Nordic Tax Law Bulletin - October


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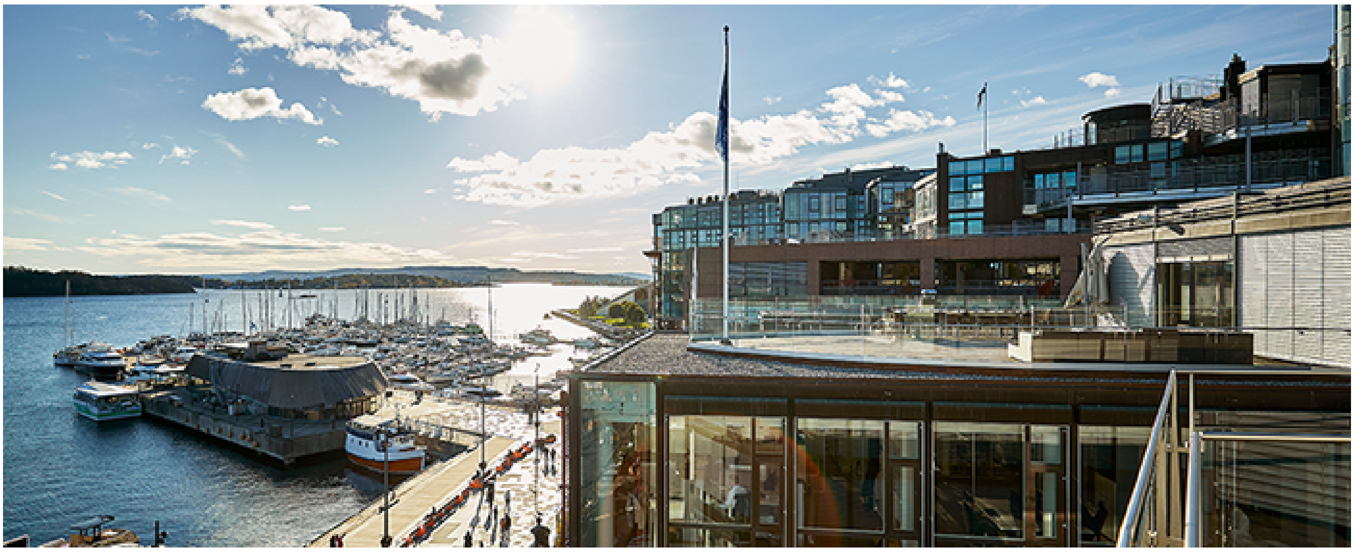
In our quarterly Nordic Tax Law bulletin our tax lawyers across the Nordic region highlight relevant news and trends on the Nordic Tax market scene. The bulletin intends to provide high-level knowledge and insight. Want to learn more? Our experts will be happy to hear from you.



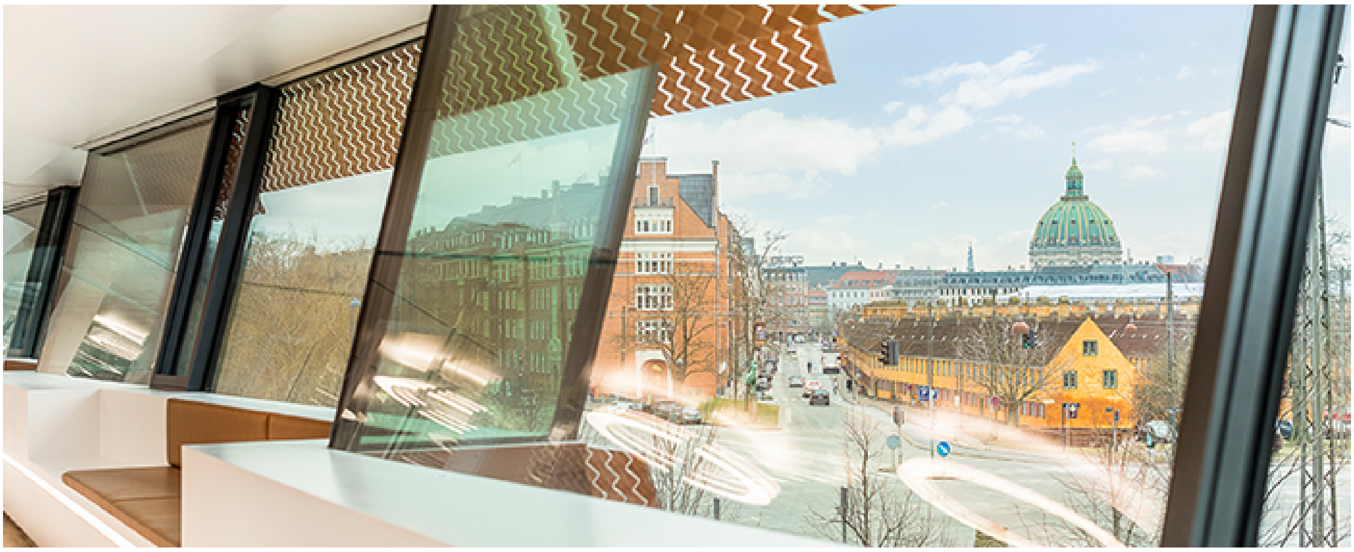
Highlights from Norway

New production fee on onshore wind: The Norwegian government has introduced a new tax (production fee) for onshore wind in Norway.

The tax is calculated from the power produced in the wind plant. The tax basis is calculated as the total amount of power produced in the wind plant, net of any (i) power used in utility equipment in connection with the production, (ii) power lost in the main transformer through production in the power plant and (iii) energy use in auxiliary generators (Nw. hjelpegenerator). Power produced outside the ordinary operations of the wind plant, such as test runs of turbines and similar, are also included in the basis for calculation.

The production fee is set to NOK 0.01 per KWh produced.

The production fee enters into force from 1 July 2021.



Highlights from Denmark

New emergency legislation introduces maximum rent increase: On 22 September 2022, the Danish parliament introduced an emergency legislation, which entails that residential landlords cannot increase the monthly rent by more than 4% annually over the next two years.

The rental increase enters into force on 30 September 2022 and will apply to existing as well as future rental agreements with certain time requirements.

The new legislation contains one exception. Landlords may increase the monthly rent by more than 4% if the tenant is able to document that reasonable and necessary operating costs have increased compared to the previous year, and that the 4% increase is not sufficient to cover these. However, the increase cannot exceed the net price index.

Denmark introduces mark-to-market taxation of real estate: A new draft bill on the long-anticipated mark-to-market taxation Danish real estate has been submitted for public hearing. If enacted, the rules will introduce a fundamental change in the taxation of capital gains on Danish properties.

Under the current rules, Danish properties can be transferred without triggering Danish capital gain tax by way of a disposal of shares in the company that owns the property rather than a disposal of the property itself.

The new draft bill introduces a mark-to-market taxation of property portfolios used for residential leasing that exceed a value of DKK 100m. The increase (gain)/decrease (loss) in value will hereinafter be included in the taxable income subject to ordinary corporate Danish income tax (22%).

The draft bill is expected to enter into force on 1 January 2023 and will apply to income years starting on or after that date.

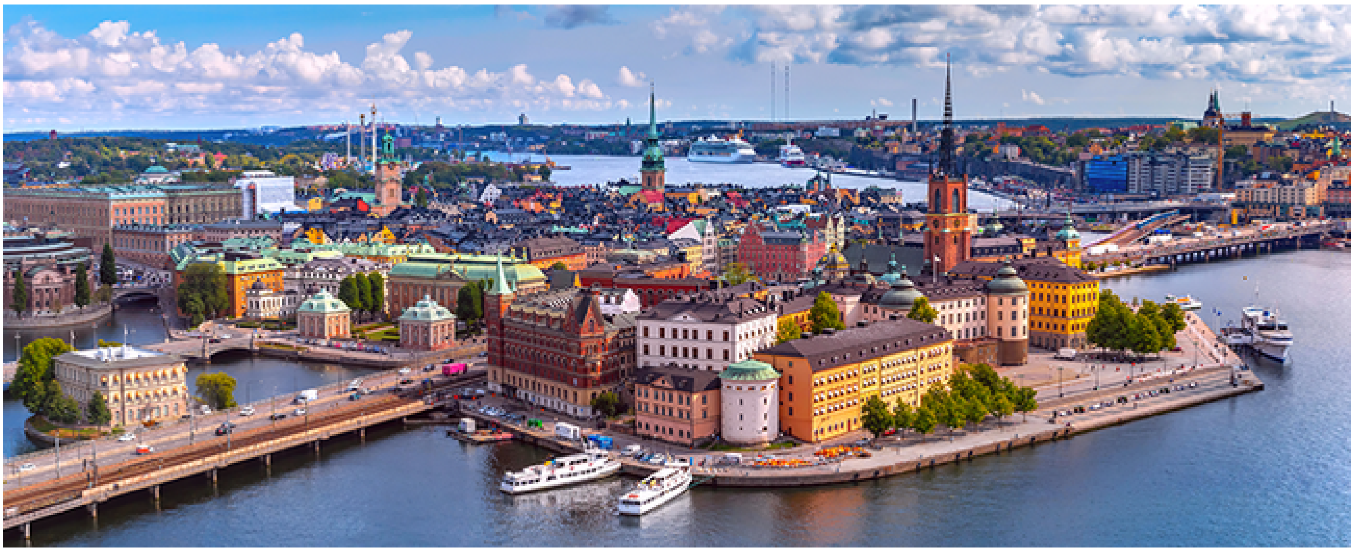
VAT treatment - Management of special investment funds: After the landmark case C 464/12 ATP PensionService A/S the European Court of Justice had the opportunity to again rule on the scope of the exemption contained in Article 135(1)(g) of Council Directive 2006/112/EC of 28 November 2006 in the joint cases C-58/20, K and C-59/20, DBKAG.

Following the Court's decision in the cases, the Danish Tax Authority found it necessary to adjust the practice of management of special investment funds by issuing a draft VAT Guideline reaffirming that tax consultancy services, including tax services such as calculation tax on the fund's income born by the participants fall within the scope of the VAT exemption provided that they are essential to the management of such funds and if they are provided exclusively for the purpose of managing such funds. The Guideline then extended the exemption to include the supply of software which was essential to risk management and performance measurement of the fund (and its manager).

Entry into force: Exp. November 2022 – react 6 months from the publication.

Retroactive corrections: Possible : From mid 2010.

At the same time the Danish Taxation Authority drafted **three other Guidelines** on the scope of the VAT exemption as contained in Article 135(1)(g).



Highlights from Sweden

The Counsel for Advance Tax Rulings rules in case regarding the application of the "external owner rule" (Swe: utomståenderegeln): In July 2022 the Counsel for Advance Tax Rulings ruled in a case regarding an incentive program in the closely held company (Swe: fåmansföretag) X AB.

A, in view of a possible acquisition of less than 1% of the shares in X AB through a new issuance of shares, wanted to know whether his shares would be qualified or not, i.e. taxed with 25% capital tax rate or 50-55% employment tax rate. X AB operates in the retail industry and the majority owner of X AB, Y AB, operates in the financial sector. Two of Y AB's shareholders sits on the board of X AB. None of Y AB's shareholders take any part in the operational activities of X AB or any of its subsidiaries.

The Counsel for Advance Tax Rulings considered that the transfer of capital from Y AB to X AB through a new issuance of shares meant that both X AB and Y AB were considered to be conducting same or similar business and that Y AB was thereby not considered to be an external owner according to the external owner rule. This applied even if the applicant stated that there was no risk of income conversion.

The case is now before the Supreme Administrative Court of Sweden and we await the court's decision. Before the judgment is announced, it can be recommended that investors, like A, report their investments openly in their income tax returns.

Capital contagion, i.e. that same or similar business is considered to be conducted even if the business conducted is essentially different, is nothing new. Adding funds from a previously conducted business to a new closely held company does not mean that the shares are not qualified. Here, however, it is put on its edge as it also means that owner, Y AB, is not considered an external owner.

The Counsel for Advance Tax Ruling's view entails that companies in connection with capital acquisition will find it significantly more difficult with investments from closely held companies instead of institutional investors. It can be noted that foreign closely held company investors based on these rules are treated as Swedish.

The Ministry of Finance is working to develop two tax-related proposals as quickly as possible, which should eventually increase electricity production in cogeneration plants and lead to energy efficiency in computer halls:

Abolished tax on waste incineration

The Ministry of Finance is working to be able to submit a proposal to abolish the waste incineration tax as soon as possible. The waste incineration tax is a tax levied on waste that is brought into a waste incineration or co-incineration plant, for example a cogeneration plant. The tax was introduced on 1 April 2020.

The Swedish Tax Agency has evaluated the waste incineration tax and concluded that the tax does not steer towards a more resource-efficient and non-toxic waste management in an effective and cost-effective way, which was one of the purposes of the tax when it was introduced. The tax has also negatively affected the economics of waste and co-incineration plants as it has been difficult for companies to fully pass on the cost of the tax.

According to the Swedish Tax Agency, some cogeneration and heating plants state that they have revised their renovation and new investment plans as a result of the tax.

Abolished tax reduction for computer halls

The Ministry of Finance is also working to be able to submit a proposal to possible to abolish the reduction of the energy tax on electricity consumption in computer halls. Under the current circumstances, the computer halls should be given additional incentives for energy efficiency and therefore taxed in the same way as the service sector in general. When the tax reduction was introduced in 2017, the conditions were completely different than today, and there is therefore reason to reconsider the assessments that were made then.

New verdict from the Court of Appeal in Gothenburg regarding the targeted interest deduction limitation rules: The targeted interest deduction limitation rules have for long been subject to discussion which intensified after the Lexel verdict from the ECJ in January 2021. The provisions subject to trial were the 2013 targeted interest deduction limitation rules, more exactly, an exception rule, which meant that the interest expense was not deductible if the *main reason* for the debt having arisen was that the group would receive a substantial tax benefit (so-called "the exception to the ten per cent rule").

The exception to the ten per cent rule was tried in the ECJ-case Lexel v. Skatteverket since Swedish companies could rely on the provisions on group contributions while groups with companies in other member states could not. The ECJ stated that Article 49 of the TFEU, which ensures freedom of establishment, entailed that the Swedish exception to the ten per cent rule was contradictory to EU law.

The rules were adjusted in 2019 in an attempt to make them compatible with EU law. The exception to the ten per cent rule was changed to allow deductions to be denied when such interest payments have been incurred "*exclusively or almost exclusively*" in order for the group to obtain a substantial tax benefit. In the 2013 rules, as mentioned, it was stated instead that the tax benefit would be the "*main reason*" for the debt having arisen.

The 2019 adjustments were not considered enough, which was confirmed in a judgment in December 2021 by the Supreme Administrative Court of Sweden. The court stated that the currently applicable interest deduction limitation rules were also contrary to EU law.

The case in the Court of Appeal in Gothenburg is a third confirmation on the importance of the freedom of establishment and the Lexel verdict. The Swedish Tax Agency had denied a Swedish group company interest deduction for the financial years 2013 – 2016 with reference to the 2013 exception to the ten per cent rule. The Administrative Court agreed with the Swedish Tax Agency and the verdict was appealed. In the Court of Appeal, the Swedish Tax Agency stated that EU law could not be invoked in the case since it was a case of abuse of the freedom of establishment. The Tax Agency argued that the companies had created an artificial financing and company structure in order to be able to get a double cost deduction for interest expenses. The Court of Appeal however, noted that the Swedish company had been allowed deductions for interest expenses since 2007, i.e. until the Tax Agency questioned the deductions for the financial years 2013–2016. The Swedish company had thus since its formation been treated as a real establishment by the Tax Agency, which undermined the Agency's argument about abuse of the rules on freedom of establishment. As such, the Court of Appeal found that the abuse rule could not be applied and ruled in favor of the company.

The Swedish government has now expanded the mandate of the government inquiry of evaluating the 2019 general interest deduction limitation rules to also include the targeted interest deduction limitation rules.

Highlights from Finland

The introduction of the exit tax on individuals proceeds: The Finnish Government decided to introduce an exit tax on individuals last fall in Government budget session. The bill has now been in the opinion round from 12 August to 12 September 2022 and the proposal is supposed to come into force from the beginning of 2023.

The exit taxation means that the calculated capital gains accumulated during tax resident in Finland can be taxed when moving out of Finland and when the assets are disposed while living abroad. Most non-real estate types of income would be subject to the tax. The exit tax would be triggered by either the tax treaty residence changing or the individual becoming a non-tax resident in Finland. The exit tax would apply to individuals moving from Finland who before moving have had their tax treaty residence and been tax residents in Finland for at least 4 years of the previous 10 years.

The assets subject to exit tax must at minimum be valued at EUR 500,000 and have a EUR 100,000 calculated capital gain. The tax would be imposed on the part of the calculated capital gain exceeding EUR 100,000. The tax rate would be calculated using the standard capital gains tax rates (30 or 34 %). However, the exit tax would not trigger, if assets are disposed in the eight tax year after emigration or later.

The proposed exit tax will have an effect to individuals planning to move from Finland and it may have an impact e.g. to hiring executive employees outside Finland. The new rules will likely create uncertainty concerning taxation when qualifying individuals are moving from Finland. The upcoming changes have been subject to criticism e.g. due to the complexity of the rules and the estimated limited fiscal yield of the legislation.

The definition of income received from sources in Finland is proposed to be changed: The Income Tax Act is proposed to be amended in such a way that income received from an indirect transfer of immovable property can also be considered as income from Finland. This could be, for example, income received from the transfer of shares of a Finnish holding company that owns immovable property in Finland. The proposed change is primarily technical and would make it possible to use the taxing right allocated to Finland as the country where the property is located.

The effects of the change to the actual Finnish taxation depend on whether indirectly owned immovable property is transferred and which tax treaty applies to the transfer. About half of the tax treaties concluded by Finland are of the old model and do not allow taxation of indirect real estate transfers. In addition, the new rules would not be applicable to non-Finnish entities that are comparable to Finnish tax-exempt entities.

The proposal is related to the recommendations of the report of the working group investigating the reform of the withholding tax of certain dividends and the taxation of profits from real estate investments set in accordance with Prime Minister Sanna Marin's government program, and it is part of the tax base consolidation package agreed upon by the government in the budget negotiations.

The bill has been in the opinion round from 3 August to 9 September 2022 and the proposal is supposed to come into force from the beginning of 2023. As a result of the upcoming changes, it would be beneficial that non-Finnish real estate investors would assess the impact of the new rules and especially analyze the effect of the applicable tax treaty to the new rules.

Fagområder	Tax