Nordic Tax Law Bulletin - July


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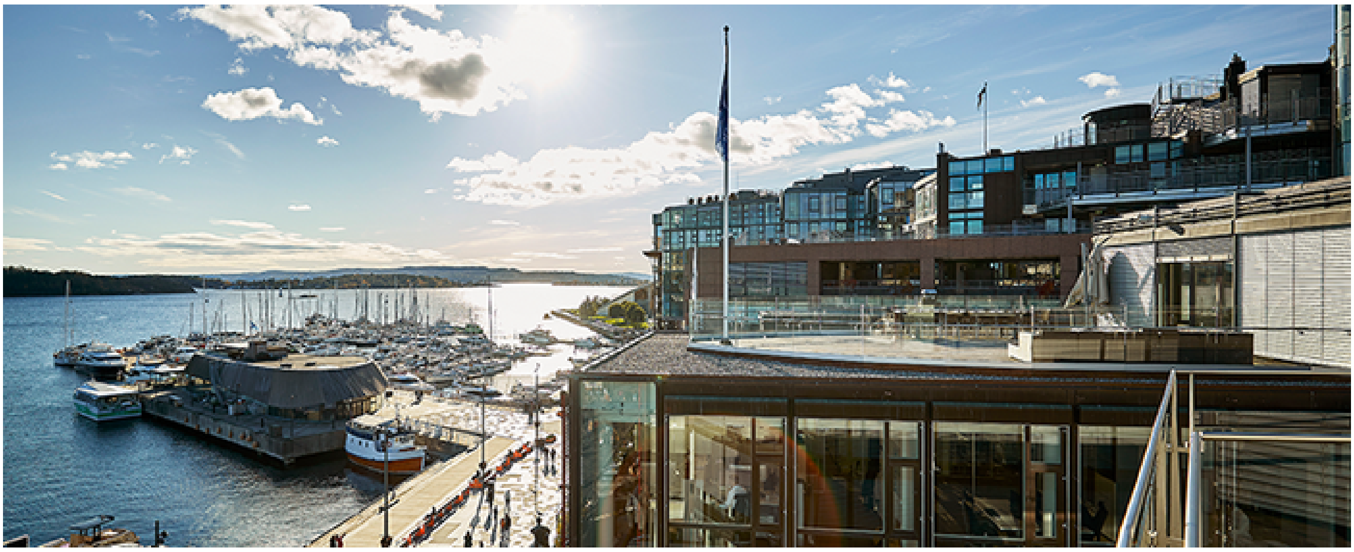
In our quarterly Nordic Tax Law bulletin our tax lawyers across the Nordic region highlight relevant news and trends on the Nordic Tax market scene. The bulletin intends to provide high-level knowledge and insight. Want to learn more? Our experts will be happy to hear from you.



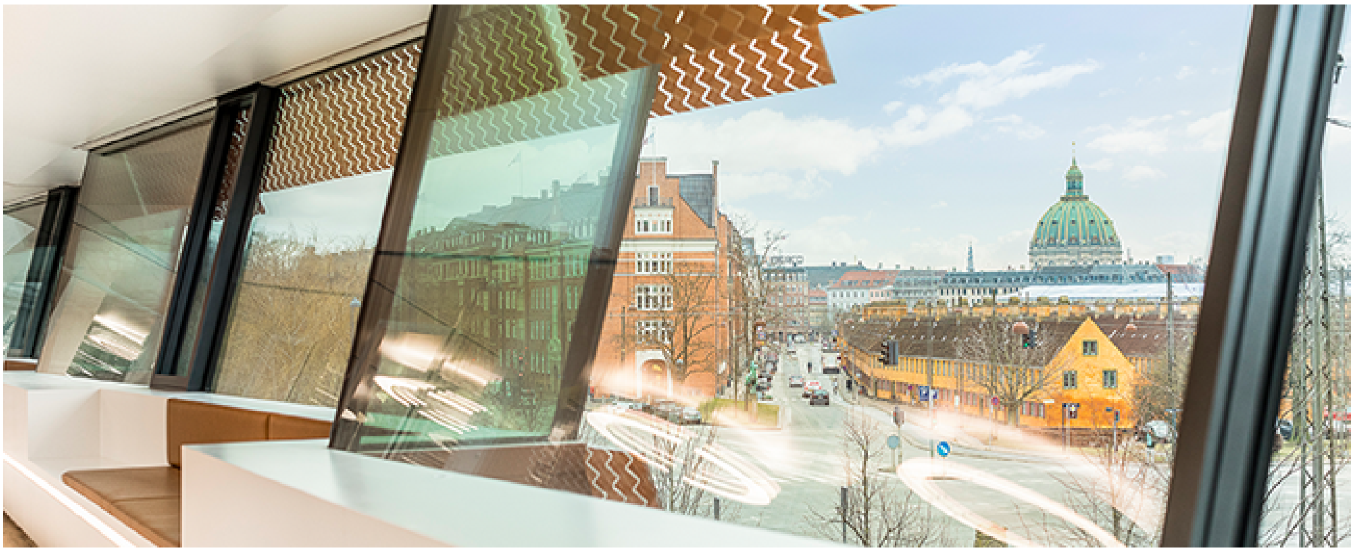
Highlights from Norway

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

Interest on corrections to previously reported VAT and subsequent VAT declarations: Up until now, taxpayers that have submitted late VAT declarations or reported corrections to previously filed VAT returns have not been required to pay interest, since legal basis to impose such a claim has not been evident from Danish law.

With the changes, interest will accrue from the date on which the VAT was originally to be paid until the date on which it is paid.

The new regulation does not distinguish between the possible reasons for a correction or subsequent declaration. This seen in combination with the high interest rate – currently at 8.4% per annum – means that the new regulation can entail severe consequences as even minor errors can prove to be costly. Possible scenarios include, but are not limited to instances where:

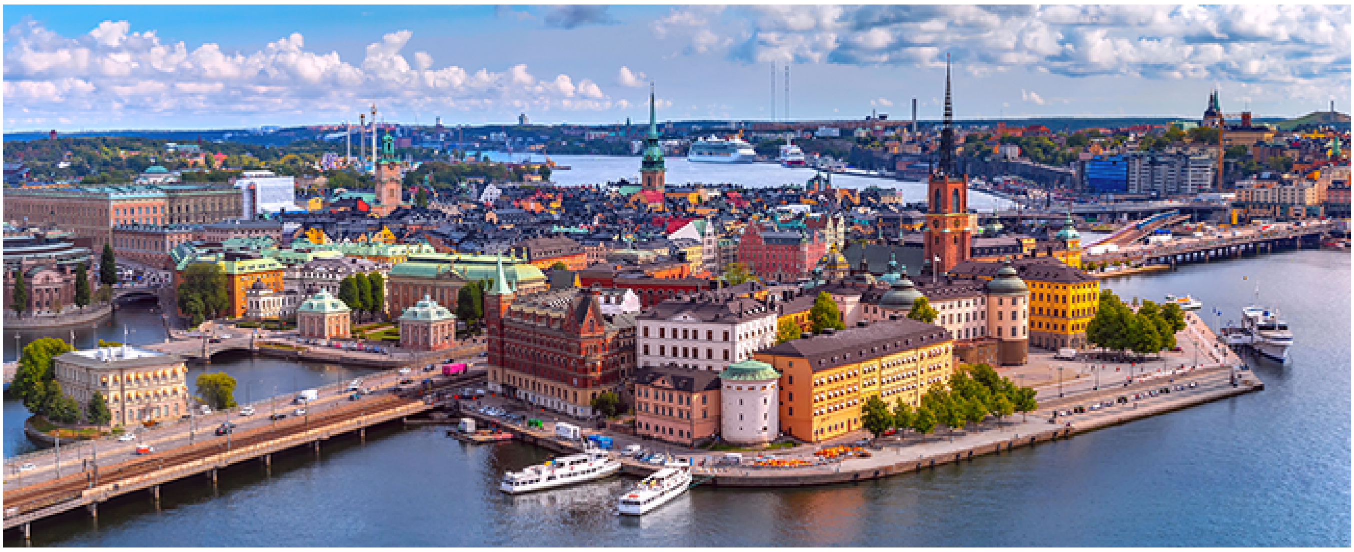
- businesses neglect an obligation to register for VAT
- corrections leading to a further payment of VAT or a repayment of previously received negative VAT
- deduction has been made for purchase VAT on an invoice where such deduction is not permissible (e.g., because invoice requirements have not been met).
- late annual adjustment of pro-rata VAT rate

The new regulation allows for the Danish Tax Authority to exempt a company in whole or in part from payment of interest back in time if it is found unreasonable to maintain the interest claim due to special circumstances. Nevertheless, it must be stressed that an individual and concrete assessment will have to be conducted in each case. As the current practice regarding exemption from payment of interest back in time is relatively strict, the clear starting point in the future will in all probability be that any error back in time will result in the payment of interest.

The amendment does therefore not only create an additional incentive to ensure VAT compliance, but also heightens the need for having adequate VAT processes in order as the opposite will be of direct economic significance.

Tax depreciation rate on buildings and installations reduced from 4% p.a. to 3% p.a. from 2023: On 20 June 2022 a bill was presented which – if passed – will reduce the tax depreciation rate on buildings and installations acquired on or after 1 January 2023 from the current 4% to 3%. For buildings and installations acquired before 1 January 2023 the tax depreciation rate will continue to be 4%.

It should be noted that the new reduced depreciation rate also applies to expenses for improvements that occur after 1 January 2023 - even though the building itself was originally acquired before 1 January 2023.



Highlights from Sweden

The Swedish Tax Agency (STA) publishes new guidelines regarding its view on when a home office constitutes a PE for the employer: The guidelines especially affect employees of foreign companies which may commute to their office in a nearby country, for instance Denmark and Norway, but wish to work from their home in Sweden. The guidelines state that the following circumstances should be assessed with regard to the question of a PE:

- Whether there is an explicit or implicit requirement that work is to be performed in the home of the employee,
- Whether there is any advantage for the foreign company in having the work carried out in Sweden and
- Whether the foreign company has an interest in the work being carried out in Sweden.

The STA emphasizes that a permanent establishment cannot be deemed to exist due to a requirement from the company when the reason for the requirement is government restrictions as was the case during the Covid-19-pandemic. Additionally, it is clarified that any contractual regulations with regard to the possibility of working from home in the employment agreement or in any other agreement do not mean that it is a "requirement" from the company. Nor does the fact that the company in such cases provides computers and certain office equipment mean that it is a requirement of the company that the employees must work from home. The new guidelines replace the previous guidelines from 2015. This will likely mean that a permanent establishment (PE) will arise in fewer situations than before.

The Swedish Government revises withholding tax law proposal: On 7 June, the Ministry of Finance revised the draft of a new law on withholding tax on dividends after major criticism was received from the first draft in 2020. The following list include some of the proposed changes:

- As a general rule, it is proposed that everyone who is not subject to unlimited tax liability in Sweden should be subject to withholding tax on dividends. This represents a change from the Coupon Tax Act, which in current legislation is limited to foreign legal entities. The new proposal entails an extension of the scope of the entities subject to the withholding tax provisions, including for example foreign contractual funds and trusts.

- New exceptions are proposed to codify the case law of the European Court of Justice. For example, dividends are exempt from withholding tax if the recipient of the dividend is a foreign equivalent of a Swedish foundation, non-profit association, registered religious community, or other such legal persons that are not liable for tax on dividend income in Sweden under the Income Tax Act.

- Tax returns are suggested to be submitted on all dividends that are liable to withhold tax by the distributing legal entity or an intermediary, such as a central securities depository, approved by the Swedish Tax Agency. To ensure efficiency in this system it is suggested that a tax return is submitted at each distribution. The tax returns must contain several items of information on the dividend itself, the shares distributed and the recipients of the dividend.

- In order to prevent tax evasion, it is proposed to extend the scope of the Tax Evasion Act to include withholding tax on dividends.

The new round of consultations will end on 7 October 2022, at which time the government is expected to once again take a stance on the new law before further preparatory work.

The Specific Tax Avoidance rule was not applicable re tax depreciations on IP acquired from a group company: The majority of the Supreme Administrative Court did not find the specific tax avoidance rule in Chapter 18 Section 11 applicable on an intra-group acquisition of IP. The basis for tax depreciations should correspond to purchase price paid and not be adjusted. The matter was, however, referred back to the Administrative Court of Appeal to be tried under the Tax Avoidance Act.

The case, that was decided on May 2, concerned an intra-group transfer of IP. The purchase price corresponded to an estimated fair market value. As the tax acquisition cost was low compared to the purchase price, the transfer resulted in a taxable gain for the transferring company. The transaction did, however, not give rise to an actual tax cost as the shares of the transferring company was sold, tax exempt, to another group which sheltered the gain against tax losses carried forward.

The Supreme Administrative Court emphasized the wording of the law and as the purchase price was not considered to be unreasonable or set in order for the acquiring company to receive a taxable benefit, the rule was not applicable. The actions that followed the transfer, i.e. a tax exempt transfer of shares and the use of tax losses carried forward to shelter the gain, and that in practice lead to a tax exempt step-up in value was made after the acquisition of the IP.

As the Tax Avoidance Act had not been tried in the Administrative Court of Appeal, the case was referred back to it for a ruling re the application of the Tax Avoidance Act. It remains to be seen what the outcome will be in that aspect. The minority of the Court disagreed and found the rule applicable on the basis that the actions that was made after the transfer should be taken into consideration.

Not taking the Tax Avoidance Act into consideration, the judgment supports the view that as long as the purchase price does not exceed the fair market value of the assets, no adjustment should be made to the basis for tax depreciations.

Highlights from Finland

The ECJ tax ruling clarifies the taxation of foreign investment funds in Finland: We assisted French A SCPI through the whole process where the European Court of Justice ('ECJ') answered a request for a preliminary ruling from the Helsinki Administrative Court. A SCPI, which is a variable-capital property investment company governed by French law, was considered as equivalent to a limited liability company governed by Finnish law by Finnish Tax Administration in its advance ruling. Consequently, A SCPI would be subject to income tax as opposite to Finnish funds constituted by contract where the unit holders are liable for income tax (i.e. a qualifying Finnish fund is tax exempt). One of the main questions in the ECJ was whether the free movement of capital provided by EU law precludes national legislation under which only foreign open-ended investment funds constituted by contract can be regarded as equivalent to Finnish tax exempt investment funds.

The ECJ's ruling gave clarity to the question whether the legal form of an investment fund could may be a regarded as a justification to different tax treatment. The Finnish requirement that tax exempt funds have to be established in contractual form is prima facie applied equally to residents and non-residents. However, as funds and special investment funds may be established in Finland only in contractual form, the requirement is liable to place Finnish undertakings at an advantage compared to undertakings established under the legislation of another Member State. The ECJ also noted e.g. that a Finnish investor may choose which legal form to use for a fund however, a non-Finnish investor must comply also with its local rules and regulations. Thus, the requirement discourages non-residents from making investments in Finland and constitutes a restriction on free movement of capital. As the ECJ did not find adequate objective justifications resulting from the purpose of the legislation or an overriding reason in the public interest, the requirement constituted unjustified infringement of free movement of capital.

As a result of the ruling, it may be that legislative changes concerning Finnish funds taxation will be introduced.

Services	Tax