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Questionnaire on Corporate Income Tax Subjects - Denmark

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Questionnaire on corporate income tax subjects - Denmark

2013 Congress

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Background

In terms of tax policy, tax harmonization or coordination of corporate taxation in the EU is usually considered from two complementary points of view: tax base and tax rate. These two perspectives structure the debate whether EU Member States, and more broadly States belonging to the same economic area, should harmonize or coordinate their policies in tax matters.

However, little attention has been paid so far to a more basic question: who are corporate taxpayers? Are they defined in the same way over Europe?

This may be explained by the fact that the vast majority of tax systems accept the same fundamental idea: while companies limited by shares and limited liability companies should be subject to corporate income tax (CIT), partnerships should be considered fully or partly transparent for tax purposes.

This general statement is nevertheless an oversimplification of reality. Comparative law indeed shows that the conditions which must be met in order to be subject to CIT are very different from one country to another.

The way tax systems define foreign entities which fall under their CIT may also vary in a significant way, which may in practice give rise to interesting tax planning opportunities.

Against this background, the EATLP congress devoted to CIT subjects should enhance the main similarities and differences which exist between European countries in order to reach a better understanding of the need (or the absence of need) of increased harmonization in this matter.

Questions

The following questions should be answered in their order, in a reasonably detailed way, bearing in mind that neither insufficient nor excessive accuracy allow constructive comparative work. Your report should therefore not exceed 15 pages. Please quote the relevant legal sources (provisions of your tax legislation, academic literature, etc.) upon which you rely to answer the questions.

Furthermore, in order to avoid a fragmented report in the form of (short) answers to questions, the national report should not be written in question and answer style, but in the

form of a full text survey of the corporate income tax subjects in your country following the order of the questions.

1. General presentation of CIT in your country

1.1. Please provide for a quick overview of the system of CIT in your country

-date of introduction of CIT

-existence of a tax distinction between corporations and partnerships (opacity vs. transparency)

-number of corporations ; proportion of corporations in the total number of businesses (the goal of this question is to understand whether the setting up of a corporation is an ordinary way of performing a business activity or whether corporations are normally used by big companies only) ;

-CIT and other taxes :

-CIT revenue compared to income tax revenue and to tax resources of the State more generally (if available) ; ratio CIT/Gross Domestic Product

The CIT revenue in Denmark, the relative size of CIT compared to total income tax revenue and the ratio between CIT and Gross Domestic Product (GDP) is illustrated in the table below:¹

CIT in Denmark (in billion euro)			
Year:	2011	2012 (estimate)	2013 (expected)
GDP	238.93	244.23	251.78
Total income tax	70.49	73.16	74.37
CIT tax	6.68	7.09	7.65
CIT/GDP ratio	2.8%	2.9%	3.0%
CIT/Income tax ratio	9.5%	9,7%	10,3%

Even though the development in absolute and relative CIT revenue is expected to rise during the next couple of years, the CIT/GDP ratio was 8.7 pct in 2006 whereas the CIT/income tax ratio was 14.5 pct. A sharp decline in CIT revenue ended in 2009 and since then CIT revenue has risen slowly in Denmark.²

In 2011, CIT amounted to 5.29 billion euro, while the hydrocarbon tax resulted in 1.37 billion euro. Foundation tax only totals to 13.4 million euro in 2011, which has resulted in some debate in the media relating to the question of raising taxation for especially business operating foundations.³ Since 1990, the CIT revenue growth has exceeded the growth in GDP. The relative importance of CIT is increasing in later years, but CIT still constitutes a

¹ Foundation tax revenue and hydrocarbon taxation is included in the CIT revenue. 2012 and 2013 numbers are estimated.

² Cf. The Danish Ministry of Business and Growth and Statistics Denmark, August 2012: <http://www.dst.dk/pukora/epub/upload/16215/Skat2012.pdf> (3 December 2012).

³ Cf. for instance the report on this debate by the liberal think tank CEPOS: http://www.cepos.dk/fileadmin/user_upload/dokumenter/2012_-_03/Notat_Fakta_om_fondsbeskatning_og_erhvervsdrivende_fonde_mar12.pdf

relatively small part of the total Danish income tax revenue. In 2010 CIT amounting to 5.44 billion euro constituted 4.8 pct of the total revenue from direct and indirect taxes and 55 pct of CIT was paid by private limited companies, while 26 pct. came from public limited companies. Foreign companies, savings banks, co-operative associations cover the remaining 19 pct.

-Are there taxes in your country which “look like” CIT but are distinct from CIT (i.e. taxes which have a comparable base, or which are presented as “additional taxes” to CIT although they have a different nature)?

As a rule, foundation taxation and hydrocarbon taxation are included when adding up the total CIT revenue. Moreover co-operative associations are included when adding up the CIT revenue in Denmark.

As a rule, foundations are subject to the principles concerning the income statement of corporations as laid down in the Corporation Tax Act⁴ (CTA henceforth) to which the Foundation Tax Act⁵ sec. 3 (1) refers. Foundations may, however, deduct donations and provisions made for public benefit purpose which in effect often eliminates tax payment.

Three forms of co-operative associations are subject to special taxation pursuant to

1. CTA sec. 1 (1) (3) covering “*andelsforeninger*”,
2. CTA sec. 1 (1) (3a) covering “*brugsforeninger*” and
3. CTA sec. 1 (1) (4) covering other business operating co-operative associations.

Taxation of co-operative associations is not based on a regular income statement, since co-operative association’s income is constituted by a certain percentage of the co-operatives association’s balance or capital at the end of the income year. The tax rate of this capital based income statement is 14.3 pct for all co-operatives even though the way this special income tax base is calculated differs according to the purpose of the co-operative, cf. CTA sec. 15 (1), 16 (2) and 16 A (1).⁶

Income gained by preliminary study, prospecting and extraction of hydrocarbon including the construction of pipelines and ship transport of extracted hydrocarbon is regulated in the Hydrocarbon Tax Act⁷. According to the Hydrocarbon Tax Act sec. 2 such income is subject to ordinary (corporation) income taxation in addition to hydrocarbon taxation amounting to 70 pct of hydrocarbon related income derived from concessions awarded before 1 January 2004 and 52 pct. of income derived from later concession.

1.2. Presentation of the historical evolution of CIT in your country (to the extent relevant)

-Has the CIT system been changed significantly since it was introduced?

⁴ Cf. consolidated Act No. 1082 dated 14 November 2012.

⁵ Cf. consolidated Act No. 1248 dated 2 November 2010.

⁶ Cf. *Henrik Dam, Henrik Gam, Kjeld Hemmingsen and Jacob Graff Nielsen Grundlæggende Skatteret*, 2012, 5.ed., Magnus Informatik, p. 565 ff.

⁷ Cf. Consolidated Act. No. 971 dated 20 September 2011.

Taxation of corporations was introduced by the Danish State Tax Act in 1903 and in 1960 the taxation of corporations was moved to the Danish CTA. Since 1903 the principle of neutrality has been a basic element of CIT in Denmark which means that the taxation of business operated within and outside of corporations should not differ.⁸ Corporations were originally subject to the same tax rates as natural persons with an important modification to enforce the principle of neutrality; corporations were only tax liable of income exceeding 4 pct of the corporations share capital. This provision was in fact regarded as an actual tax exemption for corporations. From 1903 to the renewed State Tax Act of 1912 and later 1922 the number of tax liable corporations was increased including for instance business operating co-operative associations, credit institutions and savings banks. Whereas the Danish State Tax Act of 1903 and 1912 were provisional the State Tax Act of 1922 became permanent and is in fact still in effect. The 1922-version of the Danish State Tax Act contained a number of innovations which also concerned CIT. These changes formed the foundation of an actual and separate CIT based on an independent tax statement. Tax liability was extended to associations and independent institutions but only included income derived from business related activities and allowing deduction for donations to charitable purposes. Moreover, the wide Danish concept of dividends was established by law in the Danish State Tax Act sec. 4 (e). All in all, from 1903 to 1960 the development of corporate income taxation was modest and mostly involved changing the tax rate especially when financial instability or war warranted it. The calculation of income tax for corporations was far from simple before the new Danish CTA in 1960.⁹

The Danish CTA¹⁰ from 1960 with effect from the income year 1962-63 was a milestone in Danish corporation taxation implementing a proportionate CIT rate of 44 pct with a basic allowance amounting to half of the income but not exceeding 2.5 pct of the corporation's share capital. As an attempt to try to solve the double taxation issue corporations were allowed to deduct half of taxes paid in the relevant income year. An important innovation compared to the legal status before the CTA of 1960 was the exclusion of limited partnerships and jointly owned shipping companies from the scope of CIT. These partnerships and companies henceforth became subject to transparent partnership taxation. The CIT rate was raised to 50 pct in 1989 and has since been reduced to the present rate of 25 pct.

In later years, CIT has undergone considerable changes primarily constituting statutory tightening to ensure continued tax revenue from CIT. A provision on thin capitalization was introduced in 1998 and amended in 2004 as a consequence of *Cadbury-Schweppes (C-196/04)*. In 2005 Denmark introduced the principle of territoriality in CIT pursuant to CTA sec. 8 (2) according to which Danish corporations are not tax liable of income from foreign permanent establishments and real estate the based on a wish to avoid that Danish corporations reduce the tax base by deduction of deficit from such assets abroad.¹¹ With effect from 1 July 2007 further limitation on corporations' deduction of interests was introduced in CTA sec. 11 B and 11 C. Private equity/investment funds were the target of these provisions. As late as in 2012 the Danish government passed a bill effectively limiting carry forward of deficit applying to income years beginning 1 July 2012 or later. Deficit from previous income years may henceforth reduce income in an ensuing income year amounting to approximately 1

⁸ Cf. *Jan Pedersen Selskabsbeskatning før og nu, SR-skat, Statsskattelovens 100 års jubilæum, 2003*, p. 221.

⁹ Cf. *Jan Pedersen Selskabsbeskatning før og nu, SR-skat, Statsskattelovens 100 års jubilæum, 2003*, p. 225.

¹⁰ Act No. 255 dated 11 June 1960.

¹¹ Cf. *Aage Michelsen, Steen Askholt, Jane Bolander, John Engsig og Liselotte Madsen Lærebog om indkomstskat*, 14. ed., 2011, p. 820. The principle does not apply in case of voluntary joint taxation pursuant to CTA sec. 31 A or CFC-taxation pursuant to CTA sec. 32.

million euro. Any remaining deficit from previous income years may moreover reduce 60 pct of a remaining surplus in the ensuing income year in mention, cf. CTA sec. 12.

-Has the personal scope of CIT (i.e. the list of entities which are subject to CIT) been modified since CIT exists in your country? If so, why?

2. Legislative technique

2.1. Sources

-Please explain which is the legal instrument for defining CIT subjects : are taxable entities defined through a section of your tax code, a provision in another piece of legislation, a decree, case-law, etc?

In Denmark CIT subjects are defined in the CTA. Section 1 f the CTA contains an accurate and comprehensive list of companies which are subject to CIT. The only other type of legal entities which is subject to tax is foundations, which are defined in the Act concerning Taxation of Foundations.

Where the CTA refers specifically to the company law classification of companies, there is no room for doubt with regard to the CIT classification. This is the case with public and private companies. Where the CTA does not refer directly to the company law classification, there has been some doubt with regard to the CIT subjects. In these cases, case law has solved some of the problems. This is the case with limited liability undertakings.

Foreign companies etc.

When applying Danish tax law, a foreign company or entity is classified for tax purposes as a similar Danish company.¹² Thus in general a foreign company operating in Denmark only falls under Danish CIT, if it is comparable to the types of companies which are subject to Danish CIT.

However, if a foreign foundation or corporation has a permanent establishment (branch) located in Denmark, that PE is for tax purposes subject to ordinary Danish CIT, cf. § 2 of the Danish CTA. The foreign corporation or foundation has thus no access to the tax privileges available to a similar Danish organization. The application of Danish CIT to Danish branches of foreign corporations and foundations is likely to constitute a non-justifiable restriction in relation to Articles 49 and 63 TFEU.¹³

Requalification for tax purposes

According to sec. 2 A of the CTA, introduced by Act no. 221 of March 31st 2004, a company, which is considered to be subject to CIT according to § 1 CTA, may be requalified for tax purposes in such a way that the company is considered to be transparent for tax purposes. This is the case, if the company is considered to be tax transparent according to the rules of a foreign state. A similar rule was introduced as sec. 2 C of the CTA by Act no. 530 of June 17th 2008. According to this rule, a company which is considered to be tax transparent

¹² See Erik Werlauff, *Selskabsskatteret 2011/12*, Thomson Reuters 2011, p. 157-160.

¹³ See Søren Friis Hansen, *Skattepolitisk Oversigt 2006*, p. 399-411, and Aage Michesen in *Festschrift til Erik Welauff*, Jurist og økonomforbundets Forlag 2012, p. XXX.

according to Danish law may be requalified for tax purposes in such a way that the company is subject Danish CIT. A requalification takes place, if the majority of members take residence in a state which treats the company as transparent for tax purposes. Both these rules are aimed at avoiding abuse by using the US Check the box rules. However, the provisions apply to European relation as well. If the majority of members in a Danish limited partnership transfers their residence to an EU-memberstate, which treats limited partnerships as CIT subjects, a reclassification of the limited partnership will occur, and the company will be treated as a CIT subject according to CTA sec. 2 C. This anti-avoidance measure seem to constitute a restriction in relation to Articles 49 and 63 TFEU, which cannot be justified.¹⁴

2.1. Legal drafting

- Does your tax system contain an accurate list of entities which fall under CIT?
- Does it rather provide for a general criterion (for instance legal personality, lucrative goal, commercial activities etc.)? *Please answer this question from a legal drafting perspective only, at this stage. Further details on the substance of the criterion will be requested later on.*
- Does it combine both of the above legal drafting techniques?

3. Domestic entities

3.1. First approach

- Please give an accurate list of all domestic entities which are subject to CIT in your country
 - Please check whether this list is consistent with the annexes to the Parent-Subsidiary directive, the Interest-Royalty Directive and the Draft CCCTB Directive. If not, can you provide for an explanation?
- Please give an accurate list of all domestic entities which are not subject to CIT in your country
- Can you explain *why* some entities are subject to CIT while others are not? Is there a widely accepted reason for distinguishing between taxable subjects and non-taxable subjects? If partnerships are transparent, is there a clear explanation in your domestic academic literature for the contrast between opacity of corporations and transparency of partnerships?

In general, only companies and undertakings which constitute separate legal entities are considered to be subject to CIT in Denmark.

Public and private limited companies

Public limited companies (in Danish *aktieselskaber*, abbreviated “A/S”) and private limited companies (‘*anpartsselskaber*’, abbreviated “ApS”) are subject to the Danish Companies Act of 2009.¹⁵ All public and private limited companies must be registered with the Danish Business Authority in order to obtain legal personality. Both public and private limited companies can exist with one shareholder.

Public limited companies have existed in Denmark since the first half of the 19th Century. They have been subject to CIT since 1903. This is now stated in sec. 1 (1) (1) of the CTA.

¹⁴ See Søren Friis Hansen, *Skattepolitisk Oversigt* 2008, pp. 169-187.

¹⁵ Act nb. 470 of June 12th 2009 (Lov om aktie- og anpartsselskaber), now consolidated Act nb. 322 of April 11th 2011, as amended by Act nb. 477 of May 30th 2012

The private limited company was introduced into Danish law with the Companies Acts of 1973. They have been subject to CIT since that date. However, originally their status as CIT subjects was not written into the CTA. Instead, a provision of the 1973 Act on private limited companies provided the legal base for the status of Danish private limited companies as CIT subjects. With the new Danish companies Act of 2009, the legal base for the status of the private limited company as subject to CIT was written into the CTA, cf. sec. 1 (1) (1).¹⁶

A public or private company is liable to pay CIT, if it is registered with the Danish Business Agency, cf. sec. 1 (1) (1) of the CTA, and if the management's seat is located within Denmark, cf. sec. 1 (6) of the CTA.

Other companies with limited liability

According to CTA sec. (1) (2) 'other companies where none of the members are liable for the company's debt, and whose dividend is distributed on the basis of each member's share in the capital of the company, is subject to CIT. This provision, which goes back to the State Tax Act of 1912, was originally formulated to include companies comparable to the German GmbH, as these had no legal basis in Danish law at that time. When the private limited company was introduced in Danish law in 1973, it was made subject to CIT under sec. 1 (1) (1) of the CTA (see above). Historically, it has been possible to form a company without limited liability in Denmark, which fell outside the scope of the legislation on public limited companies.¹⁷ The provision in sec. 1 (1) (2) of the CTA has been maintained to provide the legal basis for making such companies subject to CIT.

Since 1st of January 1995, the Act on Certain Business Enterprises ("CBEA")¹⁸ has been in force. It lays down rules on registration for certain types of enterprises. According to Section 1, the Act is applicable to sole proprietorships, associations, co-operatives, partnerships, limited partnerships, and societies with limited liability, which are not subject to the 2009 Companies Act, or the Act on Foundations. Branches of the corresponding foreign enterprises are also subject to the Act. An enterprise is subject to the Act, if it transfers goods or immaterial rights, or provides services against remuneration. Furthermore such an enterprise will be deemed to carry out a business for profit if it conducts activities involving selling or renting real property, if it is considered a parent enterprise in relation to a limited public or private company or similar enterprise (sec. 1 (3) CBEA).

A special Danish company type is the *limited liability undertaking* (in Danish: "*selskab med begrænset ansvar*" abbreviated "*s.m.b.a.*"). This type of undertaking must be registered with the Danish Business Agency according to the Act on Certain Business Enterprises sec. 3. Since January 1st 1995, it is a prerequisite for a limited liability undertaking to be recognised as a separate legal entity that the undertaking is registered with the Danish Business Agency according to sec. 3 of the CBEA.

Sec. 3 of the CBEA applies to 3 types of companies:

¹⁶ See Søren Friis Hansen in Neville & Engsig Sørensen (eds.), *Den nye selskabslov*, Jurist og Økonomforbundets Forlag 2009, pp. 309-318 (at p. 310f).

¹⁷ See Bernhard Gomard, *Selskabsretten*, Jurist og økonomforbundets forlag 1999, p. 64, and Søren Friis Hansen & Jens Valdemar Krenchel, *Dansk selskabsret 1*, Thomson Reuters, 3rd ed. 2010, p. 60 ff.

¹⁸ The Act on Certain Commercial Undertakings (*Lov om visse erhvervsdrivende virksomheder*) Consolidated Act No. 559 of May 19th 2010 as amended by Act no. 616 of June 14th 2011.

- co-operatives with limited liability as (*“Andelsselskaber med begrænset ansvar”* as defined in sec. 4 of the CBEA).
- Enterprise associations with limited liability
- limited liability undertakings

The limited liability undertaking has been used as a substitute for a private limited company. The rules applicable to these companies are not codified.

The sec. 3 of CBEA has been amended two times over the past years.¹⁹ As a result of these amendments, the status of a limited liability undertaking for the purpose of CIT had become doubtful. As result of this, sec. 1 (1) (2), of the CBA was amended in 2011.²⁰ All companies and entities which are registered on the basis of sec. 3 CBEA are now subject to CIT. This amendment has inadvertently caught a number of enterprise associations, which were previously subject to CIT under sec. 1 (1) (6) of the CBA. The change is of major importance, since associations, which are subject to CIT according to sec. 1 (1) (6) CBA, are only taxed on the basis of their business income.²¹

In December 2012 the Danish Business Agency has presented a draft Bill. According to this draft, sec. 3 of the CBEA shall be amended in such a way that limited liability undertakings cannot be formed according to Danish law after January 1st 2014. Existing limited liability undertakings shall be converted into enterprise associations from that date.

Partnerships

Partnerships are not subject to CIT in Denmark. The reason for this is historical. A partnership was not considered to be a separate legal entity in 1903, when the first rules on CIT were introduced in Denmark. Consequently a partnership could not have a taxable income or own assets subject to depreciation.

In civil law the case law has since established that a partnership and a limited partnership are considered to be separate legal entities, cf. the Supreme Court ruling reported as UfR 1921.959H. However this change has not influenced the tax law. The partnership's status as a separate legal entity apply also in Danish tax law. This was confirmed by the Supreme Court in the case reported as UfR 2003.2477H. The Supreme Court concluded that an income which was allocated to the partnership in a fiscal year, should be added to the taxable income of the partners in that same fiscal year, regardless of the fact that the partners did not receive dividend from the partnership until the following year.²² In the case reported as TfS 2003.982V, the Eastern High court concluded that since a partnership had not come into existence as a separate legal entity before December 31st, it could not have acquired a real estate in that fiscal year. Consequently, the partners could not deduct costs deriving from that partnership for that fiscal year.

Limited partnerships

¹⁹ See Søren Friis Hansen, 'Ændring af lov om visse erhvervsdrivende virksomheder', *Revision & Regnskabsvæsen* 2011/12, pp. 42-53.

²⁰ Amendment Act nb. 254 of March 30th 2011, § 8.

²¹ See Erik Werlauff, *Tidsskrift for Skatter og afgifter*, TfS 2012,XX, which is correct to point out that the change in the status of enterprise associations was not intended by the legislator.

²² Søren Friis Hansen & Jens Valdemar Krenchel, *Dansk selskabsret* 3 (2nd ed. 2011). p. 94 f

The limited partnership has existed in Denmark since the first half of the 19th Century.²³ After the 1912-amendment to the Danish State Tax Act the limited partnership was inadvertently made subject to CIT, as they were for tax purposes classified as a company with limited liability. This classification was maintained with the 1922 amendment to the State Tax Act. When the Danish CTA was introduced in 1960, the limited partnership was once again classified as a partnership for tax purposes. Since the fiscal year of 1963 limited partnerships have been considered to be transparent for tax purposes in Denmark. This classification has greatly contributed to the popularity of the limited partnership in Denmark.

The Limited partnership company (in Danish '*kommanditaktieselskab*' or "*partnerselskab*", abbreviated "P/S") are comparable to the German company type Kommanditgesellschaften auf Aktien (KgaA). This type of company is not subject to CIT in Denmark, as is basically a limited partnership. For tax purposes it is in every aspect treated as a normal limited partnership.

Co-operatives

In Denmark co-operatives (*andelsselskaber*, or *andelsforeninger*) are not subject to CIT. Since 1922 co-operatives have been subject to a special form of taxation. The basic principle is that the cooperative does not pay income tax. The members of the cooperative are taxed when they receive dividend from the cooperative. Cooperatives play an important role in the Danish business community, especially in the rather large agricultural sector.

In November 2012 an unusual event occurred in the Danish Parliament. On November 19th 2012 in the morning, the Danish Minister for taxation presented a draft amendment Act (Bill L 81) before the Danish Parliament. According to the Bill, the CTA was to be amended in such a way that all co-operatives would be subject to ordinary CIT. The amendment of the CTA was planned to enter into force from November 19th 2012. However, on November 19th 2012 in the afternoon, the Danish Minister for Economy issued a statement to the press. According to that statement, the proposal regarding a change in the CIT status for cooperatives was an "error". This element would be withdrawn from the Bill by the Government. Bill L 81 was adopted by the Danish Parliament on December 19th 2012 without the controversial provision on the change in the status of co-operatives for tax purposes. Co-operatives consequently remain outside the scope of CIT in Denmark.

3.2. More details

3.2.1. Link between company law and tax law

-Does the definition of a person subject to CIT depend upon company law definitions? This is the case, for instance, where the law states that entities which have a specific legal form are subject to CIT.

The question of the relationship between company law and tax law has been debated in the Danish literature for some years. One of the issues has been whether it is possible to requalify a company for tax purposes. While some authors have presented the view, that tax law may be

²³ Carl Torp, *Den danske Selskabsret*, G.e.C. Gad, København 1919, pp. 134-169.

regarded as autonomous in relation to company law²⁴, the majority opinion in the literature is that it is not possible to requalify a company for tax purposes, unless such requalification has a specific basis in the CTA.²⁵

Other authors have argued that a limited partnership, where the unlimited partner does not own a share of the company, should for tax purposes be treated as a subject to CIT.²⁶

However, there is no legal basis for such a conclusion. The civil law definition of the limited partnership is now generally applicable in Danish Law, cf. sec. 2 (2) of the CBEA, and this definition is identical to the definition inherent in the CTA. Neither definition contains a requirement that the unlimited partner shall own a share of the company.²⁷

3.2.2. Charitable organizations and associations

-May charitable organizations and associations be subject to CIT? If so, which are the criteria which are applicable? Are these criteria identical to those used in the context of VAT liability?

-Are criteria of for-profit entities identical for domestic and foreign entities?

3.3.3. Miscellaneous on CIT subjects

If this is relevant, please underline specific legal structures which may be used in your country, e.g. trusts, silent partnerships, etc. and explain what their status is with regard to CIT.

If State-owned entities raise specific issues in your country, please explain.

If companies belonging to a group no longer enjoy full tax personality in your country, please explain.

Trusts

Danish statutory law does not operate with the concept of trust, but it is possible for foreign trust to be acknowledged for tax purposes as a legal entity somewhat comparable to a foundation.²⁸ Generally, trusts may either be considered as legal entities in tax respect or as

²⁴ See Jakob Bundgaard, 'Om kvalifikation af selskaber', Ugeskrift for retsvæsen 2006B, p. 124-130. See for an identical argumentation Mads Berg, 'Skatteretlig underkendelse af et K/S', Skattepolitisk Oversigt 2012/1, p. 1-13.

²⁵ See Søren Friis Hansen, Skattepolitik Oversigt 2012/3, 'Et kommanditselskab kan ikke 'underkendes' i skattemæssig henseende', p. 177 – 199 with references. See also, Søren Friis Hansen & Jens Valdemar Krenchel, 'TûTû i skatteretten', Ugeskrift for Retsvæsen 2006B, p. 279-288, and Rasmus Kristian Feldthusen & Jacob Graff Nielsen, 'Forankring eller løsrivelse – omforholdet mellem skatteretten og civilretten, in Pedersen, Friis Hansen & Clausen (eds.), Festskrift til Ole Bjørn, Jurist og Økonomforbundets forlag 2004, pp.211 – 254.

²⁶ See Mette Neville, Boligfællesskaber i selskabsform, Jurist og økonomforbundets forlag, 1993, p. 69, and the identical argument presented by Liselotte Hedetoft Madsen, Beskatning ved deltagelse i personselskaber, Jurist og økonomforbundets forlag, 2003, p. 49f and 306.

²⁷ See Søren Friis Hansen & Jens Valdemar Krenchel, Dansk selskabsret 3, Thomson Reuters (2nd ed. 2011), p. 605- 627 with references.

²⁸ A recent overview of the taxation of trusts according to Danish tax law is presented by Jørn Quiste, *Rasmus Vang* in Beskatning af trusts – En kommentar til Højesterets dom af 15/12 2011, TfS 2012, 206 and by Rasmus Kristian Feldthusen Afgivelse af formue til trusts – vurdering af kravet om uigenkaldelig og effektiv udskillelse af stifterens midler som betingelse for skatteretligt at anerkende trusten, SpO 2009, p. 179 ff. Moreover, taxation

settled property held on trust. If a settler of a foreign trust who is subject to Danish tax liability wishes to avoid taxation of income accruing to the trust the following requirements have to be fulfilled according to Danish practice. The trust's capital has to be

- definitively and
- effectively separated from the settler's assets.

In practice, definitively means that it is impossible for the settler to reclaim capital allotted to the trust. Effectively means that the settler may not continue to dispose of the trust's capital.²⁹

Partnerships etc

Partnerships (*interessentskaber*), limited partnerships (*kommanditselskaber*), jointly owned shipping companies (*partrederier*) and limited partnerships on shares (*partnerselskaber*) are as mentioned transparent tax entities according to Danish tax law and are as such not liable to CIT.³⁰ Instead, the partners of these partnerships etc have to include income and deductions/depreciations to the partners' income statement according to the partners' undivided share in the partnership. In practice, the partnership's income statement is settled alongside the partnership's balance sheet and the calculated net profit/loss is subsequently divided between the participants. Whereas the partnership's depreciations are divided according to the participant's undivided share in the partnership, the division of the partnership's net profit/loss is based on other criteria. If the partnership contract does not contain provisions on the division of the partnership's profit/loss, the optional rule is equal division of profit/loss.³¹

In Danish legal discourse – including company law and tax law – no special provisions on silent partnerships exist.³² That is why a silent partnership cannot be considered an actual corporate form in Denmark. As regards taxation, a party is considered and taxed as a partner according to the transparency principle, if the party is entitled to an undivided share of the partnership, cf. UfR 1990.174 H and UfR 2002.844 H. Creditors without right of property to the partnerships' assets are taxed as a creditor and not as a partner.

Public entities

According to CTA sec. 3 a number of public institutions are exempt from CIT including e.g. the Danish National Bank, the state and its institutions, the national TV-broadcast Company TV2, municipalities, regional institutions, public hospitals, libraries, residential homes etc. CTA sec. 1, however, lays down tax liability for a specific number of public institutions such as the Danish State Railways (DSB), power companies, and municipality operated power supply companies, water supply companies, discharge water and sewage companies. Moreover, public business operated through public or private limited companies are liable to CIT pursuant to CTA sec. 1.

Group taxation – mandatory national

of trusts is dealt with in the Danish tax authorities' legal guidelines *Den Juridiske Vejledning* section C.B.2.15.2, in which a list of rulings is available.

²⁹ In the above mentioned article, *Rasmus Kristian Feldthusen* questions these criteria.

³⁰ Cf. *Aage Michelsen, Steen Askholt, Jane Bolander, John Engsig og Liselotte Madsen* *Lærebog om indkomstskat*, 14. ed., 2011, p. 1007 ff. samt *Søren Friis Hansen og Jens Valdemar Krenchel* *Dansk selskabsret* 3, 2. ed., p. 641 ff. og *Liselotte Madsen* *Den skatteretlige behandling af personselskaber*, 2011, p. 131 ff.

³¹ Limited partner's (*kommanditisters*) deduction based on losses derived from limited partnerships is limited to the limited partner's investment according to practice approved by the Danish Supreme Court, cf. UfR 1983.8 H.

³² Cf. *Søren Friis Hansen and Jens Valdemar Krenchel* *Dansk selskabsret* 3, 2. ed., 2011, p. 185 ff.

Group companies with residence in Denmark are subject to mandatory national group taxation according to CTA sec. 31.³³ In addition, it is a condition that the companies belong to the same group of companies, cf. CTA sec. 31 C. A corporation, foundation, trust or an association constitute a group with one or more subsidiaries. The corporation etc with controlling interest in the subsidiary is considered the parent company. Controlling interest is defined as the power to control the subsidiary's fiscal or operational decisions. As a main rule, controlling interest is considered to exist, if the parent company directly or indirectly owns more than half the voting rights of a subsidiary company, unless it can be clearly established that in fact such ownership does not constitute controlling interest. A parent-subsidiary relation based on controlling interest may also be established in case of ownership to less than half of the voting rights in the subsidiary, cf. CTA sec. 31 (4). For instance, the parent company may have right of disposition over more than half of the voting right in the subsidiary through agreement with other investors or enjoy the right to control the fiscal and operational business of the subsidiary through bylaws or other agreement. Corporations subject to mandatory national group taxation are required to apply the same income year as the appointed administration company, cf. CTA sec. 31 (4).³⁴

Group companies are subject to a group income statement consisting of the sum of the income of each group company, cf. CTA sec. 31 (2).³⁵ The share of ownership in each subsidiary is disregarded in this connection because due taxes are divided according to CTA sec. 31 (6). If the group income statement results in a surplus this surplus is divided between the profit-making companies, cf. CTA sec. 31 A. A negative group income statement leads to a division of the deficit between the loss-making companies.³⁶

Group taxation – optional international

The ultimate parent company can choose to apply international group taxation for *every* group company abroad. In this case, international group taxation also includes group companies' real estate and permanent establishments abroad. The provisions on appointment of e.g. an administration company, group income statement and liability mentioned briefly above in connection with mandatory national group taxation also apply to optional international group taxation taking into consideration the exceptions mentioned in CTA sec. 31 A (2-14). As a main rule, the choice of optional international group taxation is irreversible for 10 years unless group taxation is cancelled pursuant to CTA sec. 31 A (3). Assets belonging to foreign group companies, real estate and permanent establishments included in optional international group taxation are considered as acquired at the actual time of acquisition but to the market value of the asset at the beginning of the first income year of group taxation for tax purposes, cf. CTA sec. 31 A (7).³⁷

³³ Mandatory national group taxation applies to companies etc subject to unlimited tax liability pursuant to CTA sec. 1 (1) (1-2a, 2d-2g, 3 a-5 and 5b) and sec. 2 (1) (a and b). This means that co-operative associations, investment funds, most associations and foundations covered by the Foundation Tax Act are excluded for mandatory national group taxation.

³⁴ The administration company is responsible for tax payments. Group companies are subject to joint and several liability according to a two-tier liability model. The administration company and companies which are fully owned by the ultimate parent company are joint and several liable to income tax etc divided to the company. Other group companies (minority companies) are subject to subsidiary liability limited to the part of the group tax claim corresponding to the part of capital in the liable company directly or indirectly owned by the ultimate parent company.

³⁵ The income statement of each group company is calculated according to the standard CIT provisions, but certain exceptions for mandatory group taxation apply. Special and complex provisions apply to group companies deficit which has been carried forward from previous income years.

³⁶ Which may carry forward the tax deficit. The new provisions limiting carry forward of tax deficit apply.

³⁷ Depreciated assets are subject CTA sec. 31 A (8).

3.3.4. Partial implementation of CIT

In some countries, limited partnerships are subject to CIT to a limited extent. Please explain how limited partnerships are treated in your country, and especially whether they are considered transparent/opaque/half-transparent. Any comment on why this is so, and whether the rule could be improved, is more than welcome.

In some countries, partnerships may be partially liable to CIT (i.e. part of their profits are taxed under CIT). Is this the case in your country? Can you explain the conditions and the rationale for this rule?

In some countries, partnerships or other entities which normally do not fall within the scope of CIT may opt to be treated as CIT subjects. Conversely, some countries (sometimes the same) allow CIT subjects to be treated as transparent entities. Is this the case in your country? What are the conditions and rationale of the rule?

3.3.5. Tax planning

Is the choice between setting up a corporation rather than a partnership (or the opposite) tax-driven in your country? Is there some government interest and/or academic literature on the neutrality of taxation with respect to the choice of legal structure?

3.3.6 Others

Does submission to CIT have other tax side-effects? For instance, does it have an impact on the possibility for the taxable income to be assessed on a lump-sum basis?

Are there any other procedural consequences to be drawn from being subject (or not) to CIT?

In Denmark, all corporations, co-operative associations and foundations are subject to on account payment of CIT pursuant to CTA sec. 29 A to 30 C. CIT payment on account is calculated as 50 pct of the three previous income year's average CIT subtracted possible dividend tax and recalculated to match the tax percentage. Each March and November, corporations etc have to pay CIT on account in equal rates. The administration company is responsible for payment of CIT on account as regards corporations subject to group taxation. Newly established corporations only pay CIT on account if the corporation has chosen to use the on account-arrangement. In addition to the basic CIT payments on account a corporation can pay optional and additional CIT on account, cf. CTA sec. 29 A (6). It is possible for a corporation to apply for reduction of the basic CIT payment on account, if the corporation can document that the payment is too high compared to the expected income of the corporation. Basic CIT payments on account for the following income year are included in the income tax statement which is mailed to the corporations in October of the year after the income year.³⁸

In 2012, the Danish parliament passed a bill presented by the government which enacted a new open list policy concerning CIT payments.³⁹ This means that information about corporations' CIT payments – or perhaps primarily low or no payments – are made publicly available on the Ministry of Taxation's homepage with effect from the income year 2011. The

³⁸ Cf. the Danish tax guidance Den Juridiske Vejledning section C.D.10.4. for further information.

³⁹ Bill 173 2011/2012 enacted as Act no. 591 dated 18 June 2012.

public CIT information covers all corporations – Danish and foreign – permanent establishments, foundations and associations subject to Danish tax liability. The following information is made publicly available:

- Tax liable income after deduction of deficit carried forward from earlier income years.
- Deficit from earlier income years that has been deducted in the income statement of the corporation.
- Calculated CIT for the corporation.
- The provision according to which the corporation etc is tax liable to Denmark.
- Hydrocarbon income for corporations subject to hydrocarbon taxation.
- For corporations subject to group taxation: The above mentioned information is made publicly available in connection with the administration company including information about corporations which are members of the group.

The CIT information concerning 2011 has been made public at the Tax Ministry's homepage: <http://www.skm.dk/presse/presse/pressemeddelelser/9437.html> The new open list policy has given rise to intense debate in the media and moreover resulted in criticism directed at especially multinational groups with seemingly low CIT contribution to Denmark. For instance, the Danish left wing party Enhedslisten has established a homepage called www.multinasserne.dk which may loosely be translated to the multinational freeloaders containing information about the CIT contributions of e.g. Nestle, Fujitsu and Q8 etc. CIT contribution of multinational groups is indeed a very hot political potato in Denmark presently.

4. Cross-border situations

Where a foreign entity carries out business in your country, under which conditions may it be subject to CIT? Please note that this question only relates to personal conditions (form, activity, etc.), not to territoriality criteria.

Does a “resemblance test” apply (i.e. the foreign entity is subject to CIT provided that its features are comparable to those of a domestic CIT subject)?

Do other criteria apply?

May foreign entities opt to be treated as either transparent or opaque?

How does your country interpret Article 2 a (iii) of the parent-subsidiary Directive regarding the “subject to CIT” condition? The same question applies in the context of other tax directives.

Thank you for your time and efforts!