

## First implementation of the “Danish cases” doctrine in the Spanish administrative case-law

A resolution by the Spanish Central Administrative Court from October 2019 is the first case where a Spanish court or authority makes explicit reference to the Danish cases.



This resolution by the Spanish Central Administrative Court (*Tribunal Económico-Administrativo Central*), is considered the first interpretation by Spanish courts of the so-called “Danish cases” doctrine from the European Court of Justice. The case analyzed the obligation to withhold on account of the Spanish Non Resident Income Tax on interest paid by a Spanish entity to a Dutch holding company, which was in turn held by a structure of conduit companies including, subsequently, a Curaçao entity and an Andorran entity, which was finally held by an individual resident in Andorra.

The Spanish Central Administrative Court concluded that the interest could not benefit from the exemption on interest paid to an EU tax resident recipient because the Dutch holding entity was not the beneficial owner of the interest paid by the Spanish entity. The Court highlighted the following main facts as indicia of improper entitlement to exemption:

- » Lack of economic activity: The entities’ financial statements reflected no economic activity and did not include any reference to clients or suppliers, to payroll payments or any other payments of services. The tax authorities noticed that some data overlapped between the different entities.

- » Cash flows: The payments from the Spanish entity to the Andorran entity were made through the intermediary companies and all payments between the different entities were made for exactly the same amount and in a very short period of time and. The same flow of funds occurred for loans on the opposite way. Hence, it was clear that the entities were only used as mere conduit companies to canalize the transfer of funds.
- » Beneficial ownership: Interest were transferred in such a short period of time that the Dutch entity could not make the funds available. The entity in Andorra was the real beneficial owner of the interest paid by the Spanish company.

This resolution is based on the criteria set out by the European Court of Justice in the “Danish cases”, concerning the Interest & Royalties Directive, and applies its considerations about the principle of abuse of rights and the concept of beneficial owner of the interest. According to the Spanish Central Administrative Court, the Directive’s beneficial ownership clause could apply despite the fact that this clause has not been transposed into the Spanish law.

However, the application of the ECJ doctrine to the Spanish exemption on the interest paid to EU entities triggers controversy among practitioners because the Spanish exemption does not arise from the transposition of the Directive, but in fact it was introduced long before the Directive was adopted, and it did not include a beneficial ownership clause.

Finally, this resolution comes from the Spanish Central Administrative Court, in the context of an administrative proceeding, and hence it could eventually be appealed by the claimant before the Spanish Courts.

## Author

### Victor Macías

victor.macias@arcoabogados.es  
T + 34 963 517 619  
ARCO Abogados y Asesores Tributarios  
Av. Marqués de Sotelo, 13, 6º  
46002 Valencia  
www.arcoabogados.es

## Editorial Team

### Koen Morbée

koen.morbee@tiberghien.com  
T +32 2 773 40 00  
Tiberghien  
Tour & Taxis, Havenlaan | Avenue du Port 86C  
BE-1000 Brussels, Belgium  
www.tiberghien.com

### Thomas De Meyer

thomas.demeyer@tiberghien.com  
T +32 2 773 40 00  
Tiberghien  
Tour & Taxis, Havenlaan | Avenue du Port 86C  
BE-1000 Brussels, Belgium  
www.tiberghien.com

### Inés Blanco

ines.blanco@wts.com  
T +32 (0)2 801 30 60  
WTS Global  
Esplanade Oscar van de Voorde 1  
BE-9000 Ghent, Belgium  
wts.com

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WTS Global  
P.O. Box 19201 | 3001 BE Rotterdam  
Netherlands  
T +31 (10) 217 91 71 | F +31 (10) 217 91 70 [wts.com info@wts.de](mailto:info@wts.de)

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