Brussels, 8 February 2017
Case No: 75693
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Ministry of Finance
P.O. Box 8008 Dep,
NO-0030 Oslo,
Norway

Dear Sir or Madam,

Subject: Letter of formal notice to Norway concerning taxation of pensions received by persons residing outside Norway

1 Introduction

1. By letter dated 22 July 2014 (Doc. No 715012), the EFTA Surveillance Authority ("the Authority") informed the Norwegian Government that after delivery of the judgment in Case E-26/13 *Gunnarsson*[1], it had resumed the examination of the issues concerning taxation by Norway of pensions received by persons residing in other EEA States.
2. In the course of the examination of the issues it appeared that Norway does not respect the principles established by the Court of Justice of the European Union ("the Court of Justice") in its judgment in *Commission* v *Estonia*, C-39/10[2].
3. This judgment established, in essence, that Article 45 TFEU and Article 28 EEA prohibit national provisions under which non-resident pensioners are excluded from benefiting from the threshold below which the taxpayer is regarded as not having the necessary means to finance public expenditure, where, because of the modest amount of their pensions, they are not taxable in the EEA State of residence under the tax legislation of that State.
4. On 3 December 2015, the Authority received a complaint of a pensioner living in another EEA State and receiving a low Norwegian old-age pension (Case 78352). Norway is taxing the pension with a withholding tax of 15 %. However, according to the complaint, Norwegian residents receiving such low pensions are exempted from taxes in Norway. The complainant is not taxed in the State of residence because of the modest amount of his pension. On 9 December 2015, the Authority informed the Norwegian Government about the complaint (Doc. No 784032).

[1] Case E-26/13 *Gunnarsson* [2014] EFTA Ct. Rep. 254.
[2] Judgment in *Commission* v *Estonia*, C-39/10, EU:C:2012:282.

2 Correspondence

5. By the same letter of 22 July 2014, the Authority requested information from the Norwegian Government regarding the Norwegian tax rules applicable to pension payments from Norwegian sources paid to non-resident persons.
6. After an extension of the deadline, the Norwegian Government responded by letter of 3 October 2014 (ref. 14/3589-jr, Doc. No 724696).
7. The case was discussed at the package meeting in Norway on 16 and 17 October 2014[3].
8. On 28 August 2015, the Authority's Internal Market Affairs Directorate ("the Directorate") sent a pre-Article 31 letter (Doc. No 751501) to Norway in which it took the preliminary view that by excluding pensioners resident in other EEA States from benefiting from personal and family deductions laid down by the national tax legislation where their income received in the EEA State of residence is not taxable under the tax legislation of that State, Norway has failed to fulfil its obligations under Article 28 EEA and Article 7(1)(b) of Directive 2004/38/EC.
9. The reply from the Norwegian Government to the pre-Article 31 letter was received on 5 October 2015 (your ref. 14/3589, Doc. No 775786).
10. The case was further discussed with Norway at the packages meeting of 12 and 13 November 2015[4] and 27 and 28 October 2016[5].

3 Relevant national law

11. According to Section 2-3 paragraph 4 of the Tax Act[6], effective as of 1 January 2010, pension payments from Norwegian sources paid to non-resident persons are subject to taxation[7]:

    "*(4) A person not subject to tax liability under Section 2-1, is liable for tax on pensions, benefits derived from a surrendered property, life annuity and similar disbursements, including disability insurance according to Chapter 12 of the National Insurance Act and other disability benefits from other sources, which is taxable income according to Section 5-1 paragraph 1, Section 5-40 or Section 5-42 litra b, when*

    a) the National Insurance or a public lifecycle fund carry out the disbursement,

    b) the recipient has acquired pension points under the National Insurance Scheme and the disbursement takes place on the basis of the commitment of a person, corporation or organization resident in the country or person, corporation or organization resident abroad being tax liable to Norway according to paragraph 1 litra b, or

[3] See the follow-up letter to the package meeting (Case No 75236, Doc. No 726564).
[4] See the follow-up letter to the meeting (Case No 77692, Doc. No 781498).
[5] See the follow-up letter to the meeting (Case No 79432, Doc. No 824382).
[6] LOV-1999-03-26-14.
[7] Here and further unofficial translation by the Authority of the provisions of the Tax Act.

c) *the disbursement takes place to fulfil the commitment of a person, corporation or organization on the basis of subsidies etc. which have provided tax relief according to Sections 6-46, 6-47 and 6-72.*"

12. Such non-resident persons are subject to a fixed withholding tax where no deductions are allowed. The tax rate is 15 %. This follows from Section 3-5 paragraph 4 first sentence of the Norwegian Parliament's tax decision[8]:

    "*A person mentioned in Section 2-3 paragraph 4 of the Tax Act, shall of gross employment income as determined by Chapter 12 of the Tax Act, pay taxes to the State in the amount of 15 % of the income.*"

13. Under the tax rules, persons resident in other EEA States who are liable to tax in Norway on the whole or almost the whole of their gross income from pensions, disability benefits, employment and business activity or, as the case might be, their total income may request that their taxes be assessed pursuant to the same rules as apply to persons resident in Norway.

14. In particular, under Section 6-71 paragraph 1 of the Tax Act such persons may demand deductions available to Norwegian residents, such as general deductions, *i. e.* among other things, the minimum deduction as further specified in Sections 6-30 to 6-32 and the personal deduction as further specified in Section 15-4. Under Section 6-71 paragraph 2 of the Tax Act they can demand deductions for debt interests, as further specified in Section 6-40. Section 6-71 of the Tax Act reads:

    "*Section 6-71 Deductions for personal taxpayers with limited tax liability*

    (1) A personal taxpayer with limited tax liability according to Section 2-3 may demand deductions as if the tax liability applied to all assets and income according to Section 2-1 paragraph 9, when the taxpayer is a resident of another EEA State and the whole or almost the whole income of employment, pensions, disability benefits or business activities in the income year is taxable in Norway. For spouses, the total income of the spouses forms the basis when assessing whether the income requirement is fulfilled.

    (2) A personal taxpayer with limited tax liability according to Section 2-3 may demand deductions for debt interests as if the tax liability applied to all assets and income according to Section 2-1 paragraph 9, when the taxpayer is a resident of another EEA State and the whole or almost the whole income in the income year is taxable in Norway. The taxpayer must document that the conditions for the right to deductions in the first sentence are fulfilled.

    (3) The Ministry may lay down regulations complementing and implementing this Section."

15. Such persons are also entitled to tax deductions for pension income under Section 16-1 and to tax limitations under Section 17-1 of the Tax Act.

16. Section 16-1 of the Tax Act provides[9]:

    "*Section 16-1 Tax deductions for pension income*

    (1) Deductions are awarded on income tax and social insurance with an amount set by the Norwegian Parliament, for a taxpayer who

[8] For year 2016: FOR-2015-12-14-1564.

[9] Section 16-1 of the Tax Act entered into force in 2010 (with effect as of the income year 2011).

a. receives an old-age pension in accordance with the National Insurance Act,

b. receives an early-retirement pension (AFP) in accordance with Law 25 June 2010 No. 28 on early retirement pension for members of the Norwegian Public Service Pension Fund or other equivalent agreements or statutory schemes or is covered by Section 12 of the AFP-contribution Act,

c. receives benefits in accordance with Law 29 April 2005 No. 21 on supplementary benefits to persons with a short residence in Norway, or

d. is tax liable to Norway for pension income corresponding to litra a, b and c from another EEA State.

(2) The deduction is reduced

a. corresponding to the pension level in the case of partial age pension in accordance with the National Insurance Act,

b. corresponding to the percentual reduction in early retirement pension when such pension is reduced compared to employment income, and

c. corresponding to the number of months during the income year the taxpayer has received pension as mentioned in paragraph 1. The same applies for a taxpayer resident in the country only parts of the income year.

(3) The deduction is reduced when the taxpayers total pension income etc. in accordance with Section 12-2 litra b, i and j exceeds set limit amounts. The limit amounts are set by the Norwegian Parliament yearly, in two steps. The deduction is reduced by 15,3 % of pension income etc. that exceeds the limit value in step 1, and with 6 % of pension income etc. that exceeds the limit value in step 2. The limit values are reduced correspondingly to paragraph 2. Pension income from abroad, not taxable to Norway, is taken into account when calculating the total pension income etc. in accordance with this paragraph. Contributions as mentioned in Sections 12-2 litra j and 17-1 paragraph 1 of the Tax Act, previous to a transition from such contributions to old-age pension during the income year, is not to be included when calculating pension income etc. for the purposes of this paragraph.

(4) A taxpayer fulfilling the criteria for tax deductions in accordance with this Section and for tax limitations in accordance with Sections 17-1 or 17-4 in the same income year, shall have the tax decided in accordance with the Section providing the lowest tax.

(5) A taxpayer with limited tax liability according to Section 2-3 may require tax deductions in accordance with this Section if

a. the taxpayer is a resident of another EEA State,

b. Norway, in accordance with international agreements, may require information from this State regarding the taxpayer's income and assets, and

c. the whole or almost the whole income in the income year is taxable in Norway.

(6) The tax deduction shall not constitute a higher amount than the sum of decided income taxes and social insurance.

(7) The Ministry may lay down give regulations complementing and implementing this Section."

17. Section 17-1 of the Tax Act reads[10]:

[10] Section 17-1 of the Tax Act entered into force in 2009 (with effect as of the income year 2010).

"Section 17-1 Limitations in case of low general income

(1) If the general income with additions in accordance with paragraph 3, with deduction of additions applied in accordance with Section 10-42, does not exceed an amount set by the Norwegian Parliament, no tax or social insurance shall be calculated for tax payers who

a) receive transitional benefits in accordance with Sections 16-7 or 17-6 of the National Insurance Act, or

b) receive pensions in accordance with Sections 16-7 or 17-5 of the National Insurance Act.

(2) If the general income with additions in accordance with paragraph 3, with deduction of additions applied in accordance with Section 10-42, exceeds the set amounts, the sum of

a) income tax to the municipality,

b) income tax to the county,

c) equalisation tax to the state,

d) bracket tax to the state calculated in accordance with the two lowest percentages,

e) social insurance

shall not constitute more than 55 percent of the exceeding amount. When applying this paragraph, statutory tax deductions shall not be considered.

(3) When applying the first and second paragraphs, one and a half percent of the taxpayer's net fortune at state tax determination, exceeding NOK 200 000 for singles and NOK 100 000 for each spouse, shall be added to the general income. Residence used as a primary residence shall not be taken into account when calculating the net fortune.

(4) If the taxpayer in the income year has only partially resided in the country, the general income – with additions in accordance with paragraph 3 – shall be recalculated to a yearly income based on the number of total months of the residence prior to calculating any tax limitations. The tax limitation is thereby to be reduced proportionally.

(5) A taxpayer with limited tax liability according to Section 2-3 may require tax relief in accordance with this Section if

a. the taxpayer is a resident of another EEA State,

b. Norway, in accordance with international agreements, may require information from this State regarding the taxpayer's income and assets, and

c. the whole or almost the whole income in the income year is taxable in Norway.

(6) When general income is applied in accordance with this Section, upward adjustment in accordance with Sections 10-11, 10-3, 10-42 and 10-44 are not to be considered."

18. The rule in Section 6-71 allowing non-resident under certain conditions the same deductions as those available to residents was approved in 2005 and has effect as of the income year 2006. In the preparatory works to the rule dating from 2005 it is stated

that the term "*the whole or almost the whole*" should be understood to mean "*at least 90 %*"[11].

19. Persons resident in other EEA States and receiving less than 90 % of their income from the Norwegian sources, therefore, cannot claim the deductions and limitations available to Norwegian residents, such as the deductions and limitations referred to in paragraphs 14-17 above.

4 Relevant EEA law

20. Article 28(1) of the EEA Agreement provides that freedom of movement for workers shall be secured among EU Member States and EEA EFTA States. This shall, pursuant to Article 28(2) of the EEA Agreement, entail the abolition of any discrimination based on nationality between workers of EU Member States and EEA EFTA States as regards employment, remuneration and other conditions of work and employment.

5 The Authority's assessment

5.1 The existence of the discrimination

21. It is settled case-law that, while direct taxation falls within the competence of the EEA States, they must none the less exercise that competence consistently with EEA law[12]. Tax rules of national law must, therefore, be adopted consistently with the freedoms guaranteed by the EEA Agreement, in particular the freedom of movement for workers as conferred by Article 28 EEA abolishing any discrimination based on nationality.

22. According to established case law, discrimination can arise through the application of different rules to comparable situations or the application of the same rule to different situations[13].

23. As far as direct taxes are concerned, residents and non-residents are generally not in comparable situations, since the income received in the territory of an EEA State by a non-resident is in most cases only a part of his total income, which is concentrated at his place of residence, and a non-resident's personal ability to pay tax, determined by reference to his aggregate income and his personal and family circumstances, is easier to assess at the place where his personal and financial interests are centred, which is generally the place of his usual residence[14].

24. The Court of Justice held in the judgment in *Schumacker*[15] that the fact that an EEA State does not grant to a non-resident certain tax advantages which it grants to a resident is not, as a rule, discriminatory, having regard to the objective differences between the situations of residents and non-residents from the point of view both of

[11] Ot. prp. nr. 1 (2005-2006) section 9.5.1.1 (page 36).
[12] See, *inter alia*, judgment in *Commission* v *Estonia*, C-39/10, cited above, paragraph 47 and the case law cited therein.
[13] See, *inter alia*, judgment in *Commission* v *Estonia*, cited above, paragraph 48 and the case law cited therein.
[14] See, *inter alia*, judgment in *Commission* v *Estonia*, cited above, paragraph 49 and the case law cited therein. See also to this effect Case E-26/13 *Gunnarsson*, cited above, paragraph 86.
[15] Judgment in *Schumacker*, C-279/93, EU:C:1995:31, paragraph 34.

the source of their income and of their personal ability to pay tax or their personal and family circumstances[16].

25. There could be discrimination within the meaning of the EEA Agreement between residents and non-residents only if, notwithstanding their residence in different EEA States, it were established that, having regard to the purpose and content of the national provisions in question, the two categories of taxpayers are in a comparable situation[17].

26. That is the case where a non-resident, who has no significant income in his EEA State of residence and gains the main part of his taxable income from an activity carried on in the EEA State of employment, is in a comparable situation to that of residents of the latter State. That is by reason of the fact that the EEA State of residence is not in a position to grant him the advantages resulting from the taking into account of his personal and family circumstances. Consequently, as regards his tax treatment, he must be treated as resident in the EEA State of employment, and that State must grant him the tax advantages it allows to residents[18].

27. The Court of Justice has also held in the judgment in *Wallentin* that, in a situation in which there is no taxable income in the EEA State of residence under the tax legislation of that State, discrimination could arise if the personal and family circumstances of a person such as the complainant in that case were taken into account neither in the EEA State of residence nor in the EEA State of employment[19].

28. Moreover, in a case where a person, because of the modest amount of worldwide income is not taxable in the EEA State of residence, under that State’s tax legislation, that State is not in a position to take into account the ability to pay tax and the personal and family circumstances of the person concerned, in particular the consequences for that person of taxation of the income received in another EEA State[20].

29. In those circumstances, the refusal of the EEA State in which the income in question is received to grant an allowance provided for under its tax legislation penalises non-resident taxpayers simply because they have exercised the freedoms of movement guaranteed by the EEA Agreement[21].

30. The Norwegian provisions establish that only non-residents receiving the whole or almost the whole income from Norwegian sources may require deductions and limitations available to Norwegian residents, such as the deductions and limitations referred to in paragraphs 14-17 above. Therefore, in a situation such as assessed in the judgment in *Commission* v *Estonia*, the Norwegian rules would not allow to use the deductions and limitations at issue.

31. The difference of treatment between residents and non-residents resulting from such legislation could be justified only if it were based on objective considerations proportionate to a legitimate aim pursued by the national provisions[22].

32. The Norwegian Government has not advanced any justifications for the national provisions at issue.

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[16] See judgment in *Commission* v *Estonia*, cited above, paragraph 50 and the case law cited therein.
[17] See judgment in *Commission* v *Estonia*, cited above, paragraph 51 and the case law cited therein.
[18] See judgment in *Commission* v *Estonia*, cited above, paragraph 52 and the case law cited therein. See also Case E-26/13 *Gunnarsson*, cited above, paragraph 87.
[19] Judgment in *Wallentin*, C-169/03, EU:C:2004:403, paragraph 17.
[20] See judgment in *Commission* v *Estonia*, cited above, paragraph 55.
[21] See judgment in *Commission* v *Estonia*, cited above, paragraph 56.
[22] See judgment in *Commission* v *Estonia*, cited above, paragraph 57 and the case law cited therein.

33. It considers, however, that the situation of EEA residents receiving less than 90 % of their income from the Norwegian sources is not comparable to the situation of Norwegian residents. In its view, only the situation of individuals, receiving at least 90 % of their taxable income from Norway, can be regarded comparable to the situation of residents.

34. However, as noted above, in the judgment in *Commission* v *Estonia*, the Court of Justice established that where, because of the modest amount of his pension, a pensioner is not taxed in the EEA State of residence under the tax legislation of that State, discrimination could arise if the personal and family circumstances of a person were taken into account neither in the EEA State of residence nor in the EEA State in which the income is received. This is true also in cases where a person earns less than the whole or almost the whole income from Norwegian sources.

35. For the sake of completeness, the Authority notes that in the judgment in *Commission* v *Estonia*, the Court of Justice rejected the argument provided by the Republic of Estonia that the legislation, which took no account of the ability to pay tax and the personal and family circumstances of a non-resident taxpayer where less than 75 % of his total income is received from sources in Estonia, was intended to avoid non-resident taxpayers accumulating allowances in both the Member States concerned[23].

36. Accordingly, the Norwegian provisions under which non-resident pensioners, with the exception of those who receive the whole or almost the whole income from Norwegian sources, are excluded from benefiting from the deductions and limitations available to Norwegian residents, such as the deductions and limitations referred to in Sections 6-30 to 6-32, 15-4, 6-40, 16-1 and 17-1 of the Tax Act, where, because of the modest amount of their pensions, they are not taxable in the EEA State of residence under the tax legislation of that State, are in breach of Article 28 EEA.

5.2 Application of case law in *Commission* v *Estonia* to Norway

37. The Norwegian Government also claims that the judgment in *Commission* v *Estonia* is not relevant to Norway. The special situation that occurred in Case *Commission* v *Estonia* was mainly created by the tax treaty between Estonia and Finland according to which Finland, *i. e.* the State of residence, did not have taxation power with regard to the Estonian pension. The judgment, therefore, should be limited to such special situations. It also claims that, according to the treaties Norway has concluded with the EU and the EEA EFTA States, such situations would barely arise and, moreover, it would be contrary to international tax treaty principles if the State of source had to grant tax deductions because of the domestic law in the State of residence which does not make use of the taxing right it has been granted under the treaty.

38. The arguments by the Norwegian Government, however, cannot be accepted.

39. It is true that EEA States are free to determine the connecting factors for the allocation of fiscal jurisdiction in bilateral conventions for the avoidance of double taxation[24]. However, while implementing their taxation powers they have to apply the requirements of EEA law.

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[23] Judgment in *Commission* v *Estonia*, cited above, paragraph 57.

[24] See, for example, judgment in *Imfeld and Garcet*, C-303/12, EU:C:2013:822, paragraph 41 and the case law cited therein.

40. The Court of Justice established in the judgment in *Commission* v *Estonia* that a situation where a person, because of the modest amount of worldwide income is not taxable in the EEA State of residence, under that State's tax legislation, is comparable to the situation of a resident of the EEA State in which the income in question is received.

41. The refusal of the EEA State in which the income is received to grant to such persons an allowance provided for under its tax legislation, therefore, breaches Article 28 EEA.

42. The judgment in *Commission* v *Estonia* does not require the EEA States to change their allocated taxation powers, but only to take into account the taxpayers' worldwide income for the purposes of determining their ability to pay the tax from the income received in the source State where, because of the modest amount of their pensions, they are not taxable in the EEA State of residence under the tax legislation of that State. In such a situation, if the worldwide income of a pensioner is below the threshold under which a person is considered by the legislation of the source EEA State as not being able to pay tax because of the modest amount of the income or where the source EEA State allows deductions reducing for persons receiving low income the tax due, it should not matter where the taxable income is received.

43. Where a person, because of the modest amount of worldwide income is not taxable in the EEA State of residence, under that State's tax legislation, that State is not in a position to take into account the ability to pay tax and the personal and family circumstances of the person concerned, in particular the consequences for that person of taxation of the income received in the source EEA State.

44. Consequently, as regards tax treatment, a person must be treated as resident in the source EEA State, and that State must grant to that person the tax advantages it allows to residents.

45. This conclusion is independent of the methods of the allocation of fiscal jurisdiction chosen by EEA States in their respective conventions for the avoidance of double taxation.

46. It follows from all the foregoing that, by excluding non-resident pensioners, with the exception of those who receive the whole or almost the whole income from Norwegian sources, from benefiting from the deductions and limitations available to Norwegian residents, such as the deductions and limitations referred to in Sections 6-30 to 6-32, 6-40, 15-4, 16-1 and 17-1 of the Tax Act, where, because of the modest amount of their pensions, they are not taxable in the EEA State of residence under the tax legislation of that State, Norway has failed to fulfil its obligations arising from Article 28 EEA.

6 Conclusion

Accordingly, as its information presently stands, the Authority must conclude that, by excluding non-resident pensioners, with the exception of those who receive the whole or almost the whole income from Norwegian sources, from benefiting from the deductions and limitations available to Norwegian residents, such as the deductions and limitations referred to in Sections 6-30 to 6-32, 6-40, 15-4, 16-1 and 17-1 of the Tax Act, where, because of the modest amount of their pensions, they are not taxable in the EEA State of residence under the tax legislation of that State, Norway has failed to fulfil its obligations arising from Article 28 EEA.

In these circumstances, and acting under Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, the Authority requests that the Norwegian Government submits its observations on the content of this letter *within two months* of its receipt.

After the time limit has expired, the Authority will consider, in the light of any observations received from the Norwegian Government, whether to deliver a reasoned opinion in accordance with Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice.

For the EFTA Surveillance Authority

Frank J. Büchel
College Member

This document has been electronically signed by Frank J. Buechel on 08/02/2017