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SCHUMACKER AND *WIELOCKX* DECISIONS: CHANGES IN DANISH TAX LAWS

Christian Emmeluth[1]

In the *Schumacker* case (C-279/93) the European Court of Justice found as follows:

"1. Article 48 of the EEC Treaty must be interpreted as being capable of limiting the right of a Member State to lay down conditions concerning the liability to taxation of a national of another Member State and the manner in which tax is to be levied on the income received by him within its territory, since that Article does not allow a Member State, as regards the collection of direct taxes, to treat a national of another Member State employed in the territory of the first State in the exercise of his right of freedom of movement less favourably than one of its own nationals in the same situation.

2. Article 48 of the Treaty must be interpreted as precluding the application of rules of a Member State under which a worker who is a national of, and resides in, another Member State and is employed in the first State is taxed more heavily than a worker who resides in the first State and performs the same work there when, as in the main action, the national of the second State obtains his income entirely or almost exclusively from the work performed in the first State and does not receive in the second State sufficient income to be subject to taxation there in a manner enabling his personal and family circumstances to be taken into account.

3. Article 48 of the Treaty must be interpreted as precluding a provision in the legislation of a Member State on direct taxation under which the benefit of procedures such as annual adjustment of deductions at source in

[1] Christian Emmeluth, Lawyer, Koch-Nielsen & Grønborg, Applebys House, 1 Applebys Plads, PO Box 19, DK 1001 Copenhagen K, Denmark
Tel: (+ 45) 32 960808 Fax: (+ 45) 32 960707.

> respect of wages tax and the assessment by the administration of the tax payable on remuneration from employment is available only to residents, thereby excluding natural persons who have no permanent residence or usual abode on its territory but receive income there from employment."[2]

The European Court of Justice ruled in the *Wielockx* case (C-80/94) that:

> "A rule laid down by a Member State which allows its residents to deduct from their taxable income business profits which they allocate to form a pension reserve but denies that benefit to Community nationals liable to pay tax who, although resident in another Member State, receive all or almost all of their income in the first State, cannot be justified by the fact that the periodic pension payments subsequently drawn out of the pension reserve by the non-resident taxpayer are not taxed in the first State but in the State of residence — with which the first State has concluded a double-taxation convention — even if, under the tax system in force in the first State, a strict correspondence between the deductibility of the amounts added to the pension reserve and the liability to tax of the amounts drawn out of it cannot be achieved by generalising the benefit. Such discrimination is therefore contrary to Article 52 of the EC Treaty."[3]

Danish Response

The Danish Government found that the tax treatment of non-resident entrepreneurs and salary-paid employees was not in accordance with the principle laid down in the two above-mentioned decisions by the European Court of Justice. On 11th October 1995 the Danish Government submitted a Bill to the Danish Parliament proposing to bring the Tax at Source Act (Kildeskatteloven) in line with the two decisions. In the Bill a reference was made to the recommendation issued by the EU Commission on 21st December 1993 concerning the tax treatment of certain non-residents. According to this recommendation salary-paid employees who receive more than 75% of their total income from Member State other than the Member State of which they are residents should be entitled to the same deductions as resident taxpayers.

In the Bill the Danish Government made the following comments:

> "Even though the two cases did not involve the Danish provisions governing the taxation of non-resident taxpayers receiving remuneration for the personal services performed in Denmark and self-employed non-

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2 [1995] I ECR 225 at 267-8.

3 [1995] I ECR 2493 at 2518.

> residents, Denmark is, however, under an obligation to comply with the EU laws as laid down in the decisions. The Danish provisions concerning the taxation of non-residents are in many respects drafted according to the same principles as the German, and consequently the Danish provisions must be adjusted. This is also the case with regard to self-employed non-residents who are subject to Danish taxation. Equally, the provisions concerning dual residents should be adjusted."

The Bill was passed on 8th December 1995 and contains a number of provisions which are incorporated in the Tax at Source Act under Chapter I.A.

Previous Provisions

Under the previous provisions non-resident employees and entrepreneurs were only entitled to deduct expenses which were strictly related to the Danish income. Deductions for private interest expenses, contributions to unemployment insurances, pension contributions, alimonies, etc. were not deductible. Further, when computing the taxes no consideration was taken of the fact that the taxpayer might be married and that the spouse might have taxable losses which under the rules applicable to residents could be set off against the taxpayer's taxable income. Certain other allowances were also disallowed.

New Provisions

Section 5.A of the Tax at Source Act provides a non-resident taxpayer receiving remuneration for personal services performed in Denmark for a Danish employer, or an independent contractor performing services which may be taxed in Denmark (including taxed under a double taxation treaty) with the option to be taxed as if they were residents of Denmark. This option is available if the income which may be taxed in Denmark, with the addition of any interest expenses and losses on debt which have been deducted from the income, in any income year exceeds at least 75% of the total income less all expenses which are incurred in order to generate the income. The income must be made up according to Danish tax laws. This option is also available if the Danish taxable income as well as the total income shows a loss, provided the taxpayer in the latest income year in which he had a positive Danish income was taxed according to Chapter I.A. For the purposes of this Chapter, unemployment support and social security payments received in connection with sickness or birth shall be considered as remuneration paid for personal services. Payments received under pension schemes shall be deemed as remuneration for personal services or as income generated by a self-employed individual if that individual for a period of at least 5 years out of the last 10 years preceding the time the payments under the pension schemes start was entitled to be taxed according to Chapter I.A.

Under section 5.B of Chapter I.A the taxpayer is entitled to the same deductions as resident taxpayers with regard to the following expenses:

1. Expenses including interest expenses concerning taxpayer's personal residence to the extent such expenses exceed any income generated by the property including the imputed rental value. Such income and expenses are to be computed according to Danish tax laws.

2. Private interest expenses and certain fees for establishing credit lines.

3. Contributions to pension schemes and unemployment insurances which are deductible according to the Pension Tax Act.

4. Contributions to certain charitable associations, and

5. Alimony contributions.

If the taxpayer is subject to taxation on his gross income under section 48.B and 48.C of the Tax at Source Act or section 21.2 of the Hydro Carbon Tax Act the above-mentioned expenses may also be deducted. These provisions apply to individuals who are stationed in Denmark under a work-hire agreement or are engaged on a Danish registered ship sailing between foreign ports.

If the taxpayer is married, he is also entitled to enjoy the same benefits as if the spouse has been subject to taxation in Denmark. If the income of the spouse shows a loss, this loss may only be deducted from the other taxpayer's income to the extent both spouses elect to be taxed under Chapter I.A.

Filing Requirements

The taxpayer shall at the latest when the tax return for an income year in question is filed exercise his option to be taxed according to Chapter I.A. However, the taxpayer may withdraw his decision. Such a withdrawal shall be filed with the tax authorities at the latest on 30th June in the second calendar year following the income year in question.

The Effective Date

The Act applies as of the income year 1992. A request for a revision of the calculation of the taxpayer's taxable income for the income year 1992-1994 shall be filed at the latest on 31st December 1997.