Denmark

Government Submits Amendments to Dividend Tax Regime

Danish Minister of Taxation Karsten Lauritzen presented a bill to parliament that would make several changes to the Danish participation exemption for shareholdings in subsidiaries.

If Bill 123 is passed in its present form, Danish holding companies will be able to reclaim corporate taxes pertaining to certain foreign shareholdings since 2007.

Enhanced Participation Exemption

The Danish participation exemption generally implies that capital gains and dividends received on shareholdings in subsidiaries are tax-exempt if the Danish holding company has a stake of at least 10 percent in the subsidiary.

Bill 123 would expand the application of the participation exemption to holdings in foreign subsidiaries. Currently, the participation exemption applies only if the subsidiary is located within the EU or in a jurisdiction that has entered into a tax treaty with Denmark. Going forward, the participation exemption would apply if the subsidiary is resident and subject to tax in a jurisdiction that exchanges information in tax matters with Danish tax authorities (for example, through a tax treaty, a tax information exchange agreement, an EU directive, or the OECD Convention on Mutual Administrative Assistance in Tax Matters).

The introduction of an information exchange condition instead of the customary tax treaty requirement implies a significant expansion of the participation exemption. According to the Danish Ministry of Taxation, Denmark has entered into TIEAs with 45 countries, including traditional and potential tax havens.[1] Botswana, Costa Rica, Guatemala, the United Arab Emirates, Uruguay, and Vanuatu, however, have yet to ratify the agreements, so the participation exemption would not (yet) apply for subsidiaries in those jurisdictions, pending the ratification of a TIEA or the OECD Convention on Mutual Administrative Assistance in Tax Matters.

Danish corporate income tax would apply to dividends from a foreign subsidiary at the rate of 22 percent if the foreign subsidiary is not subject to a corporate income tax, or the relevant corporate income tax applies at a rate of zero percent, in the jurisdiction in which the subsidiary is resident.

The proposal for an enhanced participation exemption is a direct consequence of the September 11, 2014, judgment of the Court of Justice of the European Union in *Kronos International Inc. v. Germany*, C-47/12. In its decision, the CJEU held that an EU resident company could invoke the principle of free movement of capital in article 63 of the Treaty on the Functioning of the European Union (TFEU) with respect to shareholdings in subsidiaries outside the EU — even if the participation in the subsidiary exceeds 10 percent.

Bill 123 explicitly acknowledges that as a result of the CJEU judgment, the current Danish legislation violates the EU principle of free movement of capital (because dividends paid to Danish companies by foreign subsidiaries resident outside the EU have generally been subject to Danish corporate income tax, while subsidiaries resident in Denmark or within the EU have generally been tax-exempt). As a consequence, the bill would grant access to reclaim Danish corporate income taxes paid since 2007 on capital gains and dividends from foreign subsidiaries, to the extent that Denmark's taxation of that income violated the principle of free movement of capital.

The bill, however, would not affect the tax exemption for capital gains and dividends received by Danish parent companies from shareholdings in a foreign group company. The bill's definition of a group reflects the definition for accounting purposes under International Accounting Standard 27 (that is, a foreign company is generally considered to be a group company if, for example, the Danish parent company holds a share participation of more than 50 percent in the foreign subsidiary).

Withholding Tax Rate

In addition to the enhanced participation exemption for Danish holding companies, Bill 123 would reduce the Danish withholding tax rate from a maximum of 27 percent to a maximum of 22 percent in all cases in which the recipient is a foreign company. The reduced rate would apply regardless of whether the recipient qualifies as the beneficial owner.

Currently, there is a general 27 percent Danish withholding tax on dividends paid by Danish companies to foreign corporate or individual shareholders that do not qualify for the outbound dividend participation exemption. The participation exemption applies to outbound dividends from a Danish subsidiary to a foreign company resident in another EU country or a tax treaty jurisdiction that holds at least 10 percent of the share capital in the Danish subsidiary. However, the participation exemption does not apply if the foreign company does not qualify as the beneficial owner of the dividends.

The reduced tax rate is a consequence of the current Danish corporate income tax rate of 22 percent. Ac-

[1] *See* http://www.skm.dk/aktuelt/presse/pressemeddelelser/2015/november/danmark-har-nu-aftale-om-udveksling-af-skatteoplysninger-med-alle-tidligere-skattely.

cording to Bill 123, the 27 percent withholding tax rate constitutes a violation of the general principle of freedom of establishment in article 49 of the TFEU to the extent that the final withholding tax rate is imposed on foreign companies resident in the EU (because the tax rate exceeds the Danish corporate income tax rate). If a company in the EU has been subject to the Danish withholding tax on dividends received in 2007 or later, the bill would grant access to a refund, which would entail a reduction of the final withholding tax to correspond to the Danish corporate income tax rate.

It should be noted that the bill presumes that if a participation in a subsidiary exceeds 10 percent, the principle of free movement of capital would apply solely to inbound dividends (that is, investments by EU companies in non-EU subsidiaries) and not to outbound dividends (investments by non-EU companies in EU subsidiaries). Even though Bill 123 also intends to reduce the withholding tax rate for non-EU corporate shareholders, the reduced rate would not have retroactive effect from 2007, and therefore no refund would be granted for such non-EU shareholders. For non-EU shareholders, the reduced withholding tax rate would apply as of July 1.

Under the current regime, the Danish withholding tax is reduced to 15 percent if the foreign shareholder is a company holding a stake of less than 10 percent in the Danish dividend-paying company and the shareholder is resident in a jurisdiction that exchanges information in tax matters with Denmark.

If the recipient is entitled to a reduced tax rate under a tax treaty, the Danish company is still typically required to withhold and settle the 27 percent dividend tax with Danish tax authorities. The reduced tax treaty rate is then subject to a formal withholding tax refund claim to Danish tax authorities. As a result of an ongoing investigation into significant criminal offenses against Danish tax authorities, all claims for refunds of dividend tax were, since August 2015, put on hold temporarily.[2] Some media reports have suggested that dividend tax refunds resumed on March 17, but no official notices or confirmation have been released.

Antiabuse Measures

The bill also contains a new antiabuse measure relating to investment funds and unit trusts.

The current regime enables Danish investment funds and unit trusts to redeem investors' certificates for cash, free of Danish withholding tax. Foreign investors in Danish investment funds, unit trusts, and so forth, would otherwise often be subject to Danish withholding tax at a rate of 15 percent.

Because foreign shareholders can redeem certificates for cash to circumvent Danish withholding taxation (for example, in the case of a pro rata redemption of certificates held by all investors), the bill establishes that a redemption would be classified as a dividend distribution for Danish tax purposes going forward, unless certificates in the investment fund or unit trust are offered to the public and the fund or trust is subject to statutory rules regarding the redemption of certificates upon request from the investors and diversity of risk.

Further, the common practice of Danish dividend-distributing investment funds issuing ex coupon certificates in the period between year-end and the date of the dividend distribution has also provided foreign investors with the opportunity to avoid Danish withholding taxes by selling their certificates each year and reinvesting in ex coupon certificates. As a consequence, Danish investment funds would, under Bill 123, be disqualified from the special Danish tax regime for dividend-distributing investment funds if the investment funds issue ex coupon certificates that have Danish tax implications for the funds and their investors. This is expected to lead such funds to stop issuing ex coupon certifications to maintain their current classification.

Bill 123 is expected to be passed by the parliament in May or June, but the antiabuse measure regarding the redemption of certificates in investment funds and unit trusts will — if the bill is passed in its current form — have retroactive effect from February 23. The restriction on the issuance of ex coupon certificates would take effect on July 1.

♦ *Arne Riis, partner and head of tax, and Poul Erik Lytken, attorney-at-law, Accura Law Firm, Copenhagen*

[2] *See* http://www.skat.dk/SKAT.aspx?oId=2178493&vId=0.