# SUPREME COURT OF NORWAY

**J U D G M E N T**

given on 26 June 2024 by a division of the Supreme Court composed of

Justice Wilhelm Matheson
Justice Arne Ringnes
Justice Ingvald Falch
Justice Espen Bergh
Justice Kine Steinsvik

**HR-2024-1168-A, (case no. 23-155251SIV-HRET)**
Appeal against Borgarting Court of Appeal's judgment 30 August 2023

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| The State represented by the Tax Office | (The Office of the Attorney General represented by Ida Thue) |
| v. | |
| PRA Group Europe AS | (Counsel Daniel Markus Hermod Herde) |

(1) Justice **Falch:**

**Issues and background**

(2) The case concerns a claim for a deduction in taxable income for debt interest payments. The question is whether the limitation on the right of deductions that previously followed from section 6-41 subsection 3 of the Tax Act is not applicable because, viewed in conjunction with the rules on group contributions, it was contrary to the freedom of establishment in Article 31, see Article 34, of the EEA Agreement.

(3) PRA Group Europe AS – also referred to as the company – is a Norwegian company in the PRA group. The group is engaged in the acquisition of financial assets and debt servicing. The parent company PRA Group Europe Holding S.à.r.l. is domiciled in Luxembourg and has subsidiaries in several European countries, including the company in Norway.

(4) The company – under a different name before a merger in 2016 – was financed with a combination of equity and loan capital from its parent company. In its tax returns for 2014 and 2015, the company claimed a deduction for interest expenses related to that debt, see section 6-40 of the Tax Act. However, the company assumed that section 6-41 subsection 3 would lead to a reduction in the deductible amount by approximately NOK 133 million in 2014 and approximately NOK 11.5 million in 2015.

(5) On 25 October 2016, the EFTA Surveillance Authority (ESA) issued a reasoned opinion stating that Norway, by maintaining in force the rules on limitation of deductions such as those in section 6-41, has failed to fulfil its obligation under Article 31 of the EEA Agreement. Norway did not agree, but indicated that amendments to the rules would be made. These amendments entered into force in 2019, after which ESA closed the case.

(6) The reasoned opinion led the company to request the tax assessments for 2014 and 2015 amended. Following a review on the merits, the Tax Office upheld the tax assessments for 2014 and 2015 by decision of 7 July 2017. The company appealed, but the Tax Appeals Board dismissed the appeal by decision of 24 June 2020.

(7) The company brought an action against the State, seeking the invalidation of the decision by the Norwegian Tax Administration, and a full tax deduction for interest payments on debt in a new assessment. During the preparation of the case, the District Court obtained an advisory opinion from the EFTA Court. The opinion was issued on 1 June 2022, as a judgment in Case E-3/21. I will come back to this.

(8) On 15 December 2022, Oslo District Court ruled as follows:

> "1. The Court finds in favour of the State represented by the Norwegian Tax Administration.
>
> 2. The parties carry their own cots."

(9) The District Court's basis was that although the relevant tax rules constituted a restriction on the freedom of establishment, the restriction could be justified by overriding reasons in the public interest.

(10) The company appealed, and Borgarting Court of Appeal ruled as follows on 30 August 2023:

> "1. The Tax Appeals Board's decision of 24 June 2020 is invalid.
>
> 2. The State represented by the Tax Administration will pay PRA Group Europe AS costs of NOK 2,445,493.50 in the District Court within two weeks of service of this judgment.
>
> 3. The State represented by the Tax Administration will pay PRA Group Europe AS costs of NOK 617,461 in the Court of Appeal within two weeks of service of this judgment."

(11) In contrast to the District Court, the Court of Appeal ruled that the restriction could not be justified by overriding reasons in the public interests.

(12) The State has appealed to the Supreme Court. The appeal challenges the application of the law.

**The parties' contentions**

(13) The appellant – *the State represented by the Tax Administration* – contends:

(14) The interest limitation rule in section 6-41 of the Tax Act, as it read, was an important tool for avoiding profit transfers and protecting the national tax base. The rules were consistent with recommendations from the OECD and the EU Anti-Tax Avoidance Directive.

(15) The interest limitation rule section 6-41 contains, in itself, *no restriction* on the freedom of establishment. It treats companies in domestic and foreign groups equally. A difference in treatment occurs because the right to make and receive group contributions is reserved for national companies. However, this restriction is justified by the considerations of maintaining balanced allocation of the power to tax and the fight against tax avoidance and evasion. In other words, there is no difference in treatment other than that following from the justified group contribution rules.

(16) In its advisory opinion, the EFTA Court has misinterpreted the case law of the European Court of Justice (ECJ), with the result that the Supreme Court cannot rely on that opinion. The relevant case law concerns other tax benefits. There are strong and compelling reasons to waive the EFTA Court's opinion.

(17) Additionally, if Norwegian rules had permitted cross-border group contributions, there would have been an increase in the Norwegian company's tax burden without a corresponding reduction in the tax burden of the foreign lending company. The lender does not have a right to deduction in Luxembourg for group contributions made to a Norwegian company. In other words, it would have been disadvantageous for the group to make cross-border group contributions, even if such contributions had increased the scope for the Norwegian company's interest deductions. This, too, demonstrates that the Norwegian rules do not constitute a restriction.

(18) If there is a restriction in this case, it is nonetheless *justified* by the mentioned considerations. On this point as well, the EFTA Court's opinion is incorrect. It is based, among other things, on the wrong assumption that Norwegian authorities have relinquished the power to tax in the domestic situation. It is also wrong that an exception for arm's length loan transactions would have been sufficient to fulfil the mentioned purposes. Such a requirement cannot be imposed to justify objective rules.

(19) Should the Supreme Court agree with the Court of Appeal that the Tax Appeals Board's decision is invalid, the Court cannot specify how a reassessment should be carried out. The EFTA Court's opinion allows for an exception, which the tax authorities must first consider whether or not to make.

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

> "1. The Court finds in favour of the State represented by the Tax Administration.
>
> 2. The State represented by the Tax Administration is awarded costs in all instances."

(21) The respondent – *PRA Group Europe AS* – contends:

(22) The Court of Appeal's judgment is correct. The EFTA Court's opinion carries great weight and cannot be waived without strong and compelling reasons, which do not exist in this case. The opinion is based on unambiguous case law from the ECJ.

(23) The additional deduction granted to companies in Norwegian groups is a *different* tax benefit than the income equalisation such companies are allowed to make through the group contribution rules. The restriction imposed on the company therefore requires special justification, which does not exist in this case. Unilateral national deductions can be justified neither by the need to ensure balanced allocation of the power to tax nor by the need to prevent purely artificial arrangements. Less restrictive rules are available.

(24) The EU Anti-Tax Avoidance Directive is not relevant, although it allows for the application of interest limitation rules in combination with rules on group contributions. The way in which the State exercises this freedom cannot be contrary to the fundamental freedom of establishment.

(25) The consequence is that the interest limitation rule must be set aside for the company. New conditions cannot be inferred. Guidelines for a new assessment must be determined in the conclusion, see section 15-6 of the Tax Administration Act.

(26) PRA Group Europe AS asks the Supreme Court to rule as follows:

> "1. The appeal is dismissed.
>
> 2. Upon a new assessment for the income years 2014 and 2015, PRA Group Europe AS is to be granted a full deduction for accrued interest expenses.
>
> 3. PRA Group Europe AS is awarded costs in the Supreme Court."

## My opinion

### *The Norwegian tax rules and the issues they raise*

(27) Section 6-40 of the Tax Act allows debt interest deductions from taxable income. In 2014 and 2015, this right to deduct was *limited* to interest paid on debt to related persons, companies and entities in accordance with this rule in section 6-41 subsection 3 first sentence:

> "If net interest expenses exceed NOK 5 million, they may not be deducted for the part that exceeds 30% of general income or uncovered loss for the year before the limitation of deductions under this section, plus interest expenses and tax depreciation, and less interest income."

(28) In brief, the right to deduct interest payments to affiliated companies was limited to an amount corresponding to 30% of the income defined by the rule (often referred to as EBITDA). The rule itself was neutral, as it did not distinguish between interest payments to Norwegian and foreign affiliated companies. The purpose was to make the Norwegian tax base "more robust" by preventing international businesses from channelling income to other countries with lower tax rates, see Proposition to the Storting 1 LS (2013–2014) *Taxes, duties and tariffs* 2014, pages 102 and 103. The preparatory works indicate that the rule is in line with recommendations from an ongoing project led by the OECD, the *Base Erosion and Profit Shifting Project* (BEPS).

(29) This interest limitation rule was the reason why the company was not granted the disputed debt interest deductions.

(30) Norwegian groups could use the group contribution rules in sections 10-2 to 10-4 of the Tax Act to increase the limit for the interest deduction to which the recipient company was entitled. The reason is that group contributions increased the recipient company's EBITDA, and thereby the size of the interest deduction the company could claim under section 6-41 subsection 3.

(31) Group contributions are unilateral transfers of assets between companies within the same group. Because the contribution is taxable for the recipient and deductible for the transferor, it generally does not affect the group's total tax burden over time. The transferor and the recipient must be Norwegian companies or associations, see section 10-4 subsection 1 first sentence.

(32) The rules on group contribution in themselves constitute a restriction on the freedom of establishment, as parent companies established in Norway are treated more favourably than parent companies established in other EEA States, see Article 31, see Article 34, of the EEA Agreement. However, this restriction has been justified in case law, particularly based on the consideration that if cross-border group contributions had been recognised, groups would have been free to choose the country of taxation. I confine myself to referring to the Supreme Court judgment HR-2019-140-A *Yara* paragraph 43 et seq. and the judgments from the EFTA Court and the ECJ cited therein.

(33) Therefore, the *first* question in this case is whether the EEA-law justification of the group contribution rules *also* covers the effect of these rules upon the application of the interest limitation rule in section 6-41 of the Tax Act. Are we faced with a restriction that is already justified, or are we dealing with a new and *different* tax effect that must be justified

separately? In the latter case, the *second* question is whether the restriction can be justified by compelling reasons in the public interest.

### *The EFTA Court's opinion and the weight given to it*

(34) The District Court submitted three questions to the EFTA Court: The first was whether the Norwegian rules as a whole constituted a *restriction* under Article 31, see Article 34, of the EEA Agreement. The second was whether a *comparable situation* is present, particularly when no actual group contribution has been made to the Norwegian company. The third question was which *reasons in the public interest* may justify such a restriction.

(35) The EFTA Court gave these answers in its opinion in Case E-3/21:

> "1. In the context of national legislation such as that at issue in the main proceedings, a foreign EEA-based company which is in a group with a Norwegian-based company is in a comparable situation to that of a Norwegian-based company which is in a group with another Norwegian-based company. It is immaterial for the comparability assessment that no actual group contribution has been made from the company based in another EEA State to the Norwegian-based company.
>
> Article 31 EEA, read in conjunction with Article 34 EEA, must be interpreted as meaning that national legislation, such as that at issue in the main proceedings, constitutes a restriction on the freedom of establishment where a company liable to taxation in Norway may, by using group contribution rules, lessen or remove the impact of rules limiting interest deductions in respect of loans taken out with affiliated companies, provided it is in a group with other companies liable to taxation in Norway, whereas this is not possible if it is in a group with companies liable to taxation in other EEA States. 2.
>
> 2. A restriction arising from national legislation such as that at issue in the main proceedings may be justified where it serves the legitimate objective of preventing wholly artificial arrangements leading to tax avoidance. However, if national law, which is for the referring court to determine, does not provide the taxpayer with the opportunity to demonstrate that the transaction took place on terms corresponding to what would have been agreed had the relationship between the parties been one at arm's length, it goes beyond what is necessary to pursue that objective."

(36) In summary, the answers indicated that the mentioned tax rules jointly constitute a restriction on the freedom of establishment (answer 1), and that this restriction is not justified if the taxpayer is not given the opportunity to demonstrate that the transaction took place at arm's length (answer 2).

(37) The State has challenged the EFTA Court's answers and briefly contended that both of them lack support in settled case law from the ECJ.

(38) It follows from the Supreme Court judgment HR-2021-1453-S *NAV* paragraphs 64–66, that the EFTA Court's interpretative opinions carry "great weight", even if they are not formally binding. They cannot be waived unless there are "compelling reasons for doing so". On the other hand, any opinions from the EFTA Court on the individual assessment of the facts in the light of the EEA rule – the subsumption – "do not, in themselves, carry the same weight".

(39) The question before the Supreme Court is therefore whether there are sufficient reasons to waive the EFTA Court's opinion.

***Restriction***

(40) It follows from Article 31 of the EEA Agreement that there "shall be no restrictions on the freedom of establishment" of nationals of another EEA State in the territory of those States. This includes the right to set up agencies, branches and subsidiaries in another EEA State and the right to set up and manage undertakings "under the conditions laid down for its own nationals by the law of the country where such establishment is effected". Article 34 equates companies established in an EEA State with nationals of those States. In other words, natural and legal persons have the same freedom of establishment.

(41) It is settled and undisputed case law that a difference in treatment between resident subsidiaries based on the EEA State in which their parent company is established constitutes an obstacle to – a restriction on – the freedom of establishment, as it makes it less attractive for EEA companies to establish subsidiaries in that EEA State, see paragraph 28 of the EFTA Court's opinion with further references.

(42) In paragraphs 29 and 30, the EFTA Court explains why there is a restriction in our case:

> "A scheme such as that at issue in the main proceedings, resulting from the combination of the limited interest deduction rules and the group contribution rules, is liable to restrict companies' exercise of the freedom of establishment. In particular, Norwegian companies which form part of a group with companies in other EEA States, and which wish to take out an intra-group loan, are precluded from neutralising or reducing the impact of the limited interest deduction rules. Such companies are therefore placed at a disadvantage vis-à-vis companies in groups where all companies are established in Norway.
>
> It follows from case law that the fact that a potential restriction of the freedom of establishment results from the interaction between two sets of rules, particularly in circumstances in which one set provides either an exception to, or an amendment of, the other, does not change the analysis as to whether a restriction is present. A difference - 10 - in treatment may stem from a combination of different rules or circumstances (compare the judgments in *X and X*, C-398/16 and C-399/16, EU:C:2018:110, paragraphs 34 and 49, and *Lexel*, cited above, paragraphs 40, 41 and 78). As noted by ESA, to ignore differences in treatment arising from such interaction or combination of rules would weaken the effectiveness of Article 31 EEA."

(43) I agree. In the light of the State's submissions, I add:

(44) Both rulings referenced by the EFTA Court in the cited passage concerned the assessment of national tax rules that are quite similar to the Norwegian rules at issue. Also in the cases referred to, the restriction was based on the interaction between two sets of tax rules, namely certain rules on limitation of interest deduction and certain rules on tax consolidation that were applicable to national groups.

(45) In its judgment of 22 February 2018 in the joined cases C-398/16 and C-399/16 *X and X*, the ECJ notes in paragraphs 21–23 that it has previously accepted – justified – tax legislation that allows resident companies in a group to be taxed as a single tax entity, as the group contribution rules in fact allows in Norway. Then, in paragraph 24, it states that from this, it

*cannot* be inferred that "any difference in treatment" between companies that respectively belong to and do not belong to such groups, is compatible with the rules on the freedom of establishment. In paragraph 24, the ECJ writes:

> "As regards tax advantages other than the transfer of losses within the tax-integrated group, a separate assessment must, therefore, be made as to whether a Member State may reserve those advantages to companies belonging to a tax-integrated group and consequently exclude them in cross-border situations (see…)."

(46) This is followed up in paragraph 40, where it says:

> "However, the advantage which X BV claims in the present case may not be confused with the advantage provided by consolidation within a single tax entity. The main proceedings concern the possibility of deducting interest charges, not the general offsetting of costs and gains specific to a single tax entity."

(47) In its judgment of 20 January 2021 in Case C-484/19 *Lexel*, the ECJ refers to this and states in paragraph 28 that the *X and X* judgment established that companies in foreign groups could not be excluded from tax benefits that "are not specifically linked" to such profit-spreading systems of which the group contribution rules are an example. In paragraph 65, the ECJ reiterates what it stated in *X and X* paragraph 40, which I cited.

(48) I believe the assessment must be the same in our case:

(49) The rules on group contributions give Norwegian group companies the opportunity to equalise the tax among themselves, typically in that profits in one company can be offset against deficits in another. However, in combination with the interest limitation rule in section 6-41 subsection 3, such companies also received *another tax benefit* that was not specifically linked to this profit-spreading.

(50) This second benefit was an opportunity to prevent the application of the interest limitation rule. By receiving group contributions, the company's income (EBITDA) increases, with the specific effect that the ability to deduct group-internal interest expenses increases, thereby reducing the tax. This effect was not offset by a corresponding disadvantage in the transferor company. This company's income was reduced by the group contribution made, which also reduced its tax. In fact, the group contribution did reduce the donor company's capacity to deduct its internal interest expenses, but for a Norwegian group company having provided the internal loan, this reduction was of no significance. This company had internal interest income, not internal interest expenses.

(51) This implies that the Luxembourg parent company of PRA Group Europe AS was subject to a restriction on its ability to establish itself in Norway. The parent company did not have the same opportunity to neutralise or reduce the consequences of the interest deduction limitation rule in section 6-41 subsection 3 of the Tax Act, as Norwegian parent companies had. This negative difference in treatment constitutes a restriction on the parent company's freedom of establishment different from the restriction that results from the fact that only Norwegian group companies are given the opportunity to even out their income, and thereby their tax burden among them.

(52) The State also contends that a potential group contribution from the foreign parent company would not have reduced this company's income and tax in the transferor country, in this case Luxembourg. Therefore, the State claims, equal treatment in Norway would not have eliminated the disadvantage imposed on the parent company.

(53) This view cannot prevail. When assessing whether there is a restriction on the freedom of establishment in Norway, the Norwegian rules must be evaluated without considering the tax rules of other countries. As the EFTA Court states in paragraph 35, the fact that the parent company did not actually make a group contribution to a Norwegian group company is of no relevance for the assessment under Article 31 of the EEA Agreement. The restriction is already in place, as the *possibility* to neutralise the consequences of the interest limitation rule was closed off in Norway.

(54) Hence, there is a restriction on the Luxembourg parent company's possibility to establish itself in Norway, see Article 31, see Article 34 of the EEA Agreement.

***Justification***

(55) It follows from settled and undisputed case law that a restriction on the freedom of establishment can be justified by overriding reasons in the public interest. The measure that constitutes the restriction must be suitable to ensure the fulfilment of the established purpose and not go further than necessary to achieve that purpose.

(56) Paragraph 40 of the EFTA Court's opinion states that the need to maintain balanced allocation of the power to tax between the states and the fight against tax avoidance and evasion are such public interests, both individually and in combination.

(57) With regard to the *first* of these considerations – the need to maintain balanced allocation of the power to tax – the Court writes in paragraph 47 that this has been accepted by the EU Court of Justice "when an equal treatment can lead to EEA States losing their power to tax or activities carried out on their territory, typically if the taxpayer can decide where income and expenses are to be taxed". Then the Court writes in paragraph 48:

> "However, such considerations are not capable of justifying a restriction such as that arising in circumstances in which a tax deduction has been granted in a national but not a cross-border situation. Rather, and in particular, if an EEA State grants such a benefit in a domestic situation (and renounces part of its taxation rights), that EEA State cannot argue the same taxing right is important in the cross-border situation in an attempt to limit equal treatment (compare the judgment in Rewe Zentralfinanz, C-347/04, EU:C:2007:194, paragraph 43). Consequently, the difference in treatment does not appear justified by the need to safeguard the balanced allocation of the power to impose taxes between EEA States."

(58) The State argues that it is not correct that Norway has renounced part of its taxation rights in the national situation and that, therefore, the State can invoke this consideration.

(59) As mentioned, section 6-41 subsection 3 of the Tax Act allowed companies in *Norwegian* groups to increase their interest deductions because they could receive group contributions, with the consequence that the tax burden of the recipient company could be reduced. This possibility was precluded for companies in *foreign* groups. In this sense, it is correct, as the EFTA Court writes, that Norway had renounced part of its taxation rights in the national

situation. This would have been different if the interest limitation rule had been designed in such a way that group contributions could not, in any case, have affected the scope of the companies' interest deduction.

(60) The difference between the two situations is that in a fully Norwegian scenario, the corresponding *interest income* would be taxed in Norway since the lending company would also be taxed here. Therefore, such loan transactions in themselves are not suited to diminish Norway's tax authority – they are tax-neutral. This is not the case for cross-border loans. In such cases, the interest income is taxed in the lending company's resident country, with the risk that the group shifts the taxation of income earned in Norway to a lower-tax country.

(61) One may argue, however, that the rules did not consistently protect Norwegian tax authority. For example, a foreign company in an *otherwise* Norwegian group could provide a loan to a Norwegian group company that could receive group contributions from other Norwegian companies in the group. In this manner, the group was able to neutralise the interest limitation rule, although the loan was cross-border. The example shows that the purpose of the interest limitation rule, when viewed in context with the group contribution rules, cannot have been to protect Norwegian tax authority in a consistent manner.

(62) Regarding the *second* consideration – the need to fight tax avoidance and evasion – the EFTA Court writes in paragraph 52 that "such rules may only be applied to deny deductions for arrangements to the extent that they do not have any underlying commercial justification based on an assessment at arm's length". The Court continues:

> "Thus, where the transaction in question represents a purely artificial arrangement without any underlying commercial justification, the principle of proportionality requires that the refusal of the right to a deduction should be limited to the proportion of that interest which exceeds what would have been agreed had the relationship between the parties been one at arm's length (compare …)."

(63) In paragraph 53, the Court states that the taxpayer must be given an opportunity to provide evidence of any commercial justification for the loan transaction, to clarify whether it represents a purely artificial arrangement. The interest limitation rule in section 6-41 subsection 3 of the Tax Act did not provide the taxpayer with such an opportunity.

(64) In support of its view, the EFTA Court refers, among others, to the ECJ judgment *Lexel*, paragraphs 50 and 51. The State has objected that this judgment concerned the justification of tax rules based on subjective tax motives. I cannot see that *Lexel* contains any such limitation in this regard. In paragraph 49, the ECJ states *in general terms* that for a restriction on the freedom of establishment to be justified, "the specific objective of such a restriction must be to prevent conduct involving the creation of wholly artificial arrangements...". This is elaborated in paragraphs 50 and 51 in the same way as the EFTA Court does in paragraphs 52 and 53 of its opinion.

(65) The State argues that the work in the OECD – the BEPS project – shows that a subjective limitation rule is not sufficient to combat tax evasion. The recommendations are based on the need also to establish objective limitation rules, such as the Norwegian one, which the recommendations allow the states to apply in combination with various consolidation rules, including group contribution rules. In this context, the State invokes OECD (2017), *Limiting*

*Base Erosion Involving Interest Deductions and Other Financial Payments, Action 4 – 2016 Update*, paragraphs 11–16 and 47 in particular.

(66) In the EU, the recommendations are implemented in the Anti-Tax Avoidance Directive – Council Directive (EU) 2016/1164 – also referred to as the ATAD Directive. The Directive has not been incorporated into the EEA Agreement. Point 7 of its Preamble states:

> "Where a group includes more than one entity in a Member State, the Member State may consider the overall position of all group entities in the same State, including a separate entity taxation system to allow the transfer of profits or interest capacity between entities within a group, when applying rules that limit the deductibility of interest."

(67) This is followed up in Article 4 of the Directive, under which the states are to establish an interest limitation rule, and may provide for rules to carry forward interest deduction capacity within groups.

(68) In response to this contention, which I understand the State also presented to the EFTA Court, the Court writes in paragraph 56:

> "The Norwegian Government submitted that, in the light of Article 4(5) of the Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market, it would not be necessary to combine the interest limitation rule with the opportunity for taxpayers to show that the transaction is commercially justified. However, Norway's submission is not undisputed. ESA maintains that the limitation rules must comply with fundamental freedoms and an assessment on proportionality, allowing the taxpayer the opportunity – 15 – to provide commercial justification for excess interest expenses. The Court notes that this directive has neither been incorporated into the EEA Agreement nor was it in force in the EU at the material time."

(69) In my opinion, there is no doubt that the *freedom* afforded by the Directive to the Member States to combine an interest limitation rule with group contribution rules, as was the case in Norway, must be exercised in compliance with "fundamental freedoms and an assessment of proportionality". The same is evident from the ECJ's judgment of 2 September 2015 in Case C-386/14 *Groupe Steria*, paragraph 39, which concerned a different Directive. The EFTA Court has made this assessment of the Norwegian rules' compliance with the freedom of establishment earlier in its opinion, as I have demonstrated.

(70) In the light of the mentioned OECD recommendations and the regulations in the ATAD Directive, it may nonetheless be questioned whether a subjective limitation rule, like the one the EFTA Court presents as a less restrictive measure, is sufficient to achieve the purpose of fighting tax evasion. To my knowledge, the question has not been specifically addressed in case law from the EFTA Court and the EU Court of Justice. For my part, I note that the EFTA Court's response does not prevent the Member States from establishing objective interest limitation rules. What is prevented, is allowing domestic groups to neutralise the effect of such an interest limitation rule without giving others the opportunity to demonstrate that their loan transactions are of a commercial nature and conducted at arm's length.

(71) I cannot see that the Court in its second answer makes an individual assessment in such a way that the answer has only limited weight. The answer can therefore only be waived if there are good and compelling reasons for doing so. In the light of available case law from the ECJ, my view is that such reasons are not present.

(72) This means that the identified restriction is not justified. PRA Group Europe AS was not given the opportunity to demonstrate that the loan transaction was commercially motivated and conducted at arm's length. Nor were there any other rules that allowed the company to neutralise or mitigate the consequences of the interest limitation. The consequence is that the interest limitation rule in section 6-41 subsection 3 cannot be applied to the company as it read, see sections 1 and 2 of the EEA Act. The decision of the Tax Appeals Board is therefore invalid.

***New assessment***

(73) PRA Group Europe AS has asked the Supreme Court to express in its conclusion that the company is to be granted a full deduction for accrued interest expenses upon a new assessment.

(74) Section 15-6 subsection 1 of the Tax Administration Act provide that if the court decides that the taxpayer is only to pay a portion of the assessed tax, and there is insufficient information to determine the correct amount, "the conclusion must specify how a new assessment is to be carried out".

(75) The consequence of the inapplicability of the interest limitation rule, is that the disputed interest expenses must be assessed under the tax rules that otherwise applied, including section 13-1 of the Tax Act. This provision allows for a discretionary determination of the income if it has been reduced due to a common interest with others. In line with the EFTA Court's opinion, it must be clear that section 13-1 does not violate the EEA Agreement.

(76) In this case, neither the tax authorities nor the courts have considered the application of other tax rules, such as section 13-1. It is therefore not possible for the Supreme Court to determine that the company should only pay a portion of the assessed tax. For this reason, it cannot be specified how the new assessment should be carried out.

***Conclusion and costs***

(77) Similar to the Court of Appeal, I have concluded that the Tax Appeals Board's decision is invalid. The appeal must therefore be dismissed.

(78) Although PRA Group Europe AS has not been successful in its request for a specification of how the new assessment should be carried out, the company has succeeded "in the main", see section 20-2 subsection 2 of the Dispute Act. The company is therefore entitled to full compensation for its costs, see subsection 1.

(79) The company has claimed costs of NOK 723,035 in the Supreme Court, of which NOK 705,400 is for legal fees. The remainder covers VAT costs, calculated according to a specific distribution key.

(80) The claim is high. Coverage has been claimed for 186 hours of work, of which 108 hours have been performed by counsel at an hourly rate of NOK 5,100 excluding VAT. The rest of the hours were performed by other advocates and a secretary. The litigation assignment required specialist expertise, for which the rates in the legal market are higher than usual. The

actual number of hours spent cannot be considered particularly high. The case is relatively complex and has been heard over two days in the Supreme Court. After an overall assessment, I have concluded that the costs must be considered necessary, see section 20-5 subsection 1 of the Dispute Act.

(81) I see no reason to change the costs awarded by the Court of Appeal for the proceedings in the District Court and the Court of Appeal. I confine myself to referring to the Court of Appeal's reasoning.

(82) I vote for this

J U D G M E N T:

1. The appeal is dismissed.

2. The State represented by the Tax Administration will pay PRA Group Europe AS NOK 723,035 in costs in the Supreme Court within two weeks of service of this judgment.

(83) Justice **Steinsvik**: I agree with Justice Falch in all material respects and with his conclusion.

(84) Justice **Bergh**: Likewise.

(85) Justice **Ringnes**: Likewise.

(86) Justice **Matheson**: Likewise.

(87) After the vote, the Supreme Court gave this

J U D G M E N T:

1. The appeal is dismissed.

2. The State represented by the Tax Administration will pay PRA Group Europe AS NOK 723,035 in costs in the Supreme Court within two weeks of service of this judgment.