

Conclusive Force of Declaration of Foreign Authorities

Supplementary comments from a
Norwegian Perspective
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A summary of the legal situation in Norway concerning exchange of information

- Tax treaties based on OECD model- including the 2005 revisions (for later treaties and amendments)
- Tax Information Exchange -based on OECD model
- The multilateral Convention on Mutual Administrative Assistance in Tax Matters
- Nordic "Joint Venture" to obtain TIEAs with certain tax havens

- The Ministry of Finance has reached an agreement with U.S. Authorities concerning automatic exchange of financial information (Re: The US Foreign Account Tax Compliance Act)
 - Norwegian Financial Institutions may submit relevant information to the Norwegian tax authorities in place of the US authorities.
- The Tax Assessment Act section 6-3 no 3
The Credit Card project –
entitling the tax authorities to collect information from companies accepting payment with credit cards the identity of the credit card holder and the person using the card.

The Dispute Act from 2005

- Section 21-2 The evaluation of evidence
- (1) The court shall establish the facts upon which the case shall be determined based on a free evaluation of evidence.

This means that the judge is not bound by any rules as to what weight the different categories of proof shall be given

The Dispute Act

- Section 21-3; Right and duty to present evidence
- (1) The parties are entitled to present such evidence as they wish. Limitations on the right to present evidence are contained in sections 21-7 and 21-8, Chapter 22 and the other evidence provisions in this Act.
- Section 26-5 Objects as evidence
- (1) All persons are obliged to make available as evidence objects that are in their possession or of which they can obtain possession.
- (2) In order to implement the obligation in subsection (1), the court may order the parties and other persons to answer questions about whether they are aware of items of evidence and to make necessary investigations in such respect. They may also be ordered to prepare comparisons, extracts or other reviews of information that may be gathered from items of evidence.

The Dispute Act

- The main rule is that the courts must base decisions on the factual situation which is deemed to be the most probable
- Relevant exemptions
 - tax matters; limitations on what new evidence which can be submitted to the court
 - the opportunity and incentive to secure evidence
 - tax surcharge

The Dispute Act

- Section 22-7 Prohibition against improperly obtained evidence
"In special circumstances, the court may disallow evidence that has been obtained in an improper manner."
 - the acquisition of the evidence need not be illegal; improper is the term used
 - But only under special circumstances
 - Rt. 2007 page 920
Information and documentation was acquired by having a third party call the bank during lunch breaks pretending to call from internal control.
The evidence was not excluded as the court found that: A) Not excluded by law to give evidence B) Not a serious violation of integrity. C. Evidence otherwise unobtainable D) The inclusion of the documents in evidence did not exclude the party from adequately countering the evidence which was allowed.

The Dispute Act

- Section 21-7 General restrictions on the right to present evidence
 - (2) The court may disallow presentation of evidence that
 - c) the court finds necessary to have presented in a different manner.

The Client - Attorney privilege

- Information obtained by the requested state in violation of the Norwegian understanding of the privilege could not be included in evidence
- A hot topic in Norway – combined with greater interest in the role of advisors

The Norwegian Tax Authorities has argued that the Norwegian Supreme Court has understood the privilege to be more extensive than is the opinion in other jurisdictions, and this may lead to interesting questions concerning TIEAs based on the OECD model

(in addition to political discussions in Norway)

The Dispute Act

- Section 22-5 Section 22-5 Prohibition against and exemption from evidence for information confided to persons in certain occupations

Evidence cannot be presented about something that has been confided to advocates or defence council.

Rt- 2010 page 1638

- It was decided that the lawyers did not have an obligation to disclose to the prosecution to whom certain payments had been made through the lawfirms client account – provided that the transfer of funds fall within the scope of the lawyers' ordinary business.

Rt. 2012 page 868

- The representation is in itself a secret, and when the representation has been disclosed, seizure could still not be made in the lawyers timesheets. Such timesheets will disclose additional information such as information about the magnitude of assistance, what the lawyer has been working with and how much time he spent on each matter- Thus the timesheets could reveal the complexity of both factual and legal issues

Rt. 2012 page 1601

- The Supreme Court found, without qualification, that the defendant could act as the attorneys agent, and that thus documents/information in his possession which he had gotten hold of with the intent to pass it on to the attorney, were covered by the privilege – also when a document was received from a codefendant

Furthermore any document related to the criminal case which include advice to assist the defendant in his preparation for trial, will be exempt, cfr- ECHR article 6 no 3 letters b and c – also when the advice is not meant for the attorney.

Rt. 2012 - 1601

- The minority view:

Acknowledging the importance of the client-attorney privilege, the minority added that it was also important to limit the right of privilege so that it does not unnecessarily cause difficulties for the prosecution. It was pointed out that it may well cause problems as to international exchange of information, if the limitations to the privilege in Norway is linked to criteria which differ from what is more generally adopted. It was argued that in this context it is not a good solution to allow the extent of the privilege to be – to some degree – defined by the defendant and his attorney.

If the defendant can not as a rule be excluded from the role as an assistance to his attorney, the courts should only allow this construction

when it is clear that the defendant is indeed just an agent to the attorney

-does the defendant choose who to contact

-who decides whether a response requires further investigations

-is the defendant free to filter what documents which should be sent to the attorney

Client-Attorney privilege

- OECD Model Tax Convention article 26

"In no case shall the provisions of paragraph 1 and 2 be construed so as to impose on a Contracting State the obligation to supply information which is not obtainable under the laws or in the normal course of administration of that of the other Contracting State."

The Commentary:

"In the first place, the paragraph contains the clarification that a Contracting State is not bound to go beyond its own internal laws and administrative practice.."

"However, the scope of protection afforded to such confidential communications should be narrowly defined."

It is not clear what can be achieved by this statement, considering the unqualified principle in the first paragraph above.

Client-attorney privilege

- Agreement on Exchange of Information on Tax Matters

"The rights and safeguards secured to persons by the laws or administrative practice of requested Party remain applicable to the extent that they do not unduly prevent or delay effective exchange of information." (article 1)

"The provisions of this Agreement shall not impose on a Contracting Party the obligation to obtain or provide information, which would reveal confidential information communications between a client and an attorney, solicitor or other admitted legal representative where such communications are:

- (a) produced for the purposes of seeking or providing legal advice or
- (b) produced for the purposes of use in existing or contemplated legal proceedings."

This attempt to define the scope of the privilege, is further supported in the commentary, but to what effect?

Article 7 1: "The requested Party shall not be required to obtain or provide information that the applicant Party would not be able to obtain under its own laws..."

and

Is it realistic that the applicant would ask for information that it would itself not be able to provide?

Client-attorney privilege

- Clearly both model agreements must be interpreted to secure non-violation of the ECHR
- Unclear if the two model agreements give identical solutions

Rt. 2010 page 513

- A taxpayer had been under investigation for tax evasion for 6 years, and was being denied access to certain documents. This was accepted by the Supreme Court as the tax authorities had given unqualified confirmation that the documents would be disclosed to the taxpayer in time for him to have adequate opportunity to examine and comment, prior to trial.

- A paragraph in the decision may well reflect a more general attitude:

"I agree that the duration of the investigation is relevant when balancing the interests, but the weight of this argument is reduced as the taxpayer has chosen not to contribute towards a quicker process. Neither does it appear as unreasonable that it is time consuming to achieve clarity for transactions involving companies in jurisdictions where the availability of information about companies being registered there is very limited."

Holland – Luxembourg

Information leaked from Luxembourg banks in breach of confidentiality

- The information would normally be admissible even if disclosed to the authorities through breach of confidentiality – illegally obtained. The idea being that this will lead to materially correct decisions
- The Dispute Act section 22-7
"in special circumstances"
- Rt. 2007 page 920
Not a direct parallel, but the result would probably be the same

Garlic

Information from US Government laboratory

- It is very unlikely that the lab results would not be allowed in a Norwegian dispute; cfr. The Dispute Act sections 21-3 and 21-7, 2)
- A different solution is possible, if the dutch Authorities might as well have chosen alternative laboratories, the importer was excluded from the process, nothing is known about the procedures followed, the request to the U.S. laboratory is not submitted, the chosen laboratory is known to have a bias etc
- But generally speaking, it would be for the importer to come up with alternative documentation to cast (additional) doubt on the conclusion from the U.S. laboratory.

What can a Norwegian taxpayer do if in his opinion the tax-authorities are basing a claim against him on incorrect information from another state.

- Nothing much – unless the information is incorrect
- He would be free to submit relevant documentation to counter the information from that other state
- The Tax Authorities may have an obligation to ask additional information, should the tax payer request this, cfr. Section 26-5 (1):
"(1) All persons are obliged to make available as evidence objects that are in their possession or of which they can obtain possession."

What can a Norwegian resident do if the Norwegian Authorities are giving, in his opinion, incorrect information about him to foreign authorities?

- Even less
- The Norwegian Authorities would under the international agreements have an obligation to provide information they believe to be correct without undue delay.
- His only option would be to try to convince the authorities
- He would not be in a position to seek an injunction
- After the fact, he could seek damages, if if if..