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Denmark

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Questionnaire 'The Burden of Proof in Tax Matters', EATLP Conference, May 2011, Uppsala, Sweden

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How the burden of proof is allocated is an important issue in legal disputes concerning tax matters. Courts often hear tax cases in which the allocation of the burden of proof is an essential element for deciding the case. But national tax legislators also take a special interest in how the burden of proof is allocated. In abusive situations the burden of proof is often shifted to the taxpayer. This thereby strengthens the position of the tax administration.
In European tax cases the European Court of Justice (ECJ) has held that when a taxpayer provides proof in a tax case, this may only take place on the assumption that the taxpayer is able to do so without encountering undue administrative constraints.
And in international tax matters such as transfer pricing arrangements, the burden of proof is also very important. In such cases the burden of proof lies primarily with the taxpayer and he generally has to comply with severe documentation requirements.

The questionnaire, as a starting point for the coming EATLP Conference, looks at various aspects of the burden of proof at four different levels:

1. National concepts
2. The burden of proof in anti-abuse provisions
3. The burden of proof and European tax law
4. The burden of proof in cross-border situations (international tax law)

Part A: National concepts

1. General rule on the burden of proof

In Sweden like many other countries, the general rule concerning the division of the burden of proof is that the tax administration has to prove the income-side and that the taxpayer has to prove the cost-side. This rule has been established in tax practice and is based on the idea that each party must provide the evidence that is easiest for it to gather. Usually, it is easier for the tax administration to prove that income has been received and for the taxpayer to prove that costs have been made than the other way around.

Question: Does such a general rule exist in your legal system? Is it based on the law or on tax practice? If such a general rule does not exist, how is the burden of proof allocated? Do different rules apply for proceedings in the tax administration, the tax courts or the criminal courts?

JGN

A Danish saying in procedural law goes: "Three things are needed to win a law suit: Evidence, evidence and evidence". In view of this recognition, it is considered a bit of a

paradox in Danish legal discourse that legal study of proof and evidence plays a minor role as a part of Danish law education.[1]

Before turning the attention to legal discourse on proof and evidence in Danish tax cases, it is necessary to give a brief introduction to the general theory regarding firstly the procedural regulation about evidence and means of evidence and secondly the assessment of evidence in Denmark. The first subject primarily concerns practical provisions on for instance witnesses, duty to give evidence, presentation of documentation and the evidence-related rights of the parties to a given case. Provisions on evidence are found in the Danish Administration of Justice Act (AJA)[2] and related case law when it comes to evidence in court cases while administrative procedure are governed by other general principles in administrative law and – in case of administrative tax complaints – by the Danish Tax Administration Act (TAA)[3] that has relevance to evidence and burden of proof in administrative tax cases.

It is a general and fundamental legal principle in Danish legal discourse that the assessment of evidence is free, which means that it is up to the courts or administrative tribunals to assess whether a fact is considered sufficiently documented or not whereas it is up to the parties to produce the necessary evidence.[4]

Legal court proceedings – civil cases

Legal proceedings in the Danish courts of law are generally dived into two categories: Dispositive cases and non-dispositive cases. As a rule, legal court proceedings are dispositive which means that parties of a lawsuit have the right to define the questions or substance-matter – in form of claims, allegations and submissions – which the judges can decide on, cf. AJA sec. 338. Subsequently, the Danish courts of law cannot decide on questions in legal proceedings which are not worded in a claim, allegation or submission by the parties of a conflict. The negotiation principle in Danish legal discourse concerning legal proceedings describes the parties' elucidation of the facts of the case and the procedure's primary nature as a negotiation between the parties.[5] The negotiation principle does not, however, limit the court's application of legal rules including interpretation as described by the following declaration: Narra mihi factum, narro tibi jus.[6] While the principle of negotiation charges the parties of a case with the wording of claims, allegations and submissions, it does not automatically mean that the burden of proof concerning all the facts of the allegation rests on the party who has set forth the claim etc. Moreover, the principle of negotiation is not without exception as the principle is supplemented by the court's duty to provide guidance and is furthermore limited in non-dispositive cases such as for instance affiliation proceedings and

[1] Cf. *Henrik Zahle*: Bevisret og oversigt, (1994), p. 13.
[2] Consolidated Act no. 1053 of 29 October 2009 as amended.
[3] Consolidated Act no. 907 of 28 August 2006 as amended.
[4] Cf. *Bernhard Gomard & Michael Kistrup*: Civilprocessen, 6. ed., (2007), p. 25.
[5] Cf. ibidem, p. 500 ff.
[6] Tell me the facts and I'll tell you the law.

custody cases.[7] The courts also to some extent have means to induce parties to elaborate on claims and express an opinion on any factual or legal matter cf. AJA, sec. 339.

Tax cases are dispositive cases covered by the negotiation principle, but the rules laid down in TAA and general principles in administrative law may limit the negotiation principle when the tax authorities act as a party in a legal proceeding. Subsequently, the court's means of inducing the parties of the case by questioning to introduce or present evidence in an expedient manner is more conspicuous in cases to which the administration is a party.[8] Moreover, it is assumed that the courts to some extent may modify the parties' claims, allegations and submissions if the courts cannot by means of questioning ensure that the case is decided in accordance with essential public considerations, cf. *UfR 1988.1 H.*

One aspect of the negotiation principle is considered to be the principle of contradiction according to which the parties of a legal court proceeding are entitled to be informed about pleas, production of evidence of the opposite party and to state the party's point of view on any material that can form the basis of the court's ruling.

The negotiation principle also plays an important role when it comes to evidence. The Danish courts of law do not collect and present evidence as this is the prerogative of the parties of the legal proceeding. The courts may, however, preclude evidence if such evidence is deemed to be unnecessary, cf. AJA, sec. 341, and request that a party produces evidence if the facts of the case cannot be elucidated without such evidence, cf. AJA, sec. 339 (3).[9] If a party does not comply with the court's request for production of evidence, the court may regard this to be in favour of the opposite party as part of the court's assessment of evidence, cf. AJA, sec.344 (3), unless the party is unable to comply with the court's request due to legal or factual reasons.

Legal court proceedings – criminal cases

The assessment of evidence in Denmark in criminal proceedings is based on a fundamental principle that the burden of proof rests on the prosecution; In dubio pro reo. This is also the case in tax cases that result in criminal charges against a taxpayer. As a consequence, the judges on the one hand have to be convinced that the accused is guilty to convict the accused, and the prosecution on the other hand has to support the judge's conviction by producing sufficient evidence. The concept of mens rea or guilty mind in Danish legal discourse is closely related to the burden of proof in criminal cases; a broad definition of mens rea may lighten the prosecution's burden of proof while a strict definition may make the burden of proof stricter. In Denmark, mens rea in criminal cases includes dolus eventualis as the lowest threshold of criminal intent meaning that the prosecution may prove criminal intent even

[7] As burden of proof in non-dispositive cases is not relevant in tax law cases, non-dispositive cases will not be described further.
[8] Cf. *Bernhard Gomard & Michael Kistrup*: Civilprocessen, 6. ed., (2007), p. 511.
[9] Cf. Also *UfR 1981.101 H* and *UfR 1982.171 H*.

though the perpetrator did not intend to conduct the criminal act and did not to a high degree of probability belief his or her acts to be criminal, but nevertheless would not have acted otherwise. Dolus eventualis also covers a situation where the accused did not to a high degree of probability belief his or her acts to be criminal, but did realize the possibility of the criminal nature of his or her acts, cf. *UfR 1979.577 H*.

Complaints against the tax authorities

In administrative complaints procedures in Denmark, the principle of inquisitorial procedure applies.[10] That is why it is the obligation of the tax administration to procure the information that is necessary to decide the complaint including both information of a factual and legal nature. As mentioned above the inquisitorial procedure principle in administrative complaints also plays a role in legal proceedings where for instance the tax authorities act as a party.

General rule on burden of proof in Danish tax law

As a rule, the burden of proof rests on the party that makes a claim which affects or obligates another party. The burden of proof in a complaints procedure or legal proceeding also depends on the wording of the relevant statutory provision on which the claim of a party is based. As far as the question of burden of proof regarding the income-side concerns the phrasing of the Danish State Tax Act sec. 4 operates with a very broad definition of income. As a starting point, the burden of proof regarding the *existence* of taxable income that can be *allocated* to the taxpayer rests on the tax authorities. However, when the tax authorities have established these facts, it is up to the taxpayer to prove the income's eventual exemption from taxation. On the basis of the broad definition of income pursuant to the Danish State Tax Act, sec 4 and the taxpayers' obligation to file a self assessment tax return it could be argued that the taxpayer also has to participate actively in procuring information about taxable income at first hand. This does not mean, however, that the burden of proof for income taxation rests on the taxpayers in general. Moreover, the inquisitorial procedure principle generally requires that the tax authorities procure necessary information. In summary, the question about burden of proof apparently is a bit more complex in Danish legal discourse compared to Swedish legal discourse, but the end result resembles the Swedish: As a rule, the burden of proof on the income-side rests on the tax authorities.

In comparison, it is for the taxpayer to prove the existence of a deductable cost, which is primarily based on the wording of e.g. the Danish State Tax Act, sec. 6. This provision lays down a number of conditions of deductions including a close connection to income-related activity and consequently the taxpayer has to prove that these conditions are met. Moreover, it is easier for the taxpayer to prove the existence of expenses that are related to income-creating activity.

[10] Cf. *Hans Henrik Bonde Eriksen, Susanne Dahl and Poul Bostrup*: Skatte- og afgiftsproces, (2010), 3. ed., p. 240. In Danish legal discourse this principle is called: Officialmaksimen.

In general, the burden of proof regarding deductions rests on the taxpayer, while the inquisitorial procedure principle charges the tax authorities with assisting with necessary factual or legal information.

2. Variations on the general rule depending on time period or if it is claimed that the taxpayer has submitted false/incorrect information

In Sweden, the general rule is the one mentioned above. This rule is applicable only in the ordinary tax procedure. The ordinary tax procedure lasts for a period of one year after the tax year (in other words, two years after the income year). After that period the tax administration has to make its decision according to the special rules of additional taxation. In case of an additional tax assessment the tax administration has to prove that the taxpayer has provided incorrect/false information (or omitted or failed to provide information that he is obliged to provide). Accordingly, during the tax procedure with regard to the additional tax assessment the tax administration bears the burden of proof for both the income- and the cost-side. The purpose of this rule is to provide legal certainty/security when a tax decision is made after the ordinary period of time has lapsed.

Question: In your country, do different rules of burden of proof apply depending on the period of time in which the decision on the tax dispute is being made? Where does the burden of proof lie where a tax penalty is being imposed?

JB
As mentioned above has the tax administration the burden of proof concerning the income-side and the taxpayer has the burden of proof concerning the cost-side. The ordinary tax period normally last to 1 May in the fourth year after the end of the relevant income year, cf. ATA, sec. 26. But if the tax administration wants to suggest changes for personal taxpayer with simple economical conditions this has to be done before the 1 July in the second calendar year after the end of the relevant income year, cf. Ministerial Order no. 1095 of 15 November 2005. After that period the tax administration can only suggest a tax reduction of the tax assessment.

After the ordinary tax period the tax decision can only be changed in accordance with the special rules of extraordinary assessment. One situation where the tax decision can be changed is if the taxpayer or someone on behalf of the taxpayer deliberately or with gross negligence has caused the tax administration to make an assessment on a false or incomplete foundation, cf. ATA, sec. 27 (1) (5).

The tax authority has to prove that the taxpayer has been responsible for this incorrect foundation and consequently the burden of proof for both the income and for expenses or lack of deductable expenses rests on the tax administration.

If the false or incorrect information might resolute in a tax penalty or other criminal consequences, it is a general principal that the burden of proof rests on the prosecutor.

3. Burden of proof regarding discretionary decisions on tax issues or regarding estimated assessments

In Sweden, tax assessments may be made by discretionary decisions or by estimates, in situations where the taxpayer has failed to fulfil his bookkeeping obligations. In such cases the tax administration has to show that its estimate was "probable". If the estimated assessment is probable, then the burden of proof shifts to the taxpayer and he has to provide evidence that the estimate is incorrect.

Question: How is the burden of proof allocated in discretionary decisions on tax assessments or for estimates in your country? Is the burden of proof different if a tax penalty within such a tax assessment is being imposed?

JB
If the taxpayer has failed to file his or her tax return, the tax administration will make a tax assessment by a discretionary decision or by estimates, cf. the Danish Tax Control Act, sec. 5. In this case, the burden of proof to document the probability of the estimate rests on the tax administration. If the tax administration has documented the tax assessment is factual and reasonable the burden of proof shifts and the taxpayer has to prove that the estimate is incorrect. Normally the burden of proof is stronger when there is a tax penalty, but if the taxpayer hasn't made a tax return, the burden can't be that strong because the tax administration has to make some estimate

4. Variations in burden of proof with respect to tax havens, etc.

As follows from the general rule in Sweden, each party must prove whatever is easiest for that party. In practice, when it is difficult for the tax administration to obtain the relevant information, for example with respect to tax havens, etc., the burden of proof is shifted to the taxpayer. In such cases, the burden of proof lies on the taxpayer for both income and costs.

Question: How is the burden of proof allocated where a tax case contains information that is difficult or impossible for the tax administration to investigate (e.g. where a tax haven is involved)?

JGN
In Denmark, it is also a basic principle in connection with the allocation of burden of proof that it is for the party who has the easiest access to information about a particular fact to prove the fact. Consequently, if the courts or tribunals assess that it is difficult or impossible for the tax administration to prove certain tax-related facts in connection with e.g. tax havens the burden of proof can be allocated to the taxpayer who has easier access to the information. As the inquisitorial procedure principle requires the tax administration to procure information and

evidence relevant to the case, there will always rest a certain obligation on the tax administration to do its best in this respect. At first hand the tax administration must for instance render probable the existence of a tax relevant disposition by the taxpayer to, from or between companies situated in tax havens after which it befalls the taxpayer to prove the tax administration wrong. This can be elaborated by stating, that the more difficult it is for the tax administration to substantiate its claim while the taxpayer has access to the relevant documentation, the easier the burden of proof shifts to the tax payer.

Moreover, it is quite common that tax related dispositions between a taxpayer or e.g. companies controlled by the taxpayer on the one hand and tax entities resident in tax havens on the other can be characterized as dispositions between associated parties. If this is the case, there is a presumption that the taxpayer has to prove the true commercial nature of the dispositions or that the dispositions have taken place at all.

> *SKM 2005.252 Ø* illustrates the burden of proof in a case involving associated parties and companies in tax havens. In this case, company A had paid 1, 5 million DKKR to other companies as administration remuneration. The Danish High Court established that as a main rule the burden of proof concerning the deductibility of the administration remuneration rested on company A. Moreover, the burden of proof intensified, because the administration remuneration was transferred between associated parties. With reference to the production of evidence, the Danish High Court established, that the administration remuneration was only paid for the benefit of the majority shareholder who owned company A and not to the benefit of company A's operational interests. As a consequence, company A could not deduct the administration remuneration pursuant to the Danish State Tax Act, sec. 6.

It is important to note, that the mere involvement of a tax entity residing in a tax haven does not in it self imply that the burden of proof shifts from the tax administration to the taxpayer. Circumstances in these cases – such as associated companies and controlling shareholders and strong intentions of tax reduction – often lead to the burden of proof resting with the taxpayer.

In recent times, Denmark has come to agreement concerning exchange of information on tax matters with a number of states en regions some of which have been considered tax havens.[11] These information agreements improves the tax administrations possibility of procuring information of relevance to tax cases involving cross border activity to tax havens which may influence the burden of proof in cases including the states in mention.

5. Level of the burden of proof

In Sweden, as mentioned above, the general rule within the ordinary time period for taxation is that the tax administration bears the burden of proof for income and the taxpayer for costs.

[11] E.g. Agreement of 12 January 2010 between the Government of the Kingdom of Denmark and the Government of the Republic of San Marino on Tax Matters.

The general rule regarding evidentiary requirements is that each party has to demonstrate that the income/cost is "probable"/"plausible".

Question: Does your country have a general rule regarding evidentiary requirements? If so, what are the requirements (level of proof)? Is it based on the law or on practice? Do different rules apply to the tax administration, the tax courts and the criminal courts? And are there situations in which the burden of proof is aggravated, for instance when the taxpayer has not fulfilled his bookkeeping obligations?

JGN

According to Danish legal theory the question concerning level of burden of proof in general and in tax law cases specifically cannot be answered unambiguously and no general rule on onus of proof exists in Denmark. The general view of the level of burden of proof is, that numerous and different factors may have an effect on the severity of the burden of proof in any given tax dispute depending on the concrete case. If the parties of a tax case agree with each other about a tax related fact in a case, the courts do not need any further evidence concerning this fact due to the negotiation principle.[12] It is when a party contests a fact that supports the opposite party's a claim that the question about level of onus of proof arises, and in these instances tribunals or courts are obliged to choose a perception of the disputed fact on which to base the decision. Observed and verifiable facts and uncontested facts can normally be applied as is. When it comes to a fact in dispute e.g. the followings factors may play a role based on case law:

- An intuitive assessment of the level of probability in favour of or against a given perception of a disputed fact
- General experience in connection with the given forms of facts or dispositions
- The level of conviction which the evidence concerning a disputed fact supports
- The reliability of parties and/or witnesses
- The general pattern of reaction or mercantile customs related to a disputed fact or disposition (how would a persons generally react or understand a given situation)

Technical evidence or verifiable documents provide a high level of probability and generally weighs heavily in favour of a party whose claim is supported by this form of evidence. The importance of a piece of evidence consists of the probability of accuracy related to a piece of information which is the product of evidence procurement.[13] Consequently, it is not possible to indicate in general the required or necessary level of onus of proof in Danish civil cases according to Danish legal discourse.

I criminal cases conviction requires proof that leaves no reasonable doubt about a charged person's guilt. In comparison, the mere higher level of probability of a piece of evidence concerning a disputed fact may in some civil cases suffice for the court or tribunal to consider

[12] Cf. *Bernhard Gomard & Michael Kistrup*: Civilprocessen, 6. ed., (2007), p. 558 and 560. Naturally, this does not apply to criminal cases.
[13] Cf. *Bernhard Gomard & Michael Kistrup*: Civilprocessen, 6. ed., (2007), p. 567.

the fact proven. I general, however, it is assumed that a reasonable high degree of probability is required to support a clam in a legal court proceeding or a complaint case at a tribunal.

When the allocation of burden of proof is expressly stipulated in a tax law provision, the consequence is often stricter requirements to the level of probability supported by the relevant piece of evidence. Furthermore, the considerations that lie behind the provision are taken in account as described in the provision's preparatory work.

In Denmark, a party's possibility of ensuring evidence also influences the assessment of such evidence which is furthermore emphasized if the party would normally or customary be expected to ensure evidence in a given situation.

These numerous and sometimes vague factors all have to be taken into consideration by the courts or tribunals when deciding the level of evidence required to support a claim, allegation or submission. As mentioned above regarding the income-side, the initial burden of proof concerning income rests on the tax administration that is charged with proving the existence of an income and that the income in mention can be attributed to a taxpayer, cf. the Danish State Tax Act, sec. 4, which also complies with starting point in Danish legal discourse according to which the party who claims that a legal obligation exists has to prove this.[14] As a main rule, the tax administration has to prove the income side to a relatively high level of probability including actual documentation that can be verified. In cases concerning income fixation the evidence is of a more circumstantial nature why the tax administration is allowed to procure evidence by indirect means e.g. by proving that a company has benefitted from a to low interest rate or below market rent payments and that the value of this benefit has to be taxed. The abovementioned access for the tax administration to estimate a taxpayer's tax assessment in lack of an income tax return, cf. the Danish Tax Control Act, sec. 5 (3), does in practice require that the estimate is substantiated on facts to as great an extent as possible. For instance, the number of pizza boxes that a pizzeria has bought and which are no longer in stock at the pizzeria may indirectly be used as evidence for the tax administration's income estimate concerning the pizzeria's turnover.

When it comes to expenses, the burden of proof normally rests with the taxpayer, who claims to have the right to deduct the expense, but the level of proof concerning expenses varies. There is e.g. a presumption that the employer covers necessary costs in connection with an employee's work why the burden of proof for an employed salary earner concerning costs in connection with his or her position is intensified. On the other hand, a business owner is expected to pay expenses related to his or her business why the burden of proof concerning these expenses is less intense the rationale being that a business owner also has to accept the risk of losses pertaining to the business operation.

[14] *Bernhard Gomard & Michael Kistrup*: Civilprocessen, 6. ed., (2007), p. 577.

In legal court proceeding and compliant cases, a taxpayer not procuring documentation which he or she could have supplied the court of tribunal with can be deemed to be in favour of the opposite party, cf. AJA, sec. 344 (3).[15]

6. Evidentiary requirements in discretionary/estimated tax assessments

See question no. 4 above on the burden of proof in discretionary/estimated tax assessments. The tax administration has to show that its estimate is "probable". If the discretionary tax assessment is combined with a tax penalty, which is often the case, the tax administration also has to show that the tax penalty is "probable". The tax penalty in such cases so to speak follows automatically upon the discretionary tax assessment.

If the tax assessment is made according to the rules on additional taxation (two years after the tax year) the tax administration has to "prove" that the information is false/incorrect.

Question: What are the evidentiary requirements (level of proof) for discretionary/estimated tax assessments? Are the evidentiary requirements the same for tax penalties in such cases? Are the evidentiary requirements different if the tax assessments are being made according to the rules for additional tax assessments (i.e. do such rules exist in your country)?

JB
As mentioned above do the tax administration has to show that its estimate is probable. The tax penalty follows automatically upon the discretionary tax assessment.

7. Evidentiary requirements depending on exchange of information, tax havens, etc.

From question no. 4 above it follows that if it is difficult or impossible for the tax administration to investigate situations having to do with tax havens, the burden of proof may shift. More and more countries have entered into information exchange agreements with tax havens which could affect the burden and level of proof.

Question: Are the evidentiary requirements affected by the possibility for the tax administration to investigate circumstances in a case e.g. by means of exchange of information with a country involved?

JGN
In recent years, the international effort to counteract harmful tax practice e.g. by means of improving information exchange has also had an effect on Denmark's international relations. On basis of the principles in the OECD standard agreement on information exchange from 2002 as revised in 2005, Denmark has signed information exchange agreements with a number of non-member states including Isle of Man, Guernsey, Jersey, Bermuda, British Virgin Islands, Cayman Islands, Aruba and The Netherlands Antilles. Furthermore,

[15] The principle in this provision also applies in complaints cases, but the tax administration is always obliged to do its best to procure necessary information due to the inquisitorial procedure principle.

agreements with Belgium, Luxembourg, Austria, Switzerland and Singapore have been amended to ensure that information exchange includes bank information.

As mentioned above the agreements on exchange of information have an induced effect on burden of proof in tax cases in which such agreements are relevant the reason being that the Danish tax administration is obliged to procure any information relevant to the case according to the principle of inquisitorial procedure. This is the case in both legal court proceedings and in administrative complaints cases. If the agreement does not supply the tax administration with effective means of procuring information and the taxpayer furthermore is found to have easier access the relevant documentation of other evidence the burden of proof often shifts to the taxpayer. This tendency to place the burden of proof with the taxpayer in cases including tax havens is increased if dispositions between associated tax entities are involved.

8. Different evidentiary requirements for different types of taxes

In Sweden, in certain cases, the evidentiary requirements seem to differ for different types of taxes in the same case. For example, for false invoices of subcontractors, different types of taxes are involved: income tax, VAT and social security fees. In Sweden, it seems as though different evidentiary requirements are applicable for these different types of taxes.

Question: Are different evidentiary requirements applicable in your country for different types of taxes?

JB
There might be a difference between the evidentiary requirements to different types of taxes in Denmark. It is only natural that there are such differences, because some of the taxes are based on EU regulations while some of the taxes are related only by the Danish Government.

VAT and some other type of duties are regulated by EU law and these regulations determine how the burden of proof has to be carrying out. This should be consistent in all EC and the tax administration or the court has to follow these rules of proof. Apparently there is some problem with some of the custom law, where the national regulation is requiring stronger evidence than according to the EC regulation.

9. General rule on evaluation of evidence and the limitations to such a rule

In Sweden there exists the principle of a free assessment of evidence. A consequence of this is that the evidence in a case is also freely evaluated by the tax administration and ultimately by the tax court. The principle of the free assessment and evaluation of evidence in tax matters is statutory.

Question: Is the evaluation of evidence free or is it in any way limited? Is it statutory or is it based on practice?

JB
In Denmark there exists the principle of a free assessment of evidence, but at the same time the tax administration has an obligation to try to make the right tax assessment. This obligation means that if it is possible to obtain information to make the right decision the tax administration has to provide some effort to get this. Of course the tax administration hasn't got unlimited resources to pursue the information and will often rely on information given by the taxpayer, but if the administration somehow gets other information from elsewhere it is obliged to use it.

If and when the tax case is brought to court it is not the court obligation to make a correct tax assessment. The court has to make a decision on how a rule has to be interpreted and whether or not there are proofs of the income or expenses. This means that the litigants in the case has to provide the evidence for the court and the court will rule on this evidence and not collect further evidence.

Part B: Burden of Proof in Anti-Abuse Provisions

10. General anti-abuse provision

Question: Is there a general anti-abuse provision in your (procedural) tax law and which party bears the burden of proof under this provision?

Please illustrate the actual way this provision is given form: what does it provide for and to what extent is the term "anti-abuse" specified? In case there is no such provision in your national tax law, is reference made to anti-abuse provisions in other fields of law? An example of an anti-abuse provision or principle that originates from civil law is the principle of good faith (principle of abuse of law). Please explain as well the actual way the burden of proof is given form. Some jurisdictions have established a two-step mechanism, e.g. Germany in Sec. 42 General Tax Code: It is up to the tax authority to provide probable cause - it has to be substantiated that the taxpayer's legal arrangement is inappropriate. The taxpayer has then subsequently to give proof to the contrary, i.e. to substantiate that the rationale for his arrangement is not tax related but e.g. based on economic reasons.

JB
In Denmark there is no general anti-abuse provision. Many abuse situations can be dealt with according to the general tax rule in the Danish State Tax Act sec. 4. Gifts and other economical benefits are taxable under the same provisions as other kinds of income. The gifts etc. can both be a formally gift, but can also be considered as such if a transfer of an asset hasn't been paid in full. If there is a transfer of assets between parties with joint interests, and the prices doesn't match market prizes, the parties have to proof that the deviation from the market prizes is based on business considerations. There is often no room for business talent in these transfers.

For some groups of parties with joint interest there is a general rule in the Danish Tax Assessment Act sec.2. According to this rule these parties can only make transactions at arm's

length. If the arrangement is not at arm's length there will be taxation according to the arms length of the arrangement. Those who are subject of the taxation in the Danish Tax Assessment Act sec. 2 are related companies and companies with their principal shareholders. The tax authority has to prove that the prizes and terms differ from market prize, but then the taxpayer has the burden of proof as to whether this difference has a special reason for business purposes.

11. Alternative or supplementary approaches

Question: Are there any other (alternative or supplementary) approaches established in practice or by case-law in this regard and do these comply with the general principle of the division of burden of proof in your country?

Examples of such other ways may be the economic approach, the look-through approach or substance over form approach, all of which deal with the relation between legal form and economic substance. E.g. in Sweden, an anti-abuse provision is part of Swedish tax law, but a look-through approach established in practice is applied in this regard as well. If your jurisdiction recognizes both anti-abuse provisions and other approaches, is there a priority in application? With regard to the division of burden of proof, are there any deviations from the general principle recognized in many jurisdictions that each party has to prove the facts that are advantageous for them?

JB
The Danish courts in general use a realistic way of interpretation. This means that the court when it interprets a rule it consider what really had happened. The courts rules on the substance and not on the form the arrangement has taken.

There is great discussion as to what extent this substance over form can go. Professor Jan Pedersen has in his doctorial thesis stated that in Denmark, there is a Principle of Reality "realitetsgrundsætning", which the courts use when ruling in a tax case. According to this principle the arrangement will be set aside if consists of empty and artificial transaction for tax purposes. The taxation will then be in accordance with the true economic substance. This principle is an unwritten anti-abuse rule. The tax authority has to prove that an atypical transaction has taken place instead of a more usual transaction, and give probable reason that this abnormal transaction has taken place to save the taxpayer for tax. Then the taxpayer has to prove that there is a good economical reason for the atypical transaction. There is dispute to whether or not this principle is being used by the courts, and after the latest Supreme Court decision in TfS 2006, 1062 HD, it is clear that the principle, at least doesn't apply in cases where the arrangements is according to written civil law.

Besides this Principle of Reality there is another principle relevant for tax issues. This principle is also highly controversial. It is the Theory of the Tree and the Fruits, which in Denmark have been launched by Professor Aage Michelsen. According to this theory the person to be taxed of an income, should be the person who has the right to the income, and if a person who has the right to the income gives this income to another person, the given person

will not be relieved of the taxation. A consequence of this rule is that a person should be taxed of a fixed income, when the person has renounced the income for the beneficial of another. In this case the tax authority has to prove that a person has the right to an income and give some indications that the reason for the renunciation is the joint interest. The taxpayer then has to prove that there is a good economical reason for the arrangement. The Theory of the Tree and the Fruits has been rejected by the Supreme Court in a case about taxation of a fixated interest, but has been accepted by the Supreme Court in cases concerning taxation of fixated rent.

12. Special anti-abuse provisions

Question: Are there special anti-abuse provisions dealing with the burden of proof in particular tax law areas and what exact requirements does the taxpayer have to fulfill? Is the required level of proof higher compared to the general provision or principle?

Typically, special anti-abuse provisions can be found in the context of cross-border situations/international transactions. If such provisions exist in your jurisdiction, have there been any reasons given by the legislator for dealing differently with these situations, e.g. that the ex officio discovery of the facts is particularly difficult for the tax authorities and so the burden may be shifted due to the fact that the disclosure of facts is more within the sphere of the taxpayer than within the sphere of the tax authority? Please elaborate on whether there are, according to that reasoning, some provisions in which a situation is deemed to be abusive unless proven otherwise by the taxpayer.

Usually, special anti-abuse provisions also set special requirements which may include the disclosure of certain documents, proof of the appropriateness of certain legal arrangements, the compatibility of intra-group transfer prices with the arm's length principle, etc. Are there any provisions that set the requirements or the level of proof so high that producing proof to the contrary is virtually impossible?

JB
Pursuant to the Danish Tax Control Act sec. 3 there is an obligation for related parties to give information and keep documentations for transactions between controlled parties. This rule should originally only apply to cross-border ownerships, but it was questioned whether there could be an EC conflict, and the rule therefore in 2005 was extended to apply also to pure national ownerships.

Because of the burden of this documentations claim this rule only applies for controlled companies who employ more than 250 people and has a total balance on more than 125 million DKKR or an annual turnover of more than 250 million DKKR. If these terms are not met, the documentations claims apply only if the companies are resident in a foreign country, which has no double taxation convention with Denmark and at the same time is not a member of the EU or EØS.

This documentation rule is closely linked to the rule in the Danish Tax Assessment Act sec. 2, where the same group of related persons has to be at arm's length in all arrangement between them, and according to this rule in sec. 3 B of the Danish Tax Control Act they also has the burden of the documentation for the arm's length. The taxpayers has the burden of proof and documentation for the transactions between the related parties, but it is the tax authorities who has the burden of proof of whether or not these transactions are within arm's length or not.

13. Competent authority

Question: Which body (tax authority, independent institution or tax court) may decide if the required level of proof is met? Are there different levels of proof that e.g. the tax authority or the taxpayer have to fulfill?

In some jurisdictions, the decision whether the required level of proof is met will be - at first instance - up to the tax authority. In France, however, an independent institution (consultative committee, comité consultative pour le repression des abus de droit) decides whether certain arrangements have to be considered abusive. In other jurisdictions, for instance in Sweden, it is only up to the court to decide whether the required level of proof is met. With regard to the level of proof imposed on the tax authority, there might be deviations from the requirements set on taxpayers. Different levels of the burden of proof may be imposed, for instance, on the parties by means of the economic substance test (proof that a legal arrangement was made not only for tax-related reasons): while the tax authorities may only be required to show probable cause, the taxpayer may be required to prove both economic profit potential and a subjective business purpose.

JB
In Denmark it is the normal court that has to decide whether or not the required level of proof is met, and it is difficult to say whether there is a different level for the required proof for the taxpayer or the tax authority. There is neither no evidence that the court changes the level of proof as to whether the tax payer are using the rule contrary to the intension of the law.

In one situation the court refrain from changing the tax authority's decision. This is the case, if the decision involves an estimate over a value. If the tax authorities have to make an estimate of a value in according med the law, the court will be reluctant to change the tax authority's decision.

14. Judicial review

Question: Is the decision of the above authority or body subject to a full (or a partial) judicial review and are there different levels of burden of proof in the different stages of the judicial proceedings?

Please explain the extent to which the decision of the body that is in charge of deciding whether the required level of proof has been met is binding. In case the decision is subject to a judicial review, is the court bound to a certain extent by the prior decision (e.g. that the

decision will only undergo a plausibility check)? With regard to the different stages of judicial proceedings, it should be elaborated on, for instance, whether the tax authority may impose a different level of burden of proof on the taxpayer than a tax court does. May the taxpayer be obliged to present clear and convincing evidence in tax authority proceedings, while a preponderance of the evidence is a sufficient standard before tax courts?

JB
In theory there should be a difference in the level of proof as to whether the decision is made by the tax authorities or by the courts. When a decision has to be made by public authorities they normally has to comply with the "officialmaximen" which is mentioned above and translated as the principle of inquisitorial procedure. This "officialmaximen" in taxation means that the tax authorities' main goal is to make a correct decision and therefore they are also obliged to make some effort to get the right information to make the correct decision. When and if the case comes to court the case is no longer under the "officialmaximen" but is now treated in accordance with the "forhandlingsmaximen". The "forhandlingsmaximen" means that the parties at court decide what question the court has to decide on, what evidence the court has to take into consideration etc. If the parties haven't produced evidence, the court has to make at decision without this evidence

The use of the "officialmaximen" and the "forhandlingsmaximen" could make a difference in the outcome of a case. An issue has to be dealt with in the administrative system before it can go to court. Then there could be a difference of the level of proof between the administrative system and the court system.

This is the theoretical approach. In practical there will seldom be a difference. The tax authorities haven't got the time and means to make sure all aspects are being presented. Some of the aspects it is naturally the taxpayer presents. One of the places where the difference comes forth is that the administrative courts can make a decision that is neither in accordance with the taxpayers claim nor with the tax-authorities. This is not possible for the court.

15. Case law

Question: Are there any court judgments in your jurisdiction concerning the burden of proof with regard to:

a) the situations in which (special) anti-abuse provisions may be applied to the taxpayer?

b) the requirements that may be imposed on the taxpayer?

c) the compatibility of burden-of-proof provisions in anti-abuse matters with your country's Constitution or EU law?

In the answer to these questions, the focus should be in particular on the limits set by the courts, e.g. that the application of certain provisions is within the discretion of the tax authority, but that tax officers, however, have to comply with the principles of proportionality

and reasonableness. A special point at issue may be the challenge of anti-abuse provisions (especially for general anti-abuse rules) on grounds of not complying with the principle of legal certainty or, on the other hand, the justification as the fulfilment of the constitutional duty to safeguard the principle of equality of tax burdens.

JB
As mentioned above there has been cases concerning Principle of Reality and the Theory of the tree and the fruits and taxation of fixated income. Sec. 3 B in was changed because we were afraid that it was in conflict with the EC, if it only should apply on foreign transactions.

In C-55/98 (Vestergaard) the EC-court found that the Danish practice on deduction of expenses for course participation was in conflict with art. 59 (now art. 56). According to the Danish practice there was a presumption that the expense was a private expense, if the course was held in a foreign country on a typical tourist place. In these cases the burden of proof was turned over to the taxpayer. The same presumption wasn't practiced with tourist places in Denmark where it was the tax authorities that has the burden of proof. After the EC-decision the tax authorities send an announcement stated that the differentiation between Denmark and other countries couldn't be upheld and in the future there should be an evaluation on each case, and the main interest would be on how the time and activities on the courses.

Part C: The burden of proof and European tax law

16. EC law and the reversal of the burden of proof

In the famous Leur-Bloem case (ECJ 17 July 1997, case C-28/95) the ECJ ruled as follows: "Article 11 of the Directive is to be interpreted as meaning that in determining whether the planned operation has as its principal objective or as one of its principal objectives tax evasion or tax avoidance, the competent national authorities must carry out a general examination of the operation in each particular case. Such an examination must be open to judicial review. Under Article 11(1)(a) of the Directive, the Member States may stipulate that the fact that the planned operation is not carried out for valid commercial reasons constitutes a presumption of tax evasion or tax avoidance. It is for the Member States, observing the principle of proportionality, to determine the internal procedures necessary for this purpose. However, the laying down of a general rule automatically excluding certain categories of operations from the tax advantage, on the basis of criteria such as those mentioned in the second answer under (a), whether or not there is actually tax evasion or tax avoidance, would go further than is necessary for preventing such tax evasion or such tax avoidance and would undermine the aim pursued by the Directive."

In general the outcome of this ruling can be described as follows:

1. Member States are not allowed to have provisions in their national tax laws that deem certain situations to have occurred primarily as the result of tax evasion or tax avoidance, while at the same time allowing the taxpayer to provide proof to the contrary. This reversal of the burden of proof to the detriment of the taxpayer violates EC law.
2. The tax administration must prove that the motive of a transaction is tax avoidance or tax evasion on a case-by-case basis.

Questions

1. Could you give an impression how the Leur-Bloem judgment was viewed in your country by lawyers, the judiciary and the government?

The Leur-Bloem case is acknowledged as e very central ECJ judgement in Danish legal discourse and this is accentuated by the judgement very often being cited in Danish complaint cases and legal proceedings.

JGN
According to Danish tax law reorganization of companies with deferred taxation covered by the Merger Directive has since 2007[16] been possible without specific approval by the tax administration if certain conditions are met. The reason for the relatively new Danish possibility for reorganization of companies with deferred taxation without approval is derived from the Merger Directive (MTA) art. 11 (1) (a). However, it is still a characteristic of the Danish tax treatment of divisions, transfer of assets and exchange of shares, that the approval requirement does in fact constitute the original and present Danish implementation of the Merger Directive art. 11. This has led to discussion in Danish legal discourse since it is a consequence of the Danish tax treatment that *some* divisions, transfer of assets and exchange of shares are allowed without approval from the tax administration while *others* require prior approval to ensure deferred taxation.[17] The central issue of the criticism concerning the Danish requirement of approval and the stipulated conditions which have to be met to achieve reorganization without approval is primarily based on two elements: Firstly, does the Merger Directive in fact allow a member state to set up a requirement a prior approval to obtain the rights stipulated in directive? Secondly, it was in connection with tax treatment of *divisions, transfer of assets and exchange of shares* a condition for division of companies with deferred taxation pursuant to the Danish MTA sec. 15 a (1)[18] that the involved companies do not sell shares of the concerned companies within 3 years of the division. The compliance of this requirement with the Merger Directive is considered questionable.[19]

The Leur-Bloem case led to amendment of the Danish Merger Taxation Act by statute no 166 of 24 March 1999. This amendment ensured that decisions of the Danish tax administration concerning reorganization taxation covered by the Merger Directive can be appealed to the Danish National Tax Tribunal.[20]

The outcome of the ECJ ruling in the Leur-Bloem case plays an important role in Denmark when it is necessary to determine the limits set by the anti-avoidance provision in the Merger Directive art. 11. Assessing whether the tax avoidance or tax evasion is the main purpose or on of the main purposes of the reorganization has to be done individually in each case. It is assumed that the reorganization of companies may have tax deferral as an effect but not as a main purpose.[21] If reorganization of companies is not based on sound and businesslike

[16] Cf. Act No 343 of 18 April 2007 (Bill 110 A)
[17] Cf. *Jan Pedersen, Kurt Siggaard, Niels Winther-Sørensen, Jakob Bundgaard, Inge Langhave Jeppesen, Malene Kerzel og Susanne Pedersen*: Skatteretten 2, (2009), 5. ed., p. 533, *Erik Werlauff*: RR 1993, Issue 8, p. 44 ff., *Michael Serup*: RR 1994, Issue 4, p. 30 f. and *Hanne Østergaard*: TfS 1993, 536.
[18] Consolidated Act No 1286 of 8 November 2007 as ammended.
[19] By Statute No 512 of 12 June 2009.
[20] Judicial review applies to decisions of the Danish National Tax Tribunal.
[21] Cf. *Jan Pedersen, Kurt Siggaard, Niels Winther-Sørensen, Jakob Bundgaard, Inge Langhave Jeppesen, Malene Kerzel og Susanne Pedersen*: Skatteretten 2, (2009), 5. ed., p. 535 and *Michael Serup*: Fusionsskatteloven med kommentarer, (2008), 3. ed., p. 59 ff.

commercial considerations this may create a presumption for tax evasion or tax avoidance thus leading to a denial of approval by the tax administration. If the applicant cannot convince the tax administration of the sound commercial nature of reorganizing, the applicant has to file a complaint to the National Danish Tax Administration. In effect this means that the tax administration can set up a rebuttable presumption and if the taxpayer cannot refute this presumption of tax evasion or tax avoidance according to the tax administration, the taxpayer has to use his or her right of appeal. The presumption can be refuted by the taxpayer by e.g. documenting the purpose of the reorganization being:

- A realization of succession plans
- The wish to strengthen the foundation of business
- The intention of starting up new business activities
- To reorganize companies based on commercial considerations
- Rationalization
- To establish a merger-like cooperation between independent companies
- Matrimonial property considerations
- The existence of operational or cash flow related reasons, risk limitation or handling of cooperation related problems.

As a main rule – from a Danish point of view – reorganization of companies with tax deferral becomes problematic in view of the tax evasion or tax avoidance provision, if the restructuring is followed by sale or transfer of shares which is not taxed in accordance with normal share taxation principles or in case of infringement with other tax provisions.[22] Consequently, it is assumed that the complete operation in mention has to be primarily motivated by tax-related considerations in order for the tax administration to turn down an application for approval. Moreover, this leads to the conclusion that tax evasion or tax avoidance has to be the primary objective behind the reorganization for the tax avoidance provision in the Merger Directive to be relevant. In relation to the question of burden of proof in these cases it is assumed, that an ordinary assessment of evidence related to the operation is required to establish whether tax evasion is the main purpose.[23] The evidentiary procedure has to be based on recognition of the fact that the disposition may very well be soundly and commercially well-founded even though taxation would prevent the reorganization without approval for tax deferral according to the Merger Directive as implemented by the Danish Merger Taxation Act.[24] An account of the extensive and complex development concerning the interpretation and implementation of the Merger Directive art. 11 shall not be given here, but the present state of law in Denmark related to this question is still not quite clear.

In brief, case studies now show that the tax administration's interpretation of the Merger Directive is currently based on the following:

- It is not up to the taxpayer to prove that tax avoidance or tax evasion is not the primary purpose behind the reorganization.
- It is not necessarily up to the taxpayer to meet burdensome requirements of concrete documentation.

[22] Cf. *Michael Serup*: Fusionsskatteloven med kommentarer (2008), 3. ed., p. 89 and 135 ff.
[23] Ibidem, p. 90.
[24] The Danish Tax Ministry seems to acknowledge this interpretation of the Merger Directive art. 11 in a commentary to a court settlement at one of the two Danish High Courts (Vestre Landsret), cf. SKM 2007.807.

– The application does not necessarily need to document an actual need for reorganization.

In summary, the taxpayer has to present the relevant considerations in connection with the operation to the tax administration while the administration – in accordance with the inquisitorial procedure principle – may ask questions to the taxpayer who is required to answer these questions loyally. The consequence is that a presupposition of tax avoidance eo ipso requires a sure evidentiary foundation, and that the taxpayer and the tax administration in effect share the burden of proof – each pulling on different ends of the rope so to speak – to establish whether tax avoidance or tax evasion is the primary purpose of a given reorganization.

It is not quite sure according to Danish case practice whether the tax administration's requirement for concrete documentation of commercial and businesslike purpose of reorganization of companies is so strict that concrete and actual plans of action have to be presented or if a concrete presentation of business considerations suffices.[25]

2. Did the decision lead to any significant changes in legislation?

JGN
This has already been mentioned above.

3. Are there provisions in the national tax legislation that do not yet meet the standards in the Leur-Bloem judgment?

JGN
Some elements of the Danish tax legislation and practice concerning reorganization and the case law related to this legislation is disputed. The core elements of this discussion are mentioned above. In connection with exchange of shares before the Leur-Bloem decision, the Danish tax administration imposed a condition on taxpayers according to which shares could not be sold or transferred within a three year period after the exchange in order to obtain tax deferral (the holding-requirement). This practice was considered an infringement with the Leur-Bloem decision which stipulated that the overall circumstances in connection with the operation has to the subject of a concrete assessment in order to establish whether tax avoidance or tax evasion is the primary or one of the primary purposes of the operation.[26] Consequently, the standard condition was replaced by an obligation for the taxpayer to notify the tax administration about essential changes within three years after the exchange of shares concerning conditions of the approval of exchange of shares with tax deferral. The effect of this obligation to notify the tax administration is that ownership of shares or share related voting rights are not allowed to change for three years after the exchange of shares. Dispensations are extremely rare. Moreover, subsequent sale of exchanged shares without capital gains taxation within the three year period is not allowed.

The existence of this practice of mandatory notice could lead to the conclusion that a concrete assessment of the complete circumstances related to exchange of shares to uncover the importance of tax avoidance or tax evasion purposes does in fact not take place as required according to the Leur Bloum-decision.[27]

[25] Cf. *Michael Serup*: Fusionsskatteloven med kommentarer (2008), 3. ed., p. 108.
[26] Ibidem, p. 607.
[27] Cf. *Bent Ramskov*: Aktieombytning og uegentlig fusion (2004), p. 183 ff.

As mentioned below, the holding requirement is also enforced as regards divisions and transfer of assets.

17. Reversal of the burden of proof and time limits

Article 14, paragraph 4 of the Netherlands Corporate Income Tax Act 1969 contains a specific provision concerning the possible abuse of merger facilities with regard to an asset merger. It provides that if the shares in the receiving company that were received on the occasion of the transfer of the assets to the receiving company are being sold within three years after the merger, the merger facilities are retroactively withdrawn unless the taxpayer proves that the transaction was carried out for sound business reasons.

Question: Does the tax legislation of your country contain similar provisions and how do you assess such a provision in the light of EU (tax) law?

JGN
The abovementioned obligation to notify the tax administration about essential changes after an exchange of shares with deferred taxation resembles the art. 14, paragraph 4 of the Netherlands Corporate Income Tax Act 1969, and the condition is partly set in practice or expressly by the Danish MTA. Generally, a holding-requirement is enforced in Danish tax treatment of divisions, transfers of assets and exchange of shares illustrated in the following way:

Form of reorganization	With/without approval	Provision	Holding-requirement
Division	With approval	MTA sec. 15 a (1) – requirement set in practice as condition for tax deferral	Shares received as remuneration cannot be sold or transferred before three years after the date of division
	Without approval	MTA sec. 15 a (1) – condition expressly set in provision	Companies which owns more than 10 pct. of the shares in the relevant companies cannot sell or transfer its shares before three years after the date of division
Transfer of assets	With approval	MTA sec. 15 c (1) – requirement set in practice as condition for tax deferral	Transferring company must keep shares in receiving company for at least three years
	Without approval	MTA sec 15 c (1) – condition set expressly in provision	Transferring company cannot sell or transfer shares of receiving company before three years after the transfer of assets
Exchange of shares	With approval	Danish Share Taxation Act sec. 36 (1) – requirement set in practice as condition for tax deferral	Obligation to notify tax administration about essential changes for three years after the exchange. Includes notification about changes regarding ownership/voting right related to exchanged

			shares. Selling the shares within three years after the exchange will as a mail rule lead to taxation by cancelling the approval
	Without approval	Danish Share Taxation Act sec. 36 (6) – condition set expressly in provision	Receiving company cannot sell or transfer shares in acquired company before three years after the exchange of shares

There are exceptions from the holding-requirement either stipulated in the relevant provisions or implemented in practice.

18. Reversal of the burden of proof and transactions with non-domestic entities

Article 13b, paragraph 4 of the Netherlands Income Tax Act 1969 contains a specific provision to combat abuse of tax law where an intra-group loan is written down. It provides that if the loan that was written down for Netherlands tax purposes is sold to a company established outside the Netherlands or to a natural person resident outside the Netherlands, it is deemed to be a transaction with a foreign company belonging to the group or with a natural person having a substantial interest in the group, unless the taxpayer proves the contrary. The background of this provision is the situation that the written-down loan leaves the Netherlands tax jurisdiction even though it is not clear whether or not the loan was sold to an affiliated group company or a natural person. If the loan is sold to a third party, the writing down of the loan definitely ends up as a final tax loss that stays in the Netherlands. But if the loan stays 'within the group' the writing down of the loan is recaptured.

Question: Does your national tax legislation contain a more or less similar provision and what is your opinion of the provision in the light of EU law requirements?

JGN
Danish tax law does not operate with a provision similar to the Dutch provision on intra-group loans which are written down. However, the Danish Act on Taxation of Profit and Losses on Debt (TPLD)[28] includes another and general provision based on objective criteria which covers some of the same situation as the Dutch provision. Pursuant to sec. 4 (1) of the TPLD a *creditor's losses* on intra-group debt are not deductible.[29] Correspondingly, the *debtor's profit* on debt to intra-group companies is exempt from taxation, cf. TPLD sec. 8 (1). The debtor's exemption from taxation of profit does not apply in case of reduction of debt to a value lower than the value of the debt to the creditor at the time of the reduction. The exemption from taxation of the debtor's profit on intra-group debt also applies to cross border intra-group relations on the following conditions: The foreign intra-group creditor company cannot deduct losses on the debt to the Danish intra-group debtor company pursuant to TPLD sec. 4 (1)

[28] In Danish: Kursgevinstloven, Consolidated Act no 1002, 26 October 2009 as amended.
[29] This provision does not apply to losses on debtor's debt acquired as tax liable remuneration for delivered goods and services, if it is established, that the corresponding profit on creditor's debt is liable to tax, cf. TPLD sec. 4 (3). Furthermore, stock regulated bonds, interest claims, and losses in connection with debt and claims trade are not covered of the provision.

under the assumption that the foreign intra-group creditor company were fully tax liable to Denmark, and it is established or proven, that losses of the relevant nature are not deductable.

Furthermore, a person's losses as a creditor on debt to (former) controlled companies are not deductible if the conditions in TPLD sec. 14 (2) are met.

If interest or profit related to debt is not taxable due to a DTC the corresponding tax deductibility is generally denied pursuant to TPLD sec. 18. Specific regulation applies to composition scheme enforced by a majority of the creditors, cf. TPLD sec. 24.

19. Donations to foreign charitable institutions and the burden of proof

In the Persche case (ECJ 27 January 2009, case C-318/07) the ECJ ruled as follows: "Article 56 EC precludes legislation of a Member State by virtue of which, as regards gifts made to bodies recognised as having charitable status, the benefit of a deduction for tax purposes is allowed only in respect of gifts made to bodies established in that Member State, without any possibility for the taxpayer to show that a gift made to a body established in another Member State satisfies the requirements imposed by that legislation for the grant of such a benefit."

The deductibility of donations (in money or in kind) to foreign charitable institutions is a highly debated topic in the light of EU developments (Community law). In this respect the issue of the burden of proof is very relevant as taxpayers often have limited possibilities to prove that the foreign institution is involved in charitable activities while the Member State is far better equipped to investigate the contested activities.

Question: How do you view the taxpayer's obligation to provide the requested proof (as held by the ECJ) and when does a reasonable division of the burden proof evolve into a situation in which, after the taxpayer provides the initial proof, the burden shifts to the tax administration to prove the nature of the activities of the foreign charitable institution?

JGN
In Denmark, the Stauffer-case (ECJ C-386/04) led to the introduction of Bill 31 B 2007/2008 which was passed as Statute no 335 of 7 May 2007 concerning EU-related adjustments to the Danish tax legislation. One of the elements of the statute was an amendment to the Danish Tax Assessment Act sec. 8 A and sec. 12 concerning deductible contributions to bodies with a charitable status. Pursuant to the Danish Tax Assessment Act sec. 8 A (1), donations are deductible, if it is established, that the donation in mention is given to an organization, foundation or institution etc the funds of which are spent on charity in favour of a larger number of people.[30] Moreover, the deductibility of the donation is conditioned by the institution etc notifying the tax administration in accordance with the Danish Tax Control Act sec. 8 *Æ* (3).

Furthermore, the following conditions have to be met according to the Danish Tax Assessment Act sec. 8 A to obtain deductibility:

- The institution or religious society etc has to be approved in Denmark or in another EU/EEA member state of residence.

[30] The deductible donation is maximized to DKK 14.500 (2010) per income year.

- According to the institution's regulations, the objective of the institution etc has to be to support charity, which means that the funds have to be allocated in favour of a larger number of persons, 1) who are in financial need or experience financial difficulties, 2) or to a purpose which in view of the general public can be characterized as charitable and in favour of a larger number of persons, or 3) to a religious community, cf. the Danish Tax Assessment Act. Sec. 8 A (2).
- Moreover, the institution's regulation must contain a provision, according to which an eventual liquidation profit etc has to be allotted to another charitable institution.

Sec. 12 (3) concerns continuous contribution to bodies of charity and contains the same conditions as sec. 8 A. It is, however, stipulated in the provision, that the funds of the charitable institutions etc may only be allotted to humanitarian purposes, to research, to the protection of environment or to a religious society.

In Ministerial Order no 837 of 6 August 2008 these conditions are specified further by setting up the following conditions.

- The charitable institution's funds have to be allocated to a number of persons, who are not geographically or in any other way limited to a catchment population of less than 40,000.
- The number of donators in the EU/EEA in average surpasses 100 each year in a three year period.
- The yearly gross income or capital of the charitable institution etc surpasses DKK 150,000.

Moreover, societies, which constitute independent legal bodies, have to meet the following conditions:

- The organization's board of directors cannot be primarily self supplementary.
- The number of contingency paying members in the EU/EEA surpasses 300.
- The organization cannot be member of an already approved main organization unless the applying organization is a nation-wide organization.

The ministerial order also outlines the documentation which has to enclosed an application for approval according to the Danish Tax Assessment Act sec. 8 A and sec. 12 (3). Besides enclosing the regulation and accounts of the organization it has to be rendered probable or documented that the number of donators surpasses 100 in a three year period.

Approved charitable organizations are obliged to supply the Danish tax administration with information each year pursuant to the ministerial order sec. 8 (2) (3).

It is no simple matter for a charitable institution etc in another EU/EEA member state to meet the conditions according to Danish tax legislation. The criteria are, however, primarily objective except from the possible probability evaluation concerning the number of donators in a three year period.

20. The burden of proof and proportionality

In the recent SGI-case (ECJ 21 January 2010, case C-311/08) the ECJ ruled on profit corrections regarding transactions between related companies in a cross-border situation. The

contested transactions implied the provision of a loan without taking any interest into consideration and the payment of excessive management remunerations.
The Court held that it was proportional that the initial burden of proof, to demonstrate, on the basis of objective and verifiable elements, that the transaction, or elements of the transaction, represent an artificial arrangement lies with the tax administration.
The taxpayer is then to be given the opportunity, without being subject to undue administrative constraints, to provide evidence of any commercial justification that may have existed for that transaction. See also, paragraph 82 Thin Cap GLO (C-524/04) and paragraph 84 CFC and Dividend GLO (C-201/05). In the case at hand the taxpayer had a period of one month, which could be extended, within which to establish that no unusual or gratuitous advantage is involved. This seems to be reasonable.
This approach seems to be in line with Commission Paper COM(2007) 785 final concerning anti-abuse regulations in the field of direct taxes – application in the EU and with regard to third countries, page 5.

Question:
To what extent is the direct tax legislation and case law in your country in line with the above-mentioned standards set by the ECJ?

JB
Yes, Danish tax law complies with this standard as mentioned above in connection with tax abuse bases and the Danish Tax Assessment Act. Sec. 2 concerning transfer pricing. The initial burden of proof concerning the existence of an artificial tax arrangement rests with the tax administration. If the tax administration renders probable the existence of an artificial tax arrangement, the taxpayer may try to establish the businesslike nature of the arrangement.

Part D: Burden of Proof in Cross-Border Situations (International Tax Law)

Transfer Pricing Aspects

21. The burden of proof between tax authorities and taxpayers

In some countries, the burden of proof may be reversed if the taxpayer is found not to have acted in good faith, for example, by not cooperating or complying with reasonable documentation requests or by filing false or misleading returns. In other countries, the burden of proof lies only with the taxpayer.
In **Italy** tax assessments must be properly motivated and the burden of proof is with the tax authorities (Art. 2967 Civil Code, which also regulates the burden of proof in the case of tax assessments).
The application of this principle to transfer pricing means that the burden of proof that the intercompany pricing is not at arm's length lies with the tax administration. However - upon the notification of a tax assessment providing evidence that costs have not been incurred by the taxpayer - the burden of proof shifts to the taxpayer, while the tax administration must provide reasons supporting the assessment of an increase in taxable income.
Local tax offices tend to be very aggressive in challenging the deductibility of costs for centralized services charged by non-resident companies to their Italian permanent establishment or to their resident associated company. Tax assessments are usually based on the view that such expenses are not inherent to the business activity carried on in Italy, which implies the lack of any benefit to the taxpayer.

Question: Who bears the burden, the tax administration or the taxpayer, of proving that transfer pricing operations are at arm's length?

JB
It is the taxpayer that has the burden of proof as to the pricing of the operation but it is the tax authorities that have the burden of proof as to whether this price is according to arm's length. It is naturally that the taxpayer has to prove the price because the taxpayer has easier access to this proof. If the taxpayer doesn't provide this proof it can damage the taxpayer in the trial.

The burden of proof as to whether the price is according to arm's length lies with the tax authorities which also has to prove that the taxpayer has to be dealt with according to § 2 in the Assessment Act.

22. Set of documents

In recent years, OECD member countries and EU Member States have been adopting transfer pricing documentation rules.
The OECD Guidelines are based on the prudent business management principle, which means that the need for information should be balanced against the costs and the burden that the taxpayer will bear in preparing or obtaining such documentation. The OECD Guidelines stress that the tax authorities should take great care that the imposition of documentation requirements will not impose disproportionately high costs and administrative burdens on MNEs (multinational enterprises), which will have to obtain documentation from foreign associated enterprises. The tax authorities should also refrain from requiring taxpayers to engage in an exhaustive search for comparable data from uncontrolled transactions if the taxpayer reasonably believes that no comparable data can be found or the efforts to find these data would be disproportionately high in relation to the amounts at issue.
The main goal of the European Union Transfer Pricing Documentation (EU TDP) is to maintain a balance between, on the one hand, the right of the tax authorities to obtain the necessary information from taxpayers in order to assess whether transfer pricing is at arm's length and, on the other hand, the compliance costs MNEs incur from complying with the rules. The key reason for implementing the EU TPD was to significantly reduce the tax compliance burden and complications that companies have to face when doing business with associated enterprises in other EU Member States.
Italian tax law does not include any formal provisions regarding transfer pricing documentation. There is no rule that requires Italian companies to prepare contemporaneous documentation describing and supporting the transfer pricing policies that have been adopted by the corporate group and the group's intercompany transactions. Nevertheless, under Article 32 of Presidential Decree 600 of 20 September 1973, the Italian tax authorities may require taxpayers to produce documents concerning the assessment to which they are subject. This means that Italian companies must compile documents such as:

- the group's legal structure;
- a description of any existing transfer pricing guidelines or policies within the group;
- a benchmarking analysis possibly used by the parties to determine the fair market price, rate or consideration;
- intercompany agreements signed by parties; and
- all documents proving that any inter-company services have been actually rendered to the Italian company and the benefit derived by the Italian company from such services.

Question: Is there a statutory requirement in the national tax legislation to prepare documentation proving the arm's length value in the determination of transfer pricing? Is the breach of the rule accompanied by an administrative or criminal penalty? Are "*statutory requirements*" provided or is the "*documentation just recommended to avoid shifting the burden of proof concerning a reasonable price to the taxpayer*"?

JB
According to § 3 B in the Danish Tax control Act the taxpayer has produce the documentations for the prices and terms in transactions with related companies. If the taxpayer does not produce this documentation then the tax assessment will be estimated. This means that the burden of proof shift to the taxpayer.

23. Imposition of penalties and burden of proof

The EU Code of Conduct recommends that Member States not impose documentation- related penalties on taxpayers, at least not when they have complied in good faith with the EU TDP or with domestic documentation requirements in a reasonable manner and within a reasonable time (Communication from the Commission to the Council, the European Parliament and Economic and Social Committee", note 3, at 7).
Italy: There are no specific transfer pricing penalties.

Question: If there is a statutory requirement to prepare documents, what is the nature (administrative or criminal) of the related penalty?

JB
If the taxpayer fails to send the correct documentation for the related transactions then the tax assessment will be estimated. But if the taxpayer falls to give information's of whether or not there have been related transactions this will be considered to be failure in the tax return and might result in a tax supplement or penalty.

24. Type of documents to be provided

Italy: The taxpayer is obliged to provide documents within its legal sphere, e.g. the original documents which, assessed overall, lead to a functional analysis; in contrast, the taxpayer is not required to provide the summary of the functional analysis. The taxpayer, when specifically requested, has to provide (given it might be unable to produce them later) documents of its business, and therefore the auditors could well require the production of the documents that establish the capital employed and risks assumed in the intercompany transaction. For example, a contract between the assessed enterprise and an associated company (or correspondence proving covenants between the companies themselves) has to be provided to the tax authorities, without any possibility of being used afterwards; instead, the summary functional analysis, which also includes an evaluation of the functions performed by the taxpayer, may also be produced by the same taxpayer later.

Question: Is the taxpayer required to provide only "original documents" or must it provide even a functional analysis with an evaluation? In particular, are there implicit limitations in the request for information by domestic tax authorities to foreign companies within the same group of the audited company? (For example: during the tax audit, does the taxpayer have to provide the price that its foreign affiliates paid to independent enterprise or should the tax administration consult the competent foreign tax authorities by means of information exchange?)

JB
The written documentation has to be provided kept by the taxpayer. It shall only be sent to the tax authorities if they ask for it. The documentation has to be in a condition that it is possible on the basis of it to establish whether the prices and conditions are in accordance with prices and conditions among unrelated.
Database inquiries shall only be produced if the tax authorities ask for it and with a time-limit of 60 days.
The tax authorities have provided a guideline for the written documentation. In this guideline there are thorough descriptions of how the documentation material shall be produced and kept.

25. Choice of transfer pricing method

The TP Guidelines establish a hierarchy among the three traditional transaction methods (comparable uncontrolled price, cost plus and resale minus) and the transactional profit methods (transactional net margin method and transactional profit split methods). According to the TP Guidelines, the transactional profit methods are last-resort methods, e.g. they should be used only in the exceptional situations where there are no data available or the available data are not of sufficient quality to rely solely or at all on the traditional transaction methods (Paragraph 2.49 of the TP Guidelines). The CUP method is always preferable where it can be applied in a sufficiently reliable manner.
Italy: The tax treatment of transfer pricing is currently governed by Article 110, Paragraph 7 of the Income Tax Consolidated Act (ITCA). The arm's length definition contained in this provision refers to the concept of "normal value", which is defined by Article 9 (2) of the ITCA. Therefore, Article 9 of the ITCA represents the statutory basis for the determination of the arm's length value of an intra-group transaction. In order to provide guidance on the concept of "normal value" arising from Article 9 of the ICTA, the Ministry of Finance issued a Circular Letter (32/9/2267 of 22 September 1980) [and Circular letter 42/12/1587 of 12 December 1981] in which it analytically indicated the methods to be used for each type of transaction (e.g. transfer of movable goods, transfer of technology, loans and intra- group services) based on the arm's length principle. Although not legally binding, the Circular is generally accepted by the tax authorities and taxpayers, and is considered to be the main reference for the interpretation of transfer pricing issues. Such Circular Letters refer to a body of rules which have in part been modified but are still extensively applicable and extremely important, especially with regard to the methods for determining the normal value, since they represent the only instructions of a general nature supplied by the Ministry on the matter.
Basic Methods: A reading of the above-mentioned Article 9(2) ITCA seems to indicate that the comparable price method is the only method the Italian legislator allows to be used for the actual application of the transfer pricing system. The Italian Ministry of Finance, the prevailing opinion and the case law all concur in the necessity of having recourse to the transfer pricing system even when the comparable price method proves not to be applicable. In its 1980 Circular Letter the Ministry of Finance affirmed, in harmony with the indications set forth under OECD Reports, that where a comparison between the transaction being verified and the sample one is not possible, recourse must be made to the resale price method or to cost-plus method.
Alternative Methods (*The Overall Profit Allocation Method; Profit Comparison Method, Invested Capital Profitability Method, Economic Sector Gross Margin Method***)**: The use of alternative methods, in other words transfer pricing methods other than the basic ones, is not provided for by the current legislation as it envisages only the comparable price method. In its 1980 Circular Letter the Ministry of Finance has, however, allowed that "the application of

the basic methods (price comparison, resale price, cost-plus) may not, in some particular cases, satisfy the application of the regulations governing Transfer Pricing since frequently there are no comparable transactions and just as frequently a reliable comparison between independent enterprise is not possible". Consequently, it was considered advisable that other methods suitable for a practical use be taken into consideration in the event that basic methods prove inadequate. It is pointed out in the said Circular Letter that in practice the use of such methods tends to determine the normal profit rather than the congruity of the transfer price and it is specified that alternative methods may be considered useful: i) supplementary, when upon verifying the correct application of the three basic methods uncertainties, arise; ii) alternatively, when it is absolutely impossible to apply the three basic methods.

Question: Is there a regulatory hierarchy in choosing these methods? Are the *transactional methods* preferred over the *profit-based methods*? Is the choice based on the nature of the goods or service sold?

JB
The transfer pricing method is in Denmark not regulated in the law but is described in the Guidelines for transfer pricing - valuation. In 2009 a new guideline for valuation of business, goodwill and other tangible assets was given.
According to this Guideline there are three methods of evaluation:

1) An income based method where the value is calculated upon the future income arising from the object. A DCF (discounted cash flow) method or EVA (economic value added) method is often used.
2) A marked based method where there is a comparison with uncontrolled transactions. In this method the value of a peer-group of unrelated companies are found and compared.
3) A cost based method where the value is calculated based on the cost to build the asset.

In the Guidelines there are descriptions of the use of the different methods. As a principal it is up to the taxpayer to choose the relevant method but the choise has to be explained. More than one method can be used.

26. Burden of proof and bilateral conventions

Potential conflicts may result from a different allocation of the burden of proof in the jurisdictions involved in transfer pricing matters: see *Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations*, 2009 Para. 4.14 ("*When transfer pricing issues are present, the divergent rules on burden of proof among OECD Member countries will present serious problems if the strict legal rights implied by those rules are used as a guide for appropriate behaviour. For example, consider the case where the controlled transaction under examination involves one jurisdiction in which the burden of proof is on the taxpayer and a second jurisdiction in which the burden of proof is on the tax administration. If the burden of proof is guiding behaviour, the tax administration in the first jurisdiction might make an unsubstantiated assertion about the transfer pricing, which the taxpayer might accept, and the tax administration in the second jurisdiction would have the burden of disproving the pricing. It could be that neither the taxpayer in the second jurisdiction not the tax administration in the first jurisdiction would be making efforts to establish an acceptable arm's length price. This type of behaviour would set the stage for significant conflict as well as double taxation*") and Para. 4.15 ("*Consider the same facts as in the example in the preceding paragraph. If the burden of proof is again guiding behaviour, a taxpayer in the first jurisdiction being a subsidiary of a taxpayer in the second jurisdiction (notwithstanding*

the burden of proof and these Guidelines), may be unable or unwilling to show that its transfer prices are arm's length. The tax administration in the first jurisdiction after examination makes an adjustment in good faith based on the information available to it. The parent company in the second jurisdiction is not obliged to provide to its tax administration any information to show that the transfer pricing was arm's length as the burden of proof rests with the tax administration. This will make it difficult for the two tax administrations to reach agreement in competent authority proceedings").
Italy: there are no bilateral conventions containing provisions in this sense.

Question: Given that Article 9 of the OECD Model is silent on the subject of the burden of proof, are there bilateral conventions to avoid double taxation that instead contain express provisions on the burden of proof in transfer pricing matters? Is this a matter of domestic law?

In Denmark there are no bilateral conventions containing provisions in this sense.

27. Burden of proof and information exchange procedures

The tax authorities tend to perform all auditing activities in **Italy** without reverting to bilateral or multilateral procedures available in order to verify and prove their conclusions. For example, the lack of comparable data in Italy often leads the tax authorities to abandon the CUP method in favour of the cost-plus methods or the other alternative methods which do not require investigations outside of Italy. Indeed, practice shows that there are few exceptions to this attitude and few situations in which audits are commenced based on information spontaneously made available by foreign authorities.
For example, an assessment which justifies the application of the cost-plus method because of the impossibility of finding comparable data may be considered void for lack of proof if it can be shown that the tax authorities did not try to find the comparable data through an exchange of information with the jurisdiction in the market of destination of the goods. When the tax authorities have failed to undertake an exchange of information procedure, tax courts may void tax assessments for lack of proof. However it is interesting to note that the Italian tax authorities are aware of the risk that a passive approach in carrying out audits of international transactions may be considered by a judge as a failure to meet the burden of proof. In Circular letter of 21 October 1997 271/E, paragraph 2.3., the Ministry of Finance stressed that finalization of assessments concerning the deductibility of head office expenses is appropriate only after having taken recourse to the exchange of information procedures aimed at verifying whether the costs recharged to the Italian taxpayer were actually borne by the head office and if the costs were connected to the business of Italian taxpayer.

Question: Does the national law in your country require prior recourse to an exchange of information procedure in order to finalize a tax assessment regarding transfer pricing or a tax assessment involving international tax issues in general?
- In particular, are the tax authorities free to issue assessments based on alleged violations of the arm's length principle without the necessity of previously verifying abroad the information and the data which could confirm or void such assessments?
- What kind of obligations does the taxpayer have to fulfil if the tax authorities request further information during this procedure?

JGN
The Danish tax administration is not generally required to recourse to an exchange of information procedure to finalize a tax assessment concerning transfer pricing. The taxpayer's duty to provide documentation which is laid down in the Danish Tax Control Act sec. 3 B and

which is further elaborated in the Ministerial Order no 42 of 24 January 2006[31] may in effect have an effect on the burden of proof. If the taxpayer does not produce the required documentation, this may in itself be regarded to be in favour of the tax administration as part of the general assessment of evidence, cf. the principle in AJA, sec.344 (3) as mentioned above. It is, however, important to accentuate, that the Danish tax administration has to make probable, that the concerned transaction has not taken place on arms length-conditions: This cannot be assumed in general. Naturally, the tax administration also has to contribute as a consequence of the inquisitorial procedure principle. The tax administration has instruments of sanction among which are the possibility to impose fines in taxpayers who do not meet the duty to provide documentation in a deliberate way or with gross negligence, cf. the Danish Tax Control Act sec. 17 (3). Furthermore, the tax administration is authorized to conduct an estimated tax assessment based on a factual estimate pursuant to the Danish Tax Control Act. Sec. 3 B (8) which refers to the sec. 5 (3) of the same act as mentioned above.[32] If it is not possible for the Danish tax administration to assess the taxpayer's income without exchanging information with the tax authorities of another state, the administration has to verify information abroad which is necessary for the estimated tax assessment.

An estimated tax assessment is covered by the normal provisions on complaints procedure in Denmark.

28. Burden of proof in the mutual agreement procedure

Tax treaties do not provide for the avoidance of double taxation in specific situations. Consequently, there is a need for an effective tool to solve disputes among the tax authorities of different jurisdictions. Therefore, income tax treaties include a special kind of procedure known as the mutual agreement procedure (MAP), which is generally modelled on Article 25 of the OECD Model Treaty. The great advantage of the MAP for both tax authorities and taxpayers is its flexibility and relatively non-bureaucratic nature.
The taxpayer should be given the right to approach the tax authorities of the two countries involved to obtain advance clearance, on the basis of mutual agreement, on the basic elements of the transfer pricing system to be followed such as the method to be applied, the selection of the data to be used and, if required, adjustments thereto.

Question: What is the taxpayer's legal position in a mutual agreement procedure?

JGN
In Denmark, a taxpayer may contact the Danish tax administration to request that the tax administration initiate a mutual agreement procedure referring to the relevant article of DTCs. I general, it is a condition that the taxpayer will otherwise be subject to taxation contrary to the principles of a relevant DTC. No specific formal requirements have to be met concerning such a request in Denmark, but the request has to meet certain time frames.[33] This option is also relevant in transfer pricing cases and in practice the mutual agreement procedure is an effective means as tax authorities reach a solution in most situations.[34] The procedure requires the existence of a provision in a DTC between the two states corresponding to the OECD Model Convention art. 25 (1-2). As a main rule and according to most Danish DTCs, the request has to be made within three of the first notice about the primary correction. The

[31] Cf. Also the Guidelines about Transfer Pricing, Controlled Transactions and Duty to Provide Information from 2006. These guidelines are available at www.skat.dk.
[32] Cf. *Anders Oreny Hansen & Peter Andersen*: Transfer Pricing i praksis (2008), p. 65-66.
[33] Cf. *Karin Skov Nilausen*: Løsning af internationale tvister (2005), p. 131.
[34] Cf. *Anders Oreby Hansen & Peter Andersen*: Transfer pricing i praksis (2008), p. 237.

Danish tax administration is only obliged to negotiate according to the mutual agreement procedure which means that the taxpayer cannot be sure of a result, but it is in practice rare that the procedure ends without result.[35]

A taxpayer's request to the Danish tax administration for the commencement of a mutual agreement procedure should as a minimum contain the following information:

- Identification of the enterprise and other relevant parties (corporations etc)
- Detailed information about relevant circumstances in connection with the case
- Identification of the relevant tax periods
- Copies of notices on tax assessments etc leading to the alleged double taxation
- Detailed information about complaints and court cases relating to the case
- An account from the enterprise describing the principles which are infringed according to the enterprise

The taxpayer is not allowed to participate in the actual negotiations or to present his or her point of view for both competent authorities would require consent from both competent authorities. This is considered a weakness of the mutual agreement procedure, because the tax authorities also have to represent the taxpayer at the negotiations.[36] General principles founded in Danish administrative law protect the taxpayer in this respect and ensures that the taxpayer is informed about relevant development during the negotiations.

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[36] Cf. *Karin Skov Nilausen*: Løsning af internationale skattetvister (2005), p. 136, where the author refers to *Mario Züger*: General Report in Settlement of disputes in Tax Treaty Law (2002), p. 22, edited by *Michael Lang & Mario Züger*.