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Recent developments in international taxation: Denmark

Introduction

In recent years, Denmark (and the Danish tax authorities) has been at the front of the development within the assessment of beneficial ownership related to withholding tax on outbound dividend, interest and royalty payments. As part of the European Union, cases have been referred from the Danish courts to the European Court of Justice on the interpretation and application of EU law. Many of these cases have now also been settled with the Danish Supreme Court and provide guidance for assessing current and future outbound payments from Denmark. The subject of beneficial ownership is of particular interest for inbound investments, and it will continue to develop over the coming years.

While the major court disputes on withholding tax may have been settled, in the past 12 months there have been some important changes to Danish tax law, and several landmark cases have been decided.

This report provides a brief overview of some of these changes and decisions.

General improvements for Danish start-ups

In 2024, the Danish government and various political parties released several initiatives of significance for Danish start-ups which seek to improve the tax and regulatory framework for the sector (*Iværksætterpakken*).

Many of the initiatives have already been implemented and entered into force from 1 January 2025, while the remainder of the tax-related initiatives are expected to be converted into regulation entering into force in 2026 and onwards. Some of these tax-related initiatives are:

1. tax exemption for dividends on unlisted portfolio shares;
2. electing realisation principle for capital gains on listed portfolio shares;
3. more attractive rules regarding R&D costs;
4. reduced minimum salary in the expat tax regime; and
5. higher base amount for tax loss carry-forwards.

Tax exemption for dividends on unlisted portfolio shares

On 19 December 2024, the Danish Parliament passed a bill exempting dividends on unlisted portfolio shares from tax for Danish corporate shareholders and for foreign corporate shareholders reducing the withholding tax percentage to zero. Before the bill entered into force on 1 January 2025, dividends on unlisted portfolio shares were taxed at 15.4 per cent for Danish corporate shareholders, while foreign corporate shareholders were subject to a 27 per cent withholding tax, with the possibility to request the Danish Tax Agency for a dividend tax refund down to 15 per cent.

Portfolio shares are defined as shares where the corporate shareholder owns less than 10 per cent of the portfolio company, ie, shares that neither qualify as subsidiary shares nor group shares. Shares in foreign companies are only defined as unlisted portfolio shares if the foreign

company is equivalent to a Danish limited liability company (*Aktieselskab* or *Anpartsselskab*).

The tax exemption applies to both Danish and foreign corporate investors entailing that no withholding tax applies to dividend distributions. However, the tax exemption only applies for foreign corporate investors that do not control the portfolio companies despite having an ownership share of less than 10 per cent, unless the foreign company is a resident of the EU/European Economic Area or a resident of a state which has a double tax treaty with Denmark. The tax exemption does not apply if the portfolio company can deduct the dividend distribution.

Further, the recipient of the dividend must be the beneficial owner, otherwise the dividend is taxed at 22 per cent.

Electing realisation principle for capital gains on listed portfolio shares
Danish companies are generally taxed on unrealised capital gains on listed portfolio shares on an annual basis in accordance with the mark-to-market principle.

As of 1 January 2025, companies may elect to be taxed only on realised capital gains (realisation principle) on listed portfolio shares in a limited seven-year period after an initial public offering (IPO). The election is only valid for seven years after the IPO. However, investors who acquire shares after the IPO can elect to use the realisation principle for the remainder of the seven-year period. The election, once it is made, is binding for the entire seven-year period after the IPO and applies to all shares in that company.

The realisation principle may also be elected for shares that have been listed up until 31 December 2024. However, in order for shareholders to apply the realisation principles with retroactive effect, the shares must have been purchased or owned at least 30 days before the IPO, and the shareholder must request the Danish Tax Agency for permission to apply the realisation principle before 1 July 2025.

The election for the realisation principle can be made for listed shares in both Danish and foreign companies.

More attractive rules regarding R&D costs
Losses deriving from R&D activities may be converted to a cash payment equal to the tax value of the loss incurred. Currently, the cap on the amount payable is DKK 25m. As of the 2027 financial year, this cap will increase to DKK 35m.

Reduced minimum salary in the expat tax regime
Certain employees working in Denmark who have not been a Danish tax resident within the past ten years may apply to be taxed under the so-called expat regime (*Forskerskatteordningen*).

Under the expat regime, the employee is only taxed at a rate of 27 per cent plus eight per cent labour market contributions for up to seven years. As labour market contribution is levied before income tax, the effective tax rate under the expat regime is 32.84 per cent. Certain conditions must be met, including that the employee must be guaranteed a salary of at least DKK 78,000 (2025 level).

As of the 2026 financial year, this requirement will be reduced with the minimum guaranteed salary being lowered to DKK 63,000. The minimum salary requirement is adjusted on an annual basis.

Higher base amount for tax loss carry-forward
Companies may carry tax losses forward indefinitely. Tax loss carry-forwards from previous income years may only be fully deducted in taxable income up to a base amount of DKK 9.825m (subject to annual indexation). In excess of the base amount, tax loss carry-forwards may only reduce the remaining taxable income up to 60 per cent.

As of the 2025 financial year, the base amount in which the tax loss carry-forwards from previous years may be fully deducted is increased to DKK 20.829m, which is a significant improvement.

This increase in the base amount is set to accommodate start-ups with large deficits in the start-up phase, while also increasing the utilisation of tax loss carry-forwards within a joint tax group.

Supreme Court ruling: new development in transfer pricing
In a judgment from 9 January 2025, the Supreme Court ruled in favour of a Danish company that the Danish tax authorities were not entitled to correct the company's transfer pricing as the Danish tax authorities had failed to prove that the intra-group transactions were not at arm's length. The Supreme Court judgment underlined that the Danish tax authorities must meet a strict burden of proof in demonstrating that the taxpayer's transfer pricing does not reflect arm's-length conditions, and that a thorough functional analysis consistent with the OECD Guidelines is critical for validating the taxpayer's approach.

The case involved two controlled transactions. The first one was an agreement on secondment of staff between the Danish company and a group company from Luxembourg. The Danish company paid the direct and indirect salary of the employees and an additional profit margin of 30 per cent to lease the employees.

The other agreement was a licence agreement for intellectual property owned by a group company. The Danish company paid a royalty rate of 7 per cent for the utilisation of the intellectual property.

The Danish tax authority claimed, inter alia, that the transfer pricing documentation was significantly insufficient, and that the profit margin and the royalty rate should be reduced substantially to 4.1 per cent and 7.27 per cent respectively.

The Supreme Court ruled that the Danish tax authorities may only make a discretionary price determination if the Danish tax authorities prove that the transfer pricing documentation is or was significantly insufficient. The ruling further clarified that even minor deficiencies in the documentation might not necessarily render it significantly insufficient if the overall analysis is in line with accepted transfer pricing principles.

In the case, the Supreme Court found that the transfer pricing documentation was not 'significantly insufficient' as the pricing had been determined according to the OECD Guidelines, and the documentation included a well-reasoned choice of methodology, a functional and risk assessment and a comparison analysis based on sufficient data.

Furthermore, the Supreme Court found that the tax authorities had not lifted their burden of proof that the prices were not set at arm's length, stating that the Danish company had determined their prices in accordance with generally accepted methods.

Improved rules on succession
Businesses may under certain conditions be transferred to close family members with tax succession. This entails that the transferor of the business is not taxed on an estimated capital gain. Instead, the acquirer succeeds in the tax position of the transferor regarding the purchase price, purchase date, depreciation of assets, etc.

Close family members are defined as:

- children/stepchildren and their children;
- parents;
- cohabitants;
- spouses of deceased children/stepchildren; and
- foster children.

Gifts and inheritance to spouses are tax exempt, while close family members are subject to gift and estate tax.

On 8 April 2025, the Danish Parliament passed a bill that aims to make it easier to transfer businesses to the next generation in the family. The new legislation includes:

1. reduction of the gift and estate tax when transferring businesses to close family members;
2. right to a schematic valuation of the transferred business; and
3. equal tax treatment between active rental businesses and other businesses.

Reduction of the estate and gift tax
The new legislation will reduce the current estate and gift and estate tax rate of 15 per cent to 10 per cent when transferring businesses to close family members when the requirements for completing a transfer of a business with tax succession are met. As of the 2027 financial year, siblings will also be covered by the reduced tax rate.

Right to a schematic valuation
Under current rules, a business that is transferred as part of a succession is valued based on the equity of the business with the addition of a calculated goodwill. The calculation of the goodwill is usually based on historical earnings.

The new legislation introduces a schematic valuation of businesses, ensuring a higher degree of predictability. The new method of valuation is similar to the previous method but entails a more simplified calculation of goodwill. Family-owned businesses have a right to use the schematic valuation method when certain conditions are fulfilled:

1. the business transferred may be transferred with tax succession;
2. the transferor has owned the business at least one year prior to transferring; and
3. the transferor or their close family members have actively participated in the business.

When these conditions are fulfilled, the business can be valuated with the use of the schematic valuation method, unless (1) the most significant part of the business consists of activities that have resulted in commercial sales for less than three years at the time of transfer; or (2) if the most significant part of the business consists of research and development and ownership of intellectual property that have not yet yielded a return. In such circumstances, the schematic valuation method will not result in an accurate valuation of the company, and the value may instead be determined using other methods.

Equal treatment between active rental businesses and other businesses
Under the previous legislation, active real estate rental businesses could not be transferred with tax succession to close family members. With the new legislation, active real estate rental businesses may be transferred if:

- the transferor or related family members own at least 50 per cent of the business;
- an independent third party does not carry out the task of concluding contracts of major importance to the operation of the business; and
- the real estate has been owned by the business for at least one year prior to the transfer and has been actively rented out, *or* the real estate has been included as a part of an overall business engaged in rental that has been owned for at least one year.

Supreme Court ruling: when are capital gains on unlisted portfolio shares exempt from tax?
In a recent significant judgment from 5 February 2025, the Supreme Court has ruled on a matter that provides important guidance on the tax treatment of capital gains from the sale of shares in non-Danish companies.

The matter arose after a Danish company sold its shares in a UK-based private company limited by shares in June 2016. The Danish company sought confirmation from the Danish tax authorities through a binding ruling that the capital gain from this sale would be tax exempt under Danish law. However, the authorities denied the exemption – a decision that was subsequently upheld by both the Danish Tax Appeals Agency and the Eastern High Court.

The matter of the case was whether the UK-based private company limited by shares could be considered equivalent to a Danish public limited company (*aktieselskab*) or private limited company (*anpartsselskab*) for the purposes of tax exemption under the Danish Capital Gains Tax Act. The law provides tax exemption on capital gains from the sale of portfolio shares if the company in which shares are sold is either a Danish public limited company or private limited company or a foreign company that is 'equivalent' to such Danish entities.

The Danish company arguing the matter before the Supreme Court also argued that denying the exemption would violate the EU's rules on the free movement of capital.

The Supreme Court's judgment focused on the legislative intent behind the Danish tax rules. A key requirement for equivalence is that the foreign company must distribute dividends to shareholders in proportion to their shareholding, mirroring the rules for Danish public limited companies or private limited companies.

In this case, the Supreme Court found that dividends were not distributed according to shareholding, but rather based on ‘service fees’ which were linked to an underlying activity. As a result, the UK-based company did not meet the equivalence requirement set out in Danish law.

In relation to the EU law argument, the Supreme Court reviewed relevant case law from the Court of Justice of the European Union (CJEU). The Court concluded that the Danish rule, which requires proportional dividend distribution, applies equally to both Danish and foreign companies. There was no evidence that this rule generally disadvantages cross-border investments. Therefore, the rule was not discriminatory and did not constitute a restriction on the free movement of capital under Article 63 of the Treaty on the Functioning of the European Union (TFEU). The Court also saw no need to refer the matter to the CJEU for a preliminary ruling.

The Supreme Court then ruled in favour of the Danish Ministry of Taxation.

This judgment provides clarification for companies and tax practitioners regarding the criteria for tax exemption on capital gains from the sale of shares in non-Danish companies, and that individual assessment on outbound investments is essential to align on expectations for the tax treatments of future gains.