seychelles
- Vanuatu.

Bill on changes to CFC rules introduced

In November 2020 a bill proposing adjustments to the Danish CFC rules was introduced to the Danish Parliament. If adopted, Danish CFC rules will be adjusted with effect for income years beginning 1 January 2021 or later, for alignment with the EU Anti-Tax Avoidance Directive (ATAD).

In November 2020, the Danish Minister of Taxation introduced a bill on adjustment of the Danish CFC rules. The purpose of the bill is to adjust the Danish CFC rules for alignment with the EU Anti-Tax Avoidance Directive, also known as the ATAD. The rules are proposed to have a broad application and are expected to increase the administrative burden for Danish companies.

Under current CFC legislation, a Danish parent company must include in its taxable income a subsidiary's total taxable income calculated according to modified Danish tax rules if:

- The subsidiary's CFC income exceeds 50% of its total taxable income (income test); and
- The value of the subsidiary's financial assets exceeds 10% of the value of the subsidiary's total assets (asset test).

The Danish CFC applies only if a Danish parent company controls another company. In the current CFC rules, a company is considered to control another company if the parent company has a controlling influence over the other company, generally taken to be direct or indirect control over more than 50% of the voting rights in the other company.

In the following we have noted some of the important changes proposed in the bill:

- The CFC income threshold will be reduced from 50% to only 1/3 CFC income. Furthermore, the current 10% asset test will be removed.
- The CFC rules only apply if a company (the parent company) controls another company (the subsidiary). Under current Danish CFC rules, control is determined on the basis of rights (or similarly). The bill expands the control definition for alignment with the control definition in the ATAD, i.e. control will be deemed to exist if a company (the parent company) by itself, or together with its associated enterprises holds a direct or indirect participation of more than 50% of the voting rights, or directly or indirectly owns more than 50 % of capital or is entitled to receive more than 50% of the profits of the other company (the subsidiary),
- The ATAD gives the EU Member States the possibility to implement a so-called "substance test", when implementing the directive into local law. This means that it is possible to avoid the CFC taxation in situations where the foreign subsidiary (or permanent establishment) carries on a substantive economic activity supported by staff, equipment, assets, etc. According to the bill Denmark has chosen not to implement the substance test. The lack of a substance test has been highly discussed in Denmark and is one of the main challenges with the bill.

The reading of the bill is postponed until the beginning of 2021. It is expected that the bill will be adjusted when Parliament starts the reading. Regardless of how the final bill will be adopted, there is no doubt that the Danish CFC rules will be even more complex than before.

Tax Assessment Act, section 3 – developments in the Danish GAAR

In accordance with the Anti-Tax Avoidance Directive, Denmark amended the general anti-abuse rule with effect from January 2019. Two years after the amendment, the exact scope of the GAAR is not yet determined. It is too early to say how often the Danish tax authorities invoke the GAAR, but in the meantime taxpayers will have to apply for a binding ruling for certainty.

Since 1 January 2015, the Parent/Subsidiary Directive (2011/96/EU) GAAR has been transposed into Danish law by way of section 3 of the Danish Tax Assessment Act. From 1 January 2015 to 31 December 2018, the wording of section 3 closely resembled the general anti-tax avoidance rules in the Parent/Subsidiary Directive, Interest and Royalty Directive (Directive 2003/49/EC), and the Merger Directive (Directive 2009/133/EC).

However, as of 1 January 2019, the rule was given a more general scope of applicability and thus, the wording has been amended slightly.

In summarized form, the Danish GAAR, as it is currently worded, entails that an arrangement (or series of arrangements) which is:

a) not entered into for commercial reasons reflecting the underlying economic reality, and which is

b) implemented for the primary purpose of obtaining, or one of the primary purposes of which is to obtain, a tax benefit which is against the purpose and intent of the Danish tax laws

should be disregarded for purposes of calculating the Danish corporate income tax (including withholding tax such as dividend withholding tax, etc.).

Before the implementation of the GAAR, many practitioners were concerned that the GAAR would be invoked by the tax authorities in almost any case or situation where the application of the statutory tax law provisions in the view of the Danish tax authorities did not lead to an "acceptable" outcome.

Since the Danish GAAR was amended, only a handful of administrative rulings have been published and no court precedent exists. Therefore, there is still general uncertainty on the exact scope of the Danish GAAR. The uncertainty forces Danish taxpayers to apply for a binding ruling, to ensure that a given arrangement will not get caught by the Danish GAAR.

As stated in other articles in this publication, the Danish tax authorities intend to intensify their focus on international tax evasion and aggressive tax planning, which could be executed through the use of the Danish GAAR.

The following is a list of recently published binding rulings and their themes:

SKM2019.232.SR - X moved back to Denmark and therefore wanted to carry out a taxable exchange of shares in his wholly owned foreign company for shares in a newly established Danish holding company. In the proposed transaction X would be remunerated with shares and with a significant cash consideration. The Danish National Tax Board confirmed that the entire consideration was to be taxed as a capital gain. As X's acquisition price of the shares corresponded to the market value at the time of the transfer back to Denmark, there was no - or at least only a very limited - profit to be taxed. The Danish National Tax Board confirmed that **GAAR did not apply**.

SKM2020.98.SR - The facts of the case are almost equivalent to the above case (SKM2019.232.SR.). Once again, the Danish National Tax Board confirmed that **GAAR did not apply** to that situation.

SKM2020.274.SR - In this case, part of the ownership of a private limited company was reorganized so that certain investors transferred their shares to a newly created limited partnership company. The limited partnership company also raised external loan financing, the proceeds of which were used to purchase additional shares from the same shareholders who had deposited their shares in the limited partnership company. The Danish National Tax Board confirmed that **GAAR did not apply**.

SKM2020.293.SR - X wholly owned H1 and wanted to maintain the activity in the company but wanted the excess liquidity to be transferred to him personally. X did not wish to make a direct dividend distribution of the excess liquidity from H1 (which would have been taxed at 42%). X instead planned the following series of steps: i) X would incorporate a new holding company (H2) through a tax-free share exchange, ii) after the share exchange, DKK 50 million would be distributed from H1 to H2, and iii) H2 would be demerged to H3 and H4, where H4 (which possessed the cash) was to be liquidated at some point (in Denmark, when a company is liquidated the acquisition cost of the shares is deducted before tax is calculated). The Danish National Tax Board stated that **GAAR did apply** in the above situation since X "requalified" ordinary dividend distribution to liquidation proceeds with a lower tax payable as result. There was no reality in the arrangement.

SKM2020.352.SR - A Danish company (H1), which was part of a group, intended to move its registered office to another EU country (probably Luxembourg). H1 was owned by H4 (EU-residence), H5 (Danish company), H6 (EU-residence) and employees. The ultimate owner was resident in another EU country. X wanted confirmation that the relocation would not trigger Danish capital gains and dividend taxation of the shareholders in H1. The tax benefit of the arrangement would be that there would be no Danish withholding tax after the relocation. On the other hand, before the relocation, there would potentially be 15% Danish withholding tax on distribution to the ultimate shareholder through the empty holding companies. The Danish National Tax Board stated that **GAAR did not apply**.

SKM2020.359.SR - Two shareholders intended to make a change in the ownership structure. The desired structure was to be obtained by carrying out a merger, two share exchanges and lastly a demerger. Since the participating companies did not gain an advantage in carrying out the proposed restructuring which went beyond the legal position they already held, the Danish National Tax Board concluded that **GAAR did not apply**.

New withholding tax regime for dividends expected

In July 2020, the Danish Ministry of Taxation sent a draft bill for consultation on a new model for collecting dividend tax for shares stored in a central securities depository. The main goals of the new model are to establish a model that is easier to administer and to prevent dividend tax fraud.

On 3 July 2020, the Danish Ministry of Taxation sent a draft bill for consultation on a new model for collecting dividend tax for shares stored in a central securities depository. The consultation ended in August 2020. At the current moment no bill has been introduced. However, it is expected that when the Ministry of taxation has processed the consultation responses, a bill will be introduced to the Danish Parliament.

The current model

Under the current model, a 27 % tax on dividends is withheld at source when the dividend is distributed to foreign share-holders. If the dividend is paid to a shareholder in a jurisdiction covered by a double taxation treaty with Denmark, the withholding tax rate will, according to the relevant tax treaty, in most cases be reduced to 15 %, but may also be less where certain criteria are met. Even though the rate is reduced, the Danish company is obligated initially to withhold and pay 27 % in dividend tax to the Danish tax authorities. Applying for a refund requires the shareholder to provide the tax authorities with relevant documentation after the dividend distribution.

The current model has a high administrative burden and has resulted in significant tax fraud involving fraudulent dividends tax refund claims.

The new model

The new model is a relief-at-source model where the dividend tax is withheld at the correct rate at the time of distribution, i.e. down to the tax rate according to the double taxation agreement, etc. The model includes that foreign shareholders must be registered with the Danish tax authorities and must have a unique identification number, so that the correct amount of dividends tax is withheld and paid when paying dividends.

Registration must be made via the shareholder's custodian bank and the shareholder must declare that the beneficial owner requirements in relation to the shares and the dividend are fulfilled under Danish tax law. The new model also provides that banks would be held liable for the payment of tax if it is shown that too little dividends tax has been withheld.

Shareholders who have not been able to obtain an identification number from the Danish tax authorities yet will under the new model have the opportunity to reclaim excess tax withheld from the Danish tax authorities within a short period.

Kromann Reumert is following the incorporation of this new model closely and will release a newsletter when information on the implementation and commencement has been proclaimed.

Looking ahead

Closing one year opens another, and we expect 2021 to be yet another exciting tax year with several important items on the agenda:

- **High Court judgements in the beneficial owner cases**
  The "beneficial owner" cases concern whether Danish interest-paying or dividend-paying companies should have withheld withholding tax in connection with payments that have typically been made to parent companies domiciled in other EU countries. In 2019 the European Court of Justice passed its judgement. Judgments from the Danish Eastern and Western High Courts will be handed down in 2021.

- **Further transfer pricing clarification from the Supreme Court**
  The Danish Supreme Court will rule in further transfer pricing cases in 2021. Taking into account that the Danish tax authorities are rearming with more staff focusing on transfer pricing and multinational companies' alleged tax evasion, transfer pricing clearly will continue to be a focus point 2021 and beyond.

- **Extended sanctions in the form of fines and coercive fines**
  The Danish minister of taxation has introduced a bill on extended sanctions in the form of fines and coercive fines against companies that do not respond to the Tax Administration's requests for information. The reading of the bill is expected in first quarter of 2021.

- **Additional guidance on DAC6 compliance**
  The Danish DAC6 regulation entered into force in 2020, and we expect to see more guidance and practice from the Danish tax authorities in 2021 on how to apply the regulation, and perhaps we will see the first fines for non-compliance.

- **Arbitration in tax disputes**
  We expect to see an increased number of Danish based tax cases resolved though arbitration in 2021. With the incorporation of MLI in more countries the opportunity to resolve a tax matter through arbitration becomes slightly easier. MLI arbitration is only applicable in regard to countries outside of EU. Arbitration with other EU-countries may be solved through the EU Arbitration Convention.

- **"Brexit" implications**
  With Brexit now a reality, the UK is now formally a third country vis-à-vis the EU and EU law no longer applies in the UK. Even with the new EU-UK Trade and Cooperation Agreement concluded on 24 December 2020, there will be big changes as of 1 January 2021. The double taxation agreement between DK and UK has never been this important since transactions between DK and UK companies no longer will be covered by the EU directives, e.g. the Parent/Subsidiary Directive. We expect that further negotiations between the EU and UK will bring more certainty to the table. Until then, Kromann Reumert's tax team is ready to handle all the matters in relation to direct and indirect taxes that "Brexit" brings.

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