National report Norway – Taxation of intangibles
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1. Taxation of the development of intangibles[2]

1.1 Deduction of costs incurred for the development of intangibles

1.1.1 General overview

In computing net taxable income, the general principle under the Norwegian Tax Act (hereinafter NTA) is that all ordinary expenses incurred in acquiring, securing and maintaining taxable income are deductible. Costs incurred for the development of intangibles, both operating costs and costs of development, are for tax purposes treated as ordinary expenses incurred to acquire, secure and maintain taxable income and are thus deductible for computing net taxable income. The legal authority for deduction of the costs is the general rule for deduction of costs in NTA § 6-1. However, to the extent that it is likely that there will be developed an intangible, the costs must be capitalised on the asset, cf. NTA § 6-25. The capitalised cost may only be deducted at a later stage under a depreciation of the developed asset (if the asset may be depreciated, cf. NTA § 6-10(3) (see section 1.3 below)) or when the asset is realised; typically sold or scrapped.

This general principle applies irrespective of the type/categories of intangibles, and also irrespective of whether the costs are incurred by a resident company or a Norwegian permanent establishment of a non-resident entity. However, an important assumption for the deductibility is that the costs are based on an arm's length principle.

1.1.2 In-house or outsourcing of intangible development

The deductibility of costs incurred to develop intangibles, both operating costs and costs of development, applies irrespective of whether the development and/or financing is performed in-house or outsourced to related parties or third parties.

1.1.3 Donations

Donations will from a Norwegian tax point of view be considered as gifts and gifts are not deductible for tax purposes. The argument is that the gift (i.e. the cost) does not have sufficient connection to taxpayer's taxable income. However, there is a specific provision regarding deduction for donations to scientific work in NTA § 6-42. For the provision to apply for donation to scientific work it is a requirement that the institute which performs the scientific work has cooperation with the Norwegian state. In a letter from the Ministry of Finance from 1987[3] it is stated that the requirement of cooperation with the Norwegian state is fulfilled if one or more of the board members at the institute which receives the donation are appointed by the government or the parliament. At the webpage to the Norwegian tax administration there is also included a list of institutions which the tax authorities consider to fulfil the requirement.

There is no limitation for the donation. However, if the donation exceeds NOK 10,000, the donation is only deductible for tax purposes provided that the donation does not exceed 10% of the taxpayer's net income (calculated before the donation).

Furthermore, although it is normally not relevant in relation to development of intangibles, there is also a specific provision under the NTA § 6-50 where donations up to NOK 12,000 (per year) to charitable organisations are deductible. To qualify as a charitable organisation under the NTA § 6-50, the organisation must fulfil one of the predetermined aims such as working for children, elderly people, ill persons or people with any kind of disability.

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[2] Please note that the definition of "intangible assets" is not subject to discussion in this report. The purpose of the report is to discuss the tax treatment of intangibles, and thus the classification of the asset is not further discussed.

[3] Utv. 1988 page 273

1.1.4 Tax losses
Operating losses incurred in business, including losses incurred due to development of intangibles, are deductible from other income in the year in which they occur. Surplus losses may be carried forward indefinitely[4] and set off against future profits.[5] There is no optional carry-back of losses. However, when a company is closing down, losses may be carried back and set off against profits in the preceding two years.[6]

In the case of change of ownership or merger or de-merger of a company, there is no general provision for denying carry-forward of losses. Thus, the new shareholders may benefit fully from all the losses that are carried forward. However, there is a specific anti-avoidance rule, which is applicable and will deny the carry-forward of losses if the losses are the main object of the transaction, see section 3.5 below.

The carry-forward of loss provision applies to both resident taxpayers and non-resident taxpayers which operate through a permanent establishment in Norway. Furthermore, it could be mentioned that taxation of resident entities (and individuals) is based on worldwide taxation, and thus losses incurred by a resident entity thorough its foreign permanent establishment may be offset against income from Norway. With regard to the development of intangibles, this means that a resident entity which has a permanent establishment in a foreign jurisdiction performing development of intangibles, may offset the costs related to the development against domestic income from Norway and if the costs related to the development activity exceeds the domestic income, the "foreign" losses may be carried forward in Norway under the ordinary rules for carry-forward of losses.

To the extent that the foreign losses exceed domestic income, the losses may be carried forward indefinitely (i.e. in the same way as losses incurred by the activity in Norway). Please note that this applies on the condition that any potential tax treaty between Norway and the PE jurisdiction applies the credit method for elimination of double taxation (and not the exemption method) or that there is no tax treaty in force (since Norway unilaterally applies a credit method), cf. NTA § 6-3 (5). See section 2.2.1 below for more about foreign tax credit.

Utilisation of losses through group contribution
Under domestic tax legislation there is no group consolidation. However, income may be transferred with taxable effect between affiliated companies through group contributions. Group contributions (both paid and accrued) are deductible for the paying company and taxable income for the receiving company. Group contributions may be used by the recipient company to offset tax losses which are otherwise available for carry-forward.[7]

The group contribution rules only apply if the following requirements are met:

- The payer company and the recipient company must be Norwegian entities or be Norwegian branches of EEA resident companies;
- The parent company must own more than 90% of the shares of the affiliated companies and a corresponding number of votes in the general meeting (this condition must be fulfilled at the end of the calendar year);
- The payer and the recipient must report the contribution openly during the same year and classify it as a year-end adjustment; and

[4] Before 2006, a 10-year limit applied.
[5] For the sake of completeness it could be mentioned that under the Petroleum Tax Act, there are specific rules regarding carry forward of losses originating from exploration activity, including the possibility to have the cost disbursed.
[6] However, under a temporary rule under FY 2008 and 2009, losses could be carried back to the preceding two years. Thus, losses incurred in 2008 could be carried back and set off against the income of tax years of 2006 and 2007; losses incurred in 2009, against the income of tax years 2007 and 2008. The carry-back of losses was limited to NOK 20 million for each year losses were incurred.
[7] The group contribution rules apply generally and are not specifically for the development and exploitation of intangibles.

- Income from oil or gas production activities, which is taxed under the Petroleum Tax Act, may not be reduced by a group contribution.

Group contributions between two resident subsidiaries are deductible even though the parent company is a non-resident and/or if there are a number of intermediate holding companies between the subsidiaries and the ultimate parent company.

It has normally been accepted by the tax authorities that also a permanent establishment in Norway of a non-EEA resident entity due to the non-discrimination article in the tax treaties may grant group contribution to a resident entity and/or to a permanent establishment of an EEA-resident entity. However, the permanent establishment of the non-EEA resident entity may not receive group contribution since this according to the Ministry of Finance is not a violation of the non-discrimination article under the applicable tax treaty. Similarly, such a permanent establishment may not grant group contribution to another permanent establishment of a non-EEA resident entity. This interpretation of the non-discrimination article was stated by the Ministry of Finance in 1994 (Utv. 1995 page 107) and repeated by the Ministry of Finance in 2005 (Ot.prp. nr. 1 (2005-2006) section 16.1.). The viewpoint of the Ministry of Finance has been followed by the tax authorities and is also included in the annual publication from the tax authorities (latest in Lignings-ABC 2009/2010 page 66).

However, it is interesting to note that in the new commentary (added in 2008) to the OECD MC Art. 24(3) it is clearly stated that the non-discrimination article only

> "applies to the taxation of the permanent establishment's own activities. That principle, therefore, is restricted to a comparison between the rules governing the taxation of the permanent establishment's own activities and those applicable to similar business activities carried on by an independent resident enterprise. It does not extend to rules that take account of the relationship between an enterprise and other enterprises (e.g. rules that allow consolidation, transfer of losses or tax-free transfers of property between companies under common ownership) since the latter rules do not focus on the taxation of an enterprise's own business activities similar to those of the permanent establishment but, instead, on the taxation of a resident enterprise as part of a group of associated enterprises."[8]

Thus, the Commentaries clearly state that a permanent establishment may not, with reference to the non-discrimination article in the tax treaty, have a right to be able to utilise a loss within the group by use of group contribution.

To the author's knowledge, neither the Ministry of Finance nor the tax authorities have followed up on the amendment in the Commentaries, and thus it is uncertain whether a tax group in Norway may still refer to the non-discrimination article in the tax treaty and grant a group contribution from the permanent establishment. Due to the fact that the annual publication from the tax authorities (the electronic version of the Lignings-ABC which is up-to-date 25 June 2010) states that the taxpayer may rely on the non-discrimination article in this situation, this may indicate that the Ministry of Finance and the tax authorities do not agree with the 2008 amendment to the Commentaries, however this interpretation is uncertain since neither the Ministry of Finance nor the tax authorities have explicitly commented on the changes in the OECD Commentaries to Art. 24(3).[9] [10]

Finally, it could be mentioned that cross-border group contribution may not be accepted. This follows directly from the above mentioned requirement that both the granter and the recipient must be taxable to Norway. However, due to the Oy AA (the ESAB case)[11], which in some situations seems to force the member states to accept cross-border group contribution, there has been a discussion among scholars whether also the Norwegian group contribution rules in some situations must accept cross-

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[8] OECD Comm. Art. 24 para. 41.

[9] Due to the limited scope of this report it is not possible to discuss this issue in detail. However, it could be pointed out that it might be argued that the changes in the Commentaries regarding Art. 23(4) are material changes of the commentary and thus that only treaties entered into after 2008 may be interpreted in accordance with the changes. If this is the correct approach, it may be questioned why the statement in the Lignings-ABC does not reflect this. The statement in the Lignings-ABC is general and does not reflect this way of arguing.

[10] Although it is obviously, it could be mentioned that the Norwegian group contribution rules may have a wider scope than what the OECD MC Art. 24(3) require.

[11] C-231/05 *Oy AA*

border group contribution although the recipient of the group contribution is not taxable to Norway and thus that the granted group contribution is not taxable to Norway. To the author's knowledge there is no administrative practice nor court cases where a cross border group contribution has been accepted.

1.1.5 The intangible

In relation to deduction of costs incurred to develop intangibles, there are no differences due to different categories of intangibles. All intangibles are treated in the same way – all costs are deductible provided that the income from the intangible which will be developed is taxable.

Although there are no differences in the treatment of different types of intangibles in relation to the question of deductibility of development costs including the various stages of the development, it is important to bear in mind that there is an important difference in the timing as to when the costs are deductible.

As mentioned under section 1.1.1 above, costs related to the first stage of the development of the intangible may be deducted immediately. Contrary, costs incurred at a later stage of the development, when it is likely that an intangible will be developed, must be capitalised on the asset, cf. NTA § 6-25. Capitalised costs may only be deducted if the intangible is subject to depreciation (see section 1.3 below)) or when the asset is realised.

The dividing line between costs related to the first part of the development, which may be deducted immediately, and the second phase of the development which must be capitalised, is in fact very difficult to draw. And thus, there is often a discussion between the taxpayer and the tax authorities whether the development has come to the stage when the cost must be capitalised. The distinction between the first and second part of the development was established by the Supreme Court in 1993 in a case where the question was whether costs incurred in relation to design and development of a ship must be capitalised on the vessel or could be deducted immediately.[12] Unfortunately, the grounds of the judgment are very brief, and consequently there is unfortunately not much general guidance in later cases on how to distinguish between the first and second phase, including whether the costs must be capitalised or may be deducted immediately.

The Ministry of Finance issued a letter to the tax authorities in 2005 regarding capitalisation and immediate deduction of research and development costs.[13] The Ministry of Finance follows up the Supreme Court decision from 1993 and repeats that costs must be capitalised to the extent that the costs are incurred to develop a specific asset and it is likely that the asset will indeed be developed.[14] It is furthermore expressed by the Ministry of Finance that if the developed intangible asset has a shorter economic lifetime than three years, the costs may however be deducted immediately.[15]

Both the Supreme Court decision from 1993 and the statement from the Ministry of Finance from 2005 are important sources of law for the interpretation of the NTA § 6-25.

1.1.6 The industry

In general, there is no difference in the tax treatment between development of intangibles in various industries. However, although this should not be the situation, it might be the case that in some industries the tax authorities are more likely to require that the development costs be capitalised than in other industries. This may depend on the tax authorities' knowledge/lack of knowledge about specific industries.

[12] Rt. 1993 p. 1012 Forlanddommen (Utv. 1993 p. 1351)

[13] Utv. 2005 page 833.

[14] According to the Ministry of Finance the obligation to capitalise the costs will only occur if the taxpayer has sufficient technical, commercial and economic qualification to finish the project. In other words the obligation will occur if it is likely that the taxpayer will be able to develop an asset.

[15] The three year lifetime requirement is in accordance with the requirement for tangible assets.

The author's experience is that as regards the IT industry, especially the development of software, the tax authorities have applied a very strict interpretation, which means that a great part of the development costs must be capitalised, and furthermore, that the developed assets are not subject to a decrease in value and thus may not be depreciated.[16]

1.1.7 The location of the development activity

In general, it makes no difference whether the intangible is developed domestically or abroad. In both situations the same rules apply, both in relation to the question of deductibility and the question of timing of the deduction. However, if the development activity takes place in a permanent establishment located in a jurisdiction where there is a tax treaty in place and the tax treaty eliminates any potential double taxation by use of the exemption method, there is a limitation of the deductibility of the entity's interest expenses, cf. NTA § 6-3(5). In this situation, the interest deduction for the Norwegian resident entity is limited to the part of the entity's interest expenses which equals the ratio of the gross value of the assets located in the permanent establishment and the gross value of the assets in the entity, cf. NTA § 6-91.

1.1.8 The taxpayer

The tax treatment of costs related to development of intangible assets, both the deductibility and the timing does not differentiate between small and medium-sized enterprises and larger companies.

1.1.9 The owner of the taxpayer

The nationality and/or the legal status of the shareholder of the Norwegian taxpayer does not influence on the deductibility of development costs incurred by a resident subsidiary. However, to the extent that the development costs are incurred by an intra-group transaction (e.g. development of the intangible is performed by a group company), it is important that the remuneration is based on the arm's length principle. To the extent that the remuneration exceeds what two unrelated parties would have agreed upon, the Norwegian entity will not be able to deduct for tax purposes the costs exceeding an arm's length price. Furthermore, there is also a risk that the surplus payment will be reclassified as dividend payment, which may be subject to withholding tax.[17]

1.2 Deduction of royalty payments

1.2.1 General overview

As mentioned under section 1.1.1 the general principle under the Norwegian Tax Act is that all ordinary expenses incurred in acquiring, securing and maintaining taxable income are deductible in ordinary income, cf. NTA § 6-1. This also includes royalty payments for the right to use the intangible, which thus are deductible for computing net taxable income.

An important issue in relation to the question of deduction of royalty payments is *when* the royalty payments may be deducted (i.e. a timing issue). There is no link between the statutory accounts and the tax accounts. Under the NTA § 14-2, a cost may be deducted at the time when the taxpayer has an unconditional obligation to pay. This means for example that if the taxpayer actually pays before being obliged to do so, e.g. an upfront payment of royalties although he is not obliged to make such an upfront payment, the payment is not deductible for tax purposes before the obligation to pay arises. Similarly, if the taxpayer exceeds the deadline for payment, the taxpayer may anyhow deduct the "payment" which he should have paid according to his obligations.

Contrary to costs incurred in relation to development of intangibles, cf. section 1.1 above, payment for the right to use intangibles does not create any problem with regard to the dividing line between immediate deduction and capitalisation.

1.2.2 The intangible

[16] However, it seems that the Ministry of Finance not necessarily agrees with the tax authorities since they have recently put a suggested reassessment from the tax authorities regarding R&D costs for developing of software on hold.

[17] The statutory rate is 25%. However, the rate is reduced to 0% within the EEA provided that certain requirements are met and furthermore, the statutory rate is also reduced under tax treaties.

The question regarding deductibility and timing does not differentiate due to the type of intangible. Thus, for tax purposes it does not matter whether the payments relate to manufacturing and marketing intangibles or other types of intangibles. Similarly, it is irrelevant in relation to the question of deductibility and timing of royalty payments whether the payments relate to intangibles in different stages of development, such as in-process intangibles and finished intangibles.[18]

1.2.3 The industry
The rules regarding deductibility of royalty payments do not differentiate between various industries.

1.2.4 The licensor
The entitlement to deductibility of a royalty payment applies irrespective of the residence of the licensor. Further, it is irrelevant whether the recipient of the royalty payment is subject to tax in Norway. However, if the licensor is a related party, the taxpayer may only deduct an arm's length royalty payment. If the royalty payment exceeds an arm's length price, it could be questioned whether the surplus payment should be classified as dividends.[19] Since there is no statutory legislation regarding levying withholding tax on royalty payment, whereas for dividends the statutory rate is 25% (however reduced in most tax treaties), it is very important whether the surplus payment may be reclassified as a dividend distribution.[20]

1.2.5 The licensee
Royalty payments incurred by a resident company and a non-resident company with a domestic permanent establishment are equally treated under the Norwegian Tax Act.

1.2.6 The owner of the licensee
Royalty payments incurred by a licensee of a resident company and a non-resident parent company, respectively, are equally treated under the Norwegian Tax Act.

1.3 Depreciation of the purchase price of intangibles
1.3.1 General overview
Under the discussion of depreciation of intangible assets it is, for Norwegian tax purposes, important to distinguish between intangible assets limited by time and intangible assets not limited by time. Examples of intangible assets limited by time are patents, licence agreement for a fixed period and rental agreement on immovable property for a fixed period.

As a starting point, the depreciable amount is the purchase price. However, if the taxpayer has had costs related to the intangible, for example development costs which have not been accepted deducted immediately but have been capitalised, the depreciable amount is the purchase price plus the capitalised amount. (See section 1.1.5 regarding capitalisation vs. immediate deduction.)

Intangible assets which are limited by time may be depreciated based on a straight line depreciation over the lifetime of the asset. However, if the taxpayer is able to prove that the actual lifetime is shorter than the formal lifetime (e.g. the lifetime under a contract is 10 years, but the actual life is 8 years), the intangible assets may be depreciated based on this shorter period.

For intangible assets which are not limited by time, the starting point is different; these assets may not as a point of departure be depreciated. However, if the taxpayer is able to prove that the intangible assets clearly have been subject to a reduction in value, the reduction in value may be deducted for tax purposes. The evaluation of whether the intangible has been subject to an evidential reduction in value

[18] However, regarding deductibility of costs for development of the intangible, the stages of development, such as in-process intangibles and finished intangibles are relevant, cf. section 1.1.1 above.
[19] This is normally referred to as secondary adjustment.
[20] If the recipient of the surplus payment is not the parent company, it may be difficult to argue in this direction. However, although the author does not agree, in a situation where the surplus payment is made to a sister company, it may be argued that the "dividend" is paid to the parent company which has deposited the amount as share capital in the sister company. To the author's knowledge there is no case law where a royalty payment, exceeding the arm's length price, has been reclassified as dividend being subject to withholding tax.

must be performed annually.[21] Please note that in a statement from the Ministry of Finance from 2005[22] it is accepted that if the taxpayer can prove that the intangible asset has a limited economic lifetime, the intangible asset may be depreciated under a straight line depreciation (i.e. it is not necessary with an annual evaluation of whether the intangible has been subject to evidential reduction in value). The statement is upheld in the annual publication from the tax authorities (Lignings-ABC).

In practice, the author has experienced that the taxpayer and the tax authorities often have different opinions as to whether the intangible assets have been subject to a reduction in value, and furthermore it is also relatively common that the taxpayer and the tax authorities have different opinions on the actual reduction in value.

1.3.2 The intangible

As mentioned under section 1.3.1 above, whether the intangible asset is limited by time or not is important for the question of depreciation. Contrary, the type of intangible is in principle not relevant to the question of depreciation. However, since the lifetime of the intangible and whether the intangible is subject to a reduction in value depends on the type of intangible, the type of intangible will in fact influence on the depreciation.

1.3.3 The industry

Similarly to the type of intangible as a starting point not being relevant to the question of depreciation, the type of industry is neither relevant t the question of depreciation. However, the type of industry may have indirect effect since the development and use of intangible assets vary in the various types of industries. And as mentioned above, various intangible assets may be subject to different treatment due to the nature of the intangible.

1.3.4 The transferor

The residence of the transferor does not impact on the question of depreciation of the intangible assets. The rules apply equally irrespective of the transferor, and thus the depreciation of the intangible does not differ whether the transferor is subject to local taxation or not. Similarly, whether the intangibles are purchased from a related or unrelated company is also irrelevant. However, as mentioned above, an arm's length principle applies in Norway and thus, the depreciable amount (i.e. the input value) may not exceed an arm's length amount. To the extent that the purchase price exceeds the arm's length price, it is likely that the tax authorities would deny the surplus depreciation due to the violation of the arm's length principle. And as mentioned above, there might be a question about reclassification of the surplus payment into dividend and consequently a question about withholding tax.

1.3.5 The transferee

The depreciation rules for intangible assets apply equally irrespective of whether the taxpayer is a resident company or a permanent establishment of a non-resident company.

1.3.6 The owner of the transferee

The residency of the entity owning the transferee is not relevant in relation to the question of depreciation of the intangible asset. As mentioned above, what is relevant in relation to the depreciation of the asset is whether the intangible asset is limited in time, and for intangibles not limited in time, whether the intangibles have been subject to a reduction in value.

2. Taxation of the exploitation of intangibles

2.1 Domestic exploitation

2.1.1 General overview

[21] It may be mentioned that there are examples where the tax authorities have had an accommodating attitude to depreciation of intangibles not limited in time, where the tax authorities have accepted a straight line depreciation of software although the software was not limited in time.

[22] Utv. 2005 page 833.

For corporate entities, income from exploitation of intangibles is taxed under the ordinary corporate income tax rate (CIT) which is 28%. The CIT rate applies equally to both resident companies and non-resident companies with a domestic permanent establishment in Norway. Furthermore, the CIT rate of 28% applies to all income of an enterprise and a permanent establishment, such as profits from the sale of goods and services incorporating intangibles, royalties from domestic or foreign sources and capital gains and losses from the sale of intangibles.

To the extent that a resident entity is subject to juridical double taxation, there is a unilateral measure granting ordinary credit for foreign tax paid, to avoid double taxation. Foreign tax on business income may be deducted as an alternative to using a tax credit.

The foreign tax credit is calculated based on a basket system. The system contains three baskets: (1) income from CFCs and foreign partnerships, (2) income from foreign petroleum activities and (3) other foreign income. Withholding taxes on foreign source royalties fall under basket number three. Similarly, income from a foreign permanent establishment will normally fall under basket number three.

Under the basket system, the taxpayer will only be granted a credit for foreign tax calculated on income in one basket against Norwegian tax calculated on income in the same basket. Thus, the foreign tax credit is limited to the lesser of foreign tax paid and Norwegian tax calculated on the foreign income (based on the rules under the NTA). Since withholding tax on royalty payments is normally levied on a gross basis, while the maximum foreign tax credit is based on net calculation, there may be situations where the foreign tax exceeds domestic tax on the foreign income. Under the calculation of foreign tax credit, including calculating of the foreign income, the arm's length principle should be applied.

Excess tax credit may be carried forward for five years. Under certain circumstances, foreign tax may also be carried back one year insofar as the taxpayer does not incur a tax liability in Norway against which the credit could be set off during the following five years.

Tax neutral transfer of the intangible
Under NTA § 11-21, including chapter 11-21 of the Regulations to the Norwegian Tax Act, assets may be transferred between companies qualifying as a tax group without any taxation of unrealised gain. Resident companies holding more than 90% of the capital of another resident company and controlling a corresponding number of votes in the general meeting may qualify as a tax group.[23] The qualifying holding (more than 90%) must be fulfilled at each tier, but there is no limitation as to how many tiers of companies may be included. In addition, indirect ownership may be added together. For instance, if Company A holds 91% in Company B and 50% in Company C where Company B holds another 41%, all three companies (A, B and C) qualify as part of the tax group. Also a situation where A holds 91% of B and B holds 91% of C, all three companies qualify as a part of the tax group.

In principle, Norwegian permanent establishment of non-resident companies fall outside the scope of NTA § 11-21. However, due to the non-discrimination article in the tax treaty the Norwegian Ministry of Finance has accepted that also a transfer of an intangible from a permanent establishment to a resident company may be accepted.[24] Furthermore, if the general enterprise of the permanent establishment is resident within the EEA, it may be argued that due to the fundamental freedoms (i.e. the right of establishment under the EEA Agreement) the intangible may also be transferred to the permanent establishment.[25]

In principle, foreign companies may not be part of a tax group. Two Norwegian subsidiaries of a foreign company may, however, qualify. The Ministry of Finance has also accepted that other

[23] The rules for tax free reorganisation also apply to partnerships.
[24] See Utv. 1995 page 478, Utv. 2002 page 887 and Utv. 2004 page 530.
[25] In a discussion document from the Ministry of Finance from 18 January 2010 regarding cross border reorganization, the Ministry suggest to expand the scope of NTA § 11-21 as to make it in accordance with Norway's obligation under the EEA Agreement.

companies in the group chain, apart from the transferor and the recipient, may be non-resident without disqualifying for the tax group (i.e. intermediate companies may be non-resident companies).

The forming of a group is not binding for any minimum period. Neither is there a quarantine period during which the group cannot enjoy the group tax benefits for some time after it has qualified. If the holding requirements are satisfied on 31 December in the income year, the group enjoys the group tax benefits for that income year. There is no formal registration procedure. The members of the tax group must simply document that the holding requirements were satisfied on 31 December in the income year.

Thus, if the above requirements are fulfilled, the entities form part of a tax group which entails that intangibles may be transferred tax neutrally between resident companies in Norway. The rule is based on the principle of continuity; the tax cost base of the transferred assets used by the transferring company must be taken over by the receiving company.

If the recipient company is not longer part of the tax group (i.e. the holding requirement are not longer met) the deferred tax becomes taxable in the year the transferring company is not longer part of the tax group. However, if the asset which was transferred is not longer in the recipient’s possession, the fact that the recipient company exits the tax group does not trigger any taxation.

For accounting purposes, however, the market value of the transferred assets and any corresponding gain must be reported. As the market value must be reported for financial accounting purposes, such a transfer does not constitute a breach of the restrictions in company law on the transfer of equity from a company.

Exit taxation
About exit taxation, see section 3.1.

Participation exemption
About participation exemption, see section 2.2.2

2.1.2 Tax incentives
A research and development credit is granted to small and medium-sized companies. The credit is given at the value of 18% or 20% of relevant expenditure up to NOK 5.5 million (from 2009; previously 4 million). However, if the services are purchased from a university or other research organisation, the expenditure limit is NOK 11 million (from 2009; previously 8 million). To qualify, the research must be approved by the Research Council of Norway.

Groups of companies may qualify in respect of several projects, provided that they are organised in different companies, each meeting the relevant criteria.

An increase of the tax credit to 20% is available to companies meeting all of the following conditions:

- the turnover does not exceed EUR 40 million in the tax year;
- the balance sheet total is less than EUR 27 million;
- there are fewer than 250 employees in the business; and
- no company meeting the three above-mentioned conditions controls more than 25% of the company.

Please note that the research and development credit is credited against tax payable (i.e. on calculated tax) and not only as a deduction in gross income (for calculating net taxable income).

Excess tax credits are repaid to qualifying companies.

The credit does not exclude deductions for the same expenses, either by depreciation or directly in the year in which they are incurred.

2.1.3 Distortions
To the author's knowledge, the above mentioned tax incentives for R&D activities do not discriminate between different types of industries and/or different types of intangibles.

2.2 International exploitation
2.2.1 Permanent establishment
If a resident company has a foreign permanent establishment which is liable to tax in that foreign jurisdiction, unilaterally the double taxation is relieved by way of ordinary credit, see section 2.1.1. If there is a tax treaty in force, most of the Norwegian tax treaties use the credit method for relief of double taxation. However, in some tax treaties the exemption method is applied. In general, it could be mentioned that before 1991, the preferred method in Norway was the exemption method, while after 1991 the preferred method has been the ordinary credit method.[26]

In the regulation to the Norwegian Tax Act, there are guidelines for how to calculate foreign tax credit, including how to allocate income and costs to the foreign permanent establishment, cf. NTA § 16-28 and FSFIN § 16-28-4. According to the regulation income and costs should be allocated based on an arm's length principle, cf. FSFIN § 16-28-4(1). However, costs which are connected both to the general enterprise and the foreign permanent establishment, the allocation should be based on a pro rata allocation.[27] Similarly applies for interest expenses, cf. FSFIN § 16-28-4(2).

Finally, it could be mentioned that foreign tax on business income may be deducted as an alternative to taking a tax credit, cf. NTA §6-15. It is, however, not possible to combine the foreign tax credit rules with an ordinary deduction of foreign taxes in income. For example it is not possible to deduct the foreign tax which exceeds an ordinary credit.

2.2.2 Subsidiary
Provided that the company holding the intangible is held by a resident company, and the subsidiary is sold, the participation exemption method will apply and thus the gain on the alienation of the shares will be exempt taxation.[28] In other words it is possible to transfer the intangible tax-free to another group company or to a third party. However, most likely it is rare that the only asset of the subsidiary is the intangible which the taxpayer prefers to transfer. In relation to this, it is likely to question whether it is possible to separate the intangible asset through a tax free demerger, and secondly (more or less directly) after the demerger, sell the share in the newly established company which after the demerger only consists of the intangible assets. If the transfer of the intangible was the main purpose of the demerger, it is likely that the Norwegian tax authorities will question the demerger and apply the general anti-avoidance doctrine.[29]

3. Anti-avoidance rules
3.1 Exit taxation
When intangible (and tangible) assets are moved out of the Norwegian tax jurisdiction, an exit tax is levied on the deemed capital gains on the assets, cf. NTA § 9-14.[30] There are mainly three situations which may trigger the exit tax. Firstly, that the resident entity which holds the asset becomes non-resident due to the fact that the effective management and control of the company do not any longer takes place in Norway. Secondly, if an asset in a permanent establishment in Norway is moved to the

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[26] About 40% of the tax treaties in force rely on the exemption method to relieve double taxation.
[27] For example if net income is allocated with 100 to the general enterprise and 50 to the permanent establishment, the pro rata allocation for costs which is connected both to the general enterprise and the permanent establishment, should be 2:1 in favor of the general enterprise, cf. FSFIN § 16-28-4(3). Please note that donations to scientific work, cf. section 1.1.3 above, must always be allocated based on this principle (i.e. based on the ratio). However, the taxpayer may in exceptional situations apply a different allocation if taxpayer prove that such an allocation is in accordance with normally accepted business standards for and that this principle seems reasonable and is applied consistently.
[28] However, 3% of the gains so exempt must be added back to the taxable income, representing deemed expenses incurred with respect to the exempt gains.
[29] Due to the limitation of the scope of this report, it is not possible to analyse this issue in further detail. See 3.5 for more about the domestic anti-avoidance rules.
[30] For a detailed analysis of the Norwegian exit tax rules, see Frederik Zimmer, *Exit taxes in Norway*, World Tax Journal, September 2009.

non-resident head office, the asset is moved out of the Norwegian tax jurisdiction. Similarly, where a resident company has a permanent establishment abroad and the asset is moved from the head office in Norway to the foreign branch, the applicability of the exit tax rules depends on whether, on the one hand, the intangible is moved to a jurisdiction where there is a tax treaty in force which provides for the exemption method or, on the other hand, whether the tax treaty applies the credit method or there is no tax treaty in force. In the first mentioned situation where there is a tax treaty based on the exemption method, the transfer of the intangible to the foreign branch entails that the intangible leaves the Norwegian tax jurisdiction. Contrary, in the other situation where the tax treaty is based on the credit method, or there is no tax treaty in force, the worldwide taxation principle which applies unilaterally, leads to the transfer of the intangible to the branch not entailing that the intangible is moved out of the Norwegian tax jurisdiction. Finally, the third situation which is covered by NTA § 9-14 is the situation where a non-resident company which has been subject tot CFC taxation in Norway ceases to be a CFC, the asset of the CFC is moved out of the Norwegian tax jurisdiction.

The exit tax is based on the market value of the assets. The deemed taxable gain is taxed at the ordinary CIT rate (28%). For tangible assets (except for inventory items) moved to another EEA country, a tax liability may be deferred until the assets have been alienated, provided that (i) the assets are still within the EEA and (ii) there is a treaty in force providing for the exchange of information and the assistance in the collection of taxes. The exit tax liability will be cancelled if the assets are not alienated within five years.

This deferral of the exit tax does not apply to intangible assets. The argument from the Norwegian legislator for not allowing a deferral of the exit tax is the fact that an intangible asset, contrary to a tangible asset, is rarely alienated. Whether this is a sufficient justification of the different treatment between tangible and intangible assets is difficult to evaluate, and due to the limited scope of this report the question will not be further analysed. However, the author would like to point out that it could be questioned whether the denial of deferral of exit tax on intangibles is a violation of the fundamental freedoms under the EEA agreement.

3.2 Transfer pricing

The arm's length principle, including the OECD guidelines, generally applies to all transactions between related parties, including transactions involving intangibles and there is for the time being are no specific provisions or guidelines regarding transfer pricing where intangibles are involved. However, the tax authorities are currently working with guidelines regarding both valuation and recommended transfer pricing methods.

In the US there is a commensurate with income (CWI) provision under Section 482 of the Internal Revenue Code which means that for transfer pricing purposes, income paid for the transfer of an intangible must be commensurate with the income generated by that intangible. Thus, the CWI provision allows the tax authorities to adjust the consideration charged for an intangible based on the income actually resulting from the intangible after it is transferred (i.e. the use of hindsight).

From a Norwegian perspective this hindsight (i.e. how much income the intangible will provide in the future) is not relevant for determining the arm's length price on the intangible. Thus, the CWI standard is not general accepted in Norway for transfer pricing purposes. The starting point is that only available information regarding expected future income related to the use of the intangible at the time of the transaction should be determinable for the transfer price of the intangible and the tax authorities may not in the future reassess the purchase price on the intangible due to the fact that the intangible has been more profitable than expected.[31]

Special reporting requirements and transfer pricing documentation rules apply to companies that own or control directly or indirectly, either alone or together with a related party, at least 50% of another legal entity. A Norwegian permanent establishment with its head office in a foreign country and a

[31] For a more detailed analysis of transfer pricing and intangibles, see the Norwegian national report to the IFA Congress in Kyoto in 2007.

foreign permanent establishment with its head office in Norway are covered by the rules. Furthermore, partnerships where one or more of the partners are taxable to Norway are covered by the rules. Accordingly, in the annual tax return a taxpayer in a group of companies must give brief information about its transfer-pricing-related issues. In addition, the taxpayer must prepare a description of the activity within the company and in the group, including the type and the volume of the transactions between the related parties, functional analysis, comparable analysis and a report of the transfer pricing method used. However, small and medium-sized enterprises (EU definition) are exempt from the obligation to prepare transfer pricing documentation.

3.3 CFC taxation

Norway has implemented CFC rules.[32] If a non-resident company is owned or controlled, directly or indirectly, at least 50% by resident taxpayers (corporate or individual), its profits, whether distributed or not, are attributed proportionately to its resident shareholders. A "low-tax country" is defined as a country where the general income tax rate on corporate profits is less than two thirds of the Norwegian rate which would apply if the company were resident in Norway. Binding white and black lists of jurisdictions with sufficient/insufficient taxation levels are issued annually by the tax authorities.

Under the discussion of intangibles, it may be specifically mentioned that CFC income includes intangible profits embedded in the sales revenues of goods/services, royalties, and capital gains on sale of intangibles. Furthermore, the CFC rules do not differentiate between the exploitation of self-developed and acquired intangibles; intangible profits from transactions with related and unrelated persons, the active and passive exploitation of intangibles, etc.

If the company is resident in a treaty country, the above provisions apply, however, only if the company's income is mainly of a "passive" nature. Furthermore, the CFC legislation is not applicable to controlled companies that are properly established in an EEA country and perform real economic activities there (the substance test). Whether the company is properly established in an EEA country and actually performs economic activities there is based on an overall evaluation.

3.4 Withholding taxes

There are no statutory rules in Norway to levy withholding tax on royalty payments. To the author's knowledge, neither is there any discussion to implement such rules.

3.5 Other anti-avoidance rules

Norwegian legislation does not contain a general anti-avoidance provision, but a doctrine has been developed by the Supreme Court. Under the doctrine a transaction may be disregarded for tax purposes if the main purpose of the transaction is to reduce tax (the basic requirement). In addition, based on an overall evaluation of the effect of the transaction, including its intrinsic value for business purposes, the taxpayer's purpose with the transaction and the result of the transaction would be contrary to the basic policy of the tax provision in question.

Furthermore, there is a special provision under the Norwegian Tax Act which allows the tax administration to disallow any deferred tax benefit if the utilisation of that benefit is the main objective of a reorganisation or other transaction, cf. § 14-90.[33]

4. EU / EEA and tax treaties

In the author's point of view, the tax rules on development and exploitation of intangibles do not infringe the fundamental freedom rights or state aid rules of the EEA agreement. Similarly, in the author's point of view, the tax rules regarding development and exploitation of intangibles neither infringe the non-discrimination provisions of the tax treaties.

[32] The domestic term for CFC is NOKUS which is an abbreviation for "Norsk-kontrollert utenlandsk selskap" which means Norwegian controlled foreign company.

[33] For a detailed analysis of the general anti-avoidance doctrine see Bettina Banoun, *Omgåelse av skattereglene*, Oslo 2003. For a shorter, and more updated, analysis of the general anti-avoidance doctrine, see Frederik Zimmer, *Lærebok i skatterett*, Oslo 2009, page 60 et seq.

However, as mentioned above, it might be questioned whether the exit tax rules on intangibles may be a violation of the EEA agreement. There is a different treatment of transfer of intangibles between a domestic situation and a cross-border situation. In a domestic situation there will be no taxation, while a cross-border transfer of the intangible might be subject to taxation, cf. NTA § 9-4 Thus, the question is whether this difference in treatment could be justified, and if so whether the restriction is proportional.

5. Conclusion

Overall, it may be said that the Norwegian tax rules regarding intangible assets, both the development and use, are relatively straight forward where resident companies and permanent establishment of foreign entities are equally treated. However, there are some exemptions from this general statement, and the most important comment is the difficulty in separating between developing costs which may be deducted immediately and development costs which must be capitalised.

Furthermore, the difficulties related to depreciation of intangibles which are not limited by time, could be mentioned. In real life it is very difficult to determine whether the intangible has been subject to a decrease in value (and how much). It would have been great if the legislator (or the Ministry of Finance) could provide the taxpayer with more certainty and clarify the rules, hopefully with new legislation.

Finally, the author would like to comment that there are some issues regarding the fundamental freedoms under the EEA agreement which the legislator must clarify. This is especially the situation in relation to exit taxation of intangibles.