COMMENT ON THE PUBLIC CONSULTATION PAPER
ON DIRECT TAX PROBLEMS REGARDING CROSS BORDER VENTURE CAPITAL

1 Identification of the stakeholder

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Danmarks Skatteadvokater agrees to the publication of its name and this comment.

2 Problems encountered in practice

2.1 *General tax obstacles*

Two main tax obstacles affects cross border venture capital investments into Denmark.

The first is the uncertainty regarding whether or not foreign investors will be deemed to have a permanent establishment in Denmark. See the comments below.

The second is the risk of Danish withholding taxation on outbound dividend and interest payments in case the Danish tax authorities do not consider the immediate recipient as the "beneficial owner".

In recent years The Danish tax authorities have instituted a large number of cases against Danish companies regarding dividend or interest paid to their parent companies in other EU Member States or countries with which Denmark has concluded double taxation treaties. The Danish tax authorities claim that the dividend and interest payments were subject to Danish withholding taxation because the receiving foreign companies - according to the tax authorities - were not the "beneficial owners" of the payments and that no relief or exemption should then be available

under the Danish double taxation treaties or the EU parent/subsidiary and interest- and royalty directives.

The cases regarding "beneficial ownership" are now beginning to occur before the Danish courts, and a clarification by the Danish Supreme Court may be expected within the next few years.

Due to these uncertainties it might be less attractive to perform cross border venture capital investments in Denmark.

2.2 *Permanent establishment issues*

If foreign investors are deemed to carry on business in Denmark through a permanent establishment, they will be subject to limited tax liability in Denmark under section 2, subsection 1 (a), of the Danish Corporate Income Tax Act.

The following comments are based on the assumption that the foreign investors are residing in EU member states or in countries with which Denmark has entered into a double taxation treaty based on the OECD Model Tax Convention.

There have been no published court cases where a permanent establishment under Article 5(1) or 5(5) of the Model Convention has been deemed to exist in Denmark due to a venture capital investment. However, in four advance rulings the Danish Tax Board[1] has found that foreign venture capital investors did not have a permanent establishment in Denmark. The tax board based its rulings on a case by case review of all facts relating to the individual venture capital structure.

Hence, currently it is not clarified to what extent a cross border venture capital investment in Denmark can be considered a permanent establishment. Thus, in order to fully verify the tax treatment, foreign funds and investors would have to ask for an advance ruling on each individual structure.

2.3 *Entitlement under double taxation conventions*

N/A

[1] The Board is a collegiate body that, among other things, deals with applications for advanced rulings in more complex matters or matters of fundamental importance.

2.4 *Avoiding the risk of double taxation*

N/A

2.5 *Risk of double non-taxation / tax avoidance and evasion*

N/A

2.6 *Tax burden and additional costs for cross-border venture capital investment*

In case withholding tax is levied on cross border dividend and interest payments or if the individual structure is deemed to entail a permanent establishment for the investors this may lead to additional tax burdens and administrative costs for the venture capital fund and its investors.

2.7 *Possible discrimination of cross-border venture capital investment*

N/A

3 Possible solutions to the tax obstacles encountered

N/A