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Danish GAAR used for denying benefits under the EU Parent-Subsidiary Directive

The Danish tax authorities have denied an EU-based parent company and its Danish subsidiary enjoying the benefits under the Parent-Subsidiary Directive arguing that this arrangement constituted abuse under the Danish GAAR.

About the cases
A number of recent binding advanced rulings issued by the Danish National Assessment Council have amplified the understanding and use of the Danish GAAR. The rulings, which all relate to the solvent liquidation or relocation of a Danish holding company, have taken the Danish GAAR into consideration in most cases but have not found that the transactions ultimately constitute abuse or attempts of avoidance. However, one ruling ordered that the company be denied the benefits under the Parent-Subsidiary Directive.

Relevant sources of law
The Danish GAAR is contained in s. 3 of the Danish Tax Assessment Act (ligningsloven). It may be applied to deny taxpayers the benefits otherwise applicable under the EU Directives regarding the taxation of parent and subsidiary companies; royalty and interests; and mergers and divisions or applicable under double taxation treaties.

According to the Danish Corporation Tax Act, Danish tax liability of a company ceases to exist once a company is considered to have gone into solvent liquidation and its proceeds have been distributed to its shareholders. Dividends distributed in the year of solvent liquidation (or exit) are generally considered to constitute capital gains and are, therefore, seldom subject to taxation. However, the proceeds are still considered to be dividends if a shareholder owns more than 10% of the shares in the company and is subject to limited tax liability on dividends according to the Danish Corporation Tax Act.

When the taxation must be waived or lowered pursuant to the Parent-Subsidiary Directive or a relevant double taxation treaty, the limited tax liability does not include dividends from subsidiaries.

Facts of the cases
A Danish company served as a holding company in a larger international group. The company had been established at a time when Danish tax legislation made Danish holding companies popular. However, the group eventually desired to simplify its structure and wanted to move a holding company in Bahamas and the one in Denmark to Luxembourg.

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Before relocating the Danish company, the group wanted to know if this would trigger Danish tax on dividends and sought a binding advance ruling on the matter. As part of the proceedings, the company informed the tax authorities that it was not the policy of the company to pay dividends to the parent company and that it did not contemplate winding up the company.

The tax authorities denied exemption from dividend tax under the EU Parent-Subsidiary Directive as the tax authorities argued that the main reason – or, at the very least, one of the main reasons – for the relocation of the Danish company was to achieve a more favourable tax position and that the move was not based on commercial consideration. This ruling was prompted by the fact that the parent company had previously been relocated from Bahamas to Luxembourg because dividends paid to a parent company in Bahamas would be subject to Danish taxation.

The National Assessment Council agreed with the tax authorities since the company failed to provide documentation proving the commercial reasons for the relocation.

Bech-Bruun's comments

In this case, the advance ruling of the National Assessment Council seems to put the burden of proving that the contemplated action is based on commercial reasons squarely with the taxpayer. The tax authorities presumed that the purpose of first relocating the parent company and subsequently the subsidiary was to achieve a beneficial tax position and the taxpayer was required to produce documentation that this was not the case. This approach goes against the preliminary work regarding the GAAR which states that it rests with the tax authorities to determine whether a tax arrangement is an artificial one. If the tax authorities are able to lift this burden of proof it will be for the taxpayer to prove otherwise.

Moreover, when compared with some of the other cases taking the GAAR into consideration, it appears, in this case, that the tax authorities and the National Assessment Council did not consider it to be important that no dividends were to be distributed or that the parent company was considered to be the beneficial owner under EU law and should be able to claim the benefits as such.

The case is the first in which the GAAR has been used for denying a company the benefits it could otherwise claim; and what will happen next and to what extent the above approach will apply to these cases going forward will be of great importance to anyone having holding companies in Denmark. The decision has been appealed and the final outcome is, therefore, still pending.

Tags

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