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Judgment in Case E-7/23 *ExxonMobil Holding Norway AS*

THE "FINAL LOSSES" EXCEPTION FOR TAX DEDUCTION IS PRECLUDED WHERE A NON-RESIDENT SUBSIDIARY IS IN RECEIPT OF EVEN MINIMAL INCOME

In a judgment delivered today, the Court was called upon by Borgarting Court of Appeal (*Borgarting lagmannsrett*) to clarify the case-law arising from the Court's Judgment of 13 September 2017 in *Yara International ASA v The Norwegian Government*, E-15/16, in a dispute concerning the possibility for a parent company established in Norway of deducting from its taxable income the losses of a subsidiary established in another EEA State.

The case before the national court concerns the validity of a decision of the Norwegian authorities, in which the appellant company was disallowed deduction for a cross-border group contribution to its Danish subsidiary on the grounds that the subsidiary's business activities had continued in the following year, generating income for the company, and that, consequently, there were no "final losses", with reference to the exception set out in the Court's judgment in *Yara*.

Borgarting Court of Appeal requested the Court to clarify, in particular, whether the "final losses" exception is precluded where a subsidiary is in receipt of even minimal income in the fiscal year after the year for which a deduction is claimed, or whether a specific assessment must be conducted to determine whether the subsidiary's continued income will actually reduce its losses, or that part of the losses for which a deduction is claimed. That is, whether "minimal income" is only decisive if it may indicate to what extent it is possible to obtain an income in the company, or whether the existence of a minimal income itself is decisive and precludes the application of the exception.

The Court recalled that according to its judgment in *Yara*, the restriction at issue may indeed be justified. However, it will be disproportionate and incompatible with Articles 31 and 34 EEA if the loss is final and the non-resident subsidiary has exhausted the possibilities available in its State of establishment of having the losses taken into account. In that regard, the Court found that losses incurred by a non-resident subsidiary may be characterised as final only if that subsidiary no longer has any income in its EEA State of residence. So long as that subsidiary continues to be in receipt of even minimal income, there is a possibility that the losses sustained may yet be offset by future profits made in the EEA State in which it is resident. Consequently, the final losses exception is precluded where a subsidiary is in receipt of even minimal income in the fiscal year after the year for which a deduction is claimed.

The Court moreover pointed out that even if it is established that the subsidiary no longer has any income in its EEA State of residence, the losses would not be characterised as final if there is a possibility of deducting those losses economically by transferring them to a third party. In that context, the Court observed that losses which are not usable because of legal restrictions, for example if they cannot be transferred to a third party, are not intended to constitute final losses in accordance with settled case-law.

The Court also held that it is compatible with Articles 31 and 34 EEA for an EEA State to require, in order to demonstrate that a loss is final, that a liquidation process be formally decided upon immediately after the end of the fiscal year for which a deduction is claimed.

The full text of the judgment may be found on the Court's website: www.eftacourt.int.

This press release is an unofficial document and is not binding upon the Court.