TAXAND

TAX CONTROVERSY AND BENEFICIAL OWNERSHIP

INSIGHTS FROM FRANCE, ITALY AND SPAIN

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INTRODUCTION

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Welcome to the first edition of Taxand Global's new *Tax Controversy* publication, offering practical perspectives on the evolving challenges multinational face in managing tax disputes.

This inaugural issue focuses on **Beneficial Ownership** — an area of increasing scrutiny as tax authorities around the world demand greater transparency about who ultimately benefits from the income flowing through corporate structures. Complex ownership chains, particularly those spanning multiple jurisdictions, are increasingly at the centre of compliance reviews and tax audits.

With expert contributions from Taxand member firms **Maisto e Associati, Italy; Arsene, France and Garrigues, Spain**, this edition examines how the concept of beneficial ownership is interpreted and applied across these key European jurisdictions. Each chapter examines relevant **administrative practices, recent jurisprudence and case law**, and the **potential risks and practical issues** that businesses may face in audits or litigation concerning ownership transparency.

While the concept of beneficial ownership is shaped by local law, international developments — such as references to the **OECD Model Tax Convention and the jurisprudence of the Court of Justice of the European Union** — continue to influence domestic approaches. Understanding how these interpretations evolve, both locally and across borders, is essential to effective tax risk management. The insights in this issue are intended to help multinational groups to anticipate where disputes may arise and strengthen their governance, documentation, and disclosure strategies.

Future editions of this new Taxand publication will expand to cover additional jurisdictions and broader tax controversy topics, providing multinationals with a reliable guide to the evolving landscape of regulation, enforcement, and dispute resolution. Through the collective insight of the network we are part of, Taxand aims to help businesses stay informed, prepared, and aligned with the expectations of today's tax authorities.

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The notion of beneficial ownership was introduced in France with the conclusion of the Double Tax Treaty with Switzerland dated September 9th, 1966 in order to prevent the use of intermediary company.

Then, the notion of beneficial ownership has been generalized through the treaty law:

- In recent DTTs, the beneficial owner clause is systematic and explicit (cf. Articles 10, 11, and 12 of the OECD Model Tax Treaty relating to dividends, interest, and royalties).
- In any case, the judge considers that it is deemed implicit for DTTs concluded before the insertion of the beneficial owner clause in the OECD Model Tax Convention in 1977[1].
- The Interest and Royalties Directive, which has been transposed into the French legislation, contains a beneficial owner clause inserted into Article 1(4) of the Directive. A company of a Member State of the European Union is considered to be the beneficial owner of interest or royalties only if it receives them for its own account, and not as the representative of another person (e.g., trustee, authorized signatory, etc.).

In the same way as for DTT, the Court of Justice of the European Union ("**CJEU**") has recognized the existence of a beneficial owner condition for the interpretation of the Parent-Subsidiary Directive, even though the Directive does not contain an express beneficial owner clause[2].

Now, several Articles of the French Tax Code ("FTC") refer to the notion of beneficial ownership, such as:

- Article 119 *ter* granting a withholding tax ("WHT") exemption for dividends paid to a company established in the European Union (EU).
- Article 119 *quater* granting a WHT exemption for interest paid to an entity established in the EU, with which it has at least a 25% shareholding.
- This Article is of little interest, as there is no longer any WHT under French domestic law, except if the interest is paid to an entity established in a non-cooperative State or territory ("NCST").
- Article 119 bis providing for a WHT on dividends distributed to non-residents.

  The French Finance Bill for 2025 inserted the notion of beneficial owner in this Article 119 bis[3] because the French Supreme Tax Court had judged the condition related to the beneficial owner must be explicitly mentioned in the law to be used by the French Tax Authorities ("FTA"). In other words, the judge considered that the FTA can subject the granting of a tax advantage/provision to the beneficial ownership's compliance only if stated by the law[4].
- The obligation to declare cross-border arrangements in the context of compliance with DAC6, for instance.

The French administrative practice

The notion of beneficial ownership has been more and more used by the FTA, for example to deny the granting of a tax advantage.

When this notion was not expressly inserted in the law, the FTA amended its guidelines to refer to this notion and thus give legal ground to its use.

This was the case for Article 119 bis of the FTC (i.e., WHT on distribution to non-resident) which, in its initial version before being recently amended, did not refer to the notion of beneficial ownership. The FTA amended the administrative guidelines related to this Article to insert the notion of beneficial owner. Based on this amendment, the FTA applied a WHT to dividends paid to French companies/individuals considering that the beneficial owners were non-resident companies/individuals.

However, a pivotal decision by the French Administrative Supreme Court[5] provided a crucial interpretation of the beneficial owner condition.

The Court held that, the FTA cannot disregard the interposition of an intermediary entity unless they invoke the abuse of law procedure under Article L. 64 of the French Tax Procedure Code ("LPF"). This decision establishes a high threshold for the FTA to challenge beneficial ownership, requiring explicit legislative support. The beneficial owner condition must therefore be explicit in French domestic law for the FTA to make the granting of a tax advantage conditional on compliance with this condition.

In this context, the Finance Bill for 2025 introduced expressly the notion of beneficial owner into Article 119 bis of the FTC to allow the FTA to apply WHT to dividends paid to French companies/individuals if the beneficial owners are non-resident.

[1] French Administrative Supreme Court, October 13, 1999, n°191191, Diebold and November 23, 2016, n°383838, Sté Eurotrade Juice.
[2] CJEU, 02/26/2019, C-116/16 and C-117/16, T Danmark
[3] Art. 96 of the Finance Bill for 2025 (LOI n°2025-127 February 14, 2025)
[4] French Administrative Supreme Court, December 8, 2023; Fédération bancaire française, n°472587
[5] French Administrative Supreme Court, December 8, 2023; , n°472587, Fédération bancaire française

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Latest jurisprudence and French case law

French case law has developed a structured framework for assessing the notion of beneficial owner based on three primary criteria: (i) legal, (ii) factual, and (iii) functional.

- **Legal criteria:** This examines the recipient's right over the income, particularly any legal or contractual obligation to redistribute it. The legal criteria alone is sufficient to call into question the apparent beneficiary. Case law has clearly stated that the recipient of an income cannot be its beneficial owner in case of legal or contractual obligation to redistribute all the income (i.e., limiting the recipient's power to dispose of the sums).
  - In this respect, the decision of French Administrative Supreme Court February 5, 2021, no.430594 and 430594, Sté Performing Rights Society Ltd established that an entity acting as a mere agent or intermediary lacks beneficial ownership. Indeed, it ruled that a UK royalty collection entity was not the beneficial owner of payments received, as over 80% of the funds were remitted to its members, and taxation occurred at the level of these individuals.
  - The decision of the Administrative Court of Appeal of Bordeaux, October 5, 2021, 20BX03606, Meltex ruled that a Dutch company receiving royalties from its French subsidiary cannot be considered as the beneficial owner but is deemed acting on behalf of its Panamanian shareholder since (i) the Dutch company is contractually bound to repay about 90% of the royalties to the Panamanian entity, (ii) the Dutch company repays the royalties within a short period of time, (iii) its activity is limited to the collection of royalties from the French entity and (iv) it is owned at 99.6% by the Panamanian entity.
- **Factual criteria:** It focuses on income flow patterns, including the proportion of funds redistributed and the timing of onward payments. Frequently used by the tax authorities, factual circumstances are indicators, although insufficient on their own.

  In this respect, several case law ruled on this specific criteria:
  - The decision of the French Administrative Supreme Court, October 13, 1999, no. 191191, SA Diebold Courtage, rejected an FTA challenge, as the mere transfer of 68% of royalties to a related Swiss company was insufficient to disqualify the Dutch recipient.
  - The decision of the French Administrative Supreme Court, November 8, 2024 n°471147, Société Foncière Vélizy Rose: the Court emphasized the independence of the concept of beneficial owner from the concept of abuse of rights, even when the notion of a relay company is involved.

    The French Administrative Supreme Court used factual criteria to rule that the Luxembourg entity receiving the dividends was not the beneficial owner: (i) the Luxembourg entity fully held the French distributing entity, (ii) the dividends has been redistributed by the Luxembourg entity the very next day following the initial distribution from the French entity, (iii) the Luxembourg entity had no other funds available expect the dividends distributed and (iv) the Luxembourg entity had no activity other than holding the shares into the French entity. Thus, the Luxembourg entity has been characterized as a relay company despite the absence of a legal obligation.

    The Supreme court also ruled that the freedom of establishment could not be invoked in this case, as French law is considered to be implementing the parent-subsidiary Directive.

    Finally, the Supreme Court agreed on the fact that the double tax treaty concluded between France and the State of residence of the beneficial owner of the dividends can be applied, even if the dividends were paid to an intermediary established in a third State. In other words, the Supreme Court extended the scope of the recent case law Planet.
  - Indeed, the decision of the French Administrative Court, May 20, 2022, n°444451, Sté Planet ruled that the notion of beneficial owner could be brought up to claim DTT benefits.
- **Functional criteria:** This assesses whether the entity performs a genuine economic function justifying its role as the income recipient.

  Under recent case law, it appeared that functional criteria is sufficient on its own notably in cases where an entity merely collects and remits funds, it fails the beneficial owner test.
  - The decision of the Administrative Court of Appeal of Versailles, February 8, 2022, 19VE03571, SNC Meubles Ikea France challenged the FTA's reassessment based on the fact that 70% of the franchise fees paid by the French company were paid by the Dutch company to a foundation in Liechtenstein belonging to the same group. Indeed, the FTA did not prove that the Dutch company was not the beneficial owner of the income. On the contrary, the Court considered that the

company's business is to develop the brand and run the network of franchisees established in several countries, and that to this end it has offices, a test shop and a training center in the Netherlands, and that the basis for the flat-rate 70% payment to the foundation does not consist exclusively of brand royalties but also includes other income.

- The decision of the Administrative Court of Appeal of Versailles, May 27, 2021, 19VE00090, Alphatrad: a Swiss company owned by a Portuguese resident received dividends distributed by its French subsidiary. Even though the dividends had not been paid to the Portuguese shareholder, the court considered that the Swiss company, which had no human or material resources, did not in practice have the power to dispose of the dividends and was merely acting on behalf of its sole shareholder. Indeed, The **absence of redistribution** of the dividends to the Portuguese shareholder can be viewed as a deliberate decision of the latter given the **increase of upstream loan** granted to him, demonstrating that the cash was actually at his disposal.
- The Decision of the Administrative Court of Appeal of Lyon, 01/13/2022, no.19LY03610 ruled that the FTA was not entitled to reclaim the withholding tax relating to dividends paid to an intermediary Luxembourg holding company because of its economic reality. On the one hand, this company had its own offices in Luxembourg, employed several people responsible for providing services to its subsidiaries, and had transport equipment, furniture and IT office equipment enabling it to carry out its activities. On the other hand, its creation had been motivated by the need to legally organize the group made up of existing operating companies, to create new subsidiaries operating in different business sectors and to promote the group's international development.

Potential risks and practical issues in case of audits and litigation

Based on our experience, the FTA usually apply to challenge a DTT benefit related to WHT on dividends and royalties considering that the direct recipient is not the beneficial owner of the income, by requesting/analyzing the following information:

- Substance of the deemed intermediary company (i.e., employees, office space, business activities, functions, etc.).
- Accounting and financial statements of the deemed intermediary company to assess its activity (i.e., notably if its sole activity consists in receiving dividends/royalties and redistributing/repaying them).
- Contracts between companies involved.
- Economic rationale justifying the existence of the deemed intermediary company and the redistribution/repayment of the sums received.

Thanks to international administrative assistance, the FTA have more tools to obtain information on the foreign entities as it requests them directly to foreign tax authorities.

Based on our experience, challenging a reassessment based on the beneficial owner is mainly a matter of fact and burden of proof. It is key to build a strong strategy before during the tax audit and not waiting for the tax reassessment notice to build a strategy and arguments.

Finaly, the notion of beneficial ownership can be tackled from a different perspective using it to claim a DTT benefit in case where the income is paid to the intermediary company established in a State/Country which does not conclude a DTT with France while the ultimate beneficiary is established in a State/Country having a DTT with France.

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The beneficial ownership requirement is provided for by almost all Italian double tax treaties under Articles 10, 11 and 12, generally in line with the OECD Model Tax Convention (except for some treaties, such as the ones with Cyprus, Hungary, Japan, Ireland, Trinidad and Tobago which do not comprehend the notion). Among all the treaties concluded by Italy only the Protocol to the German treaty provides for an explicit definition of the requirement. According to Article 9 of the Protocol the recipient of the income can be considered the beneficial owner only if it is entitled to the right on which the payments are based and if the income derived therefrom is attributable to it under the tax laws of both States.

The same concept is also to be found in the European Legislative framework to the extent that it is provided under the Directive 2003/49/EC (Interest and Royalties Directive) which does, however, define the concept explicitly. According to Article 1 of the Directive, a company of a Member State shall be treated as the beneficial owner only if it receives interest and royalties for its own benefit and not as an intermediary, such as an agent, trustee or authorized signatory, for some other person. The same definition has been implemented in Italian domestic law by Article 26-quater of the Presidential Decree No. 600 of September 29, 1973.

The Italian administrative practice

The Italian tax authorities have historically provided an interpretation of the beneficial owner concept that generally reflects the one developed at the OECD level.

Firstly, in Circular Letter No. 306 of December 23, 1996, tax authorities adopted a formal approach, stating that the expression refers: *"to the subject to whom the income is attributed for tax purposes; therefore, as stated by the OECD Commentary, such a requirement is not met if an intermediary, such as an agent or nominee, is interposed between the recipient and the payer".*

Then, in Circular Letter No. 47/E of November 2, 2005, following the adoption by the OECD of a substance over form approach tax authorities clarified that the beneficial ownership requirement is met if the recipient of the income *"derives his own economic benefit from the transaction" and has "the right and material availability of the income received"*.

Since then, the substantive approach has been confirmed many times. The tax authorities have clarified that to assess the economic benefit of an individual or a company, it is necessary to consider both the economic and contractual profiles of the operations carried out, the presence of an adequate structure, and the capacity to manage financial risks (see Circular Letter No. 41/E of August 5, 2011).

More recently, in Resolution No. 88 of October 18, 2019, the tax authorities expressed a view in line with the principles established by the Court of Justice of the European Union in the Danish cases (joined cases C-115/16, C-118/16, C-119/16, and C-229/16 on the Interest and Royalties Directive). Tax authorities agreed that the recipient of the income is not the beneficial owner if it does not have the right to use and enjoy it, and that the following indicia qualify the transaction as abusive:

1) The recipient acts only as a conduit and is under a contractual, legal or *de facto* obligation to pass on, within a short period of time, all or almost all the income to entities that would be taxed in the State of source if they received the payments directly;

2) The group concerned is structured in such a way that the immediate recipient itself must pass the income to a third entity which does not fulfil the conditions for the application of the Interest and Royalties Directive;

3) The recipient has no economic substance and carries out very limited activities;

4) The structure was implemented following the introduction of changes in the law which would otherwise have resulted in an additional tax burden.

For the sake of completeness, it is worth noting that sometimes tax authorities refer to the beneficial ownership requirement also in the context of the Directive 2011/96/EU (Parent-Subsidiary Directive) - although the Directive does not expressly provide for it - as an indicator of the (abusive) nature of the structure. The approach of the tax authorities is supported by the interpretation of the Supreme Court (Supreme Court decision No. 23628 of September 3, 2024, Supreme Court decision No. 16173 of June 8, 2023).

Latest jurisprudence and Italian case law

The Supreme Court recently issued on February 28, 2023, **a pilot decision** on the beneficial owner concept, confirming that it is the taxpayer who bears the onus of proving the satisfaction of the requirements. The case concerned the financing of two Italian resident companies made by their parent company, also resident in Italy, but on behalf of a Luxembourg one which was not entitled to the benefits of the Interest and Royalties Directive (Supreme Court decision No. 6005 of February 28, 2023). The Supreme Court ruled that to satisfy the beneficial ownership requirement **the taxpayer needs to pass a triple test**:

i) *the substantive business activity test;*

ii) *the dominion test; and*

iii) *the business purpose test.*

The ***substantive business activity*** test is to determine whether the receiving company is a wholly artificial arrangement or not, while the **business purpose test** relates to the reasons for the diversion

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of the income, to determine whether it is driven solely by tax considerations or whether it also reflects other economic reasons.

The ***dominion test*** instead is the core of the analysis of the triple test and reflects the definition given by the Commentary to the OECD Model according to which a subject cannot be considered the beneficial owner if the use and enjoyment of the income is constrained by a contractual or legal obligation to pass on the payment received to another. The Supreme Court also pointed out some indicia reviling the lack of dominion: (i) the short period of time between the receipt of the income and the following payments; (ii) the regularity of the transfers; (iii) the small remuneration received; (iv) the identity of the management of the interposed subject and the final recipient of the income; (v) the circumstance that the interposed subject does not bear any risk and that cannot waive the amounts granted.

In the reasoning of the decision the Supreme Court accepted the look-through approach already adopted by the Court of Justice of the European Union, according to which the benefit must be recognized in any case if the third company, on behalf of which the conduit acts, fulfils the conditions to benefit for the exemption itself. However, according to the Supreme Court to recognize the benefit the third company must formally satisfy the requirements of the Interest and Royalties Directive (i.e. direct shareholding).

Starting from the pilot case, the interpretation of the beneficial owner concept has always been confirmed by the Supreme Court accordingly for both the Interest and Royalty Directive and for in Italian tax treaties (e.g., Supreme Court decision No. 14905 of May 29, 2023, Supreme Court decision No. 16173 of June 8, 2023, Supreme Court decision No. 21409, July 19, 2023, Supreme Court decisions No. 510-521-533-544-552-573 of January 8, 2024, Supreme Court decision No. 8612 of March 29, 2023, Supreme Court decision No. 23628 of September 3, 2024, Supreme Court decisions No. 26640-26624 and Supreme Court decision No. 26923 of October 17, 2024).

While the above jurisprudence provides more indications as to what to prove to comply with the beneficial ownership requirement, the framework is still too uncertain as to the appropriate means of proof needed to meet the burden.

Potential risks and practical issues in case of audit and litigation

Determining whether a non-resident is a beneficial owner is crucial for tax risk management purposes, as an Italian taxpayer who fails to make the (correct) payments at source is subject to penalties for unfaithful tax return and omitted withholdings, if any. Starting from September 24, 2024, in the event of an unfaithful tax return, the penalty will be 70% (previously, between 90% and 180%) of the amount of the higher withholding due (Legislative Decree No. 471 of December 18, 1997, Article 2) together with a penalty for the omitted withholding - if any - of 20%. It should also be noted that the assessment of beneficial ownership by the Italian tax authorities does not generally envisage a criminal offence. However, a case-by-case basis approach is required.

In such context, it is extremely important to collect sufficient documentation to enable the tax authorities (in the event of an audit) or the courts (in the event of litigation) to verify the triple test requirements. Based on our experience, such documentation should include, for instance:

- Contractual documentation of the transaction, and related accounting and financial records;
- Documentation of the group structure (e.g., organizational charts, financial statements, explanatory notes, transfer pricing documentation);
- Documentation proving the economic reasons justifying the structure and the role of the recipient within the group;
- Documentation showing that the recipient has not retroceded the income (e.g., financial statements, bank statements, certification issued by the auditors, invoices).

Audits

Based on our experience, in the event of a challenge of the beneficial ownership requirement, it is advisable before a litigation to evaluate the possibility of initiating a consultation or even a settlement procedure with the Italian tax authorities.

During these consultations it is possible to submit additional documents - that were not previously available - to prove the beneficial ownership requirement. It may also be possible to file the further documents required by the tax authorities. Moreover, during settlement procedures taxpayers may benefit from a more likely application of the above-mentioned look-through approach, even in absence of direct shareholding, to recognize the beneficial ownership requirement of the recipient's parent company.

In the event of a settlement taxpayers may benefit from a reduction of the tax burden and from a reduction of the corresponding penalties by at least 1/3 of the minimum applicable penalty.

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With the sole exception of the provisions transposing the Interest and Royalties Directive, the Spanish domestic legal system does not contain any reference or definition of the beneficial owner concept, although this requirement is indeed included in some Double Taxation Treaties ("**DTT**") signed by Spain (in line with OECD Model Tax Convention). Notwithstanding, and following the European Court of Justice ("**ECJ**") doctrine in the so-called "Danish cases", the Spanish Tax Administration ("**STA**") has also applied the concept of beneficial owner in cases where it was not expressly contained in the positive legislation (dividend payments under the Parent-Subsidiary Directive or interest and capital gains obtained by EU residents).

For instance, the Non-Resident Income Tax Law ("**NRIT Law**") contains anti-abuse clauses which, for example, exclude the application of the exemption on dividends[1] received by non-residents when the majority of the voting rights in the parent company are held, directly or indirectly, by individuals or legal entities that do not reside in Member States of the European Union (or in States that are part of the European Economic Area with which there is an effective exchange of information in tax matters), except when the incorporation and operation of the company responds to valid economic motives and substantive business reasons (article 14.1.h) NRIT Law). But this provision does not contain a beneficial ownership requirement. The same applies to the domestic exemption on interest and capital gains obtained by EU residents.

As mentioned, since 2019 the Spanish tax authorities have been in the habit of directly invoking the case law of the ECJ in in the so-called "Danish cases" to apply the beneficial owner clause, ignoring the provisions contained in this regard in the Spanish legal system.

In short, and as explained below, the absence of a definition of the beneficial owner in our legal system, the administrative stance and the lack of a clear and uniform criterion in the jurisprudence of our courts has given rise to legal uncertainty.

The Spanish administrative practice

In recent years, the Spanish Tax Agency (AEAT) has found in the invocation of the beneficial owner doctrine an expansive formula for questioning the application of tax benefits derived from European Union (EU) directives and double taxation treaties, not only in relation to dividends and interest but also with capital gains obtained from the sale of shares in Spanish entities held through investment structures when the ultimate participants in these structures are not resident in any member state of the European Union.

This issue has become one of the main topics of discussion in tax inspections in Spain, especially in the review of complex structures of international groups or investment funds obtaining income from Spanish sources.

In many of these cases, the AEAT (Spanish Tax Agency) has been considering that the effective beneficiaries of the income are the persons or entities that -in their view[2] - ultimately receive the income ("follow the cash" approach), and this regardless of the legal rights allowing the so-called intermediary entities to receive the income that is subsequently distributed. In the view of the STA, these entities are just agents or conduit entities who simply transmits the income to another party and cannot be deemed as the real recipients of the income.

The STA also emphasizes the need for intermediate structures with companies resident in EU member states (which can benefit from the exemptions provided for this type of income in EU Directives) to have sufficient substance. This means that these entities must have adequate personal and material resources, as well as sufficient decision-making capacity with respect to the funds received. The presence of real economic activities and decision-making processes within these entities, together with the evidence that they can use (or are actually using) the proceeds to service their own needs, is crucial to demonstrate that they are not mere instrumental companies created to take advantage of EU directives or tax treaties.

It should be noted that regularizations based on the beneficial owner doctrine are sometimes combined or connected with general anti-abuse clauses provided for in Spanish legislation (such as fraud and simulation) or through the exercise of the powers of reclassification that the Spanish legal system recognizes to the AEAT.

In the most serious cases, the AEAT has gone so far as to classify the structures used as simulated, which carries with it the imposition of sanctions, because, according to the most recent case law of the Supreme Court, the existence of simulation necessarily implies concealment and, therefore, the imposition of sanctions.

Latest jurisprudence and Spanish case law

The Spanish courts have been ruling on the regularizations carried out by the STA in previous years in relation to beneficial owner cases affecting dividend and interest payments.

So far, the most relevant jurisprudence in relation to the application of the beneficial owner concept to dividends is the Supreme Court. Judgment of June 8, 2023, in which is stated the following:

- As stated above, the Spanish NRIT Law contains an anti-abuse provision under which the parent-subsidiary

[1] A similar provision is contemplated in the case of the exemption provided for royalties (article 14.1.m) NRIT Law)

[2] It is a common trend to stop the analysis when the intermediate entity (now considered the "beneficial owner") is resident in a non-cooperative jurisdiction under Spanish regulations.

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exemption cannot be applied in respect of the payment of dividends where a majority of the parent company's voting rights are held, directly or indirectly, by individuals or legal entities not resident in the European Union or in the European Economic Area (with an exchange of information provision), unless there are valid economic reasons and substantive business reasons supporting the formation and operations of the parent company.

- Following an exhaustive examination of the case law of the ECJ in the Danish cases, the Supreme Court concluded that it lies with the tax authorities, not with the taxpayer, to prove satisfaction of the conditions for application of this anti-abuse provision, for which they will have to use the various means of exchanging information contemplated in tax treaties or in the exchange of information directive.
- Proof of an abusive practice requires the simultaneous existence of a number of objective circumstances evidencing that, despite formal fulfillment of the requirements laid down by EU legislation, the objective sought by this legislation has not been achieved; and of a subjective element consisting of the intention to obtain an undue advantage by creating artificial conditions.

As it can be inferred from the above, the Supreme Court's analysis is mainly bound to the legislation in force, and not so conclusive on whether the beneficial ownership of the income is an objective, independent requirement or is part of the analysis on whether the structure is abusive (in the case it was not) or not.

However, it should be noted that, in view of the jurisprudence established by the Supreme Court in this judgement, the STA is defending that in cases where the application of an exemption is denied under the beneficial owner clause, it is not necessary to prove the existence of abuse in the structure. In this sense, the STA considers that the beneficial owner clause is not an anti-abuse provision and that it is sufficient to prove that the direct recipient of the income is merely a conduit for the income, without the capacity to dispose of the received funds, and is not the ultimate beneficiary.

On the other hand, in relation to the figure of the beneficial owner in the case of interest, the most relevant case law/ administrative criteria are the following:

- The Spanish National Appellate Court ("NAC") reached the following conclusions in its recent judgement dated October 17, 2024:
  - Facts: the court examined whether a Dutch company was the effective beneficiary of the interest payments made by a Spanish company. The tax auditors concluded that the beneficial owner was an Andorran company, as the funds were ultimately transferred to this entity through intermediary companies, which had no commercial activity.
  - Decision of the NAC:
    - The court found sufficient evidence to support the tax auditor's conclusion that the intermediary companies (located in The Netherlands and Curaçao) were merely instrumental in channeling the funds.
    - The appellant argued that the Spanish exemption for interest payments to EU residents, introduced before the Directive 2003/49/CE, should not be restricted by the Directive's requirements. However, the Court states that once the Directive was enacted, national law must be interpreted in light of it (without prejudice to the fact that the content of the Directive for the purpose of applying the exemption on interest may be more restrictive).
    - The appellant also alleged that the regularization should have been based on the Spanish General Tax Law's provisions on simulation or fraud, to the extent that the Spanish NRIT Law does not include a specific anti-abuse clause in the case of the exemption for the payment of interest. The Court rejects this argument, stating that the Directive 2003/49/CE itself mandates that national authorities and courts deny tax benefits in cases of fraudulent or abusive practices.

It is very likely that the judgement is appealed before the Spanish Supreme Court.

- The Central Economic-Administrative Court (resolutions of October 8, 2019 and March 20, 2024) and the Spanish General Directorate of Taxation ((binding ruling no. V1827-24) have also concluded that the fact that Spanish domestic law does not provide for a beneficial owner clause, when the Interest and Royalties EU Directive does, does not prevent the application of this figure, as they consider it to be a general principle of EU law that can be applied in any case.
- It is still to be decided, though, whether this implicit application of the beneficial ownership clause stemming from the Danish cases should also apply to non-Directive / unrelated parties' cases (in our view it should not, since the exemption applicable in these cases is a choice of the Spanish legislator that remains unaffected by the Directive or by any other European regulation).

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Potential risks and practical issues in case of audits and litigation

According to our experience, and despite the above legal and jurisprudence uncertainties, the Spanish authorities usually request, in the course of tax audits, documentation to verify the beneficial owner's status and the existence of substance in the international structure. In our view, such documentation should include:

- Residence certificates (for DDT purposes);
- Contractual documentation of the transaction;
- Accounting and financial statements of the entities involved;
- Evidence regarding the sources and uses of the income through the chain of companies in the structure (or to meet other, own needs) to prove that the company receiving the income is not a mere conduit or intermediary.
- Documentation proving that the recipient of the income has the authority and autonomy to make decisions about the allocation of funds.
- Details of employees, office space and the nature of the business activities and functions carried out by the intermediate entities;
- Documentation demonstrating the economic (non-tax) reasons justifying the structure and the role of the recipient within the group;
- In the event that the funds obtained have been used for new investments or to finance new activities, the STA usually requires documentation to prove this; and
- In the case of investments made by investment funds, it is common to require the identification of the final investors and their residence for tax purposes. It is essential to have this information and documentation available to provide it in case of a tax audit.

In view of all the above, it is very relevant to have the adequate legal and tax assistance during the tax audits.

TAXAND

ABOUT TAXAND

Taxand is a global organisation comprising top tier local independent tax advisory firms who together provide high quality, integrated tax advice to clients worldwide.

Overall there are more than 700 tax partners and over 3,000 tax advisors across 51 countries, focussed on understanding you and your business needs; collaborating to deliver tailored, practical local and international tax advice, in consideration of your strategic goals.

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