BECH-BRUUN

Taxand

Annual Tax Newsletter 2015

The most significant Danish tax news from October 2014 until August 2015.

Contents

Introduction

This Annual Tax Newsletter covers the most significant Danish tax news from October 2014 to August 2015 based on extracts from Bech-Bruun's tax newsletters and articles from the past year. Accordingly, this newsletter includes a description of legislative amendments relevant to domestic and foreign individuals and businesses operating in Denmark.

During the past year, the Danish Parliament has adopted new legislation on a number of different areas.

In February 2015, a bill attempting to accommodate EU requirements in relation to the Danish exit tax regime was adopted. The bill also amends rules limiting the deductibility of interests under the Danish thin cap regime and, finally, amendments to the EU Parent/Subsidiary Directive disallowing tax exemption on dividends having been deducted by the distributing company, have been introduced.

On 21 April 2015, the Danish Parliament adopted a bill purportedly proposed to prevent unwanted utilisation of Danish double taxation treaties and 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. The act is an early attempt to implement the provisions of the EU Directive 2015/121 adopted by the EU Council on 27 January 2015 amending the EU Parent/Subsidiary Directive, the EU Interest/Royalty Directive and the EU Merger Directive. The Danish implementation of the EU rules also aims to include the perceived reasoning behind Action Point 6 of the BEPS initiative.

Furthermore, the act intensifies the Danish rules aimed at the use of foreign trusts fundamentally implying that in case a trust is or has been settled by a Danish tax resident, the trust will be disregarded for Danish tax purposes. The trust and the assets held in trust will be included under Danish taxation in a CFC-type taxation, according to which income from trusts set up by Danish tax-resident individuals or individuals who have been Danish tax residents within the past 10 years and move back to Denmark after setting up a trust abroad will be taxed directly with the settlor. The amendment will almost entirely curb the possibility of Danish expats setting up trusts while abroad.

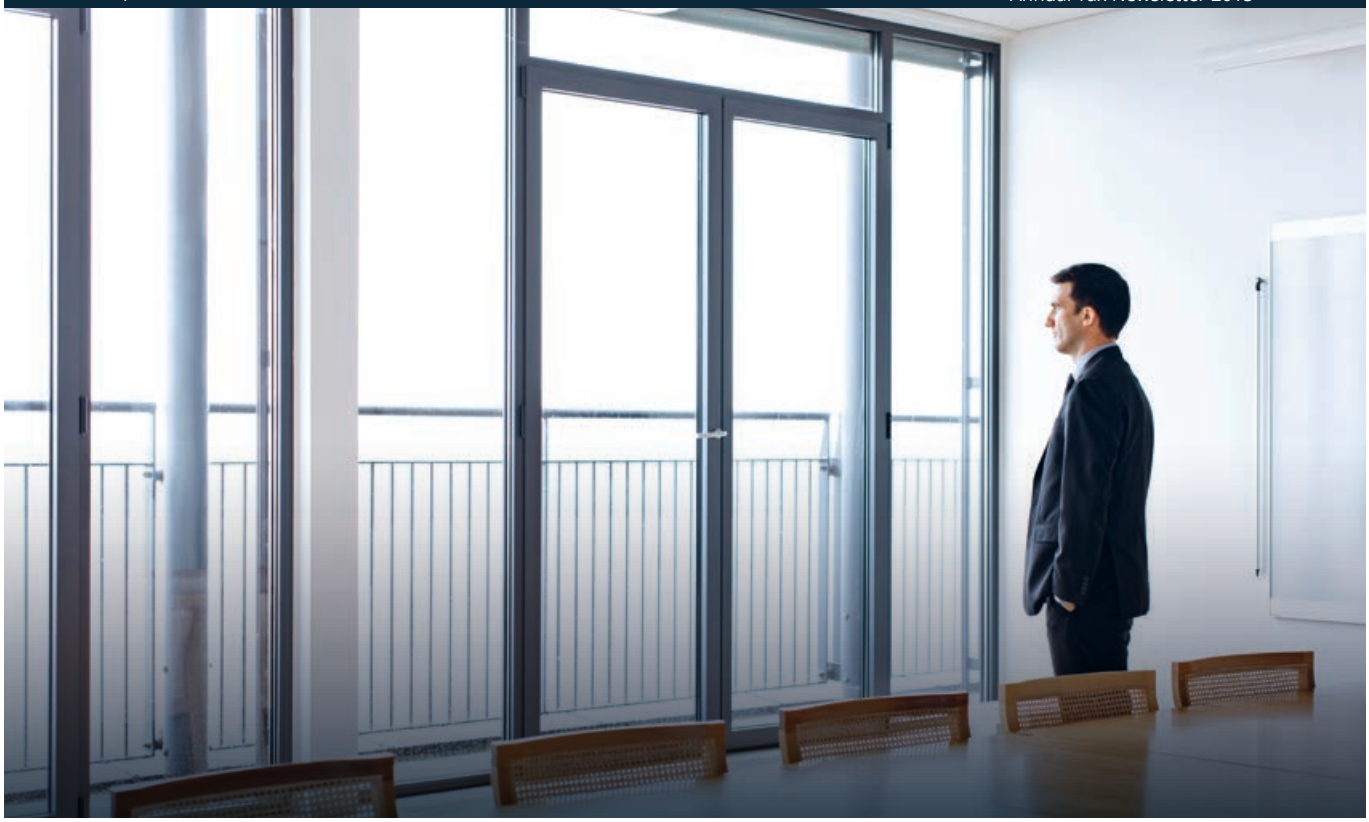
Finally, the act introduces rules depriving tax payers of the possibility of relying on binding rulings concerning the value of assets transferred out of Denmark. The amendments entail the binding ruling on the value being binding on the Danish tax authorities for a period of six months only. In practice, this means that, in subsequent circumstances, the risk will be transferred from the tax authorities to the taxpayer shortly after the asset transfer took place, significantly reducing the legal certainty of the taxpayer with regard to his tax position.

In recent years the Danish tax authorities' focus on transfer pricing has increased significantly. The efforts of the Danish tax authorities have resulted in a significant increase in the number of cases as well as the average adjustment per case which has been raised from approx. DKK 157m (approx. EUR 21m) in 2010 to approx. DKK 267m (approx. EUR 40m) in 2014. Accordingly, the average tax claim made per case has increased from DKK 39m (approx. EUR 5.8m) to approx. DKK 65m (approx. EUR 8.8m).

The EU commission has proposed an amendment to the Directive on administrative cooperation between Member States (2011/16/EU) intending to ensure comprehensive and effective cooperation between tax administrations within the EU and to eliminate aggressive tax planning opportunities provided by some member states. A mandatory and automatic exchange of information on tax rulings and advance pricing arrangements is to be introduced between the EU Member States. The proposed amendment furthermore aims to strengthen the EU tax cooperation by requiring all Member States to report all cross-border tax rulings and issued advanced pricing arrangements to the Commission quarterly. The proposed amendment will apply to all future rulings and issued pricing arrangements, as well as all existing rulings and issued pricing arrangements of the past 10 years.

Further, our Annual Tax Newsletter describes the significant developments within the area of VAT, most significantly in the decision by the EU Court of Justice in the so-called ATP case (C-464/12) which will have a significant impact on the VAT position of pension providers to customers in the financial sector.

Finally, the Annual Tax Newsletter describes the Danish tax authorities' activity plan for 2015, the key elements of which will be carried through to 2016. The main element in the activity plan is the focus on compliance performed by large and medium-sized businesses particularly with regard to transfer pricing. We expect the efforts of the Danish tax authorities within transfer pricing, which have hitherto been aimed at large corporations, to be expanded to include medium-sized corporations.



EU-driven developments

Exit tax on individuals' business activities
On 18 July 2013, the EU Court of Justice decided on a case concerning the Danish exit-taxation of individuals (C-261/11) and found the Danish regime to be in violation of article 49 of the EU Treaty (freedom of establishment) and article 31 of the EEC-treaty.

On 24 February 2015, the amendments to the Danish exit tax regime applicable to corporate tax payers made necessary by the decision from the EU Court of Justice were finally adopted, meaning that individuals will now be allowed to defer taxes payable on business assets in relation to migration out of Denmark.

What is the story?
Under the previous Danish exit tax regime tested in the case, individuals were liable to exit taxes on business assets when relocating from Denmark without being offered the possibility of deferring taxes. A deferral scheme has been in place for capital gains taxes on shares and receivables for a number of years.

In order to comply with the ruling of the EU Court of Justice, the Danish Parliament has introduced a deferral scheme similar to the deferral scheme already in place for companies. Individual business owners, emigrating to another EU jurisdiction may opt into a deferral scheme for taxes triggered because assets are transferred to another member state.

In order to be available, the deferral scheme must include all assets ceasing to be subject to Danish taxation due to the migration. The balance of the deferral scheme corresponds to tax triggered as had the assets been sold at fair market value on migration. Interest is paid on the balance which must be settled within seven years, meaning that the annual minimum payment is 1/7 of the balance.

As a particular detail, the Act has – in addition to introducing the deferral scheme – expanded the scope of assets subject to exit tax. All assets will be subject to exit tax unlike previously, where it was a requirement that the assets had been used in a taxable business in Denmark.

What is the impact?
It is now possible for business owners to use the deferral scheme on payment of exit tax thus reducing the financial strain on individual business owners exiting Denmark. It remains to be seen whether the rules now enacted will entail compliance of the Danish tax legislation with EU regulations.

Interest deductibility limitation amendments
On 1 Marts 2015, a new rule reducing the negative impact of Danish thin-cap interest deductibility limitations became effective.

What is the story?
The Danish thin-cap regulation hitherto in force could imply that well-consolidated groups of companies in some situations unintendedly be impacted negatively and have reduced possibilities of deducting interest expenses. These well-consolidated groups of companies may, in the last couple of years, have been subject to mark-to-market taxation of taxable capital gains on receivables as a consequence of the declining interest level. When interest levels increase again, these groups of companies will, other things being equal, suffer losses on the receivables. The changes in the thin-cap regulations are intended to ensure that these well-consolidated groups of companies would not be subject to interest deductibility limitations simply because of the fluctuating value of these receivables.

The Act ensures that the interest deductibility limitation rule will not apply if the net financial expenses consist of net capital losses exceeding net interest income of the income year in question. The new rule ensures that net capital losses on debt will not impact the possibility of deducting interest. Instead, net losses on debt are to be carried forward and set off against future net capital gains on receivables and net interest income.

What is the impact?
The amendments of the thin-cap regulations will ensure that the unintended impact of fluctuating values of debt and receivables subject to tax under the mark-to-market rules limiting the possibility of deducting interest will no longer have a negative impact on otherwise well-consolidated companies.

Taxation on dividends from foreign subsidiaries
Finally, amendments to the EU Parent/Subsidiary Directive have been implemented into Danish law. The new rule applies to dividends distributed 1 March 2015 or later.

What is the story?
Prior to the amendment, Danish parent companies were taxable on dividends from subsidiary shares if the subsidiary or a subsidiary at a lower level had been able to deduct the dividends for tax purposes. The received dividends would, however, not be taxable if the taxation was exempt under the Parent/Subsidiary Directive.

On 25 November 2013, the EU Commission proposed amendments to the EU Parent/Subsidiary Directive. The objective of the proposed amendments was to ensure that the Parent/Subsidiary Directive did not allow for undesirable tax exemptions – the so-called unintended tax benefits.

With effect from 1 March 2015, the amendments to the Parent/Subsidiary directive have been implemented into Danish law. Accordingly, a Danish parent company can only receive tax exempt dividends from a subsidiary if the subsidiary cannot deduct dividend distributions for tax purposes. The rule will, in a Danish context, apply regardless of where the subsidiary is tax resident.

What is the impact?
Danish rules entailing taxation of dividends deducted for tax purposes by the subsidiary have been in place for a number of years but have hitherto applied only if dividends were not exempt from tax under the EU Parent/Subsidiary Directive. Following the implementation of the amendments to the Directive, Danish taxation will be levied on all dividends received by a Danish parent company if the dividends have been deducted by the distributing company.

General anti-avoidance regulation introduced

New international anti-abuse tax rules
The Danish Parliament has adopted new international anti-abuse tax rules (GAAR), which deny tax-treaty and EU-tax benefits in cases of deemed abuse. The new anti-abuse provisions became effective on 1 May 2015.

What is the story?
The act introduces new general anti-abuse rules (GAAR) into Danish tax law. This is an early Danish attempt to adopt the recent amendments to the EU Parent/Subsidiary Directive (2011/96) as well as the perceived reasoning behind Action Point 6 of the BEPS initiative (Preventing the Granting of Treaty Benefits in Inappropriate Circumstances) in Danish domestic law.

The new provisions mark a notable change in the traditional Danish anti-abuse tax legislation doctrine, which, in the past, has targeted specific practices which have been deemed to be abusive and, therefore, have been countered by specific anti-abuse rules (SAAR).

The new rule in section 3 of the Danish Tax Assessment Act (*lignings-loven*) contains two elements: (i) An EU-tax directive anti-abuse provision and (ii) a tax-treaty anti-abuse provision. Despite differences in the wording, no specific difference in the contents is envisaged 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 which was agreed at the meeting of the European Council held on 27 January 2015.

The Danish anti-abuse provision generally mirrors the wording of the amended directive, stating that Denmark: *"shall not grant the benefits of this Directive to an arrangement or a series of arrangements which, having been put into place for the main purpose or one of the main purposes of obtaining a tax advantage that defeats the object or purpose of this Directive, are not genuine having regard to all relevant facts and circumstances. Furthermore that "an arrangement or a series of arrangements shall be regarded as not genuine to the extent that they are not put into place for valid commercial reasons which reflect economic reality."*

Unlike the anti-abuse provision in the Parent/Subsidiary Directive, the Danish domestic provision is also intended – in addition to the Parent/Subsidiary Directive – 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 on Preventing the Granting of Treaty Benefits in Inappropriate Circumstances. As the final report on Action Point 6 has not yet been released, it is arguably somewhat premature to introduce a provision which incorporates the outcome of the project.

However, the new GAAR is nevertheless explicitly applicable to both existing and new 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. Questionable reasoning is provided in the commentary as to why it is legally justified also to apply the new Danish domestic GAAR and disqualify tax treaty benefits, including tax treaties not previously subject to a GAAR.

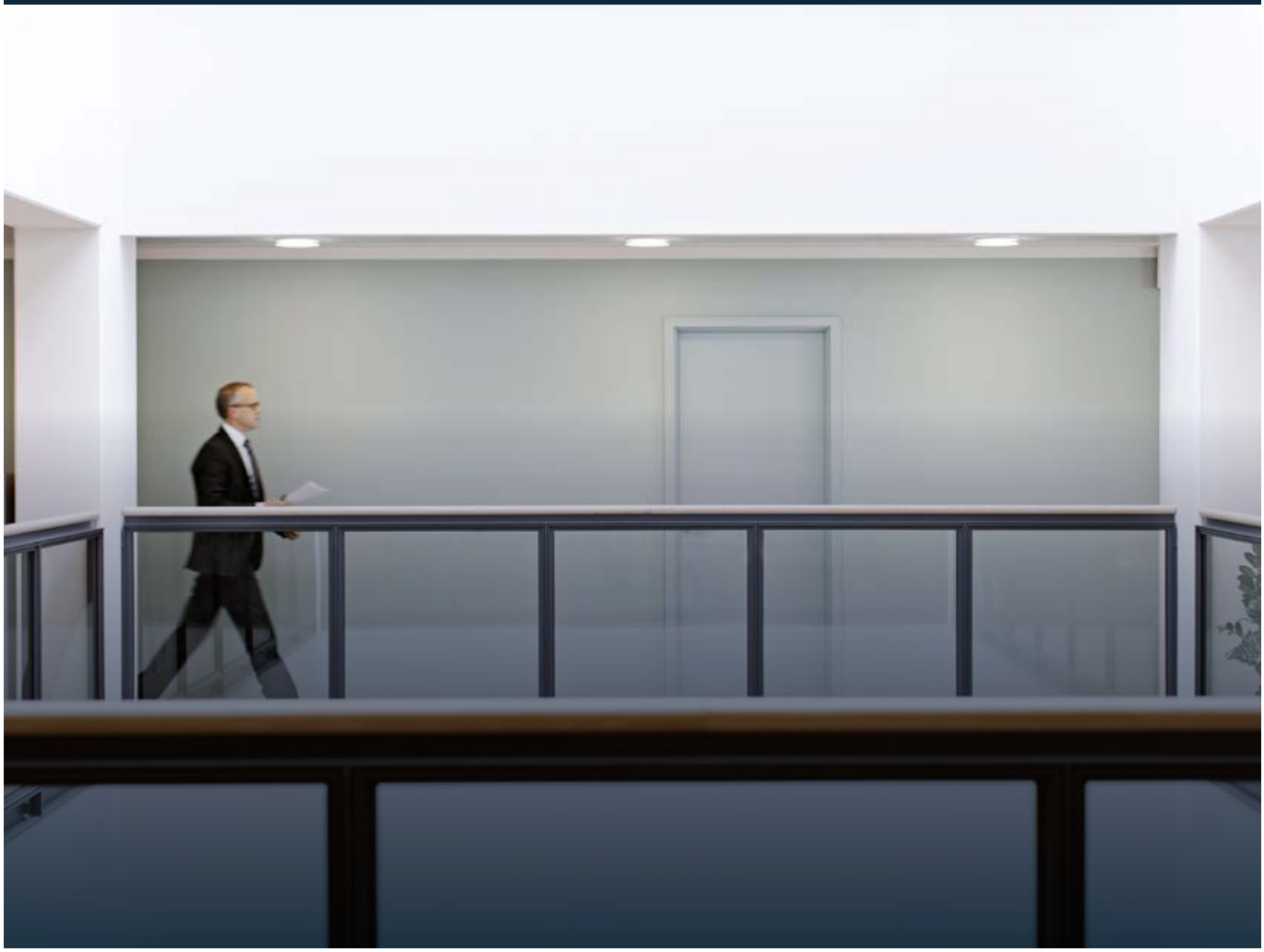
However, Danish tax authorities should not be expected to refrain from challenging perceived tax treaty abuse solely on the grounds that a tax treaty predates the GAAR or that the tax treaty itself does not contain a GAAR.

The new GAAR states that treaty benefits will not be granted if [our translation]: *"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."*

It is specifically mentioned in the commentary that the onus of proof regarding abuse lies with the tax authorities as they must establish whether a transaction falls within the scope of the GAAR, i.e. that one of the most significant purposes of the transaction or arrangement in question has been to achieve a tax advantage, taking into account all relevant facts and circumstances.

If, however, this criterion is deemed to be met, the tax payer must then substantiate that such advantage is nevertheless consistent with the content and purpose of the tax treaty, thus returning the transaction/arrangement to its initial position outside the scope of the GAAR.

The new anti-abuse provision has taken effect from 1 May 2015, meaning that a tax payer cannot claim tax-treaty or EU directive benefits



in the event of deemed abuse if the benefit claimed concerns a payment to which the relevant party is entitled on or after 1 May 2015, or if the restructuring on which tax-treaty or EU-directive benefits are claimed is adopted on or after 1 May 2015.

The new GAAR thus also applies to transactions/arrangements which have been initiated prior to 1 May, but where a part of the entire transaction/arrangement is concluded on or after 1 May 2015. No grandfathering rule will thus apply.

What is the impact?
Since Denmark has not previously operated with a general anti-abuse provision, and considering the very general nature of its wording, the obtaining of tax directive or tax treaty benefits will be subject to some uncertainty when the new proposed provisions take effect. This circumstance has been heavily criticised during the enactment process, but without any visible impact. At the least, uncertainty about the use of both provisions will exist pending specific administrative or court practice.

Accordingly, tax payers must be cautious as to the application of such provisions and should obtain specific tax advice thereon, in particular when implementing financial or organisational structures, even if legitimate business reasons justify implementing such structure, in so far as they may also be deemed to be tax-motivated.

Trusts – no longer for Danes?

With the aim of preventing international tax evasion and limiting the use of tax havens, the Danish Parliament has introduced a new section 16K in the Danish Tax Assessment Act (*ligningsloven*) containing a controlled-foreign-corporation (CFC) type rule for foreign trusts. The new rule applies to all trusts established on or after 1 July 2015, as well as all transfers made to any trust on or after 1 July 2015, regardless of when the trust was established.

What is the story?
The use of foreign trusts has been a focus point of the Danish tax authorities in recent years, mainly because the "trust" concept does not exist in Danish tax legislation and because trusts, in the eyes of the Danish tax authorities, are a tool primarily used for aggressive tax planning purposes.

The possibility provided by some foreign jurisdictions that enables the settlor of a trust to retain de facto control of the assets transferred to the trust, despite the assets having formally been effectively and irrevocably separated from the assets of the settlor, is of great concern to the Danish tax ministry.

In Denmark, a foreign trust is qualified as either a separate legal entity or a transparent entity for tax purposes. The determination is based solely on practice as there are no specific rules in Danish legislation concerning the determination of foreign trusts or even a definition of what a trust is.

In order for a trust to be treated as a separate legal entity for tax purposes, the assets of the trust must be effectively and irrevocably separated from the assets of the settlor meaning that the settlor has no means of regaining or, to any degree, maintaining control of the assets.

With the adoption of the new rule in section 16K, a CFC type tax treatment of income from trusts and other similar entities has been introduced into Danish tax law. Subject to the new rule, a Danish tax-resident individual settlor (or settlors), will be taxed on the income of the trust (or foreign fund) in two specific situations. Firstly, if the settlor is a Danish tax resident at the time the trust is established or the contribution is made. Secondly, if (i) the settlor was previously a Danish tax resident and (ii) the settlor moves (back) to Denmark within 10 years of having established or contributed assets to a foreign trust. As such, the settlor becomes tax liable on the income of the trust, despite not having been a Danish tax resident at the time of the establishment or contribution.

Assets contributed to existing trusts after the settlor (or another contributor to the trust) becomes a Danish tax resident are also subject

to taxation pursuant to the new rule. Contributions made by a legal entity controlled by an individual person, who would also be subject to the new rule personally, will be considered made by the individual person, and thereby taxable for the individual person. The level of relevant control mirrors the control requirement applicable to traditional CFC regulation.

If the trust is established in a jurisdiction where the effective and irrevocable separation of assets is an indispensable legal requirement determined by either national legislation or administrative or legal practice, the new rule will not apply. Similarly, if the trust is established exclusively for charitable purposes or other non-profit purposes (subject to definition) to benefit a large group of persons, or if the trust is set up for pension purposes to benefit a large group of persons, the settlor will not be liable to pay tax.

What is the impact?
Income generated from assets transferred to a trust by a settlor or a company controlled by one or more settlors will, for Danish tax purposes, be considered as income in the hands of the Danish tax-resident settlor (or settlors) of the trust. The same applies even if the settlor (or settlors) was not a Danish tax resident at the time of the establishment of the trust. Tax credits are, however, available for tax paid by the trust on the same income, and income on which tax has been levied on the settlor (or settlors) in accordance with the new rule will not be taxed again upon distribution from the trust.

The Danish tax-resident settlor will have to pay tax on the trust's income, as either personal income, capital income, or shareholder income, depending on the category of income in the trust. Any losses from the trust can be deducted only in the trust's future income and is furthermore subject to ring-fencing restrictions. The new rule does not change or influence the taxation of the trust itself, the trustees or other beneficiaries of the trust, assuming these are Danish tax residents.

One notable aspect of the new provision is that assets in a trust covered by the provision would be subject to inheritance tax at an effective rate of 36.25% even if the heirs would have been tax-exempt or subject to a reduced inheritance tax if the same assets had been inherited from the settlor (or settlors) directly.

It is also noteworthy that the new rules do not contain a definition of trust, particularly in the light of the fact that the trust concept does not exist in Danish law. Certain generic features are, however, set out in the commentary. Furthermore, the new rule also applies to other types of funds, in which the settlor (or settlors) retains the possibility of reclaiming control of the transferred assets. In the commentary, entities such as "stiftungs", "treuhands" and "anstalten" are mentioned as types of funds, which may be subject to the new rule.

Whereas there are uncertainties about the interpretation and application of the provision, it is likely that the use of conventional trusts in Danish wealth planning and succession planning will cease or be reduced significantly for all practical purposes.

No binding ruling when exiting Denmark

On 21 April 2015, the Danish Parliament adopted a bill, *inter alia*, to amend s. 25 of the Danish Tax Administration Act (*Skatteforvaltningsloven*), reducing the period of a binding ruling to a maximum of six months. The new rules entered into force on 1 May 2015.

What is the story?
To avoid unpleasant surprises when moving assets out of Denmark, it is common practice to obtain a binding ruling from the Danish tax authorities on the exit tax payable on certain types of assets, including unlisted shares. Generally and given that circumstances remain unchanged, the Danish tax authorities are formally bound by the binding ruling with regard to dealings involving the specific situation described in the ruling.

On some occasions, the asset valuation reached by the Danish tax authorities in the binding rulings has, however, led to an asset valuation upon exit lower than the valuation subsequently determined upon a third-party sale. In order to avoid any such future incidents, the Danish Parliament has adopted an amendment to the rules in s. 25 of the Tax Administration Act. The amendment consists of two new rules, with the purpose of ensuring a so called fair taxation of assets relocated and moved out of Denmark. It is worth noticing that the new rules apply only to valuations of assets.

The amendment introduced to subsection (1), reduces the effective period of a binding ruling applied to the valuation of assets from five years (applicable to all other types of binding rulings) to a maximum of six months. Bearing in mind that, already before the change of rules, the Danish tax authorities had the option of limiting the effective period of a specific binding ruling (even on binding rulings concerning asset valuations subject to the new six-month maximum effective period), and that current administrative practice, according to the commentary, is to limit the effective period of binding rulings regarding valuation of assets to three to six months, this aspect of the new rules cannot be considered a game changer.

A far more interesting aspect of the new rules is the second amendment to subsection (2), which provides the tax authorities with the possibility of revoking a binding ruling, following a three-step process.

Prior to revoking a binding ruling, the tax authorities must be able to subsequently document that the assets valuated in the binding ruling exceed the binding ruling value by (i) at least 30% and (ii) at least DKK 1m (approximately USD 147,000 or EUR 134,000). These thresholds are cumulative requirements and as such require both financial thresholds to be met.

Furthermore, the subsequent valuation of the assets must be made on the basis of either (i) a subsequent sale (direct or indirect) to a third party of the actual asset or an equivalent to the asset valuated in the binding ruling, or (ii) a subsequent yield received on the assets as valuated in the binding ruling.

Finally, the Danish tax authorities must also prove that the subsequently determined valuation would also have been a more correct valuation at the time of the binding ruling.

What is the impact?
If a binding ruling is revoked subject to the new rules, the tax payer will be treated as if the binding ruling had never been issued, and the general Danish rules and deadlines will apply, including rules regarding the statute of limitation.

Consequently, the new rules will, in practice, mean that, the risk will be transferred from the tax authorities to the taxpayer, even when a binding ruling is obtained precisely to avoid that uncertainty.

From a practical perspective, it may therefore be advisable to carefully document the basis for the valuation applied at the time of exit from Denmark, regardless of whether a binding ruling is obtained, giving due consideration to the documentation requirements set out under Danish transfer pricing rules.

Increased focus on transfer pricing

What is the story?
The Danish tax authorities have gradually increased the number of transfer pricing adjustments within recent years. According to the Danish tax authorities, the increase in cases is a result of a growing inflow of resources and its own increased experience.

According to the Danish tax authorities, the adjustment of taxable income was approximately DKK 267m on average in 2014. In 2010, the adjustment of taxable income was only approximately DKK 157m on average. The figures represent adjustments made subject to rulings issued by the Danish tax authorities and, therefore, they are not an indicator of the final adjustments since a number of the adjustments have been appealed by the taxpayers.

The numbers of cases and the adjustments have increased significantly since 2011. In 2012, the Danish Parliament implemented several amendments in the transfer pricing area. In order to ensure compliance with transfer pricing regulations, the Danish tax authorities may now request that companies have an auditor's opinion prepared within 90 days, if a number of criteria are met. Furthermore, corporate tax payments are published on the Danish tax authorities' website.

Where additional corporation tax becomes due following a transfer pricing adjustment, a variable non-deductible surcharge (4.6% for the 2014 income year) will be levied on all adjustments of prior years' corporate taxes. Additionally, non-deductible interest of 0.8% (for the 2010-2014 income years) will be imposed for each month calculated from the due date of any corporation tax.

Incorrect reporting of transfer pricing issues in the income tax return is subject to a fine fixed either on the basis of the annual turnover of the business or on the basis of the number of employees.

A fine based on the annual turnover will be fixed at 0.5% of the turnover up to an amount of DKK 500m (approximately EUR 67.2m); 0.1% of the turnover between DKK 500m and DKK 1bn (approximately EUR 134.4m); and 0.05% of any turnover exceeding DKK 1bn.

A fine based on the number of employees will be fixed at DKK 250,000 (approximately EUR 33,600) for every 50 employees. If the num-

ber of employees exceeds 500, the fine will be fixed at DKK 2m (approximately EUR 267,000).

The fine levied will be the higher of the two alternatives and may never be set below DKK 250,000 per company/entity per year. If the incorrect reporting is deemed to be part of a systematic violation of tax legislation, the fine may be increased by up to 50%. This will be the case if, for example, it turns out that the taxable income of the business is to be amended significantly. A fine will be levied for each income year for which reporting has not been made correctly.

Failure to prepare transfer pricing documentation as ordered is also subject to minimum fines as is the case of incorrect reporting in the income tax return.

As of 1 January 2013, a fine, generally fixed at DKK 250,000, will be levied when transfer pricing documentation has not been prepared. Until 31 December 2012, the fine was set to match the supposed savings obtained by not preparing the transfer pricing documentation.

The system applying to income years commencing before 1 January 2013, according to which any increase in the taxable income resulting from transfer pricing adjustments is subject to an additional fine of 10%, is to be preserved. Transfer pricing fines were a rare sight before 2012, but will pose a substantial threat in relation to income years commencing 1 January 2013.

The fines described above will also apply to income years commencing on or after 1 January 2013.

According to their 2015 activity plan, the Danish tax authorities will continue to focus on transfer pricing, especially on intangibles, intra-group funding, large groups of companies in relation to transfer pricing, loss making companies and non-tax-paying companies and assessments.

The Danish tax authorities will also keep an eye on procedures, transfer pricing issues and avoid incidents of double taxation of transfer pricing by renewing negotiations with foreign tax authorities.

Finally, the Danish tax authorities seem to focus on: service fees, royalty/license agreements, abandonment of business areas, intangible assets and group internal loans and interest. It is common for these issues that they involve several variables affecting the pricing, making it possible to challenge the Danish tax authorities' adjustments.

What is the impact?
The Danish tax authorities have increased their focus on the transfer pricing area since 2012, resulting in a growing number of cases and an increase in the amount per adjustment. This surge in adjustments could be compared to the Danish tax authorities' focus areas as most of them have several variables and, therefore, may be challenged. Especially transfers of intangible assets and royalty/license agreements have been occupying the Danish tax authorities. These cases represented 18% of the cases, while the adjustments represented 74% of the total adjustments (DKK 12,856m).

Completed transfer pricing increases

Period	Number of cases	Amount (DKK million)
2010	40	6,290
2011	47	6,192
2012	67	21,216
2013	77	17,374
2014	76	20,320

Source: The Danish tax authorities

New proposal to strengthen EU tax cooperation

On March 18, the EU Commission presented a proposal to amend an existing directive, aiming at combating corporate tax avoidance. The proposed amendment requires EU Member States to report all cross-border tax rulings and issued advance transfer pricing arrangements to the Commission every three months. If adopted, the proposal would apply to all future rulings and transfer pricing arrangements as well as all rulings and transfer pricing arrangements issued within the last ten years and still in force.

What is the story?
In recent years, the EU Commission has been actively engaged in the "EU's fight against tax avoidance and evasion", primarily aimed at challenging aggressive tax planning and abusive tax practices.

The Tax Transparency Package presented by the EU Commission on 18 March 2015 is step one in the EU Commission's efforts to prevent corporate tax avoidance. A key element in the Tax Transparency Package is a proposal to amend the Directive on administrative cooperation between Member States (Directive 2011/16/EU), with the aim of strengthening tax cooperation and transparency between EU Member States.

The proposal requires EU Member States to automatically exchange basic information about cross-border tax rulings and advance transfer pricing arrangements with all other EU Member States. Contrary to the current rules, the proposed amendment does not provide the EU Member States with any degree of discretion in determining if the specific cross-border tax ruling or the advance transfer pricing arrangement is relevant for other Member States. As such, all cross-border tax ruling or the advance transfer pricing arrangement must be shared.

Included in the proposal is a minimum requirement concerning the level of information which must be exchanged between all EU Member States as well as the European Commission. EU Member States may, subject to certain conditions, request further and more detailed information and may even request the full text of the cross-border tax ruling or the advance transfer pricing arrangement to be issued, if the EU Member State deems it relevant for the application of its own tax rules.

The amendment thus introduces a mandatory and automatic exchange of information on tax rulings and advance transfer pricing arrangements. If adopted the amendment will not only be relevant for tax rulings and advance transfer pricing arrangements issued after the amendment becomes effective; it will include relevant tax rulings and advance transfer pricing arrangements issued within the last ten years, if they are still effective. Information about such existing agreements must be exchanged between EU Member States before 31 December 2016.

Advance cross-border rulings and advance transfer pricing arrangements issued after the amendment becomes effective must be exchanged with all EU Member States within one month following the end of the quarter during which the advance cross-border rulings or advance transfer pricing arrangements have been issued or amended.

The information to be supplied by a EU Member State must as minimum include (i) identification of the taxpayer and where appropriate the group of companies to which it belongs, (ii) the actual advance cross-border ruling or advance transfer pricing arrangement, including a description of the relevant business activities or transactions or series of transactions to which it applies (iii) the identification of the other Member States likely to be directly or indirectly affected by the advance cross-border ruling or advance transfer pricing arrangement, (iv) the identification of any legal entity (not individuals) in the other EU Member States likely to be directly or indirectly affected by the advance cross-border ruling or advance pricing transfer arrangement.

For the purpose of information exchange, the EU Commission will set up a database in which information will be compiled. The database will be available to EU Member States and the European Commission only.

If approved by the Council, the proposed amendment to the Directive on administrative cooperation between Member States (Directive 2011/16/EU) will enter into force on 1 January 2016.

The EU Commission's Action Plan for A Fair and Efficient Corporate Tax System in the European Union (the "Action Plan") was introduced by the EU Commission on 17 June 2015, and is step two of the EU Commissions efforts to prevent corporate tax avoidance.

The Action Plan lists five key areas, which the EU Commission has identified for future action; (i) re-launching the Common Consolidated Corporate Tax Base (CCCTB), (ii) ensuring fair taxation where profits are generated, (iii) creating a better business environment, (iv) increasing transparency, and (v) improving EU coordination.

In addition to the Action Plan, the EU Commission has also published a list of third-country non-cooperative tax jurisdictions, which together with the proposed amendment to EU Directive 2011/16/EU, is part of the EU Commission's steps regarding action

item (iv). The list of non-cooperative tax jurisdictions includes a "top-30 list", on which countries such as Andorra, Bahamas, Barbados, Bermuda, British Virgin Islands, Brunei, Cayman Islands, Guernsey, Hong Kong, Monaco, and the US Virgin Islands, are well-known names.

The EU Commission's desire to bring back the Common Consolidated Corporate Tax Base (CCCTB), is a point worth noticing. It is not the first time that the EU Commission has proposed a Common Consolidated Corporate Tax Base, however, the negotiations on the 2011 proposal stalled before an agreement could be reached. In the Action Plan, the EU Commission announces its intention to present a new proposal for a mandatory Common Consolidated Corporate Tax Base, as early as possible in 2016 and within 18 months.

What is the impact?
The purpose of the proposal to amend the Directive on administrative cooperation between Member States is to ensure comprehensive and effective cooperation between tax administrations and to avoid abusive tax planning. We expect exchange of information at this level to prove an effective tool in the hands of tax authorities throughout the EU. Currently, several jurisdictions have little experience with issuing advance transfer pricing agreements. Through the exchange of information between EU Member States, it may be possible for the tax authorities to benefit from experiences throughout the EU.

Furthermore, the shared knowledge and know-how concerning the issue of cross-border tax rulings and advance transfer pricing arrangements will presumably encourage the tax authorities to develop similar practices, thus reducing the challenges one often faces when applying for advance transfer pricing arrangements and cross-border tax rulings.

However, the Danish tax authorities are already very active in this area, as Denmark currently holds tax information exchange agreements with close to 100 countries, including all EU countries as well as countries such as The Bahamas, the Cayman Islands and the British Virgin Islands.

Regarding the key areas presented in the Action Plan, it will be especially interesting to see how the new proposal on Common Consolidated Corporate Tax Base will be received. The proposal is expected in 2016, and will contain a step-by-step approach for the mandatory Common Consolidated Corporate Tax Base.

The Danish tax authorities' 2015 activity plan

Every year the Danish tax authorities publish an activity plan, which contains the focus areas of the year. The 2015 activity plan contains a number of focus areas, including:

- Medium-sized and large businesses
- Large corporates
- Withholding tax on dividends, interest and royalties
- International taxation and BEPS
- Transfer pricing
- The oil industry

Medium-sized and large businesses
In 2015, the Danish tax authorities will focus on medium-sized and large businesses, that is, businesses with a turnover between DKK 14m (approx. EUR 1.9m) and DKK 500m (approx. EUR 67m), or with a combined annual payroll tax of DKK 4m (approx. EUR 0.55m).

The Danish tax authorities will also be focusing on the tax and VAT treatment of transactions in connection with tax-exempt reorganisations, computation of capital gains and tax loss carry-forwards and the tax treatment of legal fees and accountancy costs.

Furthermore, the Danish tax authorities will focus on majority shareholders' compliance with Danish tax law. The purpose of this work is to ensure that majority shareholders and their companies are taxed correctly on the value of free goods (e.g. cars, housing and holiday homes), dividends, salaries, etc.

Large corporations
According to the activity plan, the Danish tax authorities will largely continue their ongoing activities in 2015 in relation to large corporations. The activities are scheduled to last several years, mirroring the often very long proceedings.

The activity plan also includes specific areas such as withholding tax on dividends, interest and royalties as well as branch offices and industries, for instance the oil industry, which is facing specific challenges regarding tax and duty. Enterprises owned by equity funds or funded by international intra-group cash pools or loans must expect the Danish tax authorities to examine whether or not current legislation has been observed.

Withholding tax on dividends, interest and royalties
In order to ensure correct withholding tax on cash flows made to tax havens and other relevant countries, the Danish tax authorities will keep its focus on withholding tax on dividends, interest and royalties. The focus will be aimed at large flows of dividends, equity fund takeovers and large Danish company acquisitions.

International taxation and BEPS (Base Erosion and Profit Shifting)
Furthermore, the Danish tax authorities will focus on cross-border tax issues and BEPS. The purpose is to uncover the applicability of BEPS within current tax legislation. This project will, according to the activity plan, be aimed at international transactions within multinational groups.

The information derived from the project will most likely create a basis for the first cases for which the Danish tax authorities will test the limits of the new general anti-abuse rule, which entered into force on 1 May 2015.

Transfer pricing
In 2015, the Danish tax authorities will continue to focus on transfer pricing, having seen a gradually increasing number of cases within recent years. The Danish tax authorities will consolidate their efforts through fewer but bigger projects. This will ensure an improved professional expertise in dealing with transfer pricing issues and multinational groups. Intellectual property rights and multinational group financing will be given specific attention.

The continuing focus on transfer pricing in combination with new initiatives, such as BEPS, is one reason for all multinational groups to ensure that applicable legislation is observed and to give consideration as to whether there are issues in the past that needs to be addressed.

The oil industry
The activity plan includes focus on the oil industry. The aim is to gather information about the oil industry, which is characterised by being governed by complex tax and duty legislation. The aim is also to examine whether or not a different strategy and legislation can help reduce the risk of incorrect payment of tax and duty.

Concluding remarks
On the basis of the activity plan for 2015, we expect that the Danish tax authorities will keep focusing on enterprises with large turnovers, multinational groups and Danish enterprises owned by equity funds.

All of the above-mentioned enterprises are governed by the most complex part of the Danish tax legislation, and Danish tax legislation is to be found among the most complex ones globally. To ensure that they have implemented the right policies and to be able to deal with the inquiries from the Danish tax authorities, the enterprises will have to factor in considerable resource spending.

Finally, majority shareholders in medium-sized and large businesses should consider whether the relationship between the company and its shareholders is in compliance with current tax legislation.

VAT developments – expansion of VAT exemptions

On 13 March 2014, the EU Court of Justice made its decision in the so-called ATP case (C-461/12) concerning the application of the VAT exemption offered to "special investment funds".

The EU Court of Justice found the Danish interpretation and application of the exemption to be too narrow as VAT exemption had been denied for management services related to defined contribution pension schemes. The EU Court of Justice held that the VAT exemption should apply to such services as well.

Based on the decision of the EU Court of Justice, the Danish tax authorities have been met with claims from pension providers wanting to recover VAT collected on management services for this type of pension product. Under Danish law, repayment claims may be made for VAT payments collected during the past ten years.

For pension providers who typically cannot recover VAT on their activities, the court decision will, furthermore, bring about saved VAT costs on management services to be purchased in the future.

What is the story?
In its judgment, the EU Court of Justice clarified that the tax authorities must differentiate defined contribution pension schemes from defined benefit pension schemes when applying the VAT exemption for "special investment funds". Only management services concerning the latter type of pension schemes are subject to VAT. This position has been confirmed by the so-called Wheels case (C-424/11).

The ATP case was started by ATP, a Danish provider of various administrative services to pension funds, which were denied VAT exempt status for all management services other than those relating to disbursement from pension funds. In addition to services linked to pension payouts, ATP advises employees and employers on various issues and performs various administrative duties and management services linked to the pension schemes, which are mainly defined contribution pension schemes.

The key question in the case was whether the term "special investment funds" includes defined contribution pension schemes. If the answer is affirmative, management services related to these types of funds are explicitly exempt from VAT under EU law.

According to the EU Court of Justice, the "special investment funds" exemption applies essentially when:

1. The pension scheme is funded by the persons to whom the future payments are to be made,
2. The savings are invested under the application of a risk-spreading principle,
3. The pension customer bears the risk and costs of the investments made.

On the other hand, criteria such as the type of payments scheme (i.e. lump-sum or life annuity scheme) and tax deductibility cannot be used as grounds for denying VAT exemption under the rule. Furthermore, it is of little relevance whether contributions are paid by an employer on behalf of the pension customer, and whether it is possible to add ancillary insurance elements to the pension scheme.

What´s the impact?
The outcome of the ATP case compared with the result of the Wheels case shows that defined contribution pension schemes must be differentiated from defined benefit pension schemes and that this contrast hinges on who will bear the risk and costs of the investments made in each category of pension scheme.

In our view, the judgment has paved the way for repayment claims from a large number of pension providers and their suppliers of administrative services, who have paid VAT on a wrong basis on management services provided to defined contribution pension schemes. Such repayment claims may, under Danish law, be made for a period of up to ten years.

In order to avoid recovery claims from being time-barred, it is essential that providers of services to defined contribution pension schemes make their claim against the tax authorities as soon as possible.

Contact

With more than 500 specialised and experienced employees, Bech-Bruun is among the leading law firms in Denmark. From our offices in Copenhagen, Aarhus and Shanghai we provide advice on all aspects of corporate and commercial law.

Bech-Bruun Tax, which consists of approx. 16 fee-earners/6 partners, is the largest truly specialised tax advising team of any Danish law firm. Bech-Bruun Tax advises on all issues relating to corporate taxes and duties. The combination of an extensive network of international tax advisers and our considerable expertise in tax litigation makes us an attractive alternative to the tax divisions of the large auditing firms.

For many years, Bech-Bruun Tax has been ranked as one of the leading tax advisers in Denmark, which is reflected in our ratings in Chambers, Legal500 and PLC Which Lawyer? Several of our partners and lawyers are recognised as leading Danish experts within their areas of expertise.

Bech-Bruun Tax advises on a stand-alone basis as well as in collaboration with advisers from Bech-Bruun M&A on all matters relating to private equity and venture capital structures. Furthermore, Bech-Bruun Tax has advised a number of private equity firms from, primarily, London, Stockholm and Luxembourg, in relation to the supply of investments for Danish clients.

Bech-Bruun Tax has also significant experience in tax litigation and procedural tax matters before the ordinary Danish courts, the Danish National Assessment Council and the Danish Administrative Tax Authorities both in relation to ordinary tax assessments, transfer pricing issues, VAT and duty issues and tax enforcement matters.

Bech-Bruun Tax has advised on transfer pricing matters for a number of years and possesses significant experience within this field of expertise. We advise on a wide scope of transfer pricing issues, ranging from the preparation of transfer pricing documentation files, preparation of defence files for corporations, to negotiations with the Danish tax authorities on advance pricing agreements as well as transfer pricing litigation, and we cooperate with selected specialist firms outside Denmark whenever it is relevant or useful for the client.

Tax advice in all matters relating to securities and financial instruments is one of our key competencies. Due to our international and demanding client base within the financial sector, we are always up to date with the rapid developments within this field.

International tax and rendering assistance to international clients investing in or via Denmark are the primary areas of expertise of Bech-Bruun Tax. Our clients benefit from our significant international experience and extensive international network. Several lawyers with Bech-Bruun Tax have in-depth knowledge of foreign tax legislation obtained through short- and long-term secondments abroad, both in Europe and the USA.

In particular, we advise Danish businesses established internationally, foreign businesses with subsidiaries or permanent establishments in Denmark as well as private equity firms interested in investment opportunities in the Danish market.

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