

## **Fine calculation in cases on missing or incomplete transfer pricing-documentation**

### **Two new rulings seem to herald attenuation in fine calculation in cases where the transfer pricing-documentation is not in accordance with the requirements.**

Two new rulings, one from a district court and one from the Eastern High Court, give the impression that fines in cases regarding transfer pricing-documentation could be considerably smaller than previously thought. The rulings are the two first on fines for faulty TP documentation.

### **The rules on fine calculation for faulty transfer pricing-documentation**

The principle on fine calculation related to missing or incomplete transfer pricing documentation was introduced simultaneously with the legal framework for the fines themselves, cf. The Danish Tax Management Act (skattekontrolloven) § 17(3) and (4) referring to § 3B.

In the official comments to the bill (2004/2 LSF 120) it is stated that the fines should, in general, make sure that it is not advantageous to avoid preparing the required transfer pricing- documentation. Therefore, the fines shall, in terms of size, be two times the cost of preparing the required documentation. Additionally, a company is fined based on how much its income is raised if it is found that dealings with other companies have not been conducted at arms-length terms.

It turned out, however, that in practice it is immensely difficult to assess the actually saved costs. Therefore, the rules were changed so that the fine would be based on a base amount and not a specific assessment in each case. The base amount was set to DKK 250,000 for each income year that the transfer pricing- documentation was either missing or incomplete. The fine shall then be lower to another base amount of DKK 125,000 if the company is able to provide sufficient documentation.

The above stated has been, and as such still is, the basis for determining the fines for faulty transfer pricing- documentation. The two new ruling may, however, be an indication that the Courts will somewhat deviate from this.

### **District court ruling on incomplete documentation**

The case (SKM 2017.216 BR) concerned a Danish subsidiary to a foreign group, with which the Danish company had had some inter-group dealings. As the company generated losses for several consecutive years the Danish Tax Authorities decided to request transfer pricing- documentation from the company. The request included the income years 2009-2012. In the time between receiving the request and the deadline – 60 days later – the company tried to fulfil the request and provide the proper documentation. During this period the company was continuously in contact with the Tax Authorities.

The company did not manage to provide the complete transfer pricing-documentation in time. The company was fined DKK 500,000; that is DKK 125,000 per income year as the company afterwards did submit TP- documentation for the years in question.

The district court lowered the fine further to a final amount of DKK 250,000. As they were of the opinion, the case did not call for complete accumulation.



The reason for lowering the fine was that they did not think that the intentions and objectives behind accumulation, called for accumulation in this specific case. Further, the District Court attached importance to the fact that the company had cooperated with the Tax Authorities and assisted in procuring the information.

### **Eastern High Court ruling on missing transfer pricing-documentation**

In the case before the Eastern High Court (SKM 2017.227 ØLR) the Danish Tax Authorities had requested transfer pricing-documentation from a company regarding the income years 2009-2012. The company did not manage to comply with this request before the deadline, as the message from the Tax Authorities was lost internally in the group. The information that the Tax Authorities requested was, however, already prepared prior to the request. All that was required was for the company's accountant to gather this information and answer a few additional questions. As such, the company was aware of the TP documentation requirement, and was only unable to meet the deadline because the request was misplaced.

Both the district court and the Eastern High Court found that the company had acted grossly negligent by not complying with the request. Both courts also found that the company should have been able to do so before the deadline.

The district court laid out the legal grounds in its ruling and subjected the company to a fine of DKK 125,000 for each year with incomplete TP-documentation, thus a total amount of DKK 500,000. The district court did not find any reasons to be neither harsher nor more lenient than the principle set out in the explanatory notes.

The Eastern High Court, likewise, found the company guilty in accordance with the bill of indictment and agreed in full with the reasons laid down by the District Court. The High Court lowered the fine to a total amount of DKK 250,000 as it deemed all four years to be the one and same offence and that the fine would otherwise be disproportionate.

### **Taxand's Take**

The result of the two rulings and the reasoning of the courts suggest a more lenient approach to the fine sizes in relation to missing or incomplete transfer pricing documentation. Though the cases are different they do possess some similarities that give the impression that the courts are not convinced that the base amounts of DKK 250,000 per income year for missing or incomplete transfer pricing-documentation and DKK 125,000 per income year when sufficient information is provided reflect the severity of the offence in all cases.

The cases are not, as such, to be viewed as a new free assessment of saved cost in each case. Rather, it seems, they herald a new standard in less severe cases regarding faulty transfer pricing-documentation.

The Courts have to a high degree taken the motives and objectives behind the law into account. They have done this rather than sticking with the "guidelines" that was originally put forward in the explanatory notes when deciding on the fines related to missing or incomplete transfer pricing-documentation.

The rulings give the impression that the courts will not be quite as categorical in their approach to cases on incomplete or missing transfer pricing-documentation as was otherwise suggested with the guidelines.



The rulings set the stage for an assessment of “defensible situations” – though this is not mentioned in either judgement – in which certain factors within the company can affect the outcome of a judgement.

Therefore, it is, as before, wise to take every possible step to comply with the transfer pricing-documentation requirements and cooperate fully with the Tax Authorities.