SUPREME COURT OF NORWAY

J U D G M E N T

given on 20 December 2023 by the Supreme Court composed of

Justice Wilhelm Matheson
Justice Wenche Elizabeth Arntzen
Justice Borgar Høgetveit Berg
Justice Knut Erik Sæther
Justice Are Stenvik

HR-2023-2401-A, (case no. 23-059481SIV-HRET)
Appeal against Borgarting Court of Appeal's judgment 7 February 2023

Elkem ASA Hydro Aluminium AS	(Counsel Kaare Andreas Shetelig)
v.	
The State represented by the Tax Directorate	(The Office of the Attorney General represented by Kristin Hallsjø Aarvik)

(1) Justice **Sæther:**

Issues and background

(2) The case concerns the validity of a decision on amendments to the electricity tax for the companies Elkem ASA and Hydro Aluminium AS. It addresses the scope of the exemption in the Storting's excise duty decision, specifically on electricity "used for chemical reduction or electrolysis, metallurgical and mineralogical processes".

(3) Elkem produces silicon and ferrosilicon at several locations in Norway. The production involves feeding raw materials such as ore, quartz, iron oxide, and carbon sources like coal and wood chips into smelting furnaces. Electricity is used to heat the furnaces to over 2000 degrees Celsius. The raw material reacts with the carbon to form liquid silicon. The silicon is tapped and refined before solidification and then crushed for further processing and use. The process also generates a by-product in the form of micro particles, known as microsilica.

(4) Hydro produces aluminium at plants in Sunndal, Karmøy, and Øvre Årdal. Aluminium oxide is first converted into liquid aluminium in an electrolysis cell. The metal is then transferred to a foundry for purification and processing before being mixed with cold metal in a casting furnace to achieve the desired alloy. Finally, the metal is cast into various products. In Sunndal, carbon anodes are also produced, which are used in aluminium production.

(5) Tax on the consumption of electricity – electricity tax – was introduced in 1951. Originally, this tax was earmarked for the development of the supply of electricity. In the early 1970s, the tax was converted to an ordinary excise duty. The tax is fiscally justified but is also intended to help limit the energy consumption, see Proposition to the Storting 1 LS (2013–2014) *Taxes, duties and customs 2014* page 170.

(6) Since the introduction of electricity tax, the regulations have granted reliefs and exemptions for electricity-intensive industries, among others. When the EEA Agreement entered into force on 1 January 1994, electricity-intensive industries in Norway were exempt from electricity tax.

(7) In December 2000, the EU Commission adopted environmental guidelines that tightened the conditions for granting reliefs or exemptions from environmental taxes and duties. The EFTA Surveillance Authority (ESA) adopted corresponding changes to the environmental guidelines for the EEA on 23 May 2001, and proposed that the EFTA Member States align their tax rules with the new guidelines by 1 January 2002. Norway accepted this in a letter of 6 July 2001.

(8) However, Norway did not change the electricity tax rules by 1 January 2002. According to the electricity tax decisions for 2002 and 2003, there was a general tax on the use of electricity, but "the industry" was exempted for "use in connection with the actual production process". On 26 July 2002, ESA initiated an investigation to clarify whether the exemptions constituted illegal State aid under Article 61 of the EEA Agreement considered against the new environmental guidelines. As a temporary measure, the State suspended the electricity tax for all industry activities from 1 January 2004 to 30 June 2004.

(9) On 30 June 2004, ESA concluded that the tax exemption for the industry granted since 1 January 2002 involved State aid within the meaning of the EEA Agreement. With effect from 1 July 2004, the Norwegian regulations were amended so that industrial undertakings pay *reduced* tax on electricity "used in connection with the actual production process". In addition, an *exemption* was granted for electricity "used for chemical reduction or electrolysis, metallurgical and mineralogical processes". On 30 June 2004, ESA found that the new Norwegian tax system, taking into account the EU Energy Tax Directive, Council Directive 2003/96/EC, did not involve State aid under the EEA Agreement.

(10) The electricity tax is determined in annual Storting excise duty decisions to the treasury. Apart from the specific rates, the decisions were in practice unchanged during the years concerned in the case at hand; that is, from 2014 to 2017. In section 3-12-13 of the Excise Duty Regulations, the excise duty decision is included under "Tax exemption for electricity supplied for specific purposes".

(11) In 2017 and 2018, the Tax Office audited the reporting of the tax-exempt electricity consumption for 2014 to 2016 at three of Elkem's smelting plants – Bjølvefossen, Bremanger, and Salten. The audit revealed that some of the electricity consumption had been reported as tax-exempt although the electricity, in the Tax Office's view, was not exempt. On 25 June 2018, the Tax Office decided on a reassessment of nearly NOK 2.8 million in taxes. Elkem was also required to pay interest and additional tax.

(12) Elkem appealed to Tax East, arguing that the exemption covers all use of electricity that serves no other purpose than enabling the production of silicon, ferrosilicon, and microsilica through a metallurgical process.

(13) During the appeal process, Elkem agreed that parts of the reported electricity consumption – including for dock reception, raw material processing, raw material storage, and packaging of finished products – were not eligible for tax exemption. The appeal was upheld for electricity used in activities such as timber log processing, refining of tapped silicon, crushing into smaller parts, smoke gas filtering and purification plants, as well as electricity for pumps in cooling water systems, casting halls, heat recovery systems, and pumping stations.

(14) In a decision of 19 June 2019, the Tax Directorate concluded that the basis for the reassessment was correct, but changed the additional tax to additional duty. The Directorate interpreted the exemption in section 2 subsection 1 (g) of the Storting's excise duty decision to only cover electricity for the smelting furnaces (furnace electrodes), leaving out other process steps. The decision meant that approximately 90 percent of Elkem's electricity consumption was exempt from tax.

(15) Elkem brought an action against the State in Oslo District Court on 18 December 2019, seeking the invalidation of the Tax Directorate's decision. In January 2020, the parties asked the District Court to suspend the case pending a ruling in the corresponding case involving Hydro Aluminium AS.

(16) On 20 December 2021, after auditing the reporting of tax-exempt electricity consumption at Hydro Karmøy, Hydro Sunndal, and Hydro Årdal, the Tax Office issued a decision directed at Hydro Aluminium AS, amending the electricity tax for parts of 2016 and the entirety of 2017. Hydro was reassessed for approximately NOK 3.2 million and imposed with additional tax, additional duty and interest. The reason given was that the use of electricity for support

processes in aluminium production, which Hydro had reported as tax-exempt, was not eligible for exemption. The Tax Office found that the exemption only covered the parts of the production where electrolysis, chemical reduction or metallurgical processes actually occur.

(17) Electricity used for electrolysis cells, removing impurities in the metal in the flux station, furnace casting, and homogenising furnaces for metal hardening was exempt from tax. For Hydro Sunndal, it was assumed that electricity for anode production was also not exempt. Approximately 95 percent of Hydro's electricity consumption was thus exempt from tax according to the decision, while a reduced rate was applied to the rest. Hydro disputed the decision, arguing that the exemption covered all electricity involved in metal production.

(18) The tax authorities lifted the requirement of exhaustion of remedies before an action can be brought. After Hydro brought an action against the State on 15 March 2022, seeking the invalidation of the Tax Office's decision, the case was consolidated with the Elkem case in the Oslo District Court.

(19) On 16 May 2022, Oslo District Court ruled as follows:

> "1. The Tax Directorate's decision of 19 June 2019 regarding Elkem ASA is set aside.
>
> 2. The Tax Office's decision of 20 December 2021 regarding Hydro Aluminium AS is set aside.
>
> 3. The State represented by the Tax Directorate will pay Elkem ASA's costs of NOK 176,881 within two weeks from service of the judgment. A court fee is added to this amount.
>
> 4. The State represented by the Tax Directorate will pay Hydro Aluminium AS's costs of NOK 214,998 within two weeks from service of the judgment. A court fee is added to this amount."

(20) The District Court held that the scope of the Storting's excise duty decision was unclear and that, in consideration of principle of legality, the tax exemption should be interpreted to include electricity consumption for the production process more generally.

(21) The State represented by the Tax Directorate appealed against the judgment. On 7 February 2023, Borgarting Court of Appeal ruled as follows:

> "In the case of the State represented by the Tax Directorate v. Hydro Aluminium AS:
> 1. The Court finds in favour of the State represented by the Tax Directorate.
>
> 2. Hydro Aluminium AS is to pay the State's costs of NOK 92,510.50 in the Court of Appeal within two weeks of service of the judgment.
>
> 3. Hydro Aluminium AS is to pay the State's costs NOK 52,800 in the District Court within two weeks of service of the judgment.

In the case of the State represented by the Tax Directorate v. Elkem ASA:

1. The Court finds in favour of the State represented by the Tax Directorate.

2. Elkem ASA is to pay the State's costs of NOK 92,510.50 in the Court of Appeal within two weeks of service of the judgment.

3. Elkem ASA is to pay the State's costs of NOK 59,200 in the District Court within two weeks of service of the judgment."

(22) The Court of Appeal found that the exemption for electricity used in "metallurgical and mineralogical processes" does not cover the entire production line but is limited to the specific industrial processes mentioned in section 2 subsection 1 (g) of the Storting's excise duty decision. Electricity for support processes is not exempt. Therefore, in the Court of Appeal's view, the tax authorities had interpreted the law correctly.

(23) Elkem and Hydro have appealed to the Supreme Court, invoking an error of law. The Supreme Court has been presented with additional correspondence between the tax authorities and the companies. Apart from that, the case stands as it did in the Court of Appeal.

The parties' contentions

(24) The appellants – *Elkem ASA and Hydro Aluminium AS* – contend:

(25) The tax authorities' decisions and the Court of Appeal's judgment are based on too narrow an interpretation of the exemption in section 2 subsection 1 (g) of the Storting's excise duty decision. The exemption covers electricity for the entire production process, from raw material to finished metal. Therefore, the decisions are invalid and must be set aside.

(26) A "metallurgical process" is the entire process up to a metal product, not just individual elements in the process. The extraction, manufacture, and processing of metal require a series of interconnected and integrated functions or process steps. These constitute necessary components of the metallurgical process. There is no basis for limiting the tax exemption to electricity supplied directly to the smelting furnaces, electrolysis cells, or other selected parts of the process.

(27) For *Elkem*, this means that the exemption covers, in addition to electricity for the smelting furnaces, electricity for cooling water systems, refining, further processing in liquid state, casting, crushing, and further processing in solid state. The exemption for metallurgical processes is also relevant for Elkem, but even when relying solely on the option "chemical reduction", this exemption is also too limited for the decision to be valid.

(28) For *Hydro*, the exemption covers not only electricity for the electrolysis cells, but also for gas purification, anode supply, cathode workshop, flux station for aluminium purification, casting furnace, casting, and homogenisation (tempering).

(29) Elkem ASA and Hydro Aluminium AS ask the Supreme Court to rule as follows:

"In the case between Elkem ASA and the State represented by the Tax Directorate:

1. The District Court's judgment is upheld as concerns points 1 and 3 of its conclusion.

2. Elkem ASA is awarded costs in the Court of Appeal and the Supreme Court.

In the case between Hydro Aluminium AS and the State represented by the Tax Directorate:

1. The District Court's judgment is upheld as concerns points 2 and 4 of its conclusion.

2. Hydro Aluminium AS is awarded costs in the Court of Appeal and the Supreme Court."

(30) The respondent – *the State represented by the Tax Directorate* – contends:

(31) The tax authorities have made valid decisions and a correct reassessment with a reduced rate for electricity consumption that is not exempt from tax. The Court of Appeal's application of the law is correct.

(32) Decisive for being exempt from electricity tax is the purpose for which the electricity is used. The use must be considered individually, as the tax authorities have done. The exemption applies only to electricity "used for" the chemical reduction, electrolysis, or the metallurgical or mineralogical processes in the manufacture of metals or chemicals. These are specific and delimited industrial processes, which means that exemption is granted for electricity used for these purposes – not all electricity used in the production of metal products. The exemption in section 2 subsection 1 (g) must be interpreted in the light of the EU Energy Tax Directive and does not cover electricity used solely for heating or motor operation. For Elkem's part, it must be assumed that there is a chemical reduction only, and no metallurgical process, as silicon is a metalloid.

(33) The State represented by the Tax Directorate asks the Supreme Court to rule as follows:

"1. The Appeal is dismissed.

2. The State represented by the Tax Directorate is awarded costs in the Supreme Court."

My opinion

The law

(34) Regarding the legal framework for judicial review of tax decisions, I reference chapter 15 of the Tax Administration Act and to the Supreme Court ruling Rt-2014-760 *Terratec* paragraphs 35 to 40. The review is aimed at the legality of the administrative tax decisions, and the courts have full jurisdiction in the application of the law. The parties agree that the decisions must be set aside if the Storting's excise duty decision is interpreted incorrectly.

(35) No separate interpretive principle applies in tax law, see the Supreme Court ruling Rt-2014-1281 *the Z house* paragraph 48. The legality principle means that the wording of the Storting's decision is central to the interpretation, but "interpretive doubt must be removed based on what best aligns with a weighing of all relevant sources of law, ensuring sufficient clarity and predictability for citizens".

(36) A question is whether the legality principle applies with less force when, as in this case, one is to determine the scope of an *exemption* from a clear main rule on tax liability. In the Supreme Court judgment Rt-2009-1632 *ABG Sundal Collier* paragraph 36, with reference to the ECJ's judgment of 21 June 2007 in Case C-453/05 *Volker Ludwig*, the basis was that exemptions from the general principle of tax liability for services must be interpreted strictly. The *ABG Sundal Collier* case also concerned the scope of a tax exemption, where the delimitation largely had to coincide with the delimitation of a similar rule in an EU Directive, see paragraph 33 of the judgment. However, whether or not the tax exemption should be interpreted strictly is not at issue in this case.

The interpretation of the Storting's excise duty exemption

The wording

(37) For the relevant tax years 2014 to 2017, according to the Storting's excise duty decision, electricity tax must be paid "on electricity supplied in this country", see section 1 subsection 1.

(38) According to section 1 paragraph 2 (a), a significantly *reduced rate* applies to electricity supplied to "industry, mining, production of district heating, and labour market businesses engaged in industrial production". The reduced rate covers "electricity used in connection with the actual production process".

(39) In section 2 subsection 1, *excise duty exemption* is granted for electricity that is either produced in a specific manner, for example at energy recovery plants (a), or supplied for a specific purpose, such as NATO (e). The exemption relevant to the case at hand is specified in (g):

> "Exemption is granted for excise duty on electricity that
> …
> g. is used for chemical reduction or electrolysis, metallurgical and mineralogical processes,
> …"

(40) The question is whether this exemption applies to electricity use throughout the entire metal production process, from raw material to finished metal, or if the exemption is limited to specific process steps.

(41) By its wording, the exemption applies to electricity "used for" one of the mentioned purposes, including "metallurgical and mineralogical processes" – hereafter referred to as "metallurgical processes", which are central to the case. This entails a requirement for a direct connection between the use of electricity and one of the specific applications that qualify for exemption. This is narrower than section 1 subsection 2 (a), which concerns the reduced rate for electricity "supplied ... to industry" and "used in connection with the production process".

(42) A natural linguistic understanding of the criterion "used for" suggests that it must be considered individually whether electricity used for a particular process step sufficiently falls within one of the uses mentioned in the exemption. The wording in (g) and the link to the industry rule in section 1 subsection 2 (a) suggest that it is not sufficient that the electricity is used for metal production more generally, as argued by Elkem and Hydro. The exemption

must be interpreted more narrowly and be limited to electricity for specific process steps. However, based solely on the criterion "used for", it is not possible to draw a clear line between process steps covered by the exemption and those that are not. The exact scope of the exemption depends both on the context of the current use in (g) and on sources of law in general.

(43) Uses that qualify for exemption under (g) are of various kinds. "Chemical reduction" and "electrolysis" are scientific terms with precise meanings. According to the Norwegian Encyclopaedia, "chemical reduction" refers to the uptake of electrons, for instance when minerals are converted into pure metals. "Electrolysis" is defined as "a chemical reaction that occurs with the help of electric current". Electrolysis processes are used in the production of various types of metal.

(44) The option "metallurgical processes" is not as precise. The term "processes" is used in various contexts with varying meanings, but the core idea is that something develops through multiple stages. According to the Norwegian Encyclopaedia, "metallurgy" refers to "the science of extracting metals ... and the science of the structure, properties, and treatment of metals".

(45) Based on the wording and context, I therefore interpret the exemption for electricity "used for" metallurgical processes as initially covering specific process steps directly involved in the extraction of metal and the processing of the metal until it has acquired the desired internal physical properties. From the wording alone, it is not possible to determine more precisely the extent of the exemption, and the scope must be clarified based on other sources of law.

Preparatory works to the Storting's excise duty decision

(46) Both parties have invoked the preparatory works to the Storting's excise duty decision to support their arguments.

(47) As I have outlined, it became clear in 2001 that the electricity tax system had to be revised, partly because the industry exemption could be considered illegal State aid, as stated in Report to the Storting no. 2 (2002–2003) page 56. The Ministry of Finance sent two alternative models for consultation on 19 December 2003: a "Swedish" model and a "Danish" model. The aim of the revision was "to control the increase in electricity consumption and continue to promote the transition to alternative energy sources and hydronic heating", as noted in section 1 of the consultation paper. According to point 3, it was an "absolute prerequisite" for the new tax system to be designed in accordance with the EEA Agreement, and compliance with state subsidy rules was central to the assessment of the two models.

(48) The advantage of the Swedish model was that it allowed for a full exemption from tax on electricity "used in specific processes" such as "chemical reduction, electrolytic and metallurgical processes, as well as mineralogical processes". It was noted that such energy use is not covered by the Energy Tax Directive, and that the EU Commission "in a separate agreement with the Council goes far in accepting solutions that are in line with the Directive also in terms of state subsidy rules", see point 4.1 of the consultation paper. Such a limitation would "mean that electricity-intensive industrial processes largely remain exempt from electricity tax, but with the use of electricity outside of these processes being subject to a reduced rate". In assessing the competitiveness of Norwegian industry, the Ministry stated

prior to the consultation that "[t]he majority of electricity-intensive industry (aluminium industry, ferroalloy industry, and production of chemical raw materials) will be completely exempt with the 'Swedish model'", see point 4.3 of the consultation paper.

(49) The Swedish model received support during the consultation round and was chosen by the Ministry with some adjustments, see Report to the Storting no. 2 (2003–2004) page 83. Here, it is stated that the new Norwegian scheme for the private sector is "very similar" to the Norwegian tax system before 1 January 2004. From 1 July 2004, the industry was initially to pay electricity tax at a reduced rate, with exemption for electricity consumption in "several electricity-intensive industrial processes". In the same place, it is stated that the exemption "in practice means that the production processes in the metal industry, cement industry and parts of the chemical raw material industry are exempt from electricity tax."

(50) As mentioned, the preparatory works state that the tax exemption is based on the corresponding exception in the Energy Tax Directive. The Directive is not part of the EEA Agreement, but it is a premise for tax exemption in the sense that the application of the State aid rules must be considered clarified. I note in particular that it was an "absolute prerequisite" that the new tax system comply with the EEA Agreement. There is nothing to indicate that the Ministry wanted to deviate from the corresponding exemption rule in the Directive – the aim has been harmonisation with the corresponding provision in Article 2 (4) (b) third indent of the Directive.

(51) Furthermore, the preparatory works support that the exemption is related to specific electricity-intensive process steps required to achieve specific purposes, rather than to the entire production line. It is at such process steps that considerations of the industry's competitive ability justify an exemption, and it is not realistic to achieve the goal of reducing consumption or encouraging more environmentally friendly solutions.

(52) I agree with the companies that certain statements in the consultation paper and the Report to the Storting suggest a broader interpretation of the exemption. However, the statements that the new Norwegian system is "very similar" to the old one with a full exemption, and that it will "in practice" result in a tax exemption for metal production, are also consistent with the State's understanding of the exemption. In the case at hand, this has led to 90 to 95 percent of the electricity consumption being exempt from electricity tax, while the remainder is subject to a significantly reduced tax.

(53) It must therefore be assumed that the tax exemption in section 2 subsection 1 (g), according to the preparatory works, is intended to have the same content as the corresponding exemption in the Energy Tax Directive, and the scope of the exemption must be determined in the light of the Directive. I cannot see that Norwegian administrative practice in the form of circulars or previous audit reports supports an interpretation of the exemption different from what follows from the wording and the preparatory works.

(54) Before I turn to the Directive and case law from the European Court of Justice (ECJ), I will discuss the significance of ESA's decision of 30 June 2004, approving the new Norwegian tax system.

ESA's decision of 30 June 2004

(55) ESA based its assessment on the premise that the tax exemption, effective from 1 July 2004, was not general but rather favoured certain industries, in particular the metal, cement and parts of the chemical industries. Therefore, ESA had to analyse whether the exemption could be justified according to the "logic and nature" of the electricity tax system.

(56) The Norwegian authorities argued that the exemption was lawful. Firstly, they pointed out that the use covered by the exemption in section 2 subsection 1 (g) of the Storting's excise duty decision is difficult to replace by alternative energy sources. Secondly, they referred to an agreement between the EU Commission and the EU Council of 7 October 2003, which states that energy products – including coal, oil, and gas – should essentially be subject to a tax when used as heating fuel or motor fuel. Based on this, the Norwegian authorities argued that it would be within the logic and nature of the electricity tax system to exempt electricity to the same extent as energy products not covered by the Energy Tax Directive. These are energy products used for purposes other than heating or motor fuel, or used for both heating and motor fuel and other purposes, known as "dual use".

(57) ESA confirmed that this approach was consistent with recital 22 of the Energy Tax Directive and the exemptions in Article 2 (4), to which I will shortly return. Although the Energy Tax Directive is not part of the EEA Agreement, ESA used it as a point of reference in the assessment leading to the conclusion that the new Norwegian tax system was not illegal State aid under Article 61 of the EEA Agreement.

The Energy Taxation Directive

(58) According to Article 1 of the Energy Taxation Directive, Member States are required to tax energy products and electricity in accordance with the Directive.

(59) In Article 2 (4) specifically, the use of energy products and electricity is exempted. Use for heating and motor fuel is covered by the Directive, while other uses and dual use are not covered, see recital 22 of the Preamble:

> "Energy products should essentially be subject to a Community framework when used as heating fuel or motor fuel. To that extent, it is in the nature and the logic of the tax system to exclude from the scope of the framework dual uses and non-fuel uses of energy products as well as mineralogical processes. Electricity used in similar ways should be treated on an equal footing."

(60) This is the background to Article 2 (4) (b) first to third indents:

> "This Directive shall not apply to:
> ...
> b) the following uses of energy products and electricity:
> - Energy products used for purposes other than as motor fuels or as heating fuels,
> - Dual use of energy products
> An energy product has a dual use when it is used both as heating fuel and for purposes other than as motor fuel and heating fuel. The use of energy

products for chemical reduction and in electrolytic and metallurgical processes shall be regarded as dual use
- electricity used principally for the purposes of chemical reduction and in electrolytic and metallurgical processes,
- ...”

(61) Thus, the Directive links the exemptions in Article 2 (4) (b) to the use of energy products and electricity for specific purposes.

(62) In section 2 subsection 1 (g) of the Storting’s excise duty decision, only the third indent of the Directive is cited, which concerns electricity. However, as I interpret the Directive, the intention has been to exempt electricity to the same extent as energy products such as oil, coal and gas, which are covered by the first and second indents. This suggests that the exemption in the third indent – even when interpreted to shed light on the Norwegian tax decision – cannot be read in isolation but must be viewed together with the description in the first and second indents.

(63) The second indent, which defines “dual use”, is of interest. Energy products may serve multiple purposes simultaneously at certain stages of the industrial process. For example, coal can be used for heating in addition to serving as an input factor since coal combustion generates carbon dioxide that reacts with other materials, see the ECJ judgment of 2 October 2014, in Case C-426/12 X. This is why the Directive in the second indent states that the use of energy products chemical reduction and electrolytic and metallurgical processes shall be regarded as dual use, and are therefore exempt from the Directive. The third indent specifies that the use of electricity for the same purposes is also exempt.

(64) The significance of the second indent for the interpretation of the electricity exemption third indent has been affirmed by the ECJ in judgment of 7 September 2017 in Case C-465/15 *Hüttenwerke Krupp*. The case concerned a steel plant producing pig iron in blast furnaces by a chemical reduction process using iron ore and coke. The question was whether the exemption for electricity used for chemical reduction includes electricity for turbo blowers producing compressed air, which is then heated and forced into the furnace where a chemical reduction occurs.

(65) The Court pointed out that energy products and electricity should be treated on an equal footing, and interpreted the third indent in the light of the second, see paragraphs 24 and 25 of the judgment. A broader interpretation of the third indent than of the second would undermine the purpose of the similar treatment of energy products and electricity. The electricity used to operate turbo blowers and other mechanical devices is not considered dual use, and electricity for such use was thus not exempt under the third indent, see paragraphs 29 to 30 of the judgment. The Court noted that if the turbo blower compressing the ambient air had been operated by using diesel rather than electricity, it would not have fallen within the concept of dual use. Therefore, the electricity used to operate the turbo blowers could also not be exempt.

(66) The parties disagree on the significance of the judgment for the exemption for metallurgical processes. The companies has pointed out that the ECJ’s judgment only concerned the exemption for chemical reduction and therefore is of little relevance to our case. However, I agree with the State that the Court’s interpretation of the third indent – which is based on the purpose and context of the Directive – also has implications for the exemption for electricity

used in metallurgical processes. The principle of similar treatment of electricity and energy products applies in both contexts.

(67) The link between the second and third indents, highlighted by the ECJ, therefore suggests that the exemption for metallurgical processes applies to the use of electricity that is integrated into the processes as an input factor and has the character of "dual use" within the meaning of the Directive.

(68) The companies have invoked preparatory works to the Directive, which they believe support a broader interpretation of the exemption for metallurgical processes. The material sheds light on how the draft Directive changed along the way. However, I cannot see that this alters the interpretation of the Directive based on its wording, context and purpose, and the case law of the ECJ. The same applies to information on how certain Member States have formulated their electricity tax rules. It is difficult to fully map out the legal status in other countries, and, in any case, case law from the ECJ is more relevant to the interpretation of the corresponding tax exemption in Norway, see the Supreme Court judgment Rt-2009-1632 paragraph 34.

Overall assessment of the electricity tax exemption in the Storting's excise duty decision

(69) My outline thus far indicates that the tax exemption under section 2 subsection 1 (g) of the Storting's excise duty decision must be understood in the same manner as the corresponding exemption in Article 2 (4) (b) third indent of the Energy Tax Directive. The exemption for metallurgical processes does not cover electricity for every stage in metal production. The use of electricity is exempt from tax when used in the extraction or processing of the metal to achieve the desired internal physical properties, and the use of electricity thereby has the character of dual use. This includes the use of electricity for example in smelting processes in furnaces and the use of electricity to purify and harden the metal. Excluded from the exemption is, among other things, the use of electricity for operation of mechanical devices, such as pumps, fans and conveyor belts. As I will address shortly, the further delimitation will to some extent be discretionary and individually assessed.

(70) The decisions against Elkem and Hydro are based on the premise that section 2 subsection 1 (g) of the Storting's excise duty decision, only exempts electricity for the specific uses specified in the exemption. Electricity for other process steps is not exempted. I also note that the Norwegian Tax Directorate, in its decision against Elkem, draws guidance from the ECJ judgment *Hüttenwerke Krupp* when interpreting the exemption for metallurgical processes. Thus far, the general approach on which the decisions are based is consistent with my interpretation.

(71) However, it is also necessary to consider whether the individual application of the exemption to the various process steps involved in Elkem's and Hydro's production is consistent with my interpretation of section 2 subsection 1 (g).

The individual application of the law

(72) The appeals are limited to the application of the law, and the general interpretation of the excise duty decision has been the crux of the parties' submissions to the Supreme Court. The

factual basis for reviewing the tax authorities' individual application of the law is therefore somewhat limited.

(73) The Court of Appeal also does not conduct an in-depth review of the tax authorities' individual application of the law for me to build on. The Court of Appeal gives the following reason for this:

> "The parties have to a limited extent examined the tax authorities' specific application of the exemption related to the individual elements of the production for which a reassessment of the electricity tax has been made, beyond presenting the tax authorities' assessments and having witnesses testify about Elkem's and Hydro's production processes."

(74) In the Elkem case, the Court of Appeal describes the Tax Directorate's individual application of the law as follows:

> "As outlined under point 4 of the background to the case, the Tax Directorate's decision against Elkem was based on the premise that only electricity supplied directly to the furnaces (furnace electrodes) is exempted, while other electricity-intensive processes must be considered support processes that do not qualify for exemption. Based on this, the Tax Office did not accept Elkem's argument that the entire production process leading to a finished metallic product is eligible for exemption based on the interpretation of the term 'metallurgical process'.
>
> Following the appeal, Elkem acknowledged that certain electricity-intensive elements further away from the smelting furnaces, and with lower electricity consumption, were nonetheless not eligible for exemption, such as quayside facilities, raw material preparation screens, raw material storage, and packaging. However, the Directorate upheld the reassessment, arguing that the key factor is not the distance of the electricity-intensive elements from the furnaces or their lower electricity consumption, but whether the electricity is used for one of the specifically mentioned industrial processes or for electricity-intensive processes that must be considered support processes."

(75) The Court of Appeal expresses that it cannot identify any errors related to the Tax Directorate's application of section 2 subsection 1 (g) of the excise duty decision to the individual elements of Elkem's production. However, I find it necessary to have a closer look at certain aspects of the decision before drawing any conclusions.

(76) The State contends that only the exemption for chemical reduction is relevent to Elkem, as silicon is classified as a metalloid in the periodic table. In my view, attributing such significance to this classification is overly formalistic. I also cannot see that the decision is based on such an interpretation. The decision distinguishes only to a small extent between the various exemption options in (g).

(77) The Tax Directorate has concluded that the electricity used for cooling systems must be considered a "support process". By electricity for "support processes", the Directorate refers to "electricity used in connection with various input factors in the various industrial processes". From what I can see, the use of the term "support processes" as a criterion for tax exemption cannot be derived from the Directive. However, I find no evidence that the *result* is incorrect. Cooling is indeed necessary to prevent furnaces and equipment from melting, but the electricity use does not have the character of "dual use". For the same reason, I have no

objections to the Directorate's conclusion that the exemption does not cover electricity for crushing and further processing in solid form.

(78) According to the Tax Directorate, electricity used for refining, further processing in liquid form, and casting is also not covered by the exemption. I do not find this conclusion to be clear. The process steps contribute to the development of the metal in ways that may have certain similarities with the process steps covered by the exemption in the Hydro decision. However, the Court of Appeal, which found no errors in this regard, states that it has "considered how the exemption has been applied to the different parts of the production processes [in the two companies] in comparison with each other". As the case has been presented to the Supreme Court, I have with some doubt concluded that there is no basis for setting the assessment aside. The exemption for "chemical reduction" does not lead to a different result.

(79) Regarding the individual application of the law in the Hydro decision, the Court of Appeal states:

> "In its decision against Hydro, the Tax Office, similar to the Directorate's decision against Elkem, based itself on the premise that only electricity used in the parts of the production where one of the described processes – chemical reduction, electrolysis, metallurgical and mineralogical processes – actually occurs is covered by the exemption, and that tax should be calculated for electricity used in support processes in the same manner as for other production. An overview of which parts of the production were considered covered by the exemption and which were not, and for which a reassessment made, is provided in point 6 of the background to the case."

(80) Also here, the Court of Appeal has found no errors of law.

(81) The Tax Office approved the exemption for the use of electricity in electrolysis cells and so-called "boosters", which increase the current intensity in selected cells. Exemptions were also granted for metal purification in a so-called flux station, for casting furnaces and homogenisation (tempering).

(82) Hydro contends that it was incorrect not to include electricity for anode assembly and cathode workshop in the exemption. I disagree. According to the decision, anode assembly mainly involves mechanical processes to remove used anodes and replace them with new ones. I have no objections to the conclusion that such process steps are not covered by the exemption. As I understand, they are not directly related to the extraction and development of the internal properties of the metal, and the electricity use does not have the character of "dual use". The same applies to the cathode workshop, where maintenance of electrolysis cells is carried out, and for the cleaning of emissions from the electrolytic bath.

(83) Electricity used for metal purification in the flux station is, as mentioned, partially exempt from tax. In its decision, the Tax Office distinguishes between electricity for the actual metal purification, which is covered by the exemption, and electricity for technical and mechanical installations and equipment used at the flux station, which is not covered. Hydro argues that electricity for the flux station should be fully exempt from tax. However, as the case has been presented to the Supreme Court, I do not have a basis for setting aside the Tax Office's assessment.

(84) Overall, I cannot see that the individual application of the law suffers from errors that would lead to the setting aside of the decisions.

(85) The imposition of ordinary additional tax is not specifically disputed in the event that Hydro's appeal does not succeed on the issue of tax liability.

Conclusion and costs

(86) The appeals have not succeeded, and the State is entitled to have its costs compensated in accordance with the main rule in section 20-2 of the Dispute Act. In my opinion, there are no compelling reasons to exempt the companies from liability for costs under section 20-2 subsection 3 of the Dispute Act.

(87) The State claims compensation for its costs of NOK 166,400 in the Supreme Court. The claim appears reasonable and necessary, see section 20-5 subsection 1 of the Dispute Act, and is accepted.

(88) I vote for this

J U D G M E N T :

1. The appeal is dismissed.

2. Elkem ASA and Hydro Aluminium AS will jointly and severally pay the State represented by the Tax Directorate costs in the Supreme Court of NOK 166,400 within two weeks of service of the judgment.

I vote for this

J U D G M E N T :

Justice **Arntzen:**	I agree with Justice Sæther in all material respects and with his conclusion.
Justice **Høgetveit Berg:**	Likewise.
Justice **Stenvik:**	Likewise.
Justice **Matheson:**	Likewise.

(89) Following the voting, the Supreme Court gave this

J U D G M E N T :

1. The appeal is dismissed.

2. Elkem ASA and Hydro Aluminium AS will jointly and severally pay the State represented by the Tax Directorate costs in the Supreme Court of NOK 166,400 within two weeks of service of the judgment.