

The unfavorable verdicts of the Supreme Administrative Court regarding withholding tax

On December 19, 2023, the Supreme Administrative Court dismissed three cassation appeals against verdicts of the Provincial Administrative Court in Lublin regarding the refusal to issue opinions on the application of preferences in withholding tax (WHT).

These verdicts confirm the negative approach of tax authorities towards recognizing holding companies as the beneficial owners. They also indicate the necessity of thorough examination and documentation of premises for the applied preferences. Below, we present the most important conclusions resulting from the verdicts.

Supreme Administrative Court (SAC): A holding company is not the actual beneficial owner (BO)

Negative premises regarding the possibility of recognizing a holding company as the beneficial owner

To apply preferences regarding the withholding tax (WHT) on specific receivables, certain conditions from the Polish CIT Act or Double Taxation Treaties must be met. One of the conditions is the necessity for the recipient to have the **beneficial owner** status.

The Supreme Administrative Court verdicts of December 19, 2023 (case numbers II FSK 27/23, II FSK 28/23, and II FSK 29/23) confirm the recently forming negative approach of tax authorities and administrative courts on recognizing a holding company as the beneficial owner of received interest and dividends.

The NSA aligned with the position presented by tax authorities and Provincial Administrative Courts in this matter. As **grounds indicating that holding companies do not engage in real economic activities in the country of their domicile, and that the nature of their activity and transactions is artificial**, the NSA acknowledged situations where the receiving entity:

- lacks personnel or employs a minimal number of employees,
- shares its registered office with other entities and/or shareholders,
- entirely or almost entirely transfers the received receivables to its shareholder,
- does not engage in active business activities,
- generates capital gains disproportionate to operational profits,
- the same individuals hold positions in both the entity's management and its shareholder.

The beneficial owner status also necessary in the case of dividends

According to the literal wording of the CIT Act, the beneficial owner status is not required for the application of WHT exemption on dividend payments. The legislator defines the recipient of such payments as a company 'earning revenues'.

However, in the cases at hand, the Supreme Administrative Court aligned with the standpoint that **the concepts of 'actual owner' and 'earning revenues' should be construed as identical. Accordingly, to benefit from the exemption for dividends, the entity receiving dividends must meet the statutory criteria for recognition as the actual beneficial owner.**

Condition of effective taxation

Effective taxation of the recipient of interest or dividend income

The effective taxation of receivables obtained by foreign entities is a condition for applying exemptions from WHT under the Polish CIT Act. In practice, tax authorities verify whether the receivables are reported by the taxpayer in financial statements and tax declarations and whether taxes are being paid.

This was also the case in a SAC verdict of December 19, 2023, case number II FSK 27/23. The Court pointed out that in a situation where over several consecutive years the taxpayer does not show any paid tax amount, there is a reasonable doubt as to whether the condition of effective taxation is actually met. This especially applies when there are no documents confirming that the absence of tax payment results, for example, from offsetting losses

Interpretation of grounds for refusing to issue opinions on the application of preferences

Refusal to issue an opinion on the application of preferences

Taxpayers and withholding tax agents can request tax authorities to issue a so-called **'opinion on the application of preferences'**. This document confirms the right to apply an **exemption from WHT or a preferential tax rate resulting from the relevant Double Taxation Treaty**.

Tax authorities can refuse to issue an opinion on the application of preferences if the conditions required by the regulations are not met or in situations:

- where there are **justified doubts** about the compliance of the documents presented or the taxpayer's statement that they are the actual owner of the receivable with reality,
- where there is a **justified suspicion** that the taxpayer does not conduct real economic activities in the country of their domicile.

The SAC in its verdicts of December 19, 2023, stated that the **criteria regarding 'justified doubts' and 'justified suspicions' can be interpreted broadly**. Therefore, from the perspective of a taxpayer or withholding tax remitter applying for an opinion on the application of preferences, it's crucial to meticulously prepare documentation and provide exhaustive explanations.

What's next?

We have developed the above conclusions on the basis of oral justifications of the verdicts of the Supreme Administrative Court. Publication of written justifications is expected in the coming weeks. **It is clear, however, that in the verdicts we refer to, the SAC unequivocally supported the restrictive interpretation and case law practice with respect to the WHT provisions, which includes, inter alia, the draft tax explanations of the Ministry of Finance published in September 2023.**

This means that the application of WHT preferences may prove difficult or impossible also in previously uncontroversial situations (this applies in particular to dividends), and tax remitters may be required to conduct exceptionally detailed verification of foreign counterparts and meticulously document the fulfilment of conditions for applying preferences.

If the issues raised above may apply to your business, we invite you to get in touch.

This document has been prepared for information purposes only and covers general nature. Before taking any action based on the above information, we recommend that you obtain a valid opinion of TPA experts.

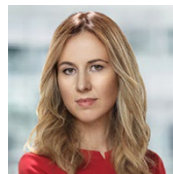


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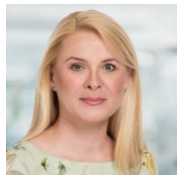
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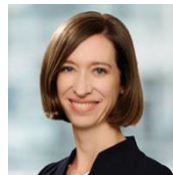
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