

# Antiabuse Rules: Changes for Holding Companies Investing In the Netherlands

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In this installment of In Step With Stibbe, Peeters and Molenaars examine two recent Dutch Supreme Court rulings providing more details about antiabuse tests for foreign holding companies that invest in the Netherlands.

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## Introduction

The Dutch Supreme Court recently issued two rulings regarding the application of antiabuse rules to foreign holding companies that invest in the Netherlands. The first one, issued in April, concerned a holding company in Curaçao, focusing on the Dutch rules for taxing foreign substantial interest. The second ruling, issued in July, focused on a Belgian holding, zooming in on the domestic dividend withholding tax exemption.

We will discuss both rulings and their impact on holding structures.

## Curaçao Ruling

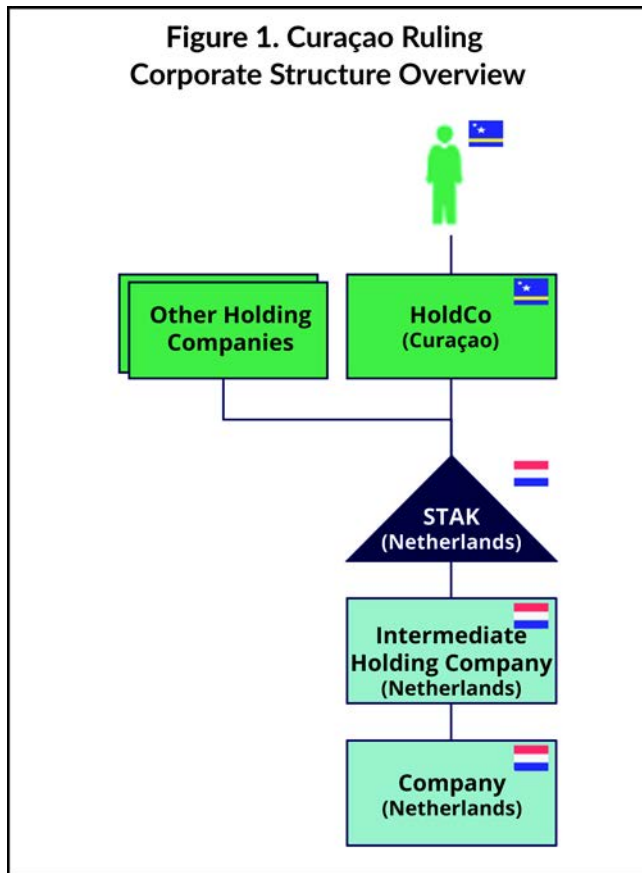
On April 25 the Dutch Supreme Court issued two rulings regarding application of the antiabuse provision under the Dutch rules for taxing foreign substantial interest (the Curaçao ruling).<sup>1</sup>

Under these rules, non-Dutch resident entities may become subject to Dutch corporate tax on income (e.g., capital gains and dividends) derived from shares in a Dutch entity if those shares qualify as a “substantial interest” for Dutch tax purposes (in short, an interest of at least 5 percent of the issued share capital). The substantial interest rules are only applicable in abusive situations. A situation is abusive if the “subjective test” and “objective test” are met.<sup>2</sup> For the subjective test, it must be determined whether the main purpose, or one of the main purposes, of holding the substantial interest is to avoid personal income tax. Under the objective test, it needs to be determined whether there is an artificial structure, a transaction, or a series of artificial arrangements or transactions that have not been put in place for valid commercial reasons reflecting economic reality.

The underlying cases of the Curaçao ruling concerned an individual living in Curaçao who, with family members, set up a Dutch limited

<sup>1</sup> Dutch Supreme Court, 22/04506, ECLI:NL:HR:2025:668 (Apr. 25, 2025) (in Dutch); and Dutch Supreme Court, 22/04508, ECLI:NL:HR:2025:669 (Apr. 25, 2025) (in Dutch).

<sup>2</sup> Dividend Tax Act 1965, art. 4, para. 3(c) (in Dutch).



entity (HoldCo) to invest in a business in the Netherlands (the Company). HoldCo's sole board member was the individual's father (who had set up a similar structure). Together with holding companies of other family members, HoldCo held an interest in the Company. A new structure was set up in early 2011, as 85 percent of the shares of the Company were acquired by a private equity fund. Afterward, HoldCo indirectly held its interest in the Company through certificates in a share trust office (a Dutch foundation, or STAK), which in turn held all shares through an intermediate holding company. At the end of 2011, the father (the board member of HoldCo) emigrated to Curaçao, and as a result, the place of effective management of HoldCo shifted to Curaçao as well. See Figure 1 for an overview of the corporate structure.

The Company was sold to a third party at the end of 2015, and HoldCo received a dividend through the intermediate holding company and STAK in 2016. As of 2016, a more beneficial regime applied, the Netherlands lost tax authority

over dividends, and only Curaçao was allowed to levy taxes on the dividends.<sup>3</sup>

The main question was whether the changes to the corporate structure, including the shift of the place of effective management to Curaçao (considering the new regime that applied as of 2016), were artificial arrangements put in place to avoid Dutch personal income tax. The Court of Appeal of The Hague ruled that the subjective test was met, but that the objective test would not be met based on the provided counterevidence of the taxpayer. The Court of Appeal considered the following counterevidence: The emigration of the father was not driven by tax motives, the taxpayer was the beneficial owner of the dividends with independent decision-making authority and had the dividends at its free disposal, the dividends were not distributed onward to the shareholder, and the new regime — given that it applied as of 2016 — couldn't have been taken into account when setting up the structure in 2011. As a result, the antiabuse provision was not applicable.

The Dutch Supreme Court is not a court of fact, and the focus was on the burden of proof regarding the antiabuse provision.<sup>4</sup>

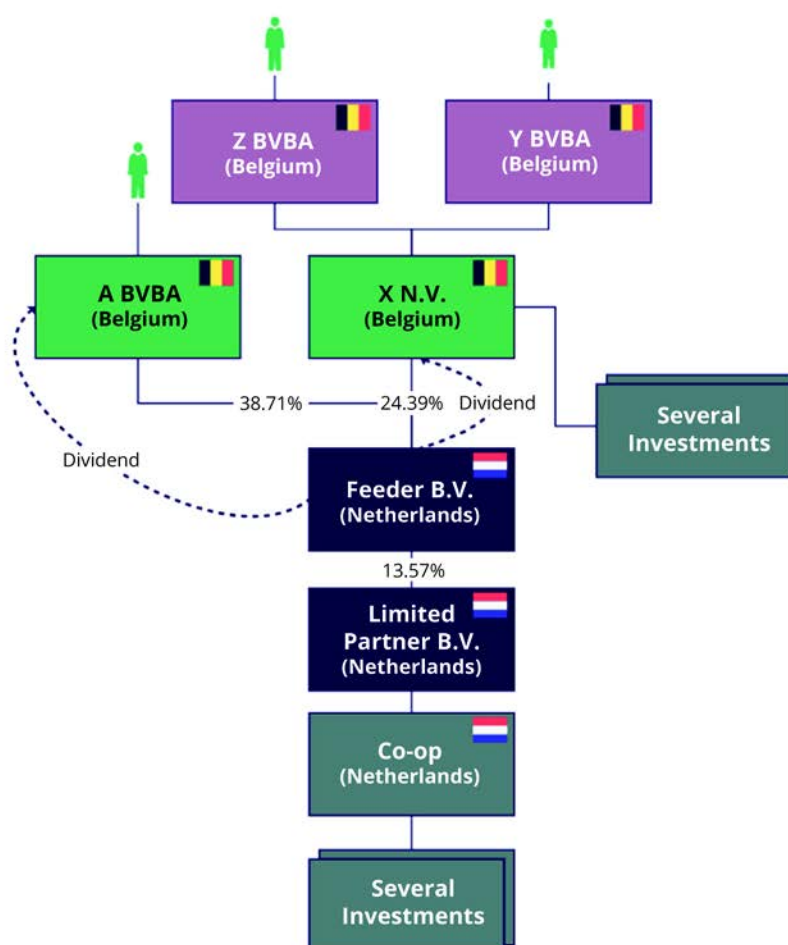
According to the court, the relevant EU case law should be taken into account when applying the antiabuse provision, which here means the so-called Danish cases.<sup>5</sup> Regarding abuse, the court emphasized that a set of circumstances must be present that, despite formal compliance with the rules of EU law, show that the objective pursued by those rules has not been achieved (also known

<sup>3</sup> *Belastingregeling Nederland en Curaçao* (Sept. 30, 2015) (in Dutch). As of January 1, 2016, the Taxation Arrangement for the Kingdom (*Belastingregeling voor het Koninkrijk*) was replaced with the Tax Arrangement for the Netherlands and Curaçao (*Belastingregeling Nederland en Curaçao*). Before the regime change, dividends were subject to Dutch dividend withholding tax at a rate of 15 percent. As of 2016, Curaçao is exclusively allowed to levy such taxes.

<sup>4</sup> EU parent-subsidiary directive (EU Council Directive 2011/96/EU). The domestic antiabuse rules implement the antiabuse rule in clause 5 of the EU Council Directive 2011/96/EU (also known as the parent-subsidiary directive).

<sup>5</sup> See Charlotte Tolman and Michael Molenaars, "Dutch Anti-Base Erosion Rule Compatibility With EU Law After *Lexel*," *Tax Notes Int'l*, Nov. 7, 2022, p. 711.

Figure 2. Belgium Ruling Corporate Structure Overview



as the “purpose requirement”). Next to that, for the concept of abuse to apply, there should be a subjective condition element present (avoidance motive) and an objective condition (artificial structure). If the subjective and objective conditions are met, the purpose requirement is most likely also met.

The Curaçao ruling provides guidance on how the burden of proof is to be allocated. First, the tax inspector should substantiate that the structure is abusive and the subjective and objective tests are met. Then, the taxpayer can provide counterevidence for both tests. The tax inspector believed a taxpayer could only counter the objective test, but the court confirmed that counterevidence also applies to the subjective test. After the taxpayer successfully provides counterevidence, the burden of proof falls back to

the tax inspector, who should make “plausible” (*aannemelijk*) that the relevant structure is abusive.<sup>6</sup> Whether a structure is abusive should be assessed when the income from the substantial interest is paid out. However, the Curaçao ruling notes that this does not bar considering the facts and circumstances before or after that moment. A structure may thus not be viewed as abusive when set up, but may become abusive later, as facts and circumstances change.

The Curaçao ruling also discusses the qualification as a flow-through entity, the presence of which can indicate an abusive

<sup>6</sup> The tax inspector must first establish the facts and circumstances based upon which the structure is considered abusive, and when there is counterevidence, must demonstrate that the arguments for it being abusive are plausible and therefore result in a “heavier” burden of proof compared with establishing (*stellen*) the facts.

structure. According to the court, a flow-through entity is a company that is exclusively engaged in receiving dividends and passing them on to the ultimate beneficiary of those dividends, or to other flow-through companies. Even if the company that receives the distributed dividends engages in other activities, it may still be an artificial arrangement. This is the case, for example, if the company passes on all or virtually all the dividends rapidly after receiving them, possibly under a different title, to entities that do not meet the conditions for application of the parent-subsidiary directive. These are merely indications that the structure may be abusive, and the taxpayer would, in principle, still be able to provide counterevidence.

The court also describes a situation in which there are no sound business reasons reflecting the economic reality of a case, which is also an indication a company might be seen as a flow-through entity and could thus be deemed abusive. This would apply when a foreign company holds a direct substantial interest in a Dutch company and (i) does not conduct a material business to which the substantial interest could be allocated, (ii) does not perform essential functions for the business operations of the group, and (iii) does not perform a linking function between head office activities of the parent company and the subsidiaries, and (iv) does not have enough substance (economic presence).

### Belgium Ruling

Another Dutch Supreme Court ruling was published on July 28,<sup>7</sup> regarding the antiabuse rules of the domestic dividend withholding tax exemption in light of a Belgian holding company structure (Belgium ruling).<sup>8</sup> The antiabuse rules for Dutch dividend withholding tax purposes are similar to those of the foreign substantial interest, although the subjective test must determine whether the substantial interest is held with the main purpose, or one of the main purposes, to

avoid dividend withholding tax instead of avoiding Dutch personal income tax. See Figure 2 for an overview of the structure.

The Belgium ruling concerned dividend payments from Feeder B.V. (a Dutch private limited feeder) to two Belgian entities. The first Belgian shareholder concerned X N.V., a Belgian holding company with a Belgian family as the ultimate shareholder, and family members on the board of X N.V. One member of the family was hired through Z BVBA to perform activities for X N.V. Furthermore, X N.V. held an interest, through Feeder B.V. via a private equity structure, in a Dutch cooperative (Co-op) that had several investments. Apart from the investment in Feeder B.V., X N.V. also held 16 other investments in Belgian and Dutch companies. The second Belgian shareholder concerned A BVBA, which was a holding company for three Belgian family members. A BVBA did not perform any other activities at the time of the dividend distribution, and the only other assets, apart from the shares in the Dutch feeder were two classic cars. The other shares in the Dutch feeder were held by a private equity fund. Employees of that private equity fund governed Feeder B.V., Limited Partner B.V., the Co-op, and the investments.<sup>9</sup>

In 2018 a dividend was distributed to the shareholders of Feeder B.V. X N.V. and A BVBA received a dividend on which 5 percent Dutch dividend withholding tax was withheld.<sup>10</sup>

Regarding X N.V., the District Court of North Holland first decided that the dividend withholding tax exemption was applicable, because X N.V. operated a material business.<sup>11</sup> However, the Amsterdam Court of Appeal ruled that the structure was abusive and that for dividend withholding tax purposes, the subjective and objective tests were met.<sup>12</sup> In short, the reason for not meeting these tests, according

<sup>9</sup>The cases regarding X N.V. and A BVBA were two separate cases until they were brought before the Dutch Supreme Court, where the same decision was applied to both.

<sup>10</sup>Feeder B.V. did not apply the Dutch dividend withholding tax exemption, but why it believed the exemption was not applicable was not described in the cases. Both X N.V. and A BVBA appealed the Dutch tax return regarding the dividend withholding tax.

<sup>11</sup>District Court of North Holland, AWB — 19\_862, ECLI:NL:RBNHO:2020:5137 (June 26, 2020) (in Dutch).

<sup>12</sup>Amsterdam Court of Appeal, 20/00439, ECLI:NL:GHAMS:2022:1732 (June 2, 2022) (in Dutch).

<sup>7</sup>Dutch Supreme Court, 22/02695, ECLI:NL:HR:2025:1163 (July 18, 2025) (in Dutch); Dutch Supreme Court, 22/02691, ECLI:NL:HR:2025:1162 (July 18, 2025) (in Dutch).

<sup>8</sup>For more information about the antiabuse rules in context of the Dutch dividend withholding tax rules, see Ashley Peeters and Molenaars, "Update on Dutch Entity Classification and Anti-Base-Erosion Rules," *Tax Notes Int'l*, Dec. 23, 2024, p. 1901.

to the Amsterdam Court of Appeal, was that the shares in Feeder B.V. were not allocable to the active business activities that were performed at the level of X N.V., and that X N.V. had no involvement in the investments of Feeder B.V. Furthermore, it was relevant that the decision-making power over the dividends received by X N.V. was entirely in the hands of members of the family, and thus X N.V. could not freely dispose of the dividends it received. As a result, the dividend withholding tax exemption could not be applied. X N.V. appealed to the Dutch Supreme Court, arguing that the structure should not be deemed abusive, and the antiabuse rules should not be applicable.

Regarding A BVBA, both the District Court of North Holland and the Court of Appeal of Amsterdam ruled that the dividend withholding tax exemption was not applicable, because A BVBA did not operate a material business given that it only passively held the shares in the Dutch feeder and had two old-timers.<sup>13</sup>

In the Belgium ruling, the Dutch Supreme Court refers to the Curaçao ruling for the application of relevant antiabuse EU case law. For the analysis whether a structure is deemed abusive considering the dividend withholding tax exemption, two extra elements are emphasized compared with the Curaçao ruling.

The first element that is emphasized by the court is that a structure can consist of several steps and components. For the application of the antiabuse rules, it is not necessary for the entire structure to be deemed artificial. If a step or component is artificial, the antiabuse rules may still apply. Such an artificial step or component will be relevant for antiabuse purposes if it cannot be justified by the economic and commercial advantages associated with it.

The second element is that a structure originally set up for business reasons may change over time, and (part of it) may become artificial because of changing facts and circumstances. This means that whether a structure is abusive should be analyzed over time and should weigh

changing circumstances that may have an impact on the structure.

Even though the Dutch Supreme Court is not a court of fact, it mentions some considerations of the Amsterdam Court of Appeal that it deemed relevant for the qualification as an artificial structure. The Dutch Supreme Court emphasized the following facts and circumstances: (i) X N.V. conducts an active business enterprise, but the shares in the subsidiary that distributes the dividend should form part of that active business enterprise, and should thus be actively managed by the holding company (which was not the case in this matter), and (ii) the Belgian family (the indirect shareholder) had full decision-making authority in both cases regarding dividends received and could decide whether or not to have the profits distributed or used for reinvestment. As a result, X N.V. and A BVBA did not have the dividends they received from Feeder B.V. at their own disposal. From the foregoing, it follows that active management of the relevant interest and control of dividends are important considerations when analyzing whether a structure is artificial.

### In Conclusion

The Curaçao ruling provides more insight into the technical aspects of application of the antiabuse rules, and the burden of proof in that respect. The court confirmed that for both the subjective and objective tests, the taxpayer should be able to provide counterevidence. It also gave more insight into when a flow-through entity is present, which can indicate an artificial structure, although the taxpayer can still provide counterevidence.

The Belgium ruling added two elements to take into consideration, namely that a step or component of structure can be artificial, and that changing facts and circumstances can make a non-artificial structure artificial over time. This shows that it is not enough to look at the structure overall, but that an individual element may be viewed as artificial and may taint the whole. It is also important that the structure is constantly monitored and that any changes to it are well documented to ensure that counterevidence can be provided.

The Belgium ruling focused on the domestic application of the antiabuse rules but did not deal

<sup>13</sup> District Court of North Holland, AWB — 19\_879, ECLI:NL:RBNHO:2020:5138 (June 26, 2020) (in Dutch); Amsterdam Court of Appeal, 20/00438, ECLI:NL:GHAMS:2022:1731 (June 2, 2022) (in Dutch).

with the application of the Belgium-Netherlands tax treaty. Under the tax treaty with Belgium, a reduced rate may be applied under certain circumstances, but general antiabuse rules apply such that the reduced rate cannot be applied in cases of abuse (the principal purpose test).<sup>14</sup> Whether this reduced rate can still apply if an exemption is denied under domestic antiabuse

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<sup>14</sup>OECD, "Model Tax Convention on Income and Capital," art. 29(9) (Nov. 22, 2017).

rules is uncertain and will most likely crystallize in future court cases.

Both the Curaçao ruling and Belgium ruling have provided clarity on how the antiabuse rules work regarding the substantial interest rules, and how the dividend withholding exemption should be applied, but in the end, it remains a facts and circumstances test and shows that a lot of elements need to be taken into account and monitored continuously. ■