

Denmark enacts new rules on international taxation

EY Tax News Update: Global Edition

EY's Tax News Update: Global Edition is a free, personalized email subscription service that allows you to receive EY Global Tax Alerts, newsletters, events, and thought leadership published across all areas of tax. Access more information about the tool and registration [here](#).

Also available is our [EY Global Tax Alert Library](#) on ey.com.

On 3 December 2020, the Danish Parliament enacted Bill No. L 28 with changes to:

- ▶ Transfer pricing
- ▶ Permanent establishments
- ▶ Foreign losses

Transfer pricing

The law significantly strengthens the Danish transfer pricing rules as follows:

- ▶ Transfer pricing (TP) documentation must be submitted to the tax authorities no later than 60 days after the deadline for the filing of the annual corporate income tax return (generally due six months after year end). This will include both the master file and country specific file(s).
- ▶ The tax authorities are entitled to extend the 60-day deadline in extraordinary circumstances.
- ▶ TP penalties may be imposed if the TP documentation is not submitted within the 60-day deadline.
- ▶ Daily penalties may be imposed if the TP documentation is not submitted within the 60-day deadline.

- ▶ Penalties may also be imposed if the tax return reporting obligation regarding transfer pricing is not satisfied.
- ▶ The tax authorities will be entitled to assess a taxpayer on an estimated basis for TP purposes if the TP documentation is not contemporaneous and is not submitted within the 60-day deadline, i.e., the burden of proof is reversed.

The new rules are applicable for income years starting 1 January 2021 and thereafter.

Permanent establishments

The permanent establishment (PE) concept of domestic Danish law is linked to the definition of PE in Article 5 of the Organisation for Economic Co-operation and Development (OECD) Model Income Tax Convention as it read before the 2017 update. In 2017, the PE definition in Article 5 was amended to accommodate the recommendation of the Base Erosion and Profit Shifting (BEPS) work. Most of the Danish tax treaties will also be amended as Denmark has signed the OECD's multilateral convention.

On this basis, Denmark's taxing rights under its tax treaties will be expanded compared to its taxing rights under domestic law. Accordingly, the domestic PE definition has been amended in order to align with the new definition in Article 5. However, two special rules under Danish law will be maintained: (1) a building site or construction or installation project work constitutes a PE from the first day, and (2) investments in shares, receivables and financial instruments only give rise to a PE if the activity amounts to a trading activity.

The new rules are applicable from 1 January 2021.

Deduction for final losses in foreign entities

Danish companies are taxed on a territorial basis meaning that income or loss from foreign subsidiaries, PEs and real estate is not included in the Danish taxable income.

The Court of Justice of the European Union (CJEU) on 12 June 2018 (case C-650/16, *Bevola*) held that Danish law was incompatible with European Union law because a Danish company could not claim a tax deduction for a final loss in a foreign PE.

For this reason, a Danish company will now be entitled to claim a tax deduction for a final loss suffered by a foreign subsidiary, PE or real estate subject to a number of conditions. Among other things, the following conditions must be satisfied in order for a loss to be "final":

- ▶ It is not possible to utilize the loss under local tax rules in previous years, the loss year or future years and that the loss has actually not been utilized.
- ▶ It is not possible to utilize the loss in other countries.
- ▶ The loss could not be utilized in previous years, the loss year or future year if the local tax rules had been identical with the Danish rules.
- ▶ For losses incurred by subsidiaries it is required that the loss would have been tax deductible under the Danish rules on international tax consolidation.

The rule is applicable for income year 2019 and onwards. The tax authorities are expected to publish a decision that will entitle taxpayers to open past years tax returns to claim a tax deduction for final losses suffered in previous years.

For additional information with respect to this Alert, please contact the following:

Ernst & Young P/S, Copenhagen

- ▶ Jens Wittendorff jens.wittendorff@dk.ey.com
- ▶ Justin Breau justin.breau@dk.ey.com
- ▶ Henrik Arhning henrik.arhning@dk.ey.com

Ernst & Young P/S, Aarhus

- ▶ Søren Næsborg Jensen soeren.n.jensen@dk.ey.com
- ▶ Henrik Morthensen henrik.morthensen@dk.ey.com

Ernst & Young LLP (United States), Nordic Tax Desk, New York

- ▶ Malte Soegaard malte.soegaard1@ey.com

About EY

EY exists to build a better working world, helping to create long-term value for clients, people and society and build trust in the capital markets.

Enabled by data and technology, diverse EY teams in over 150 countries provide trust through assurance and help clients grow, transform and operate.

Working across assurance, consulting, law, strategy, tax and transactions, EY teams ask better questions to find new answers for the complex issues facing our world today.

EY refers to the global organization, and may refer to one or more, of the member firms of Ernst & Young Global Limited, each of which is a separate legal entity. Ernst & Young Global Limited, a UK company limited by guarantee, does not provide services to clients. Information about how EY collects and uses personal data and a description of the rights individuals have under data protection legislation are available via ey.com/privacy. EY member firms do not practice law where prohibited by local laws. For more information about our organization, please visit ey.com.

© 2020 EYGM Limited.
All Rights Reserved.

EYG no. 000023-20Gbl

1508-1600216 NY
ED None

This material has been prepared for general informational purposes only and is not intended to be relied upon as accounting, tax, legal or other professional advice. Please refer to your advisors for specific advice.

ey.com