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Hot topics
Denmark

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Morten Bang Mikkelsen

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Agenda

1. Reclaim of Danish dividend withholding tax

2. New system for Danish withholding taxes

3. Credit relief for foreign taxes

4. Change of rules for EU pension funds investing in real estate in Denmark

5. Deduction for salary costs

1. Reclaim of Danish withholding and EU claims

- New procedures for reclaim of Danish withholding tax
    - Online application form
    - Extensive documentation requirements
    - Statute of limitation 3 years from dividend declaration date (in some cases longer due to DTT)

Investment funds

- Lead case pending at the level of High Court and referred to CJEU in September (C-480/16)
    - Dispute relates to (1) comparability and (2) justifications for potential restrictions
- High number of claims sent to tax authorities over the years
- A high number of proposed decisions have been issued by tax authorities

Pensions funds

- Commission closed case against Denmark in 2012 following a change of tax rules (PAL) effective from 2012.
- Still discriminatory taxation of foreign pension funds due to new rules from 2010
- Claims filed for several pension funds – recently new decisions received from Danish tax authorities. However, same argumentation as previously regardless of the fact that the legislation has changed significantly since 2010

2. New withholding tax regime under way in Denmark in the wake of the dividend tax fraud

- A working group under the Danish Government has issued a report with proposals for a new withholding tax regime.
- Three models have been suggested with some variations but in short, two of them suggest that withholding taxes should be withheld at the net rate, i.e. no subsequent reclaim of Danish withholding tax should be possible.
- The Government has decided to implement a model with a net withholding tax system where no refund can be made
  - However no concrete proposal has been issued as the practical design of the new system takes time
  - Also, it requires sufficient data and registrations for each shareholder
  - Omnibus and nominee accounts can still be used but the custodians will need to make "ratepools" for the different shareholders depending on which rate they are entitled to (0, 10%, 15%, 22% or 27%)

3. Credit relief for pension funds and life insurance companies

- Foreign withholding tax is often a gross taxation
- Credit relief in Denmark is based on a net principle, i.e. credit is only granted based on the foreign net income after associated costs
- According to the Danish tax authorities' guidelines should the costs also include provisions and payments to policyholders
    - ➢ Significant reduction in credit relief as the net income after provisions and payments is reduced significantly
- Recently in the Spring 2017 the Danish Tax Board and the Tax Tribunal ruled that provisions and payments to policyholders should not reduce the net income for credit relief purposes and this principle should apply for both pension funds and life insurance companies

4. Taxation of pension funds investing in real estate in Denmark

DK Pension Fund

- **Invests in real estate in DK**
- **The yield is taxed at a rate of 15.3% (mark to market principle)**

EU Pension Fund

- **Invests in real estate in DK**
- **The yield is taxed at a rate of 22% (realisation principle)**

Taxation of pension funds investing in real estate in Denmark

What is the background?

- The Danish government just presented their program for legislation in 2017/2018. According to the program the government wants to align the taxation of EU pension funds with EU law
- We interpret that the government wants to reduce the tax rate that applies for EU pension funds that have invested in real estate in DK (22%) so it is the same as the tax rate that applies for the DK pension funds that invests in real estate in DK (15.3%), i.e. eliminate the discriminatory treatment. NB the bill has not yet been presented
  - ➢ Pension funds in EU member states should therefore be able to reclaim tax on the yield from real estate in Denmark. The pensions fund may have paid 6.7% too much in taxes (22%-15.3%)
  - ➢ The new legislation will most likely regulate how far back pension funds can reclaim the taxes. If not, it should be for the past 3 years.

5. Deduction of salary costs in connection with M&A

- Two new Supreme Court decisions in June 2017 regarding banks' M&A activities
  - Supreme Court ruled: Salary costs related to M&A activities not comprised by the general deductibility right of operating expenses
- Danish government has issued a draft proposal introducing legal authority for deductibility of salary costs regardless of whether the salary costs are used regarding M&A activities or unsuccessful activities.
  - NB only deduction right for the employer company – This could be an issue in groups where one company handles and incurs salary costs related to M&A activities on behalf of other companies in the group
  - Also non deductibility if costs are considered shareholder costs, i.e. non-operating expenses