

Case No: 76260
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EFTA SURVEILLANCE
AUTHORITY

REASONED OPINION

delivered in accordance with Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice concerning Norway's breach of the freedom to provide services (Article 36 EEA) and the free movement of capital (Article 40 EEA) as regards car registration tax

1 Introduction

On 1 January 2015, Norway introduced a general system of reimbursement of the registration tax for motor vehicles (“tax reimbursement system”). The regulatory amendments in question were adopted in response to infringement proceedings initiated by the EFTA Surveillance Authority (“the Authority”) against Norway for breach of the freedom to provide services laid down in Article 36 of the EEA Agreement (“EEA”) (Case No. 66983) and the free movement of capital enshrined in Article 40 EEA (Case No. 71846). The prior case was referred to the EFTA Court, where the Court, in a judgment of 24 September 2014 in Case E-7/14 (*ESA v Norway*),¹ confirmed the Authority’s legal stance with regard to Norway’s breach of Article 36 EEA.²

Prior to the official entry into force of the tax reimbursement system, the Authority and the Norwegian Government held informal consultations with a view to assessing its compliance with EEA law and, in particular, the requirements laid down in the case law of the Court of Justice of the European Union (“the CJEU”) and the EFTA Court. In the framework of these consultations, it came to the Authority’s attention that not all the conditions of the case law of the CJEU had yet been taken into account in the Norwegian tax reimbursement system.

Following a letter of formal notice³ and a reasoned opinion⁴ sent by the Authority for Norway’s breach of Articles 36 and 40 EEA in this case, Norway amended its tax reimbursement system in January 2017, bringing it more in line with EEA law, by providing both for reimbursement of tax paid in excess, as well as proportionate payment of registration tax. However, Norway has still not fulfilled the requirement of ensuring that overpaid registration tax is reimbursed with interest, which, in the Authority’s view, constitutes a breach of Articles 36 and 40 EEA. For the sake of clarity, the Authority therefore issues this supplementary reasoned opinion, in order to delimit and further explain the outstanding issue in this case.

2 Correspondence

Following informal correspondence between the Authority and Norway, the Authority sent a letter of formal notice to Norway on 11 November 2015, establishing that by not providing for an *ex ante* reduction of the registration tax (proportionate payment) in certain circumstances, in particular when the precise duration of the use can be determined, and not ensuring that overpaid registration tax is reimbursed with compensation of interest, Norway had failed to comply with the requirements of the freedom to provide services as regarded leased and rented cars and the free movement of capital as regarded borrowed cars.⁵

By letter dated 11 January 2016, the Norwegian Government replied to the letter of formal notice, providing a brief overview of the possible models scrutinized, aimed at implementing the relevant case law of the CJEU.⁶ The Norwegian Government expressed its intention to make sure that the amendment would enter into force on 1 January 2017.

¹ Case E-7/14 *EFTA Surveillance Authority v Kingdom of Norway* [2014] EFTA Court Report, 840.

² Case No. 71846 was later merged with Case No. 76260, which was created as a follow-up to the judgment of the EFTA Court in Case E-7/14, *ESA v Norway*.

³ Document No. 770682.

⁴ Document No. 808777.

⁵ Document No. 770682.

⁶ Document No. 789625.

On 29 June 2016, a reasoned opinion was sent by the Authority as a result of the Norwegian Government's failure to provide more detailed information on the possible models aimed at implementing the case law of the CJEU.⁷

The matter was discussed at the package meeting, which took place in Oslo on 27-28 October 2016. The Norwegian Government informed the Authority that the legal requirement to reimburse the amount paid in excess with interest had been reconsidered in the meantime.

By e-mail of 24 February 2017, the Norwegian Government provided the Authority with information about the Norwegian legislation recently enacted and explanations regarding each provision, as well as an overview of the relevant procedures.⁸

Following a new request for information from the Authority, Norway sent a letter on 5 September 2017, providing further information regarding Norway's refusal to pay interest where overpaid registration tax is reimbursed.⁹

The matter was discussed at the package meeting, which took place in Oslo 26-27 October 2017. The Norwegian Government reiterated its view that the current system did not have to provide for payment of interest. The representatives of the Authority and the Norwegian Government agreed that it would be necessary to ensure that users of foreign-registered motor vehicles should not suffer any economic disadvantage resulting from the operation of the Norwegian system of registration tax. Norway was invited to provide evidence to that end until 15 December 2017.

By letter of 15 December 2017, Norway reiterated its view that payment of interest upon reimbursement of overpaid registration tax would not be necessary and submitted argumentation and calculation in support of that.¹⁰

3 Relevant EEA law

According to Article 36(1) EEA “*[w]ithin the framework of the provisions of this Agreement, there shall be no restrictions on freedom to provide services within the territory of the Contracting Parties in respect of nationals of EC Member States and EFTA States who are established in an EC Member State or an EFTA State other than that of the person for whom the services are intended.*”

Article 40 EEA states that “*[w]ithin the framework of the provisions of this Agreement, there shall be no restrictions between the Contracting Parties on the movement of capital belonging to persons resident in EC Member States or EFTA States and no discrimination based on the nationality or on the place of residence of the parties or on the place where such capital is invested. Annex XII contains the provisions necessary to implement this Article.*”

4 Relevant national law

Regulation of 19 March 2001 No. 268 on registration tax for motor vehicles (*Forskrift av 19. mars 2001 nr. 268 om engangsavgift på motorvogner*) (“the Norwegian Regulation”).

⁷ Document No. 808777.

⁸ Document No. 843576.

⁹ Document No. 870528.

¹⁰ Document No. 889045.

4.1 The new system of tax reimbursement

The Norwegian Regulation was amended with effect from 1 January 2015 in order to incorporate into its Chapter 7 the legal provisions regulating the general system of reimbursement of the registration tax for motor vehicles.

It follows from Section 7-1 of the Norwegian Regulation that when a leased, rented or borrowed motor vehicle, provided that it is registered in the National Motor Vehicle Register on 26 June 2014 or later, is to be exported, the exporter may apply for a proportionate refund of the registration tax.

Section 7-2 of the Norwegian Regulation stipulates that the basis for the calculation of the refund is the registration tax that would have been paid if the motor vehicle had been registered for the first time at the date of export. The deduction might, on the other hand, vary, based on the age of the car. Reference is made to Section 3-3 of the Norwegian Regulation, which indicates the relevant percentage of deduction, based on the age of the vehicle.

Chapter 7 of the Norwegian Regulation contains further legal requirements which must be met before the refund of the registration tax can be executed.

4.2 The new system of proportionate tax payment

The Norwegian Regulation was amended again on 1 January 2017 with a view to introducing a system of proportionate payment of registration tax.

Section 7-5 of the Norwegian Regulation establishes the basis for the system and stipulates that a leased, rented or borrowed vehicle with predetermined use in Norway for a temporary period may, following an application, be subject to a proportionate registration tax instead of the ordinary (full) registration tax. The application for proportionate payment has to be submitted to the Norwegian tax administration before the vehicle is registered in Norway.

Section 7-6 regulates the calculation of the proportionate registration tax. The tax is calculated as a percentage of the ordinary registration tax and is equal to the reduced rate which applies for used vehicles in accordance with Section 3-3.

It follows from Section 7-7 that ordinary registration tax has to be paid if the vehicle, after the predetermined period, stays in Norway on a permanent basis.

Section 7-8 regulates extension of the predetermined period of use in Norway and states that the proportionate tax has to be paid for the extended period.

Section 7-9 of the Norwegian Regulation deals with interruption of the predetermined period of use in Norway and stipulates that tax will be reimbursed if the vehicle is taken out of use and de-registered before the end of the predetermined period. The reimbursed amount is then proportionate to the shortened period and the calculation of the tax takes place at the time of interruption of the predetermined period (export), i.e. the calculation is based on the regulations and rates in force at the time of export.

Section 7-10 sets out the terms for the system of proportionate registration tax. The maximum timeframe a vehicle can be used in Norway within this system is 5 years and a vehicle has to be de-registered in the Norwegian motor vehicle register no later than 2 weeks after the expiration of the predetermined period, unless registration tax for permanent use or an extended period has been approved and paid.

5 The Authority's Assessment

It follows from the above-mentioned that Norway has introduced a tax reimbursement system which provides for (1) reimbursement of tax paid in excess, as well as (2) proportionate payment, commensurate to the actual or expected duration of the use of the respective motor vehicle in Norway, thereby bringing the system more in line with EEA law. The remaining issue is, however, the requirement to pay interest where overpaid registration tax is reimbursed.

It should be noted that it has not been disputed that the tax reimbursement system at issue applies to leased and rented motor vehicles, as well as borrowed motor vehicles.¹¹

In what follows, the Authority will present its views on the question of compliance of the current Norwegian tax reimbursement system with EEA law, more specifically with the freedom to provide services (Article 36 EEA) and the free movement of capital (Article 40 EEA), as interpreted by the European courts.

5.1 Relevant case law of the European courts

It follows from the EEA Agreement, as interpreted by the European courts, that it does not lay down any rules on the taxation of motor vehicles. Thus, the EEA States are free to exercise their powers of taxation in that area, provided they comply with EEA rules, in particular the principle of proportionality.¹²

In Case E-7/14 of 24 September 2014 (*ESA v Norway*), the EFTA Court found that Norway had failed to fulfil its obligations under Article 36 EEA by maintaining in force national rules which provided that a full amount of registration tax was due for foreign-registered leased motor vehicles temporarily imported by Norwegian residents to Norway, without the person having any right to an exemption or refund where the vehicle was neither intended to be used essentially in Norway on a permanent basis nor in fact used in that manner.¹³

By doing so, the EFTA Court followed the already settled case law of the CJEU in similar cases concerning the import of leased¹⁴ and borrowed¹⁵ foreign-registered motor vehicles from other EEA States. In these cases, the CJEU had ruled that persons in the aforementioned circumstances had to be able to invoke a right to exemption or reimbursement where that vehicle was neither intended to be used essentially in the first Member State on a permanent basis nor, in fact, used in that way. In these cases, leased motor vehicles were considered to be covered by Article 36 EEA (Article 56 TFEU) on the freedom to provide services,¹⁶ whereas privately borrowed motor vehicles were considered to fall within the scope of Article 40 EEA (Article 63 TFEU) on the free movement of capital.¹⁷

¹¹ See e.g. letter from the Norwegian Government, dated 7 March 2014, in Case No. 71846 (Doc. No. 701864).

¹² See Case C-451/99 *Cura Anlagen* EU:C:2002:195, paras. 40 and 71; Case C-464/02 *Commission v Denmark* EU:C:2005:546, para. 74; Joined Cases C-151/04 and C-152/04 *Nadin and Nadin-Lux* EU:C:2005:775, para. 40; Case C-232/03 *Commission v Finland* EU:C:2006:128, para. 46; Case C-242/05 *Van de Coevering*, EU:C:2006:430, paras. 23 and 33; Case C-42/08 *Ilhan* EU:C:2008:305, paras. 17 and 25; Case C-364/08 *Vandermeir* EU:C:2008:593, para. 22; Joined Cases C-578/10 to C-580/10 *Van Putten and others*, EU:C:2012:246, para. 37; Case E-7/14 *ESA v Norway*, cited above, paras. 36 and 39.

¹³ Case E-7/14 *ESA v Norway*, cited above, para. 39.

¹⁴ See Case C-242/05 *Van de Coevering*, cited above.

¹⁵ See Joined Cases C-578/10 to C-580/10 *Van Putten and others*, cited above.

¹⁶ See Case C-242/05 *Van de Coevering*, cited above.

¹⁷ See Joined Cases C-578/10 to C-580/10 *Van Putten and others*, cited above.

In case C-91/10 of 29 September 2010 (VAV), a resident in the Netherlands had leased a car registered in Germany for a specific period of two months and ten days, which was principally used in the Netherlands. The Dutch authorities charged the leased car with a full registration tax of EUR 20,277, subject to a proportionate refund which was to be paid, without interest, when the use of the car in the Netherlands ceased. The CJEU held that the national legislation was disproportionate.¹⁸

In Case C-552/15 of 19 September 2017 (*Commission v Ireland*), the CJEU found that by failing to provide for the payment of interest when registration tax of leased or rented motor vehicles is refunded, Ireland had failed to fulfil its obligations under Article 56 TFEU.¹⁹ More particularly, the Court stipulated on that matter:

“A system founded on the presumption that part of the registration tax paid initially will constitute an overpayment and will therefore have to be refunded, without the payment of interest on those sums being provided for, does not enable the cash-flow disadvantage caused by payment in advance of the full amount of tax to be alleviated. The failure to pay interest therefore does not comply with the principle of proportionality.”²⁰ (emphasis added)

It should be noted that before that case was decided by the CJEU, Ireland had amended its legislation and put in place a system of reimbursement with interest. However, as such a system was not in place at the end of the period laid down in the reasoned opinion,²¹ the Court could not take account of any such subsequent legislative amendments and therefore found that Ireland had failed to fulfil its obligations under Article 56 TFEU.

As noted above, Norway has complied with the requirements of this case law, as regards the requirement of reimbursement of tax paid in excess, as well as the requirement of proportionate payment (*ex ante* reduction of the registration tax). Norway has, however, not introduced a system which ensures that overpaid registration tax is reimbursed with compensation of interest.

5.2 The arguments presented by the Norwegian Government

In its letters of 5 September 2017²² and 15 December 2017²³, the Norwegian Government put forward the argument that Norway is not obliged to provide for payment of interest upon reimbursement of registration tax, given the fact that the calculation of the amount to be reimbursed is based on the registration tax applicable at the time of export of the vehicle. According to the Norwegian Government, the registration tax is adjusted annually in line with expected increase in consumer price index from one year to another. This practice of annual price adjustment is intended to ensure that the tax rates retain their real value over time. Norway thus argues that since the amount reimbursed is expected to equal the real value of the initial registration tax (after adjusting for the deduction according to the age of the vehicle), there is no need or reason to introduce specific compensation of interest in addition to the existing price adjustment mechanism.

Moreover, Norway has held that if the reimbursement were to include additional compensation for interest, the total reimbursement would exceed the registration tax levied, if the same car had been registered in Norway for the first time. According to the

¹⁸ Case C-91/10 VAV, EU:C:2010:558, para. 30.

¹⁹ Case C-552/15 *Commission v Ireland*, not yet reported, para. 124.

²⁰ *Ibid*, para. 117.

²¹ See also Case E-7/14 *ESA v Norway*, cited above, para. 31.

²² Document No. 843576.

²³ Document No. 889045.

Norwegian Government, this might give rise to a “carrousel system” where the same cars are imported and exported several times, thus giving rise to abuse.

Furthermore, Norway has argued that since the Dutch system in the *VAV* case did not reflect price adjustments, that order does not oblige Norway to introduce interest rules on reimbursement of registration tax upon export. The opinion of the Norwegian Government is therefore that the price adjustment system gives an adequate compensation, and that there is no need for interest compensation when overpaid registration tax is reimbursed.

5.3 The Authority’s legal assessment

It should be noted at the outset that, ever since the letter of formal notice in this case was sent to Norway on 11 November 2015, the Authority has been consistent in its opinion that interest must be paid upon reimbursement of overpaid registration tax. This view was initially based on the order of the CJEU in the *VAV* case and has been further reinforced by the recent judgment of the CJEU in the case of *Commission v Ireland* of 19 September 2017, where the Court confirmed the obligation to pay interest on the reimbursement of overpaid registration taxes.

The Authority does not agree with the arguments presented by the Norwegian Government. Price adjustments due to inflation and payment of interest upon reimbursement of overpaid taxes are by their nature two different mechanisms which serve different objectives. The system of calculating the reimbursement based on the registration tax applicable at the time of export, together with price adjustment, is intended to ensure that the amount reimbursed equals the real value of the initial registration tax. By contrast, the idea behind payment of interest upon reimbursement of overpaid taxes is to compensate for the time when the money was, wrongfully, in the possession of the State and the person concerned thus could not, during that time, receive a return on the overpaid amount. As stated by the CJEU in *Commission v Ireland*, the payment of interest should “enable the cash-flow disadvantage caused by payment in advance of the full amount of the tax to be alleviated”. The objective is, therefore, that the person who has overpaid taxes should be reimbursed, not only the same value as if he had never overpaid, but more, in order to be fully compensated for the economic loss incurred as a result of being deprived of the free disposal of funds which were used for the payment of the overpaid registration tax.

In the Authority’s view, the Norwegian tax reimbursement system thus does not adequately compensate for the overpayment of taxes, although the registration tax is adjusted annually and even though the reimbursement is based on the registration tax applicable at the time of export of the vehicle. For the same reason, users of foreign-registered motor vehicles appear to suffer economic disadvantage resulting from the operation of the Norwegian tax reimbursement system, in comparison to users of motor vehicles that have only been registered on Norway.

In this context, the Authority also observes that Norway appears to follow this principle of payment of interest upon reimbursement of overpaid taxes elsewhere in its own tax legislation, such as in Sections 10-60 and 11-4 of the Tax Payment Act.²⁴ The Authority takes note that Norway has chosen to follow a less favourable approach for this system of reimbursement of overpaid car registration tax, which only applies in cross-border situations.

As regards Norway’s argument that the *VAV* case does not entail an obligation for Norway to pay interest upon reimbursement of overpaid taxes, since the Dutch system in that case

²⁴ Lov om betaling og innkreving av skatte- og avgiftskrav (skattebetalingsloven) av 17. juni 2005 No 67.

did not reflect price adjustments, the Authority observes that nothing in the aforementioned case law of the CJEU indicates that the obligation to pay interest upon reimbursement only applies in specific circumstances. On the contrary, the case law seems clear on the general requirement of payment of interest, as is apparent, in particular, from the Court's reasoning in the recent case of *Commission v Ireland*. Furthermore, as stated above, the Authority is of the opinion that a price adjustment system does not compensate adequately for the overpayment of taxes and can therefore not replace an obligation to pay interest.

With regard to Norway's argument that the payment of interest would give rise to abuse, the Authority notes at the outset that the mere fact that cars are being imported into Norway, for the purposes of leasing, renting or borrowing, cannot be the basis of a general presumption of abusive practices and justify a measure which restricts the fundamental freedoms.²⁵ Furthermore, although EEA States remain free to enact rules which have the objective of precluding wholly artificial arrangements leading to tax avoidance, it is settled case law that such measures must, in order to comply with the principle of proportionality, enable national authorities, and courts, to carry out a case-by-case examination, taking into account the particular features of each case, based on objective elements, in order to assess the abusive or fraudulent conduct of the persons concerned.²⁶

A national measure, such as the one at issue in this case, which restricts the freedom of movement out of a general concern for the possibility of abuse of rights, and thereby excludes entirely the possibility of obtaining interest upon reimbursement of overpaid registration tax, without allowing for a case-by-case assessment by national courts or authorities, therefore does not comply with the principle of proportionality.

In the light of the arguments set out above, the Authority is of the opinion that the Norwegian system of reimbursement of registration tax, which does not ensure the payment of interest upon reimbursement of overpaid registration tax, does not meet the requirements of the provisions on the freedom to provide services and the free movement of capital, as interpreted in the case law of the CJEU, and is disproportionate. Norway has therefore failed to fulfil its obligations under Article 36 EEA, as regards leased and rented motor vehicles, and Article 40 EEA, with regard to borrowed motor vehicles.

FOR THESE REASONS,

THE EFTA SURVEILLANCE AUTHORITY,

pursuant to the first paragraph of Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, and after having given Norway the opportunity of submitting its observations,

HEREBY DELIVERS THE FOLLOWING REASONED OPINION

that by not ensuring that overpaid car registration tax is reimbursed with compensation of interest, the Kingdom of Norway has failed to comply with the requirements of the

²⁵ See Case C-524/04 *Thin Cap*, EU:C:2007:161, para. 73, and Case C-196/04 *Cadbury Schweppes*, EU:C:2006:544, para. 50.

²⁶ Case E-15/16 *Yara International ASA*, not yet reported, paras. 49 and 51; Joined Cases E-3/13 and E-20/13 *Olsen and Others* [2014] EFTA Ct. Rep. 400, paras. 166 and 173; Case C-182/08, *Glaxo Wellcome*, EU:C:2009:559, para. 99.

freedom to provide services arising from Article 36 EEA as regards leased and rented cars and the free movement of capital enshrined in Article 40 EEA as regards borrowed cars.

Pursuant to the second paragraph of Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, the EFTA Surveillance Authority requires Norway to take the measures necessary to comply with this reasoned opinion within *two months* of its receipt.

Done at Brussels, 3 October 2018

For the EFTA Surveillance Authority

Bente Angell-Hansen
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