



## Denmark will allow reopening of old tax years following transfer pricing ruling

### Global Transfer Pricing Alert 2019-023

The Danish Tax Agency has published new guidance that allows the reopening of old tax years -- back to 2008 -- if certain conditions are met. The guidance comes in response to the Supreme Court's January 2019 ruling in favor of Microsoft. (For prior coverage, see [Global TP Alert 2019-014](#)).

#### **Court decision**

The ruling on the Microsoft case -- SKM2019.136.HR -- addressed the question whether the Danish tax authorities were allowed to perform a discretionary assessment in relation to an intercompany compensation charge for marketing activities performed by a Danish company on behalf of its Irish counterparty. The tax authorities claimed that the transfer pricing documentation was not prepared within the deadline stipulated in Danish transfer pricing requirements.

The Supreme Court rejected the tax authorities' position and concluded that the tax authorities did not have a legal basis to deem the prepared transfer pricing documentation so insufficient that it could be considered non-existent documentation. The Court upheld a lower tribunal's decision to reject the Danish tax authority's proposed adjustment of commission payments for marketing activities.

#### **New Guidance**

Under the new guidance, taxpayers that were subject to a discretionary transfer pricing adjustment by the Danish Tax Agency, based solely on the fact that transfer pricing documentation, in its entirety, was not prepared at the due date for filing the Danish income tax return, can have the affected tax years reopened. As a condition for reopening the affected tax years, taxpayers must be able to document that the Tax Agency's assessment was not made in accordance with the Danish Tax Assessment Act section 2 (the Danish arm's length principle).

The oldest tax year that can be reopened as a result of the new guidance is 2008.

Whether a specific tax year can be reopened as a result of the new guidance will depend on an analysis of the facts and circumstances of each individual case.

Unless the ordinary statute of limitation rules applies, the deadline to submit a request for reopening is 12 January 2020, six months from the date of the new guidance.

The Danish Tax Control Act was changed effective 1 January 2019; thus, the guidance published by the Danish Tax Agency affects only tax years starting before that date. The new Tax Control Act provides that transfer pricing documentation must be prepared on an ongoing basis and must be finalized no later than the date of filing the Danish income tax return.

## Contacts

**Asger Mosegaard Kelstrup (Copenhagen)**

[akelstrup@deloitte.dk](mailto:akelstrup@deloitte.dk)

**Anja Svendgaard Dalgas (Aarhus)**

[adalgas@deloitte.dk](mailto:adalgas@deloitte.dk)

**Kasper Toftemark (Copenhagen)**

[ktoftemark@deloitte.dk](mailto:ktoftemark@deloitte.dk)

**Jesper Skovhus (Copenhagen)**

[jskovhus@deloitte.dk](mailto:jskovhus@deloitte.dk)

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