

Transfer Pricing Country Summary Denmark

September 2018

Legislation

Existence of Transfer Pricing Laws/Guidelines

On 7 December 2017, the Danish Parliament (Folketinget) passed amendments to the Danish tax control law (SKL). The intended purpose of this legislation (L113) is to simplify and clarify the provisions of SKL—including the provisions related to transfer pricing and the rules for preparing and submitting transfer pricing documentation. The law specifies that the statutory transfer pricing documentation must be prepared as a contemporaneous documentation and must be finalized by or on the date when the disclosure form must be submitted to the Danish tax authorities (SKAT) for the tax year covered by the disclosure form.

Taxpayers must submit transfer pricing documentation to the local tax authorities upon request.

Section 2 of the Assessment Act contains the legal basis for applying the arm's length principle.

Following a revision of the statutory transfer pricing documentation requirements in 2005 and the issue of a binding order on documentation requirements in January 2006, a Guidance Note of approximately 100 pages was issued in February 2006, which addresses not only documentation requirements but also a number of substantive transfer pricing matters. There are also an increasing number of court cases dealing with various transfer pricing issues.

The Danish transfer pricing rules are generally in accordance with the OECD Transfer Pricing Guidelines but it should be noted that the Danish tax administration increasingly formulate their own positions in areas where the OECD has not provided any (precise) guidance.

Definition of Related Party

The following must set prices and terms for controlled transactions according to the arm's length principle: Taxpayers

- over which natural or legal persons exercise a controlling influence
- which exercise a controlling influence over legal persons
- which are affiliated with a legal person
- which have a permanent establishment abroad
- which are a foreign natural or legal person with a permanent establishment in Denmark, or
- which are a foreign natural or legal person with hydrocarbon-related activities.

Section 2(2) of the Assessment Act defines control as:

1. A concept based on legal control as opposed to a notion of de facto control;
2. Ownership of more than 50% of the share capital;

3. Control of more than 50% of voting power; or
4. Not only direct but also indirect ownership of share capital or control of voting power is taken into account, also where de facto control is not present;

Furthermore, the above definitions are extended by also including shares and voting power of:

- a. Group related companies (as defined in Section 4(2) of the Act on Taxation of Capital Gains and Losses);
- b. Individual shareholders and certain close relatives; or c. A foundation or trust set up by the above persons.

Transfer Pricing Scrutiny

There are no specific transfer pricing audit procedures.

Transfer Pricing Penalties

Penalties apply if non-compliance with documentation requirements is intentional or due to gross negligence. See Section 17 (3) of the Tax Control Act. From a practical perspective, this means that penalties apply if no documentation exists or if documentation is so limited in amount and scope that effectively no documentation exists. Penalties could be the case if one or more of the basic components of good transfer pricing documentation are missing, e.g. the functional analysis or the choice and justification of transfer pricing method. In assessing whether documentation is sufficient or not, the overall situation must be examined and a principle of proportionality is applied, taking into account the nature and value of the inter-company transactions. Penalties could also be levied if a taxpayer does not submit benchmarks or other additional information upon request or does not submit an independent auditor's statement upon request.

With effect as from 1 January 2013, the penalty regime has been tightened and now includes the following features:

1. A minimum penalty of DKK 250,000 plus 10% of the profit adjustment applies;
2. The level of the penalty shall be adjusted to the benefit achieved by non-compliance;
3. The penalty is per year;
4. If non-compliance is part of a systematic non-compliance with the tax legislation, the level of penalty may be increased by up to 50 percent;
5. There are similar high penalties for providing inaccurate information needed to determine if a taxpayer is subject to the transfer pricing documentation requirements.

Prior to 1 January 2012, the practice is that the amount of a penalty is twice the cost saved by not preparing transfer pricing documentation or by only preparing insufficient documentation. If the taxpayer subsequently prepares and submits the documentation, the penalty is reduced by 50 percent. It is not a condition for levying penalties that a profit adjustment is made but the penalty is

increased by an amount of 10 percent of the profit adjustment if an adjustment is issued. Penalties can also be levied for non-compliance with a request to prepare and submit a benchmark.

Advance Pricing Agreement (APA)

Unilateral, bilateral and multilateral APAs are available. There is no filing fee for APA. The validity of an APA could be extended if the fundamentals have not changed significantly.

Documentation and Disclosure Requirements

Tax Return Disclosures

Taxpayers must disclose on the types and amounts of the inter-company transactions. The Controlled Transactions form (form no. 05.022) must be completed and enclosed with the tax return.

Level of Documentation

The taxpayer must prepare and keep written documentation of the prices and terms set for controlled transactions. This written documentation must be submitted at tax authority's request and provide a suitable basis for assessing whether the transaction was conducted at arm's length.

The scope of the documentation depends on the scope and complexity of the enterprise and the controlled transactions.

The documentation must contain the following:

- Information on the group and its commercial activities
- Information on the controlled transactions
- A comparability analysis
- Information on implementation of the pricing principles
- A list of any written agreements

Record Keeping

Transfer pricing legislation does not address the retention period for transfer pricing documentation, but Section 10(1) of the Act on Bookkeeping requires taxpayers to keep materials for a period of 5 years after the end of the financial year to which they relate.

Given that the statute of limitation for taxpayers subject to the statutory transfer pricing documentation requirements of Section 3 B of the Tax Control Act is 6 years, there is probably an obligation beyond the 5-year period of the Act on Book keeping to keep transfer pricing documentation.

Language for Documentation

Transfer pricing documentation may be prepared in the following languages: Danish, English, Norwegian or Swedish.

Small and Medium Sized Enterprises (SMEs)

Small- and medium-sized taxpayers are exempt from documentation requirements (but not from applying the arm's length principle). The exemption applies where the taxpayer, on a consolidated basis with associated companies, has: (i) less than 250 employees; and (ii) has assets of less than DKK 125 million or a turnover of less than DKK 250 million. The exemption is not applicable for inter-company transactions with associated companies or permanent establishments located in tax havens.

Small enterprises must only prepare transfer pricing documentation for special transactions, however, they are subject to the disclosure requirement if their total intercompany transactions exceed DKK 5 million.

Deadline to Prepare Documentation

Transfer pricing report needs to be prepared by 01 August of the year following the tax year.

Deadline to Submit Documentation

There is no specific deadline for filing/submitting local transfer pricing documentation. The general deadline for filing the corporate income tax return is within 6 months of the end of the income year. If a corporate uses the calendar year as its income year, the deadline is 30 June. TP documentation does not need to be filed before a taxpayer is selected for a TP audit.

Upon request by the tax authority, transfer pricing documentation is to be submitted within 60 days.

Statute Of Limitations

The statute of limitations is 6 years.

Transfer Pricing Methods

The following methods are accepted:

- Comparable uncontrolled price (CUP) method
- Resale price method
- Cost plus method
- Profit split method
- Transactional net margin (TNMM) method

Comparables

Denmark has its own database of comparable information. Foreign comparables are also accepted by the tax authorities, but Danish comparables are preferred.

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