55.

Norway

Introduction

In Norway, the arm's-length standard for related party transactions is incorporated into the General Tax Act (GTA) 1999 Section 13-1. The GTA Section 13-1 (4) makes reference to the Organisation for Economic Co-operation and Development (OECD) Transfer Pricing Guidelines (TPG) and state that the TPG 'shall be taken into account'. The reference is to the guidance on the arm's-length principle and the transfer pricing methods. It is also assumed that the reference includes the OECD guidance on business restructuring. Transfer pricing documentation and reporting requirements became effective from fiscal year 2008.

The Norwegian tax authorities consider transfer pricing a priority and have considerable resources. It is fairly common for the tax authorities to pick test cases that are subject to extensive assessments. Such cases may easily end up in courts. Settlements have traditionally not been common, but are now more frequent during audits.

During the most recent years, the tax authority's focus has been inter alia on intra-group financing arrangements, intra-group services, business restructuring and commissionaire arrangements.

Norway does not have a general Advance Pricing Agreement (APA) regime, although a formal APA can cover certain transactions related to the sale of natural gas. Nevertheless, it is becoming more common to discuss complex cases with the tax authorities in advance of implementation or before assessment. In May 2011 PwC successfully concluded the first advance 'agreement' regarding the value of intellectual property and business activity to be sold by a Norwegian company to foreign affiliated companies. In December 2011 PwC negotiated and agreed with the tax authorities on behalf of a client the valuation of certain assets to be sold by a Norwegian company to a foreign affiliated company prior to the transaction being carried out.

Statutory rules

A general arm's-length rule is laid down in Section 13-1 of the GTA. The section provides that, where the income of a Norwegian taxpayer is reduced due to transactions with a related party, the authorities may estimate the amount of the shortfall in income or wealth. The following three conditions must be met for the tax authorities to adjust a taxpayer's taxable income or assets in accordance with the GTA Section 13-1:

- The parties involved in the transaction must have a direct or indirect community of interest.
- There must be an income or wealth reduction (compared with what the situation had been had the parties not been related).

- The income or wealth reduction must have occurred as a consequence of the relationship (the community of interest) between the parties. Where the related party is resident outside the European Economic Area (EEA), the legislation assumes that the relationship is the reason for any deviation from arm's-length income or wealth, and puts the onus on the taxpayer to prove otherwise.

The Supreme Court made some interesting statements regarding the burden of proof in the 1999 Baker Hughes case (*see Burden of proof, below*).

In addition, the substance-over-form principle is a general and important non-statutory principle in Norwegian tax law:

The starting point in Norwegian tax law is that transactions in accordance with Norwegian private law are respected. The application of the non-statutory general anti-avoidance rule (GAAR) is dependent on the tax authorities showing that the relevant transaction has little value besides the tax effects and that the main purpose behind the transaction is to reduce Norwegian taxes. Furthermore, the tax benefits gained by the transaction must be contrary to the legislative intent (i.e. the relevant transaction is clearly outside the range of situations the tax rule was meant for).

The objective of the GAAR is to find the underlying reality, thus substance prevails over form. (It is important to distinguish between this and so-called pro forma transactions, which are disregarded for tax purposes.)

Other regulations

Norway has specific legislation (in the Petroleum Tax Act) to deal with the pricing of petroleum for tax purposes. Taxation of income from the sale of crude oil produced on the Norwegian Continental Shelf is based on a so-called 'norm price', which shall be equivalent to the price at which it could be sold between unrelated parties in a free market (i.e. an arm's-length price). When establishing the norm price, a number of factors shall be taken into account, including 'the realised and quoted prices for petroleum of the same or a corresponding type with necessary adjustments for quality variations, transport costs, etc. to the North Sea area or other possible markets, delivery time, time allowed for payment and other terms'.

The price norm is decided individually for each field by a separate governmental board (Norm Price Board). The taxpayer will be taxed based on the relevant norm price irrespective of the actual sales price. The norm price is used both for internal and external transactions. So far, the norm price has been set only for crude oil but may also be set for natural gas.

Court cases and revenue practice

The Supreme Court and the lower courts have made a number of decisions concerning transfer pricing. Several of the large transfer pricing cases in Norway are related to the petroleum activity on the Norwegian Continental Shelf. Reference will also be made to current revenue practice.

Bareboat charter rate – pricing methods

Trinc and Trag – Supreme Court 1997

The Trinc and Trag case is primarily an important decision with respect to tax liability to Norway for a foreign oil drilling rig owner. The case also (particularly in the verdicts from the lower courts) contains interesting elements of transfer pricing.

Two foreign companies, Trinc and Trag, were controlled by the same owners. Trinc was the ownership company of a drilling rig, and Trag operated the rig under a bareboat charter. Trag operated the rig on the Norwegian Continental Shelf and was liable to tax in Norway for that activity. The companies had seemingly not used any specific pricing method, while the tax authorities used a cost plus method to set an appropriate bareboat charter rate. The court stated that no significant income reduction was required in order to adjust the income in accordance with the GTA Section 13-1. Further, the court stated that the tax authorities were entitled to use the cost plus method in a situation where it was difficult to find comparable transactions in the market, and that the discretionary elements used by the tax authorities in the cost plus calculation were acceptable. The taxpayer argued to no avail that the resale price method was more appropriate. The historic cost of the rig was used as a basis for the computation. This part of the case was not appealed to the Supreme Court.

Captive insurance issues

There are basically two issues regarding captive insurance. The first question is whether the captive provides real insurance. The second question, if the captive is accepted as providing real insurance, is to what extent the insurance premiums meet the arm's-length standard.

Amoco – Supreme Court 2002

The question was to what extent Amoco's captive represented real insurance. Through previous Supreme Court decisions (including Dowell Schlumberger 1995) it has been concluded that premiums paid to a captive insurance company will, in principle, be accepted as a deductible for income tax purposes. However, this is subject to two conditions:

- A formal insurance policy that transfers the risk from the insured to the captive must be in place.
- The captive must have the financial capacity to meet any claims under the insurance policy (i.e. there must be a real transfer of risk).

Regarding the latter, the tax authorities (in this case, the Oil Taxation Office) have focused on the exposure ratio (maximum payout for one accident/the captive's equity). In the Amoco case the exposure ratio was more than 100% (i.e. the captive could not even meet one maximum loss).

Contrary to the city court and Court of Appeals, the Supreme Court concluded that Amoco's captive insurance arrangement qualified as real insurance. The main reason for this was the fact that Amoco Norway had placed its insurance policy in an independent insurance company (fronting arrangement). The fronting insurance company had then reinsured all the risk with the Amoco captive company, and Amoco Corp. had guaranteed coverage from the captive to the fronting insurance company. Based on the fact that the fronting company would be in a position to cover any losses incurred by Amoco Norway, irrespective of the captive's financial position, the Supreme Court concluded that the risk effectively had been shifted from Amoco Norway to the insurer. Therefore, from a Norwegian perspective, this represented a true and valid insurance.

However, it should be noted that the Supreme Court in principle accepted the 'exposure ratio' as a key factor in order to test the captive's financial capability.

Therefore, it was also concluded that the Amoco captive in itself 'clearly did not qualify as a true and valid insurance company'.

Agip – Supreme Court 2001
The Appeal Board for Petroleum Tax did not accept Agip's insurance premiums as being in line with the arm's-length standard. In order to find the 'correct' arm's-length price, the Appeal Board made use of captive insurance premiums paid by other companies operating on the same petroleum field as comparables. The Appeal Board made the following statement:

"Within captive insurance it is difficult to find comparable rates between independent insurance companies. A comparison with rates paid by other companies on the same or similar fields will be relevant for the evaluation of whether an arm's-length price exists, even if the comparable insurances are with captives. The key point is to thoroughly evaluate the comparability of the policies and to make any required adjustments in order to get a relevant basis for the comparison".

The taxpayer argued that the comparisons and the adjustments made by the Appeal Board were not representative.

The Supreme Court's conclusion was in line with that of the Appeal Board. The Supreme Court referred to the OECD Guidelines and concluded that the guidelines can and should be used as a supplement to the GTA Section 13-1, and that there is no conflict between the two. As the court found that insurance policies differ significantly from field to field, it was deemed acceptable to use other captive insurances (i.e. controlled transactions) on the same petroleum field as comparables.

With respect to transfer pricing methodology, the court stated that the OECD Guidelines cover several methods but that none of these methods was directly applicable in this particular case. The court then stated that in such a situation, the OECD Guidelines must be 'adapted' to the specific situation. Thus, the Supreme Court accepted that the Appeal Board had determined an arm's-length insurance premium using a combination of several methods as well as its own discretionary judgment.

Financing of subsidiaries
In the nineties several cases regarding Norwegian parent companies' financing of foreign subsidiaries were decided upon. The key issue was to what extent the Norwegian parent company and lender should charge interest on formal loans granted to foreign subsidiaries or whether the loans could be deemed as equity.

The first question is whether the capital injection represents a loan or equity. Based on a Ministry of Finance position from 1995 and the result from the court cases, the taxpayer's actual treatment in the statutory accounts will be an important factor – even if it is not entirely decisive.

If it is established that the capital injection in reality represents a loan, the next question is whether (and to what extent) the foreign subsidiary would have been able to borrow money in the market, based on the subsidiary's actual financial position (i.e. whether the subsidiary has borrowing capacity). To the extent the subsidiary has borrowing capacity; the Norwegian parent company will have to include interest income from the foreign subsidiary in its tax accounts.

In 2010 the Norwegian Supreme court ruled in the Telecomputing case. The Norwegian company Telecomputing had provided loans to a US subsidiary. The subsidiary had paid interest on the portion of the loans that was considered to be within the subsidiary's borrowing capacity. The part of the loan exceeding this borrowing capacity did not yield any interest. Later the entire loan was converted to equity, triggering a loss for the parent company. The parent company claimed tax deduction on the entire difference between the nominal value of the loan and the assumed fair market value of the shares. The tax authorities claimed that the portion of the loan exceeding the borrowing capacity should be characterised as equity, and that the deduction for the equity portion should be denied. The Supreme Court ruled in favor of Telecomputing, accepting that the total amount was to be characterised as a loan. Based on the Supreme Court ruling, the characterisation of nominal loan amounts will have to be based on an assessment of whether the loans – or the portion of the loans – predominantly resemble a loan arrangement or an equity arrangement. Lack of borrowing capacity for the borrower will not necessarily imply that the provided funds should be characterised as equity.

In the Bayerngas Norge AS case from March 2012 the lower court considered whether the interest margin on two intra-group loans were arm's length. The credit rating was a key factor. The court concluded that in the specific case it would be correct to base the rating on the companies Stand Alone Credit Profile and to 'notch' this up base on the group affiliation rather than to 'notch' down the parent company credit rating. The key question for the court was to what extent implicit parent company guarantees from the parent company impacts the credit rating. The court considers and determines the implicit support based on the specific fact pattern in the case. Certain factors are emphasised: Strategic importance, percentage of ownership, management's control, plans and attitudes, shared name, jurisdiction, mutual sources of capital, potential risk, history – support in other cases, parent company's capacity to provide support, ratio between investment and debt in subsidiary, and other owners. In the decision the court concludes that the stand-alone credit rating for the specific borrower could (at the best) be notched up 4 notches because of the implicit support. The judgment was not appealed and is legally binding. The decision is thorough and should be taken into consideration when assessing the credit rating of a Norwegian subsidiary.

Intra-group charges

In 2002, the Court of Appeals decided in the '3M case' on the tax deductibility of charges for inter-company services. The decision was appealed, but the Supreme Court dismissed it.

3M had for several years charged its local sales companies, including the Norwegian sales company, a license fee for various inter-company services and use of trademarks. The license fees ranged from 2% to 5% of actual turnover in each single sales company.

The Norwegian tax authorities disallowed the deduction for the license fees, as 3M Norway AS was deemed not to have provided sufficient documentation for services received. The tax authorities also charged 3M Norway a penalty tax, as they were of the opinion that the company had not provided sufficient information.

However, the city court, as well as the appellate court, concluded that the license fee was in line with the arm's-length principle. The court stated that as long as the OECD Guidelines accepted the indirect method for inter-company charges, it would also have to be accepted that detailed documentation could not always be given. In this

particular case the 3M group's accounting system was not designed to give a detailed breakdown/documentation for the various types of inter-company charges. The court further concluded that there was no doubt that the Norwegian subsidiary had received a number of significant services, and given the fact that the Norwegian subsidiary had shown good financial results over several years it was assumed that a third party also would have been willing to pay the same level of license fee.

In 2010, the Court of Appeals concluded that the Enterprise Oil Norge AS did not provide sufficient transfer pricing documentation to document a tax deduction for intra-group services provided by the foreign parent company. The parent company did not perform other operations than services to its subsidiaries. The Court of Appeals rejected Enterprise Oil Norge AS's tax deductions of NOK 141 million. With respect to the documentation requirements, the Court of Appeals stated: "The documentation requirements must depend on the actual circumstances of the situation, especially the reason why it may be necessary with further information. ... The OECD Guidelines should not be understood in a way that estimates, valuations or examples of services are sufficient to fulfill the documentation requirements." It should be noted that the calculation method for the costs related to the intra-group services was complicated. The court further emphasised that the company had not in a sufficient manner documented which activities were performed. The uncertainty that therefore was created was used against the taxpayer. The Norwegian Supreme Court did not admit the case, and the decision in the Court of Appeals is legally binding.

In recent tax audits, especially following the introduction of the specific transfer pricing documentation requirements, the Norwegian tax authorities tend to demand that a Norwegian service recipient documents its benefit from inter-company services in quite extensive detail.

Business restructuring – transfer of intellectual property

In September 2007, the Court of Appeals issued its verdict in the Cytec case. (Cytec's appeal to the Supreme Court was dismissed in January 2008). Cytec Norge AS (Norway) was originally a full-fledged manufacturer that was changed into a toll manufacturer in 1999. The customer portfolio, technology, trademarks and goodwill were apparently transferred to the related entity, Cytec Industries Europe (the Netherlands), free of charge. The appellate court found that Cytec Norge AS held intellectual property rights of considerable value prior to the 1999 restructuring, and that the Norwegian entity should have received an arm's-length remuneration for the transfer of these rights to the related Dutch entity. Hence, the court accepted the Norwegian tax authorities' calculation of such remuneration and the increased income.

Business restructuring – sale of shares

The Oslo District Court ruled in 2009 in the Tandberg ASA case regarding transfer of shares held by a Canadian group entity. The shares were sold to the Norwegian parent company, Tandberg ASA. In connection with the transaction, Tandberg ASA claimed losses for a write-down on a loan to the Canadian entity. The tax authorities challenged the loss, and also increased the taxable income of Tandberg ASA based on an assumption that the shares had been transferred at a lower than fair market value that represented taxable dividend.

Although the court ruled in favor of Tandberg ASA it is worth noticing the strong criticism by the court due to the fact that Tandberg ASA could not present a thorough valuation performed at the time of the transfer. The court clearly stated

that valuations performed at a later time could not be given the same weight as a contemporaneous valuation.

Principal models – commissionaire models and limited risk distributors
The Supreme Court delivered its decision on 2 December 2011 in the 'Dell case'. The Irish company, Dell Products Ltd., had a commissionaire agreement with the Norwegian group company, Dell AS. Dell AS marketed and sold Dell products in the Norwegian market in its own name but for the risk and account of Dell Products Ltd.

The Appellate Court ruled – in line with the District Court – that Dell AS was in fact a dependent agent for Dell Products Ltd. with reference to article 5.5 of the Ireland-Norway income tax treaty of 2000. An important question in the case was whether Dell AS had the 'authority to conclude contracts in the name of' Dell Products. In the Norwegian version of the tax treaty, the phrase for 'in the name of' reads 'på vegne av', which literally translates to 'on behalf of'. Based on its own interpretation, the Appellate Court developed its own test in order to conclude whether this was the case. The judgment resulted in some considerable debate and discussion on the international tax arena.

The Supreme Court found, in a very clear and unanimous judgment, that the Dell AS acting as a commissionaire did not create a permanent establishment for the non-resident principal Dell Products. The Supreme Court considered the Vienna-convention, the tax treaty between Norway and Ireland Art. 5 paragraph 5 in Norwegian and English language, the OECD Model Tax Treaty with commentaries and case law with special emphasis of the French Zimmer case from 31 March 2010. The Supreme Court also underlined the fact that that similar commissionaire arrangements are accepted by 15 other jurisdictions, among them Sweden, without any questions being raised related to permanent establishment for the commissionaire.

The conclusion of the Supreme Court was that the competent authorities in the tax treaty had chosen an arrangement where it is decisive whether the commissionaire legally binds the principal. Another criterion, the Supreme Court added, did not have support in the text of the treaty or in the Model Tax Treaty and a different interpretation could create substantial practical and legal technical difficulties. Dell Products won the case and the State had to pay the full costs of the proceedings.

In the June 2012 Appellate Court decision in the 'VingCard case', the court recognised the principal model as a business model for tax purposes, including limited risk allocation to the US distributor company. The court pointed out that the US distributor company was left with a limited profit which reflected the company's role in the transaction, and that it should be possible for group companies to enter into such an a agreement. It can be derived from the decision that a transfer pricing model which grants guaranteed return to a foreign distributor (return on sales method with a range) as well as true-up payments including year-end adjustments of the income of the distributor, could be accepted from a Norwegian tax perspective. The decision accentuates the importance of intra-group agreements in order to have a legal basis for the risk allocation. The Appellate Court decision is legally binding, as it was not appealed.

Cash pooling/group account system
The January 2010 Appellate Court decision in the 'ConocoPhillips cash pool case' provides an indication as to how far Norwegian tax authorities (in this case the Oil

Taxation Authorities) are prepared to stretch the theory of the arm's-length principle in practice:

Two Norwegian ConocoPhillips companies (in the following jointly referred to as ConocoPhillips Norway) were party to a cash pool arrangement. ConocoPhillips Norway had several accounts in different currencies. The sum of all these accounts constituted ConocoPhillips Norway's net position in the group's cash pool. More than 150 other group companies participated in the cash pool arrangement, and the total of the net positions of all companies constituted a so-called top account, which was placed in Bank of America. ConocoPhillips Norway was consistently in a net deposit position. Although ConocoPhillips Norway was able to document that an alternative standalone relationship with an external bank would have yielded a lower interest income on the Norwegian companies' deposits, the Court of Appeals ruled that in an arm's-length setup, an independent party in ConocoPhillips Norway's (net deposit) position would have received a larger part of the overall benefit of the cash pool arrangement. As a result, a higher interest rate was applied to ConocoPhillips Norway's net deposits for tax purposes, increasing the companies' taxable interest income to Norway. A key element in the appellate court's decision is the theoretical maxim that the arm's-length test shall be conducted by comparing the actual transaction to an otherwise identical transaction in which one imagines that there is no community of interest. The decision is controversial, especially because – as ConocoPhillips Norway unsuccessfully argued – independent parties never enter into such cash pool arrangements. The validity of the Oil Taxation Authorities' (and the Court's) arm's-length test is, therefore, questionable. However, the case was not admitted to Norwegian Supreme Court and the Court of Appeals decision is legally binding.

Intangibles – share of residual return for non-routine functions return

The September 2011 Oslo City Court decision in the Accenture case relates to deductibility of royalties paid by a Norwegian company (Accenture ANS) to a Swiss company (Accenture Global Services GmbH) for the use of intangible assets for the fiscal years 2006 and 2007.

The Tax Office decided that a part of the royalty payment in 2006 and 2007, respectively 44.9 million Norwegian kroner (NOK) and NOK 22.9 million was not deductible costs for Accenture ANS. The total royalty payments amounted to NOK 72.2 million in 2006 and NOK 102.1 million in 2007.

The parties based the royalty payments on a residual profit split method, which left Accenture ANS a base return of 4.45% of sales and Accenture Global Services GmbH the excess return of 7% of sales (only relevant if the surplus exceeded the base return). Benchmarking analyses supported the rates. In case the company's earnings exceeded the base return and the maximum royalty of 7%, any excess amounts were allocated to Accenture ANS.

In essence, the decision relates to the application of the residual profit split method and the distribution of the residual. The Norwegian tax authorities argued that the excess earnings (above 4.45%) occur as a combination of valuable intellectual property (IP) owned by Switzerland, and the use and development of the IP by Accenture ANS. Hence, as Accenture ANS performed non routine functions, it should be compensated with a share of the residual return that the group generated through its activities in Norway. Oslo City Court ruled in favor of the tax authorities. The judgment is appealed.

Attribution of income to permanent establishment – oil service industry
The Supreme Court decided on the attribution of income to a deemed permanent establishment of a Swiss company, Allseas Marine Contractors S.A. (AMC) on the Norwegian Continental Shelf in its June 2011 decision. As the double taxation treaty between Norway and Switzerland does not cover the Norwegian Continental Shelf, the decision is based solely on Norwegian domestic tax law. The court concluded that the gross income earned by AMC from the contract with the oil company for pipe laying services should be subject to taxation in Norway. The court did not accept the argument that the PE was to be considered as a service provider to the head office, which should be remunerated on a cost plus basis. Legal theorists and practitioners criticize the judgment. There are strong arguments to support a different outcome in case the OECD principles for attribution to permanent establishments are applied due to a tax treaty.

Burden of proof
The authorities carry the burden of proving that there is due reason to believe that income charged to tax in Norway has been reduced because of Transfer pricing. They must also demonstrate that such transactions took place with a related party.

Once the authorities have discharged this burden, if the related party is resident outside the EEA, Section 13-1 of the GTA assumes that the relationship is the reason for the income reduction and puts the onus of proving otherwise onto the taxpayer. However, a key Supreme Court case (Baker Hughes 1999) makes the following statement:

"Use of the GTA Section 54 (now GTA Section 13-1) will under any circumstances require that it is more likely than not that the income has been reduced".

In Dowell Schlumberger, a 1995 Supreme Court case, the question of the obligation placed on taxpayers to cooperate with the authorities was tested. The case concerned deductions due in respect of payments to a related (captive) insurance company resident outside Norway.

The authorities argued that they required access to accounts and other information concerning the offshore company relevant to the question of whether it actually carried on the business of insurance. As the company had not provided such information and therefore had not substantiated its tax deductions, the court ruled that no tax deduction was allowed for insurance premiums paid. The court rejected claims that the information requested amounted to business secrets and, therefore, ought not be disclosed.

Tax audit procedures
Selection of companies for audit
Companies or groups might be selected for transfer pricing audit in several ways, and there is no specific guidance on how to select companies for an audit. An audit might be of a general nature such as an audit of the company as such (i.e. a combination of various tax issues), or the tax authorities might audit specific issues/areas.

The provision of information and duty of the taxpayer to cooperate with the tax authorities

Under the Tax Assessment Act, the tax authorities have extensive powers to collect information relevant to settling the tax liabilities to Norway as well as to the level of income subject to Norwegian taxation. The authorities may request any information they believe to be relevant to the point in question, including information on the profitability and functions of all parties in a value chain.

There is also a general obligation on taxpayers to substantiate their tax position and to cooperate with the authorities in the provision of information relevant to deciding their tax liabilities.

If the taxpayer does not submit the requested information or does not cooperate in the provision of information, as in the Supreme Court case of Dowell Schlumberger (see Burden of proof, above), the tax authorities may base an assessment on the available facts.

The audit procedure

Investigations are conducted using correspondence, interviews and site visits, as appropriate. Once the investigation has been undertaken, the authorities complete a report that indicates any areas in which they disagree with the taxpayer. They then make proposals for a revised assessment. The taxpayer responds to this report in writing, rejecting any arguments or conclusions of the authorities with which she/he disagrees. Any supporting documentation is included in this response. The authorities then review the position in the light of the taxpayer's response and notify the taxpayer of their decision.

Audit period

The tax authorities may go back ten years but usually the audit period is three years. However, if correct and sufficient information has been provided in the tax return, the tax authorities may only change the assessment in disfavor of the taxpayer for the two previous years.

Revised assessments and the appeals procedure

If the taxpayer disagrees with the decision of the tax authorities, she/he may appeal to the appropriate Tax Appeal Board. For companies taxed by the Oil Taxation Authorities, there is a special appellate board for petroleum tax.

If the taxpayer disagrees with the appellate board's decision, she/he may take the case to court. Norway has three levels of courts (city/district court, Court of Appeals and Supreme Court) but no specialised tax court.

Additional tax and penalties

Norway uses an additional tax (penalty tax), which may be charged administratively under the Tax Assessment Act. The standard rate is 30% (rates of 45% or 60% may be used) of any tax not levied as a consequence of errors made by the taxpayer. Penalty tax is generally not used where the tax issue arises from different interpretations of laws and regulations. However, in situations where the taxpayer is or should be aware that the tax situation is uncertain, sufficient information about the transaction should be filed as a part of the tax return in order to avoid use of penalty tax. Ordinary interest

for late payment of tax also will be charged. Penalty tax is not tax-deductible. Basically, penalty tax is levied on a strict objective basis.

Resources available to the tax authorities

The Norwegian tax authorities are divided into five regions (North, East, South, West and Mid-Norway), which include several local tax offices. In addition, there are three central tax offices: the Central Tax Office – Foreign Tax Affairs (part of Tax West), the Central Tax Office for Larger Enterprises (part of Tax East), and the Oil Taxation Office. There is also the Tax Directorate, which is a central tax authority.

The central tax offices have a high level of competence and resources, and often pursue aggressive positions in transfer pricing cases. The local tax authorities often have limited resources and are usually not in a position to handle an extensive transfer pricing investigation, although there has been a development with larger resources allocated to the local tax authorities. On a regional basis, the resources are considerably larger, and in addition, the Tax Directorate often investigates transfer pricing issues and supports/assists the local tax authorities.

It is worth noting that the resources targeted at transfer pricing have increased considerably and are likely to be increased further over the coming years. It also should be noted that the tax authorities within the past few years have used a significant amount of resources in developing various IT solutions. As a result, it is easier for the tax authorities to extract relevant information and also to follow up more closely with respect to transfer pricing issues.

Use and availability of comparable information

Use

Where the taxpayer is involved in the offshore oil industry, Norway has specific legislation that deals with the pricing of petroleum (Petroleum Tax Act) for tax purposes, as noted above (see Other regulations).

In respect of all other commodities and services, the brief provisions of Section 13-1 of the GTA lay down the arm's-length principle and its application and as mentioned above there is a reference to the OECD Transfer Pricing Guidelines.

Availability

Basically, the published annual accounts of companies are the only information available in Norway about the businesses of third parties. For some business sectors, statistical data concerning gross profits is also published, but this is not detailed to the degree of discussing individual companies. Some tax offices also issue a yearly overview of the tax assessment on an anonymous basis.

A potential problem in this area is the fact that the tax authorities may compare data/pricing used by other taxpayers, without being able to give any detailed information regarding the data the taxpayer is compared against (hidden comparables). Thus, in such situations a taxpayer may find it difficult to prepare an appropriate defence.

Benchmarking

While Norwegian tax authorities previously were skeptical towards benchmark studies in general, they now vigorously test benchmarks supplied by taxpayers and also carry out own benchmarks. Due to the financial crisis from 2008 it is to be expected that

benchmarks which rely on companies in Greece, Italy, Portugal and Spain will be subject to specific scrutiny.

The Appellate Court's decision from June 2012 in the Vingcard case is of interest also from a benchmarking perspective. The Appellate Court accepts a true-up payment to an US sales subsidiary based on the application of the TNMM method where the target return on sales margin is supported by a benchmark study. The court dismisses allegations from the tax authorities to the benchmark study, including that the comparables do not operate in the same industry as the tested party. The court assumes that no independent entities operate in the same industry as the tested party and that the comparables can be used as a representative range. Most important, the decision ensures a clear case law basis for the acceptance of the TNMM and benchmark studies for Norwegian tax purposes. At the same time, based on the decision, extraordinary circumstances related to the business of the tested party (affecting income and/or costs of the company) must be considered when applying the TNMM method. If not adjusted for, such circumstances may lead to lack of comparability and hence affect the arm's-length nature of the applied method.

Risk transactions or industries

The Transfer pricing focus in Norway is on a wide range of topics such as the financing of business operations (thin capitalisation and interest levels), on intra-group service arrangements, distribution, agency and commissionaire arrangements, intangibles attribution of income to permanent establishments, etc.

In two cases, the Tandberg case (District Court March 2009) and Dynea case (Appeal Court June 2009), Norwegian tax authorities aggressively pursued their claim that inter-company share prices were not arm's length, and in a third, the Telecomputing case (Appeal Court October 2009), they similarly challenged the calculation of loss on an inter-company receivable. Although the taxpayer prevailed in all of these cases, the fact that they were tried before the courts is a strong indication of Norwegian tax authorities' general aggressiveness on transfer pricing and their willingness to go to trial in transfer pricing cases.

Limitation of double taxation and competent authority proceedings

Generally, in order to hinder or limit double taxation, the GTA provides for a tax credit system for direct and indirect foreign taxes paid by a Norwegian taxpayer or its subsidiaries. Tax treaties signed post-1992 generally is based on the credit method. Older tax treaties typically are based on the exemption method.

Double taxation arising due to a transfer pricing issue often will have to be handled through a competent authority process. The competent authority in Norway is the Ministry of Finance. The authority for specific cases is, however, delegated to the Tax Directorate.

Advance pricing agreements (APAs)

As of yet, there are no general formal APA procedures enacted in Norwegian legislation. There is one specific exception, however: Transactions involving the sale of gas may be covered by APAs in accordance with the Petroleum Tax Act Section 6 (5).

A general system of binding advance rulings has been introduced, but issues with respect of transfer pricing will not be handled.

There is an increased focus with the tax authorities to achieve and enhanced relationship with taxpayers and requests for advance clearance in transfer pricing cases are frequently welcomed.

Documentation requirements

According to the Tax Assessment Act section 4-12, with corresponding regulations, qualifying taxpayers are obligated to file a high-level statement on the type and extent of all inter-company transactions and outstanding accounts in a standardised form. The form is to be submitted together with the tax return. Taxpayers who own or control at least 50% of another entity or are at least 50% owned or controlled by another entity are obligated to file the form unless their total inter-company transactions amount to less than NOK 10 million and the total outstanding accounts amount to less than NOK 25 million.

The tax authorities also may request the taxpayer to present transfer pricing documentation. The documentation shall provide sufficient basis for the tax authorities' assessment of whether the Norwegian taxpayer's inter-company transactions are in accordance with the arm's-length principle. The transfer pricing documentation must be presented to the tax authorities within 45 days after the request. Taxpayers subject to file the high-level statement will also be subject to the transfer pricing documentation requirements, unless on a consolidated basis they have fewer than 250 employees and either a turnover of less than NOK 400 million or a total balance of less than NOK 350 million (excluding inter-company turnover/balance items). Taxpayers subject to a special tax under the Petroleum Tax Act or that are involved in transactions with jurisdictions with which Norway does not have a double tax treaty will be subject to the documentation requirement regardless of the number of employees or the consolidated turnover or balance level.

All inter-company transactions shall be addressed in both the high-level statement and the transfer pricing documentation. It should be noted that transactions between Norwegian entities are also to be covered by the high-level statement and are subject to the documentation requirements. Ikn addition, transactions between a Norwegian PE and its foreign head office shall be covered, as shall transactions between a Norwegian head office and its PE abroad.

If the taxpayer fails to submit the high-level statement and/or the more extensive documentation in accordance with the regulations, then the tax authorities may estimate the appropriate tax. Breach of the regulations covering the high-level statements and documentation may cause the taxpayer to lose the right to appeal a decision and from presenting additional information during a subsequent court case.

Liaison with customs authorities

The tax and customs authorities cooperate with the tax authorities in transfer pricing investigations. While transfer pricing adjustments agreed for corporation tax purposes normally would not be reflected in the returns for customs duty or VAT purposes, there is a high risk that information exchanged between the different authorities might lead to further investigation and adjustments.

Norway

OECD issues

Norway is a member of the OECD and has approved the OECD Guidelines. Traditionally, Norwegian tax authorities have seemingly had a preference for the cost plus method in transfer pricing issues. It has, therefore, often proved difficult to get full acceptance for other methods such as the profit split or the transaction net margin method. However, the tax authorities currently seem to be developing a more varied approach, and lately have signaled that they may apply the profit split method.

The GTA Section 13-1 (4) makes reference to the OECD Transfer Pricing Guidelines. These shall 'shall be taken into account'. The reference is to the guidance on the arm's-length principle and the transfer pricing methods. It is also assumed that the reference includes the OECD guidance on business restructuring.

Joint investigations

Norway has in a number of cases been involved in joint transfer pricing investigations with other Nordic countries, and there is nothing to prevent Norway from undertaking joint investigations with the authorities of any other country.

Thin capitalisation

Formerly, specific legislation for companies engaged in the exploitation of petroleum resources on the Norwegian Continental Shelf provided for a debt-to-equity ratio of 4:1, based on the balance sheet in the financial statements. This legislation was repealed effective 1 January 2007.

Norway currently has no statutory rules on thin capitalisation. Thin capitalisation issues are decided based on the general arm's-length standard in the GTA Section 13-1. The equity level is subject to a specific evaluation, and the 20% equity level formerly applied to petroleum companies cannot be considered as a 'safe harbor'.

In a 2004 Court of Appeals decision the Norwegian taxpayer (Scribona) was considered thinly capitalised. When the tax authorities computed how much of the interest deduction should be denied, they based their computation on an equity ratio of 15% of the total capital in the company. In addition, the court confirmed the general view that a thin capitalisation evaluation has to be based on several elements and that the crucial question is whether an independent lender (normally a bank) would have been willing to finance the taxpayer under the current circumstances.

It should also be noted that the Norwegian Company Act has certain requirements regarding the equity level of a company, even if this has no direct relevance for tax.

The Norwegian tax authorities have challenged the capital structure in several leveraged buyout transactions performed by private equity investors in the last few years. As part of the financing of the buyouts, the investors used equity and a shareholder loan in addition to loan financing from third parties. In several tax audits the authorities have claimed that there is no remaining loan capacity beyond the loan financing from third parties. As such, the authorities have not accepted interest on shareholder loans as tax deductible. It should be noted that some of these cases have been subject to settlements with the authorities during the audit process.