New rules on Danish tax residence for individuals are proposed

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The government proposes to introduce new rules determining when individuals become resident in Denmark for tax purposes.

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The current rules concerning when individuals become resident in Denmark for tax purposes have often been criticised for being outdated, implying considerable estimates and lack of predictability in application.

According to the government, the uncertainty associated with these rules may result in individuals, who live and work in different countries, refraining from performing work in Denmark in order to avoid the risk of becoming resident in Denmark for tax purposes.

Consequently, the rules on Danish tax residence for individuals may constitute a barrier to attracting knowledge and capital to Danish businesses.

The proposed rules imply that an individual will become resident in Denmark for tax purposes, if the individual has a home available in Denmark, and the individual stays in Denmark for more than 90 days within 12 months.

The subjective intention of the individual in relation to the use of the home in Denmark is no longer relevant. The only circumstance that matters is the availability of a home in Denmark suitable for all-year living. Consequently, the current rules' distinction between all-year homes and holiday homes is irrelevant.

In relation to the proposed threshold of 90 days stay in Denmark, it is no longer relevant to distinguish between whether the stay is for work or vacation purposes. The only deciding factor is, whether the individual has stayed in Denmark more than 90 days within 12 months.

Additionally, it is proposed that Danish tax residence commences from the first day of stay in Denmark for individuals with a home available in Denmark, who are not taxed as residents on their global income in any other country.

The purpose is to avoid that the proposed rules on Danish tax residence may result in situations where neither Denmark nor other countries tax the income of such individuals, even though they have a home available in Denmark.

For most working individuals, the proposed rules will likely be favourable compared to the current rules.

However, Danish pensioners living in France or Spain owning a summerhouse in Denmark may be adversely affected by the proposed rules. This may also be the case for individuals owning a summerhouse in Denmark, who are not taxed as residents on their global income in any other country.

CONTENT

Transitional schemes are proposed to offset the adverse effects for individuals, who are already in such situations, when the proposed rules are set to take effect.

The proposed rules are set to take effect from 1 January 2019 if adopted by the Danish parliament. Changes may occur before adoption.

Opinions of the Advocate General in the "beneficial owner"-cases

On 1 March 2018, the Advocate General issued her opinions in the "beneficial owner"-cases. The pending rulings by the EU Court of Justice are expected later this year.

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The cases concern whether Danish companies should have withheld taxes when distributing dividend and paying interest to parent companies in other EU jurisdictions.

It is the opinion of the Danish tax authorities that the parent companies were not the "beneficial owners" of the income as it was redistributed to group companies in tax havens.

Hence, in the opinion of the Danish tax authorities, the EU Parent/Subsidiary Directive and the EU Interest/Royalties Directive did not exempt the Danish companies from withholding taxes in these situations, and the companies are therefore liable to pay the withholding taxes.

In the cases concerning interest payments, the Advocate General concluded that a company resident in another EU member state, owning the interest-bearing claim, should be treated in principle as the beneficial owner.

The situation would only be different, if it was acting not in its own name and on its own account, but for and on the account of a third party.

The Advocate General further stated that the concept of beneficial owner according to the EU Interest/Royalties Directive must be interpreted under EU law autonomously and independently of the commentaries to the OECD Model Tax Convention.

In the cases concerning dividend distribution, the Advocate General concluded that the EU Parent/Subsidiary Directive does not apply the concept of beneficial owner.

Consequently, a company resident in another EU member state receiving dividends from a Danish subsidiary is by default the dividend recipient according to the directive.

In both the cases concerning interest payments and the cases concerning dividend distributions, the Advocate General concluded that an EU member state cannot rely on the anti-abuse provisions of the above stated EU directives, if it has not transposed such provisions.

Denmark had not transposed the anti-abuse provisions of the EU directives.

Further, no Danish general anti-abuse rules could be applied in these situations.