ESA | EFTA Surveillance Authority

Case handler: Gaukur Jorundsson
Tel: +32 2 286 1848
e-mail: gjor@eftasurv.int

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Norwegian Ministry of Finance
Postboks 8008 Dep
N-0030 Oslo
Norway

Dear Sir/Madam,

**Subject: Request for Information concerning Norwegian exit tax rules for natural persons**

The Internal Market Affairs Directorate ("the Directorate") of the EFTA Surveillance Authority ("the Authority") is in the process of examining the Norwegian exit tax rules for natural persons[1], as set out in Section 10-70 of the Act on Taxation of Wealth and Income ("the Tax Act").[2]

In the Directorate's understanding, the exit tax went into force in 2007 and applied to total capital gains on shares[3] when those capital gains exceeded NOK 500,000. For tax purposes, the capital gains were calculated as if the shares were realised on the last day before the tax emigration.[4] Payment could be deferred until realisation, with the tax being reduced if the shares fell in value after emigration. If the shares had not been realised within five years after the time the individual was regarded as non-resident, the tax liability lapsed. This was also the case if the individual returned to Norway.

In the past few years, Norway has gradually made the rules on exit taxation regarding private individuals stricter. That the exit tax liability lapses after five-years was no longer applicable as of 29 November 2022 and at that date exit taxability was extended also to the transfer of shares to close family members living abroad.[5]

[1] The Authority has recently received several complaints and enquiries concerning the issue of exit taxation for Norway. In line with the Authority's view that in terms of prioritisation and efficiency, it is in principle better to avoid having several cases open on the same legal issue or subject matter, the Directorate intends to examine the issue in the context of this Case No 93706.
[2] Lov 26. mars 1999 nr. 14 om skatt av formue og inntekt (skatteloven). Section 10-70 of the Tax Act concerns tax liability for gains on shares and units, etc. upon relocation and upon transfer. According to its first paragraph, gains on assets as mentioned in the second paragraph, and which a personal taxpayer owns at the time when the tax liability to the kingdom ceases or when the taxpayer is to be considered resident in another state pursuant to a tax treaty, are taxable as if the asset had been realized on the last day before this time ("Exit tax").
[3] Pursuant to section 10-70, second paragraph, of the Tax Act, the Norwegian exit tax for natural persons is applied to gains on e.g. shares, shares in companies, share saving accounts, options and other financial instruments with shares and shares as the underlying object, as well as endowment insurance (collectively referred to as "shares" in this request for information).
[4] As calculated in accordance with the general rules for calculating gains or losses on shares, as set out in Section 10-70, paragraph 5, of the Tax Act. In the understanding of the Directorate, a deduction for losses applies to the same extent and on the same terms as gains is taxable when emigrating to another EEA State in accordance with Section 10-70 third paragraph of the Tax Act. However, deductions are not granted if the loss has been deducted in another state.
[5] Lov 20. desember 2022 nr. 105 om endringer i skatteloven.

On 20 December 2024, amendments to the Norwegian exit tax regime came into effect,[6] including a rise in the limit from NOK 500,000 to NOK 3,000,000,[7] a 12-year deferral option for tax payments, and a collateral requirement for relocations within the EEA if there is a risk of non-recovery. Other changes include, among other things, that a decrease in value is not considered for exit tax payments, that the tax will become payable if the taxpayer dies abroad with certain exception, and that event of distribution of dividends the right to defer payment shall lapse for an amount corresponding to the distribution multiplied by 0.7. This request for information mostly concerns the proportionality of these most recent amendments.

The Directorate notes that, as a general rule, the tax system of an EFTA State is not covered by the EEA Agreement. However, the EFTA States must nonetheless exercise their competence in the area of taxation consistently with EEA law.[8] Under existing case law, taxing residents' capital gains on a realisation basis while taxing the gains of those moving to another EEA State at the time of emigration has been considered a difference in treatment that constitutes an obstacle to free movement and freedom of establishment.[9]

Such restrictions must be justified by overriding reasons in the public interest. To establish a tax debt on capital gains generated in its territory at the time of the taxpayer's emigration has been regarded as a legitimate objective to the balanced allocation of powers to impose taxes between EEA States. However, it is further necessary, in such a case, that that restriction be appropriate to ensuring the attainment of the objective thus pursued and not go beyond what is necessary to attain it. The prerogative to tax unrealised capital gains generated in the Member State may not be used in a disproportionate manner with regard to the recovery of the tax and its modalities.[10]

In *N*, the CJEU found that the levying of an exit tax on natural persons who had a substantial shareholding in a company was disproportionate because the tax due was deferred with security being required, and later losses in value were not considered at all.[11]

It could be argued that subsequent case-law on the taxation of unrealised capital gains has become more flexible in its justifications, such as allowing limits on deferral periods, allowing for securities and different taxable events other than just realisation, and not taking

[6] Lov 20. desember 2024 nr. 86 om endringer i skatteloven ("Amendment Act").
[7] In the event of emigration of natural persons. Different thresholds apply to transfer of assets.
[8] E-11/22 RS v Steuerverwaltung des Fürstentums Liechtenstein, paragraph 27, E-15/16 Yara International ASA [2017] EFTA Ct. Rep. 434, paragraph 32, E-1/04, Fokus Bank, [2004] EFTA Ct. Rep. 11, paragraph 20.
[9] See e.g. for exit tax on natural persons judgments of the Court of Justice of the European Union ("CJEU) of 11 March 2004, *Lasteyrie du* Saillant, C-9/02, ECLI:EU:C:2004:138, paragraphs 46-48, of 7 September 2006, N, C-470/04, ECLI:EU:C:2006:525, paragraphs 35-39 and of 21 December 2016, *Commission v Portugal,* C-503/14, ECLI:EU:C:2016:979, paragraphs 37-47 and 70-73. Since the complaint mainly concerns the impact of a natural person's change of tax residence between EEA States, this case will be evaluated based on the principles of the free movement of workers and the freedom of establishment. In any event, assessment of the proportionality of the Norwegian exit taxation rules under the free movement of capital provision of the EEA Agreement is unlikely to lead to a different conclusion. See e.g. judgment of 19 December 2024 *Halmer Rechtsanwaltsgesellschaft UG*, C-295/23, ECLI:EU:C:2024:1037, paragraph 79.
[10] See e.g. cases C-470/04, *N*, referenced above, paragraphs 40-48 and C-503/14, referenced above, paragraphs 48-51.
[11] C-470/04, *N*, referenced above.

into account decreases in value of underlying assets subject to exit tax. This development has though primarily occurred in cases involving companies rather than natural persons.[12]

However, natural and legal persons are subject to fundamentally different tax regimes and are motivated by different considerations. First, in the context of emigration, when a company relocates its registered seat, it typically does so for commercial reasons, often adopting a new legal identity to pursue economic activity under the freedom of establishment. In contrast, individuals usually move their residence for private reasons, such as employment, self-employment, or family considerations, often taking on already significant personal and financial burdens and risks. As a result, unlike legal persons, individuals may rely not only on the freedom of establishment but also on other free movement provisions under the EEA Agreement.

Second, it has been supported that in corporate income tax, when a company transfers its seat to another EEA State, the host EEA State will take the value of the assets at their book value at entry as a base and then take into account for tax purposes any subsequent increase or decrease in value. Thus, when a company suffers a reduction in value between the exit and the payment of the exit tax, and as a result pays too much tax, it will be able to compensation for that loss through the reduction of value in the host EEA State. In personal income taxation, such a mechanism is absent.[13]

Consequently, exit taxation can have a notably different impact for individuals, for example a fixed tax imposed at the time of emigration may create additional problems if it is enforced before assets are realized or if asset values decline post-emigration that might not only negatively affecting their liquidity and general financial status. In turn, it might also negatively impact the ability or willingness of EEA nationals to make of use of their rights of free movement to emigrate to pursue professional activity, maintain or pursue new investments, or for other aspects like family life. In contrast, companies, protected by limited liability, generally relocate based purely on business considerations.

While the CJEU appears to have subsequently transposed some of the principles of what constitutes a proportionate measure laid down in the context of exit taxation of capital gains on companies to the taxation on capital gains of natural persons,[14] the Directorate notes that in the *Wächtler* judgment, the Court held that the option to pay the exit tax in equal instalments over five years did not alter the conclusion that the exit tax rules for natural persons were disproportionate, as they failed to eliminate the cash-flow disadvantage of taxing unrealised capital gains upon relocation. That situation was found to be more burdensome than allowing deferral until the gains are actually realised.[15] In comparison, the CJEU judgment in *DMC* found that a five-year deferral period for the recovery of exit tax from companies was proportionate.[16]

In this context, the Directorate requests that the Norwegian Government provide an overview of the Norwegian exit tax regime for natural persons, including its underlying

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[12] See e.g. judgments of the CJEU of 29 November 2011, *National Grid Indus, ECLI:EU:C:2011:785,* of 23 January 2014*, Commission v Denmark, ECLI:EU:C:2013:480,* C-261/11, of 23 January 2014, *DMC*, C-164/12, ECLI:EU:C:2014:20 and of 21 May 2015 C-657/13, *Verder LabTec,* ECLI:EU:C:2015:331.

[13] See Roels Wim in 'European Commission: Legal service, *70 years of EU law – A union for its citizens*, Publications Office of the European Union 2023', https://data.europa.eu/doi/10.2880/543607

[14] C-503/14, *Commission v Portugal,* refenced above. See also, concerning realised gains, judgments of 12 July 2012, *Commission* v *Spain*, C-269/09, EU:C:2012:439 and of 16 April 2015, *Commission* v *Germany*, C-591/13, EU:C:2015:230.

[15] Judgment of the CJEU of 26 February 2019, *Wächtler*, C-581/17, ECLI:EU:C:2019:138, paragraph 68.

[16] C-164/12, DMC, reference above, paragraph 64.

objectives. In particular, the Directorate seeks detailed information on the rationale for each of the recent 2024 amendments[17] to the exit tax rules in the context of the overall scheme. The following specific information is also requested:

1. In light of the judgments in *N* and most recently *Wächtler,*[18] does the Norwegian Government consider that exit tax measures must be adapted to the different personal, economic and legal realities of natural persons compared to companies to be considered as a proportionate restriction under EEA law? To what extent is the difference between the situation of natural and legal persons reflected in the current applicable exit tax regime as amended?

    a. Please comment on the proportionality of limiting the deferral period and not taking into account decreases in value of underlying assets subject to exit tax for natural persons, including in light of *N* and *Wächtler*.

    b. Is it possible to obtain a more flexible and individual payment plan, for example in case of established liquidity issues following realisation of the underlying shares or after deferral period expires, other than the payment plans mentioned in section 10-70, paragraph 7, of the Tax Act? On that note, does the Tax Payment Act[19] apply to exit tax liability, in particular chapter 15 of that Act? Is there any possibility for the exit taxpayer to receive an individual extension beyond 12 years due to financial or other circumstances? Is there any discretion given to the Tax Authority/the individual case handler to take into account individual circumstances/factors relevant applicable to the individual taxpayers in the collection of the exit tax, other than the ones explicitly mentioned in the Tax Act?

2. According to settled case law, exit taxation of natural persons before realisation of shares is a restriction that can be regarded as proportionate only if the taxpayer can defer the payment, with subsequent case law developing its modalities further. In the understanding of the Directorate, a deferral under the Tax Act is subject to various conditions,[20] namely it is limited to 12 years, interest must be paid on the tax debt,[21] majority of dividend payment must be used to pay the debt, the taxpayer must provide the tax authorities with all information that is of significance for rights and obligations related to the exit tax, and, if necessary for relocations to EEA States due to the existence of a real risk that the tax and possible interest claim cannot be enforced, provide security that might tie up part of the taxpayers assets.[22] Further, capital losses after emigration are no longer taken into account in the recovery of the exit tax.

    a. Has an assessment been carried out on how the cumulative conditions for deferral under the Tax Act may impact the financial position of individual taxpayers? Including whether the combined effect of these conditions might in some circumstances result in the deferral option being too costly and burdensome that it would be insufficient to address e.g. cash flow difficulties arising from levying of exit tax prior to the realisation of shares that deferral of payment is meant to avoid.

[17] Lov 20. desember 2024 nr. 86 om endringer i skatteloven.
[18] C-470/04, *N*, referenced above and C-581/17, Wächtler*, referenced above.*
[19] Lov 17. juni 2005 nr. 67 om betaling og innkreving av skatte- og avgiftskrav (skattebetalingsloven).
[20] Conditions can vary somewhat depending on choice of payment.
[21] Unless payment method in instalments is chosen.
[22] See in particular Section 10-70, paragraphs 1, 7-8 and 11, of the Tax Act.

b. How might the combination of those conditions affect the overall proportionality of the exit tax deferral scheme?

c. Has an assessment been carried out with respect to the principle of legal certainty of the security requirement in place for relocations to EEA States in circumstances where there is a real risk that the tax and possible interest claim cannot be enforced? How would the individual be able to ascertain in advance of a potential relocation, perhaps in a choice between different available EEA States, whether their particular move would entail that such a "real risk" arose and they therefore would be subject to the security requirement? How is the security calculated? Has the Ministry enacted any regulations under this provision, as it is empowered to do under Section 10-70 (7) second sub-paragraph or does it plan to?

3. The case-law concerning exit tax is developed based on a distinction between the establishment of the amount of tax and the recovery of the tax. It may be proportionate for an EEA State, for the purpose of safeguarding the exercise of its powers of taxation, to determine the tax due on the unrealised capital gains that have arisen in its territory at the time when its power of taxation seizes. However, immediate recovery of the tax at the time of emigration without the possibility to defer the payments under certain conditions appears disproportionate. For the recovery of the exit tax, chargeable taxable events other than realisation have been acknowledged by the CJEU.[23]

   Section 10-70, paragraph 8, of the Tax Act sets out that in the event of distribution of dividends, etc. on other assets to which exit tax is attached, the right to defer payment shall lapse for an amount corresponding to the distribution multiplied by 0.7.

   a. Please explain the reasoning behind the introduction of this provision.

   b. Is the Government aware of similar provisions having been assessed in available case-law or similar provisions existing in other EEA States?

   c. As a taxpayer has the right of deferral of payment of exit tax debt, how can the payment of dividends be considered a taxable event that obliges the taxpayer to use those funds to settle the deferred debt, considering that the rejection of immediate recovery of exit taxes has been motivated by cash flow disadvantages for the taxable person? Should such cash flow disadvantages be understood solely in relation to the fact that the underlying shares subject to exit taxation have not yet been realised? Or should they also take into account broader liquidity constraints, such as the need to use dividend income for other financial obligations or investments that could also impact the taxpayer's overall cash flow position?

   d. In light of the EEA law principle of equivalence, how does Norwegian practice compare when deferral of income tax debt is granted in purely domestic situations? Specifically, is it standard practice in such cases to earmark certain types of income, such as dividends, for repayment of the deferred tax debt?

[23] See e.g. C-261/11, *Commission v Denmark,* referenced above.

Attached to this request for information is also a copy of a complaint concerning the new exit tax regime in Norway. The Norwegian Government is invited to comment upon the substance of the complaint.

The Norwegian Government is invited to submit the above information, as well as any other information it deems relevant to the case concerning the Norwegian exit tax regime in relation to the EEA Agreement, so that it reaches the Authority by *1 September 2025*.

Yours faithfully,

Maria Moustakali
Deputy Director
Internal Market Affairs Directorate

*This document has been electronically authenticated by Maria Moustakali.*