Norway: Proposal to amend exit tax rules introduced

On 15 May 2012, the Norwegian Ministry of Finance proposed changes to the rules on exit taxation that are partly in response to the 2011 decision of the European Court of Justice (ECJ) in the National Grid Indus case. The ECJ held – in the context of the Dutch exit tax rules – that EU member states can, in principle, impose an exit charge on unrealized gains upon the transfer of an entity’s place of effective management to another member state, but a requirement that the exit charge be paid immediately upon the transfer of seat, without the possibility of deferral of tax collection, constitutes an infringement of the freedom of establishment in the Treaty on the Functioning of the European Union.

The proposed changes, which would restrict the reduction or elimination of exit tax after a migration, are likely to be approved by Parliament and would be effective as from 15 May 2012.

Current rules

The Norwegian exit tax rules apply in the following cases:

- When non-Norwegian taxpayers cease taxable activities in Norway or the assets of such taxpayers are otherwise migrated out of Norway’s taxing jurisdiction;
- When assets belonging to Norwegian taxpayers are migrated out of Norway’s taxing jurisdiction (in cases where Norway applies an exemption method under an applicable tax treaty or where a controlled foreign corporation (CFC) is no longer a CFC because it ceases to be Norwegian controlled); and
- When a Norwegian company migrates from Norway.

Under current law, when tangible (fixed) assets, financial assets, liabilities, current assets and intangible assets are migrated out of Norway, a gain is computed as the difference between the fair market value (FMV) of certain assets and liabilities on the day before the items are no longer subject to Norwegian taxation and their tax base. The tax base is the cost of fixed assets less tax depreciation taken while the assets were subject to the Norwegian tax regime, reduced by hypothetical depreciation taken on the assets before they became subject to Norwegian taxation.

Exit tax on the calculated gain on fixed assets, financial assets and liabilities (but not intangibles and current assets) may be deferred to the extent adequate security is provided. Security is generally not required, however, if the taxpayer is resident in Norway or another European Economic Area (EEA) country.

In cases where deferral is granted and the assets or liabilities are not sold within five years from the end of the fiscal year in which they ceased to be subject to Norwegian taxation, the taxable gain originally calculated is disregarded and no exit tax is payable on the gain. Moreover, if the relevant assets or liabilities are reallocated to Norway by the taxpayer within the five-year period so that they once again become subject to Norwegian taxation, the tax originally calculated on the gain also is waived.

In cases where deferral is granted and the assets or liabilities are sold within the five-year period, the tax originally calculated on the gain is reduced to the extent the actual price obtained is less than the FMV assessed on the removal from Norway (and with respect to assets) reduced by hypothetical depreciation during the period after the assets ceased to be subject to Norwegian tax.

Losses are calculated in the same way as gains upon the cessation of Norwegian taxation, i.e. based on the value of the relevant assets at that time. There are, however, limits on the deductibility of losses. Losses on intangibles and current assets are deductible only if the taxpayer is resident in another EEA country at the time the assets cease to be subject to Norwegian taxation. In that case, the losses will be deductible in that year.

For other assets and liabilities (where a gain is subject to tax based on the rules described above), the loss (calculated at the time the assets or liabilities ceased to be subject to Norwegian taxation) is deductible only if actually realized at some future date (i.e. when they are sold, etc.) and provided the taxpayer is resident in another EEA country at that time.

Proposed rules

The proposed changes are as follows:
The possibility to defer the tax assessment on tangible (fixed) assets, financial assets and liabilities until gains are actually realized would be eliminated. That is, gains will be assessed on exit, subject to deferral of tax payments for qualifying taxpayers.

The right to defer the payment of exit tax would apply only to Norwegian tax residents or tax residents of another EEA country and only to the extent adequate security is provided. The right to defer tax payments (including interest accrued) would terminate if either criterion ceased to apply. As is the case according to current rules, the right to defer payment would not apply to intangible assets and current assets.

Taxable gain always would be the difference between the FMV of the assets on the day before the items are no longer subject to Norwegian taxation and the tax base. (The actual future sales proceeds on certain types of assets and liabilities, therefore, would no longer be relevant.) To the extent a gain would be exempt upon a sale, exit tax would not be calculated from that time.

Interest would be calculated on tax deferred from payment at a rate equal to the Norwegian central bank’s key policy rate on 1 January for the relevant fiscal year, plus one percentage point (2.75% for 2012). Interest would start to run from the time tax arrears for the relevant year would be payable (for corporations, this is normally around 1 November of the year following the tax fiscal year).

Taxes calculated on exit would not be waived if assets and liabilities are not actually realized within a certain timeframe. The five-year rule relating to tangible (fixed) assets, financial assets and liabilities would be abolished, so that exit tax would continue indefinitely.

Taxes calculated on exit would not be waived if assets are reallocated to Norway so that they again become subject to Norwegian taxation. In such cases, it is proposed that the tax base for tangible (fixed) assets, financial assets and liabilities be the FMV when the asset is reallocated to Norway.

A loss deduction (against other sources of income) based on the FMV on the day before exit and the tax base would be available for Norwegian tax residents and residents of another EEA country (at the time of exit) to the extent the loss is not deductible in another country.

According to current rules, there are certain thresholds for the amount of gain and the length of time tangible (fixed) assets were subject to Norwegian taxation before exit tax is levied. For example, tax is not assessed on a tangible (fixed) asset if the gain is less than NOK 5 million or if such assets have been subject to Norwegian taxation for a period not exceeding in aggregate 12 months during the six years preceding exit. Comments to the proposed rules do not indicate any changes in this respect.