BORGARTING LAGMANNSRETT

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EFTA Court
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Luxembourg

Request for an Advisory Opinion in Case No 23-036407ASD-BORG/01, civil case, appeal against judgment:
Exxonmobil Holding Norway AS – the Norwegian Government, represented by the Tax Administration

1. Introduction

Borgarting Court of Appeal (*Borgarting lagmannsrett*) hereby requests an Advisory Opinion from the EFTA Court in Case No 23-036407ASD-BORG/01, see 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).

The case concerns the validity of the Tax Office's decision of 18 December 2014. The question is whether the appellant, ExxonMobil Holding Norway AS (hereinafter "EMHN"), may claim a deduction for a cross-border group contribution of NOK 900 000 000 made to the subsidiary ExxonMobil Danmark ApS ("EMD") in the fiscal year 2012. The principal question in the case is whether the conditions in "the Marks & Spencer exception", see Case C-446/03 and subsequent case law, are met, that is to say, whether EMD has sustained "final losses" (*endelig tap*).

The request seeks clarification and delimitation of the substance of the Marks & Spencer exception, in particular as to whether "final losses", and thereby the application of the exception, are always precluded where a subsidiary is in receipt of even minimal income in the fiscal year after the year for which a deduction is claimed.

2. Parties to the case

The parties to the case before Borgarting Court of Appeal are:

Appellant:	ExxonMobil Holding Norway AS P.O. Box 350 0213 Oslo

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Counsel:	Advokat Hugo P. Matre Advokatfirmaet Schjødt AS C. Sundts gate 17 P.O. Box 2022 Nordnes 5004 Bergen
Respondent:	Norwegian Government, represented by the Tax Administration (*Staten v/ Skatteetaten*) Schweigaards gate 17 0191 Oslo
Counsel:	Office of the Attorney General (Civil Affairs) (*Regjeringsadvokaten*) Represented by Advokat Lotte Tvedt P.O. Box 8012 Dep 0030 Oslo

3. Facts

EMHN is a holding company for the ExxonMobil Group's Norwegian operations, which also include the subsidiaries ExxonMobil Nordic AS and Esso Norge AS, and the group companies ExxonMobil Exploration and Production Norway AS and ExxonMobil Production Norway Inc. and others. All of the companies are owned indirectly by the ExxonMobil Corporation in the United States (ultimate parent company of the ExxonMobil Group), which is engaged in the oil and energy sector on a worldwide basis. As of 31 December 2012, EMHN held 100% of the shares in EMD, the company to which the group contribution in question was made.

EMD was established as a Danish limited liability company (*anpartsselskab*) on 24 July 1964. The business activities consisted of sales of imported chemicals and lubricants to the Danish market. The company was originally also engaged in the operation of petrol stations and oil product refining. Around the year 2000, EMD also built up a significant holding operation, including financial lending operations to other companies in the ExxonMobil Group. This included companies in and outside Europe. At its peak, EMD had almost 50 employees.

As part of the extensive holding and financial lending operations, EMD accrued considerable losses. The losses, which were accrued in the period 1999–2004, related largely to interest expenses for the financing operations and financing costs relating to the holding operations. At the end of 2011, EMD had losses carried forward of DKK 2 071 155 306.

Over the years, extensive restructuring measures were implemented in the ExxonMobil Group. The reductions in operations began with scaling down and eliminating loss-making activities, more specifically the financing activities and the holding activities. This was followed by a transition to a so-called SalesCo model for the commercial operations in 2005. This entailed that sales of lubricants and centralised support functions were placed under one company, Belgian ExxonMobil Petroleum and Chemical BVBA (hereinafter "EMPC"). All contracts owned by EMD and direct marketing and sales activities for lubricants and chemical sales in Europe were brought together in that company. Contracts and other related operations in Denmark were transferred to EMPC by agreement of 24 February 2005. After that time, EMD mainly took care of marketing and sales support for EMPC in relation to Danish customers, in addition to performing certain support functions relating to market analyses and technical information. EMD was no longer involved in direct sales. As part of the scaling-down, properties that had belonged to EMD were sold and vacated. Inter alia the Hirtshals plant was closed down and the lease was terminated in 2009, and the plot of land on Island Brygge in Copenhagen was sold in 2010. The reorganisation entailed that the Nordic operations bringing together the lubricants business were placed under EMHN. The board of EMHN decided to establish a new subsidiary, ExxonMobil Nordic AS (EMN), that was to coordinate ExxonMobil's lubricants activities throughout the Nordic countries, including taking care of the remaining activities previously managed by EMD. The support functions placed with EMD were also transferred to EMN.

The decision to liquidate EMD was taken by the board of EMHN on 19 December 2012 and, on the same day, EMD was informed about the restructuring plan entailing the establishment of EMN, including the transfer of EMD's activities to EMN and the associated liquidation of EMD. On the same date, that is to say, 19 December 2012, the board of EMHN moved to make a group contribution of NOK 900 000 000 to cover part of the losses in EMD. The motion was passed at an extraordinary general meeting of EMHN the same day. The board of EMD was informed of the motion passed to approve the group contribution the same day, and decided to accept and include the amount as taxable income for 2012. The annual accounts for 2012 from Danish tax authorities show that the group contribution is part of EMD's taxable income of DKK 915 423 543. The income is applied towards losses from previous periods and thus brought the company's losses down from DKK 2 071 155 306 at the end of 2011 to DKK 1 155 731 763 at the end of 2012.

A limited part of EMD's operations were continued in the first quarter of 2013. On 22 March 2013, an asset purchase agreement (DK Asset Purchase Agreement) was concluded between EMD and EMN. The total sale price was EUR 427 514. By the end of the first quarter of 2013, all service agreements were transferred to EMN in accordance with the asset purchase agreement. On 1 April 2013, EMD sent out information about the liquidation of EMD and the accompanying transfer of EMN's activities to all contract parties, suppliers and the Nordic lubricants business. On 5 April 2013, EMD sent a letter to the Tax Centre, Fredensborg (*Skattecenteret Fredensborg*) to inform them about the transfer of assets. At the same time, a report was sent to the Danish Customs and Tax Administration (*Skatteetaten*) concerning exemption for value added tax. By extraordinary general meeting on 21 May 2013, EMD's bodies formally voted to have the company liquidated, and the company name was changed to ExxonMobil Danmark Aps likvidation. By extraordinary general meeting on 11 December 2013, the liquidation was recorded as completed and the company was definitively liquidated. On that same date, the company was deregistered with the Danish Business Authority (*Erhvervsstyrelsen*).

EMHN filed a tax return on 27 June 2013. The group contribution was deducted and the company's general income for the fiscal year 2012 was stated as being NOK 299 706 834. By letter of 25 February 2014, EMHN received a notice from the Tax Office stating that consideration was being given to revising EMHN's tax assessment for the fiscal year 2012. EMHN replied to the Tax Office's notice of decision on 31 March 2014. The Tax Office requested further information and documentation by letter of 12 May 2014, to which EMHN replied on 20 June 2014.

On 18 December 2014, the Tax Office adopted a decision revising EMHN's tax assessment for the fiscal year 2012. It is the lawfulness/validity of that decision that Borgarting Court of Appeal is to examine. In the decision, the deduction for the group contribution made to EMD was disallowed, with the consequence that the general income for 2012 increased from NOK 299 706 834 to NOK 1 199 706 834. The main reason given for the refusal was that it was not possible to allow a deduction for a group contribution when EMD was resident in Denmark. The alternative ground for refusal was that there were in any event no "final losses", see the exception in the Marks & Spencer judgment (Case C-446/03).

4. Relevant Norwegian legislation

Chapter 10 of the Norwegian Act of 26 March 1999 No 14 on taxation of assets and income (*lov om skatt av formue og inntekt av 26 March 1999 nr. 14* (*skatteloven*)) ("the Tax Act") contains rules on deductions for group contributions. The case concerns the fiscal year 2012 and it is accordingly the Tax Act as it was worded in 2012 that is relevant:

> **"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 such contribution is within the otherwise taxable general income, and insofar as the group contribution is otherwise lawful under the provisions 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 same extent as private limited liability companies and public limited liability companies. The provision in Section 10-4 first paragraph second sentence 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 (*petroleumsskatteloven*). A deduction may not be claimed for group contributions to cover losses in enterprises as mentioned in Sections 3 and 5 of the Petroleum Taxation Act. A deduction may not be claimed for group contributions to cover losses that, pursuant to Section 14-6 fifth paragraph, cannot be carried forward for deduction in subsequent years.

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

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

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

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

(1) The transferor and the recipient must be Norwegian companies or associations. Private limited liability companies and public limited liability 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 hold a corresponding proportion of the voting rights at the general meeting, 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 income year. A group contribution may be made between companies domiciled in Norway, even if the parent company is domiciled in another state, provided that the companies otherwise fulfil the requirements.

(2) A foreign company domiciled in an EEA State is considered equivalent to a Norwegian company provided that:

a. the foreign company corresponds to a Norwegian company or association as mentioned in Section 10-2 first paragraph,
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 Tax 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 submit statements pursuant to Section 4-4(5) of the Tax Assessment Act (*ligningsloven*).”

It is not disputed that EMHN (transferor) did not satisfy the conditions for claiming a deduction under the abovementioned national provisions since EMD (recipient) is a foreign company that is not liable to taxation in Norway and since the group contribution is not taxable income for EMD in Norway.

It has been held in the case law of the Supreme Court (*Høyesterett*), however, that the Norwegian tax rules must be interpreted and applied in accordance with EEA law, see the Supreme Court judgment of 28 January 2019 (HR-2019-140-A *Yara*). When Borgarting Court of Appeal heard that case, an Advisory Opinion was obtained from the EFTA Court on a question about whether the Norwegian tax rules on group contributions were compatible with the rules on freedom of establishment laid down in Articles 31 and 34 of the EEA Agreement.

The background for the reference was disagreement between the parties as to the meaning to be attached to two earlier judgments of the European Court of Justice ("ECJ"), Case C-446/03 *Marks & Spencer* and Case C-231/05 *Oy AA*. The EFTA Court answered the question referred in an Advisory Opinion of 13 September 2017 (Case E-15/16). The EFTA Court's judgment entails that the Marks & Spencer exception also applies under Norwegian law (paragraph 55). When the Supreme Court ruled on the case (HR-2019-140-A), it stated the following in paragraph 59:

> "From this conclusion [in Case E-15/16], it follows that Article 31 EEA and Article 34 do not preclude the application of national rules on group contributions under which both the transferor and the recipient must be liable to taxation in the relevant EEA State. Nevertheless, the EFTA Court ruled that in cases where the loss sustained by the foreign subsidiary was 'final', 'the requirements of national law go beyond what is necessary'. Hence, when a 'final' loss has been sustained by the subsidiary, it will be contrary to the EEA Agreement to lay down as a condition for a right to deduction that both the parent company and the subsidiary must be liable to taxation in the relevant EEA State."

Norway has adopted new rules for cross-border group contributions in Section 10-5 of the Tax Act, which take effect as from the fiscal year 2021. Those rules do not apply to the present case. The rules are worded as follows:

> **"Section 10-5.** ***Group contributions to foreign subsidiaries***
>
> (1) A parent company may claim a deduction for a group contribution to a foreign subsidiary when the parent company documents that the conditions laid down in this section are satisfied, and the group contribution also satisfies the conditions for deduction laid down in Section 10-2.
>
> (2) The subsidiary must
>
> a. be equivalent to a company, etc., coming within Section 10-1 first paragraph, and
>
> b. be resident, actually established and have carried on actual economic activity in another EEA State.
>
> (3) The parent company must, at the end of the fiscal year for which the group contribution is made, own more than nine tenths of the shares in the subsidiary and have a corresponding share of the voting rights at the general meeting. A deduction for a group contribution shall not be allowed if the parent company owns the subsidiary through companies that are resident in a foreign State other than where the subsidiary is resident.
>
> (4) The group contribution must cover the subsidiary's final losses. Losses shall be deemed to be final when the following conditions are satisfied:
>
> a. It is not, has not been and cannot be possible for the subsidiary or anyone else to claim a deduction for losses in the State where the subsidiary is domiciled.

b. The reason why the losses may not be deducted by the subsidiary is another than that it is not legally possible to do so, or that the possibility of deducting the losses is limited in time.
c. The operation of the subsidiary is ceased and a process for liquidating the subsidiary has been initiated immediately after the end of the fiscal year in which the group contribution is made.
d. The subsidiary is liquidated by the end of the year after the fiscal year for which the group contribution is made.

The assessment under letter a and b shall be conducted on the basis of the situation at the end of the fiscal year for which the group contribution is made. The possibility of using the losses shall be assessed from the time the losses were incurred.

(5) The deduction may not exceed the lowest amount of losses calculated under Norwegian tax rules and the tax rules in the subsidiary's home State. The calculation shall be made on the basis of the situation at the end of the fiscal year for which the group contribution is made. Losses accrued after that time shall not be included in the calculation. In the calculation, no account shall be taken of losses, including latent losses, accrued before the ownership conditions in the third paragraph were met.

(6) The final losses shall be reduced when in the last five fiscal years, including the fiscal year for which the group contribution is made, the following transfers have taken place between the subsidiary and companies, etc., with which it has a community of interest:

a. The subsidiary has transferred assets or liabilities with latent gains, and the latent gains are not taxed in the subsidiary. The final losses shall then be reduced by an amount equal to the latent gains at the time of transfer.
b. The subsidiary has received assets or liabilities with latent losses, and the latent losses have been deducted by the subsidiary by the end of the fiscal year for which the group contribution is made. The final losses shall then be reduced by an amount equal to the latent gains at the time of transfer.
c. The subsidiary has transferred assets or liabilities and been allowed a deduction in connection with the transfer by the end of the fiscal year for which the group contribution is made. The final losses shall then be reduced by an amount equal to the deducted amount.

(7) The deduction shall be allowed with effect for the fiscal year for which the group contribution is made.

(8) If the subsidiary is the recipient of net taxable income after the end of the fiscal year for which the group contribution is made, that shall be entered as income in the parent company in the fiscal year in which the income arose. An equivalent income entry shall be made if, after the end of the fiscal year for which the group contribution is made, a transfer takes place as referred to in the sixth paragraph. In the calculation of net taxable income under the first sentence, no account shall be taken of the group contribution received. The income entry under the present paragraph shall not exceed the deduction for a group contribution.

(9) The right to make a deduction shall lapse if the subsidiary is not liquidated by the end of the year after the fiscal year for which the group contribution is made. This

> shall nevertheless not apply if public law regulations or other overriding reasons justify the liquidation taking longer time and the liquidation is completed without undue delay. Lapse under the present paragraph shall take place by revision of the tax assessment for the fiscal year the parent company was allowed a deduction for the group contribution.
>
> (10) If a definitive revision is made to the subsidiary's tax assessment in the home State with the result that all or parts of the losses may not be deemed final, the deduction for a group contribution shall be reduced correspondingly."

5. Relevant EEA law

The question that the Court of Appeal is to determine is whether EMHN is entitled to a deduction for the group contribution that was made, on the ground that refusing the deduction would be contrary to freedom of establishment as provided for in Article 31 of the EEA Agreement, read in conjunction with Article 34.

It is not disputed that treating resident parent companies differently depending on where their subsidiaries have their registered office amounts to a restriction on the freedom of establishment. The ECJ and the EFTA Court have held that such a restriction will nevertheless be compatible with EEA law if it (i) can be justified by overriding reasons in the public interest, (ii) is deemed appropriate for ensuring the attainment of the objectives thus pursued, and (iii) is deemed necessary to attain them.

However, in Case C-446/03 *Marks & Spencer* paragraph 55the ECJ held that national rules precluding deductions where the losses in the non-resident subsidiary were final did not satisfy the requirement of necessity. However, stringent conditions were set out for that exception (often referred to as 'the Marks & Spencer exception') to apply. That paragraph reads as follows in its entirety:

> **"**In that regard, the Court considers that the restrictive measure at issue in the main proceedings goes beyond what is necessary to attain the essential part of the objectives pursued where:
>
> – the non-resident subsidiary has exhausted the possibilities available in its State of residence of having the losses taken into account for the accounting period concerned by the claim for relief and also for previous accounting periods, if necessary by transferring those losses to a third party or by offsetting the losses against the profits made by the subsidiary in previous periods, and
> – there is no possibility for the foreign subsidiary's losses to be taken into account in its State of residence for future periods either by the subsidiary itself or by a third party, in particular where the subsidiary has been sold to that third party."

In Case E-15/16 *Yara*, the EFTA Court held that that exception also applies in EEA law. The conditions for finding that a loss is considered "final" so that the exception applies, were summarised as follows (paragraph 41):

> "To assess whether a loss is to be considered final, the existence of two conditions must be verified. First, the non-resident subsidiary must have exhausted the possibilities available in its State of residence of having the losses taken into account for the accounting period concerned by the claim for relief and also for previous accounting periods, if necessary by transferring those losses to a third party or by offsetting the losses against the profits made by the subsidiary in previous periods. Second, there must be no possibility for the foreign subsidiary's losses to be taken into account in its State of residence for future periods either by the subsidiary itself or by a third party, in particular where the subsidiary has been sold to that third party (compare the judgment in *Commission* v *United Kingdom*, cited above, paragraph 26 and case law cited)."

In Case C-172/13 *Commission* v *United Kingdom* ("*Marks & Spencer II*"), referred to in the foregoing passage from the EFTA Court, the ECJ stated as follows in paragraph 36:

> "[I]t should be borne in mind that losses sustained by a non-resident subsidiary may be characterised as definitive, as described in paragraph 55 of the judgment in *Marks & Spencer* (EU:C:2005:763), only if that subsidiary no longer has any income in its Member 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 Member State in which it is resident (see judgment in *A*, EU:C:2013:84, paragraphs 53 and 54)."

Referring to that paragraph, the EFTA Court stated the following in paragraph 44 of E-15/16 *Yara*:

> "Yara's group contribution was not all used to discharge debt, with part of it being deposited into a group account. It was confirmed at the oral hearing, however, that UAB continued to receive income in the form of interest. Yara's advocate stated that this 'cash pool' allowed the investment 'to earn passive loan interest income'. The Court notes that the existence of even minimal income precludes the application of the final loss exception (compare, inter alia, the judgment in *Commission* v *United Kingdom*, cited above, paragraph 36)"

6. The need for an Advisory Opinion

Borgarting Court of Appeal may, inter alia, review whether the tax legislation was applied correctly.

Under Section 10-4, first paragraph, of the Tax Act, as it was worded for the relevant fiscal year, in order for a deduction to be allowed for a group contribution, the transferor and recipient must be Norwegian companies or associations. If the recipient is a foreign company, the transferor may claim a deduction only if the recipient is liable to taxation in Norway and the group contribution received is taxable income in Norway for the recipient. EMD does not satisfy those conditions. It is thus clear that EMHN is not entitled to a deduction for a group contribution to its Danish subsidiary EMD under the Tax Act.

It must then be examined whether it is compatible with EEA law to refuse EMHN a deduction for a cross-border group contribution to EMD for the fiscal year 2012. That question depends on whether the conditions in the Marks & Spencer exception, see Case C-446/03 and subsequent case law, are satisfied, that is to say, primarily on whether EMD has sustained "final losses".

In the preparatory judge's view, clarification should be obtained from the EFTA Court on certain EEA law-related questions raised in the case, questions which the Court of Appeal believes have not been fully resolved by earlier case law of the ECJ and the EFTA Court.

As stated earlier, the ECJ has in *Marks & Spencer II* paragraph 36 stated that there are "final losses" only if the subsidiary "no longer has any income in its Member 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 Member State in which it is resident". The EFTA Court, for its part, has stated that "the existence of even minimal income precludes the application of the final loss exception", see E-15/16 *Yara*, paragraph 44.

In the Supreme Court's judgment in HR-2019-140-A *Yara*, the preparatory judge (*førstvoterende*) stated however in paragraph 89, with two other Justices concurring, the following about paragraph 44 of the EFTA Court's Advisory Opinion in E-15/16 *Yara*:

> "In this regard, it is apparent to refer to the Marks & Spencer II case paragraph 36, to which I have previously referred. It can in particular be questioned whether 'any income' must be read in conjunction with the rest of the paragraph, so that a 'minimal income' will only be decisive if it may indicate to which extent it is possible to obtain an income in the company. In my view, it has not been clarified whether even a 'minimal income' will be decisive although it can be established on alternative grounds that the company will not obtain any income."

The majority of the Supreme Court ruled on the case on a different basis and accordingly did not delve any further into the issue, see paragraph 90.

A minority of two Justices stated the following:

> "(122) The final loss exception is established, and later specified, by the ECJ in several judgments. In accordance with the EFTA Court's judgment, the exception also applies under the EEA Agreement. In such a situation, I find that Norwegian courts are bound by the limitation given to the exception therein.
>
> (123) In the *Marks & Spencer II* case, the following is set out in paragraph 36:

> ‘Secondly, it should be borne in mind that losses sustained by a non-resident subsidiary may be characterised as definitive, as described in paragraph 55 of the judgment in *Marks & Spencer* (EU:C:2005:763), only if that subsidiary no longer has any income in its Member 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 Member State in which it is resident (see judgment in *A*, EU:C:2013:84, paragraphs 53 and 54).’

> (124) It is stated that the possibility to offset the losses against future profits exists as long as the subsidiary continues to receive an income, however minimal. The judgment does not provide a basis for distinguishing between various sources of income. Nor do other judgments.
>
> (125) In addition, the continuous interest income was suited to be offset against – and thus reduce – the loss sustained by UAB. This means that the final amount of the loss UAB would have been precluded from having taken into account in Lithuania, was not necessarily clarified around the end of the year 2009/2010. The quote from the Marks & Spencer II case suggests that a parent company’s right to a tax deduction should not be based on how likely it is that the subsidiary’s continued income will in fact reduce its losses and to which extent. As I see it, the ECJ has made the continued existence of income the decisive factor in this respect.
>
> (126) This is also the EFTA Court's understanding of the ECJ’s limitation of the exception. I refer to paragraph 44 in the EFTA Court’s judgment, which in fact expresses that the existence of such interest income precludes the application of the final loss exception.”

In light of HR-2019-140-A, it is the preparatory judge’s view that there are grounds to make a reference to the EFTA Court for an Advisory Opinion on whether the “final losses” exception is always precluded where a subsidiary is in receipt of even minimal income in the fiscal year following the year for which a deduction is claimed, or whether a specific assessment must be conducted to determine whether the subsidiary’s continued income actually will reduce its losses, or that part of the losses for which a deduction is claimed. If the answer is that a specific assessment must be conducted of the implications of that income, the EFTA Court is requested to indicate how probable it must be that the income actually will reduce the losses, whether the amount of the reduction is of any significance and which factors will be of particular relevance in the assessment.

The parties seem to agree that the Marks & Spencer exception also requires that the foreign subsidiary has ceased its ordinary business operations and has initiated the liquidation process, so that the company does not have a genuine possibility of earning income that can go towards offsetting the losses. The parties are not in agreement, however, on whether it may also be required that the liquidation process is formally decided on immediately after the end of the fiscal year for which a deduction is claimed. The answer to this question does not seem apparent from the current case law of the ECJ and the EFTA Court. The preparatory judge has accordingly concluded that the Request for an Advisory Opinion should also include this question.

7. Submissions of the parties

7.1 Submissions of the appellant

7.1.1 A refusal to allow the deduction results in an interpretation of "final losses" that goes beyond what is necessary

On the basis of an analysis of the case law, the District Court (*tingretten*) concluded the following in its judgment on page 20:

> "the court considers that there are 'final losses' in the legal sense only if the company no longer has any income. As long as the company has even minimal income, the losses will not be final."

EMHN disagrees with the District Court's restriction of the Marks & Spencer exception to cases where the non-resident subsidiary has no income during the period immediately after the accounting period for which the deduction is claimed. That position is based on a misinterpretation of the previous case-law of the ECJ and the EFTA Court. Such an outcome is directly at odds with the fundamental EEA law consideration of effectiveness and will also be disproportionate in that it goes beyond what is necessary to safeguard one or more of the three relevant overriding considerations in the public interest; (i) the need for a balanced allocation of the power to impose taxes between the Member States, (ii) the need to prevent double deductions and/or (iii) the need to prevent tax avoidance.

Although the District Court bases itself on and draws its reasons for its interpretation from the Cases C-172/13 *Marks & Spencer II* paragraph 36 and C-650/16 *Bevola* paragraphs 63 and 64, it is less accurate in elaborating the substantive details of the rule, focusing on individual words and sentences rather than reading the reasoning of the judgment in its context, viewed in light of the underlying objective the exception is intended to pursue and fundamental EEA law principles.

In drawing the inferences it does from the directions given by the ECJ in *Marks & Spencer II* paragraph 36, and as followed up in *Bevola* paragraphs 63 and 64, the District Court seems to overlook a fundamental factor. The statement to the effect that there will be "final losses" only if "the subsidiary no longer has any income in its Member State of residence", must be read in conjunction with the rest of the paragraph. The ECJ also states that "[s]o long as that subsidiary continues to be in receipt of even minimal income, there is a possibility that the losses sustained may be offset by future profits made in the Member State in which it is resident".

The ECJ's statements relating to the subsidiary's being in "receipt of even minimal income" must accordingly be construed as meaning that that income may preclude "final losses" only if the income may be used by the non-resident subsidiary even in future fiscal years, thereby giving rise to uncertainty as to whether the losses are final. There is thus no basis for the District Court's categorical approach, by which it finds that if the foreign subsidiary generates income, that will, irrespective of amount, preclude there being "final losses", see the rule in *Marks & Spencer*.

Not only does the District Court draw incorrect inferences from the ECJ's case law, but also bases itself on an outcome that is at odds with the rule's objective. The objective of the rule is to ensure that deductions are made where there are genuine final losses and where there is no income that may allow the losses to be used in the future. This is also highlighted as being the main consideration behind the exception by the ECJ in C-650/16 *Bevola* paragraphs 63 and 64, where it is stated that the rule precludes deductions where there is uncertainty regarding whether the loss for which a deduction is claimed is final. There is no such uncertainty in the present case, since the remaining losses following the group contribution exceed potential income many times over.

The appellant does not dispute that it has been held in the case law of the ECJ and the EFTA Court that the Marks & Spencer exception is to be read narrowly. However, in view of the EEA law principle of effectiveness, the rule must not be interpreted in such a way that it, in reality, "closes the door" for a deduction being allowed for a group contribution for subsidiaries domiciled in other EEA States, including in cases where there is no doubt that that part of the losses for which a deduction is claimed is "final".

Should the District Court's position to the effect that any income precludes there being "final losses" be upheld, the exception will no longer serve its purpose and the objective pursued by the exception will be unattainable, inasmuch as it will not be possible for an undertaking to satisfy the condition. This is because there will usually always be income during a liquidation process through inter alia the sale of assets, winding-up and transfer of contracts. Such a narrow interpretation which, in reality, deprives the Marks & Spencer exception of its useful effect, would run counter to the EEA law principle of effectiveness since it will be disproportionately difficult for an undertaking to have its rights under EEA law enforced, see Joined Cases C-402 and C-432/07 *Sturgeon and Others* paragraph 47, and legislative proposition Prop. 5 LS (2019–2020), part 7.1, which states that this also applies in EEA law.

The District Court's interpretation will also establish a disconnect with and erode the overall topic of examination for the overarching condition for there to be "final losses", as established in paragraph 55 of the initial Marks & Spencer judgment:

> "there is no possibility for the foreign subsidiary's losses to be taken into account in its State of residence for future periods either by the subsidiary itself or by a third party, in particular where the subsidiary has been sold to that third party."

The consequence of the District Court's categorical approach according to which any income precludes "final losses" is that the rule will also catch cases such as the present one, in which income is generated as part of the liquidation process but the decision has been taken to liquidate the business, and there is nothing in the business that can be sold to a third party and the losses are so significant that there is no uncertainty as to whether the losses can be used in future fiscal years. In such a case, the considerations for (i) the need for a balanced allocation of the power to impose taxes between the Member States, (ii) the need to prevent double deductions and/or (iii) the need to prevent tax avoidance, does not apply, with the result that the District Court sets out a rule that goes beyond what is necessary and must accordingly be held to be an unlawful restriction that is contrary to Article 34 of the EEA Agreement, read in conjunction with Article 31.

It is emphasised, for the sake of completeness and contrary to what the District Court seems to convey on page 24 of its judgment, that the significance of the subsidiary's being in receipt of income during the liquidation process was not ruled on by either the EFTA Court or the Supreme Court in Yara. This was because the issue did not come to the fore, as that case concerned the possibility of a sale of the company with a third party involved. The majority nevertheless observed, with reference to paragraph 36 of *Marks & Spencer II*, that "[t]he key issue is whether 'any income' must be read in conjunction with the rest of the paragraph, so that a 'minimal income' will only be decisive if it may indicate to which extent it is possible to obtain an income in the company", see HR-2019-140-A, paragraph 89.

EMHN further submits that the District Court's position finds no support in Advocate General Kokott's Opinion in *Marks & Spencer II*. Not only did the ECJ not concur in the Advocate General's Opinion, but it is silent on the point of the implications of income during the liquidation period for a finding of whether there are "final losses". However, the statements did solely focus on the question whether, in the determination of whether the losses are "final", both actual and theoretical income possibilities are to be included in the calculation. However, that question does not come to the fore in the present case, in which EMD's income in 2013 is not in dispute, and there is no uncertainty regarding whether that part of the losses for which the deduction is claimed must be considered final as a result of the amount of the losses, the scaling-down of the business operations and its income potential over time, and the fact that the company, through its limiting of activities to intra-group functions, had no sales value for a third party.

Reference is also made to the remarks of the Ministry of Finance in the preparatory works for a new Section 10-5 of the Tax Act, whose interpretation is to similar effect and thus dismissive of the categorical approach taken by the District Court, see Prop. 1 LS (2021–2022), page 55:

> "The Ministry finds that the losses may be considered final even though income may occur in connection with the ceasing of operations and liquidation."

On the basis of the discussion above, the appellant submits that the District Court erred in its application of the law in interpreting the rule in Marks & Spencer, as meaning that any income generated by the foreign subsidiary in the year after the fiscal year for which the deduction is claimed will preclude “final losses”.

On the basis of the case law of the ECJ and the EFTA Court, the occurrence of “minimal income” will preclude there being “final losses” only if the income is liable to give rise to uncertainty as to whether the company may use the losses in future, see *Marks & Spencer II* paragraph 36.

7.1.2 EMD’s income was too low to give rise to uncertainty as to whether the losses were final

If the District Court had based itself on a correct understanding of the Marks & Spencer exception, i.e., that “minimal income” precludes “final losses” only if the income gives rise to uncertainty as to whether the company may use the losses in future, see *Marks & Spencer II* paragraph 36, it would have been clear that EMD sustained “final losses”.

As explained thoroughly in the writ of summons and subsequent written pleadings, EMD’s operations had been scaled down over time due to poor operating results and as part of the reorganisation of the Nordic part of ExxonMobil Group under EMHN management. Since the historical premises for establishing the company no longer obtained, the board of EMHN decided that EMD was to be liquidated on 19 December 2012. The reason was that EMD had been engaged in loss-making activities for some time, combined with the transition to the distribution model in the group, which entailed that the company no longer fulfilled a commercial need, and thus there was no basis for continued operations through a separate subsidiary in Denmark.

At that time, there was almost nothing left of value in the company. EMD had very few employees and did not own any contracts or products, with the result that the business consisted solely of follow-up with Danish distributors and other support functions based on intra-group agreements. After the liquidation process was commenced immediately the following year, EMD was left with only income from the liquidation process.

The District Court is accordingly incorrect in highlighting on page 24 of its judgment that “[…] the company was still in operation at the time of assessment, and EMD was generating ordinary operating income, and not solely liquidation costs”. Not only does the District Court base itself on an incorrect time of assessment, see the discussion in part 3.3.2 of the appeal, but the statement reveals a lack of understanding of the commercial realities associated with a liquidation process. In connection with a liquidation process, there is a need and duty to continue operations for a while in order to honour the company’s obligations under contracts in effect. When EMD had limited operating income associated with the continuation of service agreements in effect until the transfer of the agreements on 1 April 2013, it is incorrect to categorise that income as commercial income, since it is a necessary part of the liquidation process.

The limited income, irrespective of categorisation, in any event does not change the fact that EMD was in liquidation as a result of a lack of business and outdated commercial needs. It is clear that the company would not have been able to use the losses in future years, even though the assessment relates to the time immediately after the end of 2012 and not the time when the tax return was filed the following year.

It becomes particularly clear that the limited income during the liquidation period does not give rise to uncertainty as to whether EMD would be able to use the losses in future fiscal years and thus whether the losses were "final" when the 2013 income is viewed in relation to the amount of the losses carried forward. At the end of 2012, EMD had losses carried forward of MDKK 2 071 and received a group contribution of MNOK 900. EMD was thus left with remaining losses of over MDKK 1 200. During the liquidation period, the company had gross turnover of EUR 1 296 000, of which EUR 600 000 was derived from sales of estimated goodwill related to the intra-group agreements. As the liquidation accounts show, EMD was also operating with a negative operating result in 2013. When account is also taken of the fact that the decision had been taken to liquidate the business and there was little, if any, stand-alone operation left in the company, it becomes clear that there was no uncertainty as to whether EMD had sustained "final losses" equal to the group contribution, see *Marks & Spencer II*.

7.1.3 End of EMD's operations

The decision to liquidate EMD was taken by the board of EMHN on 19 December 2012. After that, only a limited part of EMD's operations were continued in the first quarter of 2013. The activities consisted of taking care of previously-contracted obligations as a part of the liquidation, until such time as they could be transferred to others. On 22 March 2013, an asset purchase agreement (DK Asset Purchase Agreement) was concluded between EMD and EMN. By the end of the first quarter of 2013, all service agreements were transferred to EMN in accordance with the asset purchase agreement. On 1 April 2013, EMD sent out information about the liquidation of EMD and the accompanying transfer of EMN's activities to all contract parties, suppliers and the Nordic lubricants business. See the further discussion in part 3 above.

7.1.4 Activity in Denmark after December 2012

In part 7.2 below, the respondent puts forward submissions about activity in Denmark after the board of EMHN decided to liquidate EMD on 19 December 2012.

The respondent contends that EMD continued their operations at and after what the respondent considers is the time of assessment, that is to say, at the turn of the year 2012/2013. The respondent submits:

> "The company's ordinary operations continued until 1 April 2013 and, in that period, the operations generated income over and above the income derived from the company's transferring the business to a Norwegian sister company and the liquidation."

The appellant submits that this is not an apt description of the actual events and nor is it substantiated by the District Court's description of the facts.

The decision to dispose of the Danish company in December 2012 was a result of structural changes in the ExxonMobil Group's lubricants business over several years and, ultimately, the implementation of the distribution model with further reduced activities for operations in the individual countries. In the time after the decision in December 2012, the focus was on implementing the reorganisation process (contracts, employees, market players, suppliers, media, etc.) and, at the same time, maintaining binding agreements until such time as they were transferred to a Nordic sister company. Anything else would have amounted to breach of contract and a significant risk of claims for damages being brought against the company, which would have led to loss of value for the company and jeopardised the sale of the business to others who could take care of existing obligations. Thus, keeping those agreements in place and functioning was a required part of the company's liquidation and did not amount to continuation of EMD's "ordinary operations".

The respondent further contends:

> "The Norwegian sister company continued, and still continues, to run the business in Denmark through a Danish branch."

The appellant submits that nor is this an apt description of the actual events and nor is it supported by the District Court's description of the facts.

The sale of the business in Denmark was part of the objective of establishing a robust and effective organisation for the lubricants business in the Nordic countries, thereby boosting competitiveness in the Nordic market. A key component of the restructuring was centralising various functions in a Norwegian company, with inter alia common management and support functions for the lubricants business in the Nordic countries. An additional point was that the distribution model that was introduced was less demanding in terms of resources allocated to follow-up with distributors in Denmark, and made it possible to achieve more efficient use of the resources across the business segments in the Nordic countries. The lubricants business is a marginal business with significant requirements for efficient operations, and it was not financially viable to continue the operations as they were organised with a separate company for management and operations in Denmark. Bringing the operations together in a company in Norway, which also included services provided to other Nordic sister companies, was a more efficient and financially attractive model – and viewed as key for sound and profitable operation in the years going forward. Naturally, the Norwegian company's operations also included taking care of the agreement acquired from the Danish company involving follow-up with distributors in the Danish market. Activity in Denmark was then limited to matters requiring a local presence. That activity is reflected in the tax reporting for a Danish branch that does not have its own customers, but supports the Norwegian company's operations.

7.2 Submissions of the respondent

For the sake of completeness, the Government would observe as an initial point that there is some disagreement between the parties as to how the case is to be understood. However, the Government does not consider it necessary to go into more detail on this aspect, given that the case before the EFTA Court is limited to the questions of interpretation of EEA law.

In the Government's view, it follows clearly from the case law of the ECJ and the EFTA Court that any income in the fiscal year after the year for which a deduction is claimed precludes the application of the "final losses" exception. There is nothing in the case law to suggest that the decisive factor is whether the company has had income of a certain type or amount, or whether it has had income that makes it possible to use the losses. The interpretation advocated by the appellant is directly at odds with the wording in *Marks & Spencer* paragraph 55, which makes it clear that there is to be "no possibility" for the losses to be taken into account for future periods.

The Grand Chamber of the ECJ has, moreover, in both C-172/13 *Marks & Spencer II* and C-650/16 *Bevola*, stated that there are final losses only when there is not "any income" and that "even minimal income" precludes final losses. This is absolutely clear, read on its own and in context. The Government also observes that the Yara case involved a loss of NOK 177 million, but the EFTA Court nevertheless held that the occurrence of even minimal interest income precluded there being a final loss, see the EFTA Court's Advisory Opinion in Case E-15/16 *Yara*, paragraph 44.

A further condition for the losses to be finally sustained is that the operation has ceased at the time of assessment and a formal liquidation process has been initiated immediately after the end of the year, see *Marks & Spencer II*, in which the ECJ accepted such a condition, see paragraph 34 et seq.

Once the ECJ accepts a requirement that liquidation must be initiated immediately after the end of the fiscal year in which the losses were sustained, then a requirement that liquidation must be initiated immediately afterwards must also be compatible with EEA law. This is also connected with the condition requiring that the operations must have ceased. If the operations have not ceased, the possibility of future income cannot be ruled out, see *Marks & Spencer* paragraph 55, first indent.

In the present case, the Government takes the view that the company was operating business at the time of assessment, that is to say, at the turn of the year 2012/2013. The company's commercial activities continued until 1 April 2013 and, in that period, the business generated income over and above the income generated in connection with the company's transferring the business to a Norwegian sister company and the liquidation. The Norwegian sister company continued, and still continues, to run the business in Denmark through a Danish branch.

8. Questions

In light of the foregoing, Borgarting Court of Appeal finds that the following questions are to be referred to the EFTA Court:

1a:
Is the application of the "final losses" exception as set out in the EFTA Court's judgment in Case E-15/16 *Yara* and the case law referred to therein 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 must a specific assessment be conducted to determine whether the subsidiary's continued income actually will reduce its losses, or that part of the losses for which a deduction is claimed?

1b:
If the answer to question 1a is that a specific assessment must be conducted of the subsidiary's continued income, the EFTA Court is requested to indicate how probable it must be that the income actually will reduce the losses, whether the amount of the reduction is of any significance and which factors will be of particular relevance in the assessment.

2:
Is it compatible with Articles 31 and 34 of the EEA Agreement to require as a prerequisite for the application of the "final losses" exception that the liquidation process be formally decided on immediately after the end of the fiscal year for which a deduction is claimed?

Oslo, 20 June 2023

Thomas Chr. Poulsen
Court of Appeal Judge