DET KONGELIGE
FINANSDEPARTEMENT

Royal Ministry of Finance

Your ref	Our ref	Date
Case No: 77290	15/1761	5.04.2019

RESPONSE FROM NORWAY TO THE REASONED OPINION ON THE NORWEGIAN REPORTING OBLIGATION WHEN HIRING NON-RESIDENT CONTRACTORS

1. INTRODUCTION

We refer to the Authority's Reasoned Opinion of 5 December 2018 (in the following referred to as the "RO"), concerning the Norwegian rules on reporting obligations in cases where non-resident contractors are hired to perform activities in Norway. By letters of 18 January and 28 February 2019, the Authority extended the time limits for our response, in the latter letter to 5 April 2019. We also refer to extensive previous correspondence, including the Ministry's response of 23 March 2017 to the Authority's letter of formal notice. Finally, we refer to several meetings between the Authority and the Norwegian Government, including the meeting between the College Members and State Secretary Jørgen Næsje in October 2017. The Ministry of Finance hereby submits its written comments to the RO.

In the RO the Authority alleges that (p 26):

> *"by maintaining in force provisions such as Section 7-6 of the Tax Administration Act and Sections 7-6-1 to 7-6-6 of the Regulation implementing and specifying the obligations laid down in the Tax Administration Act, which require Norwegian based recipients of services and providers of services from other EEA States to submit to the Norwegian authorities specified information on all contracts concluded between them*

Postal address
P.O Box 8008 Dep
NO-0030 Oslo, Norway
postmottak@fin.dep.no

Office address
Akersg. 40

Telephone
+47 22 24 90 90
Org. no
972 417 807

Tax Law Department
Telephone +47 22 24 44 31/33
Telefax +47 22 24 27 16

with a value of at least NOK 20 000 within 14 days of the commencement of work in Norway, Norway has failed to comply with its obligations under Article 36 of the EEA Agreement."

The Ministry disputes this conclusion. The Ministry acknowledges that the reporting obligation under Section 7-6 of the Tax Administration Act ("TAA")[1] is a restriction pursuant to Article 36 EEA. However, the Ministry submits that this restriction is justified by both the need to ensure the effectiveness of fiscal supervision and tax collection, as well as the prevention of tax fraud. Furthermore, that restriction is both suitable and necessary to attain the said objectives. The Ministry will substantiate this view in the following.

This letter is structured in the following way:

- In **Section 2** we describe the background and purpose of Section 7-6 of the TAA, as well as its scope and content, following the amendments to the rule applicable as from 1 January 2018.
- In **Section 3** we describe and document why such a reporting obligation is necessary for tax assessment purposes, taking into account the different factual and legal circumstances between resident and cross-border service providers.
- In **Section 4** the Ministry gives its assessment of the reporting obligation under the relevant EEA rules; hereunder the evaluation on the type of restriction, the relevant justification grounds, as well as the application of the proportionality test (appropriateness and necessity).
- The Ministry gives its conclusion **in Section5**.

2. THE REPORTING OBLIGATION PURSUANT OT THE CURRENT SECTION 7-6 TAA

2.1 Introduction

Chapter 7 of the TAA contains provisions on third party reporting for tax purposes in general. Section 7-6 TAA imposes the obligation on private undertakings and public service operators to report to the tax authorities when procuring a service to be carried out in Norway, from a person or a company resident outside of Norway (hereinafter "the reporting obligation").

As the Authority has rightly noted in the RO, the reporting obligation in Section 7-6 TAA has recently been amended and new rules have been in force since 1 January 2018.

[1] By referring to Section 7-6 TAA in this letter, we also refer to Sections 7-6-1 to 7-6-6 of the Regulation implementing and specifying the obligations laid down in the Tax Administration Act

These are the rules to be assessed in this case, as they are described in paras. 43 to 47 in the RO.[2]

The Ministry would underline that the adoption of the current rules entailed substantial amendments to the previous rules applicable at the time when the Authority opened the formal procedure. Thus, the amendments decreased the administrative burden for the reporting entities in several, significant ways. This will be shown below in Section 2.2. It is also described in the preparatory works (Prop. 1 LS (2017-2018), Chapter 21.1) in the following way [unofficial office translation]:

> *«The purpose of the amendments is to ensure in a better way the balance between the need for a correct assessment and collection of taxes, and the need to keep the administrative costs as low as possible for the reporting parties and the tax authorities. In total, the amendments will reduce the scope of the reporting obligations.»*

As the Authority's RO, as well as the Ministry's arguments in earlier letters, are concerned mainly with the reporting obligations as they previously applied, we will in the following give a brief description of the current rules.

2.2 The content of the current reporting obligation

The reporting obligation established by Section 7-6 TAA imposes on the service recipient to report to the tax authorities when procuring a service to be carried out in Norway, from a physical or legal person resident outside of Norway.

At the outset, it should be noted that the *purpose* of the reporting rules in Section 7-6 TAA remains the same as before the 2018 amendments, *i.e.* to ensure the interests of financial supervision, a correct tax assessment and the effective tax collection, as well as preventing tax evasion.

To fulfil these purposes, the tax authorities need to have relevant, early information on temporary, short-term assignments in Norway in order to be able to assess whether the specific assignment/work performed in Norway involves a taxability to Norway, or not.

Without the reporting obligation in Section 7-6, the Norwegian authorities would in a large number of cases not have any information on the services performed in Norway by a person or company resident abroad, and thereby no information on the income from such services possibly subject to Norwegian taxation. The reporting obligation provides the tax authorities with information about the service provider and whether he has income in Norway that could be taxable. It also provides information about any employees who has possible taxable income in Norway. If the non-resident person is

[2] In paras. 24-38 and paras. 39-42 of the RO, the Authority describes the contents of the previous reporting obligation, in force before 1 January 2018.

found to be taxable in Norway, according to the tax authorities' assessment of national law and tax treaty criteria seen up against the factual circumstances in the concrete case, the person will be registered in the tax census, and the tax authorities are able to follow up with submitting the necessary tax returns. Furthermore, it also enables the tax authorities to carry out the necessary control and tax collection, if no tax return is returned by the service provider or the employees. It should again be recalled that, without the reporting obligation, the authorities would in a large number of cases be unaware of the presence of the service provider and its employees in Norway and, thus, be unable to carry out its financial supervision and tax collection.

Moreover, in the case of non-resident service providers from other EEA states, there is often a need, depending on the relevant tax treaty, to consider whether the service provider has a permanent establishment in Norway or not. This depends on a number of circumstances, and the information submitted by means of Section 7-6 TAA, provides the tax authorities with the necessary documentation to assess this question. Also in the case of employees, there is a need, depending on the relevant tax treaty, to consider whether the threshold of days worked in Norway results in tax liability to Norway.

The end purpose of the reporting obligation is to provide the tax authorities with sufficient and reliable information to establish taxability, make the assessments and carry out the tax collection, or, alternatively, conclude that the tax payer is not taxable in Norway on income from the specific assignment. Without the reporting obligation in Section 7-6, the Ministry would not have any information which would ensure this financial tax supervision.

As will be shown in Section 3.2 in this letter, the necessary information to make these assessments is only received by the tax authorities by means of the reporting obligation under Section 7-6 TAA.

When assessing the reporting obligation, it must be recalled that even though the reporting obligation at the outset covers services from physical and legal persons *resident outside of Norway*, a foreign resident will fall outside the scope of the reporting obligation, if the person is considered to have a presence in Norway of a more *permanent character* (that includes some sort of administrative functions), *i.e.* a branch. The Norwegian service recipient will in such cases not be obliged to make any third party reporting under Section 7-6 TAA. This follows from a firm and consistent interpretation of Section 7-6 TAA and is in accordance with its purpose, *e.g.* the consideration that foreign residents with a permanent presence in Norway should be treated under the same reporting rules as companies and persons resident in Norway. This applies to all types of business activity, including service assignments such as on-site construction, assignments on the continental shelf, labour contracting etc.

The information to be submitted from the service recipient under the current rules is the following:
- the expected point in time for the start-up and the termination of the assignment
- the geographical site where the assignment is to be performed
- the type of contract, the contract amount and the contract number (if relevant)
- the name, address and organization number of the service provider and, if relevant, the same information on the (one) sub-contractor,
- if relevant, the name, address and organization number of the service recipient's principal and the main contractor if relevant
- a contact person

The information from the service recipient is to be submitted through the form RF 1199[3]. As the Authority may observe from this, the reporting obligation was from 2018 reduced to comprising information on the primary service provider, and if relevant *one* sub-contractor, as opposed to the previous obligation for the service recipient to report on an *indefinite* number of sub-contractors down the contracting chain. In addition, the obligation to report on any contractor above the service recipient was limited to one step up the contract chain (and where relevant, on the one main contractor).

Furthermore, as from 2018 the service recipient does no longer have to report on the contractor's and the sub-contractor's employees. The threshold amount for the reporting obligation to occur, was at the same time doubled from NOK 10 000 to NOK 20 000.

Moreover, it should be noted that the system provides for flexible arrangements between the reporting units. Firstly, where there are more service *recipients* in a contractual line they may agree that one is to report for all of them. If one of these service recipients fulfils the reporting obligation correctly, the other service recipients will be freed of responsibility.

Likewise, if the service *provider* has already reported the necessary information on the assignment, there will be no need for the service recipient to fill in information about the assignment. The service recipient and the service provider may for example agree that the service provider gives the necessary information to the tax authorities by proxy. In such a case there will naturally be no sanctions executed on either of the parties, as the reporting obligation as such is already fulfilled by the service provider. This interpretation of the rules is in accordance with the purpose of Section 7-6's TAA of ensuring that the tax authorities receive the necessary information for tax purposes, but without demanding unnecessary duplicate information from the parties.

The relevant information is, as before, to be reported to the tax authorities as soon as possible, and at the latest within 14 days of the commencement of the work in Norway.

[3] https://www.skatteetaten.no/globalassets/skjema/2018/rf-1199b.pdf

Under the current rules, the service provider is obliged to report on the following:

Information on the employees
- name and address
- date of birth, identity number and gender
- first and last day of work in Norway and place of work

Information to identify the contract
- name, address and organization number of the service provider
- name, address and organization number of the service recipient
- any contract number if such number exists between the contracting parties
- a contact person

In the same manner as described above, but vice versa - If the service recipient has already reported correctly on the assignment, there will be no need for the service provider to fill in the same information about the assignment. In such cases, the service provider only needs to log onto the relevant assignment and report the employee information.

The purpose of informing about the service recipient and possible contract number is to establish the link between the relevant employees and the contract reported by the service recipient. The information about the employees enables the tax authorities to assess whether the employees have income taxable in Norway (which may, according to the relevant tax treaty, *i.a.* depend on the number of days the employee will be working in Norway) and to assess the employer's responsibility to withhold taxes on the salaries. The information is to be submitted through the form RF-1198[4]. This submission exempts the service provider from the ordinary obligation to report the employees to the AA Register (Employer and Employee register).

Failure to provide the required information may be sanctioned by a fine or an infringement charge, as provided in the TAA Sections 14-1 and 14-7. These are the same sanctions that apply in purely national situations when other reporting rules are infringed.

The previous rules imposing joint and several liability on the service recipient for the service provider's (and the unlimited number of sub-providers') unsettled taxes, social security payments, withholding tax, financial activity tax etc. were abolished in their entirety as from 2018. This removed a potentially substantial, economic responsibility on the hand of the service recipient.

[4] https://www.skatteetaten.no/globalassets/skjema/2018/rf-1198b.pdf

2.3 A final remark

In the opinion of the Ministry, the amendments of the rules in 2018 remedied any potential concerns that could be had regarding the EEA compatibility of the former rules. The rules now in place, have been cautiously considered as being the least restrictive measures possible in order for the reporting obligation to obtain its purpose. Any further limitations would leave the rules ineffective and not apt to fulfil their purpose.

Finally, we would like to clarify that there was no broadening of the sectors subject to the reporting obligation in 2018. Also before 2018, all sectors were covered by the reporting obligation. However, a smaller amendment was made in 2018, as regards work not performed on the continental shelf, nor on a building/construction site. For work performed outside those areas, the reporting obligation was previously not triggered unless the service was performed at a spot on which the service recipient was in control. After the abolishment of the requirement to report on an indefinite number of service providers down the contracting chain, the need for limiting the reporting obligation for work outside the service recipient's control diminished and the criterion was abolished.

Furthermore, cabotage assignments were at the same time explicitly exempted from the reporting duty in Section 7-6.

3. THE NECESSITY OF THE REPORTING OBLIGATION

3.1 Introduction

As described in section 2.2, the purpose of the reporting obligation in Section 7-6 is to ensure the interests of financial supervision, a correct tax assessment and the effective tax collection, as well as preventing tax evasion. To fulfil these purposes, the tax authorities need relevant, early information on temporary, short-term assignments in Norway. This enables the tax authorities to make a preliminary assessment of whether the specific assignment/work performed in Norway involves a taxability to Norway and thereby to decide whether the service provider and his employees are to be registered in the tax census and later receive a Norwegian tax return. This again enables the tax authorities to carry out the necessary control and tax collection, if no tax return is returned by the service provider or the employees.

Moreover, in the case of non-resident service providers from other EEA states, there is a need, depending on the relevant tax treaty, to consider whether the service provider has a permanent establishment in Norway or not. The information submitted by means

of Section 7-6 TAA, provides the tax authorities with the necessary documentation to assess this question. Also in the case of employees, there is a need, depending on the relevant tax treaty, to consider *i.a.* whether the threshold of days worked in Norway results in tax liability to Norway. As mentioned above, without the reporting obligation in Section 7-6, the Norwegian authorities would in a large number of cases not have any information on the services performed in Norway by a person or company resident abroad, and thereby no information on the income from such services possibly subject to Norwegian taxation.

For the proper EEA assessment of the necessity of the reporting obligation, it is crucial to explain its context in more detail. This will be carried out in this section.

First, in Section 3.2 we will describe how the reporting obligation in Section 7-6 TAA remedies the lack of information available to the tax authorities with regard to non-resident service providers performing services in Norway. Then, in Section 3.3, it will be shown how the reporting obligation is necessary due to a documented lower compliance by non-resident service providers as regards self-declaration of taxes.

3.2 The reporting obligation in Section 7-6 TAA remedies the lack of information available to the tax authorities with regard to non-resident service providers performing services in Norway

3.2.1 Introduction

Without the reporting obligation in Section 7-6, the Norwegian authorities would in a large number of cases not have any information on the services performed in Norway by a person or company resident abroad, and thereby no information on the income from such services possibly subject to Norwegian taxation. An important aspect of the reporting obligation is to supervise and give a possibility to detect such taxable income. To repeal Section 7-6 TAA would contravene the interests of financial supervision, a correct tax assessment and the effective tax collection, and increase the risk of tax evasion.

In Section 3.2.2 we will describe the information normally accessible to the tax authorities as regards service providers resident in Norway and foreign service providers with a more permanent presence in Norway. In Section 3.2.3 we describe how the information situation is different for foreign service providers without such permanent presence, due to lack of registration, third party information etc., and how Section 7-6 TAA, at least partly, is filling this gap.

3.2.2 Information sources available for the tax authorities with regard to resident service providers

All Norwegian service providers need to file a tax return, see section 8-2 of the Tax Administration Act ("TAA"). A service provider must also file a tax return with regard to any applicable VAT and special tax (see Section 8-3 and 8-4 of the TAA).

In addition, the service providers must register in certain registers and report to those registers about relevant changes in the provider's situation. Such registration includes, but is not limited to, the following:

- If the service provider is an employer of persons performing services in Norway, the employer must register in the State Register of Employers and Employees (AA-registeret), cf. the National Insurance Act (folketrygdloven) Section 25-1[5].
- The employer must notify the register about the start and termination of an employment relationship (Section 25-1, second paragraph, of that Act). The employer must also give information about the content of the employment relationship (see, *inter alia*, Section 6 in the Regulation on a State Register of Employers and Employees (Forskrift om arbeidsgiver- og arbeidstakerregisteret).
- If the service provider is under an obligation to pay VAT, the provider must register in the VAT Register, see Chapters 2 and 14 of the VAT Act (merverdiavgiftsloven).
- A service provider must also register in the Register of Business Enterprises (Foretaksregisteret), if it falls under the categories enlisted in the Register of Business Enterprises Act (foretaksregisterloven) Section 2-1. In that case, the provider must as a main rule register before any economic activity is carried out (Section 4-1, first paragraph, of that Act). It must report the company information required, listed in particular in Chapter 4 and 5 of that Act. (The Register of Business Enterprises corresponds to what is referred to as the "NCR" in the RO.)

The tax authorities have access to information from the mentioned registers. This contributes *i.a.* to the tax authorities' ascertaining of whether the tax return is correct and the right tax base is used.

In principle, the listed obligations also apply to foreign service providers. However, in practice, the compliance to these obligations are considerably higher for resident businesses, see documentation under Section 3.3.

In addition, as regards Norwegian service providers, an important tool for the tax authorities is the reporting of relevant information from third parties.

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[5] As mentioned before, if a *foreign* service provider instead fills in the simplified form RF 1198, the foreign service provider will be freed from the obligation to register in the "AA register".

The third party reporting includes reporting from banks, financial institutions etc. The banks registered in the Norwegian business registries are obliged to report on the customer's account balances and accrued interest during the income year. In addition, a bank may be required to give the tax authorities information on bank transactions, see TAA Section 10-2. In this connection it should also be mentioned that a service recipient taxable in Norway will only obtain a right to a tax deduction if the payment is made through a bank, see Section 6-1 first paragraph of the Tax Act. (Applicable for payments above NOK 10 000.) This means that it is very unlikely that the income of a Norwegian resident business would not be identified through its bank account, as the tax authorities can demand access to such accounts.

In addition, the tax authorities have access to the businesses' annual accounts in the corporate register, which for companies under audit requirement will be audited by a third party.

In sum, this gives the authorities a very good starting point for detecting any business performed by a Norwegian resident person or company, and for controlling the tax base stated by the company in its tax return.

Another reason why it is unnecessary to put a special reporting obligation on the service recipient in cases where the service provider is resident in Norway, is that Norwegian service providers have their own incentives to report to Norwegian authorities, independently of the tax aspect. Should the Norwegian service provider fail to report on the required information, for instance to the Employer and Employee Register (Section 25-1 of the Social Security Act), they would miss out on favorable treatment in other respects, *e.g.* the right for employers to receive refunds and payments from the Norwegian social security scheme, such as sick pay, daily unemployment benefit etc. Such functions are not relevant for non-resident employers when their employees are paid from a foreign payroll and in general are exempt from the Norwegian social security payments. (Foreign EEA employers/employees are as a main rule comprised by their home state's social security scheme, according to EU Regulation 883/2004.) Hence, the same encouragement to report does not apply for the foreign employers/employees.

3.2.3 Information sources available for the tax authorities with regard to non-resident service providers performing services in Norway

When a service provider resident in another EEA State, temporarily provides services in Norway, the service provider falls under the obligation to submit a tax return in Norway – as explained above.

However, for tax assessment purposes there are several factual differences in the situation of such a provider and that of a provider resident in Norway. First and

foremost, the first time a foreign undertaking takes on assignments in Norway, it will not be registered in the Norwegian tax census. Furthermore, much of the information that the tax authorities receive automatically through other different registries and third party reporting, is not available in the case of foreign service providers who temporarily provide services in Norway.

For instance, only financial institutions resident in Norway are obliged to carry out third-party reporting to Norwegian authorities according to Section 7-3 in the TAA. Most service providers established in other EEA States, having only temporary assignments in Norway, are more likely to have their bank connections with financial institutions resident in their state of residence, than in Norway. Thus, Norwegian authorities do not receive bank information automatically on foreign businesses, as they do in the case of Norwegian businesses. Neither will Norwegian tax authorities receive automatic information on balances/accounts in *other* states, if the foreign service provider is not registered as resident business in Norway. Furthermore, it will not be possible to request information under the tax treaties on service providers resident abroad and not yet known to the tax authorities, as such demands require that the requesting authority already knows the identity of the service provider.

Businesses resident abroad will not always be obliged to provide annual accounts in Norway. Please see Regulation of 7 September 2006 no. 1062, which provides a relief of the accounting obligation for *inter alia* foreign companies with no permanent association to Norway, se the regulation Section 10-1-1. These exemptions apply to companies with a yearly turnover in Norway of less than NOK 5 million.

Foreign businesses do not have a submission duty to the Accounting Registry, neither for the branch accounts, nor for the annual accounts of the foreign company, see the Accounting Regulation Section 10-1-2.[6]

As a consequence of the information gaps described above in the case of cross-border assignments, there is a need to establish *another form of third-party reporting*, which will, to a certain degree, remedy the situation of not having in place the equivalent registrations and third-party reporting as in the case of resident service providers. This forms the background for the reporting obligation established by Section 7-6 of the TAA.

Additionally, it should be recalled, that the reporting obligation established by Section 7-6 of the TAA, *substitutes* some of the reporting that the service provider would otherwise have to fulfil. If the service provider is an employer, the service provider is relieved of the obligation to register the employees in the AA-Registry, ref. Section 5 (2)

[6] For the sake of completion, it should be noticed that the foreign company's annual accounts with the annual report and the auditor's report is to be submitted to the controlling authorities, provided the company has an obligation to prepare an annual report under the rules of the state of residence, se 10-1-3 of the Regulation.

(d) in the Regulation on the State Register of Employers and Employees (Forskrift om arbeidsgiver- og arbeidstakerregisteret).

3.3 A documented lower compliance by non-resident service providers to self-declare tax and VAT necessitates Section 7-6 TAA

The above shows that there would indeed be a lack of information available to the tax authorities if only the ordinary national reporting obligations were to apply in cases of cross-border service providers. In the following, the Ministry will substantiate the necessity of filling this information gap through the special reporting obligation in Section 7-6 TAA.

Figures collected from the tax authorities show that service providers staying only temporarily in Norway, have a higher degree of defaulting on the duty to deliver a correct tax return, or, as the case may be, to deliver a tax return at all. The reporting obligation thus enables the tax authorities in those situations to carry out the necessary fiscal supervision and tax collection, as well as preventing tax fraud.

The Central Office for Foreign Tax Affairs (COFTA) has collected figures demonstrating to which degree foreign service providers fulfil their obligations to submit a tax return or not, to what extent they submit the employer's monthly reporting on the salaries (withholding tax reports – "A-ordningen") and to what extent they register in the VAT register. The table shows the number on non-submitted tax returns and the employers' monthly withholding tax reports for foreign service providers taxable in Norway both according to national Norwegian law and according to the tax treaties. The figures are divided between service providers from other EEA states and service providers resident outside the EEA.

	2015		**2016**		**2017**	
	EEA	Outside the EEA	EEA	Outside the EEA	EEA	Outside the EEA
Service providers with assignments taxable according to national Norwegian law and the relevant tax treaty	413	89	404	82	377	73
Service providers who have not submitted a tax return to this day	94	33	54	13	58	10
In per cent	22,76	37,08	13,37	15,85	15,38	13,70

Service providers who have not submitted the employers' monthly withholding tax reports to this day	72	21	77	16	71	16
In per cent	17,43	23,60	19,06	19,51	18,83	21,92
Service providers with reported contracted services at a value exceeding NOK 50 000 and thus under an obligation to register in the VAT Register according to the ordinary Norwegian rules.	1422	96	1561	112	1424	94
From which have never been registered in the VAT Register	319	30	345	36	264	29
In per cent	22,43	31,25	22,10	32,14	18,54	30,85

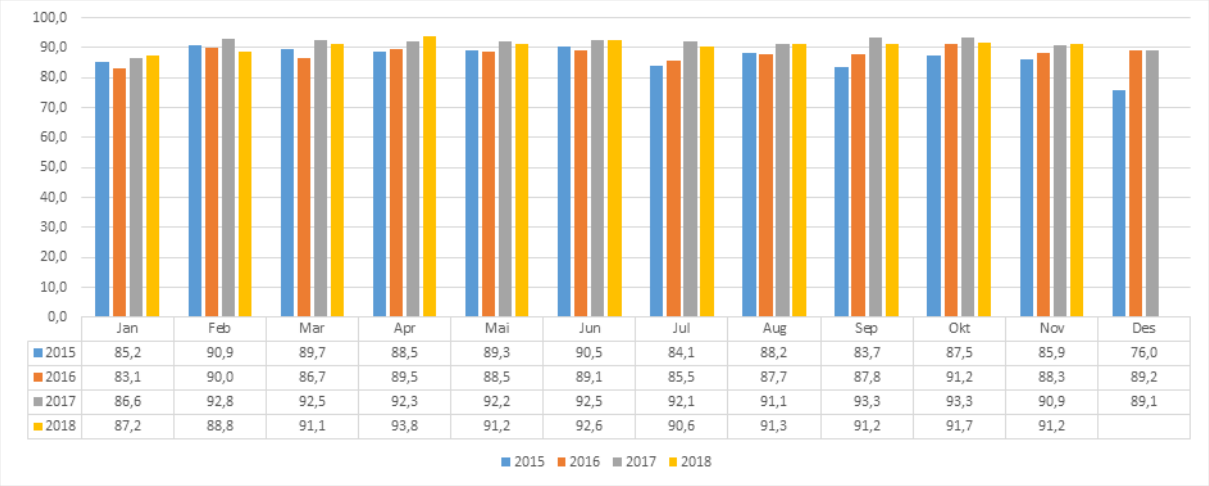
As the table shows, among the total number of foreign service providers there is a significant majority of service providers from inside the EEA. It should be noted that these statistics only show the degree of compliance among service providers reported according to the relevant rules. If there is no reporting of *any kind* of a service provider's business presence in Norway, there is a manifest risk that these figures are not complete, in the sense that there is an underreporting of cases in which the obligations are not fulfilled.

In comparison, figures collected for the OECD's 2017 Peer Review Report show that the compliance is well above 90 per cent as regards Norwegian companies' submission of tax returns in 2016[7]. This tendency is confirmed by figures the Tax Directorate has collected for the year 2017 with regard to limited companies, general partnerships and self-employed persons, which show that the compliance is above 97 per cent.

	Total number taxable entities	Non compliant tax return (number)	Non compliant tax return (per cent)
Limited companies	297 051	8 843	2,97
General partnerships	17 204	437	2,54
Self employed	334 162	8 558	2,56

[7] Peer Review Report on the Exchange of Information on Request Norway 2017, in particular page 34

Figures collected by the Tax Directorate for the income years 2015-2018 show that the compliance with regard to the submission of the employer's monthly withholding tax report is above 90 per cent, see table below. This is the percentage of employers who have submitted the report within 100 days after the deadline. The report is to be submitted monthly, within the 5th of the month following the month of payment.



	Jan	Feb	Mar	Apr	Mai	Jun	Jul	Aug	Sep	Okt	Nov	Des
2015	85,2	90,9	89,7	88,5	89,3	90,5	84,1	88,2	83,7	87,5	85,9	76,0
2016	83,1	90,0	86,7	89,5	88,5	89,1	85,5	87,7	87,8	91,2	88,3	89,2
2017	86,6	92,8	92,5	92,3	92,2	92,5	92,1	91,1	93,3	93,3	90,9	89,1
2018	87,2	88,8	91,1	93,8	91,2	92,6	90,6	91,3	91,2	91,7	91,2	

In its RO, the Authority indicates that any reporting deficiency might be due to a lack of information from the tax authorities towards the foreign service providers.

In this connection we would like to draw the attention to a pilot project initiated by the Norwegian tax authorities, in order to acquire more knowledge about the tax compliance among foreign self-employed and solely-owned limited companies ("Næringsguide Evaluering" dated 1 November 2018)[8]. In this connection, a guidance project was established, under which the tax authorities actively contacted the mentioned service providers and arranged meetings with them, in which they were informed about all obligations applicable to businesses operating in Norway. Except for some US service providers, all service providers covered by the project were resident within other EEA states. Three "one-to-one" meetings were arranged with each business provider. The target group consisted mainly of businesses within the building and construction sector, but was later extended to covering also auto repair services, hairdressers, transport and personal services. The conclusion drawn from this evaluation was that the tax compliance rate among the covered groups is low, even in those cases where personal guidance was given in advance.

Furthermore, we would point out that all information is available through the tax authorities' web site. Most of the information is available in English, but there is also information given in other languages, such as Polish, Romanian and Lithuanian, which represent the EU countries with the largest number of citizens registered in Norway in

[8] See attachments. Unfortunately, the report is only available in Norwegian. Please inform the Ministry of Finance should the Authority wish a translation of the relevant parts.

2018, to work, study or reside (according to statistics from UDI – Norwegian immigration authorities). Below, please find examples on the information available to foreign employees and businesses:

https://www.skatteetaten.no/en/business-and-organisation/employer/the-a-melding/the-a-melding-guide/special-groups/foreign-employers-reporting-obligation-in-the-a-melding/

https://www.skatteetaten.no/en/business-and-organisation/

https://www.skatteetaten.no/en/person/

https://www.skatteetaten.no/en/person/foreign/are-you-intending-to-work-in-norway/the-tax-return/video-for-foreign-workers-in-several-languages/

4. AS TO THE LAW

4.1 Introduction

In this section, the Ministry will set out our understanding of the EEA law relevant to the question in this case. The Ministry agrees with the Authority that the case should be assessed under Article 36 EEA.

In its Letter of Formal Notice ("LFN"), the Authority alleged that the reporting obligation was also in violation of selected provisions of Directive 2006/123/EC (the Services Directive). This does no longer seem to be upheld as an argument by the Authority and will not be commented further upon.

4.2 The restriction at hand

The Ministry does not dispute the fact that the reporting obligation, established by Section 7-6 of the TAA, constitutes a restriction *on the right to provide services* according to Article 36 EEA. The Ministry agrees that a reporting obligation may render it less advantageous to perform services in Norway for a service provider established in another EEA state.

Furthermore, as the Authority rightly points out, the reporting obligation may also constitute a restriction on the right to *receive services* for a service recipient established in Norway, which is also covered by Article 36 EEA. The Ministry also agrees on this point.

It has not been alleged by the Authority that the restriction is discriminatory. The Ministry would in any case emphasize that the restriction is *not discriminatory*. With regard to control measures (as the reporting obligation in question), the non-resident tax payer is not in a situation comparable to the situation of a resident tax payer (see *in particular*, C-279/93 *Schumacker*, paragraph 33-34, C-577/10 *Commission v Belgium*, para 47-48; and C-315/13 *De Clercq*, paragraph 63).

The Authority has claimed that a Norwegian recipient of services cannot be considered as being in incomparable situations depending on whether they resort to the services of resident or non-resident tax payers.[9] The Ministry finds it unclear why the Authority makes that submission. Even if the submission of the Authority were true, that would not make the restriction discriminatory in a way that limits the available overriding reasons of public interests.[10]

4.3 The relevant justification grounds

The Ministry submits that the reporting obligation is justified by both the necessity of ensuring the effectiveness of fiscal supervision and tax collection, as well as the prevention of tax fraud. Both the Ministry and the Authority agree that these justifications grounds are legitimate. The need of ensuring the effectiveness of fiscal supervision and tax collection has been considered an overriding reason of public interest in, *inter alia*, the cases of C-250/95 *Futura*, para. 31, C-72/09 *Rimbaud*, paragraph 33 and C-577/10 *Commission v. Belgium*, paragraph 44. In the case of *Futura* the ECJ explicitly stated that:

> *«A Member State may therefore apply measures which enable the amount of both the income taxable in that State and of the losses which can be carried forward there to be ascertained clearly and precisely».*

Furthermore, the prevention of tax fraud has been considered an overriding reason of public interest in case law.[11]

It should be pointed out that the above-mentioned justification grounds have been formulated in different manners in case law. For instance, in C-499/10 *X* the ECJ referred to the need of "ensuring the tax treatment of the income of a person established outside the state of taxation and ensuring that the income concerned does

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[9] See para. 50 of the RO

[10] This is clear from both C-315/13 *De Clercq*; and Joined Cases C-53/13 and 80/13 *Strojirny Prostejov*. Both cases concerned national rules which made it less attractive for a service recipient, to use a service provider established in another EEA State than the home state of the service recipient (see *De Clercq*, para. 59; and *Strojirny Prostejov*, para. 40). This was deemed as a restriction. The ECJ does not address the question of discrimination directly. However, the judgement clearly rests on the premise that the restriction was not deemed discriminatory, since all the justification grounds were available.

[11] Reference is made to the case law, cited in the RO, para. 70.

not escape taxation in the State of residence and the State where the service are provided".[12] However, in the following the Ministry will refer to "the need of ensuring the effectiveness of fiscal supervision and tax collection, as well as the prevention of tax fraud".

4.4 Proportionality – the test of appropriateness

The first leg of the proportionality test relates to whether the measure at hand is appropriate or suitable to attain the objectives pursued. Deeming from the RO, it is somewhat unclear whether this actually is a matter of dispute between the parties.

However, the Ministry finds it clear that the reporting obligation, established by Section 7-6 of the TAA, is appropriate and suitable. It suffices to point out that the reporting obligation ensures that the tax authorities have sufficient and reliable documentation as to the economic activities of the service provider, and that this enables the authorities to assess the taxability of the service provider and his employees and, eventually, to follow up on the tax assessment and tax collection. It seems clear that this enables the tax authorities to carry out an effective fiscal supervision and tax collection, in addition to preventing tax fraud.

4.5 Proportionality – the test of necessity

4.5.1 Introduction

The dispute in this case is centred around the second leg of the proportionality test. The question is whether the reporting obligation, established by Section 7-6 TAA, goes beyond what is *necessary* to attain the said objectives. The Ministry will in the following explain why the reporting obligation does not go beyond what is necessary.

Section 4.5 is structured the following way:

- In Section 4.5.2, the Ministry will recall and emphasise some of the basic legal framework underpinning the necessity test
- In Section 4.5.3, the Ministry will highlight some of the case law that the Ministry finds particularly pertinent to this case.
- In Section 4.5.4, the Ministry will establish and substantiate the fact that the Norwegian tax system in general pursues a high level of effectiveness of fiscal supervision and tax collection. This must be respected when assessing the necessity of the measure.

[12] See para 49 of that judgement

- In Sections 4.5.5 to 4.5.9, the Ministry will explain in more detail why the reporting obligation under Section 7-6 TAA is necessary.

4.5.2 The basic legal framework of the necessity test

There does not seem to be any major disagreement about the basic legal framework of the necessity test. However, the Ministry finds it appropriate to recall and underline some of the central legal aspects of this test:

One important aspect is that the necessity test must respect the level of protection chosen by the state whose measure is to be assessed. Or in the words of the Authority: "The EEA State enjoys discretion in determining the level of protection it wishes to pursue".[13] The Ministry agrees therewith.

Secondly (and following from the above), both parties agree that if another EEA state has less strict rules (even no reporting obligation at all), that does not mean that the Norwegian reporting obligation *per se* can be found to go beyond what is deemed necessary.[14]

Thirdly, the Ministry would point out that the necessity test does not rule out measures that are easily managed and supervised by the authorities. In this respect, see *inter alia* case C-512/13 *Sopora*, para. 33 (and the case law referred there):

> *"While it is true that considerations of an administrative nature cannot justify a derogation by a Member State from the rules of EU law* […]*, it is also clear from the Court's case-law that Member States cannot be denied the possibility of attaining legitimate objectives through the introduction of rules which are easily managed and supervised by the competent authorities."*

Fourthly, it is for the national authorities to show that a measure is both appropriate and necessary. As the Authority points out, case law sometimes expresses that the states must also accompany their submissions by an analysis of the appropriateness and the proportionality, and by specific evidence substantiate their arguments.[15] The Ministry would, however, underline that case law also stresses that:

> *"It cannot, however, be inferred from that case-law that a Member State is deprived of the possibility of establishing that an internal restrictive measure satisfies those*

[13] See E-3/06 *Ladbrokes,* para 58, Joined Cases C-447/08 and C-448/08 *Sjöberg*, paragraph 38, and the case law referred to in the RO, para. 74.
[14] See case C-36/02 *Omega*, para 38; case E-16/10 *Philip Morris Norway AS*, para. 80; case E-17/14 *ESA v. Liechtenstein*, para 42, and the case law referred to in the RO, para. 76.
[15] See para. 71 of the RO

requirements, solely on the ground that that Member State is not able to produce studies serving as the basis for the adoption of the legislation at issue."[16]

And furthermore:

"[…] *Whilst it is true that it is for a Member State which invokes an imperative requirement as justification for the hindrance to free movement of goods to demonstrate that its rules are appropriate and necessary to attain the legitimate objective being pursued, that burden of proof cannot be so extensive as to require the Member State to prove, positively, that no other conceivable measure could enable that objective to be attained under the same conditions* […]"[17]

Thus, the Authority cannot merely refer to the fact that a state has not submitted studies on the necessity of the measure and induce therefrom that the measure is disproportionate. However, in this case the Ministry has indeed submitted such studies, please see Section 3.3.

4.5.3 Relevant case law for the assessment of reporting obligations

The Ministry finds it appropriate to highlight some of the case law from the ECJ, which seems to be of particular interest to this case.

A first category of cases illustrates that EEA States have in several cases been allowed to impose reporting obligations on service providers from another EEA State, when that service provider intends to carry out a service in that host state.

The use of reporting obligations has been particularly used in the context where a service provider intends to use posted workers to deliver a service. The use of posted workers raises particular concerns in the host states, and there is a need to check whether national law on social welfare and work conditions are followed. In order to check this, an obligation to report before the service takes place, has been imposed. In several cases, the ECJ has held that, despite the fact that such a reporting requirement is a restriction on the right of the service provider, it may be justified. Those cases include *inter alia* Case C-445/03 *Commission v Luxembourg*, para 46; Case C-244/04 *Commission v Germany*, paragraph 41; Case C-219/08 *Commission v Belgium*, paragraph 16; and C-515/08 *Santos Palhota*, para. 51. In the latter case, the ECJ stated:

"In that connection, the Court has already held that a measure which would be just as effective whilst being less restrictive than a work licensing mechanism, prior checks or a confirmation of posting, would be an obligation imposed on an employer established in another Member State to report beforehand to the local authorities on the presence of

[16] See Joined Cases C-316/07, C-358/07 to C-360/07, C-409/07 and C-410/07 *Stoß*, para. 72
[17] See C-110/05 *Commission v. Italy*, para. 66

> *one or more deployed workers, the anticipated duration of their presence and the provision or provisions of services justifying the deployment. Such an obligation would enable those authorities to monitor compliance with the social welfare and wages legislation of the host Member State during the deployment while at the same time taking account of the obligations by which the employer is already bound under the social welfare legislation applicable in the Member State of origin* […]." (emphasis added).

In our case, this shows that a reporting obligation on the service provider may be a necessary measure of ensuring the effectiveness of fiscal supervision and tax collection, and preventing tax fraud.

Furthermore, the ECJ has also handed down a judgement which shows that the host state may impose reporting obligations on the *service recipient*.

The relevant case is C-315/13 *De Clercq*. According to the Belgian system in place, a service provider established in another EEA State and intending to post workers in Belgium for providing a service there, had to report to the Belgian authorities prior to the employment of the posted workers. Upon such declaration, the service provider would receive an acknowledgment of receipt from the authorities.[18] The Belgian rules made *any service recipient*[19] within Belgium, for whom work was performed directly or through subcontracting by posted workers, responsible for checking that the posted worker was able to submit the acknowledgement of receipt. If the posted worker was unable to present such a receipt, the service recipient had to make a declaration to the authorities.[20] The declaration had to include data to identify the declarer, the posted worker and the employer of the posted worker.[21] Penalties were in place for any service recipient having failed to comply with the duty to make such a declaration.[22]

The ECJ found the obligation on the service recipient to be a restriction on the right to provide services. This was due to the fact that the rule made it less attractive to buy services from service providers established in other EEA States, in contrast to buying services from service providers established in Belgium. However, the ECJ acknowledged that this restriction was capable of being justified in the objective of protecting posted workers and combating fraud. As regards the proportionality, this was left to the referring court to decide on. However, the ECJ indicated that the rule was proportionate, by concluding that "it appears that the national legislation is capable of being proportionate".[23] In reaching that conclusion, the ECJ stated:

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[18] See para. 14 of the judgement

[19] That ECJ treats the case as a services case. See also para. 58 of the judgement ("The national rules at issued thus require the recipients of services provided by workers posted by an employer established in a Member State other than the Kingdom of Belgium…")

[20] See para. 16 of the judgement

[21] See para. 23 of the judgement

[22] See para. 17-21 of the judgement

[23] See para. 74

"For the purposes of that assessment, it must be noted that the Court has already held that an obligation imposed on an employer established in another Member State to report beforehand to the host Member State authorities on the presence of one or more deployed workers would be an effective and proportionate measure which would enable those authorities, first, to monitor compliance with the social welfare and wages legislation of the host Member State during the deployment while at the same time taking account of the obligations by which that employer is already bound under the social welfare legislation applicable in the Member State of origin and, secondly, to combat fraud […]

As the Belgian Government points out, the national legislation at issue, in so far as it involves monitoring the obligation to make a declaration imposed on the employer of workers posted temporarily to Belgian territory, may be regarded as being the corollary of such an obligation and as necessary in order to attain the objectives pursued by the Limosa system."[24]

The *De Clercq*-case shows that also a reporting obligation on the service recipient may be a necessary measure of ensuring the effectiveness of fiscal supervision and tax collection, and preventing tax fraud. As the ECJ stated in the *De Clercq*-case, it may be seen as the corollary to the obligation on a provider and as necessary to attain the objectives pursued by the system.

A third category of cases which needs to be highlighted, relates to those national rules which impose *on a service recipient* an obligation to withhold taxes. The typical example is provided by the case C-498/10 *X*. In that case, resident service recipients were obliged to withhold taxes when a service was procured from a non-resident service provider. By contrast, there was no equivalent obligation in the case the service was procured from a *resident* service provider.

Such a withholding system is a quite clear and burdensome restriction on the right to provide services, since it makes it more onerous for a service recipient to contract with a service provider from another EEA State. It is also a clear restriction on the right to receive services, since it entails an additional administrative burden and related liability risks for the service recipient. However, the ECJ found in the *X*-case that the restriction was justified in the need to ensure the effective collection of income tax.[25] This has been the result in other cases as well. See C-290/04 *Scorpio Konzertproduktionen*, para. 35-37; Joined Cases C-53/13 and 80/13 *Strojírny Prostě jov*, para. 46-47.

The Authority seems to hold that this case law is of little or no relevance to our case.[26] The Ministry maintains the view that the case law is relevant. A tax withholding system,

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[24] Para. 71-72

[25] See inn particular para. 39-42 and para. 48-52 of C-498/10 *X*

[26] See para. 77-78 of the RO

as described above, is clearly a more burdensome restriction on the service provider and service recipient, than a reporting obligation as in our case. In the opinion of the Ministry, the case law on withholding systems thus shows that the ECJ is willing to accept a quite burdensome restriction if it is justified and necessary of ensuring the effective collection of taxes.

Moreover, the Ministry is of the opinion that the *X*-case also acknowledges that, where a system of withholding taxes is not opted for, it would be legitimate for the host state to have in place reporting obligations also on the *resident service recipient*. The Ministry refers to para. 49 to 52 of that judgement. Therein, the ECJ considered what would be an alternative measure to the withholding system. The ECJ pointed out that if a host state should renounce the withholding system and collect taxes directly from the non-resident service provider, it would be necessary for the non-resident service provider to deliver a tax return. In addition thereto, the ECJ acknowledged that

> *"the tax authorities of the Member State concerned would be likely to be required to impose an obligation on the service recipient, established on the territory of that State, to declare the service carried out by the non-resident service provider"*[27] (emphasis added).

Consequently, the ECJ acknowledged the fact that a host state, applying a system similar to the one in Norway, would "likely to be required" to impose a reporting obligation on the resident service recipient. It should be noticed that the reporting could include information on the "service carried out". It thus seems as the ECJ acknowledged that the reporting could include details about the assignment and the project etc. The Ministry is of the opinion that this is highly relevant for our case, and the Ministry contends that this supports the view of the Ministry.[28]

The Ministry is aware of the fact that, in the *X*-case, the ECJ stated that the alternative system (of collecting taxes directly from the service recipient combined with reporting obligations on the service recipient), was not a less restrictive measure than the withholding tax. However, the judgement, with its particular wording,[29] cannot be read as implying that a system like the one in our case is *more* restrictive than a withholding system. Instead, the judgement on this point must be seen in light of the facts of the case, *i.e.* that the withholding tax was the object of judicial review. As explained above, the Ministry is of the opinion that a withholding tax is in fact the more burdensome restriction on the service provider and service recipient, than a reporting obligation as in our case.

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[27] Para. 49

[28] The Ministry cannot see that the RO reflects this part of the judgement in the X-case. See, for instance, para. 78 of the RO.

[29] See para. 52 of the judgement («…would not necessarily constitute a less severe means than deducation at source.»)

4.5.4 The necessity in casu – The Norwegian tax system pursues a high level of effectiveness of fiscal supervision and tax collection

The Ministry submits that the Norwegian tax system pursues a high level of effectiveness of fiscal supervision and tax collection, as well as a high level of tax fraud prevention.
In particular, the Ministry would like to refer to Section 3.2 above. There, the Ministry explained that, in the case of resident service providers, the Ministry has available a wide range of sources and reporting obligations from which to gather the relevant information to assess whether the service provider has taxable income and whether the submitted tax return is correct. This constitutes a highly efficient and reliable control measure for the tax authorities both when it comes to checking whether a tax return has not been delivered, or to check whether the resident service provider is taxable. This shows that Norway has opted for a high level of effectiveness of the fiscal supervision and tax collection, as well as a high level of tax fraud prevention. This level must be respected, when the Authority carries out its proportionality analysis. Furthermore, as shown in Section 3.3 above, there is a high percentage of resident service providers who deliver tax returns.

Consequently, the Norwegian tax system pursues a high level of effectiveness of fiscal supervision and tax collection, as well as a high level of tax fraud prevention. According to the case law,[30] this must be respected when the necessity of the reporting obligation at hand, is assessed.

4.5.5 The necessity in casu – It is necessary with a reporting obligation on the service recipient where non-resident service providers provide services in Norway

There are several reasons why there is a reporting obligation on the service recipient, as established by Section 7-6 TAA, in the case where non-resident service providers provide services in Norway.

Firstly, the Ministry would refer to Section 2.2 above. There, the purpose of the reporting obligation has been explained in detail.

Secondly, the Ministry would refer to Section 3.2.2. It follows therefrom, that the tax authorities have wide information sources available for establishing the correct tax base in the case of resident service providers. It must be noticed that also non-resident service providers with a registered branch in Norway are included under the *ordinary* reporting obligations for resident service providers. This means that the special

[30] See Section 4.5.2

obligation under Section 7-6 do not apply either to the service provider himself, nor to the service recipient to whom the services are rendered.

However, there is considerably less similar information sources available for the tax authorities in the case of a non-resident service provider providing services in Norway. As explained in Section 3.2.3 above, third party reporting with respect to a non-resident service provider is in general not available. Thus, the reporting obligation under Section 7-6 TAA remedies the lack of information in such a case. The reporting obligation provides the authorities with information and documentation on whether the non-resident service provider and its possible employees are taxable, and safeguards a follow-up if this is the case. Without the reporting obligation, the tax authorities would not have this information at hand.

Thirdly, the Ministry would refer to Section 3.3. There, the Ministry provided documentation that service providers staying only temporarily in Norway, have a higher degree of defaulting on the duty to deliver a correct tax return, or, as the case may be, to deliver a tax return at all. Without the reporting obligation the tax authorities would in those situations not be able to carry out the necessary fiscal supervision and tax collection, or to prevent tax fraud.[31]

Consequently, the obligation on the service recipient to report under Section 7-6 TAA, is necessary to ensure the effectiveness of fiscal supervision and tax collection, as well as the prevention of tax fraud. In this context, the Authority must respect the high level of effectiveness of fiscal supervision and tax collection which Norway hast opted for (see Section 4.5.2. The renunciation of the reporting obligation would undermine the high level of effectiveness of fiscal supervision and tax collection chosen by Norway, and also undermine the work to prevent tax fraud. In this connection it should be mentioned that instruments to combat tax evasion and avoidance is currently addressed continuously by international organizations such as the OECD and the G20, but also by the European Commission and the Council of the European Union, in the sense that Member States to an increasing degree are obliged to implement EU directives and regulations in order to combat tax evasion and avoidance in cross border situations, due to the lack of national legislation in the Member States securing such purposes.

The Ministry finds clear support for the justification of the reporting obligation on the service recipient in the judgement by the ECJ in *De Clercq* (see Section 4.5.3). In that case, the reporting obligation on the service recipient was seen as justified. The Ministry would also refer to the *X*-case, where the ECJ seems to acknowledge the need to request information from a service recipient in a case where the host state has opted

[31] In the RO, the Authority submitted, that the need for the reporting obligation was undocumented and that it was based on a mere presumption that a service provider from another EEA state will seek to avoid its tax. See in particular para 90 to 105 of the RO. It seems clear that this submission by the Authority cannot longer be upheld. To the contrary, the Ministry has documented the need for a reporting obligation in case of non-resident service providers.

for a system where tax is collected directly from the non-resident service provider (instead of opting for a system where it imposes on the service recipient to withhold tax).

The Ministry would also underline the clear law which accepts that the EEA states "*cannot be denied the possibility of attaining legitimate objectives through the introduction of rules which are easily managed and supervised by the competent authorities"* (see Section 4.5.2 above).

The Authority seems preoccupied with the fact that a reporting obligation on the service recipient entails an incentive to choose service providers established in Norway, rather than service providers from other EEA States. However, the Ministry would point out, that this was also the case in *De Clercq* and all the case law related to the rule of withholding taxes. Despite this, the ECJ found the restriction to be justified.

4.5.6 The necessity in casu – It is necessary with a reporting obligation also on the service provider where non-resident service providers provide services in Norway

Some of the reporting under Section 7-6 TAA is, instead of being imposed on the *service recipient*, only imposed on the service provider. In addition to general information about the service provider, the service recipient and the contract-ID, the reporting obligation on the service provider relates to information about its employees.

The reason for imposing this obligation on the service provider, and not the service recipient, is that the information about the employees is, in general, more easily available for the service provider.

The information provided by the service provider ensures that the tax authorities receive necessary information about the employees used on the project, so that the necessary financial supervision may be carried out. This provides the tax authorities with sufficient and reliable documentation to assess whether the employees have income taxable in Norway (which may, according to the relevant tax treaty, *i.a.* depend on the number of days the employee is working in Norway) and to assess the employer's responsibility to withhold taxes on the salaries.

In this context, it must be pointed out, that any employer in Norway, either resident or non-resident, must report similar information about their employees. Reference is made to Section 6 of the Regulation on a State Register of Employers and Employees (Forskrift om arbeidsgiver- og arbeidstakerregisteret). However, when the service provider reports under Section 7-6 TAA, the service provider is also relieved of the duty to report under Section 6, see Section 5 (2) (d) in the Regulation on a State Register of Employers and Employees (Forskrift om arbeidsgiver- og arbeidstakerregisteret).

The Authority has submitted that

> *"depending on the contract, the amount of the information to be submitted and, in particular, the frequency thereof, [the reporting obligation under Section 7-6 TAA] is capable of constituting a considerable administrative burden on the service provider which by far does not compare to the amount of the information submitted by Norwegian entities to the EE-register."*[32]

The Ministry would point out that the information to be submitted under Section 7-6 TAA is less than under the Regulation on the EE-register. However, it is true that the reporting obligation under Section 7-6 TAA is triggered for every contract. In the opinion of the Ministry, the reporting obligation under Section 7-6 TAA is still in many cases a more convenient way of reporting for the non-resident service providers, than the reporting under the Regulation on the EE-Register. Thus, the Ministry does not agree that, as a general rule for the non-resident service provider, the reporting under Section 7-6 is more burdensome than the reporting under the Regulation on the EE-register.

To impose a reporting obligation on a service provider, is in line with the case law of the ECJ. See the case law of C-515/08 *Santos Palhota* etc., explained above. In that case law, the ECJ accepted that the host states could have in place a reporting obligation, which made it possible for the host states to "monitor compliance with the social welfare and wages legislation of the host Member State during the deployment". The same should be the case with regard to tax laws of the host state, as this ensures the effectiveness of fiscal supervision and tax collection, and prevents tax fraud.

Consequently, this shows that the obligation on the service provider to report under Section 7-6 TAA, is necessary to ensure the effectiveness of fiscal supervision and tax collection, as well as the prevention of tax fraud. In this context, the Authority must respect the high level of effectiveness of fiscal supervision and tax collection which Norway hast opted for (see Sections 4.5.2 and 4.5.4).

4.5.7 The necessity *in casu* – Exceptions from the reporting obligation

For the purposes of the necessity-test, it is also appropriate to point out that there are several exceptions and limitations to the reporting obligation.

Firstly, where there are more service *recipients* in a contractual line, they may agree that one is to report for all of them under Section 7-6 TAA.[33]

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[32] See para. 136 of the RO

[33] See Section 7-6-4 of the Regulation to the TAA

Secondly, the service provider and service recipient may agree that one of them is to report for both of them (by proxy). This is often implemented into the service contracts, so that the service provider is made responsible for the reporting for both the service provider and the service recipient.

Thirdly, there are exceptions for contracts where the contractual sum is below NOK 20 000 and for assignments of cabotage.[34]

These are all general measures to facilitate a more convenient reporting for the reporting entities. It also ensures that the reporting obligation are applied to contracts of less value.

4.5.8 The necessity *in casu* – Other sources of information that can achieve the same level of effectiveness of fiscal supervision are *not* available

In the RO, the Authority stated, that Norway has not explained why it is not possible to obtain the required information via international cooperation, as well as through the IMI-system.[35] The Ministry submits that this indicates a lack of understanding of the functioning of the reporting obligation.

If the non-resident service provider has not delivered a tax return, and there is no reporting under Section 7-6 TAA, the tax authorities have, in many cases, no knowledge that a non-resident service provider has been providing services in Norway. See in more detail, Section 4.5.5 above. Thus, there would be no circumstances known to the authorities which would prompt any request for international cooperation. Furthermore, the Ministry cannot see how the home state of the service provider can provide information about what services the non-resident service provider has provided in Norway.

Even if the non-resident service provider has delivered a tax return and/or reported under Section 7-6 TAA, there is a need to check whether that information is correct and whether the income is taxable. This is just the same as with resident service providers. The reporting obligation under Section 7-6 TAA enables the tax authorities to carry out that check. The Ministry cannot see that there is other information available which enables such a check.

Furthermore, the Authority stated that Norway may obtain information about the presence of foreign activity in Norway by other means. The Authority pointed out that a non-resident service provider must register in the NCR.[36] The Authority submits that "the NCR could well be used by the national authorities as a basis of gathering

[34] See Section 7-6-5 of the Regulation to the TAA
[35] See para. 94 of the RO
[36] See para. 106-112 of the RO

information necessary for checking the compliance with the national tax legislation. Other arguments are also made.[37]

With regard to the NCR, the information that a non-resident service provider needs to report, is the information which follows from Section 3-8 of the Register of Business Enterprises Act (foretaksregisterloven). That information is mainly general company information. It does not give details about the economic activities which the service provider is carrying out in Norway, and which enables the tax authorities to assess taxability and to carry out a correct tax assessment. Thus, to rely on the information in the NCR is neither suitable nor does it attain the objectives of a high level of effective fiscal supervision, which Norway pursues.

The Authority also stated that there are other means for Norway to obtain information about the presence of a foreign activity in Norway. It pointed to different examples.[38]

The Ministry would point out that none of the examples given by the Authority provide details about the economic activities which the service provider is carrying out in Norway. Instead, the examples given are means to control work and social welfare legislation, HMS- and working conditions, identification numbers etc. They do not provide any information that enables the tax authorities to carry out an assessment of taxability of either the service provider or his potential employees. To have HMS-card or identification numbers does not even mean that the relevant persons are indeed economically active. Thus, the information that can be collected from these sources is neither suitable nor does it attain the objectives of a high level of effective fiscal supervision that Norway pursues.

4.5.9 The necessity *in casu* – With regard to service providers about whom Norway already possesses information

The Authority has submitted that, in the response to the letter of formal notice, Norway did not address that "certain foreign service providers are already known to the national authorities".[39] The Authority indicates that the tax authorities could, at least with regard to such providers, receive the necessary information directly from them, instead of imposing the reporting obligation on them, or on their service recipients.

The Ministry finds it unclear what the Authority means by "certain foreign service providers already known to the national authorities". As the Ministry has explained in Section 4.5.8 there are no other registers or sources of information that provide details about the economic activities which the non-resident service provider is carrying out in

[37] See in general para 107-112 of the RO
[38] See para. 113 of the RO
[39] See para. 118 of the RO

Norway, and which enables the tax authorities to carry out an assessment of whether the person performs taxable activities in Norway or not.

The Authority has also referred to the judgement in *Strojirny Prostejov*, and submitted that the judgement

> *"…makes it clear that a restriction of free movement of service cannot be justified where it makes no distinction between foreign service providers with respect to whom the national authorities have already received information (via, for example, their registration in the NCR) and foreign service providers with respect to whom such information is not available to the national institutions."*[40]

Again, the Ministry disagrees with the submissions by the Authority.

Strojirny Prostejov concerned a Czech rule, which imposed on the service recipient to withhold taxes, if the service provider was established in another EEA state. There was no such obligation if the service recipient contracted with a provider established in the Czech Republic. The ECJ pointed out, that such a rule could be justified in the need to ensure the effective collection of income tax, where the service providers performed occasional services in a Member State other than that in which they were established.[41] However, in the case at hand, the service was provided by a the foreign service provider through a branch registered in the commercial register of the Czech Republic, which had a physical presence in that host state, and carried out administrative tasks on behalf of the mother company.[42] Given these facts, the ECJ stated that

> *"…not only can it not be excluded that the Czech tax authorities recover the tax due from that branch and that therefore that branch carries out the withholding at issue, but it is also apparent from the documents before the Court in Case C-80/13 that, in this case, the advance payments on the salaries of the employees concerned were in fact made by the branch of the Slovak temporary employment agency."*[43]

Thus, it was feasible to make the service provider (i.e. the registered branch of the service provider in the host state) responsible for the tax withholding. Consequently, the objective of effective collection of income tax could be obtained by a less restrictive measure, than imposing such an obligation on the service recipient.

It follows from this, that the submissions by the Authority do not fit our case.

First of all, Strojirny Prostejov concerned registered branches of a service provider established in another EEA State. However, the Ministry has already explained that

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[40] See para. 122 of the RO
[41] Para. 47 and 48 of the judgement
[42] Para. 49-50
[43] Para. 51 of that judgement

such registered branches would not be covered by the scope of the reporting obligation under Section 7-6 TAA (see section 2.2) Thus, as far as the Ministry can see, the reporting obligation under Section 7-6 TAA is fully in line with *Strojirny Prostejov*.

Second, the Authority's interpretation of *Strojirny Prostejov* reaches too far, and is not valid. It cannot be deduced from that judgement that there must be made a "*distinction between foreign service providers with respect to whom the national authorities have already received information (via, for example, their registration in the NCR) and foreign service providers with respect to whom such information is not available to the national institutions*".

Strojirny Prostejov merely illustrates the necessity-test: Since it was feasible to make the service provider in that case (represented by the registered branch) responsible for the tax withholding, the objective could be obtained by a less restrictive measure.

In our case that is different. Our case concerns service providers which are not registered branches. The objectives pursued by Section 7-6 TAA would not be achieved by merely imposing the reporting obligation on those service providers.

5. CONCLUSION

For the reasons above, the Ministry submits that the reporting obligation, established by Section 7-6 TAA, although being a restriction within the meaning of Article 36 EEA, is justified in the need to ensure the effectiveness of fiscal supervision and tax collection, as well as the prevention of tax fraud. As explained above, it is both appropriate and necessary to attain those objectives.

Yours sincerely,

Henriette Strandskogen Hjort
Deputy Director General

Astrid Erlingsen
Director Legal

This document has been signed electronically and it is therefore not signed by hand.
Attachment: *Næringsguide Evaluering* (compliance report)