

International Tax News*

Supreme Court clarification on taxes paid contrary to EEA Agreement

Norway

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1. Statute of limitation for indemnity claims under the EEA Agreement

The Norwegian company Canica AS (“Canica”) recently prevailed in the Supreme Court that the company’s claim in a lawsuit concerning compensation for dividends taxation contrary to the EEA Agreement was not obsolete or time barred.

In 2000, Canica was taxed in Norway on dividend payments from a Swedish limited liability company. The imputation system in the Tax Act at that time entitled shareholders resident in Norway to a full tax credit for taxation on dividends from **Norwegian** limited liability companies. This dividend computation regime was later found by the EFTA Court (in the Fokus Bank case) to be in conflict with Article 40 of the EEA Agreement (mirroring Article 56 of the EC Treaty) with regards to withholding tax on dividends from Norwegian limited liability companies to shareholders resident within EU/EEA. Correspondingly, the discriminatory tax treatment of Norwegian shareholders’ investments in EU/EEA limited liability companies under the computation regime was contrary to the EEA Agreement.

Canica filed a lawsuit on 27 October 2004 with a primary claim for repayment of taxes amounting to more than MNOK 200 based on the Norwegian Government being liable for breach of the EEA Agreement. Alternatively, Canica claimed the 2000 tax assessment to be declared annulled or invalidated.

On the grounds that the lawsuit was not filed within the time limit laid down in the Tax Payment Act, the Norwegian Government challenged Canica’s right to legal proceedings on the merits of the case. Allegedly, both Canica’s primary claim for compensation and the alternative claims involved a legal review of the tax assessment decision, and should therefore be decided upon under the Tax Payment Act setting out a 6 months time-limit for filing a lawsuit. Canica disputed the Government’s view on the basis that the primary claim is governed by the general time limit provisions in the Court Proceedings Act, and that a reinstatement of the time limit for legal proceedings under the Tax Payment Act should be granted in relation to the alternative claims.

The Supreme Court sustained Canica’s primary allegation entitling the company to pursue the claim for repayment of taxes in a legal proceeding before the court. In the court’s opinion, a legal claim for compensation resulting from the Government’s failure to bring the Tax Act in accordance with the EEA Agreement falls outside the scope of the time limitation provisions the Tax Payment Act.

Further, in relation to the alternative claims for annulment or invalidation of the tax assessment, the Supreme Court found that Canica was entitled to a reinstatement of the time limit for legal proceedings under the Tax Payment Act due to special circumstances, whereby it was especially emphasised that the Government before the Court had acknowledged the tax assessment being incorrect.

As a result of the Supreme Court decision on the procedural questions, Canica’s claim for repayment of dividend taxation and annulment/invalidation of the tax assessment will be subject to unrestricted court proceedings. It is very likely that Canica in these proceedings will prevail also on the merits of the case.

2. Action required for repayment of taxes

The following situations involving tax legislation have specifically proved to be in conflict with Norway’s obligations under the EEA Agreement:

- i) *Withholding tax on dividends from Norwegian companies to shareholders in EU/EEA before the tax reform in 2004/2006*

In January 2006, the Norwegian Government accepted the principles of the EFTA Court judgment in the Fokus Bank case referred to above. As a result, EU/EEA shareholders may claim a refund of withholding taxes on dividends from Norwegian companies for previous years.

- ii) *Tax on dividends and capital gains on shares in EU/EEA companies held by Norwegian shareholders*

The Tax Authorities has acknowledged that the previous imputation system relating to dividends taxation was contrary to the EEA Agreement. Correspondingly, the previous RISK system relating to taxation of capital gains on shares must be seen as discriminatory under the EEA Agreement, entitling shareholders to a repayment of taxes.

- iii) *CFC taxation (NOKUS) of investments within EU/EEA*

In the recent Cadbury Schweppes case, the European Court of Justice found that British CFC rules were in breach with the EEC treaty when applied to companies resident within EU, to the extent that the legislation applied to other than “wholly artificial arrangements”. Correspondingly, Norwegian CFC taxation (NOKUS) on investments within EU/EEA beyond “wholly artificial arrangements” conflicts with the EEA Agreement. Affected Norwegian shareholders should claim repayment of taxes as soon as possible.

Norwegian tax authorities originally stated that a three year statute of limitation would apply to claims for repayment of taxes on dividends in situation i) and ii) above. With reference to the Supreme Court’s decision in the Canica case, the time limitation for taking legal steps whereby claiming compensation under the EEA Agreement does not fall within the scope of the Tax Payment Act. However, any legal or administrative steps for claiming compensation, repayment of taxes or amendments of a tax assessment based on EEA arguments, should be filed as soon as possible in order for the claim not to be precluded under the time limitation provisions in the Court Proceedings Act, the Tax Payment Act or general passivity rules.

Contacts

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

Oslo:

Aleksander Grydland
+47 95 26 01 62
aleksander.grydland@no.pwc.com
Hilde Thorstad
+47 95 26 05 48
hilde.thorstad@no.pwc.com

Kristiansand:

Svein T. Soenning
+47 95 26 10 71
svein.t.soenning@no.pwc.com

Stavanger:

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

Bergen:

Leif Drillestad
+47 95 26 12 79
leif.drillestad@no.pwc.com

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