

Tax Matters Transfer Pricing

Special edition - December 2016





Tax Matters Special Edition

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Dear reader

Winter is coming. And so is the closing of yet another financial year for many companies. During 2016, many of the transfer pricing related BEPS initiatives have come to live, which inherently has broadened the area of work for in-house tax and transfer pricing people. Despite the guidelines provided by OECD, the implementation of the new documentation requirements and the introduction of the new concept of country-by-country (CbC) reporting can give rise to practical implementation uncertainties. In this special edition of Tax Matters, we provide a summary of latest news and zoom in on the below selected topics that we expect is of relevance when approaching year-end:

- Recent ruling: the National Tax Tribunal set aside SKAT's discretionary assessment.
- Friendly reminder from SKAT: Selected companies are asked to double check their filing in the tax return regarding controlled transactions and documentation requirements.
- How to navigate BEPS: Actions to consider in relation to new compliance requirements.

For each of the selected topics, we provide special service offerings, so feel free to reach out to us in case the reading gets you inspired – we are only a phone call or a click away and happy to meet or talk with you.

Please enjoy the reading.

Together, we solve tax matters.

Yours. Truly.

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Transfer Pricing Disputes

SKAT loses a TP case

On 3 October 2016, a ruling from the National Tax Tribunal ("NTT") regarding a transfer pricing case was published.

In this specific case, the NTT stated that SKAT had no basis for maintaining a discretionary increase of the taxable income of a company for the financial years 2005 and 2006.

Discretionary Assessment

Normally, SKAT has the burden of proof when it comes to TP assessments in the tax return. However, in case the precondition for a discretionary assessment is met, cf. below, this will influence and lower the burden of proof requirements, i.e. the value of the controlled transactions may be determined on the basis of a discretionary assessment.

Since 2002, SKAT has raised companies' taxable income by more than DKK 100 billion of which a significant number of these adjustments were based on discretionary assessments.

The Role of Transfer Pricing Documentation

Section 3B(5) of the Danish Tax Control Act ("DTCA") provides that certain taxpayers are required to prepare transfer pricing documentation. The transfer pricing documentation must be submitted to SKAT on request and be able to form the basis of an assessment of the arm's length nature of its intercompany dealings (controlled transactions). As from income year 2006, minimum requirements have been set out in an Executive Order.

Despite minimum requirements, the determination of documentation quality is a highly subjective matter. Until 15 August 2011, all transfer pricing adjustments were subject to a formal approval procedure with SKAT's central transfer pricing task force.

The NTT Ruling

The NTT found that overall the taxpayer had provided comprehensive transfer pricing documentation and SKAT in such situations has to render it probable that the documentation is either insufficient or incorrect and does thus not demonstrate that the controlled transactions meet the arm's length standard.

The NTT found that the alleged lack of documentation was not adequately substantiated by SKAT.

Based on that, the conclusion was that SKAT did not render it probable that the prices and terms applied by the company were inconsistent with the arm's length principle.

The NTT consequently ruled totally in favour of the taxpayer. The ruling thus provides more clarity as to when SKAT can make a discretionary assessment.

How can we help you?

As announced in the International Tax Review, KPMG Acor Tax has been recognised as the leading tax controversy BIG4 firm in Denmark.

As a special service offering, our tax dispute panel will free of charge review and provide input on your on-going tax dispute.

A fresh set of eyes and input from our global network has proven to reveal new paths to reaching the most optimal outcome, e.g. through new arguments, alternative solutions or redefined strategy.

Reach out and get inspired by our tax controversy team!

Transfer Pricing in the Tax Return

A friendly reminder from SKAT

The Danish tax authorities (SKAT) have recently issued targeted guidance to about 100 companies with a request to double check their tax return compliance with regard to transfer pricing and controlled transactions.

The guidance specifies how tax payers should prepare the tax return with regards to controlled transactions. This comprises both input related to the disclosure of information about related party transactions and information about documentation requirements.

Depending on the outcome, SKAT will evaluate whether further actions should be taken.

Disclosure of Information and Documentation Requirements

According to section 3B of the Danish Tax Control Act, Danish taxpayers are obligated to provide information about types and volumes of controlled transactions on the tax return. If the company declares "no" in checkbox 067 on the tax return, it means that the company is not obligated to provide information related to controlled transactions. Regardless of whether a company is subject to documentation requirements, the company would still be obligated to disclose information, if the total volumes of controlled transactions exceed DKK 5 million.

According to section 3B of the Danish Tax Control Act, Danish taxpayers are also obligated to prepare and keep documentation that substantiates prices and conditions for controlled transactions. If the company declares "yes" in checkbox 503 on the *appendix* to the tax return, it should reflect that the company is not subject to the requirement to prepare transfer pricing documentation.

Consequences if not Handling in Correct Information

If the company fails to complete the tax return and the accompanying appendices with sufficient information, the company risks that a discretionary assessment will be made, and, in the case of gross negligence, the company would also risk a substantial fine.

In this particular case where companies have received guidance and warnings directly from the tax authorities, it increases the probability that lack of correction of errors in the tax return would be considered gross negligence.

Experience

Experience from numerous due diligence processes gives us reason to believe that there in fact is a potential risk of non-compliance in the tax returns regarding controlled transactions and documentation requirements. We therefore recommend that attention is given to this area when preparing the tax return.

How can we help you?

As a special service, our tax and transfer pricing compliance team offers to review and provide input on your historical tax returns.

A fresh set of eyes can despite risk mitigating actions disclose tax opportunities or give input on how to optimise the tax return process.

Transfer Pricing Documentation

New compliance requirements

In view of the Danish implementation of country-by-country ("CbC") reporting and new transfer pricing documentation requirements, Danish taxpayers need to prepare for new compliance requirements.

In extension of our previous articles on the implementation of BEPS Action 13 in Denmark, including the new documentation content requirements (see [Tax Matters Q2](#)) and the implementation of CbC reporting in Denmark (see [Tax Matters Q3](#)), this article seeks to provide further considerations and input to the actions required to be compliant from a Danish perspective.

CbC Reporting

In order to be compliant, Danish taxpayers who are part of a group should consider the following:

- Is the group subject to preparation and submission of CbC reporting?
- What entity in the group is responsible for the submission of the CbC report?
- Is it possible to identify the required data in the ERP system?
- Notification to SKAT before 31. December 2016.

Also, taking into account that tax authorities around the world have different perspectives and experience, it may be reasonable to consider whether based on the CbC report on its own or in combination with the transfer pricing documentation, (see below) it is possible to identify any significant transfer pricing risks?

Even though the CbC report should not be used for the evaluation of the arms length' character of intercompany dealings on a stand-alone basis, there is a risk or false assumptions from the public in case information is leaked.

Some groups have more or less centralized compliance responsibilities in this respect and it may be a challenge to get the full overview of:

- 1) whether effective automatic exchange of information exists (AEOI);
- 2) which entities would consequently (subject to local rules) be required to file the CbC report for the income year 2016;
- 3) the different notification requirements from one country to another.

For a full overview of the international implementation of CbC reporting, please refer to the [Country-by-Country Implementation Summary](#) that is updated weekly by KPMG globally. You may also find helpful information on AEOI etc on the [OECD portal](#).

Transfer Pricing Documentation

The new Danish documentation requirements are fully aligned with the OECD recommendations, and the Masterfile concept has been effective in Denmark from the income year 2016. As from 2017, the new documentation requirements will be mandatory for all taxpayers that are obliged to prepare transfer pricing documentation.

We suggest that taxpayers review their current transfer pricing documentation and perform a gap analysis to identify if any information is missing in order to fulfill the new requirements. From our experience, most of the requirements to the local file are often fulfilled in most cases; however, special attention should be given to the implementation and link to the economic and financial data.

Conversely, the new content requirements to the master file include several new items that need to be documented thoroughly, including supply chain analysis, financial arrangements and ownership and development of intangible property.

Transfer Pricing Documentation

As the master file is likely to be made available to the tax authorities in many different jurisdictions, groups should take great care when preparing the master file, as the information could have significant impact on the market situation for a group in case the information is leaked or sold to a competitor.

CbC Notification

On December 9, 2016 SKAT announced that notification must be submitted in a standardized format, i.e. Form 05.034. The Form must be submitted through the secure digital communication line via "NemID".

In case you have already submitted notification and received a receipt, no further action is required.

KPMG Acor Tax Observation

The new compliance requirements following the Danish and international implementation of CbC reporting and the new Masterfile concept present numerous challenges and/or concerns both for global compliance, increased scrutiny and for the potential release of sensitive information.

As the CbC reporting and to some extent the group Masterfile as well may be available to numerous tax authorities around the world, multinational enterprises and advisers have raised concerns about the privacy of the information shared between the tax authorities and about whether the information potentially could be leaked or sold to the highest bidder. Therefore, groups that are subject to the submission of CbC reporting should consider undertaking an analysis and prepare for questions arising from the scrutiny from both tax authorities and the public.

How can we help you?

Our transfer pricing team is ready to answer specific questions related to the CbC reporting and the new documentation requirements.

In case solutions are found far from home we will reach out to our global network.

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