

Advocate-General opinions on the application of the Dutch dividend withholding tax exemption in two Belgian holding company cases

On June 9, 2023, Advocate-General Wattel (hereafter referred to as A-G) issued two opinions in cases concerning the application of the dividend withholding tax (DWT) exemption regarding dividend distributions to Belgian personal holding companies (we refer to our [Newsflash](#) of 15 July 2022 with respect to one of those cases). The Amsterdam Court of Appeal previously ruled that the DWT exemption did not apply in both cases because of the anti-abuse provision. The A-G now advises the Dutch Supreme Court to follow this judgment and deny the applicability of the DWT exemption.

Background

Based on the DWT exemption, the Netherlands does not levy DWT on distributions to companies established in an EU/EEA member state or a treaty state. However, the exemption does not apply if the anti-abuse provision applies. This anti-abuse provision excludes exemption if (i) the main purpose or one of the main purposes of holding the interest through the foreign holding company is to avoid the imposition of DWT (the so-called "subjective test") and (ii) there is an artificial arrangement (the so-called "objective test"). For analyzing the subjective test, the so-called "look through" approach is used, whereby the avoidance of DWT is assumed to be the main objective when more DWT would be due if the ultimate

shareholders were to hold the shares in the Netherlands-based entity directly (i.e., without the interposition of the holding company).

There is not yet much clarity regarding the application of the DWT exemption to dividend distributions to personal holding companies. The A-G's conclusion is a welcome clarification in that context.

The cases

The parties in these cases are holding companies that are tax resident in Belgium (hereinafter: **the Shareholders**). Both Shareholders are (in)directly held by natural persons from the same family, residing in Belgium. They held an interest in a limited partnership (in Dutch: commanditaire vennootschap (CV)) based in the Netherlands that held several (private equity) investments.

In 2018, the Shareholders received a dividend from a Dutch intermediate holding company on which 5% DWT was withheld. The question before the Court was whether this tax was correctly withheld or that the Shareholders would be entitled to the DWT exemption.

Unlike the Court of Haarlem, the Amsterdam Court of Appeal ruled that - in both cases - the DWT exemption was not applicable.

According to the Court of Appeal, in both cases the anti-abuse provision applies mainly because the Shareholders did not run an active business (or the shareholding in the Dutch intermediate holding company could not be allocated to such enterprise) and did not have sufficient relevant economic substance (i.e. an own office space and personnel). The DWT exemption should therefore not apply.

Before the Dutch Supreme Court, both Shareholders argued that the Amsterdam Court of Appeal did not correctly apply the anti-abuse provision.

Opinion A-G

According to the A-G, the Court of Appeal correctly analyzed in both cases whether the anti-abuse provision was applicable. This because the Court of Appeal (i) applied substantive-legal standards that are consistent with EU law, (ii) laid the burden of proof on the Dutch tax inspector and (iii) offered the possibility of counter-evidence to both Shareholders. The counter-evidence was, however, assessed by the Court as not relevant, not persuasive or not plausible. It therefore rightfully came to the conclusion that the anti-abuse provision prevents the applicability of the DWT exemption.

What's next?

If the conclusion of the A-G is followed by the Dutch Supreme Court, this could have far-reaching consequences for structures with foreign (personal) holding companies without sufficient relevant economic substance and without sufficient involvement in activities in the Netherlands.

Although these cases concerned personal holding companies of a few family members, we believe also corporate structures and private equity structures can also be challenged with the anti-abuse provision.

Own office space and own staff is in any case recommended. In addition, it is advisable to ensure that the board of directors of the holding companies can freely decide how to use the dividends received. The functionality of the foreign holding companies must be carefully substantiated. This emphasizes the importance of a thorough and careful preparation of documentation demonstrating the economic reality and non-artificiality of the structure. It is advisable to seek legal advice in this regard to ensure that all requirements are met.

Questions?

If you have any questions regarding this newsletter, please do not hesitate to contact us.

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