

# Spanish Supreme Court Holds that Burden to Prove Abuse Rests with Tax Administration, Applies ECJ Case Law on Danish Beneficial Ownership Cases

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The Spanish Supreme Court has ruled that the burden of proof of abuse rests with the tax administration in justifying a rejection of the EU Parent-Subsidiary exemption of dividends distributed to EU parent companies (see [Supreme Court Rules Burden of Proving Abuse Rests with Tax Administration \(23 June 2023\)](#)).

(a) Facts. The tax administration had assessed a case of a Spanish taxpayer that distributed a dividend in 2010 to its parent company resident in Luxembourg. The Spanish taxpayer argued that the dividend was exempt under article 14.1.h of the domestic Non-Resident Income Tax (NRIT) Law (which transposed the Parent-Subsidiary Directive). The tax administration denied the exemption on the grounds that the ultimate investor was a Canadian corporation under public law, owned by the Government of Canada, whose purpose was the administration and management of the public pension funds of various groups of civil servants, military and police officers in Canada.

The case reached the National Court, which considered that the Spanish tax administration had been wrong to establish a de facto presumption of an exclusively fiscal purpose merely because the parent company was a Canadian pension fund, which was in breach of the judgements of the Court of Justice of the European Union on the Danish cases. According to the National Court, the tax administration must justify the assumptions for the application of the anti-abuse clause, with the latter being required to provide further proof, through the various means of information provided for in the Convention with Luxembourg and Canada, making the appropriate requests to obtain the necessary information to justify the lack of a valid economic interest. The General State Administration lodged an appeal in cassation before the Supreme Court.

(b) Issue. The Supreme Court has analysed with whom the burden of proving the establishment of the parent entity on valid economic grounds lies and on whom the consequences of failure to establish that fact must fall in order to assess the anti-abuse clause of the Spanish domestic law which transposed the Parent-Subsidiary Directive.

(c) Decision. The Supreme Court concluded that it is for the tax administration, and not the taxpayer, to prove the assumptions for the application of the anti-abuse clause, by using the various means of information provided for in the relevant tax treaty or the instruments that envisage the exchange of information between tax administrations. With this decision, the Supreme Court applied the ECJ judgements on the Danish cases ([C-116/16](#) and [C-117/16](#)) and abandoned the case law doctrine set out

in prior judgments and recognized its duty to adjust and interpret the anti-abuse clause contained in aforementioned article 14.1.h of the NRIT law, in the sense that it should be established as case law that the burden of proof of abuse rests with the tax administration.

Decision STS 2652/2023 - ECLI:ES:TS:2023:2652, of 8 June 2023, published on 23 June 2023, is available [here](#) (as a PDF and in Spanish only).

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