SUPREME COURT OF NORWAY

J U D G M E N T

given on 8 June 2021 by the Supreme Court composed of

Justice Magnus Matningsdal
Justice Wilhelm Matheson
Justice Henrik Bull
Justice Ingvald Falch
Justice Erik Thyness

HR-2021-1243-A, (case no. 21-013294SIV-HRET)
Appeal against Borgarting Court of Appeal's judgment 25 November 2020

Moises Corrales Entenza Jose Ramon Rodriguez Pineiro Feliciano Fernandez Lago Juan Manuel Alsina Dominguez Farid Ati Allah Francisco Jose Caamaño Leon Poseidon Personnel Services S.A. (intervener)	(Counsel Anette Fjeld)
v.	
The State represented by the Tax Office	(The Office of the Attorney General represented by Andreas Hjetland)

(1) Justice **Bull:**

Issues and background

(2) The case concerns the application of the so-called shelf provision – in Articles 21 and 23 respectively of the Tax Conventions with Belgium and Spain – to income from work "offshore". The main issue is whether tax liability to Norway also covers income from work performed within the baseline from which the territorial sea boundary is stipulated. It is also a question whether the requirement that the work must exceed 30 days in any twelve months period for the salary to be taxable, only includes active workdays and not earned days off.

(3) The six claimants, Jose Ramon Rodriguez Pineiro, Moises Corrales Entenza, Francisco Jose Caamaño Leon, Feliciano Fernandez Lago, Juan Manuel Alsina Dominguez and Farid Ati Allah, were employed with the shipping agent Poseidon Personnel Services S.A. – hereafter PPS – during the period concerned. The first five were tax resident in Spain, while the latter was tax resident in Belgium. PPS is domiciled in Switzerland.

(4) In 2016, the claimants and 190 other PPS employees who were tax resident outside Norway worked on board the foreign ship Pioneering Spirit. The ship was used to remove the top deck on an oil platform and transport it from the Yme field on the Norwegian continental shelf to a shipyard on the island of Lutelandet in Sogn and Fjordane for dismantlement.

(5) Pioneering Spirit reached the Norwegian continental shelf on 17 August 2016. After the platform deck had been lifted off the platform legs and onto the ship, the ship crossed the baseline and thus came into Norwegian internal waters on 23 August. On the next day, the ship arrived at Lutelandet Offshore AS, where the platform deck was lifted over to a barge carrier before it was brought to shore. Pioneering Spirit returned from Lutelandet to Rotterdam on 2 September.

(6) The six claimants' periods of work in Norway have varied, including on the Norwegian continental shelf, off and within the baseline. Five of them spent seven days off the baseline, and one was there for 13 days. The latter spent only one day within the baseline, while the others were there for periods between five and 18 days. The longest period any of them was off and within the baseline altogether during the assignment, was 25 days.

(7) The claimants worked on a shift system. Their periods on board the ship were followed by days off on land. PPS offers two types of employment contracts: one for permanent crew and one for crew paid by the hour. The permanent crew work five-week shifts on board the ship followed by five weeks off. The crew paid by the hour work on demand, with eight-week shifts on board and four weeks off. While on board, both groups work twelve hours a day seven days a week. Among the six claimants, two were permanently employed, while four worked on demand.

(8) PPS operates with a so-called net salary system, which means that the company manages and carries the employees' tax obligations. The private-law contracts on net salary imply that it is PPS, not the employees, that carry the economic risk related to tax. The employees are ensured payment of the agreed net salary amounts. However, they are personally responsible

for submitting tax reports and for any outstanding tax obligations towards Norwegian authorities.

(9) PPS outsourced the management of the tax obligations of the 196 employees on Pioneering Spirit to Ernst & Young Advokatfirma AS – hereafter EY. In the tax reports to Norway, EY entered the income from work off the baseline as taxable, and the income from work within the baseline as non-taxable. After having received a notification of reassessment from the tax authorities, EY explained this division by referring to the shelf provision in the Tax Conventions that Norway has entered into with the countries in which the 196 employees were tax resident. The shelf provision confers a taxation right on Norway only for income from work [performed] "offshore" – in Norwegian referred to as "*utenfor kysten*" [off the coast]. As EY interpreted the shelf provision, the line had to be drawn at the baseline. EY also stated that the days off were not to be included in the 30 workdays required before tax liability is triggered.

(10) In a decision of 27 June 2018 from the Central Office Foreign Tax Affairs, all the 196 PPS employees were considered tax liable to Norway also for the income earned within the baseline. Moreover, the decision built on the premise that the days off also counted in the application of the 30-day rule.

(11) Six of the PPS employees, with PPS as intervener, then brought an action against the State represented by the Central Office Foreign Tax Affairs, requesting that the Central Office's decision of 27 June 2018 be ruled invalid. The other 190 taxpayers have appealed against the decision to the Tax Appeals Board, which has suspended the case pending a final judgment in the case the Supreme Court is now hearing.

(12) On 5 June 2019, Oslo District Court concluded:

> "1 The Court finds in favour of the State represented by the Central Office Foreign Tax Affairs.
>
> 2. Jose Ramon Rodriguez Pineiro, Moises Corrales Entenza, Francisco Jose Caamaño Leon, Feliciano Fernandez Lago, Juan Manuel Alsina Dominguez, Farid Ati Allah and Poseidon Personell Services S.A. are jointly and severally liable for payment of costs of NOK 71 050 to the State represented by the Central Office Foreign Tax Affairs within two weeks from the service of the judgment."

(13) The claimants appealed to Borgarting Court of Appeal, which concluded the following on 25 November 2020:

> "1. The appeal against item 1 of the District Court's conclusion is dismissed.
>
> 2. Costs are not awarded in any instance."

(14) The claimants have appealed against the Court of Appeal's judgment. The appeal challenges the application of the law.

(15) The case in the Supreme Court is conducted as a remote hearing in accordance with section 3 of the temporary Act of 26 May 2020 no. 47 on adjustments in the rules of procedure due to the Covid-19 outbreak etc.

The parties' contentions

(16) The appellants – *Jose Ramon Rodriguez Pineiro, Moises Corrales Entenza, Francisco Jose Caamaño Leon, Feliciano Fernandez Lago, Juan Manuel Alsina Dominguez and Farid Ati Allah* – contend:

(17) Neither the geographical nor the temporal requirement laid down in the shelf provision is met when it comes to Norway's right to tax the claimants' income from work [performed] within the baseline.

(18) The shelf provision requires that the activities are carried on "offshore". Treaties must be interpreted based on the ordinary meaning given to the words, which is crucial here. The ordinary meaning of "offshore" is "away from or at a distance from the coast". Similarly, the Norwegian text uses the term "*utenfor kysten*" [off the coast]. The term could also have been translated by "*til havs*" [at sea] or "*utaskjærs*" [beyond the skerries]. Thus, this cannot include internal waters – the sea areas within the baseline that Norway has drawn between various outermost points in the archipelago along the coast of Norway. Internal waters are not "offshore" or "*utenfor kysten*" [off the coast]. This solution harmonises with the provisions in the Convention on the Law of the Seas regarding the delimitation of internal waters, territorial seas and economic zones. Income from work within the baseline by residents of Belgium and Spain is not taxable to Norway under the shelf provision.

(19) The shelf provision also requires that the "offshore" activities are carried on for a period exceeding 30 days in the aggregate, in any twelve months period commencing or ending in the fiscal year concerned. There is no indication that this includes days other than those on which the work is actually done. Days off earned must be kept separate, although formally the workers are also paid for these days. Towards the Netherlands, Norway has accepted such an interpretation of the shelf provision. A different interpretation would cause much inconvenience and a need to examine the individual employment contract. The fact that Spain and Belgium have not addressed the issue with Norway does not mean that these countries have accepted Norwegian tax authorities' interpretation of the provision.

(20) The intervener – *Poseidon Personnel Services S.A.* – supports the appellants' contentions.

(21) Jose Ramon Rodriguez Pineiro, Moises Corrales Entenza, Francisco Jose Caamaño Leon, Feliciano Fernandez Lago, Juan Manuel Alsina Dominguez and Farid Ati Allah, together with Poseidon Personnel Services S.A., ask the Supreme Court rule as follows:

> "1. The decision by the Central Office Foreign Tax Affairs 27 June 2018 in case no. 2017/692357 is set aside as concerns the appellants.
>
> In the tax assessment for the income year 2016, workdays within the baseline are not to be taxed under the shelf provision. The days counted under the shelf provision shall only include days of actual work performed off the baseline of the source state.
>
> 2. The appellants/the intervener Poseidon Personnel Services S.A. are awarded costs in all instances."

(22) The respondent – *the State represented by the Tax Office*:

(23) The term "offshore" – "*utenfor kysten* [away from the coast]" – is not clear, although in daily speech it has the rather vague meaning "*til havs*" [at sea] or "*utaskjærs*" [beyond the skerries]. Read in context, "offshore" is naturally interpreted as the opposite of "onshore", i.e. "*på land*" [on land]. The wording does not suggest that the term should be interpreted in analogy to the technical rules of maritime law regarding the delimitation of territorial seas and internal waters. The Norwegian archipelago is special. In many countries, the baseline coincides with the actual mainland coast. In the opposite case, the use of the Norwegian baseline would have implied that areas that are clearly "offshore" within the ordinary meaning of the word, for instance Vestfjorden south of Lofoten, would not be so within the meaning of the shelf provision.

(24) The calculation of the 30-day time limit must include paid days off that are earned from actual workdays offshore. The salary also covers the days off. The wording, – "the employment is … carried on" – supports such an interpretation: that the length of the employment is the determinant factor. In addition, the purpose of the 30-day rule, to exclude salaries earned "offshore" that are so low that the administration costs are not in proportion to the tax income obtained, suggests this solution.

(25) In Norwegian tax assessment practice, the rule has consistently been interpreted to include earned days off. Norway has accepted a different interpretation of the Convention with the Netherlands because it has a slightly different wording than the Conventions with Belgium and Spain.

(26) The State represented by the Tax Office asks the Supreme Court to rule as follows:

> "1. The appeal is dismissed.
>
> 2. The State represented by the Tax Office is awarded costs in the District Court, the Court of Appeal and the Supreme Court."

My opinion

Tax liability to Norway for foreigners' income from work on the Norwegian continental shelf: the shelf provision in Norway's Tax Conventions

(27) As a main rule, tax liability to Norway requires residence in Norway, see section 2-1 of the Taxation Act. For persons not resident in Norway, it follows from section 2-3 subsection 1 (d) that one is nonetheless tax liable for "consideration originating from sources in this country in respect of personal work carried out on service in Norway during a temporary stay in this country". According to section 2-1 subsection 10 (e), "Norway" means Norwegian territory and any area falling within the scope of section 1 subsection 1 (a) of the Petroleum Taxation Act. The latter provision refers to internal Norwegian waters, Norwegian territorial seas and the continental shelf. The basis in domestic law for taxing the income concerned in the case at hand, is thus clear.

(28) However, through Tax Conventions with other countries, the right to tax generally conferred by Norwegian domestic tax law may be limited, see section 2-37 of the Taxation Act and Act of 28 July 1949 no. 15 relating to Authorisation for the King to Conclude Treaties for the

Prevention of Double Taxation etc. Norway has entered into a number of such Conventions, including with Belgium and Spain, where the claimants in this case are resident. For the income year 2016, the Convention of 14 April 1988 with Belgium and the Convention of 6 October 1999 with Spain are applicable.

(29) It follows from Article 3 (1) (a) in both Conventions that "Norway" includes the Norwegian continental shelf. Also, the shelf provision in both Conventions – Article 21 in the Convention with Belgium and Article 23 in the Convention with Spain – sets out that it applies "notwithstanding any other provision of this Convention".

(30) The Convention with Belgium exists in English only, and the relevant part of the shelf provision, Article 21 (5) (a), reads:

> "Subject to subparagraphs b) and c), salaries, wages and similar remuneration derived by a resident of a Contracting State in respect of an employment connected with offshore activities in the other Contracting State may, to the extent that the duties are performed offshore in that other State, be taxed in that other State provided that the employment offshore is carried on for a period exceeding 30 days in the aggregate in any period of twelve months."

(31) The Convention with Spain is entered into in Norwegian, Spanish and English, and the relevant part of the shelf provision, Article 23 (4) (a), reads as follows in Norwegian:

> "Med forbehold av underpunkt b) i dette punkt, kan lønn og annen liknende godtgjørelse som en person bosatt i en kontraherende stat mottar i anledning av lønnsarbeid knyttet til undersøkelse eller utnyttelse av havbunnen og undergrunnen og deres naturforekomster i den annen kontraherende stat, skattlegges i denne annen stat i den utstrekning arbeidet er utført utenfor kysten av denne annen stat og forutsatt at arbeidet utenfor kysten er utøvet i ett eller flere tidsrom som til sammen overstiger 30 dager i løpet av en tolvmånedersperiode som begynner eller slutter i det aktuelle Inntektsåret."

(32) It is set out in the final notes of the Convention with Spain that in case of any divergence of interpretation between the Spanish and the Norwegian texts, the English text shall prevail.

(33) A Norwegian translation of the Convention with Belgium is included in Proposition to the Storting No. 18 (1988–1989) on consent to ratification. As for the issues in dispute, this translation is for all practical purposes identical to the Norwegian version of the Convention with Spain.

(34) Although there are certain other differences in the wording of the provisions, they must be interpreted in the same way with regard to the issues raised in this case. The parties agree on this. For the record, I note that the reservations in both provisions on certain subparagraphs are not relevant to the case.

(35) It is clear, and undisputed, that the first requirement of the provision is met, namely that it must concern remuneration for – as expressed in the Convention with Spain - "activities in connection with the exploration or exploitation of the seabed and its subsoil and their natural resources situated in that other State". However, the parties disagree as to whether the next two requirements are met. The first one is *the location requirement*, i.e. that the activities must have been carried on "offshore". Secondly, the disagreement relates to *the time*

requirement, which means that the activities must have been carried on for a period exceeding 30 days in any twelve months period. The parties disagree on the determination of these 30 days.

(36) Since the Tax Conventions are treaties, they must be interpreted in accordance with rules of international law. This is regulated in Article 31 of the Vienna Convention on the Law of Treaties. Norway is not a party to the Vienna Convention, but Article 31 is generally considered to express international customary law, see Rt-2011-1581 paragraph 41 with reference to previous case law. The principle for the interpretation of treaties is worded as follows in Article 31 (1) of the Vienna Convention:

> "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

(37) In other words, the key interpretation factor is the ordinary meaning of the terms of the treaty in the context they are used, and in the light of the object and purpose of the treaty.

(38) Article 31 (3) (c) continues by stating that any relevant rules of international law applicable in the relations between the parties shall be taken into account. In the case at hand, the Convention on the Law of the Sea of 10 December 1982 has been invoked in particular.

(39) For the record, both parties agree that the special rule of interpretation in Article 3 (2) of the Convention with both Belgium and Spain, referring to a term's meaning in domestic tax law, is not applicable to the case.

The location condition: The meaning of "offshore"

(40) First, the parties disagree as to whether activities within the Norwegian baseline are carried on "offshore", as the shelf provision requires.

(41) The parties have not referenced the Spanish version of the Convention with Spain, but I mention nonetheless that the term used therein is "*en alta mar*". That should correspond more or less to the Norwegian "*til havs*" [at sea].

(42) As mentioned, the starting point in Article 31 of the Vienna Convention is the "ordinary meaning" given to the terms. The appellants have stressed that the ordinary meaning of "offshore" is "away from or at a distance from the coast", which is the definition in the online Cambridge English Dictionary, or "situated at sea some distance from the shore", as it reads in the online Lexico UK Dictionary. Also, the exclusion of the sea area adjacent to the shore follows from the Norwegian version the provision, with the term "*utenfor kysten*" [off the coast], the appellants argue. I assume that the same must apply to the Spanish "*en alta mar*".

(43) I agree that this is the ordinary meaning of the term considered in isolation. However, as I see it, this is not the only possible meaning of "offshore". From a linguistic point of view, "offshore" may also be perceived as the opposite of "onshore", which in this context must signify "*på land*" [on land] as opposed to "*på sjøen*" [at sea]. I refer once more to the Cambridge English Dictionary: "on land rather than at sea". The term "shore" points in itself to the boundary between land and water. The Norwegian term "*kyst*" [coast] also has no

specific content implying that "*utenfor kysten*" [off the coast] has to be farther out than the boundary between land and water.

(44) As set out in Article 31 of the Vienna Convention, the terms must be interpreted in their context and in the light of object and purpose. The Norwegian Tax Conventions are based on the OECD Model Tax Convention. The reservation taken by Norway, Denmark, the United Kingdom, Canada and Ireland on Article 5 of the Model Convention with regard to income from businesses with permanent establishment in the source state, shows that these countries found that the provision created special problems with taxation of activities related to "offshore" hydrocarbon exploration and exploitation. I refer to the Commentaries on the Model Tax Convention, the 2010 edition, page 125. These countries reserved the right to insert a special article related to such activities in their respective Conventions. The shelf provision is a result of this.

(45) In its Commentaries, the OECD does not specify which problems one has had in mind, but it is set out in Proposition to the Storting no. 120 (1977-1978) page 1 that "the use of ships and floating installations in offshore activities raises particular issues with regard to the allocation of taxation rights and problems with the tax collection". It is likely that the same applies to other States that have raised this issue in an OECD context. Considering the parallel to the provision in Article 5 on permanent establishment, the Ministry must have had the same mobile nature of the activity in mind. This indicates that the distinction lies between land and water. In the water, the mobility is the same within and off the baseline. Without having cited that part of the provision, I note here that the shelf provision not only covers salary income, but also income earned by an enterprise from activities on the continental shelf,

(46) Another key factor with regard to the interpretation of the location requirement, particularly in the light of the 30-day rule, is the need for a rule that leaves no doubt as to whether the activities are carried on "offshore". The ordinary meaning given to the term, as pointed out by the appellants, gives rise to uncertainty: Exactly when is a person "*utenfor*" [off] or "at some distance from" or "away from" the coast? Without a further specification of the meaning, which would have to be based on sources other than the provision itself, such an interpretation would create large problems for both taxpayers and tax authorities.

(47) Clarity would certainly be obtained if "offshore" and "*utenfor kysten*" [off the coast] were interpreted to mean the sea off the baseline. The starting point in Article 3 of the Convention on the Law of the Sea is that the territorial sea may extend up to 12 nautical miles from the baseline. However, Article 5 states that the baseline should follow the low-water line along the coast. In that case, "offshore" will coincide with the boundary between land and water. It is only in localities where the coastline is deeply indented or cut into that straight baselines may be drawn between appropriate points along the coast, including from islands, see Article 7. If one interprets "offshore" to mean the sea areas outside these baselines, one obtains in practice that "offshore" in the relevant areas will start at some distance from the coast, and thus a state of the law corresponding to the ordinary meaning given to "offshore" in the dictionaries, i.e. "away from or at a distance from the coast".

(48) If the Contracting States had intended to give this meaning to "offshore" based on several rather technical provisions in the Convention on the Law of the Sea, it is natural to assume that this would have been specified in the shelf provision. Such an interpretation does not necessarily follow from the general rule in the Vienna Convention that other rules of international law may be taken into account in the interpretation of treaties.

(49) This becomes particularly clear when considering that such a rule would not give a state of the law consistently corresponding to the mentioned dictionary meaning. I have already mentioned States with a coastline leading to the baseline practically corresponding to the boundary between land and water. Furthermore, the baseline option, depending on how the baseline is drawn, may have the result that sea areas undoubtedly "away from or at a distance from the coast" may nonetheless not be considered "offshore". Examples here are large parts of Vestfjorden south of Lofoten and Lopphavet off Troms and Finnmark. A similar effect would be obtained for archipelagic States, where the sea areas between the islands largely will be within the baselines around the archipelago, see Article 47 of the Convention on the Law of the Sea. A shelf provision like that in the case at hand is included in Article 22 of the Tax Convention between Norway and the Philippines.

(50) Moreover, Article 7 of the Convention on the Law of the Sea distinguishes between "coastline" and "baselines". The provision applies to "localities where the coastline is deeply indented and cut into". The coastline within the meaning of the Convention on the Law of the Sea is thus within the straight baselines joining outermost points along the coast.

(51) In my view, an interpretation of "offshore" as the sea area outside the baselines drawn by the relevant State must thus be dismissed. The practical result of that is that the offshore boundary must correspond to the boundary between land and water. As already mentioned, I consider this compatible with the wording, and it provides the desired rule for demarcation. It is also a rule that safeguards the considerations behind the right to depart from the OECD Model Convention reserved by Norway and other States with regard to "offshore" enterprises.

(52) The parties have also invoked Norwegian administrative practice, statements from foreign tax assessment authorities and in legal literature in support of their view. However, as I cannot see that these sources of law clearly point to a different conclusion, I will not discuss their potential relevance to the interpretation of the Tax Conventions in the light of the method of interpretation prescribed by international law.

(53) My conclusion is therefore that activities carried on within the baseline must also be considered to have been carried on "offshore" within the meaning of the shelf provision. On this point, the appeal can therefore not succeed.

The time condition: The 30-day rule.

(54) The next issue in dispute is the understanding of the requirement that the activities "offshore" must have been carried on for a period exceeding 30 days in aggregate. The disagreement relates to whether these 30 days include earned days off, as assumed in the tax decisions, or whether they only include the actual workdays. The State's view implies that when a shift system is five weeks on and five weeks off, one day off must be added for each workday, while a shift system of eight weeks on and four weeks off gives one extra day off for every two workdays.

(55) This interpretation appears to have been rather consistently used in Norwegian tax assessment practice. I refer to an article by Rørosgaard in *Bjørgen* (ed.) the Central Office Foreign Tax Affairs 1978-1998. International Taxation – selected topics, page 93. As I read it, the Central

Office has used this interpretation on all Tax Conventions apart from that with the Netherlands to which I will return.

(56) The State contends that this interpretation follows from the following wording in the English-language versions of the Conventions with Belgium and Spain:

> "… provided that the employment offshore is carried on for a period [in the Convention with Spain: "for a period or periods"] exceeding 30 days …"

(57) It has been pointed out that the employee is paid for the day off in the same way as for actual workdays, and that "employment" signifies the working relationship rather than work performed, which suggests that "the offshore employment" is "carried on" also during the days off. The State argues that when it changed its view in agreement with the Netherlands in 1996 on the interpretation of the Convention and accepted that the days off should not count, it was because the wording of that Convention is slightly different. There, the wording is "the employment is exercised offshore". As I understand, the State finds that "exercised" has a different meaning than "carried on", as "exercised" to a greater extent points to the actual performance of the work.

(58) Here, I have a different view on what may be naturally derived from the wording. I agree that "employment" may probably have a wider meaning than just the actual physical work performance, but as the Convention with the Netherlands shows, this is not the only possible interpretation. In addition, "exercised" may point more clearly to the actual performance of work than "carried on", but the latter may also be interpreted to cover the performance of the work only.

(59) In my view, the Conventions with Belgium and Spain must be interpreted based on a slightly wider part of the wording. In English, the provision in both Conventions reads:

> "… to the extent that the duties are performed offshore in that other State, be taxed in that other State provided that the employment offshore is carried on for a period [in the Convention with Spain: "for a period or periods"] exceeding 30 days …"

(60) Here, the time requirement is formulated as a restrictive addition to the location requirement. The location requirement clearly points to work actually performed: "the duties are performed offshore". It does not follow logically that the restrictive addition cannot build on a wider concept of work than the location requirement. Nonetheless, considering the structure of the sentence, it is more natural from a linguistic point of view to perceive the time requirement as building on the location requirement. To this, one may object that two different terms are in fact used, but that may as well be explained by a wish to vary the language.

(61) I cannot see that "employment" applied to shift systems is most naturally understood as an indicator for a calculation multiplying the number of actual workdays by a factor depending on an interpretation of the individual employment contract. If the intention had been to establish such a technical rule, it would have had to be clearly expressed. "Employment" is therefore much more naturally understood as work actually performed.

(62) In this regard, it is interesting to note how the same provision reads in Norwegian in both agreements – in the Convention with Spain, as mentioned, the Norwegian text is also one of the original language versions. In both Conventions, it is stated:

> "… i den utstrekning arbeidet er utført utenfor kysten av denne annen stat og forutsatt at arbeidet utenfor kysten er utøvet i ett eller flere tidsrom [in the Norwegian translation of the Convention with Belgium: "*i et tidsrom*" [during a period] som til sammen overstiger 30 dager …"

(63) Here, both "the duties" in the location requirement and "the employment" in the time requirement are translated to "*arbeidet*" [the work]. The Norwegian text gives thus no basis for distinguishing between the "duties" and the "employment". Admittedly, it is stated that "*arbeidet*" in the sense of "duties" is "*utført*" [performed], while "*arbeidet*" in the sense of the "employment" is "*utøvet*" [exercised], but the potential difference in meaning between the two verbs is, in my view, too subtle to be attributed any weight in this context. It is not obvious that employment is "*utøvet*" [exercised] during a days-off period.

(64) Furthermore, in the Spanish version of the Convention with Spain, "the employment … is carried on" has become "*el empleo ... se ejerza*". The Spanish verb gives connotations to the English "exercise", i.e. the term used in the Convention with the Netherlands, rather than of "carry on" – without this being decisive for my view.

(65) In my view, the terms read in their context thus indicate that the days off are not to be counted when determining whether the time requirement is met.

(66) Another significant argument against including the days off is the complications it would create. The tax authorities would have to request and interpret the individual employment agreements, as well as possible collective agreements, to determine what has in fact been agreed with regard to the periods on and off. The agreements are in foreign languages and subject to other countries' law, and a correct interpretation would to quite some extent depend on the parties' own understanding of them, with a risk of misinterpretation by the tax authorities. If the purpose of the time requirement is to spare the source state from administration related to taxation of small salaries, that object is best fulfilled by counting only the active workdays.

(67) The State has stressed that the object of the shelf provision is to extend the "shelf state's" right to tax compared to what would otherwise follow from the Convention and that days off should therefore be included, as that would provide the greatest extension of such a right. I do not find that this consideration should be emphasised here. It cannot be ruled out that the other Contracting State has found the rule acceptable *because* it is limited to income from work actually performed during a period exceeding 30 days in any twelve months period, with the consequence that the other Contracting State maintains the right to tax other income from activities on the continental shelf.

(68) The same applies to the State's argument that neither Spain nor Belgium, as opposed to the Netherlands, has protested against the Norwegian interpretation of the time requirement. In my view, one cannot conclude based on this that they have accepted the Norwegian view. There may be many other reasons why Spanish or Belgian tax authorities have not addressed the issue with Norwegian tax authorities.

(69) With regard to this issue, too, the parties have referred to Norwegian assessment practice and various statements from foreign tax authorities. As mentioned, Norwegian assessment practice corresponds to the State's view, apart from the Convention with the Netherlands. However, I have a different view on the interpretation of the provision in the light of its wording and context as Article 31 of the Vienna Convention prescribes. The statements from

the foreign tax authorities partially relate to other treaties using slightly different terms than the Conventions with Belgium and Spain, and point in both directions. Thus, it is not necessary to discuss them further here.

(70) Relevant Norwegian legal literature does seem to support the State's view, but it uses careful formulations and provides no broader discussions. In the light of the Vienna Convention, I will not elaborate on it here.

(71) Against this background, I conclude that the time requirement in the shelf provision in the Conventions with Belgium and Spain must be interpreted to include actual workdays only, not the earned days off. On this point, the appeal succeeds.

Consequences of my view for the claimants' tax liability to Norway for the income year 2016

(72) The parties agree that three of the claimants – Jose Ramon Rodriguez Pineiro, Feliciano Fernandez Lago and Francisco Jose Caamaño Leon – had more than 30 days of actual work in an area subject to Norwegian taxation of their income under the shelf provision in the relevant twelve months period, so that their case is lost with the dismissal of their contention that "offshore" does not include internal waters .

(73) On the other hand, the three other claimants – Moises Corrales Entenza, Juan Manuel Alsina Dominguez and Farid Ati Allah – have won their case. They had less than 30 actual workdays in an area subject to Norwegian taxation in the relevant twelve months period, and are therefore not liable to tax on income earned there. The decision by the Central Office Foreign Tax Affairs must therefore be set aside on their part. According to section 15-6 of the Tax Administration Act, the judgment must state the method of tax calculation if the court finds that the taxpayer is only partially tax liable or only partially entitled to a repayment. However, as I have concluded that they are not liable to tax in Norway for 2016, there is no reason to mention the method of calculation in the judgment.

Costs

(74) In my view, the three successful claimants – Moises Corrales Entenza, Juan Manuel Alsina Dominguez and Farid Ati Allah – must be awarded costs in all three instances in line with the main rule in section 20-2 subsection 1 cf. section 20-9 subsection 2 of the Dispute Act.

(75) As I see it, there are weighty reasons for exempting the three who have lost their case – Jose Ramon Rodriguez Pineiro, Feliciano Fernandez Lago and Francisco Jose Caamaño Leon – from liability for costs to the State under section 20-2 subsection 3 of the Dispute Act. It concerns three ordinary workers who have acted as claimants in a tax case that must be considered a pilot trial for both their employer and for the State, involving many more workers, and that has raised an issue of principle also on the point where the case is lost.

(76) For the intervener, the case must be considered partially lost and partially won. Thus, there is no basis for awarding costs, neither to the State nor to the intervener.

(77) In the District Court, the claimants claimed costs of NOK 477 999 including VAT.

(78) In the Court of Appeal, the costs claim was NOK 545 631 including VAT.

(79) In the Supreme Court, the costs claim is NOK 652 362 including VAT. The State contends that this claim is too high, considering the fact that the same issues have been dealt with in all three instances. I find no reason to reduce the claim.

(80) The appellants and the intervener have submitted joint statements of costs to all instances. The intervener has not made any submissions of its own, which must imply that the intervener has not incurred any costs. Since the case is lost by three of the appellants and won by the other three, one must consider the distribution of costs between them. When asked, Counsel Fjeld replied that, to her, the location requirement, and not the time requirement, had been the main issue in the case, but she could not state in more detail how her work had been allocated on the two issues. Based on this, I conclude that the appellants are liable towards their counsel for one-sixth each. This means that the three successful claimants are jointly entitled to have half of the appellants' total costs covered by the respondent. This constitutes the half of NOK 1 675 992, i.e. NOK 837 996.

(81) In all three instances, court fees totalling NOK 68 344 have been incurred by the appellants, for which it also natural to assume that they are jointly liable according to the same distribution key as the costs in general. A half constitutes NOK 34,172.

Conclusion

(82) Against this background, I vote for this

J U D G M E N T :

1. The decision by the Central Office Foreign Tax Affairs 27 June 2018 is set aside as concerns Moises Corrales Entenza, Juan Manuel Alsina Dominguez and Farid Ati Allah. The appeal is otherwise dismissed.

2. The State represented by the Tax Office is to pay NOK 872 168 to Moises Corrales Entenza, Juan Manuel Alsina Dominguez and Farid Ati Allah jointly within 14 days. Costs are otherwise not awarded in any instance.

(83) Justice **Thyness:** I agree with Justice Bull in all material respects and with his conclusion.

(84) Justice **Falch:** Likewise.

(85) Justice **Matheson:** Likewise.

(86) Justice **Matningsdal:** Likewise.

(87) Following the voting, the Supreme Court gave this

J U D G M E N T :

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