

Conclusions of the Advocate General at the Supreme Court with respect to the anti-abuse provision of the dividend withholding tax exemption

On June 9, 2023, two conclusions (with a combined appendix) were published in two cases in which the dividend withholding tax exemption of Section 4 of the Dividend Withholding Tax Act (*Wet DB*) was refused by invoking the anti-abuse provision contained therein. In these conclusions, Advocate General Wattel ('A-G') advises the Supreme Court to dismiss the taxpayers' appeals in cassation.

These cases concerned dividends distributed by companies established in the Netherlands to Belgian holding companies, of which the (direct or indirect) shareholders in Belgium are resident members of the same family. In one of the cases, the holding company did not carry on a business of substance. In the other case, the holding company did carry on a business of substance in connection with the holding of shares in other companies, but the shares in the company that distributed the dividend could not be functionally attributed to that business. In both cases, the Court of Appeals Amsterdam ruled that there was abuse, so that the dividend withholding tax exemption could not be applied. According to the A-G, the appeal in cassation in both cases must be rejected, because the Court of Appeals Amsterdam has established the correct legal standard and the actual conclusions are not incomprehensible.

Although the substantiation by the Court of Appeals Amsterdam (in particular in the case in which a business was involved) may be surprising, we consider it highly likely that the Supreme Court will follow the Opinion of the A-G. In that case, the judgment may lead the tax authorities to challenge similar structures. It is therefore advisable to ensure that the function of holding companies can be properly substantiated. This could include:

- actual management of the Dutch company by the foreign parent company;
- availability of personnel - at the level of the foreign parent company - dealing with the management of the Dutch company and availability of office space where those activities are carried out;
- the board of directors of the foreign parent company has actual power to dispose of the dividends received from the Dutch company.

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