SUPREME COURT OF NORWAY

J U D G M E N T

given on 26 March 2025 by a division of the Supreme Court composed of

Justice Aage Thor Falkanger
Justice Ingvald Falch
Justice Borgar Høgetveit Berg
Justice Knut Erik Sæther
Justice Eyvin Sivertsen

HR-2025-563-A, (case no. 24-073908SIV-HRET)
Appeal against Borgarting Court of Appeal's judgment 22 March 2024

Elopak ASA	(Counsel Morten Goller)
v.	
The State represented by the Norwegian Tax Administration	(The Office of the Attorney General represented by Ida Thue)

(1) Justice **Falch:**

Issues and background

(2) The case concerns the validity of the Tax Appeals Board's decision. The key question is whether the exception to the exemption method, which renders the distribution of dividends from subsidiaries in low-tax countries taxable, applies to two dividend distributions from a Swiss subsidiary. Another question is whether such taxation would be contrary to the EFTA Convention.

(3) The appellant – Elopak ASA, hereafter Elopak – is domiciled in Norway and the parent company of an international group with companies in many countries. The group's business activities include the production and sale of carton packaging and filling equipment for beverages. Elopak had the characteristics of a holding company.

(4) The Swiss subsidiary Elopak Systems AG – hereafter ESYS – was domiciled in Switzerland and subject to the tax rules in the canton of Zürich. ESYS functioned as the group's head by, among other things, managing trading activities itself and holding the group's patent rights. In 2015, ESYS's business activities were moved to Norway.

(5) During all the years up to and including 2014, ESYS qualified for taxation under the "mixed company" rules ("*gemischte Gesellschaft*" rules) in the canton of Zürich. This was because more than 80 percent of the company's gross income and gross expenses originated from countries other than Switzerland.

(6) During the years up to and including 2009, ESYS applied these rules. The effective tax rate on the company's net income was then around 10 percent. The company did not distribute dividends to Elopak during this period.

(7) However, during the period 2010–2014, ESYS chose to be taxed under the ordinary tax rules in the canton of Zürich – and not the more favourable "mixed company" rules. The ordinary rules had an effective tax rate on net income of around 20 percent.

(8) In 2010 and 2014, ESYS distributed the two dividends to Elopak, which is the subject of this case. Both distributions were of around NOK 200 million.

(9) The basis for Elopak's tax reports for 2010 and 2014 was that the dividends were covered by the exemption method and therefore not taxable in Norway. The reasoning was, and is, that the effective tax rate imposed on ESYS in Switzerland during these years – around 20 percent – was higher than two-thirds of the effective tax rate in Norway, see section 10-63 of the Tax Act.

(10) The Central Tax Office for Large Enterprises disagreed, and issued an amendment decision on 8 December 2017 to tax the dividends. Briefly, the reasoning was that because ESYS qualified for taxation under the favourable "mixed company" rules even after 2009, ESYS's choice not to be taxed under these rules had to be disregarded in the assessment under section 10-63 of the Tax Act.

(11) Elopak appealed, but the Tax Appeals Board rejected the appeal in a decision of 16 June 2021.

(12) Elopak brought an action challenging the validity of the decision, and on 22 June 2023, Oslo District Court ruled as follows:

> "1. The Court finds in favour of the State represented by the Norwegian Tax Administration.
>
> 2. Elopak ASA will compensate the costs of the State represented by the Norwegian Tax Administration of NOK 196,800 within 14 days."

(13) Elopak appealed. On 22 March 2024, Borgarting Court of Appeal ruled as follows:

> "1. The appeal is dismissed.
>
> 2. In costs in the Court of Appeal, Elopak ASA will pay NOK 135,050 to the State represented by the Norwegian Tax Administration within two weeks of the service of this judgment."

(14) Elopak has appealed to the Supreme Court, challenging the Court of Appeal's application of the law. The circumstances of the case remain same as in the Court of Appeal. I note, however, that the presentation of the content and relevance of the EFTA Convention has been significantly more thorough in the Supreme Court.

The parties' contentions

(15) The appellant – *Elopak ASA* – contends:

(16) In 2010–2014, ESYS was not resident "in a low-tax country", see section 2-38 subsection 3 (a) and section 10-63 of the Tax Act. The fact that ESYS *could* have been taxed under the "mixed company" rules, is not decisive. When interpreting the low-tax country concept, one cannot disregard the tax regime to which the company in fact was subject. There is no basis for emphasising an imaginary tax under a different regime. The State's interpretation is in conflict with the legality principle.

(17) Additionally, the obligation to pay tax is incompatible with Articles 23, 24 and 28 of the EFTA Convention. Article 23 prohibits all restrictions on the right of establishment – not only in the host State, but also in the home State. This includes restrictions on dividend payments. The rule is similar to that in the EU and the EEA. Admittedly, Article 24 prohibits only discriminatory restrictions, but there is no basis to apply any other non-discrimination rule than in the EU and the EEA. In accordance with the presumption principle[1], the Norwegian tax rules must be interpreted to avoid conflict.

(18) Elopak ASA asks the Supreme Court to rule as follows:

> "1. The Tax Appeals Board's decision of 16 June 2021 in case NS 55/2021 for the income years 2010 and 2014 for Elopak ASA, is set aside.

[1] The principle of presuming that Norwegian law is in accordance with international law.

2. Elopak ASA is awarded costs in the District Court, Court of Appeal and the Supreme Court."

(19) The respondent – *the State represented by the Norwegian Tax Administration* – contends:

(20) In 2010–2014, ESYS was resident in a low-tax country. The company was taxed in Switzerland under the "mixed company" rules for many years, and no regard should be paid to the company's choice of a different tax regime when it was to distribute dividends. This interpretation of the rules does not conflict with the legality principle.

(21) The EFTA Convention is an ordinary international-law agreement that private parties cannot invoke. Furthermore, the Convention does not impose obligations on the home State and does not regulate taxation of dividends. In any case, the Norwegian tax rules are not discriminatory. The EEA Agreement is not relevant to the interpretation of the EFTA Convention. Under any circumstance, the EFTA Convention cannot be applied to interpret away the rules of the Tax Act.

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

"1. The appeal is dismissed.

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

My opinion

The rules of the Tax Act – overview

(23) Dividends on shares are normally taxable income for the recipient, see section 10-11 subsection 1 and section 5-20 subsection 1 (b) of the Tax Act. However, section 2-38 subsection 1 (a) and subsection 1 make an exception to this rule when the recipient is a limited liability company. This exception is often referred to as *the exemption method*, which was introduced with effect from 2004.

(24) To these rules, in turn, section 2-38 subsection 3 (a) makes an exception implying that the following income and losses are not covered by the exemption method after all, with the result that the income is taxable and the losses are deductible:

> "income or loss on an ownership interest in a company, etc., resident in a low-tax jurisdiction outside the EEA, see section 10-63…"

(25) The distributing company, ESYS, was resident in Switzerland, which is outside the EEA. Therefore, according to the wording, Elopak is liable for tax on the dividends the company received from ESYS, if Switzerland is to be considered a "low-tax jurisdiction" under section 10-63.

(26) The background to this exception from the exemption method is that the justification for the method is not applicable in the low-tax country cases, see the preparatory works in Proposition to the Odelsting no. 1 (2004–2005) page 64:

> "The main justification for the exemption method is that it prevents double taxation of income. Within its scope, the exemption method means that dividend income is not taxable for the recipient. If the dividend income reflects income that is not taxed, or is taxed very low, the justification for the exemption method does not apply. This will usually be the case for dividend income from abroad with low or no company taxation (low-tax countries).
>
> A general application of the exemption method on incoming dividends will increase incentives to move business activities from Norway to companies resident in low-tax countries, as well as engage in arbitrage transactions with companies resident in such countries. Such adjustments will lead to a loss of tax base to abroad."

(27) The exception from the exemption method in section 2-38 subsection 3 (a) is generally delimited against income from investments in low-tax countries *within the EEA*. According to the Proposition page 66–68, the reason is that anything else could conflict with the EEA Agreement, particularly the rules on the freedom of establishment and free capital movements, as these had been interpreted by the Court of Justice of the European Union (CJEU).

(28) The definition of a low-tax country is found in section 10-63 of the Tax Act. I will address this later.

(29) This implies that the determination of whether Elopak is taxable for the relevant dividends must build on an interpretation and application of the exception for low-tax countries in section 2-38 subsection 3 (a) of the Tax Act and section 10-63. Elopak contends that it would conflict with the EFTA Convention to tax the dividends. If Elopak is correct, the conflict with international law would influence the interpretation of the Tax Act to such an extent – through the presumption principle – that I will first examine whether the Convention prohibits the State to tax the dividends.

The content in the EFTA Convention

Background and interpretation principles

(30) The Convention establishing the European Free Trade Association – the EFTA Convention – was concluded in 1960 and significantly revised in 2001. Since 1995, the parties to the agreement have been Iceland, Liechtenstein, Norway and Switzerland.

(31) The three first-mentioned states' relationship with the European Union (EU) and among themselves is regulated by the EEA Agreement, which Switzerland declined to join in 1992. Therefore, the EFTA Convention in practice regulates the other EFTA States' relationship with Switzerland. In 1999, Switzerland entered into several bilateral agreements with the EU, which triggered a need for updating and elaborating the EFTA Convention. This is stated in the Preamble to the Agreement amending the EFTA Convention.

(32) Norway ratified the revised EFTA Convention in 2002, after the Storting had given its consent, see Recommendation to the Storting no. 79 (2001–2002). The Convention has not, as such, been incorporated into Norwegian law.

(33) The EFTA Convention must be interpreted loyally in accordance with the rules in the Vienna Convention on the Law of Treaties, particularly Article 31. The key interpretive factor is the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose, see for instance HR-2023-491-P *Snow crab II* paragraph 109.

(34) The interpretation of the EEA Agreement is different in practice. The Agreement's unique purpose is to integrate the relevant EFTA States into the EU's internal market in the areas covered by the EEA Agreement. According to the CJEU, the aim of the EU's internal market is "the removal of all obstacles to create an area of total freedom of movement analogous to that provided by a national market, which includes inter alia the freedom to provide services and the freedom of establishment". The quote is taken from paragraph 41 in the CJEU's judgment of 15 July 2010 in Case C-70/09 *Hengartner and Gasser*, which concerned the interpretation of Switzerland's bilateral agreements with the EU. In comparison, those agreements must be interpreted in accordance with the rules of the Vienna Convention, see the judgment's paragraph 36.

(35) The implication of this is that even though the wording is the same, the EFTA Convention does not necessarily have to be interpreted in the same way as the EEA Agreement.

The rules on the freedom of establishment and capital movements

(36) It is stated in the Preamble and Article 2 (d) of the EFTA Convention that one of its objectives is "the progressive liberalisation of trade in services and of investment". Article 23 is the first provision in the Convention's Chapter IX "Investment" and section I "Establishment". The provision reads, under the heading "Principles and scope", as follows in its first subsection:

> "Within the framework of, and in subject to, the provisions of this Convention, there shall be no restrictions on the right of establishment of companies or firms, formed in accordance with the law of a Member State and having their registered office, central administration and principal place of business in the territory of the Member States. This shall also apply to the setting up of agencies, branches or subsidiaries by companies or firms of any Member State established in the territory of any other Member State.
>
> The right of establishment shall include the right to set up, acquire and manage undertakings, in particular companies or firms within the meaning of paragraph 2, under the conditions laid down for its own undertakings by the law of the Member State where such establishment is effected, subject to the provisions set out hereafter."

(37) Key words here are "there shall be no restrictions" on the right of establishment of companies or firms in the territory of the Member States. The formulation is broad and not limited in itself to specific types of restrictions or restrictions imposed by the host States of the enterprises. In Storting Proposition no. 10 (2001–2002) item 4.2.8.1 on consent to the ratification of the Convention, the Ministry writes that Article 23 (1) "is essentially a copy of the EEA Agreement's Article 31, and must be interpreted in roughly the same manner".

(38) The progressive nature of the liberalisation is particularly evident from Article 23 (3) to (7). Subsection (3) states that the Member States "shall endeavour to eliminate gradually remaining discriminations" that the States maintain in accordance with annexes L to O. Neither of these reservations is relevant in the case at hand.

(39) However, Article 23 is subject to, among others, Article 24, which under the heading "National treatment" reads as follows in subsection 1:

> "Within the scope of application of this chapter, and without prejudice to any special provision contained herein:
>
> (a) Member States shall grant treatment no less favourable than that accorded to their own companies or firms;
>
> (b) each Member State may regulate the establishment and operation of companies or firms on its territory, in so far as these regulations do not discriminate against companies or firms of the other Member States in comparison to its own companies or firms."

(40) According to item 4.2.8.1 of the consent Proposition, the provision was included at Switzerland's request. It establishes that the Member States are obliged to grant treatment no less favourable than that accorded to their own companies or firms. The States may regulate freely, but not discriminate against the undertakings of other Member States. Article 24 therefore clarifies that in this area of the Convention, a *prohibition of discrimination* applies, not a general prohibition of restrictions.

(41) Unlike Article 23, Article 24 does not have any equivalent in the EEA Agreement. Also, there is no indication in the consent Proposition that case law from the CJEU and the EFTA Court must be emphasised when interpreting Article 24. Admittedly, its item 4.2.15.7 states that it is "natural" that the case law of these courts "will be relevant," but this is related to provisions that are "identical" to provisions in the EEA Agreement. Whether Articles 23 and 24 of the EFTA Convention, considered in conjunction, imply that the Convention imposes obligations only on the host State – and not the home State – is not necessary to address here.

(42) In determining the precise content of the prohibition of discrimination, it is essential to me that it is part of a free trade agreement based on a liberalisation objective. The prohibition of restrictions and discrimination developed by the CJEU and applied by the EFTA Court, must be understood in the light of the deeper objective of the EU Treaties and the EEA Agreement of creating a common market. Therefore, in my opinion, these courts' interpretation of the rules in the EU and the EEA cannot be applied to the EFTA Convention. The precise content of the prohibition of discrimination in Article 24 of the EFTA Convention must thus be determined in accordance with the interpretation rules in the Vienna Convention.

(43) Article 28 of the EFTA Convention is found in section II in Chapter IX under the headline "Capital movement". Article 28 (1) and (2) reads:

> "1. Within the framework of this Chapter, there shall be no restrictions between the Member States on the movement of capital relating to the establishment in another Member State's territory of a company or firm of that Member State.

2. The movement of capital not relating to the establishment between the Member States shall be ensured in accordance with the international agreements to which they are parties."

(44) I read the provision to ensure capital movement only in connection with the establishment of companies and firms. It does not require other capital movements to be carried out without restrictions. The provision is therefore not relevant to our case, which concerns the taxation of dividends from an already established and operative undertaking.

Individual assessment

(45) Elopak contends that it would be discriminatory towards the company to tax dividends from the Swiss subsidiary ESYS, since there is no taxation on dividends received by parent companies from subsidiaries in Norway or the EEA.

(46) I do not agree that the comparison with subsidiaries in *Norway* leads to any discrimination covered by Article 24 of the EFTA Convention. Norwegian subsidiaries' income is already highly taxed – in Norway – before the dividends are distributed to the parent company. The exemption method prevents double taxation of the income. If Switzerland is considered a low-tax country, the income of the Swiss subsidiaries has, by comparison, only been lightly taxed.

(47) Therefore, as Norwegian and Swiss subsidiaries are not in a comparable situation, it is not discriminatory to treat them differently. Section 16-30 of the Tax Act also has rules on deductions in Norwegian tax for tax paid abroad, which aim to prevent double taxation of the foreign subsidiary's income.

(48) However, it is correct that section 2-38 subsection 3 (a) of the Tax Act differentiates between dividends from a subsidiary in Switzerland and dividends from a subsidiary in an *EEA State* that is also a low-tax country. This is, as already mentioned, due to Norway's obligations under the EEA Agreement.

(49) I cannot see that Article 24 of the EFTA Convention prohibits such differential treatment. In the case at hand, the comparison must be made with parent companies with Norwegian subsidiaries, and not with parent companies with subsidiaries in EEA States other than Norway. Switzerland has not joined the EEA Agreement and cannot demand that the other EFTA States treat Swiss companies in the same way they treat EEA companies.

(50) Against this background, I have concluded that the EFTA Convention does not require Norway to exempt Elopak from paying tax on dividends received from ESYS. Therefore, the Convention is not relevant for interpreting the relevant rules in the Tax Act.

The low-tax country assessment

Interpretation of section 10-63 of the Tax Act

(51) As already demonstrated, it follows from section 2-38 subsection 3 (a) of the Tax Act that dividends received from a company resident in a low-tax country outside the EEA is subject

to taxation. The provision refers to section 10-63, which provides this definition of low-tax jurisdictions:

> "Low-tax jurisdictions are jurisdictions in which the ordinary income tax on the overall profit of the company or undertaking is less than two thirds of the tax that would have been levied on such company or undertaking if it had been resident in Norway."

(52) In other words, the text prescribes a comparison between, *on the one hand*, the ordinary income tax on the company's aggregate profit in the relevant country and, *on the other hand,* the tax the company would have been imposed if it had been resident in Norway. If the foreign – here Swiss – income tax is lower than two thirds of the Norwegian tax, then Switzerland must be deemed a low-tax country.

(53) The wording therefore indicates an individual assessment of the company's taxation in the two countries: The stipulated tax in Switzerland is compared with the hypothetical tax in Norway. However, the Supreme Court established in Rt-2014-196 *Aban* paragraph 42, with reference to the preparatory works, that "the provision cannot be taken at face value". The Supreme Court therefore did not base the comparison on the individual incomes the company had during the relevant income years, but adjusted it to reflect more typical industry figures. The aim was to compare the *effective tax levels* in the two countries. Atypical share dividends were therefore disregarded. This legal understanding was followed up in HR-2016-586-A *Den norske Amerikalinje*, where the Supreme Court found that specific financial income had to be taken into account, see paragraphs 30–31.

(54) However, neither of these rulings directly addresses the *tax rules* on which to base the comparison. This question is significant in this case, where ESYS, in the relevant years, has been taxed according to rules with a high tax rate, while it could have chosen other rules with a low rate.

(55) Taxation is a measure that, according to Article 113 of the Constitution, requires a legal basis. The implications of the legality principle in the area of tax law are described in HR-2024-2073-A *New York branch* paragraph 52:

> "As highlighted by the Supreme Court in Rt-2014-1281 *the Z house* paragraph 48, a strict legality principle does not apply in the area of tax law, in the sense that interpretive doubts should be resolved in favour of the taxpayers. The legality principle implies that the wording of the law is central to the interpretation, but interpretive doubts must be resolved based on what is best in accordance with a balancing of all sources of law, and which ensures sufficient clarity and predictability for the citizens."

(56) In other words, the wording of the law is central, but not necessarily decisive.

(57) As I see it, *the wording* in section 10-63 of the Tax Act does not clearly specify the rules on which to base the comparison. Nonetheless, Elopak is correct in stating that the formulations indicating individual assessments suggest that the calculation should be based on the tax rules under which the company is actually taxed.

(58) However, as mentioned, that is not the correct way to interpret the provision. The preparatory works expressly disprove of individual assessments of the company's affairs, see Proposition to the Odelsting no. 16 (1991–1992) page 78–79. Taking this into account, the wording in section 10-63 is rather open.

(59) Section 10-63-3 of the Tax Directorate's tax regulations lists certain countries that are not to be considered low-tax countries. Switzerland is not among them. But for several of the countries listed, certain exceptions are made for companies that "are taxed by reduced tax". I do not agree with Elopak that the formulation in the regulations is relevant to the interpretation of section 10-63 of the Tax Act.

(60) In *Aban*, paragraphs 44–45 the Supreme Court endorsed the Court of Appeal's summary of how to interpret the term "low-tax jurisdictions":

> "A general comparison must be made between the effective tax rate on the ordinary income tax for the company in the income year 2005. In this assessment, adjustments are made to the relevant company and the industry in which it operates. Thus, the comparison should be made with the effective tax level for the type of company in question. Factors of a more specific and individual in nature, and not typical for the industry should, as a starting point, not be taken into account."

(61) The purpose of the required generalisation is to arrive at "the effective tax level for the type of company one faces". Therefore, individual circumstances that are not typical for the industry must be disregarded. As I see it, this does not only include atypical matters related to income and expenses, but also *atypical choices* the company makes of relevance to its own or closely related companies' taxation.

(62) The view has some support in *the preparatory works*. In Proposition to the Odelsting no. 16 (1991–1992) page 79, it is stated that "a more general comparison must be made of the difference in the [tax] level of the ordinary income tax in Norway and in the other State for this type of companies". This can be interpreted as a reference to the tax rules available to the relevant type of companies, and not necessarily the tax rules chosen by the company itself.

(63) An objection could be that *the purpose* of the low-tax country exception is not fulfilled when the subsidiary has in fact been sufficiently highly taxed abroad. The result could be chain taxation if the assessment is to be based on other tax rules than those according to which the company is taxed.

(64) However, this view does not take into account that the subsidiary in such a case can adapt accordingly. It may choose low tax in some income year, typically when dividends are not distributed, and high tax in other income years, typically when dividends are distributed. Thus, the result may, depending on the circumstances, be that the subsidiary's income is earned in years with low tax, while the dividends are paid out in years with high tax. If such an adaptation is accepted, it could result in the income being either untaxed or only lightly taxed. This would conflict with the purpose of the low-tax country exception.

(65) Against this background, I find that it aligns best with a balancing of all sources of law that the subsidiary's choice to be highly taxed is not necessarily decisive. In my opinion, the choice is only decisive if considered sufficiently typical for the industry, which I believe will provide citizens with sufficient clarity and predictability.

(66) This implies that a condition for disregarding the company's choice must be that the more favourable and non-chosen alternative is generally available in the relevant country, and that the company qualifies for this. Apart from that, an individual assessment must be made, as demonstrated in *Aban* and *Den Norske Amerikalinje*.

(67) I add nonetheless that, depending on the circumstances, there could be reason to accept the company's choice if the low-tax alternative would force the company to assume more burdensome terms. In that sense, the company's choice may be considered typical for the industry, even if other companies were to choose otherwise. In the light of the objective of the law, there may also be reason to accept the company's high-tax choice if this has been consistent for a long time.

The individual assessment

(68) In the light of my interpretation of section 2-38 subsection 3 (a) and section 10-63 of the Tax Act, it is clear that the dividend Elopak received from ESYS in 2010 is taxable.

(69) Up until and including 2009, ESYS was taxed under the "mixed company" rules in the canton of Zürich in Switzerland, where the effective tax rate was around 10 percent. This is less than two thirds of the effective tax rate in Norway.

(70) The company's choice in 2010 to be taxed under the ordinary tax rules, where the effective tax rate was around 20 percent, cannot be considered sufficiently typical for the industry. The company also in 2010 met the conditions for being taxed under the more favourable rules, which locally was available for all qualified companies. In the minutes of a board meeting of 23 June 2011, it is stated that ESYS "has decided to change from 'Mixed Company' taxation to 'Ordinary' taxation for the purpose of Dividend distribution to our Norwegian Mother Company". In other words, it was the individual – the company-specific – payment of dividends that justified the decision to change the taxation.

(71) However, I have had some doubts about whether the dividends that Elopak received in 2014 are taxable.

(72) Unlike in 2010, ESYS had then been taxed under the ordinary tax rules for several years. However, Elopak has not provided any other reason why ESYS continued under the ordinary regime than the one I cited from 2011. ESYS's business activities were transferred to Norway with tax effect from 2015, and the planning went on for some years. But it has not been stated that this process could have influenced the choice.

(73) It is clear that the "mixed company" rules in 2014 were still generally available in the canton, and that ESYS qualified for applying them. As the case is presented, the choice not to apply these rules can therefore not be considered sufficiently industry-typical, apart from a possible desire to save tax in Norway. I have therefore concluded that also the dividends from 2014 are taxable.

Conclusion and costs

(74) Against this background, my conclusion is that the two dividend payments this case concerns are taxable. The Tax Appeals Board's decision is therefore valid, with the result that the appeal must is dismissed.

(75) The State is the successful party and is generally entitled to compensation for costs under section 20-2 subsection 1 of the Dispute Act. However, I have found compelling grounds for exempting Elopak from liability for costs, see section 20-2 subsection 3. As mentioned, the

case has created some doubt, and the judgment provides clarifications regarding the content of the EFTA Convention, which will particularly benefit the State. Costs are therefore not awarded in any instance.

(76) I vote for this

J U D G M E N T :

1. The appeal is dismissed.

2. Costs are not awarded in any instance.

(77) Justice **Høgetveit Berg:**

Dissent

(78) I mostly agree with Justice Falch's interpretation of the EFTA Convention. However, when interpreting section 10-63 of the Tax Act, my view differs in the light of the legality principle.

(79) Justice Falch has presented the legal basis for tax on dividends. Based on the preparatory works and Supreme Court case law, the parties agree that the effective tax rates abroad and in Norway should be compared. The disagreement relates to whether one should or may disregard tax rules that are applicable and actually applied. Specifically: Is the decisive factor the tax rules under which ESYS was actually taxed in Switzerland – or the tax rules under which ESYS could have been taxed in Switzerland?

(80) The legality principle means that obligations imposed on individuals must be founded on the law, see Article 113 of the Constitution. This also includes tax. It is particularly the consideration of a foreseeable status of the law that makes the wording crucial. An interpretation that does not naturally follow from the wording makes it more difficult for taxpayers to comply with the rules. Control and efficiency considerations are also important. This means that, as a starting point, it must be possible to take tax rules at face value. I refer to the Supreme Court rulings in Rt-2014-227 paragraph 41, Rt-2014-1229 paragraph 36, and HR-2024-2073-A paragraph 52. The weight to be given to these considerations in the interpretation – and thus how strict the principle is – will largely have to be assessed on an individual basis.

(81) A straightforward reading of section 10-63 of the Tax Act implies that the objects of comparison is the tax stipulated in Switzerland and the hypothetical tax in Norway. The assessment must then be based on the applicable and actually applied tax rules in Switzerland.

(82) The preparatory works indicate that the legislature presupposed that the rules under which the tax was actually stipulated are decisive, at least as long as this was the "ordinary" tax abroad. See Proposition to the Odelsting no. 16 (1991–1992) point 6.9 on page 79:

> "The Ministry's proposal implies that the special rules should only apply to companies resident in states with a tax level where the ordinary income tax on a company's total profit amounts to less than two thirds of the tax a comparable company would have been imposed in

> Norway. When deciding whether this requirement is met, the decisive factor is not the specific difference for a company in the individual income year. Instead, a more general comparison must be made of the difference in the level of ordinary income tax in Norway and in the other state for this type of companies. If the company in a single year ends up paying a tax that is less than two thirds of the tax the company would have been imposed in Norway, it will not be decisive for whether it is a low-tax country. Similarly, it will not exclude another state from being considered a low-tax country if the company in a single year is taxed higher than this limit. In some countries, special rules are issued for certain types of companies, businesses activities or income. Then a comparison must be made with the income taxes that apply to these types of entities or income in Norway."

(83) However, the specific interpretation issue in the case at hand is not explicitly mentioned in the preparatory works – and the State's counsel in the Supreme Court has stated that the Ministry also could not have imagined the issue in connection with the laws passed in 1992 and 2004.

(84) However, the State has argued that Rt-2014-196 *Aban* clarifies both the interpretation issue and the application of the legality principle. I cannot see that there is a basis for this. In *Aban*, the issue was whether the *income* was typical for the industry and whether it was relevant in the assessment of whether Singapore was a low-tax country. The Supreme Court assessed the relevance of the gain from the sale of shares based on the type of company in question. The general views highlighted by the Supreme Court in the judgment have proper support in the preparatory works. In our case, it is not a question of what income is typical for ESYS's industry, but what *tax rules* are applied. The decision is based on disregarding ESYS' choice to be taxed according to the regular tax rules in Switzerland. In my view, this takes us much further from the wording than in *Aban*. I therefore also disagree with the State that the application of the legality principle, with effect for the case at hand, is clarified in *Aban*.

(85) When the solution in *Aban*– despite a very unfortunate legislative technique – complied with the legality principle, it must be due to the express clarifications in the preparatory works. For our issue, however, the preparatory works do not explicitly support the State's expansive interpretation. At best, it is a matter of drawing conclusions from a text that deals with something else.

(86) When neither the preparatory works nor *Aban* suggest that the applicable and applied tax rules should be disregarded, one must consider whether other sources of law support an expansive interpretation of the low-tax country exception beyond that the wording implies. Although the considerations behind the legality principle require different interpretation issues to be individually assessed, the wording cannot be undermined by any source of law.

(87) The Tax Directorate's tax regulations do not suggest an expansive interpretation of section 10-63 of the Tax Act. On the contrary, the opposite may be the case, as the section 10-63-3 subsection 1 uses the phrase "is taxed" – and not "could have been taxed" or similar.

(88) Based on the sources of law, there is no reason to delve deeply into the policy considerations. Nonetheless, I mention that the purpose of the exception from the exemption method for low-tax countries may, depending on the circumstances, imply its application in situations like the case at hand. If the rule is not interpreted expansively, it could allow for tax planning. In my view, the purpose of preventing tax planning cannot compensate for the lack of a legal basis. A desire to save tax cannot by itself justify an expansive interpretation. The decision is not based on the avoidance rule in section 13-2 of the Tax Act. Additionally, there are technical considerations against an expansive interpretation. An expansive interpretation raises several

new questions, such as how the alternative tax regime should be established, how many must opt for it, whether the taxpayers' choice should be evaluated separately for each income year, etc. In my view, it is the responsibility of the legislature to address these issues.

(89) Against this background, my conclusion is that the decision is invalid and must be set aside.

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

(91) Justice **Sæther:** Likewise.

(92) Justice **Falkanger:** I agree with Justice Høgetveit Berg in all material respects and with his conclusion.

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

J U D G M E N T :

1. The appeal is dismissed.

2. Costs are not awarded in any instance.