Audiencia Nacional confirms application of 'Danish cases' doctrine to non-resident income tax exemption of interest payments to EU residents

For the *Audiencia Nacional*, the CJEU's stance in the Danish cases is automatically applicable to the exemption of interest paid to EU residents, even if the national legislative provision does not expressly refer to beneficial ownership clauses.

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1. Introduction

The Judicial Review Division of the *Audiencia Nacional*, in Judgment of 17 October 2024 (app. 810/2019), has rejected the appeal lodged against the Central Tax Tribunal Decision of 8 October 2019 (185/2017) in which, as will be recalled, the stance of the Court of Justice of the European Union ('CJEU') in the 'Danish cases' – expressed in Judgment of 26 February 2019, *N Luxembourg* (C-115/16, C-118/16, C-119/16 and C-299/16) – was applied in a case involving the payment of financial interest by a Spanish company to its Dutch parent company, the latter being controlled by an entity resident in Curacao which, in turn, was controlled by an Andorran company whose sole shareholder was a natural person also resident in Andorra.

In the said decision, the Central Tax Tribunal, after referring to the aforementioned judgment of the Court of Justice on the concept of 'beneficial owner' and the existence of a legal basis for refusing the exemption in the event of abuse of rights, held that the Dutch company was merely a shell company, without any business activity, used solely to channel funds to the Andorran company[1]. Consequently, the Tribunal considered that the tax authority acted correctly in refusing to apply the exemption provided for in Article 14(1)(c) of the Non-Resident Income Tax (Recast) Act ('IRNR') and upheld the assessment decision relating to the concept of non-resident income tax withholdings for the years 2012, 2013 and 2014.

2. Analysis of the judgment

The substantive issues raised by the appellant in the appeal lodged with the *Audiencia Nacional* are, in essence, the following three:

a) the failure of the tax authority to prove that the Dutch parent company was not the beneficial owner of the interest paid by the Spanish company;

b) the appropriateness of the exemption of the interest paid to the Dutch company, since the exemption contained in Article 14(1)(c) IRNR does not constitute a transposition of Council Directive 2003/49/EC of 3 June 2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States (the 'Directive');

c) the need to have resorted, given the absence of the beneficial ownership clause in the aforementioned provision, to the application of one of the general anti-abuse clauses provided for in the Taxation Act, such as simulation (Art. 16) or conflict in the application of the tax rule (Art. 15).

With regard to the first claim, after analysing the Tribunal's decision and the documentation provided during the pre-trial investigation, the *Audiencia Nacional* concludes that the tax authority provided sufficient evidence to prove that the Dutch company was not the beneficial owner of the interest, since the amounts received from the Spanish company were transferred to other entities in the corporate chain until they reached the Andorran company, which was the final recipient. That operation, as well as the lack of business activity of the intermediate companies, was not challenged by the appellant, which did not demonstrate that they had any purpose other than to appear as shell companies for the purpose of directing the interest paid by the Spanish company to the Andorran company. The *Audiencia Nacional* recalls that, in order to determine who is the beneficial owner of the interest in accordance with the Directive, the legal doctrine established by the CJEU, summarised and implemented by the Supreme Court (Judgment of 22 June 2023, app. 6517/2021), requires attention to be paid to the person who actually enjoys

[1] This decision was discussed in the GA_P Analysis tax section in January 2020; see ***here***.

the interest paid, who receives it for its own benefit and not as an intermediary.

As regards the omission of the beneficial ownership clause in the exemption provided for in Article 14(1)(c) IRNR and the impossibility of considering that provision to be a transposition of the Directive, the *Audiencia Nacional* takes the view that, following the adoption of the Directive, national legislation must be interpreted in the light of such Directive. According to the Directive (Arts. 1(4) and (5)), a company of a Member State shall be treated as the beneficial owner of interest or royalties only if it receives those payments for its own benefit and not as an intermediary, such as an agent, trustee or authorised signatory, a condition that is not met in this case. Moreover, the fact that the beneficial ownership clause does not appear expressly in Article 14(1)(c) IRNR is not an obstacle to its application. On the basis of the judgments of the CJEU and the Supreme Court cited above on abuse of rights and the obligation to interpret national law in accordance with Union law, the *Audiencia Nacional* recalls that "triable persons may not rely on rules of European law in a fraudulent or abusive manner, which must be interpreted by the national authorities and courts as meaning that where there is a fraudulent or abusive practice, they must deny the taxpayer the benefit of the exemption from any tax on interest payments provided for in Article 1(1) of the Directive, even if there is no national legislative or contractual provision providing for such denial. Thus, even if the national legislation does not contain an anti-abuse provision, the European anti-abuse rules would be applicable, since the theory of abuse of rights is classified as a general principle of European law, which is automatically applicable, without its transposition into national legislation being necessary for its application". Consequently, in the opinion of the *Audiencia Nacional*, the Tribunal correctly applied Union law to determine whether or not the exemption provided for in Article 14(1)(c) IRNR is applicable, ruling in accordance with EU case law and in full compliance with the principles of legal certainty and legality.

The concept of 'beneficial ownership' is interpreted as an instrument to justify regularisations in the event of abusive conduct

Finally, the *Audiencia Nacional* rejects that, in order to regularise the situation in question and in the absence of a specific anti-abuse clause, the tax authority was obliged to resort to any of the general anti-abuse clauses provided for in the Taxation Act ('LGT'). It is the Directive itself that provides that national authorities and courts must deny the taxpayer the benefit of exemption from any tax on interest payments when they engage in a fraudulent or abusive practice. Therefore, we are not dealing with a case of simulation or conflict in the application of the tax rule, but rather with a case in which it is only necessary to determine whether or not the legally established conditions for benefiting from the exemption are met.

3. Final considerations

In this important ruling, the *Audiencia Nacional* concludes, in the same way as the Central Tax Tribunal, that the doctrine of the Court of Justice of the European Union established in the Danish cases is automatically applicable to the exemption of interest paid to residents of the European Union provided for in Spanish national legislation.

As did the Central Tax Tribunal, the *Audiencia Nacional* interprets 'beneficial ownership' as an instrument to justify regularisations in the case of abusive conduct. In this way, it departs from its own Judgment of 31 October 2017 (app. 24/2016), in which, questioned on the same issue, it concluded that, in the absence of a specific anti-abuse clause, the tax authority is logically entitled to question the structures it considers abusive, but it must respect the legally established procedure and turn to the 'conflict in the application of the tax rule' (Arts. 15 and 159 LGT), without the beneficial ownership clause being applicable where it is not expressly included. Similarly, the new ruling of the *Audiencia Nacional* departs from the position of the Supreme Court regarding the need to turn to Article 15 LGT and the procedure of Article 159 of the same law when abusive conduct is identified (Judgment of 26 January 2015, app. 2945/2013). In our opinion, it is debatable whether it can be inferred from the legal doctrine established in the judgments of the Danish cases that, in a situation such as the one described here, the procedures established for this purpose in the Taxation Act can be dispensed with, with unquestionable effects on the distribution of the burden of proof and on taxpayers' rights and guarantees.

Furthermore, despite having been claimed by the appellant, the *Audiencia Nacional* remains silent as to whether, despite ruling out the application of the Directive, the conditions for the application of the reduced withholding tax rate of 10 % provided for in Article 11 of the Double Taxation Convention between Spain and the Netherlands, which does not include the beneficial ownership clause, as opposed to the 21 % provided for the years concerned in the Non-Resident Income Tax Act, are met. It should be recalled that the Supreme Court, in its Judgment of 23 September 2020 (app. 1996/2019), in relation to the interpretation of Article 12 of the 1966 Spain/Switzerland Double Taxation Convention - which did not mention the aforementioned clause either - rejected a generalised application of the beneficial ownership category when the convention does not provide for it. The question that remains open is whether, in a situation involving two Member States of the European Union, non-application of the Directive prevents, by virtue of the principle of primacy, the applicability of the double taxation convention signed between the two countries. On this matter, of unquestionable relevance for our system of sources in the field of international taxation, the Supreme Court will have to rule (Order to Proceed of 5 June 2024, app. 6111/2023).