

International Tax News*

The Norwegian government concedes defeat on dividend withholding taxes

Norway

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The Norwegian tax authorities have over the last few years interpreted the domestic tax exemption method narrowly, and several non-resident tax payers have been excluded from its scope of application. The Norwegian Ministry of Finance have now conceded that foreign investors have been taxed in violation of European law and will now grant dividend withholding tax refunds.

Background

A qualifying resident company receiving dividends from a Norwegian company is exempt from tax on the dividend income. According to the Norwegian Tax Act, a foreign company resident within the European Economic Area is exempt from dividend withholding tax. The exemption is only available if the foreign company is “actually established and conducts genuine economic activity” within its state of residence. The tax authorities have argued that since all qualifying Norwegian entities are liable to tax in Norway, and as such resident for tax treaty purposes, the same requirements must be met by foreign entities in order to claim a refund of dividend withholding taxes under EEA law. Otherwise, they would not be comparable to any Norwegian entities and thus no discrimination would exist.

The Norwegian tax authorities have consistently over the last years denied Luxembourg SICAVs and similar entities refunds for dividend withholding taxes. As SICAVs are not comprised by the Parent-Subsidiary Directive, the Ministry of Finance held that their position could not be a violation of EEA law.

The Finnish government argued along the same lines in the Aberdeen-case (C-303/07) before the ECJ when defending the withholding tax charge on dividends from a Finnish company to a Luxembourg SICAV. The ECJ rejected these arguments and decided in favour of the tax payer.

In a letter to the Directorate of Taxes dated 29 September 2009, the Ministry of Finance conceded that their previous interpretation of EEA law cannot be upheld in light of the Aberdeen decision. In addition the Ministry clarified certain aspects of the application of the substance requirement.

Consequences

Inbound investments – the comparability analysis

Most importantly, the Ministry of Finance explicitly states that whether or not the foreign entity is subject to corporate income tax in its state of residence is irrelevant when determining if the foreign entity is comprised by the Norwegian tax exemption method.

With reference to the legislative history dating back to the introduction of the tax exemption method, the Ministry lays down the following requirements that foreign entities have to fulfil in order to be comprised by the tax exemption method:

- The entity must be a separate tax entity as determined under Norwegian law; i.e. the owners' liability must be limited to the paid in capital
- The entity must otherwise be comparable, but not identical, to a Norwegian qualifying entity; this presumable refers to the company law and regulatory regime governing the foreign entity
- The income must be properly attributable to the foreign entity as determined under Norwegian legal principles
- The entity must meet the substance requirements (see below)

Inbound investments – the substance requirement

The Ministry of Finance also gave some clarifications as to how the substance requirement should be applied.

The substance requirement was introduced in the aftermath of ECJ's decision in the Cadbury-Schweppes case. The preparatory works provides a substantive set of considerations that have to be taken into account when assessing whether a foreign entity is “actually established and conducts genuine economic activity” in its state of residence. The tax authorities have applied the substance requirement vigorously, without much regard for the type of activity performed or regulatory constraints that the foreign entity is facing.

The Ministry now states that foreign equity funds may fulfil the substance requirements even if the fund itself has no substance as long as the management company of the fund meets the requirements.

Outbound investments

When the Tax Exemption Method was introduced, companies qualifying as investors would also be qualifying investments and vice versa. In the outbound situation, i.e. Norwegian investors investing in foreign entities, the tax authorities have, however, not applied the law consistently over the last few years. Recently, the sentiment has been that these investments don't qualify under the tax exemption method. The statement will therefore also impact the taxation of Norwegian investors.

Furthermore, the substance requirement also applies to outbound investments in low tax jurisdictions within the EEA. Thus, the clarification of the substance requirement will make it more attractive for Norwegian investors to invest in equity funds in low tax jurisdictions such as Luxembourg.

Who is affected?

The following may be in a position to claim a refund of withheld taxes:

- entities resident in another EEA state than Norway, which
- have paid Norwegian withholding tax on dividends received between 2004 and 2009, and
- a refund of the withholding taxes was not attainable on account of the recipient entity not being liable to tax in its residence jurisdiction and thus not a resident under the tax treaty between that jurisdiction and Norway.

Entities resident in Norway may be in a position to claim a reassessment of previous tax years if

- the entity between 2004 and 2009 had income from an entity within the EEA, and
- the income was not comprised by the tax exemption method on account of being derived from an entity that was not liable to tax in its residence jurisdiction.

In its statement, the Ministry declared that only refund claims dating back to 2006 would be granted based on the revised position of the exemption method.

What to do

Tax payers that may be affected should, if not already done, file refund claims within the year to make sure that their claims are not barred by the statute of limitations.

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