

Belgium; Netherlands

Leuven Court of First Instance Interprets Term 'Beneficial Owner' Under Belgium-Netherlands Tax Treaty Based on Interest and Royalties Directive

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The Leuven Court of First Instance (*Rechtbank van Eerste Aanleg Leuven*), on 27 October 2023 (recently published), gave its decision in Case No. 21/942/A *S.E.bv v. Belgian State* on the interpretation of the term "beneficial owner" under article 11(3)(a) of the [Belgium - Netherlands Income and Capital Tax Treaty \(2001\) \(as amended through 2009\)](#) (the Treaty). Details of the decision are summarized below.

(a) Facts. The taxpayer (S.E. bv) paid interest on five loans received from a Dutch subsidiary. Four of these loans were tied to loans issued by a Dutch limited partnership (CV, now a US LLC) to the taxpayer's parent company (BV1). The fifth loan was associated with a loan granted by the limited partnership (CV) to a subsidiary of the taxpayer (BV2). The Dutch parent and subsidiary company formed a fiscal unity in the Netherlands. A Dutch ruling (APA settlement agreement) within the fiscal unity established a fixed compensation for the financing activities conducted for group companies. The Transfer Pricing Report attached to the ruling request indicated that a Dutch CV is the lender and the taxpayer were the ultimate borrower of the loans involved. The APA settlement agreement also clearly showed the link between these different loans. The loans granted by the CV were later contributed to a newly established LLC under Delaware law.

The taxpayer claimed an exemption from withholding tax based on article 11(3)(a) of the Treaty. The Belgian Tax Administration denied the exemption citing that the Dutch subsidiary BV2 was not the beneficial owner of the interest.

(b) Legal background. Article 11(3)(a) of the Treaty, notwithstanding the provisions of paragraph 2, exempts interest from tax in a contracting state if the beneficial owner is an enterprise of the other contracting state, and the interest does not arise from bearer securities representing loans or deposits of sums of money.

Article 1(4) of the [Interest and Royalties Directive \(2003/49\)](#) provides that a company of a Member State will be treated as the beneficial owner of the interest or royalties only if it receives those payments for its own benefit and not as an intermediary.

(c) Issue. The issue was whether the Dutch subsidiary BV2 was the beneficial owner of the interest and was entitled to an exemption from withholding tax under the Treaty.

(d) Decision. The mere fact that a fiscal unity exists between the taxpayer's subsidiary (BV 2) and parent company (BV 1) does not imply that the taxpayer's subsidiary is a conduit company and does not therefore prevent it from being regarded as a "beneficial owner". However, a fiscal unity can be part of a

construction aimed at avoiding or evading taxes in certain transactions.

The fiscal unity between the taxpayer's subsidiary (BV 2) and parent (BV 1) means that the interest obtained by the subsidiary (BV 2) is offset against the interest paid by the parent (BV 1) to the LLC, which means that almost no tax is paid on the interest. Moreover, the taxpayer could not have claimed any exemption if it had paid the interest directly to the LLC and if the intermediary Dutch companies had not been used.

In addition to the above-mentioned link between the various loans, the Court also pointed out the fact that, initially, both the claims on the taxpayer and the underlying debts were held by one company, which were subsequently split between the Dutch subsidiary (BV 2) (claims) and parent (debts) (BV 1) of the taxpayer. Subsequently, after a merger between this subsidiary and parent, the claims were again held by the same company (BV 1). According to the Court, this also pointed to the links between these loans, as well as to the artificial character of the construction.

The above facts at least implicitly show that the Dutch subsidiary and parent company merely play a role as a formal intermediary and that the ultimate lender is the LLC, which has taken over the loans from the CV.

For the fifth loan, which was financed directly by the Dutch subsidiary (BV 2) from the CV (now LCC), it appeared that the Dutch company (BV 2) was obliged to pay interest to the CV (later the LLC). For the other four loans, the Court found important indications of the actual flow of interest in the annual accounts of the companies involved.

In the court's opinion, the taxpayer, therefore, failed to meet the burden of proof that the Dutch subsidiary BV2 was the ultimate owner of the interest. Consequently, the Court held that the administration correctly rejected the exemption from withholding tax. The amount of the withholding tax must also be added to the amount of income for the calculation of the withholding tax (grossing up).

For the full text of the decision No. 21/942/A of 27 October 2023, see [here](#) (in Dutch).

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