

Brussels, 28 March 2012
Case No: 65608
Event No: 598188
Dec. No: 120/12/COL

EFTA SURVEILLANCE
AUTHORITY

Norwegian Mission to the EU
Rue Archimède 17
1000 Brussels

Dear Sirs,

Subject: Letter of formal notice to Norway for failing to comply with its obligation under Articles 11 and 36 of the Agreement on the European Economic Area by requiring companies established outside of Norway to appoint a tax representative that is jointly liable for the payment of VAT in Norway for imported goods and services

1 Introduction

According to Norwegian law, companies established outside of Norway that sell goods and services in Norway must be registered in Norway for VAT taxation purposes. This implies that the companies are obliged to appoint a tax representative in Norway that is liable for the calculation and payment of the VAT.

Following the receipt of a complaint relating to this obligation, the EFTA Surveillance Authority ("the Authority") has assessed the compatibility of the Norwegian legislation with Articles 11 (free movement of goods) and 36 (freedom to provide services) of the Agreement on the European Economic Area ("EEA").

2 Correspondence

On 22 October 2008, the Authority received a complaint against Norway concerning the requirement in Norwegian law for non-established companies to appoint a tax representative in Norway that is jointly liable for the payment of VAT.

By letter of 29 October 2008, the Authority informed Norway about the receipt of the complaint.

By letter of 19 November 2009, the Authority invited the Norwegian Government to provide information regarding the requirement for companies established outside of Norway to appoint a representative, liable for the calculation and collection of VAT on goods and services in Norway.

By letter of 15 January 2010, the Norwegian Government provided the requested information.

By letter of 30 November 2011, the Authority invited Norway to provide further information concerning the case. Norway provided the requested information by letter of 22 December 2011.

3 Relevant national law

3.1 Act No 58 of 19 June 2009 on value added tax

Section 2-1 paragraph 6 of Act No 58 of 19 June 2009 on value added tax (*LOV-2009-19-06-57 om merverdiavgift* ("the VAT Act")) sets out that taxable persons who are not established in Norway shall be registered through a VAT representative in Norway.

Section 11-1 paragraph 3 of the VAT Act states that if a taxable person is registered by a representative for VAT purposes, the representative is jointly liable with the taxable person for the calculation and payment of the VAT.

Section 2-1-1 of Regulation of 15 December 2009 relating to VAT (*FOR-2009-12-15 nr 1540: Forskrift til merverdiavgiftsloven*) sets out further details about the relationship between the non-established taxable person and the tax representative. The provision provides that documents for the sale of goods and services in Norway shall be sent through the tax representative. Both the taxable person and the representative are responsible for the storage of the sales documents in order to fulfil the requirement of the Norwegian book keeping legislation.

In its letter of 19 November 2009, Norway explained that the requirement of VAT representatives applies to non-established taxable persons who are engaged in "business activities in Norway". According to Norway it is necessary to distinguish between business activities in Norway and export sales to Norway, since the latter does not require the registration through a VAT representative in Norway.

The sale of goods in Norway is seen as a business activity in Norway if there is a sufficient link between the specific business and Norway. A central criterion for that would be the place of delivery. If the contractual place of delivery is considered to be Norway the transaction would be considered to be a business activity in Norway. In case of Internet sales of goods, a foreign non-established business which conducts sales through the Internet, using the Norwegian country code ".no" would also be considered to be engaged in business activity in Norway.

As regards services, a distinction must be made between services that require physical performance and services that can be provided from a remote location (intangible services). Services that require physical performance in Norway (e.g. building services) are considered as business activities in Norway, while services that do not require physical performance (e.g. consultancy services) do not constitute business activity in Norway.

3.2 Tax Agreements

In its letter of 22 December 2011, Norway provided the Authority with an overview of the agreements it has concluded with other EEA States which provide for the mutual assistance in the collection of VAT and administrative assistance in the exchange of information concerning VAT.

According to Norway's information such agreements have been concluded with 14 EEA States: Belgium, Denmark, Finland, France, Iceland, Italy, The Netherlands, Poland, Slovenia, Spain, Sweden, Great Britain, Czech Republic and Germany.¹

4 Relevant EEA and EU law

4.1 EEA fundamental freedoms

Article 11 EEA reads:

"Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between the Contracting Parties."

Article 36(1) EEA reads:

"1. Within the framework of the provisions of this Agreement, there shall be no restrictions on freedom to provide services within the territory of the Contracting Parties in respect of nationals of EC Member States and EFTA States who are established in an EC Member State or an EFTA State other than that of the person for whom the services are intended."

4.2 Directive 2006/112/EC on the common system of value added tax²

Article 204(1) of Directive 2006/112/EC reads:

"Where, pursuant to Articles 193 to 197 and Articles 199 and 200, the person liable for payment of VAT is a taxable person who is not established in the Member State in which the VAT is due, Member States may allow that person to appoint a tax representative as the person liable for payment of the VAT."

Furthermore, where the taxable transaction is carried out by a taxable person who is not established in the Member State in which the VAT is due and no legal instrument exists, with the country in which that taxable person is established or has his seat, relating to mutual assistance similar in scope to that provided for in Directive 76/308/EEC³ and Regulation (EC) No 1798/2003,⁴ Member States may take measures to provide that the person liable for payment of VAT is to be a tax representative appointed by the non-established taxable person."

Directive 2006/112/EC is not qualified as an Act relevant for the EEA and has not been incorporated into the EEA Agreement.

5 The Authority's assessment

¹ Norway has also concluded agreements with Malta and Portugal that have not yet entered into force.

² Council Directive 2006/112/EC on the common system of value added tax

³ Council Directive 76/308/EEC of 15 March 1976 on mutual assistance in the recovery of claims relating to certain levies, duties, taxes and other measures.

⁴ Council Regulation (EC) No 1798/2003 of 7 October 2003 on administrative cooperation in the field of value added tax.

5.1 Introduction

One of the principal aims of the EEA Agreement is to provide for the fullest possible realisation of the free movement of goods, persons, services and capital within the whole European Economic Area, so that the internal market established within the European Union is extended to the EFTA States. From that angle, several provisions of the Agreement are intended to ensure as uniform an interpretation as possible thereof throughout the EEA.⁵ It is therefore important to ensure that the rules of the EEA Agreement which are identical in substance with those of the Treaty on the Functioning of the EU (“TFEU”) are interpreted in a uniform manner within the EEA States.⁶

The provisions of the EEA Agreement relating to the freedom to provide services are applicable in so far as the Norwegian rule requiring the appointment of a tax representative concern services. The provisions of the EEA Agreement on the free movement of goods are applicable in so far as these rules concern the marketing of goods.

5.2 Existence of a restriction on the free movement of goods and services

It is settled case-law that all measures that prohibit or are liable to impede or render less attractive the exercise of the fundamental freedoms must be regarded as constituting restrictions to those freedoms.⁷

Although taxation falls within the EEA States’ competence, they must, nonetheless, exercise that competence consistently with EEA law.⁸ The power of an EEA State to levy VAT does, therefore, not exclude the application of EEA rules.⁹

A taxable person that is established in another EEA State but engaged in business activity in Norway is required to appoint a tax representative that is jointly liable for the payment of the VAT. There is no such obligation for taxable persons established in Norway.

Discrimination in the field of taxation consists of treating, for tax purposes, comparable situations differently or different situations in a similar way.¹⁰ According to settled case-law, for a difference in treatment between purely domestic and cross-border situations to be regarded as compatible with EEA law the difference in treatment must either concern situations which are not objectively comparable or be justified by overriding reasons in the general interest.¹¹

⁵ See Opinion 1/92 of 10 April 1992, [1992] ECR I-2821.

⁶ See e.g. Cases C-452/01 *Ospelt and Schlössle Weissenberg* [2003] ECR I-9743, paragraph 29 and C-540/07 *Commission v Italy* [2009] ECR I-10983, paragraph 65.

⁷ See e.g. Cases C-55/94 *Gebhard* [1995] ECR I-165, paragraph 37; Case C-442/02 *CaixaBank France* [2004] ECR I-8961, paragraph 11; and *Columbus Container Services*, paragraph 34.

⁸ See e.g. Cases E-1/04 *Fokus Bank ASA*, [2004] EFTA Court Rep., p. 11, paragraph 20; Cases E-6/98 *Norway v EFTA Surveillance Authority* [1999] EFTA Ct. Rep. 74, paragraph 34; E-1/01 *Hörður Einarsson* [2002] EFTA Ct. Rep. 1, paragraph 17; and E-1/03 *EFTA Surveillance Authority v Iceland* [2003] EFTA Ct. Rep. 143, paragraph 26.

⁹ See e.g. Case E-1/01 *Hörður Einarsson*, cited above, paragraph 18.

¹⁰ See e.g. Cases C-279/93 *Finanzamt Koeln-Altstadt v Schumacker* [1995] ECR I-225, paragraph 30; C-80/94 *Wielockx v Inspecteur der Directe Belastingen* [1995] ECR I-2493, paragraph 17; C-107/94 *P. H. Asscher v Staatssecretaris van Financiën* [1996] ECR I-3089, paragraph 40 and C-311/97 *Royal Bank of Scotland v* [1999] ECR I-2651, paragraph 26.

¹¹ Case e.g. C-386/04 *Centro di Musicologia Walter Stauffer* [2006] ECR I-8203, paragraph 32.

As regards the freedom to provide services it is settled case law that Article 36 EEA requires the abolition of any restriction on the freedom to provide services imposed on the ground that the person providing a service is established in an EEA State other than the one in which the service is provided.¹²

Article 11 EEA prohibits any measure having an effect equivalent to quantitative restrictions on imports. According to settled case law, this prohibition applies to all trading rules enacted by EEA States which are capable of hindering, directly or indirectly, actually or potentially, trade within the EEA, as such rules are considered as measures having effect equivalent to quantitative restrictions.¹³

The Court of Justice has stated that it is a restriction on the fundamental freedoms to require a non established tax payer to appoint a representative and to require such a representative to be jointly liable for the payment of tax. The Court held that such a requirement can be liable to entail additional costs on the foreign established tax payer and make market access more difficult.¹⁴

In light of the above the Authority must conclude that the Norwegian rules that require taxable persons, established outside of Norway but within the EEA, to appoint a VAT representative that is jointly liable for the calculation and payment of VAT in Norway are a restriction on the freedom to provide services and the free movement of goods as provided for in Articles 36 and 11 EEA.

Finally, the Authority notes that according to Article 204(1) of Directive 2006/112/EC it is not allowed to require a taxable person, who is not established in the Member State where the VAT is due, to appoint a tax representative liable for the payment of the VAT if a legal instrument exists that is similar in scope to that provided for in Directive 76/308 EEC and Regulation No 1798/2003.

Directive 2006/112/EC and the Acts referred to in Article 204(1) of that Directive do not form part of the EEA Agreement. Even if Directive 2006/112/EC would form part of the EEA Agreement, the Norwegian rules on VAT tax representatives for foreign established persons would not comply with Article 204(1) of the Directive.

5.3 Possible justifications

National measures liable to hinder or make less attractive the exercise of the four fundamental freedoms may be in conformity with EEA law if they are applied in a non-discriminatory manner, justified by imperative requirements in the general interest, suitable to attain the objective which they pursue and if they do not go beyond what is necessary in order to attain the objective.¹⁵

¹² See e.g. Cases C-290/04 *FKP Scorpio Konzertproduktionen GmbH v Finanzamt Hamburg-Eimsbüttel* [2006] ECR I- 9461, paragraph 31; C-180/89 *Commission v Italy* [1991] ECR I-709, paragraph 15.

¹³ See e.g. Cases E-16/10 *Philip Morris Norway AS*, not yet published, paragraph 39; E-4/04 *Pedicel A/S*, [2005] EFTA Ct. Rep. 1, paragraph 45 and C-110/05 *Commission v Italy*, [2009] ECR I-519, paragraph 33.

¹⁴ See Cases C-267/09 *Commission v Portugal* [2011] not yet published, paragraph 37; C-433/04 *Commission v Belgium* [2006] ECR I-10653 paragraph 31-32; C-30/99 *Commission v Ireland* [2001] ECR I-4619, paragraph 38.

¹⁵ See e.g. C-55/94 *Gebhard*, cited above, paragraph 37.

5.3.1 *Justifications advanced by Norway*

In its letter of 15 January 2010, Norway maintains that since it has no jurisdiction over non-resident persons and companies, the use of a VAT representative scheme is a necessary requirement to maintain and secure supervision, compliance and recovery of VAT claims. Furthermore, Norway claims that the VAT representative scheme is a suitable and efficient measure in attaining the objective of fiscal supervision.

The effectiveness of fiscal supervision and the prevention of tax evasion constitute an overriding requirement of general interest capable of justifying a restriction on the exercise of freedom of movement guaranteed by the EEA Agreement.¹⁶

The Authority recognizes that Norway has a legitimate interest in ensuring the payment of VAT by non-established taxpayers that provide services or sell goods in Norway.

5.3.2 *The proportionality of the national measures*

It is settled case law that the prevention of tax evasion can be accepted as justification only if the legislation is aimed at wholly artificial arrangements, the objective of which is to circumvent the tax laws. National measures which provide for a general presumption of tax evasion can, however, not be justified as restrictions to the EEA fundamental freedoms.¹⁷

Based on the above, the Authority is of the opinion that a legal framework whereby taxpayers that are established outside Norway are always required to appoint a tax representative that has joint liability for the payment of VAT in Norway goes beyond what can be considered necessary to fight tax evasion. Norway could apply other, less restrictive measures to achieve that objective.

As mentioned above, Norway has concluded agreements with 14 EEA States that provide for the mutual assistance in the collection of VAT and administrative assistance in the exchange of information concerning VAT. Such agreements provide the necessary legal framework for Norway to ensure effective fiscal supervision and prevent tax evasion.

In light of the above, the Authority concludes that the requirement under Norwegian law to appoint jointly reliable tax representatives for non-established taxable persons goes beyond what is necessary to reach the objective pursued, given that there exists an international instrument between Norway and an EEA State concerning mutual assistance in the exchange of information and the recovery of VAT.

6 Conclusion

Accordingly, as its information presently stands, the Authority must conclude that, by requiring companies established outside of Norway to appoint a tax representative that is jointly liable for the payment of VAT in Norway for imported goods and services in Section 2-1 paragraph 6 and Section 11-1 paragraph 3 of Act No 58 of 19 June 2009 on

¹⁶ See e.g. Cases C-451/05 *ELISA* [2007] ECR I-8251, paragraph 81; C-101/05 *A* [2007] ECR I-11531, paragraph 55.

¹⁷ See Cases C-451/05 *ELISA*, cited above, paragraph 91; C-334/02 *Commission v France* [2004] ECR I-2229, paragraph 27 and Case C-196/04 *Cadbury Schweppes and Cadbury Schweppes Overseas* [2006] ECR I-7995, paragraph 50.

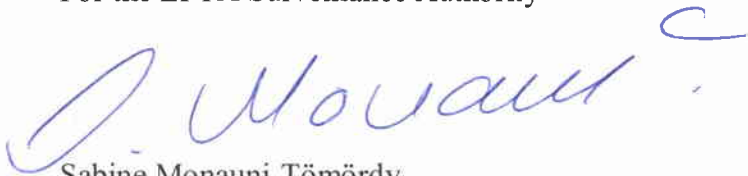
value added tax (*LOV-2009-19-06-57 om merverdiavgift*) Norway has failed to fulfil its obligation arising from Articles 11 and 36 of the Agreement on the European Economic Area.

In these circumstances, and acting under Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, the Authority invites the Norwegian Government to submit its observations on the content of this letter within *two months* following receipt thereof.

After the time limit has expired, the Authority will consider, in the light of any observations received from the Icelandic Government, whether to deliver a reasoned opinion in accordance with Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice.

Done at Brussels, xxx 2012

For the EFTA Surveillance Authority



Sabine Monauni-Tömördy
College Member