Break-out Session 1a
Tax Avoidance

Norway
What is tax avoidance

**Tax avoidance**

Legitimate arrangement of affairs so as to minimise tax liability within the letter of the Law

Circumventing the spirit of the law

— *Collector of Stamp Revenue v Arrowtown Assets Ltd*: “The driving principle in the Ramsay line of cases continues to involve a general rule of statutory construction and an unblinkered approach to the analysis of the facts. The ultimate question is whether the relevant statutory provisions, construed purposively, were intended to apply to the transaction, viewed realistically.” (Ribeiro PJ)

**What is the intention of the legislator?**

An evolving standard influenced by the general perception of duty of care

Compare: “Every man is entitled if he can to arrange his affairs so that the tax attaching under the appropriate Acts is less than it otherwise would be. If he succeeds in ordering them so as to secure that result, then, however unappreciative the Commissioners of Inland Revenue or his fellow taxpayers may be of his ingenuity, he cannot be compelled to pay an increased tax” (*IRC v Duke of Westminster* [1936] AC1 (HL)).
What is tax avoidance

**Tax management**
Ensure compliance with tax laws and reporting obligations
Tax planning is optional, tax management is mandatory

**Tax planning**
Arrangement of one’s financial and economic affairs by taking legitimate benefit of all deductions, exemptions, allowances and rebates to ensure no overpayment of tax
Arrangements by which tax laws are fully complied with
No intention to circumvent the spirit of the Law
— Rt 2007.1025 *Statoil Angola*; «I den grad det er skattemessige årsaker som ligger til grunn for at SCC er organisert som et belgisk selskap, er plasseringen i Belgia et resultat av en lovlig skattemessig tilpasning.» (para 54)

**Tax evasion**
Illegal avoidance of tax liabilities e.g. through suppression of facts, untrue statements or misleading documentation
Usually a criminal offence
What is tax avoidance

**Tax planning seeks to achieve efficient tax cost management**
Pay the correct amount of tax at the right time
Reduce or mitigate juridical and economic double taxation
Avoid tax on dry income charges
Secure efficient cash flow
Reduce the effective tax cost of the group
Achieve double (or more) deductions for the same cost (double dip)
Achieve deductions for a cost without recognising the equivalent income (double non-taxation)
Impact from broader society

**Why should I be concerned?**

- Increased transparency – CbC/exchange of information
- Public perception - NGOs and the press
- Impact on tax function – visibility
- Liabilities – financial institutions and clients

---

**Krever skattegransking av Ryanair**

Skattemyndighetene må undersøke om Ryanair har betalt det selskapet skal av skatter og avgifter til Norge, mener KrFs Hans Olav Syversen og flere arbeidstakerorganisasjoner.

---

**Stortinget vil ha flere svar fra regjeringen om DNB**

Stortingets kontroll- og konstitusjonskomité ber næringsminister Monica Mæland (H) si sin mening om DNBs redegjørelse i skatteparadis-saken.

---

**To av tre mer negative til DNB etter Panama Papers**

Tilliten til DNB i den norske befolkningen har falt kraftig etter avsløringene om at banken har hjulpet kunder med å plassere penger i skatteparadiset Seychellene.
Public debate leading to government intervention

| 'Letterbox' companies | No substance  
|                       | No risks, no functions, no activities |
| Tax havens | Bermuda  
|           | British Virgin Islands  
|           | Cayman Islands  
|           | Others  |
| Paying too little corporate income tax | Relative to total turnover  
|           | 'Fair share'  
|           | Eroding 'fair share' in developing countries  |
| International mismatches | Hybrid entities  
|           | Hybrid financial instruments  |
| Transparency | Lack of corporate tax transparency  
|           | Lack of effective exchange of tax information  |

| OECD | Fight against base erosion and profit shifting  |
| EU | Fight against aggressive tax planning  
|           | State aid initiatives  |
| Country-specific | Unilateral anti-abuse measures  |
Risk areas of some concern

**Dividend stripping – who is responsible for deduction of the correct amount of withholding tax?**

Liability under legislation and the limitations of legislation in cross border transactions

Contractual liabilities

**Third party products – who is responsible for taking advice?**
Dividend stripping

A variety of techniques aimed at reducing or eliminating the burden of dividend withholding tax

In its simplest form, dividend stripping can be described in the following three steps:

— (1) the sale of the shares in a company with undistributed profits;
— (2) distribution to the recent acquirer, and
— (3) the re-sale of the shares to the original shareholder at a pre-determined price.

Essential concept is that the shares are ultimately sold back to the original shareholder and that the pricing is fixed.

Securities lending as an alternative; the temporary transfer of securities on a collateralized basis from one party (the lender) to another (the borrower) for a fee.

— the borrower achieves a lower rate of withholding tax than the lender
— dividend payments transferred back to the lender through manufactured dividends

A Norwegian borrower is responsible for deducting withholding tax on manufactured dividends, § 10-13(1) in fine

Assess the entitlement to reductions under tax treaty or domestic law

Recipients in the EEA entitled to zero rating unless “wholly artificial arrangement”

Requirement to deduct the statutory rate of 25% if in doubt – entitlement to zero rating on confirmation from the tax authorities in certain cases

Joint liability for the distributing entity – responsibilities of the custodian?

What if the borrower is resident outside Norway?

Possible liability of the Norwegian distributing company
Responsibility for WHT in Norway

“In one email exchange, a manager of Norway’s sovereign wealth fund wrote to intermediaries to confirm his understanding of a lending transaction. The purpose of the loan, he wrote, was to “avoid” a 15 percent withholding tax on shares of international companies by agreeing to a 50-50 split of the taxes saved.

“We do not necessarily know the motivation for borrowing, or who the end user is, but are aware that tax considerations are one of several drivers for pricing these transactions,” a spokesman for the fund said in an email.”

Washington Post 3 May 2016

Stock lending – Beneficial ownership

Bank lends from Client A – Client A will be compensated with manufactured dividend.

Bank lends out to Client B - Client B who will be required to pay the Bank a manufactured dividend does not know if the stock lent is from the Banks own portfolio or sublet from Client A.

The Bank will earn spread on the stock loan fees received.

Who has the legal ownership?

The legal ownership may be transferred under the stock lending agreement

Who bears the economic risk of the stock?

The Bank may have actual economic risks related to the stock lending agreement in case of default.

Practice

Aberdeen (C-303/07)
Fokus Bank (E-1/00)
Prévost Car - Federal Court of Appeal in Canada of 26 February 2009
Products

Third party products
E.g. fund structures, e.g. BFU 13/13

— A Norwegian company would set up a fund in Luxembourg to invest in Norwegian bonds, but would hold a few shares in a listed company. Managed from Norway and administration in Luxembourg. Technically, returns from the fund would be exempt for a Norwegian company.

— The Directorate of Taxes held that this was a wholly artificial arrangement.

— To be contrasted with E-3/13 and 20/13 Fred Olsen and others

How to assess the product from a tax perspective
Liabilities vis a vis customers
Reliance on customers disclosure to the tax authorities
Conclusions

Blurring the lines between tax planning and tax avoidance
From “blame” to “shame”

Tax Planning often based on legal concepts
The legalistic approach is not always viable

Increasing demands from the public and politicians
Expecting companies to behave as “good citizens”
Dangerous liaisons

Since we have agreed to have full transparency with the IRS, I remind you that we never had this meeting.
Thank you