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Judgment in Joined Cases E-3/13 and E-20/13 *Fred. Olsen and Others and Petter Olsen and Others* v *The Norwegian State, represented by the Central Tax Office for Large Enterprises and the Directorate of Taxes*

NATIONAL TAX LEGISLATION ON CONTROLLED FOREIGN COMPANIES CAN ONLY APPLY TO WHOLLY ARTIFICIAL TAX ARRANGEMENTS

Trusts may invoke fundamental freedoms

In a judgment delivered today, the EFTA Court answered questions referred to it by Tax Appeals Board for the Central Tax Office for Large Enterprises ("Tax Appeals Board") and Oslo District Court regarding the interpretation of the rules on freedom of establishment and the free movement of capital in relation to the Norwegian controlled foreign company tax legislation ("CFC rules") which permits national taxation of capital placed in a low-tax country.

The cases before the referring courts both concern the taxation of Norwegian beneficiaries of Ptarmigan Trust established in Liechtenstein, and governed by Liechtenstein law, to hold the interests of the Olsen family in certain companies. The trust has been registered by the Liechtenstein tax authorities as an "asset management" trust. The trust has a tax exemption, which was conditional on the trust not engaging in business or commercial activities on the Liechtenstein market. Since the adoption of the CFC rules, Norwegian tax authorities have held the participants in the trust to be liable to domestic CFC taxation on their share of the profit achieved by the trust.

The Court found that a trust, such as Ptarmigan Trust, falls within the scope of the freedom of establishment pursuant to Article 31 EEA provided that it pursues a real and genuine economic activity within the EEA for an indefinite period and through a fixed establishment.

The Court noted that it depends on the facts of the case in point whether the situation to which the disputes relate falls within the scope of the freedom of establishment or the free movement of capital. This must be determined by the national courts, taking account of the Court's considerations. The Court held that beneficiaries of capital assets set up in the form of a trust that are subject to national tax measures such as those at issue in the main proceedings may be able to invoke Article 40 EEA in the event that they are not found to have exercised definite influence over an independent undertaking in another EEA State or engaged in an economic activity that comes within the scope of the right of establishment.

The Court found the difference in treatment entailed in the national CFC rules to constitute a restriction on the right of establishment within the meaning of Articles 31 and 34 EEA. It creates a tax disadvantage for resident taxpayers to whom the legislation applies, which is such as to hinder the exercise of their right to establishment. If the tax disadvantage is such as to hinder the beneficiaries from investing funds in another EEA State, without any intention to influence the control or the management of an undertaking, and from engaging in the movement of capital of a personal nature, it constitutes a restriction on the free movement of capital within the meaning of Article 40 EEA and Annex XII to the EEA Agreement.

Moreover, a rule of national law entailing that, in contrast to participants in comparable domestic entities, personal participants in a CFC in another EEA State are not afforded any opportunity to undo the economic double taxation that the CFC rules entail constitutes a restriction on the right of establishment under Articles 31 and 34 EEA, or, depending upon the assessment of the national court, the free movement of capital which is, in principle, prohibited by Article 40 EEA.

As regards possible justification for such legislation, the Court held that a national measure restricting freedom of establishment or, where applicable, the free movement of capital may be justified where it specifically relates only to wholly artificial arrangements aimed at escaping national tax normally due and where it does not go beyond what is necessary to achieve that purpose. What is decisive is the fact that the activity, from an objective perspective, has no other reasonable explanation but to secure a tax advantage. Accordingly, such a tax measure must not be applied where it is proven, on the basis of objective factors which are ascertainable by third parties, that despite the existence of tax motives a CFC is actually established in the host EEA State and carries on genuine economic activities, which take effect in the EEA.

The Court also assessed the difference in tax rate between the plaintiffs as beneficiaries of Ptarmigan Trust and the beneficiaries of family foundations or asset funds that are not subject to wealth taxation under Norwegian law. It held that it is for the national court to determine whether these two entities are in an objectively comparable situation, noting that the closest equivalent to a family trust in Norwegian law appears to be a family foundation or asset fund. If the situation is found to be comparable then the difference in tax rate constitutes a restriction under Article 31 EEA or, in the alternative, Article 40 EEA. Such a restriction cannot be justified.

The full text of the judgment may be found on the Internet at: www.eftacourt.int.

This press release is an unofficial document and is not binding upon the Court.