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Dutch Supreme Court renders judgments on the dividend withholding tax exemption

On July 18, 2025 the Dutch Supreme Court rendered two long-awaited judgments on the withholding exemption for dividend withholding tax purposes. The judgments concern dividend distributions made by a Dutch BV to two Belgian companies in 2018. In dispute was whether the anti-abuse provision for dividend withholding tax purposes led to the refusal of the withholding exemption. The Amsterdam Court of Appeals had ruled in both proceedings that there was abuse and therefore refused the withholding exemption. In line with the Opinion issued by the Advocate General, the Supreme Court upheld the judgments rendered by the Court of Appeals. These judgments are very important for the practice, because the Supreme Court addressed the application of the anti-abuse provision in holding structures.

The anti-abuse provision

The anti-abuse provision leads to the withholding exemption being refused – and thus to the levying of Dutch dividend withholding tax – if there is an artificial arrangement that is not related to economic reality and that was set up for the main purpose (or one of the main purposes) of avoiding dividend withholding tax being levied on another party. This anti-abuse provision constitutes the implementation of EU law and is applied and interpreted in accordance with EU law. The scope of the anti-abuse provision and the question whether there is 'artificiality' have been a matter of debate since the Danish cases. See for example the recent Nordcurrent judgment rendered by the Court of Justice of the European Union and the judgments the Dutch Supreme Court rendered earlier this year concerning Curaçaoan personal holding companies.

District Court allows withholding exemption in one case, Court of Appeals refuses in both cases

The judgments concern dividends that a Dutch 'feeder company' of a private equity fund had distributed to two Belgian companies in 2018. The first Belgian company was a BVBA. This company held a 38.71% interest in the feeder company and acted as a Belgian holding company for three Belgian family members. The BVBA was initially set up to hold the shares in another Belgian company. At a certain point in time after the sale of those shares in 2011, the BVBA invested in the feeder company. At the time of the dividend distribution in 2018, the BVBA did not perform any other activities and, besides the shares in the feeder company, only had two vintage cars. The other Belgian company was a Belgian NV that held a 24.39% interest in the feeder company. This NV managed investments for a Belgian family. In that context, the NV held various participations in the Netherlands and Belgium that carried on active businesses, whereby the NV actively managed and governed those participations. One of the (indirect) shareholders and their spouse formed the management for the NV (for which they were remunerated) and they performed the activities from a separate workspace in their home.

In debate was whether the withholding exemption for Dutch dividend withholding tax purposes could be applied to the dividends that the feeder company had distributed to the two Belgian companies. In principle, the basic conditions for applying the withholding exemption had been met. However, for the purposes of applying the

withholding exemption to foreign shareholders, a subsequent requirement had to be met and that is that the structure does not qualify as abuse. The structure is regarded as abuse if there is an artificial arrangement unrelated to economic reality that was set up for the main purpose (or one of the main purposes) of avoiding dividend withholding tax.

With regard to the BVBA, it was ruled both in the court of first instance and in appeal that the anti-abuse provision meant that the withholding exemption did not apply. Because the BVBA did not perform any further economic activities, did not have any office space at its disposal and did not employ any personnel, the Noord-Holland District Court concluded that the taxpayer had failed to convincingly demonstrate that there was no artificial arrangement. The fact that the intention of the BVBA was to 'pool' the investments of the underlying participants was not considered sufficient justification, which meant that the structure was regarded as abuse. In the appeal proceedings, the Amsterdam Court of Appeals came to the same conclusion.

With regard to the NV, the District Court and the Court of Appeals reached opposite conclusions. The District Court had ruled that the Belgian BV was entitled to the withholding exemption. According to the District Court, the activities were performed from the NV, which meant that the NV carried on a business of substance and also held the interest in the feeder company in that context. The District Court therefore concluded that the arrangement was not artificial and thus there was no abuse. The Amsterdam Court of Appeals, on the other hand, ruled differently and refused the withholding exemption. It argued that without the interposition of the NV (and the holdings above it in the structure), dividend withholding tax would be payable on distributions by the feeder company to the ultimate shareholders, i.e. the Belgian natural persons. The Court of Appeals further noted that the interest in the feeder company could not be functionally attributed to the business of the NV, given that the NV was not involved with the activities of the feeder company and/or the interests held by the feeder company. Lastly, according to the Court of Appeals there was insufficient 'relevant substance' present at the NV: it did not have any own personnel (the personnel was hired from an entity of the shareholders) and there was no own office (the workspace in the home was not used specifically for the Belgian NV). The Court of Appeals did however give the taxpayer the opportunity to convincingly demonstrate that there was no abuse. However, the taxpayer did not succeed in this. The Amsterdam Court of Appeals concluded that the withholding exemption did not apply to the dividend distribution to the NV and that therefore Dutch dividend withholding tax was payable.

Dutch Supreme Court upholds the Court of Appeals rulings

The Supreme Court upheld both of the judgments by the Amsterdam Court of Appeals. In doing so, it aligned itself with the previously rendered Curaçaoan holding company judgments in respect of the framework for assessing whether there is abuse (see our memorandum of May 1, 2025). An important addition now made by the Supreme Court is that maintaining a structure that was originally set up for business considerations reflecting economic reality may, if circumstances change, lead to the structure being regarded as artificial.

According to the Supreme Court, the Court of Appeals used the correct test to assess whether there was abuse. Furthermore, the presence or absence of abuse is a strong factual assessment. For the Supreme Court, that factual assessment is only grounds for an appeal in cassation if there is an incomprehensible or insufficient substantiation. According to the Supreme Court, that was not the case here, which meant that the Court of Appeals' conclusion that there is abuse was upheld. However, the Supreme Court did address several specific elements important for the assessment:

- The circumstance that a company carries on an active business does not mean that there is no abuse. The shares held must also be attributable to the business capital. Of importance is therefore that there is active management and governance of those participations.
- It follows from the judgments in the Danish cases that of relevance is the degree to which the company (intermediate company) has actual control over the dividends. The Supreme Court reiterated that the Court of Appeals had noted that it were, in fact, the underlying family members who were the shareholder of the Belgian companies, who can decide whether the realized profits can be distributed and that the company therefore does not have any control over this. Furthermore, the company was not obliged to reinvest any profits.

KPMG Meijburg & Co comments

In the Dutch implementation of the EU law anti-abuse test, the government provided a specific assessment framework for assessing the presence of abuse, thereby dividing the burden of proof between the Dutch tax authorities and the taxpayer. Earlier this year, in the Curaçaoan holding company judgments, the Supreme Court had ruled that this assessment framework – including the Dutch interpretation of the subjective and objective tests – was not contrary to EU law. As part of the subjective test, the Dutch tax authorities can therefore suffice with the disregard principle (*wegdenkgedachte*). Based on the doctrine of judicial discretion, the taxpayer can then argue the absence of abuse on other grounds, but the present cases show that this is not always easy to do.

Of practical importance is, in particular, that if the shareholder carries on a business of substance, then for the purposes of the abuse test each interest must be assessed separately as to whether this is functionally attributable to that business. Of relevance in doing so is whether that business is also actively involved with the subsidiary in which the interest is held. In principle, a business structure may contain an artificial part or element by holding a portfolio investment. With regard to that portfolio investment, there may then be abuse, which means the withholding exemption does not apply to dividend distributions by that portfolio investment. The Supreme Court also added that a structure that was initially set up for business considerations may become non-business motivated by maintaining those changed circumstances.

If you would like to know more about this matter, feel free to contact us or your usual Meijburg tax advisor.

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