

Danish courts rule on penalties for missing transfer pricing documentation

The Danish Tax Authority, SKAT, published the first two court rulings on penalties for missing or inadequate transfer pricing documentation in March 2017.

Both cases involved a request for transfer pricing documentation for income years 2008-2012, and in both cases, the taxpayer received a penalty of DKK 250,000.

The two rulings are described below.

Lower court ruling

The first ruling regarding transfer pricing documentation penalties was published on 23 March. The case involved a taxpayer that had been asked to provide transfer pricing documentation covering income years 2008-2012 to the Danish tax authorities. As required by Danish tax law, the transfer pricing documentation had to be submitted within 60 days from the request.

The taxpayer, a Danish subsidiary of a large foreign-based multinational group, submitted a transfer pricing report that covered income years up to and including 2007. The report was submitted before the deadline, but covered the wrong income years, and did not include appendices, which were referred to in the report.

Five days after the 60-day deadline expired, the tax authorities sent a letter to the taxpayer notifying it that it would be penalized for not submitting adequate transfer pricing documentation within the 60-day deadline.

Through requests for additional material from SKAT, the company provided adequate transfer pricing documentation for income years 2008-2012 approximately four months after the 60-day deadline had expired.

Based on the above, the lower court imposed a penalty of DKK 250,000. The penalty guidelines call for the imposition of a penalty of DKK 250,000 per income year. However, the penalty may be lowered to 125,000 per income year if the taxpayer subsequently provides adequate documentation. In this case, because the taxpayer had provided adequate documentation after the 60-day deadline had expired, the court ruled that the taxpayer should not be subject to the full penalty. Instead, the court assessed a penalty of DKK 250,000.

High Court ruling

The second ruling regarding transfer pricing documentation penalties was published on 27 March.

Similar to the case in the lower court ruling, this case also involved a taxpayer that received a request for transfer pricing documentation covering income years 2008-2012. As required by Danish tax law, transfer pricing documentation must be submitted to the Danish tax authorities within 60 days from the request.

The taxpayer failed to submit any transfer pricing documentation within the 60-day deadline, because the letter from the tax authorities requesting the documentation had been misplaced internally within the group.

The company ultimately provided adequate transfer pricing documentation and answered additional questions during the tax audit.

The lower court imposed a penalty of DKK 500,000, equal to DKK 125,000 for each of the four income years in question. The taxpayer appealed the ruling to the High Court.

The High Court upheld the lower court's ruling, and thereby sentenced the taxpayer to a penalty for not submitting the transfer pricing documentation in time. Surprisingly, the High Court reduced the penalty to DKK 250,000, because the court treated the missing documentation for income years 2008-2012 as a single offense.

Conclusion

The Danish penalty regime includes penalties for late preparation and late filing of transfer pricing documentation. These rulings are the first published Danish cases on penalties for late filling of transfer pricing documentation.

The rulings establish that in evaluating whether transfer pricing documentation has been filed in a timely manner, the courts also consider the content of the documentation and whether it complies with the Danish documentation rules.

In both cases, the courts applied a gentler approach in determining the amount of the penalty than the administrative guidance provides for. In other words, the courts reduced the amount of the penalty based on the specific facts and circumstances of the cases.

Companies that are subject to the Danish transfer pricing documentation requirements should carefully observe the formal requirements before submitting transfer pricing documentation to ensure penalty protection.

Taxpayers should also keep in mind that companies that are penalized for non-compliance with the Danish transfer pricing documentation requirements may be subject to an additional penalty of 10 percent of any potential income adjustment.

— Asger Mosegaard Kelstrup (Copenhagen)
Equity Partner
Deloitte Denmark
akelstrup@deloitte.dk

Anja Dalgas (Aarhus)
Equity Partner
Deloitte Denmark
adalgas@deloitte.dk

Jonathan Bernsen (Copenhagen)
Equity Partner
Deloitte Denmark
jbernsen@deloitte.dk

Kasper Toftemark (Copenhagen)
Partner
Deloitte Denmark
ktoftemark@deloitte.dk

About Deloitte

Deloitte refers to one or more of Deloitte Touche Tohmatsu Limited, a UK private company limited by guarantee (“DTTL”), its network of member firms, and their related entities. DTTL and each of its member firms are legally separate and independent entities. DTTL (also referred to as “Deloitte Global”) does not provide services to clients. Please see www.deloitte.com/about to learn more about our global network of member firms.

© 2017. For information, contact Deloitte Touche Tohmatsu Limited.