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CROSS BORDER GROUP CONTRIBUTIONS.

The Norwegian Supreme Court made the 28. January 2019 a ruling on tax deductibility of cross border group contributions from a Norwegian mother company to a foreign subsidiary.

On the request of the court of appeal, the EEA court had previously given an advisory opinion on the Norwegian group contribution rules, accepting in principle the condition for tax deduction that both the giver and the recipient (parent and subsidiary) must be taxable in Norway. The EEA court however stated that, if the loss in the foreign subsidiary is "final" these conditions for tax deduction would be in breach with EEA law. The question for the Supreme Court was thus the understanding of a "final" loss.

Referring to the "Marks & Spencer" case the Supreme Court stated that in order for the loss to be final, the company must have exhausted all opportunities to exploit the loss, in both current and prior accounting periods, and if necessary, by transferring the loss to a third party, e.g. by selling the company to a third party. Even though the subsidiary was liquidated, the Supreme Court found that, since the asset of the subsidiary had been sold to a third party the taxpayer could have sold the company as an ongoing business were a buyer could have exploited the company's tax positions. The loss was therefore not "final" and the tax deduction for the group contribution was denied.

TAX RESIDENT COMPANYS

Previously there has been no legal definition of the term "domiciled" for companies in Norwegian tax legislation. In a new provision, the term "domiciled in the Kingdom" is defined depending on the company being founded in Norway or abroad.

1. Companies founded in accordance with Norwegian law.

A company "founded in accordance with Norwegian company law" shall be deemed to be domiciled in the kingdom. Under the Tax Act, section 2-2 new eighth paragraph; it is a condition that the company is not at the same time taxed in another state. The clarification implies that a company founded under Norwegian law will be taxable to Norway as long as the company exists, or until it is deemed tax resident in another State following the tax treaty between Norway and the competent state. Companies founded in accordance with foreign law

2. Companies founded abroad

Companies founded abroad will be considered domiciled when the company "has the real management in Norway ". The new term "real management" is defined and determination is based on "where management at the board level and daily management is exercised", but also "to other circumstances in the company's organisation and operations". The Ministry assumes that it will be uncomplicated to determine where "daily management exercised" but that it can be more demanding to determine where "leadership at the board level [...] is exercised ".

The definition of the terms of general tax liability for companies serve two purposes. Firstly, the proposal will help clarify the status for Norwegian-and overseas-founded companies, while the reference to the tax treaty contributes to a more universal interpretation of the regulations. Secondly, the proposal will prevent Norwegian companies from being able to achieve the status of "homeless " and the benefits that may have be caused by it.

Norwegian companies that are deemed taxable in another state pursuant to the tax treaty will still be required to file a tax return in Norway. In such cases, the company will be able to deliver a so-called "zero-tax message" to the IRS where in the tax report the company does not have taxable income to Norway together with a concise justification. The obligation to provide tax return will also apply to Norwegian stapled companies that have moved tax residency out of Norway.

The legislative changes take effect immediately with effect starting from the year 2019. For companies with divergent fiscal years, it is proposed to give legislative changes effect starting from the first fiscal year starting after 1. January 2019, but no later than 1. January 2020.

INTEREST DEDUCTION LIMITATION RULES (BEPS ACTION POINT)

Based on the OECD and G20 “Base Erosion and Profit Shifting” (“BEPS”) project Norway has introduced new and stricter interest deduction limitation rules. The new interest deduction limitation rules include interests on any kind of debt, including debt to unrelated parties, such as bank loans and bonds for companies for the whole group. However, the net interest costs threshold (collectively for the Norwegian units) is raised to MNOK 25 (with an interest rate of 5%, the threshold amount corresponds to a loan of MNOK 500) for the Norwegian part of the group and MNOK 5 for companies that are not part of a group.

Where the threshold amount is exceeded, deductions are limited to 25% of taxable EBITDA. The proposal intends to exempt interest expenses on ordinary arms-length loans. To achieve this, an equity escape clause is introduced; granting full deductions for interests provided the taxpayer is able to demonstrate that the year prior

1.) the relevant company on a stand-alone basis has a debt-to-equity ratio similar to or stronger than the consolidated debt-to-equity ratio in the group that the company is a part of, or

2.) the Norwegian part of the group has a consolidated debt-to-equity ratio that is similar to or stronger than the consolidated debt-to-equity ratio in the wider group.

If net interest costs exceed the 25% deduction frame, the interest deduction may be carried forward for 10 years.

The proposal includes quite extensive documentation requirements for taxpayers who wish to apply the equity escape clause. The auditor must approve the group accounts and the local accounts for the Norwegian company, or alternatively, the local accounts of the Norwegian part of the group, including certain specific tax accounting adjustments.

For groups consisting of Norwegian entities only, it is sufficient to provide documentation approved by the auditor that the group does not include any foreign companies.

The existing interest deduction limitation rules, which limit interest expenses to related parties, will remain in force for companies that do not belong to a consolidated group, and to companies that belong to a group and have interest expenses to a related party outside of the group. A related party outside the group will typically be an individual who holds, directly or indirectly, 50% or more of the shares in the company. Consequently, a Norwegian company belonging to a group and qualifying for the equity escape clause may still be exposed to the interest deduction limitation to the extent it has debt to a related party outside the group.

TAX CLASSIFICATION OF PARTICIPANTS IN FOREIGN PRIVATE EQUITY FUNDS

The Directorate of Taxes issued a principle statement of 4. December 2018 on the ownership requirements for the General Partner (GP) in relation to the tax classification of foreign private equity funds.

If GP of a limited partnership has made equity contribution giving the GP title to a part of the profit, and an obligation to cover losses in the same manner as the other partners, this indicates that GP is partner in the business, even if the contribution is small.

The Directorates of taxes stated that; even though the assessment of the fund being a business abroad is individual, for reasons of predictability and practical feasibility, the GP will in general be regarded as a participant in the foreign Limited Partnership for Norwegian tax purposes, where GP has a stake/ Deposit of more than 0.1% of the total stake/deposit in the company. In such cases, a PE fund will thus be regarded as a foreign company with a participant determination for Norwegian tax purposes.

If the GP has under 0.1 percent interest, and GP does not share in the profits beyond its stake, a specific assessment will be made of whether there is a company to be participant-determined.

NEW DOCUMENTATION REQUIREMENTS - WITHOLDING TAX

As of 1. January 2019, Norway introduced new documentation rules in regards to withholding tax on dividends.

If the Norwegian distributing company does not know the identity and tax status of the foreign shareholder (the final dividend recipient), the company must deduct 25 percent withholding tax on dividends. However, the company may apply a reduced withholding tax rate according to a tax

treaty, or refrain from deducting withholding tax pursuant to section 2-38, subsection 5, of the Norwegian Taxation Act, if the shareholder has provided documentation showing that they are entitled to a reduced withholding tax rate.

The shareholder must submit the documentation before the tax deduction. Normally, that means before the dividend distribution. The same documentation requirements apply for shares registered in VPS (the Norwegian Central Securities Depository) and shares not registered in VPS.

ENACTMENT/WHITE PAPER ON THE ANTI ABUSE DOCTRINE

In Norway the courts have developed a general anti avoidance doctrine that ensures that the tax authorities can cut through structures and dispositions whose primary motive is to achieve tax benefits and are deemed "disloyal" to the tax legislation. The 10. April 2019 the Ministry of Finance presented a new bill to be passed by the parliament regarding a general anti avoidance rule in the tax legislation.

The bill is not significant different from the applicable statutory right, however the following will be changed:

- tax benefits abroad may no longer be used as a part of the transactions business reason
- the evaluation of the transactions business purpose is made "objective" and should be done based on what an
- the fact that the tax consequences of the avoidance has been addressed by the legislative powers without any specific rules being made shall no longer be a regarded as in the taxpayers favour

The Ministry proposes that the statutory rule be valid for direct tax and for VAT, cf. section 13-2 of the Tax Act and section 12-1 of the VAT law and applicable as of the income year 2020.

VAT

VAT - transfer of real estate under construction/rehabilitation

The Ministry of Finance issued a principal statement 17 September 2018 with respect to VAT implications concerning transfer of real estate by way of sale, demerger, merger etc. Previously, such transfers involved a considerable VAT risk if the transfer took place prior to the completion of the construction or the real estate, or during major rehabilitation work. The risk involved loss of VAT deduction although the real estate was constructed for use in a future VAT liable business. The VAT risk has been considerable reduced after the statement from the Ministry of Finance was issued. However, there still exists a VAT risk in some specific situations. In situations where a company is pre-registered in the VAT Register due to future leasing of real estate to a VAT liable lessee, and the company is not involved in any other VAT liable activities, the company would be required to repay any deducted input VAT if the real estate is being transferred prior to the leasing activities has commenced.

NOK 350-threshold exemption concerning importation

As a rule, VAT shall be paid on importation of goods to Norway from abroad. However, a customer in Norway may order goods from other countries without having to pay Norwegian VAT and any other Norwegian duties on any order if such an order has a value of less than NOK 350 including transpor-tation costs to the Norwegian border and insurance, if any. There are currently several suppliers located outside of Norway taking advantage of this NOK 350-rule and selling products without the

customer having to pay Norwegian VAT and any other Norwegian duties. However, the Norwegian government has decided to reduce the NOK 350-threshold to NOK 200 with effect from 2020.