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# Nordic News

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## 1 Introduction

In the middle of the BEPS period both taxpayer and the tax authorities are waiting for the outcome of the process. Although there still are a lot of work to be done by the OECD, countries have started implementing some of the findings and ideas from the BEPS work in their domestic legislation. So is the situation for some of the Nordic countries. In Norway, for example an ongoing tax reform is influenced by the work and ideas in the BEPS process. The main object with the tax reform in Norway is to examine the corporate tax system in Norway in view of international developments and ensure that Norway is sufficiently competitive for both resident and non-resident taxpayers to invest in.

Also in Denmark, the ideas from BEPS seem to have influenced the tax legislation. In November 2014, the Minister for Taxation launched an initiative to minimize the use of tax havens and the proposal was adopted by the Danish Parliament in April 2015. In brief, the act entailed in three main features: (1) taxation of settlors of trusts; (2) fair taxation of assets expatriated from Denmark; and (3) the adoption of an international general anti-avoidance rule (GAAR) in Danish tax law.

In Sweden, there is, similar to Norway, an ongoing tax reform were it, among other things, proposes 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.[1] The proposal has resulted in more than one hundred comments from Tax Agency, courts, organizations, companies, etc. Almost all of the comments including harsh criticism of the proposal. It is still to see what impact the criticism will have on the outcome of the proposal. In addition to the proposal to abolish the right to deduct interest expenses, another important field, which is currently subject to committee work, is the Swedish rules concerning closely held companies. The rules are intended to prevent income derived from work performed by the owners from being taxed as income from capital rather than employment income.

In Finland, only a few legislative amendments regarding taxation have been announced lately. This might be due to the election in April this year. It may however, as a result of the parliamentary election, be expected that the new government will propose more changes and amendments to the Finish tax law in the near future.

More details about the above-mentioned proposals and changes of legislation are provided in each of the country sections below. In addition to the ongoing legislative processes, many interesting cases regarding both domestic and international tax issues in all the Nordic countries are decided. The most interesting cases are briefly commented below.

The remaining parts of this news report is written by our country reporters, which are presented in direct connection to the different country sections. In addition, this news report starts with a short review of the recent Proposal of the Norwegian Commission on Corporate Taxation: Official Norwegian Report (NOU) 2014:13, named ”Capital Taxation in an International Economy”

This news report aims to be up-to-date up until 15 June 2015.[2]

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1 For an account of the proposal, see Lodin, S-O
An overview of the Proposal of the Swedish Government Committee on Corporate Taxation 2014 (2) p. 43-54.

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

# 2 An overview of the Proposal of the Norwegian Commission on Corporate Taxation

By Kari Anita Syverud[3]

## 2.1 Introduction

On 15 March 2013, the Stoltenberg II Government appointed a commission to review the corporate taxation in Norway in light of international developments. The commission was especially asked to look at trends towards combining lower tax rates with measures to prevent undesirable cross-border planning. In November 2013, the Solberg Government asked the Commission to also review the system of tax depreciations and to submit at least one proposal with net tax reductions.

The Commission's report was the first major review of the tax system following the tax reforms of 1992 and 2006. The 1992 tax reform focused on equal treatment, broad tax bases and low rates – notably within corporate and capital taxation to ensure efficient resource use. The reform followed an international trend of tax-cut-cum-base-broadening, but Norway went further than many others. The corporate rate was cut from 50.8 to 28%, relatively low at the time. The dual income tax was introduced to build a bridge between the low tax rate on capital income and the progressive and higher taxes on labor income. Over time loopholes were created and the marginal tax rates on labor income increased. While maintaining the neutrality principles of the 1992-reform, the reform in 2006 introduced a new method to deal with the different tax rates on labor and capital income. The 2006 tax reform introduced a principle where ownership income above an estimated risk-free return on invested capital is taxed either as personal income (self-employed model), or as ordinary income when paid to business owner (shareholder model or partnership model).

While the Commission has primarily assessed changes to corporate taxation, it has had to give considerable consideration to the close economic connection, and since the earlier reforms, formal connections, that exist between personal and corporate taxation in Norway. The Commission was asked to come up with one revenue neutral proposal and one proposal with net tax relief. The Commission therefore also made suggestions to improvements in other taxes and changes to the tax mix, to finance some of the main proposals.

The Commission was of the opinion that, generally speaking, Norway has a good tax system and that it is important to build on existing principles in the Norwegian income taxation, such as neutrality and symmetry. However, international changes to corporate and capital mobility as well as ensuing changes to tax systems abroad necessitates changes to protect the Norwegian tax base and also encourage growth in the long term.

The Commission's findings and proposals were presented on 2 December 2014 in the Official Norwegian Report (NOU) 2014:13, named "*Capital Taxation in an International Economy*".

## 2.2 The main difficulties with corporate tax in Norway

Cross-border economic integration and investment has increased, and the impact on corporate investment, financing, and ownership has changed. The opportunities for both legal and illegal cross-border tax planning have increased, and there are strong indications that taxpayers are exploiting these opportunities to a greater extent than before.

Several tax bases are more mobile than before. Not only are both companies and persons more mobile in physical terms, but the increased digitalization of the economy is also reducing the relevance of physical presence. Further, the EEA Agreement is making such cross-border transactions easier within the EEA, and limits Norway's opportunities to levy tax. Although increased mobility is positive for economic growth, it represents a challenge in the context of taxation. Research is increasingly finding strong indications of international companies shifting profit to low-tax jurisdictions, or to special tax regimes within countries. The few studies that have been conducted on Norwegian data indicate that profit shifting is prevalent also in Norway[4].

Partly as a response to the altered international environment, corporate taxation is changing in many countries. The average corporate tax rate in the OECD area has fallen from almost 50 per cent in the early 1980s to around 25% today. At the same time the Norwegian tax rate has

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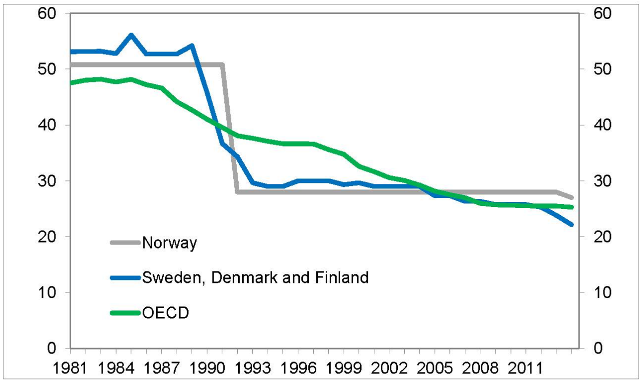
4 See for instance Balsvik, Jensen, Møen and Tropina (2009) «Kunnskapsstatus for hva økonomisk forskning har avdekket om flernasjonale selskapers internprising i Norge», SNF Rapport 11/09.




Source: OECD

**Figure 1:** Formal corporate tax rates in selected countries 1981–2014. Percent

remained at 28% since the 1992 tax reform, until it was reduced to 27% in 2014. Several countries have also implemented special cuts in the tax rate for selected, particularly mobile types of income, such as interest and profits on intangible assets (patent boxes). At the same time, ever more countries are introducing rules to counter the shifting of profits and erosion of the corporate tax base. For example, many countries are limiting deductions in respect of interest expenses.

Based on these international developments, the Commission identified three primary challenges to corporate tax in Norway:

- Norway's relatively high effective tax rates gives incentives to invest in countries with lower tax rates. This also applies to Norwegian taxpayers, because it is impossible to apply the residence principle consistently in the context of capital taxation. For example, the combination of the exemption method and the shareholder model breaches the residence principle.
- Corporate debt and equity are treated differently. Funding costs connected to debt financing (interest) are deductible, whereas costs connected to equity financing are not. In an open economy, such differential treatment will, in isolation, encourage companies to increase their debt levels. The differential treatment of debt and equity also facilitates legal profit shifting.
- A relatively high statutory tax rate gives incentives for multinational enterprises to shift profits to other countries, for example through thin capitalization or tax-motivated transfer pricing.

The Commission emphasized that the impact of corporate tax on investment should not be exaggerated. Many other factors play a substantial, and sometimes greater, role with respect to the level of investment. Norway is rich in resources, has a skilled workforce and a stable political system, and ranks low in international corruption-prevalence surveys. Factors that make business in Norway attractive also raise wage costs. These factors are more important for investments than tax issues. Nevertheless, tax may have a noticeable effect on the margin, particularly if the tax level differs significantly from the level in countries that are otherwise comparable to Norway. The effective tax rates in Sweden and Denmark are of particular relevance, since these two countries are close to Norway both socially and geographically. Effective tax rates on investments, which take both tax rates and tax bases into account, are relatively high in Norway compared to the rates in the said countries.

One consequence of a high effective corporate tax rate is that it increases the significance of differential treatment of corporate debt and equity. Unlike the financial cost of equity, companies may deduct interest expenses. Although, in isolation, the deduction of interest expenses reduces the cost of capital on debt-funded investments, the Commission is of the view that it is undesirable for corporate debt to be granted preferential treatment. The preferential treatment of debt is an important factor in profit shifting within multinational groups. Such preferential treatment of debt may also encourage increased gearing by companies.

In an open economy, it will be impossible to compensate fully for the favorable treatment of debt in the context of corporate tax through the taxation of Norwegian investors. The corresponding favorable treatment of equity held by Norwegian personal taxpayers (tax on interest income and tax-free ownership income under the allowance for shareholder equity), can only partially counter the favorable treatment of debt, primarily in the case of investments that lack access to international funding and instead depend on Norwegian equity.

## 2.3 Differential treatment of debt and equity and alternative tax models

The Commission assessed whether the current corporate tax base should still be used in light of the challenges identified. The Commission assessed several alternatives to the current system, including a cash flow tax, an allowance for corporate equity (the ACE model), or an abolishment of the deduction of interest (the CBIT model). Under a cash-flow tax, the tax base is the difference between inflows (receipts) and outflows (payments). The cash-flow tax functions as a tax on the present value of the net cash flow. Even if it is taxed on a proportion of this net present value, the company still has incentives to maximize its pre-tax profits. A cash-flow tax has many attractive characteristics. It eliminates the current favorable tax treatment of debt in the context of corporate income tax, and does not distort marginal investment decisions. Nevertheless, the Commission did not recommend a general cash-flow tax for the entire corporate sector. Such a tax presents a range of practical challenges, including challenges related to cross-border investments, and would give incentives for tax planning.

A model that is much discussed in the international debate is based on a standard corporate income tax under which companies can deduct the opportunity cost of equity (ACE – allowance for corporate equity). A correctly designed ACE model would ensure that debt and equity are treated equally, and that all investment projects that are profitable pre-tax remain profitable post-tax. The Commission considered an ACE model feasible, but it would be difficult to design the model to prevent tax planning. For a given tax revenue, the model will require a higher tax rate than alternative models, and thus increase the profitability of profit shifting. To prevent profit shifting through the deduction of interest costs, the ACE model could be modified by granting a deduction for the opportunity cost of all capital, both debt and equity (the ACC model). In this model, the interest deduction is replaced with a fixed rate deduction for both debt and equity. This prevents profit shifting through interest deduction. Under an ACC model, financial sector taxation would have to be specially adapted, which in turn could trigger further tax planning strategies. Moreover, the ACC model presents challenges regarding integration with personal income taxation.

In a CBIT model, there are no deductions for funding costs, nor for interest costs. The company is thus taxed on the total return, irrespective of whether the investments are funded by debt or equity. On the one hand, the CBIT model raises the cost of capital for investments funded by debt. On the other hand, revenue raised by abolishing interest deductions permits a lower tax rate, which in turn reduces the cost of capital for equity- funded investments and the incentives to engage in profit shifting. The CBIT model raises many practical questions and problems, including the integration of financial sector taxation and personal taxation of capital income.

The Commission also examined the proposal of the Swedish corporate tax commission (SOU 2014:40) to abolish the net funding costs of companies. The Swedish proposal is largely a version of the CBIT model. The proposal would counter profit shifting, but at the same time present considerable challenges regarding the interaction between personal taxation and corporate taxation. The Norwegian Commission could not see that it was possible to avoid lock-in effects. Moreover, distortions would arise in the corporate sector through mergers and acquisitions involving companies with different interest rate positions. Equity-funded investments would be subject to lower tax as a result of the rate reduction (or capital deduction), while the model would increase the cost of capital of debt-funded investments. Based on the above, the Commission did not recommend a CBIT model or the Swedish version of this model.

The Commission in the end recommended keeping the current system for taxing companies, but to reduce the tax rate from 27% to 20%. This rate cut will give Norway a corporate tax rate in line with the rates levied by its closest neighbours. A lower statutory tax rate will reduce the cost of capital in Norway, particularly for equity-funded investments. The different treatment of funding types would also be reduced somewhat by a lower rate. Further, a lower tax rate would to some extent counteract profit shifting.

Deciding how far the tax rate should be reduced involves a difficult balancing act. The Commission emphasized that the tax system, along with other economic conditions, needs to be able to compete for investment and businesses in an internationalized market. On the other hand, the Commission advised against Norway taking the lead in an international tax competition in which countries compete to offer particularly low tax rates to companies, on certain types of business income or through patent boxes.

## 2.4 Measures to prevent profit shifting and erosion of the corporate tax base

A reduced corporate tax rate would, to some extent, make it less profitable to shift profits out of Norway. However, many countries have corporate tax rates lower than 20%, or favorable tax regimes for certain types of income. In practice it is possible for some companies to obtain effective tax rates close to zero. The incentives to engage in profit shifting will thus remain strong. The Commission therefore proposed that a reduction in the tax rate should be combined with targeted measures to counter profit shifting. The possibilities for adopting such measures are severely limited by international obligations, most notably the EEA-agreement. These restrictions will also limit the effect of measures that are introduced. Nevertheless, the Commission proposed a number of measures including the introduction of a domestic rule to levy withholding tax on interest and royalties, specific rules targeted at hybrid instruments and companies, restrictions on certain rental payments (e.g. contracted bare boats), the introduction of a statutory general anti-avoidance rule and an obligation to submit tax returns electronically. The Commission also stated that consideration should be given to OECD recommendations on base erosion and profit shifting (BEPS) that are awaited by the end of 2015.

The most far-reaching measure was perhaps the proposed changes to the interest deduction limitation. By now it is well known that multinational groups have considerable incentives to reduce their tax bills through debt financing of group companies in normal or high tax countries. The manner in which the arm's length principle is applied with regard to related party loans may give some multinational companies possibilities to deduct interest that in sum far exceeds the group's actual borrowing costs vis-a-vis third party lenders. This constitutes a large advantage to multinational groups compared to domestic firms. Such an advantage also applies for domestic enterprises with owners who are not liable to pay tax on interest income, typically municipalities and foundations. Most OECD countries now have some sort of rule limiting interest deductions to counteract profit shifting through debt-financing.

In 2014, Norway introduced a general interest limitation rule similar to the rules currently used in Finland, Germany, Italy, Portugal, and Spain. Deductible interest to related parties is limited if total interest expenses exceed 30% of taxable earnings before interest and depreciations (EBITDA). Denied interest can be carried forward. There is also a threshold of net interest of 5 million NOK for the rule to be applicable. Unlike some other countries, Norway has not introduced an escape clause. The ratio thus represents an absolute limit to the amount of internal interest that can be deducted. The cap is based on an approximation of the maximum interest to earnings that a third party lender would accept. In other words, it is based on a company's debt servicing ability. To a certain degree, therefore, it mimics the arm's length test the way it is currently applied in most countries.

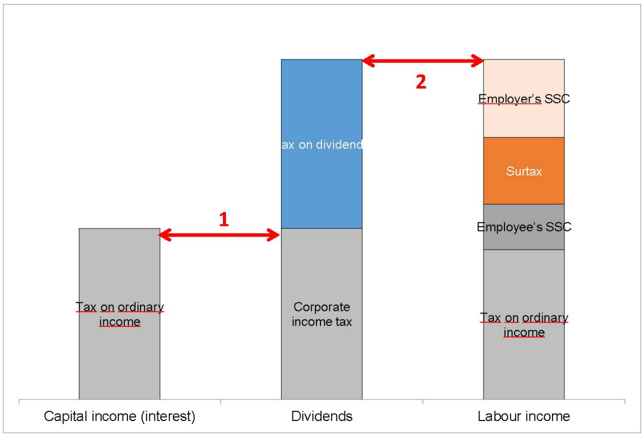
Since the rule was introduced only in 2014 there is as yet little available information on how it works. However, according to the Commission, the design of the rule has substantial weaknesses with regard to its efficiency in countering profit shifting.

The Commission report illustrates two types of typical profit shifting schemes where the current rule has limited impact. The first example is where a group sets up an internal treasury unit in an EEA-country with limited or no tax on interest income. The treasury is financed through equity, while third party debt is kept in Norway and deducted from its income here. The foreign treasury unit then lends the equity back to a group company in Norway as an internal loan, thus making it possible to get a second deduction in Norway (so-called double dip). The interest income is not liable to tax in the receiving country. The profit from this structure can be returned to Norway free of tax through the exemption method applied to profit from holdings abroad. The current interest deduction limitation limits the deductions of interest paid on the loans to the internal treasury unit. However, since the limitation rule takes into account both internal and third party debt, but only cuts off interest on the latter, the group might be able to bypass the limit by keeping internal and external debt in different companies.

A second typical example of profit shifting is where a Norwegian parent finances subsidiaries abroad through equity, while deducting third party interest related to the subsidiaries in Norway. In this case the current limit will not have effect at all because the company is not paying interest on internal loans, only deducting an unproportionate part of its third party loans in Norway.

A possible solution to this problem would be to apply the arm's length principle in the same way that is currently used with other group costs. According to the transfer pricing guidelines of the OECD, IT-support, headquarter functions, etc. can be debited group companies according to a cost driver. An allocation of third party interest according to a pre-determined key, such as assets, would make it impossible for companies to deduct costs in excess of third party interest and severely limit the possibility to skew allocation of third party debt. However, the Commission does not recommend such a solution due to the complicated nature of an allocation rule.

The Commission majority instead recommended the retention of a profit-based rule against profit shifting, but making the rule stricter to disallow a larger portion of the interest deductions stemming from profit shifting. Firstly, the Commission proposed that the deduction limit should apply to all interest, both internal and external. That would make it impossible to bypass the limit through the structures described above. The Commission also proposed to change the limit to 45% of earnings before interest and taxes (EBIT), compared to the current 30% of EBITDA. At the same time they proposed that the threshold for applying the rule should be reduced from NOK 5 million to NOK 1 million in net interest. Disallowing interest on third party loans while at the same time tightening up the deduction limit means that the rule also will affect interest deduction for companies without opportunities to engage in profit shifting. The Commission majority was of the view




Source: The Tax Commission

**Figure 2:** Principles for personal taxation

that having an effective rule against profit shifting is more important than protecting a few, highly geared companies.

An unfortunate potential consequence of the rule is that it may have negative impact on the investment incentives of the affected companies. However, if the rule primarily affects profit shifting companies, it will have a positive effect on overall investment returns due to more equal playing ground between companies with and without opportunities to engage in profit shifting.

Limiting profit shifting through interest deductions is one of the action points in the OECD BEPS project. Recommendations for best practice will be presented in the autumn of 2015. A follow-up of the Commission proposal could therefore take these recommendations into account, as well as information about the functioning of the current rule, once experiences from the tax year 2014 has been reviewed.

## 2.5 Changes to personal income taxation

Personal and corporate taxation are closely connected in economic terms, and in Norway the two sets of tax rules have been closely linked since the tax reforms of 1992 and 2006, notably through the application of a common tax rate to ordinary income. Given the Commission's proposal to reduce the corporate tax rate to 20%, the tax rate on capital income and the personal level should be reduced correspondingly. A special, lower tax rate for companies would incentivize transfers of capital from persons to companies and increase the differential treatment of different organizational forms. The Commission has therefore recommended retaining a common rate on capital income for both personal tax payers and companies (illustrated as principle 1 in figure 2).

The Commission concluded that the most sensible approach would be to retain ordinary income as the tax base and reduce the tax rate on ordinary income to 20%, also at the personal level. Under this approach, different forms of income at the personal level remain connected through a single net tax base. An advantage of preserving ordinary income is that the system is well known to taxpayers and that the changes, from a technical point of view, will be easy to adapt for tax authorities.

However, a reduced tax rate on ordinary income will mean a large revenue loss from personal taxation. The Commission has proposed recovering the majority of the lost revenue through a progressive tax on personal income.

A lower corporate tax rate will reduce the overall tax levied on domestic investment by Norwegian investors, and thus in isolation make it more profitable to convert labor income into ownership income (income shifting). The Commission considered that it was necessary to increase the tax on ownership income (as defined by the shareholder model; i.e., dividends and gains exceeding the allowance for shareholder equity), and by making it a separate tax base with a separate tax rate. The Commission majority recommended that the marginal tax rate on ownership income (including corporate tax) was set approximately equal to the maximum marginal tax on wages (including employer's social security contributions). This is illustrated as principle 2 in figure 2. Under the Commission's revenue neutral proposal the total marginal tax rate (incl. SSC) will be 52,8% on both. In the alternative proposal involving net tax reductions, the marginal tax rate on work is reduced to 50,2%.

A further implication of reducing the rate on ordinary income is that the value of deductions against this tax base is reduced. This means, for instance, that the value of interest deductions will be reduced. The Norwegian tax system favors investments in real property through a number of special rules and the possibility for unlimited interest deductions while not applying tax on the imputed rent, is one of them. The reduced value of interest deductions will reduce state subsidies towards mortgages.

## 2.6 Financing of the proposal and long-term effects

The Commission proposed a number of changes to finance the reduction in corporate taxation, on top of necessary changes to personal taxation described above. These proposals differed between the revenue neutral proposal and the proposal involving a net tax relief of NOK 15 bn.

The efficiency loss in connection with taxation increases more than proportionately compared to the tax rate. This suggests broad tax bases and low rates. In line with this, the Commission thus proposed eliminating tax subsidies both in personal and corporate taxation. For instance, the Commission proposed to eliminate a number of allowances in personal taxation with rather weak justifications and/or limited links with taxable income. Political goals connected with these allowances are better reached through other means. Further, the Commission proposed several improvements to existing taxes and a larger emphasis on consumption and property taxation, to improve the overall functioning of the economy.

The Commission also proposed changes to the value added tax. The current value added tax system features reduced rates and exemptions influence the composition of production and consumption. The Commission was of the opinion that the sole purpose of value added tax should be to generate government revenue. The simplest and most efficient way of doing this is to have a single, common value added tax rate and make all goods and services taxable. However, a change to a single rate would imply large increases in certain sectors and this alternative should therefore be assessed in a wider context. Amongst other things, persons on low incomes would face a considerable increase in tax relative to income because they spend a greater proportion of their income on consumption, particularly on food, which has benefited from a reduced rate since 2001. The Commission has therefore proposed a dual rate value added tax system in which the general rate of 25% is retained, but the current zero rate and lowest rate are increased to 15%, corresponding to the current rate on foodstuffs.

In the context of the value added tax, the financial sector is treated differently from other industries, since most financial services are exempt from the tax. This means that no tax is charged on the majority of sales by financial institutions, although – on the other hand – these institutions are not entitled to deduct value added tax paid on associated costs. Thus, the financial sector is taxed through input VAT instead of the difference between output VAT and input VAT. The exemption means that the cost of services is higher for companies, and cheaper for households, than in a scenario with VAT. The Commission urged the Ministry of Finance to continue its work on solving the problems associated with the current exemption[5]. The value added tax base should be expanded to encompass financial services provided for in the form of fees and so on and a tax should be levied on margin-based income from financial services. This tax should be designed to include as many of the neutrality characteristics of value added tax as possible. However, further consideration should be given to whether margin-based income should be subject to value added tax at the ordinary rate, or whether account should be taken of the fact that a tax on interest margins may impact saving.

The Commission as part of their mandate also considered the system of tax depreciation. Available data on economic lives of assets indicated that some of the depreciation rates for some capital groups deviated so much from economic depreciation that there was reason to lower them. The increased revenue from these changes both makes it possible to keep a lower corporate tax rate, and increases efficiency through a more equal effective tax rate on different investments.

As part of its review of personal and capital taxation, the Commission also proposed changes to the net wealth tax. As a result of the repeal of inheritance tax and the Commission's proposal to reduce tax on ordinary income, the role of net wealth tax in the tax system – and not least its function as an instrument of redistribution policy – is now highly topical. At present, assets are valued very differently and the tax rate is relatively high. In the Commission's opinion, these factors do not constitute arguments for repealing the tax, but rather for ensuring a more uniform valuation and reducing the tax rate. The Commission therefore proposed a concrete reorientation of the net wealth tax within an unchanged revenue. In other words, changes in the net wealth tax were not used to finance the rest of the proposal. However, the Commission pointed towards reducing the favorable treatment of residential property also in the context of income taxation. As a first step, the Commission proposed repealing the tax exemption for rental income from letting up to 50% of the market value of one's home.

Generally speaking, the Commission's proposal involves shifting the tax burden from corporate tax, tax on saving and tax on labor onto taxes on real property and consumption. This is consistent with international recommendations to promote economic growth. In total the proposals are expected to result in more efficient use of resources, increased investment and higher value creation. On an uncertain basis, the Commission assumed that the degree of self-financing of reduced corporate tax rate, reduced depreciation rates, and a stricter interest limitation

5 See description in Prop. 1 LS (2013-2014)

rule over time would total between 20 and 40%[6]. The results depend of course on the assumptions made, and should therefore be used with caution. A tax on margin-based income in the financial sector pulls in the opposite direction. Better allocation of capital stemming from more correct depreciation-reduced profit shifting is not taken into account.

Shorter term redistributive effects indicate that the proposed changes to personal income taxes under the revenue neutral proposal will, on average, mean approximately unchanged tax for all income deciles except the highest decile. Increased tax on ownership income will mean that the income group with highest average income will, on average, face tax increases that in some cases will be considerable. The increased tax on ownership will be counteracted by a reduced corporate tax rate, but for various reasons, it is difficult to calculate the overall redistributive effects of the reduction in corporate tax.

## 2.7 Concluding remarks

While the proposal, in general, has been well received, inevitably a proposal that changes the tax mix will have its critics. Groups that today are privileged through special allowances unwarranted from an economic viewpoint will oppose their abolishment. A politically contentious issue in Norway is the relationship between corporate income tax on the one hand and tax on capital income and ownership on the other hand. A central premise of the proposal is that due to the mobility of corporate profit, one should rely more on residential taxation. Studies show that a shift towards residence tax and tax on property will entail potentially large welfare gains, but such a change will nevertheless be difficult to follow through.

Preventing profit shifting without harming business activity is a complex and difficult task. As well as proposing a number of measures in this area, the Commission emphasized the need to take into account the upcoming proposals resulting from the OECD and G20 work on BEPS. These recommendations might necessitate adjustments to the Commission proposals. Increased awareness of the role of harmful tax practices might put a higher pressure on countries to reduce tax competition and so both make measures against profit shifting more effective, as well as somewhat reducing the pressure on corporate tax rates. Many are, however, sceptical of the outcome of the BEPS-process and this remains to be seen.

The Commission report has been on public consultation. Siv Jensen, Minister of Finance has announced that a proposal for a follow-up of the Commission report will be published in autumn 2015.

# 3 Denmark

By Lars Kjærgård[7]

## 3.1 Introduction

Benny Engelbrecht (The Social Democratic Party, Socialdemokratiet) was appointed Minister for Taxation from 2 September 2014, replacing Morten Østergaard (The Social-Liberal Party, Det Radikale Venstre) who was appointed Minister for Economic Affairs and the Interior.

## 3.2 Tax initiatives

Since November 2013 the Danish Ministry of Taxation has been part of an inter-ministerial task force on tax havens. The goal of the task force is to identify the characteristics of a tax haven in order to improve the ability of the tax authorities to expose illegal uses of tax havens. There has been an ongoing political discussion on the use of tax havens since prior to the formation of the task force. The leak of documents on tax arrangements in Luxembourg ("Luxleaks") and the publication of the OECD's report on base erosion and profit shifting (BEPS) have contributed to this discussion. In line with this, the Danish government has proposed initiatives to combat the use of tax havens.

### 3.2.1 Tax haven initiatives

In November 2014 the Minister for Taxation launched an initiative to minimize the use of tax havens. On

6 Calculations are based on elasticities described in De Mooij and Everdeen (2008) as well as a general equilibrium model developed by Sørensen (2014), adopted to Norwegian parameteres.
DeMooij and Everdeen (2008) «Corporate Tax Elasticities: A Reader's Guide to Empirical Findings.», Oxford University Centre for Business Taxation WP 08/22.
Sørensen (2014): «Measuring the Dead-weight Loss from Taxation in a Small Open Economy. A general method with an application to Sweden.» Journal of Public Economics 117 (2014), 115–124

7 Associate Professor Lars Kjærgård Terkilsen PhD, Department of Law, University of Southern Denmark.

12 December 2014 an agreement was made between the government, The Socialist People's Party (Socialistisk Folkeparti), The Red-Green Alliance (Enhedslisten), and The Danish People's Party (Dansk Folkeparti). The agreement has three main parts: (1) taxation of settlors of trusts; (2) fair taxation of assets expatriated from Denmark; and (3) the adoption of an international general anti-avoidance rule (GAAR) in Danish tax law. On 25 January 2015, a bill was published for consultation.[8] The proposals in the bill are presented in more detail below. Taking measures to prevent the use of tax havens is also part of the 2015 action plan of SKAT (the Danish Customs and Tax Administration).

### 3.2.2 Taxation of settlors of trusts

Danish law does not have any legal form similar to a trust. Since trusts are based on agreements rather than regulation they can take many forms with wide-ranging characteristics. This means that when a Danish taxpayer contributes to a foreign trust, the trust must be categorized according to Danish law. In essence, this categorization determines whether a specific trust can be regarded as a separate legal entity or a transparent entity. In order to recognize a trust as a separate legal entity, the capital contributed by the settlor must be effectively and definitively separated from the settlor. According to the case law this means that the contribution must be irrevocable and that the settlor may no longer have control of the capital. If the settlor is also a beneficiary, the trust will not be recognized as a separate legal entity and contributions to the trust will be considered part of the settlor's capital. It can be difficult for tax authorities to verify whether the capital of a trust is effectively and definitively separated from the settlor. For example, may a letter from the settlor to the trustee expressing the settlor's wishes be used to return the capital to the settlor. While the letter of wishes may not necessarily bind the trustee, a protector can be appointed with the power to replace the trustee if their actions do not comply with the letter of wishes.

The current regulation includes a protective rule to govern situations where a contribution is made to a trust in a low tax jurisdiction. Under Section 3A of the Taxation of Foundations Act (*Fondsbeskatningsloven*), a tax of 20% is payable on such contributions.[9]

The proposed legislation will repeal this section and introduce a new Section 16K into the Tax Assessment Act (*Ligningsloven*) whereby a settlor will be taxed on the income from a trust. This provision will apply to people who are or who have been a resident of Denmark within the preceding 10 years and who have contributed to trusts without being subject to taxation in Denmark.

The bill proposes to grant exemption from this taxation if the settlor can prove that it is an absolute requirement of forming the trust that the capital contributed to the trust is effectively and definitively separated from the settlor,[10] if trust has a charitable purpose for a larger group of people, if the purpose is to provide pension for a larger group of people, or if the trust is an investment company regulated by Section 19 of the Taxation of Capital Gains on Shares Act (*Aktieavancebeskatningsloven*).

If a trust is taxed in the state where it is formed, a tax credit will be granted.

If the bill is adopted there will be a form of mandatory Controlled Foreign Companies (CFC) taxation on the formation of trusts which will limit the scope for using trusts to avoid Danish taxes. Already under the current rules if a trust is formed abroad and the capital in the trust is not effectively and definitively separated from the settlor, the settlor will be taxed on income from the trust. The proposed provision will do away with the need for this discussion, as any contribution to or formation of a trust will be taxed unless the specific exceptions apply. The bill does not mention any European Union (EU) implications of this change. However there might be a breach of the right to the freedom of establishment if a foreign category of legal entity is not respected. The case law of the Court of Justice of the European Union (CJEU) is not clear as to the criteria a national category must meet.[11] A breach of the right to freedom of establishment might arise if a trust fulfils the Danish criteria for being a foundation and if taxation of the settlor were to make it more interesting to form a trust in Denmark than in another member state. The question is whether Denmark could successfully argue that the taxa-

8 The bill was adopted by the Danish Parliament as act no. 540 of 29 April 2015 with minor changes.

9 The fee is similar to that paid when contributing to Danish family foundations pursuant to Section 3(6)(3) of the Taxation of Foundations Act.

10 It follows from the explanatory notes that this requires that the forming of a trust is based on legislation and not only agreements.

11 The CJEU has touched upon this topic at several instances. See for instance case C-386/04 *Stauffer* where the CJEU dealt with income in charities.

tion of settlors is justified because the rules are intended to prevent abuse.[12]

### 3.2.3 Fair taxation on assets expatriated from Danish taxation

A taxpayer in Denmark who has carried out or plans to carry out a transaction and wants to know its tax consequences can ask the tax authorities for a binding answer (*bindende svar*). The rules on binding answers are in Chapter 8 of the Tax Administration Act (*Skatteforvaltningsloven*). Pursuant to section 24(1)(1) of the Act, a request for a binding answer must contain all the information that is relevant to the answer. If it is deemed that information is lacking, extra information can be required. If the taxpayer does not provide the information, a binding answer will be refused. When a binding answer is given, it is generally binding on the tax authorities for 5 years, pursuant to Section 25(1) of the Tax Administration Act. However, this period can be limited. Pursuant to the explanatory notes on the provision, this will often be the case when dealing with the valuation of assets.

Certain factors can influence the binding nature of the answer. Pursuant to Section 25, an answer is not binding if the assumptions that form the basis of the answer change (this includes where the underlying regulation, whether national or European, changes) or if the answer concerns the interpretation of a tax treaty and the tax authorities of the other contracting state use a different interpretation.

Part of the bill on tax havens further limits the use of binding answers in cases involving the valuation of assets. The bill proposes two changes. First, the period during which an answer is binding is limited to 6 months. Second, the answer is not binding if it is probable, either on the basis of a selling price or the yield of the asset, that the value of the asset differs by at least 30% and DKK 1,000,000 from the value given for the purpose of the binding answer. The explanatory notes to the bill state that a higher selling price than that stated in the binding answer does not necessarily mean that the binding answer no longer applies. It must be probable that the actual selling price was a more likely value at the time of the valuation used in the binding answer.

The proposed rules may lead to greater uncertainty for a taxpayer who asks for a binding answer involving the valuation of assets. While the period during which the answer is binding is now often limited, the risk that the tax authorities will disregard a binding answer may lead to a situation where taxpayers have limited interest in requesting a binding answer on the valuation of assets.

### 3.2.4 International anti-abuse rules

On 27 January 2015, the European Council adopted an anti-avoidance rule in the Parent-Subsidiary Directive.[13] The member states must implement such a provision in their national laws.

In July 2013 the OECD published its BEPS action plan.[14] Action 6 deals with treaty abuse. It was recommended that the Member States implement anti-abuse rules to prevent inappropriate use of the DTCs.[15]

Two international anti-abuse rules have been proposed in Danish tax law. One is to prevent abuse of European directives and the other to prevent abuse of tax treaties.

The anti-abuse rule for European directives denies the application of a directive if the main purpose or one of the main purposes of an arrangement or series of arrangements is to obtain a tax benefit that is contrary to the content or purpose of a directive. This applies if, in all the relevant circumstances, the arrangement or series of arrangements are not genuine. The determination of whether or not a given arrangement is genuine is to be decided on the basis of whether the arrangement is founded on valid commercial reasons which reflect economic reality.

Under the anti-abuse rule on the use of tax treaties, treaty benefits are to be denied if under all the relevant circumstances, it is reasonable to determine that obtaining the benefit is one of the main purposes with the arrangement or transaction, unless it can be proved that the benefit is in accordance with the content and purpose of the treaty provision.

The wording of the two proposed anti-abuse rules differs a little, but in the explanatory notes, it is stated that the use of the provisions will not differ. Both are to be implemented in a new Section 3 of the Tax Assessment Act.

12 The CJEU's case law on abuse as a ground of justification is quite extensive. See e.g. Case C-196/04 *Cadbury Schweppes*.

13 The amendment was proposed by the Commission on 25 November 2013.

14 OECD (2013), Action Plan on Base Erosion and Profit Shifting, OECD Publishing. http://dx.doi.org/10.1787/9789264202719-en

15 The action plan was followed by a discussion of a draft for Action 6 issued in March 2014.

The application of national anti-abuse rules to European directives covers the Merger Directive,[16] the Directive on the taxation of cross-border interest and royalty payments[17] and the Parent-Subsidiary Directive.[18] As mentioned above, it was not until 2015 that the Parent-Subsidiary Directive included an anti-abuse provision. For several years, the two other directives have allowed the possibility of denying benefits by applying national anti-abuse provisions.[19]

If the bill is passed, the determination of what constitutes a real or artificial arrangement will be subject to review by the CJEU. The determination of what constitutes a genuine or artificial arrangement in relation to treaty rights has been the subject of decisions by the CJEU. In Case C-196/04 *Cadbury Schweppes*, the CJEU dealt with the UK CFC rules. It was ruled that the purpose of combating wholly artificial arrangements could justify a restrictive national rule. On several occasions the CJEU has ruled that setting up an establishment in another member state in order to benefit from a more favorable tax regime does not in itself constitute abuse whereby the establishment can be regarded as a wholly artificial arrangement. It will be interesting to see how this case law will affect the anti-abuse clause in the directive and Danish tax law.

## 3.3 New legislation

### 3.3.1 Changes in the special scheme for the taxation of undertakings (*Virksomhedsskatteloven*)

The Special Scheme for the taxation of undertakings has existed since 1987 and is used by a large amount of self-employed taxpayers. The act has been amended with Act no 992 of 16 September 2014. The amendment aims to combat unwanted tax planning within the special scheme for the taxation of undertakings.

When using the special scheme the self-employed taxpayer is granted several tax benefits. Firstly, the tax rate on earnings that remain in the undertaking is equivalent to the corporate tax rate. Secondly, interest payments are deductible in the business income leading to a higher tax-value than that of interest deductions outside of the special scheme. These possibilities have led to tax planning within the frame of the Special Scheme on Business Taxation.

One type of tax planning is the placing of private debt within the business economy. This results in a high tax value of interest deductions on private debt. To combat this form of tax planning the special scheme contains an interest correction-mechanism (*rentekorrektion*). However, reality was that the level of the interest correction was lower than the rate, which was to be paid on the private loan. This meant that the mechanism was not as effective as planned.

One of the changes in the Special Scheme for the Taxation of Undertakings is that the rate on the interest correction is calculated in a different way. The new calculation results in a rate which is more in line with the market rate. Another change to combat this form of tax planning is that in case of a negative equity account (*indskudskontoen*),[20] the self-employed cannot profit from the possibility of making savings in the business economy at a low tax rate. All earnings must be transferred to the private economy and taxed as personal income thus making it impossible to obtain a tax credit on these earnings.

Another type of tax planning made profit of the threshold of the top bracket tax, which in 2015 is DKK 459.200. To avoid paying the top-bracket tax, the self-employed managed their withdrawals from the business economy in such a way, that their personal income did not exceed the threshold. The rest of the earnings remained as low taxed savings within the business economy. In order to finance private spending, the self-employed took up a loan from their bank, where the business savings served as collateral. The result was a substantial tax credit on business savings without a need for an appertaining modest private spending.

This is countered by the amendment by viewing business savings that serve as collateral for debt, which is not part of the business economy, as withdrawn from the business.

The act entered into force as of the income year 2015. The amendments regarding business assets used as collateral, however, entered into force as of 11 June 2014. Some further transitional rules apply.

16 Directive 90/434, last amended with Directive 2009/133.

17 Directive 2003/49.

18 Directive 90/435, last amended with Directive 2015/121.

19 Article 11 of the Merger Directive and Article 5 of the Directive on the taxation of cross-border interest and royalty payments.

20 A negative equity account is when the amount of debt placed in the business exceeds the value of the assets.

### 3.3.2 Modification on dividends from portfolio shares.

A package for growth was presented by the government on 8 May 2014. Part of this package was to reduce the tax on dividends from tax exempt portfolio shares. See Inge Langhave Jeppesen in Danish Tax News 2014/2. This part of the package for growth was adopted by the Danish Parliament as Act No 1375 of 16 December 2014.

### 3.3.3 New form of company

On 8 October 2014, the government presented a bill proposing a new form of company: the employee investment company. It was proposed that this form of company form should be the subject of a three-year trial. The bill was passed as Act No 1286 of 12 September 2014. The corporate aspect of the new form of company is regulated by the Employee Investment Company Act.[21]

The purpose of an employee investment company is to finance investments, loans, or securities in the employing company. Pursuant to Section 2 of the Act, the company must be promoted by two kinds of investors: the employing company and the employees. The employing company has unlimited liability, while the liability of employees who invest their salaries is limited to their investment. This form of company is thus similar to a limited partnership.

However, under Section 1(1)(2b) of the Corporation Tax Act an employee investment company is taxed as a separate taxable entity (similar to an A/S - a public limited company).

The salaries invested in an employee investment company by its employees are tax exempt. The tax liability arises when a dividend is paid to the employee from the employee investment company.

### 3.3.4 Tax treaties

On 19 December 2014, the tax treaty between Denmark and Luxembourg was changed so that pension funds are now taxable in the source state. This means that Denmark can now tax pension funds paid from Denmark to people resident in Luxembourg.[22]

21 Act No 1284 of 12 September 2014.

22 The protocol was adopted as Act No 1472 of 19 December 2014. The agreement was reported in Danish Tax News 2014/2 by Inge Langhave Jeppesen.

## 3.4 Case law

### 3.4.1 The CJEU

The CJEU ruled in Case C-48/13 *Nordea Bank Denmark* on 17 July 2014.[23] The CJEU was asked by the Eastern High Court (*Østre Landsret*) whether the now repealed Danish rules on recapturing losses breached freedom of establishment.

In the period 1996–2000, Nordea generated losses in permanent establishments in Norway, Sweden, and Finland. These losses were deducted from income in Denmark. In 2000 a restructuring of the offices in Norway, Sweden and Finland led to a recapturing of the losses so they were included in Nordea's taxable income in Denmark.

The question for the CJEU was whether this recapturing of losses breached the freedom of establishment. The CJEU found that the Danish rule was a restriction since the recapture of losses did not apply to Danish branches of companies.[24] The CJEU considered whether the rule could be justified as its purpose was to prevent tax avoidance. The CJEU concluded that the restriction could be justified but that the principle of proportionality was not satisfied.[25]

It has been argued in the tax literature that, even though the *Nordea Bank Denmark* case dealt with rules that had been repealed, similar rules still exist. It can be expected that these current rules in the Corporation Tax Act (*Selskabsskatteloven*) and the Tax Assessment Act (*Ligningsloven*) will be found to breach the right of freedom of establishment.[26]

### 3.4.2 The Supreme Court (*Højesteret*)

In SKM2014.777.HR, the Supreme Court ruled on whether an organization could be categorized as charitable. Pursuant to Sections 8A and 12(3) of the Tax Assessment Act it is possible to deduct contributions to charities if they are granted as gifts or regular payments (løbende ydelser). Deductibility requires the organization receiving such payments to be approved as a charity. The conditions for this approval can be found in Sections 1–7 of Executive Order 837 of 6 August 2008. Among the conditions are requirements for the number of contributors, how the contribu-

23 The case is discussed in detail by Anders Nørgaard Laursen in *Nordic Tax Journal* 2014/2, and by Jens Wittendorff in SU 2014, 256.

24 Paragraph 21.

25 Paragraph 36.

26 See note 13.

tions are used and the amount of the organization's capital.

If the organization receiving the contributions is an association (*forening*), extra conditions apply. One of these is that the association should have at least 300 contributing members. If the receiving organization is a trust or similar, this requirement does not apply.

The question in this case was whether the organization qualified as an association or a trust. The Eastern High Court gave its decision in SKM2013.374.ØLR where it was decided that, since the rules of the organization stated that its governing body was an "association assembly", the organization was registered as an association in Denmark, and it was not supervised by the Danish foundation authorities, the organization was an association. Since it did not have 300 members it could not be approved as a charity.

In SKM2015.24.HR, the Supreme Court gave its decision in a case dealing with a doctor resident in Denmark who worked in Norway in 2007–2009. During this time he kept his residence in Denmark. Norway categorized the doctor's income as income from professional services and did not tax it. Denmark viewed the income as income from government services regulated by Article 19 of the Nordic tax treaty; according to this the income was to be taxed at source in Norway. This led to a case of double non-taxation. The case illustrates the tax challenges when the source state and the residence state categorize income differently. The Nordic tax treaty contains a provision on subsidiary taxing rights in order to counter cases of double non-taxation.

The question in the case was whether the subsidiary taxing right in Article 26(2) of the Nordic tax treaty allowed Denmark to tax the income.

The taxpayer argued that since, over the years, Denmark had not made use of the subsidiary taxing right, it had shown passivity and could not exercise the right in his case.

The Supreme Court concluded that the taxation of the income was in line with the case law and thus the tax authorities had not shown passivity. Furthermore, the taxpayer had not received any binding answer from the tax authorities stating that the income could not be taxed, nor did the taxpayer have any legitimate expectation that the income would not be taxed. It was concluded that Denmark could apply the subsidiary taxing right in Article 26(2) of the Nordic tax treaty.

### 3.4.3 The High Courts (*Landsretterne*)

In 2012, the Supreme Court gave its decisions in SKM2012.92.HR and SKM2012.221.HR concerning income corrections. SKM2012.92.HR concerned an interest-free loan between two associated enterprises. SKM2012.221.HR concerned whether a shareholder or a company was the rightful recipient of the income.[27] In both cases, the Supreme Court decided that Section 2 of the Tax Assessment Act (*Ligningsloven*) applies to any changes to the tax assessments of the persons and companies in question. This affects both the time limits for making changes to tax assessments pursuant to Section 26(5) of the Tax Administration Act and the possibility of making payment corrections pursuant to Section 2(5) of the Tax Assessment Act. The Supreme Court's decisions thus concern the ongoing discussion in Danish tax theory and case law about the principle of rightful ownership and the doctrine of reality in taxation.

In December 2014, these decisions were followed by two decisions of the Eastern High Court; SKM.2014.846.ØLR and SKM2014.866.ØLR. Both cases concerned whether income attributed to a company instead of its shareholder fell under Section 2 of the Tax Assessment Act, whether a wrongful attribution of income could be reversed pursuant to Section 29 of the Tax Administration Act, and whether the payment could be corrected pursuant to Section 2(5) of the Tax Assessment Act. Both the reversing of attribution and the correcting of payment would require the relations to be covered by Section 2 of the Tax Assessment Act.

In SKM2014.846.ØLR, the Eastern High Court stated that the wording of Section 2 of the Tax Assessment Act only concerns prices and terms. In the view of the Eastern High Court, the Supreme Court had not decided that Section 2 of the Tax Assessment Act concerns the question of rightful ownership and thus concluded that there was no possibility for reversing the attribution of income or correcting payment in the case.

In SKM2014.866.ØLR, the Eastern High Court stated that, since there was no controlled transaction between the parties but rather payment to the wrongful recipient, it was not possible to reverse the transaction pursuant to Section 29 of the Tax Administration Act or correct the payment.

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**27** The cases have been discussed by Aage Michelsen in RR.SM.2013.2, and Jan Pedersen in RR.SM.2012.146.

### 3.5 Administrative changes

On 5 February 2015, the Minister for Taxation decided to abolish the *formueskattekurs* (the wealth tax valuation). The rules for this were in points 17 and 18 of Circular No 185 of 17 November 1982. When shares were transferred between people covered by the Inheritance and Gift Tax Act (*Boafgiftsloven*), they could use the wealth tax valuation for valuing the shares.

The abolishing of the rules was done with Circular no 9054 of 4 February 2015 and is followed by a Signal of Guidance (*styresignal*) on how the valuation of shares is to be done.

The National Tax Board (*Skatterådet*) decided that the wealth tax valuation could be used in SKM2015.57.SR. It was on the basis of this decision that the rules were abolished.

## 4 Finland

By Kristiina Äimä and Suvi Lamminsivu[28]

### 4.1 Introduction

Only a few legislative amendments regarding taxation have been announced so far. The next parliamentary elections will be held on 19 April 2015. The new government is expected to propose changes in tax law after the elections. Finland suffers from recession and lack of investments. Tax reform is considered necessary in order to boost economic growth.

The Supreme Administrative Court has issued a number of interesting rulings. Ruling KHO 2015:9 concerns withholding taxation of US regulated investment companies in Finland. The ruling implies that Finland will have pay withholding tax refunds to third country investment funds which have been subject to tax at source. The claim back period is five years. Finland pays an interest rate on the amount to be refunded.

### 4.2 The Additional budget

The government presented an additional budget to the Parliament in February. The additional budget includes the following measures. The threshold for small businesses that are exempt from VAT is increased from EUR 8,500 to EUR 10,000.

The interest-free payment period for the inheritance and gift tax under the business succession relief scheme is extended to seven years from the tax assessment imposing the tax has been completed. Currently, the maximum period is five years. The purpose is to ease transfers of business from the older generation to the next generation.[29]

### 4.3 FATCA agreement between the US and Finland

The President of Finland approved the FATCA agreement and related amendments on 20 February 2015. Financial institutions are required to identify their US clients. They must report about US clients' payments and account balances to the Finnish Tax Administration. Reporting obligation starts in 2015 covering information from 2014.

### 4.4 Case law of the Supreme Administrative Court

#### 4.4.1 KHO 2015:11

On 14 January 2015, the Finnish Supreme Administrative Court ("the SAC") issued its ruling on a case concerning the equity ratio test and the applicability of interest deduction limitation rules. The Finnish limited liability company "A Oy" had prepared its statutory financial statements according to the Finnish Accounting Act and Finnish Accounting Standards (FAS). Pursuant to the general guidelines of the Finnish Accounting Board, the company had booked the accumulated depreciation difference as a separate entry in the balance sheet. The company was a part of a group which had prepared the consolidated financial statements according to the international financial reporting standards (IFRS) and recorded the depreciation difference less deferred tax liability in equity.

Pursuant to Section 18 a (3) of the Finnish Business Income Tax Act if the equity ratio of the company (the ratio

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29 Source: *Laura Ambagtsheer-Pakarinen*. IBFD's Tax News Service, www.ibfd.org.

between equity and the total balance) is higher or equal to the equivalent ratio of the group, the interest deduction limitation rules are not applicable. The SAC ruled that when conducting the equity ratio test the depreciation difference less deferred tax liability in the company's financial statements could not be considered as equity for equity ratio test purposes.

#### 4.4.2 KHO 2015:9

The Finnish Supreme Administrative Court issued on 13 January 2015 its ruling KHO 2015:9 concerning withholding of tax on dividends paid to US investment fund. The taxpayer "A" was a US Regulated Investment Company ("US RIC") and established in the form of a Delaware Statutory Trust and resident for tax purposes in United States. A was, in practice, tax exempt in the US and subject to limited tax liability in Finland. Furthermore, A was a closed-end investment fund whose common shares were listed on the New York stock exchange. In the US, A was taxed as a company and treated as the beneficial owner of the income. A had received dividends from Finland which had been subject to a withholding tax of 15% based on the US-Finland tax treaty. A had applied for an advance ruling of the tax treatment from the Finnish Central Tax Board for the years 2011 and 2012.

The SAC overruled the ruling of the Central Tax Board and stated that the dividends paid to A were exempt from withholding tax in Finland. When examining the case, the SAC analyzed several criteria and concluded that A was considered to be mostly comparable to a Finnish publicly quoted limited liability company engaged in investment activities although it had certain similarities with Finnish investment funds as well. According to the SAC, different tax treatment of dividends paid to resident limited liability companies and non-resident limited liability companies is in breach of EU law. As Finnish publicly quoted, limited liability companies do not pay tax on dividend income, the dividends paid to A must be exempted from tax in Finland. Reference was made to the Articles 63 and 65 of the TFEU and the Emerging Markets Series of DFA Investment Trust Company case (*C-190/12*)[30].

30 KPMG Finland represented the claimant before the Finnish Central Tax Board and the SAC.

#### 4.4.3 KHO 2014:198

On 31 December 2014, the Finnish Supreme Administrative Court issued its decision KHO 2014:198 concerning the applicability of Finnish CFC rules. The taxpayer "A Oy" was a Finnish publicly quoted limited liability company which owned a subsidiary in Malaysia. The subsidiary was 100% owned by its Finnish parent company. The Malaysian subsidiary was engaged in providing global IT help desk services, services related to updating anti-virus databases and conducting research and development related to anti-virus programs and software. The subsidiary's business activities were similar to its parent company's business activities. It was unclear whether the activities of the Malaysian subsidiary were industrial or comparable production activities which would fall outside the applicability of the Finnish CFC rules.

The SAC pointed out that the activities of the subsidiary were somewhere between industrial production and service production. The subsidiary carried on active business which included similar business processes than in the industry of IT sector. The SAC concluded that the business activities of A Oy's Malaysian subsidiary were considered to be "other production activities" which were comparable to industrial production activities. Thus, the A Oy's Malaysian subsidiary was not considered as a controlled foreign corporation for tax purposes and its income could not be taxed at the level of A Oy.[31]

#### 4.4.4 KHO 2014:184

On 19 December 2014, the SAC issued its ruling KHO 2014:184 concerning transfer of assets and incorporation of port business carried on by a municipality. According to Section 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 SAC ruled that incorporation of the port business carried on by a municipality into a municipality's 100% owned limited liability company was considered as transfer of assets pursuant to Section 52 d (1) of the Business Income Tax Act. The SAC overruled the decision of the

31 KPMG Finland represented the claimant before the SAC.

Finnish Central Tax Board and returned the case to the Central Tax Board in order to determine whether the transferred assets, liabilities, and reserves constituted a branch of activity.

#### 4.4.5 KHO 2014:161

On 4 November 2014, the Finnish Supreme Administrative Court gave its ruling KHO 2014:161 on tax treatment of training costs related to Doctor of Business Administration program. The taxpayer “A” was Master of Economics and Business Administration and had, for many years, been the CEO of the Finnish limited liability company “B Oy”, which was engaged in venture capital investments. Before that A had worked for more than 20 years in management positions in different companies. On his employer’s initiative, A had agreed to participate in Aalto University’s Doctor of Business Administration (DBA) training program. The duration of this program was from 3 to 6 years. According to the agreement, the employer paid incurred training costs, the application fee of EUR 1 500 and annual fee of EUR 29 000 plus VAT. The company’s obligation to pay the training costs would end if A quits his job for reasons beyond the company. In this case, A would be liable to compensate the training costs paid by the company for the previous two years of training preceding the resignation.

The SAC ruled that taking into account the company’s line of business, A’s position in the company, the report concerning the content of the training, and the terms of the training agreement concluded between A and the employer, the company had acquired the training for its business purposes. The SAC stated that the training costs paid by the company were not taxable income for A.

# 5 Norway

By Ingvild Brandal Gaasemyr[32]

## 5.1 Introduction

Since the tax reform in 1992, an overall principle for the tax policy has been to utilize resources in the best possible manner by a combination of broad tax bases, low tax rates and equal tax treatment of industries, businesses and investments, cf. Prop. 1 LS (2014-2015).

The government’s objectives for its tax policies are to finance the welfare state, secure social mobility, achieve more efficient use of resources and provide better conditions for Norwegian businesses. The government wants to strengthen private ownership, and stimulate people to work, save, and invest. In their joint declaration of assent (Sundvolden declaration) the government stated that the tax level should be reduced and that tax revenues shall be used more efficiently. The government also announced a goal to simplify regulations in general, including tax regulations.

In October 2014, the Solberg-government (consisting of the Conservative party (Høyre) and the Progress Party (Fremskrittspartiet)) presented its first budget not influenced by the previous government. In the 2015 Budget the government proposed tax reliefs of approximately 8.3 billion NOK. No significant structural changes concerning taxation of companies or individuals were proposed. The proposal included income tax reliefs and reduced duties on cars and so on. The wealth tax base on real estate was expanded along with a reduced wealth tax rate and an increase of the basic allowance for net wealth tax. The Government negotiated with its partners, Venstre and Kristelig Folkeparti, and concluded on a budget agreement on 22 November 2014.

On 21 November 2014, the Ministry of Finance released a consultation paper on a new Tax Assessment Act. The aim is to simplify tax assessment regulations by uniting and harmonizing the rules and thereby, strengthen the tax payer’s legal protection.

The government has announced a review of agricultural taxation to simplify the regulations and contribute to more efficient use of resources. Further, the government has appointed a new Green Tax Commission to propose tax changes to shift taxation towards environmentally-harmful activities.

This article will present the most important changes to Norwegian tax legislation in force as from 1 January 2015. A list of tax treaties concluded in the second half of 2014 is also provided. The report from the Tax Commission is presented. Finally, summaries of four Supreme Court decisions in the tax area from that same period are presented.

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## 5.2 New legislation

### 5.2.1 Wealth tax

As from 1 January 2015 the net wealth tax rate is reduced from 1% to 0.85%. The basic allowance increased from NOK 1 million to NOK 1.2 million (2.4 million for spouses). At the same time the valuation of business premises and second dwellings increased from 60 to 70% of the estimated market value. The reduction of the valuation discount for such properties reduced the favorable tax treatment compared to bank deposits and listed shares. See Innst. 4 L (2014-2015).

### 5.2.2 Simpler tax rules for partnerships

In the 2015 Budget the government proposed several simplifications to the tax rules applicable to partnerships. The rules on the place of taxation are changed to ensure that all persons are taxed in their home municipality. Investment measures have been simplified. Married partners will now be treated individually instead of as one partner. The option for certain partnerships to utilize losses from such activity in ordinary income has been abolished. Instead the losses shall be carried forward for deduction against future partnership income or gain from realization of the partnership. See Prop. 1 LS (2014–2015) chapter 4.

### 5.2.3 Tax liability for public hospital pharmacies

With effect from 1 January 2015 public hospital pharmacies are liable to pay taxes on income from retail activities in Norway. New procedures will ensure that no cross-subsidization takes place between commercial and non-commercial activities in public hospital pharmacies. The aim of the proposal was to prevent distortion of competition between public hospital pharmacies and private pharmacies, and to secure that the financing of public hospital pharmacies are compatible with the EFTA State Aid regulations. See Prop. 1 LS (2014–2015) chapter 11 and Innst. 4 L (2014–2015) chapter 9. On 4 February 2015 the EFTA Surveillance Authority announced that the investigation on Norway's financing of public hospital pharmacies was closed due to the tax changes.

### 5.2.4 Increased depreciation rate for heavy goods vehicles, lorries and buses

As from 1 January 2015, the depreciation rate for heavy goods vehicles, lorries and buses are increased by 2% from 20% to 22%. See Innst. 4 L (2014–2015) art. 17.4.

### 5.2.5 Exit tax

In the 2015 budget, the government proposed amendments to the scheme of payment for exit tax on latent unrealized capital gains on assets transferred out of the Norwegian tax jurisdiction. The proposal was passed by Parliament with effect from 19 June 2014 for tangible assets, financial assets and obligations, and with effect from the tax year 2014 for intangible assets. The exit tax is payable in seven annual installments. However, the total exit tax becomes payable if the asset is realized before the seven year period expires. Interest is added to the deferred exit tax. The background for the proposal was a letter of 24 April 2014 from the EFTA Surveillance Authority and new practice from the EU Court and the EU Commission.

Further, the obligation to provide collateral for deferred exit tax is limited for tax payers moving from Norway to another EEA country. The obligation to provide collateral is now reserved to cases where there is a genuine risk that the tax payment cannot be recovered.

## 5.3 Tax treaties

An information exchange agreement with Hong Kong Special Administrative Region of the People's Republic of China was signed in August 2014. The agreement is a result of the joint Nordic negotiations with tax havens, and is mainly in accordance with the OECD Model Agreement on Exchange of Information on Tax Matters. The new double taxation treaty with Cyprus entered into force in July 2014 with effect from 1 January 2015.

A consequence of the abolition of the Norwegian Inheritance Tax Act in 2014 is that the inheritance tax treaties with Switzerland and the United States of America expired on 1 January 2015. The Foreign Account Tax Compliance Act (FATCA) is effective for information concerning the 2015 tax year, even if the information exchange will take place in 2016.

## 5.4 Norwegian Tax Commission

On 2 December 2014, the Norwegian Tax Commission presented its proposals in NOU 2014:13 *Capital taxation in an International Economy*. The Commission was appointed by the previous government to examine the corporate tax in view of international developments. The present government modified the mandate to reflect the aim to reduce taxes and the Commission was further asked to assess tax depreciation rules. The Commission proposed to reduce the general tax rate from 27 to 20%. A central recommendation is to retain the current model for taxation of companies. To avoid a rise in income shifting as a result of a reduced corporate tax rate, the Commission has suggested to increase taxation on ownership income (dividends, capital gains, etc.).

Further, a withholding tax on royalties and interest was suggested. Companies registered in Norway are suggested to always be considered resident in Norway for tax purposes. The threshold for being a low-tax country is suggested to change from 2/3 to 3/4 of the Norwegian tax level. Limited deductions for interest paid to related parties are suggested to expand to cover interest paid to unrelated parties as well. Some changes in the depreciation rates are suggested to better reflect the actual economic decrease in value. For individual taxation, a new tax on personal income is suggested to replace the surtax. At the same time, several reliefs are proposed abolished; home savings scheme, tax class 2, several deductions etc.

## 5.5 Case law

### 5.5.1 Rt. 2014 p. 1057 "Deduction for overseas withholding tax"

The case concerned the right to claim a deduction for overseas withholding tax. The exemption method was introduced in 2004. Among other things, this made dividends received by a company exempt from taxation. As a consequence, costs related to such dividends were no longer deductible. The year after, a new rule (§6–24) was introduced that made it possible after all to deduct costs related to income that is tax-free according to the exemption method. The majority of the court found that overseas withholding tax could not be considered a cost in the sense of §6–24. In particular, the majority considered overseas withholding tax as a consequence of the income, rather than a cost incurred to generate it. The court's minority interpreted this point differently. It also believed that the introduction of §6–24 was meant to re-establish all deductions that were previously allowed.

### 5.5.2 Rt. 2014 p. 1025 "Sale of fishing vessel with accompanying fishing rights"

The main question of the case was whether the sale of two fishing vessels generated a taxable gain of accompanying fishing rights. There was also a question on how the fishing rights should be viewed for the purpose of wealth tax. The two fishing vessels were traded from a sole proprietorship to partly-owned limited companies. The companies were given permission by the Directorate of Fisheries to fish commercially and were given the same access to fisheries as before. The court found that after the transactions, it was the companies that had the right to fish, rather than the active shareholders. A taxable gain had therefore been realized. Furthermore, the fishing rights should be considered taxable assets for the purpose of wealth tax.

### 5.5.3 Rt. 2014 p. 986 "Regular GP's practice"

The case concerned how the value of the right to receive municipal payments should be classified for tax purposes when a regular GP's practice is traded. If the right is classified as goodwill, it can be amortized and deducted from taxable income over time. On the other hand, if it is classified as an "other intangible asset", it cannot be amortized and would therefore not be deductible. Among other things, the regular GP scheme involves a payment from the municipality to the GP for each person on the GP's patient list. When a GP's practice is traded, the patient list is transferred to the buyer. However, patients are free to switch to another GP at any time, leading to a reduction in the payment from the municipality. The court pointed out that the value of the transferred patient list would deteriorate over time as patients changed to another GP. The court therefore ruled that the right to receive municipal payments for each person on the patient list should be classified as goodwill.

### 5.5.4 Rt. 2014 p. 822 "Realized gain on convertible bonds"

A company had issued a bond that gave the lenders the right to convert the amount owed to shares in the company at a predetermined conversion price. The bond holders were later offered the chance to subscribe to shares at a subscription price similar to the conversion price in exchange for revoking their right to convert the bond to shares. The court came to the conclusion that the difference between the market price and the subscription price was a taxable income for bond holders that had taken up the offer. The court found that the agreement had led to the convertible bond being transformed into two separate financial instruments; one regular bond and one subscription right. For tax purposes, this meant that the convertible bond had been realized. As convertible bonds

# 6 Sweden

By David Kleist and Pernilla Rendahl[33]

## 6.1 Legislative changes

### 6.1.1 Income tax

Very little has happened during this period in terms of legislative changes relating to income tax. However, a couple of proposals regarding very significant legislative changes have been presented or are currently subject to committee work. Most significantly, 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.[34]

In accordance with the Swedish legislative process, the proposal was circulated for comments by relevant entities such as the Tax Agency, courts, organizations and companies. More than one hundred comments were submitted, almost all of them including harsh criticism and many of them rejecting the proposal. Among other things, the commentators meant that the proposal would have a negative impact on the production of leasehold flats. Several commentators were also concerned that the proposal would increase the complexity of the corporate tax system. Moreover, the suggested 50% reduction of losses carried forward as a means of financing part of the proposal was perceived as having undesirable retroactive effects.

Taking into account the response to the proposal, it seems - in my view - unlikely that the government will present a Government Bill to the Parliament based on the proposal in its current form in. Some significant changes would probably first have to be made. It is even possible that the proposal will not lead to any legislation at all, but this remains to be seen.

Another important field, which is currently subject to committee work, is the Swedish rules concerning closely held companies, that is, companies where the owners are active. The rules are intended to prevent income derived from work performed by the owners from being taxed as income from capital rather than as income from employment.

Initially, the committee's work was limited to the tax rules that are relevant for passing on the ownership of a closely held company to the next generation. However, in January 2015, the instructions to the committee were amended. According to the new instructions, the committee shall make a review of essentially the entire set of tax rules relating to closely held companies, meaning that the committee is free to suggest major changes to these rules. The review shall be aimed at preventing the shifting of employment income to income from capital, so the focus seems to be on protecting the tax base rather than encouraging enterprise. At the same time, the dead-line for the committees work was extended until 1 September 2015.

### 6.1.2 Value added tax

In January 2015 several legislative changes in the Swedish VAT Act[35] came into force. Besides implementing the final stage in adapting the place of supply for services sold to consumers to directive 2008/8/EC also changes as regards VAT on imports, the exemption for dental technical products and related services have entered into force per 1 January 2015.

Preparatory work 2013/14:16, Swedish Code of Statutes: 2014:50. One reason for changing the collection of VAT on imports is to simplify for taxable persons. Instead of accounting for VAT separately to Customs upon importation of goods this is done through the regular VAT declaration to the Tax Authority from 1 January 2015. The

33 Jur.Dr, Senior lecturer David Kleist The School of Business, Economics and Law, Gothenburg University; and Jur.Dr, Senior lecturer Pernilla Rendahl The School of Business, Economics and Law, Gothenburg University. This chapter covering tax news from Sweden in the period from June 2014 to January 2015.

34 For an account of the proposal, see Kleist, D. ; Rendahl, P. (2014). Swedish Tax News. Nordic Tax Journal. 2014 (2) p. 268-276.

35 *Mervärdesskattelagen* 1994:200.

main reason for the changes is to simplify since taxable persons can declare VAT and customs to one authority instead of two and improving the liquidity of the company since the VAT can be deducted at the same time as the output VAT is declared.

Preparatory work 2013/14:224, Swedish Code of Statutes: 2014:940 and 941. In directive 2008/8/EC, a number of changes to the place of supply of services was suggested and adopted. The last step in the changes concerns the place of supply of radio and television broadcasting services, electronically supplied services and telecommunication services when sold from a taxable person established in an EU member state to non-taxable persons, that is, consumers, residing in another member state. The previous provisions result in taxation in the place where the supplier of these services is established (origin), whereas from 1 January 2015, these services are taxed where the consumer is resident or usually resides (destination).

To simplify, a mini one-stop shop (MOSS) was introduced at the same time. The suppliers that are tax liable for the supplies to consumers are not required to register for VAT in all member states where their customers are residing, but use one contact point for declaring their VAT. For example, a Swedish supplier registered for VAT in Sweden uses the Swedish Tax Authority as contact point, accounting VAT including sales of television and broadcasting services, electronically supplied services, and telecommunication services to consumers residing in other member states. The Swedish Tax Authority then forwards the declaration and payment to the Member States concerned.

At both, EU level and national level explanatory materials from the Commission and the Swedish Tax Authority has been published. These are non-binding in character but are based on the changes in the Council implementing regulation of 7 October, 2013, which are directly applicable in all member states.[36] The explanatory materials use presumptions meaning that the taxable persons need to provide documentation validating where the non-taxable buyer is residing. It has proved to be difficult to uphold the documentation requirements, especially for smaller companies.

Preparatory work 2014/15:1, Swedish Code of Statute 2014:1492. The change in the treatment of sales of dental technical products mainly affects intermediaries as the exemption since 1 January 2015 requires the products to be sold by a dentist or dental technician. Intermediaries not fulfilling the requirement are thereby selling a taxable product. The intermediaries selling taxable dental technical products then also may deduct input VAT.

Another change, proposed in the same preparatory work, covers the possibility to use a simplified invoice. Previously, the invoiced amount for issuing a simplified invoice was 2000 SEK, as from 1 January 2015, it is changed to 4000 SEK.

Preparatory work 2014/15:5, Swedish Code of Statute 2014:1505. This covers minor changes including an adaption of the Swedish VAT Act to the VAT directive regarding non-VAT territories and an adaption to changing the competent authority to issue permissions for export shops at airports to the Swedish Tax Authority.

## 6.2 Case law

### 6.2.1 Income tax

In a large number of cases, Högste Forvaltningsdomstolen (HFD) has granted rehearing of old court cases on the basis of the *ne bis in idem* principle, that is, on the right not to be tried or punished twice, which follows from the European Convention for the Protection of Human Rights and Fundamental Freedoms and from the Charter of Fundamental Rights of the European Union. This principle was first accepted by HFD as having an impact on Swedish tax law in its ruling HFD 2013 ref. 71.

So far no new legislation that deals with the *ne bis in idem* problem in Swedish tax law has been enacted. Hence, there is some uncertainty as to how the Tax Agency and the prosecution shall coordinate their work. The *ne bis in idem* problem in Swedish tax law mainly stem from the fact that criminal charges are tried by the regular courts, whereas tax surcharges (which according to the jurisprudence of the European Court of Human Rights are also to be considered as a form of criminal penalty) are tried by the administrative courts in a separate court system.

## 6.3 Value added tax

### 6.3.1 Introduction

In addition to the two cases shortly described below, there are three other VAT cases that have been decided upon in the period from June 2014 until January 2015. One case concerns the aftermath in the Swedish courts due to the Graphic Procédé case from the Court of Justice of the Eu-

**36** Council implementing regulation (EU) No 1042/2013 of 7 October 2013 amending Implementing Regulation (EU) No 282/2011 as regards the place of supply of services.

ropean Union.[37] The latest case confirms the current position, whereby it is not undue for the tax authority to change the taxation by using after taxation and consequential changes. [38]

Two other cases concerns appealed decisions from the Board of Advanced Rulings. The first concerns the application of 6% VAT on swimming courses provided to children with disabilities, whereas the previous case law has applied 25% VAT on courses given to babies and small children up to the age of four, on the reason that it was not covered by sporting activity in the VAT provisions (*idrottslig verksamhet*).[39] HFD claims that the main difference between the cases is that the purpose of the courses for the children with disabilities is to learn to swim independently.

The other appealed decision from the Board of Advanced Rulings concerns taxable services. A non-profit organization is delivering taxable services of control of contractual wages (*ackordskontroll*) for their members and non-members. The organization can no longer charge nonmembers due to a decision in the Swedish Labour Court on 24 October, 2012 and therefore raises the member fee to cover the costs for their service.[40]

### 6.3.2 HFD 2014 ref. 40

This case was decided on 18 June 2014 and concerns the revaluation of the taxable amount on services carried out by a holding company to its subsidiaries. The Swedish Tax Authority estimated the taxable amount based on the costs for performing the services whereas the company argued that the price for the services to its subsidiaries was comparable to another group of companies acting in the same market.

The basis for revaluation of the taxable amount is found in Article 80 in the VAT directive and implemented in chapter 7 sec. 3 a ML. The purpose of the provision is to obstruct tax avoidance through lowering prices between closely related companies. One of the possibilities to revaluate the taxable amount is when the actual compensation for the provided services is lower than the market price. The subsequent question then is what the tax authority and the company need to prove in such situations.

HFD starts by referring to that it is the tax authority that shall prove that the compensation actually received is lower than the market price. However, in transactions between closely related companies showing that the compensation is lower than the costs for providing the services fulfils the burden of proof. Subsequently it is then for the company to prove that it is probable that the actual compensation is comparable to the market price. In this case, the court ruled in favour of the tax authority.

### 6.3.3 HFD 2014 ref. 73

This case concerns intermediation of payment services and if such services are exempted from value added tax in accordance with Chapter 3 sec. 9 ML (the implementation of Art. 135.1.d in the VAT directive) or not. The intermediary is a subsidiary to a parent company which provides payment services. The subsidiary actively calls on potential customers, analyzing their need for payment services. If the customer accepts, a contract between the customer and the parent company is made and the parent company thereafter handles the customer. The payment service is thereby provided by the parent company to the customer.

HFD reaches the conclusion that the services provided by the subsidiary to the parent company is an intermediary services. Since the payment service provided by the parent company is exempt from VAT, the intermediary service from the subsidiary is also exempt.

37 Case C-88/09 Graphic Procédé [2010] REG I-1049 and the description of the Swedish VAT case HFD ref. 14 in Swedish Tax News, Nordic Tax Journal 2014:2, p. 275-276.

38 See case 3336-3338-13, delivered 20 October 2014.

39 See case 8453-13, delivered 21 November 2014 compared to HFD 2012 ref. 71.

40 See case 3855-14, delivered 17 December 2014.