SUPREME COURT NORWAY

On 28 January 2019, the Supreme Court composed of the justices Endresen, Møse, Noer and Lindsetmo gave judgment in

HR-2019-140-A (case no. 18-069096SIV-HRET), civil case, appeal against judgment:

Yara International ASA	(Counsel Morten Goller)
v.	
The state represented by the Central Tax Office for Large Enterprises	(Counsel Pål Erik Wennerås)

(1) Acting Justice **Lindsetmo:** The case concerns the information validity of the Tax Appeals Board's decision of 27 November 2013 to deny Yara International ASA (Yara) a deduction for a group contribution to its Lithuanian subsidiary UAB Yara Lietuva (UAB) in connection with the income tax assessment for 2009. The question is whether Yara has demonstrated that UAB has sustained a "final loss" in Lithuania so that a tax deduction must be granted, see Article 31 of the Agreement on the European Economic Area (the EEA Agreement) and the judgment by the Court of Justice of the European Union (ECJ) 13 December 2005 in case C-446/03 *Marks & Spencer* paragraph 55 and subsequent case law.

(2) Yara is the Norwegian parent company of a group that is among the world's leading manufacturers of fertilisers. In 2007, Yara acquired the Finnish group Kemira GrowHow Oy, later renamed Yara Suomi Oy (hereinafter Kemira). The group consisted of more than 50 operating companies in many countries, and according to information provided, the transaction was of great strategic importance to Yara. Since the acquisition, the Finnish group has been renamed to Yara Soumi Oy and is now a wholly-owned subsidiary of Yara.

(3) Kemira had a subsidiary in Lithuania – UAB Kemira Lifosa. The company was operating in the same industry as Yara, production and sale of fertilisers. After Yara's acquisition, the company was renamed to UAB Yara Lietuva.

(4) After the acquisition of Kemira, Yara decided in 2009 to close down the business in UAB. As a part of this process, UAB entered into an agreement with AB Lifosa on 28 April 2009 regarding the sale of the company's assets for 1 Lithuanian lira (LTL).

(5) On 14 December 2009, Yara acquired all the shares in UAB from Kemira. On 17 December the same year, Yara and UAB entered into an agreement under which the latter would receive a group contribution of EUR 16 million – approximately NOK 132 million. The group contribution was paid on 10 January 2010. At that point, UAB had the understanding that it, in 2009, had a carry-forward tax loss of approximately NOK 177 million before receiving the group contribution.

(6) On 29 January 2010, Yara decided to liquidate UAB. The group contribution was used to pay debt. The part of the group contribution exceeding the debt was credited to UAB in the group account system. Upon completion of the liquidation, the remaining part of the group contribution, approximately EUR 6.4 million, was channelled back to Yara as liquidation dividend. On 12 April 2012, the company was struck off the local companies' register.

(7) Yara claimed a deduction for the group contribution of approximately NOK 132 million in its 2009 assessment. However, in connection with the sale of UAB's assets, the Lithuanian tax authorities did not approve for tax purposes the value of the assets estimated. For this reason among others, the taxable loss in UAB was reduced to NOK 93 133 891. As a result, Yara has reduced its claim for a deduction in the 2009 assessment to that amount.

(8) In the tax assessment for 2009, Yara was denied a deduction for the group contribution. Yara appealed to the Central Tax Office for Large Enterprises, claiming that Norway was obliged under the EEA Agreement to allow such a deduction with reference to the *Marks & Spencer* exception.

(9) The appeal was dismissed. The Central Tax Office upheld the 2009 assessment in its decision of 20 June 2011. The basis for the decision was that Yara could not claim a deduction since UAB had not been liquidated as at 31 December 2009, but continued to receive an income after this date – which meant that the final loss exception in *Marks & Spencer* paragraph 55 did not apply.

(10) Yara appealed the decision in a letter of 5 July 2011. In a decision of 27 November 2013, the Tax Appeals Board arrived at the same conclusion, arguing that the subsidiary's possibilities of having the loss taken into account, i.e. offsetting it, could not be regarded as exhausted. The Tax Appeals Board did not consider it necessary to take a final stand as to whether the group contribution rules would have been disproportionate – and contrary to EEA law – if the loss had been final.

(11) Yara brought an action before Oslo District Court on 27 May 2014 claiming a reassessment. On 17 December 2015, the court gave judgment concluding as follows:

> **"1. Judgment is given for the state represented by the Central Tax Office for Large Enterprises.**
>
> **2. Yara International ASA is to pay costs to the state represented by the Central Tax Office for Large Enterprises of NOK 119 200 – onehundredandnineteenthousandtwohundred – within 14 – fourteen – days of the service of the judgment."**

(12) The district court concluded that the final loss exception did not apply to group contributions, referring in particular to the ECJ judgment 18 July 2007 in case C-231/05 *OY AA*. Therefore, the court did not consider whether the conditions for invoking the final loss exception were met.

(13) Yara appealed to Borgarting Court of Appeal. During the case preparations, the court of appeal decided to request an advisory opinion from the EFTA Court on whether the national rules on intra-group contributions were compatible with Article 31 and Article 34 of the EEA Agreement. The EFTA Court responded in a judgment 13 September 2017 in case E-15/16, which will be presented later.

(14) On 5 March 2018, Borgarting Court of Appeal gave judgment concluding as follows:

> **"1. The appeal is dismissed.**
> **2. Yara International ASA will pay to the state represented by the Central Tax Office for Large Enterprises costs in the court of appeal of NOK 166 730 – onehundredandsixtysixthousandsevenhundredandthirty – within 2 – two – weeks of the service of the judgment."**

(15) The court of appeal arrived at the same conclusion as the district court, but on different grounds. Based on the EFTA Court's judgment, the court of appeal was to determine whether the loss in UAB had to be considered final, but made no finding to that effect. The loss could be taken into account otherwise, for instance by selling the company as a going concern to a third party that could claim the taxable loss carried forward in Lithuania.

(16) Yara has appealed the judgment to the Supreme Court. The appeal relates to the application of the law and "to some extent elements of the court of appeal's assessment which cannot be clearly regarded as findings of fact or application of the law." On 12 June 2018, the Supreme Court's Appeals Selection Committee granted leave to appeal.

(17) The appellant – *Yara International ASA* – contends:

(18) A loss is to be considered final if the foreign subsidiary has exhausted all possibilities available in its state of residence of having the loss taken into account, including by transferring them to a third party, or by selling the company or the loss to a third party in the future, see paragraph 41 of the EFTA Court's advisory opinion.

(19) The question whether a final loss has been sustained must be answered based on the circumstances as at 31 December 2009, or immediately after, see the ECJ judgment 3 February 2015 in case C-172/13 *Marks & Spencer II* paragraph 37.

(20) The issue at stake is whether, at the relevant time, there was an effective possibility in the subsidiary's state of residence to have the loss taken into account in previous, present or future accounting periods. A purely hypothetic possibility is not sufficient, cf. the principle of effectiveness and the ECJ judgment 4 July 2018 in case C-28/17 *NN*.

(21) At the end of 2009, UAB was an "empty" company; its assets had been sold. The company consisted only of the relevant loss that could not be taken into account in Lithuania. There were no other possibilities available to have the loss taken into account. The court of

appeal has wrongly assumed that the company as a going concern could have been sold earlier, before its assets were sold. This is contrary to ECJ case law, including the judgment 21 February 2013 in case C-123/11 *A Oy* paragraph 48 et seq. Whether or not the loss can be considered final must be determined based on the circumstances at the relevant time.

(22) At that time, the company had no income, not even a "minimal" one, and the conditions for deduction were thus met.

(23) The interest earned from the group contribution was insignificant and of no relevance to whether the condition for deduction is met, see the ECJ judgment 12 June 2018 in case C-650/16 *Bevola.* According to Norwegian tax rules, a loss in a subsidiary must be taken into account through an effective transfer of capital, where the amount will be deposited into an interest-bearing account until all debts have been paid and the excess amount has been channeled back to the parent company. If such a system precludes a deduction, the final loss exception will be void, and contrary to the principle of effectiveness. Moreover, the interest income was lower than the liquidation costs, and cannot be considered as income.

(24) The rule that all possibilities of having a loss taken into account must have been exhausted before a final loss can be established means that the loss must be lawfully deductible, but impossible to offset. Reference is made to the ECJ judgment 7 November 2013 in case C-322/11 *K.*

(25) Under Lithuanian tax rules, a received group contribution is taxable, but not to the extent it is used for payment of lost equity. However, the fact that the contribution was not in its entirety considered taxable income in Lithuania has no relevance to the right to deduction in Norway. What is essential is that that the loss could not be taken into account more than once.

(26) No abuse of EEA rights has taken place. Yara's acquisition of Kemira was carried out for commercial purposes, and so was the liquidation of UAB. Neither process was initiated to avoid tax, which means there is no basis for establishing abuse of rights.

(27) The transfer of UAB from another subsidiary of Yara prior to the group contribution has no relevance, as the possibility to make such contributions and thus obtain a right to deduction would have been the same within the group. The fact that the contribution in itself was tax-motivated, is also irrelevant in the assessment of any abuse of rights, because that is how a group loss may be taken into account under Norwegian tax rules, where the purpose is, exactly, tax equalisation.

(28) Yara International ASA has submitted this prayer for relief:

> **"1. The decision by the Tax Appeals Board represented by the Central Tax Office for Large Enterprises of 29 November 2013 on reassessment for Yara International ASA for the accounting year 2009 is to be set aside.**
> **2. The reassessment it is to assume that Yara International ASA has a right to deduction for a group contribution of NOK 93,133,891.**
> **3. Yara International ASA is to be awarded costs in the district court, the court of appeal and in the Supreme Court. "**

(29) The respondent – *The state represented by the Central Tax Office for Large Enterprises* – contends:

(30) Yara has not fulfilled the burden of proof by demonstrating that the loss at the end of 2009, or immediately after, was final. Documentation must exists from that period of time showing that the conditions for final losses, as set out in *Marks & Spencer*, are met. Documentation not presented to the tax authorities, but obtained later, cannot be given weight in the assessment of the documentation requirement. As a main rule, the court's review in tax cases must be based on the facts presented to the tax authorities, see the Supreme Court judgment Rt-2006-404 paragraph 38.

(31) Yara has submitted very little documentation in the case at hand; the Tax Appeals Board only received four documents. It has not been demonstrated that the conditions for deduction set out in *Marks & Spencer* are met, and the failure to do so is displayed in a number of ways.

(32) The conditions set out in *Marks & Spencer* are strict, and the exception has been further limited in subsequent case law. It is a condition that the company has exhausted all possibilities to offset the loss against income in previous, current or future accounting years. This also includes the possibility of transferring the loss to a third party that may take them into account.

(33) As Yara has not documented any final loss in UAB at the end of 2009 or immediately after, no final loss has been sustained.

(34) Yara has also failed to document a lack of income against which the loss can be offset in the present or in the future. UAB received a group contribution and, in addition, interest income from the part of the contribution that was not used to pay debt. UAB could also have started a new business or resumed the current. The income possibility did not end until the liquidation in April 2012.

(35) The requirement of a lack of a third party to have the loss taken into account has also not been met. Instead of liquidating UAB through a preceding sale of assets, the company's shares could have been sold to a buyer that was able to offset the taxable loss. This applies both in a possible sale to AB Lifosa and to a different third party.

(36) One of the conditions for exception in *Marks & Spencer* is that the company must have exhausted the possibilities of having the loss taken into account by way of offset. Yara has stated that this is not permitted under Lithuanian tax rules, thus the condition has not been met. Norwegian tax authorities have no duty to make up for the prohibition against offsetting losses under Lithuanian tax rules.

(37) Yara was not a direct owner of UAB when the loss was sustained. UAB was then owned by Kemira, which in turn was owned by a Dutch group company. *Marks & Spencer* concerns a parent-subsidiary relationship and does not address arrangements with intermediary group companies in third states. Either way, the efforts to take the loss into account should first have been made in the state of the relevant subsidiary.

(38) It is Yara's arrangements with UAB that have created a situation that, in turn, enabled Yara to assert a final loss as a basis for deduction. The arrangements have been tax-motivated

and constitute an abuse of right sunder EEA law. Hence, Yara cannot invoke the final loss exception in *Marks & Spencer* as a basis for claiming a deduction.

(39) Yara has also not demonstrated that the group contribution was taxable income in Lithuania. If the group contribution was indeed taxable, it only applied in the accounting year in which it was paid, i.e. in 2010. Consequently, the group contribution was not taxable income in 2009 for UAB, and cannot form a basis for deduction for Yara in connection with the assessment in Norway in 2009.

(40) The state represented by the Central Tax Office for Large Enterprises has submitted this prayer for relief:

> **"1. The appeal is to be dismissed.**
>
> **2. The state represented by the Central Tax Office for Large Enterprises is to be awarded costs in the Supreme Court."**

(41) *My view on the case:*

(42) It is undisputed that Yara cannot claim a deduction for its group contribution to UAB under national tax rules. According to section 10-4 subsection 1 of the Taxation Act, the condition for a right to deduction is that "[t]he transferor and the recipient are Norwegian companies or organisations." I will not elaborate on the Norwegian tax rules on group contributions in section 10-2 et seq. of the Taxation Act, apart from mentioning that Yara is not entitled to a deduction since UAB is not liable to taxation in Norway and since the group contribution is not taxable income in Norway for UAB.

(43) The question in the case at hand is whether Yara is nevertheless entitled to a deduction because a refusal thereof would be contrary to Article 31, cf. Article 34 of the EEA Agreement. It has been clarified by the EFTA Court's advisory opinion that this depends on whether Yara can be said to have documented that the group contribution has been used to cover final losses in Lithuania, in accordance with the exception rule in *Marks & Spencer* paragraph 55.

(44) The Norwegian provisions on group contributions are implemented to ensure tax neutrality within a tax group. The transferor may claim a deduction in the tax assessment to the extent the contribution is within the otherwise taxable general income, see section 10-2 of the Taxation Act. The group contribution constitutes taxable income for the recipient, see section 10-3 of the Taxation Act. The system is based on tax symmetry. It is a basic condition that both the transferor and the recipient are liable to taxation in Norway, see section 10-4 of the Taxation Act.

(45) It appears from the preparatory works that the group contribution rules are meant to fulfil two objectives, see Propositions to the Odelsting No. 16 (1979–1980) page 6 et seq. and No. 1 (1999–2000) page 25 et seq. One of them is to facilitate net taxation within the group by transferring profits to a company with taxable losses. With such transfers, the taxable losses in one group company will reduce the taxable profits in another, also referred to as intra-group tax equalisation.

(46) The second objective is the possibility of transferring funds between group companies, through pure asset transfers, in order to build up reserves in the group company or

companies where such a procedure is commercially appropriate. When funds are transferred between two group companies that both have been profitable, the transferor will have a right to deduction while the recipient will be taxed for the group contribution.

(47) I also add that Norwegian tax legislation is not a part of the EEA Agreement, and that the tax rules within the EU/EEA are not harmonised.

(48) *The EFTA Court's judgment 13 September 2017*

(49) As mentioned, during the preparations for the proceedings in the court of appeal, an advisory opinion was requested from the EFTA Court on whether the Norwegian tax rules on group contributions are compatible with the rules on the freedom of establishment in Article 13 cf. Article 34, of the EEA Agreement.

(50) The request was made due to a dispute between the parties on the significance of two previous ECJ rulings, *Marks & Spencer* and *OY AA*. There was considerable disagreement, both as to the appropriateness of requesting an advisory opinion and as to which questions to refer.

(51) In the court of appeal's letter of 27 September 2016, the following question was formulated to the EFTA Court:

> **"Is it compatible with Articles 31 and 34 EEA that national rules on intra-group contributions, such as the rules in the Norwegian Taxation Act, under which the contribution reduces the transferor's taxable income and is included in the recipient's taxable income regardless of whether the recipient makes a loss or a profit for tax purposes, lay down the condition that both the transferor and the recipient are liable to taxation in the EEA State in question, or must the EEA rules be interpreted to mean that, on certain conditions, an exception must be granted from the requirement for tax liability in the realm?"**

(52) The EFTA Court replied to the question in a judgment 13 September 2017 in case E-15/16.

(53) In paragraph 35, the EFTA Court established that a difference in treatment between resident parent companies according to the seat of their subsidiaries constitutes an obstacle to the freedom of establishment in the EU/EEA.

(54) With that as a starting point, the EFTA Court stated in paragraph 36 that the legislation, such as that described in the question referred, constitutes a restriction of Article 31 EEA.

(55) The EFTA Court noted that such a restriction could only be justified by overriding reasons in the public interest. When making this assessment, the necessity of the national legislation adopted to attain these objectives had to be the main issue at stake.

(56) Next, the EFTA Court addressed the conditions for a loss to be considered final according to *Marks and Spencer* paragraph 55, and concluded as follows in paragraph 42:

> **"If these conditions are fulfilled, it is contrary to the freedom of establishment to preclude the possibility for the parent company do deduct from its taxable profits in that EEA State the losses incurred by its non-resident subsidiary."**

(57) Also, the EFTA Court did not find it necessary to draw a distinction between the ECJ judgment in *OY AA*, concerning the Finnish system of intra-group financial transfers and *Marks & Spencer*, concerning loss relief, as there was no reason for a distinction in terms of the scope of any restriction.

(58) The EFTA Court concluded as follows in paragraph 55:

> **"In light of the above, the answer to the question referred must be that Articles 31 and 34 EEA do not preclude the application of national rules on intra-group contributions, such as the rules in the Norwegian Taxation Act, under which the contribution reduces the transferor's taxable income and is included in the recipient's taxable income regardless of whether the recipient makes a loss or a profit for tax purposes, that lay down the condition that both the transferor and the recipient are liable to taxation in the EEA State in question. It is a condition of EEA law that the national rules must serve a legitimate objective such as the need to safeguard the balanced allocation of taxation powers between EEA States or to prevent wholly artificial arrangements leading to tax avoidance. However, the requirements of national law go beyond what is necessary to pursue those objectives in cases where the loss sustained by the foreign subsidiary is final."**

(59) From this conclusion, it appears that Article 31 EEA and Article 34 do not preclude the application of national rules on intra-group contributions under which both the transferor and the recipient must be liable to taxation in the relevant EEA State. Nevertheless, the EFTA Court ruled that in cases where the loss sustained by the foreign subsidiary was "final", "the requirements of national law go beyond what is necessary". Hence, when a "final" loss has been sustained by the subsidiary, it will be contrary to the EEA Agreement to lay down as a condition for a right to deduction that both the parent company and the subsidiary must be liable to taxation in the EEA State in question.

(60) Based on the factual circumstances of the case, the EFTA Court also found reason to address the issue of earned interest and then the issue of prohibition abuse of rights under EEA law. It pointed in particular at the circumstances of Yara's acquisition of UAB, the sale of UAB's assets and the subsequent liquidation. Then, the EFTA Court stated the following in paragraphs 50–52:

> **"(50) In assessing the fulfilment of the conditions for the application of the final loss exception, the national court must equally take account of this principle, in order to preclude arrangements designed merely to secure a tax advantage and to avoid taxation in an EEA State.**
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> **(51) It is settled case law that, in order to examine wholly artificial arrangements, national courts must carry out a case-specific examination, taking into account the particular features of each case, in order to assess the abusive or fraudulent conduct of the persons concerned…**
>
> **(52) Two elements must be considered in this analysis. In addition to a subjective element consisting in the intention of obtaining a tax advantage, the objective circumstances must also attest to the artificial character of the situation. What is decisive is the fact that the activity, from an objective perspective, has no other reasonable explanation but to secure a tax advantage…"**

(61) In continuation of this, the EFTA Court held that Yara's contention that it first acquired the Lithuanian company, and then, after having looked into it, decided that it no longer wished to operate in Lithuania, was not convincing. It was for the national courts to determine "in light of the specific circumstance of the case" whether the loss at issue was final, "or

whether the situation could constitute a wholly artificial arrangement, designed to avoid taxation".

(62) The circumstances highlighted by the EFTA Court would undoubtedly be relevant in an assessment of abuse of rights. As I see it, there is no reason to look into this. The fact that these circumstances are presented as relevant in an assessment of abuse of rights cannot, in my opinion, preclude their relevance in the assessment of whether a final loss has been sustained, an issue to which I will revert.

(63) *The final loss exception in Marks & Spencer*

(64) The requirements for a loss to be "final" are presented in *Marks & Spencer* in paragraph 55 and in subsequent ECJ rulings. It is therefore necessary to give a further account of this exception rule.

(65) The issue at stake in *Marks & Spencer* was briefly whether British tax rules that did not allow "group relief for losses", i.e. transfers of losses to a parent company in the United Kingdom incurred by its subsidiaries in Belgium, Germany and France, were contrary to Article 43 and Article 48 of the EU Treaty on the freedom of establishment. The tax rules applicable in the United Kingdom only allowed such transfers to take place between resident companies liable to taxation in the realm.

(66) The ECJ concluded that the tax rules applicable in the United Kingdom, at the outset, were compatible with the EU Treaty.

(67) However, in paragraph 54, it is discussed whether the relevant measures should have been "less restrictive than a general exclusion from group relief". In paragraph 55, the ECJ formulated the exception rule as follows:

> **"In that regard, the Court considers that the restrictive measure at issue in the main proceedings goes beyond what is necessary to attain the essential part of the objectives pursued where:**
>
> **- the non-resident subsidiary has exhausted the possibilities available in its State of residence of having the losses taken into account for the accounting period concerned by the claim for relief and also for previous accounting periods, if necessary by transferring those losses to a third party or by offsetting the losses against the profits made by the subsidiary in previous periods, and**
>
> **- there is no possibility for the foreign subsidiary's losses to be taken into account in its State of residence for future periods either by the subsidiary itself or by a third party, in particular where the subsidiary has been sold to that third party."**

(68) Then, the Court states the following in paragraph 56:

> **"Where, in one Member State, the resident parent company demonstrates to the tax authorities that those conditions are fulfilled, it is contrary to Articles 43 EC and 48 EC to preclude the possibility for the parent company to deduct from its taxable profits in that Member State the losses incurred by its non-resident subsidiary.**

(69) I take the exception to mean that a deduction cannot be denied for Yara's group contribution if Yara demonstrates that the taxable loss in UAB was final within the meaning of the law. This entails that UAB must have exhausted all possibilities of having

the loss taken into account both in present and in previous accounting periods, if necessary by transferring the loss to a third party or by offsetting it against profits in previous accounting periods. It must also be documented that the loss cannot be taken into account in future accounting periods, neither by UAB itself nor by a third party, especially where the subsidiary has been sold to a third party.

(70) It is a condition for applying the exception rule that none of the mentioned ways in which the losses can be taken into account is available.

(71) I note that paragraph 56 sets out that only in cases where the parent company "demonstrates" to the tax authorities that the conditions in the exception rule are fulfilled, it is contrary to Articles 43 and 48 of the EU Treaty to preclude the right to deduction. This entails that it is Yara that must demonstrate that the conditions have been fulfilled.

(72) It is undisputed that the *Marks & Spencer* exception is a narrow rule, which is also addressed in subsequent ECJ case law. In this regard, I mention *Marks & Spencer II*, where it is discussed in paragraph 36 what can be characterised as definitive losses:

> **"Secondly, it should be borne in mind that losses sustained by a non-resident subsidiary may be characterised as definitive, as described in paragraph 55 of the judgment in Marks & Spencer (EU:C:2005:763), only if that subsidiary no longer has any income in its Member State of residence. So long as that subsidiary continues to be in receipt of even minimal income, there is a possibility that the losses sustained may yet be offset by future profits made in the Member State in which it is resident (see judgment in A, EU:C:2013:84, paragraphs 53 and 54).**

(73) It is however undisputed that a final loss must be demonstrated as at 31 December 2009, or under no circumstances later than the expiry of January 2010. In *Marks & Spencer II*, the ECJ seems to acknowledge national legislation that laid down as a condition that the assessment concerned the situation immediately after the relevant accounting period.

(74) *Has a final loss been sustained?*

(75) <u>*The requirement of tax liability*</u>

(76) Firstly, I will emphasise that it is a condition for deduction that the group contribution is considered taxable income in Lithuania to the recipient. The exclusion of this issue in the EFTA Court's judgment was probably due to the parties' agreement on this.

(77) The question is then to which extent the group contribution constituted taxable income to UAB in Lithuania in 2009.

(78) The appellant has claimed that the part of the group contribution that was offset against the company's loss as at 31 December 2009 cannot be regarded as taxable income. In Yara's letter of 12 January 2018 to the Tax Office, it is stated that the imbalance "for Norwegian tax purposes does not qualify as a taxable group contribution".

(79) Then, it is stated that an amount of LTL 19 498 868, equaling NOK 46 797 283, is "Group contribution entered as income".

(80) However, the appellant has also referred to an internal memorandum from Ernst & Young of 20 August 2013, which states that the parts of a group contribution used for adjusting the share capital to meet the requirements of the law, cannot be considered taxable income either. To me, it is unclear whether a further reduction should have been made of the part of the group contribution that can be considered taxable income – equaling half of the share capital stated to be LTL 29 872 200. In that case, it would imply a further reduction of the group contribution taxable in Lithuania.

(81) In addition, Yara has claimed a deduction for LTL 19 257 046, equaling NOK 46 216 910, and entered the amount as "loss according to local tax return", which is also entered in the accounts overview as at 31 December 2009 as "Taxable profit (loss)". No further explanation is given as to why this amount should also be entered as a deductible part of the group contribution in the 2009 assessment.

(82) As it will have appeared, I consider these numbers uncertain, including which part of the group contribution that has actually been taxed in Lithuania. This uncertainty alone makes it questionable whether Yara has demonstrated that the conditions for deduction in Norway have been met.

(83) However, as the case now stands, I do not consider it necessary to elaborate further on this issue, as it is not decisive for the result.

(84) *The issue of interest income*

(85) As I have already mentioned, the EFTA Court was only presented with the question whether it was possible under the circumstances to refuse a tax deduction for a group contribution to a company in a different EEA State. Hence, the EFTA Court's reply is limited to this. However, in its judgment the Court also commented on the fact that parts of the group contribution were deposited into an interest-carrying group account. Then, the Court stated the following in paragraph 44:

> **"Yara's group contribution was not all used to discharge debt, with part of it being deposited into a group account. It was confirmed at the oral hearing, however, that UAB continued to receive income in the form of interest. Yara's advocate stated that this "cash pool" allowed the investment "to earn passive loan interest income". The Court notes that the existence of even minimal income precludes the application of the final loss exception (compare, inter alia, the judgment in Commission v United Kingdom, cited above, paragraph 36)."**

(86) Since it is clear that interest would accrue on UAB's credit balance in the group account system, the case might have been decided on that basis. However, as pointed out by the EFTA Court's judgment, it is for the national court to assess whether the final loss condition has been fulfilled.

(87) The EFTA Court's judgment must be read in light of the relatively brief description given of the facts of the case, which as should be expected influenced the Court's reply. However, other details relating to the case, which have been presented to the Supreme Court in a much broader scope than to the EFTA Court, are of such a nature that the case cannot be based on the fact that the company actually earned interest.

(88) The company's business had been closed, the assets sold and liquidation proceedings were pending. The latter entailed the appointment of a receiver who took over the board's authority, but who was precluded from acting on behalf of the company apart from ensuring its liquidation. The capital could thus not be used to establish a new business. The interest amount would at no point in time be paid to UAB, but be channeled back to Yara as a part of the liquidation dividend. The capital could thus not have been used to establish a new business. Moreover, it has been stated that the costs of the liquidation proceedings exceeded the interest income.

(89) In this regard, it is natural once more to bring in *Marks & Spencer II*. The key issue is whether "any income" must be read in conjunction with the rest of the paragraph, so that a "minimal income" will only be decisive if it may indicate to which extent it is possible to obtain an income in the company. In my view, it has not been clarified whether even a minimal income will be decisive although it can be established on alternative grounds that the company will not obtain any income.

(90) I will confine myself to pointing at the issues this raises, as a more detailed examination is not necessary. In my view, the case should be decided on a different and, to me, more principled basis.

(91) *The issue of the use of a third party*

(92) I find that the case should be decided based on whether Yara could have sold UAB as a going concern, i.e. through a transfer of shares, and thus rendered it possible for a potential buyer, in the capacity of a third party, to take UAB's taxable loss into account.

(93) As mentioned, it is undisputed that the application of the exception rule in *Marks & Spencer* depends on the situation as at 31 December 2009, or immediately after. The question is whether alternative ways of taking the loss into account must be assessed solely based on the situation at that time, or whether one must consider UAB's possibilities of taking its taxable losses into account up until that time.

(94) The exception rule in *Marks & Spencer* paragraph 55 clearly expresses that the possibilities of taking the loss into account must be assessed based on previous, present and future periods. I cannot see that the exception rule contains any requirement that the assessment must be limited to the situation at the time of assessment. At least, this must apply to past periods.

(95) If the assessment of all possible ways of taking the losses into account had to be based on the fact that UAB had sold its assets and was pending liquidation, this would lead to a significant limitation to the scope of review.

(96) It is clear that such an assessment would be entirely different than if Yara's options until this date were also included.

(97) If only the situation at the time of the assessment was to be considered, it would have enabled the taxpayer, through its arrangements, to create a situation where there was no other effective possibility to take the loss into account. The practical implication of this is that the taxpayer indirectly would be free to choose the country of taxation. It is not given that such arrangements could be contested as abuse of rights under EEA law. However,

strong policy considerations weigh heavily against such a solution, and I find no legal basis for reading it into *Marks & Spencer*.

(98) Yara contends that an assessment from this perspective is mistaken, also because there would have been no loss to take into account if Yara, instead, had sold the company as a going concern. It is pointed out that the loss actually accrued partially as a result of the operation in the year the assets were sold, and partially as a result of the actual sale of assets.

(99) I cannot see the relevance of this argument. By selling the company, Yara could have exploited its taxable position. It is undisputed that a buyer could do the same. The possibility of a third party paying less for this position than the group's estimated value thereof in a sale of assets, is not relevant for the legal assessment.

(100) I will now turn to the issue whether a final loss has been sustained.

(101) The assessment in terms of tax must in this case, as in others, be based on the group's commercial arrangements. However, it follows from the conditions for considering a loss "final" that one must also consider what possibilities were available. A number of possible adjustments will have a commercial end to some extent, including a decision to make a group contribution. Such adjustments are not thus precluded from the assessment of whether the loss could have been taken into account.

(102) When Yara acquired Kemira, later Yara Soumi Oy, in 2007, UAB was a company with substantial income and a certain profit. It appears from the accounts for 2007 and 2008 that the company had a sales income of approximately NOK 411 million and 511 million respectively, and a "[g]ross profit" after a deduction of selling costs, of almost NOK 70 million. The company had 144 employees in 2007, reduced to 65 at the end of 2008 due to the decision to liquidate.

(103) No circumstances have been reported regarding the operation before Yara's takeover in terms of operating licences, the company's economy or similar suggesting that liquidation was likely or necessary for economic, environmental or other reasons. The large accounting losses in 2008 were mainly due to allocations and depreciations relating to the liquidation of the company. It was not the company's, but the group's, interests that motivated the liquidation.

(104) An internal e-mail in the Yara system sets out that relatively shortly after the acquisition of the Finnish group, a process was initiated in the company to assess the possibility of continued production at UAB's plant. It was pointed out that the plant was small and land-based, without competitive market advantages and without access to reasonably priced raw material, and that substantial investments were necessary to bring the company to Yara's "HESQ standards", i.e. the requirements for health, safety, environment and quality that Yara otherwise operates with. In the e-mail, it was recommended to close the plant if the liquidation costs did not exceed EUR 15 million. A potential sale of the business or the company was not mentioned.

(105) On 28 April 2009, UAB entered into an agreement with AB Lifosa for the sale and purchase of the entire business of the company for a nominal amount of LTL 1, or around

NOK 2.40. AB Lifosa owned a chemical plant operating within the same field and located on the same industrial area.

(106) The agreement included the buildings and all assets belonging to UAB, as well as a transfer of the land lease contract. Under clause 8 of the agreement, the buyer assumes the risk of "chemical contamination of Land and Assets" relating to UAB's operation, and the seller disclaims all future responsibility for this. A comprehensive disclaimer for the seller is included in clause 9:

> **"9. The Seller shall have no liability whatsoever, including but not limited to any environmental issues, related to the Assets, the Land and/or the Land Lease Right. The Seller in no case shall be liable for any operational loss, loss of profit or any other direct, indirect, criminal, special, secondary, consequential, economic or other loss and damages of any kind. The Buyer shall assume the liability for claims related to the Land or the Assets lodged by any third parties and the Buyer shall hold harmless and keep indemnified the Seller against any claims made by any third party regarding the Land or the Assets. The Buyer shall be liable for the cleaning of any contamination or pollution of the Land. The Buyer shall assume liability for all environmental issues whatsoever related to the Assets including but not limited to demolishing of the buildings and removal of asbestos at its own cost."**

(107) It is also set out in clause 10 that the buyer undertakes for a period of three years after signing to abstain from producing "NKP", i.e. chemical fertilisers that UAB had produced at the plant. Under clause 11, the seller reserves a right to claim remedy for any breach of the non-compete clause.

(108) No information has been provided of any attempts to sell the entire company to a third party, or of any estimates of the value of the company in a potential sale.

(109) In my view, the sale of the assets to AB Lifosa, on the terms accounted for, suggests that it was indeed possible for Yara to sell the company as a going concern. I note in particular that AB Lifosa also acquired the assets with a view to further operation of the production plant – with the non-compete clause in mind, and assuming full responsibility for potential pollution.

(110) Most probably, AB Lifosa could just as well have bought the entire company, with a similar non-compete clause, and thus have become able to take the taxable losses into account. As I see it, such a sale could also have been possible to other third parties. This seems like an effective rather than a theoretical or hypothetical possibility.

(111) Such a sale would have maintained the overall commercial concerns behind the decision to liquidate. An agreement on a sale of the entire company could have been formulated so that the effect of the transaction would mainly have been the same as that of a sale of assets. As mentioned, the buyer would then have acquired the taxable position.

(112) Against this background, I conclude that Yara has not demonstrated that a final loss has been sustained according to the exemption rule in *Marks & Spencer*. The company is thus not entitled to a tax deduction for any part of the group contribution.

(113) The case has been thoroughly presented by both parties before the Supreme Court. It is not necessary for the result to elaborate further on alternative grounds.

(114) Consequently, the appeal must be dismissed.

(115) The state has won the case and is, in principle, entitled to full compensation for its costs under the main rule in section 20-2 (1) of the Dispute Act. The result is the same as that in the tax assessment and in the rulings of the district court and the court of appeal. I cannot see that there is a basis for exempting Yara from liability for the state's costs in the Supreme Court. Nor has the case given rise to much doubt, in terms of the result.

(116) The state represented by the Office of the Attorney General has claimed costs of NOK 240 700. The entire amount constitutes counsel's fees. No objections have been raised to the claim. The amount is considered necessary, see section 20-5 of the Dispute Act, and is awarded.

(117) I vote for this

J U D G M E N T :

1. The appeal is dismissed.

2. Yara International ASA will costs in the Supreme Court to the state represented by the Central Tax Office for Large Enterprises of NOK 240 700 – twohundredandfortythousandsevenhundred – within 2 – two – weeks of the service of the judgment.

(118) Justice **Falch:** I have arrived at the same conclusion as acting justice Lindsetmo, but on different grounds.

(119) In my view, the loss is not final because the Lithuanian subsidiary – UAB – continued to receive income in the form of interest after 2009.

(120) As mentioned by Justice Lindsetmo, Yara's group contribution was only partially used to discharge UAB's debt. The rest was deposited into a group account, which gave UAB a regular income in the form of interest. Although the general meeting in UAB of 29 January 2010 decided to liquidate the company, it was clear that this process would take time and that UAB would receive interest income for a while yet.

(121) Yara contends that this modest interest income should not be included in the assessment of whether the loss was final. Otherwise, the right to tax deduction for cross-border group contributions – which is generally protected under the EEA Agreement – is precluded if the subsidiary does not have debts. Then, Yara argues, the protection is not effective.

(122) The final loss exception is established, and later specified, in several ECJ rulings. In accordance with the EFTA Court's judgment, the exception also applies under the EEA Agreement. In such a situation, I find that Norwegian courts are bound by the *limitation* given to the exception therein.

(123) In *Marks & Spencer II* the following is set out in paragraph 36:

> **"Secondly, it should be borne in mind that losses sustained by a non-resident subsidiary may be characterised as definitive, as described in paragraph 55 of the judgment in**

> **Marks & Spencer (EU:C:2005:763), only if that subsidiary no longer has any income in its Member State of residence. So long as that subsidiary continues to be in receipt of even minimal income, there is a possibility that the losses sustained may yet be offset by future profits made in the Member State in which it is resident (see judgment in A, EU:C:2013:84, paragraphs 53 and 54).**

(124) It is stated that the possibility to offset the losses against future profits exists as long as the subsidiary continues to receive an income, however minimal. The judgment does not provide a basis for distinguishing between various sources of income. Nor do other judgments.

(125) In addition, the regular income in the form of interest was suited to be offset against – and thus reduce – the loss sustained by UAB. This means that the final size of the loss UAB would have been precluded from having taken into account in Lithuania, was not necessarily clarified at the year-end 2009/2010. The quote from *Marks & Spencer II* suggests that a parent company's right to a tax deduction should not be based on how likely it is that the subsidiary's continued income will in fact reduce its losses and to which extent. As I see it, the ECJ has made the *continued existence* of an income the decisive factor in this respect.

(126) This is also the EFTA Court's understanding of the ECJ's limitation of the exception rule. I refer to paragraph 44 in the EFTA Court's judgment, which in fact expresses that the existence of such interest income precludes the application of the final loss exception.

(127) On these grounds, I vote for the same result as Acting Justice Lindsetmo. That is also the case with the issue of costs.

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

(129) Justice **Møse:** I agree with Acting Justice Lindsetmo in all material respects and with his conclusion.

(130) Justice **Endresen:** Likewise

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

J U D G M E N T :

1. The appeal is dismissed.

2. Yara International ASA will pay costs in the Supreme Court to the state represented by The Central Tax Office for Large Enterprises of NOK 240 700 – twohundredandfortythousandsevenhundred – within 2 – two – weeks of the service of the judgment.