The Dutch Take on Antiabuse Rules and Conduit Companies In the Context of the CJEU's Danish Cases

by Roland Meuwissen

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In this article, Meuwissen examines how Dutch direct taxes and antiabuse rules have been affected by two 2019 Court of Justice of the European Union judgments — the so-called Danish cases.

Combatting the abuse of tax law has been at the top of the world's agenda for a while now, culminating in a deal on the major reform of the international tax system on October 8 agreed on by 136 jurisdictions of the OECD inclusive framework on base erosion and profit shifting.[1]

With those constant developments, one could almost forget the two landmark judgments handed down by the Court of Justice of the European Union in six cases referred to it by the Danish courts on February 26, 2019.[2] The CJEU ruled that tax authorities and national courts must deny the exemptions of the parent-subsidiary directive (2011/96/EU) and interest and royalty directive (2003/49/EC) — even if the requirements for those exemptions have been formally met — if sought for fraudulent or abusive ends.

Those verdicts can be considered part of the fight against treaty shopping. As early as 1977, treaty shopping was defined as using a conduit company in another state to obtain treaty benefits that were otherwise not available directly. Since then, many reports have been published addressing the issue. A major milestone is the introduction in the OECD multilateral instrument of limitation on benefits clauses and principal purpose tests (PPTs) to tax treaties.

The first Dutch case applying that precedent was handed down in 2020, giving more detail on what exactly qualifies as abuse of law for Dutch dividend withholding taxes, Dutch foreign substantial interest taxation, and the new source withholding tax act that came into force January 1, 2021.[3] The Dutch government has announced that the guidelines formulated in the Danish cases will also influence the interpretation of the PPT in the MLI and OECD model treaty,[4] although approximately 50 of the Netherlands' 92 tax treaties contain that test.[5]

This article reviews the Danish cases, discusses the role antiabuse rules play in Dutch direct taxes and the Dutch implementation of and case law on antiabuse rules, provides practical guidelines that can be distilled from those discussions, and notes some relevant developments.

I. The Danish Cases

Although the CJEU decisions are groundbreaking in many ways, the rule that EU law cannot be relied on in situations of fraud or abuse is not new. In the Danish cases, the CJEU remained close to the rule it formulated as early as

[1] Stephanie Soong Johnston, "G-20 Finance Chiefs Approve OECD Global Tax Reform Deal," *Tax Notes Int'l*, Oct. 18, 2021, p. 287.

[2] *Denmark v. T Danmark*, joined cases C-116/16 and C-117/16 (CJEU 2019); and *N Luxembourg 1 v. Denmark*, joined cases C-115/16, C-118/16, C-119/16, and C-299/16 (CJEU 2019) (hereinafter, the "Danish cases").

[3] ECLI:NL:HR:2020:21 (2020), discussed *infra*.

[4] Tweede Kamer, 2017-2018, 34 788, No. 3, at 6.

[5] As of July 1, according to the Dutch government. *See* Rijksoverheid, "Multilateraal Instrument (MLI) en Nederlandse belastingverdragen" (July 1, 2021) (in Dutch).