

NovioTax Deister Holding and Juhler Holding

February 2018

On 20 December 2017, the CJEU gave its decision in the joined cases (Case C-504/16, C-613/16) Deister Holding and Juhler Holding concerning the compatibility of the Germany “look through approach” in case of insufficient substance as clarified in Sec. 50d para. 3 German Income Tax Act, with the Parent-Subsidiary Directive (“PSD”) and freedom of establishment. This case is interesting for most Netherlands groups operating in Germany that have received dividends from Germany, which in most cases start with questionnaires about the relevant Netherlands substance at the level of the company receiving the German dividend.

Juhler Holding

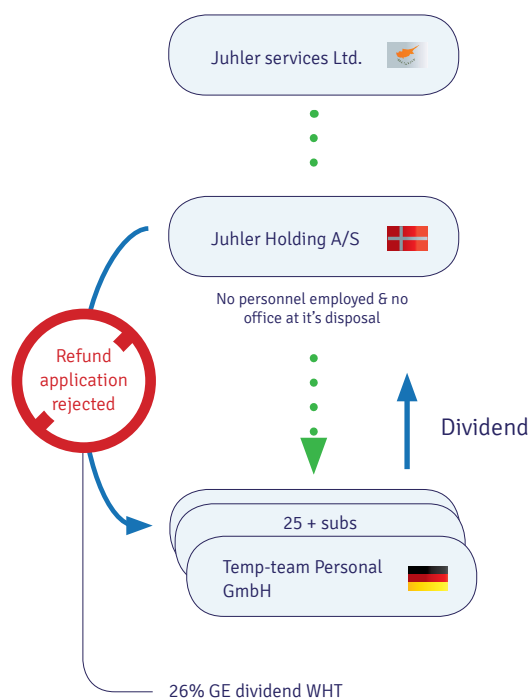
Juhler Holding is a holding company with its registered office in Denmark. Juhler Services Limited, a company incorporated under Cypriot law, holds 100% of the capital in Juhler Holding. Juhler Services Limited’s sole shareholder is an individual resident in Singapore. Juhler Holding has holdings in more than 25 subsidiaries. The group in question supplies personnel procurement services to the extent of a third of the volume of such services in Denmark. Since 2003, Juhler Holding has held 100% of the capital in temp-team Personal GmbH, a company established in Germany.

Juhler Holding has, in addition, a property portfolio, exercises financial control within the group so as to optimise the group’s interest costs, is responsible for supervising and monitoring the performance of the individual subsidiaries and has a phone line and an email address. Juhler Holding is listed as a contact partner on the group’s homepage. Juhler Holding does not, however, have its own offices. If necessary, it uses the premises, as well as the other facilities and staff, of other companies within the group. Lastly, Juhler Holding’s chief executive is also on the boards of various companies in the group.

In 2011, Juhler Holding received dividends from temp-team Personal GmbH. Since those dividends were subjected to WHT and the solidarity surcharge, Juhler Holding applied for a refund of those taxes. Following decisions in which the tax authority rejected that application and the objection raised against the rejection, Juhler Holding brought an action against those decisions before the Finanzgericht Köln (Finance Court, Cologne), on the ground that the relevant legislation in the main proceedings is incompatible with the freedom of establishment and the PSD.

Deister Holding

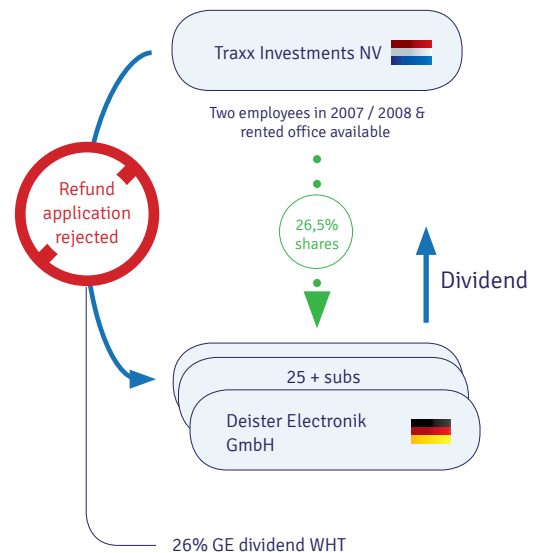
Deister Holding is the successor in title of Traxx Investments NV (C 504/16: hereafter ‘Traxx’), which had its registered office in the Netherlands. Traxx principally had holdings in several companies established in various jurisdictions and financed those companies, inter alia, by making loans to the companies of the group in question. From 2005, Traxx had a holding amounting to at least 26.5% of the capital in Deister Elektronik GmbH, a company incorporated under German law. From March 2007, Traxx had a rented office in the Netherlands and two employees there in 2007 and 2008. Traxx’s sole shareholder, Mr. Stobbe, was resident in Germany.



On 19 November 2007, Deister Elektronik paid dividends to Traxx, on which Deister Elektronik withheld the tax on income from capital tax and the solidarity surcharge, and remitted the amounts to the tax authorities. On 16 May 2008, Traxx applied for an exemption from the tax and surcharge in respect of that distribution of dividends. Following decisions in which the tax authority rejected that application and the objection raised against the rejection, Deister Holding, as the successor in title of Traxx, brought an action against those decisions before the Finanzgericht Köln (Finance Court, Cologne, Germany) on the ground that the relevant legislation in the main proceedings is incompatible with the freedom of establishment and the PSD.

Decision CJE

The CJE followed its previous case law (in particular Case C-6/16 Eqiom) and stated that Sec. 50d para. 3 German Income Tax Act was not covered by (old) Article 1(2) of the PSD, which allows Member States to deny the benefits of the Directive only on the basis of domestic norms aimed at counteracting wholly artificial arrangements not reflecting economic reality and purported to obtain illegitimate tax advantages. In addition, provisions establishing a general presumption of fraud and abuse go beyond what is necessary to achieve that result and conflict with the PSD (para. 60-62 and 74). The same arguments were applied by the CJE to conclude that Sec. 50d para. 3 German Income Tax Act infringed the freedom of establishment and were not justified by the objective of preventing fraud and abuses (para. 97).



Impact Netherlands HoldCo's

Interestingly, the CJE noted that the fact that the parent companies exclusively manages the assets of its subsidiaries or that its income derives solely from that management could not be regarded, of itself, as implying the existence a wholly artificial arrangement (para. 73). 'The fact that the economic activity of a non-resident parent company consists in the management of its subsidiaries' assets or that the income of that company results only from such management cannot per se indicate the existence of a wholly artificial arrangement which does not reflect economic reality.' Contrary to what Sec. 50d para. 3 German Income Tax Act provides, the finding of such an arrangement requires that, on a case-by-case basis, an overall assessment of the relevant situation should be conducted. Relevant factors should be the organizational, economic or other substantial features of the involved group of companies and strategies of the particular group (para. 74).

ABOUT NOVIOTAX

NovioTax is a Dutch research-oriented tax consultancy firm with offices in Amsterdam and Nijmegen. Our employees are members of the Dutch Association of Tax Advisers (NOB) and the International Fiscal Association (IFA), have many years of experience and some are much sought-after guest speakers on tax policy and other topics that fall within their field of expertise. We typically serve midsized and large MNE clients, coordinate discussions with the DTA and closely cooperate with international law and tax law firms.

DISCLAIMER

The information contained in this blog is of general nature and does not address the specific circumstances of any particular individual or entity. Hence, the information in this blog is intended for general informational purposes and cannot be regarded as advice. Although we endeavor to provide accurate and timely information and great care has been taken when compiling this blog, there can be no guarantee that such information is accurate as of the date it is received or that it will continue to be accurate in the future. No one should act on such information without appropriate professional advice after a thorough examination of the particular situation. We do not accept any responsibility whatsoever for any consequences arising from the information in this publication being used without our consent.