

International Tax News*

Information secular from the tax authorities regarding refund of taxes

Norway

Issue 13, 16 June 2008

Content

Norwegian companies with Permanent Establishments (“PEs”) in the EEA and Norwegian tax rules on maximum credit allowance

Information secular issued by the tax authorities regarding refund of Norwegian tax imposed in breach of the EEA Agreement as a consequence of the Norwegian tax rules computing maximum credit allowance which limits foreign taxes being credit in Norwegian tax

On 2 June 2008, the Norwegian tax authorities issued an information circular dealing with the consequence of the recently rendered judgement by the EFTA court in the SeaBrokers AS case.

1. The main facts in the SeaBrokers AS case

SeaBrokers AS is a Norwegian company with five subsidiaries and a PE in the UK. The main office (in Norway) and subsidiaries were operating in the real estate business and the PE in the ship broking business. Hence, the two units operated separately both with regards to the nature and location of business activities.

Norway do grant an ordinary credit allowance for taxes paid abroad which basically means that the credit allowance is limited to the Norwegian tax levied on the same income. The important question in this respect was how foreign sourced

income is to be computed and the rules regulating this were the disputed points the SeaBrokers AS case.

The rules allocating debt interest expenses and rendered Group Contribution had the effect that foreign sourced income was reduced and as a result also the maximum credit allowance against Norwegian tax.

Interest expenses would under the disputed rule be allocated to and reduce calculated foreign sourced income based on a net income principle after direct income and cost had been allocated.

The effect in the SeaBrokers AS case was that interest expenses resulting from funding of the main office's real estate business reduced the calculated income of the PE's ship brokering business when computing maximum credit allowance. The double taxation which arose would have been avoided if the expense instead had been allocated in an economic justifiable way. In the opinion of the Court this double taxation was a restriction of the freedom of establishment pursuant to the EEA Agreement. The Court did not see any reason which could justify this restriction and concluded that the rule in question was in breach with community law.

The second disputed point was the allocation rule for rendered Group Contributions. Group Contributions were also allocated based on a net income principle. This did also lead to double taxation. Again the Court found this imposed a restriction on the freedom of establishment. No valid reason was presented by the Norway to the Court that could justify the restriction and the Court ruled in favour of SeaBrokers AS on this issue too.

2. Appeal and get refund for previous paid taxes in breach of the EEA Agreement

Taxpayers that have paid taxes which are in breach with the EEA Agreement may appeal against previous tax assessments and get the taxes refunded. There is according to the circular only possible to appeal against tax assessments that are less

than three years old, thus the 2005 tax assessment has to be appealed against before 31 December 2008.

It should be noted that there are ongoing court cases where the disputed point is whether there is a three year or a ten year time limit in EEA based refund cases.

3. The revised interpretation of the disputed tax rules

The SeaBrokers AS case is relevant both going forward and for appeal cases with respect to previous years.

The rule for allocating Group Contribution was amended with effect from 2007. After the amended Group Contributions will first reduce the Norwegian source income and then reduce foreign source income for the rendering company. This rule shall also apply for previous years in appeal cases.

Interest expenses shall in appeal cases be allocated based on where the expenses have actually been incurred and no longer based on a net income principle provided that the taxpayer can document this. It is fair to assume that the disputed rule will be amended with effect from 2008 and be in line with the above.

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