KPMG
cutting through complexity

GLOBAL TRANSFER PRICING SERVICES

Global Transfer Pricing Review

Denmark

kpmg.com/gtps

TAX

Denmark

KPMG observation

In recent years, the Danish tax authorities (SKAT) have significantly increased the size of their transfer pricing organization in order to comply with the strong political pressure to audit Danish multinational companies and to present actual results to the Danish government.

Changes in relevant tax law

In June 2012, the Danish Parliament passed a transfer pricing bill focusing on strengthening the measures against zero tax companies. The bill introduced new and more stringent regulations for companies engaging in controlled transactions. The most important change in relation to transfer pricing is the tightening of the rules on specific transfer pricing fines and the introduction of the possibility for SKAT to require independent auditors' opinions on transfer pricing.

Another consequence of the bill is that Danish companies have their corporate tax payments for 2011 and onwards made public. The possibility of offsetting losses has also been limited. This means that the first million Euros (EUR) in losses can always be offset against positive taxable income, but the remaining losses can only reduce the remaining income by 60 percent. Losses can still be carried forward indefinitely.

BEPS impact

SKAT has been following the developments of the Organisation for Economic Co-operation and Development (OECD) Base Erosion and Profit Shifting Project (BEPS) closely and is expected to continue its focus on the future developments of BEPS. More specifically, the developments resulting from BEPS are expected to find their way into the existing transfer pricing guidelines issued by SKAT.

We have already seen cases in which SKAT refers directly to BEPS discussion drafts as part of their reasoning/argumentation, e.g. references to the revised discussion draft on transfer pricing aspects of intangibles in connection with transfer pricing audits regarding intangible assets.

How to react

Companies are urged (i) to be aware of OECD work in progress/focus areas as SKAT is expected to – and in some cases already does – follow these developments, (ii) to identify significant risk areas and initiate any remediation as required on the basis of current actions of tax authorities, including SKAT, and the future impact of OECD work (BEPS etc.). It is expected that SKAT going forward will focus on companies' ability to explain their transfer pricing processes, communicate how transfer pricing risks are identified and the controls applied to mitigate these transfer pricing risks.

Other observations

There is a continued trend towards SKAT being aggressive and detail-oriented in its audit of whether the content of the transfer pricing documentation fulfils the comprehensive qualitative transfer pricing documentation requirements set out in the Danish Executive Order no. 42 of 24 January 2006 (*BEK nr. 42 af 24.01.06*).

In recent years, this trend has led to many cases in which SKAT has claimed that the transfer pricing documentation prepared by the tax payer did not fulfil the specific Danish transfer pricing requirements. This has resulted in SKAT issuing estimated and discretionary assessments, which then result in a shift in the burden of proof. Along with this, SKAT has introduced deemed transactions in certain transfer pricing audits in order to reach an appropriate result in the eyes of SKAT.

As such, preparation of localized transfer pricing documentation is highly recommended. It should:

(i) represent all relevant facts relating to the company.

(ii) serve as a viable cornerstone of any potential transfer pricing audit.

Therefore, the preparation of transfer pricing documentation should not be seen merely as a matter of compliance.

Basic Information

Tax authority name

The Danish Customs and Tax Administration (SKAT).

Citation for transfer pricing rules

- Danish Tax Assessment Act (*ligningsloven*), section 2
- Danish Tax Control Act (*skattekontrolloven*), sections 3 B, 14(4) and 17(3) and (4)

- Danish Corporation Tax Act (*selskabsskatteloven*), section 11
- Danish Executive Order no. 42 of 24 January 2006 (*BEK nr. 42 af 24.01.06*)
- Guidelines on Transfer Pricing Documentation, updated on 30 July 2014 (*Den juridiske vejledning 2014-2; Selskabs-, fonds- og foreningsbeskatning; C.D.11 Transfer pricing*). The guidelines are available for download on SKAT's website
- Guidelines on the valuation of business enterprises and ownership interests in business enterprises, including the valuation of goodwill and other intangible rights as issued by SKAT, 2009 (*Transfer pricing; Kontrollerede transaktioner, værdiansættelse*). The guidelines are available for download on SKAT's website

Effective date of transfer pricing rules

June 1998.

What is the relationship threshold for transfer pricing rules to apply between parties?

That a company or individual owns (directly or indirectly) more than 50 percent of the share capital or controls more than 50 percent of the votes or has an agreement regarding controlling interest in another company (common control).

What is the statute of limitations on assessment of transfer pricing adjustments?

Notice of transfer pricing adjustments must be given to the taxpayer by 1 May in the sixth year after the end of the income year subject to adjustment. This means that income adjustments for financial year 2014 can be made until 1 May 2020.

The final income adjustment must be given to the taxpayer by 1 August of the sixth year after the end of the income year.

In case of a corresponding adjustment (income adjustment made by a foreign tax authority), SKAT is not bound by any statute of limitation. However, no later than 6 months after receipt of the first notice of the corresponding adjustment, the taxpayer must ask for a re-opening of the tax assessment for the relevant years.

Transfer Pricing Disclosure Overview

Are disclosures related to transfer pricing required to be prepared or submitted to the revenue authority on an annual basis (e.g. with the tax return)?

In accordance with section 3B of the Danish Tax Control Act (*skattekontrolloven*), taxpayers engaging in controlled transactions must attach an appendix to the income tax return. The appendix is a form on which certain high-level data regarding the taxpayer and the nature and scope of controlled transactions must be disclosed. The form is called Form no. 05.021 (Danish version) or Form no. 05.022 (English version). The form is available for download on SKAT's website. Since the passage of the new bill transfer pricing bill introduced in 2012, much more focus is given to the information on the form.

What types of transfer pricing information must be disclosed?

The main business activity of the taxpayer, the exact number of entities that participate in the taxpayer's controlled transactions, their location and joint taxation status. When the value of the controlled transactions exceeds 5 million Denmark Krone (DKK) approximately EUR670,000, a range of further information regarding the controlled transactions must also be disclosed.

What are the consequences of failure to prepare or submit disclosures?

Penalties will be imposed. SKAT may impose a penalty if incorrect information is given in connection with the obligation to provide documentation, i.e. in relation to the appendices to the tax return (special forms) and high-level information given regarding the transfer prices declared on the tax return. The penalty is issued in proportion to the higher of either:

(i) the turnover of the company (weighted as 0.5 percent of the turnover up to DKK500 million (approximately EUR67 million), 0.1 percent of the remaining turnover up to DKK1 billion (approximately EUR135 million) and 0.05 percent of the turnover exceeding DKK1 billion), or

(ii) the number of employees in the company. The penalty amounts to DKK250,000 (approximately EUR35,000) if the company has less than 50 employees and increases by DKK250,000 for every additional 50 employees. If the company has more than 500 employees, the penalty will be DKK2 million (approximately EUR270,000).

Transfer Pricing Study Overview

Is preparation of a transfer pricing study required – i.e. can the taxpayer be penalized for mere failure to prepare a study?

Yes, for all transactions.

Other than complying with a requirement per the previous question, describe the benefits, if any, of preparing and maintaining a transfer pricing study?

Penalty protection if prepared in compliance with the Danish transfer pricing rules, and mitigation of (i) the risk of shifting the burden of proof from SKAT to the taxpayer; (ii) the risk of SKAT introducing deemed transactions; and (iii) the risk of SKAT issuing a discretionary assessment.

To satisfy the requirement and/or obtain the benefits, are there any requirements on when the transfer pricing study must be prepared and submitted?

Transfer pricing documentation must be prepared per income year. The transfer pricing documentation must be submitted to SKAT within 60 days after receipt of a request to that effect, and the deadline is to be considered an absolute deadline which cannot be extended.

SKAT is of the opinion that documentation should be prepared and available to SKAT no later than at the time of the submission of the tax return for the year documented. However, no case law exists and it is our assessment that this argument put forward by SKAT is not valid.

Database searches (comparable searches) must be provided within 60 days after SKAT's request to that effect, but are not subject to the simultaneous documentation requirement mentioned above. The deadline for submission of database searches may be extended to 90 days.

When a transfer pricing study is prepared, should its content follow Chapter V of the OECD Guidelines?

Yes, with some exceptions. The Danish transfer pricing legislation sets out very specific minimum requirements for a transfer pricing study, which should be addressed in order to comply with the documentation requirements. In general, these requirements go further than what is specified in the OECD Guidelines.

SKAT normally emphasizes that the content of the descriptions and analyzes are of great importance, meaning that the substance should be adequately presented.

Does the tax authority require an advisor/tax practitioner to have specific designation in order to prepare or submit a transfer pricing study?

No.

Transfer Pricing Methods

Are transfer pricing methods outlined in Chapter II of the OECD Guidelines acceptable?

Yes.

Is there a priority among the acceptable methods?

No.

If there is no priority of methods, is there a "best method" rule?

Yes, the most appropriate method should be applied per the OECD Guidelines.

Transfer Pricing Audit and Penalties

When the tax authority requests a taxpayer's transfer pricing documentation, how long does the taxpayer have to submit its documentation?

No more than 60 days after receipt of a request to that effect.

If an adjustment is proposed by the tax authority, are dispute resolution options available to the taxpayer outside of competent authority?

Yes, the taxpayer can file a complaint with the Danish National Tax Tribunal. The complaint must be filed no later than 3 months after the date of the adjustment.

If an adjustment is sustained, can penalties be assessed? If so, what rates are applied and under what conditions?

Penalties relating to documentation can be imposed if the transfer pricing documentation requirements are not fulfilled, whether intentionally or due to gross negligence. It is not a condition for imposing penalties that an income adjustment is made. The penalty is fixed at DKK250,000 (approximately EUR35,000) per financial year per entity if the submitted transfer pricing documentation is inadequately prepared preventing SKAT from using it as a basis for assessing whether prices and conditions have been set on arm's length terms.

Penalties can also be imposed if supplementary material, a benchmark analysis or an auditor's statement is not submitted at SKAT's request. The penalty can be reduced by 50 percent if the required is subsequently prepared. On top of this, penalties relating to adjustments can be imposed as well. Such penalties are calculated as an amount corresponding to up to 10 percent of an income increase. If the applied transfer prices are considered to be tax evasion, the penalty can be significantly higher.

To what extent are transfer pricing penalties enforced?

SKAT enforces the transfer pricing penalties more frequently. SKAT can apply the penalty regime starting with the income year 2009.

What defences are available with respect to penalties?

The penalty of DKK250,000 (approximately EUR35,000) for not preparing the transfer pricing documentation in the first place can be reduced if the documentation is subsequently submitted. Penalties can be appealed to the National Tax Tribunal and after that to the ordinary courts where the taxpayer has the opportunity to challenge the imposed penalty before it becomes final.

What trends are being observed currently?

SKAT has significantly increased the number of field tax auditors specializing in transfer pricing audits. Since 15 August 2011, the field tax auditors have been authorized to make income adjustments. Prior to this, all transfer pricing adjustments were subject to approval by SKAT's Central Transfer Pricing Office, and as a result, the income adjustments made by SKAT are observed to be less coherent. As stated above, there is a continued trend towards SKAT being aggressive and detail-oriented in its audit of whether the content of the transfer pricing documentation fulfils the comprehensive qualitative transfer pricing documentation requirements.

In transfer pricing audits, companies are requested to submit a copy of their transfer pricing documentation to SKAT. Typically, after the submission and once SKAT has read the company's transfer pricing documentation, a meeting is held with the field tax auditor. It is, therefore, important that the transfer pricing documentation can operate on a stand-alone basis with respect to the facts and conditions, and that the documentation fulfils the statutory documentation requirements.

SKAT continues to focus on loss-making companies and business restructurings, in particular the outbound transfer of intangible assets. Financial transactions are also increasingly subject to scrutiny. Furthermore, BEPS has had – and is expected to continue to have – a major impact on SKAT's approach to transfer pricing in general and transfer pricing audits involving BEPS-related issues in particular.

In addition to the increase in the total number of transfer pricing audits, the number of transfer pricing audits that actually result in income adjustments remains at a historically high level in Denmark. In 2013, SKAT completed 77 transfer pricing audits resulting in transfer pricing adjustments of DKK17.4 billion, compared to 67 audits resulting in adjustments of DKK21.2 billion in 2012 and 47 audits resulting in adjustments of DKK6.2 billion in 2011.

Special Considerations

Are secret comparables used by tax authorities?

No.

Is there a preference, or requirement, by the tax authorities for local comparables in a benchmarking set?

Yes, there is a preference, but not a requirement, for local comparables in a benchmarking set. However, European comparables are often produced, and accepted, by SKAT where a limited number of local comparables is available.

Do tax authorities have requirements or preferences regarding databases for comparables?

SKAT has no database requirements. However, the most commonly used databases include Amadeus, Orbis and RoyaltyStat. For financial transactions, SKAT uses Moody's RiskCalc, Bloomberg and Thompson Reuters LPC LoanConnector.

What level of interaction do tax authorities have with customs authorities?

Low, but the level is expected to increase going forward.

Are management fees deductible?

For a company to be allowed to deduct management fees (i) the fees must qualify as operating costs, i.e. the costs must relate to the company acquiring, securing and maintaining taxable income, cf. section 6 of the Danish State Tax Act (*statsskatteloven*); (ii) no shareholder costs may be included in the management fees; (iii) the services rendered must provide an actual and documented benefit to the recipient; and (iv) the company must have taxable income.

Are management fees subject to withholding?

No.

Are year-end transfer pricing adjustments permitted?

Yes, provided that the transfer pricing adjustments are in accordance with the arm's length principle and supported by written agreements. Adjustments must be presented in the transfer pricing documentation.

Other unique attributes?

None.

Other Recent Developments

SKAT continuously focuses on large multinational enterprises (including taxation of large one-off transactions involving large multinational enterprises), intra-group financing, restructurings and outsourcing (especially if turnover drops in the restructured entity post-restructuring), permanent establishments, management fees, transactions involving countries located in tax havens, simultaneous audits (Nordic and EU), intangible assets (IP transfers, royalty transactions etc.), loss-making companies (no or little tax payment in Denmark in the last couple of years).

In addition, a special project was announced in 2013 focusing on companies within the oil industry.

As stated above, SKAT continues to focus on loss-making entities. As such, companies facing consecutive income years with losses are likely to be challenged in a transfer pricing audit. Companies having had a loss for an average of the previous four years and companies engaging in controlled transactions involving low-tax jurisdictions may be ordered by SKAT to submit a special auditor's opinion regarding transfer pricing documentation stating whether the documentation complies with the arm's length principle. In such an opinion, the auditor must state whether:

(i) the documentation gives a fair view and presentation;

(ii) the documentation requirements are fulfilled; and,

(iii) the company's intra-group transactions are carried out on an arm's length basis.

The provision came into force on 1 January 2013.

The results of BEPS are expected to continue to be one of SKAT's major focus areas. This is expected to affect SKAT's approach to both on-going and future transfer pricing audits.

Tax Treaty/Double Tax Resolution

What is the extent of the double tax treaty network?

Extensive.

If extensive, is the competent authority effective in obtaining double tax relief?

Almost always.

When may a taxpayer submit an adjustment to competent authority?

After the taxpayer has been notified of the proposed adjustment. The taxpayer must submit an adjustment to SKAT no later than 6 months after notification.

May a taxpayer go to competent authority before paying tax?

Permitted.

Advance Pricing Agreements

What advance pricing agreement (APA) options are available, if any?

Unilateral (advance assessment notice), bilateral, and multilateral.

Is there a filing fee for APAs?

There is currently no filing fee for bilateral and multilateral APAs. There is a filing
fee of DKK300 (approximately EUR40) for a binding advance assessment notice/
unilateral APA.

Does the tax authority publish APA data either in the form of an annual report or through the disclosure of data in public forums?

SKAT publishes limited information regarding APAs each year. The information is provided in a published response to the Danish Parliament. The information contains the number of ongoing APAs, the number of closed APAs and the number of APAs taking effect in the year in question.

Please provide some information on how successful the APA program is and whether there are any known difficulties?

SKAT has quite substantial experience in negotiating APAs and has concluded several APAs as sufficient resources have been provided. For example, in 2011, Denmark was the first European country to enter into a bilateral APA with China.

Language

In which language or languages can documentation be filed?

Danish, English, Swedish or Norwegian

KPMG Acor Tax in Denmark

Simon Schaadt
Tel: +45 5374 7044
Email: simon.schaadt@kpmg.com

Henrik Lund
Tel: +45 5374 7066
Email: henrik.lund@kpmg.com

Martin Nielsen
Tel: +45 5374 7055
Email: martin.nielsen@kpmg.com

As email addresses and phone numbers change frequently, please email us at transferpricing@kpmg.com if you are unable to contact us via the information noted above.

kpmg.com/socialmedia

kpmg.com/app

Designed by Evalueserve.

Publication name: Global Transfer Pricing Review

Publication number: 131196

Publication date: October 2014