



**DET KONGELIGE  
FINANSDEPARTEMENT**

*Royal Ministry of Finance*

EFTA Surveillance Authority  
Rue Belliard 35  
1040 Brussels, Belgium

Your ref

Our ref  
21/576 -

Date  
23.02.2021

## **Temporary amendments to the Petroleum Tax Act**

### **1. INTRODUCTION**

Reference is made to the Authority's letter of 26 January 2021 forwarding a complaint regarding the temporary amendments to the Petroleum Taxation Act.

A description of the amendments is given in the enclosed translation of the proposed bill, cf. Prop. 113 L (2019-2020) Temporary amendments to the Petroleum Taxation Act.<sup>1</sup> The Norwegian Parliament (Stortinget) made certain changes to the proposal; an increased uplift, a prolonged time period for the depreciation regulations and the replacement of the permission to grant security interests in the claim for payment with a system of negative instalment tax. However, the description in the bill, including the scope, still covers the main parts of the amendments.

Before the amendments were proposed, the Ministry of Finance and the Ministry of Trade, Industry and Fisheries considered whether such tax amendments would be in accordance with the EEA Agreement. The Government found that the amendments did not represent any state aid within the meaning of the EEA Agreement, as the measures were not selective, cf. Prop. 113 L (2019-2020). Likewise, the Parliament concluded that the passed rules did not constitute state aid as they did not entail any selective advantage, cf. Innst. 351 L (2019-2020) chapter 2.7.

We maintain that the temporary petroleum tax regulations do not constitute state aid pursuant to Article 61(1) of the EEA Agreement, as they are not selective.

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<sup>1</sup> <https://www.regjeringen.no/en/dokumenter/prop.-113-l-20192020/id2701992/>

In section 2 below, we describe the background for the proposal. Section 3 gives a brief overview of the relevant parts of the present Norwegian petroleum tax system, and section 4 gives a description of the petroleum tax amendments. In sections 5, 6 and 7 we comment upon the system of reference and selectivity.

## **2. BACKGROUND**

The outbreak of COVID-19 early in 2020, with comprehensive lockdown measures caused a major drop in demand for oil and drop in oil prices in the first half of 2020. On the basis of the estimated demand shortfall in particular during the second quarter of 2020, the April report from the IEA predicted a large excess supply of oil and gas in the market until the summer of 2020. The production from existing oil and gas fields remained more or less unchanged at the time, but the fall in prices had reduced the cash flow significantly. Reduced cash flow combined with lower demand for oil and gas and overall market uncertainty, had reduced investment forecasts made by most economic analysts.

On 31 March 2020, the Norwegian Parliament adopted a request (No. 474) asking the Government to consider different relief measures to remedy the shortage of liquidity and to stimulate investments in the petroleum industry and the Norwegian supply industry. Proposals were to be submitted to Parliament no later than the Revised National Budget 12 May 2020.

In order to ensure that liquidity remained available for profitable companies, the Government proposed the temporary amendments to the petroleum tax system on 12 May 2020, cf. Prop. 113 L (2019-2020). The amendments made it possible for companies to sustain economic activity during and after the COVID-19 outbreak.

According to the Guidelines on best practice for the conduct of state aid control procedures, pre-notification contacts provide the Authority and the notifying EFTA State with the possibility to discuss the legal and economic aspects of a proposed measure informally and in confidence prior to implementation, and thereby enhance the quality and completeness of possible notifications.

It has been the opinion of the Norwegian authorities all along that the temporary amendments to the petroleum tax act do not constitute state aid under the EEA Agreement, as they do not involve a selective advantage. Nevertheless, the Norwegian authorities presented the proposal to the Authority for a preliminary state aid assessment. Based on such preliminary assessment the amendments were proposed without notification.

### **3. THE NORWEGIAN PETROLEUM TAX SYSTEM – PARTS RELEVANT TO THE CASE**

The Petroleum Taxation Act (the PTA) covers the taxation of extraction and pipeline transportation of petroleum (petroleum activity) on the Norwegian continental shelf. Companies involved in petroleum activities (petroleum companies) are subject to a special tax (56 pct. tax rate) in addition to the 22 pct. tax rate on income from such activities, i.e. a marginal tax rate of 78 pct.

The special tax is assessed on income from the activities that also forms the basis for the assessment of the 22 percent tax with a few exceptions, a.o. the uplift, cf. below.

Expenses incurred in acquiring production facilities and pipelines may be depreciated at a maximum rate of 16 2/3 percent per annum. The first year of the depreciation period is the year in which such expense was incurred, which means that the asset (the production facility etc.) does not have to be completed before the (annual) costs are depreciated (cf. the PTA Section 3b). Hence, these expenses are depreciated after six years, with effect both for the ordinary corporate tax and the special tax.

Special tax is payable on net income, adjusted for uplift. The uplift is 5.2 percent of the expenses incurred in acquiring the production facilities and pipelines. The cost price of the asset shall be included when calculating the taxable income for 4 years, beginning with the first year of depreciation thereof, i.e. a total uplift of 20.8 pct. The uplift shall be deducted when calculating the special tax.

Petroleum companies in a tax loss position, may carry forward losses with the addition of an interest (interest on 12 months treasury bills plus 0.5 percentage points, after ordinary income tax). If there remains an uncovered tax loss upon the discontinuation of petroleum activities on the Norwegian continental shelf, the company may claim payment from the State of the tax value of such loss (with effect for both ordinary tax and special tax, i.e. 78 pct. tax rate).

### **4. TEMPORARY PETROLEUM TAX AMENDMENTS**

The Norwegian Government proposed amendments to the petroleum tax system to facilitate the continuation of planned petroleum projects, cf. Prop. 113 L (2019-2020). The amendments were intended to help the oil and gas industry and the supply industry to maintain activity by providing liquidity during and after the COVID-19 outbreak.

In the proposal, investments included in Plans for development and operation (PDO) and Plans for installation and operation of infrastructure (PIO) and other related applications under the Petroleum Act Sections 4-2 and 4-3 submitted to the Ministry of Petroleum and Energy for approval in accordance with the Petroleum Act Sections 4-2 and 4-3 before 1 January 2022 and approved before 1 January 2023, may be depreciated at the time when they are incurred.

The Parliament made certain changes to the proposal; an increased uplift, a prolonged time period for the temporary depreciation regulations and a replacement of the permission to grant security interests in the claim for payment with a system of negative instalment tax. Hence, the adopted amendments differ from the proposed bill regarding the level of uplift and the duration of the immediate tax allowance. The deadline for submitting and getting approval of PDO/PIOs was extended by one year. The investment costs comprised by the PDO/PIOs, will include costs incurred before planned production start-up, i.e. without the deadline excluding costs incurred after 2024 (cf. the proposal in Prop. 113 L (2019-2020)). However, the description in the proposal, including the scope, still covers the main parts of the amendments.

A short description of the temporary amendments:

## I

Instead of the ordinary petroleum tax regulations on depreciation and uplift (see above), an immediate tax allowance, including a 24 pct. uplift, in the special tax base for the following costs in acquiring production facilities and pipelines (cf. the PTA Section 3 b):

- costs incurred in 2020 and 2021, and
- costs included in a PDO or PIO and other related applications under the Petroleum Act Sections 4-2 and 4-3 submitted to the Ministry of Petroleum and Energy before 1 January 2023 and approved by the Ministry before 1 January 2024 and incurred before planned production/operation start-up (according to the PDO/PIO). The ad hoc regulations are in effect as from the income year 2020 until planned production/operation start-up for the PDO/PIOs approved under the temporary regulations.

## II

A cash payout of tax losses (both the 22 percent tax and the special tax, incl. unused uplift), limited to 2020 and 2021. The petroleum companies may claim payment from the State of tax losses in 2020 and 2021. The cash payout will be assessed by the tax authorities.

## III

A system of negative instalment tax is established, which means that the companies receive the tax value of the expected loss through the six instalments (three in the second half of the income year and three in the first half of the following year).

The authority of the Ministry of Petroleum and Energy to approve PDOs, PIOs and related applications under the Petroleum Act Sections 4-2 and 4-3 is unchanged with regard to such applications submitted under the temporary provisions described. Consequently, the Ministry's considerations of such applications submitted for approval under the Petroleum Act are the same irrespective of whether the applications in question are submitted within the time limits set under the temporary provisions of the PTA or not. In other words, the discretion of the Ministry with respect to approval of PDOs, PIOs and related applications under the Petroleum Act remains unaffected by the temporary amendments to the Petroleum Tax Act.

The effect of the amendments is that companies will receive the tax value of future depreciations including an increased uplift and losses at an earlier point in time. This will increase the present value of the deductions and provide companies that invest and/or end up in a tax loss position with liquidity. All petroleum companies may be able to make use of the amendments. Companies that neither invest nor end up in a tax loss position during the relevant time period will, however, not be affected by the amendments.

The Ministry of Finance has estimated the additional liquidity to about NOK 115 billion, spread between 2020 and 2021. Over time the temporary amendments are estimated to give a tax relief of about NOK 8 billion (in present value terms).

## **5. SELECTIVITY – THREE-STEP ANALYSIS**

The Ministry of Finance disagrees with the complainant that the temporary tax regulations should be deemed a subsidy in a specific sector. In our opinion the three-step selectivity analysis should be used to assess selectivity of the temporary regulations, cf. Notion of Aid (NoA) para 128, the previous cases Dec. No. 018/19/COL, 90/02/COL (incl. case 25275) and EU case law. First, the system of reference must be identified. Second, it should be determined if the temporary regulations are a derogation from that system. If the measure is a derogation from the system, the final question would be whether the derogation is justified by the nature or the general scheme of the system, cf. NoA para 128.

## **6. THE SYSTEM OF REFERENCE**

The temporary amendments are based on the prevailing PTA regulations. They are an integrated part of the petroleum tax system. Regarding the identification of the reference system, it is the Ministry's opinion that the reference system should be the PTA.

In the special tax base, the immediate tax allowances (100 pct. depreciations with the addition of an uplift of 24 pct.) are limited to investments in petroleum assets (production facilities and pipelines, cf. the PTA Section 3 b). The assets comprised by the temporary regulations are the same group of assets comprised by the prevailing PTA Section 3 b.

The payout of tax losses for the income years 2020 and 2021 only applies to losses incurred due to activities covered by the petroleum tax system, i.e. the loss is calculated based on the prevailing PTA.

In previous decisions the Authority assessed whether petroleum tax measures were selective or not. In all decisions, the Authority concluded that the reference system is the Petroleum Tax Act, cf. Dec. No. 018/19/COL item no. 6.2.3.2 and Dec. No. 90/02/COL item no. 2 (Condition 3). We also refer to item 6.2 “Identification of the reference system” in letter 9 February 2018 from the Norwegian Ministry of Finance to the Authority<sup>2</sup>, see enclosure. The main relevant factors pointed out in that letter have not changed. It is the Ministry’s opinion that also in the case of these temporary tax regulations applicable to petroleum companies only, the petroleum tax system forms the relevant reference system. Hence, in the following, the Ministry’s assessment is based on the petroleum tax system being the correct reference system.

## **7. THERE IS NO DEROGATION FROM THE REFERENCE SYSTEM**

As the regulations do not favour certain undertakings within the petroleum tax system over other undertakings within the same tax system and in a similar situation, the selectivity criterion is not fulfilled.

The immediate tax allowance, incl. a 24 pct. uplift, in the special tax base for costs incurred in 2020 and 2021 and costs comprised by PDO/PIO, see section 4 above, is a general provision open to all petroleum companies and applicable according to objective criteria. The temporary regulation comprises all assets within the scope of the prevailing PTA art. 3b, i.e. all investments depreciated over 6 years under the prevailing PTA. The Ministry of Finance cannot see that the amendments will discriminate between petroleum companies based on tax position. Neither can we see that the amendments will discriminate between petroleum companies with costs from different phases of production. In an attachment to this letter, investment statistics are presented for different categories of companies engaged in petroleum activities on the Norwegian continental shelf. These statistics are provided to the ESA to give some information about the distribution of the benefits of the temporary tax change. It is emphasized that the forecasts are uncertain. The numbers are confidential and must not be shared or published.

All investments in production and pipeline facilities over the years 2020 to the year of planned production start-up are covered by the temporary proposals. All petroleum companies that will incur costs in 2020 and 2021, and/or submit a PDO or PIO to the Ministry of Petroleum and Energy before 1 January 2023 (which is approved by the Ministry before 1 January 2024), will be subject to the temporary rules. The Parliament

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<sup>2</sup>

[https://www.regjeringen.no/contentassets/1733033494a5410e8bfdaa618b4ff754/norwegian\\_tax\\_regime\\_petroleum\\_exploration.pdf](https://www.regjeringen.no/contentassets/1733033494a5410e8bfdaa618b4ff754/norwegian_tax_regime_petroleum_exploration.pdf)

argued that the duration should be set to planned production start to avoid undesirable tax planning, cf. Innst. 351 L (2019-2020) chapter 2.5. In the Ministry of Finance's opinion the temporary nature of the regulations does not as such make the amendments selective.

Normally, only tax losses related to exploration costs may be paid out to petroleum companies. If there remains an uncovered loss upon the discontinuation of petroleum activities, the taxpayer may claim payment from the State of the tax value of such uncovered loss, cf. PTA art. 3 c. After the amendment, all tax losses will be paid out for the income years 2020 and 2021.

Further, all petroleum companies may potentially incur a tax loss in the income year and may claim payment from the State of the tax value of losses in 2020 and 2021. This may be the case for an increasing number of petroleum companies due to low oil prices and the temporary regulation of immediate tax allowance incl. uplift, cf. above. Companies in a tax paying position have deducted their costs/losses from taxable income and are not disfavoured by the proposal. In Dec. No. 018/19/COL the Authority stated that introducing a generally applicable loss carry forward rule which applies to all companies not in a tax paying position does not imply that companies in a tax paying position are discriminated against. The Ministry's opinion is that the cash payout of the tax loss (both ordinary tax and special tax, incl. unused uplift), limited to 2020 and 2021, represents a general measure and is therefore not selective.

Yours sincerely,

Stig Sollund  
Director General

Ingvild Brandal Gaasemyr  
Legal Adviser

*This document has been signed electronically and it is therefore not signed by hand.*

Attachments:

1. Prop. 113 L (2019-2020) Proposition to the Storting (bill) Temporary amendments to the Petroleum Taxation Act
2. Letter 9 February 2018 from the Ministry of Finance to the Authority
3. Confidential: Investment statistics for categories of companies on the Norwegian continental shelf

4. Confidential: Investments on the Norwegian Continental Shelf sorted by year and category of company