8 February 2021

Global Tax Alert

Denmark proposes defensive measures against countries on EU's list of non-cooperative jurisdictions for tax purposes

Executive summary

The Danish Minister of Taxation, on 27 January 2021, presented Bill No. L 150 (the bill) on defensive measures against countries on the European Union's (EU) list of non-cooperative jurisdictions for tax purposes (the List). The bill will implement the EU Council conclusion of 5 December 2019 that invites Member States to adopt at least one of the four specific defensive measures.

The bill introduces two new rules:

- Payments made to persons in designated non-cooperative jurisdictions are not tax deductible.
- Dividends paid to shareholders in designated non-cooperative jurisdictions are subject to a higher withholding tax.

The new rules will be effective from 1 July 2021 if enacted by Parliament.

Detailed discussion

EU List

The EU Finance Ministers adopted the EU List for the first time on 5 December 2017. Subsequently, the List has been regularly updated and is now revised twice a year.

The current EU List was adopted on 6 October 2020 and includes the following jurisdictions: American Samoa, Anguilla, Barbados, Fiji, Guam, Palau, Panama, Samoa, Seychelles, Trinidad and Tobago, US Virgin Islands, and Vanuatu.

Denmark has a tax treaty with Trinidad and Tobago. In order to ensure that the new rules will be effective for this jurisdiction, a separate Bill No. L 149 calls for this tax treaty to be terminated with effect from 1 January 2022.

The next update of the EU List is scheduled for February 2021. The intention is that the new Danish rules will be amended by law to reflect changes to the EU List.

Non-deduction of payments

A new section 5 H of the *Tax Assessment Act* will mean that a taxpayer normally cannot claim a tax deduction for payments if the following two conditions exist:

- The payee is tax resident or registered in a designated non-cooperative jurisdiction
- The payee and payor are affiliated or closely related

Scope

The payor and the payee can be companies or individuals.

The payee can be a separate entity for tax purposes or transparent. Hence, the new rule will also affect payments made to transparent entities such as limited partnerships registered in a designated non-cooperative jurisdiction.

The payee can also be a company resident in a cooperative country (e.g., an EU Member State), if the payee is not the beneficial owner of the payment from Denmark, and the payment is repaid to an affiliated company in a designated non-cooperative jurisdiction.

There are two exceptions under the new section 5 H:

- If a company in a designated non-cooperative jurisdiction is not the beneficial owner of the payment, the payment is repaid to the beneficial owner, and the beneficial owner is tax resident in the EU/European Economic Area (EEA) or a country with which Denmark has concluded a tax treaty.
- If a company in a designated non-cooperative jurisdiction is also tax resident in the EU/EEA or a country with which Denmark has concluded a tax treaty.

The term "beneficial owner" must be interpreted based on Article 10-12 of the Organisation for Economic Co-operation and Development Model Income Tax Convention and the Commentary thereto.

Tax consequences

The new section 5 H will apply to payments that ordinarily would qualify as tax deductible operating expenses including interest and royalty payments.

The new rule also applies to purchase prices for goods and other assets. For example, if a Danish company purchases a receivable from an affiliated company in a designated non-cooperative jurisdiction, it will not obtain a tax basis in the receivable for which reason repayment or transfer of the receivable will trigger taxation of the gross amount received.

Likewise, a taxpayer will not be entitled to amortize tangible and intangible assets purchased from a company in a designated non-cooperative jurisdiction.

A payment may be non-deductible even if it triggers Danish withholding tax which may be of relevance for interest and royalties.

Dividend withholding tax

The withholding tax will be increased from 27% to 44% for certain dividends paid to shareholders in the designated non-cooperative jurisdictions, see proposed section 2 of the *Withholding Tax Act* and section 2 of the *Corporate Tax Act*.

The 44% dividend withholding tax rate will be applicable if the following two conditions exist:

- The shareholder is tax resident in a designated non-cooperative jurisdiction
- The shares qualify as "main shareholder shares", "subsidiary shares" or "group shares" (portfolio shares are outside of the scope of the new rule)

The shareholder can be a separate entity for tax purposes or transparent. Hence, the new rule will also affect dividends paid to transparent entities such as limited partnerships registered in a designated non-cooperative jurisdiction.

The shareholder can also be a company tax resident in a cooperative country if the shareholder is not beneficial owner of the dividend from Denmark, and if the dividend is repaid to an affiliated company in a country on the List.

There are two exceptions under the new section 5 H:

- If a shareholder in the designated non-cooperative jurisdiction is also tax resident in the EU/EEA or a country with which Denmark has concluded a tax treaty.
- If a shareholder in the designated non-cooperative jurisdiction repays the dividend from Denmark to a company or individual, if the company or individual is the beneficial owner thereof and is tax resident in the EU/EEA or a country with which Denmark has concluded a tax treaty.

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

Ernst & Young P/S, Copenhagen

- Jens Wittendorff jens.wittendorff@dk.ey.com
- Jesper Frøkjær jesper.froekjaer@dk.ey.com

Ernst & Young P/S, Aarhus

- Søren Næsborg Jensen soeren.n.jensen@dk.ey.com

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

- Malte Søgaard 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.

EYG no. 001020-21Gbl

1508-1600216 NY
ED None

ey.com