



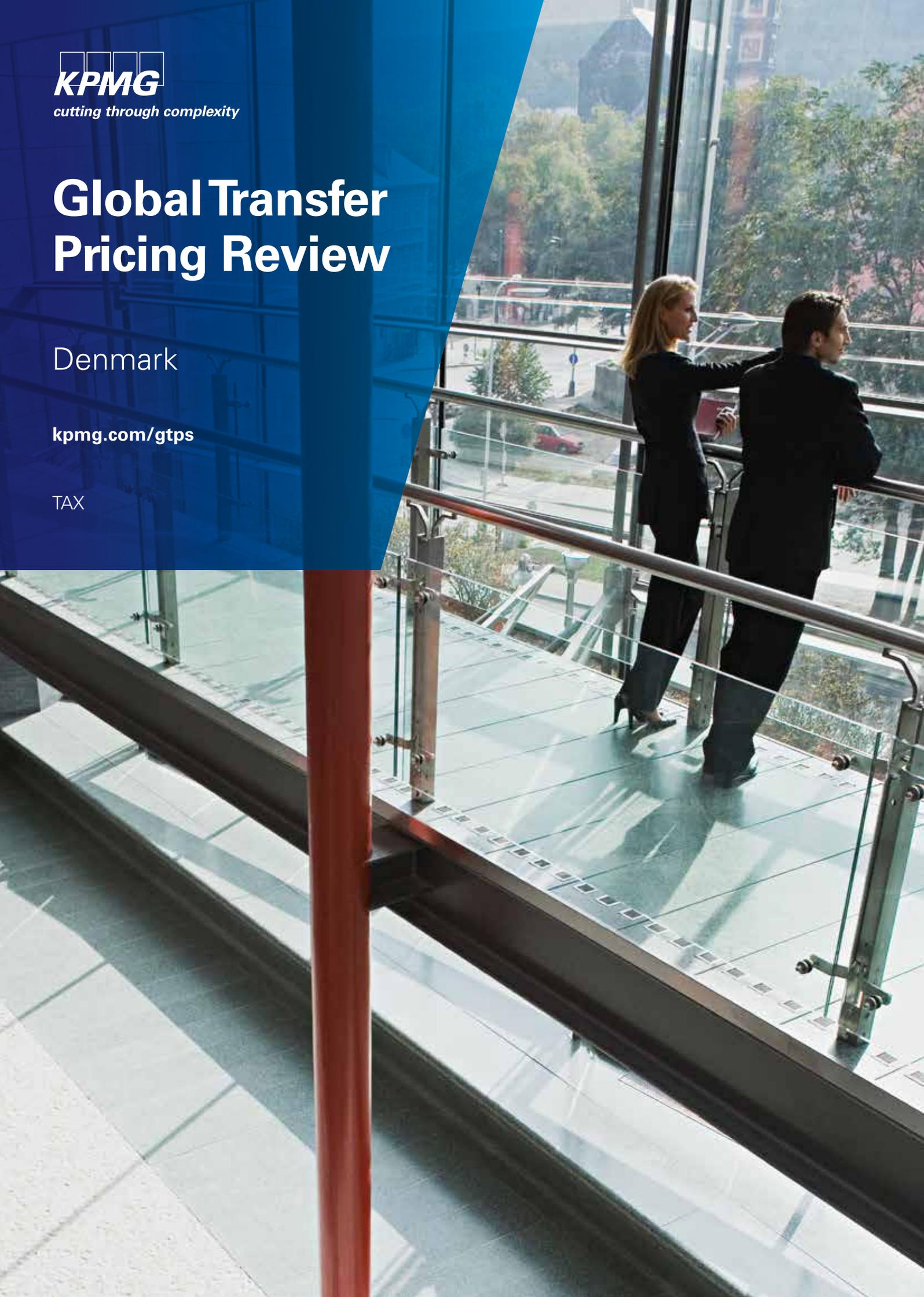
cutting through complexity

Global Transfer Pricing Review

Denmark

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TAX



Denmark



KPMG observation

The Danish Customs and Tax Administration (SKAT) and the Danish Parliament (Folketinget) continue to focus heavily on transfer pricing and perceived international corporate tax avoidance. This was most recently substantiated by the introduction of the first-ever general anti-avoidance rule (GAAR) into Danish tax law. Also, the Organisation for Economic Co-operation and Development's (OECD) Base Erosion and Profit Shifting (BEPS) Action Plan is of high interest to SKAT. In particular, the Danish government has openly expressed support for the BEPS project and will most likely be among the first to adopt the BEPS deliverables. This was reinforced by the fact that the BEPS project was specifically mentioned as part of SKAT's 2015 action plan.

Changes in relevant tax law

In April 2015, the Danish Parliament passed a bill introducing (i) a GAAR aimed at European Union tax directive abuse and double tax treaty abuse; (ii) new rules on taxation of foreign trusts; and (iii) limitations on the permanence of binding assessment notices provided by SKAT relating to the cross-border transfer of assets. The wording of the GAAR is intended to be direct translations and implementations of:

- the wording of the amendments made by the European Council on 27 January 2015 regarding the parent-subsidiary directive; and
- the wording of the GAAR proposed by the OECD regarding rules aimed at arrangements where one of the principal purposes is to obtain treaty benefits.

In 2012, the Danish Parliament passed a transfer pricing bill focusing on strengthening the measures against zero tax companies. The bill introduced new and more stringent regulations for companies engaging in controlled transactions, and Danish taxpayers are now starting to see the effects of this bill. The most important change in relation to transfer pricing is the tightening of the rules on specific transfer pricing fines and the introduction of the possibility for SKAT to require independent auditors' opinions on transfer pricing.

Another consequence of the bill is that Danish taxpayers' corporate tax payments for 2011 and onwards are made public. The possibility of offsetting losses has also been limited. This means that the first million Euro (EUR) in losses can always be offset against positive taxable income, but the remaining losses can only reduce the remaining income by a maximum of 60 percent. Losses can still be carried forward indefinitely.

BEPS impact

SKAT has been following the developments of the BEPS project closely and is expected to continue its focus on the future developments of the BEPS project. More specifically, the developments resulting from the BEPS project are expected to find their way into the existing transfer pricing guidelines issued by SKAT.

KPMG in Denmark has already seen cases in which SKAT has referred directly to BEPS discussion drafts as part of their reasoning/argumentation (e.g. by referring to the revised discussion draft on transfer pricing aspects of intangible assets in connection with SKAT's transfer pricing audits regarding intangible assets).

How to react

Danish taxpayers are urged (i) to be as aware of OECD work in progress/focus areas as SKAT, (ii) to identify significant risk areas and initiate any remediation as required on the basis of the current actions of tax authorities, including SKAT, and the future impact of OECD work (the BEPS project, etc.). It is expected that, going forward, SKAT will focus on companies' ability to explain their transfer pricing processes, communicate how transfer pricing risks are identified and the controls applied to mitigate such transfer pricing risks.

Other observations

There is a continued trend towards SKAT being aggressive and detail-oriented in its audit of whether the content of the transfer pricing documentation fulfills the comprehensive qualitative transfer pricing documentation requirements set out in the Danish Executive Order. In recent years, this trend has led to many cases in which SKAT has claimed that the transfer pricing documentation prepared by the taxpayer did not fulfil the specific Danish transfer pricing requirements. This has resulted in SKAT issuing estimated and discretionary assessments, which then has resulted in a shift in the burden of proof. Along with this, SKAT has introduced deemed transactions in certain transfer pricing audits in order to reach an appropriate result in the eyes of SKAT.

As a consequence thereof, the preparation of localized transfer pricing documentation is highly recommended. Such documentation should:

- represent all relevant facts relating to the taxpayer; and
- serve as a viable cornerstone of any potential transfer pricing audit.

Therefore, the preparation of transfer pricing documentation should not be seen merely as a matter of compliance.

Transfer pricing study snapshot

The purpose of a transfer pricing study

	Applicable	Thresholds apply/exist
Legal requirements	●	●
Protection from penalties	●	
Reduce risk of adjustment	●	
Shifts burden of proof	●	

Basic information

Tax authority name

The Danish Customs and Tax Administration (SKAT).

Citation for transfer pricing rules

- Danish Tax Assessment Act (ligningsloven), section 2
- Danish Tax Control Act (skattekontrolloven), sections 3 B, 14(4), 17(3) and 17(4)
- Danish Corporation Tax Act (selskabsskatteloven), section 11
- Danish Executive Order no. 42 of 24 January 2006 (BEK nr. 42 af 24.01.06)
- Guidelines on Transfer Pricing Documentation, updated on 30 January 2015 (Den juridiske vejledning 2015–1; Selskabs-, fonds- og foreningsbeskatning; C.D.11 Transfer pricing). The guidelines are available for download on SKAT's website, but only in Danish; and
- Guidelines on the valuation of business enterprises and ownership interests in business enterprises, including the valuation of goodwill and other intangible rights as issued by SKAT, 2009 (Transfer pricing; Kontrollerede transaktioner, værdiansættelse). The guidelines are available for download on SKAT's website, but only in Danish.

Effective date of transfer pricing rules

June 1998.

What is the relationship threshold for transfer pricing rules to apply between parties?

A company or an individual must own (directly or indirectly) more than 50 percent of the share capital or control more than 50 percent of the votes or have an agreement regarding controlling interest in another company (common control).

What is the statute of limitations on assessment of transfer pricing adjustments?

SKAT must give notice of transfer pricing adjustments to the taxpayer by 1 May in the sixth year after the end of the income year subject to adjustment. This means that income adjustments for the financial year 2014 can be made until 1 May 2020.

SKAT must give notice of the final income adjustment to the taxpayer by 1 August in the sixth year after the end of the income year subject to adjustment.

In case of a corresponding adjustment (income adjustment made by a foreign tax authority), SKAT is not bound by any statute of limitation. However, no later than six months after receipt of the first notice of any such corresponding adjustment, the taxpayer must request a re-opening, if relevant, of the tax assessment for the relevant years.

Transfer pricing disclosure overview

Are disclosures related to transfer pricing required to be submitted to the revenue authority on an annual basis (e.g. with the tax return)?

Yes. In accordance with section 3B of the Danish Tax Control Act (skattekontrolloven), taxpayers engaging in controlled transactions must provide information on their controlled transactions as an integrated part of their corporate income tax return if the total controlled transactions exceed 5 million Denmark krone (DKK).

This information is provided in Form no. 05.021 (Danish version) or Form no. 05.022 (English version) which are available for download on SKAT's

website. The form is now an integrated part of the electronic corporate income tax return filing system/process.

What types of transfer pricing information must be disclosed?

The taxpayer's main business activity, the exact number of entities (including permanent establishments) that participate in the taxpayer's controlled transactions, their location and joint taxation status. As from the income year 2014, the actual amounts per transaction type (including nil transactions), as opposed to certain volume/scope intervals, must be disclosed. The amounts may be rounded according to certain specifications.

What are the consequences of failure to submit disclosures?

Penalties will be imposed. SKAT may impose a penalty in case of misrepresentation in connection with the obligation to provide documentation, i.e. in relation to the appendices to the tax return (special forms) and high-level information given regarding the transfer prices declared on the tax return. The penalty is issued in proportion to the higher of either:

- the turnover of the company (weighted as 0.5 percent of the turnover up to DKK500 million (approximately 67 million euros (EUR)), 0.1 percent of the remaining turnover up to DKK1 billion (approximately EUR135 million) and 0.05 percent of the turnover exceeding DKK1 billion; or
- the number of employees in the company. The penalty amounts to DKK250,000 (approximately EUR35,000) if the company has less than 50 employees and increases by DKK250,000 for every additional 50 employees. If the company has more than 500 employees, the penalty will be DKK2 million (approximately EUR270,000).

Transfer pricing study overview

Can documentation be filed in a language other than the local language? If yes, which ones?

Yes. Danish, English, Swedish or Norwegian.

When a transfer pricing study is prepared, should its content follow Chapter V of the Organisation for Economic Co-operation and Development (OECD) Guidelines?

Yes, for certain transactions. Yes, with some exceptions. The Danish transfer pricing legislation sets out very specific minimum requirements for a transfer pricing study, which should be addressed in order to comply with the documentation requirements. In general, these requirements go further than what is specified in the OECD Guidelines.

SKAT normally emphasizes that the contents of the descriptions and analyses are of great importance, meaning that the substance should be adequately presented.

Does the tax authority require an advisor/tax practitioner to have specific designation in order to prepare or submit a transfer pricing study?

No.

Transfer pricing methods

Does your country follow the transfer pricing methods outlined in Chapter II of the OECD Guidelines? If exceptions apply, please describe.

Yes.

Transfer pricing audit and penalties

When the tax authority requests a taxpayer's transfer pricing documentation, are there timing requirements for a taxpayer to submit its documentation? And if so, how many days?

Yes, 60 days.

When the tax authority requests a taxpayer's transfer pricing documentation, are there timing requirements for a taxpayer to submit its documentation? Please explain.

The taxpayer must submit its documentation no later than 60 days after receipt of a request to that effect.

If an adjustment is proposed by the tax authority, what dispute resolution options are available?

Yes, the taxpayer can file a complaint with the Danish National Tax Tribunal. The complaint must be filed no later than three months after the date of the adjustment.

If an adjustment is sustained, can penalties be assessed? If so, what rates are applied and under what conditions?

SKAT can impose penalties relating to documentation if the transfer pricing documentation requirements are not fulfilled, whether intentionally or due to gross negligence.

It is not a condition for imposing penalties that an income adjustment is made. The penalty is fixed at DKK250,000 (approximately EUR35,000) per financial year per entity if the submitted transfer pricing documentation is inadequately prepared preventing SKAT from using it as a basis for assessing whether prices and conditions have been set on arm's length terms.

Penalties can also be imposed if supplementary material, a benchmark analysis or an auditor's statement is not submitted at SKAT's request. The penalty can be reduced by 50 percent if the required materials are subsequently prepared. On top of this, SKAT can also impose penalties relating to adjustments. Such penalties are calculated as an amount corresponding to up to 10 percent of an income increase. If the applied transfer prices are considered to constitute tax evasion, the penalty can be significantly higher.

To what extent are transfer pricing penalties enforced?

SKAT enforces the transfer pricing penalties more frequently. SKAT can apply the penalty regime starting with the income year 2009.

What defenses are available with respect to penalties?

The penalty of DKK250,000 (approximately EUR35,000) for not preparing the transfer pricing documentation in the first place can be reduced if the documentation is subsequently submitted. Penalties can

be appealed to the Danish National Tax Tribunal and after that to the ordinary courts where the taxpayer has the opportunity to challenge the imposed penalty before it becomes final.

What trends are being observed currently?

SKAT has significantly increased the number of field tax auditors specializing in transfer pricing audits. Since 15 August 2011, the field tax auditors have been authorized to make income adjustments. Prior to this, all transfer pricing adjustments were subject to approval by SKAT's Central Transfer Pricing Office, and as a result, the income adjustments made by SKAT are observed to be less coherent. As stated above, there is a continued trend towards SKAT being aggressive and detail-oriented in its audit of whether the content of the transfer pricing documentation fulfils the comprehensive qualitative transfer pricing documentation requirements.

In transfer pricing audits, companies are requested to submit a copy of their transfer pricing documentation to SKAT. Typically, after the submission and once SKAT has read the company's transfer pricing documentation, a meeting is held with the field tax auditor. It is, therefore, important that the transfer pricing documentation can operate on a stand-alone basis with respect to the facts and conditions, and that the documentation fulfils the statutory documentation requirements. SKAT continues to focus on loss-making companies and business restructurings, in particular the outbound transfer of intangible assets. Financial transactions are also increasingly subject to scrutiny. Furthermore, BEPS has had and is expected to continue to have a major impact on SKAT's approach to transfer pricing in general and transfer pricing audits involving BEPS related issues in particular.

In addition to the increase in the total number of transfer pricing audits, the number of transfer pricing audits that actually result in proposed income adjustments remain at a historically high level in Denmark. In 2014, SKAT completed 76 transfer pricing audits resulting in proposed transfer pricing adjustments of DKK20 billion, compared to 77 audits resulting in proposed adjustments of DKK17.4 billion in 2013.

Special considerations

Are secret comparables used by tax authorities?

No.

Is there a preference, or requirement, by the tax authorities for local comparables in a benchmarking set?

Yes, there is a preference, but not a requirement, for local comparables in a benchmarking set. However, European comparables are often produced, and accepted, by SKAT if only a limited number of local comparables are available.

Do tax authorities have requirements or preferences regarding databases for comparables?

SKAT has no database requirements. However, the most commonly used databases include Amadeus, Orbis and RoyaltyStat. For financial transactions, SKAT uses Moody's RiskCalc, Bloomberg and Thompson Reuters LPC LoanConnector.

Does the tax authority generally focus on the interquartile range in a TNMM analysis?

Yes, always.

Does the tax authority have other preferences in benchmarking? If so, please describe.

Not applicable.

What level of interaction do tax authorities have with customs authorities?

Low, but the level is expected to increase going forward.

Are there limitations on deductibility of management fees beyond the arm's length principle?

Yes, some. For a company to be allowed to deduct management fees, (i) the fees must qualify as operating costs, i.e. the costs must relate to the company acquiring, securing and maintaining taxable income, see section 6 of the Danish State Tax Act (statsskatteloven); (ii) no shareholder costs may be included in the management fees; (iii) the services rendered must provide an actual and documented benefit to the recipient;

and (iv) the company must have taxable income.

Are management fees subject to withholding?

No.

Are there limitations on the deductibility of royalties beyond the arm's length principle?

No.

Are royalties subject to withholding?

Yes.

Are taxpayers allowed to file tax return numbers that differ from book numbers?

Yes, provided that the transfer pricing adjustments are in accordance with the arm's length principle and supported by written agreements. Adjustments must be presented in the transfer pricing documentation as well as the tax return.

Other unique attributes?

No.

Tax treaty/double tax resolution

What is the extent of the double tax treaty network?

Extensive.

If extensive, is the competent authority effective in obtaining double tax relief?

Almost always.

When may a taxpayer submit an adjustment to competent authority?

After the taxpayer has been notified of the proposed adjustment. The taxpayer must submit an adjustment to SKAT no later than six months after notification.

May a taxpayer go to competent authority before paying tax?

Permitted.

Advance pricing agreements

What APA options are available, if any?

Unilateral, bilateral, multilateral.

Is there a filing fee for APAs?

Yes. Currently, there is no filing fee for bilateral and multilateral APAs. There is a filing fee of DKK400 (approximately EUR50) for a binding advance assessment notice/unilateral APA.

Does the tax authority publish APA data either in the form of an annual report or through the disclosure of data in public forums?

Yes.

Are there any difficulties or limitations on the availability or effectiveness of APAs?

No. SKAT has quite substantial experience in negotiating APAs and has concluded several APAs as sufficient resources have been provided. For example, in 2011, Denmark was the first European country to enter into a bilateral APA with China.

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