Switzerland

Federal Supreme Court Rejects Swiss Withholding Tax Reclaims Made by an Italian Bank under Italy-Switzerland Tax Treaty

Peter Reinarz[*]

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By decision dated 5 April 2017,[1] the Federal Supreme Court essentially upheld a judgment rendered by the Federal Administrative Court (FAC) on 29 August 2016,[2] rejecting Swiss withholding tax refund claims brought by an Italian bank regarding dividends received on Swiss listed shares for an amount of approximately CHF 10.7 million. Only in respect to a reclaim amount of CHF 11,600, the Supreme Court reversed the decision of the FAC and referred the matter back to the FAC for further review, as it found the consideration of the evidence made by the FAC regarding one particular share position to be arbitrary. In this report, we will however focus on the main claim of the Italian bank, which was rejected by both Swiss courts.

1. Facts of the Case

An Italian resident bank X SpA (X) lodged several requests to the Swiss Federal Tax Administration (SFTA) for partial refunds (up to a non-refundable tax rate of 15%, in accordance with the Italy-Switzerland Income and Capital Tax Treaty (1976), DTT-I) of Swiss federal withholding tax (WHT) deducted from dividends X had derived from publicly traded Swiss shares during the calendar years 2008 and 2009. Reviewing the refund requests, the SFTA sent X numerous questionnaires regarding the majority of the Swiss share positions for which the WHT funds had been requested. X provided one written response to the SFTA in 2010, which the SFTA followed up with further questions, partly answered by X. Finally, the SFTA announced that the WHT reclaims would be rejected if the questions were not sufficiently answered by X, which was followed by a reminder sent on 3 January 2013, alerting X of its duty to provide information to the SFTA on all facts that may be important for determining whether the right to a WHT refund existed, and reminded X of the consequences of failure to comply with that information duty. After further correspondence, the SFTA finally rendered its decision on 24 April 2014, rejecting the WHT refunds on the ground that not all requested information had been provided. X filed an appeal to the FAC against that decision on 27 May 2014.

As can be read from the FAC's considerations (*see* section 2.), X had reclaimed a total amount of CHF 10,759,100 in Swiss WHT, an amount corresponding to 20% of the gross dividends received in 2008 and 2009 on Swiss shares, from which 35% WHT had been withheld by the Swiss issuers. One can assume that X is an Italian financial institution that acquired Swiss shares shortly before the dividend dates and sold them again shortly thereafter. At the same time, X apparently entered into futures and options transactions (in particular call/put combinations) with regard to the underlying shares. The FAC gave an example of a purchase by X of 8 million shares of Swiss company A on 19 February 2008, from which X derived gross dividends of CHF 12.8 million on 29 February 2008, following which X sold the 8 million A shares again on 3 March 2008. Furthermore, during March 2008 and March 2009, X purchased and shortly thereafter re-sold 2 million and 4 million shares, respectively, of Swiss company B, from which it derived gross dividends of CHF 9.2 million and CHF 20 million respectively. Similarly, X derived a gross dividend of CHF 7 million on 29 April 2009 from a position of 5 million shares of Swiss company C, which it had purchased on 22 April 2009 and sold again on 6 May 2009.

It appeared that these share positions were "covered" by means of options and futures. X maintained that the sale of single stock futures had been carried out through the EUREX exchange "on screen" via an intermediary bank and that it had not received any written deal confirmations from the intermediary bank. X further asserted that it would no longer be in a position to provide deal confirmations on transactions realized in 2009, as the intermediary bank after five years would no longer keep any records on such transactions (the SFTA had requested these deal confirmations only in 2015). X also claimed that the share purchase transactions were not covered by financial derivatives and, further, that the counterparties for the purchases and sales of shares on the one hand and for the options trades on the other hand were always brokers who acted as principals, not as agents. They were also resident in tax treaty jurisdictions, the treaties of which would provide for the same residual rate of WHT (15%) as provided under the DTT-I. Furthermore, X maintained that it generally followed a trading model whereby it would not use the same counterparty for the purchase and sale of the shares, nor with regard to the derivatives trade.

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* **Partner, Bär & Karrer AG, Zurich.**
1. CH: Supreme Court, case no. 2C_964/2016.
2. CH: Federal Administrative Court, case no. A-2902/2014.

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2. Essential Considerations of the FAC

2.1. Applicable procedural rules

The FAC noted that the DTT-I does not include any procedural rules concerning claiming (partial) relief from Swiss withholding tax.[3] The court held that, according to article 42 of the Swiss federal Withholding Tax Act (WHT Act), decisions of the SFTA may be objected against within 30 days of their communication. However, the court noted that this rule only applies to WHT reclaims made under the WHT Act, but not to reclaims made under an applicable Swiss double tax treaty (DTT). The court referred to the implementing ordinance under the Denmark-Switzerland Income and Capital Tax Treaty (1973), under which decisions of the SFTA may be directly appealed against to the administrative court.[4] While the DTT-I does not have any such implementing ordinance, the court found that it would be appropriate to provide for a consistent system of procedure in matters involving DTTs. The court noted that in such a procedure the SFTA would undertake an in-depth review before rendering a decision anyhow, hence a mere objection to the SFTA would hardly ever yield any success. Therefore, the FAC concluded that decisions of the SFTA concerning DTT-based reclaims of WHT should generally be admitted to direct appeal to the FAC[5] – a solution that was also adopted in a case arising under the Luxembourg-Switzerland Income and Capital Tax Treaty (1973).[6]

2.2. Scope of taxpayer's cooperation and information duties

Regarding the procedure before the FAC, the court pointed to the general principle of the establishment of facts by the FAC ex officio;[7] however, that principle is subject to the procedural duty of the parties to cooperate in establishing the relevant facts.[8] The parties in particular have to indicate their means of proof and substantiate their requests. The FAC held that the taxpayer's duty to cooperate with the authorities in establishing the facts is not limited to those facts for which the taxpayer carries the burden of proof, but extends also to those facts that the tax authority needs to prove.[9] While the taxpayer is not held to disclose any such facts spontaneously, the taxpayer is obligated to provide all information that the tax authority considers relevant and requests to be provided, including supporting evidence. Essentially, it is the task of the tax authority to inform the taxpayer of the type of information it needs and which measures of proof it considers appropriate. Once the authority requests such information, it is bound to inform the taxpayer of the consequences of failure to comply with the information request within a reasonable time.[10] While a taxpayer generally cannot be asked to supply information that cannot be supplied with reasonable efforts, or is impossible to supply, the court pointed to the fact that this is no excuse when the taxpayer is under an obligation to self-declare. The required level of proof is limited to predominant likelihood, if it is not possible to provide strict evidence.[11]

2.3. Allocation of burden of proof and consideration of evidence

The tax authority may, in principle, freely weigh and consider the evidence provided by the taxpayer. The tax authority does not need absolute certainty for its decision; objective life experience, common sense and generally objective reasons are a sufficient basis for the tax authority's decision.[12] When there are remaining uncertainties about facts, the tax authority must apply the general rules on the allocation of the burden of proof, as inspired by article 8 of the Swiss Civil Code. Based on that general principle, whoever desires to derive rights from a fact is held to prove the fact. Applied to tax law, taxpayers are required to prove all facts that reduce the tax liability, while the tax authorities must prove the facts establishing or increasing the tax liability. When the tax authority has sufficient indicia supporting a tax liability, the burden is on the taxpayer to counter such indicia.[13]

2.4. Role and meaning of "beneficial owner" requirement in tax treaty context

The FAC reiterated the fact that (partial) relief from Swiss WHT in favour of an Italian resident cannot be based on the WHT Act, but only on the DTT-I (or other international conventions, such as the EU-Switzerland Savings Tax Treaty[14]).[15] Article 10 of the DTT-I principally limits the WHT of the source state on dividends to 15%, if the beneficiary is a person resident in the other contracting state and is the beneficial owner of such income.

3. FAC Decision A-2902/2014 (29 Aug. 2016), consid. 1.2, para. 1.
4. Id., consid. 1.2, para. 3.
5. Id., consid. 1.2, paras. 4-6.
6. FAC Decision A_4693/2013 (25 June 2014).
7. FAC Decision A-2902/2014 (29 Aug. 2016), consid. 2.2.
8. Id., consid. 2.3.
9. Id., consid. 2.3, para. 1.
10. Id., consid. 2.3, para. 2.
11. Id., consid. 2.3, para. 3, with references to Supreme Court Decision (5 Nov. 2014), case no. 2C_611/2014 and further jurisprudence.
12. Id., consid. 2.4.1.
13. Id., consid. 2.4.2, with references to Supreme Court Decisions 133 II 153, consid. 4.3 and 2C_1201/2012, consid. 4.6, as well as further jurisprudence.
14. Agreement between the European Community and the Swiss Confederation providing for measures equivalent to those laid down in Council Directive 2003/48/EC on taxation of savings income in the form of interest payments, Official Journal L 385, 29 Dec. 2004, p. 0030-0049.
15. Id., consid. 3.2.

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The FAC pointed to several recent decisions of the Federal Supreme Court that dealt with the notion of "beneficial owner" in the context of relief from Swiss WHT.[16] Swiss jurisprudence basically relies on the definition proposed by Klaus Vogel,[17] who described the beneficial owner as the person who may freely decide on the utilization of the capital or the income, to dispose of such income in favour of third parties or to put it at the use of such parties. Beneficial ownership means economic control and the power of effective utilization. The concept of beneficial ownership tests the intensity of the nexus between a taxpayer and the taxable revenue (such as a dividend). It is meant to prevent the mere insertion of a legal entity that has only limited powers with regard to the income (treaty shopping considerations). The beneficial owner is to be determined based on a substance over form approach, whereby an economic analysis has to prevail, not a merely formal-legal one. Swiss courts focus particularly on situations whereby a legal entity is held to transfer certain revenues to another person, so that its power to dispose of the revenues is substantially limited (leading to a loss of beneficial ownership). Such limitations may result from contractual obligations in particular, but also from mere factual circumstances. The FAC pointed to the two conditions developed by Beat Baumgartner in his doctoral thesis on beneficial ownership:[18]

According to Baumgartner's theory, there must be a *mutual dependency* between the receipt of the revenues in question and the obligation to transfer them to somebody else, meaning that the receipt of the income must depend on the obligation to transfer it *and* the obligation to transfer must be contingent on the receipt of the income. The FAC also pointed to the allocation of risks as a further indication, specifically the question of who bears the risk that a dividend will be paid at all. An analysis of these facts must occur at the time the income in question arises (i.e. the moment of payment). The FAC mentioned that the beneficial owner notion does not per se require a long-term holding of the shares (however, the court seems to see short-term holdings as an indication of lacking beneficial ownership under certain further circumstances).[19]

The FAC clarified that beneficial ownership is a condition precedent for treaty benefits and should not be understood simply as an anti-abuse rule. According to the FAC, the notion of the "abuse of rights" should be tested separately, under the aspect of interpretation of international conventions in accordance with the principle of good faith. In that sense, *all Swiss tax treaties are subject to an implicit anti-abuse clause*. The good faith principle is derived from article 31 et seq. of the Vienna Convention on the Law of Treaties. The prohibition on abuse of law (or rights) constitutes one aspect of the principle of good faith. Abuse of treaty rights can be excluded when a corporate taxpayer claiming tax treaty benefits shows that its principal business purpose, its activities, and the acquisition and holding of the shares are motivated by sound business considerations, as opposed to a mere objective to secure tax treaty benefits.[20]

2.5. Implications of "beneficial owner" requirement for procedure, in particular with regard to taxpayer's information duties

2.5.1. National law's procedural rules apply by default

Regarding the procedure for obtaining tax treaty benefits, the FAC held that since the DTT-I does not set forth any procedural rules, procedural provisions of domestic law are applicable.[21] In that context, the FAC pointed to article 48(1) of the WHT Act, according to which anyone who claims a refund of WHT tax is bound to provide to the competent authority (the SFTA) information on any facts that might be of importance for the WHT reclaim according to its best knowledge and belief. The claimant is obliged especially to fill out the reclaim forms, including any questionnaires, completely and exactly and, on request by the SFTA, to procure certifications of the deduction of the WHT, and business records, books and other documents. According to article 48(2) of the WHT Act, the WHT refund request must be rejected if the claimant does not comply with the information duties, and the basis of the WHT reclaim cannot be clarified without the information requested by the competent tax authority.[22]

2.5.2. Claimant's comprehensive information and disclosure duties

The FAC pointed to the principle of proportionality based on article 5(2) of the Federal Constitution, which governs the information duty of the claimant.[23] The FAC reiterated that the taxpayer's information duty not only extends to the facts for which the claimant (of WHT relief) carries the burden of proof, but likewise to those facts for which the tax authority is burdened with the proof.[24] From this general statement, the FAC immediately derived the following conclusion:

> Thus, when a legal entity requests a refund of WHT from a holding of shares *which it has only recently acquired* and where it cannot be excluded that, due to the transfer of the shares, the tax due by a foreign person has been avoided or evaded, the claimant is under the obligation, upon request of the SFTA, to supply the name and address of the seller of the shares. This information is effectively necessary to enable the authority to identify the effective beneficiary [beneficial owner] of the taxable revenue and hence

16. Id., consid. 4.3.1 with references to Supreme Court Decisions 141 II 447 (5 May 2015), consid. 5 (the "total return swaps case" under the former Denmark-Switzerland Income and Capital Tax Treaty (1973), discussed by P. Reinarz & F. Carelli, *Court Rulings on Dividend Stripping and Denial of Swiss Tax Treaty Benefits*, 18 Derivs. & Fin. Instrums. 4 (2016), Journals IBFD), 2C_752/2014 (27 Nov. 2015), consid. 4.1; 2C_753/2014 (27 Nov. 2015), consid. 4.1; 2C_383/2013 (2 Oct. 2015), consid. 4; and 2C _895/2012 (5 May 2015), consid. 4.
17. The Supreme Court referred to Vogel & Lehner, *Doppelbesteuerungsabkommen, Kommentar*, 5th edition (2008), note 18 on art. 10-12 OECD Model.
18. Id., consid. 4.3.2, para. 2.
19. Id., consid. 4.3.3.
20. Id., consid. 4.4.
21. Id., consid. 4.5.1.
22. Id., consid. 4.5.2.
23. Id., consid. 4.5.2, para. 2.
24. Id., consid. 4.5.3.

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to determine whether a right to refund is given. If the claimant does not satisfy its information duty, the refund request must be rejected (emphasis added).[25]

In that context, the FAC first pointed to two rulings it had rendered under the regime of the former DTT with Denmark concerning swap and Swiss Market Index (SMI) futures arrangements, where the FAC had found that the identity of the counterparties to the transactions did not constitute a relevant element and hence the claimant's failure to disclose the identity of such counterparties did not amount to a violation of the duty to cooperate, given that under applicable foreign law, such disclosure would have been exposed to criminal sanctions. However, the FAC then pointed to the fact that its own rulings were reversed by the Federal Supreme Court (swap and futures decisions rendered on 5 May 2015, *see* footnote 15). The Supreme Court clarified that the refusal to disclose information concerning the counterparties constituted a violation of the duty to cooperate on the side of the claimant of WHT refunds; thus, even if it could not be demanded that the foreign claimant violate provisions of foreign criminal law, the foreign claimant would nonetheless have to bear the consequences in Switzerland of failure to provide the requested information to the Swiss authorities. The FAC further pointed to the Supreme Court's consideration that, under the circumstances, the claimant company shall not be relieved from its obligation to provide necessary information, merely because the failure to comply with that obligation is caused by the conduct of a third person.[26]

The FAC concluded that the SFTA, when dealing with a WHT refund request, first has to examine the conditions precedent for such a WHT refund, in particular the claimant's beneficial owner capacity and, (only) thereafter, whether there exists any abuse of the right to claim the benefits of the applicable DTT. In that context, the applicant must provide any information on facts that bear importance for the determination of the right to WHT refunds: "If the claimant does not satisfy that obligation to supply information, the SFTA has to reject the request, without even entering into the merits of the question whether the conditions of the right to refund of the tax are fulfilled".[27]

2.5.3. Importance of disclosure of transaction counterparties in particular

The FAC determined that X had refused to disclose to the SFTA the identities of the counterparties to the purchase and sale transactions for the shares and to the derivative financial instruments connected therewith, and that X did not supply certain documents that the SFTA had requested, in particular concerning the futures transactions and examples of transactions carried out outside the dividend season. The FAC considered that the information requested was not only useful, but truly essential to shed the necessary light on the circumstances and to understand the entire environment of the transactions under review. The requested information, in particular the identities of the counterparties, would have allowed the different flows of shares to be visualized, in order to establish whether there was a nexus between the parties, whether they knew each other and who was actually bearing the risk. According to the FAC, the requested information was hence necessary to verify whether X did not merely play the role of a simple intermediary but was truly the effective beneficiary of the dividends, and in order to obtain assurance that the transactions under review were based on true business motives rather than merely fiscal ones. Such an examination would have been key in the case at hand, *in particular in view of the fact that the shares were purchased a short time before dividends fell due and then sold again a short time thereafter*.[28]

The FAC concluded that such transactions, *in the light of their volume, the short holding period of the shares that fell into the dividend seasons, the high amounts of the dividends, as well as the covering transactions by means of options and futures that were concluded by X for the most part of the cases, called for certain questions, in particular regarding the identities of the counterparties and any liens between them and X*, as had been demonstrated by the SFTA. The FAC held that in this context, it would also have been useful to have information on any transactions involving the same shares outside the periods during which dividends fell due; in that sense, the absence of such transactions outside the dividend period may provide an indication that the claimant was not the effective beneficiary of the dividends in question. Therefore, especially the questions about the identities of the counterparties, clearly constituted "facts which may be important for the determination of the right to WHT refund". Hence, X would have had to disclose such information to the SFTA in principle.[29]

2.5.4. Confidentiality of requested information provides no valid grounds to withhold such information

The FAC proceeded to the question of whether X could reasonably be required to provide that information, which was found to be insightful. As regards the disclosure of the identities of the counterparties to the share purchase and sale transactions and to the derivatives ("call/put combinations"), X had maintained that this information was confidential and hence could not be supplied. The FAC pointed to the jurisprudence of the Federal Supreme Court that foreign criminal sanctions threatening the disclosure of information do not relieve the taxpayer from the obligation to supply necessary information to the SFTA. The same would apply a fortiori to information that is merely subject to private confidentiality obligations. In that context the FAC pointed to the official secrecy provided by article 37 of the WHT Act, which requires tax authority agents to keep the information received confidential.[30]

Concerning requested documentation on the futures transactions, which X allegedly had done on screen on the EUREX exchange via an intermediary bank, X's argument that the information could no longer be provided after five years was rejected. The FAC did not

25. Id., consid. 4.5.3, para. 2.
26. Id., consid. 4.5.3, paras. 3 and 4.
27. Id., consid. 4.6.
28. Id., consid. 6.1.
29. Id., consid. 6.1.
30. Id., consid. 6.2.

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understand why X could not have provided the document "EUREX Trading Member Ranking", which apparently lists the details of the transactions made on EUREX by members, which the bank acting for X could in principle have obtained from EUREX at any time.[31]

2.5.5. Failure to provide necessary information key to rejection of WHT refunds

The FAC made it very clear that the WHT refund requests *had to be rejected, if only for the mere reason that X refused to disclose the identities of the counterparties* to the purchases and sales of shares and to options connected therewith.[32]

In a further consideration,[33] the FAC referred to the argument raised by X that the purchases of shares were not covered by derivative financial instruments and the counterparties to the purchases and sales of shares and options transactions were always brokers who acted as principals, not as agents and who were resident in DTT jurisdictions that provided for the same rate of residual withholding tax as the DTT-I, further to the argument made by X that its transaction model principally was not to use the same counterparties for the purchases and sales of shares as opposed to the derivative transactions. In response to this, the FAC reiterated that the WHT refund claims were rejected not by virtue of the fact that the beneficial owner capacity of X was not recognized, but rather because X had not satisfied its obligation to provide information. The FAC considered the following:

> We further have to note that the fact that certain of the share transactions were not subject to coverage operations does not provide any guarantee that the claimant was in fact the effective beneficiary of the dividends from the shares in question, or that the transactions were based on economic rather than merely fiscal considerations. As an example, a request for refund of WHT based on "dividend stripping" is also thinkable in the absence of derivative transactions, as has rightfully been maintained by the SFTA.[34]

The FAC held further that X had implicitly admitted that in certain cases, the purchases and sales of shares were done with the same counterparties as the derivative transaction when it stated that such counterparties were "in principle" different. The FAC referred to a letter of X, according to which "the counterparties to the derivatives are almost always different from the counterparties to the acquisition of the shares" and observed that "it is not excluded that the person from which the lots of shares were acquired was the same to which the shares were resold later on".[35] The FAC found that this circumstance would undeniably constitute a fact that could be important for the determination of the right to a WHT refund within the meaning of article 48(1) of the WHT Act.[36]

Furthermore, the FAC considered that X's assertion that the transactions in question were done by different brokers who acted as principals would "not allow to exclude that the claimant had entered into some understanding with a third party in advance about the number and type of shares to be transferred soon before and soon after the payment of dividends"(!), "in that sense" referring to the Supreme Court ruling 2C_895/2012. It stated further: "Rather to the contrary, the use of a broker who acted as a principal may appear to be useful in order to keep the identity of the counterparty to such an arrangement secret" (again referring to the Supreme Court ruling 2C_895/2012). The FAC stressed that in this type of case, the information obligation extends to the identity and the residence of such a third party.[37]

In further considerations,[38] the FAC stressed that X had to expect that the SFTA would examine with its questions not only the aspects of beneficial ownership, but also whether the DTT was not being utilized in an abusive fashion. The FAC confirmed that the SFTA was perfectly entitled to come up with different motivations for its rejection of the WHT reclaims during the procedure. The FAC stressed again that, in the case at hand, the only question was whether the claimant had satisfied its obligation to provide information under article 48(1) of the WHT Act. The request had been rejected not based on grounds of abuse of rights under the tax treaty, but based on the breach of the obligation to provide information to the SFTA.

As to a complaint placed by the claimant that the procedure was taking (too) many years until the SFTA came to a decision, the FAC held that the claimant ultimately had not suffered any damage; furthermore, that it was up to the claimant to ask for the procedure to be accelerated.[39]

All these reasons led the FAC to confirm the decision of the SFTA to reject the WHT reclaims and to dismiss the appeal in full. X filed a public law appeal to the Federal Supreme Court, claiming essentially that the FAC had weighed the evidence arbitrarily and had reached manifestly wrong conclusions about the facts.

3. Essential Considerations of the Federal Supreme Court

3.1. Supreme Court principally bound by facts determination by lower court

The Supreme Court first reminded that its decisions are generally based on the facts as determined by the lower court (article 105(1) of the Supreme Court Act). Therefore, a public law appeal to the Supreme Court cannot be motivated on factual grounds, except where

31. Id., consid. 6.2.2.
32. Id., consid. 6.2.2 *in fine.*
33. Id., consid. 7.
34. Id., consid. 7.1.1, para. 1.
35. Id., consid. 7.1.1, para. 2.
36. Id., consid. 7.1.1, para. 2.
37. Id., consid. 7.1.1, para. 3. We note that this consideration of the FAC appears to be extremely far-reaching. We feel that this was essentially driven by apparent suspicions held by the FAC about the existence of pre-arranged and coordinated behaviour of transaction counterparties in view of abusive "dividend stripping".
38. Id., consid. 7.2.
39. Id., consid. 8.

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it is argued that the facts have been established in a "manifestly wrong" or "illegal", "arbitrary" fashion (including arbitrary consideration of evidence) in the meaning of article 95 of the Supreme Court Act, provided further that this had a decisive impact on the outcome of the decision.[40]

3.2. Information on transaction counterparties held to be relevant for beneficial owner analysis under DTT-I

The Supreme Court reiterated that, in the case at hand, the key issue was whether the identity of the (ultimate) counterparties of X in the share purchase transactions and in the financial derivatives transactions did or did not constitute an element of information necessary to decide whether X was entitled to any refunds of Swiss withholding tax with regard to the dividends paid on the shares. The Supreme Court had to decide whether the requested refunds of withholding tax could be granted in spite of the fact that X had failed to provide all information the SFTA had requested.[41]

Furthermore, the Supreme Court reminded that, unlike for Swiss resident beneficiaries, for non-Swiss resident beneficiaries, Swiss withholding tax on dividends paid by Swiss companies is under Swiss domestic law principally meant to constitute a final fiscal burden, unless and to the extent that applicable international treaties limit Switzerland's authority to impose taxes on investment income from Swiss sources.[42]

The Supreme Court referred to article 10(2) of the DTT-I, according to which the tax of the source state of the dividend paid to a resident of the other contracting state shall not exceed 15%, provided that the recipient is the "effective beneficiary" (or "beneficial owner") of the dividend. The Supreme Court made explicit reference to its "total return swap ruling"[43] and the legal doctrine cited in that ruling,[44] according to which the beneficial owner is the person who can freely decide on the utilization of the capital or its return, the decisive factor being the economic control over the income in question. The discretion to dispose of the income may be limited as a result of a written agreement, but may also arise in the light of the overall circumstances. A person that is bound to transfer the income in question to another person does not qualify as beneficial owner. This may result from a contractual obligation existing before the dividend falls due, but also from other effective limitations of the freedom to decide on the application of the income. The Supreme Court referred to Baumgartner's theory of "mutually dependent obligations", i.e. the receipt of the income depends on the obligation to pass it on and the obligation to pass on depends on the actual receipt of the income.[45]

The Supreme Court also clarified that the notions of "right to use" stipulated under Swiss domestic law (article 21(1)(a) of the WHT Act) and of "beneficial ownership" used in international tax treaties both mean the same thing, namely ownership and economic control. Both concepts are intended to prevent that a person or entity that holds only limited powers of disposal of the dividends may be inserted between the payor and the effective beneficiary of the dividend in order to unduly receive a refund of Swiss withholding tax.[46]

3.3. Applicability of article 48 of the WHT Act concerning the taxpayer's information duties in the absence of procedural rules in the relevant tax treaty

The Supreme Court held that, given that the DTT-I does not contain any procedural rules pertaining to the taxpayer's information and cooperation duties, the scope of such duties must be derived from domestic law, in particular article 48 of the WHT Act.[47] Under paragraph 1 of article 48, the taxpayer who requests a refund of withholding tax is obliged to provide to the competent authority all facts that may be important in determining the claimant's entitlement to such refunds; in particular, the claimant has to properly and completely fill out the reclaim forms and answer the questionnaires and, under paragraph 2, upon request of the competent authority, provide evidence of the deduction of the tax being reclaimed and supply books of accounts, supporting evidence and other documents. Under paragraph 2 of article 48, failure to comply with these information duties shall trigger the rejection of the refund claim, if the information requested is needed to determine the existence of the entitlement to the tax reclaim.[48]

The Supreme Court derived two principles from article 48 of the WHT Act: (i) The competent tax authority's duty to examine the refund claim ex officio finds its limit in the information and disclosure duties of the claiming taxpayer, whereby the competent tax authority enjoys a certain degree of discretion; and (ii) the information and disclosure duties of the claiming taxpayer are subject to the constitutional principle of proportionality (article 5(2) of the Federal Constitution), which implies that information requests must be reasonable and must not cause disproportionate compliance costs to the claiming taxpayer.[49]

Furthermore, the Supreme Court reiterated that, in order to determine whether X was entitled to a partial withholding tax refund corresponding to 20% of the gross dividends in question, the SFTA had to test the beneficial owner quality of X, as required by article

40. Supreme Court decision (5 Apr. 2017), case no. 2C-964/2016, consid. 2.1.
41. Id., consid. 3.
42. Id., consid. 4.1.
43. Supreme Court Decision 141 II 447, *supra* n. 16.
44. OECD Model Treaty commentary by Vogel & Lehner, 5th edition (2008), note 18 on articles 10-12; Beat Baumgartner, *Das Konzept des beneficial owner im internationalen Steuerrecht der Schweiz* (Zurich 2010), pp. 130 et seq.
45. Supreme Court decision (5 Apr. 2017), case no. 2C-964/2016, consid. 4.2 and 4.3.
46. Id., consid. 4.4.
47. Id., consid. 5.1. and 5.2.
48. Id., consid. 5.2.
49. Id., consid. 5.3.

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10(2) of the DTT-I. In order to do so, the SFTA had to determine whether there existed a contractual obligation to transfer the dividends in question to a third party, or effective restrictions of the claimant's decision power with regard to the application of the income.[50]

The Supreme Court considered that X had purchased some 19 million Swiss shares shortly before dividend dates, giving rise to dividends of some CHF 49 million, and sold the shares again shortly thereafter. The Supreme Court found this situation to be extraordinary, hence giving rise to more in-depth questions by the SFTA. The information requested by the SFTA about the futures transactions connected with the share purchase and sale transactions, in particular about the counterparties in the transactions, as well as examples of similar transactions outside the "dividend season", would have allowed the flow of the shares to be established and whether there were special liens or connections between X and the counterparties. This in turn would have permitted recent jurisprudence of the Supreme Court concerning the determination of the beneficial owner to be applied, as established by the Supreme Court rulings of 5 May 2015 concerning total return swap and SMI futures situations. Hence, the information concerning the counterparties was essential for the decision on the withholding tax refund claims, as it would have cleared up the entire structural background of the transactions at hand. Regardless of the reasons preventing X to disclose that information (such as business secrets, contractual confidentiality obligations and provisions of penal law), the fact of the non-disclosure could lead the SFTA to reject the withholding tax refund claims.

Referring to the total returns swaps case ruling (Supreme Court decision 141 II 447, consideration 5.2.1), the Supreme Court also reminded that it was not decisive whether the intermediary broker would actually have taken benefits from the withholding tax refund, as the identities of the effective counterparties remained unknown. The questions and doubts as to whether there existed special connections and liens with undisclosed third parties that would have excluded X's entitlement to withholding tax refunds remained. The Supreme Court held that withholding of the information regarding the counterparties meant that X was deliberately hiding essential elements of information needed to determine X's entitlement to withholding tax refunds, behaviour that should not have procured X any fiscal advantage.[51]

Finally, the Supreme Court held that the SFTA had brought forward several elements of fact indicating special arrangements with one or more third parties concerning the transfers of shares. By not countering these indications through disclosure of the counterparties and further surrounding circumstances, X failed to make its own beneficial owner position plausible. For all these reasons, the Supreme Court confirmed the decision of the lower court to reject X's withholding tax reclaims. X was also ordered to pay the court fees of CF 35,000.

4. Summary

The decisions of the FAC and the Federal Supreme Court in the case at hand are broadly in line with recent Swiss court decisions in the context of presumed (or suspected) abusive "dividend stripping" by Swiss and international financial institutions, such as the two "Denmark decisions" rendered by the Federal Supreme Court on 5 May 2015, concerning Swiss listed share positions held by Danish resident banks over dividend dates, which served to "hedge" obligations under total return swaps or under SMI index futures sold by the banks in the market via specialized brokers, with the same shares underlying. The case of the Italian bank at hand was distinctive insofar as the court decisions focused specifically on the failure by the Italian bank to provide the tax authorities any details about the derivatives transactions entered into by the bank in connection with its holdings of Swiss listed shares, in particular regarding the identity of the counterparties and further transaction details, even though that information had been repeatedly requested by the SFTA. This led the courts to the conclusion that the Italian bank deliberately withheld important information that would have been needed by the SFTA to establish whether the bank could be regarded as the beneficial owner of the dividends in question. Against that background, it appears understandable that the courts found that the Italian bank failed to demonstrate sufficiently that it was the beneficial owner of the dividends in question, which would have been an absolute prerequisite for any tax treaty benefits in accordance with established Swiss jurisprudence.

50. Id., consid. 6.
51. Id., consid. 6.

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