

Norway's Parliamentary Finance Committee addresses uncertainty resulting from Ministry of Finance statement regarding application of GAAR

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Executive summary

In connection with the [revised national budget for 2020](#), the Norwegian Ministry of Finance, on 12 May 2020, issued an interpretation statement concerning the application of the statutory general anti-abuse rule (GAAR) on tax-exempt "de-merger sales" of shares. A de-merger sale generally implies that a single asset may be sold through a tax-free demerger and a subsequent tax-exempt sale of the share in a spun-off company. Based on its understanding of the 2014 Supreme Court ruling in *ConocoPhillips III*, the Ministry stated that such transaction sequences should be considered under the GAAR unless they involve real estate assets. This statement created uncertainty among taxpayers, as the tax authorities currently do not apply the GAAR on de-merger sales and does not differentiate between real estate and other assets.

On 15 June 2020, the Parliamentary Finance Committee, which represents the parliamentary majority, commented on the Ministry's interpretation. The Committee stated that the tax authorities should continue to not apply the GAAR on de-merger sales, regardless of what type of asset or business is involved.

The Committee's statement reduces the uncertainty caused by the Ministry's proposal, and it is expected that the tax authorities will continue to treat all de-merger sales as tax exempt.

Detailed discussion

Norway has implemented a statutory GAAR, effective 1 January 2020, which generally codifies a non-statutory GAAR developed by the Norwegian Supreme Court since the 1920s and which was effective until 2020.¹

In the landmark *ConocoPhillips III* case from 2014, under the non-statutory GAAR, the Supreme Court ruled that a transaction sequence involving the de-merger of all other assets except a real estate asset, which was carved out, followed by a tax-exempt sale of shares, was not to be taxed under the non-statutory GAAR.

As a brief summary, the Supreme Court stated that such transaction structures had been considered when developing the exemption method and were in line with the objective of the rule. Consequently, the non-statutory GAAR should not be applied.

Based on the *ConocoPhillips III* case, the tax administration has not applied the GAAR to disregard transaction structures involving the de-merger of assets for the purpose of a subsequent (tax-exempt) sale of shares. During the preparation of the statutory GAAR, the Ministry of Finance proposed that the new statutory GAAR could be applied to disregard such transaction sequences. However, the Parliamentary Finance Committee rejected this proposal in 2019. Consequently, both taxpayers and tax authorities have continued to practice the rule set out by the Supreme Court in the *ConocoPhillips III* case, including after the introduction of the statutory GAAR.

The Ministry's comments in the proposal for a Revised Fiscal Budget for 2020

In the Norwegian Government's proposal for a Revised Fiscal Budget for 2020, the Ministry of Finance issued a statement to clarify what it considers legal uncertainty regarding the applicability of the statutory GAAR.² In the Ministry's view, the precedence effect of *ConocoPhillips III* is limited to transactions involving real estate and not to other types of assets.

The Ministry referred to the following statements in support of their position:

- ▶ It is common practice for businesses to have real estate asset in single purpose entities.

- ▶ The statutory GAAR would in practice be less effective if it cannot be used to disregard similar transactions in which other assets than real estate assets are transferred.
- ▶ A wide delimitation increases the risk that businesses implement arrangements that could lead to significant tax revenue losses.
- ▶ A wide delimitation entails that taxpayers largely can decide whether the sale should be tax liable or tax exempt, implying that tax rules will influence how transactions are carried out.

Comments from the Parliamentary Finance Committee

On 15 June 2020, the Parliamentary Finance Committee issued its recommendation to the Parliament, including a response to the Ministry's comments on the statutory GAAR.

The majority of the committee believes that, unlike the proposal, the current practice of the statutory GAAR should remain firm for the time being. Furthermore, the majority believes that different types of assets should be treated as equally as possible, although the lack of a delimitation can make it difficult to monitor how the possibility is practiced. The Committee supports the Ministry's view that the development of the practice must be followed closely, and it assumes that the Government will propose specific regulations to the Parliament if the need arises.

The Ministry's proposal resulted in several responses from taxpayers and tax advisors. The Committee sent these responses to the Ministry for its review. The Ministry's response, which is cited in the Committee's comments, is that it recognizes that it can be beneficial to treat different types of assets similarly, but that the development of transaction structures should be monitored to consider measures to counteract aggressive tax planning. The Ministry states that it assumes that the current practice will continue to apply until any special rules are implemented to that effect.

Following the comments from the Finance Committee, as well as the response, it is expected that the Norwegian tax authorities will not apply the GAAR to disregard transaction structures involving demerger of assets for the purpose of a subsequent (tax-exempt) sale of shares.

Endnotes

1. See EY Global Tax Alert, [Norwegian Ministry of Finance issues bill proposal for statutory general anti-abuse rule](#), dated 12 April 2019.
2. See EY Global Tax Alert, [Norway proposes Revised Fiscal Budget 2020](#), dated 14 May 2020.

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