New Danish Rules on Trusts
Jacob Girke Nordlander, Arne Møllin Ottosen and Michael Nørremark*

Introduction

In connection with the introduction of a so-called ‘tax haven package’ in Danish tax law, the Danish Government has laid down specific rules governing taxation of the trust’s income and related profits. Below is a description of the contents of the recently adopted Danish rules.

In Denmark, no legal structure exists which in all respects is identical to that of a trust. Regarding Danish tax law this gives rise to problems as the trust is not recognised as a taxpayer under Danish law. Danish law is, however, familiar with commercial foundations that are established based on a legal framework which governs both the activities and guidelines of the foundation, as well as the tax treatment of the formation and the ongoing taxation of commercial foundations.

If Denmark recognised trusts in the same way other countries do, the persons or company that have established or contributed capital to a foreign trust would no longer be liable to pay tax on the profits in the form of interest, dividend on shares, proceeds, etc. Danish law does not recognise this trust structure unless it is adequately similar to Danish commercial foundations by which the trust becomes an independent taxable entity.

Danish Qualification and Identification of the Trust

The qualification of the trust is inferred from case-law and the administrative practice of the Danish tax authorities. First, it is assessed generally whether the contribution of the assets to the trust is definitive, effective and irrevocably separates the assets from the settlor’s estate. In this regard, it is examined whether an independent management/administration exists with the trustee – and what is agreed between the trustee and the settlor. Regarding the contribution, new and independent ownership of the contribution must be procured. Thus, the trustee must have an independent exclusive right in his management of the funds. These characteristics are consistent with Danish foundations law and represent Danish tax law requirements indicating an independent taxable entity.

Consequently, the decisive factor is whether the contribution can be considered as having left the settlor’s ownership and estate, which is also significant when establishing whether the settlor may still be considered the rightful recipient of income – or if in fact the trust is the rightful recipient of the income.

‘Definitive and Effective Separation’

When determining if a definitive separation from the settlor’s assets has taken place, the agreement prepared concerning the settlor’s contribution into the trust serves as the legal basis. If the settlor still has the option of withdrawing his assets according to the agreement, it cannot be considered definitively separated. The Danish tax authorities have made this clear in a binding ruling from 2009.1

* Jacob Girke Nordlander, Attorney, Kromann Reumert, Arhus, Arne Møllin Ottosen and Michael Nørremark, Managing Partner and Partner, respectively, Kromann Reumert, Copenhagen.

1 SKM 2009.249 (Danish binding ruling reference number).
In addition to the requirement of non-withdrawal of the contribution, it is also required that
the contribution must be made effectively. According to the requirement of effective
separation, the settlor cannot control the contribution, which he would be able to if he dictates
instructions to the trustee. An example of non-effective separation could be an instance where
the settlor through a letter of wishes appoints a protector who may demand that the trustee
resigns as trustee.\(^2\)

If these conditions for a definitive and effective separation have not been met, the trust cannot
be recognised as an independent taxable entity and the funds must be considered a continuous
part of the settlor’s assets. The tax implications of the trust not being considered an
independent taxable entity are that the settlor is still considered the owner of the assets
contributed, and thus will still be liable to pay tax on returns, sales, etc. If both conditions
have been met, the settlor will not be liable to pay tax on returns, sales, etc.

Any beneficiaries liable to taxation in Denmark are taxed on any distribution as either
personal income (tax rate up to 56.5%) or capital income (tax rate up to 42%). Generally
speaking, distributions from a family trust (or a trust where the settlor has dictated the
specific beneficiaries) is regarded as personal income. On the other hand, distributions from a
trust where the trustee to a broader extent has the right to choose the recipient(s) of the
distributions, is taxed as capital income.

**Background to the New Danish Rules**

The Danish tax authorities have experienced difficulties in establishing – and subsequently
proving – if the settlor has maintained the control of the trust’s property (the requirement of
effective separation is not met). Such trusts will often reside in countries from which the
Danish tax authorities do not have access to – or only have very limited access to –
information.

One method that the Danish tax authorities have experienced difficulties in discovering
concern those instances where the settlor has issued a letter of wishes to the trustee. The letter
of wishes is not directly binding on the trustee, but it may become binding if a ‘protector’ is
appointed with powers to dismiss the trustee.

From the Danish tax authorities perspective, this will constitute tax evasion, since the settlor
by the letter of wishes will remain in control of the assets, but due to the tax authorities lack
of information and knowledge of the side letter, the settlor will at the same time avoid
taxation of return, sale, etc of the assets. This has resulted in the introduction of new trust
rules from 1 July 2015.

**New Rules Effective from 1 July 2015**

Based on the above, rules have been introduced which, in the opinion of the Danish tax
authorities, should make it easier to detect these tax evading situations.

Consequently, it has been adopted that taxation must be made of the settlor’s income earned
in trusts and foreign foundations in which according to local trust law it is not a mandatory
element of validity that the assets have been irrevocably and effectively separated out.
Accordingly, the settlor will be taxed as if he still had access to the assets even if the assets
have been formally renounced. This does not apply, however, to charitable or non-profit
making trusts.

---

\(^2\) Explanatory notes to proposed law to amend the Danish Tax Assessment Act, the Danish Inheritance Tax Act, the Danish Act on Taxable Nonstock Corporations, the Danish Tax Administration Act and other laws made on 20 March 2015, at p 6.
At the same time, the burden of proof has been placed on the settlor. Therefore, the settlor must prove that the assets have been irrevocably and effectively separated out. In the event that the settlor cannot carry this burden of proof, he will be taxed on the trust’s income as return on investment.

Further, a new provision is made in the Danish Inheritance Tax Act to the effect that if the trust does not meet the requirements of the new legislation then the assets of the trust must be included in the estate accounts of the deceased settlor; this results in an increased effective rate of tax from 15%–36.25%.

Finally, it should be noted, that even if the new requirements are met and the tax authorities recognise the trust, Danish tax law has an anti-avoidance rule already in force regarding trusts in tax havens. This rule implies that in the event of contributions made by a person liable to pay tax in Denmark to a trust or foundation in a country with low tax rates, a 20% contribution fee on the part of the contribution exceeding DKK10,000 must be paid. The contribution fee also applies to persons moving back to Denmark who, in the last 5 years, have made contributions to a foreign trust or foundation in countries with low tax rates.

**Conclusion – What Does the Future Hold?**

With these legislative changes, the Danish tax authorities have tightened the rules for the tax treatment of trusts. In particular, the reversed burden of proof may in practice result in difficulties, and consequently, it is advised to pay attention to the amended rules.

It has only been a few months since the law became effective so we have seen no cases at the courts or tax tribunals; therefore, naturally the grey-areas of the law have not yet been tried. Thus, it is hard to say how the law will influence Danish settlors. However, the authors have seen some indications that financial institutions are starting to refrain from advising their Danish clients to establish trusts.

Jacob Girke Nordlander  
Kromann Reumert  
Rådhuspladsen 3  
DK-8000 Aarhus C  
Denmark  
Arne Møllin Ottosen and Michael Nørremark  
Kromann Reumert  
Sundkrogsgade 5  
DK: 2100 Copenhagen Ø  
Denmark