Norway

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In 2012, total transfer pricing adjustments in Norway amounted to NOK6.8 billion (approximately USD1 billion or EUR0.8 billion). In 2012, the adjustments totaled NOK7.2 billion (approximately USD1.2 billion or EUR0.9 billion).

Twelve agreements under the mutual agreement procedure (MAP) provided for by the tax treaties were concluded in 2013. At the close of 2013, there were four ongoing APA cases, out of which three have been concluded as of October 2014. One new APA request has been lodged.

Transfer pricing issues have been, and will continue to be a key area for Norwegian tax authorities. This applies in particular to the oil taxation authorities, as exploration and production activities on the Norwegian Continental Shelf (NCS) are subject to a 78 percent marginal tax rate, and most of the companies on the NCS are part of international groups. The oil taxation authorities have therefore been in the forefront in the transfer pricing area. Several of the larger transfer pricing court cases involve petroleum activity on the NCS. In 2013, the key focus for the Oil Taxation Office has been petroleum pricing and intragroup services.

Outside the oil tax cases, the tax authorities have stated that the assessments for 2014 will particularly be concentrated on intragroup financing and services, TNMM and database searches, business restructurings, IP and bareboat lease structures.

In line with the increased focus on transfer pricing issues, we have seen that Norwegian tax authorities have staffed up with technical and economic experts. This year, the tax authorities announced their intention to increase their manpower in the transfer pricing area by approximately 15 percent by the end of 2014.

In 2014, it was further announced that the tax authorities will assume the role of competent authority and will be responsible for all MAP and APA cases in transfer pricing matters as of 1 January 2015. This responsibility previously rested with the Ministry of Finance.

1. Statutory Rules and Administrative Regulations

1.1 Introduction

Norway has mostly followed the OECD guidelines for transfer pricing since these were first introduced in 1979. In 1981, the guidelines were codified as general reference to the arm's length principle. Further, a set of new transfer pricing regulations, which took effect in 2008, was introduced in the Tax Act Section 13-1 and in the Tax Assessment Act Section 4-12. The Tax Act now states explicitly that attention should be paid to the OECD guidelines when considering whether income has been reduced in the case of transactions between related parties when an applicable tax treaty refers to the arm's length principle. It is assumed that the reference to the OECD guidelines also pertains to the OECD guidance on business restructurings.

At the same time, completely new documentation requirements, closely linked to the OECD recommendations, were introduced in the Tax Assessment Act.

The regulations apply in cases where there is a "community of interest" between two parties. This will typically be for transactions between companies that are directly or indirectly fully owned within the same group, but also cover situations where there is less than 100 percent ownership, provided there is common control, substantial influence or other basis for a community of interest that could impact the terms for such dealings.

Section 13-1 follows a two-step approach. First, the tax office must substantiate that there is reason to assume taxable Norwegian income has been reduced. Second, the correct price must be determined. The courts can always test the first criterion for a transfer pricing adjustment, while there are certain limitations to how far a court will go in testing the price assessed by the tax office (see paragraph 5.5 below).

Where there is a community of interest between the parties to a transaction, and as a result, Norwegian taxable income has been

reduced, tax authorities may adjust the pricing for basically all types of transactions and agreements. The tax authorities carry the burden of proof to substantiate that it is more likely than not that the income has been reduced because of wrongful pricing. The tax authorities may normally not adjust terms of the dealings other than the price. However, typically in the area of thin capitalization, a reclassification may be carried out in the sense that debt might be reclassified as equity, or vice versa.

Where income has been reduced and the other party to the transaction is a resident outside the EEA,[1] the burden of proof is with the taxpayer to demonstrate that the income reduction is not due to the community of interest between the parties. However, the practical implication of this rule is somewhat unclear as the tax authorities, in any event, have to prove that the income has been reduced.

For the sale of crude oil and propane, taxable income is determined using a price list presented by the Norm Price Board every quarter. The daily price for each field/product is set based on averages of observed transactions. The Norm Price Board has representatives from the government and from oil companies. The norm price may also be set for natural gas, but has so far only been used for crude oil and propane. The norm price system for petroleum is not explained any further within the framework of this handbook.

1.2 Scope of the rules

The Norwegian transfer pricing rules apply to transactions where one of the parties is a Norwegian tax resident and the other one is not, as well as to transactions where both parties are residents in Norway. In practice, they are normally not invoked for purely domestic transactions, unless the transaction implies a value transfer that could be viewed as irregular dividend from a fully or partly owned company, or concerns transactions involving the 78 percent special tax regime on the NCS and the ordinary (27 percent) corporate tax

[1] EU plus Norway, Iceland and Liechtenstein.

regime. An example of the latter is the ExxonMobil case from 2010 (appeal court). In that case, the group established a new subsidiary to charter and to operate a vessel for the parent company's crude production. The subsidiary was funded with equity, and this equity was used to fund a loan to the ship owner. As a result, interest costs were deducted in the 78 percent special tax regime, and interest income was taxed at the level of the subsidiary in the ordinary corporate tax regime. Using the substance-over-form principle, the court, however, concluded that the transaction could not be accepted for tax purposes, and the interest income was taxed at the hands of the parent company (78 percent).

Dealings with companies that reside in a tax haven are normally dealt with under the same principles as dealings with companies in other countries. However, the OECD guidelines are not directly applicable. Hence, where the Norwegian tax base has been eroded due to wrongful pricing, it might be more difficult in such cases to challenge the concrete pricing as assessed by the tax office.

The allocation of profits to a permanent establishment follows the same principles as laid down in the OECD guidelines and is therefore heavily influenced by the same arm's length standard as applied under the transfer pricing rules. This entails that the profit of the permanent establishment shall be allocated between the head office and the permanent establishment as if the latter had been a separate legal entity dealing with both the head office and related companies on terms consistent with the transfer pricing guidelines.

1.3 Form and depth of documentation

There are detailed regulations outlining the content requirements for transfer pricing documentation. These adhere very closely to the OECD guidelines on documentation. Among the requirements that may be mentioned is a description of the business environment in which the company operates, the legal structure, business areas and business units, important competition factors, financial relations, types and size of internal transactions, functional analysis, centralized

service performance, intellectual property, choice of pricing methods, comparable prices, and the internal agreements.

The regulations explicitly state that documentation based on the EU Code of Conduct on transfer pricing documentation between associated enterprises is accepted.

The documentation must be presented in Norwegian, English, Swedish or Danish.

1.4 Advance pricing agreement (APA)

Norwegian tax authorities do not issue APAs. On a case-by-case basis, it is possible to discuss the transfer pricing principles with the tax office, but they will not issue a formally binding pricing acceptance, either in the form of an agreement or a ruling. In practice, where the principles are disclosed and discussed prior to implementation, unless the tax office has indicated that other methods might be superior, the tax office will normally respect the applied principles. The Ministry of Finance has announced that they are considering introducing APA regulations.

In the case of sales of gas between related parties, a special APA procedure exists within the oil tax authorities (so far, this has not been used much in practice).

Recently, Norway has opened itself up for mutual APA negotiations with other countries. Only a handful of pilot cases have so far been dealt with under such MAP/APA approach.

1.5 Interest limitation rule

With effect from 1 January 2014, new rules have been introduced, limiting tax deductions in the corporate tax base for interest expenses to related parties. Under the new rules, deductions for intragroup interest expenses are disallowed if total net interest expenses exceed 30 percent of an adjusted taxable income. The adjusted taxable income is taxable income increased by net interest costs and tax

depreciations, similar to earnings before interest, taxes, depreciation and amortization (EBITDA). The taxpayer cannot carry forward loss against the income caused by the disallowed interest expense, but disallowed interest expense may be carried forward for up to 10 years.

The interest deduction cap applies to domestic as well as cross-border loans. Income accrued from interest payments is taxable income for the lender, regardless of the cap on deduction for the borrower. The debt/equity ratio is irrelevant, as is the aggregate interest expense or equity ratio on the group level.

Only net intragroup interest expenses are disallowed. However, interests paid to unrelated lenders are included when calculating the interest deduction limit. The cap does not apply to external bank financing, although a few exemptions are made to prevent “back-to-back” loans through external banks.

The limitation rule does not apply if the net interest expenses do not exceed NOK5 million.

For the purpose of the interest limitation rules, a related company is defined as a lender directly or indirectly controlling 50 percent or more of a borrower, or a borrower directly or indirectly controlling 50 percent or more of a lender.

The interest limitation rule applies to both limited and unlimited companies, controlled foreign corporations (CFC), and foreign entities with limited tax liability to Norway. Financial institutions are, however, exempt and taxpayers subject to special tax for exploration and production activities on the NCS are also currently exempt from the interest limitation rule.

2. Transfer Pricing Methods

2.1 OECD guidance

Norwegian tax authorities have traditionally normally used the cost plus method as well as other traditional methods, but have, over the

years, developed a more varied approach based on the characteristics of the concrete transaction.

The OECD Guidelines (published in July 2010) provide that the transfer pricing method selected should be the most appropriate method in the circumstances of the case. However, where a transaction-based method (comparable uncontrolled price [CUP], resale price or cost plus) and a profit method (profit split or transactional net margin method [TNMM]) are both equally valid in the circumstances, the transaction-based method is preferable. Where a CUP method and another transaction-based method are both equally reliable, the CUP method should be used. Consideration of which method to apply from a Norwegian perspective should therefore always begin with a consideration of whether any comparable uncontrolled price is available. Cost plus is often used for services where no comparable uncontrolled price is available. Indirect cost allocation methods for overhead costs are accepted.

The comparable uncontrolled price should not only be for comparable goods and/or services, but should also be from the relevant period of time. This is particularly important for assets that typically have a fluctuating market value.

TNMM has been accepted, for example, when determining the profit level of a distributor/sales company buying and reselling goods from an affiliated wholesale producer (refer to the *VingCard Elsafe* case).

Residual profit split methods are frequently used to determine charter payments for oil rigs and offshore vessels.

For certain financing arrangements such as, *inter alia*, cash pooling arrangements and intragroup loans and guarantees, the tax authorities have also applied the “modified” profit split method (“yield approach” or “expected benefit approach”), where the point of departure is to allocate the profit obtained by the group as a whole between the parties (see below regarding the *ConocoPhillips* case).

2.2 Pricing adjustment

Year-end and retrospective pricing adjustments may be acceptable, for example, to take into account actual circumstances that have occurred, where only budgeted indicators were initially used to set transfer pricing policies. Other factors (for which adjustments need to be made) may also be relevant, such as indirect taxes.

2.3 Working capital/inventory

Norway does not generally require calculation of comparability adjustments to ascertain levels of working capital/inventory when comparing equivalent business activities. Adjustments may be required if, for example, distributor companies are being used in benchmarking returns as a proxy for commission-based sales functions.

2.4 Business restructurings

The OECD guidelines for business restructurings are critical in determining the Norwegian transfer pricing approach and the impact of changes on functions, risks and assets of taxpayers. It should be expected that Norwegian tax authorities and courts will follow these guidelines in their analyses of business restructuring impact, and as mentioned above, it is assumed that the reference to the OECD guidelines in Tax Act Section 13-1 also includes the OECD guidance on business restructurings.

2.5 Safe harbors

There are no safe harbor rules. Previously, there was an explicit rule for oil companies disallowing financial costs such as interest if the equity was less than 20 percent of the total balance. This was abolished with effect from 2007. An article published by tax administration employees indicates that for practical terms, it might be reasonably safe to rely on a level of debt financing at a subsidiary level that is within the overall debt-equity ratio at group level. Based on the *Scribona* case (see paragraph 5 below), the starting point is whether or not the company in question could have obtained such a

loan from an independent bank (without a parent company guarantee). The approach in a different court case was to consider the normal debt ratio based on public data available for listed companies, although this was only one of several relevant factors.

3. Transfer Pricing Documentation and Filing Requirements

3.1 Recordkeeping

A special form has to be filed with the annual tax return listing all intragroup transactions by type and size (RF-1123). This form is a relatively simple, three-page listing of the various types of possible intragroup transactions, where the taxpayer indicates by ticking boxes whether or not the company has undertaken any such transactions.

This form provides a starting point for the tax office to consider whether or not to look into transfer pricing matters for the company in question.

Upon request from the tax office, the company must submit complete written documentation in a transfer pricing report. This must be filed within 45 days after such request has been made. Companies with fewer than 250 employees, and a turnover of less than NOK400 million or a total balance sheet value of less than NOK350 million, are exempted from the full documentation requirement. This exemption does not, however, apply in relation to dealings with companies located in countries without a tax treaty with Norway, and it does not apply to taxpayers that are subject to special tax under the Petroleum Tax Act.

The documentation requirement applies where one company owns or controls at least 50 percent of the other party, and between companies with at least 50 percent direct or indirect common ownership or control.

It should be noted that a breach of the regulations concerning transfer pricing documentation may result in penalty tax (ref. item 6.2 below).

3.2 Timing of evidence and analysis

The statutory filing date for corporation tax returns is 31 May in the year following the income year. The company should have sufficient evidence and analysis at that date to confirm that its transactions with related parties are at arm's length.

3.3 Statute of limitation

The tax authorities may not adjust the prices when this leads to an increased tax burden for the taxpayer if such adjustments are made more than two years after the lapse of the income year to which the adjustment relates. However, this is dependent upon the taxpayer having provided complete and correct information when filing the tax return. If this is not the case, the time limit for the tax authorities to raise transfer pricing adjustments is 10 years after the income year. It has been shown in practice that the tax authorities have often found that insufficient information had been given in cases of transfer pricing adjustment, but this might change as taxpayers provide the new and more detailed reporting requirements related to transfer pricing.

Errors in applying the transfer pricing principles that result in significant underreporting of income may, in itself, be treated as filing of wrong or incomplete information (refer to the maximum 40 percent deviation rule in the 2012 *Statoil* case under paragraph 5.5 below).

3.4 Duration of recordkeeping

Records must be preserved for 10 years.

3.5 Reviewing and updating documentation

Documentation should be reviewed on an annual basis to determine if historical, functional and economic analyses are still relevant. The documentation must be "prepared" for each income year (upon request), but in practice, there will often be time to do an update of the previous year's report within the 45-day time limit if no major changes have taken place.

4. Tax Audit Procedures

4.1 Tax office questions

Based on the information provided in the mentioned form RF-1123, the tax office will determine whether or not to raise questions related to transfer pricing.

Large cross-border transaction amounts and/or transactions with affiliated companies in low-tax jurisdictions are more likely to attract follow-up questions. The tax authorities may choose to focus on specific industries in a given year. If the tax office knows that a company has implemented transfer pricing documentation, either from having seen a previous year's report or from other sources, it is less likely that a full report will be requested.

The largest tax offices and in particular, the Oil Tax Office and Central Tax Office for large enterprises, have dedicated personnel who specialize in transfer pricing. Similarly, the five regional tax offices and the tax directorate have dedicated groups of personnel dealing with transfer pricing.

No guidelines have been published for the tax authorities' focus or work in relation to transfer pricing matters.

As an alternative to written questions, the tax office may initiate an audit of selected themes. The taxpayer will be notified of such an audit. When an audit has been performed, the tax office will issue an audit report summarizing its findings and conclusions. This will be sent to the taxpayer for comments before the tax office decides on issues raised in the report.

4.2 Information powers

The tax office may generally ask the taxpayer to provide any documentation that may be relevant for the purpose of verifying a taxpayer's tax position. This includes information about companies that are not liable to tax in Norway to the extent that they are included

in dealings with Norwegian taxable companies. In more extreme cases where serious tax fraud is suspected, "dawn raids" have been arranged with computers and files sealed off for further investigation, but this would not happen as part of a more regular transfer pricing enquiry.

Taxpayers subject to tax under the Petroleum Tax Act have extensive reporting obligations toward the oil taxation authorities. Thus, since 2012, such taxpayers shall report all key conditions in the gas sales agreements (internal and external) to the oil taxation authorities on a quarterly basis. Through these reporting obligations, the oil taxation authorities will build up a large database for gas sales, and major concerns have been made with respect to the oil taxation authorities' use of this, that is, to compare internal gas sales with external gas sales without the taxpayer being able to access the same information (secret comparables). In the *Total* case from 2012 concerning internal gas sales (lower court), the oil taxation authorities had compared the pricing applied in the internal arrangements with information on external sales that was not available for the taxpayer. The taxpayer claimed that this use of secret comparables implied a procedural error for the tax authorities' decision (breach of the adversarial principle). However, the court held that if the taxpayer was given access to the information used as comparables by the tax authorities, this would imply a breach of the tax authorities' professional secrecy. Thus, according to the court, lack of access to the comparables did not constitute a procedural error. The case has been admitted to the Supreme Court, which will rule on this issue in 2015.

4.3 Transfer pricing information

The type of information available to the tax authorities includes the company's transfer pricing documentation, everything that the company has prepared for its corporate tax return for transfer pricing purposes, any further evidence of arm's length pricing, the company's transfer pricing manual, and budgets for each function and management accounts, among others. In assessing the company's position, the tax office may also include in their business case

sensitive information or confidential information that the company itself has not provided.

5. Dispute Resolution

5.1 Appeal

Provided the tax office concludes, after examination of documentation submitted and arguments put forward, that there is reason to believe that the income of a company has been reduced due to dealings with related parties, it will issue a reassessment for the relevant income year(s). Within three weeks, the taxpayer may appeal this decision to the same tax office, and subsequently, to the Appeal Board. A taxpayer who disagrees with the Appeal Board's decision may, within six months, bring the case before the courts (three instances).

5.2 Settlement strategy

In practice, many potential transfer pricing disputes can be resolved in discussions with the tax office, provided this takes place at an early stage and with full disclosure of all relevant facts. Once a reassessment has been issued, this may be more complicated and the tax authorities have no particular strategy for settling such cases.

5.3 Mutual agreement procedure (MAP)

Norway has concluded a significant number of double tax treaties that contain a MAP article. The extent to which the MAP is available is largely a discretionary assessment by the competent authority. The tax directorate will often be authorized as the competent authority by delegation from the Ministry of Finance. The treaty will generally require the competent authorities endeavoring to apply a MAP in such a way that double taxation is eliminated. Only a few cases have so far been dealt with on a MAP basis and there is no obligation for the parties to such proceedings to reach a result that prevents double taxation. The taxpayer must initiate a MAP within the time limit mentioned in the tax treaty clauses for such procedures.

Where another state has adjusted prices resulting in double taxation, a Norwegian taxpayer may alternatively use this as an argument to re-open the Norwegian assessment and ask for a corresponding adjustment by an appeal. A corresponding adjustment will normally be accepted if the adjustment made in the other state is found to be in accordance with the OECD principles for transfer pricing as practiced in Norway.

5.4 The European Arbitration Convention

Norway has not signed the European Arbitration Convention. The Ministry of Finance has indicated that they will consider introducing arbitration provisions in new tax treaties. So far, this has been done in the tax treaties with the UK and the Netherlands.

5.5 Transfer pricing litigation

There are Norwegian court cases dealing with different aspects of transfer pricing. Tax litigation regarding transfer pricing would, in earlier years, typically relate to adjustments of insurance premiums paid by oil companies to their captive insurance companies offshore. Examples here are the *Schlumberger* case in 1995 (Supreme Court), the *Agip* case in 2001 (Supreme Court) and the *Amoco* case in 2002 (Supreme Court). In the Agip case, the Supreme Court accepted that the tax authorities had determined the arm's length premium rate using a combination of pricing methods, as well as its own discretionary judgment.

Other cases dealt with adjustments/apportionment of salary versus dividend from personally owned companies, due to tax rate differences between the two types of income.

In a case in 1999, the Supreme Court found that *Baker Hughes* had paid too much for the leasing of equipment from a related company. From 2000 onward, there have been court cases dealing with the level of license fees and royalties paid by Norwegian companies to their foreign affiliates. In a case regarding *Intrum Justitia* in 2008, the deductible license fee was reduced as the court found that the taxpayer

paid more than an independent company would have been willing to pay. A case regarding 3M in 2002 had an opposite outcome, as the court found that an independent party would probably have been willing to pay a license fee of a size comparable to what 3M paid to the parent company. Moreover, a 2004 case dealt with Mercuri International Norge AS, which was found to have paid royalties in excess of the value of the services received.

Another notable case of charges for intragroup services is that of *Enterprise Oil Norge AS* from 2010 (in the appeal court). In this case, the appeal court rejected Enterprise Oil Norge AS's claim for deductions related to charges for services provided by the parent company, *inter alia*, because the taxpayer had not, in a sufficient manner, documented the services that had been performed and thus was not able to document the benefits obtained related to the services. Margins on charges for intragroup services is a focus area in particular for the oil taxation authorities, and a key issue here is whether the applied margin reflects the level of risk undertaken by the (foreign) service provider.

Meanwhile, in the 2007 *Cytec* case, the court ruled on tax questions related to cross-border restructuring. A Norwegian business was changed from being a producer for its own risk and account to a contract producer, receiving cost plus 8 percent. Based on the facts and circumstances, the majority of the court found that the technology and know-how that Cytec had previously acquired, in effect, had been transferred out of Norway. The court concluded that in reality, what took place was a transfer of business from the Norwegian party to the affiliated party abroad. Only the assets needed to be a contract producer were left in Norway, with the affiliated party taking over the income potential previously belonging to the Norwegian business. No consideration was paid and an adjustment was made, resulting in a substantial increase in taxable income.

In 2004, the courts ruled in the *Scribona* case that interest deductions could be reduced, as the Norwegian subsidiary was found to be thinly capitalized because it was probable that an independent bank would

not have granted such a loan. The tax office had, in that case, based the assessment on a deemed equity ratio of 15 percent, which was found acceptable by the court. Other notable cases on the financing of subsidiaries are *Telecomputing* (Supreme Court 2010) and *Bayerngas Norge AS* (lower court 2012). Further to the *Telecomputing* case, lack of borrowing capacity for the borrower will not in itself imply that provided funds shall be characterized as equity; the question is whether the funds predominately have the characteristics of a loan arrangement or an equity arrangement. The *Bayerngas Norge AS* case concerned the interest margin on loans from a foreign group company to a Norwegian subsidiary. In determining the arm's length margin, the court's point of departure was the standalone credit rating of the Norwegian subsidiary, notched up for group affiliation (implicit support).

A third case concerning group financing arrangements is the *ConocoPhillips* cash pool case from 2010 (appeal court). In this case, two Norwegian ConocoPhillips companies ("COP") were parties to a cash pool arrangement. COP had several accounts in different currencies, and the sum of these accounts constituted COP's net position in the cash pool. The sum of all net positions of all companies participating in the cash pool constitutes a so-called top-account, which was placed in the Bank of America. COP was constantly in a net deposit position. Even if COP was able to demonstrate that in case of an alternative standalone relationship with a third-party bank COP would have received a lower interest income on its deposits than actually achieved in the cash pool scheme, the appeal court ruled that in an arm's length setup, an independent party in COP's position would have received a larger part of the overall benefit of the cash pool arrangement, and, thus, a higher interest rate was applied and taxable income for COP increased correspondingly. The appeal court's decision has been criticized, especially because COP unsuccessfully argued that cash pool arrangements are never entered into by independent parties. In addition the company could demonstrate that in case of an alternative standalone relationship with a third-party bank, COP would actually have received a lower interest income on its deposits than it achieved in the cash pool scheme.

However, the theoretically expected benefit approach has also been advocated by the tax authorities in other cases (in particular by the oil taxation authorities) and the case has not been admitted to the Supreme Court.

Another cash pool arrangement was the subject of a 2014 district court case (Exxonmobil). The taxpayer was member of a cash pool arrangement headed by a Dutch group company. The Norwegian entity had, for the tax years in question, a consistent net deposit. The interest rate was based on an "overnight rate." The tax authorities argued that a six-month deposit rate was more appropriate and the court accepted this argument.

Both in the *Scientific Drilling* case in 2010 and the *3M* case in 2002, the court found that indirect cost allocation methods are acceptable. The 2010 case was related to a Norwegian permanent establishment. The tax authorities argued that the taxpayer had not documented that the overhead administration and engineering costs were relevant for the Norwegian permanent establishment. The taxpayer had described this in more general terms, without presenting accurate calculations for administrative services and costs that were allocated to the permanent establishment. The court concluded in favor of the taxpayer, referring to the OECD guidelines that accept allocations based on turnover when a more precise allocation method would be unreasonably burdensome, considering the nature of the services rendered. It should be noted, however, that in a district court decision from 2014 (Total), the court, rather than reviewing the allocation key for indirect charges, analyzed each item of the services that formed part of the indirect allocation scheme and assessed whether or not the taxpayer had sufficiently documented actual use and benefit of the service in question.

In 2012, there were two notable Supreme Court cases on transfer pricing. In the *Norland* case, the court concluded that it may only overturn the price as assessed by the tax office if it finds that the tax administration based its decision on incorrect facts or valuation principles, or the result is manifestly unreasonable. As the court was

convinced that the income was underreported, the actual price setting by the tax office could, hence, not be tested in this case. Even though the case concerned a purely domestic transaction (a taxpayer sold shares to his or her wholly owned domestic company), it is also relevant for cross-border transactions. However, in those transactions, the OECD transfer pricing guidelines apply, and the court should test whether the tax authorities have correctly applied the guidelines. The practical impact of the decision is therefore uncertain.

Acknowledging that transfer pricing is not an exact science, the Supreme Court held in the *Statoil* case (with reference to previous case law) that price adjustments constituting less than a 40 percent deviation from the price as applied by the company could not, in itself, imply that the company had filed wrong or incomplete information. Hence, in cases where the correctly adjusted income is less than 40 percent higher than the declared income, and the taxpayer otherwise has filed correct and complete information, there is a two-year time bar within which the tax office must raise their case, and no penalty tax is applicable.

6. Interest and Penalties

6.1 Interest

Where additional corporation tax becomes due following a transfer pricing adjustment, any corporation tax paid late will carry interest.

6.2 Penalties

Penalties may be applied where the taxpayer has presented wrong or incomplete facts to the tax office. The basic rate of penalty is 30 percent. In cases of transfer pricing adjustment, it has quite often been the case that the tax office finds that wrong or incomplete information was filed with the tax return. Penalties will then often be applied, at least where the adjustment made is substantial compared to the income declared in the tax return. In cases of willful misconduct or gross negligence, the penalty rate can be increased to 45 percent or a maximum of 60 percent. The burden of proof of negligence is with the

tax office. The penalty is based on the potential lost tax revenue. However, where the taxpayer is in a tax loss position after adjustment, losses from other sources are disregarded when calculating the amount of penalty. Where only a timing benefit is achieved, the penalty is based on the net present value of the deferral.