Slovak Republic

Supreme Administrative Court Decides That Tax Authorities Correctly Assessed Additional Withholding Tax Due to Tax Avoidance

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The tax authorities announced their victory in the long-standing legal dispute with the energy supplier and distribution company "SPP" (*Slovenský plynárenský priemysel* a.s.) for the amount of EUR 15.43 million. The respective judgement of the Supreme Administrative Court entered into force recently and confirms that the actions of the tax authorities were correct in assessing additional withholding tax as a response to the taxpayer's tax avoidance actions.

The tax authorities report that shortly before SPP had to pay dividends to its shareholders, the German company Ruhrgas Aktiengesellschaft Essen and the French G.D.F. International Paris, SPP established a new holding company in the Netherlands - Slovak Gas Holding B.V., which received the dividends on behalf of the two shareholders free of withholding tax on dividends. The tax authorities considered that the new shareholder was established with the purpose of obtaining tax advantage in the form of non-taxation of dividends. Tax authorities came to this conclusion on the basis of tax audit for the financial year 2003, as the result of which they assessed additional withholding tax of EUR 15.43 million.

According to the tax authorities, the Dutch company was an "empty" company (conduit company) whose only purpose was to obtain a tax advantage. If dividends were directly paid to the original shareholders of SPP, their amount would be taxed at source at the tax rate of 15% and 10% respectively. Since the dividends were already paid to the new shareholder in the Netherlands, the withholding tax was not levied in Slovak Republic due to the full exemption resulting from the Netherlands - Slovak Republic Income and Capital Tax Treaty (1974) (MLI synthesized text 2019), which also did not contain the beneficial ownership requirement. At the same time, these dividends were also exempt from income tax in the Netherlands according to the national participation exemption rule. As the result, the dividends "flowed" without taxation through the newly established Dutch company to the original shareholders.

The tax authorities considered the actions of the taxpayer and its shareholders as an abuse of law, as the change in the shareholding structure was purposeful and implemented in order to obtain tax advantage.

The text of the judgment of the Supreme Court is final but is not yet available publicly. During the years of legal proceedings conducted in Slovakia, the case was also addressed at the Court of Justice of the EU and the respective ECJ decision is available here (in Slovak and French, *see* ECJ Rules on Application of Council Directive 90/435/EEC: Slovenský plynárenský priemysel, a.s. v. Finančné riaditeľstvo Slovenskej republiky (Case C-113/20) (16 November 2020)).