



# DENMARK



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## INTERNATIONAL DEVELOPMENTS

### 1. WHAT ARE RECENT TAX DEVELOPMENTS IN YOUR COUNTRY WHICH ARE RELEVANT FOR M&A DEALS AND PRIVATE EQUITY?

On 19 December 2017 a new bill was adopted ensuring that companies can deduct payroll costs to employees working with the acquisition of enterprises. Prior to the bill only operating costs, i.e. payroll costs spent on obtaining, securing and maintaining income were deductible. With the bill the Government seeks to improve the circumstances for doing business by decreasing the administrative burden on enterprises caused by their not being able to deduct all payroll costs, but instead having to calculate in detail how much time the individual employees have spent on non-deductible activities must be dismissed. The new rule applies to payroll costs for employees and directors (both executive and non-executive) but not costs related to outside parties, e.g. accountants.

In March 2018 a new bill was introduced amending the rules regarding tax free cross-border mergers and divisions of Danish companies. With the bill the Government seeks to remove the current possibility to use an earlier date of merger or division than the date of the decision in the company(ies). The aim is to prevent taxable income being allocated from Denmark to another country by allowing mergers with retroactive effect. The amended rules will also apply to the transfer of assets. However, if the receiving company and the ceasing company both before and after the decision of the merger are subject to Danish international joint taxation the rules will not apply.

### 2. WHAT IS THE GENERAL APPROACH OF YOUR JURISDICTION REGARDING THE IMPLEMENTATION OF OECD BEPS ACTIONS (ACTION PLANS 6 AND 15 SPECIFICALLY) AND, IF APPLICABLE, THE AMENDMENTS TO THE EU PARENT-SUBSIDIARY DIRECTIVE AND ANTI-TAX AVOIDANCE DIRECTIVE?

Denmark has implemented the OECD BEPS Action Point 6 and amendments to the EU Parent-Subsidiary Directive. The 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 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 these two provisions. 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 hadn't been 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 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 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 around obtaining the tax directive or tax treaty benefits still exists. Uncertainty will at least exist pending on further specific administrative or court rulings 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.

Denmark has also implemented Action Point 13 of the BEPS Initiative (Guidance on the Implementation of Transfer Pricing Documentation and Country-by-Country Reporting). The OECD's recommendation of BEPS Action Point 13 has been directly implemented.

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. However, the Danish Ministry of Taxation has published a government order which more precisely describes the information that the country-by-country report must contain.

Regarding Action Point 15, the Government has announced that a bill will be introduced providing the domestic legal grounds for Denmark to sign the MLI agreement. Though the bill has not been introduced yet, it formed part of the legislative program of 2017/2018 and thus is expected in the near future.

The Anti-Tax Avoidance Directive is generally not expected to cause significant changes to taxation of Danish companies, as the majority of the initiatives are already established principles in Denmark.

## GENERAL

### 3. WHAT ARE THE MAIN DIFFERENCES BETWEEN AN ACQUISITION OF SHARES AND 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. 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.

#### Tax advantages:

It is usually possible to carry-forward losses.

The capital gain realised by the seller on the sale of shares is often tax-exempt.

#### Tax disadvantages:

No deduction is possible on share deals.

#### 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 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.



### **Tax advantages:**

When acquiring assets, it is possible to depreciate the purchase price according to specific rules. 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.

Goodwill may generally be depreciated over seven years.

### **Tax disadvantages:**

It is not possible to carry-forward losses.

## **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 AMORTISATION OF GOODWILL IN YOUR COUNTRY?**

Goodwill may generally be amortised over seven years. Goodwill forming a part of the acquisition price for shares cannot be amortised.

### **6. WHAT ARE THE LIMITATIONS TO THE DEDUCTIBILITY OF INTEREST EXPENSE? ARE THERE SPECIAL INTEREST LIMITATIONS IN THE CASES OF ACQUISITION OF SHARES AND ASSETS?**

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. This limitation only applies if debt to companies within a group exceeds DKK 10 million.
- 2)** A limitation based on the value of assets: Net financing expenses are limited to an amount corresponding to 2.9% of certain assets (the asset limitation). The rate of 2.9% is adjusted annually. The limitation percentage does not apply to net financing expenses up to DKK 21.3 million calculated on a group basis.
- 3)** A limitation based on annual profits: Net financing expenses may not exceed 80% of earnings before interest and tax (the EBIT limitation). Net financing expenses below DKK 21.3 million (calculated on a group basis) will be deductible under the EBIT limitation rule, but may be reduced according to the thin capitalisation rules described above.

As Denmark is subject to the EU Anti Tax Avoidance Directive (ATAD) it is expected that the EBIT rule will be amended to align with the EBITDA rule in the ATAD. No bill to amend the rule has been proposed as of yet.



As set out in the directive, there is a transition period until the end of the first full fiscal year following the date of publication of the agreement between the OECD members on the official website on a minimum standard regarding BEPS Action 4. However, this period will end by 1 January 2024 at the latest.

## **7. WHAT ARE COMMON STRATEGIES TO PUSH-DOWN THE DEBT ON ACQUISITIONS?**

Acquisition of a Danish corporation is often structured to reduce the tax base of the Danish target company by interest expenses incurred on the acquisition debt or by virtue of other deductible expenses.

This is achieved through the establishment of a Danish acquisition vehicle which partly debt finances the acquisition of the Danish target. Through the formation of a Danish (mandatory) tax consolidation group comprising the Danish target company and the Danish acquisition vehicle, the interest expenses on the acquisition debt and other deductible expenses can, subject to restrictions on deductions of interest and the utilisation of tax losses, be utilised to reduce the tax liability of the Danish target company.

The abovementioned rules regarding the limitation of deduction of interest expenses apply.

## **8. ARE THERE ANY TAX INCENTIVES FOR EQUITY FINANCING?**

There are no incentives for using equity financing in Denmark, apart from avoiding thin capitalisation where by foreign debt outweighs the equity at a 4:1 ratio.

## **9. ARE LOSSES OF THE TARGET COMPANY(IES) AVAILABLE AFTER AN ACQUISITION IS MADE? ARE THERE ANY RESTRICTIONS ON THE USE OF SUCH LOSSES?**

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 8,205,000 (approximately €1,102,000). 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 8, 205,000 for the group as a whole.

If the loss carried forward exceeds DKK 8,205,000, 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 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.



**10. ARE THERE ANY ITEMS THAT SHOULD BE INCLUDED IN THE SCOPE OF A TAX DUE DILIGENCE THAT ARE VERY SPECIFIC TO YOUR COUNTRY?**

When performing a tax due diligence in Denmark, there are no specific items that must be included. However, it is important to note that the fine for not having prepared proper transfer pricing documentation is quite high. It is also important to note that the Danish Tax Authorities can make corrections in the company's taxable income regarding intra-group transactions until approximately five years after the transaction has taken place.

**11. 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.

**12. ARE THERE ANY RESTRICTIONS ON THE CORPORATE TAX DEDUCTIBILITY OF ACQUISITION COSTS?**

According to Section 8J of the Tax Assessment Act, expenses related to acquisition costs are, in general, not deductible if the acquisition is for the purpose of participation in management.

However, companies can deduct salaries of employees working on the acquisition of enterprises.

**13. CAN VAT (IF APPLICABLE) BE RECOVERED ON ACQUISITION COSTS?**

The Danish Tax Authorities will allow a company to deduct VAT in relation to the acquisition of assets if the acquiring company intends to supply services subject to VAT. As a main rule the Danish Tax Authorities will not allow a company to deduct VAT in relation to the acquisition of shares. However, following the decisions from the European Court of Justice in C-108/14 (Larentia + Minerva) and C-109/14 (Marenave), 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.

**14. ARE THERE ANY PARTICULAR TAX ISSUES TO CONSIDER IN THE ACQUISITION BY FOREIGN COMPANIES?**

The only particular issue to consider when acquiring a foreign company is whether a double taxation treaty is in place between Denmark and the other country.

**15. CAN THE GROUP REORGANISE AFTER THE ACQUISITION IN A TAX NEUTRAL MANNER THROUGH MERGERS OR A TAX GROUPING?**

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.

**16. ARE THERE ANY PARTICULAR ISSUES TO CONSIDER IN CASE OF A TARGET COMPANY THAT HAS SIGNIFICANT REAL ESTATE ASSETS?**

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 regarding corporate income tax (application of the participation exemption regime under the standard conditions) and transfer tax (absence of transfer tax).



**17. IS FISCAL UNITY/TAX GROUPING ALLOWED IN YOUR JURISDICTION AND IF SO, WHAT BENEFITS DOES IT GRANT?**

In Denmark, joint taxation is obligatory for national groups. All Danish companies and Danish 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.

**18. DOES YOUR COUNTRY HAVE ANY SPECIAL TAX STATUS SUCH AS A PATENT BOX FOR COMPANIES THAT HOLD INTANGIBLE ASSETS?**

Denmark has no special tax status for companies that hold intangible assets.

**19. DOES YOUR COUNTRY IMPOSE ADVERSE TAX CONSEQUENCES IF OWNERSHIP OF INTANGIBLES IS TRANSFERRED OUT OF THE COUNTRY?**

If ownership of intangibles is transferred out of Denmark, and Denmark does not retain the right of taxation, the intangibles will be considered to have been sold for tax purposes. This entails that the gain on the intangibles, though not yet realised, will be taxed in Denmark.

The taxation can be postponed if the intangibles have been transferred to an EU Member State and that the company is still the owner of the intangibles. If postponement is possible and is opted for, the payment is made over seven years conditional upon the company paying 1/7 of the payable tax each year and provided the outstanding amount accrues interest at a rate of at least 3% per year.

## **SELL-SIDE**

**20. HOW ARE CAPITAL GAINS TAXED IN YOUR COUNTRY? WHAT, IF ANY, GAINS ARISING IN AN M&A CONTEXT ARE ELIGIBLE FOR SPECIAL TREATMENT?**

There is no taxation in Denmark of capital gains on shares realised when the seller is not a Danish tax resident entity.

If the seller is a Danish tax resident, entity capital gains are usually taxed at the regular corporate income tax rate of 22% for 2018.

Shareholdings are divided into three groups depending on the ownership percentage:

Tax exemption is granted for 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). However, it is a condition that the subsidiary is a Danish subsidiary or a foreign subsidiary which is liable to tax in the state in which the subsidiary is resident and that the tax authorities in this state is obligated to exchange information with the Danish tax authorities according to a DTT or another relevant agreement.

If the shareholding constitutes less than 10% of the share capital and the shares are “unlisted shares” capital gains realised on the transfer of shares are tax exempted.

By contrast, if the shareholding constitutes less than 10% of the share capital and the shares are “listed shares” (shares that are listed on the stock exchange or similarly regulated markets) capital gains realised on the transfer of shares are subject to tax at the ordinary corporate rate of 22% for 2018.



### **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.

## **21. IS THERE ANY FISCAL ADVANTAGE IF THE PROCEEDS FROM THE SALE OF SHARES ARE REINVESTED?**

There are no fiscal advantages when reinvesting the proceeds from a sale.

## **22. ARE THERE ANY LOCAL SUBSTANCE REQUIREMENTS FOR HOLDING 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, the above mentioned conditions regarding tax exemption for capital gains are met 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.

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.

## **23. ARE THERE ANY SPECIAL TAX CONSIDERATIONS REGARDING MERGERS/SPIN-OFFS?**

Denmark has fully implemented the merger directive.

## **MANAGEMENT INCENTIVES**


## **24. WHAT ARE THE TAX CONSIDERATIONS IN YOUR JURISDICTION FOR MANAGEMENT INCENTIVES IN CONNECTION WITH SELLING OR BUYING A COMPANY?**

Companies are able to grant their employees employee shares (shares, RSUs, PSUs, purchase rights and subscription rights) at no cost or at a favourable price without the employees having to pay income tax on the value at the grant date. Instead, the employees become liable to pay tax when they sell their shares, at which point any legalised gains will be taxed as equity income (maximum 42%).

According to the provision in Tax Assessment Act section 7P (in Danish "Ligningsloven"), a number of criteria must be met in order for the rules on employee share schemes to be applicable:

- (i)** the employee and the employer company must agree on the granting of shares being subject to s. 7P;
- (ii)** the value of the granted shares may not exceed 10% of the employee's annual salary;



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- (iii) the shares must be granted by the employing company or a consolidated company as part of an employment relationship, for which reason board members cannot qualify as eligible grantees;
  - (iv) shares granted under employee share schemes must not make up a special class of shares;
  - (v) purchase and subscription rights may not be assigned to any third party.

The company is at liberty to decide whether the shares should be granted to all of its employees or only to certain employees.

The cost relating to the benefits of a qualifying section 7P scheme are non-deductible for the employer. However, costs relating to the implementation etc. of the scheme are deductible for the employer company.

If the company wants the costs relating to the scheme to be deductible they can use the provision in The Law of Assessment section 28 instead. According to this provision the employee is taxed of the value of shares at vesting (a total tax rate of up to 55.8%).

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