JUDGMENT OF THE COURT

of 9 July 2014

in Joined Cases E-3/13 and E-20/13 between:

Fred. Olsen and Others and Petter Olsen and Others

and

The Norwegian State, represented by the Central Tax Office for Large Enterprises and the Directorate of Taxes

(Taxation of controlled foreign companies — Right of establishment — Free movement of capital — Circumvention of national law — Justification — Proportionality)

(2015/C 68/05)

In Joined Cases E-3/13 and E-20/13, between Fred. Olsen and Others and Petter Olsen and Others and The Norwegian State, represented by the Central Tax Office for Large Enterprises and the Directorate of Taxes — REQUESTS to the Court pursuant to Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice by the Tax Appeals Board for the Central Tax Office for Large Enterprises (*Skatteklagenemnda ved Sentralskattekontoret for storbedrifter*) and Oslo District Court (*Oslo tingrett*), concerning the interpretation of the rules on freedom of establishment and the free movement of capital, in particular the interpretation of Articles 31 and 40 of the EEA Agreement, 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 Court, composed of Carl Baudenbacher, President, Per Christiansen and Páll Hreinsson (Judge-Rapporteur), Judges, gave judgment on 9 July 2014, the operative part of which is as follows:

1. – 2. A trust such as Ptarmigan Trust falls within the scope of Article 31 EEA provided that the trust pursues a real and genuine economic activity within the EEA for an indefinite period and through a fixed establishment. Whether this is the case is for the national court to assess. All interested parties, that is to say the trust's settlors, trustees and beneficiaries hold the rights under Articles 31 and 34 EEA.

3. 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 economic activity that comes within the scope of the right of establishment. It is for the national courts to make the final assessment in that regard, based on the factual circumstances of the case.

4. The difference in treatment entailed by section 10-60 of the Tax Act creates a tax disadvantage for resident taxpayers to whom the legislation on controlled foreign companies applies, which is such as to hinder their exercise of freedom of establishment, dissuading them from establishing, acquiring or maintaining a subsidiary in an EEA State in which the latter is subject to low levels of taxation. It therefore constitutes a restriction on freedom of establishment within the meaning of Articles 31 and 34 EEA. If the tax disadvantage resulting from the differential treatment for resident taxpayers under section 10-60 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 controlled foreign company in another EEA State are not afforded any opportunity to undo the economic double taxation that the Norwegian CFC rules entail constitutes a restriction on the freedom 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.

5. A restriction on the freedom of establishment or, where applicable, the free movement of capital resulting from national CFC legislation such as that applicable in the main proceedings may be justified on grounds of overriding public interest, in particular on considerations of preventing tax avoidance or maintaining the balanced allocation of taxing powers between EEA States. The restriction is proportionate if it relates only to wholly artificial arrangements which seek to escape the national tax payable in comparable situations. 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 controlled foreign company is actually established in the host EEA State and carries on genuine economic activities, which take effect in the EEA.

6. It is for the national court to determine whether the plaintiffs as beneficiaries of Ptarmigan Trust are in a comparable situation to beneficiaries of family foundations or asset funds that are not subject to wealth taxation under Norwegian law. If so, the difference in tax rate constitutes a restriction under Article 31 EEA or, in the alternative, Article 40 EEA.

7. The difference in tax rate cannot be justified if the beneficiaries of Ptarmigan Trust are in a comparable situation to beneficiaries of family foundations or asset funds not subject to wealth taxation under Norwegian law.