

On Tax Law and Private Law Relations

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1 Introduction to the Subject

The subject of this article is the legal relationship between fiscal law and private law in Denmark. The relationship between tax law and private law has not been given attention corresponding to the practical and theoretical importance of the topic.¹ The theoretical and practical clarification of tax law and private law relations presently finds itself in an embryonic stage. The traditional focus has been placed on the use of private law terms in tax law legislation and on the discussion on form and substance, tax avoidance and evasion.

In contradiction to the situation in several other countries the subject has not been profoundly analysed in Danish legal science. The reasons for this may be many, but one obvious reason may be the historical lack of academical interest in tax law as such. The historical interest in countries such as Germany, Switzerland and Austria can be seen as an expression of recognition of the practical overlap between the disciplines. Such recognition is important due to the fact that modern business imply multidisciplinary business advising by the solution of practical problems. Beginning by the last third of the 20th, Century, Post-industrial service rendering business in Europe and North America has been characterized by a high and until then unseen degree of complexity. Hereby certain demands for interdisciplinary research arise. In the field of business advising, lack of knowledge across legal disciplines may lead to insufficient advice.

The importance of the subject is beyond doubt. Basically, all fact finding in tax law is based on private law. Taxation of business activities is thus based on the private law qualification and use of private law terms. From a theoretical

¹ In Swedish law especially Sture Bergström has presented an acknowledgeable effort in analysing the relationship, *cf.* the author's doctoral thesis *Skatter och civilrätt – En studie över användningen av civilrättsliga termer i skatterättsliga sammanhang*, 1979 and further *Ogiltighet ur civilrättslig och skatterättslig synvinkel*, 1984 and *Private law and tax law* in Sc.St.L. 1979, at 33 et. seq.

point of view the subject is of utmost importance, since it regards the structure and position of the tax law as such, and at the same time at the end of the day deals with the principle of legal security. The subject, however, is not only of theoretical interest. On the contrary, tax law and private law relations constitute a key problem in practice, which is emphasized by the increasing number of corrections of the taxable income made by the tax authorities. Such corrections have been seen on a regular basis in Danish law since 1919, whereby frequent tax law deviations from private law occur. Simultaneously it is important to be familiar with the use of private law terms in tax legislation, and for the tax legislator to be aware of potential problems arising when private law is not taken sufficiently into consideration.

Even though an immediate consideration show no common points of coordination between tax law and private law, a more thorough analysis will show a common core inextricably connected despite differing content and function of the legislation.

2 Expanding the Focus

The article a forehand is based on a theory of coordination between the legal disciplines. Thus, the article presents a view upon tax law and private law relations in Danish Law differing from the traditional conception. Hereby the objective of the contribution is to bring forth a renewed interest in interdisciplinary legal coordination and to clarify the fundamental relationship between tax law and private law. Furthermore the article differ from the traditional view since a holistic view is taken, whereby as well the theoretical theme concerning the relationship between tax law and private law in principle as the related practical subjects are analysed. Thus, the general results are applied on actual occurring legal interactions. Additionally the statements of the article apply as well for tax practice and judgements as for tax legislation.

It is stated that tax law and private law relations consist of more than merely a treatment and an analysis of tax abuse. However, it is not hereby stated that tax law abuse as an issue is of limited importance. On the contrary, tax law abuses presumably represent the single most important example of existing difficulties in tax law and private law relations. The article presents a somewhat broader view on the subject than the traditional focus on tax law abuse.

The treatment by Danish scholars of the subject has so far been limited to a dogma point of view, according to which the tax law and private law relations are described by way of black-white schemes either resulting in a controlling function of private law or resulting in statements involving tax law autonomy.

3 Potential Interactions – a Non-exhaustive Catalogue

Tax law and private law interaction may take several forms. However, no generally accepted exhaustive catalogue or general consensus on potential

interactions exists. In my opinion, at least eight kinds of such interactions may be mentioned.

(1) Primarily it is seen that tax law make use of private law terms and concepts, which accordingly are interpreted in a specific tax context. The reason for this is the obvious lack of specifically designed tax law terms and concepts, which may be explained by several factors.² Knowledge about the use of private law terms and concepts is relevant matters for as well tax legislators as for interpreters and users of the tax legislation. A general demand for congruity based on legal authority cannot be set forth regarding the use of private law terms in tax legislation. However, this may be the case when private law terms and concepts explicitly are presupposed to be used in their private law meaning and understanding. In some cases private law terms have a broad and varying meaning, which may be taken over by the tax law usage of the same term. Hereby the extent and number of tax law deviations from private law is reduced. The difficulty of using private law concepts in their private law meaning increase when private law concepts are not clarified. Hereby a related interaction between tax law and private law occur. (2) Thus, an independent tax law private law may occur, whereby private law concepts are interpreted in a specific tax law meaning. Furthermore it may possibly occur that private law concepts are misunderstood by tax legislators or tax law interpreters that are assumed to be less skilful in the field of private law than in the field of tax law. In such situations a risk of uncertainty exist, which should be avoided and reduced. (3) Recognition of the outcome of the Freedom of contact represents an important field of interaction between tax law and private law. The interaction is relevant both by tax law design and by judicial decisions. (4) Furthermore the interaction between tax law and private law may occur by way of problems in coordination. The legal disciplines hereby may discourage or counteract each other whether intentional or unintentional. The type of interaction in question may e.g. occur when specific tax law terms are used without any linkage to private law terms etc. (5) The problems of coordination can reach as far as resulting in the discouragement of private law values. (6) In continuation of the exactly mentioned a field of interaction lie within the use of specific tax law terms. Certain problems arise when terms and concepts of a similar wording as in private law are used, but it is not on the assumption that the terms and concepts are understood in their private law meaning. (7) Furthermore tax law may have a knock-on effect on private law. Bearing in mind that taxes are burdens imposed on taxpayers it seems evident that tax law may have an impact on private law. Thus the tax system may determine how the taxpayers will arrange actions and make use of the freedom of contract. Hereby tax law is of great importance to the choice between different alternatives and the contents hereof. Similarly the knock-on effect may occur due to the fact that concrete problems, which may rarely occur in private law, occur on a regular basis in the field of tax law. Hereby tax law may give rise to inspiration to private law solutions of similar circumstances. Finally the knock-on effect may give rise to a real knock-on, whereby tax law considerations are decisive in private law matters. (8) Finally

² Thus, the phenomenon may partly be explained by tradition, partly necessity, partly lack of superior alternatives and partly due to appropriability.

private law rules of foreign countries may influence Danish tax law. Thus, foreign private qualification of global income, taxable in Denmark, is essential. Similarly, the type of interaction is relevant by the Danish tax law qualification of foreign legal entities, if such entities are taxable in Denmark or may wish to qualify for specific beneficial tax rules.

4 Potential Grounds of Tax Law Detachment – a Non-exhaustive Catalogue

Possible grounds of tax law detachment from private law can be elaborated. It should, however, be noted that no generally accepted exhaustive catalogue or general consensus on potential tax law detachments exists. The following grounds are commonly seen in Danish law, however, of a varying frequency: (1) different methods of interpretation in tax law and private law, (2) the safeguarding of different values in tax law and private law, (3) the prevention of tax abuse (evasion and avoidance), (4) discrepancies between formality (form) and reality (substance), (5) tax payers tax saving devices, (6) the development in businesses life and economic realities herein, (7) impossibility of having similar opportunities, concepts and terms etc. in tax law and private law, (8) intentional or unintentional lack of coordination, (9) wrong preconditions due to a wrongful conception of private law, and (10) a fragmentary technique in tax legislation design.

The catalogue should not be considered as an attempt to present an exhaustive list of possible grounds of tax law detachment. It is assumed that the prevention of tax abuse and the pragmatic grounds are the most commonly seen and thereby represent the most important grounds.

5 Practice and Theory of Today in Danish law

5.1 Statements in Preparatory Work Regarding Tax Law Statutes

In Danish law there is no tradition to make specific statements regarding tax law and private law relations in preparatory work concerning tax law statutes. This statement is verified by a random examination of such text materials. Often tax statutes make use of terms and concepts of a certain linguistic similarity to private law terms and concepts. Even in such situations no specific remarks regarding tax law and private law relation are made in the official documents. However, as a general principle of interpretation legal terms must be used in their commonly known meaning, in so far such terms and concepts are used in tax legislation and no specific remarks are made in relevant sources of law relating to the statute in question. In several occasions tax legislation aim at making a detachment from private law. However, also in several occasions it is stated that tax authorities as a starting point are obliged to respect private law arrangements of the taxpayers.

The general impression however is, that preparatory work regarding tax law statutes suffer from an obvious lack of thorough analysis of tax law and private law relations or merely remarks concerning tax law and private law relations. In my opinion, the mentioned makes up a somewhat inappropriate situation. Such analysis or remarks could be introduced quite easily ad modum the analysis already carried out on the effects of the proposed tax legislation on tax yield, environment and EU law etc.

5.2 *Judicial Decisions*

On the basis of an examination of Danish case law it is possible to conclude, that no general line of interpretation can be identified regarding the relationship between tax law and private law. Judicial authorities have not manifested a general opinion on tax law and private law relations through explicit ratio decidendi or the use of obiter dictae. The judicial decisions afore hand are marked by a natural casuism in tax law and are often based on concrete circumstances. However, it must be acknowledged that courts' or tax authorities' remarks from time to time indicate, that valid private law actions must be recognized for tax law purposes. A closer look at the judgements in question, however, leads to the conclusion, that no general guideline on tax law and private law relations can be extracted. Thus, it is not possible to conclude whether or not Danish courts and tax authorities support an idea of congruity between tax law and private law, or whether the mentioned in general support an idea of tax law autonomy. The legal grounds have been unclear, why it additionally is not possible to conclude whether a specific tax law qualification or lack of precise private law qualification is causing the occurring tax law detachments.

5.3 *Legal Theory*

Legal theory on tax law and private law relations has been living a quiet life so far in Danish legal tradition. However, it is possible to identify different opinions among scholars.³ The prevailing view taken by numerous authors is the opinion that private law takes a controlling position over tax law. A leading Danish scholar has categorized the legal relation as follows, "... *Although it does not explicitly appear so from tax legislation, it is obvious that Danish tax law depends on and is guided by private law. In legal systematics, tax law is usually regarded as an independent discipline belonging to public law. In actual fact, however, tax law is intimately connected with private law concepts. The relations are so close that in a way private law guides tax law and has a decisive impact on its application, generally as well as specifically. The consequence is that the interpretation of tax legislation cannot be performed solely on a tax law basis, but implies a preliminary private law interpretation. In a way, tax law is a dependent discipline which is incapable of taking care of itself, but needs*

³ As mentioned already the traditional focus in legal theory is narrow, cf. 2, *supra*.

guidance from private law, just as the dog guides the blind man. The guiding function of private law is a result of the structure and nature of income taxation..."⁴ In essence, and in its original version, this point of view imply private law prejudice and tax law respect of private law arrangements, concepts and terms etc. In other words, in accordance to this viewpoint the controlling function of private law leads to extensive congruity between tax law and private law. Furthermore it follows this point of view that the primary occurrences of tax law detachments from private law only concerns tax abuse situations.

In recent time some scholars have taken the radical point of view that any tax law detachment from private law prerequisite a firm statutory authority for this. In my opinion, such a point of view calls for considerable contradiction, since it is undifferentiated, and since no legal grounds for such statements can be presented with authority on the basis of the precedent of private law.

According to a different opinion some scholars advocate that tax law basically is autonomous. Only few authors have supported the latter autonomy-point of view.

According to the prevailing opinion in Scandinavian law, private law concepts and terms often have varying meanings according to the functions and aims of the various rules. It has been recommended that tax law make use of this terminological flexibility, which may result in a situation where no tax law detachment from private law is necessary in many situations regarding the use of terms and concepts. It may be concluded that the terminological flexibility of private law terms and concepts does not represent a general explanation covering all tax law and private law interactions. The theory on terminological flexibility contributes to the clarification on whether a factual tax law detachment is present, or whether the tax law use of the term, concept etc. can be seen merely to constitute a usage of terms etc. within the flexible terminology and thereby not a tax law detachment from private law after all. The theory on terminological flexibility hereby eliminates certain problems - but only certain problems - of interaction between tax law and private law to the extent that it is concluded that no tax law detachment from private law has found place regarding the tax law use of private law terms and concepts.

6 Alternative Approach – Coordinating the Legal Disciplines

An alternative approach in analysing tax law and private law relations can be introduced. This alternative is based on thoughts of *coordination*. This way of thinking is inspired by the development in namely Swiss and German legal theory and case law. Based on this way of thinking the thoughts on coordination can be expressed by way of a hypothesis on the relative autonomy of tax law, which may be applied as well in tax law design as in case law and legal science. The hypothesis constitutes a reassessment of tax law and private law relations. The hypothesis can be presented as consisting of three levels.

⁴ Cf. Pedersen, Jan, in *Cahiers de droit fiscal international*, Vol. LXXXVIIa, 2002, at 233 et seq.

As a starting point tax law basically can be seen as autonomous from private law. It can be assumed that tax law and private law fundamentally are independent and equal legal disciplines. None of the disciplines take precedence over the other, why tax law is not tied up to private law. On the other hand, private law do establish precedent as regards the practical fact finding in tax law matters. Tax legislators, tax authorities and courts thus, from a theoretical point of view, may as a rough starting point keep tax law and private law separated in accordance with the statements presented by the hypothesis.

However, important considerations can be pointed out leading to the conclusion that the starting point should not be upheld unlimited. Thus, deviations from the basic contents of the hypothesis must be accepted to a certain – not insignificant - extent. The important considerations consist of the fundamental view that legal disciplines in general should not be allowed to undermine basic values and intentions in any other specific field of law. Fundamental structures of one part of the law (private law) necessarily must influence judgements in other parts of the law (as for instance tax law). Otherwise unacceptable inconsistencies between the different parts of the legal system may arise. Hereinafter private law should not undermine basic tax law values and intentions, as should tax law not undermine basic private law values and intentions. In so far these guidelines are not upheld, severe disturbances of the legal structures may occur. In each single case of occurring tax law and private law interaction a concrete weighing of affected values and intentions in private law and tax law should be carried out. On the basis hereof it is possible to conclude whether or not important considerations should result in congruity with regard to the specific tax law and private law interaction.

The thoughts of coordination may result in either a demand for congruity or a need for congruity between tax law and private law. Thus, a *need* for tax law and private law congruity may occur on the basis of policy considerations, while a *demand* for congruity may occur on the basis of more or less certain statutory authority regarding the specific issue in question. The thought on interdisciplinary coordination may be clarified by pointing out essential parameters. Thus:

- The more important and fundamental a private law ideal, institute, value or intention,
- The more clarified and evident a private law phenomenon has been developed in statutory law and case law, hereby leaving little room of interpretation for the parties involved,
- The more appropriate private law reflects the economic substance of the transactions in question,
- The degree of certainty whereby it objectively can be stated that the tax legislator has presupposed the use of private law terms and concepts etc. in a private law meaning,
- The degree of certainty whereby it objectively can be stated that courts etc. has presupposed the use of private law terms and concepts etc. in a private law meaning,

the more tax law should pay attention to private law, i.e. congruity should be the objective. However, certain additional conditions should be fulfilled in order to put forth a demand or a need for congruity. Such conditions may be a general wish to obtain results in accordance with common sense and a possibility to identify a private law position on the subject in question. Thus, a demand or a need for congruity is not valid in so far the subjects in question are not slightly identical or if private law has no solution for the question. Furthermore a rule of assumption can be presented according to which private law is assumed to be decisive where no relevant sources of law exist from a tax law perspective.

It should be emphasized that no demand for statutory authority regarding tax law detachments from private law on the basis of the hypothesis can be put forth. The presented modification to the hypothesis ensures specific tax law considerations, of which the prevention against tax law abuse seems more important. However, other tax law considerations and political considerations may be considered.

It is not possible in an abstract manner to express which values etc. should be respected and which should not in tax law and private law interaction. A concrete evaluation is required in each interdisciplinary interaction between tax law and private law. Despite this circumstance potential grounds of tax law detachment are listed above in a non-exhaustive catalogue, cf. 4. The presented hypothesis implies a sophistication of the description of tax law and private law relations in Danish law. Hereby it has been a goal to set forth the foundation for the achievement of a permanent solution regarding the problems arising from interdisciplinary interaction between tax law and private law.

The following shall confront the hypothesis with actual interdisciplinary interactions between tax law and private law.

7 Confrontation

7.1 Confronting the Freedom of Contract and the Coordination Theory - Possible Reactions of the Tax Authorities Towards Tax Payers' Arbitrary Dealings

In the core of interdisciplinary interactions the problem of possible reactions of the tax authorities against the outcome of the freedom of contract must be analysed.

The starting point, according to which tax law is completely autonomous, should clearly be modified in this specific field of tax law and private law interaction. Thus, the freedom of contract constitutes an essential principle and an essential value in private law. However, a development away from the freedom of contract can also be seen within the field of private law. The recognition hereof leads to a strong demand and a nearly as strong need of congruity. Hereafter a general confrontation between tax law and private law must be carried out between the value of the freedom of contract and the central tax law and tax policy values and objectives, such as taxation according to economic ability, the principle of equality and the principle of neutrality. On the

basis hereof it may be concluded, that the mentioned principles and values in tax law and tax policy take up a somewhat equally essential position in tax law as does the freedom of contract in private law. Thus, the opportunity in tax law to prevent tax law abuse by way of corrections in the parties' contracts must be acknowledged on the basis of the coordination way of thinking.

Namely where tax law abuse is carried out, significant and legitimate tax law detachments from private law exists a priori. However, in practice the results of the freedom of contract is mostly recognized for tax law purposes.⁵ The potential interactions between tax law and private law may be the prevention of tax abuse (evasion and avoidance) and potential discrepancies between formality (form) and reality (substance). As already mentioned the freedom of contract is recognized as a general rule in Danish tax law. However, tax authorities may correct the existence and contents or conditions of the contracts for tax law purposes.

Tax law *corrections of conditions in contracts* are primarily based on statutory authority as set forth in section 2 of the Danish Tax Assessment Act, which adopts the arm's length standard.⁶ Pursuant to the wording of Section 2 (1), taxpayers under common control are required to apply the prices and terms for commercial and financial transactions that would have been used, if the transactions were entered into between independent parties. The provision covers all types of transactions.⁷ Section 2 covers taxpayers, who *are* controlled by individuals or legal entities (Danish subsidiaries), *or* controls legal entities (Danish parent companies and majority shareholders), *or* are legal entities that are members of a group of companies (Danish group companies), *or* has a permanent establishment abroad (Danish companies and individuals), *or* are foreign individuals or legal entities with a permanent establishment in Denmark (foreign companies and individuals).

The concept of "control" relies on de jure control and is defined as the direct or indirect ownership or control of more than 50% of the share capital or voting power. In determining whether control exists, the shares and voting power held by various majority shareholders are taken into consideration. The concept of "group companies" refers to legal entities controlled by the same shareholder or group of shareholders. Again, control refers to the holding of more than 50% of the share capital or voting power. An individual or legal entity is deemed to be "foreign" if the person is resident for tax purposes in a foreign state under domestic law or for the application of a tax treaty.

The above mentioned does not preclude the Danish tax authorities from making Transfer pricing adjustments in case of transactions between independent parties lacking opposing interest for tax purposes in a given

⁵ It is evident that tax law recognition of the outcome of the freedom of contract preconditions private law validity of the contract in question. Invalid contracts, which do not obligate the parties, cannot obligate tax authorities either.

⁶ Section 2 (1) conforms to the internationally acknowledged principle stated in Article 9 of the OECD Model Tax Convention. See Bundgaard, Jakob & Wittendorff, Jens, *Armslaengdeprincippet & Transfer pricing*, 2002.

⁷ However, with respect to permanent establishments only transactions covered by Article 7 (2) of the OECD Model Tax Convention are covered.

situation. Thus, tax authorities are legitimised to correct the conditions in contract between formally independent parties. Such corrections, however, are normally limited to the distribution of the value of assets in assets deals. The ratio decidendi behind such corrections is that taxpayers should not be able to dispose over the system of qualification in tax law.

Additionally, tax law *corrections of the existence and contents of contracts* may occur, based on a substance over form doctrine. The existence hereof has been discussed in theory. However, recent Supreme Court case law provides strong indications of the existence of a substance over form doctrine.

Considering the importance of the considerations behind the access to correct the conditions of contracts and the existence and contents, it seems as if no convincing arguments imply that tax law and private law congruity should be maintained unaffected. Hereafter tax law detachments should be acknowledged as even theoretically legitimate.

7.2 Confronting the Concepts of Public- and Private Limited Liability Companies in Private Law and Tax Law

Another interesting issue is interaction on legal subjectivity and tax subjectivity as regards legal persons. In Danish tax law tax subjectivity of public and private limited liability companies is a consequence of the formal corporate law registration hereof.⁸ As a result, the notion of public or private limited liability companies for tax law purposes is based on the corporate law definitions hereof. Thus, tax law and private law definitions of public- and private limited liability companies are basically congruent. As a consequence, no need for a specific tax law qualification of public- and private limited liability companies exist. As a starting point the tax law treatment of public- and private limited liability companies should follow the company treatment of these legal persons. In corporate law corporations are independent legal entities, which accordingly must be adopted as the basic rule in tax law. Hereinafter public limited liability companies and private limited liability companies constitute independent legal persons and taxable entities. Potential detachments from the basic rule in tax law thus additionally constitute a detachment from corporate law.

It is common knowledge that the mentioned companies are characterized by a limitation in liability.⁹ However, in the field of corporate law deviation from the limited liability assumption occurs. Thus, corporate law identification of legally independent entities occurs in Danish case law, although only rarely. In addition piercing of the corporate veil may not be excluded as an opportunity *de lege lata*. These circumstances should be kept closely in mind by the analysis of the tax law treatment of public limited liability companies and private limited liability companies.

According to the hypothesis presented *supra*, tax law as a starting point may be considered as autonomous with regard to private law. Accordingly, a specific tax law definition and treatment of private and public limited liability companies

⁸ Cf. Corporation Tax Act section 1, paragraph 1.

⁹ Cf. Section 1, paragraph in the Danish company acts.

seems legitimate. However, based on the remarks above, a modification to the autonomy resulting from the starting point of the hypothesis should be made. This modification is based on the fact that a demand for congruity is identified in this context. The essential command of the hypothesis is the prohibition against any undermining of values and intentions in private law (corporate law). Regarding the terms of public- and private limited liability companies such values and intentions consist of the freedom of contract, resulting in a free choice of corporate form and the possibility to provide necessary financing of businesses. In a private law context these values and intentions are not upheld without exception. When the specific clarifying parameters in the identification of demands and needs for tax law and private law congruity are pointed out, it seems clear that public limited liability - and private limited liability companies should be respected for tax law purposes even though only legal and artificial phenomena. This statement should be elaborated by the fact *that* the terms are fundamental and of great importance in corporate law, *that* the underlying values and intentions are fundamental and of great importance in corporate law, *that* the terms have been developed in corporate law to a certain degree of clarity, hereby leaving little room for interpretation of the terms, *that* the terms make up an appropriate expression of the economic substance, given the fact that corporations are artificial notions created by the legal order whereby form and substance per se are identical,¹⁰ *that* it is a documented fact that the tax law use of the terms directly is based on a trace of the private law terms, and *that* practicability provides an argument for congruity between tax law and corporate law regarding the use of the terms public- and private limited liability companies. Thus, congruity should be maintained by the use of the specific private law terms in tax law. The statement is based on as well a demand as a need for congruity in tax law and private law interaction.

As already mentioned it should be kept in mind, that corporate law detachments from the basic contents of public- and private limited liability companies occur, which weakens as well the demand as the need for congruity. From the observed private law detachments it may be deduced, that tax law is granted a certain degree of liberty in determining the treatment of public- and private limited liability companies for tax law purposes. In addition it cannot be denied that certain important tax law and tax policy values may be identified, resulting in an acceptable tax law detachment from corporate law, from a theoretical point of view. It is essential that tax law contain possibilities to counteract tax law abuse.

The presented basis may be confronted with the legal reality of Danish public- and private limited liability companies. As a result hereof it is possible to conclude that, tax law has not been able or willing to detach itself from corporate law in this specific context. Thus, corporate law formalities are decisive, even though tax law detachments do occur as a solution of specific problems.

Disregard of the legal entity in a tax law perspective is carried out by way of *voluntary identification* between shareholders and the corporation. Voluntary identification constitutes an important tax law detachment from corporate law. A great variation in ratio legis is seen as legitimation of such identification. As a

¹⁰ The notion of legal persons thus represents a legal fiction.

consequence of companies being separate legal entities, transfers of assets between shareholders and corporations may result in taxation as other changes in ownership. However, the experience is that such taxation may hinder generational changes and corporate mergers and acquisitions, which are considered politically desirable. Thus, tax legislation has been introduced, which implies a succession at the shareholder level. Succession can be seen as a kind of identification between corporations and shareholders.

These considerations are important in the Act on conversion of personal business entities into corporations (*virksomhedsomdannelsesloven*), the Merger Tax Act (*fusionskatteloven*), making mergers, transfers of assets and divisions possible and the EU merger tax directive (90/434/EEC), making tax neutral mergers, transfers of assets, divisions and exchange of shares possible. In addition the overall objective of the merger directive is stated in the preamble where it is specified that it should be possible to carry out cross border restructuring within the European Union, to ensure the establishment and effective functioning of the common market; whereas such operations ought not to be hampered by restrictions, disadvantages or distortions arising in particular from the tax provisions of the Member States; whereas to that end it is necessary to introduce with respect to such operations tax rules which are neutral from the point of view of competition,¹¹ in order to allow enterprises to adapt to the requirements of the common market, to increase their productivity and to improve their competitive strength at the international level.

The possibility to obtain joint taxation between Danish corporations and Danish and foreign subsidiaries,¹² may be seen as a voluntary tax law identification within corporate groups. It may be assumed that the objective of the rules is to ensure neutrality by way of treating subsidiaries and affiliates similar.

The possibility to obtain participation exemption¹³ may be seen as a voluntary tax identification of groups of companies. The objective hereof is to eliminate economic and international double taxation and hereby ensure tax neutrality.

Disregard of the legal entity in a tax law perspective is also carried out by way of *compulsory identification* between shareholders and the corporation. Compulsory identification occurs in Danish tax law, based on different ratio legis and different ration decidendi. The primary reason of tax law detachment in this context is seen to be the prevention of tax law abuse. These considerations have often been carried through under specific safeguarding of the principle of neutrality. Counteractions against a genuine risk of tax law abuse should not be met with a theoretical or practical opposition. Central tax law values are at stake, which weigh heavier than the observed demand and need for congruity regarding the treatment of shareholders and corporations as separate entities.

¹¹ The notion of "neutrality" is not clarified in the directive. However it may be concluded that the directive aims at neutrality in the original economic sense, *cf.* van Thiel, S., Ratträ, Christine and Meër, Michael in *European Taxation 1990*, at 326 with references.

¹² *Cf.* Section 31 of the Danish Corporation Tax Act.

¹³ *Cf.* Section 13 and Section 2 of the Danish Companies Tax Act and the parent- /subsidiary directive (90/435/EEC).

One category of compulsory identification concerns the *access to establish companies*. Certain rules exist, that prevent taxpayers from obtaining advantages from the mere establishment of corporations. Thus, section 5, paragraph 4 of the National Tax Assessment Act prescribe that shareholders are obliged to accrual expenses of interest and income of interest, in so far the corporations are obliged to do so and the shareholder holds an outstanding account on the corporation. The objective of this rule is to prevent tax planning regarding accrual of interests. With the objective of obtaining tax neutrality the tax rate on income of shares (aktieindkomst) increases drastically when a certain amount has been earned. Hereby limitations on the use of corporations as tax shelters for business income are introduced and tax neutrality is ensured

Another category of tax law identification concerns the *abuse of shareholders influence over corporations*. Thus, shareholders are identified with their companies in Section 3 of the condominium tax act, where condominiums owned by corporations are included in the number of terminated tenancies within the previous five years, which determines tax liability. Danish Controlled Foreign Companies (CFC) legislation may be seen as a statutory compulsory identification.¹⁴ The nature of the CFC regime is antiabusive, with the objective to impede persons and corporations from avoiding taxation in high tax jurisdictions by the placement of financial income in low tax jurisdictions. As a result tax neutrality is ensured. Even tax legislation aiming at Captive Insurance Companies¹⁵ is based on the principle of neutrality, whereby different insurance alternatives are treated identically. Section 33 of the company tax act implies that tax claims may be addressed to shareholders in so far the corporation in case of insolvency distributes the proceeds without sufficient payment for tax claims. A similar rule is introduced to counteract the sale of companies to commercial robbers who empty the corporation of assets without any payment of tax claims. Identification is seen to apply even when the corporation-shareholder relationship no longer exists. Thus, Section 2, paragraph 2, litra f) of the company tax act and section 43, paragraph 2, litra i) of the Danish source tax act imply that immigrants are taxable on the advisory fees from companies which they own or has owned. The objective again is anti-abusive. Case law has provided some examples of compulsory identification between corporations and shareholders. Thus, losses from the transfer of shares within corporate groups have been disrespected for tax purposes. The ratio decidendi most likely is the prevention of construction of losses when intragroup gains are placed in corporations with a loss carry forward. However, such circumstances should be identified before tax law identification is made, whereby a general refusal to recognize intragroup losses as a result of asset deals should not be applauded.

Finally, a category of identification based on considerations of *efficient control by the fisc*. On the basis hereof the tax authorities may instruct corporations to change their fiscal year resulting in a similar fiscal year as the controlling party.¹⁶ The objective is to improve the tax authorities' access to

¹⁴ Cf. Section 32 in Danish Company tax act and section 16 H in the national tax assessment act.

¹⁵ Cf. section 11 of the Danish Company tax act.

¹⁶ Cf. Section 10, paragraph 5 of the Company tax act.

obtain a correct view of the business earnings, which may be disturbed by close relations between the corporations and its shareholders, in so far the controlling party makes use of a different fiscal year.

In conclusion tax law and private law interaction regarding the treatment of public- and private limited liability companies is satisfactory. The grounds of tax law detachment are found to be legitimate from a coordination point of view. However, caution should be observed so that legislation based on objective conditions does not result in inappropriate tax law detachments from private law. Inappropriate tax law detachments may occur if the anti-abuse considerations are stretched beyond the actual risk of tax abuse.

As a main result, the tax law detachment from corporate law regarding the company-term should not be criticized. However, it may be concluded that tax legislator probably has not chosen a superior solution by the reference to the legal person as decisive in the matter of determining tax liability. The legal system, however, has reached a sufficiently correct result, which has been able to function in real life despite the congenital weaknesses.

It may also be concluded that congruity is ensured in most cases. This is assumed to be an advantage of some importance, given the fact that taxpayers are hereby granted the opportunity to foresee the tax law effects of the establishment of limited liability companies.

8 Tentative Conclusions

The article has presented a new line of thinking regarding tax law and private law relations in Denmark. Instead of the traditional focus on either interdisciplinary autonomy or congruity, the article presented a hypothesis, which implies a certain degree of sophistication in tax law and private law coordination. It seems reasonable to conclude that the thoughts on coordination are suitable in order to deal with the complex interdisciplinary interactions between tax law and private law. Such a conclusion is supported by the confrontations above, under which actual interactions have been analysed by the use of the coordination hypothesis.

The coordination hypothesis expresses sound goals for the legal system as such, and tax law in particular. It has been the objective of the article to present thoughts making way for a final solution regarding tax law and private interactions in Danish law. Thus, future alterations of the hypothesis may be needed. However, the width of the hypothesis may reduce the potential need thereof. Apart from the basic recognition in the hypothesis it has been possible to formulate non-exhaustive catalogues over potential interdisciplinary tax law-private law interactions, and potential grounds of tax law detachment from private law. Even these catalogues may be altered in the course of time and should be maintained continuously, whereby new interactions and grounds of detachment may be recognized.

It should be emphasized that the hypothesis does not provide, and does not pretend to provide unavoidable statements of truth *de lege lata*, and thus does not reflect the prevailing attitude towards tax law and private law interactions in

Denmark as of today. On the contrary, the thought on interdisciplinary coordination primarily consists of policy considerations. However, it should be noted that the presented way of thinking does not conflict directly with existing tax law theory, case law or legislation. The substantial value of the coordination thought is anticipated to lie within the mere presentation of a new pattern of thinking, the mere systematisation and the presentation of methods of analysis. A pragmatic view may, however, more modestly imply hopefulness that the academical treatment of tax law, and private relations will lead to a badly needed increase in theoretical and practical treatment of the subject. The subject deserves such an increase, since it contributes to an essential understanding of the placement and nature of the tax law as a legal discipline and legal science. Such questions have so far been treated unsatisfactory. Tax law and private law interactions are complex. Legal Analysis of such complex interactions deserves patterns of thinking, which are wide ranging and which are not limited to black and white theories on interdisciplinary autonomy or congruity. The thoughts on interdisciplinary coordination provide such a sophisticated line of thinking. It has been the intention of this article to introduce the basic contents of the coordination line of thinking. Furthermore, the article has attempted to show, by way of examples, how the coordination hypothesis may be useful in analysing actual tax law and private law interactions.