FAGLIGT NETVÆRK

28. Oktober 2025

AGENDA

- Afgrænsning af IP og ejerskab hertil generelt og i en transfer pricing sammenhæng
- Pepsico-dommen
- Nyt om pillar II
  - Er UTPR-reglen i strid med EU-retten?
  - Udkast til Permanent Safe Habour
  - "Side-by-side" system
- Aktieklasser i K/S anerkendt skattemæssigt
- Nyt om earn outs

DETERMINING IP AND OWNERSHIP HEREOF FOR TP PURPOSES

SETTING THE SCENE

- Outline
  - Selected topics.
  - Merely scracting the surface within such a vast and complex topic.
  - Terminology – intellectual property/intangible assets.

- The importance of IP in business and tax law is undeniable.
  - BEPS project – several advanced tax planning tecniques involved IP.
  - Tendency: Tax authorities see IP as highly valuable and quite often use a broad notion of IP.

- Typical practical issues.
  - Centralization of IP and other business restructurings.
  - Mitigating exit taxation (profit potential).
  - Securing step up in value and amortization of IP.
  - Claiming local co-development and ownership of IP.
  - Valuation.

- Overall analytical topics
  - Determining IP – including the issue of mis-characterization.
  - IP Ownership – including the concept of economic ownership and relevance of DEMPE functions.

DETERMINING IP

DETERMINING IP

- Determining IP
  - The notion:
    - Potential difference in tax, TP, accounting and IP law

      - The transfer pricing context: OECD TPG (2022)
        - Ch. VI 6.6.: "[…] *the word "intangible" is intended to address something which is not a physical asset or a financial asset, which is capable of being owned or controlled for use in commercial activities, and whose use or transfer would be compensated had it occurred in a transaction between independent parties in comparable circumstances."*
        - Consider: Best practices, internal procedures, human capital, non-contractual relations to customers or suppliers, network effects, and DEMPE functions?
        - Goal of TPG: Align transfer pricing outcomes with value creation – IP is vulnerable to manipulation – moving away from formality based approach.

- Key considerations
  - Typically highly valuable – drives entrepreneur status and higher remuneration (once profitable otherwise losses borne).
  - Complexity and hard to value.
  - Interaction with corporate tax law, accounting etc. – sloppyness can be costly.
  - Delineating a right to use from ownership (royalties from disposal/acquisition) of IP.
  - Mischaracterized IP (embedded IP/royalites).

MIS-CHARACTERIZED IP

- Recent developments may indicate the beginning of a global trend towards mischaracterized and embedded royalties.

- Tax issues in a nutshell
  - Concept (broader than TP):
    - Taking the derivative IP related component into consideration in the proper characterization of certain cross border transactions.
    - No specific provisions regarding embedded royalties in domestic law or tax treaties.
      - *NB: Mixed contracts in OECD Model article 12 commentary?*
  - Transfer pricing context:
    - IP related transactions which should be remunerated – typically higher remuneration for IP.
    - Determine if IP transfer has taken place or other IP transaction.
    - Deeming embedded IP/royalties on the basis of "delineation of actual transaction".
    - The price of a package contract should be disaggregated to confirm each element of the transaction.
  - CFC Taxation: (BEPS Action 3 - Chapter 4).
    - Active income escapes CFC legislation – IP income is considered passive/mobile income.
      - *"For instance, income from IP could be embedded in income from sales and therefore treated as active sales income under the CFC rules of some countries."*
  - Withholding tax.
    - Sale of goods/services vs. royalty payments.

PEPSICO DECISION - AUSTRALIA

Important decision from the Australian High Court (13. August 2025)

- Facts:
  - Pepsi group US entities (PepsiCo Inc. and Stokely-Van Camp, Inc. (SVC)).
  - Entered into Exclusive Bottling Agreements (EBA) with Schweppes Australia Pty. (SAPL) which is part of the Asahi group.
  - EBA:
    - SAPL should produce, bottle, sell and distribute finished soft drinks on the Australian market under the brands Pepsi, Gatorade or Mountain Dew.
    - EBA included a royalty free license for SAPL to use trademarks and other IP rights.
    - Sale from PepsiCo of concentrates to be used in the production as part of a secret process according to a recipe made available from PepsiCo.
- The ATO position – royalty payments should be deemed and subjected to Australian WHT.
  - Subject to AUS WHT for 2018 and 2019 (AUD 3.6M)..
  - Alternatively subject to the DPT (AUD 28.9 AUD).

PEPSICO DECISION - AUSTRALIA

- The final decision of the High Court 13. August 2025.
  - The majority (4-3) (GORDON, EDELMAN, STEWARD AND GLEESON JJ).
    - Not for nothing.
      - *147. In sum, the use of a local bottler such as SAPL was mutually beneficial for both PepsiCo and the bottler. SAPL was able to leverage the PepsiCo Group's innovation and marketing capabilities, and PepsiCo received the benefit of SAPL's local investment in bottling and distribution equipment and capabilities.*
    - No royalty and not the right party.
      - *158. The payments made were for concentrate and did not include any component which was a "royalty" for the use of the PepsiCo Intellectual Property.*
      - *And, in any event, the payments were received by PBS on its own account.*
    - Diverted profits tax clause not applicable (no tax benefit).
  - However, mind the minority reasoning on DPT.
    - DPT:
      - *110. If the royalty withholding tax provisions did not apply, the DPT provisions would apply. In these appeals, accordingly, as the royalty withholding tax provisions do not apply, the DPT provisions do apply.*

DETERMINING IP OWNERSHIP

A short guided tour of a few recent challenges within the IP space

CASE LAW EXAMPLES OF IP OWNERSHIP

Recognition of economic ownership - Cancellation of royalty agreement between DK sub and foreign parent company – (SKM 2020.30 LSR).

- Facts
  - Group activity: construction of diesel engines.
  - DK sub had contributed to the design and research of the specific model and carried out services for the licensees of the specific engine.
  - Foreign parent was registered owner of the design IP.
  - 50/50 split of concrete royalty income.
  - Following centralization the agreement was cancelled - compensating payment made as lump sum payment as NPV.

- Arguments
  - Challenged by the DTA claiming that the payment was too low and the economic ownership of the IP in fact belonged to DK sub.
  - In essence the cancellation was not a cancellation of a service agreement but a transfer of IP.
  - The group argued against the co-ownership to IP stating that the payment was remuneration for service-obligations.

- Ruling of Danish Tax Tribunal
  - Valuable IP has been transferred based on the documentation available.
  - ALP requires higher remuneration than NPV of service fees.
  - Taxation of IP transfer (based on estimates of future sales).

- Comment
  - Support existence of economic ownership concept in Danish tax law (although terminology not explicitly used).
  - Broad notion of IP and questionable legal basis to tax transferred asset.

CASE LAW EXAMPLES OF IP OWNERSHIP

DEMPE functions as determinative for IP ownership (Supreme Court decision dated 9. January 2025) – The Accenture case.

- Facts
  - Complex fact pattern – Only considering the royalty issue.
  - Accenture DK paid royalties of 7% of turnover to Accenture Global Services GmbH (AGS) (CH).
  - Use of Residual profit split method – where AGS as the owner of IP received the whole residual profit while Accenture DK only earned routine profits.
  - AGS was the legal owner of the brand etc. since an alleged transfer in 2001.
    - AGS employed 9-11 staff carrying out administrative and coordinating functions and not contributing with valuable functions etc. to the development of IP.
    - Local Accenture companies possessed the local IP in the form of clients, workforce, goodwill etc.
- Arguments
  - DTA challenged the royalty.
  - Stating that Accenture DK co-created the IP and that AGS merely carried out invaluable contributions to the IP and that the alleged transfer was artificial. Upheld by the Eastern High Court.
- Supreme Court decision
  - AGS owns certain IP according to the license agreement, including brand, patents, process-tools.
  - AGS had been responsible since 2001 for and made decisions regarding the development of the Accenture groups' IP, had maintained the protection of the IP and carried the costs.
  - AGS handled and financed the overall marketing within the group.
  - Carried the cost of 11 FTE as well as significant costs from hiring of labor from other group companies.
    - In fact, close to DEMPE functions – pre DEMPE concept.
  - Based on this: No reason to reject AGS as the owner of the IP covered by the 2006 license agreement.
  - Since the DTA did not provide any convincing arguments, the agreed royalty was upheld.

NYT OM PILLAR II

PILLAR II og EU-retten?

- Generelt om Pillar II
  - Simpel i sin essens – men kompleks!
  - Lav skattebetingelse (ETR)
  - Opkrævningsmekanismen og den interne sammenhæng
    1. QDTT
    2. IIR
    3. UTPR

- Problematisk ift. EU-retten?
  1. Gælder formelt også for rent nationale koncerner….men er det godt nok?
     - Uanset hvad gælder etableringsfriheden kun indenfor EU - ikke ift. 3. lande.

  2. Enheder kan, som følge af UTPR-reglen, komme til at betale en skat, som langt overstiger enhedens profit og derved risikerer konkurs (Belgisk sag).

  3. Er det overhovedet et anliggende for EU?

UDKAST TIL PERMANENT ETR SAFE HARBOUR

- Hovedpunkter
  - Forenklet ETR Safe Harbour er tænkt at reducere compliance-byrden for MNE-grupper i lavrisiko-jurisdiktioner og gælde efter 31. december 2026.
  - Foreslås at gælde på jurisdiktionsniveau: Hvis den forenklede ETR er mindst 15 % eller der er negativ indkomst, anses jurisdiktionen for at have nul Top-up Tax.
  - ”Simplified Income” and ”Simplified Taxes”
    - JPBT = FANIL + JITE
    - FANIL: Visse justeringer (udbytter, ulovlige betalinger)
    - JITE: Alle skatter, undtaget UTP’er og skatter som ikke forventes betalte indenfor tre år (dog udskudt skat på materielle anlægsaktiver)

- Transfer Pricing, grænseoverskridende forhold
  - Transfer pricing: Regnskabstal accepteres, hvis de følger armslængdeprincippet; justeringer kræves ved afvigelser.
  - MNE-grupper kan vælge at allokere både indkomst og tilhørende skat fra faste driftssteder, hybride enheder, CFC’er mv. til hoved- eller ejerjurisdiktionen. Valget gælder for fem år.
    - Hvis valget ikke foretages, skal de relevante skatter udelades for at undgå mismatch.

UDKAST TIL PERMANENT ETR SAFE HARBOUR

- Branchespecifikke justeringer
  - International Shipping Income og Qualified Ancillary Shipping Income udelukkes som udgangspunkt fra Simplified Income, medmindre MNE-gruppen aktivt vælger at inkludere dem (femårigt valg).
  - Forsikringsselskaber kan udelukke policyholder tax recharges, medmindre de vælger at inkludere dem. Bevægelse i forsikringsreserver relateret til udelukkede poster udelades også.

- Behandling af skatte-neutrale enheder
  - Skatte-neutrale enheder (fx statsløse enheder, investeringsenheder og transparente enheder) er som udgangspunkt udelukket fra Safe Harbour, medmindre al indkomst og skat allokeres til andre enheder, eller der foretages et gyldigt valg efter artikel 7.5 eller 7.6.
  - Hvis den ultimative moderenhed er en flow-through-enhed eller omfattet af et fradragsberettiget udbytteregime, og al indkomst allokeres til kvalificerede personer, anses dens Simplified Income og Taxes for at være nul.

UDKAST TIL "SIDE-BY-SIDE" SYSTEM

- Hovedpunkter
  - Formål: Undgå dobbeltbeskatning og unødig compliance for MNE-grupper i lande med robuste skattesystemer ved at deaktivere GloBE's IIR og UTPR.
  - Foreslås at gælde for MNE'er med hovedsæde i godkendte SbS-jurisdiktioner; IIR/UTPR deaktiveres for samme indkomst.
  - QDMTT skal fortsat gælde for alle MNE-grupper, uanset UPE's placering.
- Centrale kriterier
  - Omfattende beskatning af indenlandsk indkomst
  - Beskatning af CFC-indkomst
  - Credit for QDMTT
- JV'er, minoritetsejede enheder, POPE
  - Forslår "holistisk" tilgang til JV'er og minoritetsejede enheder (acceptere at de måske ikke beskattes)
  - POPEs foreslås undtaget fra IIR for at reducere compliance-byrder.
- Implementering
  - Foreslås at IF beslutter hvilke system, der skal omfattes
  - Foreslås at SbS skal fungere som Safe Harbour

AKTIEKLASSER I K/S'ER

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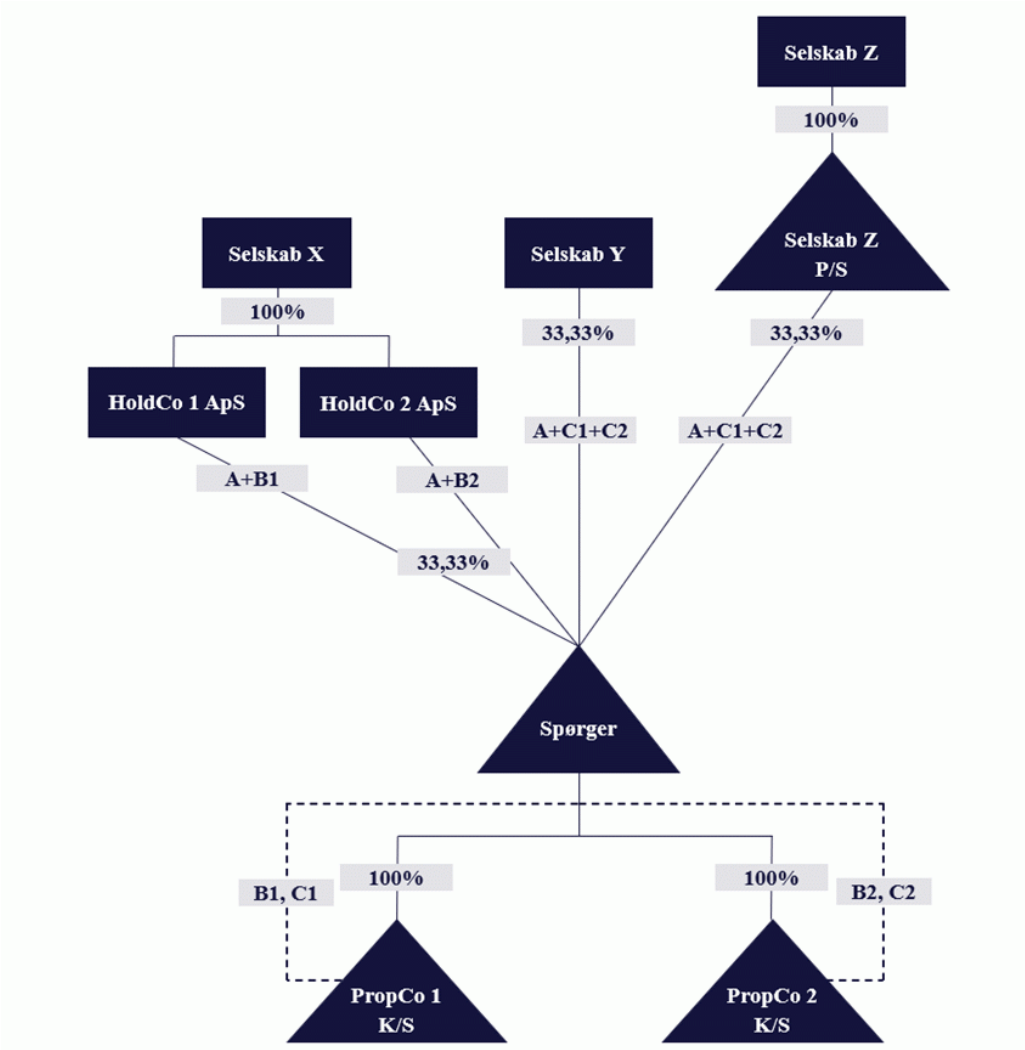
Faktum

- 3 deltagere investerer ligeligt i et K/S (ejendomsinvestering)
  - En finansiel kortsigtet investor (X) og to langsigtede investorer (Z og Y)
  - Hver ejendom ejet af underliggende separat K/S
- Aftalegrundlaget indebærer såkaldte aktieklasser/tracking shares vedrørende afkastet fra de enkelte aktiver og passiver til at facilitere de forskellige investorer, herunder nye investorer.
  - Aktieklasse A: Alene tilknyttet stemmerettigheder, og hvor Selskab Z, Selskab X (evt. via et eller flere HoldCo ApS'er) og Selskab Y hver vil eje 33,33%.
  - Aktieklasse B: Tracke Spørger' økonomiske rettigheder i de underliggende PropCo K/S'er, der tilkommer Selskab X via de respektive HoldCo ApS'er.
  - Aktieklasse C: Tracker Spørger' økonomiske rettigheder i de underliggende PropCo K/S'er, der tilkommer Selskab Y og Selskab Z. Disse aktier vil være ejet ligeligt mellem Selskab Y og Selskab Z (50% hver).
- Der etableres flere aktieklasser i Spørger i takt med, at der etableres flere ejendomsselskaber.
  - Det vil medføre, at B- og C-aktieklasserne vil blive underopdelt i B1, B2 mv. og C1, C2 mv. så det sikres at der via B1 og C1 alene trackes ejendomme ejet af PropCo 1 K/S, og at der via B2 og C2 alene trackes ejendomme ejet af PropCo 2 K/S.

Spørgsmål 2

- Kan Skatterådet bekræfte, at hver investors ejerandel i Spørgers aktiver og passiver skattemæssigt svarer til de specifikke aktiver og passiver, som de enkelte aktieklasser giver økonomisk rettighed til? (fremfor ideel andel alle aktiver og passiver)



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Afgørelse og betydning

- Personselskaber beskattes på basis af det totale transparensprincip/bruttoligningsprincippet, dvs. deltagerne i anses for hver at eje en ideel andel af hvert enkelt aktiv og passiv i personselskabet.
  - Baseres i høj grad på Kähler-dommen (UfR1983.318H).
- I sagen ønsker spørgerne - modsat I/S-aftalen i Kähler-dommen - at deltageren via aktier tilhørende de konkrete B- og C-aktieklasser, vil eje en ideel andel af den relevante afdeling/PropCo.

- Skatteretten anvender - som udgangspunkt - den civilretlige kvalifikation af f.eks. art, størrelse m.v. af indtægter og udgifter, men bruttoligningsprincippet er et eksempel på en undtagelse, hvor skatteretten har fraveget den civilretlige kvalifikation.
  - U1982.443H (Gårdejer Nielsen) må anses for en undtagelse til undtagelsen (bruttoligningsprincippet).
- Deltagerne i Spørger kunne opnå det ønskede resultat ved at investere direkte i de enkelte PropCo K/S'er. Skattemæssigt er strukturen ikke nødvendig, men kommercielle og administrative begrundet.
- Der er heller ikke efter Skattestyrelsen's opfattelse oplyst forhold, som indikerer et interessefællesskab mellem de tre deltagere i Spørger med risiko for, at der sker formueoverførsel mellem parterne.

- Det var derfor konklusionen, at parternes aftale skal anerkendes skattemæssigt, dvs. konkret så investorerne skattemæssigt blev stillet som om de havde investeret direkte i et specifikt underliggende ejendomskommanditselskab og ikke faktisk havde investeret via det øverste kommanditselskab.

EARN-OUT

EARN-OUT

Earn-out

- Earn-outs (løbende ydelser) anvendes i visse transaktioner, hvor parterne ikke er enige om prisfastsættelsen/forventningerne til fremtiden.
  - Men kan være problematisk ift. kontrol
- Den del af købesummen, der betales som earn out dvs. hvor varigheden eller den årlige betaling er usikker (f.eks. afhængig af EBIT/salg), og som strækker sig ud over kontraktåret, behandles som en earn-out
  - En engangsjustering af købesummen defineres ikke som en earn-out

Tidligere problematikker

- Før særregler: Beskatning af både kapitaliserede værdi (hvis skattepligtigt gode) og de faktiske betalinger
- Efter særregler: Beskatning af kapitaliserede værdi (hvis skattepligtigt gode) og de faktiske betalinger som overstiger den kapitaliserede værdi, selv hvis overdragelse af skattefrit gode.

Nye regler

- Øget mulighed for at strukturere opkøb med earn-out uden negative danske skattemæssige konsekvenser
  - **Nyt:** Mulighed for at udskyde skattebetalingen fsva. den kapitaliserede earn out
    - Sælger kan vælge at udskyde beskatningen af den kapitaliserede værdi (rente- og afgiftsfrit) indtil betaling.
    - Ingen kapitalisering er nødvendig, hvis der er tale om skattefrie aktier for sælger og køber.
  - **Nyt:** Ingen asymmetri i forhold til det overdragne aktiv, da de faktiske earn out betalinger ikke beskattes/fradrages, hvis det overdragne aktiv er skattefrit

TAK FOR I DAG