



Settlement in dividend case surprises U.S. experts: “I’m shocked”

Originally published January 25, 2020

By JOACHIM CLAUSHØJ - TV2 News, Copenhagen, Denmark

The National Audit Office does not decide whether it was right or wrong to settle in the dividend case.

The Tax Authority's secret billion-dollar settlement in the dividend case with a group of New York backers is given a tough ride by law professors, lawyers and tax experts in the United States.

The criticism is that the amount to the IRS is far too low, that Americans are not really obliged to cooperate and that a feared weapon is cut off in American law.

Most strikingly, the settlement contains wordings which, according to the experts, make it extremely unlikely that the perpetrators can be convicted in criminal proceedings. The Danish Tax Authority has otherwise said several times that the settlement did not affect the criminal investigation.

- My best guess is that there is zero percent probability that they will go to prison and that Denmark gets more money back, says law professor William Byrnes of Texas A&M University School of Law.

- I am surprised that an EU member who is as respected as Denmark is in such a weak position in relation to fraud committed against the government as this agreement proves. It is so incredible that I wonder if they have really lost four billion kroner, says Byrnes, who has been researching the area for more than 25 years.

Shocked top lawyer

The settlement also evokes amazement in New York, where experienced partner Marc Levey of Baker McKenzie, America's largest law firm, has read the settlement.

- I am shocked that the IRS is even considering entering into a settlement on this basis, says Marc Levey, who has also worked as a prosecutor in the U.S. Department of Justice.

You can get an overview of the experts' criticisms further down the article.

Backers can pull everything from

As TV 2 and Politiken have previously uncovered, the settlement has entered into a group of pension funds led by Matthew Stein and Jerome Lhote, who live in New York. The two are backers in a network involved in suspected fraud for at least DKK 4.1 billion. With the settlement, they and their network, made up of friends, family and business relations, must repay DKK 1.6 billion to Denmark.

The two men collaborated a transition with the prime-suspect, British financier Sanjay Shah, who lives in Dubai but chose to do their own organization. They then bought the small German bank North Channel Bank and tailored it to recover dividend tax from Denmark and Belgium with the help of former employees at Sanjay Shah.

In May 2019, the Danish Tax Authority reached a settlement with Matthew Stein and Jerome Lhote and the network around them to withdraw the cost of, among other things, tax advice, stockbrokers and banks. In addition, the backers were able to deduct a fine for gross fraud received by North Channel Bank last September.

The revelations resulted in the National Audit Office being asked to explain the case. On Friday this week, the state auditors dealt with the memo, in which the National Audit Office did not decide whether it was reasonable at all to be reconciled.

- The National Audit Office cannot assess whether the decision to enter into the settlement is the best, the National Audit Office wrote in the note.

Criticism 1: Backers now stand to escape jail

Three of the four experts who have read the settlement and put themselves into the case for TV 2 believe that the settlement makes it much harder to have the backers in the United States imprisoned and fined.

The Danish Tax Authority has otherwise repeatedly said that the settlement does not affect criminal proceedings, but the experts completely disagree with that.

The problem is that the Danish Tax Authority undertakes to talk well about the backers of the Attorney General for Special Financial Crime (SØIK), also called the Bagmandspolitiet. They do this by saying that the negotiations have taken place in a "good spirit" that the money is paid back and that the Americans are working with the IRS to get more money in the box.

This makes the backers stand much stronger in criminal proceedings, says partner Michael Wise of the firm Lawrence Kamin Law in Chicago, who has been working for years on stock fraud cases.

- Defense attorneys will definitely highlight this and tell the Department of Justice (the U.S. Department of Justice, ed.) that there is no problem because we repaid the money to Tax, which told the Danish prosecutor that we were good people. It makes them look less guilty. It was wisely done by the lawyers, says Michael Wise.

In addition, it is beneficial for the backers that the settlement states that they simply have a disagreement with the Danish Tax Authority. This will make it very difficult to convince a jury and a judge that there has been serious fraud, according to William Byrnes.

- By reducing it to a controversy in which we negotiate in a good spirit, and we have opposing views, how can the Prosecutor's Office in Denmark raise a case? The evidence that will be presented is this agreement, in which the Danish authorities officially say that this is merely a disagreement, he says.

Criticism 2: Too little money

The backers are collectively involved in payouts of DKK 4.1 billion, but only have to pay back DKK 1.6 billion because they can withdraw their expenses. In addition, the refund is without interest.

This is problematic for two reasons, points out Professor William Byrnes of Texas and attorney James Henry, who is a fellow at Yale University and former chief economist at McKinsey.

Firstly, there is something in principle wrong in letting people deduct the cost of suspected fraud.

- It is another way of saying that it is society, taxpayers who pay. It is against the principles of the law. But that's what they negotiated for in the settlement, and I find it very strange. I don't know what to say, because I've never seen it before. I've been writing about this for 25 years, says law professor William Byrnes.

In addition, it faces criticism that the backers do not have to pay interest for the long period of about five years when they have had Danish tax billions available. In doing so, they have had the opportunity to get the money to breed, which is why it is also normal for money to be paid back with interest.

According to James Henry, in relation to the settlement, it means that some of the money that the backers pay back probably comes from investments made with Danish tax dollars. The rest they can put in their pockets, which is why - from a purely economic perspective - it can be a good investment, even if money has to be paid back.

Criticism 3: Backers do not commit to anything

A third common criticism is that, according to several experts, the backers have not committed themselves to real cooperation.

- It's nonsense when they say they're ready to cooperate, says top lawyer Marc Levey of Baker McKenzie to TV 2.

The settlement says that the backers have "expressed a willingness to cooperate to the best of their ability" and that a mediator can be appointed if the Danish Tax Authority does not believe that the backers cooperate as desired. But in practice it is not worth much, experts say, pointing out that there are a large number of procedures for forcing people to cooperate - for example by handing over all documents and giving independent experts access.

Instead, the Danish Tax Authority has been given an opportunity for mediation, but according to lawyer James Henry, it will simply drag the case into a long way and, moreover, ensure that it is going to happen outside the public eye - for the benefit of the backers.

- It's a big job program for lawyers, says Henry.

At the same time, an essential detail is that, as a result of the agreement on cooperation, the backers should not speak to the Danish authorities themselves. This must be done through the lawyers, and therefore they do not run the risk of incrimination in relation to criminal proceedings.

- An economist would say that it is a profitable business and that you should do it again. You got out with a slap over your wrist, you have to repay less than half the win, and you have this undefined commitment to cooperate that no one can enforce, says James Henry.

Criticism 4: Denmark misses important opportunity

The backers in New York must be very pleased that Denmark has not gone after using a particularly feared law called RICO that provides access to very tough tools - such as seizures, years of imprisonment and heavy fines - against suspected fraudsters.

With the settlement, the Danish Tax Authority agrees to protect the backers and their networks against new lawsuits related to the fraud case.

According to law professor William Byrnes, the RICO Law is otherwise obvious in the Danish case. It is tailored to hit organized, financial crime, it has been used in fraud cases in financial markets and then it can be raised civilly and in cases that have affected other countries.

The professor points out that a number of people in the 1990s were convicted in the United States of breaching RICO in a case in which Canada was subjected to tax fraud.

- I don't understand how Denmark can't know anything about that matter. But I assume that Denmark has cut itself off from further civil cases against the perpetrators once the settlement is signed, says William Byrnes.

In addition, RICO has the great advantage of raising awareness and opening doors. According to all the experts, no one in the United States knows the fraud case against Denmark, and it is essential for going to the authorities to go into the case.

No one knows the case in the United States because it looks like a tax dispute because of the settlement. But if it had been a RICO, there would be a whole panel on it, says William Byrnes.

This is a crystal clear RICO, says attorney James Henry.

Authorities will not give interviews

Neither the Danish Tax Authority nor the Danish Tax Authority wish to deal with the criticism in an interview, but Press Manager Claus Dithmer of the Danish Tax Authority said in an email:

- The Danish Tax Authority does not agree, and we must reject the criticisms mentioned by outsiders about how the settlement should be understood, he writes.

Nor does Tax Minister Morten Bødskov of the Social Democrats wish to stand for interviews and deal with the criticism. In an email from the Ministry's press department, the Minister says he is pleased that the settlement has been concluded on a legal basis.

- I understand if the settlement or conditions of the settlement have bladed strangely in ordinary Danes' ears. It is both subject to confidentiality and is based on a number of difficult trade-offs, says Morten Bødskov.

At SØIK, Chief Prosecutor Per Fiig states that the case is still under investigation and that the assessment by the experts in the United States is being disagreed.

- SØIK does not agree that the settlement makes the investigation difficult or the possibility of conducting any criminal proceedings, the chief prosecutor writes in an email.

Two administrative law experts yesterday rejected the National Audit Office's justification for denouncing the settlement as lawful.