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INDEPENDENT TAX CONSULTING

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1. Introduction
2. Relevance of tax residence
3. Overview of current law in Scandinavia
 - a) Brief introduction to Iceland, Finland and Sweden
 - b) More details on Norway
 - c) More details on Denmark
4. Tax residence according to tax treaties (The Nordic Tax Treaty as an example)
5. Global outlook

2 - Relevance of tax residence

Relevance of tax residency



Relevance of tax residence

EU tax directives

- Gives rights to certain companies resident in the EU
 - Parent subsidiary directive ([90/435/EEC](#))
 - The Merger (Tax) Directive ([90/434/EEC](#))
 - Interest and Royalty Directive ([2003/49/EC](#))
- *“according to the tax laws of a Member State is considered to be resident in that State for tax purposes”*
- *“and, under the terms of a double taxation agreement concluded with a third State, is not considered to be resident for tax purposes outside the Community; ”*

Four freedoms – a different requirement

- Freedom of establishment (art. 34 cf. 31 - EEA A.)
 - *“Companies or firms formed in accordance with the law of an EC Member or an EFTA State”, and*
 - *“having their registered office, central administration or principal place of business within the territory of the Contracting Parties shall, for the purposes of this Chapter, be treated in the same way as natural persons who are nationals of EC Member States or EFTA States.”*
- Norway has taken this difference into account, e.g. the participation exemption rules regarding WHT exemption on dividends
 - Corporate investors tax resident in an EEA country (fulfilling the substance /reality requirement)
 - For hybrid entities (fulfilling the substance /reality requirement), it is sufficient that it is formed in accordance with the law of an EEA state (when transparent abroad but not in Norway) – MoF’s interpretative statement 19.03.12



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Brief Introduction

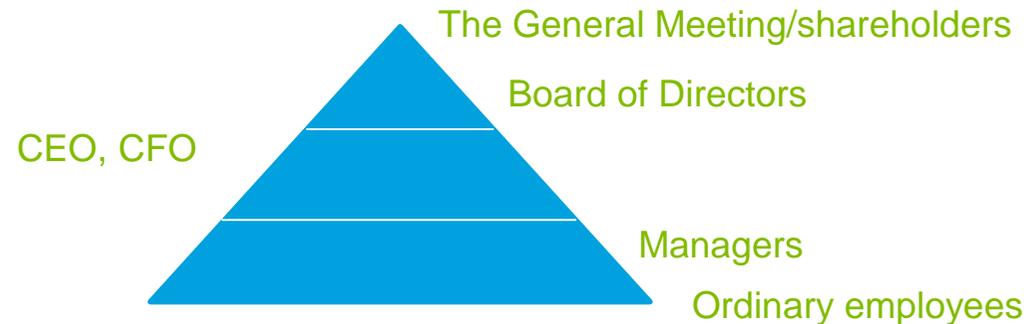
- Sweden:
 - The residence of corporations is determined based on registration
- Finland:
 - The residence of corporations is determined based on registration
- Iceland:
 - In general, all corporations incorporated and registered in Iceland are considered to be tax residents in Iceland
 - The same applies to corporations that have their home address in Iceland according to their articles of association or if the management of the company is carried out in Iceland
 - Foreign corporations are regarded as Icelandic tax residents if the effective management is carried out in Iceland

Corporate residence in Norway

Corporate residence in Norway

The legal basis – tax residency

- Section 2-2 of the Tax Act
 - Defines which entities are opaque (separate taxpayer) and transparent entities (first and second paragraph)
 - Does also state that the separate taxpayers are liable to tax on a worldwide basis if they are tax resident in the Kingdom [Norway].
 - Silent on the resident test (as the similar provision in the previous Tax Act of 1911)



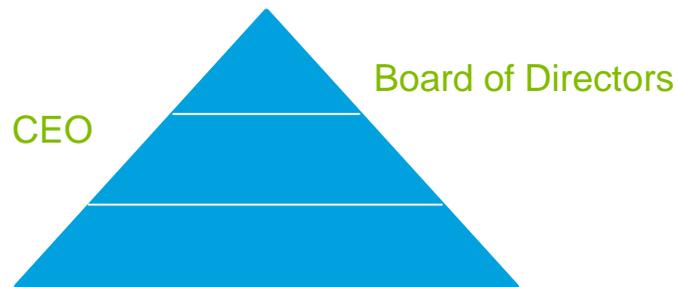
From 1920-1998 – one test

- Not that common to immigrate or emigrate companies for tax purposes
- There were some cases concerning the division of taxing rights between municipalities and a case concerning a Panama company
- The decisive was the place of the actual management of the company, carried out by the CEO and board of directors with emphasis on decisions rendered by the board of directors

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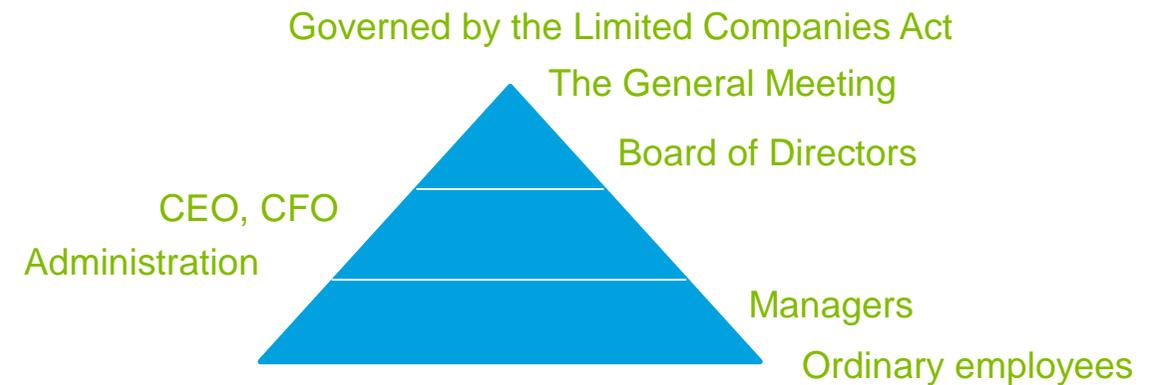
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Corporate residence in Norway

1998 - paradigm shift?

- A company wanted to transfer its seat to a low-tax country
- The Ministry of Justice issued first an interpretative statement regarding the company law aspects
- The Ministry of Finance issued a statement that introduced a new test; an overall assessment of features that gives nexus to Norway (influenced by the MoJ statement)
 - Norwegian registration
 - The place(s) of the board meetings
 - The location of the main administration
 - Day-to-day management
 - Other corporate bodies
 - The place(s) of the general meeting
 - If the company is still regulated by the Norwegian Limited Companies Act (a reference to the MoJ statement)



Corporate residence in Norway

Criticised in legal theory

- Articles
 - Hole, SR 2000 p. 18
 - Leegard, Utv. 2001 p. 928
 - Dragvold, SR 2012 p . 97
- Zimmer – Festschrift til Mads Henry Andenæs 2010 p. 344
 - The article was called “Utv. 1998 s. 848 FIN - a bridge too far?”
 - The new interpretation was required to hinder emigration of companies
 - “Man merkt die Absicht and wird verstimt”



Has been referred in some legal sources

- The tax authorities' handbook from 1998 and onwards
- Articles, etc. (referred but not problematized)
 - Widerberg/Berger, Utv. 2011 p. 123
 - Thommessen, p. 177
- The Ministry of Finance upholds its view, the last example is in the infringement case initiated by complaints against Norway relating to the reporting obligations when contracts are awarded to non-Norwegian contractors (a formal notice was issued by ESA 13 January 2016)

Corporate residence in Norway

The rule on foreign registered companies

- The disputed rule does only apply for Norwegian registered AS and ASAs
- For foreign registered companies the test is still actual management with emphasis on the functions carried out by the board of directors
 - Supreme Court Judgment (criminal case), Rt. 2001 p. 716 (Cyprus)
- Several decisions from the Tax Office for Large Enterprises
 - 2006-040KV (Utv. 2011 p. 365)
 - 2006-609SFS
 - 2008-605SFS

The rule should be the same in both cases

- Nothing in the wording of the law (or other important legal sources) indicates that there are two different tests
- Could cause restrictions (arbitrary discrimination) for Norwegian registered companies that wants to use one of its four freedoms to emigrate (prohibited under EEA law)
- There are no good reason to distinguish the two situations, especially after Norway introduced statutory exit tax rules
- It could be mentioned that the Scheel Tax Commission has recommend that registration should be added as an alternative legal basis for tax residency (the MoF will probably propose such amendment soon)



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Corporate residence in Denmark



Denmark

- Registration is the main criteria
 - Companies remain subject to corporate income tax - even if the place of effective management is in another country
 - Actual taxation depends on the existence of a tax treaty and the content hereof
- Place of effective management – since 1995
 - Companies are considered residents of Denmark, if the place of effective management is in Denmark, irrespectively of the place of registration

Denmark

- Interpretation:

- Depends on a concrete assessment of the actual decision-making in the company
- Daily management is decisive
- Assumption: That the management is handled by the management of the company
- As a starting point the company is considered a resident of Denmark, when the management (the board of directors) has its seat in Denmark and the headquarter is in Denmark
- No actual definition of *daily management*
 - Determined based on company law regarding the division of competence between different company organs
- In case there is no daily management, emphasis shall be on the place where other relevant decisions are taken

Denmark

- Preparatory remarks (lov nr. 312 af 17. maj 1995 (L 35)):
 - The place of the board of directors will be important if the board of directors in fact handle the management of the company
 - The place of decision making
- If all meetings and decisions are made outside of Denmark, the company is not considered resident in Denmark
- In case of doubt:
 - Provisions on residence, offices and the domicile of the members of the management
 - Hardly important where the members of the board are domiciled
 - The place of implementing the decisions is of less importance



Denmark

- Companies without daily management (e.g. holding companies)
 - Place where other decisions, regarding the management of the company, are in fact made

- Importance of parent-subsidiary relationship?
 - Increasing from an international perspective
 - Exercise of shareholder rights only affect the residence of the company, if the shareholders actually carry out the management of the company



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Denmark – Case Law

- Concrete assessment based on the actual facts
- Emphasis on decisions regarding:
 - Daily management
 - Hiring and dismissal of employees and other employee issues
 - Bookkeeping, accounting, etc.
 - Investment operations
 - Financing operations
 - Marketing

Denmark – Case Law

- In addition:
 - Whether shareholders and members of the management are connected to Denmark
 - Place where board meetings are held
 - Hosting of software
 - If employees carry out work where the management is resident
 - Residence of the managing director, where this person's work is carried out, the content and the volume of the work
 - Whether the corporate strategy support are carried out where the management is resident
- To a large extent, case law has dealt with companies without daily management
- Emphasis shall be on where:
 - The overall management makes its decisions
 - Where the meetings are held
 - Where the members of the management are residents



Denmark

- Tax treaty tie breaker rule in OECD Model Convention article 4(3):
 - *“The place of effective management is the place where key management and commercial decisions that are necessary for the conduct of the entity’s business as a whole are in substance made. All relevant facts and circumstances must be examined to determine the place of effective management. An entity may have more than one place of management, but it can have only one place of effective management at any one time.”*
- Danish interpretation:
 - Notion of *place of effective management* is not settled
 - Danish position is that the notion should be interpreted in accordance with domestic law



Denmark

- Practical issues:
 - Quite often legal opinions
 - Practical approach:
 - The place of effective management of the company should be analysed based on the following questions:
 - Which organisational structure is proposed?
 - Which managerial tasks are at the core of the activities of the companies' business?
 - Which managerial body carries out the actual daily management of the companies?
 - Where are the daily management decisions made?



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Denmark

- Practical issues:
 - Avoidance of tax residency based on the place of effective management
 - Absolute certainty regarding the managerial structure of the company and the managerial tasks
 - Documentation
 - *Rules of procedure* regarding the working procedures of the management organs
 - Physical meetings in other countries
 - Residence in other countries for the daily management and majority of the board of directors

Tax residency according to tax treaties (e.g. the Nordic DTC)

Tax residency according to tax treaties (e.g. the Nordic DTC)

The importance of residency

- A requirement to get tax treaty protection (save for some tax treaties that also regulates triangular cases)
- Important for the distribution rules (normally articles 6-8 and 10-21) and the method rule at the end of the treaty (exemption / credit)
 - one state needs to be resident state and one source state



Renvoi to domestic rules (Nordic DTC)

- Article 4 (1)
- For the purposes of this Convention, the term "resident of a Contracting State" means any person who, under the laws of that State, is liable to tax therein by reason of his domicile, residence, place of management or any other criterion of a similar nature, and also includes that State and any political subdivision, local authority and public institution thereof. The term:
 - (a) does not include any person who is liable to tax in that State in respect only of income from sources in that State or capital situated therein; and
 - (b) includes a body of persons and an estate of a deceased person only to the extent that their income or capital is taxed in that State in the same way as income derived or capital owned by a resident of that State.

Tax residency according to tax treaties (e.g. the Nordic DTC)

If both countries are resident countries

- The tie breaker rule – article 4 (3)
- Where by reason of the provisions of paragraph 1 a person other than an individual is a resident of more than one Contracting State, then it shall be deemed to be a resident only of the State in which its place of effective management is situated.
- OECD Commentaries - note 22 to art. 4 (3)
 - “It would not be an adequate solution to attach importance to a purely formal criterion like registration. Therefore paragraph 3 attaches importance to the place where the company, etc. is actually managed.”

Alternative provision (BEPS suggestion)

- OECD Commentaries - note 24 to art. 4 (3)
 - “24. As a result of these considerations, the “place of effective management” has been adopted as the preference criterion for persons other than individuals. The place of effective management is the place where **key management** and **commercial decisions** that are necessary for the conduct of the entity’s business as **a whole are** in substance made. All relevant facts and circumstances must be examined to determine the place of effective management. An entity may have more than one place of management, but it can have only one place of effective management at any one time.”
- The removal in from the OECD commentaries in 2008:
 - «The place of effective management will ordinarily be the place where the **most senior person or group of persons** (for example the **board of directors**) makes its decisions, the place where the actions to be taken by the entity as a whole are determined; however, no definitive rule can be given [...]»

Tax residency according to tax treaties (e.g. the Nordic DTC)

POEM countries

- Germany, Italy, Japan, the Netherlands, Switzerland
- Companies with two levels of boards
 - Supervisory board with non-executive directors
 - Management board with executive directors (part of the company's management)
- The test in Civil law countries is normal more focused on the day-to-day management, i.e. the management board

MAC countries

- E.g. United Kingdom
- Companies with only one board (save for Canada)
 - Consists of only of non-executive directors (or a mix)
- The Common law test focuses more on policy making (and control)
- The differences in view may be attributed company law *cf.* Avery Jones m.fl. *The Origins of Concepts* [...] 2006



International Outlook

- The criteria is being expanded
- Certain countries (e.g. Spain and Italy) use *deemed residence rules* as anti-avoidance rules
 - Rules of presumption with a reversed burden of proof
- Parent company's involvement in subsidiaries may lead to a share in residence to the shareholder
 - Holland: Hoge Raad, 17 December 2004, BNB 2005/105:
 - The balance is shifting when the shareholder takes over management authority from the board of directors and often or constantly carry out management decisions

International Outlook

- Parent company's involvement in subsidiaries may lead to a share in residence to the shareholder (continued)
 - Italy: Provincial Tax Court Firenze, 13 July 2007, decision 108/2007 and Provincial Tax Court Belluno, 14 January 2008, decisions 173/2008 and 174/2008
 - Germany: Bundesfinanzhof, 7. December 1994, IK 1/93 BStBl. II 1995, 175
 - UK:
 - *"The development in case law means that it is potentially extremely difficult for a UK company to have a non-resident subsidiary. The dividing line is whether the foreign directors really made the decision, even though the decision is what the parent wanted them to make, or whether they go through the motions of making the decision."*

International Outlook

- OECD
 - Proposed changes to *place of effective management* from OECD Technical Advisory Group on Monitoring the Application of Existing Treaty Norms for the Taxation of Business Profits (Business Profits TAG).
 - Hierarchy among tests
 - Majority against
 - Professor Stef van Weeghel i Maisto (ed.): Residence of companies under Tax Treaties and EC Law, 2009, p. 305 on the lack of certainty in art. 4(3):
 - *"...This is the centrally managed multinational, one that has its parent company definitely in one country but has subsidiaries throughout the world, which subsidiaries are in fact very tightly managed from the centre. Even though some of the formal acts relating to the local subsidiaries, such as the corporate housekeeping, etc., are performed locally, the businesses conducted by these subsidiaries tend to be managed tightly from the centre. With this type the question is not whether the parent company has its effective management in a particular country, but whether the operating subsidiaries have their effective management in the country of their stated residence or in fact all have their residence in the country of the parent company."*

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