Denmark

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General

1. What are recent tax developments in your country which are relevant for M&A deals?

During the past year, the Danish Parliament adopted new legislation in a number of different areas relevant for M&A deals.

In February 2015, a bill amending the rules limiting the deductibility of interest under the Danish thin cap regime was adopted. Furthermore, the EU Council introduced an amendment to the EU Parent-Subsidiary Directive not allowing companies to benefit from tax exemption on dividends having already been deducted by the distributing company.

On 21 April 2015, the Danish Parliament adopted a bill purportedly proposed to prevent unwanted utilisation of Danish double taxation treaties as well as a number of EU Directives. The amendments constitute a Danish attempt at implementing general anti-abuse initiatives currently considered and contemplated at EU and OECD levels.

This Act introduces a General Anti-Abuse Rule (GAAR) hitherto not known in Danish legislation, cf. more below.

2. What is the general approach of your jurisdiction regarding the implementation of OECD BEPS actions (Action Point 6 specifically) and, if applicable, the amendments to the EU Parent-Subsidiary Directive?

As mentioned above, Denmark has adopted a bill implementing the OECD BEPS Action Point 6. The bill also contains amendments to the EU Parent-Subsidiary Directive. The new provision marks a change in the traditional Danish anti-abuse tax legislation doctrine which, in the past, targeted specific practices deemed to be abusive and, therefore, countered by Specific Anti-Abuse Rules (SAAR). The new rule contains two provisions: An EU tax directive anti-abuse provision and a tax treaty anti-abuse provision. Despite differences in the wording, no specific difference in the contents is pursued between the directive anti-abuse provision and the tax treaty anti-abuse provision. The EU tax directive anti-abuse provision mainly attempts to implement the anti-abuse or misuse amendment to the Parent-Subsidiary Directive and thus the Danish anti-abuse provision more or less mirrors the wording of the amended Directive.

Unlike the anti-abuse provision in the Parent-Subsidiary Directive, the Danish domestic provision is also intended to apply as an anti-abuse rule to all EU Direct Tax Directives, specifically the EU Merger Directive (2009/133) and the Interest-Royalty Directive (2003/49).

The tax treaty anti-abuse provision aims at implementing the expected outcome of the BEPS project, specifically Action Point 6. As the final report on Action 6 was not yet released at the time of the adoption of the bill, it was arguably somewhat premature to introduce a provision incorporating the outcome of the project. Nevertheless, the bill aims at applying the new provision on both existing and future Danish tax treaties based on the alleged general agreement among the OECD countries implying that states are not obliged to grant treaty benefits from participation in arrangements that entail abuse of treaty provisions. The new provision states that treaty benefits will not be granted if: “it is reasonable to establish, taking into account all relevant facts and circumstances, that obtaining the benefit is one of the most significant purposes of any arrangement or transaction which directly or indirectly leads to the benefit, unless it is established that granting the benefit under such circumstances would be in accordance with the content and purpose of the tax treaty provision in question.”

Since Denmark has not previously operated with a general anti-abuse provision and due to the very general nature of its wording, a level of uncertainty as to the obtaining of tax directive or tax treaty benefits will be introduced with the entering into force of the proposed provisions. Uncertainty will at least exist pending specific administrative or

court practice regarding the use of both provisions. Accordingly, caution should be shown as to the application of such provisions, and specific tax advice thereon should be obtained.

On 18 December 2015, a new bill was adopted. The purpose was to implement Action Point 13 of the BEPS Initiative (Guidance on the Implementation of Transfer Pricing Documentation and Country-by-Country Reporting) into Danish law. The bill is a direct implementation of the OECD recommendation of BEPS Action Point 13, and although the country-by-country reporting requirement is new, the OECD standard to be used is very similar to the EU standard already being used by many Danish companies. The country-by-country report must, for example, contain information relating to the global allocation of the multinational enterprise's income and taxes paid together with certain indicators of the location of financial activity within the multinational enterprise group and information on the multinational enterprise's total employment, capital, retained earnings and tangible assets in each tax jurisdiction.

3. What are the main differences among acquisitions made through a share deal versus an asset deal in your country?

a. Share deal

The main difference between acquisitions made through share deals and acquisitions made through asset deals in Denmark is that no deduction is possible on share deals. When acquiring assets, however, it is possible to depreciate the purchase price according to specific rules. Apart from the carry-forward of losses described below, the tax position of the acquired Danish company remains unchanged. Consequently, it is not possible to create a tax-free step-up in the tax basis of the assets of the acquired company. However, the capital gain realised by the seller on the sale of shares is often tax-exempt.

b. Asset deal

In an asset deal, the purchaser will generally only inherit those liabilities that it assumes specifically pursuant to the terms of the asset purchase agreement.

The purchase price must be allocated to the different assets included in the deal as the allocation serves as the basis for capital gains taxation of the seller and as the basis for the tax depreciation of for the purchaser.

The Danish tax authorities may challenge either the total cash value or the allocation between depreciable assets. Where no allocation is made, the tax authorities may assess an appropriate allocation and both the seller and the purchaser are obliged to apply the assessed values.

Depreciation

A general prerequisite for depreciation is that the relevant asset is in fact subject to deterioration when in use. Land is not depreciable, for example. The method of declining balance depreciation is allowed for commercial operating equipment, i.e., machinery, vehicles, ships, aircraft, certain buildings, fixtures, furniture and other equipment used exclusively for business purposes. The depreciation balance is the balance at the beginning of the year plus acquisitions made during the year and less the proceeds from assets sold during the year. The maximum permitted rate of depreciation is 15% to 25% (depending on the specific type of assets included in the depreciation balance), and taxpayers are free to apply a lower rate and a different rate each year.

Buy-side

4. What strategies are in place, if any, to step up the value of the tangible and intangible assets in case of share deals?

No step up is available if the transaction is carried out as a share transfer. This is often a disadvantage with share transfers compared with asset deals.

Normally, a purchaser would investigate whether the target company has tax capacity in the form of a loss carry-forward which may be used to offset any subsequent taxable gains realised by the acquired company on the assets in this company. This investigation is relevant to assess whether an asset deal is preferential to a share deal.

5. What are the particular rules of depreciation of goodwill in your country?

Goodwill may generally be amortised over seven years. However, in a share deal, financial goodwill (the portion of the purchase price that cannot be allocated to the assets of the target) cannot be amortised.

6. Are there any limitations to the deductibility of interest on borrowings?

The deduction of interest expenses is limited by the following three rules which apply simultaneously (in chronological order):

1) A limitation based on the debt-to-equity ratio: Thin capitalisation limitations with a debt-to equity ratio of 4:1 are in force.

2) A limitation based on the value of assets: Net financing expenses are limited to an amount corresponding to 3% of certain assets (the asset limitation). The rate of 3% is adjusted annually.

3) A limitation based on annual profits: Net financing expenses may not exceed 80% of earnings before interest and tax (the EBIT limitation).

7. What are usual strategies to push down the debt on acquisitions?

Given the Danish interest limitation rules, push-downs are something to avoid.

In Denmark, joint taxation is obligatory for national groups. All Danish companies and permanent establishments in a group must be included in the joint taxation calculation. Each group company prepares its own tax return, and then the results are consolidated for overall group taxation purposes. To determine which companies are in a group, the general rule is that a company is within the group if it is controlled by a group entity. There are five specific provisions listed in the rules for which this would be the case:

- If an entity has a voting majority through equity,
- If an entity may appoint a majority of directors,
- If, through provisions in the articles of association or similar agreement with the subsidiary, an entity exercises a decisive influence,
- If an entity has decisive influence through a shareholders' agreement or similar, and
- If an entity has shares and exercises a decisive influence over its operations.

These provisions are quite specific, but the basic rules may be summarised as a company being in a group where control is exercised through voting, the board of directors or contracts (either with the subsidiary itself or other shareholders). The definition in this regard is the same as the definition under consolidation for accounting purposes; therefore, groups which are already forced to consolidate for accounting purposes should know for which companies the consolidation is relevant. Groups are obliged to provide the tax authorities with an overview of the group structure with sufficient information to ascertain whether the correct companies have been included. If an individual owns two Danish companies, these companies are not treated as jointly taxed.

8. Are losses of the target company(ies) available after an acquisition is made?

In Denmark, companies are granted an unlimited carry-forward of tax losses. No carry-back exists. However, the annual amount of losses from previous tax years to be set off against profits cannot exceed DKK 7,852,500 (approximately EUR 1,052,000). It should be noted that this base amount applies to group level, i.e., companies that are jointly taxed have a mutual base amount of DKK 7,852,500 for the group as a whole.

If the loss carried forward exceeds DKK 7,852,500, the remainder of the loss may be set off against 60% or less of the year's profit. There is no time limit for how many years the losses may be carried forward.

Loss carry-forward restrictions exist in relation to control of ownership (more than 50%) of a company.

The main Danish loss limitation rule applies when more than 50% of the shares (or voting rights) in a company are transferred within one tax year. If this is the case, the Net Operating Losses (NOLs) are limited to be offset against future operating income. Consequently, the NOLs may not be used to offset "net capital income", which includes net interest income, net income realised on the transfer of bonds and other debt instruments, dividends, net income realised on the transfer of shares and leasing income.

The loss limitation rules referred to above, if triggered, apply to the company's income in the year in which the transfer of more than 50% of its shares takes place. Thus, the loss limitation rules also apply to income realised before the transfer of shares in the company took place if such income is realised in the same taxable year as the taxable year in which the transfer takes place.

Additionally, a loss limitation rule applies to the transfer of more than 50% of the shares (or voting rights) in companies without any active trade or business.

Consequently, when more than 50% of the shares (or voting rights) in companies without any active trade or business are transferred, all of the NOLs are lost. A look-through rule applies to holding companies in that the activities of the subsidiaries are taken into consideration when determining whether the holding company has trade or business.

9. Is there any indirect tax on transfer of shares (stamp duty, transfer tax, etc.)?

There is no indirect tax (such as stamp duty or transfer tax) on the transfer of shares in Denmark.

10. Are there any restrictions on the deductibility of acquisition costs?

According to Danish law, expenses related to acquisition costs are, in general, not deductible if the acquisition is for the purpose of participation in the management.

Furthermore, it should be noted that the Danish Tax Authorities in the past years have been challenging the deductibility of internal labour cost accrued in connection with M&A activity carried out by a company. As a result, uncertainty will exist pending specific administrative or court practice regarding the deductibility of internal labour cost accrued in connection with M&A activity. Accordingly, caution should be shown and specific tax advice thereon should be obtained.

11. May VAT (if applicable) be recovered on acquisition costs?

Following decisions from the European Court of Justice, the Danish Tax Authorities will allow a company to deduct VAT in relation to the acquisition of shares in a subsidiary company if the acquiring company intends to supply services subject to VAT.

12. Are there any particular issues to consider in the acquisition by foreign companies? (for example non-resident taxation rules/substance rules and tax efficient exit routes

If a Danish company is acquired by a foreign company it is relevant to consider if there is a double taxation treaty in place, as dividends from a Danish company to a foreign recipient - as a starting point - are subject to Danish withholding tax at a rate of 27%. However, no withholding tax would be applicable on outbound dividends if both of the following two conditions are met (participation exemption). The recipient of the dividend holds directly, at least 10% of the share capital and the recipient qualifies for an exemption from or reduction of the Danish withholding tax by virtue of a relevant tax treaty or the Parent-Subsidiary Directive. Please note, that the Danish Tax Authority has taken the view that protection under the Parent-Subsidiary Directive and/or tax treaties is only available to the beneficial owner of dividends distributed. Thus, if a Danish company is used as a conduit entity in a structure effectively facilitating the reduction of foreign dividend withholding tax, Denmark will impose dividend withholding tax on the dividend distributions from the Danish company to the foreign parent. Further, it is relevant to consider the Danish interest deduction limitations regarding thin capitalisation rules as well as the asset and EBIT limitation tests. Finally, it is relevant to consider the newly adopted an anti-abuse clause. The anti-abuse clause prevent companies from benefiting from the Parent-Subsidiary Directive and/or tax treaties in respect of reorganisation of companies, payment of dividends, interests and royalties if the main purpose or one of the main purposes of the arrangement is to achieve a tax advantage contrary to the purpose of the double tax treaty.

13. May the group reorganise after the acquisition in a tax-neutral environment through mergers or a tax group?

After an acquisition, a group may reorganise in a tax-neutral environment. The decisive factor is whether 10% or more of the shares are owned or not. If so, there are a number of possible tax regimes. If this threshold is not met, the matter is more complicated. If these regimes are applied, no taxes will be triggered as a consequence of the event. Generally, the original acquisition values will be reflected in the values carried forward.

14. Is there any particular issue to consider in case of companies whose main assets are real estate?

When acquiring a company whose main asset is real estate, a buyer must consider Denmark's complex rules on the depreciation of real estate. The sale of shares in a company whose assets are mainly composed of Danish real estate assets is subject to the same rules as the sale of other shares as regards corporate income tax (application of the participation exemption regime under the standard conditions) and transfer tax (absence of transfer tax).

Sell-side

15. How are capital gains taxed in your country? Is there any participation exemption regime available?

As a general rule, the disposal of receivables will trigger Danish capital gains taxation. Taxable capital gains are taxed at the regular corporate income tax rate of 22% for 2016.

Sale of shares – distribution of dividends

Shareholdings are divided into two groups depending on the ownership percentage.

Tax exemption is granted for dividends received by and capital gains realised on the transfer of shares in companies where the shareholding constitutes at least 10% or more of the share capital (subsidiary investments). By contrast, if the shareholding constitutes less than 10% of the share capital (portfolio investments) and the shares are "listed shares" (shares that are listed on the stock exchange or similarly regulated markets), dividends received by and capital gains realised on the transfer of shares are subject to tax at the ordinary corporate tax rate of 22% for 2016.

Losses on financial instruments

The ring-fencing restrictions applicable to losses incurred on financial instruments, which contain a certain right or obligation to sell shares, now apply only to financial instruments relating to subsidiaries or group-related companies. Additionally, losses incurred on portfolio investments subject to the mark-to-market principle are deductible in other income

16. Is there any fiscal advantage if the proceeds from the sale are reinvested?

Aside from certain rules that apply to investments in real estate, there are no fiscal advantages when reinvesting the proceeds from a sale.

17. Are there any local substance requirements for holding/finance companies?

The Danish Tax Authority has taken the view that protection under the Parent-Subsidiary Directive and/or tax treaties is only available to the beneficial owner of dividends distributed. Accordingly, the distribution of dividend for Danish tax purposes will be tax exempt if the foreign recipient owns at least 10% of the company distributing the dividend and the foreign recipient qualifies as the beneficial owner. However, if a foreign company does not qualify as the beneficial owner, the dividend distributed will be subject to a Danish requirement for withholding tax. Generally, the issue of beneficial ownership is determined on the basis of substance requirements. In general, a conduit company only acting as an intermediary receiving income on behalf of another company that de facto constitutes the recipient of the income in question will, from a Danish tax point of view, be disregarded in relation to

protection under the relevant EU Directives and tax treaties. Such flow-through entity is not likely to be considered beneficial owner of dividends received and will, according to the Danish Tax Authorities, not be eligible for protection under the relevant EU Directives, meaning that the Danish standard rules prescribing the withholding of certain taxes will apply.

As described above under question 2, Denmark has adopted GAAR and will consequently disallow protection under the EU Parent-Subsidiary Directive if an arrangement or a series of arrangements have been put into place with the main purpose or one of the main purposes being to obtain tax advantages.

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