



Kongens Lyngby, February 5 2019

SKAT v/ Microsoft Danmark ApS

Danish Supreme Court – January 31 2019

On January 31 2019 the Danish Supreme Court made a ruling in the area of transfer pricing which will have significant impact on multinationals operating in Denmark.

The case in question is the Danish Tax Authorities (SKAT) vs Microsoft Danmark ApS. SKAT has claimed that a remuneration which Microsoft Danmark ApS received in the years 2004 to 2007 for certain marketing activities, was not considered a remuneration made on an arm's length basis. This mainly because SKAT considered Microsoft Danmark ApS' marketing activities to cover more than what was included in the agreement entered into with Microsoft Ireland Operations Ltd. and therefore Microsoft Danmark ApS did not receive sufficient remuneration for the work actually carried out. This has led to SKAT's assessment of increased taxable income of approx. 300 mDKK for the years 2004 to 2007.

The key element of general interest in this Supreme Court case, is the question of when SKAT can make a discretionary assessment in a transfer pricing audit situation.

Some multinationals operating in Denmark have in the later years experienced that SKAT has deemed their transfer pricing documentation inadequate – and for that reason alone moved directly to a discretionary assessment.

In this case of SKAT vs Microsoft Danmark ApS this was also a central item.

SKAT claims that 1. the transfer pricing documentation was not prepared in time (i.e. at the time of filing the tax return) and 2. the documentation was inadequate to the extent that SKAT had to move to a discretionary assessment.

1. Not prepared in time

While it is not disputed that the documentation was not prepared at the time of filing the tax return, both the Danish High Court and the Supreme Court ruled that this did not give SKAT access to move to a discretionary assessment under the regulations in place at the time. SKAT had received the transfer pricing documentation when the audit of the years in question took place. Under the legislation that was in place at the time, this was deemed adequate, and not grounds for moving to the discretionary assessment.

Here it must be mentioned, that going forward there will be a strong focus on transfer pricing documentation being in place at the time of the filing of the tax return, as such a requirement is now included in the legislation. A tax payer must be able to prove that the documentation was prepared at the time of the filing of the tax return.

2. Inadequate documentation

This is, as mentioned, a highly important element of the Supreme Court ruling. This will set the bar for when SKAT can declare a transfer pricing documentation inadequate – and move directly to discretionary assessment. The Supreme Court ruling makes it clear that it takes quite a lot more, than the practice adopted by SKAT in recent years, to declare a documentation package “inadequate”, to the extent that it does not give SKAT the foundation to evaluate if intercompany transactions have been made on an arm’s length basis or not.

In this case, Microsoft Danmark ApS did submit the transfer pricing documentation package to SKAT upon request. And the Supreme Court did not find the documentation to be inadequate to an extent so that it would constitute a non-reporting. Also (from the High Court ruling), SKAT did not at any point in time ask for supplemental information during the audit, but moved directly to the discretionary assessment.

Following this ruling, it would seem that if you prepare your documentation in line with the basic requirements (for transactions taking place from 1 January 2019 onwards, see the updated notice nr. 1297 of 31 October 2018) *and* you prepare it on time, SKAT does not have access to move directly to a discretionary assessment just on the basis that SKAT does not agree with your methodologies, conclusions, benchmark studies or if a certain area of your business is not sufficiently covered in terms of the intercompany aspects. SKAT would then, which only makes sense, just have to use the transfer pricing documentation as a foundation to elaborate and ask clarifying questions.

In short: no easy way out for SKAT anymore, following this supreme court ruling.

The remuneration

As for the actual remuneration received by Microsoft Danmark ApS the Supreme Court confirmed the ruling from the High Court – i.e. the remuneration which Microsoft Danmark ApS received for marketing carried out in Denmark was deemed to be on an arm's length basis.

3 judges did not find any evidence that the remuneration was not made on an arm's length basis and 2 judges found that the remuneration was not made on an arm's length basis, but did find SKAT's basis for the assessment of approx. 300 mDKK for the years 2004 to 2007 to be flawed and should be reviewed again by SKAT in order to perform a re-assessment. So, by majority the High Court ruling in favor of Microsoft Danmark ApS stands.