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0134 Oslo

Oslo, 16 March 2020

[redacted]

Request for advance ruling: Nicolai Tangen, personal identity number [redacted]

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1. Introduction

1.1 The Investor's personal situation

Nicolai Tangen (the "**Investor**") is a Norwegian national who has been living and working in the United Kingdom (the "**UK**") since 1992. The Investor is resident in the UK for tax purposes. While he has made regular visits to Norway during the period he has been living and working in the UK, he has not been resident in Norway for Norwegian tax purposes for many years.

The Investor is currently in discussion with Norges Bank Investment Management (the "**New Employer**") regarding the possibility that he may take up the position of Chief Executive Office of the New Employer and carry out work for the New Employer (the **"Work"**). The Work is expected to begin around August 2020 and continue for approximately five years. The Work would require the Investor to spend time in Norway each year. The commitments involved in the Work, together with the time which the Investor has spent in Norway during recent years, may result in the Investor becoming a resident of Norway for Norwegian domestic tax purposes, cf. the Norwegian Tax Act (the "**NTA**") section 2-1(2), with effect from 1 January 2020. Meanwhile, the Investor expects to continue to be resident in the UK for UK domestic tax purposes throughout the period of the Work.

It is still to be determined whether the Investor will become resident in the UK pursuant to Article 4(3) litra a of the double taxation treaty between Norway and the UK (the "**Tax Treaty**") if he takes up the position at the New Employer, since there are factors suggesting that his "*centre of vital interest*" will be in the UK during the period in which he carries out the Work. However, it is not possible to obtain a binding advance ruling on matters to be resolved pursuant to the Tax Treaty, cf. the Norwegian Tax Administration Regulations section 6-1-4.

The Investor may therefore not request a binding advance ruling as to whether or not he will be considered resident in Norway for the purposes of the Tax Treaty once he has started the Work. The Investor may only request a binding advance ruling concerning the application of domestic Norwegian tax law. For the purpose of this request for a binding advanced ruling, it should therefore be assumed that The Investor will be considered resident in Norway pursuant to Article 4 of the Tax Treaty from the time he starts the Work.

1.2 The Investor's business affairs etc.

The Investor is a member of AKO Capital LLP (the "**Existing LLP**"), which is a UK limited liability partnership. There are other members of the Existing LLP. Each member (including the Investor) has a right to share in the profits of the Existing LLP.

The Investor currently makes significant donations to a charitable foundation named AKO Foundation (the **"Foundation"**).

So that he can devote himself to the Work, the Investor proposes to retire from active involvement in the business of the Existing LLP. Accordingly, it is proposed that his interest in that business be restructured. A new limited liability partnership would be formed under English law and registered at Companies House (the **"New LLP"**). The New LLP would be a member of the Existing LLP, and will take over the Investor's interest in that business. The Investor and a small number of other individuals would be the only members of the New LLP. The New LLP is intended to donate all (or substantially all) of its profits to the Foundation.

This request for an advance ruling concerning Norway's taxation of the new holding structure and related issues.

1.3 Request for a binding advance ruling

The Investor requests that the Norwegian tax authorities confirm in a binding advanced ruling that:

1. the Investor will not be taxed on his share of the profits and losses of the New LLP, pursuant to NTA chapter 10-40 while working for the New Employer (and possibly being a tax resident of Norway);

2. the Investor will not be taxed on the profits of the New LLP until the New LLP Board makes an explicit resolution to make a distribution of profits to him;

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3. gifts by the New LLP to the Foundation will not be taxed as dividends in the hands of the Investor pursuant to NTA section 5-1(1), section 10-11 or section 13-2; and

4. distributions by the Existing LLP to the New LLP and distributions by the New LLP to the Investor will not be taxed as labour income in the hands of the Investor pursuant to NTA section 5-1.

The transactions that the request for a binding advanced ruling concern are all connected with the Investor's potential commencement of the Work. It is of significant importance for the Investor to obtain legal certainty with respect to the transactions that relate to him potentially becoming resident in Norway for tax purposes. The conditions for requesting a binding advanced ruling in the Tax Administration Act section 6(1) and the pertaining regulation are therefore fulfilled.

1.4 Structure of request

The factual background will be described in section 2 below, and the questions covered by the request are addressed in sections 3 to 6 below.

1.5 Payment of fee

The fee of NOK 2,344 (two times the court fee) is paid, cf. the Tax Administration Act section 6-3, cf. the Tax Administration Act Regulation section 6-3-1(3), litra d.

Enclosure 1: Confirmation of payment of fee.

1.6 Request for priority treatment of request

It is essential for the Investor to obtain as soon as possible a reply to this request for an advance ruling, since that reply will be highly relevant to the consequences for him of taking on the Work. We therefore kindly ask that this request be given priority. Further, we kindly ask that we are informed as soon as possible if you need additional information to consider the request, or if you have questions. We will answer any requests for additional information and/or additional questions as soon as we receive them.

1.7 Anonymization

With respect to any publishing of the binding advance ruling in response to this request, we kindly ask that all personal names (including the name of the Investor), names of corporate entities (e.g. the Existing LLP, the New LLP and the Employer) are anonymised as far as possible throughout the advance ruling, cf. the Tax Administration Act Regulation section 6-1-8. Further, we kindly ask to receive the draft for the anonymised ruling before it is published and to be allowed to file comments on the level of anonymization.

2. Factual background

2.1 The Existing LLP

2.1.1 Business activities and history of the Existing LLP

The Existing LLP is an authorised firm for the purposes of UK financial services regulation. The Investor is currently a member of the Existing LLP. The Existing LLP is a limited liability partnership established in accordance with English law. The partners of a limited liability partnership are generally referred to as "*members*".

The Existing LLP was incorporated in England and Wales on 6 April 2005. The Investor was the founder of the Existing LLP and became a member of the Existing LLP at the time of its incorporation, together with one other individual. Several other individuals and corporate entities have since become members.

The business of the Existing LLP is to act as an investment manager for various funds (together, the "**Investment Funds**"). The business of the Existing LLP started in 2005. The first of the Investment Funds were AKO Fund Limited, AKO Partners LP and AKO Master Fund Limited master feeder structure. These were launched on 1 October 2005. Additional funds have been added over the years. As investment

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manager for the Investment Funds, the Existing LLP is entitled to the following, pursuant to individual contracts:

(i) management fees, based on the value of the assets belonging to that Investment Fund; and

(ii) performance fees, based on the investment performance of such assets.

The Investment Funds aim to provide their investors with long-term capital growth. While members of the Existing LLP can invest in the Investment Funds (generally through the classes of shares known as "Management Shares") the investors in the Investment Funds are generally unconnected with the Investor and with the Existing LLP.

2.1.2 Current ownership structure

The Investor's share of the profits of the Existing LLP is currently approximately 66 %, and the aggregate share of the profits allocated to the remaining members is approximately 34%. The Investor currently holds 95 out of 137 votes in the Existing LLP, which accounts for 69.34% of the total voting rights held by the members of the Existing LLP. Under the laws governing limited liability partnerships in the UK, there is no necessary connection between the share of the profits that a member receives and his voting rights. In the case of the Existing LLP, the share of the profits varies from year to year depending on when members join, leave and become more senior, whereas voting rights have remained relatively constant. As a result, the Investor's profit share is lower than his voting share. An overview of the voting rights held by the members of the Existing LLP as of 22 May 2017 can be found in schedule 1 to the partnership agreement between the members of the Existing LLP of 22 May 2017 (the "**Existing LLP Deed**").Since the Existing LLP Deed was signed, the number of members in the Existing LLP has increased by four. Each new member holds one voting right, making the current total number of member voting rights 137. The mechanism under which the Existing LLP's profits are allocated and distributed to its members is regulated by chapter 10 and 11 of the Existing LLP Deed. A copy of the Existing LLP Deed is attached to this request for a binding advanced ruling.

Enclosure 2: the Existing LLP – the Existing LLP Deed of 22 May 2017.

2.1.3 Separate legal personality

A limited liability partnership is a body corporate and a legal entity separate from its members. This means that, for example, the partnership owns the assets of the partnership business and is liable for its own debts. The members act its agents and are generally only liable up to the amount that they have contributed to the partnership. A limited liability partnership has unlimited capacity which means it can do anything that a legal person can do (for example, own property, enter into contracts, sue and be sued) cf. section 1(3) of the Limited Liability Partnership Act 2000.

The operation of a limited liability partnership is generally governed by a legally binding contract made between the members. That agreement sets out the rights, duties, responsibilities and liabilities of each member, and sets out how the partnership will be managed and run.

Enclosed is a copy of an extract from chapter 12 of the Limited Liability Partnership Act 2000.

Enclosure 3: Limited Liability Partnership Act 2000.

It is also specifically provided by section 1(3) of the Limited Liability Partnership Act 2000 that the members of a limited liability partnership have authority to bind the partnership.

2.1.4 UK tax status

Although a UK limited liability partnership is treated for the general purposes of English law as a legal entity separate from its members, for UK tax purposes it is treated by specific UK tax legislation as transparent, so that its members (and not the partnership entity itself) are taxed on (broadly speaking) their respective shares of the income or gains arising to the partnership entity.

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2.1.5 Limited liability for members of the Existing LLP

2.1.5.1 Limitation of liability pursuant to English law

As mentioned in section 2.1.3 above, generally, as a matter of English law, all members of a limited liability partnership have a limited liability for the partnership's obligations. The members are therefore not usually required to meet the liabilities of the partnership.

However, there exist specific circumstances under which a member of a limited liability partnership may be required to contribute to the assets of the partnership, for example, if a member:

(i) is a sole member of the limited liability partnership trading as such for six months;

(ii) is required to make a contribution pursuant to an agreement entered into between the members;

(iii) is guilty of misfeasance or falls within special clawback provisions under the Insolvency Act 1986; or

(iv) has breached a fiduciary duty owed to the limited liability partnership.

As evidenced by the above, the circumstances under which a member may be required to make a contribution to the assets of a limited liability partnership are highly specific, and to some degree dependent on how the particular limited liability partnership in question is organised.

2.1.5.2 Limitation of the liability of members of the Existing LLP

As a limited liability partnership constituted in accordance with English law, all members of the Existing LLP enjoy a limited liability for the Existing LLP's obligations that arise out of its business.

With respect to situation (i)–(iv) listed above in section 2.1.5.1, category (i) is not relevant for the Existing LLP. The Existing LLP has several members.

With respect to situation (ii), the members of the Existing LLP have not agreed that one or more of the members shall have an obligation to make capital contributions etc. to cover the obligations of the Existing LLP. Pursuant to section 7.1 of the Existing LLP Deed (**Enclosure 2** to this request for a binding advanced ruling), the members are obliged to contribute a specific amount (referred to as "*ordinary capital contributions*") set out in schedule 1 to the Existing LLP Deed, for the purpose of section 74 of the Insolvency Act 1986. The contributions specified in schedule 1 to the Existing LLP Deed represent the maximum amount that each member is liable to contribute, cf. section 7.1 of the Existing LLP Deed. Hence, the liability to make contributions in case of an insolvency situation in the Existing LLP is also limited. It follows from section 7.3 that members "*may contribute further ordinary capital*" by agreement with the board of the Existing LLP (the "**Existing LLP Board**"), but as the wording indicates, there is no obligation to make such further contributions.

There is neither an obligation for any member of the Existing LLP to contribute or pay an amount to cover a negative balance (if any) on the respective member's "*distribution account*", cf. section 11.5 of the Existing LLP Deed. The "*distribution account*" is the account where the profits or (losses) that are distributed to the members each financial year based on the principles laid down in chapter 10 of the Existing LLP Deed. The regulation in section 11.5 in the Existing LLP Deed ensures that no member has a liability to cover losses allocated to the "*distribution account*".

With respect to situations (iii) and (iv) listed above in section 2.1.5.1, a duty to make contributions in such situations does not indicate that members of the Existing LLP have unlimited liability. Rather, the obligation to make contributions in situation (iii) would merely be a consequence of UK reversal rules in insolvency situations. A member would have a duty to repay amounts withdrawn (e.g. repayments of loans, profit distributions, salary, interest or transfers of property) by a member within a certain period (normally two years), if said member knew or ought to have concluded that, after the withdrawal in contemplation at that time, there was no reasonable prospect of the limited liability partnership being able to avoid an insolvency situation. The obligation to make contributions in situation (iv) would in turn be a claim for damages due to breach of the member's obligations towards the partnership.

In summary, no member of the Existing LLP has unlimited liability for the obligations of the Existing LLP. The liability of each member of the Existing LLP is limited.

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2.1.6 The Investor's involvement in the Existing LLP

2.1.6.1 Engagement in the Existing LLP from inception to date

The Existing LLP was founded by the Investor in 2005 at which time the total staff (members of the Existing LLP and employees of the Existing LLP's service company) was eight and the assets under management approximately USD 580 million which were all managed to a single investment strategy. Since 2005 the Existing LLP has grown very substantially to become one of Europe's leading alternative investment partnerships and currently manages approximately USD 18.4 billion across both long-only and long-short equity funds. The current total staff is 67 including an investment team of 19.

As a member of the Existing LLP, the Investor has made contributions of "Ordinary Capital" (cf. chapter 7 of the Existing LLP Deed) of book value GBP 285,000 in the Existing LLP. However, the capital base of the Existing LLP consists not only of the cash contributed by its members but also of intangible assets (which are not reflected on the balance sheet), such as the skill and intellectual capital of its investment team, its name and standing in the industry and its customer relationships. The level of the actual value of the Existing LLP is better illustrated by an offer (which was refused) received from a third party in 2016 of [redacted] in exchange for a 20% equity interest.

In addition to being a member of, and an investor in, the Existing LLP, the Investor has also been active in the Existing LLP's business activities. From the inception of the Existing LLP in 2005, the Investor has been a member of the Existing LLP Board and has held the positions of CEO (or co-CEO) and CIO (or co-CIO). The Existing LLP Board has, in accordance with the Existing LLP Deed, exclusive responsibility for management and control of the business and affairs of the Existing LLP. The Investor has been closely involved in the finance advisory services provided by the Existing LLP as well as in building its the value as a business. As a result, the distributions he has received from the Existing LLP from 2005 onwards, while he has been resident in the UK for tax purposes, may have exceeded what would have been an ordinary return on the capital he has invested in the Existing LLP.

Hence, for the period from 2005 to the time the Investor potentially starts the Work, at least some of the distributions he has received from the Existing LLP have been due to his personal efforts and contributions to the business of the Existing LLP.

2.1.6.2 Retirement from involvement in the Existing LLP upon commencing work for the New Employer

As mentioned in section 1.2, if the Investor begins the Work, he will retire from all active involvement in the business of the Existing LLP. He will also step down from the Existing LLP Board. Hence, the Investor will not perform any financial advisory service or other activities on behalf of the Existing LLP while undertaking the Work and will simply be a passive investor in the Existing LLP (through the New LLP).

Given the strong position of the Existing LLP in the financial advisory market and its large and well-established investment team, the Existing LLP is well equipped to function without the Investor being involved in the management of the business. The Existing LLP has strong management capable of running its day to day business without any involvement of the Investor.

As mentioned, in order to facilitate the Investor's retirement from the Existing LLP, he is contemplating a restructuring of his interest in the Existing LLP, as further described in section 2.3 below.

2.2 The Foundation

2.2.1 History and purpose of the Foundation

For around seven years, the Investor has made gifts (donations) to the Foundation. The Investor established the Foundation as an English company limited by guarantee in accordance with English law on 1 February 2013. On 29 April 2013 the Foundation was registered as a charity by the Charity Commission for England and Wales (the "**Commission**") with charity number 1151815. In accordance with the requirements of English law, details of the Foundation, including annual audited financial statements, are filed with, and published by, the Commission. The Foundation is recognised as a charity for UK tax purposes.

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The objects of the Foundation are exclusively charitable, and include the advancement of education and the advancement of the arts, culture, heritage and science. The Foundation makes regular grants to further such charitable objects. More information about the Foundation is available on its website.[1] In addition, the most recent annual report and accounts of the Foundation are attached to this request for a binding advance ruling.

Enclosure 4: the Foundation: Report and Financial Statements of 31 December 2019.

2.2.2 The Investor's involvement in the Foundation

2.2.2.1 Trustee

The Investor is currently one of five trustees of the Foundation. The other trustees include the Investor's wife, and the following three other members: David Woodburn (**"Mr Woodburn"**), Henrik Syse and Sally Procopis. Mr Woodburn is a member of the Existing LLP and Henrik Syse is a Director of a number of the Investment Fund entities. Sally Procopis has no connections with the Existing LLP or with the Investor. Trustee appointments are made by the members of the Foundation (currently Mr Woodburn and Ms Nicola Staples). The Trustees are required by English law to further the objects of the Foundation for the public benefit and, in relation to that requirement, are regulated by and answerable to the Commission.

None of the trustees of the Foundation receives any benefit from the Foundation and, in particular, none of the trustees is remunerated for acting as a trustee of the Foundation.

2.2.2.2 Funding of the Foundation

The Foundation has been funded by the Investor, primarily by means of gifts to the Foundation out of shares in AKO Fund Limited, which he personally owned. Following those gifts, the Foundation has called from time to time for those shares to be redeemed by AKO Fund Limited for cash, and the cash received from those redemptions has been applied for the purposes of the Foundation's charitable grants.

As stated at the Foundation's website, the foundation has to date been funded with more than GBP 300 million and has approved grants of around GBP 100 million.

2.2.2.3 The Investor's involvement in the Foundation while working for the New Employer

So that he can devote himself more fully to the Work for the New Employer, the Investor is considering resigning from the board of trustees of the Foundation and he will isolate himself from all decisions and information relating to the manner in which the funds of the Foundation are invested.

As part of the restructuring in order to facilitate the Investor's retirement from the Existing LLP, as further described in section 2.3 below, the Investor will not personally make gifts to the Foundation whilst carrying out the Work (and being an assumed tax resident of Norway, cf. section 1.1 above). Continued funding of the Foundation will be by way of gifts from the New LLP.

2.3 New holding structure

2.3.1 Indirect ownership interest in the Existing LLP

To restructure the Investor's interest in the Existing LLP the Investor is planning to establish the New LLP before starting the Work.

The Investor, and a few (probably three) other individuals, will be the only members of the New LLP. The New LLP will become a member of the Existing LLP. The Existing LLP Deed will be amended so that the New LLP takes over the Investor's profit share in the Existing LLP. The Investor himself will cease to be a member of the Existing LLP, and will consequently cease to be entitled to a share of the profits distributed by

[1] https://www.akofoundation.org/

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the Existing LLP. His interest in the Existing LLP will be held indirectly through the New LLP. As mentioned above in section 2.1.6.2, the Investor will also retire from the Existing LLP Board.

2.3.2 New LLP

2.3.2.1 The Investor's share of profits and voting rights

As mentioned in section 2.3.1 above, the Investor will be one of a few individual members of the New LLP. The profit shares of the members of the New LLP and all matters relevant to the operation of the New LLP will be set out in an agreement between the members of the New LLP (the "**New LLP Partnership Deed**"). It should be assumed that the Investor's share of any profits distributed by the New LLP will be 100% or nearly 100%. It is expected that the Investor's share of the member voting rights will also be 100% or nearly 100%, unless the Investor is not permitted to have such member voting rights pursuant to UK domestic financial services regulations. The extent of which the Investor is permitted to have member voting rights in the New LLP is currently under review. For the purpose of this request for a binding advance ruling it may be assumed that a difference between the Investor's share of the profits of the New LLP and the Investor's share of the member voting rights in the New LLP (if any) will merely be a consequence of UK domestic law.

2.3.2.2 New LLP Board

The New LLP Partnership Deed will establish a board (the "**New LLP Board**") which will be responsible for the management of the New LLP. The composition of the New LLP Board is not yet determined but it is intended that the Investor will not be a member of the New LLP Board and not involved in its running or management. Since the Investor's share of the member voting rights remains to be clarified (cf. section 2.3.2.1 above), it is also uncertain whether the Investor will have any power over the composition of the New LLP Board. These details are still under review and have yet to be decided.

2.3.2.3 Object of the New LLP

The objects of the New LLP will be set out in the New LLP Partnership Deed. The business object of the New LLP will be to hold its interest in the Existing LLP as an investment. A further object of the New LLP will be to make gifts to the Foundation, and the New LLP Partnership Deed will include an express power to make such gifts.

2.3.2.4 Gifts by the New LLP to the Foundation

All decisions to make gifts to the Foundation out of the profits of the New LLP will, under the terms of the New LLP Partnership Deed, have to be made by the New LLP Board. The consent of the members (and, in particular, the consent of the Investor) would not be required to enable to New LLP to make such gifts. It is anticipated that, in practice, the New LLP Board will exercise its powers so as to ensure that the New LLP gives away all (or substantially all) of its profits to the Foundation. However, it is likely that those profits would first be used to subscribe for shares in one of the Investment Funds, e.g. AKO Fund Limited, and that the New LLP would give those shares (rather than cash) to the Foundation, as the Investor himself has done previously, cf. section 2.2.2.2 above.

Gifts by the New LLP to the Foundation will only be made insofar as such donations are permitted under English law. For the purpose of this request for a binding advance ruling, it may therefore be assumed that gifts by the New LLP to the Foundation will be in accordance with English law.

Under UK tax legislation, certain gifts to charities give rise to income tax relief for the donor. The shares of AKO Fund Limited have been accepted as qualifying for such an income tax relief. Therefore, because the New LLP will be regarded as transparent for UK tax purposes, and acts of the New LLP will for UK tax purposes be deemed (broadly) to be the acts of the members, gifts of such shares by the New LLP will have the potential to enable members of the New LLP to obtain relief from UK income tax.

2.3.2.5 Distributions from New LLP to its members

Any distributions by the New LLP to its members will have to be resolved upon by the New LLP Board. Hence, in the absence of an express resolution by the New LLP Board to make a distribution to members, the Investor will not receive or be entitled to any part of the profits of the New LLP.

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2.3.2.6 Legal characteristics of the New LLP

1. Separate legal personality of the New LLP

The New LLP will be established as a limited liability partnership in accordance with English law. As a matter of English law, the New LLP will thus have the same general characteristics as the Existing LLP (described above in section **Error! Reference source not found.**) above. In particular, the New LLP will have separate legal personality.

2. UK tax status of the New LLP

As set out in section 2.1.4, although a UK limited liability partnership is treated for the general purposes of English law as a legal entity separate from its members, for UK tax purposes it is treated by specific UK tax legislation as transparent, so that its members (and not the partnership entity itself) are taxed on (broadly speaking) their respective shares of the income or gains arising to the partnership entity. Therefore, the members of the New LLP (and not the New LLP itself) will be within the scope of UK tax on (broadly speaking) their respective shares of the income or gains arising to the New LLP.

3. Limited liability of members of the New LLP

As described in section 2.1.5.1 above, all members of a limited liability partnership generally have limited liability for the partnership's obligation as a matter of English law. That will also be the case for the New LLP. Just as in the case of the Existing LLP, no general obligation of any member of the New LLP to make contributions to cover the total obligations of the New LLP will be agreed between the members of the New LLP. With respect to the other situations where a member of a limited liability partnership may be required to make a contribution to the assets of the New LLP, please refer to section 2.1.5.2 above. The same considerations as set out in that section will apply in the case of the New LLP.

In summary, no member of the New LLP will have unlimited liability for the obligations of the New LLP. The liability of each member of the New LLP will be limited.

3. Question 1: Classification of the New LLP for Norwegian tax purposes

3.1 The issue and the question

After the establishment of the New LLP, the Investor will have an indirect ownership interest in the Existing LLP, and a direct ownership interest in the New LLP. If the New LLP is classified as a tax *transparent* entity (similar to "*deltakerlignede selskaper*" established in Norway) for Norwegian tax purposes, the Investor will be liable to pay tax on his share of the profits of the New LLP (which in turn will comprise of distributions from the Existing LLP) pursuant to NTA chapter 10-40, irrespective of whether or not he receives any distributions from the New LLP.

If, on the other hand, the New LLP is classified as an *opaque* entity (i.e. a separate tax subject) for Norwegian tax purposes, the Investor will only be liable to pay tax to the extent he receives distributions from the New LLP, pursuant to NTA chapter 10-10.

The question for which the Investor requests a binding advance ruling, and which will be examined in this section 3, is whether the New LLP will be classified as a tax transparent or an opaque entity for Norwegian tax purposes.

3.2 Classification shall be based on Norwegian law

The Supreme Court stated in case Rt. 2012 page 1380 *Statoil Holding* that the comparison of a non-Norwegian entity with Norwegian entities that qualify as separate tax subjects (i.e. opaque entities) has to be based on a classification of the non-Norwegian entity pursuant to Norwegian law.[2] The Supreme Court case concerned a question of whether a non-Norwegian entity was "*equivalent*" (in Norwegian: "*tilsvarende*") to a qualifying subject under the Norwegian participation exemption method, so that the ownership interest in the

[2] Rt. 2012 page 1380 *Statoil Holding*, paragraph 48.

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non-Norwegian entity was a qualifying object, cf. NTA section 2-38(2) litra a. The company in question was established in Germany as a limited partnership pursuant to German company law. Norwegian limited partnerships (Norwegian: "*kommandittselskaper*") are not separate tax subjects under Norwegian law, and are therefore not qualifying subjects under the Norwegian participation exemption method, cf. the exhaustive list of qualifying subjects in NTA section 2-38(1). However, the limited partnership was deemed "equivalent" to a Norwegian "*aksjeselskap*" (similar to a UK limited liability company), which is a qualifying subject. The ownership interest in the German entity therefore fell under the Norwegian participation exemption method, cf. NTA section 2-38(2) litra a.

The Investor is not requesting a binding advanced ruling on whether or not his ownership interest in the New LLP will be a qualifying object under the Norwegian participation exemption method. Hence, this case does not involve a question of whether the New LLP would itself be a qualifying subject under the participation exemption, cf. NTA section 2-38(1) litra a had it been resident in Norway, meaning that the Investor's ownership interest would be a qualifying objet, cf. NTA section 2-38(2) litra a. However, as in the aforementioned case, there is a question of how to classify a non-Norwegian entity for Norwegian tax purposes. And the approach taken by the Supreme Court in its practice has equal bearing for the classification in this case. The classification of the New LLP as a transparent or opaque entity for Norwegian tax purposes must therefore be based on Norwegian law.

It follows from this approach that the New LLP's tax status in the UK is not decisive for the classification of the New LLP for Norwegian tax purposes. That the tax status of an non-Norwegian entity in its country of residence is not decisive for the classification for Norwegian tax purposes, was explicitly stated by the Supreme Court in Rt. 2012 page 1380 *Statoil Holding* (paragraph 50):

> The respondent has argued that NHD is considered a transparent entity under German law, and that this must have significance for the equivalent-assessment. **I can neither see that such a view is compatible with the classification being done after Norwegian law**.[3] (**Bold** added)

The Supreme Court also referred to the European Court's decision in case C-303/07 *Aberdeen*, where it was decided that it was not consistent with EU law to treat a foreign entity differently from an equivalent resident entity based on the foreign entity's tax status in its country of residence.[4] As mentioned in section 2 above, although treated as a separate legal entity from its members, for UK tax purposes, the New LLP will be treated under specific UK tax legislation as transparent for UK tax purposes. However, this treatment for UK tax purposes is not relevant to the classification of the New LLP for Norwegian tax purposes. The classification must be based on Norwegian law only. This does not mean that UK law is not relevant. As stated in Rt. 2012 page 1380 *Statoil Holding*, the assessment will be based on the roles that owners etc. have in relation to the non-Norwegian entity pursuant to the company law in the non-Norwegian entity's country of residence:

> (…) The classification must be based on the different parties' participation in the management of the company, the liability for the company's obligations and share in profits and losses, and this clarification of the parties' relations must be based on German law.[5,6]

3.3 Norwegian domestic law: limitation of liability the key criteria for determining whether an entity is a transparent entity or an opaque entity for Norwegian tax purposes

3.3.1 NTA section 10-40, cf. NTA section 2-2(2): positive definition of entities that are *not* tax subjects under Norwegian domestic law

The NTA section 10-40(1) defines the scope of taxation of participants in tax transparent entities. The provision has the following wording:

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[3] In Norwegian: "*Ankemotparten har anført at NHD anses som et transparent selskap etter tysk rett, og at dette må ha betydning for tilsvarende-vurderingen. Jeg kan heller ikke se at et slikt syn er forenlig med at klassifiseringen skal skje etter norsk rett.*"

[4] Rt. 2012 page 1380 *Statoil Holding*, paragraph 52.

[5] Rt. 2012 page 1380 *Statoil Holding*, paragraph 48.

[6] In Norwegian: "*(...) Klassifiseringen må bygges på de ulike involverte parters deltakelse i ledelsen av selskapet, ansvaret for selskapets forpliktelser og deltakelse i overskudd og underskudd, og denne avklaringen av partenes posisjoner skjer med bakgrunn i tysk rett.*"

[redacted]

[redacted]

> The provisions in Sections 10–41 to 10–48 shall apply to partners of general partnerships, limited partnerships, silent partnerships, shipping partnership, as well as to silent partners.[7]

As stated in the commentaries to the provision,[8] the listing of entities where partners are subject to taxation of its share of profits (and losses), is a reference to NTA section 2-2(2). NTA section 2-2(2) exhaustively lists the entities that are not separate tax subjects (i.e. entities that are transparent) under Norwegian domestic law. The provision lists a number of entities established under Norwegian company law in its litra a–d. The New LLP will not be established pursuant to Norwegian company law, and will thus not constitute any such listed entity. However, NTA section 2(2) litra e has a more general definition of entities which will also not be considered tax subjects:

> other partnerships falling within the scope of Section 1-1, Sub-section 1, of the Partnerships Act.[9]

Section 1-1(1) of the Partnerships Act is not limited to companies established in accordance with Norwegian company law. Therefore, if the New LLP falls within the definition of partnerships in section 1-1(1) of the Partnerships Act, it shall be considered tax transparent for Norwegian tax purposes. Section 1-1(1) of the Partnerships Act has the following wording:

> This Act is applicable to a commercial business which is conducted for the joint account and risk of two or more partners, of whom **at least one has unlimited personal liability for the total obligations of the business**. The Act applies also where **two or more partners have unlimited liability for parts of the obligations when these parts altogether constitute the total obligations of the business**.[10] (**Bold** added)

It follows from the wording of the provision that the key criterion for an entity to be considered as a partnership under the Partnerships Act is that at least one partner has "*unlimited personal liability*" for the total obligations of the partnership. Therefore, whether the New LLP will be classified as a tax transparent entity for Norwegian tax purposes depends on whether or not at least one of the members of the New LLP will have "unlimited personal liability" for the obligations of the business of the New LLP.

3.3.2 NTA section 2-2(1): positive definition of entities that *are* separate tax subjects under Norwegian domestic law (if resident in Norway)

That limitation of liability is the key criterion for determining whether or not the New LLP will be classified as tax transparent or opaque for Norwegian tax purposes is further substantiated by NTA section 2-2(1), which defines entities that *are* subject to Norwegian tax, provided that they are resident in Norway. The definition includes specific entities established in accordance with Norwegian law, all of which are entities with limited liability, such as e.g. "*aksjeselskap"* og "*allmennaksjeselskap*" (similar to English private limited liability companies and public limited liability companies respectively). Section 2-2(1) litra e also includes a general definition of separate tax subjects (if resident in Norway) that applies to entities established in accordance with non-Norwegian company law:

> companies or associations, the net wealth of which anyone holds any ownership stake in, or the income of which anyone receives any portion of, **provided that liability for the debts of such company or association is limited to the capital of said company or association**.[11] (**Bold** added)

It follows from the wording of the provision that the key criterion for an entity to be a tax subject (if resident in Norway for tax purposes) is that the obligations of the entity are limited to its capital, i.e. that no shareholder or partner or member has an unlimited liability for the obligations of the business of the entity.

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[7] In Norwegian: "*Bestemmelsene i §§ 10-41 til 10-48 gjelder for deltakere i ansvarlig selskap, kommandittselskap, indre selskap, partrederi og for stille deltakere.*"

[8] *Norsk Lovkommentar*, note 911 to section 10-41(1).

[9] In Norwegian: "*andre selskaper som omfattes av selskapsloven § 1-1 første ledd.*"

[10] In Norwegian: "*Loven gjelder når en økonomisk virksomhet utøves for to eller flere deltakeres felles regning og risiko, og minst en av deltakerne har et ubegrenset, personlig ansvar for virksomhetens samlete forpliktelser. Loven gjelder også hvor to eller flere deltakere har et ubegrenset ansvar for deler av forpliktelsene når disse deler til sammen utgjør virksomhetens samlete forpliktelser*."

[11] In Norwegian: "*selskap eller sammenslutning som noen eier formuesandeler i eller mottar inntektsandeler fra, når ansvaret for selskapets eller sammenslutningens forpliktelser er begrenset til selskapets eller sammenslutningens kapital.*"

[redacted]

[redacted]

3.3.3 All members of the New LLP will have limited liability

As mentioned above in section 2.1.5.1, the general rule is that all members of a UK limited liability partnership have limited liability. Hence, all members of the New LLP will as a general rule have limited liability by virtue of the New LLP being established in accordance with English law.

Further, and as described in section 2.3.2.6(3) above, no general obligation of any member to make contributions to the assets of the New LLP to cover the total obligations of the New LLP will be included in the New LLP Partnership Deed or any other agreement between the members of the New LLP. With respect to the other situations where a member of a limited liability partnership may be obliged to make a contribution to the partnership, please refer to section 2.1.5.2 above.

In summary, no member of the New LLP will have unlimited liability for the total obligations of the New LLP. The liability of each member of the New LLP will be limited.

3.3.4 Conclusion

The New LLP will be an opaque entity for Norwegian tax purposes. The Investor will therefore not be taxed on his share of the profits (and losses) of the New LLP in accordance with NTA chapter 10-40. Rather, the Investor will be taxed in Norway only if (and to the extent that) he receives distributions from the New LLP.

4. Question 2: Distribution of profits from the New LLP to the Investor

4.1 The issue and the question

After the establishment of the New LLP, the Investor will have a direct ownership interest in this entity. Presuming that the New LLP is an opaque entity (cf. section 3 above), the Investor will only be liable to pay tax insofar as he receives distributions from the New LLP, pursuant to NTA chapter 10-10.

That raises the question of what event that will constitute a taxable "*distribution*" to the Investor. If the Investor is considered to receive taxable distributions when the New LLP receives distributions from r, notwithstanding any subsequent active decision from the New LLP to allocate funds to the Investor, the tax situation for the Investor is not much different compared to a situation where the Investor would be taxed for his share of the profits and losses of the New LLP pursuant to NTA chapter 10-40. The situation would however be different if a tax liability for the Investor only arises upon an active decision by the New LLP to distribute profits.

The question for which the Investor requests a binding advance ruling, and which will be examined in this section 4, is what event will trigger a tax liability for the Investor on distributions from the New LLP.

4.2 The Investor shall only be considered to have received taxable dividends from the New LLP when the New LLP Board has passed a resolution to distribute

4.2.1 UK law: The Investor is not entitled to profits of the New LLP in absence of New LLP Board resolution

As described in section 2.3.2.5, distributions from the New LLP to its members are subject to a resolution to make such distributions by the New LLP Board. From a UK law perspective, the board resolution will be the "distribution event", i.e. the Investor is not considered to have received any part of the profits of the New LLP before the New LLP Board has actually resolved to make a distribution.

4.2.2 NTA section 14-2(1) second sentence: tax obligation arises once the Investor is "*unconditionally entitled*" to a benefit

The same event will also be decisive from a Norwegian tax perspective. The time at which distributions shall be taxed at the hands of a personal owner is governed by NTA section 14-2(1) second sentence, which has the following wording:

[redacted]

> Any benefits accrued by transfer from others shall be recognised as income upon the taxpayer becoming **unconditionally entitled** to such benefit.[12] (**Bold** added)

It follows from the wording that a distribution shall not be taxed in the hands of the shareholder before the shareholder is "*unconditionally entitled*" to said distribution. With respect to the Investor, he will not become entitled to any part of the profits of the New LLP before the New LLP Board resolves to make a distribution to its members. Therefore, the Investor will only become "*unconditionally entitled*" to a distribution once the New LLP Board has passed the resolution. This is similar to the situation where a shareholder receives dividends from a Norwegian limited liability company, where the general meeting's resolution to distribute dividends is generally the event that triggers the shareholders' tax obligation.[13]

4.2.3 Conclusion

The Investor shall not be subject to tax on distributions from the New LLP until the New LLP Board has passed a resolution to make a distribution to the Investor (and other members).

5. Question 3: Gifts from the New LLP to the Foundation

5.1 The issue and the question

As mentioned in section 2.3.2.4 above, it is anticipated that the New LLP Board would exercise its powers so that the New LLP gives away all or substantially all of its profits to the Foundation (either directly by cash transfer or by first subscribing for shares in one of the Investment Funds and giving those shares to the Foundation).

Gifts from a company are not taxable at the hands of the owners of the company under Norwegian domestic tax law. Gifts from the New LLP are therefore not taxable at the hands of the Investor. By contrast, only distributions from the New LLP to the Investor will be taxable income for the Investor pursuant to NTA section 5-1, cf. NTA section 10-11(1).

The question for which the Investor requests a binding advance ruling, and which will be examined in this section 145, is whether or not gifts made from the New LLP to the Foundation shall be deemed as distributions of taxable dividends from the New LLP to the Investor pursuant to NTA section 5-1 and NTA section 10-11(1).

5.2 Gifts from the New LLP to the Foundation shall not be classified as dividend distributions to the Investor

5.2.1 The gifts will not be "*dividends*" pursuant to NTA section 10-11(2)

Dividends are, for the purpose of the NTA, defined in NTA section 10-11(2), which has the following wording:

> Any distribution implying a gratuitous transfer of values from a company **to a shareholder** shall be classified as dividends. (…) Gratuitous transfer to the **shareholder's spouse or to persons to whom the shareholder is related by blood or marriage, in an ascending or descending line or in the horizontal line as far as aunts and uncles, shall also be classified as dividends to the relevant shareholder.**[14] (**Bold** added)

Pursuant to the wording of the provision, only distributions made to a shareholder or certain specifically listed related persons of said shareholder shall be considered as dividends. The list of individuals that are

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[12] In Norwegian: "*Fordeler som innvinnes ved overføring fra andre, tas til inntekt når skattyteren får en ubetinget rett til ytelsen.*"

[13] See Zimmer, "*Bedrift, selskap og skatt*, 6 edition (2014), page 300.

[14] In Norwegian: "*Som utbytte regnes enhver utdeling som innebærer en vederlagsfri overføring av verdier fra selskap til aksjonær (...) Som utbytte til vedkommende aksjonær regnes også vederlagsfri overføring til aksjonærens ektefelle eller til personer som aksjonæren er i slekt eller svogerskap med i opp- eller nedstigende linje eller i sidelinjen så nær som onkel eller tante.*"

[redacted]

[redacted]

identified with the shareholder is exhaustive. This has been established by the Supreme Court,[15] in legal literature,[16] and has been accepted in administrative practice.[17]

A gift from the New LLP to the Foundation will not constitute a gratuitous transfer of value from the New LLP to the Investor, or to any person to whom the Investor is related by blood or marriage. In the absence of an express resolution by the New LLP Board to make a distribution to its members, the Investor is not entitled to any of the New LLP's profits. A gift from the New LLP to the Foundation requires a resolution by the New LLP Board, but such a resolution will not entitle the Investor to any part of the gift values.

It follows that gifts from the New LLP to the Foundation cannot be considered as dividends pursuant to NTA section 10-11(2).

5.2.2 NTA section 13-2 is not applicable

5.2.2.1 The issue

Although gifts from the New LLP to the Foundation will not be classified as dividends to the New LLP's members pursuant to NTA section 10-11(2), such gifts may in principle be recharacterised as dividends based on the general anti-avoidance rule in NTA section 13-2, if the conditions of the provision are fulfilled.

That gifts from a company to a charity may in principle be recharacterised as taxable dividends at the hands of the personal shareholder, has been assumed in legal literature[18] and in administrative practice[19] in relation to the former non-statutory general anti avoidance rule, of which NTA section 13-2 to a large extent is a codification. Since there are no apparent rationale for why the situation should be different after the entry into force of the general anti avoidance rule in NTA section 13-2, we assume gifts may in principle be recharacterised pursuant to said provision.

5.2.2.2 NTA Section 13-2(2): wording

It follows from NTA section 13-2(1), cf. NTA section 13-2(4)–(7) that taxation of a recharacterised disposition or dispositions may be done in case of "*avoidance*". The NTA section 13-2(2) establishes two cumulative conditions in order for there to be an "avoidance" within the meaning of the provision:

> An avoidance exists if one or more dispositions in connections have been carried out that
>
> a) suggests that the main principle was to obtain a tax benefit, and
>
> b) cannot be given fiscal effect based on after an overall assessment, cf. third paragraph.[20]

The general structure of NTA section 13-2 is the same as the previous non-statutory general anti avoidance rule, albeit there are certain differences in the content of the two cumulative conditions in NTA section 13-2, compared to the previous non-statutory general anti avoidance rule.

5.2.2.3 Threshold: Statement by the Ministry of Finance

As a general rule, the taxpayer's choice of transactions, dispositions etc. that are in line with private law shall be accepted for tax purposes. There is a high threshold for recharacterising a private law disposition (e.g. a gift in this case) for tax purposes. The Ministry of Finance (the "**Ministry**") has emphasised this in a

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[15] Rt. 1878 page 1184 *Sømme*

[16] See e.g. Zimmer, *Bedrift, Selskap og Skatt* , 7 edition (2019) page 295.

[17] See e.g. BFU 06/09.

[18] See e.g. Zimmer, *Bedrift, Selskap og Skatt* , 7 edition (2019) page 296.

[19] See e.g. BFU 27/09.

[20] In Norwegian: "*En omgåelse foreligger når det er foretatt en disposisjon eller flere sammenhengende disposisjoner som*

a) tilsier at hovedformålet var å oppnå en skattefordel, og
b) etter en totalvurdering ikke kan legges til grunn for beskatningen, jf. tredje ledd."

[redacted]

[redacted]

statement made in relation to a gift from a limited liability company to charitable purposes (building of a swimming bath):[21]

> In certain cases it may be difficult the see the genuine company interest of a company gift to ideal purposes, so that it is natural to assume that it is the shareholders' more personal interests that is the rationale for the company's decision to make the gift. If the shareholders have sufficient influence in the company to make sure that the making of the gift can be resolved in the relevant corporate body, it may out of more general avoidance considerations in exceptional cases be imagined cases where the distribution must be considered as dividends to these shareholders. Such recharacterisation will first and foremost be relevant for certain gifts of irregular size in relation to the company (…) Hence, in principle it is possible to imagine dividend taxation by way of recharacterisation where large gifts to charity may be assumed to be due to the shareholders' more personal interests than to promote the company's reputation etc. Such taxation will however be demanding and difficult to enforce, especially if the aim is an administrative practice that is strict and as consequent as possible. It may also appear unreasonable to be taxed for reasonable gifts for the public benefit. I will therefore consider it **appropriate not to seek to achieve such a strict practice. Recharacterisation in this field should, in my opinion, be limited to atypical cases where the shareholders uses their authority to carry out resolutions in the corporate bodies of the company in an disloyal way to favour its own gift purposes, instead of resolving to make the gift based on the company's interests**. (…)[22] (**Bold** added)

It follows from the above that the Ministry has taken the position that gifts from a company to ideal purposes shall, as the clear point of departure, be accepted for tax purposes. Recharacterisation will only be an option if the owners of a company use their influence to force through resolutions to make gifts to favour their own personal gift purposes, at the expense of the company purpose. The Ministry's statement directly concerned recharacterisation of gifts from companies to ideal purposes pursuant to the previous non-statutory anti-avoidance rule. However, the statement should have equal bearing in relation to recharacterisation pursuant to NTA section 13-2, as the rationale for the Ministry's position in relation to recharacterisation of gifts to dividends is not affected by the legal basis for the recharacterisation. We have also not identified any statements in the preparatory works to NTA section 13-2 that would suggest that there should be a lower threshold for recharacterising gifts to dividends under NTA section 13-2 than under the previous non-statutory general anti-avoidance rule.

The Ministry's statement suggests that gifts from the New LLP to the Foundation shall not be recharacterised pursuant to NTA section 13-2, as such gifts will not constitute such an atypical case that recharacterisation of gifts to taxable dividends shall be reserved for. The New LLP will be set up with an express purpose to make donations to the Foundation. The Investor, and the other members, will not themselves receive any benefits from the Foundation. Hence, the Investor will not use his influence to force through resolutions to make gifts to his own personal gift purposes, at the expense of the expressed purpose of the New LLP.

5.2.2.4 Administrative practice

1. BFU 05/09

The position taken by the Ministry has been followed up by the Directorate of Taxes (the "**Directorate**") in its administrative practice. Reference is in particular made to the Directorate's binding advanced rulings in BFU 05/09 and BFU 06/09, where the Ministry's statement in Utv. 2009 page 728 FIN is referred to. The two cases bears significant resemblance to the facts of this case. In both cases, the Directorate concluded that there was no legal basis for recharacterising the gifts in question to taxable dividends.

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[21] Utv. 2009 page 728 (FIN).

[22] In Norwegian: "*I enkelte tilfeller kan det være vanskelig å se den genuine selskapsinteressen i en spesiell selskapsgave til et ideelt formål, slik at det er nærliggende å anta at det er aksjonærenes mer personlige interesser som ligger bare selskapets gavebeslutning. Har aksjonærene tilstrekkelig innflytelse i selskapet til å sørge for at gaven kan besluttes i det aktuelle selskapsorgan, kan det da ut fra alminnelige omgåelsesbetraktninger unntaksvis tenkes tilfeller der utdelingen må anses som utbytte til disse aksjonærene. Slik gjennomskjæring vil først og fremst være aktuelt for enkelte gaver av uvanlig størrelse etter selskapets forhold (...) I prinsippet er det altså mulig å se for seg utbyttebeskatning ved gjennomskjæring når større gaver til allmennyttige formål kan antas å bero mer på aksjonærenes personlige interesser enn på hensynet til selskapets omdømme mv. Slik beskatning vil imidlertid være krevende og vanskelig å håndheve, især hvis det legges opp til en streng og mest mulig konsekvent ligningspraksis. Det kan også fremstå som urimelig å bli beskattet for fornuftige gaver til allmennyttige formål. Jeg vil derfor anse det mest hensiktsmessig at det ikke legges opp til en slik streng praksis. Gjennomskjæring på området bør etter mitt syn begrenses til helt atypiske tilfeller hvor aksjonærene illojalt bruker sin vedtaksmyndighet i selskapets organer til å tilgodese sine egne gaveformål, fremfor å legge selskapets interesser til grunn for gavevedtaket. (...)*".

[redacted]

The case in BFU 05/09 concerned a holding company that planned to make a gift to a foundation that promoted various ideal purposes, and where the shareholders (a husband and a wife that owned 50% of the shares in the holding company each) sat in the board, in addition to two other board members. The articles of association of the company had been amended to include as an object for the holding company to make donations to charity. Hence, the shareholders wanted the company to make gifts to charity, and had used their influence as shareholders to facilitate such gifts. The gift in question could be made in accordance with Norwegian company law.

The Directorate concluded that the gift could not be considered as dividends pursuant to NTA section 10-11(2) (cf. the description above in section 5.2.1.). The gifts could also not be recharacterised pursuant to the non-statutory general anti-avoidance rule.

The Directorate referred to the Ministry's statement in Utv. 2009 page 728 FIN. The concrete assessment of whether the conditions for applying the non-statutory general anti-avoidance rule does not clearly separate between the two different cumulative conditions, although their argumentation seems more focused on the so-called "overall assessment" (Norwegian: "*helhetsvurderingen*"). The Directorate stated that the gifts would not constitute a benefit for the shareholders, and that the gift would therefore not be in conflict with the purpose of the dividend rules:

> The reality is that it is the **Foundation that gets the economic benefit** of dividends not being taxed (…) when the gift is made directly from the company.
>
> On the other side it may be argued that if such a gift is not taxed as dividends, it is in reality the Shareholders that decide how the amount that [equals the dividend tax] shall be used, and not the authorities (…) It is still uncertain if it involves a benefit for the Shareholders. In reality they do not come "closer to the money", rather the opposite.
>
> In the present case, the Shareholders will not get access to the funds, in the sense that they may dispose of them for their own benefit. The ideal purpose, that the Shareholders have defined through the incorporation of the Foundation, sets the limits (…)
>
> It is also a factor that the Company/Shareholders actually makes a gift to the Foundation and thus give away the actual values. Further, the Foundation is a self-owning institution that no one can have an ownership share in (…)
>
> In summary, the directorate is of the opinion that if the gift in this case is made directly to the Foundation, this does not constitute a benefit for the Shareholders. If the Shareholders does not obtain a benefit, it is difficult to argue that the transaction conflicts with the purpose of the dividend rules.[23] (**Bold** added).

The ruling in BFU 05/09 has great resemblance to this case, and clearly suggests that gifts from the New LLP cannot be taxed as dividends. Like in BFU 05/09, the entity that will make the gift (i.e. New LLP) is set up to facilitate making gifts to a foundation that promotes ideal purposes. Making such gifts will therefore be in accordance with the purpose of the New LLP. Further, the Investor has been involved in the board of the Foundation together with amongst other his wife, although the Investor himself may step down from the board when he starts working for the New Employer. In any case, he (together with his wife) has no more control over the Foundation than the shareholders in BFU 05/09 had over the foundation in that case. Based on the considerations in BFU 05/09, the Investor will not obtain a relevant benefit if gifts are made directly from the New LLP to the Foundation.

The reasoning in BFU 05/09 suggests that none of the conditions of NTA section 13-2(2) are fulfilled. With respect to NTA section 13-2(2) litra a, the main purpose of making the gifts is not to obtain a tax benefit, since the Investor will not obtain a relevant benefit. With respect to NTA section 13-2(2) litra b, whether the transaction will conflict with the purpose of tax rules are among the factors to be taken into consideration, cf.

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[23] In Norwegian: "*Realiteten er at det er stiftelsen som får den økonomiske fordelen av at utbyttet ikke beskattes (...) når gaven gis direkte fra selskapet. (…) På den annen side kan det argumenteres med at dersom en slik gave ikke utbyttebeskattes, så er det i realiteten aksjonærene som bestemmer hvordan beløpet [som tilsvarer utbytteskatten] skal disponeres, og ikke staten. (...) Det er likevel usikkert om det innebærer noen fordel for aksjonærene. Reelt sett kommer de ikke "nærmere pengene", snarere tvert imot. (…) I foreliggende sak, vil ikke Aksjonærene få tilgang til midlene, i den forstand at de kan disponere over dem til egen fordel. Det allmennyttige formålet, som Aksjonærene har definert ved opprettelse av stiftelsen, setter grensene. (…) Det er også et moment at Selskapet/Aksjonærene faktisk gir en gave til stiftelsen og således gir fra seg de aktuelle verdiene. Videre er Stiftelsen en selveiende institusjon som ingen kan ha eierinteresser i (...) Oppsummeringsvis er direktoratet derfor av den oppfatning at dersom gaven i inneværende sak gis direkte til Stiftelsen, innebærer det ikke en fordel for Aksjonærene. Dersom Aksjonærene ikke får en fordel er det også vanskelig å argumentere for at transaksjonen er i strid med utbyttereglenes formål.*"

[redacted]

[redacted]

NTA section 13-2(3) litra f. The fact that gifts from New LLP to the Foundation will not conflict with the purpose of dividend rules clearly suggests that the condition in NTA section 13-2(2) litra b is not fulfilled.

2. BFU 06/09

The case in BFU 06/09 is very similar to the one in BFU 05/09. It involved a holding company that planned to make a gift to a foundation that promoted various ideal purposes. The shareholders (a husband and a wife who owned 69% and 39% of the shares in the company respectively) constituted the majority of the initial board of the foundation. The articles of association of the company included as an object for the holding company to make donations to charity. The gift in question from the holding company to the foundation could be made in accordance with Norwegian company law.

The Directorate stated, as in BFU 05/09 that the gift would not constitute a benefit for the shareholders, and that the gift would therefore not be inconsistent with the purpose of the dividend rules. The Directorate's reasoning is more or less word for word identical to the Directorate's statement in BFU 05/09 cited above in section 5.2.2.4(1).

The Directorate has clearly seen the two cases in connection, and taken the position that such gifts from companies to foundations shall not be taxed as dividends. This is also in line with the general position taken by the Ministry in Utv. 2009 page 728 FIN.

3. BFU 34/09

The case in BFU 34/09 concerned a limited liability company ("**A**") that was going to be established with an ideal purpose. The company would receive annual gifts from another limited liability company ("**B**"), where the sole shareholder of A was a minority shareholder. One of the questions was whether A was a tax-exempt company pursuant to NTA section 2-32, which the Directorate concluded that it was. Another question was whether the gifts to A should be taxed as dividends at the hands of the shareholders in B. The Directorate concluded, with a similar reasoning as in BFU 05/09 and 06/09, that the gifts could not be taxed as dividends pursuant to NTA section 10-11 or the non-statutory general anti-avoidance rule.

The case further underlines the position taken by the Directorate in BFU 05/09 and 06/09. The case suggests that gifts from a company to an entity with ideal purposes shall not be taxed as dividends, even if an owner of the company making the gifts has influence over the recipient of the gift, when said owner does not himself/herself obtain any economic benefit from the recipient of the gift.

4. BFU 23/08

It may also be mentioned that the Directorate was reluctant to recharacterise gifts from a company to charities even before the Ministry's statement in Utv. 2009 page 728 FIN. The case in BFU 23/08, which predated said statement from the Ministry, involved gifts from a holding company to a charity. The articles of association of the holding company had been amended to include making donations to charity as a purpose of the company. The contemplated gift would also otherwise be compliant with company law rules. The Directorate concluded that there was no legal basis for taxing the gift as dividends at the hands of the sole shareholder of the holding company. The Directorate considered that it would not be disloyal that the gift would be made from the holding company, and not the personal sole shareholder. The Directorate stated:

> The Tax Directorate have after this not found basis to consider it disloyal to make the contemplated gift from the Company, rather than make a dividend distribution to the shareholder who then makes the gift in his own name. We assume in this regard as informed that it will be within the purpose provision of the Company to make distributions to charitable and ideal purposes. We also assume as informed that this is a gift that the Company can make pursuant to the Private Limited Liability Companies Act sections (…) We further emphasise that the recipient of the gift is a voluntary organisation (…), that the shareholder does not have influence or an economic interest in relation to the recipient of the gift, and that the gift does not benefit the shareholder insofar as he obtains benefits towards the recipient of the gift.[24]

[24] In Norwegian: "*Skattedirektoratet har etter dette ikke funnet holdepunkter for at det er illojalt å gi den skisserte gave fra Selskapet, i stedet for å foreta en utbytteutdeling til aksjonær som så gir gaven i sitt navn. Vi legger i denne sammenheng til grunn som opplyst at det ligger innenfor Selskapets formålsbestemmelse å kunne foreta utdelinger til veldedige og allmennyttige formål. Vi legger også til grunn som opplyst at dette er en gave som Selskapet kan gi i henhold til aksjeloven § (...) Videre legger vi bl.a. vekt på at gavemottaker er en frivillig organisasjon (...), at aksjonæren ikke har innflytelse eller økonomisk interesse i forhold til gavemottaker, og at gaven ikke kommer aksjonæren til gode ved at han får fordeler overfor gavemottaker.*"

[redacted]

[redacted]

A distinguishing factor in BFU 23/08, compared to the cases in BFU 05/09 and BFU 06/09 (and the Investor's case), is that the shareholder did not have any influence over the recipient of the gift. However, the Directorate has consistently held in its later practice that influence over the board of a foundation that receives gifts from the shareholder's holding company does not itself provide reason for recharacterisation. The emphasis put on a lack of influence over the recipient of the gift in BFU 23/08 should therefore not have any decisive significance for the assessment of gifts made by the New LLP to the Foundation in the Investor's case.

As in the BFU 23/08, the Investor does not have an economic relation to the recipient of gifts from the New LLP (i.e. the Foundation). The Investor will also not obtain any benefit from the Foundation.

5.2.2.5 Summary

In summary, both statements from the Ministry and administrative practice clearly indicate that gifts from an entity to charities shall not be recharacterised as dividends when such gifts are in line with the purpose of the entity making the gifts, and such gifts are otherwise made in accordance with relevant company law rules. Such gifts from the entity will not favour the shareholder(s) of the entity making the gift at the expense of the entity. That remains true even if the shareholders of the entity making the gifts have influence over how the recipient will make use of the gift to promote ideal purposes in line with the object of the recipient, as long as the shareholders do not otherwise have an economic interest in, or obtain any economic benefit from, the recipient of the gift.

On this basis, the contemplated gifts from the New LLP to the Foundation will fall into the category of gifts that the general anti-avoidance rule (now in NTA section 13-2) is not intended to apply to, as understood by the tax authorities themselves.

5.2.3 Conclusion

The contemplated gifts from the New LLP to the Foundation shall not be taxed as dividends at the hands of the Investor, neither based on NTA section 10-11(2) nor based on NTA section 13-2.

6. Question 4: Labour income

6.1 The issue and the question

After the reorganisation of the Investor's interest in the Existing LLP to facilitate his retirement from his active engagement in the Existing LLP, the Investor will not receive any distributions directly from the entity. Rather, the New LLP may receive distributions from the Existing LLP. As described in section 2.3.2.5, the Investor will only receive dividend distributions from the New LLP if the New LLP Board makes an explicit resolution to make a distribution.

Dividend distributions from a company to an owner of the company are taxed as capital income, cf. NTA section 5-1 and NTA section 5-20. However, if the dividend distributions qualify as labour income for tax purposes, the distributions shall be taxed as labour income irrespective of the company law-classification of the distribution, cf. NTA Section 5-1.

The question for which the Investor requests a binding advance ruling, and which will be examined in this section 6, is whether distributions from the Existing LLP to the New LLP, or from the New LLP to the Investor, shall be taxed as labour income, cf. NTA section 5-1.

[redacted]

[redacted]

6.2 Profits distributed from the Existing LLP to the New LLP shall not be taxed as labour income in the hands of the Investor

6.2.1 NTA section 5-1: income must be "*gained from work*"

NTA section 5-1(1) defines taxable labour income as "*any benefit gained from work*".[25]

As the wording indicates, there has to be a connection between personal services performed by the taxpayer and the benefit gained. Supreme Court practice indicates that the personal services must have given rise to the acquirement of the benefit.[26] There is no requirement that the benefit is received from an employer or that the taxpayer has a right to receive the income.[27] Further, a taxpayer cannot attribute labour income to a holding company (or, by analogy, to a UK limited liability partnership which is regarded as fiscally opaque for Norwegian tax purposes) with fiscal effect. Hence, if personal services performed by the Investor give rise, in whole or in part, to distributions by the Existing LLP to the New LLP, such distributions will be taxed as labour income at the hands of the Investor.

6.2.2 Personal work performed by the Investor will not give rise to any distributions from the Existing LLP to the New LLP

As described in section 2.1.6.1 above, the Investor has, from the formation of the Existing LLP in 2005 until the present date, been personally involved in the management of the financial advisory services business of the Existing LLP. Further, the distributions he has received from the Existing LLP from 2005 onwards, while he has been resident in the UK for tax purposes, may have exceeded an ordinary return on the capital he has invested in the Existing LLP. However, as explained in 2.1.6.1, the capital base of the Existing LLP consists not only of the "Ordinary Capital" contributed by its members but also of intangible assets (which are not reflected on the balance sheet), such as the skill and intellectual capital of its investment team, its name and standing in the industry and its customer relationships. Accordingly, the actual value of the Existing LLP is very substantially greater than the amount of the Ordinary Capital contributions it has received.

Historically, the Investor's work at the Existing LLP has given rise to distributions to him by the Existing LLP. However, the Investor has not been resident in Norway for tax purposes at the time of these distributions, and so these historical distributions are not taxable in Norway.

As described in section 2.1.6.2 above, the Investor will no longer be active in the business activities of the Existing LLP if he takes up the Work. He will also no longer be a member of the Existing LLP Board. Given the strong position of the Existing LLP in the financial advisory market and its large and well-established investment team, the Existing LLP is well equipped to function without any involvement of the Investor in the management of the business. Since the Investor will only become resident in Norway under the Tax Treaty once he starts the Work (cf. the assumptions described in section 1.1), the Investor will not perform any personal work related to the financial advisory services business of the Existing LLP while he is resident in Norway for Norwegian tax purposes.

On this basis, personal services performed by the Investor will not give rise to any part of any distribution by the Existing LLP to the New LLP while the Investor is carrying out the Work.

6.2.3 Conclusion

Profits distributed by the Existing LLP to the New LLP while the Investor undertakes the Work (and may be a tax resident in Norway) will not be taxed as labour income in the hands of the Investor.

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[25] In Norwegian: "*enhver fordel vunnet ved arbeid*".

[26] See e.g. Zimmer, *Lærebok i skatterett*, 7 edition (2014), page 156.

[27] See e.g. Zimmer, *Lærebok i skatterett*, 7 edition (2014), page 153.

[redacted]

[redacted]

6.3 Profits distributed from the New LLP shall not be taxed as labour income in the hands of the Investor

6.3.1 Personal work performed by the Investor will not give rise to any distributions from the New LLP

Distributions (if any) by the New LLP to the Investor raise the same legal question with respect to taxation as labour income as distributions by the Existing LLP to the New LLP. In order for such distributions to be taxed as labour income in the hands of the Investor, personal services performed by the Investor must have given rise to the distributions.

While the Investor carries out the Work (and may be tax resident in Norway), he will only perform personal services for the New Employer. His engagement with the New LLP will be that of a member of a UK limited liability partnership. The purpose of the New LLP will be to hold its investment in the Existing LLP and to make gifts to the Foundation (cf. section 2.3.2.3). The activity in relation to the achievement of these purposes will not entail any personal services performed by the Investor. Any distribution received by the Investor from the New LLP will therefore be in his capacity as a member of the New LLP.

6.3.2 Conclusion

Profits distributed by the New LLP to the Investor while the Investor is carrying out the Work (and may be a tax resident in Norway) will not be taxed as labour income in the hands of the Investor.

7. Request for advance ruling

The Investor requests a binding advanced ruling, and confirmation from the Norwegian tax authorities that:

1. the Investor will not be taxed for his share of the profits and losses of the New LLP, pursuant to NTA chapter 10-40 while working for the New Employer (and possibly being a tax resident of Norway);
2. the Investor will not be taxed of the profits of the New LLP until the New LLP Board makes an explicit resolution to make a distribution of profits to him;
3. gifts by the New LLP to the Foundation will not be taxed as dividends in the hands of the Investor pursuant to NTA section 5-1(1), section 10-11 or section 13-2; and
4. distributions by the Existing LLP to the New LLP and distributions by the New LLP to the Investor will not be taxed as labour income in the hands of the Investor pursuant to NTA section 5-1.

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If there is need for additional information or if there are questions, the undersigned may be contacted on e-mail, office phone [redacted]

Yours sincerely for [redacted]

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