The Danish implementation of EU Anti-Tax Avoidance Directive (ATAD) – the proposed legislation

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The reintroduced draft of the proposed CFC bill still does not contain the exemption available in the ATAD Directive where CFC taxation is not applied if the CFC entity has a substantive economic activity (substance test).

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The current draft of the bill on implementation of the Danish CFC rules was introduced in the Danish Parliament again on 11 November 2020 after several previous attempts to adopt the new legislation.

The bill is essentially identical to previous drafts of the bill and the political controversies among the parties in the parliament as well as the outspoken concern of large Danish industries with activities abroad therefore remains the same.

As mentioned, the draft still does not contain the possibility to avoid the CFC taxation, also in situations where the foreign subsidiary (or permanent establishment) carries on a substantive economic activity (a substance test) supported by staff, equipment, assets and premises, which could have been a part of the national implementation according to the ATAD Directive, if so decided under local law.

Regular Danish companies may therefore be subject to CFC taxation if they have a foreign subsidiary or permanent establishment, and – as a minimum – would need to deploy administrative resources to test whether the new and quite complex rules apply.

The proposed changes of the existing CFC rules include*:

- The income test is reduced from 50 % to 1/3 of the CFC income in order to be covered by CFC taxation.
- Abolishment of the so called “asset test”.
- The concept of control is adjusted. Control is essential when determining if a subsidiary is covered by the CFC rules.
- The definition of CFC income will be expanded to include certain “embedded royalties” and even income from a subsidiary’s own R&D activities will be covered by the definition in some specified cases.
- If a subsidiary controlled by a Danish company is sold to a buyer that is not owned by a Danish entity, fictive disposal of assets or liabilities that creates CFC income, shall be included in the calculation of the threshold on 1/3 of the income.

One of the main controversies about the new legislation is the changes regarding intellectual property rights, especially the inclusion of embedded royalties in the CFC taxation as covered by “other income generated from intellectual property (IP)”.

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According to these changes, the profits of the sale of otherwise tangible goods and services may trigger the CFC taxation if the goods and services comprise elements of intellectual property.

These profits will be included when calculating the threshold on 1/3 of the total income that will make the entity subject to CFC taxation when exceeded. This is expected to expand the number of foreign subsidiaries (or permanent establishments) to the Danish parent company, that will be taxed according to the CFC rules.

As a result of the new legislation the complexity of the CFC rules increases. The changes are expected to raise tax revenues and, not least, significantly increase the administrative burdens for Danish companies, which have been unusually vocal in their criticism of the proposed rules. Danish companies with foreign subsidiaries are encouraged to consider the impact of the new legislation and to consider how it can secure compliance with the new legislation that is expected to be enacted effective as of 1 January 2021.

*Non-exhaustive list

Bill on defensive measures against EU blacklist countries

The bill introduces defensive measures and sanctions against countries that do not live up to international tax standards and good tax practices. The Danish Ministry of Taxation submitted the new bill to public consultation on 12 November 2020.

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The Council of the European Union declared in 2019 that defensive measures against the countries on the EU blacklist must be implemented in national law effective from 2021. The objective is to avoid international tax evasion.

By introducing sanctions across all EU-member states, the countries listed as non-cooperative in the blacklist are expected to change their national laws gradually and thereby eliminating the tax havens.

The countries on the EU-blacklist are American Samoa, Anguilla, Bangladesh, United States Virgin Islands, Fiji, Guam, Palau, Panama, Samoa, Trinidad and Tobago, Seychelles and Vanuatu.

The bill which has been disclosed for public consultation introduces following main sanctions:

- *Deductibility*
  Payments to parties that reside or are registered in the blacklisted countries will not be deductible in the calculation of taxable income by persons or enterprises subject to Danish taxation. The payments that are covered by the changes are payments when acquiring assets, services etc. Included are also payments regarding loans and credits e.g. interest rates.
- *Taxations of dividends*
  The dividends derived from a Danish company will be subject to a higher tax on 44 % that is required to be withhold by the Danish company if the recipient is a resident in the mentioned blacklisted countries.

The deadline of the public consultation is 9 December 2020 and we expect an introduction of the bill in the Danish Parliament shortly hereafter. If adopted in its present form, it is decided in the bill, that the amendments take effect 1 July 2021.