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TAX LITIGATION

Session Chairs

Liesl Fichardt	Quinn Emanuel Urquhart & Sullivan LLP, London, England
Jonathan Schwarz	Temple Tax Chambers, London, England

Speakers

Benjamin Twardosz	Cerha Hempel Rechtsanwälte Gmbh, Vienna, Austria
Bodil Tolstrup	Bjornholm Law, Copenhagen, Denmark
Andrea Silvestri	Bonelli Erede Lombardi Pappalardo Studio Legale, Milan, Italy
Angel Garcia Ruiz	J&A Garrigues SLP, Madrid, Spain
Christopher Slade	Aird & Berlis, Toronto, Ontario, Canada
Caroline Ciraolo	Kostelanetz LLP, Washington, District of Columbia, USA

Topics

- Austria: cum/ex Supreme Administrative Court VwGH 28 June 2022 Ro 2022/13/0002
- Canada: exchange of information, Levett v CRA
- Denmark: beneficial ownership in EU law (C-116/16 T Denmark and C-117/16 Y Denmark ApS. (NetApp))
- Italy: Withholding tax regime on dividends paid to US investment funds, EU law, American funds insurance
- Spain: deduction of borrowing costs (Duscholux); recovery of excess withholding taxes by non-resident alternative investment funds EU law infringements (or hedge funds)
- US: exchange of information (Puri v US, Zhang v US, Harper v US)

Liesl Fichardt, who specialises in complex tax, finance and debt related investigations and has been recognized in the *Chambers & Partners Global Guide*, and consistently ranked in Band 1 for Tax: Contentious. Chambers wrote, *"She is first-class; she is a very good international lawyer who is highly respected, extremely hard-working and a brilliant strategist and tactician." "She is a very practiced, skillful and determined litigator.".* Further, Liesl has been recognized by *Legal 500* in the Tax Litigation & Investigations Hall of Fame. *Legal 500* wrote, "*Liesl Fichardt is a superb lawyer, for whom there are not enough superlatives. Technically brilliant in the principles and details of domestic and international taxation law, she has a fantastic strategic nous and great skill and experience in dealing with tax authorities*.". Liesl was also listed in the Hot 100 List by *The Lawyer*. She has been recognized by *Who's Who Legal: Corporate Tax.*

Liesl leads this international practice from London. Previously, Liesl was head of the Tax Investigations and Disputes practice at Clifford Chance. She is one of the leading experts advising corporates and multi –nationals and high net individuals. Her experience is wide-ranging as solicitor, advocate, arbitrator and former acting judge. Given the complex and sensitive nature of the work, she often provides strategic guidance to Boards and how to assess, manage, minimize or mitigate risks and exposure.

Liesl is former Chair of the British Branch of the International Fiscal Association and also sits on the International Taxes Committee of the Law Society of England and Wales. She has published widely in this field.

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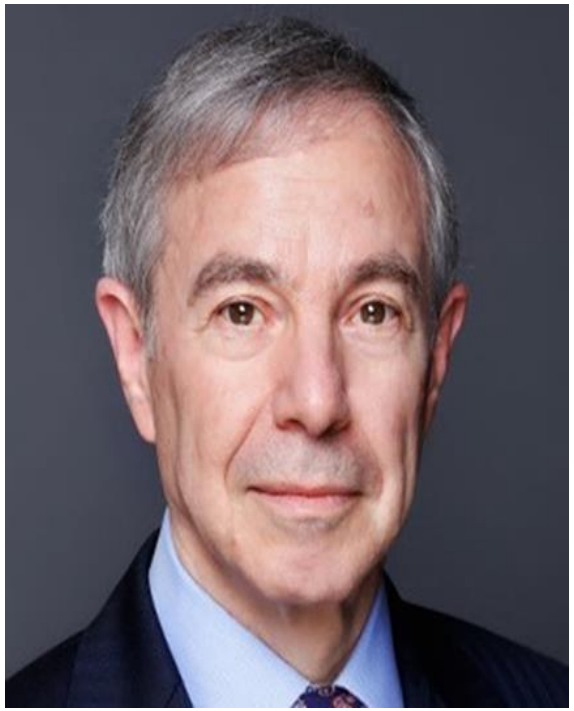
Jonathan Schwarz

- English Barrister, Irish Barrister
- Barrister and Solicitor, Alberta, Canada
- Advocate South Africa
- Practice focuses on international tax disputes as counsel and as an expert and advises on solving cross-border tax problems.
- Visiting professor King's College London and programme director International Tax Law LLM
- Author:
  - *Schwarz on Tax Treaties* and of *Booth and Schwarz: Residence, Domicile and UK Taxation* among other publications and a contributor to *Transfer Pricing and Business Restructurings: Streamlining all the way*.
- Chambers Guide UK 2023:
  - "highly regarded for his expertise in international tax matters. His particular areas of expertise include double tax relief, tax treaties, transfer pricing and cross-border transactions."
  - "A guru on matters of international tax law."
- See www.taxbarristers.com for details



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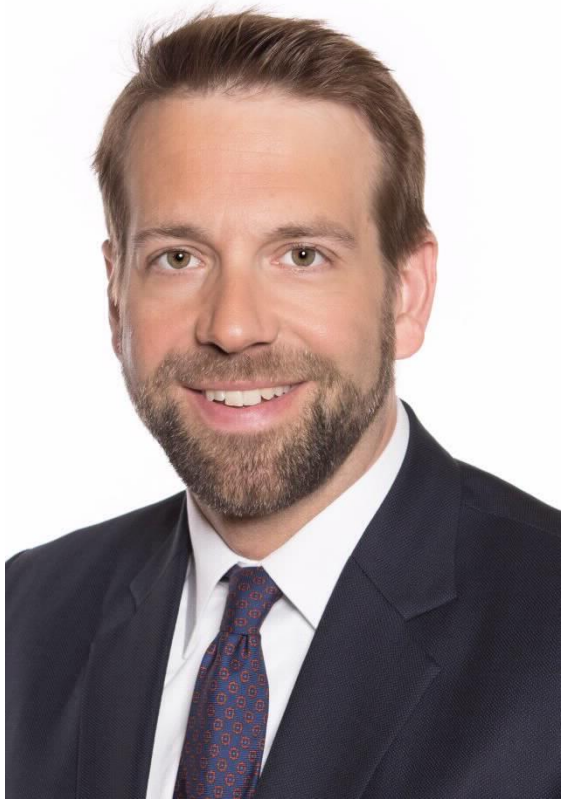
Benjamin Twardosz, who specialises in international tax, tax litigation, fiscal criminal law and transfer taxes, has been recognized as “Leading Individual” in Austria for Tax by *Legal 500*. Legal 500 wrote “*Benjamin Twardosz is a leading practitioner and gives clear and timely advice.” Who is who Legal* says that he *“stands out as a leading name in Austria and Europe-wide on corporate tax disputes with sources calling him ‘very creative and effective, with an excellent reputation’. He provides clients with superb insight into transactional taxes and tax litigation.”* and ranked him as a leading individual in the EMEA region. Chambers Europe currently ranks him in Band 2 for Tax in Austria and writes that he is described as *"technically very good, problem-solving and solution-oriented."*

Benjamin is dually admitted as an attorney-at-law and as a certified public tax advisor in Austria. He joined CERHA HEMPEL as a partner in 2018. Previously he had worked with the Supreme Administrative Court, and as a partner both in tax and law firms. He is author and editor of a commentary to the Stamp Duty Act (7th edition), co-editor and co-author of a Commentary to the Fiscal Criminal Act (edited since 2014), author of a “Handbook Supreme Administrative Court” (5th edition), author of more than 60 individual publications in legal journals and contributions to books, member of the expert senate of the Austrian Federal Chamber of Certified Public Tax Advisors and Public Accountants and frequently acts as a lecturer.

Benjamin co-heads the international tax practice from Vienna. Most of his clients are Austrian industrial clients, private equity funds, multi-nationals and high net worth individuals.



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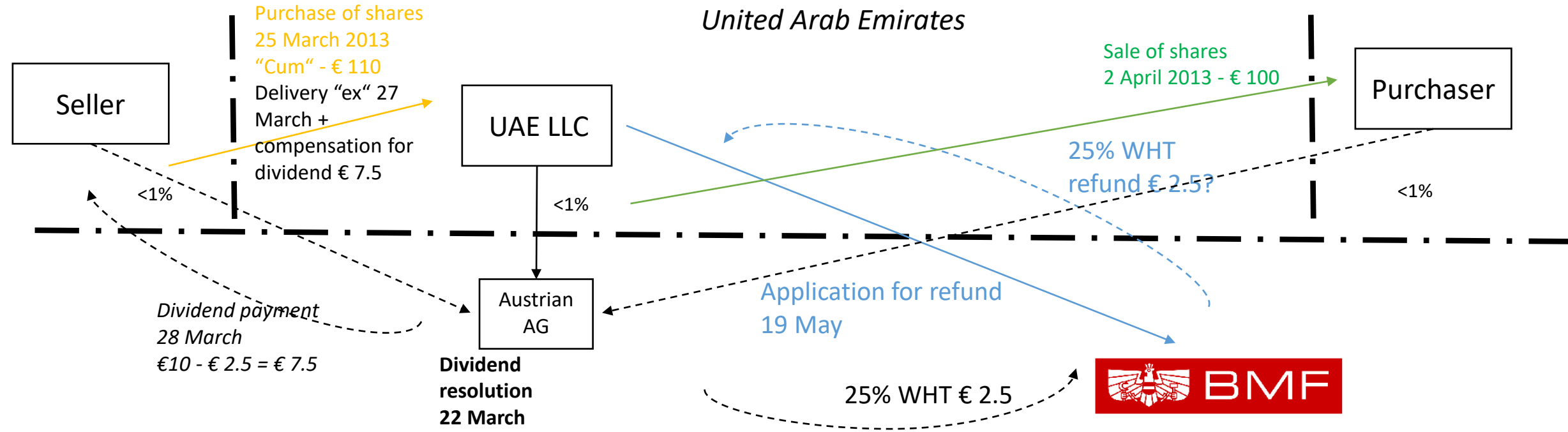
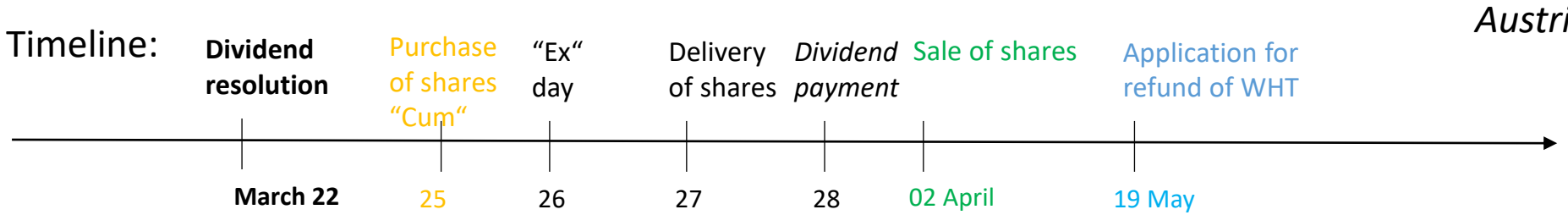
Cum/ex Supreme Administrative Court (VwGH) 28 June 2022





Cum/ex Supreme Administrative Court (VwGH) 28 June 2022

- Art 10/1 DTT UAE/Austria: “Dividends“ may be taxed only in the resident state. Has UAE LLC received a “dividend“?
- Entitlement for refund of UAE LLC questionable – depending on beneficial ownership. In Austria, beneficial ownership of dividends follows generally the beneficial ownership of shares. However, timing is of essence:
- Position of UAE LLC: Entitlement to refund because UAE LLC was beneficial owner of shares since the purchase of the shares on 25 March (irrespective of the time of delivery) and therefore entitled to the dividend.
- Tax office: Refund of WHT denied because purchased shares were not delivered to UAE LCC before “Ex” day.
- Federal Fiscal Court: Refund of WHT denied because UAE LLC received shares “ex” dividend, only a compensation payment and not a dividend, and is therefore not considered beneficial owner of the shares before delivery.
- Supreme Administrative Court: Refund of WHT denied because UAE LLC was not beneficial owner of shares on the day of the dividend resolution and is therefore from a tax perspective not considered to receive a dividend.

Bodil Tolstrup is specialized in tax controversy within all areas of tax. She has represented clients varying from individuals and small independent businesses to venture funds; labor-unions and listed companies.

Bodil has published several articles in both Danish and international tax journals and is a member of the Tax Committee of the General Council of the Danish Bar and Law Society.

In 2016 she founded Bjørnholm Law a boutique tax law firm specializing in tax litigation together with Nikolaj Bjørnholm. Bodil and Nikolaj works collectively on all the firm's cases drawing on their collective and individual strengths.

Bjørnholm Law is ranked in e.g. Chambers; Legal 500; and International Tax Review (e.g. Tier 1 in Tax Controversy, World Tax 2023).

"The team really stand out as very knowledgeable and easy to work with. They have the ability to challenge and see matters from different angles adding value for the client. They are very well connected to key stakeholders both within the industry and the authorities ensuring that the latest practice is a key capability." (Legal 500, 2022)

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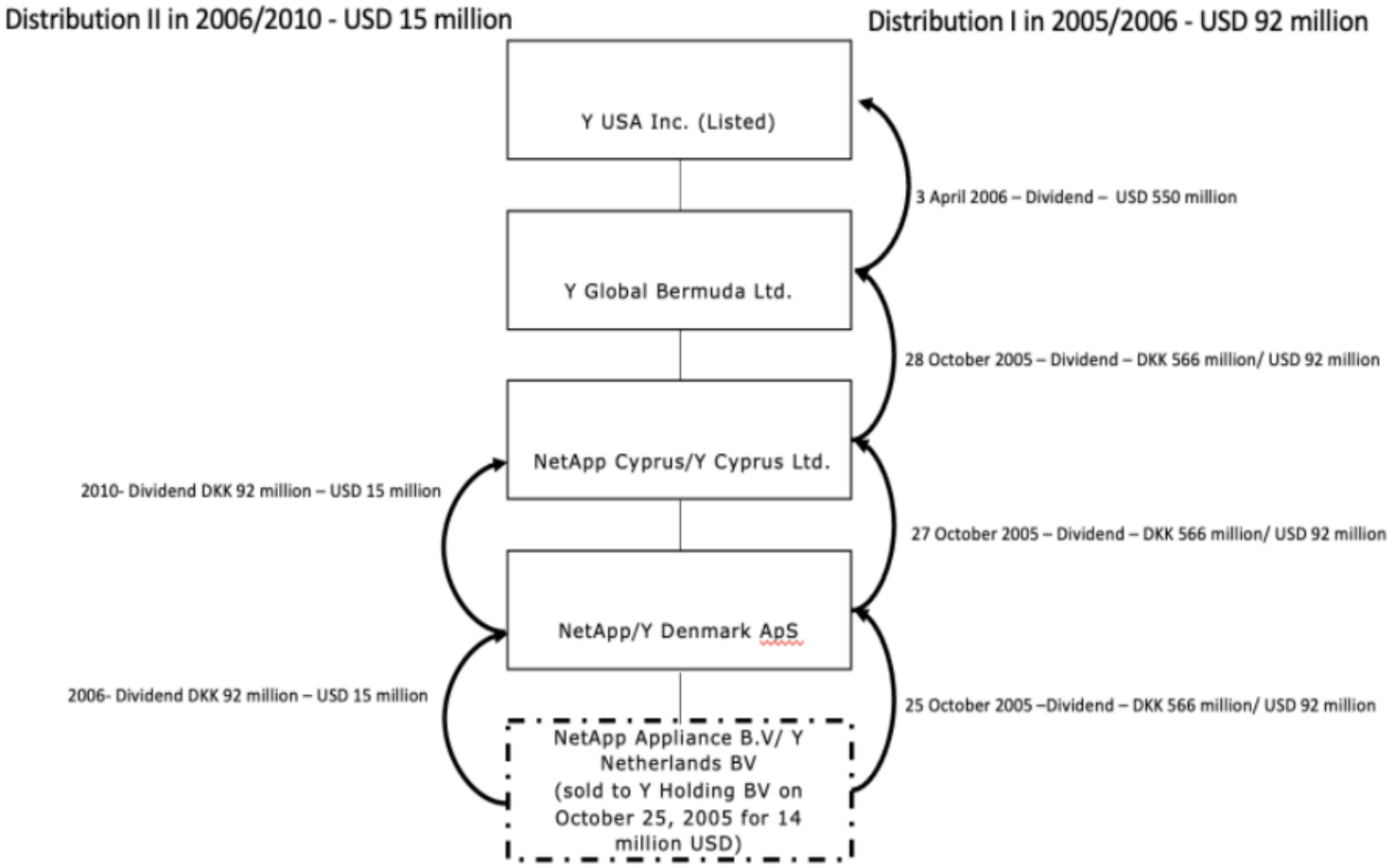
Denmark: Beneficial ownership

Final judgment from the Danish Supreme Court – dividend cases

- ECJ (2019): NetApp case, C-117/16 and TDC case, C-116/16
- Danish High Court (2021): SKM2021.304
- Danish Supreme court (2023): 69/2021, 70/2021, 79/2021

NetApp structure and distributions



NetApp judgments in Denmark

High Court (2021):

- Generally, in favour of Tax Authorities on: abusive practise, no substance, no right of disposal, artificial arrangement.
- In favour of NetApp re. Distribution I (USD 92 million) but not Distribution II (USD 15 million): no abuse when funds are re-distributed to ultimate owner in US (distribution of USD 550 million).
  - Distribution I: Held in Bermuda for 5 months and invested in bonds before repatriation was acceptable to High Court.
  - Distribution II: Not clear from evidence that it was deemed as part of the repatriation given that payment was not made until 2010.

NetApp judgments in Denmark

Supreme Court (2023 (9 January)):

- Generally, in favour of Tax Authorities on: abusive practice, no substance, no right of disposal, artificial arrangement.
- In favour of NetApp re. ”Distribution II” (USD 15 million) but not Distribution I (USD 92 million): No abuse when funds are re-distributed to ultimate owner in US.
  - Distribution I: Holding for 5 months without constrains by Bermuda entailed Bermuda was beneficial owner not US. Thus, Cyprus abusive.
  - Distribution II: Clear from evidence intended distributed to US in 2006, conf. American Jobs Creations Act no later than end of FY 2006 (30 April 2006 for NetApp). US was therefore beneficial owner.

General comments

- Several other cases decided by lower tier courts – also on interest.
- General interpretation: the Danish ”BO-complex” has been lost by the taxpayers on all arguments (generally expected post ECJ)
- Even DK-specific issues lost: DK Minister stated (2001): WHT can be avoided by interposing an e.g. Cyprus entity between the DK entity and a BVI entity … => Courts: the Miniters statement could not imply that abuse would be accepted by the Danish Government
- The “flow-through” discussion will presumably be subject in other cases, e.g. timing, pre/post decisions, evidence-issues.
- BO-assessments today: BO is an intermediary holding funds for 5 months … will that hold up in future structures?

Andrea Silvestri is a partner of BonelliErede and the head of its Tax Department.

He specializes in domestic and international tax advice as well as dispute resolution with particular focus on corporate taxation, acquisitions, reorganizations and financial transactions. He assists major Italian and international corporations as well as several private equity players.

Andrea serves as an Adjunct Professor of "*Strategic Tax Management*" and "*International and European Taxation*" at Luiss University of Rome. He has published widely on tax matters and sits on the board of several large Italian corporations.

Andrea has been consistently ranked in Band 1 for "Tax" in the *Chambers & Partners Global Guide*.

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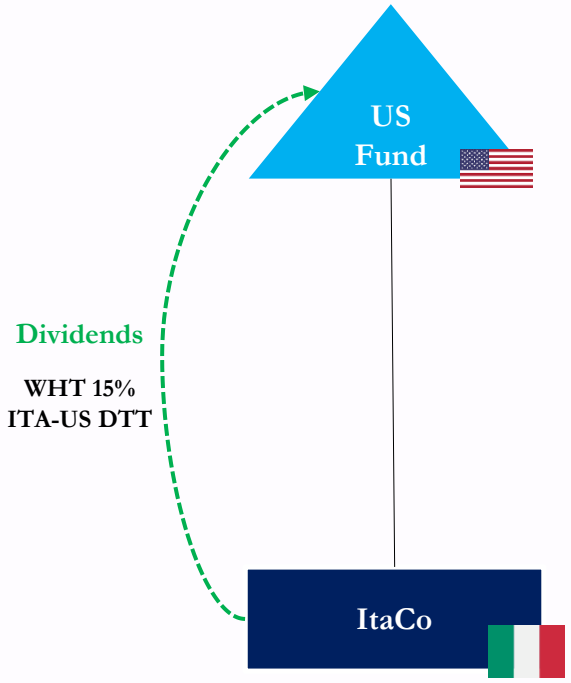
Italy: Withholding tax regime on dividends paid to US investment funds, EU law, American funds insurance



Facts:

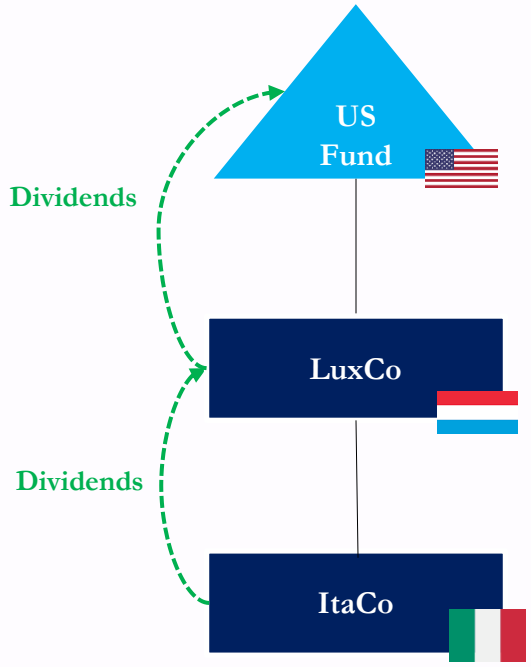
- US mutual fund received in FYs 2007-2010 dividend distributions from an Italian company
- Dividends were subject to 15% WHT under the ITA-US DTT, in lieu of the 12.5% WHT applicable, at that time, to Italian open-ended funds (which are currently WHT exempt)
- The US fund argued that, under the EU free movement of capital, it was entitled to the lower 12.5% rate
- The first and second instance tax courts rejected the claim, which was brought before the Supreme Court

Italy: Withholding tax regime on dividends paid to US investment funds, EU law, American funds insurance

The Italian Supreme Court (judgment 6th July 2022, no. 21454) upheld the claim of the US fund, based on the following principles:

- the more burdensome treatment of US funds (15% WHT) compared to that of Italian funds (12.5% WHT) is in breach of the EU free movement of capital, which is applicable also to non-EU-based investors
- the above disparity is not justified since:
  - (i) both Italian and US open-ended funds are subject to qualified regulatory supervision and
  - (ii) the US legislation provides for the exchange of information with Italy
- the fact that the disparity is based on the ITA-US DTT is irrelevant, since also DTTs shall be interpreted in compliance with EU law and the free movement of capital

Italy: Withholding tax regime on dividends paid to US investment funds, EU law, American funds insurance



Potential impacts of the Supreme Court judgment:

- significant pending tax litigations on private equity structures – both dividends and capital gains taxation (generally LuxCo is being disregarded for Italian tax purposes)
- based on 2021 domestic legislation, dividends and capital gains realized by EU qualified investment funds are exempt from Italian taxes (like Italian domestic funds)
- the principles stated by the Supreme Court may be used to extend the above exemption to non-EU private equity funds, provided that:
  (i) they are located in countries that exchange information with Italy; and
  (ii) are subject to qualified regulatory supervision

Ángel García is a partner of the Tax Department of Garrigues, where he has pursued his entire professional career. He specializes in Tax Law, mainly in relation to tax litigation, tax implications of insolvency processes and criminal tax investigations.

Ángel is the head of the Tax Litigations Department at Garrigues and habitually acts before the different Spanish Courts in front of the Spanish Tax Authorities, and has also participated in proceedings before the European Court of Justice.

Ángel has also taken part in the tax advisory and execution of important real estate transactions and in numerous restructuring and refinancing operations in real estate group entities.

He is a regular speaker at seminars and conferences in the Firm and at various specialized centers (IEB, IFE, AEDAF, CEF, etc.). Ángel is a member of the Madrid Bar Association.

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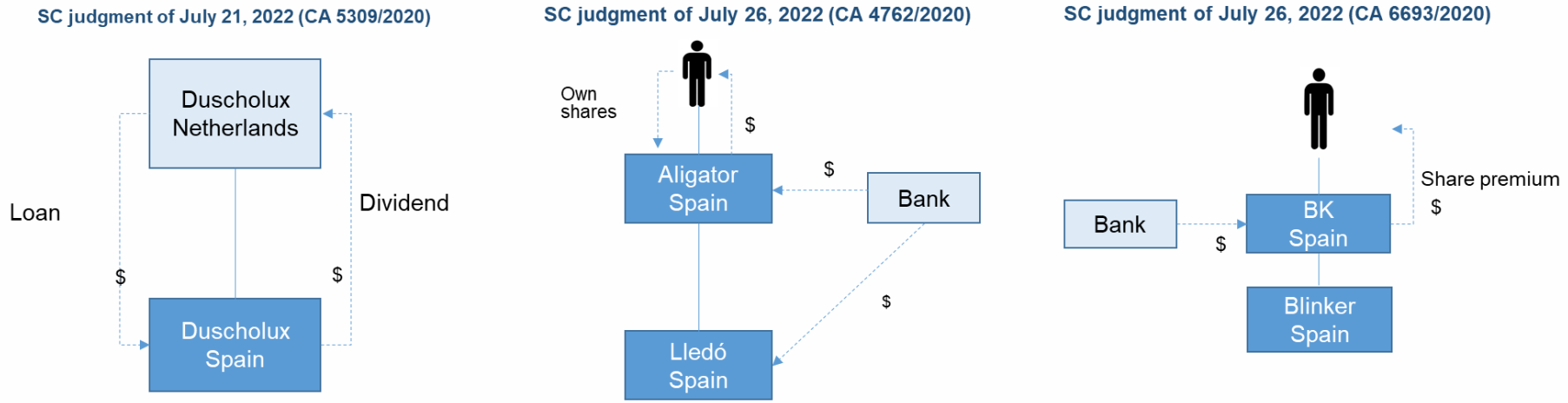
Deductibility of borrowing costs of loans taken out for the distribution of dividends

- *Supreme Court judgments of July 21, 2022 (Cassation Appeal nº 5309/2020) and July 26 (Cassation Appeals nº 4762/2020 and 5693/2020)*
  - **Facts**:
    - The Spanish Supreme Court ("SSC") in these three judgments of July 2022, has ruled on the deductibility for Spanish Corporate Income Tax purposes of certain borrowing costs arising from loans obtained to distribute dividends, acquire own shares, and distribute a share premium
    - The tax authorities had concluded that these costs were not deductible because, either they should have been classified as remuneration for equity or as gifts or gratuities not related to the taxpayer's economic activity



❖ *Duscholux Case (Cassation Appeal nº 5309/2020)*

Facts:

- Specifically, in the Duscholux Case the debate revolved around the deductibility of borrowing expenses from a loan granted to a Spanish subsidiary by its parent company (resident in the Netherlands) to finance the distribution of a dividend to its shareholders.
- Although the Spanish entity had unrestricted reserves at the time, it did not have enough liquidity to distribute the dividend. Consequently, it had to obtain the loan from its parent company to be able to finance the payment of the dividend.
- The Spanish tax authorities considered that the loan was not used “to finance the Spanish entity’s ordinary activity” but rather solely to pay the dividend and that, therefore, “it only benefited the shareholder”.
- On the basis of the above, they concluded that the borrowing costs should be considered as nondeductible to the extent that should been classified as “expenses that represent remuneration for equity” or as “gifts or gratuities that are not matched to revenues.

❖ *Spanish Supreme Court: Deduction of borrowing costs incurred to finance dividend distribution (Duscholux)"*

Supreme Court´s conclusions:

- The SSC recalled that we were dealing with a transaction and expenses that had not been classified by the STA as fraudulent or artificial or performed with the sole aim of obtaining a tax advantage so, based on these premises, held the following:
  - Borrowing costs cannot be characterized, generally, as cost of equity, due to the nature of these costs.
  - Additionally, finance costs arising from a loan that is related, directly and immediately, to the performance of a business activity by the company, cannot be characterized as a gift or gratuity, because they are incurred for consideration, in the same way as the loan that they were incurred to pay for is for consideration also.

    In this regard, the matching revenues do not have to result from a specific transaction or project generating a separate revenue at the company, instead regard must be had to the company´s economic management as a whole.
- The decision to resort to debt financing *"lies with the managing bodies of the company".* Asserting that there is no need to undertake the transaction because unrestricted reserves could have served the same purpose (as the STA did) is irrelevant from a tax standpoint, because it involves a decision concerning the management of a company's economic resources.

Chris is a tax partner at Aird & Berlis LLP in Toronto, Ontario. He has extensive experience advising on domestic and international tax controversy and litigation matters, and has successfully represented a wide range of clients, including multinational corporations, financial institutions, pension funds and ultra high net worth individuals, and he routinely acts on high value and complex cases. Chris' strategic approach allows him to position his clients for effective negotiation with the tax authorities, with the objective of obtaining favourable results efficiently and avoiding litigation when possible. He has an exceptional track record, having successfully resolved most of his cases by consent judgment or at the administrative level.

In addition to resolving tax disputes, his practice includes navigating the audit process, disclosures under the Voluntary Disclosures Program, requesting interest and penalty relief and other discretionary remedies, challenging collection action initiated by the tax authorities, and applications for rectification of transactions that resulted in unintended tax consequences.

Chris has been recognized in International Tax Review's World Tax Guide for his expertise in Tax Controversy, and by The Legal 500. He has authored articles on a variety of tax issues in professional legal journals and presents at conferences and other events for tax executives and tax practitioners. Early in his legal career, Chris completed a judicial clerkship at the Tax Court of Canada. Prior to joining Aird & Berlis, Chris was a senior partner at a national law firm affiliated with one of the Big 4 accounting firms, where he co-led the affiliated firm's tax litigation practice in Toronto.

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Canada: exchange of information, *Levett v. Canada*, 2022 FCA 117

- Requests for information (RFIs) made by the Canada Revenue Agency (CRA) to the Swiss Federal Tax Administration (Swiss Authorities) under Article 25 of the Canada-Swiss treaty, which provides:

  *"The competent authorities of the Contracting States **shall exchange such information as is foreseeably relevant** for carrying out the provisions of this Convention or to the administration or enforcement of the domestic laws concerning taxes covered by the Convention, insofar as the taxation thereunder is not contrary to the Convention."*

- RFIs sought information regarding accounts presumed to be held in Swiss banks, and corporate/financial information regarding a Swiss entity

- Taxpayers challenged the RFIs on the basis that the CRA failed to exhaust all reasonable domestic means prior to requesting the information from Switzerland

Canada: exchange of information, *Levett v. Canada*, 2022 FCA 117

- Para. 2(a) of the treaty's *Interpretive Protocol* provides:

  *"It is understood that an exchange of information will only be requested once the requesting Contracting State has pursued **all reasonable means** available under its internal taxation procedure to obtain the information."*

- Prior challenge of the order of the Swiss Authorities that the information be produced was unsuccessful (A. et al. v. Swiss Federal Tax Administration (ESTV), A-223/2019 (Switzerland))

Canada: exchange of information, *Levett v. Canada*, 2022 FCA 117

"…The appellants claim that the CRA did not do enough in pursuing domestic means of obtaining the information sought in these RFIs. I disagree, as I am satisfied that it was reasonably open to the CRA, in the circumstances of this case, to proceed with the Levett-Baazov RFIs at the time it did in view of the fact that ***Messrs. Levett and Baazov had, to that point, denied, on more than one occasion, having any such assets, revenues or activities in the taxation years at issue****."*

"Messrs. Levett and Baazov have not convinced me that … the issuance of the Levett-Baazov RFIs, when examined in light of the primary objective of Article 25—which is to ***encourage the exchange of information to the maximum extent possible****—and of the particular circumstances of this case, was unreasonable. Like all powers whose exercise involves a measure of judgment or discretion,* ***an abusive exercise of these powers will generally justify the intervention of the reviewing court*** *[…]. However, here, that demonstration was not made."*

Canada: exchange of information, *Levett v. Canada*, 2022 FCA 117

- Canada's Federal Court of Appeal held that the word **reasonable**

  *"… **strongly suggests some measure of discretion** in determining, in any given case, that all reasonable means available under the Act to obtain the information sought have been pursued before sending a RFI to the Swiss Authorities."*

- Primary objective of Article 25 and true intentions of the parties:

  *"to promote the exchange of information **to the maximum extent possible** with a view, notably, of **preventing tax evasion and avoidance**"*

Canada: exchange of information, *Levett v. Canada*, 2022 FCA 117

Key points:

1. Multi-jurisdictional challenges to exchange of information requests
2. Reluctance of courts to narrowly construe exchange of information provisions in bilateral treaties
3. Degree of deference on judicial review of administrative action taken by tax authorities

Caroline D. Ciraolo, former Acting Assistant Attorney General of the U.S. Department of Justice's Tax Division, is a partner with Kostelanetz LLP and a founder of its Washington, D.C. office.

Her practice focuses on federal and state civil tax controversies, including representation in sensitive audits, administrative appeals, and litigation, providing related tax advice, conducting internal investigations, and representing individuals and entities in criminal tax investigations and prosecutions. Caroline is President of the American College of Tax Counsel, immediate past Chair of the ABA Tax Section's Civil and Criminal Tax Penalties Committee, and inaugural Vice Chair of Membership, Diversity, and Inclusion of the ABA Tax Section.

She is a recipient of the IRS Chief Counsel Award and the ABA Tax Section's Janet Spragens Pro Bono Award. Caroline serves as an Adjunct Professor at the Georgetown University Law Center (*Criminal Tax Law & Procedure* and *International Tax Controversies*) and University of Baltimore School of Law Graduate Tax Program (*Investigation, Prosecution, and Defense of Tax Crimes* and *Tax Practice & Procedure*). Caroline has been recognized by Chambers (Band 1, Tax Fraud (nationwide); Band 1 (High Net Worth: Private Client) (nationwide); Band 2, Tax (DC)), Legal 500, International Tax Review, Best Lawyers in America (Lawyer of the Year, Litigation and Controversy – Tax (Washington, D.C.) (2022)), Super Lawyers, and The Daily Record's Top 100 Women Circle of Excellence.

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U.S. Exchange of Information/Summons Enforcement

Sample EOI Treaty Provision

US-Australia Tax Treaty (1983)

Article 25- Administrative provisions of AUS-U.S. Income Tax Treaty, provides for exchange of information between the two countries when such information is necessary for carrying out the provisions of the treaty or of their domestic tax laws. This does not require either country to carry out measures contrary to its laws or administrative practices or to supply information not obtainable under its laws or in the normal course of its information or to supply information which would disclose trade secrets or information or other information the disclosure of which would be contrary to public policy. *See* Explanation by Joint Committee on Taxation (1983) on AUS-US Capital Tax Treaty (as signed) dated May 23, 1983.

U.S. Exchange of Information/Summons Enforcement

- ***Rabassa v United States*** *(USDC)* (Feb. 2022) – Rabassa asks USDC to quash summons issued by the IRS at the request of Spain and to a company seeking Rabassa's financial information. Rabassa claimed the company was not notified of the request and that Spain is using the civil treaty request for a criminal investigation.
- ***Puri v. United States*** *(9th Cir.)* (Aug. 2022) – Court found Puri was not entitled to a hearing before the court enforced a summons for bank records issued at the behest of India. Puri argued that the U.S. should consider the purpose behind India's request for her bank account information and whether the purpose is abusive, even if the request is allowed under the treaty. The U.S. argued that in a summons enforcement action, the motives of the IRS are at issue and India's motives were irrelevant. Puri's request for *en banc* review is pending.
- ***Zhang v. United States*** *(9th Cir.)* (Aug. 2022) – Court found couple was not entitled to a hearing before the court enforced a summons for financial records issued at the behest of Canada. Zhangs argued that the U.S. must review evidence that Canada is abusing its authority in seeking to obtain records as part of a criminal tax investigation. Citing *Puri,* the Court affirmed enforcement of the summons.

U.S. Exchange of Information/Summons Enforcement

- ***United States v. Agrama*** *(9th Cir.)* (Oct. 2022) – IRS served a summons on Agrama, who was under audit in the U.S. and had been convicted of tax crimes in Italy. The IRS sought documents Agrama received from the Italian prosecutors, who in turn received the documents from treaty partners (Hong Kong, Ireland, and Switzerland). Agrama challenged the summons, arguing that the foreign treaties did not permit the disclosure of documents to the U.S. The case is pending.
- ***United States v. Ohnstad*** *(USDC)* (Nov. 2022) – France issued an EOI request pursuant to the U.S.-France treaty in connection with France's investigation into Sasu Motorcorp. IRS issued a summons to Ohnstad to obtain the information and the U.S. sought to enforce the summons when Ohnstad failed to respond. The Court closed the case after Ohnstad cooperated with U.S. authorities.