

The Spanish Supreme Court rules that the tax authorities have the burden of proving an abuse to deny the withholding tax exemption on EU dividends

The **anti-abuse clause** in article 14(1)(h) of the Non-Resident Income Tax Law (in the version in force until 1 January 2015) **infringed EU law** because it established a general presumption of abuse and fraud that transfers onto the taxpayer the burden of proving the lack of abuse. This anti-abuse clause must be construed in such a way that the **Spanish tax authorities** have the **burden of proving** in each specific case that all the elements of an abusive practice are present to deny the Spanish dividend withholding tax exemption.

Further to the Court of Justice of the European Union's decisions in in [Egiom and Enka](#) (C-6/16), [Deister Holding](#) (C-504/16) and [Danish cases](#) (C-116/16 and C-117/16), the Supreme Court has upheld the judgment of the Spanish National Court of 21 May 2021 and rectified its previous criterion. It has concluded that the anti-abuse rule in article 14.1.h) of the Non-Resident Income Tax Law (in the version in force until 1 January 2015), which applies to dividend distributions by a Spanish subsidiary to its EU parent company controlled by shareholders not resident in the EU or in the EEA, infringes EU law as it establishes a general presumption of abuse and fraud which transfers onto the taxpayer the burden of proving the lack of abuse.

To deny the application of the exemption, the Spanish tax authorities have to evidence that all the elements of an abusive practice are present in a given situation. They cannot deny the exemption based on general presumptions of fraud and abuse (such as those that prevent specific categories of taxpayers from applying the exemption) without providing even *prima facie* evidence of the absence of economic reasons or of fraud or abuse. In other words, the Spanish tax authorities cannot pass the burden of proof to the taxpayer, as it would undermine the objective pursued by the Parent-Subsidiary Directive and the freedom of establishment guaranteed by the EU treaties.

In short, the anti-abuse clause of the Parent-Subsidiary Directive must be construed and applied restrictively, because it represents an exception to the benefits of the Directive: only those dividends distributed to EU parent companies incorporated in circumstances where the Spanish tax authorities can prove abuse should not be entitled to this dividend exemption. As a result, this interpretation should allow Spanish-source profit distributions to EU parent companies to benefit from the exemption when the Spanish tax authorities are not able to evidence that an abusive scheme was used.

The decision represents a turning point in the Supreme Court's case law, which until now had ruled that the taxpayer had the burden of proof (among others, Supreme Court judgments of 21 and 22 March 2012;

and of 4 April 2012). This change of approach is significant for Non-Resident Income Tax payers, as it gives them greater legal certainty and forces the Spanish tax authorities to argue and evidence in each case that abuse or fraud exists, particularly in European groups controlled by entities or persons resident in third countries.

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