

International Tax News*

ECJ-decision affecting the Norwegian Tax Exemption Method

Norway

Issue 4, 18 June 2009

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. A recent decision from the European Court of Justice (ECJ) gives affected tax payers strong ammunition for challenging the current practice of the tax authorities, and a refund of withholding taxes and/or reassessments may be available.

Background

On 18 June the ECJ rendered its decision in the Aberdeen case. The case concerns a Luxembourg company with a Finnish subsidiary. The Luxembourg entity was organised as a SICAV ("Société d'Investissement à Capital Variable"). Under domestic Finnish law, dividends paid from the Finnish company to the Luxembourg owner are subject to a withholding tax. Dividends paid to a domestic corporate shareholder are, however, comprised by the participation exemption method and thus tax free.

The tax payer argued that the situation where dividends are paid to a non-resident shareholder is comparable to when dividends are paid to a resident shareholder. The difference in taxation is thus an infringement of the EC Treaty art. 43 and 56 pertaining to the right to establishment and freedom of movement of capital.

The tax authorities upheld the taxation of the outbound dividends. They argued that the Luxembourg SICAV was not an entity that was comparable to a Finnish limited liability company comprised by the participation exemption method. The reasoning was based on the following three arguments:

- in Finnish law there is no type of company with a legal form identical to that of a SICAV;
- a Finnish limited liability company is liable to tax in Finland whereas a Luxembourg SICAV is not liable to tax in Luxembourg; and
- a Finnish limited liability company is comprised by the EC Parent-Subsidiary Directive.

The ECJ rejected these arguments and decided in favour of the tax payer. Referring to its decisions in Denkvit and Amurta, the Court stated that when the source country imposes withholding tax on dividends to a non-resident, the non-resident company is in a comparable situation to a resident taxpayer. Thus, Finland could not exempt domestic companies on the income from shares and, at the same time, subject companies resident in other EEA states to a withholding tax liability on the same dividends.

Consequences

Inbound issues - dividend withholding taxes

A qualifying resident company receiving dividends from a Norwegian company is exempt from tax on the dividend income.

Pursuant to the Norwegian Tax Act, a foreign company resident within the EEA is exempt from dividend withholding tax. The tax authorities have nevertheless consistently over the last few years denied Luxembourg SICAVs and similar entities refunds for withholding taxes. The authorities argue that they are not comparable to qualifying Norwegian entities. The reasoning is that the qualifying Norwegian entities are liable to tax in Norway and thus resident for tax treaty purposes. SICAVs, on the other hand, are supposedly not resident within the EEA as they are not liable to tax in Luxembourg and thus not resident in Luxembourg for purposes of the Luxembourg-Norway double tax treaty. As SICAVs are not comprised by the Parent-Subsidiary Directive, the tax authorities have held that their position cannot violate EEA law.

Under the principles laid down by the ECJ in this decision, these arguments can no longer be upheld. A withholding tax refund should be available for companies resident within the EEA without regard to whether they are liable to tax in their residence jurisdictions. This will have effect both for future dividends from Norwegian companies as well retroactively.

Outbound issues

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 SICAVs, the tax authorities have, however, not applied the law consistently over the last few

years. Recently, however, the sentiment has been that these investments don't qualify under the Tax Exemption Method leaving the investors with a tax burden of 28% on dividends and capital gains on ownership shares in these companies.

This decision will therefore also impact the taxation of Norwegian investors.

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 and thus not a resident under the tax treaty between that jurisdiction and Norway.

What to do

Tax payers that may be affected by ECJ's decision should analyse their position, and if, within the scope of the decision, take appropriate action to make sure their potential claims are not barred by the statute of limitations.

Contacts

For more detailed information, please do not hesitate to contact your local PwC contact or

Oslo:

Aleksander Grydeland
+47 95 26 01 62
aleksander.grydeland@no.pwc.com

Hilde Thorstad
+47 95 26 05 48
hilde.thorstad@no.pwc.com

Daniel Herde
+47 95 26 01 42
daniel.herde@no.pwc.com

Stavanger:

Kjell Inge Gade
+47 95 26 11 75
kiell.inge.gade@no.pwc.com

Kristiansand:

Svein T. Sønning
+47 95 26 10 71
svein.t.sonning@no.pwc.com

Bergen:

Dag Saltnes
+47 95 26 06 32
dag.saltnes@no.pwc.com

* * *

*If you do not wish to receive our newsletter, please reply to this message with:
"unsubscribe International Tax News"*

The information contained in this publication should not be relied on as professional advice and should not be regarded as a substitute for advice in individual cases. No responsibility for any loss occasioned to any person acting or refraining from action as a result of material in this publication is accepted by the author or the publisher.

page

2