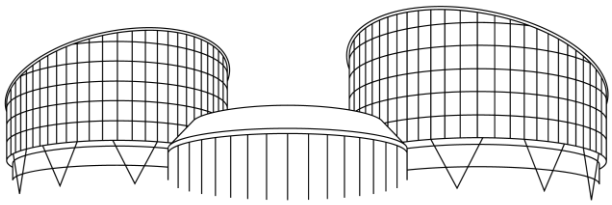

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF BERNH LARSEN HOLDING AS AND OTHERS v. NORWAY

(Application no. 24117/08)

JUDGMENT

STRASBOURG

14 March 2013

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Bernh Larsen Holding AS and Others v. Norway,

The European Court of Human Rights (First Section), sitting as a Chamber composed of:

Isabelle Berro-Lefèvre, *President,*
Elisabeth Steiner,
Khanlar Hajiyev,
Mirjana Lazarova Trajkovska,
Julia Laffranque,
Linos-Alexandre Sicilianos,
Erik Møse, *judges,*
and Søren Nielsen, *Section Registrar,*

Having deliberated in private on 12 February 2013,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 24117/08) against the Kingdom of Norway lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") on 19 May 2008 by three limited liability companies, Bernh Larsen Holding AS, Kver AS and Increased Oil Recovery AS (hereinafter referred to as "B.L.H.", "Kver" and "I.O.R.", respectively). All three companies are registered in Norway.

2. The applicant companies were represented by Mr T. Hatland, a lawyer practising in Bergen. The Norwegian Government ("the Government") were represented by Mrs F. Platou Amble, Attorney of the Attorney General's Office (Civil Matters) as their Agent.

3. The applicant companies complained under Article 8 of the Convention about a demand by the tax authorities that they make available for inspection at the tax office a backup copy of a computer server used jointly by the companies, in the context of a tax audit.

4. On 24 November 2009 the application was communicated to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. B.L.H., a holding company, Kver and I.O.R. (together with two further companies) had their business address at *Hopsnesveien 127*, Bergen (Western Norway), at premises owned by Kver. The companies used a common server and e-mail server (hereinafter referred to as "the server") for their respective information technology systems. The server was owned by Kver. It contained the applicant companies' electronic archives and private information (including private e-mail correspondence) of employees and other persons working for the companies, which did not have their own administration. They received administrative support from a small number of persons working in Bergen Underwater Services AS operating at the same address.

6. B.L.H.'s data were stored on the server in the user areas dedicated to three persons: Mr S., who was B.L.H.'s Managing Director, and two other persons. They were employed by Bergen Underwater Service AS – a subsidiary company of B.L.H. – which carried out management services for several companies, including B.L.H. The data in question were accessed by entering those persons' user areas, through their respective user names and passwords.

A. Accountancy audit

7. In January 2003 the Bergen tax office (*ligningskontor*) warned B.L.H. that the company's accounts for the tax year 2001 would be audited. On 9 March 2004 a meeting was held between representatives of B.L.H., on the one hand, and the Bergen tax office and Hordaland County tax office (*fylkesskattekontor*), on the other. The meeting took place at B.L.H.'s offices in Bergen. During the meeting the tax authorities presented B.L.H. with a list of questions and demanded that B.L.H. allow the auditors to make a copy of all the data on the server, which contained, *inter alia*, information on B.L.H.'s accounts.

8. The representatives of B.L.H. complied with the request to grant access to the server, including offering the tax authorities the necessary passwords. They refused, however, to comply with the tax authorities' further demand to supply a mirror copy of the (entire) server.

9. The Managing Director, Mr S., argued, *inter alia*, that B.L.H. did not own the server but only rented server capacity and that also other companies made use of the server. The Managing Director of Kver, the company owning the server, was called but he too refused to allow the tax authorities to take a mirror copy of the server.

10. Information and documents stored on the server were in part linked to other companies (with the necessary access control), in part to employees working for the different companies. Access to the home directorates and e-mails (including the map "private files and pictures") belonging to the different employees were protected by passwords.

11. Thus the server contained information belonging to the applicant companies and also information belonging to other companies and persons.

12. Following the refusal by B.L.H. and Kver to supply a mirror copy of the server, alternatives to a complete copy of the server were discussed. The discussion related first and foremost to whether the tax authorities would have to limit themselves to demanding copies of the part of the server administered by B.L.H. or persons working for B.L.H. The Managing Director of B.L.H., Mr S., explained to the tax authorities how they could obtain (all and only) the documents belonging to B.L.H.

13. When Kver, as a co-user and the owner of the server, opposed the tax authorities' demand to seize the entire server, the tax authorities responded by issuing a notice that Kver would also be subject to a tax audit. They further ordered Kver to "hand over all electronically stored information".

14. After further discussions, the parties compromised and agreed that the previous months' backup tape would be handed over to the tax authorities and sealed pending a decision on their complaint. The backup tape contained 112,316 files in 5,560 folders, totalling 41 gigabytes. In the applicant companies' submission, which the Government did not dispute, only a minor part of that information was relevant for the tax audit of B.L.H.

15. Both Kver and B.L.H. immediately lodged a complaint with the Directorate of Taxation, a central tax authority under the Ministry of Finance, and requested the speedy return of the backup tape.

16. On 25 March 2004 Kver informed the Bergen tax office that three other companies, including I.O.R. (the third applicant company), also used the server and had therefore been affected by the seizure of 9 March 2004. On 26 March 2004 the tax office notified those companies that they would also be audited.

17. On 1 April 2004 I.O.R. lodged a complaint with the Directorate of Taxation.

B. Directorate of Taxation's decisions of 1 June 2004

18. The Directorate gave a decision on each of the applicant companies' complaints on 1 June 2004.

19. As regards Kver and I.O.R., the Directorate withdrew the tax office's notice that an audit would be carried out and its demand that those companies hand over data. The Directorate observed that the tax audit

concerned B.L.H. and that section 4-10 of the Tax Assessment Act (*ligningsloven*) did not authorise the measures at issue where the purpose of the audit was to collect information about third parties.

20. The Directorate confirmed the tax office's demand that B.L.H. hand over or give access to the server. Its decision further stated that a representative of this company would have the opportunity to be present during the review of the server by the tax office. The tax office's access to each area of the server was to be limited to those areas that were (also) used by B.L.H.

21. In reaching the above conclusion, the Directorate noted that the Ministry of Finance had observed, in its letter to the Directorate of 20 May 1997, that the term "document" in sections 4-8 and 4-10 of the Tax Assessment Act was not limited to information appearing on paper, plastic cards and so on, but also covered texts and figures stored electronically on a computer. Furthermore, the duty to hand over documents also applied to electronically stored documents. The tax authorities could choose whether to ask for paper printouts, electronically readable media, or for the documents to be forwarded to their own computers.

22. In the Directorate's view, the question at issue concerned the delimitation of the tax authorities' access to the "company's archives" under section 4-10 (1) (b) of the Act (see paragraph 68 below). In instances where the documents were stored on a server, the server was to be considered as an archive for the purposes of that provision. In the present instance, the tax office had "seized" ("*tatt beslag i*") the server and the question was to what extent the tax office could inspect it. Whether an obligation could be imposed under section 4-10 to hand over each document in the archive required consideration in the specific circumstances.

23. The Directorate moreover noted that a tax subject was not under a duty to produce documents which exclusively concerned the rights and business relationships of other tax subjects. A further limitation was that the documents in question should be relevant to the tax subject's tax assessment. Accordingly, documents of exclusively private character fell outside that definition. That distinction was important in ascertaining the extent to which the tax authorities could themselves go through the server (the archive) or whether it was for the tax subject to decide which areas of the server should be handed over.

24. Section 4-10 (1) (b) had been added to give the tax authorities an opportunity to act with assertiveness ("*gå offensivt til verks"*) when inspecting archives in order to find documents of importance to the activity concerned. It was thus clear that the authority to audit did not just amount to the passive reception of information handed out by the person subjected to the audit.

25. Moreover, the Directorate noted, section 4-10 of the Act applied to the tax audit of a specific tax subject. The handing over of documents

relating to other tax subjects ought to be based on Chapter 6 of the Act. In instances where the archives were physically separated (into different parts of the server), section 4-10 did not authorise the imposition of access to the archives of other companies. In the present instance, Chapter 6 did not apply.

26. To the extent that a joint archive was not physically divided but was mixed, the tax subject could not refuse the tax authorities access to the archive. In discussions on the draft legislation, it had been emphasised that the purpose of an audit should not be undermined by the tax subject withholding documents. In the Directorate's view, this ought also to apply in relation to access to the tax subject's archives. The tax subject could thus not refuse the tax authorities access to its archives on the ground that they contained documents concerning other tax subjects. The duty to hand over all documents contained in the archives should, however, be limited to documents of importance to the tax subject's tax assessment, see section 4-10 (1) and (2).

27. In practice, in order to solve the problem of the tax subject avoiding the inspection of documents in the archives (the server) that were insignificant for its tax assessment, the tax subject would be allowed to be present during the review of the archive (see section 4-10 (3)). Accordingly, the Directorate stated, a representative of B.L.H. was to be present during the tax authorities' review.

C. Appeals to the City Court and the High Court

28. Under section 11-1 of the Tax Assessment Act, the applicant companies instituted proceedings before the Oslo City Court, asking it to quash the Directorate of Taxation's decision of 1 June 2004 in respect of B.L.H. and to order the return of the backup tape to Kver. On 10 June 2005 the City Court found in favour of the State and rejected the applicant companies' appeal.

29. In its judgment, the City Court found that the measure imposed by the tax authorities could comprise the copying of data for subsequent inspection at the tax office to the same extent as on-site access to data on the server could be imposed. It also found that the server in the present instance should be considered in the same way as mixed paper archives.

30. The applicant companies appealed to the Borgarting High Court, which by a judgment of 30 April 2007 upheld the City Court's decision on essentially the same grounds. The High Court noted *inter alia* that the case concerned an inspection by the tax authorities of a taxpayer in connection with a notified tax audit, an area in which the principle of legality (*legalitetsprinsippet*) applied, as did other legal safeguards, including the prohibition of self-incrimination derived from Article 8 of the Convention.

D. Appeal to the Supreme Court

31. On 2 June 2007 the applicant companies appealed to the Supreme Court, disputing in the main the High Court's application of the law. It had failed to appreciate that the relevant provisions of section 4-10 (1) laid down clear limits for the manner of conduct of a tax inspection, which could be carried out only of the archives of the tax-subject in question, and a demand to hand over documents should be limited to pertinent material contained therein. These limits had been transgressed in the present case.

32. The threshold for accepting access beyond the relevant company's own archives ought to be high, not least because, by reviewing the server, the right to inspect B.L.H. had been extended to other tax subjects that were not being audited, and to any private and confidential information stored on the server. They referred to Article 8 of the Convention, according to which interference with "home" and "correspondence" was not permitted unless it was "in accordance with the law" and "necessary in a democratic society". They submitted that, according to the European Court's judgment in *Société Colas Est and Others v. France* (no. 37971/97, ECHR 2002-III), Article 8 also protected companies.

33. By empowering the authorities to demand copies of the server this would also give them full access to personal data belonging to employees working for different companies as well as any private correspondence that they might have stored on the server or received on their respective e-mail addresses. This aspect of the case also appeared to breach Article 8 of the Convention, as well as laws and regulations on the processing of personal data.

34. Since the imposition of an inspection of the archives of entities others than B.L.H. lacked a basis in section 4-10 (1) (b) of the Tax Assessment Act and Article 8 of the Convention, the tax authorities had acted contrary to the national legal provisions relied on.

35. The application of the mixed-archive doctrine to their case had no legal basis, nor did it follow from clear and established practice. The tax authorities had not documented that there was a mixed archive in the instant case or made any attempt to carry out a prior on-site review in order to determine whether it would be possible to separate B.L.H.'s archives from those of the other companies. It ought to be a condition for a company accepting the seizure of its archives that adequate attempts be made to restrict the seizure to those areas that concerned the activity at issue. Where a partial inspection on the spot revealed that one or more documents had no corroborative significance, the tax authorities could not, according to the Supreme Court's case-law, seize the archives for further investigation. The same would also follow from Article 8 of the Convention.

36. There had been no legal basis for the authorities to take a full backup copy of the server. The Tax Assessment Act had come into force at a time

when archives had been paper based. In the absence of the tax subject's consent and any prior review, the tax authorities were not entitled to take away an entire paper archive in order to go through all the material at the tax office. The same ought to apply in relation to electronically stored documents, the only difference being that they had to be printed out rather than being photocopied. In this manner the intents and purposes of the Act would be fully taken into account. The copying of the server in order to subsequently review the entire archives constituted an interference that could not be justified as proportionate and necessary for the purposes of Article 8 of the Convention.

37. In additional written pleadings to the Supreme Court dated 6 July 2007, the applicant companies stated, *inter alia*:

> "In this context, it is noted that the references to Article 8 of the Convention in the notice of appeal do not constitute a new submission. As the Attorney General also indicates, reference to the Convention was made during the oral proceedings in the lower courts. In the High Court the respondent made reference to a decision of the Icelandic Supreme Court which considered the relationship between Article 8 of the Convention and the country's competition law. The decision is enclosed in the joint case documents before the High Court, on page 109 et seq."

E. The Supreme Court's judgment

38. In its judgment of 20 November 2007 (*Norsk Retstidende* 2007 p. 1612) the Supreme Court upheld the High Court's judgment by four votes to one and held that no award should be made for costs.

1. Opinion of the majority

39. Mrs Justice Stabel, whose opinion was endorsed in the main by the other members of the majority, observed that the case raised three questions, all related to section 4-10 (1) (b) of the Tax Assessment Act concerning the inspection of records located on a computer server: First, whether the tax authorities could demand access to all the records, regardless of content; secondly, whether this also applied in cases where the records included material belonging to other taxpayers; and, thirdly, whether the tax authorities could demand access in order to copy material for subsequent inspection at the tax office.

40. Section 4-10 (1) (a) of the Tax Assessment Act empowered the tax authorities to order a tax subject to hand over specific documents of significance for a tax assessment. Sub-paragraph (b) provided, in addition to the on-site visit and review of the taxpayer's assets, a legal basis for the imposition of a review of the company's archives. With the exception of the rule on review of archives ("*arkivgjennomsyn*") in sub-paragraph (b), those provisions were essentially a continuation of the earlier ones of the Taxation Act on the duty to provide information and allow special inspections. Since

the rule on review of archives had been added during the consideration of the Bill by the Parliamentary Committee on Financial Matters', the preparatory work had been rather sparse. On the other hand, the Committee had pointed out that an order to produce a document pursuant to sub-paragraph (a) presupposed knowledge about the existence of the document, and that the refusal to allow access to review archives constituted a hindrance to effective inspection.

41. From the context, it transpired that the purpose of the provision in section 4-10 (1) (b) was to provide a basis for the tax authorities to assess whether a tax subject possessed documents which he or she could be ordered to produce under sub-paragraph (a). The duty to produce documents was not limited to accountancy documents. What was decisive was whether the documents were significant for the taxpayer's tax assessment and the authorities' review of the latter. It was clear that also electronic documents were covered by sub-paragraph (a).

42. Sub-paragraph (b) should naturally be interpreted in the light of its purpose. The aim of an inspection was to find out whether an archive contained documents that could be significant for tax assessment purposes. Access should therefore comprise all archives which the tax authorities had reason to assume contained information of significance for the tax assessment, not just those archives or parts of archives that included accountancy material. In the interests of efficiency of the tax audit, access at that stage should be relatively wide. Therefore, the companies' argument that it should be up to each tax subject to give binding indications as to which parts of the archive contained documents of significance for the tax assessment or the audit had to be rejected.

43. Access to archives could not be compared to search and seizure, as argued by the applicant companies. Measures taken under Chapter 4 of the Tax Assessment Act formed part of ordinary administrative procedures with a view to ensuring that a correct tax assessment was made. An accountancy audit could be initiated independently of any suspicion of the commission of a criminal offence. An order imposed pursuant to section 4-10 also involved compulsion of a different character than enforcement measures ("*tvangsmidler*") in the context of criminal proceedings, where the prosecution executed the measure by way of enforcement ("*tvangsgjennomføring*"). The principle of the duty to submit tax returns, supplemented by the tax subject's duty to provide information under section 4-2, presupposed that it should be possible to verify and depart from the information provided by the tax subject. The consequences of a tax subject's refusal to cooperate were exclusively administrative (discretionary tax assessment).

44. As to the applicants' argument that the server contained archives belonging to several companies, Mrs Justice Stabel observed that where several companies shared an archive and the areas belonging to the different

users were clearly separated, the authorisation to access the archives was limited to the tax subject concerned. The problem arose where it was not possible, at least in advance, to ascertain whether the respective parts were clearly separated, typically where the data were stored electronically on a common server. On this point she agreed with and cited the Directorate of Taxation's distinction between separate and common (mixed) archives in its decision of 1 June 2004:

> "When several tax subjects share an archive, one must, in the opinion of the Directorate, distinguish between cases in which the archives are clearly physically separated and cases in which there is a common (mixed) archive. Whether or not an area will be considered as clearly separate must be assessed in the specific case. The Directorate emphasises that, at present, there is insufficient information in this case to make that assessment."

45. Mrs Justice Stabel further agreed with the High Court that, as a starting point, where full access was not given to the tax authorities, it should be possible to impose full access if the archive was organised in a manner making the tax authorities dependent on indications by the tax subject in order to identify relevant information. It would be up to the companies whether they wished to organise clearly separate archives or to maintain mixed archives which, in practice, would lead to an extension of the tax authorities' powers.

46. In the present case, the companies had disputed that there had been a mixed archive of the type described. They had argued that B.L.H.'s representative should be able to identify which users had been working on matters pertaining to them and which files had been relevant to their activities. However, it followed from the facts established by the High Court that B.L.H. did not have its own administration but was serviced by a small number of persons in Bergen Underwater Services AS located at the same address, as was the situation of the other companies using the server in question which was owned and run by Kver. B.L.H. did not have its own user area, but the persons who provided services to the company stored the company's documents under their own user names and passwords.

47. It would have been impossible for the tax authorities to identify immediately the areas of the server where the relevant information was stored. The archive was not organised with clear separations between the different companies, and the distinction between each service person's user area was not such as to enable the tax authorities to identify information of significance for the tax assessment. In this situation, the High Court had correctly considered that the tax authorities could not depend on B.L.H. indicating the files that might be relevant for the tax assessment of the company. Therefore, the authorities ought to be vested with powers to review all the data on the server. Like the High Court, she also attached some weight to the fact that it had been fully possible to organise the

cooperation regarding the use of the server differently, for example by applying consistently own user names.

48. As to the third question, the manner in which the review of the relevant data should take place, Mrs Justice Stabel took note of the fact that the backup tape containing all the information on the server had been prepared, sealed and taken to the tax office, pending a final judgment in the case. A backup tape contained all the files stored in the archive but, unlike a mirror copy, not the computer programmes and deleted material, as the tax authorities had initially wanted.

49. The question was whether the imposition of a duty to allow access with a view to take copies for subsequent inspection at the tax office could be deduced from the right to demand access to the company's archives. The answer did not follow directly from section 4-10 (1) (b) of the Tax Assessment Act. Unlike sub-paragraph (a), which expressly stated different alternatives for access to documents, sub-paragraph (b) made no mention of how the review should take place. That provision was supplemented by section 4-10 (3), which authorised the tax authorities to demand the presence of a representative of the tax subject in order to provide the necessary guidance, assistance and access to the company's premises.

50. The question of copying was twofold: did the tax authorities have a right to require a copy and, if so, could the tape then be inspected at the tax office?

51. Very little preparatory work had been carried out on that provision and that particular point had not been dealt with. Since archives had been almost exclusively paper based at the time when the provision had been enacted, the question of copying a whole archive had been unlikely to arise. In view of its purpose, there was no reason to interpret the provision to the effect that it hindered the imposition of a requirement to take a copy where the review of a copy was desirable. The central question was whether the measure imposed by the tax authorities could also include the taking of material to the tax office.

52. The rationale behind sub-paragraph (b) – namely to remove obstacles to an effective audit occasioned by the requirement on the tax authorities to show that the archives contained documents that were significant for tax assessment purposes – militated strongly in favour of an interpretation adapted to the current situation. According to the Directorate of Taxation, an on-site inspection would be particularly time-consuming, and if the authorities were unable to take copies for inspection at the tax office, they would face difficulties in implementing the audit.

53. It could be questioned whether access would entail such an additional burden for the tax subject that the above interpretation would be incompatible with the principle of legality (*legalitetsprinsippet*). In the view of Mrs Justice Stabel, it was difficult to see that this could be the case. Indeed, the inspection as such would be less burdensome in that the tax

subject would at no time be deprived of access to the archive. The requisite safeguards were preserved as the tax subject had a right, under section 3-5 (1) of the Tax Assessment Act, to be notified about and to be present during the authorities' review of the tape. If the measure was the subject of a complaint, the material had to be sealed pending examination of the complaint (section 3-6 (4)). In most instances, there was reason to believe that it would also be in the tax subject's interest that the review took place at the tax office. In any event, there was little reason to oppose that.

54. Mrs Justice Stabel agreed, however, that the protection of privacy ("*personvernhensyn*") had to be taken into consideration, because the review of the archive was not limited to accountancy documents but included other documents in the archives which the tax authorities had reason to believe might be of relevance for the tax assessment. However, the tax authorities could also access such sensitive information even if the review were carried out on the tax subject's premises. Even though, theoretically, there would always be a danger of abuse, which might be somewhat greater if the copied material were taken to the tax office, that risk was hardly so great as to be decisive.

55. It had not been alleged that the backup copy contained more data than what would have been accessible had the review been carried out on-site. The legal safeguards described above would be observed during the review. It was further understood that once the review had been completed, the copy would be destroyed and all traces of the contents would be deleted from the tax authorities' computers and storage devices. In addition, the review was to provide a basis for orders pursuant to section 4-10 (1) (a). The tax authorities would not be authorised to withhold documents from among the material that had been taken away unless the tax subject accepted the measure.

2. Dissenting opinion

56. The dissenting member of the Supreme Court, Mr Justice Skoghøy, agreed with the view held by the majority that the tax authorities could require B.L.H. to give access in order to enable them to carry out an inspection of the server used jointly by the applicant companies.

57. As to the further issue of whether the tax authorities could demand a copy of the server on which the archive was stored with a view to subsequent review at the tax office, Mr Justice Skoghøy observed as follows. In his view, section 4-10 (1) (b) could not reasonably be understood to mean that it authorised the tax authorities to demand a copy of the archive. The provision was limited to "review". To demand a copy was something else and much more far-reaching.

58. The reason why the majority in Parliament in 1980 had been in favour of conferring on the tax authorities a power to search and seize material was that they had believed that the authorities should be able to

ensure that important documents had not been "hidden or destroyed (notably burned)". If the tax authorities were allowed to demand a copy of the archive, they would in reality be empowered to seize, a power which the majority in Parliament in 1984 had not wished to give them when removing a provision to that effect before the entry into force of the relevant part of the Tax Assessment Act.

59. He agreed with the majority that the right to review archives under section 4-10 (1) (b) comprised not only archives containing accountancy material but all archives that potentially contained documents of significance for the tax assessment. This meant that the archived material which the tax authorities could demand to review included a great quantity of sensitive personal data. If the tax authorities were to be empowered to demand the copying of archives, the risk of dissemination and abuse of sensitive personal data would increase considerably beyond what followed from a review on the taxpayer's premises. This applied especially to the copying of electronic archives. The search facilities for an electronic archive were different from those used for a traditional paper-based archive. Even if electronically stored data were deleted, they could be reconstructed. Also, electronically stored data might be disseminated far more easily and effectively than information on paper. The right of the tax subject to be present when the tax authorities opened and reviewed the archive did not constitute a guarantee against abuse. There was no way of ensuring that that right had been respected. Therefore, weighty considerations of legal security and protection of privacy militated against conferring on the tax authorities a right to demand a copy of the archive. As the majority in Parliament had pointed out in the context of the legislative amendment in 1984, the requirements of legal security and protection of privacy were an overriding political aim in a democratic society. In particular, since the parliamentary majority had voted strongly against search and seizure, and since copying for subsequent review at the tax office was in reality a form of seizure, Mr Justice Skogøy found that the tax authorities clearly should not be empowered to require a copy without the question being first considered by the legislator and a clear statutory power given for copying.

60. On that ground, Mr Justice Skoghøy voted for quashing the Directorate of Taxation's decision of 1 June 2004 in respect of B.L.H. authorising the copying of the server.

F. Process for review of the backup tape

61. On 28 January 2008 the Tax Administration (*skatteetaten, Skatt Vest*) notified the applicant companies of their intention to open the tape with a view to ordering the production of documents. It notified them of the dates, time and place of the review, its object, certain preparatory processing not involving searching or opening of documents, and the identity of the

companies concerned. It also invited them to appoint a common representative to attend the said preparations, and the opening and review of the tape.

62. In a letter to the applicant companies dated 30 April 2008, the Tax Administration responded, *inter alia*, to certain complaints made by the applicant companies in their letter of 22 February 2008.

63. In response to the applicant companies' complaint that the backup tape had been secretly copied, the Tax Administration reiterated that they had already informed the applicant companies in a letter of 19 June 2007 that after their meeting on 5 June 2007, the contents of the tape had been copied to hard disk. This had been necessary in order to be able to open and read the files, and the data would be carefully secured pending further proceedings. Except for in the limited context of the criminal investigation described in paragraph 65 below, the files had not been opened and read.

64. As regards the applicant companies' demand that either the two hard disks in question be handed over to B.L.H., or the copied material be deleted, the Tax Administration replied that they could not see that the Supreme Court's judgment of 20 November 2007 would prevent them from copying the contents of the backup tape to hard disk, or that the actual review could be carried out on this instead of the backup tape. They referred to the Supreme Court's reasoning summarised in paragraph 49 above. The copying of the data onto an independent, free and unused hard disk was necessary in order to be able to carry out an appropriate review of the contents of the backup tape. In that connection, the tax office took note of the Supreme Court's understanding that, once it had been reviewed, the copy would either be returned or destroyed, and all traces of the contents would be deleted from the tax authorities' computers and storage devices. The Supreme Court's reasoning thus appeared to be based on the presumption that the contents of the server could be copied temporarily as described. The tax office would not hand over the hard disks or delete information from the backup tape stored on them until completion of the review.

65. In reply to a request by the applicant companies for the names of personnel who had dealt with the case, including those who had viewed documents on the backup tape, the tax office stated that the correspondence, faxes and e-mails that the tax authorities had produced in connection with the case indicated sender's identity. Moreover, representatives of the tax office had presented themselves by name during meetings and telephone conversations that had taken place. Furthermore, in the context of a separate tax investigation of the applicant companies and other companies within the same ownership sphere that were linked to a certain Mr X and criminal proceedings against the latter, the regional tax office had filed a complaint against him to the police alleging that he had committed aggravated tax fraud. During the criminal investigations the police had obtained a judicial

order authorising the seizure of the backup tape. The tax office accepted to assist the police, in accordance with relevant agreements and instructions. The assistance had consisted of the reviewing of the backup tape, during the period between January and March 2006, by certain named expert accountants and a tax lawyer. After completion of the work, the police had demanded that the Office delete all documents stored electronically and shred all paper copies taken. That had been done immediately. In the proceedings before the High Court in the present case, the parties agreed to distinguish these from the afore-mentioned criminal proceedings.

66. The Tax Administration agreed with the applicant companies that it would be problematic with respect to the duty of confidentiality if the representative(s) of all taxpayers present were to be given the opportunity to view the computer screen during the review of documents. For that reason – and because it would have made working conditions difficult if the officer had the said representative(s) just behind his back while working on the backup tape – it had been decided that the representative(s) would not have access to the screen or to read printed documents continuously during the inspection (section 3-13 (1), first sentence, and section 3-5 (1), second sentence, of the Tax Assessment Act). The representative(s) would therefore be directed to another part of the premises where they could observe the processing but not the documents being reviewed.

As the officers identified documents that the taxpayer would be ordered to produce, the documents would be printed out and listed. After completion of the review, the printed and listed documents would be sorted for each taxpayer in the case complex. The representative of the individual taxpayer would then be given access to the document which concerned him and would, in so far as desirable, be able to comment.

II. RELEVANT DOMESTIC LAW

67. Pursuant to section 4-1 of the Tax Assessment Act (*ligningsloven*) of 13 June 1980 the tax subject had a general duty to provide relevant information to the tax authorities carefully and loyally and ought to contribute to his or her tax liability being clarified in due time and being complied with. He or she ought to draw the attention of the authority concerned of errors in the assessment and payment of the taxes.

68. The disputed measures in the present case had been taken pursuant to section 4-10 (1), which – supplementing the duty of information above – authorised the tax authorities to order a taxpayer:

> "(a) To present, hand out or dispatch its books of account, vouchers, contracts, correspondence, governing board minutes, accountancy minutes and other documents of significance with respect to the tax assessment of the taxpayer and the audit thereof. ...

(b) To grant access for on-site inspection, survey, review of the companies' archives, estimation etc. of property, constructions, devices with accessories, counting of livestock, stock of goods and raw materials, etc."

Under section 4-10 (3), when required by the tax authorities, the taxpayer had a duty to attend an investigation as described in section 4-10 (1), to provide necessary guidance and assistance and to give access to office and business premises.

69. Section 3-5 (1) of the Tax Assessment Act gave the taxpayer the right to be present during the review of the archive:

"The taxpayer or the party who has an obligation to disclose information shall be given reasonable notification and have the right to be present and express views during the investigation that takes place pursuant to section 4-10 (1) (b), or section 6-15. This applies only in so far as it may be implemented without risking the objective of the investigation."

Pursuant to section 3-5 (2), when an investigation had been carried out according *inter alia* to section 4-10, a report or protocol was to be drawn up describing the factual information collected, in so far as it pertained to the relevant tax subject.

70. A duty of confidentiality of tax information was set out in section 3-1 (1):

"Everyone who assumes or has assumed a task, post or commission linked to the tax administration shall prevent that persons who are not concerned obtain access to or knowledge of what he in the performance of his work has learned about a person's assets or income or other financial-, business- or personal matters. Upon taking up such task, post or commission he shall give a written declaration on whether he is aware of and will comply with the duty of confidentiality."

71. Section 3-6 laid down a right to complain in cases where the taxpayer had been ordered to give access to archives pursuant to section 4-10 (1) (b):

Section 3-6 (1)

"A person ordered to provide information or to cooperate with an inspection pursuant to Chapter 4 or 6, may lodge a complaint if he considers that he has no duty to comply, or is prohibited by law from doing so. ... "

Section 3-6 (4)

"The order shall be complied with even if the complaint has not been decided, unless the person who has issued the instruction grants a stay of implementation of the measure. Such a stay shall be granted where the person who has given the order finds that the complaint raises reasonable doubt as to the legality of the order. A stay shall be granted where the order concerns the presentation of documents which are sealed and deposited according to regulations issued by the Ministry."

72. Various provisions supplementing the Tax Assessment Act may be found in the Regulations on Accountancy Audit of 23 December 1983 no. 1839. Pursuant to Article 3, the tax subject ought to be informed about

his or her duty to provide information and his right to complain about an order to assist in the audit.

73. Article 4 of the Regulations provided that in the event of a complaint about an order to produce documents the documents in question ought to be placed in a sealed envelope. The person conducting the review could, where appropriate, decide that the envelope should be deposited with him or her until the complaint has been decided. If the complaint was upheld, the envelope ought to be returned. If not, the complainant ought to be informed accordingly. Unless it would lead to considerable delay, the tax subject ought to be given an opportunity to be present when the seal is broken.

74. Article 5 required – in conformity with section 3-5(2) of the Act – the person conducting the review to draw up a report setting out in detail the information that should be included in the report. Under Article 6 a copy was to be sent to the tax subject.

75. According to Article 7, documents provided to the tax authorities pursuant to section 4-10 of the Act ought to be returned as soon as possible, possibly after copies had been taken of specific documents deemed to be of significance for the tax assessment or the tax audit.

III. THE COUNCIL OF EUROPE DATA PROTECTION CONVENTION

76. The Council of Europe Convention of 1981 for the protection of individuals with regard to automatic processing of personal data ("the Data Protection Convention"), which entered into force for the United Kingdom on 1 December 1987, defines "personal data" as any information relating to an identified or identifiable individual ("data subject"). Article 5, which deals with quality of data, provides:

> "Personal data undergoing automatic processing shall be:
>
> a. obtained and processed fairly and lawfully;
>
> b. stored for specified and legitimate purposes and not used in a way incompatible with those purposes;
>
> c. adequate, relevant and not excessive in relation to the purposes for which they are stored;
>
> ...
>
> e. preserved in a form which permits identification of the data subjects for no longer than is required for the purpose for which those data are stored."

77. Article 7 on "Data security" states:

> "Appropriate security measures shall be taken for the protection of personal data stored in automated data files against accidental or unauthorised destruction or accidental loss as well as against unauthorised access, alteration or dissemination."

78. Article 8, providing for "Additional safeguards for the data subject", reads:

"Any person shall be enabled:

a. to establish the existence of an automated personal data file, its main purposes, as well as the identity and habitual residence or principal place of business of the controller of the file;

b. to obtain at reasonable intervals and without excessive delay or expense confirmation of whether personal data relating to him are stored in the automated data file as well as communication to him of such data in an intelligible form;

c. to obtain, as the case may be, rectification or erasure of such data if these have been processed contrary to the provisions of domestic law giving effect to the basic principles set out in Articles 5 and 6 of this convention;

d. to have a remedy if a request for confirmation or, as the case may be, communication, rectification or erasure as referred to in paragraphs b and c of this article is not complied with."

79. Article 9, setting out the conditions for "Exceptions and restrictions", provides:

"1. No exception to the provisions of Articles 5, 6 and 8 of this convention shall be allowed except within the limits defined in this article.

2. Derogation from the provisions of Articles 5, 6 and 8 of this convention shall be allowed when such derogation is provided for by the law of the Party and constitutes a necessary measure in a democratic society in the interests of:

a. protecting State security, public safety, the monetary interests of the State or the suppression of criminal offences;

b. protecting the data subject or the rights and freedoms of others.

3. Restrictions on the exercise of the rights specified in Article 8, paragraphs b, c and d, may be provided by law with respect to automated personal data files used for statistics or for scientific research purposes when there is obviously no risk of an infringement of the privacy of the data subjects."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

80. The applicant companies complained that their right to respect for privacy, home and correspondence under Article 8 of the Convention had been infringed as a result of the Supreme Court's judgment of 20 November 2007 upholding the Directorate of Taxation's decision of 1 June 2004. This Article reads:

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the

country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

81. The Supreme Court's judgment had upheld the local tax authorities' order of 9 March 2004 that B.L.H. make a copy of the contents of the server located at *Hopsnesveien 127* available for review in the tax authorities' offices. The applicant companies disputed that the interference was "in accordance with the law". They argued that it had exceeded the wording of the relevant statutory provisions and that the law in question failed to fulfil the quality requirements in the Court's case-law. Moreover, the reasons relied on by the Supreme Court, although partly relevant, had not been sufficient to establish convincingly that the "seizure" of the backup tape had been necessary in a democratic society. There had been no effective safeguards against abuse. In any event, the interference could not be considered strictly proportionate to the legitimate aims pursued. A significant proportion of the seized backup tape had contained information that was irrelevant for tax audit purposes and had included private material pertaining to employees and other persons working for the applicant companies. The Supreme Court's majority had underestimated the seriousness of the interference arising from the risk of spreading and misuse of sensitive personal data.

82. The Government disputed the applicant companies' complaint.

A. Admissibility

1. Requirement of exhaustion of domestic remedies

(a) The Government's submissions

83. The Government maintained that the applicant companies had failed to exhaust domestic remedies. Although the applicant companies had referred to Article 8 of the Convention in their appeal to the Supreme Court, they had not argued that there had been a violation of that provision. They had merely maintained that section 4-10 of the Tax Assessment Act had to be interpreted in the light of Article 8. In this connection, the Government referred to certain passages in the applicant companies' additional pleadings to the Supreme Court dated 3 October 2007 (apparently referring to those of 6 July 2007, quoted at paragraph 37 above).

84. The fact that the Convention had merely been relied upon as a general argument in the interpretation of provisions of domestic law, and that no violation – explicitly or in substance – had been alleged was further confirmed by the fact that the Supreme Court had not ruled on whether Article 8 of the Convention had been violated. More importantly, in its judgment the Supreme Court had made no reference to Article 8, either in its own reasoning or in its rendering of the parties' final submissions at the hearing before it. The applicant companies' pleadings had merely related to

the measures taken by the tax authorities in requesting access to the server, notably concerning how to examine the server and whether a backup copy of the server could be requested for subsequent inspection at the tax office (see paragraph 39 above).

85. The substance of the complaints pursued by the applicant companies before the national courts could not be said to have raised issues that the Supreme Court had had any reason to examine under Article 8 of the Convention.

(b) The applicant companies' submissions

86. The applicant companies, disputing the Government's contention, maintained that the requirement of exhaustion of domestic remedies under Article 35 § 1 of the Convention had been fulfilled. The core issue in the domestic proceedings had been whether the tax authorities had had the necessary statutory authority to carry out the contested measures thereby coercing them to surrender the relevant backup tape for inspection at the tax office. That issue was now the subject of their complaint to the Court. Referring to their written pleadings before the Supreme Court (see paragraphs 31-37 above) and also to certain parts of the High Court's reasoning (see paragraph 30 above), they stressed that they had clearly raised before the national courts the matter they were now pursuing under the Convention. As could be seen from their domestic pleadings, the applicant companies had expressly invoked Article 8 of the Convention and had clearly argued the substance of their complaint before the national courts, which thus had had the opportunity, both in fact and in law, to assess the matter under this Article.

(c) The Court's assessment

87. The Court cannot but note that in their written pleading to the Supreme Court the applicant companies challenged in the main the High Court's findings with regard to the lawfulness of the inspection of archives other than those pertaining to B.L.H. and of the copying of all the data on the server. In this connection they argued inter alia that contrary to Article 8 of the Convention the inspection lacked a legal basis in national law and that the copying could not be justified as proportionate or "necessary" for the purposes of this provision (see paragraphs 32-36 above). In their additional written pleadings the applicant companies further clarified that their arguments drawn from Article 8 of the Convention were not new but had been raised previously (see paragraph 37 above). In the absence of any express indication to the contrary in the Supreme Court's judgment or otherwise, the Court finds no reason to assume that the Article 8 plea was subsequently withdrawn or not pursued before the Supreme Court. Thus, the Court is satisfied that the applicant companies' grievances were sufficiently raised, expressly or in substance, to enable the Supreme Court to consider

the matters now complained of under the Convention. Indeed, the Supreme Court did take the opportunity, albeit without reference to Article 8 of the Convention, to assess the applicable safeguards of various interests, including those in place for the protection of privacy (*personvernhensyn*). Accordingly, the applicants must be considered to have fulfilled the requirement of exhaustion of domestic remedies pursuant to Article 35 § 1 of the Convention. The Government's submission to the contrary must therefore be dismissed.

2. The "victim" requirement

88. The Government further argued that, whilst the applicant companies had maintained that the backup copy of the server had contained e-mails to and from different people working for the applicant companies and that an inspection of the tape would interfere with their "legitimate right for privacy at work", no one working for them had applied before the Court. The matters which the applicant companies were pursuing under the Convention concerned natural persons working for them, not the companies themselves. Thus the applicant companies could not be regarded as "victims" within the meaning of Article 34. The Government invited the Court to declare this part of the application inadmissible as being incompatible *ratione personae*.

89. The applicant companies did not dispute that employees, contracting parties, lawyers and other affected third parties must exhaust national remedies before they could enjoy an independent right to submit a complaint before the Court. However, this did not mean that the Court was prevented from considering the interests in question in its assessment of the applicant companies' protection under Article 8 of the Convention.

90. The Court notes that the applicant companies' interest in protecting the privacy of their employees and other persons working for them did not constitute a separate complaint but only an aspect of their wider complaint under Article 8 of the Convention. The fact that no such individual person was a party to the domestic proceedings nor brought an application under the Convention should not prevent the Court from taking into account such interests in its wider assessment of the merits of the application.

3. Conclusion

91. Accordingly, the Court rejects the Government's requests to declare the application inadmissible on grounds of failure to exhaust domestic remedies. It also dismisses their invitation to declare part of the application inadmissible as being incompatible *ratione personae*. The Court further considers that the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention and is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. Whether there was an interference with an Article 8 right pertaining to the applicant companies

(a) The applicant companies' submissions

92. The applicant companies pointed out that the essential object and purpose of Article 8 was to protect the individual against arbitrary interference by the public authorities (see *Niemietz v. Germany*, 16 December 1992, § 31, Series A no. 251-B), and extended to companies and legal persons. The instant case concerned a "seizure" (according to the applicants' terminology) that had not only been very comprehensive (see paragraph 14 above) but had also taken place in a manner that bore witness to arbitrariness and abuse of power. The interference had also involved a number of interests beyond those of the companies in running their business without arbitrary and unlawful interference by the authorities. The "seizure" of 9 March 2004 had, moreover, had a distinct coercive character, as illustrated by the fact that the authorities had brought in computer experts to execute the order and by their stance on the matter in the ensuing judicial proceedings. A failure to comply with a section 4-10 (1) (b) order was punishable by imprisonment of up to two years.

93. In the case of B.L.H., particular reference was made to the fact that, at a meeting on 9 March 2004 held at B.L.H.'s office, the tax authorities had demanded a mirror copy of the server with the assistance of third parties, without prior notice and with reference to legislation authorising penal sanctions. That demand had in itself entailed a violation of B.L.H.'s right to respect for its "home", as had in any event the manner in which the tax authorities – *de facto* – had obtained the backup tape. At the material time, the tax authorities had been of the opinion that the order could be enforced.

94. In a similar way, Kver's and I.O.R.'s right to respect for their "home" had been violated, notably as a result of the fact that the tax authorities had "seized" the backup copy of the server on which the companies had been renting capacity, located in the same building as the companies' offices (see *Buck v. Germany*, no. 41604/98, § 31, ECHR 2005-IV).

95. Moreover, the "seizure" had amounted to an interference with the applicant companies' "right to respect for ... correspondence", which implied a legitimate expectation as regards the privacy of letters, e-mails and phone calls (see *Copland v. the United Kingdom*, no. 62617/00, § 42, ECHR 2007-I) and a right to uninterrupted and uncensored communication with others. The applicant companies relied on *Wieser and Bicos Beteiligungen GmbH v. Austria* (no. 74336/01, § 45, ECHR 2007-IV), where the search and seizure of electronic data in relation to a legal person had been found to constitute an interference with the applicant's right to

respect for correspondence. In so far as the impugned "seizure" concerned documents covered by statutory confidentiality, they also prayed in aid *Niemietz* (cited above, § 37).

96. The "seizure" of the backup tape had also entailed an interference with the applicant companies' right to respect for "private life" within the meaning of Article 8, which in essence acknowledged that one could expect protection from arbitrary interference within a certain sphere. The "seizure" had concerned purely private material belonging to the employees as well as professional material related to the companies as such and to the professional activities of individual employees. The Court had already accepted that the concept of "private life" could also encompass "professional activities" in a strict sense (ibid., § 29).

97. The protection afforded to a private company under Article 8 should not be viewed as limited to legal persons but should apply also to a group of individuals striving to achieve common goals. Thus, the protection of people working for a company – as a group – against arbitrary interference in their common effort, ought to be considered as inherent in the same protection afforded to a company. This had clearly not been the situation in respect of employees of and people working for the applicant companies, whose family pictures, private and professional correspondence as well as numerous work-related documents that were not relevant to the tax audit had been "seized" by the domestic authorities and thus exposed to them. Apart from the strong interest in protecting the privacy of their employees, contracting parties and other third parties, the applicant companies also had a legal obligation to protect personal data. Accordingly, a comprehensive "seizure" would affect significant societal interests, which deserved consideration when assessing the scope of the protection of Article 8. It could not be a condition for such protection that all affected parties must initiate legal proceedings.

(b) The Government's submissions

98. In the Government's opinion, the Court's jurisprudence in relation to Article 8 of the Convention clearly indicated that only natural persons could be considered to have a "private life" (see *Gillan and Quinton v. the United Kingdom*, no. 4158/05, § 61, ECHR 2010 (extracts)). The Court had not confirmed that "private life" also pertained to legal persons such as the applicant companies, and there was no need to establish new Convention ground in the present case.

99. In so far as the applicant companies relied on the right to respect for "correspondence" under Article 8, the Government maintained that this was closely linked to the right to respect for private life and thus disputed the applicability of this aspect of the Article to the applicant companies. Whilst any private correspondence on the backup tape of the server pertained to

natural persons working for the applicant companies, none of them had presented themselves as applicants before the Court.

100. Moreover, the content of business or professional correspondence of legal persons such as the applicant companies could not reasonably be said to relate only to the interests of individuals that were safeguarded by the right to respect for "private life", such as a person's physical and psychological integrity, their innate need for personal development and their interaction with others. Bearing in mind the rationale for Convention protection of "correspondence", as seen in the Court's case-law, there was no need to extend the right to such protection to the correspondence of legal persons such as the applicant companies.

101. Furthermore, since the correspondence of legal persons such as the applicant companies could only be of a professional nature, the argument for extending the Article 8 protection to such correspondence found no support in *Niemietz* (cited above). The present case ought to be distinguished from the latter because it did not touch upon the legal professional privilege of lawyers, where the Court had been concerned that "an encroachment on professional secrecy may have repercussions on the proper administration of justice and hence on the rights guaranteed by Article 6" (ibid., § 37).

102. The Government further disputed that the applicant companies could claim a right to respect for their "home" under Article 8. It followed from *Société Colas Est and Others* (cited above) that that right applied only to legal persons "in certain circumstances" that did not exist in the instant case. Unlike the former case, the present case did not concern searches or seizures, nor had the measure under scrutiny been carried out in a similar context. It concerned an administrative order to allow the inspection of records as part of a tax audit, not an order that had formed part of an investigation into unlawful practices, as in the French case. Suspicion that a criminal offence had been committed was not a prerequisite for issuing an order pursuant to section 4-10 (1) (b) of the Tax Assessment Act.

103. The fact that the tax authorities had not entered the premises of the applicant companies' offices without their consent should be of particular consequence for the Court's assessment of whether any "interference" had occurred. The order to allow the inspection had been issued during a meeting held between the tax authorities and the first applicant, B.L.H. The fact that the latter had consented to a backup copy of the server being taken proved that no "interference" had occurred in this case.

(c) The Court's assessment

104. The Court first reiterates that, as interpreted in its case-law, the word "home", appearing in the English text of Article 8, – the word "*domicile*" in the French text has a broader connotation – covers residential premises and may extend also to certain professional or business premises

(see *Niemietz*, cited above, § 30). It includes not only the registered office of a company owned and run by a private individual (see *Buck*, cited above, § 32) but also that of a legal person and its branches and other business premises (see *Sallinen and Others v. Finland*, no. 50882/99, § 70, 27 September 2005). Such an interpretation would not unduly hamper the Contracting States, for they would retain their entitlement to "interfere" to the extent permitted by paragraph 2 of Article 8; that entitlement might well be more far-reaching where professional or business activities or premises were involved than would otherwise be the case (see *Niemietz*, cited above, § 31).

105. The Court further reiterates that in certain previous cases concerning complaints under Article 8 related to the search of business premises and the search and seizure of electronic data, the Court found an interference with "the right to respect for home" (ibid., § 71) and "correspondence" (ibid., § 71, and *Wieser and Bicos Beteiligungen GmbH*, cited above, § 45). On the other hand, it did not find it necessary to examine whether there had also been an interference with the right to respect for "private life" (ibid.).

106. Turning to the particular circumstances of the present case, the Court observes that during a meeting between representatives of the tax authorities and the first applicant company, B.L.H., on its premises on 9 March 2004, the former ordered the latter, pursuant to section 4-10 (1) (b) of the Tax Assessment Act, to provide access to and enable the tax auditors to take a copy of all data on a server used by all three applicant companies. Both B.L.H. and I.O.R., respectively the first and third applicant companies, rented space on the server, which was owned by Kver, the second applicant company. All three companies' offices were in the same building. Although the disputed measure was not equivalent to a seizure imposed in criminal proceedings or enforceable on pain of criminal sanctions (see paragraph 43 above), the applicant companies were nonetheless under a legal obligation to comply with the order to enable such access. The imposition of that obligation on the applicant companies constituted an interference with their "home" and undoubtedly concerned their "correspondence" and material that could properly be regarded as such for the purposes of Article 8. In the absence of any argument to the contrary, the Court has found no basis for differentiating between the applicant companies in this respect.

107. A further question is whether there was also an interference with the applicant companies' right to respect for private life. The Court notes that, according to them, the backup copy of the server included copies of personal e-mails and correspondence of employees and other persons working for the companies. However, no such individual had complained of an interference with his or her private life, either before the national courts or before the European Court. In the absence of such a complaint, the Court does not find it necessary to determine whether there has been an

interference with "private life" in the instant case. This said, the applicant companies had legitimate interests in ensuring the protection of the privacy of individuals working for them and such interests should be taken into account in the assessment of whether the conditions in Article 8 § 2 were fulfilled in the instant case.

2. Whether the interference was justified

(a) In accordance with the law

(i) The applicant companies' arguments

108. The applicant companies maintained that the wording of section 4-10 (1) of the Tax Assessment Act indicated that the tax authorities were empowered to demand access to a company's business premises for tax audit purposes and to review the company's archives on site. However, their order to hand over a backup tape on which all or most of the companies' documents were kept had greatly exceeded the wording of that provision, from which no such power could be deduced. Nor could any support to that effect be found in case-law, the preparatory work on the legislation, legal doctrine or the tax authorities' own guidelines. As had been pointed out by the minority of the Supreme Court, the provision was limited to "review"; to demand copies was far more interfering. When Parliament had authorised search and seizure in 1980, it had done so in order to ensure that important documents would not be hidden or deleted. If the authorities were to be empowered to copy the archive in question, it would mean conferring on them an authority over and above the intentions of Parliament in 1984 (see paragraph 58 above). The majority of the Supreme Court had ignored that fact in supporting the argument that the tax authorities should be permitted to "seize" electronic documents. The majority had interpreted section 4-10 (1) incorrectly.

109. In any event, it had not been foreseeable that section 4-10 (1) (b) would be invoked as a legal ground for "seizure" of the entire backup tape. The present case did not concern any "grey areas at the fringes of the definition" (see *Cantoni v. France*, 15 November 1996, § 32, *Reports of Judgments and Decisions* 1996-V) but a far-reaching interference clearly outside the wording of the law and what could reasonably be deduced from the relevant legal sources. A number of factors indicated that the law was not sufficiently clear and precise. The tax authorities could easily have adhered to existing requirements by conducting the search on-site, limiting it to what was relevant for tax assessment purposes, and requiring the production of any documents necessary for those purposes. The fact that the "seizure" of the backup tape related to large amounts of data, including personal e-mails and lawyer-client correspondence, and affected the important interests of a wide group of persons, suggested a strict

requirement of precision. The "seizure" had been planned and executed as a "dawn raid" and had been coercive in nature owing to the pressure that had been brought to bear on the applicant companies to surrender the backup tape. Since the danger of abuse had been as great as in criminal proceedings, the requirement of precision should not have been any less in the present instance. The need to keep pace with general technological and social developments could not of itself provide the requisite legal ground for the interference at issue.

110. The interference was even less foreseeable to Kver and I.O.R., who had merely been co-users of the server and had not been informed that a tax audit would take place. The so-called mixed-archive doctrine had been invoked only later, on 1 June 2004.

111. Also, despite the fact that B.L.H.'s and Kver's representatives had offered to identify the relevant parts of the server, the authorities had persisted in their demand to copy the whole server.

112. Against that background, the scope of the tax audit, as asserted by the tax authorities and later upheld by the Supreme Court, involving access to the whole backup tape unrestrained by the applicant companies' instructions, had been incompatible with the requirement of lawfulness in Article 8 of the Convention.

(ii) The Government's arguments

113. By way of general argument, the Government maintained that the domestic authorities' latitude in assessing compliance with the three sets of requirements in Article 8 § 2 should be wide when the business activities of legal persons were at issue (see *Niemietz*, cited above, § 31).

114. The interference complained of had a legal basis in Norwegian law. As held by the Supreme Court, the tax authorities' demand for a backup copy of the entire server for review at the tax office had a sufficient legal basis in section 4-10 (1) (b) of the Tax assessment Act.

115. Also, the quality requirement that the law be accessible had been complied with. This was undisputed by the applicant companies.

116. As to the requirement of foreseeability, while certainty was highly desirable, excessive rigidity should be avoided so that the law can keep pace with changing circumstances (see *The Sunday Times v. the United Kingdom (no. 1)*, 26 April 1979, § 49, Series A no. 30).

117. In the view of the Government, the requirement for precision ought to be less rigorous in relation to orders to allow the inspection of records as part of a tax audit, than, for instance, in relation to penal provisions or coercive measures associated with criminal procedures (see *Sallinen and Others*, cited above, § 90). Orders pursuant to section 4-10 (1) of the Tax Assessment Act did not require any suspicion of criminal offences, and the tax authorities were not empowered to enforce an order against the will of the taxpayer. The requirement of precision should be

construed less strictly in relation to the procedural aspects of a section 4-10 (1) measure than in relation to the conditions for its application.

118. The Government contended that the second and third applicants had been able to foresee – if need be with appropriate advice – that by not keeping their electronic records clearly separated from those of other companies, they had run the risk of having them examined in connection with a tax audit of one of the other companies. The purpose behind the provision in section 4-10 (1) (b) of the Tax Assessment Act, as clearly indicated by the relevant preparatory discussions on the legislation, had been introduced because the tax authorities should not be dependent on indications by the taxpayer for identifying the files relevant to the audit.

119. The Tax Assessment Act had been drafted before the advent of electronic records. At the time, it was natural to assume that an examination of records would be conducted on the taxpayers' premises, since that was where the records were located. In contrast, the development of technologies for copying servers meant that it would often be more practical for all parties involved to make copies of electronic records for subsequent inspection at the tax office. Owing to the large amounts of data contained on many computer servers, on-site inspection would be very time-consuming. The tax authorities would have difficulty in carrying out effective audits if they were denied the possibility of copying electronic records.

120. The wording of section 4-10 (1) (b) interpreted in the light of the purpose of an effective tax audit and having regard to the changed circumstances as a result of technological innovation, was sufficiently precise to enable the applicant companies to foresee – with appropriate advice – that the tax authorities could demand that a backup copy be taken of the electronic records.

121. As legal persons carrying out a professional activity and used to having to proceed with a high degree of caution (see *Cantoni*, cited above, § 35), the applicant companies could be expected to have taken special care in assessing the risks that such an activity entailed. At the time, the tax authorities would frequently demand that copies be made of electronic records in connection with tax audits. It must be assumed that tax advisors would have been familiar with that practice. The applicant companies' contention that the tax authorities had made similar demands to other companies on a number of previous occasions supported the assumption that the applicant companies, at the material time, could have foreseen that an order to allow the inspection of records could have included the taking of a backup copy of any electronic records.

122. In any event, with the benefit of appropriate legal advice, the applicant companies should have appreciated at the material time that there was a risk that an order to allow the inspection of records would include a demand to take a backup copy of their electronic records.

(iii) The Court's assessment

123. The Court reiterates that, according to its well-established case-law, the words "in accordance with the law" require the impugned measure both to have some basis in domestic law and to be compatible with the rule of law, which is expressly mentioned in the preamble to the Convention and inherent in the object and purpose of Article 8. The law must thus be adequately accessible and foreseeable, that is, formulated with sufficient precision to enable the individual – if need be with appropriate advice – to regulate his conduct (see, among other authorities, *S. and Marper v. the United Kingdom* [GC], nos. 30562/04 and 30566/04, § 95, ECHR 2008, with further references). In *The Sunday Times* (cited above, § 49), the Court held – in relation to Article 10 – that a citizen

> "must be able ... to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice."

124. Moreover, in *Gillan and Quinton* (cited above), the Court held:

> "77. For domestic law to meet these requirements it must afford a measure of legal protection against arbitrary interferences by public authorities with the rights safeguarded by the Convention. In matters affecting fundamental rights it would be contrary to the rule of law, one of the basic principles of a democratic society enshrined in the Convention, for a legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate with sufficient clarity the scope of any such discretion conferred on the competent authorities and the manner of its exercise (see *Rotaru v. Romania* [GC], no. 28341/95, § 55, ECHR 2000-V; *Hasan and Chaush v. Bulgaria* [GC], no. 30985/96, § 4, ECHR 2000-XI; *Maestri v. Italy* [GC], no. 39748/98, § 30, ECHR 2004-I; see also, amongst other examples, *Silver and Others v. the United Kingdom*, 25 March 1983, §§ 88-90, Series A no. 61; *Funke v. France*, §§ 56-57, judgment of 25 February 1993, Series A no. 256-A; *Al-Nashif v. Bulgaria*, no. 50963/99, § 119, 20 June 2002; *Ramazanova and Others v. Azerbaijan*, no. 44363/02, § 62, 1 February 2007; *Glas Nadezhda EOOD and Anatoliy Elenkov v. Bulgaria*, no. 14134/02, § 46, ECHR 2007-XI (extracts); *Vlasov v. Russia*, no. 78146/01, § 125, 12 June 2008; and *Meltex Ltd and Movsesyan v. Armenia*, no. 32283/04, § 81, 17 June 2008). The level of precision required of domestic legislation – which cannot in any case provide for every eventuality – depends to a considerable degree on the content of the instrument in question, the field it is designed to cover and the number and status of those to whom it is addressed (see, for example, *Hashman and Harrup v. the United Kingdom* [GC], no. 25594/94, § 31, ECHR 1999-VIII; *S. and Marper*, cited above, § 96)."

125. Also on the issue of foreseeability, it may be reiterated that in *Cantoni* (cited above), the Court stated (in examining a matter under Article 7):

> "35. The Court recalls that the scope of the notion of foreseeability depends to a considerable degree on the content of the text in issue, the field it is designed to cover

and the number and status of those to whom it is addressed (see the *Groppera Radio AG and Others v. Switzerland* judgment of 28 March 1990, Series A no. 173, p. 26, para. 68). A law may still satisfy the requirement of foreseeability even if the person concerned has to take appropriate legal advice to assess, to a degree that is reasonable in the circumstances, the consequences which a given action may entail (see, among other authorities, the *Tolstoy Miloslavsky v. the United Kingdom* judgment of 13 July 1995, Series A no. 316-B, p. 71, para. 37). This is particularly true in relation to persons carrying on a professional activity, who are used to having to proceed with a high degree of caution when pursuing their occupation. They can on this account be expected to take special care in assessing the risks that such activity entails."

126. Turning to the present case, the Court will first consider whether the interference had a sufficient legal basis in domestic law. It notes that section 4-10 (1) (a) of the Tax Assessment Act specified the nature of documents which the tax authorities were empowered to order the taxpayer to "present, hand out or dispatch" – namely those "of significance with respect to the tax assessment of the taxpayer and the inspection thereof". Under sub-paragraph (b), the same authorities could order the taxpayer "[t]o grant access for on-site inspection, survey, or review of the companies' archives ...". For the reasons expounded by the Supreme Court in its judgment (see paragraphs 40-42 above), the Court sees no reason to question its interpretation that, having regard to the purpose of those provisions, electronically stored documents were also covered by sub-paragraph (a) (see similarly *Wieser and Bicos Beteiligungen GmbH*, cited above, §§ 53-54).

127. The Court also notes that access pursuant to sub-paragraph (b) extended to all archives potentially containing information of importance for the tax assessment. Had the archive been organised with clear dividing lines between the different companies, the tax authorities could have identified the areas on the server where relevant information could have been found. To allow the authorities to access the entire server would therefore have been consistent with the above-mentioned purpose (see paragraphs 41-48 above). So would, in the view of the Supreme Court majority, a requirement enabling the authorities to obtain copies of documents where a review of those copies appeared expedient. Nothing in the relevant rules prevented either such copying (see paragraphs 51 above) or the taking of a backup copy of the server to the tax authorities' premises for review there (see paragraphs 51-55 above). Although the minority in the Supreme Court had considered the latter points differently (see paragraphs 57-60 above), the Court is prepared to accept that the impugned interference had a legal basis in national law.

128. As regards the other requirements derived from the notion "in accordance with the law", it was undisputed that the law in question was accessible and the Court sees no reason to hold otherwise. On the other hand, the parties disagreed as to whether it had been foreseeable.

129. The main issue in the instant case relates to the fact that by taking a backup copy containing all the existing documents on the server, 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 section 4-10 (1). That included private documents and correspondence of employees and other persons working for the companies, and confidential commercial information pertaining to the companies themselves and other companies; in other words, documents which affected the rights and interests of individuals and companies that were protected by Article 8 of the Convention.

130. The Court first observes that the purpose of a measure taken under sub-paragraph (b) was, as explained by the Supreme Court, to give the tax authorities a basis for assessing whether the tax subject possessed documents which they could require the latter to furnish pursuant to sub-paragraph (a). It was not limited to accountancy documents but extended to all documents that might be relevant to the tax assessment (see paragraph 41 above). Considerations of efficiency of the tax audit suggested that the tax authorities' possibilities to act should be relatively wide at the preparatory stage (see paragraph 42 above). The tax authorities could therefore not be bound by the tax subject's indications as to which documents were relevant, even where the archive in question comprised documents belonging to other tax subjects. However, although the scope of a section 4-10 (1) order was potentially very wide, it did not confer on the tax authorities an unfettered discretion, as the object of such an order was clearly defined in statute.

131. Thus the authorities could not require access to archives belonging entirely to other tax subjects. Where the archive belonged to the tax subject concerned, access could not be demanded to documents belonging to other tax subjects in order to obtain information about them, unless the documents contained information relevant to the tax assessment of the tax subject in question.

132. Furthermore, where several businesses shared archives and their respective parts of the archives were clearly separated, access should be limited to the area of the tax subject concerned. The Court sees no reason for disagreeing with the Supreme Court's finding that the archives at issue were not clearly separated but were so-called "mixed" archives. It could therefore reasonably have been foreseen that the tax authorities should not have had to rely on the tax subjects' own indications of where to find relevant material, but should have been able to access all data on the server in order to appraise the matter for themselves.

133. In the light of the above, the Court considers that the national administrative authorities' and the courts' interpretation and application of section 4-10 (1) as a provision authorising the taking of a backup copy of the server with a view to inspection at the tax authorities' premises were

reasonably foreseeable by the applicant companies in the circumstances. Any measures taken to that end ought to adhere to the above-mentioned limitations, as they transpired from the Supreme Court's reasoning.

134. Against that background, the Court is satisfied that the law in question was accessible and also sufficiently precise and foreseeable to meet the quality requirement in accordance with the autonomous notion of "lawfulness" under paragraph 2 of Article 8.

(b) Legitimate aim

135. The Government submitted that the measures at issue had been taken in the interest of the economic well-being of the country and thus pursued a legitimate aim for the purposes of Article 8 § 2 of the Convention. Their submission was not disputed by the applicant companies.

136. The Court sees no reason for arriving at a different conclusion in this regard.

(c) Necessary in a democratic society

(i) The applicant companies' arguments

137. In the applicant companies' submission, the reasons relied on by the Supreme Court were only partly relevant and certainly not sufficient to convincingly establish that the "seizure" of the backup tape in their case was necessary in a democratic society.

138. The Supreme Court's majority had failed to sufficiently emphasise the broadness of the measure as described above, and the fact that a significant part of the information had been irrelevant for tax audit purposes. The minority had rightly pointed to considerations pertaining to "sensitive personal information" and to the fact that the "seizure" (in the applicants' submission) of a backup tape, as opposed to paper archives, entailed a risk of abuse through the use of advanced search tools and rapid copying and spreading of sensitive information. In so far as Kver and B.L.H. had been forced by the tax authority to "consent" to handing over the backup tape, the measure could even be regarded as an affront to the privilege against self-incrimination.

139. The Supreme Court's majority had also wrongfully distinguished between the administrative investigations at issue in the present case and criminal investigations. The applicant companies would in fact have enjoyed far more extensive procedural guaranties had the "seizure" in their case been carried out pursuant to the Code of Criminal Procedure, including a hearing before an impartial tribunal considering the proportionality of the measure *in concreto*.

140. Whilst the Supreme Court had emphasised that the tax authorities' decision to "seize" the backup tape could not be enforced, it had disregarded the coercive nature of a section 4-10 (1) (b) order and the Government's

shifting position on the matter during the domestic proceedings. Indeed, until the proceedings before the Supreme Court, the Government's position had been that such an order was enforceable.

141. Sections 3-5 and 3-6 (4) of the Tax Assessment Act did not provide effective safeguards against abuse. The affected companies had had no means of controlling the access and review of the backup tape in general. A minimum requirement should therefore be that the backup tape, when not subject to review, should be deposited with an independent third party.

142. The alleged safeguards provided to B.L.H., and particularly to the other two applicant companies, had been full of loopholes and had fallen foul of the requirements in Article 8.

143. The Supreme Court had not been in a position to properly assess the alleged difficulties with respect to on-site reviews and the purported need to obtain a backup copy of the server. It had had no sources of information other than the assertions made by the tax authorities themselves. Whilst in most cases it would probably be more convenient for the tax authorities to carry out a review on their own premises, their affirmation that an on-site review had been difficult was open to question. Since the introduction of computers and electronic archives, the use of search software must surely have facilitated the task of the tax authorities compared with the review of traditional paper archives. It should also be noted that pursuant to section 4-10 (3) of the Tax Assessment Act, the taxpayer was obliged to assist the tax authorities in their review.

144. It was unclear to the applicant companies whether it was through necessity or convenience that less than ten percent of on-site tax audits and archival reviews resulted in "seizures" of electronic documents, and that in the remaining ninety percent of cases, the tax authorities found it sufficient to review the archives on-site. The risk of abuse and arbitrariness appeared obvious.

145. The Supreme Court's ruling had meant that a section 4-10 (1) (b) order was acceptable also where the affected company (namely the company whose archive was "seized") was not the subject of a tax audit or similar inspection. By invoking the mixed-archive doctrine, that is, the argument that the different archives were not distinguishable, the tax authorities in effect had the discretion to demand a copy of an entire server containing several different archives.

146. The Supreme Court's ruling had also left room for considerable legal uncertainty with respect to the scope of the powers conferred on the tax authorities. As illustrated by the tax authorities' demand that Kver provide copies of "all electronically stored information" (see paragraph 13 above), considerations of efficiency and control would have to be strongly invoked in order to justify a very wide interpretation of the concept of "company archive" in section 4-10 (1) (b).

147. Despite the fact that the imposition of a section 4-10 (1) (b) order was not subject to any conditions or qualifications – not even the existence of suspicion that an offence or wrongdoing had been committed – the tax authorities were empowered to demand the "seizure" of an entire server backup tape. This state of affairs of itself rendered the measure disproportionate and incompatible with Article 8 of the Convention.

148. Moreover, unlike decisions by public authorities generally (see section 25 of the Public Administration Act – "*forvaltningsloven*"), the tax authorities were under no obligation to give reasons for their decision to impose a section 4-10 (1) (b) order (section 1-2 of the Tax Assessment Act).

149. A prior judicial authorisation was not a prerequisite for issuing a section 4-10 (1) (b) order and had not been issued in the applicant companies' case. Nor had they been afforded an effective complaints procedure or legal remedies, the procedure under section 3-6 of the Tax Assessment Act being illusory. The Supreme Court's judgment of 20 November 2007 had left very little room for complaints. In essence, it had implied that there had been no need for the tax authorities to give any particular reason as to why the "seizure" was taking place. In cases where several companies shared the same server, the tax authorities could invoke the "mixed-archive doctrine" at their own discretion. The judgment apparently left no scope for effective judicial review of the proportionality and necessity of a "seizure" in a specific case.

(ii) The Government's arguments

150. In the Government's opinion, the reasons adduced to justify the measure in the present case were relevant and sufficient. Orders pursuant to section 4-10 (1) (b) of the Tax Assessment Act were issued in order to ensure an effective tax audit.

151. Furthermore, sections 3-5 and 3-6 of the Tax Assessment Act afforded adequate and effective safeguards against abuse in relation to section 4-10 orders. According to section 3-5 (1), the taxpayer was to be given reasonable notice and have the right to be present and express his or her views at an inspection of the records. Section 3-5 (2) required a written report to be drawn up describing the factual information that had been collected. If the person concerned by the order believed that he or she was not required or legally permitted to comply with the order, a complaint could be lodged against the order (section 3-6 (1)). In the event of a complaint, section 3-6 (4) provided that an extension would be granted if the documents were sealed and deposited. Lastly, the lawfulness of the order could be challenged before the national courts.

152. Contrary to the assertions of the applicant companies, the fact that an order to allow the inspection of records could be issued without prior judicial authorisation did not mean that the above-mentioned safeguards were ineffective. Since a section 4-10 (1) (b) order could not be legally

enforced, a requirement of prior judicial authorisation would be unreasonable. Bearing in mind that the tax authorities were not empowered to carry out an inspection if the taxpayer refused to cooperate with the order, there could be no need for prior judicial authorisation, which moreover was not an absolute requirement according to the Court's case-law (see *Smirnov v. Russia*, no. 71362/01, § 45, 7 June 2007, and *Mastepan v. Russia*, no. 3708/03, § 43, 14 January 2010).

153. The Government disputed that a taxpayer might be liable to punishment if he or she refused to cooperate with a section 4-10 (1) (b) order; such a possibility was only theoretical. There were no examples to the contrary nor had such measures been contemplated here.

154. They also disagreed that the risk of misuse of sensitive personal data would increase if backup copies were taken to the tax office rather than inspected on the taxpayer's premises. Again, they emphasised that no individuals working for the applicant companies had presented themselves as applicants before the Court; thus, any matters pertaining to their interests fell outside the scope of the case.

155. The measure in question was also strictly proportionate to the aim pursued. In no way could the tax authorities' decision to issue the section 4-10 (1) (b) order be viewed as arbitrary. BLH had been selected for tax audit because the tax authorities had had reason to believe that there had been a commonality of interest between B.L.H. and I.O.R. On several occasions they had asked B.L.H. to provide information concerning the transactions and the relationship between the two companies, but B.L.H. and I.O.R. had both failed to provide such information. The order to allow the inspection of records had been issued more than a year after the tax audit had been started and after the tax payer had repeatedly been asked to produce the documentation necessary to verify the information provided in the tax return. In those circumstances, it had been apparent that an on-site inspection would have been far less effective than a subsequent inspection at the tax office.

156. In the instant case, sections 3-5 and 3-6 of the Tax Assessment Act, together with the right to judicial review, had provided the applicant companies with adequate and effective safeguards. Indeed, after they had complained about the section 4-10 (1) (b) order, the backup copy of the server had been sealed and the applicant companies had been granted an extension pursuant to section 3-6 (4) of the Tax Assessment Act. They had been granted a further extension pending a final and enforceable judgment and, subsequent to the Supreme Court judgment, yet a further extension in connection with legal proceedings on interim relief. Thus, whilst in most cases a backup tape would within a short time be reviewed in accordance with the section 4-10 (1) (b) order, in the present case the tax authorities had been in the possession of the backup tape for almost six years and had repeatedly agreed to defer their review of the tape.

157. In sum, the impugned measure had been "necessary in a democratic society".

(iii) The Court's assessment

158. In determining whether the impugned measure was "necessary in a democratic society", the Court will consider whether, in the light of the case as a whole, the reasons adduced to justify it were relevant and sufficient, and whether it was proportionate to the legitimate aim pursued. In so doing, the Court will take into account that the national authorities are accorded a certain margin of appreciation, the scope of which will depend on such factors as the nature and seriousness of the interests at stake and the gravity of the interference (see, for instance, *Z v. Finland*, 25 February 1997, §§ 94 and 99, *Reports of Judgments and Decisions* 1997-I, and *Leander v. Sweden*, 26 March 1987, § 58, Series A no. 116).

159. One factor that militates in favour of strict scrutiny in the present case is that the backup copy comprised all existing documents on the server, regardless of their relevance for tax assessment purposes (see *Miailhe v. France (no. 1)*, 25 February 1993, § 39, Series A no. 256-C, and *Niemietz*, cited above, § 32). On the other hand, the fact that the measure was aimed at legal persons meant that a wider margin of appreciation could be applied than would have been the case had it concerned an individual (see, *mutatis mutandis*, *Niemietz*, cited above, § 31).

160. The Court notes that a tax audit pursuant to section 4-10 (1) of the Tax Assessment Act complemented the duty of the tax subject to provide accurate information to the tax authorities to enable them to make a correct tax assessment (see paragraph 67 above).

161. The purpose of measures taken under sub-paragraph (b) of section 4-10 (1) was to enable the tax authorities to assess whether the tax subject possessed documents the production of which could be imposed under sub-paragraph (a). There is no reason to call into doubt the view held by the Norwegian Parliament when adopting those provisions that the review of archives was a necessary means of ensuring efficiency in the checking of information which tax subjects submitted to the tax authorities, as well as greater accuracy in the information so provided and in the latter's tax assessment (see paragraphs 41 and 42 above). Nor is there any reason to assume that the impugned application of section 4-10 (1) was based on any other considerations in the instant case. On the contrary, 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 was supported by reasons that were both relevant and sufficient for the purposes of the necessity test under Article 8 § 2.

162. It remains to consider whether the interference complained of was proportionate to the legitimate aim pursued.

163. As stated above (see paragraph 159), the interference was particularly far-reaching in that the backup tape contained copies of all existing documents on the server, including, as was undisputed, large quantities of material that was not relevant for tax assessment purposes, *inter alia*, private correspondence and other documents belonging to employees and persons working for the companies (see paragraphs 10, 14, 19-20, 54 and 59 above). An important consideration in the present case, therefore, is whether the procedure relating to the authorities' obtaining access to a backup copy of the server with a view to inspecting it in the tax office was accompanied by effective safeguards against abuse.

164. The Court recalls the various limitations highlighted in paragraphs 122 to 129 above to the effect that that section 4-10 (1) did not confer on the tax authorities an unfettered discretion, notably with regard to such matters as the nature of the documents that they were entitled to inspect, the object of requiring access to archives and of authorising the taking of a backup tape. Furthermore, it is to be noted that B.H.L. had been notified of the tax authorities' intention to carry out a tax audit a year in advance, and both its representatives and those of Kver were present and able to express their views when the tax authorities made their on-site visit on 9 March 2004 (section 3-5 (1) of the Tax Assessment Act).

165. In particular, the Court observes that, not only was a right to complain available under section 3-6 (1), as soon as the first and second applicants complained about the section 4-10 (1) measure in their case – which they apparently did immediately – the backup copy was placed in a sealed envelope that was deposited at the tax office pending a decision on the complaint (section 3-6 (4) of the Act and Article 4 of the 1983 Regulations on Accountancy Audits; see paragraphs 71 and 73 above).

166. The Court has further taken account of the other safeguards set out in the above-mentioned regulation, notably the right of the tax subject to be present when the seal is broken, except where that would cause considerable delay (Article 4); the duty of those responsible for the audit to draw up a report (section 3-5 (2) of the Act, Article 5 of the Regulation); the right of the tax subject to receive a copy of the report (Article 6); and the duty of the authorities to return irrelevant documents as soon as possible (Article 7) (see paragraphs 71 to 75 above).

167. The applicant companies apparently did not complain that the tax authorities had reviewed the backup copy during the period between January and March 2006 in order to assist the police in the investigation of the criminal case involving Mr X (see paragraph 65 above). After completion of the review, all electronically stored documents were deleted and all paper documents were shredded with immediate effect. The Court sees no need for it to pronounce any view on the matter.

168. On the other hand, the applicant companies were concerned that the authorities had copied the contents of the backup tape to hard disk. The

Court observes that from the material submitted, it transpires that this was done after 5 June 2007, the applicant companies were informed thereof on 19 June 2007 and it had been necessary in order to make it possible to open and read the files (see paragraph 63 above). Material so copied would be secured pending the further proceedings, by which time the tax authorities at two levels and both the City Court and the High Court had upheld the impugned measures as being lawful.

169. It was only later, after the delivery of a final judgment by the Supreme Court, that the tax authorities decided to review the material in question and thus, on 28 January 2008, notified the applicant companies of their intention to open the sealed envelope containing the tape with a view to ordering the production of documents. They informed them of the dates, time and place of the review, its object, certain preparatory processing not involving searching or opening of documents, and the identity of the companies concerned. The tax authorities also invited them to appoint a common representative to attend the preparations and the opening and review of the tape.

170. The Court has taken note of certain criticism expressed by the applicant companies regarding the practical measures envisaged for the viewing of the files in their representative's presence, notably their inability to watch the computer screen. However, it does not find that this gives rise to any serious cause for concern. As can be seen from the Tax Administration's letter to the applicant companies of 30 April 2008, the constraints in this respect essentially stemmed from the mixed character of the archives and were designed to accommodate the applicant companies' own wishes to respect confidentiality. Any documents selected would be listed, printed out and sorted according to company and be made accessible to the company in question for comment (see paragraph 65 above).

171. Furthermore, as observed by the Supreme Court, after the review had been completed, the copy would either be deleted or destroyed and all traces of the contents would be deleted from the tax authorities' computers and storage devices. The authorities would not be authorised to withhold documents from the material that had been taken away unless the tax subject accepted the measure. There is no reason to doubt that the tax authorities would follow that procedure in the applicant companies' case (see paragraph 64 above).

172. In the light of the above, while it is true that no requirement of prior judicial authorisation applied in the instant case (compare *Funke v. France*, 25 February 1993, § 57, Series A no. 256-A; *Crémieux v. France*, 25 February 1993, § 40, Series A no. 256-B; and *Miailhe*, cited above, § 38), the Court is satisfied that the interference with the applicant companies' rights to respect for correspondence and home which the contested section 4-10 (1) order entailed was subject to important limitations and was accompanied by effective and adequate safeguards

against abuse (see, *mutatis mutandis*, *Klass and Others v. Germany*, 6 September 1978, § 50, Series A no. 28; *Leander*, cited above, § 60; and *Z*, cited above, § 103).

173. It should also be observed that the nature of the interference complained of was not of the same seriousness and degree as is ordinarily the case of search and seizure carried out under criminal law, the type of measures considered by the Court in a number of previous cases (see, for instance, the following cases cited above: *Funke*; *Crémieux*; *Miailhe; Niemietz; Société Colas Est and Others; Buck*; *Sallinen and Others*; *Wieser and Bicos Beteiligungen GmbH*; and also *Robathin v. Austria*, no. 30457/06, 3 July 2012). As pointed out by the Supreme Court, the consequences of a tax subject's refusal to cooperate were exclusively administrative (see in particular paragraph 43 and also paragraphs 106 and 153 above). Moreover, the disputed measure had in part been made necessary by the applicant companies' own choice to opt for "mixed archives" on a shared server, making the task of separation of user areas and identification of documents more difficult for the tax authorities (see paragraphs 46-47 above).

174. Having regard to the circumstances of the case as a whole, the Court finds that the impugned section 4-10 (1) measure in the instant case was supported by relevant and sufficient reasons. It also sees no reason to doubt that the tax authorities of the respondent State, acting within their margin of appreciation, struck a fair balance between the applicant 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 efficiency in the inspection of information provided by the applicant companies for tax assessment purposes, on the other hand.

175. Accordingly, there has been no violation of Article 8 of the Convention in the present case.

FOR THESE REASONS, THE COURT

1. *Declares* the application admissible unanimously;

2. *Holds* by five votes to two that there has been no violation of Article 8 of the Convention.

Done in English, and notified in writing on 14 March 2013, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen	Isabelle Berro-Lefèvre
Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the dissenting opinion of Judges Berro-Lefèvre and Laffranque is annexed to this judgment.

I.B.L.
S.N.

DISSENTING OPINION OF JUDGES BERRO-LEFÈVRE AND LAFFRANQUE

(Translation)

The case that has been examined by the First Section is important, firstly because it deals with a issue which is in constantly development, given the ever-increasing role of information technology in all areas of society, and secondly because the Court's case-law on the protection of data and information systems is limited.

To our great regret, we disagree with the majority as regards the finding that there has been no violation of Article 8 of the Convention, for two main reasons: in the first place, the domestic law did not establish with sufficient precision the conditions in which the Norwegian tax authorities were entitled to make a complete copy of the server belonging to the applicant companies for the purpose of subsequent consultation in the former's premises; secondly, the procedure used by those same authorities was not accompanied by sufficient and adequate safeguards against abuse.

With regard to the legal basis, it should be noted from the outset that the requirement of accessibility and foreseeability is intended to ensure adequate protection against arbitrary interference and that, to this end, the scope and manner of exercise of the powers conferred on the relevant authorities must be defined with sufficient clarity (see, in this connection, *Malone v. the United Kingdom*, 2 August 1984, Series A no. 82, § 67, and *Rotaru v. Romania* [GC], no. 28341/95, § 55, ECHR 2000-V).

In holding that the law (section 4-10(1) of the Tax Assessment Act) was accessible and foreseeable, that is, formulated with sufficient precision to enable the individual – if need be with appropriate advice – to regulate his conduct, the majority found that the legal provisions in section (4-10 (1) (a) specified the nature of the documents which taxpayers could be required to furnish to the tax authorities in the context of their audit and provided for the possibility of carrying out on-site inspections and examining archives (section 4-10 (1) (b)). On the basis of the Supreme Court's reasoning in its judgment of 20 November 2007, the majority consequently held, on the one hand, that electronic documents were also covered by the relevant provisions of section 4-10(1)(a), and, on the other, that there was nothing to prevent the tax authorities from making a complete copy of the server for the purpose of consulting it in their premises.

We consider that such an interpretation of the provisions of section 4-10 (1) goes too far and cannot be "deduced" from the text in question.

The Norwegian tax system is indeed based on the principle of "self assessment", and the authorities enjoy wide investigative powers. The tax authorities are entitled to order a taxpayer to grant access for inspections of

the taxpayer's business premises and can request anything, on the presumption that there exists additional information which could be found in other documentation; this includes reviewing the company' archives.

We could agree that it would have been difficult for the authorities, faced with a situation where the archives of several companies were held together on the same server (mixed archives), to identify the information relevant to the company being audited, and that it was for those companies to organise their affairs in such a way that their data could be separated.

In contrast, in our opinion, the provisions of section 4-10 (1) b do not permit those same authorities to make a complete copy of the backup server for the purpose of consulting its contents in their own premises. Furthermore, the Supreme Court was itself conscious of the difficulty when it recognised that "the answer did not follow directly from section 4-10 (1) (b) of the Tax Assessment Act" (paragraph 49).

In our opinion, the justifications given both by the Supreme Court and the majority of the Chamber judges are insufficient. Neither the necessity for an interpretation of the text adapted to the situation, nor the time-consuming nature of an on-site inspection justified such an extensive interpretation of the legislation. As Mr Justice Skoghoy pointed out in his minority dissenting opinion "the provision was limited to 'review'. To demand a copy was something else and much more far reaching. The reason why the majority in Parliament in 1980 had been in favour of conferring on the tax authorities a power to search and seize material was that they had believed that the authorities should be able to ensure that important documents had not been "hidden or destroyed (notably burned)". If the tax authorities were allowed to demand a copy of the archive, they would in reality be empowered to seize, a power which the majority in Parliament in 1984 had not wished to give them when removing a provision to that effect before the entry into force of the relevant part of the Tax Assessment Act."

The "seizure" of the backup tape concerned a large amount of data pertaining to a wide group of people and important interests, such as private individuals' e-mails and correspondence by employees and other persons working for the companies. Such a scenario implies that the requirement for precision had to be strict. This view is supported in, for example, *Petri Sallinen and Others v. Finland*, no. 50882/99, 27 September 2005, § 90, in which the Court states that "search and seizure represent a serious interference with private life, home and correspondence and must accordingly be based on a "law" that is particularly precise. It is essential to have clear and detailed rules on the subject".

In this respect, we cannot follow the Chamber's reasoning in paragraph 173 of the judgment, where it finds that the copying of complete electronic archives for subsequent use constituted a lesser form of interference because it took place as part of a tax audit, in contrast to cases where seizure takes place in the context of criminal proceedings.

Firstly, the Government themselves have recognised in their observations that the refusal to cooperate with an order pursuant to section 4-10 (1) (b) is liable to punishment pursuant to section 12-1 (1) of the Tax Assessment Act, which provides for a fine or imprisonment for a term not exceeding 2 years.

Furthermore, the nature of the interference, and the risks linked to danger of abuse is equally great, whatever the purpose of the seizure. In the criminal field, however, the Court's case-law surrounds such measures with a number of important safeguards against abuse and arbitrariness, and particularly "whether the search was based on a warrant issued by a judge and based on reasonable suspicion [and] whether the scope of the warrant was reasonably limited" (see *Niemietz v. Germany*, 16 December 1992, § 37, and *Wiser and Bicos Beteiligungen GmbH v. Austria*, no. 74336/01, 16 October 2007, §56).

In our case, however, even supposing that the entitlement to interfere may be more extensive where the business premises of a legal person are concerned (see *Société Colas Est and Others v. France*, no. 37971/97, § 49, ECHR 2002-III), the tax authorities were given wholly unfettered discretion to copy the entire backup tape – without need of warrant or judicial authorisation – and we note that only a minor part of the information contained therein was relevant for the tax audit of B.L.H. The tax authorities were given broad powers to consult documents, including those of no relevance for tax audit purposes, and the decision to copy the server was linked to their discretion, without the need to provide reasons.

The applicant companies were under a legal obligation to comply with the order to grant access to the server, which was copied in its entirety, while, at the same time, the Norwegian authorities had no grounds to suspect (at least on the basis of the documents or information already in their possession) that the applicants had failed to fulfil their tax obligations.

In our opinion, the majority has not sufficiently emphasized the seriousness of the interference: having failed to attach sufficient weight to the coercive nature of the measure, it has disregarded the potential legal consequences of the backup copy for the applicants, without affording them adequate and effective safeguards against abuse. This view finds strong support in Judge Skoghoy's dissenting opinion: "The fact that the taxpayer ... has the right to be present when the tax authorities open and conduct their review of the archive does not in any way guarantee against abuse. It would not be possible to control whether this right is being respected. Important legal protection and personal integrity considerations therefore argue against granting the tax authorities the right to demand copies of the archive".

In the absence of any suspicion of fraud by the company being audited, the Government do not explain why a measure on such a scale was necessary, although an on-site inspection of the server, in accordance with the law, would have enabled the same objectives to be achieved effectively.

Of course, it was probably more convenient for the tax authorities to make a copy, but the disadvantages inflicted on all three applicants as well as their employees through the impugned measure far outweigh the alleged advantages which the authorities may have obtained by conducting an examination at their own premises. It is important to emphasise at this point that Kver and IOR, like the first audited company BLH, have found that significant amounts of important documents were copied and they expect these documents to be reviewed by the tax authorities.

We regret that the majority attach decisive weight to the interests of the taxation authorities, without giving sufficient consideration to the interests of the other parties affected. We consider that the protection afforded to legal persons in this regard must also entail the consideration that people working for such companies are, as a group, afforded protection from arbitrary interference. Employees and other people working for the applicant companies must also have such protection, where professional and private correspondence and a large volume of work-related documents, irrelevant to tax-audit purposes, are taken by the authorities and lie open for review in their premises.

Copying of backup tapes means that the authorities have access to surplus information of a different nature. Electronically stored data can be reconstructed, or might be disseminated far more easily than information on paper. There is no regulation in the law regarding the keeping, handling, return and destruction of this copied material.

In sum, we consider that the order to hand over a backup tape on which all or most of the companies' documents were kept greatly exceeded the wording of the legal provision, from which no such power could be deduced. We conclude that the domestic law does not indicate with sufficient clarity the scope and manner of exercise of the authorities' discretion in the area under consideration, and that the interference was in any event disproportionate. There has been a violation of Article 8 of the Convention.