

May 17, 2019

Jurjen Bevers and Paul Halprin, tax partners at Dentons Amsterdam, represented one of their clients in a case concerning the deductibility of interest costs for purposes of the state profit share levy (“SPS”). On May 10, 2019 the Supreme Court published its judgement for this case and ruled in favor of the client. Although it specifically concerns the interpretation of the Dutch Mining Act, the judgement can be interpreted broadly and can also be applied to allocation issues in the Dutch Income Tax and Dutch Corporate Income Tax.

In the case at hand, the company is active in the off-shore industry and performs exploration and mining activities on the Dutch continental shelf. For its profits deriving from the mining activities, the company is subject to Dutch corporate income tax (“CIT”) and the Dutch SPS. In 2009, the company acquired an external participation and financed this acquisition through a loan from its parent company. Immediately after the acquisition, the subsidiary was legally merged with the company as a result of which the mining activities of the subsidiaries became part of the company’s mining business.

The company allocated the interest costs to its mining activities and deducted the costs from its SPS profit. The Dutch tax authorities denied the deduction arguing that the historical approach should be applied and that the loan and costs fall outside the so-called “ring-fence”. The Supreme Court however, ruled that certain circumstances can justify deviating from a strict application of the historical approach and that it is possible that a loan’s function can change over time. According to the Supreme Court, a loan that has initially been obtained for the acquisition of shares in a subsidiary, can afterwards be attributed to the mining business of its parent company if the mining activities of the subsidiary are transferred to that company through a legal merger.

The judgement provides helpful guidance to allocation questions, specifically when the function of assets has changed over time. Instead of applying a strict historical approach, the Supreme Court now confirms that under certain circumstances, a more material approach is justified. This is also relevant for allocation issues of branches, when determining which assets and liabilities of the HQ should be attributed to the branch and in connection with anti-abuse provisions such as article 10A of the Dutch corporate income tax act.

If you would like to learn more about the potential impact of this judgement for you and your business, please do not hesitate to contact Jurjen Bevers or Paul Halprin for more information.

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