

The saga on the withholding tax exemption continues

Introduction

Recently, the Amsterdam Court of Appeal decided on the application of the dividend withholding tax exemption, on a distribution to a Belgian family holding company. According to the Court of Appeal, the dividend withholding tax exemption was not applicable, due to the lack of physical substance. This case is highly relevant to all foreign personal and family holdings that invest in the Netherlands.

Background

In principle, the Netherlands does not levy dividend withholding tax on dividend distributions to corporate shareholders that reside in the EU / EEA or a jurisdiction with which the Netherlands has a double tax treaty (the “**WHT Exemption**”).¹ The WHT Exemption contains an anti-abuse rule: the exemption is not applicable to conduits and holding companies that lack physical presence, when they are used to obtain access to the WHT Exemption and it concerns a wholly artificial arrangement. Many personal holding companies and family holding companies lack physical presence and often do not have employees. Further, using a holding company provides access to the WHT Exemption, whilst the holding company’s owners would not be entitled to this exemption had they owned the shareholding in the Dutch distributing company directly instead of through the holding company.² One can therefore debate whether the use of a personal holding or family company should be considered a wholly artificial arrangement.

Unfortunately, there is much uncertainty in practice about whether personal and family holding companies can apply the WHT Exemption. This case sheds further light on this topic.

The case

The case concerned a Belgian holding company (“**Holding**”) that was held by a Belgian family. The Holding received a dividend from a Dutch BV (“**BV**”). BV served as a pooling vehicle for a Dutch private equity fund. The Holding did not have its own office space or employees. However, the Holding paid a management fee to an affiliated entity for management services and for the use of its premises. Holding also owned various other investments and was actively involved with the management of those other investments.

On the dividend, 5% dividend withholding tax was withheld in the Netherlands, which is the rate provided by the tax treaty with Belgium. Holding filed an objection against the dividend withholding tax return and claimed that the WHT Exemption should apply. The Lower Court of Haarlem agreed that the WHT Exemption should apply. However, the tax authorities appealed to this judgment at the Court of Appeal.

The decision of the Court of Appeal

According to the Court of Appeal, the Holding had the main purpose to avoid Dutch dividend withholding tax. This conclusion is based on the fact that the (ultimate) shareholders in the Holding are individuals who themselves are not entitled to the WHT Exemption.

The Court of Appeal was also of the view that the Holding was an artificial arrangement. The reasons were as follows:

- » The Holding did not have relevant substance, due to the absence of (own) personnel and office facilities;
- » Furthermore, the decision-making of the

¹ Provided the shareholding equals or exceeds 5% of the nominal and paid-up capital.

² Individuals are not entitled to the WHT Exemption.



holding is fully in the hands of members of the family.

In view of the Court of Appeal, it was not detrimental that the Holding had no involvement with the BV or the underlying private equity fund. However, the Court of Appeal mentioned that the absence of active involvement could be an indication of the absence of economic activity in relation to the shareholding and was therefore an artificial arrangement. It was also not relevant that the dividend income was not distributed to the ultimate shareholders. The Court of Appeal came to this conclusion on the basis that there was no obligation to reinvest any income and that the family was free to request a distribution at any time.

Hence, the WHT Exemption was denied.

Atlas notes

This decision from the Court of Appeal – in particular the reasoning on which the decision is based – has come as somewhat of a surprise to many practitioners. If the decision is indeed correct, then this implies that the WHT Exemption conditions may be much more restrictive than what was assumed by many. In our view, the legality of the reasoning of the Court of Appeal can be questioned, as well as the compatibility of its interpretation of the Dutch rules with EU Law. We will be closely watching the decision of the Supreme Court.

In the meantime, this decision makes the dividend withholding tax position of personal holding companies and family holdings of foreign individuals even more precarious. It is recommended that the applicability of the WHT exemption is carefully reviewed prior to any dividend distribution. If possible, it could be considered to postpone dividend distributions until the moment the Supreme Court gives its decision. It is also possible to discuss the application of the WHT Exemption in advance with the Dutch tax authorities. Finally, when structuring an investment in the Netherlands, one should carefully review the cash repatriation strategy.

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