

Main Subject 1 – Cross-Border Business Restructuring

Danish Branch Report*

by

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Summary and conclusions

Danish tax law does not contain specific provisions on cross-border business restructurings. Business restructurings should normally be recognized by the tax authorities, though in rare cases such transactions may be disregarded under the court-based substance-over-form or assignment-of-income doctrines. The tax authorities are thus normally restricted to making ordinary transfer pricing adjustments based on the arm's length principle, as set out in domestic tax law and the Danish tax treaties.

Part One

Domestic provisions with an international scope that apply to business restructurings

1.1.General overview

In Danish tax law there are no specific provisions governing international business restructurings. Accordingly, the tax consequences of business restructurings should be analyzed on the basis of generally applicable tax law provisions and case law. Part One will describe the tax treatment of transactions carried out for tax purposes and outline the content of the substance-over-form doctrine established by case law, since these principles will determine whether business restructurings should be accepted or not.

Treatment of transactions based on tax motives

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In the case law of the Supreme Court there is an established presumption that there is no tax avoidance clause in Danish tax law. Nevertheless, there have been some Supreme Court decisions in which avoidance-like considerations have played a part.³

TfS 1998.199 concerned a taxpayer with a number of non-interest bearing claims against his companies. The tax authorities taxed him on imputed interest income, but the Supreme Court found that a lender cannot be taxed on imputed interest income unless the transactions in question were made with the intention of circumventing tax law.⁴

TfS 1998.99 concerned a taxpayer who used a special business tax regime and contributed personal debts to it at the start of the year, only to withdraw them again at the end of the year, thereby avoiding the rules on the adjustment of interest on personal debts. In a judgment later upheld by the Supreme Court, the Western High Court ruled (unofficial translation):

‘Taking into account the purpose of the Business Tax Act [*virksomhedsskatteloven*] and the fact that the taxpayer’s transactions clearly abused the rules of the Act, the Court finds that the assessment authorities were justified in setting aside the arrangement.’

TfS 2002.460 concerned two taxpayers who had made a debt-financed investment in bonds to obtain tax-exempt capital gains and interest deductions on the loan. But new rules were introduced, making capital gains based on borrowed funds taxable. At the same time, however, an exemption was introduced whereby capital gains would not be taxable if the taxpayer could show that the total result, after tax, of the combined interest on the loans and the capital gain was negative. Having learned about the bill, the taxpayers in the case rearranged their debt-financed investments to make the total result after tax negative, claiming an exemption. The Supreme Court ruled against the taxpayers (unofficial translation): ‘The exemption is only intended to include cases where no tax speculation is involved.’

The wording of the TfS 1998.99 and TfS 2002.460 judgments could suggest that the Supreme Court acknowledges the existence of a tax avoidance clause. However, one cannot assume

³ See TfS 1998.199; TfS 1998.99; and TfS 2002.460.

⁴ In TfS 1998.207, Overgaard refers to this judgment, claiming that: ‘It is hard to take the Supreme Court’s choice of words to be anything other than an indication that reference to a general avoidance clause is made to provide statutory authority for the taxation of an imputed interest income. It is, presumably, the first time the Supreme Court has ever used the term “avoidance” separately in any judgment to provide legal basis for taxation’ (unofficial translation).

that this is in fact the case. Both judgments concerned the taxpayers' attempts to circumvent an anti-avoidance rule. In such cases, where the legislators had considered a specific kind of abuse when drafting the statute, the Supreme Court found that a literal interpretation may be set aside by purposive construction, as the very purpose of the statute was to prevent any such abuse.

Accordingly, tax motives are generally accepted as lawful motives in Danish tax law. In fact, there have been cases where the Supreme Court has countered exploitation of tax rules by applying quite concrete interpretations of the law involved.

In a recent case the Supreme Court reaffirmed the previous case law.⁵ In this case the Court even accepted a business restructuring based on oral agreements despite there being a possible intent to obtain a tax advantage. The case concerned the transfer of a business from one group company to another, with the objective of exploiting losses carried forward.

The substance-over-form doctrine

It is established that a substance-over-form principle applies in Danish tax law, despite fierce arguments to the contrary in parts of the Danish tax law literature. The Supreme Court has laid down clear restrictions on the use of the substance-over-form approach. It is a precondition for its application that there is a significant inconsistency between the form and the substance of a given transaction. No such conflict will be found to exist if the form of a transaction is also presumed to reflect its substance, which is the case where a transaction results from the rules of company law.

The main element of the general clause is that fictitious or artificial transactions may be set aside for tax purposes if their actual content conflicts with their external civil law form, resulting in a tax advantage. Tax will then be imposed in accordance with the substance of the transaction, as it appears from an overall assessment. Thus, a chain of transactions forming part of a larger transaction, each step plausible in itself ('step-by-step transactions'), may be subject to one overall assessment.

⁵ See TFS 2010.147, *Ferilux*.

There are limits, however, to the applicability of the substance-over-form doctrine.⁶ Thus, according to leading commentators it is important to bear in mind that it cannot be applied to all transactions with an element of fiction. There is a further condition that there must be a clear conflict between form and substance. Therefore, although by their very nature they are only of formal significance, the formation of companies and the conclusion of marriages and divorces purely for tax purposes, etc. cannot be set aside.

Alongside the substance-over-form doctrine, it is commonly agreed that the taxpayers must adhere to the assignment-of-income doctrine, according to which any income must be taxed in the hands of the legitimate owner of the income for tax law purposes. This also applies to costs.

1.2.The arm's length principle and cross-border business restructurings

The transfer pricing provision in Section 2 of the Danish Tax Assessment Act applies to intercompany business restructurings. As a result, the arm's length principle should be respected in business restructuring. If the arm's length principle is not complied with, there will be a traditional transfer pricing adjustment and not a re-characterization of the transaction as such. However, the delimitation between a transfer pricing adjustment based on the arm's length principle and a reclassification based on the substance-over-form doctrine is not entirely clear.

1.3.General and specific provisions with an international focus or effect in business restructuring cases

There are no specific provisions aimed at business restructurings in Danish tax law. Internal transfers of assets and liabilities from a Danish company to its foreign permanent establishment and from a Danish permanent establishment to its foreign head office are subject to exit taxation. Such assets and liabilities are considered to have been sold at market prices at the time of transfer.⁷ Moreover, certain generally applicable provisions may apply to business restructurings. Please refer to Part II of this report for an overview of these provisions.

⁶ See J. Pedersen in *Skatteorientering*, Ø.5, p. 24.

⁷ Section 8(4) of the Danish Corporation Tax Act.

1.4. The relationship between the domestic business restructuring provisions and tax treaties

N/A

1.5. Business restructurings and domestic anti-abuse rules

In general, there are no specific Danish tax provisions applicable to business restructurings. However, the substance-over-form and assignment-of-income doctrines outlined above are also applicable to business restructurings. The Danish case law on business restructuring is not extensive. However, a few landmark cases are of some significance in this respect.

Before discussing these cases it should, however, be noted that it is generally accepted that there is nothing unlawful in moving assets to low-tax countries.⁸ In TfS 1997.862 a savings bank had set up a subsidiary in Ireland, presumably with a view to avoiding tax. In its introductory comments the National Tax Tribunal commented that the case did not involve a challenge to the arrangements made, even though the company had been set up in Ireland for tax purposes. The Supreme Court is evidently of the same view, as it referred to this case in its judgment in TfS 1997.506 *Tage S. Nielsen*.⁹ This case concerned a taxpayer who had been resident in Belgium from 1980 to 1992, and who was only taxable in Denmark on business income and business assets. For 1985 this taxpayer deducted interest on a loan from his taxable income, and for 1986 he deducted a debt from his taxable assets, as a result of a loan provided by a company set up by him in Jersey (Zartok Ltd.) to an undertaking carried on by him in a personal capacity in Denmark. This arrangement secured for the taxpayer a deduction in the calculation of the undertaking's taxable income in Denmark. For the Supreme Court, the case only concerned whether the loan which the taxpayer received from the company in Jersey had been on market terms. The Supreme Court found that receiving the loan was in the nature of an ordinary business decision for financing the running of the company. There was thus no basis for classifying the loan as not being relevant for tax purposes.

It is thus clear that moving assets to low tax countries is not such a departure from normal business decisions as to lead to it being disregarded for tax purposes. However, certain

⁸ Aa. Michelsen, *Revision & Regnskabsvæsen*, 1998 SM 42.

⁹ J. Nørgaard in *Juristen*, 2001, p. 65 ff (p. 68).

company restructurings have been set aside so that restructurings that are valid in civil law have not been accepted for the purposes of tax law.¹⁰

The first of the landmark decisions is U 1960.535 *Aalborg Havnemølle*. The case concerned a limited company which owned a mill, where a corn drying facility was leased to a partnership of the shareholders of the limited company. The Supreme Court found that the leasing agreement and the separation of the corn drying facility were not based on business reasons. Instead, the Supreme Court found that the arrangement should be considered as an arrangement which had the objective of ensuring the shareholders an ongoing income, separate from the annual dividend payments from the limited company.

Another landmark case is TfS 1999.950 *J.S. Ejendoms- og Investeringsselskab*. In this case a retail company (J.S. Ejendoms- og Investeringsselskab) had transferred its purchasing function to a separate company (Hobby Hall), retaining a commission of five per cent on the purchases. The terms of the controlled transaction meant that over a number of years the purchasing company would accumulate significant profits without having undertaken any investment or being exposed to business risks. The tax authorities attributed the income of the purchasing company to the retail company. According to the Western High Court, it could not be denied that the transfer of a purchasing function to a separate company could serve a business purpose. Such an arrangement should be recognized for tax purposes to the extent that the terms corresponded to normal business terms for the provision of a service of the nature in question. However, since the retail company had not sought to show that a smaller fee than the agreed commission would correspond to normal business terms, the High Court upheld the decision of the tax authorities. Thus, the High Court was, in principle, prepared to decide the case by means of a transfer pricing adjustment. The majority of the Supreme Court upheld the decision giving the following reasons (unofficial translation):

‘Business considerations can unquestionably favour the splitting up of functions in large enterprises, so that certain tasks are transferred to specialist companies. However, as appears from the auditors’ report on the calculation of the commission, the agreement of 25 August 1989 meant that, on the basis of a total of purchases of DKK 5.7 billion, in the course of 9 years Hobby Hall would have received commission of about DKK 288 million from J.S. Ejendoms- og Investeringsselskab, while Hobby Hall’s costs over the same period would have amounted to only DKK 51 million. On this basis and on the grounds stated by the High

¹⁰ See e.g. TfS 1999.950 *J. S. Ejendoms- og investeringsselskab A/S*; and TfS 2004.703 *GKS 1 ApS and GKS 2 ApS*.

Court, we find that the agreement departed so far from the splitting up of functions on a normal business basis that the arrangement should be totally disregarded for tax purposes. For the same reasons we find that the case should not be referred to the tax authorities with a view to reducing the agreed commission.’

The reasoning of the majority of the Supreme Court must be understood as meaning that the unusual terms of the transaction were the primary reason for the transactional adjustment. The validity of the transfer of the purchasing function under private law was not challenged, and the purchasing company seems to have had business substance. The majority of the Supreme Court may also have attached some weight to the fact that there were tax motives for the transaction. In contrast, the minority of the Supreme Court and the High Court recognized the controlled transaction, even though its terms departed substantially from normal business terms. The judgment of the Supreme Court has rightly been criticized, and it cannot have any precedent value for cases that are judged under the new transfer pricing provision in Section 2 of the Danish Tax Assessment Act.

A significant criterion for deciding the extent to which a restructuring should be recognized is presumably whether both the split off part and the remaining part are able to sustain independent existences. In this context it must be relevant whether the split off undertaking has a clearly separate area of operation, its own employees and operating assets and is subject to independent financial risk. If such conditions do not exist following a restructuring, a transactional adjustment would be natural.¹¹

Part Two

Tax effects of cross-border business restructurings

2.1 General overview

A business restructuring may generally give rise to one or more of the following taxable events in Danish law: (1) a transfer of assets or liabilities; (2) a contractual right to indemnification; and (3) a right to indemnification under commercial legislation or case law. A transferor is generally subject to tax on the income from such events at the rate of 25 %. A transferee is normally entitled to deduct or amortize the costs for tax purposes. Transfer prices

¹¹ J. Pedersen, *Transfer pricing – i international skatteretlig belysning*, 1998, p. 39.

may be adjusted under the arm's length principle.¹² Special rules are applicable to internal dealings between a head office and a permanent establishment.

2.2 Transfer of risks and functions

A simple transfer of risks and functions would not normally constitute a taxable event under Danish law. It does not matter whether the transferee will subsequently carry out the functions in question as a service for a third party or for the transferor (outsourcing). The Tax Assessment Council has held that the outsourcing of invoicing, inventory, finance, and IT functions from a foreign subsidiary to a Danish parent company would not qualify as an entire or partial transfer of an enterprise.¹³ In contrast, the transfer of a manufacturing function from a subsidiary has been held to constitute a partial transfer of an enterprise. The outsourcing of a function was also addressed in the *Haahr Raffinaderiet* case which concerned two associated enterprises in the oil industry.¹⁴ Haahr Petroleum Limited (HPL) was engaged in importing and selling oil and petroleum products in Denmark, whereas Haahr Raffinaderiet A/S (HR) was engaged in storing and blending oil products at the harbour in Aabenraa. HPL decided to close its own oil facilities at the harbour in Vejle and granted the right to handle the oil to HR in consideration of a lump sum payment designated as goodwill. HR was to receive ongoing compensation for the services provided to HPL. The tax authorities determined that the agreement did not involve the transfer of goodwill or other intangibles. The Western High Court upheld the decision as follows (unofficial translation):

'The fact that Haahr Petroleum Limited made Haahr Raffinaderiet A/S carry out the functions that were previously linked to the throughput of oil at the harbour in Vejle, for remuneration, did not involve the transfer of a business with its related goodwill. It should be noted that the business at the harbour in Vejle was closed down and no employees or assets were transferred. Furthermore, there was no transfer of customers, business relations or similar. There was in essence a service arrangement.'

However, a transfer of functions and risks could trigger taxation if it involves the transfer of assets etc. (see 2.3 and 2.4) or if the transferor would be entitled to indemnification (see 2.5).

The treatment of the costs of the closure of a facility, and other restructuring costs caused by the cessation or transfer of a function, has not been addressed in Danish transfer pricing case

¹² Section 2 of the Tax Assessment Act.

¹³ Tfs 2004.157.

¹⁴ Tfs 2006.780.

law. Restructuring costs may give rise to at least three separate tax issues: (1) the allocation of the costs between associated enterprises; (2) the deductibility of the costs; and (3) the arm's length nature of the arrangement. The issue of the allocation of costs is outside of the scope of the arm's length principle of Article 9(1) of the OECD Model. Under Danish tax law, restructuring costs such as redundancy payments, write-offs of equipment, and penalties for the termination of leases should normally be allocated to the enterprise that has carried out the function hitherto, assuming that this is the enterprise that is legally obliged to defray the costs. It should not matter whether the restructuring decision has been taken by the enterprise itself or by an associated enterprise. The deductibility of restructuring costs is also outside the scope of the arm's length principle. Under Danish tax law, costs may be deducted or amortized for tax purposes if they are incurred in order to acquire, secure and maintain the taxable income.¹⁵ It depends on the facts of each case whether or not restructuring costs are tax deductible. The issue of the arm's length nature of the arrangement is covered by Article 9(1). However, the scope of the arm's length principle is confined to the transfer prices of controlled transactions. Thus, under the arm's length principle of Article 9(1), the controlled transaction as actually structured, including the contractual risk allocation, should be recognized for transfer pricing purposes. Hence, in the opinion of this branch reporter, the arm's length principle do not authorize tax authorities to adjust, impose, or disregard contractual terms other than the transfer prices.¹⁶ For example, if the tax authorities were to disregard a short-term contractual term and impute a long-term contractual term, this would amount to a recharacterization of the controlled transaction. Similarly, the tax authorities are not entitled to impute a contractual obligation for the principal to reimburse the restructured entity for its restructuring costs. The tax authorities are thus required to evaluate the arm's length nature of the transfer prices of a controlled transaction, based on the actual contractual terms including the risk allocation.¹⁷ If the contractual terms entitle the principal to terminate a manufacturing arrangement at short notice, without being obliged to reimburse the manufacturer for restructuring costs, this may mean the manufacturer bears a significant risk which should be reflected in the transfer prices during the term of the arrangement. However, the Danish tax authorities seems to be of the opinion that the arm's length principle authorizes

¹⁵ Section 6(1)(a) of the State Tax Act.

¹⁶ J. Wittendorff, 'The Transactional Ghost of Article 9(1) of the OECD Model', 63 *Bulletin for International Taxation* 3 (2009), at 107, 115 and 124. For contrary view see paras 9.106-9.114 and 9.167 of the OECD Guidelines.

¹⁷ Para. 9.112 of the OECD Guidelines.

contractual terms to be imputed that deals with the allocation of closure costs. This position has not yet been tested by the Courts.

2.3 Transfer of intangible assets

2.3.1 Definition

The arm's length principle of Article 9(1) of the OECD Model does not address the definition of an intangible. The definition applied in domestic tax law thus prevails for transfer pricing purposes.¹⁸ The concepts and definitions used in intellectual property law are normally used in Danish tax law.¹⁹

A business opportunity may presumably qualify as a taxable object for Danish transfer pricing purposes. Hence, the transfer of a business opportunity, which is expected to result in above-normal profits, may be a compensable transaction provided that the transferor controls the business opportunity. In the *ABCD* case, a company engaged an affiliated company to perform services without transferring the customer base or other assets.²⁰ Furthermore, the main shareholder of the group engaged another affiliated company to perform services without transferring the customer base or other assets. Thus, in both cases the transferees were held to be working as subcontractors for the transferors. The Supreme Court held that both assignments involved the transfer of significant annual profits, in reality without any compensation. The arrangements were found to differ substantially from normal business transactions and were disregarded for tax purposes. The reasoning of the Court suggests that compensation could have been paid which would have counterbalanced the above-normal profits. In such a case there would presumably not have been a basis for making a tax adjustment. Thus, the transfer of a business opportunity must in principle be recognized in Danish tax law as a taxable object. A business opportunity will be taxable at the rate of 25 %.

2.3.2 Ownership of intangibles

The tax consequences of a business restructuring depend on the allocation of tax ownership of intangibles between the associated enterprises in question. The arm's length principle of Article 9(1) of the OECD Model does not address the allocation of tax ownership, which must

¹⁸ J. Wittendorff, 'The Object of Art. 9(1) of the OECD Model Convention: Commercial or Financial Relations', 17 *International Transfer Pricing Journal* 3 (2010), at 200.

¹⁹ J. Wittendorff, *Cahiers de droit fiscal international*, vol. 92a (2007), at 211, 218.

²⁰ TFS 2003.802.

be determined on the basis of domestic law.²¹ Danish tax law has no special rules on the ownership of intangibles. In general, the tax ownership of an intangible is determined on the basis of civil law.²² Against this backdrop, the civil law concept of ownership must normally be applied in tax law, unless the tax legislation specifically provides otherwise.²³

The ownership of legally protected intangibles, such as patents, copyright and trademarks, under civil law and tax law can often be easily identified as it is generally established upon registration. As regards trademarks, the owner is the enterprise which first uses the trademark and/or obtains registration of the trademark. In the relationship between a manufacturer and its distributor, the ownership of a trademark is normally vested in the manufacturer. If a manufacturer has created, registered and has been the first to use a trademark, the issue is not in doubt (producer brands). It may be more difficult to establish ownership of trademarks which are developed in cooperation between a manufacturer and its distributor, or trademarks created by the manufacturer and used by the distributor in its marketing (agent brands). The presumption is that ownership follows the product and thus the manufacturer.²⁴ Conversely, where a distributor has created, registered and is the first to use a trademark, ownership is vested in the distributor (private label).²⁵

It may be more difficult to establish the ownership of non-legally protected intangibles. In relation to goodwill, according to the case law tax ownership is attributed to the enterprise which controls the customer portfolio, based on an overall assessment.²⁶ The determination of control will be based on the underlying factors attracting customers. These might include legal ownership of intangibles that are incorporated in the product (e.g. designs or patents), or are used in connection with marketing the product (e.g. trademarks). Another relevant factor may be loyalty to the enterprise on grounds of location, business associates, service levels, prices, etc. If the customers are attracted by the product, the distributor will not normally control the customer portfolio and ownership must be attributed to the enterprise controlling

²¹ J. Wittendorff, 'The Transactional Ghost of Article 9(1) of the OECD Model', 63 *Bulletin for International Taxation* 3 (2009), at 107, 115.

²² Tax Assessment Guidelines 2010-1 E.C.1.1.2. See C.H. Eriksen, *Beskatning af immaterielle aktiver* (2007), at 52.

²³ See J. Wittendorff, *Cahiers de droit fiscal international*, vol. 92a (2007), at 211, 219.

²⁴ J. Schovsbo and M. Rosenmeier, *Immaterialret* (2008), at 424.

²⁵ *Ibid.* at 403.

²⁶ TfS 2001.231; TfS 2002.563; TfS 2004.342; and TfS 2008.369. The tax ownership of goodwill in the insurance industry was addressed in TfS 2009.818.

the product. This will often be the manufacturer. If the customers are attracted out of loyalty to the distributor, so the manufacturer cannot gain access to the customer portfolio by terminating the distribution agreement, the distributor may be said to control the customer portfolio. If the customers are loyal to both the distributor and the product, the customer portfolio may have to be divided into two separate intangibles. These control criteria can probably also be applied to other intangibles that are not legally protected or based on contracts, such as know-how.

2.3.3 Taxation

A transferor is subject to tax on capital gains from the transfer of an intangible at the rate of 25 %.²⁷ If the compensation is structured wholly or partly as an earnout, the transferor may apply for permission to postpone paying tax, and to pay it as the compensation is received (for a maximum of seven years).²⁸

A transferee is entitled to amortize the purchase price for intangibles on a straight-line basis, with up to 1/7 per annum.²⁹ If, at the time of acquisition of a legally protected intangible, the remaining period of protection is less than seven years, it may be amortized in a straight-line over the remaining period of protection. A distribution right qualifies as an amortizable intangible in Danish tax law.³⁰ The purchase price for the ownership of patents and know-how, as well as the right to use such rights, may be deducted in full in the year of acquisition.³¹ Alternatively, a transferee that carries out research and development may opt either to claim full deduction for the purchase price for intangibles acquired for its research and development, or to amortize the purchase price on a straight-line basis over five years.³² Under an anti-avoidance rule, a transferee is not entitled to a step-up in tax basis in connection with the purchase of depreciable assets, goodwill and other intangibles if the transaction does not trigger any Danish or foreign taxation.³³ Under another anti-avoidance

²⁷ Section 40(6) of the Tax Depreciation Act.

²⁸ Section 40(7) of the Tax Depreciation Act.

²⁹ Section 40(2) of the Tax Depreciation Act.

³⁰ TfS 1996.876.

³¹ Section 41(1) of the Tax Depreciation Act.

³² Section 8 B of the Tax Assessment Act. See para. 14.4 of Circular No 72 of 17 April 1996 to the Tax Assessment Act.

³³ Section 8 B of the Corporation Tax Act.

rule, a transferee's amortizable tax basis for goodwill acquired in a controlled transaction is reduced by an amount equal to the non-amortizable purchase price for the transferor.³⁴

A transfer of intangibles is not subject to Danish stamp duty or any similar duties.

2.3.4 Transfer of an intangible

The arm's length principle of Article 9(1) of the OECD Model does not address the issue of the existence of a controlled transaction.³⁵ Hence, domestic tax law determines whether a transfer of an intangible has taken place.

The transfer of the ownership of an intangible and the subsequent licensing back of the intangible has not been addressed in Danish tax law. In the opinion of this branch reporter, such an arrangement would normally be recognized for Danish tax purposes.

2.3.5 Valuation

In 2009, the tax authorities published valuation guidelines on the transfer of intangibles and businesses.³⁶ The guidelines state that valuation of intangibles may be made under the comparable uncontrolled price method, the relief-from-royalty method, or as a residual value vis-à-vis the total value of a business ('excess earnings method').³⁷ The guidelines do not address how to identify the profits attributable to a specific intangible or the useful life of an intangible. It is generally recommended that income-based methods should be applied on the basis of free cash flow. However, it is emphasized that an intangible may serve as a platform for the development of new intangibles, which may cause the capitalization period to extend beyond that of the useful life of the subject intangible.³⁸ A tax amortization benefit should be added to the discounted cash value of a depreciable intangible.

The guidelines state that, in principle, a valuation should be made from the perspectives of both the transferor and the transferee, and that synergies should be allocated between the

³⁴ Section 40(5) of the Tax Depreciation Act.

³⁵ J. Wittendorff, 'The Object of Art. 9(1) of the OECD Model Convention: Commercial or Financial Relations', 17 *International Transfer Pricing Journal* 3 (2010), at 200.

³⁶ *Transfer Pricing; kontrollerede transaktioner; værdiansættelse* (Copenhagen: SKAT, 2009).

³⁷ *Ibid.* para. 4.4.

³⁸ *Ibid.* para. 4.4.1.

parties on the basis of their relative bargaining powers.³⁹ However, it is also stated that it is normally impossible to determine the outcome of hypothetical bargaining between the parties. It is recommended that a valuation should be made on the basis of a hypothetical willing seller and buyer, assuming full informational transparency between the associated enterprises. The guidelines state that this will mean that potential group synergies will be implicitly taken into account, regardless of whether the valuation is made from the perspective of the transferor or transferee. This is a rather narrow view of the issue, as it does not account for the effect of entity-specific circumstances such as location savings, synergies from other intangibles owned by the parties, and different tax regimes. Furthermore, the arm's length principle is mixed up with the fair value standard which is based on the concept of a hypothetical willing seller and buyer.

2.4 Transfer of a going concern

2.4.1 Definition

In Danish tax law, goodwill is defined as the value of an enterprise's customers, business relations or the like.⁴⁰ This definition differs from the residual value definition applied under financial accounting standards. Hence, goodwill does not cover the residual value over and above the value of other assets, unless it is attributable to customers etc.⁴¹ The business relations that give rise to goodwill may include the value of relations with suppliers.⁴² Transactions with associated enterprises may count as goodwill if the nature of the customer relationships is such that an independent purchaser of the enterprise would value them as goodwill.⁴³ The aggregate value of the intangibles of an enterprise has traditionally been qualified as goodwill in Danish tax law.⁴⁴ Hence, the separate intangibles of an enterprise have not been identified and subjected to separate taxation. A distinction between 'goodwill' and 'going concern' has not traditionally been made in Danish tax law.⁴⁵ However, the tax authorities introduced the concept of 'going concern' in 2009.⁴⁶ The significance of this concept is not yet known. It may be important to distinguish between goodwill and other intangibles for tax purposes. Hence, the substantive tax treatment of the two types of

³⁹ *Ibid.* para. 4.1.5.2.

⁴⁰ Tfs 2005.520; Tfs 2005.308; Tfs 2002.288; and Tfs 1992.431.

⁴¹ Tfs 2005.520.

⁴² Tfs 1989.482.

⁴³ Tfs 1997.222 H.

⁴⁴ O. Bjørn, in *FSRs Årsskrift 1990 Skatteret*, ed. Aa. Michelsen (1991), at 9, 30.

⁴⁵ See C.H. Eriksen, *Beskatning af immaterielle aktiver* (2007), at 47.

⁴⁶ Tfs 2009.542; and Tfs 2010.602.

intangible is not identical, and goodwill cannot be transferred as an asset separate from the enterprise with which it is associated (see 2.4.4).

2.4.2 Ownership of goodwill

See above section 2.3.2.

2.4.3. Taxation

The transferor is subject to tax on capital gains from the transfer of goodwill at the rate of 25 %. If the compensation is structured wholly or partly as an earnout, the transferor may apply for permission to postpone payment of taxes on the capital gain in line with payments of the compensation actually received (for a maximum of seven years). The transferee is entitled to amortize the purchase price for goodwill on a straight-line basis with up 1/7 per annum.⁴⁷

2.4.4 Transfer of goodwill

Under Danish tax law, a business restructuring will not necessarily involve the transfer of goodwill. First, the tax ownership of the goodwill may not be vested in the restricted entity (see 2.3.2). Second, goodwill cannot be transferred separately from the enterprise with which it is associated.⁴⁸ The scope of a transfer of goodwill may include the entire business of the taxpayer or a distinct part of it that constitutes an independent enterprise.⁴⁹ It is not settled how the concept of an ‘independent enterprise’ should be defined in this respect. The definition of a ‘branch of activity’ in the EU Merger Directive may be one of several factors to consider when evaluating whether a business restructuring involves the transfer of an independent business.⁵⁰ The transfer of separate customers, isolated from the enterprise, will not normally mean that a transfer of goodwill has taken place.⁵¹

⁴⁷ Where the goodwill acquired relates to a research and development activity, the transferee may elect to deduct the purchase price in full in the year of acquisition, or amortize the purchase price on a straight-line basis over five years. See section 8 B(1) of Tax Assessment Act.

⁴⁸ TfS 2005.749; TfS 2002.288; TfS 2002.202; TfS 1991.16; and TfS 1986.376.

⁴⁹ TfS 1997.700; and TfS 1990.23.

⁵⁰ Article 2(i) of Directive 90/434/EEC on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States.

⁵¹ TfS 1991.16; TfS 1990.119; and TfS 1986.376. See C.H. Eriksen, *Beskatning af immaterielle aktiver* (2008), at 59; O. Bjørn, *SR-Skat* (1991): at 54; H.S. Hansen, *Revision & Regnskabsvæsen*, SM (1990): at 59; and Aa. Michelsen, *Revision & Regnskabsvæsen*, SM (1990): at 39.

If the business of an enterprise is closed down and the intangibles are licensed to an associated enterprise which continues the business, it is likely that goodwill will be deemed to be transferred in Danish tax law, provided the licensor has hitherto been the tax owner of the goodwill.⁵² In such a situation the transaction may potentially be structured as a right to use the business, including the goodwill, rather than a transfer of ownership.⁵³

2.4.5 Valuation

For many years the value of goodwill transferred between associated enterprises has been determined on the basis of a simplified income-based method, developed by the tax authorities relying on historical profits.⁵⁴ In 2009, the tax authorities published new valuation guidelines on the transfer of the ownership of intangibles and businesses (see 2.3.5).⁵⁵

2.5 Termination or substantial renegotiation of an existing arrangement

The termination or substantial renegotiation of an existing arrangement may mean that a party is entitled to indemnification. Indemnification may be due under the contractual arrangement of the parties, for example due to a breach of a term of notice. In the opinion of this branch reporter, the tax authorities are not entitled to impute termination clauses etc. (see 2.2). A claim for indemnification might also be made under commercial legislation. A commercial agent may be entitled to compensation for the termination of an agency agreement pursuant to the Commercial Agents Act.⁵⁶ A commercial agent may also be entitled to indemnification if the statutory minimum term of notice has not been observed.⁵⁷ These rules are not applicable to buy/sell distributors and probably not to commission agents.⁵⁸

Indemnification may be due pursuant to case law. For example, a buy/sell distributor is entitled to an appropriate term of notice.⁵⁹ A commercial agent will not normally be entitled

⁵² Tfs 2003.182.

⁵³ Tfs 2002.720.

⁵⁴ TSS-Circular No 2000-10.

⁵⁵ *Transfer Pricing; kontrollerede transaktioner; værdiansættelse* (Copenhagen: SKAT, 2009).

⁵⁶ Section 25 of the Danish Commercial Agents Act, which is based on Article 17(2) of Directive 86/653/EEC on the coordination of the laws of the Member States relating to self-employed commercial agents.

⁵⁷ Sections 6 and 22 of the Danish Commercial Agents Act.

⁵⁸ U 2000.567; and U 1998.221. The issue of the direct or analogous application of the rules on commercial agents to buy/sell distributors in commercial law has been the subject of much discussion in Denmark. See B. Iversen, *Handelsagenten & eneforhandleren* (2003), at 274.

⁵⁹ U 1976.947; U 1980.42; U 1988.983; Tfs 1989.179; U 1991.803; U 2000.567; U2000.1543; U 2000.1581; U 2001.1; and U 2004.148.

to indemnification for the loss of goodwill in addition to the statutory compensation; see above. An independent buy/sell distributor is only entitled to indemnification for loss of goodwill ‘under exceptional circumstances’.⁶⁰ The same probably also applies to an independent commission agent. The application of the case law on independent buy/sell distributors has not been addressed in Danish practice in a transfer pricing context.

2.6 Recognition of the actual transaction

Pursuant to Article 9(1) of the OECD Model, a controlled transaction should be recognized as actually structured.⁶¹ The OECD Guidelines also provide that, as a rule, controlled transactions should be recognized.⁶² Thus, the arm’s length principle of Article 9(1), as well as section 2 of the Danish Tax Assessment Act, does not allow for transactional adjustments. However, the arm’s length principle of Article 9(1) does not prevent transactional adjustments that are authorized by domestic law in order to address substance-over-form issues; see above sections 1.1 and 1.5. In Danish tax law there is a significant precedent for recognizing controlled transactions in the Supreme Court decision in the *BP* case (TfS 1988.292). The case concerned a Danish subsidiary’s purchases of oil from associated foreign companies. A central point of dispute in the case was a long-term contract under which the transfer prices deviated from the prices on the spot market. The majority of the Court recognized the contractual terms which were adhered to by the parties and which, over a period of four income years, did not give a cumulative financial disadvantage to the subsidiary. In contrast, the minority of the Court would disregard the contractual terms for transfer pricing purposes, since it was not found that the need to secure a long-term and stable supply was significant, in view of the group association. The opinion of the minority should presumably be understood as meaning that the contractual terms were not to be considered to have any independent value in fact, due to the group association. This judgment has general precedent value for the application of the arm’s length principle in Danish tax law. Another Danish precedent is the *TT Meditrade* case (TfS 2004.903), concerning a Danish company which had made a holiday home available for the use of its sole shareholder on a full-year basis. The Supreme Court specifically stated that the rental of a holiday home for a full year was assumed to be unusual and that no information was available regarding the market price for such terms, but this did

⁶⁰ U 2008.108; U 1980.42; U 1998.221; U 2000.567; U 2000.1543; U 2000.1581; and U 2004.1603.

⁶¹ J. Wittendorff, *Transfer Pricing and the Arm’s Length Principle in International Tax Law* (2010), 152 et seq. and 332 et seq.

⁶² Para. 1.64 of the OECD Guidelines.

not mean that the Court disregarded the contractual terms.⁶³ Instead, the arm's length price of the transaction was calculated on the basis of a realistic alternative for the company.

2.7 Permanent establishment issues

Domestic Danish law does not provide a definition of a permanent establishment (PE). In administrative practice the meaning of a PE is interpreted in accordance with Article 5 of the OECD Model and its Commentary.⁶⁴ The following addresses the question of whether an associated enterprise may constitute a PE for the principal following a business restructuring.

2.7.1 Sales and marketing

An associated enterprise that acts as a commercial agent or a commission agent may constitute a PE for the principal. Although both a basic PE and an agency PE may be created, the following comments focus on the agency PE concept which is more relevant in a sales and marketing context.

If a dependent agent enters into contracts that are legally binding on the principal, a PE will arise under Danish tax law and Article 5(5) of the Danish tax treaties. If contracts concluded by a dependent agent are not binding on the principal, an agency PE will not normally arise.⁶⁵ However, if the subsequent approval of the contracts by the principal is a mere formality, an agency PE may also arise according to a 1992 decision.⁶⁶ This is in line with the substance-over-form approach of the OECD Commentary.⁶⁷ However, according to this decision no PE would be created if the agent informed customers in writing that the principal was not bound by any orders until an order confirmation was received by the customers. In this situation it did not matter that the approval by the principal was a formality. Thus, the requirement for a dependent agent to be authorized to enter into contracts on behalf of the enterprise is interpreted in a strict legal sense by the tax authorities and the National Tax Tribunal.

⁶³ This position has been confirmed by the Supreme Court in the *A.J. Aamund* case (TfS 2008.1337).

⁶⁴ Para. 15 of Circular No 136 of 7 November 1988 on the Corporation Tax Act; para. 12 of Circular No 135 of 4 November 1988 on the Withholding Tax Act; and the Tax Assessment Guidelines 2010-1 S.A.2.2.

⁶⁵ J. Wittendorff, 'Agency PEs and the Zimmer Case: Danish law', 17 *International Transfer Pricing Journal* 5 (2010), at 358.

⁶⁶ TfS 1992.294.

⁶⁷ Paras 32.1 and 33 of the Commentary on Article 5 of the OECD Model.

If an agent enters into contracts that are binding on the principal, no agency PE will arise if the agent qualifies as independent agent acting in the ordinary course of business, as set out in Article 5(6) of the OECD Model. Both requirements have been addressed by the Supreme Court, which has relied on the criteria laid down in the OECD Commentary.⁶⁸ However, with respect to the ordinary course of business test, the Supreme Court has relied on both objective and subjective elements. In a case decided by the National Tax Tribunal, an agency PE was held not to exist even though the agent had only two principals, one of which was predominant.⁶⁹

The allocation of profits to an enterprise agency PE was addressed in a binding ruling of the Tax Assessment Council in 2003.⁷⁰ The Council was asked to confirm that the profits of an enterprise agency PE would be zero under the single-taxpayer approach.⁷¹ However, the Council determined that the profits of the agency PE would not necessarily be zero, and that it seemed incorrect that the profits of the agency PE would be zero, since that would make Article 5(5) superfluous. The result of the case accords with the authorised OECD approach (AOA) introduced by the OECD in 2008.

The situation of a commission agent in a PE context has not been addressed in Danish case law. This is presumably because contracts entered into by a commission agent are not binding on the principal under Danish commercial law.⁷²

2.7.2 Manufacturing

An associated enterprise acting as a toll or contract manufacturer may constitute a PE for the principal.

A basic PE may be created if the principal has a fixed place of business at its disposal at the premises of the manufacturer from where the principal conducts its own business. However, there will not be a PE if the activity of the principal is only of an auxiliary or preparatory nature, as referred to in Article 5(4) of the OECD Model. In line with Article 5(4) it has been

⁶⁸ Tfs 2004.162; and Tfs 1996.532.

⁶⁹ Decision of 23 September 2003 of the National Tax Tribunal, journal No 2-4-1220-0054.

⁷⁰ Binding ruling of 23 September 2003, journal No 99/03-4317-00217.

⁷¹ Para. 26 of the 2008 Commentary on Article 7 and Annex on Art. 7; and para. 235 of *2010 Report on the Attribution of Profits to Permanent Establishments* (Paris: OECD, 2010).

⁷² Section 56(1) of the Danish Commission Act.

confirmed in Danish case law that the maintenance of a stock of goods at the premises of an associated or independent enterprise does not create a PE.⁷³

A binding ruling in 2008 addressed several of the PE issues that may arise in the context of a business restructuring.⁷⁴ The case concerned a Danish limited partnership, of which one limited partner owned 98 % and three general partners together owned 2 %. The limited partner and two of the general partners were resident in the United States, whereas the third general partner was resident in Denmark. All the partners were associated enterprises of a US multinational enterprise. The partnership was treated as a transparent entity for Danish tax purposes. The partnership was to own the intangibles that were to form the basis for a manufacturing activity in Denmark. The partnership was to enter into a toll manufacturing arrangement with the Danish subsidiary. Among other things, the issue was whether the US partners would acquire a PE in Denmark by the toll manufacturing arrangement. The subsidiary was to be authorized to purchase raw materials for its manufacturing activity in the name of the partnership. The raw materials, the work in progress and the finished goods would belong to the partnership. The subsidiary would keep the finished goods until they were sold by the partnership to affiliated companies. The partnership would not have a fixed place of business at its disposal in Denmark, nor would it have any employees in Denmark. Against this background the National Tax Board evaluated various aspects of the PE concept. First, the Board held that the subsidiary was a dependent agent of the partnership. However, the purchase of raw materials constituted a preparatory and auxiliary activity that did not give rise to the establishment of an agency PE. Second, the Board held that the maintenance of a stock of goods at the premises of the subsidiary was also an auxiliary or preparatory activity. Third, the Board confirmed that the purchase of manufacturing services from the subsidiary should be treated as the purchase of goods which did not give rise to the establishment of a PE. On this basis the Board implicitly confirmed that the subsidiary did not constitute a PE solely because it was controlled by a parent company resident in another country, as stated in Article 5(7) of the OECD Model, and that the combination of the activities of the subsidiary did not mean that the overall activity gave rise to the establishment of a PE under Article

⁷³ Tfs 1989.165; Tfs 1991.38; and Tfs 2008.747.

⁷⁴ Tfs 2008.747.

5(4)(f). This decision is in line with the OECD Commentary, and is an important precedent for the evaluation of taxpayers acting as toll or contract manufacturers.⁷⁵

Part III: Tax effect of typical business restructuring cases

3.1 Change of a fully-fledged distributor into commission agent or a low risk distributor

There are no specific tax rules governing the situation where a fully-fledged distributor is converted into a commission agent or a low risk distributor. A conversion will not usually mean that intangibles are transferred from the distributor to the principal, as the tax ownership is often vested in the supplier (see 2.3.2).

3.1.1 Exit situation

With regard to the conversion of a Danish distributor into a commission agent, in 1998 the Danish Minister for Taxation was asked whether this would entail a transfer of goodwill to the principal. The Minister replied that a conversion could potentially involve a transfer of goodwill to the principal.⁷⁶ Further, if a transfer of goodwill did not arise, the principal should pay arm's length remuneration to the commission agent for the use of its customer portfolio. The reply of the Minister must be rejected. If the ownership of goodwill rests with the principal, a transfer would not arise and no compensation would be due for the use of the customer portfolio. Even if the ownership of goodwill rests with the distributor, a conversion need not mean that the distributor has transferred goodwill to the supplier. This is especially true if the distributor continues to do business with the customers in its own name. All things being equal, the compensation paid to the distributor will be reduced, though this may accord with the arm's length principle if the supplier has taken over functions and risks from the distributor. Furthermore, in Danish tax law goodwill is not transferable separately from the business to which the goodwill attaches (see 2.4.4). A conversion from a distributor to a commission agent should thus not in itself be deemed a transfer of goodwill. However, depending on the facts of each case, other intangibles, inventory, receivables, etc. may be transferred and there may be a contractual right to indemnification etc. Subsequent case law has confirmed that the supplier usually has tax ownership of marketing intangibles (see 2.3.2).

⁷⁵ Para. 42 of the Commentary on Article 5 of the OECD Model.

⁷⁶ Bill No L 84 of 14 November 1997, Annex 14, Question 6.

For example, a 2004 case concerned a Danish sales company of a foreign group which had restructured its Nordic sales organization for a certain product group.⁷⁷ Thus, there was to be only one company in the Nordic region for this product group, which would establish a branch office in each Nordic country, including Denmark. A newly established Danish branch office would be given sole distributorship of some of the group's products in Denmark. The Danish company's assets, liabilities and employees allocated to these products would be transferred to the new branch. The rest of the group's products would continue to be distributed by the existing Danish company. The customers would cease to trade with the existing company as soon as it no longer had the right to sell the products in question. The ruling was based on the fact that the sole distributorship agreement could be terminated at 6 months' notice, that no intellectual property rights would be transferred and that the distributor's transfer of rights under the agreement was subject to the group's consent. On this basis, the National Tax Board decided that the Danish sales company was not the owner of the customer portfolio associated with the business. Instead, the customer portfolio was found to belong to the regional parent company in Europe or the group's parent company.

With regard to the situation where a Danish parent company establishes a foreign subsidiary to sell the parent company's products in a specific market, there are no reported cases where the tax authorities have argued that this should entail a transfer of goodwill. This may be explained by the fact that the parent company continues to manufacture and sell its products to the customers in the market in question, though the distribution company earns an arm's length return for its functions. Furthermore, the parent company would normally continue to be in control of the customer portfolio. In a 1986 case a sales and assembly function was transferred from a Danish company and its main shareholder to an affiliated Irish company.⁷⁸ The Danish company was essentially turned into a contract manufacturer. Transfer prices were determined on a cost plus 15 % basis and later on a cost plus 25 % basis. The Irish company had a gross profit of 124 %. On this basis the Danish company was subject to a transfer pricing adjustment. The National Tax Tribunal found that an element of the business had been separated, that a disproportionate amount of the earnings had been placed abroad, and that this transaction had been motivated exclusively by tax considerations. The case was

⁷⁷ Tfs 2004.342.

⁷⁸ Tfs 1986.146.

decided by an adjustment of the transfer prices of the goods rather than by deeming that there had been a sale of goodwill or know-how.

3.1.2 Entry transaction

If a Danish principal pays arm's length compensation to indemnify a distributor for the termination of or for substantial changes to a distributorship, the payment may normally be amortized over seven years.⁷⁹ The acquisition of marketing intangibles by a Danish principal in such a situation will often not be recognized, because marketing intangibles usually belong to the principal (see 2.3.2). For example, in a 2003 case the tax authorities determined that goodwill for the German market should be attributed to a German sales company and not to the Danish manufacturing company.⁸⁰ The reason given was that the German market had been developed by the German company. However, the National Tax Tribunal held that the goodwill should be attributed to the Danish manufacturer.

3.2 Change of manufacturing activities

There are no specific tax rules governing the situation where a fully-fledged manufacturer is converted into a toll or contract manufacturer.

3.2.1 Exit transaction

The conversion of a Danish fully-fledged manufacturer into a low-risk manufacturer for a foreign principal was addressed in a case in 1988.⁸¹ The case concerned a Danish parent company and its Danish subsidiary which had been sold to a Swiss MNE together with the intangibles forming basis for their business. Subsequently, the Danish subsidiary was turned into contract manufacturer and the profits of the subsidiary decreased significantly. The National Tax Tribunal acknowledged that income shifting had taken place but ordered the tax authorities to lower the transfer pricing adjustment because, among other things, it had to be taken into account that the intangibles had been transferred to the Swiss MNE.

The transfer of a manufacturing function from a Danish parent company to a foreign subsidiary has not been addressed in Danish case law.

⁷⁹ Section 40(3) of the Tax Depreciation Act.

⁸⁰ Tfs 2003.363.

⁸¹ Tfs 1988.524.

3.2.2 Entry transaction

The tax treatment of an indemnity paid as a result of changes to a supply contract was addressed in a case in 2007.⁸² The case concerned company *A* that had entered into a long-term contract for the supply of an ingredient to two unrelated companies *B* and *C* that were members of the same MNE. It was agreed that the price should be contingent on the price development of a substitute ingredient. Subsequently it turned out that the market price for the ingredient varied with the demand for the ingredient in question and the contract price for the ingredient became much lower than the market price. After all three companies had become members of the same MNE it was agreed that the supply contract should be replaced by a new long-term supply contract under which the transfer prices would accord with the prevailing market prices. A condition of the new arrangement was that *A* paid a lump sum to *B* and *C* as compensation for the financial disadvantage they would suffer from being obliged to purchase the ingredient at the higher market price in the future. The National Tax Board confirmed that the compensation would be taxable for *B* and *C* and that *A* would be entitled to deduct the compensation for tax purposes in the year the new supply contract was concluded.

The acquisition of goodwill from a foreign subsidiary in the course of conversion from being a fully-fledged manufacturer to a contract manufacturer was addressed in 2000.⁸³ The case concerned an MNE arranging a business restructuring whereby a Danish parent company would acquire the goodwill etc. of foreign subsidiaries, the subsidiaries were to be liquidated and the Danish parent company would carry on business overseas through permanent establishments; alternatively the Danish parent company would acquire the customers, manufacturing intangibles, inventory, receivables etc. from the subsidiaries, which would be turned into contract manufacturers. The National Tax Tribunal implicitly recognized that the parent company had acquired the goodwill and that it was amortizable for tax purposes.

3.3 Centralization of intangible property rights and research and development (R&D) activities in a specific IP company

There are no specific Danish tax rules governing the situation where intangibles and R&D activities are centralized in an IP company.

⁸² Tfs 2007.836.

⁸³ Tfs 2000.65.

The profits of an IP company may be subject to Danish CFC taxation if, for example, more than 50 % of the taxable income of the CFC is made up of royalties and capital gains from the disposal of intangibles. In this respect, royalties from third parties relating to self-developed intangibles do not qualify as CFC income. In 2007, the Danish tax authorities proposed that the definition of CFC income should be expanded to include revenue from the sale of goods manufactured on the basis of patents.⁸⁴ The aim of this proposal was to target principal companies whose intangible profits are embedded in trading income rather than in a royalty stream. The proposal was not included in the final bill and the enacted law.⁸⁵

If a non-resident principal maintains a fixed place of business in Denmark in order to perform R&D activities, this will often qualify as an auxiliary and preparatory activity that does not create a PE under domestic law and the Danish tax treaties. This was confirmed in a binding ruling in 2007, where the National Tax Board held that R&D activity performed by a Danish company in Sweden constituted an auxiliary and preparatory activity that did not create a PE.⁸⁶

Denmark imposes a withholding tax of 25 % on royalty payments to non-resident companies. However, the withholding tax is often eliminated under the Danish tax treaties and the interest and royalty directive (2003/49/EC).

3.4 Substitution or discontinuation of a specific product without any change in the numbers of employees or turnover when such product is now produced by a related party

There are no specific Danish tax rules dealing with the substitution or discontinuation of a specific product and the subject has not been addressed in Danish case law.

3.5 Relationship with EU law

As there are no specific provisions in Danish tax law governing business restructurings and as cross-border transactions are treated similarly to domestic transactions, it seems that Danish tax law does not breach EU law in connection with business restructurings. However, this

⁸⁴ Proposed section 32(5)(7) of the Danish Corporation Tax Act set out in section 1(24) of draft No 1 of 1 February 2007 (journal No 2007-411-0081).

⁸⁵ Bill No L 213 of 18 April 2007; and Law No 540 of 6 June 2007.

⁸⁶ TFS 2007.549.

does not rule out the possibility that certain tax law provisions, which also apply to cross-border business restructurings, may in fact breach EU law; see above section 1.3. Hence, the Commission has formally requested Denmark to amend its exit taxation.⁸⁷

⁸⁷ Press release IP/10/299 of 18 March 2010.