OSLO TINGRETT

Doc 42

EFTA Court
1 Rue du Fort Thüngen
L-1499 Luxembourg

Your reference	Our reference	Date
	20-126483TVI-TOSL/06	1 July 2021

PRA Group Europe AS - Skatteetaten – Request for an Advisory Opinion

1. Introduction

Pursuant to Section 51a of the Norwegian Courts of Justice Act (*Lov om domstolene*) and Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (SCA), Oslo District Court (*Oslo tingrett*) hereby requests an Advisory Opinion from the EFTA Court in Case No 20-126483TVI-OTIR/06 between PRA Group Europe AS and the Norwegian Government, represented by the Tax Administration (*Staten v/ Skatteetaten*).

The parties to the case are as follows:

Plaintiff: PRA Group Europe AS,
represented by Board Chairman Leif Henning Dokset
P.O. Box 9106 Grønland
0133 Oslo

Counsel: Advokat (H) Anette Fjeld
Deloitte Advokatfirma AS
P.O. Box 221 Sentrum
0103 Oslo

Defendant: Norwegian Government, represented by the Tax Administration
(*Staten v/ Skatteetaten*)
P.O. Box 9200 Grønland
0134 Oslo

Counsel: Office of the Attorney General (Civil Affairs)
(*Regjeringsadvokaten*)
Represented by Advokat Ida Thue

P.O. Box 8012 Dep
0030 Oslo

The case concerns the validity of the Tax Appeals Board's decision of 24 June 2020 concerning PRA Group Europe Subholding AS, by which a deduction for interest paid on debt to affiliated parties was limited, see Section 6-41 of the Norwegian Tax Act (*skatteloven* – "the Tax Act"). The central question in the case is whether the limitation on deductibility under Section 6-41 is compatible with Article 31 of the Agreement on the European Economic Area ("EEA Agreement" or "EEA"), read in conjunction with Article 34.

2. Facts

PRA Group is a global group engaged in the acquisition of financial assets and service of debt. The group has several companies in Europe, which are owned by the holding company PRA Group Europe Holding S.à.r.l. That company is subject to taxation in Luxembourg.

PRA Group Europe Subholding AS (subject to taxation in Norway) was a wholly-owned subsidiary of the holding company PRA Group Europe Holding S.à.r.l. PRA Group Europe Subholding AS was financed with a combination of equity and loan from the parent company. The interest expenses for the fiscal years 2014 and 2015 are related to that debt.

The company did not receive any other value transfers from the parent company in 2014 and 2015. In its tax returns for 2014 and 2015 the company claimed a deduction for that debt interest, see Section 6-40 of the Tax Act. The company asserted that Section 6-41 of the Tax Act entailed a reduction in the deductible amount. Disallowed interest deductions amounted to NOK 132 969 145 for the fiscal year 2014 and NOK 11 580 008 for the fiscal year 2015, a total of NOK 144 549 153. PRA Group Europe Subholding AS was merged into PRA Group Europe AS in November 2016.

By letter of 7 December 2016, PRA Group Europe AS requested a change in its tax assessment for the fiscal years 2014 and 2015. The company contended that the limited interest deduction rule was contrary to the freedom of establishment provided for in Article 31 EEA and that Norway was under an obligation to allow a full deduction for debt interest accrued.

By the Tax Office's decision of 7 July 2017, the request for a reassessment was admitted for consideration. Following a review on the merits, the tax assessments for 2014 and 2015 were upheld.

PRA Group Europe AS appealed against that decision to the Tax Appeals Board (*Skatteklagenemnda*) on 31 July 2017.

By decision of 24 June 2020, the Tax Appeals Board, sitting in extended composition, dismissed the appeal.

On 8 September 2020, PRA Group Europe AS lodged proceedings before Oslo District Court, seeking to be allowed a full deduction for accrued debt interest in the fiscal years 2014 and 2015, meaning, without the limited interest deduction rule under Section 6-41 of the Tax Act.

The Norwegian Government, represented by the Tax Administration, responded by Defence of 29 October 2020, claiming that the court should find in its favour.

During the preparatory stages of the proceedings, the District Court has decided to obtain an Advisory Opinion from the EFTA Court concerning the EEA law questions raised by the case.

3. Relevant Norwegian legislation

3.1. The limited interest deduction rule in Section 6-41 of the Norwegian Tax Act

Section 6-40(1) of Act No 14 of 26 March 1999 on taxation of assets and income (*Lov om skatt av formue og inntekt av 26. mars 1999 nr.14 (skatteloven)*) ("the Tax Act") lays down deduction for debt interest as a general rule. Section 6-41 of the Tax Act is an exception and limits the deductibility of interest paid to affiliated parties to a specified *maximum deduction*.

Paragraphs (1) to (3) read as follows in 2014 and 2015:

> ***Section 6-41.*** *Limitation of interest deduction between affiliated parties*
>
> *(1) The rules in this Section regarding limitation of deduction of net interest expenses on debt to affiliated individuals, companies or entities shall apply to:*
>
> *a. companies and entities as referred to in first paragraph of Section 2-2;*
>
> *b. companies as referred to in Section 10-40 for the purpose of determining profit or loss pursuant to Section 10-41;*
>
> *c. companies and entities as referred to in Section 10-60 for the purpose of determining profit and loss pursuant to Section 10-65; and*
>
> *d. companies and entities that are not domiciled in the Kingdom but that are liable for taxation pursuant to Section 2-3 or Section 1 of the Petroleum Taxation Act, read in conjunction with Section 2.*
>
> *(2) Net interest expenses under this section shall include interest expenses as referred to in Section 6-40, less interest income. Profit and loss on composite bonds that are not to be broken down into a bond part and a derivate part for tax purposes, shall in their entirety be considered to be interest income or interest expenses. The same applies to profit and loss on financial assets issued at a higher or lower price than its redemption value. Profit and loss as referred to in the preceding sentence are not considered to be interest income or interest expenses for a holder who has acquired the debt instrument in the secondary market.*
>
> *(3) If net interest expenses exceed NOK 5 million, they may not be deducted for the part that exceeds 30% of general income or uncovered loss for the year before the limitation of deductions under this section, plus interest expenses and tax depreciation, and less interest income. The disallowance of interest deduction pursuant to the preceding sentence shall be done only for an amount up to the amount of net interest expenses on debt to affiliated individuals, companies or entities. No deduction shall be given for any additional losses carried forward, see Section 14-6, or group contribution, see Section 10-4, after an interest deduction has been disallowed under this paragraph. If net interest expenses for the year do not exceed NOK 5 million, but the sum of net interest expenses for the year and net interest expenses carried forward from previous fiscal years under paragraph seven exceeds NOK 5 million, the taxpayer may require deduction of net interest expenses carried*

forward and net interest expenses for the year within the limit provided for in this paragraph.

Under Section 6-41(3) of the Tax Act, the maximum deduction shall correspond to 30% of "general income or uncovered loss for the year before the limitation of deductions under this Section, plus interest expenses and tax depreciation, and less interest income" (known as tax EBITDA).

Only taxable income is included in "general income or uncovered loss for the year" and affects the maximum deduction. In the preparatory works it is stated that "[w]hen the limitation rule is to be based on taxable income and expenses at the time of the tax assessment (general income or loss for the year), it is because tax amounts are more difficult for the taxpayer to influence than accounting amounts", see Prop. 1 LS (2013–2014) part 4.7.1 p. 111.

Group contributions with tax effect, see part 3.2, are one example of value transfers between companies that are taxable, see Prop. 1 LS (2013–2014) part 4.7.1 p. 111. The recipient's maximum deduction will then increase, whilst the transferor's maximum deduction will undergo an equivalent reduction.

The limited deduction provided for in Section 6-41 is calculated for each individual company separately, irrespective of whether the company is part of a group, see Prop. 1 LS (2013–2014) part 4.7.1 p. 111.

The purpose of Section 6-41 is to counteract tax adaptations whereby international groups place disproportionately large shares of the group's debt, and thus interest expenses, in countries with high tax rates, whilst interest income and financial assets are channeled to group companies domiciled in countries with lower or no taxation, see Prop. 1 LS (2013–2014) part 4.1 p. 102.

The limited interest deduction rule shall "contribute to make the Norwegian tax base more robust while simultaneously strengthen the framework conditions for domestic enterprises competing with multinational companies", see Prop. 1 LS (2013–2014) part 4.1 p. 102.

It is stated in the preparatory works that "[t]he issue of exploitation of differences in rates may also arise domestically …", see Prop. 1 LS (2013–2014) part 4.1 p. 102.

The limitation of the deduction to a share of a calculated profit or loss is based on a company's debt service capability. This gives an indication of whether the loan is based on customary, business-related calculations and not tax-related considerations, see Prop. 1 LS (2013–2014) part 4.6 p. 108.

The rule laid down in Section 6-41 "involves a simple, template-style model for the limited interest deduction, that is independent of the tax rules in other countries, of considerations of business-related reasons, etc.", see Prop. 1 LS (2013–2014) part 4.6 p. 109. The Ministry wrote that "[c]onsiderations of foreseeability and consistent enforcement of the rules weigh against discretionary exceptions, such as those based on whether a transaction is carried out on market terms", and also considered that "those kinds of exceptions will be very resource-intensive", see Prop. 1 LS (2013–2014) part 4.6 p. 109.

The preparatory works also contain statements about the EEA Agreement, see Prop. 1 LS (2013–2014) part 4.6 p. 110:

The Ministry takes the view that the proposal is not contrary to the EEA Agreement. The limited deduction applies in respect of both Norwegian-owned and foreign-owned groups. As in other countries, the tax rules on group contributions are, as a main rule, restricted in their application to domestic (Norwegian) companies (although see the second paragraph of Section 10-4(2) of the Tax Act), which cannot be regarded as contrary to the freedom of establishment.

3.2. The group contribution rules in Sections 10-2 to 10-4 of the Tax Act

PRA Group Europe AS contends that the Norwegian rules on group contributions are relevant for the determination of whether the limited interest deduction rule in Section 6-41 is contrary to the EEA Agreement. The Government disagrees.

Group contributions are value transfers between companies or associations in a group which, subject to certain conditions, allow the transferor to claim a deduction. The contribution is then deemed to be taxable income for the recipient.

In 2014 and 2015, the rules on group contributions read as follows:

Section 10-2. *Deduction for group contributions*

(1) Private limited liability companies and public limited liability companies may claim a deduction in connection with income tax assessment for a group contribution to the extent that these are within the otherwise taxable general income, and to the extent the group contribution is otherwise lawful under the rules of the Private Limited Liability Companies Act (aksjeloven) and the Public Limited Liability Companies Act (allmennaksjeloven). Equivalent companies and associations may claim a deduction for a group contribution to the extent that private limited liability companies and public limited liability companies may do so. The second sentence of the first paragraph of Section 10-4 is nevertheless not applicable where a cooperative undertaking pays a group contribution to an undertaking that belongs to the same cooperative federation; see Section 32 of the Act relating to cooperatives (samvirkeloven).

(2) A deduction may not be claimed from income that is taxed pursuant to the rules of the Petroleum Taxation Act. A deduction may not be claimed for group contributions to cover losses in operations as referred to in Sections 3 and 5 of the Petroleum Taxation Act. A deduction may not be claimed for group contributions to cover losses which may not be carried forward for deduction in subsequent years pursuant to the fifth paragraph of Section 14-6.

Section 10-3. *Tax liability for group contributions received*

(1) A group contribution constitutes taxable income for the recipient in the same fiscal year as it is deductible for the transferor. That part of the group contribution that the transferor may not deduct due to the rules in the second paragraph of Section 10-2 or because it exceeds the otherwise taxable general income, is not taxable for the recipient.

(2) A group contribution does not constitute a dividend for the purposes of Sections 10-10 to 10-13.

Section 10-4. *Conditions for entitlement to make and receive group contributions*

(1) The transferor and the recipient must be Norwegian companies or associations. Private limited liability companies and public limited companies must belong to the same group, see Section 1-3 of the Private Limited Liability Companies Act and Section 1-3 of the Public Limited Liability Companies Act, and the parent company must own more than nine-tenths of the shares in the subsidiary and have a corresponding part of the votes that can be given in general meetings, see Section 4-26 of the Private Limited Liability Companies Act and Section 4-25 of the Public Limited Liability Companies Act. These requirements must be fulfilled at the end of the fiscal year. A group contribution may be made between companies domiciled in Norway even though the parent company is domiciled in another State, provided that the companies otherwise fulfil the requirements.

(2) A foreign company domiciled in a country within the EEA is considered equivalent to a Norwegian company provided that:

(a) the foreign company corresponds to a Norwegian company or association as referred to in the first paragraph of Section 10-2;

(b) the company is liable to taxation pursuant to point b of the first paragraph of Section 2-3 or Section 2 of the Petroleum Act, read in conjunction with Section 1; and

(c) the group contribution received constitutes taxable income in Norway for the recipient.

(3) The transferor and recipient must file tax returns pursuant to Section 4-4(5) of the Tax Assessment Act (ligningsloven).

A group contribution is a cost-free transfer of values from one limited liability company to another, see Ot. prp. nr. 16 (1979–1980) part 5 h) p. 9. It may consist of an immediate transfer of funds or other assets, or that the transferor undertakes to pay a specified amount to the recipient at a later time, see Ot.prp. nr. 16 (1979–1980) part 5 j) p. 12.

The provisions on group contributions are intended to support taxation neutrality between undertakings that organise their business operations through departments in a limited liability company, etc., and undertakings that organise their operations through several limited liability companies, etc., in a group.

Whether a group contribution shall be made and what the value of that contribution shall be, is determined by the companies themselves, see Ot. prp. nr. 16 (1979–1980) part 5 c) p. 7. There are nevertheless some limitations in terms of how large a taxable group contribution can be, since it must be within the otherwise taxable general income for the transferor company, see Section 10-2(1) of the Tax Act.

Only companies that are liable to taxation in Norway may make or receive group contributions with tax effects, see Section 10-4(1) and (2), see the Supreme Court judgment in HR-2019-140-A (Yara), paragraph 44.

In the preparatory works for the limited interest deduction rule in Section 6-41 of the Tax Act, the Ministry stated that "[s]ince the group contribution forms part of the basis for the calculation, companies in the tax group will be able to a certain extent to coordinate to achieve interest deductions where there are profits ('tax EBITDA') and interest expenses are distributed unevenly between the companies in the group", see Prop. 1 LS (2013–2014) part 4.7.1 p. 111. The recipient of a taxable group contribution will then have the maximum deduction increased, whilst the transferor will have an equivalent reduction. For the group as a whole, the maximum deduction will remain unchanged.

In Prop. 1 LS (2013–2014) part 4.15.1 p. 129, it is stated that there "may be some cases where businesses organised as a group are somewhat worse off than businesses that are organised as a single company. This is due to inter alia that decisions on group contributions may be affected by other factors than the limited interest deduction. If a company in the group has losses that are not related to large interest expenses, it may be appropriate to make a group contribution to that company, even though that will reduce the options for the transferor company to deduct interest due to the limited interest deduction rule."

The Ministry stated that "the rules may have unfortunate results in certain cases", see Prop. 1 LS (2013–2014) part 4.15.3 p. 130, but added that it "is challenging to formulate rules that, formally, give equal treatment to transactions across national borders without at the same time impacting domestic transactions that are clearly not motivated by tax-related considerations", see Prop. 1 LS (2013–2014) part 4.15.3 p. 130.

The Ministry also stated that "an argument can be made that the deduction limitation should be placed at the group level instead of on the individual company. There is no reason to affect interest payments where the corresponding interest income is taxed at the ordinary rate. Consequently, countries that practise group taxation have usually opted to place the limitation at the group level. In Norway, however, we do not have taxation at group level, so that is not possible without making extensive changes to how companies are taxed", see Prop. 1 LS (2013–2014) part 4.15.3 p. 130.

3.3. The Norwegian EEA Act

The EEA Agreement has been implemented into Norwegian law through Section 1 of Act No 109 of 27 November 1992 on the implementation into Norwegian law of the Main Part of the Agreement on the European Economic Area, etc. (*lov om gjennomføring i norsk rett av hoveddelen i avtale om Det europeiske økonomiske samarbeidsområde mv. av 27. november 1992 nr. 109 (EØS-loven)*. Under Section 2 of that act, the EEA Agreement takes precedence over general Norwegian law. In the event of conflict between the rules of the Tax Act and the EEA Agreement, the EEA Agreement will prevail.

4. The court's reasons for the request for an Advisory Opinion

The parties are in agreement that the interpretation of Article 31 EEA is central to the decision. The parties disagree on how Article 31 is to be interpreted and applied in relation to the facts of the case before the District Court.

The District Court considers that a request to the EFTA Court is appropriate. The key question is whether the limited interest deduction rules as drafted, in combination with a limited possibility to use the rules on group contributions with tax effects, constitute a restriction contrary to EEA law. The court is not able, on the basis of the submissions in the case, to establish that the practice in respect of group contributions, referred to by the Government, solves the question on the effect of the limited interest deduction rules in combination with the formulation of the rules on group contributions. The court accordingly considers that there is some doubt about the interpretation of EEA law in this area.

The court notes that, in its reasoned opinion, ESA states precisely that "**the Norwegian interest cap rules, applied in a legal context in which the possibility to rely on group contribution rules is available only for a limited amount of companies, a Norwegian target company will, for example, effectively pay more taxes in Norway if it is acquired and owned by groups based in other EEA States as opposed to Norwegian based groups.**" (the court's emphasis added).

The court understands that statement to mean that, in ESA's view, the limited interest deduction rules, as then formulated, could not be accepted since a purely Norwegian group could avoid the interest limitation through group contributions, while other groups did not have the same opportunity. As the court understands it, the limited interest deduction rules could be accepted if they contained exceptions that made it possible for someone to place themselves in an equivalent position as the national companies, who could avail themselves of the rules on group contributions.

In a letter of 31 January 2017, the Ministry of Finance stated that it disagreed with that interpretation, as well as ESA's interpretation of the scope of cases from the Court of Justice of the European Union ("ECJ"), including C-231/05 Oy AA. The fact that Norwegian authorities disagree with ESA and their understanding and interpretation of case-law from the ECJ is, in the court's view, a factor weighing in favour of making a reference to the EFTA Court. The parties also disagree as to the scope of other case-law, including C-398/16 X BV and C-484/19 Lexel. The court also notes that the Tax Appeals Board's decision was given with a dissenting opinion, where the dissenting opinion was founded precisely in the context of the EEA rules.

The court also notes that there are other cases pending involving the same issue. In the court's view, the consideration of obtaining legal clarification warrants that an Advisory Opinion is obtained in this case.

5. Submissions of the parties on EEA law

5.1. Principal submissions of PRA Group Europe AS:

PRA Group Europe AS submits that the Norwegian limited interest deduction rule constitutes a restriction on the freedom of establishment because it treats Norwegian groups more favourably than EEA-based groups. Under EEA law, a national rule is discriminatory when the effect or purpose of the rule results in discrimination.[1] This applies even if the effect is due to interaction between two sets of rules.[2] The limited interest deduction rule enables Norwegian companies in a group to circumvent the interest limitation (entirely or partly) because the maximum deduction (30% EBITDA) is affected by group contributions made and received. A possibility not available to EEA-based groups. It is established EEA law that restricting the possibility to make and receive group contributions to domestic group companies constitutes a restriction on the freedom of establishment.[3] The same must apply when the rules on group contributions affect the limited interest deduction rule. The discrimination (that group contributions should affect the limited interest deduction rule) was a *desired effect* from the legislature.[4]

[1] See inter alia C-375/12 (Bouanich) paragraphs 42–43, and C-565/18 (Société Générale) paragraph 26.
[2] See inter alia C-484/19 (Lexel) paragraph 31 and joined cases C-398/16 and C-399/16 (X and X) paragraph 26, which both concerned the interaction between interest cap rules and group taxation rules.
[3] See inter alia C-231/05 (Oy AA) paragraph 39.
[4] See Prop. 1 LS (2013–2014) part 4.6 p. 110.

It is sufficient that the national rule is *suitable* to pose an obstacle to establishment in order for there to be a restriction.[5] That is to say, that the assessment is undertaken on the basis of how the rule is formulated prior to an event (*ex ante*). Thus, it is not significant that an actual group contribution was not made from an EEA company to the Norwegian company in this case. The taxpayer is not obliged to do the impossible, in the present case, to make a group contribution that cannot have an impact in taxation in Norway and affect the maximum deduction.[6] There are no other real alternative courses of action in the cross-border situation that can affect the maximum deduction for interest.

PRA Group Europe AS further contends that a Norwegian company in the same group as an EEA company is in an *objectively comparable situation* to a Norwegian company in the same group as another Norwegian company. The ECJ's decisions in the cases X and X and Lexel show that the key factor of examination is whether Norway possesses the same powers of taxation in both situations, and whether the national and the cross-border situations are affected by the same national provision.[7] That is the case here. In both situations, Norway has the power to tax the Norwegian company that pays interest, and the limited interest deduction rule encompasses loans to both the Norwegian and the EEA-based companies in the group. Thus, the situations are objectively comparable. This is also the view held in ESA's statements on page 9 of its reasoned opinion.

PRA Group Europe AS further submits that the restriction may not be justified by overriding reasons in the public interest. In cases where the restriction is due to the interaction between two sets of rules, the ECJ holds that the assessment must focus on *the advantage* being refused, in this case the interest deduction.[8] The ECJ's decision in Lexel is key to resolving the present case.[9] Lexel concerned the question whether the Swedish limited interest deduction rule, in combination with the rules on group contributions, infringed the freedom of establishment because the deduction was disallowed only in a cross-border situation. As in the present case, the Swedish tax authorities argued that the restriction could be justified on grounds of preventing tax avoidance and maintaining a balanced allocation of the power to impose taxes, or a combination of the two.

The consideration of preventing tax avoidance cannot in any event justify the restriction because the Norwegian limited interest deduction rule can cover interest on loans made on commercial terms. In order for the consideration of preventing tax avoidance to be accepted, the restriction must be directed *solely* at *purely artificial arrangements which do not reflect economic reality,* set up to avoid tax on activities pursued on the State's territory.[10] Thus, in order to be EEA-compliant, the national rule must allow for a taxpayer to be able to produce evidence of commercial justification for the transaction.[11] In Lexel, the interest deduction was disallowed because the cross-border loan was viewed as being "mainly" tax-motivated. The ECJ found, however, that the Swedish rule did not cover *solely* artificial loans, but also loans made on arm's-length terms.[12] The consideration of tax avoidance was accordingly rejected. Since the Norwegian limited interest deduction rule does not impact *solely* artificial loans either, the outcome in this case must be the same as in Lexel.

[5] See inter alia C-231/05 (Oy AA) paragraph 42, in which the question arose in the discussion of a binding prior declaration before an envisaged transaction, C-96/08 (CIBA) paragraph 19, C-342/17 paragraph 48, and the Advocate General's Opinion in the joined cases C-478/19 and C-479/19 paragraphs 53–65.
[6] See inter alia joined cases C-622/16 P and C-624/16 P (State aid case) paragraph 79, C-156/17 (Köln-Aktienfonds Deka) paragraphs 62–64, paragraph 48, and C-480/16 (Fidelity Funds), in which foreign investment funds were held to be objectively comparable to Danish investment funds, even though they had not actually applied for a withholding tax exemption, see paragraphs 14 and 63.
[7] C-484/19 (Lexel) paragraphs 43–44, and joined cases C-398/16 and C-399/16 (X and X) paragraphs 33–35.
[8] C-484/19 (Lexel) paragraph 64, and joined cases C-398/16 and C-399/16 (X and X) paragraphs 40–41.
[9] The case joins the ranks of joined cases C-398/16 and C-399/16 (X and X).
[10] C-196/04 (Cadbury Schweppes) paragraph 55, C-398/16 and C-399/16 (X and X) paragraph 46, and C-484/19 (Lexel) paragraph 49.
[11] See inter alia C-484/19 (Lexel) paragraph 50, and C-524/04 (Thin Cap) paragraph 83.
[12] C-484/19 (Lexel) paragraph 53.

The consideration of a balanced allocation of the power to impose taxes between the States cannot justify the restriction. That consideration has been accepted when equal treatment can lead to States' losing their powers of taxation over activities on their territory, typically if the taxpayer is able to decide where income and expenses are to be taxed.[13] The consideration has thus been accepted in group taxation cases.[14] However, the ECJ has rejected the consideration with regard to tax deductions granted in a national, but not cross-border situation.[15] In Lexel, the ECJ stated that the reasoning in group contribution cases was not relevant for *other advantages* allowed domestic group companies.[16] Since the Swedish company was claiming an advantage in the form of an *interest deduction*, and not an advantage linked to a group contribution, the consideration of balanced allocation of the power to impose taxes could not justify the restriction. The ECJ held – on the same grounds – that a combination of those considerations could not justify the restriction. As in Lexel, it is *the interest deduction* that is being limited in the present case. The restriction cannot, therefore, be justified on grounds of overriding reasons in the public interest.

The limited interest deduction rule is in any event disproportionate. The rule is mechanical and goes beyond what is necessary when it can disallow interest on loans made on commercial terms. This has not been accepted by the ECJ.[17] As pointed out by ESA, the rule could have been less disproportionate if it had contained an exception clause.

5.2. The principal submissions of the Government, represented by the Tax Administration:
Section 6-41 of the Tax Act does not constitute any restriction on the freedom of establishment. The rule treats interest on loans from foreign companies in the same way as interest on loans from Norwegian companies. The limited deduction applies equally to Norwegian and foreign groups.

Under Norwegian tax law, group contributions are taxable transactions and, as such, are to be included in the calculation of the maximum deduction for interest in Section 6-41. This is solely a consequence of the rule providing that only taxable income is included for the purposes of the maximum deduction and is not a "desired discrimination".

The plaintiff's parent company is not domiciled in Norway for tax purposes and, accordingly, may not claim a deduction for group contributions under Norwegian tax law. That the parent company is not domiciled in Norway for tax purposes is not in itself any restriction on the freedom of establishment.

It is the rules on entitlement to deductions in the country where the parent company is domiciled for tax purposes (in this case Luxembourg) that determine whether it has incentives to make other value transfers to subsidiaries in addition to the loan. That Luxembourg does not have rules on group contributions is a consequence of the fact that the tax rules are not harmonised within the EEA, with the result that the individual EEA State determine themselves whether they wish to have rules on matters such as group contributions. That the parent company may not claim deductions for group contributions is a matter that possibly must be taken up with the authorities in Luxembourg, not the tax authorities in Norway.

Since it is the tax rules in Luxembourg that determine whether the parent company has incentives to undertake other transfers to the plaintiff in addition to the loan, the rules on

[13] See inter aliaC-484/19 (Lexel) paragraph 61.
[14] See inter alia C-231/05 (Oy AA) paragraph 56, and C-337/08 (X Holding) paragraphs 29–33.
[15] See inter alia C-388/11 (Santander Asset Management) paragraph 48 with references.
[16] The ECJ refers in that connection to the cases X and X (C-398/16 and C-399/16).
[17] C-524/04 (Thin Cap) paragraph 83.

group contributions in Sections 10-2 to 10-4 of the Tax Act are irrelevant for the question whether there is a restriction.

The case is not comparable to the joined cases C-398/16 and C-399/16 X and X or case C-484/19 Lexel. In those cases, the national tax rules treated interest paid to foreign group companies and interest paid to domestic group companies differently. That is not the situation in the present case.

It is correct that group contributions from a Norwegian company will help to increase the maximum deduction under the limited interest deduction rule in Section 6-41. In this situation there are however two transactions: one loan and one group contribution. That kind of situation is not comparable to a case such as the one in the present case, where only a loan was given. The judgments in X and X and Lexel also concerned cases involving only a single transaction.

A potential restriction may in any event be justified by overriding reasons in the public interest.

The limited interest deduction rule in Section 6-41 of the Tax Act and the limited interest deduction rule in Article 4 of Directive 2016/1164/EU, also known as “ATAD” (“Anti-Tax Avoidance Directive”), are based on the same considerations, and is based on the OECD’s so-called BEPS initiative, see recitals (1) to (3) in the preamble to ATAD.

The EU legislature considered that the rule in Article 4 was necessary to counter “the erosion of tax bases in the internal market and the shifting of profits out of the internal market” (recital (5)). Similar considerations form the basis for the Norwegian limited interest deduction rule.

The rules in Section 6-41 of the Tax Act and Article 4 ATAD are also formulated identically in terms of the aspects that are alleged to be incompatible with the freedom of establishment. The rules are based on EBITDA for calculating the maximum deduction, see Article 4(1), and there are only taxable income that may be included in the calculation of EBITDA (“income subject to corporate tax”), see Article 4(2).

The EU legislature must necessarily have taken the view that ATAD is compatible with primary EU law, including the freedom of establishment. Had it not, the Directive would have been invalid under EU law.

The plaintiff is requesting the EFTA Court to declare a rule which the EU States are obliged to have in their national tax law (see Article 4 ATAD) incompatible with the freedom of establishment as provided for in the EEA Agreement.

Under Article 6 EEA, the freedom of establishment is to be interpreted and applied uniformly in the EU and the EEA. If the limited interest deduction rule in Article 4 ATAD is compatible with the freedom of establishment in the EU, then it is also compatible with the freedom of establishment in the EEA. A similar limited interest deduction rule in national law, see Section 6-41 of the Tax Act, must then also be compatible with the freedom of establishment in the EEA.

It is not significant that ATAD had not entered into force in 2014–2015. The treaty provisions in the EU and EEA on the freedom of establishment have not changed since 2014–2015. A limited interest deduction rule that is compatible with the freedom of establishment today, was also compatible with the freedom of establishment in 2014–2015.

It follows directly from recital (7) in the preamble to ATAD that the EU States may have a limited interest deduction rule allowing transfer of profits between companies within a group in the same State:

> "Where a group includes more than one entity in a Member State, the Member State may consider the overall position of all group entities in the same State, including a separate entity taxation system to allow the transfer of profits or interest capacity between entities within a group, when applying rules that limit the deductibility of interest."

The reason why the Directive allows for such transfers of profits or interest deduction capacity is most likely because there is no risk of erosion of the tax base when all the companies are subject to taxation in the same State.

Since the States may have rules on transfers of profit or interest deduction capacity in national groups, Sections 6-41 and 10-2 to 10-4 of the Tax Act may be justified on grounds of considerations of countering erosion of the tax base, if they are found to constitute a restriction on the freedom of establishment.

6. Questions

1) Is there a restriction within the meaning of Article 31 EEA, read in conjunction with Article 34, when group contributions from Norwegian companies increase the maximum deduction for interest and thus the entitlement to deduction of interests on debt to affiliated parties under the limited interest deduction rule, a possibility which, under Norwegian tax rules, is not available for investments by or in EEA companies?

2) Is an EEA company that is in a group with a Norwegian company in a comparable situation to that of a Norwegian company that is in a group with another Norwegian company, and what significance does it have for the comparability assessment that no actual group contribution has been made from the EEA company to the Norwegian company, but rather a loan?

3) In the event that there is a restriction: Which reasons in the public interest may justify such a restriction?

Oslo District Court

Jon Sverdrup Efjestad
Acting District Court Judge