

The Danish Tax Agency allows for the opportunity to reopen certain transfer pricing cases

SPECIALITY TAX

On 12 July 2019 the Danish Tax Agency issued a decree regarding transfer pricing documentation. The decree may impact transfer pricing cases regarding income years from 2008 and up to and including 2017.

For several years the tax agency has required that transfer pricing documentation for the individual income years should be prepared continuously and should be available at the latest upon filing of the tax return. This point of view is controversial and subject to constant challenges by taxpayers as well as advisers as the tax agency until recently did not have the necessary and adequate legal basis to support this point of view. However, the tax agency decided to disregard the criticism and adopt the point of view that the tax agency was entitled to make a discretionary increase of the taxable income unless the taxpayer could prove that arm's length conditions had indeed been applied in situations where complete transfer pricing documentation had not been prepared at the time of filing the tax return. If the taxpayer could not meet this often heavy burden of proof, a discretionary assessment was made. The tax agency made many increases on this basis and the new decree affects these increases.

On 31 January 2019, the Danish Supreme Court ruled in favor of Microsoft Danmark ApS as the Supreme Court disregarded the tax agency's point of view and ruled and the tax agency could only make discretionary assessments in cases where the taxpayer had not filed complete transfer pricing documentation at the time of the assessment, meaning the time of tax agency's decision. It was thus not a valid claim – as stipulated by the tax agency – that transfer pricing documentation for the individual year should be prepared continuously and be available at the time of filing the tax return.

Based on the Supreme Court ruling, the tax agency issued a decree on 12 July 2019 allowing a reopening of tax assessments in cases where the tax agency had made a discretionary assessment solely with reference to incomplete transfer pricing documentation for the individual income years at the time of filing the tax return. Companies which transfer pricing documentation was available and complete at the time of the tax agency's decision, but not at the time of filing the tax return, can have their tax cases reopened.

At present it is possible to apply for reopening of the tax agency's assessments for income years from 2008 and onward. The deadline for applying for the tax agency to reopen the cases is 12 January 2020 and the deadline for income year 2008 is 20 November 2019.

For income year 2018 and onward it is laid down by law that transfer pricing

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documentation must be available at the time of filing the tax return. Contrary to income years 2017 and prior, the tax agency now has the necessary legal basis for making discretionary assessments for income year 2018 and onward if the transfer pricing documentation is not available at the time of filing the tax return. Thus, the decree has no affect for income year 2018 and onward.