

Current issues in trusts, foundation and estate planning

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Disposition

- Current issues;
 - Trusts and estate planning
 - Foundations and estate planning
 - Inheritance law and estate planning

Trusts

- The trust is a creature of common law, division of ownership;
 - Trustee; legal owner
 - Beneficiary; equitable owner
- Trusts come in many different variations;
 - Private express trust,
 - Discretionary trust,
 - Purpose trust*
 - Ect.

Trusts

- Trusts and the Danish tax authorities
 - An increasing amount of cases
- "Skattelypakke" (Tax Haven Law Package), law no. 540 29/4-2015 (trusts and foundations),
 - boafgiftsloven § 11,
 - fondsbeskatningslovens § 3 A, stk. 2, 2. pkt.
 - ligningslovens § 16 K.
- Has effect for trusts and foundations (stiftung, stichting, treuhand, anstalt, ect) established or on which there are deposits July 1st, 2015 or later.

Trusts

- Liechtenstein (1926)
- Italy (1992)
- Panama (1995)
- Malta (1996)
- Netherlands (1996)
- Belgium (2004)
- Luxembourg (2004)
- San Marino (2006)
- Switzerland (2007)
- Monaco (2008)

Foundations

- Liechtenstein (1926)
- Austria (1993)
- Panama (1995)
- Bahamas (2003)
- Saint Kitts (2003)
- Nevis (2004)
- Anguilla (2006)
- Malta (2006)
- Switzerland: 2006 reform
- Jersey (2009),
- IoM (2011)
- Guernsey (2012)

Ligningslovens § 16 K

- Persons or estate's of deceased fully liable to tax in DK at the time of establishing the trust or making further transfers to it,
- Persons having previously been fully liable to tax in DK but not at the time of establishment of the trust or making further transfers to it, if they again become fully tax liable to DK within 10 year after the aforementioned dispositions,
- Exception 1; The taxpayer establishes that it is an indispensable condition for the validity of the trust's existence, has been given final and irrevocable waiver of its assets.
- Exception 2; the trust having a solely charitable purpose,
- Exception 3; pension purpose for a large number of people,
- Exception 4; the trust is an investment firm

Ligningslovens § 16 K

- The settlor is taxed by the positive income of the trust in his or her own capacity,
- Negative income in the trust can be carried forward,
- Tax credit for foreign taxes (but only for the portion corresponding to the ratio of the taxpayer's share of income and the total income.)
- Tax credit for taxes paid by the trustee
- But what about taxes paid by beneficiaries receiving distributions from the trust?

Industrial Foundations (Ifs)

- New legislation on commercial/industrial foundations in Denmark as of 1/1-2015,
- Comprehensive law (136 articles);
 - Governance, esp. article 1 and chapter 7,
 - 1/3 has to be independent from the settlor, major donors and recipients (Excp.: before 1985),
 - Recommendations on foundation governance,
 - Transparency,
 - Reporting

Publicity

- The annual accounts of the foundation are public,
- The total amount of the remuneration of board of directors and management has to be disclosed in the annual accounts,
- Transactions with related parties has to be disclosed in the annual accounts (IAS 24),
- Donations in kind has to be accompanied by a valuation
- The foundation has to publish it's Granting Policy in the annual accounts,
- The foundation has to comply-or-explain in its annual report on 16 recommendations on Recommendation of Foundation Governance,
- Large foundations have to report on CSR and the gender composition of the board

Recommendations on Foundation Governance

Recommandations on Foundation Governance

1. Transparency and communication	6
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Industrial foundations

- A.P. Møller, Novo, Novozymes, Carlsberg, Danfoss, Grundfos, Lundbeck, Rambøll, LEO, ect.
- Direct and indirect turn-over of the IFs in 2011 was 700 billion DKK, the equivalent of 54 % of the total market value on Nasdaq OMX Copenhagen,
- The 100 largest IF owned companies account for 100.000 employees in DK and 300.000 abroad
- The IFs distribute app. 9 billion DKK each year
- But no new significant IFs have been established since “Pinsepakken” (Pentecost Law Package) entering in to effect 1999

Report on Tax Succession to Industrial Foundations

- Report published 6th of May 2015.
- Reintroducing tax succession to IFs, however;
 - A transfer-duty of 15 pct. or 20 pct.,
 - Deferred payment for up to 15 years possible, (>3%)
 - Foundation must receive more than 50 pct. of the shares and more than 50 pct. of the votes,
 - Excluding shares in “over”capitalized companies (pengetank/Geldspeicher),
 - Dividends from subsidiary company is taxable at the foundation,
 - Foundation’s primary purpose has to be the business /charitable also possible as secondary),
 - Disposal of shares trigger capital gains tax

Capital Gains Tax - Foundations

Purpose of foundation / Gift Inheritance	Existing rules			New rules	
	Family, regardless of other purposes	Only charity From shareholder	Only Charity From shareholder's company	Business purpose (and in addition a possible charitable purpose	
Gift	42 pct.	42 pct.	0 pct.	42 pct.	20 pct./ 15 pct.
Inheritance	42 pct.	42 pct.	0 pct.*	42 pct.	20 pct./ 15 pct.

Gift to:	Foundations with a family purpose	Foundations with other purposes
Core capital which may not be distributed by the foundation		
- on establishing the foundation	20 % tax	Tax free
-on enlargement of the core capital	Foundation Tax (23,5 % in 2015)	Tax free
Core capital which may be distributed by the foundation		
-on establishing the foundation	Foundation Tax (23,5 % in 2015)	Foundation Tax (23,5 % in 2015)
-on enlargement of the core capital	Foundation Tax (23,5 % in 2015)	Foundation Tax (23,5 % in 2015)
Other gifts	Foundation Tax (23,5 % in 2015)	Foundation Tax (23,5 % in 2015)

Inheritance to:	Foundations with a charitable purpose	Foundations with other purposes (even if one of these is a charitable purpose)
On establishing the foundation	Tax free	Approximately 36,25 % in Inheritance Tax
To an already existing foundation	Tax free	Approximately 36,25 % in Inheritance Tax

Inheritance law

- Successionsrækkefølge (Danish counterpart to Vor- und Nacherbschaft, BGB sec. 2100 ff.)
 - Danish Inheritance Act sec. 60
- Fælles testamante (Danish counterpart to Gemeinschaftliches Testament (Berliner Testament), BGB sec. 2265 ff.)
 - Danish Inheritance Act section 13

Gemeinschaftliches Testament

- German Law (BGB § 2271)
 - The right of revocation expires on the death of the other spouse; the survivor may, however, revoke his disposition if he disclaims the testamentary gift made to him. Even after the acceptance of the testamentary gift, the survivor is entitled to revoke in accordance with BGB section 2294 and section 2336.

Fælles testamente

- Danish Law
 - If the will is for the benefit of a child of both spouses, the surviving spouse may revoke for ½ of the non-mandatory inheritance,
 - If the will is for the benefit of a child of the deceased spouses, the surviving spouse may not revoke the will,
 - Life-time gifts ect. being disproportionate may be declared void during the lifetime of the spouse or met by claims after the death of the spouse.

BGB § 2271

- **§ 2271 Widerruf wechselbezüglicher Verfügungen**
- (1) Der Widerruf einer Verfügung, die mit einer Verfügung des anderen Ehegatten in dem in § 2270 bezeichneten Verhältnis steht, erfolgt bei Lebzeiten der Ehegatten nach den für den Rücktritt von einem Erbvertrag geltenden Vorschriften des § 2296. Durch eine neue Verfügung von Todes wegen kann ein Ehegatte bei Lebzeiten des anderen seine Verfügung nicht einseitig aufheben.
- (2) Das Recht zum Widerruf erlischt mit dem Tode des anderen Ehegatten; der Überlebende kann jedoch seine Verfügung aufheben, wenn er das ihm Zugewendete ausschlägt. Auch nach der Annahme der Zuwendung ist der Überlebende zur Aufhebung nach Maßgabe des § 2294 und des § 2336 berechtigt.
- (3) Ist ein pflichtteilsberechtigter Abkömmling der Ehegatten oder eines der Ehegatten bedacht, so findet die Vorschrift des § 2289 Abs. 2 entsprechende Anwendung.

Arvelovens § 81

- § 81. Har ægtefæller ved en fælles testamentarisk disposition truffet bestemmelse om, hvordan arven skal fordeles ved længstlevendes død, kan den længstlevende ægtefælle ved testamente råde over friarven i boet efter længstlevende, jf. dog stk. 2.
- Stk. 2. Den længstlevende ægtefælle kan ikke ved testamente råde over
 - 1) friarv, der ifølge det fælles testamente skal tilfalde førstafdødes særlivsarvinger, og
 - 2) halvdelen af friarv, der ifølge det fælles testamente skal tilfalde fælles livsarvinger.
- Stk. 3. Stk. 1 og 2 finder ikke anvendelse, hvis den fælles testamentariske disposition indeholder anden bestemmelse om den længstlevende ægtefælles testationsret.

Arveloven § 82

- § 83. Har ægtefæller ved fælles testamente truffet bestemmelse om arvens fordeling efter den længstlevendes død, som den længstlevende ikke kan tilbagekalde, kan den længstlevende ikke tilsidesætte denne bestemmelse ved
 - 1) at give gaver eller arveforskud, hvis værdi står i misforhold til formuen, eller
 - 2) at indsætte en begunstiget i en livsforsikring eller en lignende ordning, der er oprettet for et beløb, der står i misforhold til formuen.
- Stk. 2. Har den længstlevende foretaget en disposition i strid med stk. 1, nr. 1, kan en arving efter den førstafdøde kræve dispositionen omstødt, hvis modtageren vidste eller burde vide dette.
- Stk. 3. Stk. 2 finder tilsvarende anvendelse, når en livsforsikring eller en lignende ordning omfattet af stk. 1, nr. 2, kommer til udbetaling til en begunstiget.
- Stk. 4. Efter den længstlevende ægtefælles død finder stk. 2 og 3 ikke anvendelse, i det omfang den pågældende arving kan opnå dækning for sin arveret, ved at der ydes den pågældende vederlag af det beholdne bo, jf. § 85.
- Stk. 5. Stk. 2-4 finder ikke anvendelse, hvis dette er udelukket ved testamentet.