

Olsen Case: Joined Cases E-3/13 and E-
20/13
«A Ptarmigan for more fairness in tax
issues»

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Overview: The Ptarmigan / Olsen case

- Introduction & Facts
- Judgement
- Implications
- Conclusions for Liechtenstein



Introduction & Facts

EFTA-court-decision, 9 July 2014:

Fred Olsen and Others v. Norway

The involved:

Ptarmigan Trust and its beneficiaries

Norwegian Tax Administration

N, FL, UK, F, EEA, EU

The claims and allegation:

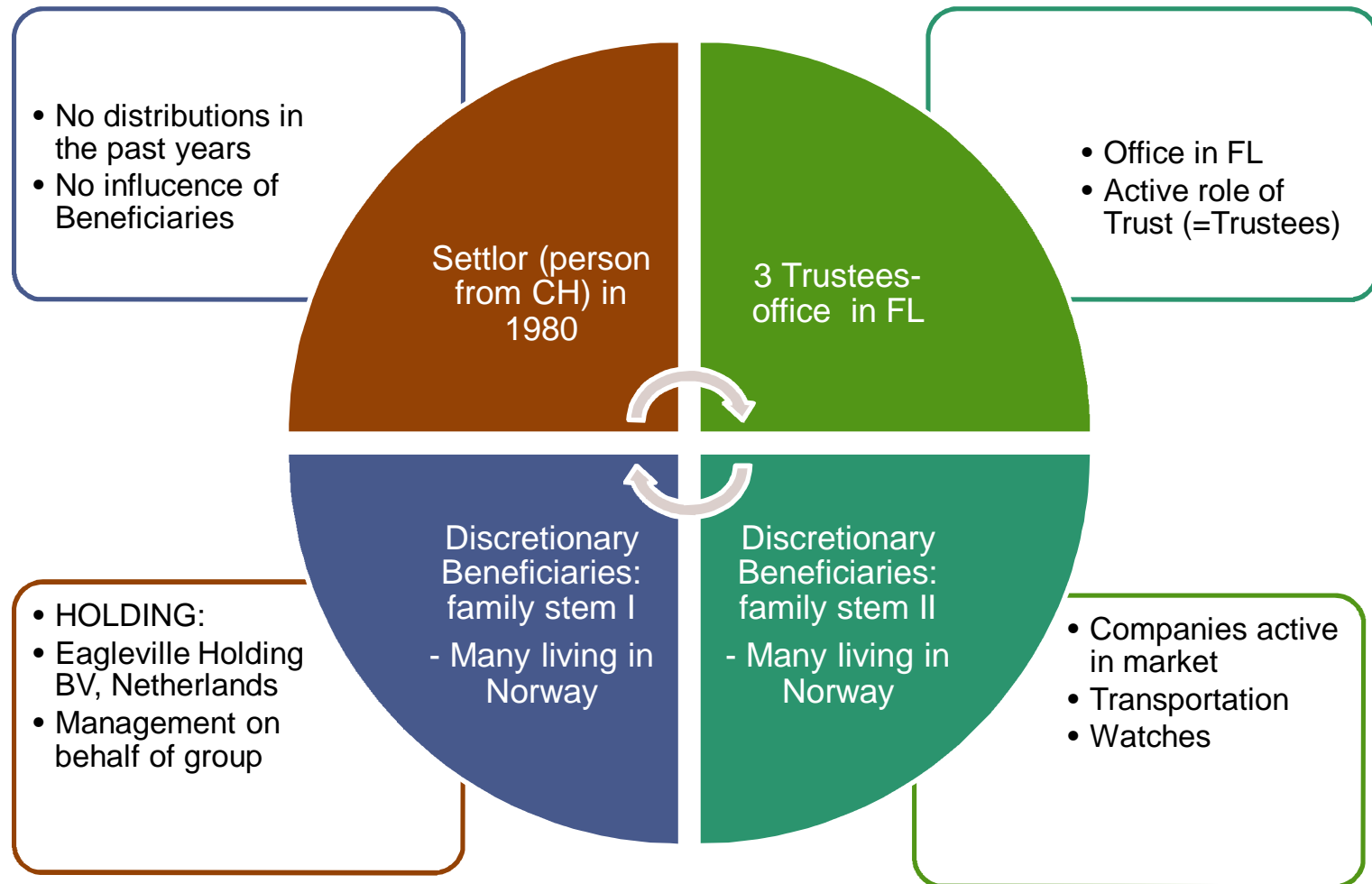
1. A Trust cannot rely on the 4 freedoms – really?
2. CFC (controlled foreign company)- rule applied

Nr. 47 - The purpose of the CFC rules is to prevent tax avoidance and to give the same tax treatment to Norwegian capital whether the investment takes place in Norway or in a low-tax country (capital export neutrality)

Target missed:

1. wealth tax: 1.1% <-> 0.3%
2. Being taxed without receiving funds!

The Ptarmigan Trust and how it works



Judgment – I: Trust ... doesn't matter

- Do **trusts** fall within the scope of the **freedom of establishment** (EEA 31)?

→ Broad meaning of «concept of establishment» (Nr. 94);
European interpretation – there is no overall harmonisation on the concept of «companies»

→ Pursuit of real and **genuine economic activities**

*Nr. 99: "If a specific assessment reveals, for example, that the trust is involved in the management of a group's companies or other activities for a group, such as managing a pool of resources, and its actual incorporation reflected its actual activities, it has to be regarded as a **real and genuine economic activity**, which constitutes establishment." AND "[...], it is not required that the economic activities take effect in the EEA State of establishment. It suffices that they take effect in the EEA."*

→ Trust falls within the scope of EEA 31

Judgment II – criteria for establishment ...

NOT: wholly artificial arrangements – Cadbury Schweppes C-196/04 as point of reference

98 A fixed establishment may be gained and maintained by such activities as settling personally in the host State, establishing the **seat of management** there and/or **recruiting staff** to **perform the services that may be required** from the establishment there. In contrast, an entity not carrying out any business in another EEA State, due to the extent it exists in terms of premises, staff and equipment, and whose incorporation may thus not reflect economic reality cannot invoke Articles 31 and 34 EEA due to its lack of actual economic activity (compare, to that effect, Case C-196/04 *Cadbury Schweppes and Cadbury Schweppes Overseas* [2006] ECR I-7995, paragraphs 67 to 68, and case law cited).



Judgment III – free movement of capital ...

For the sake of completeness:

*Nr. 125 – “In light of the preceding considerations, the answer to the third question must be 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. “*

In the case at hand: obviously freedom of establishment

Judgment – IV: CFC and its limits...

CFC «permits national taxation of capital placed in a low-tax country” – under certain circumstances

1. Prohibition of discrimination (Nr 137) - Comparing the situation in both countries (nr. 138)
2. Overriding reasons for CFC? **Justified and Proportionate?**

Do the Norwegian CFC-rule involve a restriction on the freedom of establishment?

- Yes.

Are there overriding (public) interests to justify the restriction?

1. Improper and fraudulent advantages of EEA
2. Nr. 166: “wholly artificial arrangements which do not reflect economic reality and **the sole purpose** of which is to avoid the tax normally payable” => purely artificial structure
3. Nr. 168: “**jeopardise a balanced allocation** between EEA States of the power to impose taxes”

Is legislation for CFC to be deemed justified and proportionate?

- Ptarmigan Trust → reflects economic reality, no abusive behaviour

General Implications

- A trust falls within scope of freedom of establishment
- All interested parties (settlor, trustee, beneficiaries) hold the rights under Art 31 & 34 EEA
- CFC-legislation is a restriction of freedom rights – Justification within narrow limits

Nr. 175: “**The intention to benefit from a tax advantage is not in itself sufficient to constitute an artificial arrangement and neither is the fact that the activities of the foreign entity could have been carried out by an entity established in the home State.** [There must be a case by case assessment.] What is decisive is the fact that the activity, from an objective perspective, has no other reasonable explanation but to secure a tax advantage. If this is the case, the arrangement is purely artificial [...]”

Conclusions for Liechtenstein

Discrimination of Liechtensteiner companies and structures without specific, transparent and objective reasons are *not* admissible

1. Low taxes are no sin.
2. Respect for taxation of «home state» of Beneficiaries, but not more.
3. 31/40 EEA are applicable «even» if the establishment is a TRUST.
4. Substance and genuine economic activity as basic aspects.
5. Effectiveness of EEA freedoms.
6. Rimbaud should no longer be of importance (C-72/09 *Etablissement Rimbaud v Directeur général des impôts and Directeur des services fiscaux d'Aix-en-Provence*)

Thank you for your attention



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