

Norwegian Government proposes introduction of cross-border group relief rules

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Executive summary

The Norwegian Ministry of Finance (the Ministry) issued, on 13 August 2019, a public consultation paper regarding cross-border group relief in final loss situations, i.e., when a loss-making company has exhausted all possibilities to utilize the losses incurred.

It is proposed that the rules shall be effective from the income year 2019 and comments to the proposal must be submitted by 13 November 2019.

Detailed discussion

Current rules

There is no consolidation of groups for tax purposes in Norway, but relief for losses may be claimed within a tax group by way of group relief. By granting a group relief, a group company can transfer its taxable income to another group company, thus utilizing losses within the group. Group relief is deductible for the contributor and constitutes taxable income for the recipient.

Currently, the group relief rules only allow for group relief between Norwegian group companies. A tax group consists of companies' tax resident in Norway that are owned by the same ultimate parent company holding more than 90% of equity and voting rights directly or indirectly at year end.

However, on 13 September 2017, the Court of Justice of the European Free Trade Association (EFTA Court) ruled that the Norwegian group relief rules infringe the right of freedom of establishment under Articles 31 and 34 of the Agreement on the European Economic Area (EEA). In the Norwegian Supreme Court ruling published on 28 January 2019 (the *Yara* case), the Supreme Court stated that a group relief made to a subsidiary tax resident within the EEA is allowed in “final loss” situations.

On this basis, the Ministry issued the public consultation paper regarding the proposal to codify cross-border group relief in final loss situations.

The proposed changes - “final loss” exception

In addition to the general requirements for rendering group relief between Norwegian group companies, the Ministry proposes the following conditions for a taxpayer to render group relief to foreign group companies:

- ▶ The recipient entity must be genuinely established in an EEA state and tax resident there.
- ▶ Any intermediate companies between the contributing company and the recipient company cannot be located in another country than Norway or the country where the recipient entity is tax resident.
- ▶ The group relief must be regarded as taxable income for the recipient company.
- ▶ The recipient company must be in a “final loss” position.

With respect to the “final loss” requirement, the Ministry states that the term must be interpreted in accordance with the guidelines from the EFTA Court and the Court of Justice of the EU (CJEU), and clarify that the following factors are relevant:

- ▶ The “final loss” assessment shall be conducted at the end of the year when the loss has occurred. Hence, any losses from previous years will never be considered as final. Further, losses incurred after the year when the loss was regarded as final, shall not be added to the final loss.
- ▶ The loss is final the year when the company has exhausted every possibility to utilize the loss. i.e., the loss cannot be set off against profit from previous years or utilized in the current or future years either by the company itself or by a third-party acquirer.

- ▶ The company’s previous alternative course of actions must be considered when assessing whether the company has exhausted every possibility to utilize the loss. The subsidiary must have terminated its operational activity in the year of the final loss and initiated the liquidation process immediately after year-end. As a main rule, the liquidation process should be finalized within the year after the relevant tax year. Exceptions to this main rule are accepted if the liquidation takes longer time due to local legislation or other imperative conditions, provided that the liquidation is conducted without unnecessary delay.

The proposed rules also establish the rules for computing the final losses and the obligation to adjust the amount based on subsequent incidents, for example if the subsidiary derives any taxable income due to the liquidation.

Impact

The proposal codifies the possibility of carrying out cross-border group relief in final loss situations. It is expected that the scope of application of the rules will be very narrow. This is confirmed by the Ministry in the proposal, which states that the rules will not have an economic or administrative impact for the Government, as they will apply only in rare exceptional circumstances.

The proposal clearly states that the rules should not give taxpayers a wider possibility to grant group relief in cross-border situations compared to pure domestic situations. However, in domestic situations, tax losses can be carried forward indefinitely, while final losses according to the proposal cannot be carried forward but have to be used in the year they occurred. This, as well as other aspects of the proposed rules, may be considered as a restriction, which does not seem to be justified by imperative reasons in the public interest as long as the loss is final. Hence, the proposed rules might still infringe the right of freedom of establishment under Articles 31 and 34 of the EEA Agreement.

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