EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

Information Note on the Court's case-law 161

March 2013

Bernh Larsen Holding AS and Others v. Norway - 24117/08

Judgment 14.3.2013 [Section I]

Article 8

Article 8-1

Respect for correspondence

Respect for home

Order requiring applicant company to copy all data on server it shared with other companies: *no violation*

Facts – The three applicant companies (and two other companies) shared a common server for their respective information technology systems. In March 2004 the regional tax authorities requested one of the applicant companies, Bernh Larsen Holding (B.L.H.), to allow tax auditors to make a copy of all data on the server. While B.L.H. agreed to grant access, it refused to supply a copy of the entire server, arguing that it was owned by the second applicant company (Kver) and was also used for information storage by other companies. When Kver in turn opposed the seizure of the entire server, the tax authorities issued a notice that it too would be audited. The two companies then agreed to hand over a backup tape of the data of the previous months, but immediately lodged a complaint with the central tax authority and requested the speedy return of the tape, which was sealed pending a decision on their complaint. After being informed by Kver that three other companies also used the server and were affected by the seizure, the tax authorities notified those companies that they would also be audited. One of them, Increased Oil Recovery (I.O.R.), subsequently lodged a complaint with the central tax authority. In June 2004 the central tax authority withdrew the notice that an audit of Kver and I.O.R. would be carried out, but confirmed that B.L.H. would be audited and was obliged to give the authorities access to the server. That decision was upheld on appeal to the City Court, the High Court and ultimately the Supreme Court.

Law – Article 8: The obligation on the three applicant companies to enable tax auditors to access and copy all data on their shared server constituted interference with their "home" and "correspondence" for the purpose of Article 8. It was unnecessary to determine whether there had also been interference with the companies' "private life" as none of the employees whose personal e-mails and correspondence were allegedly backed up on the server had lodged a complaint. The Court would, however, take the companies' legitimate interest in ensuring the protection of the privacy of persons working for them into account when examining whether the interference was justified.

The interference had a basis in national law and the law in question was accessible. The Court was also satisfied that it was sufficiently precise and foreseeable. The applicant companies had argued that, by taking the backup copy, the tax authorities had obtained the means of accessing great quantities of data which did not contain information of

significance for tax assessment purposes and which thus fell outside the remit of the relevant provisions. However, as the Supreme Court had explained, the tax authorities needed, for reasons of efficiency, relatively wide scope to act at the preparatory stage. That was not to say that the relevant provisions had conferred on the tax authorities an unfettered discretion, as the object of an order to access documents was clearly defined. In particular, the authorities could not require access to archives belonging entirely to other taxpayers. Where, however, as here, the applicant companies' archives were not clearly separated, but "mixed", it was reasonably foreseeable that the tax authorities should not have to rely on the taxpayers' own indications of where to find relevant material, but should have access to all data on the server to appraise the matter for themselves. The Court further found that the interference had pursued the legitimate aim of securing the economic well-being of the country.

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

As to proportionality, the procedure whereby the authorities had obtained access to a backup copy of the server had been accompanied by a number of safeguards. One of the applicant companies had been notified of the tax authorities' intention to carry out a tax audit a year in advance, and both its representatives and those of another of the applicant companies had been present and able to express their views when the tax authorities were on-site. The companies were entitled to object to the measure and had done so and the backup copy had been placed in a sealed envelope and deposited at the tax office pending a decision on their complaint. The relevant legal provisions included further safeguards, in particular the taxpayer's rights to be present when the seal was broken, and to receive a copy of the audit report and the return of irrelevant documents. The material was not reviewed until after delivery of the final judgment of the Supreme Court. Furthermore, once the review had been completed, the backup copy would be destroyed and all traces of the contents deleted from the tax authorities' computers and storage devices. The authorities were not authorised to withhold documents unless the taxpayer agreed.

Finally, the nature of the interference was not of the same seriousness and degree as was ordinarily the case in search and seizure operations carried out under the criminal law. The consequences of a taxpayer's refusal to cooperate were exclusively administrative. Moreover, the measure had in part been made necessary by the applicant companies' own choice to opt for "mixed archives" on a shared server, making the task of separation of user areas and the identification of documents more difficult for the tax authorities.

In sum, despite the lack of a requirement for prior judicial authorisation, the Court found that effective and adequate safeguards against abuse had been in place and a fair balance had been struck between the companies' right to respect for "home" and "correspondence" and their interest in protecting the privacy of persons working for them on the one hand, and the public interest in ensuring efficient inspection for tax assessment purposes on the other.

Conclusion: no violation (five votes to two).

(See also, in a criminal-law context: *Robathin v. Austria*, no. 30457/06, 3 July 2012, Information Note no. 154)

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