SVENSK SJÖFART
SWEDISH SHIPOWNERS' ASSOCIATION

Finansdepartementet
Skatte- och tullavdelningen

103 33 Stockholm

REMISSYTTRANDE
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Föreningen Svensk Sjöfarts remissyttrande avseende Europeiska kommissionens förslag till rådets direktiv om skatteundandraganden KOM (2016) 26 slutlig

Föreningen Svensk Sjöfart har tagit del av rubricerad remiss.

Föreningen ansluter sig i huvudsak till det yttrande som Svenskt Näringsliv (Näringslivets skattedelegation) lämnat. Svensk Sjöfart avstyrker EU-kommissionens förslag.

I det följande lämnas ett antal branschspecifika synpunkter som föreningen vill lyfta fram i tillägg till Näringslivets skattedelegations yttrande. Föreningen Svensk Sjöfarts yttrande är, i likhet med Näringslivets skattedelegations yttrande, formulerat på engelska för att underlätta finansdepartementets vidare hantering av frågan.

The Swedish Shipowners´ Association, SSA (Föreningen Svensk Sjöfart) accedes to Näringslivets skattedelegation's written submission dated February 29, 2016 regarding the proposal and in general concurs in the conclusion that the draft proposal lacks an analysis in regard to expected effects as well as predictability and as such lacks the minimum requirements for legal certainty.

SSA, however, also wishes to add some specific concerns relating to the shipping industry.

Interest deductibility

Companies conducting international shipping business typically have made substantial investments in e.g. a ship fleet or other fixed assets and are as such in general to a large extent financed through external sources. Typically a group's entire financial need is coordinated through an internal financing company, not engaged in any shipping business or holding any

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vessels, which e.g. enables the group to be granted more favorable financial solutions. Such an arrangement would, however, be effectively prevented under the 30 percent EBITDA cap in article 4 paragraph 2 in the draft proposal (keeping in mind that the Member States are free to introduce even stricter provisions).

As such, the importance of the group ratio rule in paragraph 3 cannot be stressed enough, why it is crucial that the prerequisites needed to be met in order to be covered by it are made clear enough to be able to foresee to which extent the exception would apply in a specific case.

In paragraph 3 (c) it is stated that all assets and liabilities must be valued using the same method as in the consolidated financial statements.

According to Regulation (EC) No 1606/2002 of the European Parliament and of the Council of 19th July 2002 on the application of international accounting standards, companies whose securities are admitted to trading on a regulated market of any Member State as of January 1, 2005 are to prepare their consolidated accounts in conformity with the IFRS adopted by the European Commission. However, Swedish legal entities are obligated to prepare their annual accounts according to the Swedish Annual Accounts Act (*sw. årsredovisningslagen*). As IFRS is not in all cases compatible with Swedish legislation, the Swedish accounting standard RFR 2 in some cases also deviates from IFRS. Also, the Swedish accounting standard K3 deviates from IFRS.

The draft proposal lacks an analysis to which extent distinctions between domestic compulsory accounting legislation and standards for legal entities in comparison to consolidated accounts standards, as exemplified above, would entail that the prerequisite in paragraph 3 (c) would not be deemed met.

Lastly, no valid reasons have been presented in support of why the EU draft proposal deviates from the group ratio rule based on net interest to EBITDA ratio under the OECD proposal.

Exit taxation

Sweden already has exit taxation rules, which basically entails that an asset is viewed as if disposed of at fair market value upon an exit. Under general Swedish continuity principles, such an exit taxation results in the acquirer being granted a corresponding value for tax purposes on the asset. Accordingly, a capital loss upon the disposal of an asset results in a corresponding lower value for tax purposes at the level of the acquirer.

It is notable that article 5 in the draft proposal does not contain any instructions or analysis in regard of the acquirer's value for tax purposes upon exit taxation of an asset, when the acquirer is resident in a third country state. As such, it cannot be ruled out that a third country state would under its domestic tax law not take the exit taxation into account when determining the asset's value for tax purposes at the level of the acquirer, which of course presents a risk of the same increase in value of an asset being taxed twice. In the same

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manner, it cannot be ruled out that a third country state regardless of exit taxation would tax the asset at its source, risking double taxation.

Also, article 5 in the draft proposal does not address the situation where the fair market value of an asset is less than its value for tax purposes upon an exit resulting in a capital loss, nor whether such loss should be deductible.

As to the possibility to defer the payment of an exit taxation under article 5 paragraph 2, it should be noted that paying instalments over five years entails a tightening in relation to Swedish law, where exit taxation upon disposal of intangibles under certain conditions may be deferred up to ten years. The Swedish provisions have been introduced in order to comply with EU law, as the Swedish exit taxation rules were found to be in conflict with the freedom of establishment.[1]

Switch-over clause

Under article 6 of the draft proposal a Member State's exemption system is switched to a credit system if the foreign profits are taxed in a third country state at a statutory corporate tax rate lower than 40 percent of the statutory tax rate that would have been charged under the applicable corporate tax system in the Member State of the tax payer.

Many jurisdictions (inside and outside the European Union) have introduced a tonnage tax system, where qualifying shipping companies are taxed on their tonnage rather than net profits, which in general entails a lower effective tax rate in comparison to the one that would have been levied under the ordinary corporate tax system. The reason for this of course being to promote domestic shipping industry and encouraging domestic shipping companies to fly their vessels under domestic flag.

From the wording in article 6 of the draft proposal it is unclear to what extent the article would cover income that is subject to tonnage tax only, as would e.g. be the case under certain conditions if someone is conducting shipping business in for example Norway or another non EU country. The draft proposal does not present any analysis in regard of this aspect.

Also, from a Swedish tax perspective, the switch-over clause is at risk coming in conflict with the Swedish participation exemption regime.

CFC

From e.g. a shipping industry point of view, the choice of jurisdictions from which to operate is not firstly driven by tax considerations but rather the suitability from a business perspective. This may entail aspects such as the legal system's continuity and predictability, the political stability, the banking and financing system, customer requirements and available legal form of cooperation with other entities. It is as such unfortunate that the draft proposal

[1] SG-Greffe (2008) D/2056673, reference No. 2007/2372.

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seems to assume that the choice of jurisdiction is always done based on tax reasons rather than business reasons.

Many states that have CFC rules also have introduced different kind of exemptions from it, e.g. when it can be shown that there are genuine business reasons behind an arrangement. As the CFC provisions in the draft proposal are minimum rules the question arises whether the Member States would be obligated to revoke any domestic exemptions from their respective CFC legislations.

The draft provision lacks an analysis regarding these issues.

GAAR

Although the GAAR rule under article 7 in the draft proposal in many ways resembles the Swedish GAAR, it offers one significant difference. The Swedish GAAR basically states that an arrangement should be ignored if, alongside the other prerequisites, taxation based on the arrangement would be contrary to the purpose of the legislation according to the general *wording* of the legislation as a whole and according to specific rules that apply or have been circumvented through the arrangement.

The reference to the legislation's wording has been included in order to stress that it is the purpose of the legislation as it appears by the wording of the law, in contrast to how it is presented in the draft legislation's explanatory notes, that is decisive, as taxation under Swedish constitution may not be done under anything other than the rule of law.

Article 7 in the draft proposal simply refers to object or purpose of applicable tax provisions, without any restrictions, hence making its applicability broader than the Swedish GAAR. Keeping in mind the draft proposal offers minimum requirements, Sweden would become obligated to amend its GAAR provisions in order to be compliant with the directive. However, as the Swedish prohibition to levy tax without the expressed basis of law is guarded by the constitution, Sweden would be unable to comply in respect of article 7.

The draft proposal lacks an analysis in respect of this aspect.

The relation between the Switch-over clause, CFC and domestic participation exemption provisions

It is notable that the draft proposal offers no instructions in relation to how the Switch-over clause, CFC regulations and domestic participation exemption provisions should relate to each other. In a worst case scenario, this could entail that the same profit is taxed multiple times. See the example below.

Assume that a Swedish group conducting business has operational subsidiaries in a low tax third country state. As the statutory corporate tax rate would then be lower than 40 percent,

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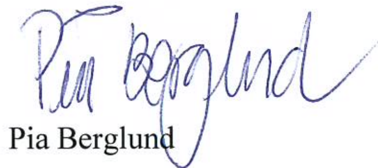
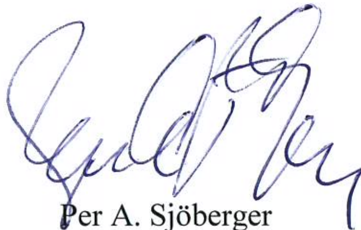
any net income calculated under Swedish rules would also be subject to Swedish CFC taxation (and potentially other Member State's CFC taxation as well, provided there are other subsidiaries in the structure resident in one of these). Upon any dividend distributions from the operational subsidiary to the Swedish parent these would initially be totally exempted from taxation under the Swedish participation exemption. However, as this would trigger the switch-over clause, the received distribution would become subject to 22 percent ordinary income tax (then set of against income taxes paid in the subsidiary's country of residence). Later on, upon disposal of the shares in the operational subsidiary, any remaining value would once again be taxed in Sweden (from which taxes paid in the subsidiary's country of residence would be set of) as the switch-over clause would override the Swedish participation exemption provisions.

Hence, the same profits would have become taxed multiple times. The draft proposal lacks an analysis re these aspects, which is particularly concerning as the prosed provisions risk coming in conflict with the fundamentals of the Swedish, among others, tax system.

Föreningen Svensk Sjöfart vill avslutningsvis gärna framhålla att en skatte- och avgiftsmässig regelhantering av svensk sjöfart i enlighet med regeringens ambition i augusti 2015 att "Sverige ska sträva efter att erbjuda det bästa regelverket i Europa för sjöfart" beräknas medföra flera tusen nya jobb, inte minst för ungdomar. Därmed kan en svensk basnäring som på många områden är tekniskt och kompetensmässigt världsledande bidra till de sysselsättningsmål som finns i Sverige.

Göteborg, dag som ovan





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