Dutch Supreme Court judgment on the crediting of dividend withholding tax

On January 19, 2024 the Dutch Supreme Court clarified the rules applying to the crediting of dividend withholding tax for corporate income tax purposes. The Supreme Court judgment and its potential implications are addressed in more detail below.

The case

The taxpayer is a company established in the Netherlands and part of a group carrying on the banking business. During the years 2006 through 2013 it maintained a commercial strategy under which it:

a) acquired shares in Dutch funds listed on the Dutch AEX;
b) entered into futures contracts on a futures exchange, with the AEX shares as underlying value, and sold those futures contracts on the trading floor of that futures exchange;
c) lent out the AEX shares to its second-tier parent company established in the United Kingdom.

According to the taxpayer, before dividends were distributed, this share-secured loan was always repaid for a short time, so that it could credit the dividend withholding tax against its corporate income tax payable. The taxpayer had a securities deposit account registered in its name and which was held at a bank/custodian in France. After the shares had been acquired by the taxpayer, they were initially placed in the securities deposit account and then lent out to the second-tier parent company. The second-tier parent company always repaid each of the share-secured loans immediately before the date on which the dividends on the relevant AEX shares were distributed. To this end, the second-tier parent company placed the relevant AEX shares back in the taxpayer's securities account and notified the bank/custodian in France that the dividend to be distributed had to be booked in the taxpayer's account. Shortly after the dividend distribution, the taxpayer re-lent the same class and number of shares to the second-tier parent company. To this end, the second-tier parent company had the relevant AEX shares transferred from the taxpayer's securities account back to its own securities account. Taxpayer credited the withheld dividend withholding tax as an advance tax in its corporate income tax return. In dispute is whether the taxpayer was entitled to this credit.

Amsterdam Court of Appeals

According to the Amsterdam Court of Appeals, the conditions for crediting dividend withholding tax against any corporate income tax payable had not been met. The Court of Appeals ruled that in principle it can be assumed that placing shares in a deposit account creates a presumption of (legal) ownership of the relevant shares for the holder of the deposit account. According to the Court of Appeals, if however the relevant shares are always placed in the taxpayer's securities account without that transfer being based on a legally valid deed of transfer of legal ownership, the taxpayer cannot be regarded as the legal owner of those shares. In the present case, the Court of Appeals ruled that the taxpayer had failed to convincingly demonstrate that the transfer of the legal ownership of the shares (the 'always repaid') it contends took place is based on a decision by the taxpayer and/or on an agreement between it and the second-tier parent company, or is otherwise based on a legally valid deed. According to the Court of Appeals this means that is not plausible that the placement of the relevant shares in the taxpayer's securities account with the custodian in France – which is always related to the repayment of the share-secured loans – is based on a legally valid transfer of ownership deed. The Court of Appeals therefore did not deem it plausible that the legal ownership of the shares was always (temporarily) transferred to the taxpayer before the date on which the dividends were distributed.

If, as the taxpayer contended, the fact that the share-secured loans were 'always repaid' by the second-tier parent company meant that the taxpayer would indeed have become the legal owner of the relevant AEX shares, the Court of Appeals assessed whether the taxpayer thus always became the ultimate beneficial owner of the dividends on which the dividend withholding tax that it wished to credit had been withheld. In this respect, the Court of Appeals noted that a situation arises here whereby by interposing a party without a beneficial interest, use is being made of the opportunity to credit dividend withholding tax contained in Section 25(1) Corporate Income Tax Act 1969 (hereinafter: CITA) and subsequently ruled that it is not plausible that the taxpayer had become the ultimate beneficial owner of the dividends on which the dividend withholding tax that it wished to credit had been withheld.

The Supreme Court judgment

Issues in dispute

The extensive judgment deals with various disputed procedural law and substantive law issues. With regard to the substantive law issues, also in dispute was whether (some of) the taxpayer's profit had to be attributed to a permanent establishment in the United Kingdom and also whether the taxpayer was entitled to credit Dutch dividend withholding tax. We will only deal with the disputed issues regarding the dividend withholding tax credit.

General rule: the beneficiary to the income may credit dividend withholding tax

The Supreme Court noted first and foremost that Section 25(1) CITA designates the levied dividend withholding tax as an advance tax and that this applies for the beneficiary to the income for whom that income is taxable income. In short: only the beneficiary to the income can credit the dividend withholding tax. According to Section 1(1) Dividend Withholding Tax Act 1965 (hereinafter: DWTA), the beneficiary to the income from shares is the party that is directly or by means of depositary receipts entitled to that income. The basic assumption is that the beneficiary to the income is the party that, in civil-law terms, is entitled to the income from the shares. That beneficiary to the income is the owner of the share, the dividend voucher or a similar right to the benefits derived from the share. Generally, if such a right to the income from the share has not been separated, the status of beneficiary to the income will coincide with the status of shareholder. The burden of proof is on the taxpayer in this respect.

The Court of Appeals had already ruled that the securities account registered in the name of the taxpayer in France belonged to the taxpayer and that on the instruction of the second-tier parent company the AEX shares lent out were always returned to that securities account and also registered in that account immediately before or at the time the dividends on those shares were distributed. Those conclusions could no longer be successfully challenged before the Supreme Court.

The Supreme Court ruled that in a case such as the present one which (i) concerned cashless transferable securities in a Dutch company, and in which (ii) the party transferring the shares was established in the United Kingdom, and (iii) the bank/custodian of those shares was established in France, the applicable law is that designated by Dutch international private law. According to Dutch international private law, in such a situation the question as to who the beneficiary to the income is, must be answered according to the law of the state on whose territory the account in which the cashless securities are administered, is held (in the present case: France). The Supreme Court has referred the case to the Court of Appeals in The Hague asking it to answer (among other things) the question whether, under French cashless securities law, the taxpayer must be regarded as the holder of the shares at the time the dividends on the relevant shares were distributed.

Exception: there can be no crediting of dividend withholding tax if the beneficiary to the income is not the "ultimate beneficial owner".

An exception to the rule that the beneficiary to the income may credit dividend withholding tax, is the situation where the beneficiary to the income is not the "ultimate beneficial owner". In principle, the beneficiary to the income is regarded as the ultimate beneficial owner if it can freely dispose of that income and does not act as manager or agent when the income is received. There can only be an exception to that rule if there is dividend stripping as specifically referred to in Section 25(2) and (3) CITA. The burden of proof is on the tax inspector in this respect. The Supreme Court inferred from the parliamentary records on these provisions that there are no exceptions. If the Courts of Appeals in The Hague concludes that the taxpayer is the beneficiary to the income from the shares (see above), then it must subsequently assess whether the taxpayer was also the ultimate beneficial owner. That the taxpayer could freely dispose of the dividends had already been established by the Amsterdam Court of Appeals and thus does not have to be assessed again. However, whether there is a specific exception for dividend stripping will have to be assessed.

KPMG Meijburg & Co comments

The Supreme Court judgment provides more clarity on the possibilities for crediting dividend withholding tax. The conclusion that entitlement to the income is crucial in order to credit dividend withholding tax was in line with expectations. The Supreme Court has also provided more clarity on the beneficiary to the income: as a rule, if an entitlement to the income from a share has not been separated (by selling the dividend voucher or transferring a similar right to the benefits of the share), the status of beneficiary to the income will coincide with the status of shareholder. Further, the judgment makes clear that the beneficiary to the income is also the ultimate beneficial owner, provided they can freely dispose of the dividend and do not act as manager or agent, unless there is dividend stripping as specifically referred to in Section 25(2) and (3) CITA. There are no other exceptions.

As of January 1, 2024 legal measures have been taken to provide the tax inspector with more options to combat dividend stripping. The most important measure is that the burden of proof has been moved to the taxpayer. If you would like to know more about crediting dividend withholding tax or the tax aspects of dividend stripping, feel free to contact us.

KPMG Meijburg & Co
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