

Netherlands; United Kingdom

Supreme Court Rules on Anti-Dividend Stripping, Specifying Exhaustive Situations Where Taxpayer, Despite Control, is Not Ultimate Owner

24 January 2024

Report from Dr René Offermanns, Principal Associate, IBFD

The Supreme Court (*Hoge Raad der Nederlanden*) gave its decision on 19 January 2024, in the case of *X BV v. State Secretary for Finance* (Case No. 20/01884) on the issue of whether the taxpayer (legal entity) was entitled to a credit for dividend withholding tax as it was the legal owner of shares and the ultimate beneficial owner of paid dividends. Details of the decision are summarized below.

(a) Facts. The taxpayer (X BV) was part of a US Bank group. Its activities consisted of acquiring Dutch-listed shares (long stock positions) and selling futures (listed forward contracts) related to these shares. The shares were kept by a French bank acting as a custodian. The taxpayer took short future positions. To increase its returns and reduce its financing costs, the taxpayer lent the shares to D Ltd in the United Kingdom, which was the European broker-dealer of the Bank group. In return, the taxpayer received cash deposits in US dollars as collateral (cash collateral) and a stock lending fee.

The total value of the shares purchased by the taxpayer in the period from 2006 to 2010 amounted to more than EUR 7 million.

The taxpayer stated that it always owned (although for a short period of time) the shares around the time of the dividend payment and therefore should be regarded as the ultimate beneficiary of the dividends. As proof, the taxpayer indicated that the ownerships were registered in its securities deposit with the French custodian bank on the basis of legal acts concluded with its shareholder D Ltd.

The taxpayer claimed credit for EUR 39,249,246 dividend withholding tax on the dividend income received on the Amsterdam Exchanges Index (AEX) listed shares.

The tax inspector rejected the credit because the taxpayer's documentation contained insufficient information for granting the credit and the case constituted dividend stripping, which the taxpayer appealed.

(b) Background. Article 25(1) of the Corporate Income Tax Act (CITA) provides that dividend withholding tax constitutes a pre-levy of the CITA.

Article 25(2) of the CITA provides that dividend withholding tax will not be considered if the taxable person against whom this tax has been withheld is not also the ultimate beneficiary of those dividends.

Article 25(3) of the CITA provides that a combination of transactions may also exist in cases where transactions have been entered into on a regulated market as referred to in article 1:1 of the Financial Supervision Act or a system comparable to a regulated market.

Article 52(1) of the General Tax Act (GTA) provides that persons that are liable to keep books and records are bound to keep such books and records of their financial position and of all facts pertaining to their business and will retain these books, records and other data carriers in such a way, that they clearly show, at any moment in time, their rights and obligations. In addition, they must keep any data that are otherwise of importance for the levying of taxes.

(c) Issue. The issue was whether the taxpayer was entitled to a credit for the dividend withholding tax because it was the legal owner of the underlying shares and the ultimate beneficial owner of those dividends.

(d) Decision. The Amsterdam Court of Appeal decided in favour of the tax administration because the taxpayer had not satisfied the Court's request for proof that it was the legal owner of the shares and, therefore, the ultimate beneficiary of the dividends. Furthermore, the Court held that the taxpayer's administration did not meet the legal requirements. The taxpayer appealed that decision. The Amsterdam Court of Appeal then referred the case to the Supreme Court.

The Supreme Court overturned that decision and observed that dividend withholding tax cannot be credited with the corporate income tax if the recipient of the dividends is not the ultimate beneficiary. Under article 25(1) of the CITA, the holder of the dividends is, in principle, regarded as the ultimate beneficial owner if they could freely dispose of those dividends and did not act as a fiduciary or agent at the time when the dividends were made available. The Supreme Court held that articles 25(2) and (3) of the CITA contain an exhaustive regulation about the cases in which the holder of the dividends cannot be considered as the ultimate beneficial owner of the dividends despite the owner being able to freely dispose of such dividends and not acting as a fiduciary or agent upon receipt thereof.

According to the Supreme Court, the explanatory memorandum showed that article 25(2)(2) of the CITA constitutes a very targeted measure that is limited to obvious cases of dividend stripping. This explanatory memorandum further showed that the legislator intended that judges should further define the concept of beneficial owner, but it cannot be determined from this explanatory memorandum what conditions, requirements and circumstances the legislator regarded as sufficient for ultimate beneficial ownership.

The Supreme Court decided that outside the situations described in article 25(2)(2) of the CITA, no case could arise in which the taxpayer cannot be regarded as the ultimate beneficial owner, even though they freely disposed of the dividends and did not act as a fiduciary or agent upon receipt. Therefore, the Supreme Court considers the decision of the Court of Appeal incorrect.

Therefore, the Supreme Court decided that the case had to be referred to the Den Bosch Court of Appeal (Under Dutch practice, it is customary that when new factual research must be conducted in a case, the case is referred back to another Court of Appeal) to re-examine if the taxpayer was the legal owner of the underlying shares and the ultimate beneficial owner of the dividends.

The Supreme Court also decided that the decision of the Appeal Court Amsterdam with regard to the decision to provide information was incorrect.

This decision was based on the view that the taxpayer was denied the status of beneficial owner of the dividends as they were not sufficiently involved in the carrying out of the transactions that formed their trading strategy, because those transactions were carried out on their behalf by other (legal) persons.

Based on this reasoning, the Amsterdam Court of Appeal had denied the credit for the dividend withholding tax.

According to the Supreme Court, it was sufficient that the taxpayer's administration showed that, when, with whom and under what conditions the taxpayer had carried out the transactions concerned as part of their trading strategy. It was irrelevant to what extent the taxpayer had actually carried out such transactions itself or had them carried out by another party on their behalf.

The Supreme Court decided that the administration of the taxpayer met the legal requirements of article 52 of the GTA. The fact that the stock lending system showed the size and type of AEX listed shares at any time for each of the outstanding share loans, with the associated fees and (the status of) the cash collateral, meant that the rights and obligations could be determined from this system at all times.

For the full text of the decision, see [here](#) (in Dutch only).

Netherlands; United Kingdom - Supreme Court Rules on Anti-Dividend Stripping, Specifying Exhaustive Situations Where Taxpayer, Despite Control, is Not Ultimate Owner (24 Jan. 2024), News IBFD.

Exported / Printed on 7 Mar. 2024 by hkermadi@deloitte.lu.