Federal court
Federal Tribunal
Tribunals federale
Tribunal federal

2C_354 / 2018

Judgment of April 20, 2020

II. Public law department

occupation
Federal Judge Seiler, President,
Federal Judge Zünd,
Federal Judge Aubry Girardin,
Federal Judge Donzallaz,
Federal Judge Stadelmann,
Court clerk Seiler.

Party to the proceedings
AA_____ Ltd.,
Complainant,
represented by PrimeTax AG,

against

Federal Tax Administration,
Main Department Direct Federal Tax, Withholding Tax, Stamp Duties,
Eigerstrasse 65, 3003 Bern.

object
Withholding tax (refund),

Appeal against the judgment of the Federal Administrative Court, Section I, of February 28, 2018 (A-7299/2016).

Facts:

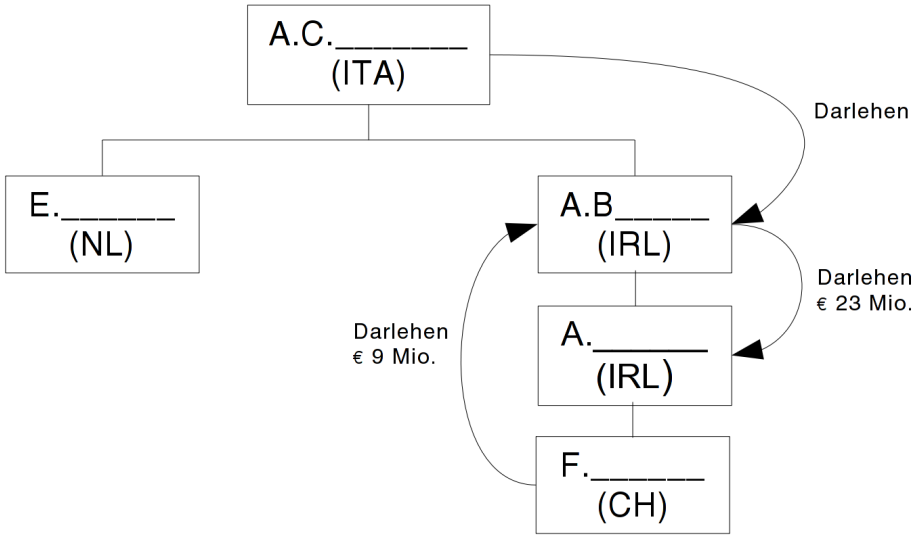
A.

Aa
AA_____ Ltd. (hereinafter: A ._____ or parent company) was incorporated on February 25, 2003 in X ._____ / Ireland. It was founded on August 5, 2003 by AB_____ Ltd. in Dublin (hereinafter: AB_____ or grandparent company). A ._____ takes care of the trademark and patent administration as well as the management of the research and development activities of the A ._____ group, the world's largest manufacturer of coffee machines. The group companies of the A ._____ Group relevant to the present proceedings are based in Italy, the Netherlands and Ireland.
As of September 25, 2007, the group was held by a private equity fund. As of 2009, the A ._____ group became part of the electrical company D ._____, whose parent company is based in the Netherlands.

Ab E ._____ BV, based in the Netherlands (hereinafter: E ._____ or sister company), was also part of the A ._____ Group. Since 1999 it has been held directly by AC_____ SpA, based in Italy (hereinafter: AC_____ or great-grandparent company). Since 1999, E ._____ held various patents and was a shareholder in F ._____ AG, based in Zurich (hereinafter: F ._____ or subsidiary).
F ._____ distributed various dividends between 1999 and 2003, for which E ._____ was based on the then valid agreement of November 12, 1951 between the Swiss Confederation and the Kingdom of the Netherlands to avoid double taxation in the Taxes on income and assets (aDBA CH-NL; AS 1952 179) requested full refund of withholding tax. However, the Federal Tax Administration (hereinafter: FTA)

reimbursed E ._____ only 20%, so that a base charge of 15% remained. The FTA justified this by stating that E ._____ would have acquired the Swiss participation from a company in the Netherlands Antilles without any economically motivated connection. In the years 2004 to 2007 the F.

Ac In September 2005, A ._____ acquired the entire intellectual property rights from E ._____ - namely numerous patents and brands - as well as the accumulated research and development costs. A ._____ financed the purchase price with a loan that AB_____ had given her. A ._____ has been the sole shareholder of F ._____ since the beginning of 2006. It also acquired this stake from E ._____ and financed the purchase price (around EUR 11.5 million) again with funds that AB_____ lent it. A ._____'s debts to AB_____ for the acquisition of the intangible goods and the stake in F ._____ totaled around EUR 23 million.
For its part, AB_____ was largely financed by loans from AC_____. In addition, there was an obligation between F ._____ and AB_____ for approx. EUR 9 million.
The ownership and liability relationships can be shown graphically as follows:



Ad Die F ._____ resolved on June 25, 2007 a dividend of CHF 14 million, due on September 25, 2007. On November 24, 2008, the FTA received an undated Form 823C (basic application for the international reporting procedure). A Form 108 dated September 25, 2008 and an undated Form 103 were enclosed with this basic application. The FTA rejected the notification procedure, which decision was finally confirmed by the Federal Supreme Court with judgment 2C_756 / 2010 of January 19, 2011.
On March 7, 2011, F ._____ paid the withholding tax owed on the disputed dividend of CHF 4,900,000 plus default interest.

B.

Ba In the event of failure in the aforementioned procedure 2C_756 / 2010 (see above item Ad), A ._____ had submitted a precautionary application to the FTA on December 24, 2010 for a full refund of the withholding tax on the disputed dividend (application no. Xxx; Receipt by the FTA on December 27, 2010). This application was based on the agreement of October 26, 2004 between the Swiss Confederation and the European Union on the automatic exchange of information on financial accounts to promote tax compliance in international matters (AIA-A CH-EU; SR 0.641.926.81, former title: " Agreement of October 26, 2004 between the Swiss Confederation and the European Community on regulations

Bb In its decision of August 26, 2014, the FTA refused to reimburse the withholding tax for the 2007 due dates. A ._____ raised an objection against this decision, which the FTA rejected with an objection decision of October 27, 2016. The Federal Administrative Court dismissed the complaint against this in its judgment of February 28, 2018.

C.
With a complaint in public law matters dated April 23, 2018, AA_____ Ltd. requested that the judgment of the Federal Administrative Court of February 28, 2018, that its application for a refund of withholding tax 964'455 in the amount of CHF 4'900'000 - and that the amount of CHF 4,900,000 .-- plus interest of 5% is to be reimbursed to her in full since March 7, 2011. The FTA requests that the complaint be rejected.

Considerations:

1.

1.1. As a final decision in a matter of public law, the contested judgment of the Federal Administrative Court according to Art. 82 lit. a in conjunction with Art. 86 Para. 1 lit. a andArt. 90 BGGthe complaint in public law matters. On the according to Art. 100 Para. 1 andArt. 42 BGGThe complaint legitimized in accordance with Art. 89 Para. 1 BGG, submitted in due time and in the correct form, must therefore be entered.

1.2. The Federal Supreme Court applies the law under Art. 106 Para. 1 BGG ex officio , but only examines the alleged violations of the law, provided there are no legal deficiencies , taking into account the general obligation to give reasons and give reasons under Art. 42 Para. 1 and Para. 2 BGG are downright obvious (**BGE 142 I 135 at** 1.5 p. 144). It is neither bound by the arguments put forward in the appeal nor by the considerations of the lower court; it can approve a complaint for a reason other than the one invoked and it can reject it on grounds that differ from the reasoning of the lower court (**BGE 141 V 234 at** 1 p. 236; **134 V 250 at** 1.2 p. 252;**133 III 545** E. 2.2 p. 550; **130 III 136** E. 1.4 p. 140).

1.3. According to Art. 105 (1) BGG, the Federal Supreme Court bases its judgment on the facts that the lower court has established. In accordance with Art. 105 (2) BGG, the lower court findings can only be corrected if they are either obviously incorrectly, ie arbitrarily determined (**BGE 140 III 115 at** 2 p. 117; **137 II 353 at** 5.1 p. 356) or are based on a violation of the law within the meaning of Art. 95 BGG and remedying the deficiency can be decisive for the outcome of the proceedings (Art. 97 Para. 1 BGG ; **BGE 142 I 135**E. 1.6 p. 144 f.). The complaining party must therefore substantiate why these requirements should be met; if it does not meet this requirement, it remains with the facts ascertained at the lower court (**BGE 140 III 16** E. 1.3.1 p. 18).

2.
The complainant bases her claim on the AIA-A CH-EU. This was changed and renamed by the change protocol of May 27, 2015 (AS 2016 5003). The amending protocol entered into force on January 1, 2017 (see Art. 2, Paragraph 1 of the amending protocol; Federal Decree of June 17, 2016 on the approval and implementation of a protocol amending the savings tax treaty between Switzerland and the EU, AS 2016 5002). As far as the presently relevant provisions are concerned, the changes are not intended to be retroactive. According to a principle of customary international law, which was codified in Art. 28 of the Vienna Convention of 23 May 1969 on the Law of Treaties (VRK; SR 0.111) (see judgment of the International Court of Justice [IGH] of 20 July 2012 *Questions concernant l'obligation de poursuivre ou d'extrader [Belgium v Senegal]* , CIJ Recueil 2012, p. 457 § 100; PATRICK DAILLIER AND OTHER, Droit international public, 8th edition 2009, p. 242), in such a constellation it can be assumed that the relevant new or amended international treaty will only bind the contracting parties from the time it comes into force. The present case must therefore be judged according to the old law.

3.
The lower court stated in the judgment under appeal that the right to use the dividend is a prerequisite for the discharge according to Art. 15 para. 1 aAIA-A CH-EU. On the basis of this, it refused to refund the withholding tax to the complainant, since it was not entitled to use the dividend in question. The complainant asserts that the alleged lack of entitlement to use the dividend does not prevent the withholding tax from being reimbursed in accordance with Art. 15 (1) AIA-A CH-EU. The right of use could not be a prerequisite for reimbursement in and of itself, but at most in the context of a broader abuse test.

3.1. Whether the usage authorization is a prerequisite for the discharge according to Art. 15 para. 1 GAA-A CH-EU is a question of the interpretation of this provision. When interpreting and applying agreements such as the AIA-A CH-EU, the principles of international law must be observed, as specified by the Vienna Convention (**BGE 143 II 136 at** 5.2.1 p. 148; **143 II 202 at** 6.3. 1 p. 207 f .; **142 II 161 at** 2.1.3 p. 167; **139 II 404 at** 7.2.1 p. 422). In any case, as far as this is relevant, the principles of the Vienna Convention on the Interpretation of Treaties represent codified customary international law (report of the IGH of July 9, 2004 *Conséquences juridiques de l'édification d'un mur dans le territoire palestinien occupé* , CIJ Recueil 2004, p. 174 § 94; **BGE 125 II 417** E. 4.d P. 424 f .; **122 II 234** E. 4.c p. 238; **120 Ib 360** E. 2.c p. 365). They must therefore be observed for the interpretation of the AIA-A CH-EU by the local law enforcement authorities, although the European Union (EU) is not a party to the Vienna Convention (judgment 2C_653 / 2018 of July 26, 2019 E. 5.3.1, for Publication planned, with instructions).

3.2. According to the wording of Art. 15 Para. 1 GAIA-A CH-EU "Dividend payments from subsidiaries to parent companies are not taxed in the source country if:

- the parent company holds a direct stake of at least 25% in the subsidiary's share capital for at least two years and
- one company is resident for tax purposes in a member state of the European Community and the other company in Switzerland and
- According to the double taxation agreements with third countries, neither of the two companies is resident for tax purposes in this third country and
- Both companies are subject to corporation tax without exemption and both have the form of a corporation.
"

3.3. It cannot be inferred from the wording of the provision whether the parent company must be entitled to use in order to be exempt from withholding tax. The connection with the other provisions of the aAIA-A CH-EU does not immediately indicate whether the user authorization is to be assumed.

3.4.

3.4.1. In order to ensure the most uniform possible application of the norms of a double taxation agreement by the contractual partners and to minimize conflicts, court rulings by the contractual partner (s) can be taken into account when interpreting double taxation agreements (so-called decision harmony; see rulings 2C_344 / 2018 of February 4, 2020 at 3.4 .5; 2C_707 / 2016 of March 23, 2018 E. 2.4.3, with information).

3.4.2. In the European Union (EU), the Court of Justice of the European Union (ECJ) guarantees the uniform interpretation of Union law by submitting national courts questions on the interpretation of the founding treaties and the legal acts of the institutions, bodies and other agencies of the EU (cf. Art. 267 of the Treaty on the Functioning of the European Union [TFEU] or Art. 234 of the Treaty establishing the European Community [TEC]). This also includes the AIA-A CH-EU. The ECJ recently dealt with the question of the conditions under which a parent company is subject to Council Directive 90/435 / EEC of 23 July 1990 on the common tax system for parent companies and subsidiaries of different member states (OJ L 225 of 20 August 1990 p. 6; hereinafter: mother-daughter directive 1990; since then replaced by Council Directive 2011/96 / EU of November 30, 2011 on the common tax system of parent companies and subsidiaries of different member states, ABl. L 345/8 of December 29, 2011) the withholding tax relief may or must be refused due to lack of usage authorization or misuse (judgment of the ECJ of February 26, 2019 C-116/16 and C-117/16 *T Danmark* and *Y Denmark Aps,* ECLI: EU: C: 2019: 135). This guideline was a decisive inspiration for Art. 15 Para. 1 GAA-A CH-EU (see **BGE 138 II 536**E. 5.4.2 p. 542; Judgments 2C_1078 / 2015 of May 23, 2017 E. 3.3; 2C_756 / 2010 of January 19, 2011 at 2.3, in: ASA 79 p. 855, StR 66/2011 p. 431; Preamble 3 of the decision of the Council of the European Union of June 2, 2004 on the signing and conclusion of the agreement between the European Community and the Swiss Confederation on regulations that correspond to those in Directive 2003/48 / EC of the Council in the field of taxation of Interest income are equivalent, and the associated Memorandum of Understanding [2004/911 / EG], OJ. L 385/28 of December 29, 2004). Where the relevant provisions of the Parent-Subsidiary Directive 1990 correspond at least to those of the AIA-A CH-EU, it can be assumed that

3.4.3. Like Art. 15 para. 1 GAA-A CH-EU, the Parent-Subsidiary Directive 1990 also provided for a discharge at the source in Art. 5 ("The profits distributed by a subsidiary to its parent company are exempt from tax deduction at the source . "). In its judgment, the ECJ, taking into account the purpose of the Parent-Subsidiary Directive 1990, came to the conclusion that Article 5 of the Parent-Subsidiary Directive 1990 does not oblige the member states to exempt dividends from withholding tax if the subsidiary and parent company are in different EU member states are resident for tax purposes, whereas the company actually entitled to use is resident for tax purposes outside the EU (see judgment of the ECJ of February 26, 2019 C-116/16 and C-117/16 *T Danmark* and *Y Denmark Aps,* ECLI: EU: C: 2019: 135 para. 113). The ECJ did not need to answer whether parent companies may be refused discharge simply because they do not have a right of use, even if the company entitled to use is resident in the EU for tax purposes. In any case, discharge is to be refused in such a case if the parent company not only lacks the right of use, but the design as a whole falls under a relevant reservation of fraud or misuse (see ECJ judgment of February 26, 2019 C-116/16 and C-117/16 *T Danmark* and *Y Denmark Aps,* ECLI: EU: C: 2019: 135 paragraphs 96 et seq. And 111 et seq.).

4th
In light of the case law of the European Court of Justice, it remains to be seen whether the complainant's reimbursement should be refused with the lower instance due to lack of usage authorization, even though all potentially beneficial owners were resident in the EU for tax purposes, if the structure chosen by the complainant and the companies affiliated with it falls under a reservation of abuse in accordance with Art. 15 para. 1 GAA-A CH-EU and the complainant cannot refer to Art. 15 para. 1 GAA-A CH-EU for this reason.

4.1. Pursuant to Art. 15 Para. 1 GAIA-A CH-EU, the exemption from dividend payments takes place "without prejudice to the application of domestic or agreement-based regulations in Switzerland and in the member states for the prevention of fraud and abuse".

4.2.

4.2.1. With the reservation of tax avoidance, Swiss internal law includes a general anti-abuse regulation within the meaning of Art. 15 Para. 1 GAA-A CH-EU. It is controversial in the literature whether the provision of Art. 21 Para. 2 VStG applicable to domestic dividend recipients is also applicable to international relations or whether the prohibition of tax avoidance vis-à-vis foreign residents is based on the general prohibition of legal abuse under Art. 2 Para 2 ZGB (cf. DANON / GLAUSER, Cross-border Dividends from the Perspective of Switzerland as the Source State - Selected Issues under Article 15 of the Swiss-EU Savings Agreement, Intertax 33/2005 p. 518 [Art. 21 Paragraph 2 VStGanalogous]; BEAT BAUMGARTNER, The concept of the beneficial owner in international tax law in Switzerland, 2010, p. 298; ALBERTO LISSI, Tax consequences of profit distributions by Swiss corporations in an international group relationship, 2007, p. 255; OESTERHELT / WINZAP, exemption from withholding tax on dividends, interest and licenses through Art. 15 Interest

Taxation Agreement (ZBstA), ASA 74 p. 461 [general prohibition of abuse of rights according to Art. 2 Para. 2 ZGBanalogous]). At least for the present case, however, this controversy has no practical consequences, since according to case law the same criteria apply regardless of the legal basis. According to this, tax evasion occurs if (a) a legal structure chosen by the parties involved appears to be unusual ("insolite"), inappropriate or peculiar, at least completely inappropriate to the economic situation (objective element), if also (b) it can be assumed that the The chosen legal structure was used improperly only to save taxes that would be owed if the circumstances were properly organized (intent to circumvent; subjective element), and if (c) the chosen procedure would actually lead to considerable tax savings, if it would be accepted by the tax authorities (effective element). Whether these requirements are met must be checked on the basis of the specific circumstances of the individual case. Tax avoidance is only possible in very extraordinary situations if there is a legal structure that - apart from the tax aspects - is beyond what is economically reasonable. The subjective element proves to be decisive insofar as the assumption of tax avoidance is ruled out if other than mere tax-saving reasons play a relevant role in the legal structure (to which - apart from the tax aspects - is beyond what is economically reasonable. The subjective element proves to be decisive insofar as the assumption of tax avoidance is ruled out if other than mere tax-saving reasons play a relevant role in the legal structure (to which - apart from the tax aspects - is beyond what is economically reasonable. The subjective element proves to be decisive insofar as the assumption of tax avoidance is ruled out if other than mere tax-saving reasons play a relevant role in the legal structure (toArt. 21 para. 2 VStG cf. Judgments 2C_597 / 2016 of August 10, 2017 E. 2.6; 2C_896 / 2008 of October 30, 2009 E. 2.4, in: StR 65/2010 p. 156; 2A.660 / 2006 of June 8, 2007 at 5.1, in: ASA 77 p. 554, StR 63/2008 p. 643; analogous to Art. 2 Para. 2 ZGB cf. **BGE 142 II 399** E. 4.2 p. 408 [direct federal tax]; **138 II 239** E. 4.1 p. 243 ff .; Judgment 2C_119 / 2017 of October 5, 2018 E. 3.1 [VAT]).

4.2.2. In a purely internal relationship, the prohibition of tax avoidance primarily covers cases in which taxpayers use a special legal structure in order to evade subsumption under an onerous tax standard (see judgment 2C_117 / 2017 of February 13, 2018 at 3.2.2 , in: StE 2018 B 99.2 No. 25). In these cases, taxation is based on the legal structure that would have been appropriate to achieve the intended economic purpose (so-called factual fiction; see **BGE 138 II 239**E. 4.1 p. 245). In addition to this basic form of tax avoidance, however, there is a further variant: Instead of avoiding subsumption under an onerous tax standard, the taxpayer tries in this variant to gain access to another, relieving standard by means of peculiar circumstances. The core of the accusation lies in the inappropriate appeal to the exonerating norm (see judgment 2C_117 / 2017 of February 13, 2018 E. 3.2.2, in: StE 2018 B 99.2 No. 25, with references). This second variant is almost typical for the international relationship, since double taxation agreements and other international agreements such as the AIA-A CH-EU contain numerous exonerating norms (cf. E. 4.3). In the purely internal relationship, case law does not generally differentiate between the two variants,**BGE 138 II 239** E. 4.1 p. 245 and E. 5 p. 250 [input tax deduction for value added tax]).

4.3.

4.3.1. If the taxpayer can invoke a double taxation agreement or another international treaty relieving him of the tax consequences of internal law, the internal law prohibition of tax avoidance may usually not be opposed to him (Art. 27 VRK). However, the obligation of the contracting states to grant the discharge provided for in these treaties is sufficient in good faith (Art. 26 and 31 para. 1 VRK) not to the point that they would also have to grant these advantages to persons whose appeal constitutes an abuse of rights (so-called abuse of the agreement; see judgment 2A.239 / 2005 of November 28, 2005 at 3.4.3, in: StR 61 / 2006 p. 217; cf. on the international legal status of the *prohibition* of abuse of rights, judgment of the ICJ of 6 June 2018 *Immunités et procédures pénales [Equatorial Guinea v France]*, P. 41 f. § 144 ff .; DUPUY / KERBRAT, Droit international public, 14th edition. 2018, § 289; ROBERT KOLB, La bonne foi en droit international public, 1999, p. 440 ff .; VERDROSS / SIMMA, Universelles Völkerrecht, 3rd edition 1984, § 461). Sometimes the agreement itself defines when abuse is to be assumed (see e.g. Art. 9 Para. 2 lit. a (i) aDBA CH-NL; see also Art. 27a DTA CH-NL in the version of the protocol of 12 June 2019 between the Swiss Confederation and the Kingdom of the Netherlands amending the Agreement of February 26, 2010 between the Swiss Confederation and the Kingdom of the Netherlands to avoid double taxation in the area of taxes on income, BBl 2019 7987 [not yet in force]). If there is no provision in the text of the agreement, the interpretation of customary international law,Art. 26 and 31 para. 1 VRKcodified concept of good faith to determine which behaviors are not in line with it and are therefore to be classified as illegal. The work of international committees and organizations, such as the comments by the OECD, offer important assistance, as they allow for the most uniform possible handling at the international level, which is foreseeable for all parties involved (see judgment 2A.239 / 2005 of November 28, 2005 E. 3.6, in: StR 61/2006 p. 217). In the current version, the OECD commentary states that treaty benefits can only be refused restrictively because of abuse. According to the OECD, there is abuse if the achievement of a more tax-favorable position was one of the main purposes of the transaction or structure concerned and the granting of the treaty advantage would run counter to the aim and purpose of the relevant provisions (OECD comment on the OECD-MA, as amended on November 21, 2017, No. 61 on Art. 1 OECD-MA). The Federal Supreme Court essentially agreed with this point of view (cf. judgment 2A.239 / 2005 of November 28, 2005 E. 3.6.6, in: StR 61/2006 p. 217 [but on earlier versions of the OECD commentary]) .

4.3.2. The improper invocation of exonerating treaty norms does not result in a factual fiction, but as a rule results in the denial of the desired benefits (see judgments 2A.239 / 2005 of November 28, 2005 at 3.4.3 and 3.4.5, in: StR 61 / 2006 p. 217, with references; 2A.11 / 1994 of August 16, 1996 E. 5c, in: ASA 66 p.

406; see also Art. 27a DBA CH-NL in the version of the protocol of June 12, 2019 between Swiss Confederation and the Kingdom of the Netherlands amending the Agreement of February 26, 2010 between the Swiss Confederation and the Kingdom of the Netherlands to avoid double taxation in the field of income taxes, BBl 2019 7987 [not yet in force]). Something different only applies if the agreement in question itself stipulates a different legal consequence (see judgment 2A. 11/1994 of August 16, 1996 at 5c, in: ASA 66 p. 406; see. now also Art. 7 Para. 4 of the Multilateral Agreement of November 24, 2016 on the Implementation of Tax Agreement-related Measures to Prevent Profit Reduction and Profit Shifting [MLI; SR 0.671.1]).

4.3.3. The aDBA CH-NL contained in Art. 9 Para. 2 lit. a (i) a reservation of abuse already in the text of the agreement, which ordered an independent legal consequence (cf. similarly also Art. VI, Paragraph 2 of the agreement of May 24, 1951 between Switzerland and the United States of America to avoid double taxation in the area of Taxes on income [aDBA CH-US; AS 1951 892]). According to this, corporations remain subject to a base of 15% in spite of a participation in a corporation in the other contracting state, which in itself entitles to full discharge, if the connection was established or maintained primarily with the intention of securing full reimbursement. Whether the corporation is to blame for a corresponding intention must naturally be determined on the basis of objective facts (evidence) (**BGE 110 Ib 287** E. 5a p. 292).

4.4. If you measure the present case against the above anti-abuse regulations, the following picture emerges:

4.4.1. As the former owner of the stake in the Swiss subsidiary, the complainant's sister company had a base charge of 15% in accordance with Art. 9 Para. 2 lit. a (ii) aDBA CH-NL because, according to the findings of the FTA, it had primarily acquired this stake in order to secure full reimbursement, so that the reservation of abuse in Art. 9 Para. 2 lit. a (i) aDBA CH-NL excluded full discharge. The entry into force of Art. 15 para. 1 GAA-A CH-EU on July 1, 2005 did not change this base burden, since the sister company, based on the reference in this provision, Art. 9 para. 2 lit. a (i) aDBA CH-NL could still be held against as an anti-abuse provision in an agreement with Switzerland.

4.4.2. Only the transfer of the participation in the Swiss subsidiary to the Complainant, who is resident in Ireland for tax purposes, removed the participation from the scope of the reservation of abuse of Art. 9 Para. 2 lit. a (i) aDBA CH-NL. The transfer consequently resulted in a potential reduction in the base load from 15% at the sister company (Art. 9 Para. 2 lit. a (ii) aDBA CH-NL) to 10% (Art. 9 Para. 4 lit. a in conjunction with Art. 9 Paragraph 4 last sentence aDBA CH-IE) or even 0% (Art. 15 Paragraph 1 aAIA-A CH-EU) for the complainant. The legal structure chosen by the companies involved would have resulted in considerable tax savings for the companies affiliated with the group, if the Swiss subsidiary already had funds in liquid form at the time of the transfer of the stake at the beginning of 2006, clearly not necessary for business operations and distributable under commercial law, which would have been subject to the base tax of 15% if distributed to the sister company (so-called "old reserves"; see judgment 2A.11 / 1994 of August 16, 1996 E. 6, in: ASA 66 p. 406; ESTV, practice specification of November 29, 2004, in: LOCHER UND ANDERE, Double Taxation Agreement Switzerland-Germany, B 10.2 No. 36; STEFAN OESTERHELT , Altreservenpraxis, international transposition and deputy liquidation, FStR 2017 p. 106 f.). According to the decision of the Federal Tax Administration of August 26, 2014 and the annual financial statements in the files (clearly not necessary for business operations and distributable under commercial law, which would have been subject to the base tax of 15% in the event of a distribution to the sister company (so-called "old reserves"; see judgment 2A.11 / 1994 of August 16, 1996 at 6, in: ASA 66 P. 406; FTA, practice definition dated November 29, 2004, in: LOCHER UND ANDERE, Double Taxation Agreement Switzerland-Germany, B 10.2 No. 36; STEFAN OESTERHELT, Altreservenpraxis, international transposition and substitute liquidation, FStR 2017 p. 106 f.). According to the decision of the Federal Tax Administration of August 26, 2014 and the annual financial statements in the files (clearly not necessary for business operations and distributable under commercial law, which would have been subject to the base tax of 15% in the event of a distribution to the sister company (so-called "old reserves"; see judgment 2A.11 / 1994 of August 16, 1996 at 6, in: ASA 66 P. 406; FTA, practice definition dated November 29, 2004, in: LOCHER UND ANDERE, Double Taxation Agreement Switzerland-Germany, B 10.2 No. 36; STEFAN OESTERHELT, Altreservenpraxis, international transposition and substitute liquidation, FStR 2017 p. 106 f.). According to the decision of the Federal Tax Administration of August 26, 2014 and the annual financial statements in the files (Practice definition of November 29, 2004, in: LOCHER UND ANDERE, Double Taxation Agreement Switzerland-Germany, B 10.2 No. 36; STEFAN OESTERHELT, Altreservenpraxis, international transposition and deputy liquidation, FStR 2017 p. 106 f.). According to the decision of the Federal Tax Administration of August 26, 2014 and the annual financial statements in the files (Practice definition of November 29, 2004, in: LOCHER UND ANDERE, Double Taxation Agreement Switzerland-Germany, B 10.2 No. 36; STEFAN OESTERHELT, Altreservenpraxis, international transposition and deputy liquidation, FStR 2017 p. 106 f.). According to the decision of the Federal Tax Administration of August 26, 2014 and the annual financial statements in the files (Art. 105 (2) BGG), at the time of the transfer of the stake at the beginning of 2006, the Swiss subsidiary had substantial liquid, clearly not operationally necessary funds and distributable reserves. The structure chosen by the complainant and the companies affiliated with it would have resulted in considerable tax savings had the tax authorities accepted them.

4.4.3. The complainant asserts that the transfer of the participation was not made mainly to obtain this tax advantage, but for economic reasons. It is customary for a group company such as the subsidiary that is active in research and development to be transferred to the complainant as the group company that is

responsible for research and development within a group. There was also economic justification for the control of the complainant by the grand parent company as the group company responsible for monitoring compliance with the license agreements and collecting license fees.

4.4.4. From the contested decision and above all from the appeal decision of the FTA on October 27, 2016, there are concrete indications that the transfer of the participation to the complainant at the beginning of 2006 in conjunction with the subsequent dividend distribution in summer / autumn 2007 was not of economic benefit Motives was directed. For example, the FTA found that the complainant did not employ any staff in Ireland, nor did it maintain any business premises. Furthermore, the complainant had no funds of her own during the relevant period. In order to acquire the subsidiary (including the funds that are clearly not necessary for the business), the complainant raised a considerable amount of outside capital from the grand parent company (ie its parent company).
Since the lower court considered the complainant's request for reimbursement to be unjustified due to the lack of usage authorization, it did not appreciate the aforementioned evidence. In such cases, the Federal Supreme Court can add to the factual assessment ex officio (Art. 105 Para. 2 BGG). In view of the extensive files, the detailed submissions of the parties to the proceedings and the long duration of the proceedings, this is justified in the present case. Based on general life experience, the circumstantial situation suggests with a probability bordering on certainty that the complainant and the other companies involved wanted to secure a tax saving for themselves by transferring the stake in the subsidiary and the subsequent distribution of a dividend to the complainant previous group structure would not have admitted. The economic goal asserted by the complainant - the establishment of the research and development function including the participation in the subsidiary under the Irish grandparent company responsible for monitoring the license agreements - does not explain why the complainant got heavily into debt in order to ultimately be the liquid to purchase deferred withholding tax assets from the subsidiary. It would have been much easier for everyone involved and would have led to the same economic result if the subsidiary had instead distributed these funds immediately prior to the transfer of the stake to the sister company and the sister company had thus recorded access to liquidity in the form of a dividend instead of a purchase price payment. Against this background, the chosen procedure appears strange and the legal structure as artificial. Since the design chosen by her mainly served to obtain advantages from the DBA CH-IE and the AIA-A CH-EU and the three characteristics of tax avoidance are given, the complainant is to be accused of abuse of law both from an international and internal law perspective.

4.5. What remains to be examined is the legal consequences of the abuse in the context of Art. 15 Para. 1 GAA-A CH-EU.

4.5.1. It is not clear from the wording of Art. 15 para. 1 GAA-A CH-EU how far the reference to anti-abuse provisions of national law extends. In particular, the question arises whether, in the event of abuse, the basis for the right to discharge is withdrawn by the agreement, i.e. whether there is only reference to the abuse of national law, or whether the AEOI-A CH-EU also leaves it to national law, to order the appropriate legal consequence.

4.5.2. Tax avoidance under internal law and the abuse of treaties have different legal consequences (see above E. 4.2.2 and 4.3.2). In the context of the AEOI-A CH-EU, the internal law prohibition of tax avoidance could in any case not apply directly, but only through the reservation in Art. 15 para. 1 AEOI-A CH-EU. It cannot be overlooked that the matter at hand is an unjustified use of an advantage from Art. 15 Para. 1 GAIA-A CH-EU and not circumventing an onerous norm of Swiss tax law. Consequently, it is appropriate to infer the legal consequences of the abuse from international law, even if the relevant abuse, to which Art. 15 (1) GAO CH-EU refers, would be seen in tax avoidance and not in abuse of the treaty.

4.5.3. In the interests of decision harmony (see E. 3.4.1 above), the judgment of the ECJ in the *T Danmark and Y Denmark Aps* cases must again be observed, as it also provides information on the question of the legal consequences of an abuse of law. Like Art. 15 Para. 1 GAA-A CH-EU, the Parent-Subsidiary Directive 1990 also reserved national anti-abuse regulations in Art. 1 Para. According to the ECJ, the member states are obliged to refuse the benefits of the 1990 Parent-Subsidiary Directive even if they do not have any anti-abuse provisions in their national law and their agreements. This follows from the general prohibition of abuse of rights of Union law (judgment of the ECJ of February 26, 2019 C-116/16 and C-117/16 *T Danmark* and *Y Denmark Aps,* ECLI: EU: C: 2019: 135 para. 82 f.). This means that the abuse of law in the EU has the uniform consequence that taxpayers are completely denied the benefits of the 1990 Parent-Subsidiary Directive.

4.5.4. For the improper invocation of the dividend article under double taxation agreements, the Federal Supreme Court has ruled, and it is in line with the practice of the FTA, that the recipient of the dividend can benefit from the reduced rate if and as soon as the Swiss company exceeds the amount of the old reserves (see E. 4.4.2) (judgment 2A.11 / 1994 of August 16, 1996 E. 6, in: ASA 66 p. 406 [on Art. VI, Para. 2 aDBA CH-US]; cf. on the FTA administrative practice, practice definition of 29. November 2004, in: LOCHER UND ANDERE, Double Taxation Agreement Switzerland-Germany, B 10.2 No. 36; STEFAN OESTERHELT, Altreservenpraxis, international transposing and substitute liquidation, FStR 2017 p. 106 f.). The extent to which this practice can be adopted for Art. 15 Para. 1 GAA-A CH-EU does not need to be decided here. In the interests of harmony with the legal situation in the EU, which apparently does not recognize the partial

granting of the benefit from Art. 5 Parent-Subsidiary Directive 1990, it would at least be assumed that the dividend in question is free of old reserves. This is obviously not the case here, so that the complainant as a whole cannot invoke Art. 15 para. 1 GAA-A CH-EU. Under these conditions, it can also remain open whether Art. 15 para. 1 aAIA CH-EU, in addition to the reservation of the anti-abuse regulations of the individual states, a further, fully autonomous reservation of abuse can be derived from the subsidiary, as the ECJ analogously applies to the parent-subsidiary -RL 1990 (see judgment of the ECJ of February 26, 2019 C-116/16 and C-117/16 which apparently does not know a partial granting of the advantage from Art. 5 Parent-Subsidiary Directive 1990, would at least have to be assumed that the dividend in question is free of old reserves. This is obviously not the case here, so that the complainant as a whole cannot invoke Art. 15 para. 1 GAA-A CH-EU. Under these conditions, it can also remain open whether Art. 15 para. 1 aAIA CH-EU, in addition to the reservation of the anti-abuse regulations of the individual states, a further, fully autonomous reservation of abuse can be derived from the subsidiary, as the ECJ analogously applies to the parent-subsidiary -RL 1990 (see judgment of the ECJ of February 26, 2019 C-116/16 and C-117/16 which apparently does not know a partial granting of the advantage from Art. 5 Parent-Subsidiary Directive 1990, would at least have to be assumed that the dividend in question is free of old reserves. This is obviously not the case here, so that the complainant as a whole cannot invoke Art. 15 para. 1 GAA-A CH-EU. Under these conditions, it can also remain open whether Art. 15 para. 1 aAIA CH-EU, in addition to the reservation of the anti-abuse regulations of the individual states, a further, fully autonomous reservation of abuse can be derived from the subsidiary, as the ECJ analogously applies to the parent-subsidiary -RL 1990 (see judgment of the ECJ of February 26, 2019 C-116/16 and C-117/16 that the dividend in question is free of old reserves. This is obviously not the case here, so that the complainant as a whole cannot invoke Art. 15 para. 1 GAA-A CH-EU. Under these conditions, it can also remain open whether Art. 15 para. 1 aAIA CH-EU, in addition to the reservation of the anti-abuse regulations of the individual states, a further, fully autonomous reservation of abuse can be derived from the subsidiary, as the ECJ analogously applies to the parent-subsidiary -RL 1990 (see judgment of the ECJ of February 26, 2019 C-116/16 and C-117/16 that the dividend in question is free of old reserves. This is obviously not the case here, so that the complainant as a whole cannot invoke Art. 15 para. 1 GAA-A CH-EU. Under these conditions, it can also remain open whether Art. 15 para. 1 aAIA CH-EU, in addition to the reservation of the anti-abuse regulations of the individual states, a further, fully autonomous reservation of abuse can be derived from the subsidiary, as the ECJ analogously applies to the parent-subsidiary -RL 1990 (see judgment of the ECJ of February 26, 2019 C-116/16 and C-117/16 *T Danmark* and *Y Denmark Aps,* ECLI: EU: C: 2019: 135 para. 90).

4.6. Anyone who, like the complainant, fulfills the conditions of abuse of the agreement and tax avoidance as defined in practice, cannot invoke the advantage according to Art. 15 para. 1 GAA-A CH-EU. As a result, the lower court did not violate federal or international law by completely refusing to refund the withholding tax to the complainant based on Art. 15 Para. 1 GAA-A CH-EU.

5.
Since the complainant's request for reimbursement is unfounded, there is no need to state whether Art. 15 (1) AIA-A CH-EU or federal law create a claim for default interest on the reimbursement claim.

6.
The complaint turns out to be unfounded and must be dismissed. The complainant bears the court costs (Art. 66 para. 1 BGG). No party compensation is owed (Art. 68 Para. 3 BGG).

Accordingly, the Federal Supreme Court recognizes:

1.
The appeal is dismissed.

2.
The complainant has to pay court costs of CHF 25,000.

3.
The complainant, the Federal Tax Administration and the Federal Administrative Court, Department I, are informed of this judgment in writing.

Lausanne, April 20, 2020

On behalf of the II. Public Law Department
of the Swiss Federal Court

The President: Seiler

The clerk: Seiler