

A Guide to Norwegian Petroleum Taxation (2011)

– Key updates February 1st, 2018



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The 2011 version of “A Guide to Norwegian Petroleum Taxation” still gives a relatively accurate description of the Norwegian petroleum tax system as it is per 2017/2018. The petroleum tax regime has been stable for many years, and neither the previous high price situation up to mid 2014 nor the following steep price decline has led to any system changes, incentives or reliefs.

Key Rate changes

There has, however, been changes in the corporate tax rate as well as the special tax rate for petroleum. The corporate tax rate has been gradually reduced from 28% in 2013 down to 23% as of 2018, and during the same time period, the special tax rate has gradually been increased from 50% in 2013 to 55% in 2018. Thus, the combined marginal tax rate has been kept at a level of 78%.

One of the key changes since 2011 was the reduction in uplift (capital allowance) from 30% to 22% mid 2013. This was done in a period with a very high investment activity in the E&P sector, and the intention was to reduce the so-called investment incentives. The new uplift rate of 22% kicked in for all development capex incurred after 5 May, 2013, but with certain grandfathering rules for coming investments that had been decided prior to May 2013. The key trigger for the grandfathering rules was basically whether a field development plan had been filed prior to 5 May, 2013. The grandfathering rules, if applicable, will be available for all covered investments up through the year of first production, but no later than investments incurred up through 2020. Since uplift is deductible only for special tax purposes, it should be noted that the gradual increase of the special tax rate has slightly reduced the negative impact of the reduced uplift rates. However, the uplift has been reduced from 22% to 21,6% in 2017 and further to 21,2% in 2018 in order to reflect the increase in special tax rate. Nevertheless, the reduced uplift rate will only apply for investments from 2017 and 2018 respectively. Thus, investments prior to 1 January, 2017, will still enjoy a 22% uplift for the remaining uplift period. Investments subject to the grandfathering rule will not be affected.

There has also been ordinary adjustments of the CO₂ and NoX tax rates which currently (2018) are:

- CO₂: NOK 1,06 per sm³/liter emission, and a new category of emissions of natural gas to air of NOK 7,30 per sm³/liter emission. The latter category is assumed to be very limited.
- NoX: 21,94 NOK per kg emission

It should be noted that members of the NoX fund (more or less all E&P operators) are exempted from the NoX tax against paying a certain fee to the fund. The NoX fund arrangement is based on an agreement with the state that has been continued for the period 2018 - 2025. The payment to the NoX fund is currently NOK 12 per kg NoX emission for E&P companies and NOK 6 per kg NoX emission for other companies.

New tax assessment act

A new tax assessment act was enacted during 2016, and entered into force from 1 January, 2017. The law gathers various rules regarding tax assessment for income tax, value added tax, payroll tax and certain excise taxes under one law.

The most important change relevant for E&P companies is the fact that the general (ordinary) statute of limitation is increased from 2 years to 5 years from and including FY 2015. This may lead to a longer period of uncertainty for the taxpayer, and longer time to get tax issues solved. The 10 year limit is maintained for situations where the taxpayer is in a position with willfulness or gross negligence.

On the tax administrative side, the Oil Tax Board does no longer exist, and the tax assessments is now made directly by the Oil Tax Office. Also, advance rulings are issued by the Oil Tax Office. The new law opens for filing an appeal with respect to advance rulings. This does, however, not apply for rulings regarding gas pricing.

The general limit for filing an appeal has been extended from 3 to 6 weeks, but given that extensions often are given if needed, this change will be of limited importance. Further, as a starting point, E&P companies may now take a case directly to the court without having to go via an appeal. The Oil Tax Office may, however, decide that the case has to go via the Appeal Board (will most likely not be done for most of the cases).

The system for penalty tax is to a large extent kept unchanged, but there are some relatively minor changes. In addition, there are certain rate changes. It is also stated that the exemption for penalty tax for excusable errors or mistakes shall be somewhat expanded, but it remains to see how this will be followed up by the tax administration.

The standard rate for penalty tax has been reduced from 30% to 20%, and for more serious errors, an additional 20% or 40% may be used. This requires willfulness or gross negligence on the taxpayers hand. The maximum rate will then be 60% (as it also is today), but it is stated that this should be reserved for the most serious cases.

Finally, the payment of penalty tax shall be postponed until the case is finally decided, and not as today when the initial deviation is made.

Interest limitations

In 2013, interest limitation rules were introduced for companies' tax under the general tax legislation. The rules are relatively similar to what can be found in other OECD countries. The interest limitation rules does currently not apply to E&P companies subject to the special petroleum tax, but the Ministry of Finance has stated that they consider this type of rules also for E&P companies.

Rules limiting taxable deductions for interest expenses have entered into force with effect for all accounting years ending on or after 1 January 2014. In short, the rules limit deductibility of interest paid on loans to related parties.

While the rules are essentially an anti-avoidance measure, they are template-based and would therefore apply regardless of the business rationale behind a financing arrangement.

The basis for the calculation is the taxable income as stated in the tax returns. This is the final taxable income, after use of loss-carry forwards, group contributions and other relevant adjustments. Tax exempt income, such as certain dividends and gains on shares, does not increase the basis for deductions. Tax depreciations and net interest expenses (on both related party debt and debt to unrelated creditors) are added back onto the taxable income, and maximum deductible interest on related party debt is limited to 25% of this amount:

Taxable income
+ tax depreciations
+ net interest costs (from related and unrelated parties)
= tax EBITDA

Maximum tax deductible interest is 25% of Tax EBITDA. Disallowed related party interest costs can

be carried forward for a total of ten years. The interest expense limitation is triggered only if the taxpayer has net interest expenses (related and unrelated creditors) in excess of NOK 5 million.

While it is only deductions for interest payments made to related parties which can be disallowed under the new rules, it is important to note that payments made to unrelated parties would also count towards the computation of maximum deductible interest. Interest cost to unrelated parties is deducted from the maximum interest cost (25% of Tax EBITDA) before related interest cost is deductible. The rules also apply for interest expenses on certain short-term loans (including cash-pool arrangements). In addition to ordinary interest payments, the rules apply to payments made in consideration for a related party providing a guarantee for a loan.

Loans from unrelated parties may in certain circumstances be within the scope of the interest limitation rules if they are guaranteed by a related party.

Referring to the 2014 proposal and to the OECD's work in connection with base erosion and profit shifting (BEPS), the position of the Norwegian government is that the current interest limitation rules still provide opportunities for profit-shifting. According to the government, extending these rules to apply to both internal and external lenders must be examined and evaluated in light of the BEPS-project and recommendations. Thus, the government may propose that the interest limitation rule on interest expenses should also cover interest on external debt.

In addition to the rules described above, the arm's length principle in section 13-1 of the Norwegian Tax Act 1999 still applies e.g. with regards to the level of interest rates and general thin capitalisation implications.

During May 2017, the Ministry of Finance has issued a proposal to tighten up the current rules, mainly by including also external interest in the interest limitation rules for companies that is part of a concern. However, the Ministry also suggests certain exemptions linked to the equity level of the consolidated group balance sheet relative to the Norwegian entity's equity. The suggested exemptions are relatively complicated, and could be burdensome for the companies to administer and lead to challenging discussions with the tax authorities. The Ministry of Finance has not yet come back with a final proposal.

BEPS actions

The Norwegian petroleum tax system is fairly robust when it comes to make sure that all income generated from E&P activities on the Norwegian Continental Shelf becomes taxable to Norway, and also that only related costs are deductible.

Thus, we are not aware of any particular BEPS action plans that will impact the E&P activities on the Norwegian Continental Shelf, with the exceptions for the Ministry's indication that interest limitation rules will be considered. Further, on a general basis, withholding tax on interest and royalties may also be considered.

The new country by country reporting rules for tax that was introduced in 2016 with the first reporting by year end 17 will, however, have impact for some companies, and may also give the tax authorities better transfer pricing information, and better understanding of the relevant company and its group.

There is a global multilateral tax treaty expected to be signed during the summer of 2017, but this is not likely to have much impact with respect to activities on the Norwegian Continental Shelf.

Way forward

Under the current Government it is not expected any major changes to the petroleum tax system. It may be noted that ESA currently is considering whether the exploration refund system represents a breach to the EU/EEA state subsidy rules. Under any circumstances the exploration refund system may come under increasing pressure, but no changes are expected near term.

Foreign E&P activities (General Tax Act section 2-39)

In 2013, the Ministry of Finance introduced a new section 2-39 to the General Tax Act, which exempted foreign E&P activities from being taxable to Norway. This was done in order to limit the possibility to use foreign E&P losses against income from other Norwegian activities while at the same time having sufficient foreign E&P tax credits to protect against any future Norwegian income tax from such activities.

Section 2-39 does not apply to other income than pure E&P activity. Thus, e.g. financial income and costs follows the ordinary tax legislation.

Subordinated liability for the seller for future decommissioning

In 2009, a new section 5-3 (3) in the Petroleum Law was introduced giving a seller of a license share (i.e. direct license transfer) subordinated liability for future decommissioning costs towards the other license partners if the buyer cannot cover his share.

As of 2017, the Ministry of Oil and Energy has introduced a subordinated decommissioning liability also for sellers of shares in an E&P company operating on the Norwegian Continental Shelf. Such a subordinated decommissioning liability for a seller of shares will, at the Ministry's discretion, be established as part of the conditions for approval of a share transfer. This extension of the subordinated liability raises a number of legal as well as tax issues.

Company law

The company law was changed in 2013, where most changes were to the benefit of the business community. There has also been a major revision of the company legislation in 2017, with changes entering into force June 2017 and January 2018.

The key changes from 2011 are as follows:

- Less restrictions for dividend distributions, where the only requirement is that the company has a sufficient and reasonable equity base post distribution. Further, it became possible to make distributions based on interim balance sheets, but a condition is that there is an interim audit.
- The requirement for a share premium fund was taken out, and existing funds became a part of free and distributable equity.
- R&D, goodwill and deferred tax benefit will no longer limit the dividend capacity
- Easier to provide loans to other (non-Norwegian) group companies
- Easier to establish a company
- Distinction between the obligation to keep and store company documents and accounting material. Company documentation, including e.g. minutes and protocols, shall be kept for the entire life of the company and for at least 10 years after it has been liquidated. The acquirer in a merger or a demerger shall furthermore keep the company documentation for the transferring company for at least 10 years.
- For a number of corporate actions, the requirement for an auditor confirmation is removed. Inter alia, the auditor does no longer need to confirm that there will be full cover for
- the company's restricted equity after a capital reduction. For Public Limited Companies, this requirement is retained, but will be considered further.

In addition there were a number of other changes to the benefit to business community such as, less requirement for physical board meetings and general meetings, a general acceptance for electronic communication and no requirement for 3 board members in companies with less than 3 MNOK in share capital.

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