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Tax authorities' request for company to provide copy of computer server used jointly with other companies was legitimate

In today's Chamber judgment in the case of **Bernh Larsen Holding As and Others v. Norway** (application no. 24117/08), which is not final[1], the European Court of Human Rights held, by a majority, that there had been:

no violation of Article 8 (right to respect for private and family life, home and correspondence) of the European Convention on Human Rights.

The case concerned the complaint by three Norwegian companies about a decision of the tax authorities ordering tax auditors to be provided with a copy of all data on a computer server used jointly by the three companies.

The Court agreed with the Norwegian courts' argument that, for efficiency reasons, tax authorities' possibilities to act should not be limited by the fact that a tax payer was using a "mixed archive", even if that archive contained data belonging to other tax payers. Moreover, there were adequate safeguards against abuse.

Principal facts

The applicant companies, Bernh Larsen Holding AS ("B.L.H."), Kver AS ("Kver") and Increased Oil Recovery AS ("I.O.R."), are limited liability companies registered in Bergen (Norway).

In March 2004, the regional tax authorities requested that B.L.H. allow tax auditors to make a copy of all data of the computer server used by the company. B.L.H. granted the authorities access to the server, but refused to supply them with a copy of the entire server, arguing that it was owned by another company (Kver) and was being used by other companies for their information storage. When Kver opposed the seizure of the entire server by the tax authorities, the authorities issued a notice that that company would also be audited. The two companies then agreed to hand over a backup tape of the data of the previous months, but immediately lodged a complaint with the central tax authority, requesting the speedy return of the tape, which was sealed pending a decision on their complaint. Being informed by Kver that three other companies also used the server and were affected by the seizure, the tax authorities notified those companies that they would also be audited. One of them, I.O.R., subsequently also lodged a complaint with the central tax authority.

In June 2004, the central tax authority withdrew the notice that an audit of Kver and I.O.R. would be carried out, but confirmed that B.L.H. would be audited and was obliged to give the authorities access to the server. On appeal by the three applicant companies,

1 Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day.
Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution

that decision was upheld by the City Court in June 2005 and by the High Court in April 2007. The courts found that the relevant legal provisions (section 4-10 of the Tax Assessment Act) authorised the copying of data for inspection at the tax office. The fact that the server was used jointly by several companies did not justify denying the tax authorities access, as the jointly used server was to be treated in the same manner as mixed paper archives for the purpose of those provisions.

On 20 November 2007, the Supreme Court upheld the High Court's judgment (by four votes to one). It held in particular that the relevant legal provisions authorised tax authorities to access all archives – including stored electronic documents, and not only accountancy documents - which they had reason to assume contained information relevant for tax assessment purposes. In the interests of efficiency, access should be relatively wide. Therefore, the companies' argument that it should be up to each tax subject to give binding indications as to which parts of the archive contained documents of significance for the tax assessment or the audit had to be rejected. While the measure was not comparable to a seizure in criminal proceedings, the companies were nonetheless under an obligation to comply with the order to allow access.

Complaints, procedure and composition of the Court

The companies maintained that the tax authorities' decision had breached their rights under Article 8, alleging in particular that the measure had been taken in an arbitrary manner.

The application was lodged with the European Court of Human Rights on 19 May 2008.

Judgment was given by a Chamber of seven judges, composed as follows:

Isabelle **Berro-Lefèvre** (Monaco), *President*,
Elisabeth **Steiner** (Austria),
Khanlar **Hajiyev** (Azerbaijan),
Mirjana **Lazarova Trajkovska** ("The former Yugoslav Republic of Macedonia"),
Julia **Laffranque** (Estonia),
Linos-Alexandre **Sicilianos** (Greece),
Erik **Møse** (Norway),

and also Søren **Nielsen**, *Section Registrar.*

Decision of the Court

Article 8

The Court found that the obligation on the applicant companies to enable tax auditors to access and make a copy of all data on the server jointly used by them constituted an interference with their "home" and "correspondence" for the purpose of Article 8. The obligation concerned all three companies. According to them, the copy of the server also included copies of personal e-mails of employees. However, since no employee had complained of an interference with his or her private life before the courts, the Court found it unnecessary to determine whether there had also been an interference with "private life". It would, however, take the companies' legitimate interest in ensuring the protection of the privacy of persons working for them into account when examining whether the interference was justified.

The Court accepted that the interference had a basis in national law. The relevant provisions of the Tax Assessment Act, as interpreted by the Norwegian Supreme Court, authorised tax auditors to access companies' archives, including electronically stored

documents, for review. Had the archive been organised with clear dividing lines between the different companies, the tax authorities could have identified the areas on the server where relevant information could have been found. Since this was not the case, the authorities were entitled to access the entire server and obtain copies of documents where a review appeared expedient. Nothing in the relevant rules prevented the taking of a backup copy of the server to the tax authorities' premises for review. It was moreover undisputed that the relevant law had been accessible.

Furthermore, the Court was satisfied that the law was sufficiently precise and foreseeable. The applicant companies had argued that, by taking the backup copy, the tax authorities had obtained the means of accessing great quantities of data which did not contain information of significance for tax assessment purposes and which thus fell outside the remit of the relevant provisions. However, as the Norwegian Supreme Court had explained, for efficiency reasons tax authorities' possibilities to act should be relatively wide at the preparatory stage. They could therefore not be bound by the tax subject's indications as to which documents were relevant, even where the archive in question comprised documents belonging to other tax subjects.

However, the relevant provisions did not confer on the tax authorities an unlimited discretion, as the objective of an order to access documents was clearly defined. In particular, the authorities could not require access to archives belonging entirely to other tax subjects. At the same time, the Court saw no reason for disagreeing with the Supreme Court's finding that the applicant companies' archives had not been clearly separated. The companies could therefore have reasonably foreseen that the tax authorities should be able to access all data on the server in order to appraise the matter for themselves.

The Court agreed with the Norwegian Government's submission that the tax authorities' measures had been taken in the interest of the economic well-being of the country and had thus pursued a legitimate aim for the purpose of Article 8.

There was moreover no reason to call into doubt the Norwegian legislature's view when adopting the relevant legal provisions that the review of archives was a necessary means of ensuring efficient verification of information submitted to the tax authorities, as well as greater accuracy in the information so provided. The tax authorities' justification for obtaining access to the server and a backup copy with a view to carrying out a review of its contents on their premises had therefore been supported by reasons that were both relevant and sufficient.

As to the proportionality of the measure, the Court noted that the procedure relating to the authorities' obtaining access to a backup copy of the server had been accompanied by a number of safeguards against abuse. The company B.H.L. had been notified of the tax authorities' intention to carry out a tax audit a year in advance, and both its representatives and those of Kver had been present and able to express their views when the tax authorities made their on-site visit. The companies had had the right to complain against the measure, and as soon as they had done so, the backup copy had been placed in a sealed envelope and deposited at the tax office pending a decision on the complaint. The relevant legal provisions included further safeguards, in particular the right of the tax subject to be present when the seal is broken and the right of the tax subject to receive a copy of the audit report.

Furthermore, as the Supreme Court had observed, after the review had been completed, the copy of the server would be destroyed and all traces of the contents would be deleted from the tax authorities' computers and storage devices. The authorities would not be authorised to withhold documents from the material that had been taken away unless the tax subject accepted the measure. Finally, the nature of the interference was not of the same seriousness and degree as was ordinarily the case in search and seizure

carried out under criminal law. As pointed out by the Supreme Court, the consequences of a tax subject's refusal to cooperate were exclusively administrative. Moreover, the measure had in part been made necessary by the applicant companies' own choice to opt for "mixed archives" on a shared server, making the task of separation of user areas and identification of documents more difficult for the tax authorities.

In sum, the Court found that effective and adequate safeguards against abuse had been in place and a fair balance had been struck between the companies' right to respect for "home" and "correspondence" and their interest in protecting the privacy of persons working for them, on the one hand, and the public interest in ensuring efficient inspection for tax assessment purposes, on the other hand. There had accordingly been no violation of Article 8.

Separate opinion

Judges Berro-Lefèvre and Laffranque expressed a dissenting opinion, which is annexed to the judgment.

The judgment is available only in English.

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