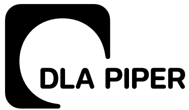

Nordic Tax Law Bulletin - February

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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

- **Introduction of changes to the tax regime for onshore wind power plants:** On 19 December 2023, the Norwegian Parliament formally approved the introduction of resource rent tax on onshore wind farms. Below follows the main features of the new tax:

- Nominal tax rate of 32.1% (effective 25%).

- Applicable to wind farms subject to licensing under the Norwegian Energy Act (wind farms with more than 5 turbines or a total installed capacity of 1 MW or more).

- The resource rent income/annual sales revenue (tax base) is, as a general rule, set at the sum of the spot market price per hour multiplied by actual production at the wind power plant in the corresponding time period. The following exceptions to the general rule apply:

1. Electricity delivered under a PPA concluded between independent parties before 28 September 2022 is valued at the contract price.

- Electricity delivered at spot market price where an agreement has been concluded with an independent party before 28 September 2022 to financially hedge against the spot market price in the area where the energy is delivered or against the Nordic System Price is valued at the hedged price.
- Electricity delivered to an energy supplier under a long-term fixed-price PPA, subject to further delivery under standard fixed-price agreements in the end-user market, is valued at contract price.
- Electricity delivered under a PPA between independent parties concluded in the period 2024-2030 is valued at the contract price. The PPA must be entered into for the purpose of hedging the prices on delivery of electricity from wind power plants for projects established in the same period (2024-2030).

- Direct deductions for new investments.

- For existing wind farms, the assets are depreciated against the resource rent tax on a straight-line basis over 5 years. A 40% increase in the tax values of the assets granted, limited to 85% of the historical investment cost. For existing wind farms that have applied the special 5-year straight-line depreciation rule for corporate income tax purposes, the tax value of the assets depreciable under the resource rent tax regime is set equal to the value of the assets as if the assets had been depreciated (for corporate income tax purposes) based on the declining balance method (with a subsequent increase of 40% of the tax value) at maximum depreciation rates. In addition, existing wind farms are granted deductions for a so-called “investment interest” to compensate for the fact that no immediate deductions are available for historical investments. The investment interest is calculated on the basis of the average tax value of the assets per 1 January and 31 December in the income year, multiplied with a normal interest rate (to be determined).

- Negative resource rent income (tax base) is carried forward with interest and deducted from positive tax base in later years. For new wind power plants, the negative resource rent tax is payable after the wind power plant has become operational and the Norwegian Tax Authorities have controlled the assessed tax. The payment scheme is subject to ESA approval.

- Resource rent tax related corporate income tax is deductible from the resource rent tax.

Entry into force: 1 January 2024

In addition to the introduction of the resource rent tax, the top tax (high price contribution) has been abolished with retroactive effect from 1 October 2023.

Further, the excise duty on onshore wind energy introduced in 2022 has been increased from NOK 0.02 per kWh of produced electricity in 2023 to NOK 0.023 per kWh in 2024. The excise duty is generally deductible NOK for NOK in the assessed resource rent tax.

- **Implementation of the Norwegian Supplementary Tax Act:** On 12 January 2023, the Norwegian Parliament approved the introduction of the Norwegian Supplementary Tax Act, which implements the Pillar 2 Income Inclusion Rule (Pillar 2: Global Minimum Taxation under the Inclusive Framework on BEPS) in Norwegian law.

The Norwegian Supplementary Tax Act apply to companies and permanent establishments in Norway that are part of a group with a total annual turnover of MEUR 750 or more in at least two of the last four financial years based on the consolidated accounts of the ultimate parent company.

In contrast to the OECD Pillar 2 framework, the Norwegian Supplementary Tax Act applies not only to multinational groups, but also to purely Norwegian groups.

The Norwegian Supplementary Tax Act implements two sets of rules for levying supplementary tax (top-up tax):

National supplementary tax

A national supplementary tax is levied on Norwegian entities or permanent establishments in Norway if the effective tax rate for the group in Norway is less than 15%. The national supplementary tax applies even if the parent company is located abroad.

Ordinary supplementary tax (Income Inclusion Rule)

Under the Income Inclusion rule, an ultimate parent company or an intermediate parent company located in Norway is subject to supplementary tax in Norway for undertaxed group companies.

The calculated national supplementary tax is deductible from the ordinary supplementary tax levied under the Income Inclusion Rule, provided that the Norwegian national supplementary tax rule qualifies as a *safe harbour* rule under the administrative guiding by OECD Inclusive Framework of July 2023. This means that a group subject to national supplementary tax in Norway can set the ordinary supplementary tax to zero and only calculate the national supplementary tax.

For more information on Pillar 2, please see the Nordic Tax Bulletin, July 2023 edition.

Entry into force: 1 January 2024

Highlights from Denmark

Tax

- **Denmark have implemented EU 'Pillar 2' rules in Danish law:**

On 7 December 2023, the Danish Parliament passed bill no. L 5 that implements the EU COUNCIL DIRECTIVE (EU) 2022/2523 of 14 December 2022 on ensuring a global minimum level of taxation for multinational enterprise groups and large-scale domestic groups in the Union (Pillar 2).

The rules are incorporated into a new law, The Minimum Taxation Act (in Danish *Minimumsbeskatningsloven*).

The wording and construction of the Danish rules are very close to the Directive, meaning that for calendar-year taxpayers the rules will have an impact as of 1 January 2024 through the so-called "Income Inclusion Rule", with the "Under-Taxed Profits Rule" to come into effect one year later, i.e. for income years beginning from 31 December 2024 or later.

The rules apply to large EU Groups with a turnover of at least EUR 750m. in two of the last 4 income years prior to the income year in question according to the consolidated financial statements for the group's ultimate parent company.

Broadly, the effect of enacting the EU Directive is that large EU groups, wherever headquartered, will now be subject to an effective tax rate of at least 15% on all their profits wherever arising.

Under the Danish implementation, the global minimum taxation of 15% is made based on a calculation of the effective taxation of the group in each country where it is established. The calculation is made on an aggregated basis for the group's company/ies and permanent establishments in each country.

Denmark have implemented all three Pillar II rules, according to which the charge of the 15% minimum taxation is made and in the following order:

1. Qualified Domestic Minimum Top-Up-Tax (QDMTT)
2. Income Inclusion Rule (IIR)
3. Undertaxed Payment Rule (UTPR)

There is however, still uncertainty following the implementation of the rules. The Danish tax agency is yet to publish its' official guidance on the pillar II rules. Furthermore, it is still uncertain whether the GloBE information return prepared by the OECD will be used for filing information comprised by the Pillar 2 rules and the Danish tax agency may determine that a different return shall be used.

- **New double tax treaty between Denmark and France implemented in Denmark**

In 2022, Denmark and France agreed on a new double tax treaty after the previous double tax treaty between the countries was revoked by Denmark 15 years ago.

Denmark had previously ratified the double tax treaty in March 2023, and in December 2023 France also finalized the ratification process. As a result, the Danish Parliament issued an order 28 December 2023 to implement the double tax treaty as of 1 January 2024.

The double tax treaty is largely in line with other tax treaties to which Denmark is a party. However, the main difference is in relation to taxation of pension payments, which led to the previous double tax treaty being revoked by Denmark.

Under the double tax treaty, the main rule is that the country of residence has the taxation right to the pension payments. However, if the pension payments were tax deductible in the source country or not included in the taxation basis (typical for employer pensions in Denmark), the source state can also tax the pension payment (and provide tax credit).

VAT

- **VAT treatment of fuel cards - Danish draft guideline:**

According to the draft guideline, fuel card issuers and leasing companies can still reclaim VAT on fuel purchased through a commissioner agreement.

The VAT handling on fuel cards has been unclear for years, culminating when the Danish Tax Authorities enforced a complete stand-still in the VAT refund process. The guideline has therefore been long-awaited and is highly welcomed by all parties.

Previously, a card issuer / leasing company could not be considered as supplying fuel, cf.C-185/01, Auto Lease and C-235/18, Vega International. Instead, the issuer / leasing company was regarded as providing financing to the card holder.

Following the draft guideline, an issuer of a fuel card / a leasing company (intermediary) can be considered to supply fuel in the capacity of a commissionaire, from a fuel company (principal), provided that:

1. the legal title to the fuel is transferred to the intermediary,
2. the supply to and from the intermediary is similar, and
3. a commissionaire agreement is concluded between the intermediary and the principal.

The draft guideline has been issued for consultation to interested parties and is therefore yet to be adopted.

The draft gives operators the possibility to continue VAT optimizing fuel card structures. However, it mandates a reassessment of the sales model, as the conventional buy/sell structure is no longer applicable. Such review should therefore explore transitioning to a commissionaire structure.

Highlights from Sweden

- **New interest deduction limitation ruling from the Supreme Administrative Court of Sweden:** On 22 January 2014, the Supreme Administrative Court ("SAC") ruled on the issue of the interest deduction limitation rules. The SAC has previously ruled that the application of the so-called exception rule in the limitation rules for interest deductions, which were introduced in 2019, is not compatible with the freedom of establishment in the TFEU. Now, in the January ruling, the SAC has concluded in a confirmed preliminary ruling that the second limitation rule, which only becomes relevant if the debt relates to an intra-group acquisition of shareholder rights, is also contrary to EU law.

Background: A Swedish company within an international group sought clarification from the Swedish Counsel for Advance Tax Rulings (the "Counsel)" on the possible denial of interest deduction on intra-group debt under the Targeted Rules. The group was planning a reorganisation and the Swedish company was to acquire shares in an intra-group company, financed by a loan from another group company registered in another EU member state. The Counsel initially held that the denial of the interest deduction was contrary to the freedom of establishment under the TFEU. However, the Swedish Tax Agency appealed the decision and the case was to be tried in the SAC. The SAC found that the rules resulted in a difference in treatment between domestic and cross-border situations, as the special provision would not apply to debts between two Swedish companies with unlimited group contribution rights. The court concluded that the provision in question would constitute an impermissible restriction on the freedom of establishment if applied to interest payments to companies in other EU Member States.

- **Clarifying ruling from the Supreme Administrative Court on the passive-external owner rule:** The circumstances of the case involved the applicant planning to set up a new company (NYAB) to enter into a franchise agreement with an insurance company. NYAB would distribute insurance products and would be owned 31% by the insurance company and 69% by the applicant. The applicant sought an advance ruling on the applicability of the passive-external-owner-rule to his shares in NYAB. Thus, the question in the case was whether, despite the significant passive-external ownership, there were special reasons to consider that the applicant's shares in NYAB were qualified. The SAC began by noting that the shares in NYAB were of the same type and gave equal rights to dividends. Since the insurance company was entitled to recover contributions and dividends were distributed in accordance with the shareholding, the SAC found that it is not worthwhile for the Applicant to convert employment income into capital income in the proposed structure. Thus, there were no special reasons to consider the Applicant's shares in NYAB as qualified.

- **Sweden implemented EU 'Pillar 2' into Swedish law:** The parliament approved the proposal regarding the new top-up tax for companies in large groups but with an amendment concerning the accounting standard. According to the government's proposal, groups with an annual turnover of at least EUR 750 million will pay an effective tax of at least 15% on a specially defined tax base. Exceptions are public authorities, non-profit organisations and pension funds.

The purpose of the amendment is to ensure that companies in multinational and national groups pay a fair share of tax regardless of where they operate. The proposal is based on an EU directive.

Entry into force: 1 January 2024

Highlights from Finland

- **The Supreme Administrative Court of Finland issued two rulings regarding the Delaware flip:** On 31 August 2023, the Supreme Administrative Court issued rulings on the implementation of the Delaware flip, one concerning the implementation of the arrangement by merger and the other by share exchange.

In summary, the rulings concerned the establishment of US parent companies for Finnish companies. However, the same principles could also apply to the establishment of a parent company in a non-EEA country other than the US.

According to the rulings, the Delaware flip by share exchange was not considered tax neutral, but the arrangement by merger met the conditions for tax neutrality. The rulings thus confirmed that only a merger is possible if the Delaware flip is intended to be tax neutral.

- **The Finnish Tax Administration has updated its guidance on the tax treatment of directed distributions from unrestricted equity reserves:** According to the Tax Administration's updated guidance dated 24 November 2023, the principles of favourable dividend distribution (fiscally adverse) do not apply to a directed distribution from unrestricted equity reserve to the investing party under certain conditions.

Previously, there was no Tax Administration guidance or published case law on the distribution of unrestricted equity reserve to the investing party. As a result, a directed distribution from the unrestricted equity reserve involved the risk of a favourable dividend distribution and the applicability of gift tax.

The updated guidance contains conditions under which the rules on favourable dividend distributions do not apply when the return of unrestricted equity reserve is made to the investing party. However, these rules are relatively strict and must be considered at the time of the investment of the unrestricted equity reserve.

- **First annual reports based on DAC7 directive obligations issued:** The deadline for filing the first annual reports to the Finnish Tax Administration was 31 January 2024. In general, the DAC7 directive reporting obligation applies to all platform operators operating in Finland and providing services to individuals or businesses in Finland.

A platform operator is a company that provides a digital platform and contracts with sellers to allow the seller to offer services or goods through the digital platform (e.g. a website or mobile app). In general, platform operators are required to file an annual report in Finland even if they have no reportable activities, i.e. they will file a zero report.

DAC7 directive has been implemented in Finland in accordance with the purpose and content of the Directive without national extensions.

Tjänster	Tax