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Recent Developments in International Taxation

Denmark

Poul Erik Lytken

Accura Advokatpartnerselskab, Copenhagen

pel@accura.dk

Introduction

Denmark is one of three Scandinavian countries, is situated in the northern part of Europe and is a member of the European Union.

The last 12 months have seen some significant Danish case law, as well as changes in tax law. This report aims to provide an overview of the following three topics:

1. initiatives to reduce the emission of greenhouse gases;
2. recent case law concerning alternative financial instruments; and
3. status of Pillar Two.

Initiatives to reduce the emission of greenhouse gases

The focus on the emission of greenhouse gases and the effects they have on our environment is increasing. A Danish Climate Act was adopted by the Danish Parliament in 2020, with the stated aim to reduce the Danish emission of greenhouse gases by 70 per cent by 2030. The current Danish Government aims for Denmark to be climate neutral by 2045.

In order to succeed on this and to accelerate the green transition, the Danish Government has put forward a number of proposals on, among others, green taxes and duties to help reduce the emission of greenhouse gases and finance the green transition.

Passenger tax on commercial flights

The Danish Government has concluded a political agreement with a number of other parties in the Danish Parliament to implement a passenger tax on all commercial flights, which, among others, should be used to finance the green transition of domestic aviation.

The proposal entails a passenger tax on flights from Danish airports. As such, the tax is solely imposed on travel that begins in Denmark, that is, not on travel with intermediate landings in Danish airports. The tax is to be phased in from 2025 and is expected to amount to DKK 70 per passenger, on average, in the first year, increasing to DKK 100 per passenger, on average, in 2030. From 2031, the tax will be index adjusted annually.

The tax charge per passenger will depend on the end destination of the flight, that is, intermediate landings should not imply a reduced or additional Danish tax charge. Three brackets are expected to be introduced: intra-Europe, middle-length travel and long haul travel.

The tax charge will be imposed on and be payable by the airline company.

The proposal is expected to generate proceeds of DKK 920m in 2025, which is expected to increase yearly until 2030, when the expected proceeds will amount to DKK 1,400m going forward. Notably, it is stated in the proposal that the contemplated passenger tax is not expected to have any or only have limited positive climate and environmental effects.

The proposal is contemplated to enter into force on 1 January 2025.

CO_2-equivalent (CO_2e) emissions from allowance-regulated sectors

In order to further enhance the green transition, a political agreement was also concluded by the previous Danish Government and a number of parties in the Danish Parliament on a green tax reform for the industrial sector, which includes, inter alia, a proposal regarding a new higher and more consistent CO_2 tax than the current Danish emission taxes.

A new tax on CO_2e emissions was proposed to be phased in with effect from 2025 and will, as of 2030, entail a tax charge of DKK 375 per ton levied on CO_2e emissions from companies covered by the EU allowance trading system. The tax will be levied on actual greenhouse gas emissions when allowances are to be returned to being pursuant to the EU Parliament and the Council Directive on establishing a scheme for greenhouse gas emission allowance trading within the Community (2003/87/EF 13 October 2003).

Together with an additional proposal on the implementation of a green tax reform for the industrial sector, this proposal is expected to generate increasing proceeds of DKK 725m in 2025 to approximately DKK 2,050m in 2030. A CO_2 emissions reduction of 1.3 million tons is expected in 2025 and the reduction is expected to increase to 2.6 million tons in 2030.

The proposal is contemplated to enter into force on 1 January 2025.

Danish agriculture accounts for a large part of the Danish emission of greenhouse gases. Thus, in order to meet the 70 per cent reduction, a Danish expert group has proposed three models for a new and consistent CO_2e tax on agriculture, in addition to the taxes on the industry and allowance-regulated sectors. The models are estimated to meet the aim of the 70 per cent reduction by 2030 and lay the foundation for long-term climate regulation on the way to climate neutrality.

However, the taxation of CO_2e on agriculture has been discussed, to a great extent, since the report was published. At this point, no proposals have been set forth.

Road taxes

In June 2023, the Danish Parliament adopted a proposal introducing a Danish kilometre-based road toll on certain trucks to support a reduction of CO_2 emissions through a toll on certain trucks on Danish roads. The kilometre-based toll was adopted to ensure that the socio-economic cost, which truck traffic entails, and the contribution to traffic congestion, are covered to a greater extent than is the case today.

With effect from 2025, a road toll will be levied on certain trucks weighing 12 tons or more. The road toll is based on the driven kilometres and the truck's emitted CO_2. An additional toll will be levied for driving in certain environmental zones.

The toll is estimated to reduce CO_2 emissions by approximately 0.3 million tons in 2025 and 0.4 million tons in 2030.

Alternative financial instruments: recent developments

While the ingenuity of financial advisers and lawyers is ever expanding with regard to the creation of financial instruments, the law determining how such instruments should be taxed in Denmark struggles to keep up.

While these new types of instruments may work from a commercial point of view, uncertainty regarding tax treatment may result in the instruments being unattractive in practice.

While Denmark is not at the forefront of financial engineering when it comes to the creation of these instruments, waves are also seen in Denmark, as demonstrated by two recent rulings concerning the tax treatment of a simple agreement for future equity (SAFE) instrument and that of a warrant-like agreement. The rulings were issued by the Danish National Tax Board.

Tax ruling regarding the SAFE instrument

In this case, the taxpayer had requested a binding ruling on the Danish tax qualification of a SAFE instrument. In the specific case, the SAFE instrument entailed the investor contributing a fixed amount of capital. If one of several events occurred (eg, a new funding round or an exit), then depending on the event, the investor would have the right to: (1) receive shares; (2) receive a combination of shares and the repayment of some of the contributed capital; or (3) receive the repayment of the contributed capital.

The Danish tax authorities were asked to confirm whether the SAFE instrument from a Danish tax perspective should be considered:

- a debt claim;
- a convertible bond; or
- a ‘gambling contract’.

To be considered a debt claim from a Danish tax perspective, the instrument must contain a debt element, that is, an unconditional obligation or right to the monetary repayment of an amount. As it was only if a certain event took place that such a claim of repayment could be made, and as it was not certain that such an event ever took place, the Danish Tax Board found that the SAFE instrument in question could not be considered a debt claim.

Based on the same argumentation, the Tax Board also rejected the notion that the SAFE instrument could be a convertible bond because such an instrument must contain both a debt claim and a conversion mechanism.

Even though it was not part of the taxpayer’s initial request, in its argumentation, the Danish Tax Board, also concluded that the SAFE instrument did not fall under the classification of a ‘financial contract’ in Danish tax law. It should be noted that a financial contract for Danish tax purposes is a specified term for certain type of instruments, such as futures and swaps, and does not necessarily conform with what would otherwise be viewed as a financial contract from a commercial or economic point of view.

As such, the SAFE instrument was qualified as a 'gambling contract'. The qualification as a gambling contact can be viewed as a form of fallback classification when the financial instrument does not comprise any other qualification.

As the taxpayer was a physical person, the qualification as a 'gambling contract' meant that the taxation of any gains was subject to a marginal tax rate of approximately 52 per cent instead of 42 per cent and that losses on the contract would be non-deductible. The issuing company in this case was a United States company, but from a Danish tax perspective, the contributed capital would have been taxable for a Danish company if an event did not take place, making the use of SAFE as an instrument to raise capital unattractive in the Danish market for both investors and companies.

Tax ruling regarding a warrant-like agreement

In this ruling, the taxpayer wanted to know whether an instrument under which the investor contributes an amount to a company, which gives the right (but not the obligation) to subscribe for new shares in that company if one of three events takes place (eg, new investment round or exit), could be categorised as a warrant from a Danish tax perspective subject to taxation under the Danish Capital Gains Act. It was not possible for the investor to claim the contributed amount back under any circumstances.

Formal Danish company law requirements for issuing warrants (ie, issued by resolution of a general shareholders' meeting and reflected in the company's articles of association) had not been observed. Instead, the shareholders of the company had entered into an agreement with the investor according to which the shareholders were obligated to ensure the adoption of a capital increase at a general shareholders' meeting and the issuance of shares to the investor if a trigger event occurred. The shares, and the rights attached to such shares, that the investor could subscribe to were not further defined at the time of the conclusion of the agreement, but would instead depend on the type of trigger event.

The Danish Tax Board concluded that the instrument under the agreement could not be categorised as a warrant for Danish tax purposes, primarily due to the fact that the formal requirements for the company to issue such warrants had not been observed and the instrument was therefore not qualified as a warrant for Danish corporate law purposes. In addition, the Danish Tax Board emphasised that, at the time of the conclusion of the agreement, it was in principle unknown which type of shares the investor would receive and the rights attached to such shares.

Instead, the Danish Tax Board viewed the instrument as an option to a warrant, which the Danish Tax-Board for Danish tax purposes qualified as a 'financial contract' subject to mark-to-market taxation under the Danish Capital and Exchange Gains Act (see section entitled 'Tax ruling regarding the SAFE instrument', above, with respect to the Danish tax law concept of a financial contract).

Key takeaways

It is always important to consider how the characteristics of a given instrument fit within the tax framework to avoid any unforeseen tax consequences. As shown by the two rulings, small details can cause the tax categorisation of said instrument to be completely different from what was originally expected from a commercial point of view.

Status on Pillar Two

As a Member State of the EU, Denmark is part of the process launched by the European Commission to implement the Global Anti-Base Erosion (GloBE) model rules under Pillar Two and is subject to, and required to implement, any directives adopted by the EU.

On 7 December 2023, the Danish Parliament passed legislation to introduce the Pillar Two directive into Danish law. The new act (the 'Minimum Taxation Act') went into force on 31 December 2023.

The draft Minimum Taxation Act that was issued for public consultation contained the income inclusion rule (IIR) and undertaxed payments rule (UTPR). Further, the Danish Ministry of Taxation made use of the option to also include a rule regarding a qualified domestic top-up tax (QDTT). As expected, all three rules were included in the act that was passed and shall be applied in the following order:

1. QDTT;
2. IIR; and
3. undertaxed payment rule.

The deadline for filing the information return relating to the Minimum Taxation Act is 15 months after the end of the financial year and up to 18 months for the first year where a group is encompassed by the act. Currently, it has not yet been determined whether the reporting format will be the GloBE information return prepared by the Organisation for Economic Co-operation and Development (OECD) or whether the Danish tax authorities will develop a new reporting format.

> Even though the law was passed on 7 December 2023, a rather substantial amending act was proposed to the Danish Parliament on 30 April 2024. The proposed amendments will introduce anti-avoidance rules with regard to the transitional rule that allows groups to set any additional tax to zero in a jurisdiction if the group's country-by-country reporting shows revenue of less than €10m or profit before tax of less than €1m in that jurisdiction. Further, the amending act introduces simplified methods of calculation for the application of the safe harbour rules that was contained in the OECD agreement from 2022 and where administrative guidelines were issued in December 2023. The amending act, if passed, is set to enter into force on 1 July 2024.