



Taxation of cross-border mergers and acquisitions

Norway

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Norway

Introduction

Norway's tax system and tax framework for cross-border mergers and acquisitions (M&A) has been relatively stable, except for the general tax exemption introduced in 2004. However, a Tax Commission presented a tax reform in late 2014, which was partly followed up in the state budget for 2016 and a white paper containing proposals for a tax reform. The 2016 budget generally retains the main characteristics of the current corporate income tax system.

In addition, for 2014 and later financial years, Norway has adopted legislation that sets limitations on intragroup interest. This legislation applies to limited liability companies as well as Norwegian branches of foreign companies and partnerships. The rules limit the intragroup interest deduction to an amount equal to 25 per cent of tax-adjusted earnings before interest, taxes, depreciation and amortization (EBITDA).

Recent developments

The most significant recent change is the new intragroup limitation legislation, which will significantly affect multinational groups with intragroup financing relating to their Norwegian operations. The rules offer few exemptions, so it might be difficult for these entities to claim full interest deductions in Norway on intragroup financing arrangements. Note that the definition of 'intragroup loans and interest' includes debt secured by guarantees.

As of the financial year 2014, multinational groups with operations in Norway need to consider and evaluate their current financial arrangements in light of these new rules. The arm's length principle continues to apply in addition to the interest deduction limitation rules. KPMG in Norway assumes the arm's length principle will be applied in exceptional cases since the new rules are strict; however, this remains unclear.

The amendments to the Limited Companies Act and Public Limited Companies Act revise corporate governance rules, remove certain dividend constraints, and ease the ability to arrange intragroup loans from Norwegian subsidiaries to foreign group companies.

The general corporate tax rate has been reduced to 25 percent (from 27 percent), as of fiscal year 2016. For corporate taxpayers, the 2016 budget recommends further reducing the corporate tax rate to 22 percent in the next few years in line with recommendations in the Tax Commission's 2014 tax reform report.

The Tax Commission's 2014 report on tax reform recommended that Norway implement withholding taxes (WHT) on interest and royalty payments. A 'royalty' would include lease payments on certain tangible assets, such as bare-boat rentals of vessels and rigs. These recommendations were not proposed in the 2016 state budget, but the government's white paper proposal for tax reform maintains that WHTs need to be reviewed in more detail, including WHTs on lease payments. It is expected that the Ministry of Finance will prepare a discussion paper for public consultation.

The government has indicated it would maintain the current Norwegian exemption method for cross-border income from shares and investigate how the qualification criteria for foreign companies could be simplified. The exemption system was amended to clarify the tax treatment of acquisition costs. As of 1 January 2016, costs incurred in connection with the purchase or sale of shares covered by the exemption method are not deductible for tax purposes in cases where acquisition or sale fails.

Under another amendment to the exemption system, as of 1 January 2016, Norwegian shareholders would be denied tax exemption where the foreign distributing company is entitled a deduction for the distribution, typically because the payment is classified as interest in the foreign jurisdiction.

On 23 June 2015, the Directorate of Taxes (DoT) published a binding ruling on whether a holding company in Luxembourg

would be considered a qualifying investor under the Norwegian exemption method. The DoT concluded that the Luxembourg holding company did not qualify as genuinely established in Luxembourg and was therefore not considered a qualifying investor under the exemption method. For holding companies, which typically require limited personnel and office space, the tax authorities appear to have taken an unfavorable turn with this ruling.

Asset purchase or share purchase

As a starting point, potential buyers should keep in mind that a sale of shares in a Norwegian entity is tax-exempt. Thus, it can be useful to purchase entities by setting up a Norwegian purchasing entity so the investor may exit without any major tax costs and reinvest in another Norwegian entity.

Acquisition of a Norwegian company may be carried out either through a share purchase or asset purchase, or by a merger. (See below regarding the purchase of vehicles.)

A number of aspects related to asset acquisitions are discussed below, followed by a discussion of share acquisitions.

Purchase of assets

Asset purchases are normally the preferred choice of the purchaser, as this approach clears any company history and creates a step-up for depreciation.

Purchase price

The purchase price must be allocated among the individual assets, and this allocation determines the tax bases for future depreciations. Normally, this is not a major obstacle, and, for most practical purposes, it is sufficient to mirror the allocation made for accounting purposes.

Also, it is important that the purchase price is described in a way that avoids the risk of having some of the purchase price deemed as salary for any of the sellers.

Goodwill

Goodwill paid for a business can be depreciated for tax purposes at 20 percent on a declining-balance basis. Time-limited intangible rights, such as leasing contracts, rights of use or patents, are amortized by equal annual amounts over the lifetime of the asset.

Non-time-limited intangible rights, such as a company name or brands, are only depreciable where there is a clear decrease in value, in which case the right is amortized over the asset's projected lifetime.

The seller is taxed on any gain on intangible assets and goodwill. The gain could be deferred and taxed at 20 percent

on a declining balance through the company's gain and loss account. A higher amount could be entered as income.

Depreciation

All assets used in the business are depreciable if they are either listed in the following depreciation groups or are documented as having lost value over time. The rates for different depreciation groups are as follows:

- a. office equipment: 30 percent
- b. acquired goodwill (business value): 20 percent
- c. trucks, trailers, buses, taxis and vehicles for disabled persons: 20 or 22 percent
- d. automobiles, tractors, machinery and equipment, tools, instruments, fixtures and furniture, etc.: 20 percent
- e. ships, vessels, drilling rigs, etc.: 14 percent
- f. aircraft and helicopters: 12 percent
- g. plant and certain machinery for the distribution of electric power and electro technical equipment for the production of electric power: 5 percent
- h. buildings, hotels, restaurants, etc. including but not limited to cleaning plants, cooling systems, pneumatic systems and similar technical and auxiliary plants and installations: 4 percent
- i. office buildings: 2 percent
- j. permanent technical installations in buildings, including sanitary installation, elevators etc.: 10 percent.

Plant and buildings with an estimated lifetime of 20 years or less may be depreciated at 10 percent, rather than 4 percent. However, the increased depreciation rate of 10 percent does not apply to plant and machinery used in petroleum activities outside the European Union (EU)/European Economic Area (EEA).

Automobiles, tractors, machinery and other assets covered by category (d) may be depreciated with an additional 10 percent in the year of acquisition (for a total of 30 percent in the acquisition year). The same applies if an investment or upgrade is made to an asset in category (d).

All the tangible assets listed and acquired goodwill are subject to the declining-balance method of depreciation. Assets in groups (a) to (d) are depreciated on an aggregate (pool) basis. Each asset in groups (e) to (i) must be depreciated separately. Assets in group (j) must be depreciated on an aggregated basis per building.

The depreciation rate for trucks, trailers and buses were increased to 22 percent (from 20 percent), as of 1 January 2015. Taxis and vehicles for disabled persons are still depreciated at 20 percent.

Value added tax

Value added tax (VAT) is levied on any sale of assets, unless it can be deemed a sale of a whole activity. Sales of shares do not trigger VAT, but it is important to check whether the company was part of a VAT group. Further, the continued business activity needs to be de-registered or re-registered for VAT purposes.

The disposal of operating assets or shares as part of the transfer of a business, or part of a business, to a new owner can take place without triggering VAT. One condition is that the new owner continues the activity within the same industry. If there is evidence of purchasing with the intention of closing down the business, a VAT liability is triggered.

Transfer taxes

Norway does not have transfer taxes, except for registration of new legal owners of cars and real estate. Stamp duty on real estate is 2.5 percent of fair market value.

Purchase of shares

A share sale is normally the seller's choice because a Norwegian corporate seller benefits from the tax-exemption model and does not remain liable for the business.

There are no immediate Norwegian tax consequences for a foreign company when it acquires shares in a Norwegian company. Thus, where goodwill is included in the value of shares, depreciation for tax purposes is not permitted.

Apart from the carry forward of losses, as described later in the report, the tax position of the acquired Norwegian company remains unchanged. Thus, there is no possibility of a tax-free step-up in the tax base of the assets of the acquired company.

An acquisition of shares can be restructured in such a way that the purchaser obtains tax benefits (see later in the report).

It is not possible to obtain assurances from the tax authorities that a potential target company has no tax liabilities or advice as to whether the target is involved in a tax dispute.

Instead, the purchaser must carry out due diligence. A normal part of the due diligence process involves a review of the tax affairs of the potential target company.

Financing costs generally are considered as ordinary operating costs, and organizational costs are immediately deductible. However, costs for legal assistance, other consultancy costs and costs for due diligence, among others, related to the purchase of shares are treated as part of the shares' cost price. Due to the exemption method, the cost is not deductible for a Norwegian corporate shareholder.

Tax indemnities and warranties

Such provisions are normal and legal for Norwegian purposes, and the parties may freely agree to the terms.

Tax losses

Losses of any kind may be set off against income from all sources and capital gains, and they may be carried forward indefinitely. Changes in ownership do not change the right to carry forward, provided that it is not likely that the exploitation of the losses was the main reason for the transaction.

Pre-sale dividend

Dividend payments are taxable to the receiver, regardless of whether the dividends are paid before or after the transaction or whether the payment is made to the old or new shareholder.

Transfer taxes

Norway does not have transfer taxes, except for registration of new legal owners of cars and real estate. Stamp duty on real estate is 2.5 percent of the fair market value. Stamp duty for real estate is not payable when shares are transferred in a corporation holding real estate or the real estate is a part of a demerger.

Tax clearances

It is possible to get pre-clearance from the tax authorities on transactions, usually in 1–3 months, provided the facts are clearly presented.

Choice of acquisition vehicle

The following vehicles may be used to acquire the shares and assets of the target:

- local holding company
- branch of a foreign company
- subsidiary of a foreign company
- treaty country intermediary
- joint venture.

Generally, the advantages and disadvantages of the different acquisition vehicles must be considered on a case-by-case basis.

Local holding company

Profits and losses within a Norwegian group of companies may be consolidated by way of group contributions between group companies. The holding requirement for group contribution purposes is 90 percent ownership or voting rights, directly or indirectly, of the subsidiary. The ownership requirement must be met as at the end of the fiscal year.

Group contributions are deductible for the payer and taxable for the recipient.

A deduction also may be granted for group contributions between Norwegian subsidiaries of a foreign parent company and from a Norwegian company to a Norwegian branch of an EEA resident company. Group contributions may be granted from a Norwegian branch of an EEA resident company to a Norwegian subsidiary, subject to the same 90 percent common ownership condition.

Group contributions may be granted from a Norwegian branch of a company outside the EEA to a Norwegian subsidiary to the extent the relevant tax treaty has a non-discrimination clause stating that the taxation of a permanent establishment shall not be less favorable than the taxation of companies.

Foreign resident company

A foreign resident company purchasing assets in Norway is generally deemed to have a permanent establishment. The taxation of a permanent establishment is normally the same as the taxation of a company, but the company is free to remit the profit without awaiting completion of the formalities, such as approving the annual accounts or deciding a dividend distribution, and there is no requirement that payments are within distributable equity.

Non-resident intermediate holding company

Norway has comprehensive tax treaties with more than 80 countries, including all industrialized countries and most important developing countries.

Local branch

A non-resident company normally carries on business in Norway through a Norwegian corporation (subsidiary) or through a registered branch. The corporate tax rate of 25 percent applies to both subsidiaries and branches. Although the choice of the legal form of an enterprise should

be determined on a case-by-case basis, the following tax issues should be considered:

- Profits of a branch are currently taxed in Norway (the source country) as well as in the home country (where the source country tax is normally credited against the home-country tax unless an exemption applies), while profits of a subsidiary are taxed in Norway only. If distributed, the dividend taxation of the owner must be examined separately for each situation.
- A branch cannot deduct interest on loans from the head office.
- No branch profits tax is withheld in Norway. Likewise, distributions from a Norwegian subsidiary are normally not subject to WHT, but each case must be examined separately.
- Subsidiaries and branches are not subject to net wealth tax.
- Filing requirements are more extensive for subsidiaries than for branches.

Joint venture

No special tax legislation applies to joint ventures.

Choice of acquisition funding

Debt

Interest on loans is normally deductible for the purposes of calculating the net profits from business activities where the loan is taken out for the purpose of acquiring shares. The deduction is made on an accrual basis.

Intragroup interest deduction limitation

Norway has adopted legislation related to intragroup interest, with effect from the financial year 2014.

The basis for the calculation is the taxable income as stated in the tax returns, including adjustment for group contribution. Tax-exempt income, such as certain dividends and gains on shares, does not increase the basis for deductions. Tax depreciation and net interest expenses (on both related-party debt and debt to unrelated creditors) are added back to the taxable income, and maximum deductible interest on related-party debt is capped at 25 percent of this amount.

Only deductions for interest payments to related parties can be disallowed under the proposed rules. However, loans from unrelated parties may be within the scope of the rules

in certain circumstances if a related party guarantees them. Payments to third parties also count towards the maximum deductible interest.

The rules apply to interest expenses from related parties (directly or indirectly hold 50 percent or more of the shares) and to loans guaranteed by related parties. The government recently proposed that loans guaranteed by subsidiaries should be exempted as well as loans granted with security in the underlying subsidiaries' shares. The rules also cover arrangements like back-to-back loans.

Companies with tax losses carried forward are required to pay tax on non-deductible interest insofar as it exceeds current-year losses. The rules do not apply to companies with 5 million Norwegian krone (NOK) or less in net interest costs (including interest on related-party and third-party debt). Disallowed related-party interest costs can be carried forward for up to 10 years.

Referring to the 2014 proposal and to the Organisation for Economic Co-operation and Development's (OECD) 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 OECD BEPS project and recommendations. Thus, the government has proposed that the interest limitation rule on interest expenses would also cover interest on external debt.

The financial sector and the petroleum industry are currently exempt from the rules. For the oil industry, previous practice normally considered a debt-to-equity ratio of 4:1 to be a safe harbor.

Where a Norwegian company is thinly capitalized, the tax authorities may deny the deduction of part of the interest, or part of the interest might be considered a dividend distribution to the foreign parent company.

The arm's length principle continues to apply in addition to the interest deduction limitation rules. KPMG in Norway assumes the principle would be applied in exceptional cases since the new rules are strict; however, this remains unclear.

There is no WHT on interest in Norway.

Withholding tax

There is no WHT on interest or royalties. The Tax Commission's 2014 report on tax reform recommended implementing WHT for interest and royalty payments.

These recommendations were not proposed in the 2016 state budget, but the government's white paper proposal for tax reform maintains that WHTs need to be reviewed in more detail, including WHTs on lease payments. The Ministry of Finance is expected to prepare a discussion paper for public consultation.

Checklist for debt funding

When funding a Norwegian entity, the following questions should be asked:

- Will the intragroup interest legislation limit the deduction of intragroup interest? Will interest paid to a third party be considered as intragroup interest due to debt secured by intragroup guarantees?
- Is there a business reason for setting up a Norwegian purchasing entity? If not, the anti-avoidance rules may apply and the interest deemed void for tax purposes.
- Is the interest set at fair market value? If so, are the market conditions well documented (e.g. similar types of loan, similar market, similar security, etc.)? For subordinated loans, interest could be challenged if the situation of the company is such that the interest poses a threat to the equity.

Equity

There is no capital duty of any kind on contribution to equity.

Hybrids

The tax treatment of a financial instrument usually is determined by the instrument's form rather than its substance. No single characteristic is decisive, but the following characteristics are considered to be typical of debt:

- There is an obligation to repay the capital, possibly with the addition of interest.
- There is an agreement governing interest, date of maturity and the loan's priority in relation to other creditors.

The following characteristics are considered to be typical of equity:

- A right is granted for a share in surplus liquidity and any dividend in the intervening period.
- The equity must take a certain form and be subject to certain restrictions and obligations regarding repayment of the provider of capital.
- The equity is intended to cover ongoing losses, and the yield is conditional on the company's performance.

Deferred settlement

Any settlement that permanently reduces the company's obligation to make payments or reduces its claims against third parties is accepted as income/loss at the time of settlement, as long as the settlement is made with third parties. Any settlement within a group must be documented as a fair market action, or the tax authorities will likely challenge it.

Other considerations

Concerns of the seller

The seller normally prefers a sale of shares, because this frees them from responsibilities and historical risk and attracts more favorable tax treatment. However, the tax benefit is normally a part of the purchase price discussions, which makes the choice less crucial for both parties.

Company law and accounting

In Norway, labor laws are protective and favor employees, who are entitled to have all their earned rights transferred with them.

Norwegian legislation also makes all contracts, etc., valid after a sale of shares, unless there are specific changes of control clauses or a change of ownership is clearly a breach of important explicit and implicit conditions.

For the dissolving entity, a formal merger is not considered liquidation. The company is regarded as a fully continuing corporation in all legal aspects unless the contracts state otherwise.

For accountancy purposes, a purchase of assets is considered to be a transaction, and the purchase price must be allocated. Only transactions within a group, without change of control, are treated as a continuous transaction, provided the consideration is shares in the purchasing company.

Group relief/consolidation

There is no consolidation of groups for tax purposes, but relief for losses may be claimed within a group by way of group contributions. Group contributions are deductible for the contributor and taxable income for the recipient. The holding requirement for group contribution purposes is 90 percent. The parent company must hold, directly or indirectly, more than 90 percent of the shares and the voting rights of the subsidiary. The ownership requirement must be met at the end of the fiscal year.

Group contribution (with tax effect) may not be given or received with respect to income subject to the petroleum tax regime.

Group contribution is available between Norwegian subsidiaries of a foreign parent as long as the 90 percent ownership requirement is fulfilled at year-end. The same applies to foreign companies resident within EEA, which are considered comparable to Norwegian companies regarding group relief as long as they are taxable in Norway through a permanent establishment and the group relief is taxable in Norway. Also, under non-discrimination clauses of tax treaties, group relief is available for contributions made from branch of a foreign resident company to a Norwegian subsidiary of the same tax group.

Mergers/demergers and exchanges of shares

A takeover may be carried out as a merger. Mergers and demergers may be treated neutrally for tax purposes. The companies may carry forward tax losses after the merger, provided the main motive for the transaction is not the tax position itself. A prerequisite for tax neutrality is that there be continuity in the tax positions involved before and after the transaction.

Rules for cross-border mergers and demergers were introduced with effect from 1 January 2011. The rules allow for tax-neutral cross-border mergers and demergers between Norwegian private limited companies/public limited companies and foreign limited companies that are resident within the EEA area.

Under these rules, a merger or demerger between a Norwegian transferring company and a foreign qualifying company does not trigger taxation at the level of the company or shareholders. However, where assets, rights or liabilities are taken out of Norwegian tax jurisdiction, the general exit tax rules apply.

The new legislation also allows for the tax-neutral exchange of shares under certain conditions. A general condition for tax-free cross-border mergers, demergers or exchanges of shares is that the participating companies are not resident in low-tax jurisdiction within the EEA area, unless the company is genuinely established and carries on business activities in the EEA country. Exchanges of shares can be carried out outside of the EEA, provided that the companies are not resident in 'low-tax jurisdictions'.

Another general condition is that the transaction is tax-neutral in all countries and that all tax positions are unchanged for the shareholders and the companies involved. There are some exceptions.

The rules grant the Ministry of Finance authority to adopt new regulations on tax-free transfers of business in following situations:

- transfer of business in a Norwegian company's foreign branch to a limited company in the same country
- transfer of business in a Norwegian branch of a foreign company to a Norwegian limited company
- transfer between branches of related assets, liabilities and business, provided that the foreign ownership companies constitute a part of a group.

Transfer pricing

In Norway, transfer pricing policies must be documented at the request of the tax authorities. Failing to comply with such a request leads to fines. In addition, the company must keep a documentation file that can be forwarded to the tax authorities on short notice. Transfer pricing documentation rules impose an obligation for companies to prepare specific transfer pricing documentation. Norway's transfer pricing system is based on the OECD's guidelines.

Dual residency

Dual residency is treated in accordance with a relevant tax treaty between Norway and another country.

However, domestic law clearly states that a person is a Norwegian tax-resident if they spend more than 183 days in Norway in any given 1-year period.

Norwegian exemption method

Corporate shareholders are exempt from taxation of dividends and gains on shares, except for a clawback of 3 percent on dividends. Before 1 January 2012, the clawback was also levied on gains. As of 1 January 2012, the clawback is abolished for dividends within a tax group. Losses on shares qualifying under the exemption method cannot be deducted.

For individual shareholders, dividends and gains are taxed under a modified classical system.

Exemption for dividends and gains on shares in companies resident in the EEA

For corporate shareholders, an exemption system generally applies to all investments within the EEA. Under rules applicable from 2008, the exemption method only applies in relation to companies resident in low-tax countries within the EEA if the investee company fulfills an additional substance requirement. The exemption applies only if such a company is genuinely established in and performs real economic activity in the relevant country. The fulfillment of this criterion is based on the particular facts and circumstances. A key factor is to consider whether the foreign entity is established in a way that is similar to what is normal for such entities both in the country of residence and in Norway.

If the investment qualifies, the exemption method covers dividends, gains on shares and gains on derivatives where the underlying object is shares, regardless of the level of holding or holding period. Trading in shares and certain derivatives is thus tax-exempt when made from a Norwegian resident limited company.

Convertible bonds are not covered by the exemption method.

Losses on shares in a company which is a tax resident in a low tax country within the EEA and lack the sufficient substances are not deductible, as the shares, in the case of a loss, qualify under the exemption method, even though a gain or dividends would not.

Limitation of exemption for investments outside the EEA

For investments outside the EEA area, the exemption only applies if the shareholder holds 10 percent or more of the share capital and the voting rights of the foreign company. The shares must be held for a period of 2 years or more. Losses are not deductible if the shareholder, at any point during the last 2 years, has held 10 percent or more of the share capital or the voting rights of the foreign company. The exemption does not apply to investments outside the EEA, where the level of taxation is below two-thirds of the Norwegian tax that would have been due if the foreign company had been resident in Norway (both a white list and black list exist). Dividends are tax-exempt from the date of investment, provided that the criteria are met at a later time.

For investments outside the EEA not qualifying for the exemption, dividends and gains are taxable and losses deductible. For such investments, a credit for WHT and underlying tax is granted.

Exemption from withholding tax on dividends for EEA resident corporate shareholders

The exemption method also provides for a tax exemption for shareholders resident within the EEA, so no Norwegian WHT is due for shareholders that are covered by the exemption method. Under rules applicable from 2008, the exemption method, only applies in relation to EEA-resident shareholders resident if the shareholder fulfills a substance requirement (see above) — that is, if company is properly established in and performs real economic activity in the relevant country. The fulfillment of this criterion is based on particular facts and circumstances. A key factor is to consider whether the foreign entity is established in a way similar to the normal organization of such entities both in the country of residence and in Norway.

Shareholders resident outside the EEA would still be charged WHTs, subject to limitations under tax treaties.

Comparison of asset and share purchases

Advantages of asset purchases

- The purchase price (or a portion) can be depreciated or amortized for tax purposes.
- A step-up in the cost base for tax purposes is obtained.
- No previous liabilities of the company are inherited.
- No acquisition of a tax liability on retained earnings.
- Possible to acquire only part of a business.

Disadvantages of asset purchases

- Possible need to renegotiate supply, employment and technology agreements, and change stationery.
- A higher capital outlay is usually involved (unless debts of the business are also assumed).
- Possibly unattractive to the vendor, so the price may be higher.
- Accounting profits may be affected by the creation of acquisition goodwill.
- Potential benefit of any losses of the target company remains with the vendor.

Advantages of share purchases

- Lower capital outlay (purchase net assets only).
- More attractive to the vendor, since a capital gain is (almost) tax-free for companies.
- Purchaser may benefit from tax asset and losses of the target company.
- Purchaser may gain the benefit of existing supply and technology contracts.

Disadvantages of share purchases

- Purchaser acquires an unrealized tax liability for depreciation recovery on the difference between the market and tax book values of assets.
- No deduction for the purchase price or underlying goodwill.

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