



"Foreign Tax Credit for Interest Income

Norwegian case THOD-2019-83263 / UTV-2021-1244
Fiscal year 2013

Supreme Court Justice Erik Thyness
IATJ 14th Assembly, Paris, 14 September 2024

Basic Facts

- Mowi ASA («Parent») claimed ordinary tax credit under the applicable tax treaties for withholding tax on interest income from subsidiaries in South Korea, Poland, Chile and Singapore (“Subsidiaries”)
- Parent’s interest income from Subsidiaries: NOK 91 million
- Norwegian tax on the interest income assuming sufficient overall net profit in Norway: NOK 25 million (28%)
- Withholding tax on interest income: NOK 13 million
- Tax assessment: Norwegian overall net income negative => Maximum credit 0

Basic Principles

- Ordinary credit limitation:
 - Credit limited to Norwegian income tax on the foreign income
- General rule:
 - Domestic/foreign income split on the basis of where income accrues and where expense is incurred (direct allocation)
- Exception: Interest expense allocated pro rata to the split of directly allocated income/expense

Issue 1: Tax-free Income

- Should tax-free income (capital gains on shares and dividends) be included in domestic net income?
- The Court: Only *taxable* income to be included
 - Parent had *tax-free* income of app. NOK 2 billion
 - Parent had negative *taxable* income
 - => Maximum credit 0

Issue 2: Group Contributions

- No consolidated group taxation in Norway, but taxable profits be transferred by means of group contributions
- Parent had received (taxable) group contributions from Norwegian affiliates of app. NOK 1.3 billion
- A group contribution is included in the receiving entity's tax base, but is it *income*?
- The Court:
 - Group contributions are transfers of other companies' profits and as such irrelevant for the calculation of the maximum tax credit
 - Follows from the regulations
 - Supported by the preparatory works
 - => Maximum credit 0

Issue 3: Tax treaty protection (1)

- Tax treaties have direct effect in Norway and prevail in the event of conflict with national law
- The relevant treaties apply the ordinary credit method (Model Convention article 23 B)
- Parent: The exclusion of group contributions from income contravenes the tax fundamental principle of avoiding double taxation

Issue 3: Tax treaty protection (2)

- The Court:
 - No specific provisions relating to group contributions in the tax treaties
 - The treaties do not specifically address group contributions
 - OECD commentaries to Article 23:
 - Article 23 B sets out the main rules of the credit method, but does not give detailed rules on the computation and operation of the credit. In many States, detailed rules on credit for foreign tax already exist in their domestic laws. A number of conventions, therefore, contain a reference to the domestic laws of the Contracting States and further provide that such domestic rules shall not affect the principle laid down in Article 23 B.
 - The Norwegian rules on calculation of maximum credit apply