Global corporate losses have increased significantly in recent years. Where the resulting loss carry-forwards cannot regularly be utilized by taxpayers, it may happen that some of them look for loopholes and develop aggressive tax planning techniques in order to deploy the use of the losses in tax planning.

For this Comparative Survey, the authors look into corporate loss utilization and present a description and analysis of the situation in their country. This issue of the International Transfer Pricing Journal contains reports on Denmark, Norway and Sweden.

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**Danish tax authorities have announced that a statement concerning**

3.2. Sec. 6 State Tax Act.

1. The Danish tax authorities have announced that a statement concerning

4. SKM2012.353.HR.

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* Department of Law, Aarhus University.

1. See Aage Michelsen et al., _Lønreg, om indkomstskat_ (2011), at 288; Jan Pedersen et al., _Lærebog om indkomstskat_ 2(2009), at 171 et seq.

2. Sec. 6 State Tax Act.

3. See Aage Michelsen et al., *supra* n. 1, at 291 et seq.; Jan Pedersen et al., *supra* n. 1, at 182.

4. SKM2012.353.HR

5. The Danish tax authorities have announced that a statement concerning the further consequences of the verdict will be issued later in 2012. see SKM2012.363.SKAT

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**Corporate Loss Utilization through Aggressive Tax Planning**

**1. Introduction: Loss Utilization in Denmark**

Danish tax law does not provide for a general rule regarding loss utilization. Hence, the question of deductibility is determined in part by the general rules for income assessment, i.e. sections 4-6 of the State Tax Act (Statsskatteloven) and in part by various specific provisions. Under Danish tax law, a loss can be derived from either ordinary operations or a transfer of the company’s assets.

*Operating losses are, under Danish tax law, conceptually distinct from operating costs.* However, the same criteria must be applied in order to ascertain if the loss is deductible. Under Danish tax law, the deduction of operating costs is allowed if the costs are incurred to “acquire, consolidate and maintain income”. If an operating loss is a manifestation of an ordinary operating risk, that loss may be deducted from taxable income (often referred to in Danish literature as the “causation criterion”). This would be the case if, for instance, a loss is incurred as the result of an explosion at a fireworks factory. A recent Supreme Court judgment concerned an accounting firm (Ernst & Young) that had paid damages to the Danish state for loss of tax revenue. The damages were paid by the accounting firm on behalf of a client, due to the firm’s assistance in a tax planning scheme in the 1990s which later turned out to be illegal. The accounting firm then in turn deducted the damages as an operating loss. The Danish tax authorities contested this all the way to the Supreme Court. The Supreme Court eventually decided in favour of the accounting firm, thereby allowing the deduction.

No deduction is allowed for other losses which cannot be said to be a result of an ordinary operating risk. In the statement issued as SKM2009.181.SKAT, the Danish tax authorities stated that if Danish companies did not seek a refund for VAT paid to other EU Member States – due to the administrative burden and time-consuming nature of such efforts – the amounts paid were non-deductible, as they could not be seen as a manifestation of an ordinary operating risk.

A loss can also be incurred if a company’s assets are sold, damaged or destroyed. Whether such a loss may be deducted from the company’s taxable income is determined either by the general rules for income assessment in sections 4-5 of the State Tax Act or by specific provisions. Danish tax law makes a distinction between (1) assets acquired by the taxpayer in a professional capacity or with a speculative intent (referred to as “current assets” or “tax relevant assets”) and (2) fixed assets. In the first instance, any loss incurred will be deductible (the downside of this being that any gain will be taxable). In the second instance a loss is non-deductible (and a gain would be exempt from taxation). If, for instance, a warehouse burns to the ground, destroying goods meant for resale, this would allow for a deduction of the value of the goods. A deduction is allowed in such a case because if the goods had been sold, that transaction would have resulted in taxable income for the company. Thus, the decisive criterion is how the asset would have been taxed in the event of a sale (often referred to in Danish literature as the “object criterion”).

As mentioned, the taxation of capital gains is not only subject to the general rules for assessment of taxable income under the State Tax Act. Indeed, the taxation of capital gains and the deductibility of losses are subject to a wide range of provisions aimed at specific types of capital gains and the deductibility of losses are subject to a wide range of provisions aimed at specific types of capital gains. Danish tax law makes a distinction between (1) assets acquired by the taxpayer in a professional capacity or with a speculative intent (referred to as “current assets” or “tax relevant assets”) and (2) fixed assets. In the first instance, any loss incurred will be deductible (the downside of this being that any gain will be taxable). In the second instance a loss is non-deductible (and a gain would be exempt from taxation). If, for instance, a warehouse burns to the ground, destroying goods meant for resale, this would allow for a deduction of the value of the goods. A deduction is allowed in such a case because if the goods had been sold, that transaction would have resulted in taxable income for the company. Thus, the decisive criterion is how the asset would have been taxed in the event of a sale (often referred to in Danish literature as the “object criterion”).

As mentioned, the taxation of capital gains is not only subject to the general rules for assessment of taxable income under the State Tax Act. Indeed, the taxation of capital gains and the deductibility of losses are subject to a wide range of provisions aimed at specific types of capital gains. Thus, there are provisions concerning the taxation of specific types of capital gains arising from real estate, securities and interests (including financial contracts) and certain types of specific assets (including intangible assets and shares). This myriad of specifically targeted provisions makes the general rules for assessment of taxable income under the State Tax Act de facto obsolete in numerous circumstances. However, the principles underlying the State Tax Act are broadly mirrored in the specific provisions. When determining if a capital gain is taxable or

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if a loss is deductible, one therefore must examine if one of the specific provisions applies to the asset in question. If not, taxation/deductibility is determined by the general rules found in the State Tax Act. Thus, if the asset in question is a “current asset”, any gains will be taxed and losses may be deducted, whereas gains from a fixed asset are tax exempt and losses may not be deducted.

Under Danish tax law, the most important regulations in determining taxation of gains and deductibility of losses are found in the Depreciation Tax Act (Afskrivningsloven); the Capital Gains Tax Act (Kursgevinstloven); the Share Profit Tax Act (Aktieavancebeskatningsloven) and the Real Estate Profit Tax Act (Ejendomsavancebeskatningsloven). A brief description on the individual provisions regarding loss deduction for companies will be presented below, as will their eventual interplay with the general provisions of the State Tax Act.

2. Shares

As mentioned above, the State Tax Act distinguishes between (1) assets, in casu shares, which are held by a taxpayer in the capacity of a professional trader of shares and (2) other shares. This distinction is mirrored in section 17 of the Share Profit Tax Act, where special provisions apply to any such taxpayer. Accordingly, professional share traders must include any gain from shares in their taxable income and are allowed a deduction for losses. As a general principle, income is taxed (and losses deducted) under Danish tax law only when realized, e.g. when a share is sold. However, shares held by a company in its capacity as a professional share trader are taxed on a year-by-year basis. The value of the shareholding is assessed at the beginning of the year and at the end of the year. If the year-end value is higher, the company is taxed on the appreciation. If the year-end value is lower, the company is allowed a deduction for the loss. This is referred to as the “inventory principle” (lagerprincippet).

For other companies, i.e. non-professional shareholding companies, the taxation of gains and the deduction of losses depend on the “category” of the share. If the share is a so-called “subsidiary share” or a “group share”, any gain is tax exempt and losses are non-deductible and thus have no impact on the tax assessment. Subsidiary shares are defined as the shares a company holds, when owning at least 10% of the share capital in another company. Group shares are defined as the shares a company holds in another company when both companies belong to the same mandatory group taxation scheme (or could belong to the same facultative international group taxation scheme). The non-taxation of profits from subsidiary and group shares is motivated by the consideration for the avoidance of economic double taxation. The downside of this – the non-deductibility of losses – is motivated by the need to hinder aggressive tax planning. If a deduction were allowed, deficits from foreign subsidiaries could be “imported” into Denmark in the form of share losses.

If the shares are neither subsidiary shares nor group shares, the shares held are defined as “portfolio shares”. Non-professional share traders are assessed on their shareholding of portfolio shares in accordance with the inventory principle. However, if the shares held are unlisted, the company may opt out of the inventory principle and defer taxation until the shares are in fact sold. If a company chooses to opt out, any loss incurred may be offset only against gains from other unlisted portfolio shares (i.e. so-called sideways loss relief is not allowed). Under Danish tax law, such losses are commonly known as “source-restricted losses”.

3. Claims, Debt and Financial Contracts

The Capital Gains Tax Act regulates the taxation of various securities, e.g. bonds and financial contracts. As for the taxation of companies, the Capital Gains Tax Act distinguishes between losses/gains on claims; losses/gains on debt; and losses/gains on financial contracts.

If a company incurs a loss on a claim, this loss is fully deductible. The deduction is denied, however, if the claim is against another group company, the upside being that the other company is not taxed on the corresponding debt gain. This is an anti-avoidance provision aimed at a situation where the creditor company lends a sum to the debtor company, which in turn invests in fixed assets. If the investment turns out to be beneficial for the debtor company, this would result in an increase in share value for the creditor company. Such an increase would be tax exempt if the criteria outlined above are met (i.e. the shares are subsidiary shares or group shares). If the investment does not yield a profit for the debtor company, resulting in the debtor not being able to make payment on the claim, the creditor would realize a claim loss. Without the provision outlined, this loss would be tax deductible for the creditor company.

Intra-group claim loss deductions are, however, allowed in certain circumstances. If the claim derives from the ordinary intra-group delivery of goods, assets or services at arm’s length, loss deduction is granted. “Money lending” is not regarded as “goods” in that sense. Loss deduction is allowed only if the debtor company and creditor company have never been part of the same group taxation scheme and if the debtor company is taxable on the equivalent debt gain.

If the claim is a claim for unpaid interest against another group company, loss deduction is allowed only if the interest has already been taxed in the hands of the creditor company and if the creditor and debtor have never been part of the same group taxation scheme. The Capital Gains Tax Act also – subject to certain restrictions – allows for deduction of claim losses if the creditor company is a professional trader of securities etc. even though the creditor belongs to the same group of companies as the debtor.

Loss deduction is denied if interests stemming from the claim (or a hypothetical capital gain) would not be taxed in Denmark due to provisions of an applicable income tax treaty.

8. See sec. 9 Share Profit Tax Act.
Companies are taxed using the inventory principle regarding most types of claims, but may choose to defer taxation until any loss/gain is in fact realized for some claims. An example of this is the above-mentioned intra-group claims.

Debt gains are taxable for companies and debt losses are deductible from taxable income. This, however, also falls subject to certain restrictions, most notably that debt gains are tax exempt for the debtor company if the creditor company is not allowed a deduction for the claim loss. The Capital Gains Tax Act also exempts from taxation any debt gain incurred as a result of certain financial restructuring arrangements of ailing companies. The downside of this is a corresponding reduction of the debtor company’s tax loss carry-forwards. This will be discussed further below in section 6.3.

As opposed to claims, any gains/losses incurred from debt are taxed/deducted only when realized, i.e. the inventory principle does not apply to claims. Companies may, however, choose to apply the inventory principle to some of their debt.

The Capital Gains Tax Act provides for special rules concerning gains and losses derived from financial contracts such as futures and options.10 Gains are taxable for the company, and losses are deductible. In most cases the inventory principle is applied to financial contracts. The deduction of losses incurred from financial contracts can under certain circumstances fall subject to restrictions.11 This would be the case if a loss is derived from a financial contract involving the right or the obligation to buy or sell either (1) group shares or subsidiary shares as defined above12 or (2) unlisted portfolio shares where the holding company has opted out of taxation under the inventory principle. The provision has as its objective to hinder any tax planning scheme seeking to utilize the asymmetrical taxation of share gains/losses as compared to gains/losses derived from financial contracts. If the provision applies, the loss incurred may be offset only against gains derived from other financial contracts or (if the financial product involved unlisted portfolio shares) gains derived from unlisted portfolio shares.

4. Real Estate

The taxation of capital gains from real estate is regulated by the Real Estate Profit Tax Act and the State Tax Act. If the taxpayer is trading real estate in the capacity of a professional trader, the taxation of gains and the deductibility of losses is governed by the provisions of the State Tax Act. In that case, any loss is fully deductible, and gains are considered taxable income. Any write-off will be deducted directly from the purchase price when calculating gains.

For non-professional real estate traders, the utilization of losses is determined by the Real Estate Profit Tax Act. A number of specific and highly complicated provisions apply to the way a profit or loss is calculated, and also various grandfather clauses exist that are applicable to real estate purchased before 1 January 1993. A discussion of these provisions is beyond the scope of this article. Losses are regarded as “source-restricted”, i.e. sideways loss relief is not allowed.

As of 2005, a loss incurred from real estate located abroad is deemed non-deductible, and gains are tax-exempt due to the principle of territoriality which applies to Danish tax resident companies.13

5. Assets, Including Intangibles

A loss derived from assets included in the Depreciation Tax Act is deductible only if the taxpayer sells the asset in the capacity of a professional trader of said asset.14 Losses derived from other assets may be deducted only if the asset is sold due to the enterprise going out of business.

Under Danish tax law, intangibles (including goodwill) may be written off.15 If transfer of an intangible entails a loss, that loss is deductible (and any gain taxable). This holds true regardless of whether the intangible is being sold by a company in the capacity of a professional trader of intangibles.16 However, the calculation of losses and gains may differ depending on the status of the taxpayer. Whether a transfer of an intangible has occurred is defined very broadly under the Depreciation Tax Act, such that even situations where no title to the intangible has shifted yet the owner has received consideration for giving up its right to use the intangible are covered.17

6. Carry-Forward, Carry-Back and Loss Utilization

6.1. Loss utilization

At a starting point, Denmark imposes taxes in accordance with the net income principle. As such, any loss incurred may, unrestricted, be offset against other income if not subject to explicit restrictions. As a result, losses impact the overall income assessment the same way as ordinary operating expenses and depreciation. Thus, a loss may result in an overall deficit (which can be described as a “loss” in the broad sense of the word) for the taxpayer which may be carried forward.

Denmark provides for a mandatory group taxation regime for resident companies, as well as the permanent establishments of foreign companies in Denmark. An optional international group taxation regime is also available. Nat-
Corporation Tax Utilization through Aggressive Tax Planning

6.2. Tax Loss Carry-forward

As stated above, losses impact the overall tax assessment of the taxpayer and may thus result in an overall deficit (loss). Denmark provides for a general tax loss carry-forward rule, but allows for a tax loss carry-back only in very specific situations.

On 13 June 2012, the Danish parliament passed Bill 173 2011/2012 (Law 591 of 18 June 2012) concerning (among other things) the tax loss carry-forward regime. The bill moved the provisions from their original position in the Tax Assessment Act to sections 12-12B of the Corporate Tax Act.

Since 2002, tax losses may be carried forward indefinitely. Prior to 2002, tax losses could be carried forward only for five years; before 1976, losses could be carried forward only for two years. As any tax loss carry-forward must be offset against all positive income, it is not possible to “save” (part of) the tax loss carry-forward for later years.

Consider the following example:

A Co has a tax loss carry-forward of 10 million DKK and turns a profit of 1.2 million DKK in 2012. A Co becomes aware of a general tax increase to 30% (from currently 25%) effective from 1 January 2013. In such a situation, the tax loss carry-forwards would increase in value corresponding to the tax increase, hence A Co would benefit from not utilizing the tax loss carry-forward in 2012. Even so, A Co must offset all positive income (1.2 million) leaving a tax loss carry-forward of 8.8 million.

In some situations, a reduction of tax loss carry-forwards is imposed. Most notably this will be the case if (1) one or both companies in a merger have tax loss carry-forwards, (2) more than 50% of the share capital or 50% of the vote is owned by other investors at the end of the year as compared to the beginning of the year or (3) an economically ailing company realizes a debt gain in conjunction with a financial restructuring. The first situation will be addressed further below in section 8, while the latter will be discussed here. The second restriction mentioned is an anti-avoidance provision aimed at situations where companies with no real assets besides losses are traded. A discussion of those situations is beyond the scope of this article.

The Capital Gains Tax Act exempts from taxation any debt gain incurred by a debtor company as a result of certain financial restructuring arrangements of ailing companies. The downside of this is a corresponding reduction of unused losses being carried forward by the debtor company. The reduction is done on a step-by-step
basis. First, any unrestricted losses being carried forward are reduced. If the value of the debt gain surpasses unrestricted losses, certain source-restricted losses will also be reduced. This carry-forward restriction, however, does not apply if the creditor company is barred from deducting the corresponding claim loss because both companies belong to the same group (see section 3.). Likewise, the carry-forward restriction does not apply if the debt gain can be qualified as a tax-exempt contribution from the creditor, e.g. because of the companies belonging to the same group taxation scheme. However, these restrictions can be bypassed.

Consider the following example:23 Parent Co holds 100% of the shares in Sub Co. Sub Co owes DKK 10 million to Bank Co. If Bank Co forgives half the loan, Sub Co (provided that Bank Co is the main creditor) will fall subject to tax loss carry-forward restrictions. Bank Co could instead sell the loan to Parent Co at rate of 50% (i.e. DKK 5 million). Parent Co then, in turn, converts the claim against Sub Co into share capital at a rate of 200. Under Danish tax law, this has no immediate tax consequences for Parent Co and the DKK 5 million would be considered the purchase price of the shares. Sub Co would, on the other hand, not be subject to any loss carry-forward restrictions. Even though the tax loss carry-forward restrictions are indeed applicable to debt-to-share conversions, Sub Co will not fall subject to tax loss carry-forward restrictions because – as both companies belong to the same group – Parent Co is not taxable on the corresponding claim loss.

The Ministry of Taxation declared in 2011 that the Ministry was aware of the tax planning scheme, but has nevertheless not addressed the issue in the latest amendment to the tax loss carry-forward regime.

As mentioned, the Danish corporate tax system is built on the net income principle. However, for certain types of losses, the tax system departs from this principle, i.e. the so-called source-restricted losses. Indeed, as discussed above in sections 2. through 4., losses derived from certain shares, real estate and financial contracts may be offset only against income of a similar kind (sideways loss relief restrictions).

Even though sideways loss relief is restricted, such losses may be carried forward to offset future income of a similar kind.

A restriction to the tax loss carry-forward regime applies to foreign resident companies. If a company has formerly been subject to full or limited Danish tax liability and subsequently re-enters, any loss or deficit derived from the first period of tax liability may not be utilized, i.e. the loss is considered lost. The legal basis for this is highly questionable and may very well be an infringement of EU rights.24

6.3. Tax loss carry-back

Danish tax law does not provide for a general tax loss carry-back rule. Carry-back is, however, allowed in a few very specific circumstances. For companies – outside of bankruptcy – only a very specific carry-back rule exists where real estate is sold in-part over a number of years.

6.4. Losses converted into cash

Effective from 1 January 2012, a new type of loss utilization opportunity was introduced.25 As stated above, Danish tax law provides for a tax loss carry-forward regime. However, if the overall deficit is wholly or partially due to research and development (R&D) expenses, the company may choose to have the tax value of the overall deficit stemming from R&D expenses paid out in cash. Consider the following example:

A Co has a total deficit of DKK 20 million in 2012. DKK 15 million of the deficit is caused by R&D expenses. Instead of a tax loss carry-forward, A Co may opt to have the tax value paid out. However, the amount which may be paid is capped at DKK 1.25 million. As the current tax percentage for Danish companies is 25%, only a deficit of up to DKK 5 million may be converted into cash. Naturally, the converted deficit may not be carried forward. Thus, A Co has a tax loss carry-forward of only 15 million of the total deficit of 20 million.26

This new regime is part of the government’s overall plan to stimulate economic growth and investment in R&D.

6.5. Law 173: General restriction to the utilization of tax loss carry-forwards

6.5.1. Generally

As a result of parliament’s enacting Law 173, the utilization of tax loss carry-forwards will be restricted for fiscal years beginning after 1 July 2012. The new rules have been added to paragraph 2 of section 12 of the Corporate Tax Act. In future, tax loss carry-forwards may only reduce taxable income in excess of DKK 7.5 million (approximately EUR 1 million) by 60%.27 Income up to the cap of DKK 7.5 million may be fully offset by tax loss carry-forwards. The new rules, as compared to the old rules, can be explained by an example:

A Co has a tax loss carry-forward of 11 million DKK and turns a profit of 9 million DKK. The taxable income would under the old regime be 0 million (9 million – 11 million) with 2 million DKK in excess to be carried forward. Under the new regime, A Co’s taxable income would be calculated as:

9 million – 7.5 million – (60% × (9 million – 7.5 million)) = DKK 0.6 million.

24. See Niels Winther-Sørensen, Fremførelse af underskud efter periode uden dansk skattepligt, Tidskrift for Skatter og Algifter (Danish tax journal, TIS) 157 (2009), at 726 et seq.
25. Sec. 8 X Tax Assessment Act (Ligningsloven).
26. See Kim Wind Andersen, Underskud, der kan vekses til kontanter, SpO (2012), at 103 et seq.
27. The original bill contained a cap of just DKK 1 million. This was amended during the reading of the bill.
The new tax loss carry-forward regime does not restrict losses from being carried forward; only full utilization of losses exceeding the cap is hindered. It is important to bear in mind that only the utilization tax loss carry-forwards are restricted; losses incurred during the course of the fiscal year still impact the tax assessment in full.

The utilization restriction on tax loss carry-forwards also applies to companies subject to the group taxation regime. However, for such companies the restriction is applicable to the group as such, not to the individual companies, i.e. the utilization of tax loss carry-forwards is restricted only if the taxable income of the group exceeds DKK 7.5 million. This can also be illustrated by the following example.28

<table>
<thead>
<tr>
<th>Income (DKK million)</th>
<th>Tax loss carry-forwards</th>
<th>Cap</th>
<th>Income exceeding cap</th>
<th>Restriction: (60% of income above 7.5 million)</th>
<th>Taxable income</th>
<th>Remaining loss to be carried forward</th>
</tr>
</thead>
<tbody>
<tr>
<td>9</td>
<td>11</td>
<td>7.5</td>
<td>9 – 7.5 = 1.5</td>
<td>60% of 1.5 = 0.9</td>
<td>9 – (7.5 + 0.9) = 0.6</td>
<td>11 – (7.5 + 0.9) = 2.6</td>
</tr>
</tbody>
</table>

As stated in section 2., companies that are non-professional share traders are only taxed on gains derived from “portfolio shares”, whereas gains derived from the transfer of “subsidiary shares” and “group shares” are tax exempt. Portfolio shares are taxed using the inventory principle (see section 2.). These rules were implemented through Bill 202 (2008/2009) (Law 525 of 12 June 2009) effective from 2010, i.e. in the wake of the financial crisis. As the inventory principle was introduced at a time when share value was extremely low, this would reflect on the entry value of shares taxed under the inventory principle. The first draft of the bill would calculate the entry value of shares as either actual purchase value (if held for less than three years) or market value (if held for more than three years). This would then, in turn, mean taxation of unrealized gains when the economic climate would eventually improve. This was highly criticized during the reading of the bill and eventually amended in the final bill. To accommodate this, the market value as of 2010 was used as the entry value for the shares taxed under the inventory principle. If, however, the actual purchase value of portfolio share exceeded the market value at the beginning of 2010, the difference may be carried forward and offset taxable gains from portfolio shares in the future.29

Another issue concerning the interplay between taxation of shares after Bill 202 (2008/2009) had been passed and the financial crisis was addressed in 2011 with the passing of Bill 84 (2010/2011).30 Before 2010, losses derived from shares were deductible if the shares had been owned less than three years. Consider the following example:

On 1 October 2006 A Co purchased a shareholding of DKK 350 million in listed company X Co. When Bill 202 (2008/2009) was presented, the value had dropped to a mere DKK 100 million. A Co holds more than 10% of the share capital in X Co, i.e. the shares are “subsidiary shares”, and after Bill 202 (2008/2009) had passed, losses would therefore be non-deductible. Had the bill not been


29. See Michael Sørensen, Forandringer i udbyttebeskatning (L 2002), RR 2009/10, at 12 et seq.

passed, such a loss could be deducted if shares had been sold before being held for three years. After Bill 202 (2008/2009) had passed, X Co increases its capital, resulting in A Co now holding less than 10%. At this point, the market value is DKK 150 million. As A Co now holds less than 10% of the share capital in X Co, the shares held are no longer subsidiary shares, but rather portfolio shares. Such a change in status has no immediate tax consequences for A Co. However, the market value of the shares at the time of ownership falling below 10% is used as the entry value for future taxation under the inventory principle. As a result, A Co will be taxed on gains if the share value were to rise above DKK 150 million, even though shares were in fact purchased for DKK 350 million.

With the passing of Bill 84 (2010/2011), the Share Profit Tax Act now contains a grandfather clause aimed at such situations allowing “losses” to offset gains. 31

8. Mandatory Group Taxation, Restructuring and Loss Utilization Restrictions

As mentioned, Danish tax law provides for a mandatory group taxation regime. Each member of the group is assessed on an individual basis. Only after each group member has assessed its own taxable income, may losses be utilized by other companies with positive income. The group taxation regime provides for so-called ring-fenced loss utilization, meaning that one group company may utilize losses from another company only if the loss was incurred while both companies belonged to the same group taxation scheme.

If two Danish companies merge, the merger may be carried out as either a taxable or tax-exempt event. In the first instance, tax loss carry-forwards of the discontinuing company are lost, but the continuing company keeps its own pre-merger tax loss carry-forwards. 32

If the merger is tax exempt, both companies lose their tax loss carry-forwards. 33 However, an exception to this applies if the merging companies prior to the merger belonged to the same group taxation scheme. In that case, the continuing company may utilize losses from both companies as long as they were incurred during the time while the companies belonged to the same group taxation scheme. With the passing of Bill 173 (2011/2012), these rules have been amended. Now, a continuing company loses any pre-merger loss incurred while belonging to the same group taxation scheme as the discontinuing company if the assets and liabilities from a non-group company (directly or indirectly) have been transferred to the continuing company at the time of the merger. Consider the following example: 34

A Co, B Co and C Co have belonged to the same group taxation scheme for three years. B Co and C Co have tax loss carry-forwards incurred during those years. In the fourth year, A Co merges with the non-group company X Co, with A Co being the continuing company. If A Co subsequently were to merge with C Co (with C Co being the continuing company), C Co would not lose its tax loss carry-forwards under the old regime. However, with the amendment, C Co will lose its tax loss carry-forwards because due to the merger with A Co, assets and liabilities stemming from X Co have been transferred indirectly to C Co.

If the merging companies are not part of the same group taxation scheme, but indeed belong to each separate scheme, a special situation arises. If the merger is tax exempt, both companies lose their tax loss carry-forwards. As for the other companies in the group, they may continue to carry forward and utilize both pre- and post-merger tax losses among the companies in the group taxation scheme. The companies, which pre merger were part of the same group taxation scheme as the continuing company, may even continue to utilize the continuing company’s tax loss carry-forwards post merger, despite that loss being off limits for the continuing company itself post merger. The continuing company in the merger may utilize only losses incurred post merger from the other group companies, while pre-merger losses are off limits for the merging companies. This is due to the unity principle, which was applied by the Danish tax authorities. 35

However, two decisions from the National Tax Tribunal (Landsskatteretten) rendered the legal basis of the unity principle uncertain. 36 As a direct result, the unity principle is now explicitly stated in paragraph 4 of section 31 of the Corporate Tax Act. The intention is clearly stated in the explanatory notes accompanying Bill 173 (2011/2012) as the desire to prevent “tax motivated restructuring”, especially in a time where companies have realized huge losses caused by the financial crisis.

9. Overall Evaluation

Danish Tax Law provides for a myriad of different and highly detailed loss utilization provisions. In general, any loss is deductible if a hypothetical corresponding gain would be taxable income for the company. However, Danish tax law deviates from this starting point in many instances. Deeming some losses non-deductible and others source restricted. As such, to decide whether a loss is deductible entails a thorough scrutiny of the general provisions of the State Tax Act, as well as the various specific Capital Gains Acts (see sections 1. through 5.). If a loss is indeed deductible, it must next be determined if the loss may be utilized by the company itself or if other companies may do so, i.e. due to the companies belonging to a (mandatory or facultative) group taxation scheme (see section 6.1.). Only then can the final question of carry-forward, carry-back or even cash payout be determined (see sections 6.2. through 6.4.).

Very low tax payments or no tax payments at all, especially from MNEs, have been a hot issue in Danish politics for several years now. This has put loss utilization on the political agenda, and the amendment to the tax loss carry-forward regime (see section 6.5.) is a direct consequence.

32. See Sanne Neve Darnagda, En fusions skattemæssige konsekvenser for fremforskerberegtnede underskud – skattepligtige fusioner, TIS 491 (2009), at 2362 et seq
34. See the explanatory notes accompanying Bill 173 (2011/2012).
35. See the legal guidelines: Den juridiske vejledning 2012- 1 C.D.5.2.7.3.
36. See SKM2006.75.LSR and SKM2011.588.LSR
Likewise are the attempts to stop tax-driven restructurings, which in some cases are designed to sidestep the ring-fenced utilizations of losses within the group taxation scheme (see section 8.). However, even if the general idea is not to interfere with restructuring such as mergers which are not tax driven, the further increase in complexity of regulation may very well have that effect. Furthermore, either way one looks at it, the provision limiting the utilization of tax loss carry-forwards will reinforce the negative effects of the financial crisis.

However, the political issue of the lack of (or absence of) payment of corporate taxes must be weighed against the actual economic difficulties many companies face due to the financial crisis. This has resulted in provisions aimed at relieving some of the unintended consequences of the general change in the way companies are taxed on shares, which provisions were amended in 2010 (see section 7.). The general restriction on utilization of tax loss carry-forwards (above the cap of DKK 7.5 million) has been criticized for affecting companies with substantial R&D investments more severely than companies in other sectors. To ease this burden, losses derived from R&D may to some extent be converted and paid out in cash instead of being carried forward (see section 6.4.).

However, this opportunity is capped at DKK 1.5 million, making the impact almost symbolic for companies with large R&D investments.

From a general perspective, it is clear that the current policy is to ensure that companies pay taxes and – to a much lesser extent – to provide relief from the consequences of the financial crisis. As such, the focus is “motivating companies to contribute to the financing of the welfare state through the payment of correct taxes”, which is the exact wording used in the explanatory notes accompanying Bill 173 (2011/2012). 37

As the results of Bill 173 (2011/2012) are not yet known, it is currently impossible to say whether the new provisions will prove their worth in increasing corporate tax payments, or whether aggressive tax planning opportunities still exist. Presumably, however, it is safe to say that tax advisors and tax planners will test the strength of the system in the future.

37. See explanatory notes accompanying Bill 173 2011/2012. It should be noted that the bill includes a range of other steps aimed at ‘motivating’ companies to pay their fair share of taxes. A thorough examination of all aspects of the bill is beyond the scope of this article.