Tax criminal law - Selected decisions, Criminal liability for omitted transfer pricing documentation, SKM 2022.75 BR and SKM 2022.76 BR

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Summary:

Apparently, Section 84(5) of the Tax Control Act (SKL) on criminal liability for failure to submit TP documentation in due time has become increasingly topical. A number of judgements have been published in recent years. These have mainly concerned the sentencing of fines with regard to whether and, if so, to what extent the instructions in the legislative history should be applied in practice. In particular, the question has been whether the normal fines of DKK 250,000 for each income year's completely omitted TP documentation and of DKK 125,000 for each merely delayed TP documentation in the event of several years' omissions should be added together by full cumulation, or whether a reduction should be granted in the form of limited cumulation. The article reviews the content of section 84(5) of SKL and the required conditions for criminal liability. In addition, the available case law is reviewed, in particular with regard to the question of the imposition of fines for offences committed over several years. Two new judgements, SKM 2022.75 BR and SKM 2022.76 BR, which are referred to as 'test cases', are reviewed and commented on.

1. Arm's length principle - Substantive and formal transfer pricing legislation

The arm's length principle, i.e. that transactions between related parties are to be taxed as if they had been entered into on market terms, is at the centre of tax law. The relevant rules, the so-called transfer pricing (TP) legislation, distinguish systematically between substantive TP legislation and formal TP legislation.

The substantive TP legislation provides the legal basis for setting aside and correcting non-market terms and is found in particular in section 2 of the Tax Assessment Act (LL) on the correction of principal shareholder and group transactions and in the rules of the Capital Gains Act on transfers within communities of interest. In general, section 2 of the Act covers all types of contractual transactions, but is reserved for specified controlled principal shareholder and group relationships. The rules of the Capital Gains Tax Act, on the other hand, cover all transactions between related parties but are limited to transfers covered by the Capital Gains Tax Act, i.e. shares (Section 31 of the Capital Gains Tax Act), real estate (Section 3 of the Real Estate Capital Gains Tax Act), receivables (Section 34 of the Capital Gains Tax Act) and depreciable assets (Section 49 of the Depreciation Act). Correction of arbitrary price conditions outside these sets of rules is generally not possible. In particular, section 4 of the State Tax Act does not contain a general arm's length principle. This was established by the Supreme Court in the central interest rate fixing judgement, TfS 1998.199 H.

The formal TP legislation contains the control obligations and control powers that aim to ensure that the TP legislation can be effectively enforced. At the same time as the introduction of Section 2 of the Tax Code in 1998, Section 3 B of the current Tax Control Act (SKL) established a duty of disclosure and a duty of documentation. The duty of disclosure meant - and still means - that taxpayers who participate in controlled transactions covered by section 2 of the Act must provide information on such transactions, so-called TP information parties, at the same time as submitting the information form (formerly the tax return). The intention was - and is - that the tax authorities are thereby made aware of transactions covered by the arm's length principle. The documentation obligation, which was - and is - reserved for specified "large companies" and transactions with tax havens, implied - and still implies - that these taxpayers must prove, by means of ongoing so-called TP documentation, that the intra-group transactions took place on arm's length terms. The scope of the TP documentation obligation is set out in section 40(1)(1)-(3) of SKL. It appears from this that companies that at group level have more than 250 employees and a total annual balance sheet of at least DKK 125 million or a turnover of at least DKK 250 million are subject to the documentation obligation. The same applies to smaller companies that have internal turnover with related enterprises resident in non-treaty countries. The detailed requirements for the TP documentation are set out in an executive order, most recently Executive Order 2022.468 on documentation of controlled transactions with associated guidance, most recently Guidance of 21 January 2019: "Transfer Pricing; controlled transactions; valuation". The content of this Executive Order is coordinated with the recommendations in OECD-Transfer Pricing Guidelines Chapter V. The intention was - and is - that the tax authorities now have a basis for closer tax control. Originally, failure to fulfil the documentation obligation could only be sanctioned by a daily penalty (daily fine) and a discretionary determination and thus a discretionary tax assessment of the internal turnover. This introduced a kind of reversal of the burden of proof in TP cases when the documentation did not fulfil the rather complicated and abstract obligations.

The rules on TP documentation are now found in sections 39-42 of the SKL. Originally, the TP documentation was only to be submitted on request following a summons from the authorities with a deadline of 60 days. By L 2020.1835, this was changed with effect for income years commencing 1 January 2021 and later, so that the companies subject to the documentation requirement must prepare the documentation on an ongoing basis and submit it without a separate request. Another issue is that the requirement to prepare the documentation on an ongoing basis makes little sense, given that significant parts of the documentation can only be prepared after the end of the income year.

In other areas, too, formal TP legislation has been tightened up. This reflects the difficulties that arise when the undoubtedly fair and reasonable arm's length principle has to be applied in practice. Added to this is the fact that the TP area undoubtedly represents, in monetary terms, the biggest tax challenge in international terms, as the TP issue must be considered as the main cause of international tax evasion by so-called "base erosion". In addition to the fact that TP legislation has a significant impact on the size of national tax revenues, it also influences their international distribution. It is therefore not surprising that formal TP legislation has not only been of national interest but also of international interest. Indeed, the OECD BEPS report contains considerable guidance on formal TP legislation.

At national level, the tightening of the rules has resulted in the possibility of obtaining a statement from an independent auditor that the terms of the internal turnover actually fulfil the arm's length requirement. The rules on this are now found in SKL §§ 43-45 and most recently Bkg. 2018.1298. This means that the authorities' control function has been "privatised", so to speak. The detailed justification for and, in particular, the appropriateness of this measure remains unclear. The appointed auditor seems to be placed in an "outsider's position", given that the auditor is - well - only involved when the otherwise highly qualified authorities are unable to resolve the arm's length issue. The rules on the auditor's report therefore appear to be "political symbolic legislation" rather than a useful tax control power. The most positive aspect is that - as far as this author is aware - the scheme is not used in practice. In addition, rules on "country-by-country reporting" have been introduced, according to which specified ultimate parent companies must submit an overall report for the entire group with an allocation of the group income to the group companies covered. The rules on this are now found in SKL §§ 47-52 and most recently Bkg. 2018.1304. This gives the tax authorities the opportunity to obtain an overall picture of the distribution of the group income on the individual group companies and an insight into whether this distribution corresponds to the activities that have taken place in the group companies.

A significant tightening of the formal TP legislation was achieved by criminalising the obligation to submit the prescribed TP documentation in due time, so that failure to do so could be sanctioned with a fine. The rules were introduced by L 2005.408 in the current SKL § 17(3), according to which a fine could be imposed on anyone who intentionally or through gross negligence failed to timely fulfil the obligation to submit written TP documentation. The rules on this are now found in section 84(5) of the SKL. Accordingly, the lack of TP documentation can be sanctioned under both tax law and criminal law, as there is still a legal basis for daily fines and discretionary assessment if the TP documentation is not available. The complete failure to submit the TP documentation may therefore give rise to both a discretionary assessment and criminal liability. It must be argued that the mere delayed but nevertheless proper submission of the documentation before the assessment is actually made in the absence of special rules cannot give rise to a discretionary assessment. In SKM 2019.136 H, the Supreme Court also stated that *"there is no basis for an understanding that the time at which discretionary assessment of the income can be made if the transfer pricing documentation is not available is different from the time of assessment".* However, the Supreme Court judgement led to an amendment of section 39(3) of SKL, according to which it was clarified that a discretionary assessment can be made even when the TP documentation has simply not been submitted on time, cf. L 2020.1835. This establishes a difference with regard to valuation in the form of discretionary assessment in the event of failure to submit an information form in section 74 of SKL, where it is recognised that a late submission of a proper information form leads to a resumption of the valuation made. This can also be explained by the fact that the submission of a duly completed information form leads to a claim for ordinary reopening of the tax assessment pursuant to section 26(2) of the Tax Assessment Act. Thus, the right to make a discretionary assessment, even if the TP documentation is available at the time of assessment, seems to contradict the rules on the requirement for a reassessment in the event of new relevant information within the ordinary assessment period in section 26(2) of the SFL. However, it appears from the legislative history of L 2020.1835 that the taxable income must continue to be justified in accordance with the general principles of administrative law, stating the circumstances that have been

given importance in the determination of the price and stating the method used in the calculation thereof.[1] It is added that also the discretionary assessment must be in accordance with the arm's length principle, so that there will be no need for a discretionary assessment if the taxpayer in a subsequent TP documentation actually proves that the prices and terms disclosed fulfil the arm's length requirement. Indeed, these comments seem to be more in line with the reopening requirement when relevant information is available.

2. Criminal liability for omitted TP documentation, SKL § 84, no. 5

As mentioned above, the applicable penalty provision is now found in SKL § 84, no. 5. According to the provision, a fine may be imposed on anyone who intentionally or through gross negligence fails to submit the written documentation in due time in accordance with SKL 39, fails to submit a "country-by-country report" in accordance with SKL §§ 48, 49 and 51 or fails to submit an auditor's report in accordance with SKL § 43. The provision is a continuation of the current section 17(3) of the SKL, which is why practice and preparatory works concerning this provision have a certain relevance.

2.1. The constituent elements of the offence in Section 84(5) of the SKL

The provision covers in particular the failure to submit the TP documentation in due time, as prescribed in section 39 of the SKL. According to this provision, specified groups must regularly prepare and keep the written TP documentation and, according to paragraph 3, submit the documentation to the tax authorities within 60 days of the expiry of the information deadline. Although the companies are thus obliged to prepare the documentation on an ongoing basis, it is only the timely submission that is punishable. This means that a failure to prepare the TP documentation on a regular basis is not a punishable offence, provided that the documentation has been submitted in due and timely manner.

It appears from section 39(1) of SKL that the TP documentation must be of such a nature that it can form the basis for an assessment of whether prices and terms have been fixed in accordance with what could have been achieved if the transactions had taken place between independent parties. Reasonably against this background, it has been clear since the introduction of the criminal provision that the criminal liability does not only cover the complete failure to submit the TP documentation, but also the delayed but nevertheless submitted TP documentation.

The criminal liability also covers the timely submission, but where the TP documentation is so deficient that it must be considered a nullity and therefore deemed not to have been submitted. It is thus clear from the comments to the original penalty provision that a fine may be imposed, for example, if there is no documentation at all. Similarly, it appears that the same applies if, although there is some evidence, it is of such a nature that there is in fact no evidence.[2]

The question is therefore what degree of deficiency and insufficiency is required for the TP documentation to be disregarded with the consequence that it is deemed not to have been submitted. As stated above, this issue is relevant both in terms of discretionary assessment and criminal liability.

[11] See in this regard Bill No 28 FT 2020-2021, General remarks, on § 6, points 3 and 4.
[2] See the legislative history of L 2005.408 in LF 120 of 2 March 2005, General remarks, point 3.2.

Firstly, it should be noted that transfer pricing is not an exact science, but is to a large extent based on legal and, in particular, economic judgements. The economic models developed to determine arm's length conditions are - to a large extent - normative and abstract and therefore express general principles rather than clear and concrete instructions.[3] The rules on the content of an adequate TP documentation are therefore similarly general and abstract. In fact, there are only some economic standards which have to be filled in in the specific context. Although economic science is considered to be an exact science, the reality is that the developed and recognised arm's length models - to a large extent - contain discretionary assessments. It must therefore be decided on a case-by-case basis whether a given TP documentation is regulatory to such an extent that the description of the nature, character, realisation, settlement, etc. of the internal turnover can constitute the basis for a regulatory TP documentation. The existing practice on the requirements for regulatory TP documentation will therefore provide guidance. In this context, it is not necessary to elaborate on the requirements for regulatory TP documentation and related case law. It should only be stated that the courts have taken a position on the issue in several cases. See in particular: SKM 2019.136 H, SKM 2020.224 H, SKM 2020.303 V and SKM 2020.397 V. It is obviously difficult to summarise these specific decisions other than in programmatic statements that a discretionary assessment presupposes that the TP documentation is qualified deficient to such an extent that it lacks the relevant basis of comparison for the corresponding independent turnover. It is recalled here that the core of the arm's length principle is precisely the comparison with similar independent turnover.[4]

The assessment of whether the clearly deficient and insufficient TP documentation can be regarded as a nullity is the same with regard to whether there is a basis for a discretionary assessment and with regard to whether there is a basis for criminal liability. Here, however, it must be borne in mind that the assessment is an evidentiary assessment that must be made on the factual basis, namely the specific content or lack thereof of the TP documentation. In a criminal law context, the assessment must be made according to the principles of criminal procedural law in line with the other assessment of evidence in the criminal case. In particular, the principle of "In dubio pro reo", i.e. the requirement that any legitimate doubt must be given to the benefit of the accused, will mean that only the very obvious and extraordinarily deficient TP documentation can be equated with the omitted TP documentation. It is thus possible that an insufficient TP documentation can be disregarded for tax purposes with the following discretionary assessment, while this is not possible in the criminal law assessment. In SKM 2020.224 V, where the Western High Court ruled that there was a basis for a discretionary assessment, no criminal proceedings were brought - to the knowledge of this author.

However, there is case law where the submitted but deficient TP documentation has also been considered a nullity under criminal law, resulting in criminal liability. In SKM 2017.216 BR, the company received a request in August 2013 to submit TP documentation for the income years 2009, 2010, 2011 and 2012, and the company therefore submitted a number of

[3] A number of economic models have been developed in the OECD Transfer Pricing Guidelines comprising both transaction-based models ("The Comparable Uncontrolled Prices method", "The Cost Plus method", "The Resale method") and profit-based methods "The transactional Net Margin method" and "The Profit Split method"), cf. Jens Wittendorff: Transfer Pricing, 2nd edition, 2018, Part VI, p. 516 ff.

[4] See an analysis of the practice by Troels Kjølby Nielsen in SR-Skat 2021.36.

appendices and documents that had been requested from the company's German parent company and which only described the group's general TP principles, and they all related to previous income years. The submitted documents did not, as required, contain separate and specific information on the structure, activities and internal turnover of the Danish company, nor did they contain an account of the arm's length assessment in relation to the internal turnover of the Danish group company. The District Court therefore concluded that the submitted material did not fulfil the requirements for proper TP documentation in a criminal law context. The court emphasised that the material had not been updated since 2007 and did not contain the required information. It was not until February 2014 that the company's auditor submitted proper TP documentation. In SKM 2019.272 BR, the company had similarly submitted a number of documents and appendices, without these being summarised in an actual report. The company explained that it had been under the misunderstanding that it was the group's parent company that also handled the Danish company's TP documentation. The District Court found that the company had only submitted some historical information regarding the group's structure and trade within the group, but that no country-specific material for Denmark had been submitted. It was then assumed that the documentation submitted was also so deficient in criminal law terms that it had to be equated with a lack of documentation.

2.2. The subjective requirements for criminal liability for failure to submit TP documentation

From a subjective point of view, Section 84(5) of the SKL requires that the failure to submit the return must be attributable to intent or gross negligence. This corresponds to other penalty provisions in the Tax Inspection Act. The subjective imputation must then be assessed on the basis of the usual delimitation of intent and gross negligence. If sufficient evidence of actual intent cannot be obtained, it must then be determined whether negligence exists and whether it can be characterised as gross negligence. Ignorance of the obligation to provide documentation or errors and omissions in the preparation or submission of the documentation must generally be characterised as gross negligence. This can be explained by the fact that those subject to the TP documentation obligation are professional traders, even if only large companies and companies with intra-group transactions with affiliated companies in "tax havens". A review of the available case law shows that liability has only been imposed for grossly negligent omissions. In SKM 2017.225 Ø, SKM 2019.272 BR, SKM 2022.75 BR and SKM 2022.76 BR, an indictment was brought and convicted for gross negligence. In SKM 2017.216 BR and SKM 2018.584 BR, an indictment was brought for intent or gross negligence, but in both cases gross negligence was found.

The imputability assessment will often centre on the company's knowledge of the existence or content of the documentation obligation. As mentioned, the documentation obligation was tightened with effect from 1 January 2021, so that the documentation must be submitted on an ongoing basis for each income year. Before that date, the documentation had to be submitted only at the request of the tax authorities. In this way, the company was made positively aware of the documentation obligation, and at least in the case of failure to submit the documentation on time, this generally seems to qualify as an intentional omission. For documentation submitted after 1 January 2021, there is not the same basis for establishing intent. Therefore, an objection of ignorance or misunderstanding of the documentation obligation seems more credible than under the previous regime. The qualification of an

intention will therefore have to be made on a different basis. This could, for example, consist of specialised expertise, repetition or if the necessary intent can be proven in another way.

2.3. Corporate and personal liability

Section 85 of the Tax Control Act states that liability for offences against the Tax Control Act can be imposed as a corporate liability, i.e. liability is imposed on a company as such. All judgements therefore impose the fines imposed on the company. Admittedly, it is common practice in cases of offences against the tax fraud provisions of the Tax Control Act that a principal shareholder in small companies is often held (contributory) liable for the company's evasion. Such a breach of criminal liability is, however, linked to the fact that the main shareholder - at least indirectly - benefits financially from the evasion and otherwise determines the company's activities. It may perhaps be argued that the same applies to the saving of the cost of preparing TP documentation, which is closely linked to the imposition of the fine (see below under 2.5), but regardless of this, this practice cannot be transferred to SKL § 84, no. 5.

A breakthrough of criminal liability with the involvement of the management will also be relevant in the case of more serious offences, which are usually sanctioned by imprisonment. The fact that section 84 of the SKL only authorises fines and not imprisonment seems to mean that there is no basis for involving the company's management through supplementary personal liability even in particularly punishable intentional cases. It is recalled here that companies by definition cannot be subject to custodial sentences.

2.4. Criminal liability for failure to submit TP documentation and other offences under the Tax Control Act

As stated in SKL § 40, only specified "large" companies and companies with internal turnover with subsidiaries and permanent establishments located in "tax havens" are covered by the documentation obligation. The penalty provision in section 84(5) of SKL is therefore supplemented by the penalty provision in section 84(2) of SKL, which covers anyone who provides false or misleading information with regard to whether the conditions for the limited TP documentation obligation are met. This provision is relevant if a company incorrectly states that it does not fulfil the conditions for full TP documentation with regard to the company's turnover, balance sheet or number of employees or similarly incorrectly states that the company does not have internal turnover with controlled subsidiaries in "tax havens". A breach of section 84(2) of SKL will generally entail a subsequent breach of section 84(5) of SKL, as the documentation obligation was duly fulfilled.

As far as is known, there are no published decisions on section 84(2) of the SKL. It is thus unclear whether liability is imposed under both provisions or only one of them. At first glance, it seems obvious that liability is imposed under both provisions. This must be justified by the fact that there are two separate criminal offences, namely the false information about the conditions for exemption from TP documentation and the subsequent failure to submit the TP documentation.

It is noteworthy that section 84(5) of SKL only covers the failure to submit the TP documentation. The incorrect or misleading TP documentation is therefore only covered by section 84(5) of SKL if the incorrectness is so extensive that the documentation can be completely disregarded, cf. above under 2.1.

In other cases, the punishability of incorrect TP documentation must be assessed according to SKL § 82 on tax evasion by providing false, misleading or incomplete income information, so-called active tax fraud. It is recalled here that section 82 of SKL is not limited to the submission of false information, etc. in the information form, but includes all information, including in a TP documentation.

It is noteworthy that practice does not show any examples of tax fraud carried out by TP evasion, even though information on arbitrary terms in the internal turnover in the information form is clearly covered by section 82 of SKL and the requirements contained therein on, among other things, "misleading information". The available "pure" TP cases have therefore all been treated as civil tax cases. This can probably be explained by the fact that it has not been possible to obtain the necessary basis for considering the incorrect pricing as a result of intent or gross negligence. Only cases of income transfers with clear fictitious elements going beyond mere valuation have therefore given rise to criminal liability. The existing - admittedly somewhat "uneven" - practice of tax fraud by international tax evasion has therefore been characterised by the provision of false, misleading or incomplete information on the entire existence or nature of a transaction and not "merely" on the economic terms of the transaction. [5]

However, criminal liability under section 82 of SKL on tax fraud in the event of incorrect tax documentation will arise if an omission in the income statement due to incorrect pricing is attempted to be concealed or camouflaged by a subsequent inaccuracy, etc. in a tax documentation. It is, of course, a condition that this inaccuracy etc. can be regarded as an expression of intent or gross negligence. It is a further condition that the incorrect TP documentation covers an omission of income and as such fulfils the evasion requirement in section 82 of SKL. The mere incorrectness etc. that does not relate to an understatement of income is thus not punishable.

However, when assessing the criminal liability of the false TP documentation itself, the principle of "prohibition of self-incrimination" as laid down in section 10 of the Legal Certainty Act must be borne in mind. According to this provision, the duty of truthfulness, including with regard to information provided under the Tax Inspection Act, ceases, at least in criminal law, when there are grounds for suspicion of a criminal offence in relation to matters related to the information now provided. In other words, incorrect information etc. that relates to previously submitted criminal offences, e.g. in the information form, will not in itself be a criminal offence. Incorrect TP documentation will therefore only be punishable under section 82 of SKL on tax fraud if the information in the information form against which the documentation is directed does not in itself give rise to a suspicion of tax fraud. Admittedly, there is no practice for the mere information about incorrect pricing to give rise to criminal liability, but the fact that the non-compliance that occurred, albeit subsequently attempted to be concealed or camouflaged in the TP documentation, will, however, be a proof

[5] Jan Pedersen: Skatte- og afgiftsstrafferet, 4th edition, 2019, p. 284 ff.

that the information in the information form was also provided with the necessary criminal imputability of intent or gross negligence.

In practice, there seems to be no need for the actual submission of incorrect TP documentation to be covered by section 82 of SKL on tax fraud. Instead, the incorrect TP documentation seems to be a proof that the previously submitted incorrect information in the information form fulfils the subjective and objective requirements of section 82 of SKL. If so, the incorrectness in the information sheet is criminalised as tax fraud.

2.5. Imposition of penalties

When criminalising the failure to submit TP documentation in the current section 17(3) of SKL by L 2005.408, the provision only stipulated that a fine could be imposed. However, the legislative history contained some guidelines for the imposition of fines. Thus, it appeared that the level of the fine was "imagined" to be determined on the basis of a principle according to which a normal fine corresponding to twice the costs saved by not having prepared the documentation or the full documentation in the first instance was to be set.[6] If proper documentation was subsequently submitted, the fine was to be reduced by half, i.e. one times the costs saved. If there was a further increase in income as a result of non-compliance with the arm's length principle, the minimum fine was to be increased by an amount equal to 10% of the increase. However, it was added that the details of the fining practice were to be determined by the establishment of a practice, with the courts having the final say. On the other hand, the legislative history gave no indication as to whether a distinction should be made between intentional and grossly negligent offences when imposing fines, and as to how sanctions should be imposed when the omission covered several income years. Thus, there was no explicit indication whether the principle of fines should be applied without limitation in the case of full cumulation (also called absolute cumulation) or whether a reduction should be granted in the case of limited cumulation (also called moderated cumulation). [7]

By L 2012.591, the current section 17(4) of SKL was inserted, according to which the financial advantage obtained from the offence was to be taken into account in the assessment of the fine. The amendment took effect from and including the 2013 income year. It appears from the legislative history that the fine should, as before, be assessed on the basis of the costs saved by the failure to prepare the TP documentation, which was estimated to be at least DKK 125,000.[8] Subsequently, the fine was to be calculated as twice the saved costs, i.e. DKK 250,000, but the fine was halved to DKK 125,000 if, however, a TP documentation was subsequently but belatedly submitted. If an increase in income was made as a result of the tax inspection in which the TP documentation was included, the fine was still to be increased by 10 per cent of the increase in income. It was added that a fine was to be calculated for each income year for which the TP documentation was not submitted in full. The preparatory

[6] See the preparatory works to L 2005.408, LF 120 FT 2004-05 (2nd collection), re § 1, no. 11.

[7] Full cumulation means that a fine for several offences is calculated as the sum of the fine imposed for a single offence, while limited cumulation reduces the total fine. Danish criminal law does not contain any separate rules on this with regard to the imposition of fines, but full cumulation is used in practice in a number of areas, see Gorm Toftegaard Nielsen: "Strafferet 2 - Sanktionerne", 4th edition, 2014, p. 107 et seq.

[8] See in this respect LF 173 FT 2011-12, General remarks, point 3.3.2.

works thus indicated that full cumulation should be applied. On the other hand, the preparatory works still did not indicate whether and, if so, according to which guidelines a distinction should be made between intentional and grossly negligent offences.

The current rules were transferred to section 84(5) of the Tax Control Act, however, so that the current section 17(4) of the Tax Control Act on the imposition of fines was deleted. However, it appears from the legislative history of Section 84(5) of the Tax Control Act that the principles set out in the previous legislation were to continue to apply.[9]

From the point of view of legal policy, it should be noted that it is not customary for Parliament - directly or indirectly - to specify a fixed penalty practice. It also follows from section 80 of the Criminal Code (STRFL) that it is the courts that determine the penalty within the penalty limits specified in the legislation. This must be done on the basis of the specific circumstances of each case and the offender's individual circumstances. While it may be argued that there may be a need for a uniform and clear practice, particularly in the field of tax offences, it must be stressed that the above principles of sentencing can be criticised. It seems reasonable that the fine should be based on the costs saved in preparing the TP documentation, but this undoubtedly depends to a large extent on the size and nature of the internal turnover. Large companies with high costs for the preparation of the TP documentation will therefore be subject to a relatively less sensitive fine than smaller companies. Similarly, it can be argued that the discount granted for the late submission of proper TP documentation is independent of the length of the delay. At first sight, the longer delay seems to be more worthy of penalisation than the shorter delay. In addition, as stated above, it seems reasonable to distinguish between intentional and grossly negligent offences. Finally, it seems debatable whether, as stated in the preparatory works, full cumulation should be applied in all cases when calculating fines.

It can thus be concluded that the sentencing principles based on motives do not fulfil the requirements for individual sentencing, which is a tradition in Danish criminal procedure and which is also set out in section 80 of the Criminal Code. It can also be noted that the grounds do not take a position on a number of questions of doubt.

2.6. Limitation period

Infringement of SKL § 84, no. 5, is time-barred according to the general rules of the Penal Code. It follows from Section 93(1)(1)(1) of the Criminal Code that the limitation period is two years when no higher penalty than imprisonment for one year is provided for the offence. On the face of it, therefore, a 2-year limitation period seems to apply, as SKL § 84 only authorises fines. However, according to Section 93(2)(2)(2) of STRFL, the limitation period is 5 years for offences against, inter alia, tax legislation "*whereby unjustified gain is obtained or may be obtained"*. Notwithstanding the fact that the legislative history of Section 84(5) of SKL, as described, recommends the imposition of a fine on the basis of the costs saved, it must be argued that this is not sufficient for the savings achieved to constitute unjust enrichment. It is noted here that the company subject to the documentation obligation does not necessarily have the TP documentation prepared by an external

[9] LF 13 FT 2017-18, Special remarks on § 84.

consultant. In addition, it is argued that the 5-year limitation period presupposes that the criminal offence involves a financial gain in terms of actual tax evasion. Irrespective of this, it appears from the legislative history of L 2012. 591 that a violation of SKL § 84, no. 5, is subject to the 5-year limitation period in STFRL § 93(2), no. 2.[10] This is justified by the fact that it is typically the case that missing or inadequate documentation may lead to unjustified gain in the form of an underestimation of tax. In addition, the special control considerations mean that tax and VAT cases should always be subject to a limitation period of at least 5 years.[11] This interpretation seems difficult to reconcile with the rule in Article 93(2)(2)(2) of the STRFL and the distinction in tax criminal law between offences of misconduct with a two-year limitation period and offences of evasion with a five-year limitation period.

As stated, the preparatory works recommend that if the failure to submit the TP documentation and the resulting tax inspection results in an increase in income, i.e. tax evasion, the fine is increased by 10 % of the tax evaded. Again, it could be argued that a 2-year limitation period applies, as the 5-year limitation period requires that the offence, i.e. the failure to submit the TP documentation in due time, constitutes an evasion or a risk of evasion. This is not the case, as the evasion is due to the incorrect declaration of income and not to the failure to submit the TP documentation. In this case, the evasion is only an aggravating circumstance.

It follows from Section 94(1) STRFL that the limitation period starts from the day on which the criminal activity or omission has ceased. Since violation of SKL § 84(5) is an offence of omission, the limitation period therefore begins from the time when the TP documentation is actually submitted. In UfR 1980.1016 H on criminal liability under the current Section 74(1)(2) of the Withholding Tax Act on criminal liability for non-payment of withholding tax withheld, the Supreme Court ruled that the limitation period had not commenced as long as payment had been criminally omitted. If this judgement is taken literally, the limitation period does not start if a TP documentation is never submitted. However, practice has interpreted the Supreme Court judgment restrictively when the criminal omission is linked to an obligation to act that can be determined in time.[12] In UfR 1990.649 V, the Western High Court ruled that the limitation period for failure to submit a VAT return must be calculated from the deadline for submission. This practice also seems to be applicable to offences under section 84(5) of the Tax Code, as the TP documentation is more time-limited. For TP documentation for income years starting later than 1 January 2021, the submission deadline in section 39(3) of SKL is set at 60 days after submission of the information form. For previous income years, the deadline is 60 days after the demand for submission. The 2-year limitation period therefore starts from this date.

2.7. Practices

[10] See in this respect LF 173 FT 2011-12, General remarks, point 3.3.2.

[11] The comments refer to Report No. 1438/2004 on the limitation of criminal liability for special offences, page 68 f., but it does not seem to be supported here that the - possibly - saved cost of preparing a TP documentation constitutes an "unjustified gain".

[12] See Jan Pedersen, Skatte- og afgiftsstrafferet, 4th ed. 2019, p. 207.

It is not surprising that there has been a need to establish a more concrete assessment of the principles for calculating fines, which is why several judgements have been published.

As far as we know, SKM 2017.227 Ø is the first and so far the only High Court judgement on criminal liability for failure to provide TP documentation, and the judgement therefore sheds light on the principles for the imposition of fines.

In the case, a group company had received a request for submission of TP documentation for the income years 2009, 2010, 2011 and 2012, which, due to a clerical error, was not complied with in due time. Apparently, after the deadline had expired, the group company had itself recognised the error and had subsequently submitted the correct documentation at an undisclosed time, but before SKAT had "remindered" for the documentation.

An indictment was then brought for violation of the current section 17(3) of SKL and a claim for a fine of DKK 500,000, which was calculated as 4 x the tariff fine of DKK 125,000 per income year for late submission of TP documentation as stated in the above-mentioned grounds.

The Eastern High Court imposed criminal liability, but reduced the fine to DKK 250,000. Although the judgement in its premises for the imposition of the fine maintains the motivational statements, according to which, as a starting point, a tariff-based fine of DKK 125,000 per income year should be imposed for late submission of TP documentation, i.e. a total of DKK 500,000, the fine was reduced to DKK 250,000. This was further justified by the fact that there was no information on the background for the fact that SKAT had requested documentation for the income years 2009-2012, and it was also unclear whether it was SKAT's practice to request documentation for several years at a time. On this basis, the High Court found that the defendant's failure to submit the documentation for the four income years in due time had to be regarded as one offence concerning four years in this case. It added that a fine based on the number of years would lead to a disproportionate fine.[13]

SKM 2017.227 Ø thus applies a limited cumulation. It should be noted here that the judgement concerns the income years 2009-2012, i.e. prior to the amendment of the current SKL §17(3), where the legislative history prescribes full cumulation (see above).

A similar fine was imposed in SKM 2017.216 BR, where late TP documentation was submitted for the income years 2009-2012. Here, a full accumulation of fines would correspondingly trigger a fine of DKK 500,000 (4 x DKK 125,000) according to the fine calculation rules stated in the legislative history, but here, too, the fine was set at DKK 250,000. It is noteworthy that the District Court refers to the legislative history's instructions on the calculation of fines and related comments on the calculation of fines for each income year, but deviates from these. This is done with reference to the fact that the considerations justifying the starting point for the determination of the fine do not indicate that in a situation such as the present one there should be a complete accumulation of fines. In doing so, the Court had taken into account what was stated in the preparatory works about the background for the calculation of the fine and the fact that the defendant during the case had co-operated and contributed to the provision of information to the tax authorities.

[13] The judgement is commented by Jan Pedersen in SR-Skat 2017.368.

However, in the judgements SKM 2018.584 BR, SKM 2019.272 BR and SKM 2020.342 BR, a full accumulation of fines was made, even though the cases concerned income years prior to 2013, where, as mentioned, there was no direct recommendation for full accumulation of fines in the preparatory works to the current rules. In SKM 2018.584 BR, due to a misunderstanding, TP documentation was not submitted in time for the income years 2011-2015, a total of five income years, and a fine of DKK 625,000 (5 x DKK 125,000) was imposed. In SKM 2019.272 BR, only completely insufficient TP information was submitted for the income years 2010-2013, totalling four income years, and a fine of DKK 500,000 (4 x DKK 125,000) was imposed. In SKM 2020.342 BR, the submission of the TP documentation for the income years 2009-2011, totalling three income years, was completely omitted, and a fine of DKK 375,000 (3 x DKK 125,000) was imposed.

3. Recent practice, SKM 2022.75 BR and SKM 2022.76 BR

The above-mentioned case law can be taken as an argument in favour of full cumulation, but with the possibility of limited cumulation of fines when special concrete circumstances exist. This maintains the premise of the Penal Code that the courts should determine sentencing on a concrete and individual basis within the statutory penalty limits, but departs from the instructions in the legislative history, although it is made clear that the final determination of a practice falls within the competence of the courts.

However, the judgements relate to income years prior to the 2013 income year, when the rules were tightened and the legislative history explicitly recommended full accumulation of fines.

The question was therefore whether the already established practice could be maintained also for income years after 2013.

Two recent judgements, SKM 2022.75 BR and SKM 2022.76 BR, illustrate this. Both judgements are listed in SKM under the heading "Prøvesag", which is why at least the tax authorities consider them to be precedent-setting.

3.1. SKM 2022.75 BR

In this case, TP documentation was requested on 5 September 2017 for the tax years 2012-2016, i.e. five tax years, with a deadline of 6 November 2017. Following a reminder by telephone, the appropriate documentation was submitted on 29 March 2017 for the income year 2012 and on 8 June 2017 for the income years 2013-2016. Therefore, a full cumulative claim for a fine of DKK 625,000 (5 x DKK 125,000) was made. Apparently, the company was prepared to accept such a penalty, but the tax authorities wanted a judgement as the case was considered a test case. The defendant company therefore failed to appear at the trial and was convicted on the indictment. After "an overall assessment", a fine of DKK 625,000 was imposed. This was justified with reference to the legislative history's indication that the fine should be based on the saved costs that a lack of documentation entailed, and with particular reference to the fact that it could not be ruled out that the defendant company could have had a financial advantage by not preparing an ongoing TP documentation if the tax authorities had not requested it.

3.2. SKM 2022.76 BR

In the case, TP documentation for the tax years 2013-2016 was requested on 14 December 2017 and was not submitted in due time. However, it appears from the judgement that the documentation was submitted at an undisclosed later date. Again, the company seems to have accepted a fully cumulative fine of DKK 500,000 (4 x DKK 125,000), but allegedly because the case was considered a test case, a bill of indictment was drawn up for consideration by the court. The defendant confessed and was fined DKK 500,000. The judgement contains a detailed reference to the underlying legal basis and, in particular, to the above-mentioned legislative history on the imposition of fines. Obviously with reference to the comments of the Eastern High Court in SKM 2017.227 Ø, it is stated that the court was not presented with further information about the tax authorities' request for documentation to the company or about the background for the company's omissions or actions in relation to the preparation and submission of this documentation. The District Court therefore found that there were neither aggravating nor mitigating circumstances, and the fine was therefore calculated in accordance with the guidelines set out in the legislative history.

4. Some comments on SKM 2022.75 BR and SKM 2022.76 BR

The two judgements, which concern income years after the entry into force of the tightening measures in L 2012.591, both impose the fine with full cumulation. This is fully in line with the instructions contained in the legislative history of L 2012.591, which, unlike the legislative history of the previous legislation, expressly provides for full cumulation of fines.

Notwithstanding these legislative history, it is - as the legislative history itself indicates - the courts that ultimately determine the level of the fine. The question is therefore whether the precedent created by the Eastern High Court in SKM 2017.225 Ø with the possibility of a limited accumulation of fines after an individual assessment has been set aside by SKM 2022.75 BR and SKM 2022.76 BR. On the face of it, a High Court judgement cannot be set aside by two District Court judgements, but this obviously presupposes an identical legal basis. As can be seen, this is not entirely the case, as the latest city court judgements have been decided on the basis of the stricter rules for criminal liability in the absence of TP documentation.

However, there is hardly any basis for concluding that there can never be a limited accumulation of fines. This must be justified by the fact that the rules of the Penal Code on individual sentencing on a case-by-case basis cannot be overridden by statements of motive for the penal provision. There seems therefore to be a need for the practice established by the district court judgements to be tested by higher courts. For the time being, however, the district court judgements SKM 2022.75 BR and SKM 2022.76 BR must be regarded as indicative.

Another matter is that the issue of full or limited fine cumulation, at least as a starting point, will soon be transferred to legal history. This is because section 39(3) of SKL was amended by L 2020.1835 so that the TP documentation for income years commencing after 1 January 2021 must be submitted for each income year and without a separate request from the tax authorities. This means that the situation where the tax authorities request TP documentation for several income years at a time will not arise - at least not as a starting point. This will only be the case when it is subsequently established that the annual submissions of the TP

documentation have not been made and the tax authorities subsequently obtain these for several income years. Here, too, the two district court judgements will - at least for the time being - provide guidance.