

The Spanish Tax Agency must prove that there are no valid economic grounds to deny the dividend exemption

The Spanish National High Court rejects the obligation of the taxpayer to prove the existence of valid economic motives when the Spanish Tax Agency has not carried out a minimum evidential investigation to justify the application of the anti-abuse provision.

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The National High Court has limited the application of the beneficial ownership doctrine and the anti-abuse provision contained in article 14.1.h) of the Revised Non-Resident Income Tax Law in a recent ruling dated 21 May 2021.

In the case in question, the Spanish Tax Agency (“AEAT”) denied the application of the exemption for dividend payments in a case in which the dividends were paid to a Spanish company wholly owned by a Luxembourg entity whose ultimate owner was a Canadian corporation dedicated to the management of public pension funds for various groups of civil servants, military and police officers.

The denial of the exemption was based on the application of Article 14.1.h) of the Revised Non-Resident Income Tax Law, in the version in force at the time, on the grounds that (i) the Spanish subsidiary directly receiving the dividends did not carry out any economic activity, (ii) the Luxembourg parent company did not have the necessary resources to be considered as having a structure capable of carrying out a minimum economic activity, and (iii) the taxpayer did not demonstrate the existence of valid economic reasons for the incorporation of the interposed Luxembourg entities.

In relation to this third aspect, the decision under analysis rejects that the AEAT can refrain from carrying out any minimal evidential investigation in order to challenge the existence of a valid economic motive, limiting itself to presuming that, given that the entity at the end of the chain of ownership is a pension fund, which by definition seeks to minimise administrative

costs, the only reason that can justify the incorporation of an intermediary structure in a country other than that of the final investment is always for a tax benefit.

In the decision analysed, the Spanish National High Court cites and recalls the doctrine established by the CJEU in the cases of Equiom and Deister Holding, and concludes that, notwithstanding the provisions of article 14.1.h) of the Non-Resident Income Tax Law, anti-abuse provisions which deny the application of the exemption to generic structures or transactions are not admissible, reversing the burden of proof of the existence of valid economic reasons placed on the taxpayer. On the contrary, it is the Spanish Tax Agency, and not the taxpayer, which must justify the assumptions for the application of the anti-abuse provision by using the various means of information provided for in the Double Taxation Agreements or the Directive on Administrative Cooperation (DAC).

According to this decision, against which an appeal may still be lodged, the Spanish National High Court aims to overcome the doctrine established on this issue by both the National High Court itself and by the Supreme Court.

There is no doubt that this new position, should it be definitively confirmed, would limit the broad application of the beneficial ownership doctrine, which has been applied by the Central Economic Administrative Court in several rulings, and influences the interpretation of the current wording of Article 14.1.h) of the Non-Resident Income Tax Law.