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Judgment in Case E-7/07 *Seabrokers AS v The Norwegian State, represented by Skattedirektoratet (the Directorate of Taxes)*

Norwegian tax rules on maximum credit allowance for tax paid abroad may restrict freedom of establishment

In a judgment delivered today, the EFTA Court gave an advisory opinion concerning questions referred to it by *Stavanger tingrett* in Norway. The case before *Stavanger tingrett* concerns a dispute on Norwegian tax rules on maximum credit allowance for tax paid in another EEA State and whether they conform *inter alia* with Article 31 EEA on freedom of establishment.

The questions referred to the Court concerned in essence whether it is contrary to Article 31 EEA for an EEA State, when calculating the maximum credit allowance for tax paid in another EEA State, to attribute a portion of on the one hand debt interest expenses of a company and on the other hand group contributions that are made between companies under its fiscal jurisdiction, to income earned through its branch in the other EEA State, and whether the answer depends on the expenses being linked solely to the business activities in the former State.

According to Norwegian tax rules, resident taxpayers with income both in Norway and abroad are taxed, according to the principle of global income taxation, on their combined net income in Norway and abroad. When resident taxpayers have income in another State (host State) which taxes that income, the principle of global taxation entails double taxation. To relieve such double taxation, Norway grants a tax credit for tax paid in the host State, but only up to a maximum amount (maximum credit allowance).

In Norway, the maximum credit allowance is calculated on basis of the net income in the host State after deduction of a portion of expenses, such as debt interest and group contribution, proportionate to the part of the global income derived in the host State. If the host State does not allow deduction of these expenses when it calculates the base on which to tax income, the result is that taxpayers may be left with having paid more tax in the host State than what Norway compensates in credit allowance. This places taxpayers with a branch in another EEA State in a less favorable position for the sole reason that they made use of their right of establishment under the EEA Agreement.

The Court held that the EEA Agreement does not oblige the Contracting Parties to give relief for double taxation within the European Economic Area and that the Contracting Parties have retained their competence to determine the connecting factors for the allocation of their fiscal jurisdiction, *inter alia* by concluding bilateral agreements. However, as far as the exercise of their taxation power so allocated is concerned, the EEA States must comply with EEA rules. Therefore, the Court found it necessary to assess whether rules limiting maximum credit allowance, such as the ones at issue in the main proceedings, restrict the freedom of establishment under Article 31 EEA.

The Court noted that a higher tax burden resulting from the fact that a taxpayer is subjected to two tax regimes is, as such, liable to dissuade companies from using their right of establishment under the EEA Agreement. However, obstacles to freedom of establishment that are a consequence of a mere difference in tax regimes between States are outside the scope of the EEA Agreement.

In evaluating whether a disadvantage caused by rules on apportionment of expenses when calculating the maximum credit allowance is a consequence of a mere difference in tax regimes between States, the Court found it necessary to assess whether a company with a branch in another EEA State is in a situation which is, with regard to the relevant expenses, objectively comparable to the one of a company having all its business within the home State.

As concerns debt interest expenses, the Court held that a company conducting all its business in its home State and having all its debt interest expenses linked to that State, and a company conducting its business in its home State and through a branch in a host State but having all its debt interest expenses linked to the home State, are in a comparable situation with respect to these expenses. Thus, they should get the same tax treatment in the home State with respect to these expenses.

Consequently, the Court concluded with respect to debt interest expenses that an EEA State which attributes, in applying the principle of net income taxation, a portion of debt interest expenses of a company to income earned through its branch in another EEA State, when calculating the maximum credit allowance for tax paid in that State, restricts the freedom of establishment within the meaning of Article 31 EEA, insofar as the expenses can only be linked to the company's business in the former State.

As concerns group contributions, the Court held that when comparing two companies that make group contributions to daughter companies in their home State, the fact that one of the companies has a branch in another EEA State, does not place it in a different position with regard to group contributions. The existence of the branch abroad has no bearing on the possibility of the home State to tax the group contributions at the receiving companies. Both companies should thus get the same tax treatment with respect to group contributions.

Therefore, the Court concluded with respect to group contribution that an EEA State which attributes, in applying the principle of net income taxation, a portion of a company's costs in the form of group contributions made to other companies under this State's fiscal jurisdiction to income earned through the company's branch in another EEA State, when calculating the maximum credit allowance for tax paid in that State, restricts the freedom of establishment within the meaning of Article 31 EEA.

The full text of the judgment may be found on the Internet at: www.eftacourt.int.

This press release is not an official document. Please note that the Court may not comment on the case.