JUDGMENT OF THE COURT

23 November 2004*

(Free movement of capital – taxation of dividends – tax credit granted exclusively to shareholders resident in a Contracting Party – denial of procedural rights to shareholders resident in other Contracting Parties)

In Case E-1/04,

REQUEST to the Court under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice by Frostating lagmannsrett (Frostating Court of Appeal), Norway, in a case pending before it between

Fokus Bank ASA

and

The Norwegian State, represented by Skattedirektoratet (the Directorate of Taxes)

on the interpretation of the rules of free movement of capital within the EEA,

THE COURT,

composed of: Carl Baudenbacher, President and Judge-Rapporteur, Per Tresselt and Thorgeir Örlygsson, Judges,

Registrar: Henning Harborg,

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* Language of the Request: Norwegian.

having considered the written observations submitted on behalf of:

– Fokus Bank ASA (hereinafter the "Appellant"), by Bettina Banoun, Advokat;

– the Norwegian State (hereinafter the "Respondent"), by Thomas Nordby, Advokat, Office of the Attorney General (Civil Affairs), acting as Agent, and Amund Noss, Advokat, Office of the Attorney General (Civil Affairs), acting as co-agent;

– the EFTA Surveillance Authority, by Niels Fenger, Director, and Per Andreas Bjørgan, Senior Legal Officer, acting as Agents;

– the Commission of the European Communities, by Richard Lyal, Legal Adviser, and Hans Støvlbæk, Member of its Legal Service, acting as Agents;

– the United Kingdom, by Mark Bethell, Treasury Solicitor's Department, acting as Agent, and by Gerald Barling, QC, David Ewart and Jemima Stratford, Barristers;

having regard to the Report for the Hearing,

having heard oral argument of the Appellant, represented by Bettina Banoun, the Defendant, represented by Thomas Nordby, the EFTA Surveillance Authority, represented by Per Andreas Bjørgan and the Commission of the European Communities, represented by Richard Lyal at the hearing on 28 September 2004,

gives the following

Judgment

I Facts and procedure

1 By a decision of 23 April 2004, registered at the Court on 27 April 2004, Frostating lagmannsrett referred to the Court under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (the "ESA/Court Agreement") two questions on the interpretation of Article 40 EEA.

2 Those questions arose in the context of a dispute between the Appellant, a joint stock company, and the Directorate of Taxes over the tax assessment of dividends the Appellant distributed to its shareholders in 1997 and 1998. Among those shareholders were two companies residing in Germany and the United Kingdom respectively. Immediately before the decision to pay out dividends was

taken, these companies sold their shares in the Appellant to companies residing in Norway, and exercised an option to buy the shares back shortly after the dividend payments had been completed.

3 In accordance with regular practice, the Appellant withheld withholding tax before paying dividends to shareholders who, according to the register of Verdipapirsentralen ("VPS"; the Central Securities Depository), were resident outside Norway. Where the VPS register showed that the shareholders were resident in Norway, tax was not withheld.

4 In a final decision following administrative proceedings on a revision of the tax assessment, Trondheim overligningsnemnd (the Trondheim Tax Assessment Appeals Board) in 2001 found that, for tax purposes, the foreign shareholders had, at the time of distribution of the dividends, to be regarded as the owners of the shares in the Appellant. In 2003, Trondheim kemnerkontor (the Trondheim Tax Collection Office) held that the Appellant was liable for the tax obligations resulting from the reclassification of ownership.

5 Throughout the administrative proceedings, only the Appellant was notified and granted procedural rights as a party, and not the shareholders residing in Germany and the United Kingdom.

6 The Appellant brought an action before Trondheim tingrett (the Trondheim District Court) against the Norwegian State claiming repayment of assessed withholding tax in cases where tax was assessed based on information other than that contained in the VPS register at the time of distribution of dividends. On 18 June 2003, Trondheim tingrett rendered judgment dismissing the claims. The Appellant appealed against that judgment to Frostating lagmannsrett.

7 The Frostating lagmannsrett referred the following questions to the Court:

> *1. Is it consistent with Article 40 of the EEA Agreement that imputation tax credit for withholding tax is not granted to taxpayers resident in other Member States?*
>
> *(a) Is it of legal significance whether the taxpayer is resident in a Member State which, in a tax agreement with Norway, has undertaken to grant credit for withholding tax?*
>
> *(b) Is it of legal significance whether the taxpayer in the specific case actually is granted, or will be granted, credit for the withholding tax?*
>
> *2. Is it consistent with the EEA Agreement that a Member State deals solely with the distributing company when assessing and reassessing dividend tax (withholding tax) in those cases where the assessment decision for the foreign taxpayers is based on the assumption that the owner for tax purposes is someone other than the person who (1) is the owner under private law; (2) is registered in the VPS register as owner;*

and (3) is stated as owner in relation to the tax authorities, without either the owner for tax purposes or the VPS-registered owner under private law having been made aware of the reclassification?

II Legal background

National Law

8 Under Chapter 3 of *selskapsskatteloven* (the Corporate Tax Act) of 20 July 1991 No 65 which has been transferred without amendment to Chapter 10 of *skatteloven* (the Tax Act) of 26 March 1999 No 14, dividends paid out by a company residing in Norway to shareholders residing in Norway are taxable as general income, cf. Section 3-2 of the Corporate Tax Act. Dividends paid out to shareholders not residing in Norway are taxed at a rate to be determined by Parliament on an annual basis, cf. Section 3-5 of the Corporate Tax Act. In the case at issue in the main proceedings the rate was 15 per cent.

9 In order to avoid economic double taxation in the sense that profits distributed by Norwegian companies are subject first to corporate tax in the hands of the company distributing the dividends and then to income tax in the hands of the recipients of those dividends, shareholders with general tax liability in Norway are granted an imputation tax credit against the tax assessed on general income, cf. Section 3-4 of the Corporate Tax Act. This tax credit corresponds to the amount of the tax paid by the company on the dividends that have been distributed. The imputation tax credit is defined as follows, in Section 3-3 of the Corporate Tax Act:

> *Imputation tax credit means the dividend received multiplied by the shareholder's tax rate for general income.*

10 The practical result of the imputation system is that dividends are tax-free in the hand of shareholders with general tax liability in Norway and will only be taxed in the company's hand at a rate of 28 per cent. A shareholder has general tax liability to Norway when resident in Norway. Shareholders residing abroad are not granted an imputation tax credit. Dividends paid out to these shareholders are subject to withholding tax for which the distributing company is liable, cf. Section 3-5 of the Corporate Tax Act. The company has rights of recourse and set-off in relation to the foreign shareholders.

11 Pursuant to Article 10 of the double taxation agreements between Norway and Germany of 4 October 1991 and between Norway and the United Kingdom of 3 October 1985, respectively, both the home state and the source state are entitled to impose tax when dividends are distributed from a company resident in one state (source state) to a shareholder resident in another state (home state). According to the tax agreements, the right of taxation of the source state is limited to 15 per cent of the dividends. In order to avoid so-called juridical

double taxation, i.e. that a taxpayer is taxed on the same income both in the home state and in the source state, both tax agreements entitle shareholders residing in Germany and the United Kingdom, respectively, to credit in the amount of assessed tax corresponding to the tax on dividends which has been imposed in Norway. However, neither the tax agreement with Germany nor the tax agreement with the United Kingdom entitles taxpayers residing in those two countries, respectively, to the same imputation tax credit as taxpayers residing in Norway.

12 As to procedural rights in connection with tax assessment decisions and reassessments, Chapters 3 and 9 of *ligningsloven* (the Tax Assessment Act) of 13 June 1980 No 24 provide, *inter alia,* that taxpayers shall be notified in the event of reassessment proceedings, and shall be given a reasonable time limit within which to submit comments. They are also entitled to access to the file. Reassessment decisions must state the reasons for reassessment in writing, and the decision must be sent to the taxpayers together with information on the taxpayers' right of appeal. The rules only apply to shareholders resident in Norway in connection with assessment of dividend income. As regards shareholders not resident in Norway, it is only the distributing company that receives notification of any changes in the assessed withholding tax and is granted rights as a party to the administrative proceedings, including a right of appeal. Foreign taxpayers do not receive notification of the assessment, nor are they granted other rights as parties to the administrative proceedings. If a foreign taxpayer wishes to appeal against the assessment or reassessment, that taxpayer is required to request the distributing company to raise the issue on its behalf.

13 During the proceedings, it has been brought to the Court's attention that the Norwegian Government has recently proposed legislation to the effect that the imputation tax credit be abolished with regard to dividends paid to natural persons, and that dividends be exempt from the imposition of tax with regard to legal persons, irrespective of whether they reside in Norway or abroad.

EEA Law

14 Article 4 of the EEA Agreement reads:

> *Within the scope of application of this Agreement, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.*

15 Article 40 of the EEA Agreement reads:

> *Within the framework of the provisions of this Agreement, there shall be no restrictions between the Contracting Parties on the movement of capital belonging to persons resident in EC Member States or EFTA States and no discrimination based on the nationality or on the place of residence of the parties or on the place where such capital is invested. Annex XII contains the provisions necessary to implement this Article.*

16 Article 1(1) of Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty, OJ L 178 of 8.7.1988, p. 5, referred to in Point 1 of Annex XII to the EEA Agreement (hereinafter "Directive 88/361") reads:

> *Without prejudice to the following provisions, Member States shall abolish restrictions on movements of capital taking place between persons resident in Member States. To facilitate application of this Directive, capital movements shall be classified in accordance with the Nomenclature in Annex I.*

17 Reference is made to the Report for the Hearing for a fuller account of the legal framework, the facts, the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

III Findings of the Court

First Question

18 By its first question, Frostating lagmannsrett is essentially asking whether Article 40 EEA precludes legislation whereby shareholders residing in Norway are granted a tax credit on dividends paid by a Norwegian company, whereas shareholders residing outside Norway are not granted such a tax credit.

19 At the outset, the Court notes that Norwegian legislation distinguishes between natural persons as being resident ("bosatt") or non-resident and legal persons as being domiciled ("hjemmehørende") or non-domiciled. The Court will use the terms resident and non-resident for both categories.

20 As a general rule, the tax system of an EFTA State party to the EEA Agreement is not covered by the EEA Agreement. The EEA/EFTA States must, however, exercise their taxation power consistent with EEA law (see, to that effect, Cases E-6/98 *Norway* v *EFTA Surveillance Authority* [1999] EFTA Ct. Rep. 74, at paragraph 34; E-1/01 *Hörður Einarsson* [2002] EFTA Ct. Rep. 1, at paragraph 17; and E-1/03 *EFTA Surveillance Authority* v *Iceland* [2003] EFTA Ct. Rep. 143, at paragraph 26).

21 The Respondent contends that the allocation of jurisdiction as to the taxation of dividends under double taxation agreements is excluded from the scope of application of Article 40 EEA and refers in that regard to the judgment of the Court of Justice of the European Communities in Case C-336/96 *Gilly* v *Directeur des Services Fiscaux du Bas-Rhin* [1998] ECR I-2793, at paragraph 30. In that case, the Court of Justice of the European Communities held that the Community Member States are at liberty, within the framework of bilateral agreements concluded in order to prevent double taxation, to determine the connecting factors for the purposes of allocating powers of taxation as between

themselves. That does not mean, however, that in the exercise of the power of taxation so allocated, a Contracting Party may disregard EEA law (see, for comparison, Cases C-307/97 *Saint-Gobain* v *Finanzamt Aachen-Innenstadt* [1999] ECR I-6161, at paragraph 58; and C-385/00 *De Groot* [2002] ECR I-11819, at paragraph 94).

22 As stated in Article 1(1) EEA, one of the main objectives of the Agreement is to create a homogeneous European Economic Area. This objective has consistently guided the jurisprudence of the Court as well as of the Court of Justice of the European Communities, (see, inter alia, Cases E-1/03 *EFTA Surveillance Authority* v *Iceland*, at paragraph 27; and C-286/02 *Bellio F.lli Srl* v *Prefettura di Treviso*, judgment of 1 April 2004, not yet reported, at paragraph 34). In this regard, Article 6 EEA provides that the Court is bound by the relevant rulings of the European Court of Justice given prior to the EEA Agreement, and the second paragraph of Article 3 of the ESA/Court Agreement provides that the Court has to take due account of later case law. The case law of the Court of Justice of the European Communities on Article 56 EC is thus relevant for the interpretation of Article 40 EEA.

23 The rules governing the free movement of capital in the EEA Agreement are essentially identical in substance to those in the EC Treaty (see Case C-452/01 *Ospelt and Schlössle Weissenberg* [2003] ECR I-9743, at paragraph 28; see also, along the same lines, Opinion of Advocate-General *Geelhoed* in that case, at paragraphs 72 and 73; compare, Case E-1/00 *Íslandsbanki-FBA* [2000-2001] EFTA Ct. Rep. 8, at paragraph 16). The Court of Justice of the European Communities emphasized in *Ospelt* that "one of the principal aims of the EEA Agreement is to provide for the fullest possible realisation of the free movement of goods, persons, services and capital within the whole European Economic Area, so that the internal market established within the European Union is extended to the EFTA States" (paragraph 29 of that judgment).

24 With regard to the question of whether the distribution and receipt of dividends constitutes movement of capital within the meaning of Article 40 EEA, the Court refers to Article 1(1) of Directive 88/361/EEC and the nomenclature of capital movements in Annex I thereto, as referred to in Annex XII to the EEA Agreement. According to the last paragraph of the introduction to Annex I, the nomenclature is not exhaustive. In Community law, the Court of Justice of the European Communities found that the situation where a national of a Member State residing in that Member State receives dividends on shares in a company whose seat is in another Member State, is covered by Directive 88/361 (Case C-35/98 *Verkooijen* [2000] ECR I-4071, at paragraph 30).

25 Article 40 EEA prohibits restrictions between the Contracting Parties on the movement of capital belonging to persons resident in EC or EFTA States, and discrimination based on the nationality or the place of residence of natural or legal persons or on the place where such capital is invested. That provision confers a right upon individuals and economic operators to market access (see,

with regard to the free movement of services, Case E-1/03 *EFTA Surveillance Authority* v *Iceland*, at paragraph 30).

26 As concerns the question of whether the national legislation at issue restricts the free movement of capital, it should be noted that the national provisions at issue may adversely affect the profit of non-resident shareholders and may thereby have the effect of deterring them from investing capital in companies having their seat in Norway. The application of provisions such as those at issue in the main proceedings impedes the freedom of companies and individuals resident in another Contracting Party to invest in Norway. Those provisions are also capable of having the effect of impeding Norwegian companies from raising capital outside Norway. Therefore, the legislation at issue affects market access of both the distributing companies and the foreign shareholders, and thereby constitutes a restriction within the meaning of Article 40 EEA.

27 It must, however, be examined whether the above-mentioned restriction can be justified.

28 In that respect the Court notes that Article 40 EEA does not preclude EEA States from applying the relevant provisions of their tax law that distinguish between taxpayers who are not in the same situation with regard to their place of residence. However, as this constitutes a derogation from the fundamental principle of the free movement of capital, it must be interpreted strictly, and cannot be interpreted as meaning that any tax legislation making a distinction between taxpayers by reference to their place of residence is automatically compatible with the EEA Agreement. A difference in treatment can only be regarded as compatible with Article 40 EEA where the situations at issue are not objectively comparable, or where it is justified by reasons of overriding public interest. In order to be justified, moreover, the difference in treatment must not exceed what is necessary in order to attain the objective of the legislation (see, for comparison, Case C-319/02 *Manninen*, judgment of 7 September 2004, not yet reported, at paragraphs 28-29).

29 The Respondent has argued that in the case at hand there is no comparable situation between shareholders resident in Norway and shareholders resident abroad, and has cited case law of the Court of Justice of the European Communities in support thereof (Cases C-279/93 *Finanzamt Köln-Altstadt* v *Roland Schumacker* [1995] ECR, I-225, at paragraphs 31-32; and C-234/01 *Gerritse* [2003] ECR I-5933, at paragraph 44). In this respect, the Court notes that the mere fact that the resident shareholders have general tax liability in Norway while non-resident shareholders are subject to tax in Norway only with respect to profits which they earn there, is not sufficient to prevent the two categories from being considered as comparable situations (see, for comparison, Case C-311/97 *Royal Bank of Scotland* v *Elliniko Dimosio* [1999] ECR I-2651, at paragraph 29).

30 Important guidance can also be found in the case law of the Court of Justice of the European Communities concerning inbound dividends, i.e. dividends that

non-resident companies pay to resident shareholders (Cases C-315/02 *Lenz* v *Finanzlandesdirektion für Tirol*, judgment of 15 July 2004, not yet reported; and C-319/02 *Manninen*, at paragraphs 35-37). The case at hand concerns outbound dividends, i.e. dividends that resident companies pay to non-resident shareholders. The Respondent's contention that taxation of outbound dividends is to be treated differently from taxation of inbound dividends must, however, be rejected. The purpose of the tax credit mechanism set up by Norwegian tax law is to avoid economic double taxation, i.e that profits that have already been taxed in the hand of the distributing company, are subsequently taxed as general income in the hands of the shareholders. That purpose can only be achieved if all the shareholders are given the benefit of an imputation credit, irrespective of their places of residence. Economic double taxation of the same assets will create the same undesirable effect, regardless of the shareholders' places of residence. In that respect, residents and non-residents are in a comparable situation.

31 The Respondent has invited the Court to accept a justification of the restriction contrary to Article 40 EEA on the grounds of cohesion of the international tax system. In the Respondent's opinion, an obligation derived from EEA law to grant non-resident shareholders the same tax credit as resident shareholders would entail a de facto transfer of the right of taxation from the source state to the home state and would run counter to a principle of international tax law according to which the avoidance of economic double taxation is a matter for the home state of each taxpayer. In that respect, the Court recalls firstly that the basis for its interpretation of Article 40 EEA is the effect of national measures on individuals and economic operators within the EEA. Further, permitting derogations from the fundamental principle of free movement of capital laid down in Article 40 EEA on the grounds of safeguarding the cohesion of the international tax system would amount to giving bilateral tax agreements preference over EEA law. A Contracting Party cannot make the rights conferred by Article 40 EEA subject to the contents of a bilateral agreement concluded with another Contracting Party (see, for comparison, Case 270/83 *Commission* v *France ("avoir fiscal")* [1986] ECR 273, at paragraph 26).

32 Furthermore, regard must also be had for the aim pursued by the tax legislation in question (see, for comparison, Case C-9/02 *De Lasteyrie du Saillant*, judgment of 11 March 2004, not yet reported, at paragraph 67). The aim of avoiding economic double taxation of profits that have already been taxed in the hand of the distributing company would not be affected in any way if this benefit of the Norwegian tax legislation would also be given to shareholders residing outside Norway (see, for comparison, Cases C-315/02 *Lenz*, at paragraph 38; and C-319/02 *Manninen*, at paragraph 46 concerning the cohesion of the national tax system).

33 The Court notes that the Appellant and the EFTA Surveillance Authority have referred to the legislative history of the Corporate Tax Act and argued that this gives rise to the assumption that the real purpose behind not granting a tax credit to non-resident shareholders is not to preserve the cohesion of the international tax system, but primarily to protect the Norwegian tax base, as appears from

point 16.4.6.1 of the preparatory works to the Corporate Tax Act (Ot. prp. nr. 35 (1990-91)). Whether the Corporate Tax Act also pursues other goals, as argued by the Respondent at the oral hearing, is irrelevant in that context. The national legislation in question is at least in part meant to prevent reduction in tax revenue. This constitutes a requirement of purely economic nature, and cannot be regarded as a reason of overriding public interest. Therefore, it cannot be relied upon to justify a restriction on the exercise of a fundamental freedom (see, for comparison, Cases C-35/98 *Verkooijen*, at paragraph 59; C-385/00 *De Groot*, at paragraph 103; and C-319/02 *Manninen*, at paragraph 49).

34 Furthermore, the Court notes that the Respondent acknowledged that the Norwegian tax legislation in question entails differential treatment of resident and non-resident shareholders with regard to the tax credit. Denying the benefit of a tax credit to foreign shareholders places them at a disadvantage when pursuing investments in Norwegian joint stock companies as compared to shareholders resident in Norway. Therefore, the legislation at issue constitutes discrimination prohibited by Article 40 EEA.

35 By its questions 1a) and 1b) which in the Court's view must be dealt with together, the national court is essentially asking if it is significant whether the non-resident shareholders are, according to the tax agreements entered into between Norway and their respective home countries, eligible in their home countries for a tax credit for withholding tax paid in Norway, and whether such credit is actually granted in the specific case.

36 The Respondent argues that the total tax on a foreign shareholder's dividends must be taken into account when comparing it to the situation of a Norwegian shareholder, including tax credits that the former may be granted in its home state. As to any restriction contrary to Article 40 EEA, the Respondent contends that the investment choice of potential foreign shareholders is not adversely affected by the Norwegian legislation since the grant of tax credits in their home states keeps the overall tax burden constant.

37 In that respect, it suffices to state that a restriction and discrimination, such as that resulting from the tax legislation at issue, can not be offset by advantages which shareholders may obtain in their countries of residence. As a general rule, and supposing that tax advantages do in fact exist, unfavourable tax treatment contrary to a fundamental freedom cannot be justified by the existence of such tax advantages (see, for comparison, Cases 270/83 *Commission* v *France*, at paragraph 21; C-307/97 *Saint-Gobain*, at paragraph 54; C-35/98 *Verkooijen*, at paragraph 61; and C-385/00 *De Groot*, at paragraph 97). A Contracting Party cannot shift its obligation to comply with the EEA Agreement to another Contracting Party by relying on the latter to make good for discrimination and disadvantages caused by the former's legislation. Likewise, the principle of legal certainty would require that the granting, or not, of an imputation tax credit to a non-resident shareholder, may not depend on whether a tax credit is granted in his or her state of residence in respect of dividend payments.

38 Accordingly, the Court holds that Article 40 EEA precludes legislation whereby shareholders resident in a specific Contracting Party are granted a tax credit on dividends paid by a company resident in that Contracting Party, whereas non-resident shareholders are not granted such a tax credit. Whether the taxpayer is resident in another Contracting Party which, in a tax agreement with the Contracting Party upon the territory of which the dividend is distributed, has undertaken to grant credit for withholding tax, or whether the taxpayer in the specific case actually is granted, or will be granted, credit for the withholding tax, is of no legal significance.

Second question

39 By its second question, the national court essentially asks whether, in a situation such as the one at issue in the main proceedings, it is consistent with EEA law that a Contracting Party deals solely with the distributing company when assessing and reassessing the withholding tax without the shareholders concerned having been made aware of the reclassification.

40 As is clear from the facts provided by the national court, non-resident shareholders are not notified of changes in their tax positions, nor are they granted rights as a party to the administrative proceedings. Resident taxpayers, on the other hand, do enjoy such rights.

41 The Court notes at the outset that the EEA Agreement does not, as a general rule, lay down specific provisions governing the administrative proceedings in the Contracting Parties' legal orders. However, such proceedings must be conducted in a manner that does not impair the individual rights flowing from the EEA Agreement. Such an obligation on the Contracting Parties follows from Article 3 EEA, the provision mirroring Article 10 EC.

42 The Respondent stated at the hearing that it considers it possible or even likely that a filing of administrative complaints or proceedings by non-resident shareholders would be accepted and dealt with by the Norwegian tax authorities. That contention can not be considered by the Court since it does not reflect the situation in the case at hand. In any case, the fact would remain that non-resident shareholders are not being notified of any reassessment proceedings, which would undermine a possible right to be heard.

43 That non-resident shareholders, unlike their resident counterparts, are denied procedural rights to the extent that they are not notified of and cannot be a party to tax administrative proceedings entails differential treatment amounting to an unjustified discrimination under Article 40 EEA. This provision requires equal treatment of non-resident and resident shareholders, not only concerning substantive rights, but also with regard to procedural rights insofar as procedural rights are prerequisite to the protection of substantive rights under the EEA Agreement. It is to be emphasised that the extent of disadvantages suffered is irrelevant in such a situation. Besides pleading a violation of EEA law, the shareholders residing in Germany and the United Kingdom in the case at issue in

the main proceedings could, for example, have sought to argue that the transactions were not so-called parking arrangements, i.e. that there was no intention to avoid the Norwegian withholding tax. Contrary to what the Respondent has contended, the fact that the distributing company has procedural rights and can submit the information necessary for the tax assessment procedure cannot make up for the lack of remedies on the part of the shareholders affected.

44 The Respondent has presented a comparative survey of selected legal orders and concluded from that that other Contracting Parties employ virtually the same procedure as the Norwegian one. This is not relevant in the case at hand, where discrimination within the meaning of Article 40 EEA arises from the disparate treatment of shareholders resident within and outside Norway.

45 The Court therefore holds that in a situation such as the one at issue in the main proceedings, it is not consistent with the EEA Agreement that a Contracting Party deals solely with the distributing company when assessing and reassessing the withholding tax without notifying the shareholders.

46 In the course of the proceedings before the Court, the Appellant has argued a third possible inconsistency between Norwegian tax law and the right to the free movement of capital. In the view of the Appellant, an infringement of Article 40 EEA arises from the fact that the Appellant was held liable under the second sub-paragraph of Section 49(1) of the Norwegian Tax Payment Act for payment of the tax assessed on the non-resident shareholders following the reclassification of ownership for tax purposes. That reclassification took place after the distribution of dividends had been completed, and therefore the Appellant did not withhold any tax with respect to the dividends pertaining to the reclassified shares.

47 Given that the questions from the national court do not address this issue, and that it has not been the subject of any specific consideration in the proceedings before it, the Court is not in a position to consider the issue. The national court is, however, not thereby precluded from examining the question of whether the application of the provisions of the second subparagraph of Section 49(1) of *skattebetalingsloven* (the "Norwegian Tax Payment Act") of 21 November 1952 No 2 leads to a restriction of the issuing company's access to, or benefits from, non-resident sources of capital and to draw the appropriate legal conclusions.

IV Costs

48 The costs incurred by the EFTA Surveillance Authority, the Commission of the European Communities and the United Kingdom, which have submitted observations to the Court, are not recoverable. In so far as the parties to the main proceedings are concerned, these proceedings are a step in the proceedings pending before the national court. The decision on costs is therefore a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by Frostating lagmannsrett by a reference of 23 April 2004, hereby gives the following Advisory Opinion:

1. Article 40 EEA precludes legislation whereby shareholders resident in a specific Contracting Party are granted a tax credit on dividends paid by a company resident in that Contracting Party, whereas non-resident shareholders are not granted such a tax credit. Whether the taxpayer is resident in another Contracting Party which, in a tax agreement with the Contracting Party wherein the dividend is distributed, has undertaken to grant credit for withholding tax, or whether the taxpayer in the specific case actually is granted, or will be granted, credit for the withholding tax, is of no legal significance.

2. In a situation such as the one at issue in the main proceedings, it is not consistent with the EEA Agreement that a Contracting Party deals solely with the distributing company when assessing and reassessing the withholding tax without notifying the non-resident shareholders.

Carl Baudenbacher Per Tresselt Thorgeir Örlygsson

Delivered in open court in Luxembourg on 23 November 2004.

Henning Harborg
Registrar

Carl Baudenbacher
President