DOM

delivered on 28 May 2020 by the Supreme Court in Division with

Judge Magnus Matningsdal
Judge Kristin Normann
Judge Henrik Bull
Judge Wenche Elizabeth Arntzen
Judge Espen Bergh

HR-2020-1130-A, (Case No. 19-177162SIV-HRET)
Appeal against Borgarting Court of Appeal judgment September 26, 2019

A / S Norske Shell	(lawyer Jan Birger Jansen)
against	
The State v. The Oil Tax Office	(Attorney General v. lawyer Anders Flaatin Wilhelmsen)

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VOTING

(1) Judge **Bergh:**

Question and background of the case

(2) The case concerns the validity of a decision by the Appeals Board for petroleum tax on the equation of A / S Norske Shell for the income years 2007 to 2012. It is the judgment of the Court of Appeal legally determined that there is a basis for a discretionary addition to the company's income after Section 13-1 of the Tax Act was based on costs for research and development (R&D) in Norway been distributed within the Shell Group. The question for the Supreme Court is about this supplement as well may include the portion of the costs charged to A / S Norske Shell's license partners in mining projects on the Norwegian continental shelf.

(3) The Shell Group is one of the world's largest oil and gas companies, with operations in many countries. A / S Norske Shell (hereafter Norske Shell) is a wholly owned subsidiary of the Group. company conducts activities related to exploration and production of petroleum in Norwegian continental shelf and is in that context taxable under the Petroleum Tax Act. Norske Shell is the licensee and operator in several large Norwegian extraction projects.

(4) The recovery projects take place in collaboration between several petroleum companies. relationship between the various licensees is regulated by a government-appointed contractual authority, as among others others include a cooperation agreement and an accounting agreement.

(5) Shell Technologies Norway AS was previously a wholly owned subsidiary of Norske Shell. It The research and development activities to which this case applies were to a large extent run through this company. However, the parties agree that it is not in the case here reason to differentiate between the two companies. When I use the term in the following Norske Shell, may therefore also include Shell Technologies Norway AS.

(6) The Shell Group conducts extensive research activities. The majority of the group's research related to extraction activities is taking place in the Dutch company Shell International Exploration and Production BV (SIEP). The cost of applied research is distributed to the various companies that operate mining operations, according to a distribution key which should reflect the individual company's supposed benefit from the research. The principles of cost allocation is regulated in a separate agreement - the SIEP agreement. According to this agreement In the period 2007–2012, Norske Shell has paid an annual amount of between 46 and NOK 100 million to participate in the SIEP scheme. This is equivalent to five to six percent of them total SIEP costs.

(7) Norske Shell participates in a number of projects with research collaboration that are linked to Norway - many of these under the auspices of the Research Council of Norway. The cost of research in Norway during that period was covered by Norske Shell without any division between the various Shell companies according to the distribution key in the SIEP agreement or otherwise. The research in Nevertheless, Norway is covered by the SIEP cooperation in the sense that the results from The research effort is available to companies in the Shell Group and is considered one integrated part of the SIEP system.

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(8) By the equation for the years 2007 to 2012, Norske Shell deducted all R&D costs as was not already covered by special assignment research. In addition, deducted the Company's share of the Shell Group's joint research costs under the SIEP agreement. The annual deducted costs for research and development in Norway ranged from 81 to NOK 111 million.

(9) By a change decision from the Oil Tax Board for the income years 2007 and 2008 and by the equation for the income years 2009–2012, the company's deduction of R&D costs in Norway was not accepted. The refusal to deduct was justified by the fact that the costs should have been distributed within The Shell Group, following the same key as in the SIEP agreement. The keeping of deductions for however, the company's share of SIEP costs was not changed. Norwegian Shell appealed The Petroleum Tax Board's decision to the Petroleum Tax Appeals Board.

(10) The Petroleum Tax Appeals Board issued a ruling in the case on December 12, 2016. The Board came unanimously that the terms of discretion under the Internal Pricing Clause i Section 13-1 of the Tax Act was fulfilled. In exercising its discretion, the Board agreed The oil tax office in that it was right to base their total costs on them current R&D projects in Norway. The distribution within the Shell group should happen without some reduction for the portion of these costs that was in accordance with the accounting agreement charged Norske Shell's license partners within the individual extraction projects.

(11) The Tribunal found that it could not be ruled out that there are conditions that cause that research activity in Norway to some extent provides Norske Shell with greater financial benefits than what Shell companies in other countries get. However, there was disagreement in the committee about the meaning of this. On the basis of these benefits, the majority determined a reduction in the cost base of ten percent.

(12) The remaining costs were distributed according to the board's decision according to the key that Shell uses within the SIEP collaboration. The share for Norske Shell is as mentioned five to six percent. This meant that the equation was based on about 85 percent of them total R&D costs in Norway were to be distributed to the Shell companies in other countries.

(13) Norske Shell brought the decision of the Appeals Board to the Oslo District Court for judicial review. The District Court issued a March 23, 2018 judgment with such a verdict:

> '1. The State v. Oil Tax Office is acquitted.
>
> 2. A / S Norske Shell pays NOK 224 750 in legal costs to the state v / The Oil Tax Office within two weeks of the verdict being served. ”

(14) Norwegian Shell appealed the judgment to Borgarting Court of Appeal, which handed down on September 26, 2019 judgment with such a verdict:

> '1. The appeal is rejected.
>
> 2. In case costs for the Court of Appeal, A / S pays Norske Shell 146 450 - one hundred and sixty-four hundred and fifty-five dollars to the state v / The Tax Agency within - 2 - two weeks from the announcement of the verdict. »

(15) Both the District Court and the Court of Appeal applied to all parts of the Board of Appeal's decision. Norske Shell attacked both the right to determine the income by discretion under the Tax Act § 13-1 and the detailed implementation of the discretion.

(16) Norske Shell appealed the decision of the Court of Appeal to the Supreme Court. The appeal concerned the judgment in its entirety and included both the assessment of evidence and the use of justice.

(17) The Supreme Court's Appeals Committee has allowed the appeal "as far as the question is concerned

research and development costs that are distributed to A / S Norske Shell's license partners after the accounting agreement shall be included in the determination of the company's loss of income pursuant to the Tax Act § 13-1 ('gross / net question') ». Otherwise, the appeal is not allowed.

(18) The matter was dealt with at a remote meeting, cf. Temporary Regulation 27 March 2020 No. 459 on simplifications and measures in the justice sector to remedy the consequences of outbreaks of Covid-19 Section 2 and Temporary Act 26 May 2020 No. 47 on adaptations in the process regulations as a result of the outbreak of covid-19 etc. § 3.

The parties' views on the matter

(19) The appellant - *A / S Norske Shell* - has mainly claimed:

(20) Section 13-1 of the Tax Act does not give access to a discretion which implies that proportion of the research and development costs covered by Norske Shell's licensing partners, at the same time shall be included as costs of the distribution within the Shell group starting point in the SIEP agreement.

(21) First, the Appeals Board's decision is based on the wrong fact. There is not one transaction that transfers transferable tangible or intangible assets that can valued.

(22) Furthermore, the application of law is wrong. The discretionary valuation is contrary to the arm's length principle in section 13-1 of the Tax Act and the OECD guidelines, as section 13-1 fourth paragraph refers to. The costs charged to the license partners do not constitute costs for Norske Shell to enter the SIEP distribution.

(23) Alternatively, it can be seen that the contribution from the license partners for Norske Shell constitutes revenue which must be attributed to cost sharing in the same way as costs and in the same way like other SIEP revenues.

(24) Furthermore, the decision entails illegal double taxation. That means the same income - the costs borne by the licensing partners - are taxed twice.

(25) A / S Norske Shell has made the following claim:

> '1. The tax assessment for A / S Norske Shell for the income years 2007 to 2012 repealed. In the case of a new tax assessment, income should not be set for A / S Norske Shell from the Shell Group for that share of R&D costs which is carried by the company's partners in production licenses.

> 2. A / S Norske Shell is awarded legal costs for district court, court of appeals and Supreme Court. "

(26) The appellant - the *State v / Oil Tax Office* - has mainly asserted:

(27) The Board of Appeal's judgment is that the remuneration is determined in the same way as Shell- otherwise, the group prices access to research and development results, namely at that price each company must pay is determined as a percentage of the total costs. This the estimate is valid.

(28) It is not right to see it as the burden under the accounting agreement that Norske Shell's costs for research and development are actually reduced, and that on this basis less costs of distribution remain in the Shell Group. The costs for Norske Shell are unaffected by both the burden under the accounting agreement and by the redistribution in Shell Group.

(29) There is no legal basis for the other companies in pricing the benefit
The Shell Group receives only the "net cost" that can be distributed. The objective of
the exercise is discretionary to assess what the parties would have agreed if they were independent.
In this there is no room to reduce the remuneration because one of the parties benefits from one
another transaction.

(30) There is no double taxation. The taxation in this case applies to income from
various transactions.

(31) The State v. Oil Tax Office has made the following claim:

> '1. The appeal is rejected.
>
> 2. The State v. Oil Tax Office is awarded legal costs before the Supreme Court. »

My view on the matter

starting points

(32) By the judgment of the Court of Appeal, it was legally determined that Norske Shell's R&D activities in Norway has provided benefits to other companies in the Shell Group and that of the Norwegian company - if the corporate community had not existed - would have demanded in this context remuneration or compensation from the foreign companies. It is thus decided that it is basis for determining the income for Norske Shell by discretion under section 13-1 of the Tax Act. The first paragraph of this provision reads as follows:

> "Determination can be made by judgment if the taxpayer's wealth or income is reduced because of direct or indirect interest in the interests of another person, company or company device."

(33) The Board of Appeal's assessment is based on a distribution of the costs of research and development in Norway between the group companies according to the benefits the various companies have had of this activity. Norske Shell's access to deductions is limited to the Board's decision the proportion of costs that is considered to correspond to the benefits of this company. The Board has

based on the distribution key the Group uses for costs that are
covered by the SIEP agreement, and based on this has assumed that Norske Shell's share of
costs are five to six percent. The way the case stands before the Supreme Court is its use
the distribution key is not in itself a topic of dispute.

(34) Prior to the distribution among the group companies, the majority of the board made a reduction of the cost base by ten percent as a result of Norske Shell's research and development being considered to be of somewhat greater value to this company than to the international companies.
The size of this reduction is not covered by the case as it stands before the Supreme Court.

(35) The question the Supreme Court should decide is whether in calculating them
R&D costs that are, by discretion, distributed to group companies in other countries are available
also to include costs that are charged to Norske Shells on the basis of the accounting agreement
license partners within the individual extraction projects. This makes it necessary for me
first to go into the licensing cooperation for extraction activities on the Norwegian continental shelf and
cost coverage within this collaboration.

Relationship between operator and other licensees in production licenses in Norwegian shelf - cover costs for research and development

(36) Extraction of petroleum on the Norwegian shelf takes place on the basis of a production license

(license) granted by the state in accordance with the provisions of section 3-3 of the Petroleum Act. It is common to a license for a field is awarded to several licensees jointly. In such cases, should one of the licensees is designated as an operator, cf. § 3-7 of the Petroleum Act. This case applies to costs related to fields where Norske Shell is the operator.

(37) The relationship between the licensees, which together form a partnership, is as mentioned regulated inter alia by the cooperation agreement and the accounting agreement. It follows Article 3.1 of the cooperation agreement that the operator shall carry out and manage the day-to-day management of the business of the partnership. It is further stipulated here that the operator shall not have profits or losses in the performance of their duties, unless otherwise specified agreement. In accordance with Article 8.1, all Contracting Parties are obliged to intervene sufficiently amount to cover all expenses arising from the partnership's activities.

(38) The dispute in this case concerns the cost of activity defined in the accounting agreement "General Research and Development". According to Article 1.1 (d):

> «[P] rosjekts (according to the Norwegian Research Council's definition of Research and Development) as performed by or under the direction of the Operator. The projects will be of benefit to them upstream operations and being cost-burdened with the Operator. ”

(39) The costs of such research and development may be borne by the operator in accordance with detailed rules Article 2.2.2 of the Accounting Agreement charges the so-called joint account and thus the others the licensees according to their share. Every year it must be documented that the costs apply activity that "has utility for the Norwegian continental shelf". The parties in the case have built on that around 40 percent of Norske Shell's costs for general research and development are charged to them other licensees. This means that Norske Shell itself has covered about 60 percent.

The tax rules

(40) I have already cited section 13-1 first paragraph of the Tax Act. Such is the case before the Supreme Court, it is, as I have pointed out, clarified that the basic conditions of the law are fulfilled by the fact that Norske Shell's income is reduced due to a joint interest with the other group companies. That's it on the mere fact that the Appeals Board had the right to determine the income by discretion. The question for the Supreme Court is whether the Appeals Board has properly used its discretion when the amount of the allowance made in Norske Shell's income has been determined.

(41) The procedure for the discretion is governed by section 13-1 third paragraph, which reads:

> “At the discretion, wealth or income should be determined as if no community of interest had existed. "

(42) It is clear that this is an international matter, so that § 13-1 fourth paragraph comes into use. Under this provision it shall

> “… In deciding whether wealth or income has been reduced by the first paragraph and by discretionary determination of assets or income pursuant to the third paragraph shall be taken into account Internal pricing guidelines for multinational corporations and tax authorities that are adopted by the Organization for Economic Cooperation and Development (OECD) ».

(43) The fourth paragraph was added by Act 29 June 2007, No. 72. Also in previous Norwegian case law it was assumed that the OECD's internal pricing guidelines were relevant in interpreting section 13-1 of the Tax Act. The amendment was made because it was desirable to give these guidelines a more formal status in Norwegian law, see Ot.prp. No. 62 (2006–2007) page 14. On page 15 i the proposition states at the same time that the OECD guidelines are still intended to be indicative, and not binding rules. However, it is also called, on the page 14, that the guidelines "are relevant in the interpretation of § 13-1". That must mean that the guidelines can be of significance when section 13-1 third paragraph is to be given a content as legal framework for the detailed determination of income or costs.

(44) The courts' competence to review the valuation estimate in section 13-1 third of the Tax Act paragraphs follow the general administrative law rules on decisions that are freely subject discretion, see Rt-2012-1025 section 68. Norske Shell claims that the discretion in this the case is based on an erroneous factual basis and on incorrect application of law. This is located within what the courts can try.

(45) Section 13-1 third paragraph of the Tax Act expresses the so-called arm's length principle. That man should find out is how independent parties would have aligned themselves in a similar one situation. The OECD Guidelines item 1.119 emphasizes that it has been properly implemented analysis

> «… Will have identified the substance of the commercial or financial relations between the parties, and will have accurately delineated the actual transaction by analyzing the economically relevant characteristics ».

(46) Thus, a concrete analysis of the transaction should be carried out where the central is the sides the one that is relevant in an economic context.

The Appeals Board's right to use

(47) The Board of Appeal's decision is based on the fact that the group companies have gained international access research results obtained through research and development in Norway. It's talk about sharing the results and not about a transfer with the effect that Norske Shell gives waive any rights or that the group companies receive any form of exclusive right.

(48) A key starting point for the decision is that the research activity that Norske Shell As a driver in Norway, the tax should be treated in the same way as the business that is operated by Shell internationally through the SIEP collaboration. The collaboration is based on one principle of cost sharing. This means that it is the actual cost, with no additional charge of any kind of profit, which should be shared proportionately between the group companies based on the individual company's utility. The Board of Appeal's decision must be understood as such accepts that the SIEP collaboration is established in a way that meets the requirements for arm's length distance.

(49) An internal corporate document, entitled "Operating Module Documentation", is described the cost sharing within the SIEP cooperation, among others as follows in section 1.4:

> «The Operating Model operates within the context of a cost sharing system, where services are made available 'at cost' (ie without any element of profit) and shared proportionally amongst each of the companies benefiting from the activities for which the costs were incurred. ”

(50) It further follows from the Group's regulations that one must do when calculating costs deduction for income earned in connection with R&D activities. This is expressed such:

> «From the said cost shall be deducted all such amounts (…) as in the year concerned shall have been received by SIEP in consideration of the granting of any licenses or other rights of use in respect of patented and unpatented technical knowledge and information in the said fields. »

(51) In the bill in connection with the addition of section 13-1 fourth paragraph of the Tax Act in 2007, Proposition. No. 62 (2006–2007), the Ministry reviewed the content of the OECD guidelines for internal pricing. Section 5.9 of the proposition describes the guidelines attached to it Cost Contribution Schemes (KBO) - in the guidelines itself referred to as Cost Contribution

Arrangements (CCA). The contents of such schemes are described as follows:

> "A KBO is a contractual framework for sharing costs and risks related to the development, production or acquisition of assets, services or rights. Participants seek to gain an expected benefit through their contributions to CCA. Under a KBO, each participant will have the right to exploit their interests in The KBO that actually owns these, and the participants should therefore not respond to royalty or other remuneration to any other party for the exercise of their interests in the scheme. The The most common KBOs are schemes for joint development of intangible assets, but there KBOs are also established for other purposes. "

(52) As I see it, it is in good accordance with the arm's length principle that follows from the Tax Act Section 13-1 and the OECD Guidelines, when the Board of Appeal in its decision has taken as its starting point that the relationship between Norske Shell and the group companies entails a scheme

cost sharing. In this case, there is no transfer of assets for consideration is determined on the basis of the commercial principles that will apply to the ordinary sale of goods, services or rights.

(53) This principle implies that the tax authorities' discretion must follow them the principles for cost reimbursement schemes that can be deduced from section 13-1 of the Tax Act interpreted in in light of the OECD guidelines. The guidelines in paragraph 8.12 state how the arm's length principle should be applied in such a context:

> «For the conditions of a CCA to satisfy the arm's length principle, the value of participants' contributions must be consistent with what independent enterprises would have agreed to contribute under comparable circumstances given theirs proportionate share of the total anticipated benefits they reasonably expect to derive from the arrangement. »

(54) The decisive factor here is what contribution would have been agreed between the independent parties, but then considering what benefit the recipient can actually expect to gain through the current scheme. In Ot.prp. No. 62 (2006–2007), paragraph 5.9, this is described on same way.

(55) In its decision, the Appeals Board states the following about the importance of a share of Norwegian Shells Research and development costs were charged to the license partners:

> "The burden from the parent company and the company's further burden on the partners are two separate transactions. The Complaints Board cannot see that there is a connection between these transactions, which indicates that these should nevertheless be considered overall against sktl. § 13-1. »

(56) Based on what I pointed out, the Board of Appeal here has not taken a proper legal basis. The the said opinion must of course be understood to mean that it is in fact a transaction - a sale - in the relationship between Norske Shell and the group companies abroad. That's right been based on the existence of an agreement involving a cost reimbursement scheme.

(57) Proper application of the arm's length principle requires that one consider what Shell companies abroad - as part of a cost subsidy scheme between independents parties - would agree to provide considering the benefit one expects to achieve through access to the results of the R&D business in Norway. As I see it, it will right then be based on what is actually the cost burden for Norske Shell. The means that costs covered by others should not be included.

(58) It does not matter if the cost is achieved through the load of the license partners, seen from Norske Shell's side appears as a cost sharing or more as a payment for access to the results of R&D projects. It is crucial anyway be that the relationship between Norske Shell and Shell companies abroad is one cost reimbursement scheme which means that these are the actual costs for Norske Shell

which should be distributed based on the companies' relative utility. The share of the cost R&D projects charged to the licensing partners cannot be considered in this context as a cost to Norske Shell.

(59) After this, I have come to the conclusion that the Board of Appeal's decision is based on an incorrect understanding of the arm's length principle as follows from section 13-1 of the Tax Act and the OECD guidelines.

(60) The Board of Appeal's decision must then be annulled. It follows from what I have pointed out, that by the committee new treatment can be the proportion of research and development costs charged Norwegian Shell's licensing partners do not form part of the income to be determined by discretion. The verdict can thus be designed on the basis of Norske Shell's claim.

Legal costs

(61) Throughout the entire case, including in the appeal to the Supreme Court, Norske Shell has argued that not at all was the basis for applying section 13-1 of the Tax Act in this case. The the result that exists after the Supreme Court ruling is that it is permissible to make one discretionary income determination, but that the income must be set lower than in the Appeals Board decisions. This means that none of the parties to the case has been fully supported or in it material, cf. section 20-2 of the Dispute Act.

(62) Both parties have been upheld by significance, cf. Section 20-3 of the Dispute Act. However, I do not see due to some of them being awarded legal costs before the district court or the court of appeals.

(63) In the Supreme Court case, the case was limited to the issue whether the proportion of the costs charged to the license partners should be included in it discretionary income determination. On this point, Norske Shell has been successful. The there are then compelling reasons which indicate that Norske Shell should be partially awarded costs for the Supreme Court, cf. Section 20-3 of the Dispute Act.

(64) In my view, Norske Shell should have the necessary costs incurred after that the referral decision was made, and also the court fee. For work after submission of the appeal declaration requires coverage of fees totaling NOK 378,505. Costs make up 21 396, and the court fee 31 050. A total of NOK 430 951 is then awarded.

Conclusion

(65) I vote for this one

JUDGMENT:

1. Order from the Petroleum Tax Appeals Board on December 12, 2016 is repealed. In the case of a new equation, no income for A / S Norske Shell from others shall be determined companies in the Shell Group for that share of research and development costs which is carried by the company's partners in production licenses.

2. The costs of the District Court and the Court of Appeal are not awarded.

3. In case costs before the Supreme Court, the state pays the Oil Tax Office 430 951 - four hundred and thirty-nine hundred and fifty-six - more dollars A / S Norske Shell within 2 - 2 weeks from the announcement of the judgment.

(66) Judge **Arntzen:** I agree and agree with the results first Justice.

(67) Judge **Normann:** Likewise.

(68) Judge **Bull:** Likewise.

(69) Judge **Matningsdal:** Likewise.

(70) After voting, the Supreme Court rejected this

DOM:

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