1 Introduction

On the international tax scene, the BEPS 2015 Final Reports are one of the most important, and most discussed, happenings in 2015. The BEPS Reports will, and already have, influence the tax legislation in not only the 34 Organization for Economic Co-operation and Development (OECD) Countries but also the tax system in the entire world. So is the situation for the Nordic Countries. Further, several of the BEPS 2015 Final Reports suggest changes in both the OECD Model tax convention and the OECD Commentary.

Although most of the BEPS-influenced changes in domestic legislation will come in the future, we already see some changes in domestic tax legislation in the Nordic countries. In Denmark, for example, with effect for fiscal year 2016, Section 3B of the Tax Control Act has been amended to provide for a country-by-country (CbC) report that is the key element of BEPS Action 13.

In Norway, there is an ongoing tax reform, and several of the issues at discussion will be influenced by the BEPS project. One suggestion is the introduction of withholding taxes on interest and royalty payments, another is a tightening up of the interest deduction limitation rule. Further, the Government is also notifying that the Ministry of Finance will review the CFC taxation legislation. This review will include an examination of whether the current distinction between active and passive income is appropriate.

Also in Sweden, there is work going on reforming the Swedish tax system. The outcome of two major committees on income tax in Sweden is still pending. First, the major reform of the Swedish corporate tax system that was presented by the Committee on Corporate Income Taxation in 2014 met harsh criticism and is expected not to become law. Instead a new, less radical proposal is on the way. The new proposal will most likely introduce some form of interest deduction limitation rules. However, the proposed rules will be more in line with similar rules in other countries. Second, there is a committee working on a proposal regarding the tax rules for closely held companies.

In Finland, the law transposing the amendments to the EU Parent-Subsidiary Directive¹ into domestic law regarding the new anti-avoidance measure for dividends was enacted with effect from 1 January 2016. In Sweden, the implementation of the new anti-avoidance measure in the Parent subsidiary directive has been more difficult. Initially, the new provisions of the Directive concerning tax avoidance were proposed to be implemented by making the Swedish general anti-avoidance legislation applicable to the Swedish withholding tax on dividends. This part of the proposal was criticized and a revised proposal was presented in July 2015. The Government basically argued that an already existing—in practice almost never applied—tax avoidance provision in the Swedish Withholding Tax Act was sufficient for achieving the intended outcome of the amendments to the Directive. This proposal entered into force on 1 January 2016.

In addition to important changes, and upcoming changes in domestic legislation, there are also many interesting and important case law decision both regarding national and international tax law issues from the Nordic Countries. In Sweden, for example, the Supreme Administrative Court has dealt with taxation of poker winnings. Further, in Norway and Sweden, the Supreme Court and the Supreme Administrative Court, respectively, have dealt with classification issues for tax treaty purposes.

The article aims to be up to date up until 1 January 2016.²

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² The content of the information in the countries is solely written by the author mentioned in the footnote of the Country section.
2 Denmark

By Inge Langhave Jeppesen

2.1 Introduction

Owing to the parliamentary election on 18 June 2015, yet another new Minister for Taxation has been appointed. Karsten Lauritzen (The Liberals/Venstre) replaced Benny Engelbrecht (The Social Democratic Party/Socialdemokratiet) on 28 June 2015.

2.2 Tax initiatives

2.2.1 Abolition of the Commission on Pension Savings

In Danish Tax News 2014:2, it was reported that a commission on pension savings had been formed. Depending on its results, it could have led to amendments to the current tax regime for pension schemes. The commission’s report was due in the autumn of 2016. The new Danish government has taken a different view on the topic, thus changing the scope of the commission’s work to such a degree that the Commission on Pension Savings has been abolished.

2.3 New legislation

2.3.1 Exit taxation on natural persons

An amendment to the Danish exit taxation on natural persons has been adopted by Law No. 202 of 27 February 2015. One amendment is the gathering of all the provisions on exit taxation in Section 10 of the Tax at Source Act. Another amendment is a clarification of the provision. That is, all assets, which are no longer subject to Danish taxation, will be subject to exit taxation. Contrary to the former provisions, this is also the case for assets, which haven’t been included in a business activity, if only the capital gain arising from that asset would have been subject to taxation upon disposal. It is the mere transfer of the asset that gives rise to exit taxation, as the transfer is regarded as a disposal. The value of the asset at the time of the transfer is regarded as the selling price.

It is possible for the taxpayer to postpone the payment of the exit tax if the asset is transferred to another EU/EEA country. It is now for the natural person to decide whether to profit from the postponement or not. When deciding to do so, the postponement is to be recorded in a special postponement account pursuant to Section 73 B and 73 C of the Tax at Source Act. The functioning of the postponement account is similar to the one prevailing for companies. Furthermore, the making up of the postponement account has been amended in order to secure similarity with the making up used for shares.

2.3.2 Tax haven initiatives

As already mentioned in Danish Tax News 2015:1, the former Minister for Taxation launched an initiative to minimize the use of tax havens. It led to the adoption of Act No. 540 on 29 April 2015. The initiative concerns an international general anti-avoidance rule, taxation of settlors of trusts and fair taxation of assets expatriated from Denmark. Reference is made to chapter 3 Denmark in Nordic News for a further explanation of the initiative.

2.3.3 DIAS—digitalization of the taxation of companies

Time has come to digitalize within the area of taxation of legal persons (company taxation)—in short, referred to as DIAS. The idea is to digitalize the tax return process, including losses to be carried forward. Part of the digitalization process was the registration of losses that can be carried forward. This led to the adoption of Act No. 528 of 28 May 2014, giving way to the demand for a one-time registration of losses from the income years 2002–2013. The legislation was followed by a ministerial order setting up the framework for the registration. One of the requirements was that companies and so on should register their losses no later than 1 August 2015. A lack of registration would lead to cancellation of the losses. In other words, a company would never be able to offset a loss from the period 2002–2013 against a future gain, in the case of a late/lacking registration.

With the passing of time, it has become apparent that the DIAS project cannot be realized in the way that it was first planned. Furthermore, a delay has occurred. There-

3 Reference is made to Danish Tax News 2014:1 where a short description can be found.
fore, by Act No. 540 of 29 April 2015, the period for registration of losses has been extended and registration must take place no later than 1 September 2015. Furthermore, a late/lacking registration will only lead to a fine of DKK 5,000.

2.3.4 EFI (Et Fælles Inddrivelsessystem), A united system for the collection of public receivables—major challenges.

Another Danish project within the area of digitalization is the so-called EFI system. The idea was to create a system supporting the collection of public receivables thus making the collection more efficient. In autumn 2015, the Legal Adviser to the Danish Government issued a report saying that the current system didn’t secure the collection of public receivables being performed on a legal basis. Thus the Minister for Taxation suspended the use of EFI that has resulted in an almost nonexistent collection of public receivables. In order to be able to collect these receivables later on, it has been necessary to pass an amendment to the normal statute of limitations. It has been decided that the starting point for the statute of limitations on a public receivable, which was to be collected by SKAT on 19 November 2015 or later, is postponed until 20 November 2018. As a main rule such receivables are subject to limitation within three years, thus making it possible for SKAT to collect them until 20 November 2021.

2.3.5 The House Job Scheme (Bolig Job ordning)—backwards and forwards

The Danish House Job Scheme has been reintroduced after having been abolished from 1 January 2015. During the election campaign, the Liberals promised to reintroduce the special scheme and did so on 3 July 2015. The bill was passed on 26 August 2015 as a mere reintroduction of the former scheme, granting private households tax deduction for wages paid for services conducted in owner-occupied houses.5

From 1 January 2016, a new “green” scheme has been introduced. Private households are still granted a tax deduction (up to DKK 6,000) for the wages paid for cleaning and gardening services. A tax deduction (up to DKK 12,000) for wages paid for other services conducted in owner-occupied houses is granted on the condition that the service rendered can be qualified as a “green” renovation, which covers energy savings or improvements of the environment. Furthermore, wages paid for installments of broadband are also deductible.

2.3.6 The Danish tonnage taxation

It is probably well known that Denmark has a special scheme for taxation of shipping companies. The regulation is laid down in the Tonnage Tax Act. Pursuant to the Tonnage Tax Act a shipping company transporting passengers or goods between different destinations is entitled to taxation according to the special tonnage tax scheme. The conditions in Sections 6–8 of the Tonnage Tax Act must be met. Not all activities involving transportation by boat can benefit from the tonnage tax. The excluded activities are listed in Section 8 of the Tonnage Tax Act. In order to improve the competitive conditions for the Danish shipping industry, the kinds of activities that can profit from the tonnage tax (when performed at sea) are now expanded to include the following:

- Watch duty;
- Duties within supply at sea;
- Construction, repair, and dismounting of wind turbines or other plants at sea, when performed outside of the Danish territory at sea or continental shelf;
- The laying out, inspection, and repair of pipelines or cables at the seabed;
- Handling of ice not being an activity within towage; and
- Accommodation and support vessels (ASV), that is, housing of employees, spare parts, or repair facilities within offshore activities.

In the future, the special scheme for tonnage tax will be extended to include activities not necessarily being transportation of passengers or goods but closely related to this kind of activity. As the current Tonnage Tax Act constitutes state aid, the extension in relation to the above-mentioned activities must be approved by the European Commission before coming into force.

2.3.7 Country-by-country reporting

Section 3 B of the Tax Control Act regulates the demand for documentation of controlled transactions. The demand for documentation is also a central issue in action 13 of the BEPS project. It’s well known that action 13 concludes

5 Reference is made to Danish Tax News 2013 for further knowledge on which services where covered by the scheme.
that in order to obtain sufficient information on controlled transactions the information must consist of a master file, a local file and finally a CbC report.

Apart from the CbC report, the Danish provisions on transfer pricing documentation do, in general, fulfill the demands laid down in action 13 of the BEPS project. By Act No. 1884 of 29 December 2015, an amendment to Section 3B of the Tax Control Act has been passed. This implements the demand for a CbC report. An ultimate parent company resident in Denmark is obliged to make up a CbC report, when the annual consolidated revenue in the immediately preceding fiscal year succeeds DKK 5.6 billion. The provision regarding the CbC report is found in Sections 3B (10–16) of the Tax Control Act.

The provision will, in general, come into force from 1 July 2016 for fiscal years beginning from 1 January 2016.

2.3.8 Tax Treaties

The agreement on exchange of information between Denmark and Hong Kong came into force on 4 December 2015. Denmark has also entered into an agreement on exchange of information with the United Arab Emirates. The agreement is not yet in force. The Minister for Taxation points out that the agreement with the United Arab Emirates was the final step in having entered into agreements on exchange of information with all potential tax havens.

Furthermore, some amendments have been made to the tax treaties between Denmark and India and Ireland and to the Nordic tax treaty. Some of the amendments concern exchange of information, whereas others deal with the actual relief for double taxation.

2.4 EU law and Danish tax law—potential violations

2.4.1 Joint taxation and denial of losses realized by a permanent establishment

On 19 June 2015, the Commission sent a letter of formal notice to the Danish Government regarding a possible violation of the freedom of establishment pursuant to TEU Article 49. The letter of formal notice relates to the Danish rules on preventing double dipping laid down in Section 31(2) of the Corporation Tax Act and Section 5 G of the Tax Assessment Act.

Pursuant to Section 31(1) of the Corporation Tax Act, joint taxation is mandatory for resident companies within a group. It is also mandatory for any foreign company’s permanent establishment and real estate in Denmark, if either of these are consolidated with another Danish entity—a company, a permanent establishment, or a real estate. For example, if a foreign company controls a Danish company and at the same time has a permanent establishment in Denmark, it is mandatory for the Danish company and the permanent establishment to enter into joint taxation. If the permanent establishment has a loss, it can be offset against a gain in the Danish company because of joint taxation. Pursuant to Section 31(2) of the Corporation Tax Act, the loss can only be offset against a gain, when the loss cannot be offset in the income statement for the headquarters in the residence state. Otherwise, the loss would lead to a possible double dip.

In short, Section 5 G of the Tax Assessment Act denies a company, which is fully liable to pay tax in Denmark, the deduction of costs which pursuant to foreign rules can be deducted in foreign income when the foreign income is not subject to Danish taxation.

In its letter of formal notice, the Commission makes a remark on the fact that both Section 31(2) of the Corporation Tax Act and Section 5 G of the Tax Assessment Act only apply to cross border activities in relation to groups and not in relation to purely domestic activities. This may prevent a company in another member state from setting up activity in Denmark; and it may prevent a Danish company from setting up a company abroad.

In addition, the Commission questions whether it is legitimate for Denmark, as the first in line to tax a subsidiary or a permanent establishment resident in Denmark, to have rules on double dipping. According to the Commission, such rules can only be justified in states that are not the first in line to tax the entity. The Commission refers to the ruling by the CJEU in Case C-18/11 Philips Electronics UK Ltd.

In its reply, the Danish Government has argued that it does not agree with the Commission about the situations that are to be compared in order to decide whether a violation of the freedom of establishment exists. In short, the Danish Government finds that situations where it is possible to obtain double dipping are not comparable to situations where such a possibility does not exist.

At almost the same time, the Eastern High Court has referred a case to the Court of Justice of the European Union for a preliminary ruling. The case concerns Section 31(2) of the Corporation Tax Act and its conformity with EU law. A Swedish company had a permanent establishment in Denmark as well as a Danish subsidiary. The Danish entities were subject to joint taxation. A loss had been realized in the permanent establishment because of the deduction for depreciation on goodwill according to Danish tax
law. Pursuant to Swedish tax law, it was in principle also possible to deduct for depreciation on goodwill in Sweden. However, in the actual case, the goodwill was not subject to depreciation according to Swedish law, because this was a deduction for depreciation that did not and could not take place. Nevertheless, as the depreciation on goodwill, in principle, was deductible in Sweden, pursuant to Section 31(2) of the Corporation Tax Act, the Danish tax authorities found that the loss realized by the Danish permanent establishment could not be offset against the gain in the Danish subsidiary.

In its ruling on 4 June 2015, the Eastern High Court decided that the question whether the refusal for deduction of costs pursuant to Section 5 G of the Tax Assessment Act is based on a similar condition as the refusal for deduction of losses for permanent establishments pursuant to Section 31 (2) of the Corporation Tax Act needs clarification. Furthermore, it has to be clarified whether the refusal of setting off losses pursuant to Section 31(2) of the Corporation Tax Act is in conflict with the proportionality principle.

It will be interesting to see what the future will bring on these questions. Any ruling has consequences for the Danish rules on mandatory joint taxation.\footnote{Anders Nørgaard Laursen has made a comment on the matter in The Danish Group Taxation Regime and EU Law—Clarification under way? in Kluwer International Tax Blog, 18 August 2015.}

2.4.2 Case C-48/13 Nordea Bank Denmark and its consequences

In Danish Tax News 2015:1, reference was made to the CJEU ruling in C-48/13 Nordea Bank Denmark. It was argued that the current rules on taxation of recaptured losses in the Corporation Tax Act and the Tax Assessment Act might also be found to breach the right of freedom of establishment. That is, in case of an intragroup conveyance of a company or a transfer of the place of management taxation of all former losses might be regarded as such a breach.

In the meantime, a guidance note (styrsignal) has been issued in SKM2015.505.SKAT, giving access to a “reopening” of the tax assessment in certain cases. A reopening will be possible for Danish companies having permanent establishments in an EU or EEA state, which have been taxed on recaptured losses pursuant to either the former Section 33 D (5) of the Tax Assessment Act or the so-called shadow joint taxation laid down in Section 15 (9) of Act No 426 of 6 June 2005. The shadow joint taxation is the nickname for the transitional rule regarding the former Section 33 D (5) of the Tax Assessment Act.

It is specified that the reopening of the tax assessment is not possible when the recaptured losses are taxed pursuant to the current Section 31 A of the Corporation Tax Act on voluntary international joint taxation. From this, it can be seen that the question raised by some scholars, about whether the current rules on recapturing losses constitutes a violation of the freedom of establishment, is not taken into consideration by the tax authorities.

In addition to the guidance note, the Minister for Taxation has proposed an amendment to the shadow joint taxation. A full taxation of recaptured losses will not take place if the intragroup conveyance or the transfer of the place of management takes place within EU or EEA. The amendment is not yet tabled in the Danish Parliament.

2.4.3 Denial of loss on shares in a subsidiary—a violation of the freedom of establishment?

In SKM2015.463.LSR, the National Tax Tribunal had to decide whether the tax authority’s refusal to grant a deduction for the loss resulting from the disposal of shares in a subsidiary pursuant to Section 8 in Taxation of Capital Gains on Sale of Shares Act constituted a violation of the freedom of establishment.

A Danish company H1 A/S formed a British subsidiary H2 whose shares were issued in British Pounds. Over the years, further capital contributions were made, and in 2010, the capital in H2 was GBP 197 million. H1 A/S had paid a total of DKK 2,034,525,445 for the shares. On 27 May 2010, the Danish company H1 A/S entered into an agreement on the disposal of all the shares at a price of GBP 749 million/DKK 6,448 million. Thus, the disposal of the shares resulted in a capital gain of approximately DKK 4,414 million, which could be separated into a gain on the shares of DKK 4,753 million and a currency loss of DKK 338 million.

Pursuant to Section 8 of the Taxation of Capital Gains on Sale of Shares Act, a capital loss on holdings in a subsidiary is tax exempt regardless of whether the disposal results in a loss or a gain. The Danish company argued that it should be granted a deduction for the currency loss inherent in the capital gain on the shares. Otherwise, it would be a violation of the freedom of establishment, as the refusal for the currency loss would prevent the company from making investments in another EU member state. Reference was made to C-293/06 Deutsche Shell.

In its ruling, the National Tax Tribunal put emphasis on the fact that the regulation of the capital gain on the
shares according to Danish tax law would have been the same, had the Danish parent company sold a Danish subsidiary instead of an English subsidiary—there would still have been no deduction for capital losses and no taxation of capital gains. On the basis of this analysis, the National Tax Tribunal ruled that in this situation, a cross border transaction would not be treated differently than a purely national transaction, contrary to the decision in C-293/06 Deutsche Shell.

Therefore, the refusal to grant a deduction for the currency loss was not a violation of TEUF article 49.

In the case, reference is also made to a similar Swedish case C-686/13 X AB. At the time of the decision of the National Tax Tribunal, the CJEU Advocate General had only delivered his opinion. On 10 June 2015, the CJEU ruled that article 49 of the TFEU does not preclude a Member State from exclusion of capital losses on holdings for business purposes, even if those capital losses are due to currency losses.

The decision made by the National Tax Tribunal is, therefore, in accordance with the ruling by CJEU.

2.5 Case law

2.5.1 Refusal of a tax exempt restructuring owing to tax evasion and tax avoidance

In SKM2015.226.HR, the Supreme Court ruled on whether the Danish tax authority, SKAT, could withdraw a preapproval for a tax exempt restructuring in the form of a tax exempt exchange of shares. The exchange of shares was part of a generational handover. A father, person S, was the only shareholder in company B A/S. As part of the generational handover, the holding company C A/S was founded by a tax-exempt exchange of S’s shares in B A/S—in other words, S made a tax-exempt deposit of his shares in B A/S into C A/S. With reference to article 11 in the Merger Directive, the Danish provision on the tax-exempt exchange of shares in Section 13 of the Taxation of Capital Gains on Sale of Shares Act demanded that a preapproval by the tax authorities was obtained.

S had been granted such a preapproval pursuant to the former Section 13 of the Taxation of Capital Gains on Sale of Shares Act (now Section 36) based on the information given by S on the planned generational handover. The preapproval was given on the condition that S should give notice in the event of any changes occurring to the scheduled generational handover within a period of three years.

After the foundation of company C A/S, company B Holding ApS owned by person E (the son of person S) should subscribe to shares in B A/S. Specifically, through a capital increase in B A/S, person E would indirectly become owner of 49% of the shares in B A/S. In order to finance the capital increase in B A/S, the company B Holding ApS had borrowed money from C A/S, which in turn had borrowed money from B A/S. Therefore, the capital increase in B A/S was in reality funded by funds belonging to B A/S, thus being a violation of the prohibition of self-financing in a capital company.

This part of the generational handover had not been explained to the tax authorities when applying for the preapproval. The Danish tax authorities thought that the plan for financing was such a change to the scheduled generational handover that A should have given notice. The question for the Supreme Court to decide was whether the violation of the prohibition on self-financing meant that A should not have had the preapproval to go through with the tax-exempt exchange of shares, thus making it possible for the tax authorities to withdraw the preapproval when becoming aware of the financing conditions.

At first, the Supreme Court ruled that according to the preparatory work, the demand for the preapproval laid down in Section 13 of the Taxation of Capital Gains on Sale of Shares Act was based on Article 11 of the Merger Directive, allowing a member state to deny or withdraw a preapproval of a tax exempt exchange of shares if its principal objective or one of its principal objectives is tax evasion or tax avoidance. Therefore, Section 13 of the Taxation of Capital Gains on Sale of Shares Act is a rule on preapproval based on a principle of anti-avoidance. In other words, it entitles the tax authorities to deny or withdraw a preapproval in the case of tax evasion or tax avoidance.

Having stated this, the Supreme Court had to decide whether the actual restructuring had tax evasion or tax avoidance as a principal objective. As a rule, a restructuring as part of a generational handover is not to be regarded as part of tax planning. However, as the actual generational handover included a capital increase, violating the prohibition on self-financing, the principal objective or one of the principal objectives of the generational handover was to avoid paying taxes on capital gains. Therefore, the tax authorities had the authority to withdraw the preapproval, which should not have been granted in the first place had the authorities known about the self-financing.

The decision is interesting as it states that Section 13 of the Taxation of Capital Gains on Sale of Shares Act is based on the principle of anti-avoidance, thus making it possible to deny a tax-exempt restructuring in some cases. The recently adopted international anti-avoidance rule in Section 3 of the Tax Assessment Act also covers cross bor-
der tax-exempt restructuring. It might give rise to some interplay.

2.5.2 New trends on the hiring out of labor

Danish Tax News 2014:2 mentioned that SKAT had issued a guidance note in SKM2014.478.SKAT on the definition of the hiring out of labor. The guidance note was a reaction to the development in case law, where the emphasis was almost entirely on whether the service provided constitutes part of the business activities of the Danish enterprise, without regard to who is responsible for the service provided. The guidance note spelled out that additional factors were also to be considered.

The guidance note has led to the reopening of some of the cases, which were decided when the more wide definition of hiring out of labor prevailed. Examples of this are found in SKM2015.385.SR, SKM2015.386.SR, SKM2015.388.SR, and SKM2015.389.SR.

In short, the reopening of the cases has resulted in a different decision about whether the service provided is to be regarded as hiring out of labor. While the first decisions had emphasized (almost entirely) the service being an integrated part of the Danish enterprise, the new decisions confirm that additional factors must be taken into consideration. When doing so, the result is that the agreement between the Danish enterprise and the foreign subcontractor is regarded as a project contract. Some of the factors that are taken into consideration are whether the foreign company is economically responsible (runs a risk), whether the remuneration is fixed and whether the foreign company is responsible for the management of the project, including delivering it on time.

To conclude, the understanding of the Danish rules on hiring out of labor has become more OECD uniform, as the decision-making takes into account not only the kind of service provided but also how it is done, by whom, under whose guidance, and who is economically responsible.

These factors are also decisive in several other cases on the question of whether the provision of a service constitutes hiring out of labor.

2.5.3 Income correction—is it possible to avoid the consequences?

In SKM2015.717.HR, the Supreme Court put what can be seen as a final end to the everlasting debate on income correction and especially the possibility to correct it. To be more precise, the debate regards the access for the tax authorities to attribute income to a tax subject merely because the taxpayer is regarded as the proper subject of income. It is debated whether such an attribution is covered by the Danish provision on transfer pricing in Section 2 of the Tax Assessment Act or Section 4 of the State Tax Act. The importance of this question has to do with the taxpayer’s access to avoid the consequences of such an attribution. If Section 2 of the Tax Assessment Act applies to the case, the taxpayer is entitled to the so-called “payment correction” pursuant to Section 2 (5) of the Tax Assessment Act. If not, the taxpayer will have to ask permission to reverse the transaction pursuant to Section 29 of the Tax Administrations Act.7

The debate has been going on for years and was further nourished by the rulings from the Supreme Court in SKM2012.92.HR and SKM2012.221.HR. The rulings were by some scholars seen as the Supreme Court’s acknowledgement of Section 2 of the Tax Assessment Act being applied on cases regarding attribution of income to the proper subject of income. This interpretation meant that the taxpayer was entitled to a payment correction. The opinion was based on an obiter dictum by the Supreme Court in SKM2012.92.HR saying that Section 2 of the Tax Assessment Act on controlled transactions is to include all relations between parties with a special community of interest.

In SKM2015.717.HR, income had been attributed to a natural person (a doctor) instead of his company because the doctor was regarded as the proper subject of income. The attribution resulted in double taxation—as salary in the income statement for the doctor and as a subsidy in the income statement for the company. The doctor asked for a reversion of the transaction or a payment correction.

Both claims were denied by the Supreme Court. The reversion was denied because the doctor’s transfer of income to his company was regarded as a transaction with the purpose of saving or deferring the payment of taxes.8 The payment correction was denied because the attribution of income was covered by Section 4 of the State Tax Act and not Section 2 of the Tax Assessment Act. Therefore, a payment correction pursuant to Section 2 (5) of the Tax Assessment Act was not obtainable.

In its ruling, the Supreme Court emphasized that nor in its ruling in SKM2012.92.HR neither in its ruling in

7 Reference is made to Danish Tax News 2012 and Chapter 3, Denmark in Nordic Tax News in Nordic Tax Journal, Volume 2015, issue 1 where the question is described.
8 Pursuant to Section 29 of the Tax Administration Act a reversion of a transaction is to be denied, if the transaction had a purpose of saving or deferring the payment of taxes.
SKM20012.221.HR had it takes the stand that matters on the proper subject of income were to be covered by Section 2 of the Tax Assessment Act. The Supreme Court made reference to the former ruling by the Eastern High Court. It was stated that the case was on attribution of income to the proper subject of income and not on the question of neither price nor terms of the contract between the doctor and his company. As no income correction pursuant to Section 2 of the Tax Assessment Act had taken place, the doctor was not entitled to a payment correction.

The conclusion is that taxpayers have to be very aware of transactions that might be in conflict with the proper subject of income. It will lead to a substantial double taxation, as both the shareholder and the company are taxed on the same amount. Furthermore, it is difficult to avoid the double taxation as neither a reversion nor a payment correction is granted.

### 2.6 Miscellaneous

#### 2.6.1 The circular on valuation dated 17 November 1982—new challenges

One of the oldest circulars in Danish tax law is the circular on valuation dated 17 November 1982. The circular sets out the valuation principles to be used when assets and liabilities are transferred between family members (persons covered by the Inheritance and Gift Tax Act) as part of a gift or inheritance. In practice, the circular has played an important role as the taxpayer could rely on the valuation principles it contains being accepted by the tax authorities. For example, if the valuation of shares being transferred between a father and a son followed the principles laid down in the circular, the tax authorities accepted the value. This was also the case in SKM2015.57.SR.

As referred to in Danish Tax News 2015:1, the principles in the circular on valuation are abandoned with regard to the transfer of shares. In future, the valuation must follow the guidelines explained in the guidance note SKM2015.96.SKAT.

The abolition has given rise to some debate, as it is believed that the guidelines in SKM2015.96.SKAT will result in higher values, making it especially difficult to go through with generational handovers.

Another important asset that has traditionally been transferred using the valuation principles in the circular is real estate. It is generally accepted that a valuation of a real estate within an interval of ±15% of the public property value will be accepted. In reality, this means that it will often be possible to hand over a real estate to the next generation at a favorable price.

However, in SKM2015.302.VLR, the Western High Court has handed down a decision that might be a challenge to this generally accepted ±15% model. In the actual case, the estate of a deceased person had transferred two real estate to an heir at a price lying in the ±15% interval. The tax authorities wanted an expert opinion on the value of the real estates. The question was whether the tax authorities were allowed to demand such an expert opinion or whether the valuation principle in the valuation circular constituted a binding rule, which the taxpayer could rely on.

In its ruling, the Western High Court states that the valuation principle (±15%) is not a binding rule for the tax authorities. Furthermore, there is no case law showing that an estate of a deceased person can be sure to profit from the ±15% model, when selling a real estate to an heir.

The decision concerns an inheritance outlay from an estate of a deceased person but has given rise to doubt about whether the remarks by the Western High Court also includes the use of the valuation circular in the case of real estate or other assets being handed over as a gift. It is argued that the decision means that the valuation principles in the valuation circular will not be generally accepted by the tax authorities. However, case law may support the use of the valuation circular when a transfer is made as a gift.

Despite the uncertainty following from the case, it can be concluded that the old valuation circular in Danish tax law has been challenged in spring 2015.

#### 2.6.2 Reimbursement of withholding tax on dividend – a case of fraud/scam

In the summer of 2015, it came to SKAT’s knowledge that the right for a taxpayer to get a refund of withheld taxes on dividend pursuant to a double taxation agreement had been exploited by some foreigners.

Pursuant to the Tax at Source Act Danish companies are obliged to withhold taxes on dividend at the time of disbursement. Pursuant to Section 65 of the Tax at Source Act, the withholding tax on dividend is as a main rule 27%.

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9 About the use of the ±15% in property valuation, see Jane Bolander in Retskrav på anvendelse af ±15% af ejendomsvurderingen i SRSkat 2015, no. 2, p. 30.

10 The withholding of taxes on dividend and the exemptions are currently explained further regulated in ministerial order No 499 of 27 March 2015.
Some exemptions prevail pursuant to Section 65 of the Tax at Source Act. As a main rule, a Danish company is obliged to withhold tax on dividend upon the disbursement of dividend. The shareholder can then ask the Danish tax authorities (SKAT) for a full or partly reimbursement of the withheld tax by sending an application to SKAT.

A taxpayer is entitled to a reimbursement if the actual double taxation agreement leaves Denmark (as a source country) with a limited taxing right to dividend—often 15%. A company owing subsidiary shares or group company shares can also be entitled to a relief because of the parent/subsidiary directive (2011/96/EU). The taxpayer must apply for the reimbursement. SKAT does not necessarily know the identity of the person or company having received dividend. Therefore, it is not possible to compare an application with central data on taxpayers having paid withholding tax on dividend. On the contrary, the application is processed manually at SKAT. An applying shareholder must, therefore, send documentation verifying the amount of tax paid on the dividend. The documentation has until now served as basis for the reimbursement.

Time has shown that in many cases the documentation has been false—especially on dividend from some of the major listed Danish companies. The false documentation has served as basis for reimbursement of withholding tax on dividend—that is, taxes that have never been withheld. It is believed that the fraud has led to reimbursement of up to DKK 9.1 billion. SKAT has stopped the reimbursement of withheld taxes until the proportions of the fraud have been established.

Owing to this, the Minister for Taxation has been heavily criticized by the government auditors.

3 Finland

By Kristiina Äimä and Suvi Lamminsivu

3.1 Legislative amendments

The goal of the government’s economic policy is to give a boost to economic growth and employment. Only a few legislative amendments were introduced as of 1 January 2016\(^\text{11}\).

A number of minor amendments were introduced for taxation of individuals:

- The maximum amount of the earned income credit against national tax on earned income was increased to EUR 1,260 (earlier EUR 1,025). Furthermore, the percentage used to calculate the credit is increased to 11.8% (earlier 8.6%) and the percentage to reduce the maximum credit is increased to 1.46% (earlier 1.2%).
- The maximum amount of the basic allowance for low-income earners for municipal tax purposes was increased to EUR 3,020 (earlier EUR 2,970).
- The higher tax rate for capital income received by individuals was increased to 34% (earlier 33%).
- The deductibility of mortgage interest was further limited. The percentage of interest on a loan used to purchase a dwelling in which the taxpayer or his family lives permanently is deductible as follows:
  - 55% in tax year 2016;
  - 45% in tax year 2017;
  - 35% in tax year 2018; and
  - 25% in tax year 2019.
- Capital losses accrued from 1 January 2016 may be deducted from other capital income. Earlier capital losses could only be set off against capital gains.
- A deduction for donations made to universities and institutions of higher education was introduced. The deduction is given for individuals and estates of deceased persons making a donation of at least EUR 850 and a maximum of EUR 500,000.
- The temporary expatriate regime providing a flat taxation of employment income received by qualifying foreign specialists and executives was extended until 31 December 2019.

Some of the indirect tax rates were adjusted. These adjustments include

- Excise duties on tobacco and tobacco products was increased approximately by 24%. The increase takes place in four phases within two years.
- The basic tax included in the vehicle tax for vehicles used in Finland was increased by EUR 36.5 for personal vehicles and vans.

\(^{11}\) See regeringsproposition 31/2015.
3.2 New Parent Subsidiary Directive with anti-avoidance measures for dividends

The law\(^{12}\) transposing the amendments to the EU Parent Subsidiary Directive\(^{13}\) into domestic law was enacted with effect from 1 January 2016. Section 6 a of the Business Tax Act stipulates the conditions under which dividends received from other EU/EEA companies are tax exempt for the receiving company resident in Finland. Such dividends are no longer tax exempt for the receiving company if the dividends have been tax deductible for the paying company. If the dividends were partly deductible and partly taxed, the part that has been tax deductible is fully taxed, whereas the nondeductible part of the dividends remains tax exempt.

A general anti-avoidance rule for dividends was also introduced. The benefits of Section 6 a are not granted to an arrangement or a series of arrangements whose main purpose or one of the main purposes is to obtain a tax advantage.\(^{14}\)

3.3 Possible termination of the Finland-Portugal Double Tax Treaty

Finland has been trying to renegotiate the double tax treaty with Portugal without success since 2013. The Finland is preparing to terminate the treaty, because the current treaty restricts Finland from taxing pensions paid to Portugal. Finland would like to amend the rules applicable on taxation of pensions paid to Portugal. The Ministry has announced that the negotiations are being continued although Finland is preparing to terminate the Treaty unless the countries conclude a new treaty.\(^{15}\)

3.4 Taxation of remuneration received by board members and managing directors

On 1 February 2016, the Tax Administration issued updated official guidance on the taxation of remuneration paid to board members and managing directors\(^{16}\). The guidance has been updated with recent case law from the Supreme Administrative Court.

Remuneration received as a member of a board of directors or supervisory board or as a managing director is always taxed as employment income, irrespective of who receives the remuneration. For tax purposes, it is irrelevant how long the appointment lasts and in whose interest the person has been appointed.\(^{17}\)

3.5 Case law of the Supreme Administrative Court

3.5.1 KHO 2015:184

On 22 December 2015, the Supreme Administrative Court gave its ruling KHO 2015:184 concerning a co-operative enterprises right to deduct input value-added tax (VAT) on its purchases made during fiscal years 2008 and 2010.

In 2008, the co-operative enterprise A had four subsidiaries B Oy, C Oy, D Oy, and E Oy. Companies D Oy and E Oy carry on business activities subject to VAT. Companies B Oy and C Oy are holding and investment companies whose activities were not subject to VAT. In 2010, A had also a wholly owned subsidiary F Oy, which was a mutual real estate company. A carried on rental activities subject to VAT via F Oy. A sold administrative services subject to VAT to B Oy and C Oy, whose activities were not subject to VAT. In addition, A received dividend income from its subsidiaries.

Co-operative enterprise A employed two people. According to A, in 2008 15% and in 2010 45% of its employees’ work input were related to administrative services and rental activities subject to VAT. According to the decision of the Administrative Court, A had a right to deduct 15% of the VAT in 2008 based on the employee’s work input and also the corresponding share of A’s overhead costs. Thus, the total deductible VAT for 2008 was 27.75%. Correspondingly, for 2010, the total deductible amount of VAT was 69.85%.

The SAC upheld the decision of the Administrative Court and ruled that the VAT deductible part of the costs could be determined on the basis of the employees’ work input.

\(^{12}\) Law 1599/2015, regeringsproposition 59/2015.
3.5.2 KHO 2015:174

On 10 December 2015, the Supreme Administrative Court gave its ruling KHO 2015:174 concerning taxation of income received by a nonprofit organization from a ski trail café.

The mission of the nonprofit organization was to contribute ski, hiking and other recreation and outdoor activities to general habit for the people. The organization owned a hiking lodge, which was located in the hiking trail maintained by the city. The organization had run a café at the lodge, which had been open to public mainly on the weekends every year during the ski season. In 2011, the café had been open 25 days. The café had been run by volunteers of the organization.

In 2011, the income received from the lodge was EUR 6,114.95 and expenses of EUR 6,585.93 out of which EUR 5,302.34 were real estate maintenance costs. EUR 5,869.95 out of the income was sales revenue received from the café. Running the café had been considered as business activities for tax purposes. In the tax assessment, the costs relating to the café supplies as well as the part of the other expenses of the lodge corresponding the business activities were deductible for tax purposes. According to the tax assessment, the organization’s taxable profit from the business activities was EUR 3,739.76.

Taking into account that running of the café was closely connected with the organization’s actual nonprofit activities, low amount of income received from the activities, the café was run by volunteers, and the fact that the café could not be considered to be run in a competitive environment, the SAC ruled that the income received from the café was not considered as organization’s taxable business income. Instead the income was tax-exempt income for the organization.

3.5.3 KHO 2015:156

The Supreme Administrative Court gave on 23 October 2015 its ruling KHO 2015:156 concerning a partial division. The taxpayer “A Oy” which owned state-subsidized real estate was planning on transferring a tenement building comprising 91 apartments to B Oy via a partial division where the parent company of the group, owning 100% of the shares in A Oy, would receive in exchange for the shares in B Oy. After that the purpose was to change the legal form of B Oy. The SAC overruled the decision of the administrative court and the tax administration’s advance ruling and ruled that the arrangement considered a branch of activity and thus, the provision concerning a partial division referred to in Section 52 c of the Finnish Business Income Tax Act shall be applied to the arrangement.

3.5.4 KHO 2015:155

On 23 October 2015, the Supreme Administrative Court issued its decision KHO 2015:155 concerning transfer of assets. According to Sec. 52 d (1) of the Finnish Business Income Tax Act, transfer of assets refers to an arrangement where a limited liability company transfers without being dissolved all or one or more branches of its activity with assets, liabilities, and reserves related to that branch of activity to a limited liability company continuing the activity, in exchange for the transfer of shares representing the capital of the receiving company.

The decision concerned a mutual real estate company “A” that transferred a real estate with its 133 tenants and a rental income of approximately EUR 2.5 million to a new company B Oy. After the transfer, the legal form of B Oy was also changed to a mutual real estate company. The SAC ruled that the Section 52 d of the Business Income Tax Act concerning transfer of assets shall be applied to the arrangement.

4 Norway

By Kristine Aase Sommerfelt

4.1 Introduction

On 7 October 2015, the Norwegian government presented its budget proposal for 2016. An overall objective was to adjust the tax system to the current situation in the Norwegian economy. In this perspective, the government particularly emphasized the need for a tax system that encourages the incentives for saving, investments, activity, and labor. A further priority was to ensure that the tax system is adjusting to new trends of development within the Norwegian and international economy, to make it less attractive...
to pursue aggressive international tax planning, which in turn will undermine the Norwegian tax base.

Said objectives were sought achieved by, inter alia, a reduction in the tax rate of ordinary income for persons and companies, a further reduction within the wealth tax, a tightening up of the regulations for interest deduction between related companies and alterations to the exemption method. It also introduced a new bracket tax system on personal income, replacing the previous surtax on high incomes.

Together with the budget proposal, the government presented a white paper to the parliament titled Better Taxation – A Tax Reform for Transformation and Growth (the “Tax Report”), following up the Tax Commission’s report from 2014.

Some of the proposals from the Tax Report were already included in the budget proposal, whereas other recommendations have a more long-term perspective. Being presented at the same time, the (tax related parts of the) budget proposal and the Tax Report to some extent complement each other and should be read in connection. As a general note, both the budget proposal and the Tax Report are based on the same general objective of the Norwegian tax policy that has prevailed since the tax reform of 1992, namely, to enhance the utilization of the resources in the best possible manner by a combination of broad tax bases, low tax rates, and equal treatment of industries.

Following negotiations between the government parties, the Conservatives (Høyre), and the Progress Party (Venstre) and their partners Left (Kristelig Folkeparti), a budget agreement was concluded on 23 November 2015. The Parliament passed the budget on 18 December 2016.

The Green Tax Commission submitted its report on 9 December 2015. The commission was appointed on 15 August 2014 and has evaluated whether and how a green tax reform can be used to secure a better use of the resources in the construction of the economy and companies, further reduction in the wealth tax, and companies, a tightening up of the regulations for interest deductions between related companies and alterations to the exemption method. It also introduced a new bracket tax system on personal income, replacing the previous surtax on high incomes.

In this article, Section 4.2 provides a brief description of the Tax Report. In Section 4.3, the most important changes to the Norwegian tax legislation for 2016 are presented. A list of relevant new tax treaties are presented in Section 4.4, and finally, summaries of some of last year’s most important Supreme Court decisions on tax law are described in Section 4.5.

4.2 The Tax Report

The Tax Report is the Government’s follow up of the report presented by the Tax Commission in 2014, in which the Commission reviewed corporate taxation in Norway in light of international developments.

In the report, the Government recommends that the current model for corporate taxation is preserved. This is in line with the conclusion of the Tax Commission. Further, the government recommends that the corporate tax rate is gradually reduced to 22% in the period 2016–2018, to better correspond with the levels in comparable countries. First step is taken in 2016 with a lowering of the tax rate from 27% to 25%. Technically, the reduction in the corporate tax rate is done by reducing the tax rate on ordinary income (see Section 4.3.1).

The government inter alia argues that a fixed common rate for ordinary income throughout the system will limit the possibilities of tax planning. A reduced rate on ordinary income will, however, result in a substantial revenue loss within the personal taxation. A new tax on gross personal income has, therefore, been introduced to recover a large part of this revenue loss. A reduction in corporate taxation will further reduce the overall taxation on dividends and thus create incentives to shift income from employment income to dividend income. To ensure that differences in marginal tax rates on employment income and dividend income are basically unaltered, the government has suggested an increase in dividend taxation (see Section 4.3.1).

As for measures to counteract profit shifting, one suggestion is the introduction of withholding tax on interest and royalty payments, another is a tightening up of the interest deduction limitation (see Section 4.3.8.3). The Gov-

18 NOU 2015: 15—Sett pris på miljøet.
21 NOU 2014:i3—Kapitalbeskatning i en internasjonal økonomi.
ernment is also notifying that the Ministry of Finance will review the CFC taxation legislation inter alia in light of the Commission’s findings, with an aim to enhance the practicability of the regulations. This review will include an examination of whether the current distinction between active and passive income is appropriate.

It is also notified that the government will look into taxation of the financial sector, to cater for the current under-taxation because of the exception for VAT within this sector.

4.3 New legislation and relevant Parliament resolutions

4.3.1 Tax rates and so on

Overall, the tax reliefs in the final passed 2016 budget were an aggregate of approximately 5.6 billion NOK, being around 3.4 billion NOK lower than the initial proposal from the government.

The major part of the reliefs was made through a reduction of the tax rate on ordinary income, which was reduced from 27% to 25% for both personal taxpayers and companies.

A new bracket tax payable to the State was introduced, replacing the former surtax on high income. As the surtax, the bracket tax is a progressive tax on gross salary and other personal income. The tax is triggered when the annual income exceeds NOK 159,800, with a rate of 0.44%. Next step, with a rate of 1.7%, is triggered on income exceeding NOK 224,900, while the third step, with a rate of 10.7%, comes into effect on income exceeding NOK 565,400. The final step is triggered on income higher than 909,500, with a rate of 13.7%.

Said amendments give a maximum effective marginal tax of 46.9% on employment income (down 0.3 pct. units), 43.8% on pension income (down 0.3 pct. units), 50.1% on business income (down 0.3 pct. units), and 46.6% on dividend and so on (down 0.1 pct. units).

The basic allowance on wealth tax is increased from NOK 1.2 million to NOK 1.4 million (NOK 2.8 million for spouses). Further, the valuation of secondary dwellings and business premises increased from 70% to 80% of the estimated market value.

4.3.2 Personal taxation

4.3.2.1 Loans to personal shareholders

Norwegian company legislation allows for loans to be granted from company to shareholder, provided that the amount is within the limits for distribution of dividends. Previously, loans from company to personal shareholders were treated for tax purposes in the same manner as ordinary loans. This made it possible for personal shareholders to defer dividend taxation by the granting of loans instead of dividend payments. Further, control of potential reclassifying of pro forma loans included a significant use of resources for the tax authorities. Inter alia to address such concerns, it was decided that loans from company to personal shareholder for tax purposes shall be treated as dividend. The new regulation has effect for loans entered into on and from 7 October 2015.

4.3.2.2 Payments in kind and so on

As a part of a thorough work for an improvement of the regulations for payments in kind (naturalytelser), a simplification of the taxation of private use of company cars is set in force. There has also been an abolition of the former right of deduction for petty expenses (småutgifter).

4.3.2.3 Cancellation of tax-free severance pay

The former tax exemption for certain severance pays was abolished with effect from 1 January 2016.

4.3.2.4 Deduction for payments to foreign pension schemes

As part of the Revised National Budget for 2015, it established a new regulation in the Tax Act granting a right of deduction for payments to foreign pension schemes established within the EEA as and from 1 January 2015. Specified conditions for the deduction right are set out in secondary provisions.
4.3.3 Business taxation

4.3.3.1 Interest deduction between related companies

Since 2014, Norway has had regulations limiting the right of deduction of interest paid to related parties, granting no right of deduction of such costs exceeding 30% of EBITDA. The objective of the regulation is to protect the Norwegian tax base from profit shifting through excessively high interest deductions. As from 1 January 2016, in accordance with the recommendations from the Tax Commission, the regulation has been further tightened by reducing the deduction limit to 25%.

4.3.3.2 Alterations to the exemption method

To redress the undesirable effects from different classifications/taxation of hybrid instruments in separate jurisdictions, amended legislation is established, which excludes the use of the exemption method when the distributing entity has a corresponding right of deduction for the distribution. The new regulation came into force as and from 1 January 2016.

4.3.3.3 Taxation of securities’ fund

Former legislation for securities’ funds was based on a distinction between equity funds (aksjefond) and bond funds (obilagjonsfond). This led to some extent of double taxation of interest in funds that include both shares and interest papers and also opened up for undesirable tax planning. The legislation for taxation of securities’ funds is now amended to better reflect the diversity of securities included in the funds. For details, see Prop.1 LS (2015–2016) Section 5.10.

4.3.3.4 Cross border intragroup transfers

Amendments to the regulations for tax-free transfer of assets between related entities have been made, allowing the regulations to apply to cross border transactions to a larger degree. Following the regulations, transfers of assets from Norwegian-based companies and establishments to foreign-based companies within the same group can be carried out with no immediate taxation. To secure the Norwegian tax base, the expansion of the regulations is connected to the regulations for exit taxation. The amendments were set into force as and from 1 January 2015. Detailed conditions and regulations have been adopted in secondary provisions. See Prop. 120 LS (2014–2015) Chapter 12 for further details.

4.3.3.5 Profit taxation for agriculture

Profit from realization of ordinary farms (alminnelig gårdsbruk) and forestry units (skogbruk) shall no longer be included in the tax base for personal income for sole proprietorships, meaning that such profits are now taxed only with the rate for ordinary income (25%). Further, the special regulations stating that profits from realization of agricultural lots, which formerly were excluded from the tax base for personal income when not exceeding NOK 150,000, are now abolished. The main object of said amendments was to make it more attractive and profitable to sell farms and woodland in the ordinary marked.

There has also been established an expansion of the regulations for conditional tax exemption following forced realization of agricultural holdings.

4.3.4 Indirect taxation

An exemption from stamp duty (dokumentavgift) and reregistration duty (omregistreringsavgift) for certain company reorganizations with tax continuity is effective from 1 January 2016.

Introduced in the budget agreement, it was agreed on introduction of a duty on all airplane travels in the amount of NOK 80. Exemption is made for aircraft employees on work travels, children under two years of age, and passengers in transit and transfer. The new duty is not yet set in force. For further details, see Innst.3 S (2015-2016) Section 11.1.

4.4 Tax Treaties

On 17 June 2015, Norway signed a new double tax treaty with Serbia, replacing the former treaty with Serbia from 1983 (originally entered into between Norway and the Socialist Federal Republic of Yugoslavia). Norway also signed a new double tax treaty with Bulgaria, on 22 July 2015, replacing the former tax treaty between the countries from 1988. Both new agreements were adjusted to the current tax treaties of the contracting parties and were based on the OECD Model Tax Convention with certain deviations. The new treaties were set into force as and from 18 December 2015 and 30 July 2015, respectively.
New double tax treaties between Norway and Romania and between Norway and Zambia were signed on 27 April 2015 and 17 December 2015, respectively. These new treaties have not yet been set into force.

Additional protocols to the double tax treaty between Norway and Germany signed on 24 June 2014, and Norway and South Africa signed on 16 July 2012 was set into force on 3 February 2015 and 20 November 2015, respectively. An additional protocol to the double tax treaty between Norway and Switzerland was signed on 4 September 2015 but has not yet entered into force.

Information exchange treaty between Norway and Brunei signed 27 June 2012 was set into force on 27 April 2015.

Norway also signed a new information exchange treaty with the United Arab Emirates in November 2015.

4.5 Case Law

4.5.1 Limited tax liability to Norway—Rt.2015 p.1360

The case concerned the scope of limited tax liability to Norway for a foreign company that was limited partner in a Norwegian registered limited partnership (kommanditsskap). The limited partnership owned a drilling rig that was rented out on bareboat terms to a related party. The management of the drilling rig was handled by another, Norwegian-based, company.

Section 2-3 (1) b of the Norwegian Tax Act states that a person, a company, or an entity is liable to pay tax (inter alia) of income from activity it performs or participates in, which is operated from Norway.

The question was whether the foreign limited partner was liable to tax in Norway for rent income of the drilling rig. The parties agreed that the limited partner itself was not operated in Norway; the question was whether the limited partner could be deemed to operate activity in Norway because it had granted management of the rig to the Norwegian management company.

The parties agreed that the activity of the management company, for tax purposes, was to be treated as the owner company’s (i.e., the partnership’s) own activity. However, the Supreme Court’s majority (4-1) found that tax liability could not be established, as the Norwegian management of the rig, in this particular case, was not enough to consider the rental business as operated from Norway. The conclusion was based on the view that in order for an activity to be considered “operated” in Norway, it is required that the functions carried out here falls within the central characteristics of the principal activity of the entity. In this case, the court found that the functions performed by the Norwegian management company were merely support functions and not sufficient to be considered the principal activity of the limited partnership, which was rental of the rig. According to the facts of this case, the decision to enter into rental arrangements was made by the partnership meeting abroad. It was also emphasized that the value of the activities performed by the management company was very limited compared to the value of the bareboat contract.

The minority (1 judge) found that the rental income was subject to limited tax liability in Norway for the foreign limited partner and that the activity of the limited partnership was “operated” from Norway for the purpose of Section 2-3 of the Tax Act.

4.5.2 Tax Treaty between Norway and Ireland—Rt.2015 p.513

An Irish company, which (directly and indirectly) was wholly owned by a Norwegian limited liability company, was considered an independent tax subject under Irish law, but not under Norwegian law. The Norwegian LLC (AS) was taxed in Norway for the income of the Irish company pursuant to the Tax Act Section 2-2; for Norwegian tax purposes, the Irish company was to be deemed as a branch of the Norwegian company.

The relevant income was also taxed in Ireland, and the company claimed that because of this, an additional taxation in Norway would present a breach of Article 7 no.1 of the double tax treaty between Norway and Ireland.

The Supreme Court found that taxation of the Norwegian company for the income of the Irish company was valid pursuant to Norwegian law and the tax treaty, because the Irish company was not an independent tax subject under Norwegian law. The potential for double taxation that arose was resolved as the Norwegian company was granted a tax deduction for a sum equal to the tax paid by the Irish company in Ireland.

The judgment confirms the principle that in application of tax treaties, the domestic law of the country applying the treaty is decisive for the classification of the relevant companies.
4.5.3 Deductibility of loss on receivables between related parties—Rt.2015 p.203

The case concerned the scope of the right for tax deduction of loss related to waiver of account receivables in partly owned subsidiary.

A Norwegian company bought 75% of the shares in an African company in July 2000, of which the remaining 25% remained in the ownership of the state (Gabon). The company bore deficit from the time of purchase, and the Norwegian company granted goods and services to its subsidiary on credit. Owing to a continuing worsening of the economic development of the subsidiary, the Norwegian company formally waived 62% of its outstanding receivables toward the subsidiary in 2007, in order to secure the subsidiary enough equity to continue its activity. The question for the Supreme Court was whether the Norwegian company had a right of tax deduction for its loss on said receivables pursuant to the Tax Act Section 6-2.

The court majority (4-1) found that a deduction right was conditioned by the claimed loss being “ultimately established.” Pursuant to former case law from the 1990s, the court concluded that this requirement is strict and requires that it must be certain that the receivable will not be fulfilled. In respect of related parties, this includes a consideration of whether there is a realistic possibility for the creditor to gain back its loss through its position as shareholder, for example, through receipt of dividend. Where such possibilities exist, there is merely a potential for loss on the creditor’s hands and not an ultimately established loss.

The court found that the creditor in this case was only subject to a potential loss and thus declined a right for tax deduction. It was emphasized that at the time of the waiver, there were no plans of liquidating the subsidiary and that the waiver was granted in order to enable a continued conduct. It did not matter that the Norwegian company only owned 75% of the shares or that the remaining 25% was state owned, as the parent still would have decisive influence on the decisions for dividend distributions. Nor was it decisive that the relevant receivables was account receivables for which the secondary provisions to the Tax Act (FSFIN Section 6-21) sets out certain specified conditions for when an ultimate loss must be deemed established: The court found that said provision must be interpreted stricter when the parties involved are related and that under any circumstances the creditor in this particular case did not meet the activity demands set out therein.

The minority (1 judge) found that the loss was ultimately established, and that the Norwegian company had a right of tax deduction for its loss.

4.5.4 Classification and allocation of carried interest—Rt.2015 p.1260

The case concerned questions of correct classification and allocation of the so-called “carried interest,” a result-based payment in the fund management industry.

Two funds and their respective general partners were established in Jersey as limited partnerships. The general partners were 60% owned by a holding company, which in turn was owned by three separate holding companies, each wholly owned by three Norwegian citizens (the “principals”). The funds, represented by the general partners, had entered into consulting agreements with a Norwegian limited liability company. Through a separate holding company, the consulting company had the same owners as the general partners. The principals were hired in the consulting company.

In 2007, the funds had realized a large profit, which according to the partnership agreement granted the general partners a right for a payment of carried interest. The carried interest was further distributed as dividend to the owners of the general partners.

The Norwegian tax authorities had found that the carried interest was in reality a success fee paid as a consequence of the consulting services of the consulting company and allocated this profit to the consulting company as business income. Further, it had found that the carried interest was to be classified and taxed as work income for the three principals because of their work in the consulting company.

The majority of the Supreme Court, however, found that the carried interest could not be allocated as business income for the consulting company, but that it was business income for the general partner(s). The main argument was that the structure of, and payment to, the general partners had a genuine business purpose and that the general partners were the companies making the investment decisions. Two judges dissented on this question and found that the business income was to be allocated to the consulting company, where the real value creating activity was performed.

Further, an unanimous court found that the income from the general partners could not be classified as employment income for the principals. The main rationale was that the three principals were founders and real owners of the fund management activity of the general partners and that the nature of the carried interest derived from this activity and thus accrued to the principals as owners. Further, it was emphasized that the profits from the fund activity stemmed from more factors than merely the work performed by the principals.
Although the judgment does bring forth some clarifications relating to classification and allocation in the private equity business, the reasoning of the court was closely linked to the specific factual matters of the particular case.

5 Sweden

By David Kleist

5.1 Legislative changes

Not much has happened in 2015 in terms of tax legislation. The outcome of two major committees on income tax is still pending. First, in June 2014, a major reform of the Swedish corporate tax system was presented by the Committee on Corporate Income Taxation comprising inter alia a proposal to completely abolish the right to deduct interest expense and other financial expenses in excess of financial income and the introduction of a 25% basic allowance that would in effect lower the effective tax rate to 16.5% for companies that do not have any net financial expense. The proposal met with harsh criticism from all directions and is now expected not to become law. Instead, it seems that a new, less radical, proposal is on the way, which will also comprise interest deduction limitations, but which will be more in line with such legislative changes in other countries. Second, there is a committee working on a proposal regarding the tax rules for closely held companies, aimed at preventing the shifting of employment income to income from capital, which is expected to result in increased taxation for owners of such companies. This proposal is due on 1 September 2016.

Another proposal that has been modified as a result of criticism is the proposal for Swedish implementation of recent changes in the Parent Subsidiary Directive. In regard to outbound dividends, initially, the new provisions of the Directive concerning tax avoidance were proposed to be implemented by making the Swedish general anti-avoidance legislation applicable to the Swedish withholding tax on dividends. This part of the proposal was criticized for significantly reducing foreseeability, for going further than required by the Directive and for leading to various complications in relation to double tax agreements entered into by Sweden. A revised proposal was presented in July 2015. The Government basically argued that an already existing—in practice almost never applied—tax avoidance provision in the Swedish Withholding Tax Act was sufficient for achieving the intended outcome of the amendments to the Directive. This proposal entered into force on 1 January 2016.23

The budget bill for 2016 was presented on 21 September 2015. The proposals presented in the bill lead to an increase in the tax burden. For instance, tax on employment income is increased through raised progressivity, the reduced social security contributions rate for employees under the age of 25 years is phased out, tax refund on building repairs and maintenance is reduced, and tax on fuel is increased. However, although the bill contains some adjustments of tax rates, no significant changes to the tax legislation as such are proposed.

5.2 Selected Cases

5.2.1 The Court of Justice of the European Union

5.2.1.1 C-686/13 X v. Skatteverket

The question referred to the CJEU by the Swedish Supreme Administrative Court concerned whether a capital loss on shares derived by a Swedish limited liability company (Aktiebolag) shall be deductible when it is attributable to a currency loss, in spite of the fact that capital losses on such shares in general are nondeductible.

X AB, which was resident in Sweden, formed a subsidiary in the United Kingdom, whose shares were issued in US dollars (USD). Subject to certain conditions, capital gains on shares derived by a Swedish limited liability company are exempt from tax. Correspondingly, losses on such shares are nondeductible.

In this case, a part of the capital loss was attributable to changes in the exchange rate between SEK and USD from the date of investment until the disposal. X AB, therefore, requested a ruling from the Board for Advance Tax Rulings (Skatterättsnämnden) on whether such an exclusion was compatible with EU law when it applied to a cap-

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23 For a comment on the proposal insofar as it deals with outbound dividends, see Kleist, David, Implementering av nya skattelyktsbestämmelser i moder-dotterbolagsdirektivet – regeringen lägger fram reviderat förslag, Svensk Skattetidning 2015:8, pp. 665-677.
capital loss resulting from a currency loss on a holding of shares in a company resident in another Member State of the European Union.

The CJEU found that as capital losses having their origin in a currency loss are nondeductible regardless of whether the shares are held in a company established in another Member State or in a company established in Sweden, investments in holdings in a Member State other than Sweden are not treated more unfavorably than similar investments effected in Sweden.

As a consequence, the CJEU declared that Article 49 of the Treaty on the Functioning of the European Union must be interpreted as meaning that it does not preclude tax legislation of a Member State which, in principle, exempts capital gains on holdings for business purposes from corporation tax and, by the same token, excludes the deduction of capital losses on such holdings, even where those capital losses are due to currency losses.

5.2.1.2 C-114/14 European Commission v. Kingdom of Sweden—VAT on postal services

In 2013, the European Commission decided to refer Sweden to the Court of Justice over its application of VAT on postal services as the EU VAT Directive states that services supplied by public postal services, and the sale of stamps, should be exempt from VAT. Sweden argued that in Sweden, several undertakings operate under identical financial conditions in a postal market that was liberalized long ago and that Sweden no longer has a “public postal service.” Furthermore, it argued that Posten AB (now named PostNord) receives no compensation from Sweden for its universal service obligations.

However, on 21 April 2015, the CJEU ruled in Case C-114/14. The CJEU was not convinced by the arguments put forward by Sweden as national legislation imposes specific obligations on Posten AB to ensure that it provides the universal postal service within the meaning of that directive throughout national territory. Thus, as Posten AB provides all or part of the “universal postal service” within the meaning of Directive 97/67 in Sweden, it must according to the CJEU be classified as a “public postal service” within the meaning of Article 132(1)(a) of Directive 2006/112, and consequently, that supplies of services, other than passenger transport and telecommunications services, and supplies of goods incidental thereto made by Posten AB as a universal service provider must be exempted from VAT.

Consequently, the CJEU declared that by failing to exempt from VAT, the supply by the public postal services of services other than passenger transport and telecommunications services, and the supply of goods incidental thereto, and the supply at face value of postage stamps valid for use for postal services within national territory, the Kingdom of Sweden has failed to fulfill its obligations under Articles 132(1)(a) and 135(1)(h) of Council Directive 2006/112/EC of 28 November 2006 on the common system of VAT.

This means that Sweden has wrongfully imposed VAT on public postal services since it joined the European Union in 1995, raising questions on the extent of Sweden’s obligations to repay VAT or otherwise compensate for wrongfully imposed VAT.

5.2.2 The Administrative Supreme Court (Högsta förvaltningsdomstolen)

5.2.2.1 HFD 2015 ref. 24—tax treaty classification of income from redemption of shares

After moving from Sweden to Switzerland, the taxpayer in question intended to redeem his shares in a company resident in Luxembourg and applied for an advance ruling by the Board for Advance Rulings (Skatterättsnämnden). According to Swedish case law, income from redemption of shares is normally regarded as capital gains. However, if the rules for closely held companies apply to the shares, such income shall according to Chapter 57 Section 2 Income Tax Act (ITA) be treated as dividends.

Capital gains on shares are taxable in Sweden under Chapter 3 Section 19 ITA during a 10-year period following relocation from Sweden. The first question dealt with by the board was whether the rule which stated that income from redemption of shares in closely held companies shall be treated as dividends meant that Chapter 3 Section 19 ITA was not applicable. The board held that the fact that the income should be treated as dividends for purposes of the specific rules on closely held companies did not have any effect on the characterization of the income as a capital gain per se and, therefore, did not preclude tax liability of a nonresident individual on basis of Chapter 3 Section 19 ITA.

The next question concerned the classification of the income under the double tax treaty between Sweden and Switzerland as dividends, capital gains, or other income. Sweden had reserved its taxing right in respect of capital

24 See Kristoffersson, Eleonor, Återbetalning av mervärdesskatt till följd av EU-domstolens postmomsdom, Svensk Skatte tidning 2015:5 pp. 494-509.
gains arising during a five-year period after relocation from Sweden. A classification of the income as dividends on the other hand would have resulted in limited taxing rights for Sweden. Moreover, a classification as other income would have precluded Sweden entirely from taxing the income.

According to the board, the classification did not follow from the treaty text. Furthermore, the board found that the commentaries to the OECD were not conclusive at this point. The board, therefore, referred to the interpretational rule of the treaty (Art. 3.2), which as a main rule points back to the domestic law of the state in which the treaty is applied. As the income was regarded as a capital gain under Swedish domestic law, it was also classified as a capital gain under the tax treaty. Thus, Sweden was not precluded from taxing the income from the redemption of shares.

The ruling was appealed by the taxpayer, but it was confirmed by the Supreme Administrative Court.

5.2.2.2 HFD 2015 ref. 26—taxation of poker winnings

According to Chapter 8 Section 3 of the Swedish ITA, winnings from lotteries established within the European Economic Area are exempt from tax. However, according to Chapter 42 Section 25 ITA, winnings from lotteries outside the European Economic Area are taxable. Further, according to this provision, expenses for participating in lotteries are nondeductible, regardless of whether the lottery is Swedish or foreign.

According to the court, the above-mentioned provisions apply to poker winnings. The issue at stake was whether the expression lottery winnings in Chapter 42 Section 25 ITA refers to gross income, net income from each game, net income from each game provider, or net income from all such lotteries.

According to the court, it would be unreasonable and impractical to tax the net income from each game as the participation in, for instance, a poker tournament may continue for a considerable time and comprise a high transaction volume. The court held that the player should be taxed on his or her net income from each game provider, meaning that he or she would not be entitled to deduct a net loss from one provider against net income from another provider.

The outcome means that a poker player may be taxed on his or her net income from a game provider regardless of whether his or her total losses from poker exceed his or her total gains. It can be argued that this is contrary to the ability to pay principle (this argument led the Administrative Court of Appeal to accept the setting off of losses from one game provider against gains from another provider). On the other hand, it can be argued that the ability to pay principle is a principle that should be taken into account by the legislator but that has no relevance for application of the law in a particular case.
