KPMG Meijburg & Co Tax & Legal

Supreme Court judgments on interpretation and allocation of the burden of proof of the anti-abuse provision for non-resident taxation for shareholding entities

On April 25, 2025, the Supreme Court rendered judgment in two related cases concerning the anti-abuse regime in corporate income tax that provides for the tax liability of foreign-established entities in respect of a substantial interest in an entity established in the Netherlands. In these judgments, the Supreme Court provides further clarification on the allocation of the burden of proof of this anti-abuse regime and the circumstances under which this regime may apply. Because it concerns the general EU anti-abuse provision, this interpretation may also be relevant for other tax rules.

Dividend in the case at hand not subject to substantial interest levy in the corporate income tax

Foreign companies may be subject to Dutch corporate income tax if they hold a substantial interest (as referred to in box 2 of the personal income tax) in a Dutch entity on the basis of the 'technical substantial interest' (Section 17(3)(b) CITA 1969, hereinafter referred to as the technical substantial interest rules). The aim of the rules is to prevent individuals from being able to avoid Dutch box 2 personal income tax by not directly holding a substantial interest in a Dutch entity but through a foreign entity, such as a personal holding company. The rules only applies if there is abuse, namely when the structure is set up i) with the main purpose or one of the main purposes of avoiding Dutch personal income tax (and, until 2018, dividend withholding tax) and ii) the structure must also be regarded as an artificial arrangement.

The two judgments relate to the same structure: two personal holdings (Dutch BVs) of a father and son. Since 2007, they have each held an interest in a Dutch operating company through their personal holdings. The father was also the director of the son's personal holding. In January 2011, 85% of the stake in the operating company had been sold to a private equity house. To facilitate this sale, an intermediate holding company was established. The personal holdings of father and son, together with the personal holdings of other family members, held the depositary receipts for shares in this intermediate holding company via a trust office foundation (in Dutch: STAK). The remaining 15% of the shares in the operating company were contributed to this intermediate holding company. The personal holdings of the father and son each held 11.11% of the depositary receipts in the intermediate holding company. At the end of 2011, the father emigrated to Curaçao, which also meant that the actual management and location of both personal holdings were moved to Curaçao. The son also lived in Curaçao before that.

Subsequently, at the end of 2015, the intermediate holding company sold the remaining 15% interest in the operating company and at the beginning of 2016 the proceeds were paid out as dividend (via the STAK) to, among others, the two personal holdings established in Curaçao. The issue was whether the personal holdings were subject to corporate income tax in the context of a technical substantial interest (see Section 17(3)(b) CITA 1969), on the basis of which the dividend income would have been taxed in 2016.

The Court of Appeal of The Hague first addressed the burden of proof in such discussions. In the first place, it would be up to the inspector to demonstrate that there is a motive for avoidance and for artificiality. The taxpayer then has the opportunity to demonstrate the contrary. In the case at hand, the inspector had successfully demonstrated that the subjective test, which relates to having a tax-saving motive, had been met, but the taxpayers had subsequently successfully demonstrated the contrary with regard to the objective test, which relates to the artificial nature of the structure. The structure set up in 2007 was seen as a customary domestic holding structure and the father's subsequent emigration had taken place for personal (non-tax) reasons. As a result, it was not regarded as artificial, which meant that the technical substantial interest rules did not apply, according to the Court of Appeal.

An additional aspect was that under the Tax Regulation for the Kingdom of the Netherlands (BRK) that applied until 2016, the Netherlands would have been entitled to levy tax up to 15% on dividends, but that as of January 1, 2016 – partly as a result of the reduction of the holding requirement to 10% – this right to tax was fully allocated to Curaçao under the Tax Regulation Netherlands Curaçao (BRNC) that applied from that moment on. The fact that the interested parties had thus ended up in a more favorable position did not mean that the structure should therefore be regarded as an artificial arrangement, in view of the time elapsed between the setting up of the structure in 2007, the relocation of the personal holdings to Curaçao in 2011, and the dividend payment in 2016.

Considerations of the Supreme Court

The Supreme Court upheld the Court of Appeal's judgments and decided that there was no artificial arrangement in the present case, and that therefore the technical substantial interest rules did not apply. However, the relevance of the judgment exceeds this individual case, because the Supreme Court elaborates how the anti-abuse test should be applied for purposes of the technical substantial interest rules.

In the first place, the Supreme Court considered that the anti-abuse provision was in line with the EU-law concept of anti-abuse and that case law of the European Court of Justice (hereinafter: CJEU) is therefore also relevant for the interpretation of this provision.

The Supreme Court also adhered to the case law of the CJEU for the allocation of the burden of proof and stated that the Court of Appeal correctly applied the allocation of the burden of proof as described above. However, the Supreme Court does seem to make a further nuance, namely that it is in the first place up to the inspector to put forward facts and circumstances on the basis of which the technical substantial interest rules would apply, after which it is up to the taxpayer to dispute this assertion with supportive arguments. Subsequently, the burden of proof would again lie with the inspector, after which the rules as applied by the Court of Appeal would apply and therefore the evidential burden of 'demonstrating' would apply to both parties.

In addition, the Supreme Court also reiterates some elements that it considers relevant as indications of abuse of EU law, more specifically when an entity acts as a 'conduit company'. This is a company that is exclusively engaged in receiving and paying

dividends. Even if activities are developed, there may be artificiality if the dividends are paid very quickly after receipt – possibly under a different legal title. This may also be the case if there is no contractual or legal obligation to redistribute it. In this regard, the Supreme Court does make note of the examples that have been mentioned in the legislative history where there is no artificiality under the objective test, namely i) the operation of an active enterprise to which the substantial interest can be attributed, ii) the holding of an essential function in the service of the business operations of the group, or (iii) the provision of a linking function between the head office activities of the parent company and the activities of its sub-subsidiaries, provided that the company has sufficient substance. In the same vein, the Supreme Court considered that the 'disregard principle' of the subjective test – whereby a comparison is made of the Dutch tax burden between the situations with and without the intervention of the disputed company – also constitutes such an indication of abuse. However, these examples are only indications of whether there is a conduit company and the taxpayer nevertheless has the opportunity to demonstrate to the contrary.

On the basis of these indications, the inspector had demonstrated that there was abuse. The taxpayer, on the other hand, had succeeded in making it plausible that there was no (completely) artificial arrangement. The Supreme Court considered that the assessment of abuse takes place at the time that the benefit from the substantial interest occurs, but that this does not exclude the possibility that facts and circumstances before or after that moment are also taken into account, and that the structure must be examined as a whole. In addition, the Supreme Court states that the personal holdings have not been 'interposed' in order to avoid Dutch personal income tax or dividend withholding tax. On the other hand, the fact that the favorable change from the BRK to the BRNC became applicable from 2016 does not constitute an abuse, because the structure was not set up at any time with a view to that advantage, given the sequence of the events.

Comments by KPMG Meijburg & Co

In these two judgments, the Supreme Court provides an insight into the way in which the anti-abuse test of the technical substantial interest rules should be applied. These are also the first cases that relate to the 'new' anti-abuse test as it has been in the law since 2016, when the double anti-abuse test was introduced, consisting of the subjective test (is there a circumvention motive?) and the objective test (is there an artificial arrangement?).

Until now, the Supreme Court's case law on the technical substantial interest rules was limited to a single judgment on the rules as they applied until 2016 (judgment on January 10, 2020). Under those previous rules, it was important whether there was an attribution of the substantial interest to a business. If not, then – if there was also an avoidance motive – abuse was considered to be present. That judgment concerned the distribution to the personal holding company of an individual who had emigrated to Switzerland, whereby that personal holding company had been moved from the Netherlands to Luxembourg. In that situation, however, abuse was considered to apply, in particular because the personal holding was only a cash company and therefore did not run a business.

Now, for the first time, the Supreme Court is addressing the double anti-abuse test. This is important for the technical substantial interest rules, but is also reflected in other places in tax legislation, such as the withholding exemption for dividend withholding tax (from 2018, Section 4(3)(c) of the Dividend Withholding Tax Act 1965), the conditional withholding tax (Section 2.1(1)(c) of the Conditional Withholding Tax Act 2021) and, since 2025, with the codification of the general EU anti-abuse rule in the CITA (Section 29i CITA 1969).

In interpreting the anti-abuse test, the Supreme Court closely follows the judgments of the CJEU. It frequently refers to the Danish cases from 2019 (see our previous memorandum) and also to the recent Nordcurrent judgment (see our previous memorandum). The Supreme Court also seems to consider the structure as a whole: not only at the time the taxable event occurs, but also the history and subsequent events. Interestingly, a personal holding company does not necessarily have to be regarded as artificial, despite the fact that this company does not run an active enterprise.

Two other cases are currently pending concerning Belgian holding structures, in which the central question is whether the anti-abuse provision in the dividend tax applies to dividends paid to Belgian holding companies. The Amsterdam Court of Appeal had already ruled in both cases that there had been abuse. The Advocate General then issued his Opinion in 2023 (see our previous memorandum) and advised that the appeal in cassation should be dismissed. Hopefully, following these judgments on the technical substantial interest rules, there will also be further clarification in the context of the application of the EU abuse principle to dividend withholding tax.

If you would like to know more, please feel free to contact us or your usual Meijburg advisor.

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