Federal court
Tribunal fédéral
Tribunal Federale
Federal tribunal

2C_880 / 2018

Judgment of May 19, 2020

II. Public law department

occupation
Federal judge Seiler, President,
Federal judge Zünd,
Federal judge Aubry Girardin,
Federal judge Stadelmann,
Federal judge Hänni,
Court clerk Seiler.

Participants in the proceedings
A ._____ Plc,
represented by Dr. Thomas Meister and / or Robert Desax,
Complainant,

against

Federal Tax Administration, Department of Direct Federal Tax, Legal Department, Eigerstrasse 65, 3003 Bern.

object
Refund of withholding tax (DBA CH-GB),

Appeal against the judgment of the Federal Administrative Court, Division I, dated August 22, 2018 (A-1951/2017).

Facts:

A.

Aa A ._____ Plc (hereinafter: A ._____ Plc) is a bank based in the United Kingdom. It belongs to the investment banking group A ._____ with headquarters in New York, USA.
On May 2, 2008, A ._____ Plc received a gross dividend totaling CHF 101,805,782.50 for 40,722,313 shares in B ._____ AG (hereinafter: B ._____ shares), of which withholding tax had been deducted from 35%. On September 30, 2008, A ._____ Plc submitted an application for a refund of withholding tax amounting to 20% of the gross dividend in the amount of CHF 20,361,156.50 to the Federal Tax Administration (FTA) on Form 86 (application for reimbursement no. xxx).

As part of a correspondence spanning several years, which the FTA and A ._____ Plc had regarding the aforementioned reimbursement request, A ._____ Plc provided the following information, among others:

- When asked about the economic reasons behind the share purchase, A ._____ Plc stated that the economic reason for the share purchase was the "hedging" of a special derivative arrangement that A ._____ Plc had entered into with a client. The client approached A ._____ Plc in the summer of 2007 and asked for a "leveraged economic exposure" for a basket of US and European securities that contained B ._____ shares. The deal was entered into as part of the ordinary course of business of A ._____ Plc, which offers financing solutions for its global clientele. According to the terms of the contract, A ._____ Plc had to compensate the client for an increase in the value of B ._____ shares, while the client had to pay A. _____ Plc had to compensate for losses in value. In addition, the client of A ._____ Plc had to pay a financing sum ("charge") for the hedging. The economic effect is that the client is exposed to the market risk for the B ._____ shares on a leveraged basis, which allows the client to measure the price movements of a notional value based on real values of "imaginary" value) in addition to the capital investment. The counterparty is only exposed to the price movements of the B ._____ shares. It also has no rights. The term was two years. The derivative contract was documented under a standard ISDA master contract. To protect yourself
- A ._____ Plc further stated that it was part of its business to hedge positions. It does this by either concluding derivative contracts or - as in relation to the B ._____ shares - buying securities. Insofar as securities were purchased, they formed part of their net inventory pool, which would be actively managed in the best possible way. Various trading strategies would be hedged with the securities positions held as a whole.

- In addition, A ._____ Plc announced the composition of the notional share basket on which the derivative contracts were based in relation to the relevant reimbursement request. In Swiss securities, this basket of shares contained only B ._____ shares. The remaining 24 types of shares are to be assigned to foreign companies. In the course of the transactions, four derivative contracts were entered into with three companies that were controlled by the same client. The client is an investment group domiciled in Europe that invests in investment vehicles. Two of the three companies are domiciled in non-EU offshore areas, while the third is domiciled in the EU. In addition to the risk of impairment of the shares, the customer also bore the currency risk under some of the derivative contracts. All contracts could only have been fulfilled by payment ("cash settlement"). There was no transfer of shares to fulfill the contract ("physical settlement"). A ._____ Plc charged the customer the financing fees in accordance with the applicable "overnight" interest (eg CHF-LIBOR-BBA or EONIA) plus a margin based on the full notional value of the underlying share basket. A ._____ Plc paid the client amounts that were calculated based on the dividends paid for the share basket. According to the contracts, the client had a deposit (_____ Plc charged the customer the financing fees in accordance with the applicable "overnight" interest rate (eg CHF-LIBOR-BBA or EONIA) plus a margin based on the full notional value of the underlying share basket. A ._____ Plc paid the client amounts that were calculated based on the dividends paid for the share basket. According to the contracts, the client had a deposit (_____ Plc charged the customer the financing fees in accordance with the applicable "overnight" interest rate (eg CHF-LIBOR-BBA or EONIA) plus a margin based on the full notional value of the underlying share basket. A ._____ Plc paid the client amounts that were calculated based on the dividends paid for the share basket. According to the contracts, the client had a deposit (*cash collateral*) of up to 25% of the notional value of the underlying share basket, whereby A ._____ Plc paid interest at the applicable "overnight" or a "term rate" plus margin. The client was able to increase or decrease the stocks within the basket. The shares were bought or sold during the term of the derivative contracts from June 8, 2007 to October 8, 2008.
- The dividend in May 2008 on B ._____ shares was paid almost eleven months after the conclusion of the derivative contracts. No B ._____ shares were bought in the months before the cut-off date. On the contrary, A ._____ Plc sold almost 3.9 million shares in the month before the cut-off date. The shares were sold more than five months after the dividend date in October 2008 after the client failed to meet his contractual obligation. The shares were not bought by counterparties before the dividend cut-off date and then sold to them. No derivative transactions were entered into with the counterparties to the share purchases. The dividend on the B ._____ shares was received by A ._____ Plc as the sole legal and economic owner of the B ._____ shares. With regard to the dividend, payments of 65% of the gross dividend were made under the derivative contracts. Nevertheless, A ._____ Plc argued that the dividend was not passed on, nor was such a transfer to any party intended.
- When the values of global securities fell sharply in October 2008, A ._____ Plc made a "margin call" (asking the contract partner to provide additional funds), which the client unfortunately did not comply with. As a result of this breach of contract, A ._____ Plc terminated the contract and began selling the positions it would have acquired for hedging purposes, which included selling the B ._____ shares on the market at its own risk in October 2008 . As a result of the sale of the basket of shares that was held to hedge the derivative contracts, A ._____ Plc suffered a significant loss as the value of the shares contained fell sharply in October 2008. It's a real loss,

Ac By letter dated March 8, 2012, a mutual agreement procedure was based on Art. 24 Para. 1 of the Agreement of December 8, 1977 between the Swiss Confederation and the United Kingdom of Great Britain and Northern Ireland to avoid double taxation in the area of taxes on income (DTA CH-GB; SR 0.672.936.712) between the State Secretariat for Financial Affairs (SIF) and the British tax authority Her Majesty's Revenue and Customs (HMRC). The HMRC at least provisionally agreed that the payment to the counterparty would be made regardless of whether the A ._____ Plc actually received B ._____ dividends. A ._____ Plc is not used as a straw or continuous company and it has the right to use the dividends. Since talks between the A.
On June 23, 2014, A ._____ Plc asked the FTA to issue a dispute.

B.

Ba By order of February 28, 2017, the FTA rejected the application for reimbursement. On March 31, 2017, A ._____ Plc lodged an appeal with the Federal Administrative Court.
As the FTA in its response to the complaint partially requested approval and reimbursement of CHF 168,512.50 and subsequently transferred this amount to the complainant, the applicant reformulated her legal request on April 17, 2018 and reduced the requested amount accordingly.

Bb In the proceedings before the Federal Administrative Court, the complainant disclosed the three counterparties in the four derivative contracts. These were the C ._____ LP based in the Cayman Islands, the C ._____ Limited based in the British Virgin Islands and the D ._____ Limited based in Cyprus. The Federal Administrative Court also found that A ._____ Plc had concluded a swap agreement with C ._____ Limited on June 8, 2007. On November 21, 2007, the contract was partially converted into a contract with D ._____ Limited. On December 21, 2007, the remainder of the contract with C ._____ Limited was transferred to a contract with C ._____ LP. At the same time, the contract with C ._____ Limited was canceled. On December 28, 2007 with the D. _____ Limited concluded a new contract and part of the contract with C ._____ LP was transferred to this contract. On July 21, 2008, the holdings from the two contracts with D ._____ Limited were transferred to the contract with C ._____ LP. The contract with the C ._____ LP was finally prematurely terminated on October 17, 2008.
According to the findings of the Federal Administrative Court, A ._____ Plc made the following payments under the various derivative contracts of the respective counterparty:

- Payment equal to the increase in the value of the notional titles;
- compensation payment equal to the net dividend;
- Compensatory payment in the amount of dividend withholding taxes (such as withholding tax), insofar as these were reimbursed to A ._____ Plc, but not more than 80% of the gross dividend in total;
- Interest on "collateral" and margin or corresponding reduction in financing costs.

A ._____ Plc received the following payments from the counterparties:

- payment in the amount of the impairment of the notional titles;
- Interest (at the "overnight" rate);
- Margin based on the value of the notional basket;

- "collateral" (repayable), which was up to 25% of the value of the underlying securities.

Bc By judgment of August 22, 2018, the Federal Administrative Court wrote off the appeal proceedings in the amount of CHF 168,512.50, since it had become irrelevant in this regard. Otherwise, it rejected the complaint.

C.
With a complaint in public law matters dated September 26, 2018, A ._____ Plc requested that the judgment under appeal be set aside and that the matter be referred back to the lower court for a new decision. Eventually, she requests that her application of September 30, 2008 for reimbursement of withholding tax No. 726,301 (form 86) in the amount of CHF 20,361,156.50 should be approved.
The FTA concludes that the complaint is dismissed. The lower court referred to her judgment and submitted two additional documents on which she had based her finding that A ._____ Plc was obliged to hedge the swap transactions.

Considerations:

1.

1.1. The final decision of the Federal Administrative Court in a withholding tax dispute is contested, hence in a matter of public law (Art. 82 lit. a,Art. 86 para. 1 lit. a andArt. 90 BGG). The complaint in public law matters is admissible, especially since there are no grounds for exclusion under Art. 83 BGG . On the complaint submitted on time and in due form (Art. 42 andArt. 100 para. 1 BGG) the complainant, who is legitimized according to Art. 89 Para. 1 BGG, must enter.

1.2. With a complaint in public law matters an infringement according to Art. 95 andArt. 96 BGGbe reprimanded. The Federal Supreme Court applies the law ex officio (Art. 106 (1) BGG). It is therefore not bound by the arguments raised in the complaint or by the considerations of the lower court; it can approve the complaint for a reason other than the one called and it can reject a complaint with a reason that deviates from the reasoning of the lower court (motive substitution; **BGE 141 V 234** E. 1 p. 236; **139 II 404** E. 3 p. 415). Taking into account the general obligation to notify and justify (Art. 42 para. 1 and 2 BGG), the Federal Supreme Court generally only reviews the claims made, unless any other legal deficiencies are downright obvious (**BGE 142 I 135** E. 1.5 p. 144; **138 I 274** E. 1.6 p. 280; **133 II 249** E. 1.4.1 P. 254). In any case, it only examines the violation of fundamental rights to the extent that such a complaint has been made and substantiated precisely in the complaint (Art. 106 (2) BGG ; **BGE 139 I 229** E. 2.2 p. 232; **134 II 244** E. 2.2 p. 246).

1.3. The Federal Supreme Court bases its judgment on the facts ascertained by the lower court (Art. 105 (1) BGG). It may correct or supplement the factual finding of the lower court ex officio if it is obviously incorrect or based on an infringement within the meaning of Art. 95 BGG (Art. 105 para. 2 BGG). "Obviously incorrect" means "arbitrary" (**BGE 140 III 115** E. 2 p. 117). The complaining party can object to the ascertainment of the facts under the same conditions if the rectification of the defect can be decisive for the outcome of the proceedings (Art. 97 (1) BGG). A corresponding complaint must be made substantively; otherwise the matter remains as determined in the lower instance (**BGE 140 III 16** E. 1.3.1 p. 18; **137 II 353** E. 5.1 p. 356; **136 II 304** E. 2.5 p. 314).

2nd
The dispute to be assessed revolves around the reimbursement of withholding tax on a dividend from a Swiss share, which the applicant requests and which the FTA and the lower court have refused to do.

2.1. Withholding tax generally results in a final tax charge at source for foreign recipients of Swiss dividends such as the complainant (Art. 22 para. 1 andArt. 24 para. 2 of the Federal Act of October 13, 1965 on Withholding Tax [VStG; SR 642.21]). The complainant can, however, request discharge if international law - namely a double taxation agreement (DTA) - gives her the right to do so (see **BGE 141 II 447 at** 2.2 p. 450 with references; judgments 2C_209 / 2017 from December 16, 2019 at 3.1 ; 2C_936 / 2017 of August 22, 2019 E. 5.1). It claims that from the DBA CH-GB - specifically from its Art. 10 Para. 2 lit. b - such a claim is due. Whether this is the case is to be determined by design.

2.1.1. When interpreting and applying DTAs, the principles of international law must be observed, as stipulated in particular by the Vienna Convention of May 23, 1969 on the law of contracts (VRK; SR 0.111) (judgment 2C_306 / 2017 of July 3, 2019 E. 4.4 .1, intended for publication; **BGE 144 II 130** E. 8.2 p. 139; **143 II 136** E. 5.2.1 p. 148; **143 II 202** E. 6.3.1 p. 207 f .; **142 II 161** E. 2.1 .3 p. 167; **139 II 404**E. 7.2.1 p. 422). As codified customary international law, they also apply to international agreements with non-convention states (see judgments 2C_653 / 2018 of July 26, 2019 E. 5.3.1, intended for publication; 2C_306 / 2017 of July 3, 2019 E. 4.4.1, to be published) and to international agreements that were concluded before the Vienna Convention entered into force for the contracting states concerned (Art. 4 VRK ; see judgment 2A.239 / 2005 of November 28, 2005 E. 3.4.1, in: StR 61 / 2006 p. 217 with information). According to Art. 31 Para. 1 VRKThe Contracting States shall interpret an intergovernmental agreement in good faith in accordance with the usual meaning given to their provisions in their context and in the light of their purpose and purpose. In addition to the context, in accordance with Art. 31 Para. 3 VRK, any subsequent agreement between the contracting parties on the interpretation of the contract or the application of its provisions (lit. a), each subsequent exercise in the application of the contract, from which the agreement results of the contracting parties on its interpretation (lit.b), as well as any relevant international law applicable in the relations between the contracting parties (lit.c). The preparatory work and the circumstances of the conclusion of the contract are afterArt. 32 VRK additional means of interpretation and can be used to confirm the meaning determined according to Art. 31 VRK or to determine the meaning if the interpretation according to Art. 31 VRK leaves the meaning ambiguous or dark (Art. 32 lit. a VRK) or leads to an obviously senseless or unreasonable result (Art. 32 lit. b VRK ; see judgments 2C_653 / 2018 of July 26, 2019 E. 5.3.2, intended for publication; 2C_306 / 2017 of July 3, 2019 E. 4.4.2, intended for publication; **BGE 144 II 130** E. 8.2 p. 139; **143 II 136** E. 5.2; each with references).

2.1.2. Art. 31 Para. 1 VRK determines an order in which the various design elements are taken into account, without establishing a fixed ranking among them. However, the starting point for interpreting international law contracts is the

usual meaning of their provisions (**BGE 144 II 130** E. 8.2.1 p. 130; **143 II 202** E. 6.3.1 p. 208; **143 II 136** E. 5.2.2 p. 148). This common meaning is to be determined in good faith and taking into account their context and the purpose and purpose of the contract (judgment 2C_653 / 2018 of July 26, 2019 E. 5.3.2, intended for publication; **BGE 144 II 130** E. 8.2. 1 p. 139; **143 II 202** E. 6.3.1 p. 208; **143 II 136**E. 5.2.2 p. 148). The aim and purpose of the contract is what should be achieved with the contract. Together with the interpretation in good faith, the teleological interpretation ensures the "effet utile" of the contract (judgment 2C_653 / 2018 of July 26, 2019 E. 5.3.2, intended for publication; **BGE 144 II 130** E. 8.2.1 p 139; **143 II 136** E. 5.2.2 p. 148; **142 II 161** E. 2.1.3 p. 167; **141 III 495**E. 3.5.1 p. 503). According to several possible interpretations, the definition of a DTA to be interpreted must be attributed to the sense that guarantees its effective application and does not lead to a result that contradicts the aim and purpose of the commitments entered into (judgment 2C_653 / 2018 of July 26, 2019 E. 5.3. 2, intended for publication; **BGE 143 II 136** E. 5.2.2 p. 149; **142 II 161** E. 2.1.3 p. 167). In addition, the contracting states are obliged, in good faith, to refrain from any behavior and interpretation by means of which they would circumvent their contractual obligations or empty the contract of its purpose and purpose (judgment 2C_653 / 2018 of July 26, 2019 E. 5.3.2, intended for publication; **BGE 144 II 130**E. 8.2.1 p. 139; **143 II 202** E. 6.3.1 p. 208; **142 II 161** E. 2.1.3 p. 167).

2.2. In addition to Art. 10 para. 2 lit. b DBA CH-GB, on which the complainant bases her right to discharge, are also Art. 10 para. 6 and Art. 3 para. 1 lit. l DTA CH-GB as amended by the revision protocol between the Swiss Confederation and the United Kingdom of Great Britain and Northern Ireland amending the Double Taxation Avoidance Agreement in the field of income taxes, signed in London on December 8, 1977, as amended in accordance with the protocol signed in London on March 5, 1981 and in accordance with the protocol signed in Bern on December 17, 1993 of June 26, 2007 (Protocol 2007; AS 2009 843) and Art. 27 Paragraph 7 DBA CH-GB important. These provisions are briefly outlined below.

2.2.1. Art. 10 para. 2 lit. b DBA CH-GB reads as follows (German translation of the original French and English texts in accordance with SR 0.672.936.712)
"b) [Dividends paid by a company resident in a Contracting State to a person resident in the other Contracting State] may, with the exception of the cases referred to in subparagraph a, also in the Contracting State in which the company paying the dividends is resident, under the law of that Contracting State be taxed, but the tax may not exceed 15 percent of the gross amount of the dividends if the beneficial owner is located in the other Contracting State. "

2.2.2. With the 2007 protocol, Art. 10 DBA CH-GB was supplemented by a paragraph 6, which excluded the discharge for dividends based on a profit regulation (French "système de relais", English "conduit arrangement") or as Part of such were paid (Art. III lit. D Protocol 2007). What is to be understood by a throughput regulation was defined in Art. 3 Para. 1 lit. l DBA CH-GB regulated in more detail. Thereafter "the term" flow rate regulation "means a transaction or a sequence of transactions that is designed in such a way that a person who is a resident of a contracting state receives income from the other contracting state and receives all or almost all of that income (at any time or in any form) directly or indirectly to another person,
After the Federal Assembly approved the change on December 16, 2008, it entered into force on December 22, 2008.

2.2.3. In the course of adapting the DBA CH-GB to the results of the OECD project to combat base erosion and profit shifting (BEPS) and the introduction of a general anti-abuse provision in Art. 27a DBA CH-GB, Art 3 para. 1 lit. 1 and Art. 10 para. 6 DTA CH-GB with the protocol between the Swiss Federal Council and the government of the United Kingdom of Great Britain and Northern Ireland amending the agreement to avoid double taxation in the field of income taxes, signed in London on 8 December 1977, as amended in accordance with the protocols dated November 30, 2017 in London on March 5, 1981 in London, on December 17, 1993 in Bern, on June 26, 2007 in London and on September 7, 2009 in London (Protocol 2017 ; AS 2019 3295) repealed (Art. II and IV protocol 2017; see. Message for approval of a protocol amending the double taxation agreement between Switzerland and the United Kingdom of August 22, 2018, BBl 2018 p. 5512). This (last) adjustment to the DBA CH-GB entered into force on July 19, 2019 and applies to withholding tax for income that is paid or credited on or after January 1, 2020 (see Art. XI Section 2 lit. b (i) Protocol 2017).

2.2.4. Art. 27 para. 7 DBA CH-GB finally clarifies that the source state is not obliged to exempt the income of persons entitled to discharge at the source. Rather, he is free to grant relief in the form of a tax refund instead. He and his tax authorities can assume that "the beneficiary of the income can prove within the time limits applicable in this state that he is entitled to the relief."

3rd
As can be seen from the wording of Art. 10 Para. 2 lit. b DBA CH-GB results (see E. 2.2.1 above), the taxation right of the source country is only restricted by this provision if the beneficiary is resident in the other country.

3.1. The Federal Supreme Court has ruled on the meaning of the term "beneficial owner" (French "beneficial owner") in connection with Art. 10 of the agreement of November 23, 1973 between the Swiss Confederation and the Kingdom of Denmark to avoid double taxation developed a practice in the area of estate and inheritance taxes (DBA CH-DK; SR 0.672.931.42) (cf. **BGE 141 II 447**E. 5 pp. 458 ff .; Judgment 2C_895 / 2012 of May 5, 2015 E. 4), which it subsequently adopted for other double taxation treaties (see judgments 2C_209 / 2017 of December 16, 2019 E. 3.3 and 3.4.3; 2C_936 / 2017 of 22 August 2019 E. 5.3; 2C_964 / 2016 of April 5, 2017 E. 4.3; 2C_752 / 2014 of November 27, 2015 E. 4.1). According to this, the beneficiary is anyone who can fully use the dividend and enjoy it to the full. If, on the other hand, the recipient is restricted in this use by a contractual or legal obligation because he has to forward the dividend to another person by contract or law, he is not entitled to use. The greater the proportion of the dividend that the recipient resident in the DBA country has to pass on, the more likely it is that the usage authorization will be denied.**BGE 141 II 447** E. 5.2.4 p. 462).

3.2. According to the lead judgment, the recipient can also lose his position as a beneficial owner if he is forced to buy the shares and to pass on the dividends received, and is therefore subject to an "actual transfer obligation". In this context, forwarding is the payment of an amount that is fundamentally equivalent to the dividend. It is sufficient if the amount of the dividend is included in the calculation in a total amount that, in addition to the dividend, also takes into account or compensates for other risks (e.g. price fluctuations on the shares) and services (e.g. execution of the

forwarding) (see **BGE 141 II 447**E. 6.4 p. 467 ff.). The assessment must be made on the basis of the specific circumstances at the time of dividend distribution ("substance over form"), whereby the subsequent forwarding of the (dividend) income must also be taken into account, at least if this forwarding had been agreed before the due date of the income (**BGE 141 II 447** E. 5.2 p. 458 ff.).

4th
The lower court held that the complainant had been subject to a de facto forwarding obligation within the meaning of the federal judicial rulings. In this context, it also referred to the current view of the OECD. The complainant complains that it is not a question of equating mere economic constraints with an obligation to forward them. In general, it is misleading to speak of a "factual obligation" in this context, since obligations are always of a normative nature. It also complains of various factual findings by the lower court as being obviously incorrect.
Since legal and factual issues can hardly be distinguished from one another with regard to the concept of usage authorization, the appraisal of the lower court is examined in its entirety below (cf. implicitly **BGE 141 II 447 at** 5 and 6 p. 358 ff.). Wherever factual questions can be isolated, the test scale according to Art. 97 Para. 1 BGG applies (cf. E. 1.3 above).

4.1. According to established practice, the Federal Supreme Court takes into account the model agreement of the OECD (OECD-MA) and the associated comment when interpreting DTAs, insofar as they are based on this standard (see **BGE 144 II 130** E. 8.2.3 p. 140; **143 II 257** E. 6.5 p. 264; **141 II 447**E. 4.4.3 p. 457). With regard to Art. 10 DBA CH-GB, the contracting states followed the OECD-MA, which had just been passed in 1977 and which for the first time used the concept of the beneficial owner (see message on a double taxation agreement with Great Britain of January 11, 1978, BBl 1978 I p. 216). In the accompanying commentary, the OECD expressed that the concept of the beneficial owner could be specified in more detail in the bilateral negotiations by the contracting states if necessary, so it is therefore an open term (see commentary by the OECD, No. 13 on Art 10 OECD-MA as amended in 1977). Against this background, the contracting states of the DBA CH-GB had to recognize on the occasion of the conclusion of the contract that that the meaning of the concept of the beneficial owner, which was new for international tax law at the time, would change in the following years, which would be reflected in particular in the work of the OECD. Therefore, a dynamic interpretation of the international treaty is justified here (see judgment of the International Court of Justice of July 13, 2009 *Différend relatif à des droits de navigation et des droits connexes [Costa Rica v Nicaragua]* , CIJ Recueil 2009, p. 243 § 66; see. also JAMES CRAWFORD, Brownlie's Principles of International Law, 9th edition 2019, p. 365 f .; DAHM / DELBRÜCK / WOLFRUM, international law, vol. I / 3, 2nd ed. 2002, p. 649; DUPUY / KERBRAT, Droit international public, 14th edition 2018, § 314; RICHARD GARDINER, Treaty Interpretation, 2nd edition 2015, p. 467 ff .; VERDROSS / SIMMA, Universal International Law, 3rd ed. 1984, § 782). It is consequently for the interpretation of the concept of the beneficial owner in Art. 10 para. 2 lit. b DBA CH-GB to refer to the current version of the OECD comment (see **BGE 144 II 130** E. 8.2.3 p. 140; see also **BGE 141 II 447**E. 4.4.3 p. 457, where the Federal Supreme Court also used a later version of the OECD commentary for the interpretation of the concept of the beneficial owner, which is only implicit in the relevant DBA CH-DK; STEFFEN LAMPERT, The Dynamic Interpretation of Double Taxation Agreements with Special Attention to the Commentary on the OECD Model Agreement, iStR 2012, p. 514 f .; LINDERFALK / HILLING, The Use of OECD Commentaries as Interpretative Aids - The Static / Ambulatory-Approaches Debate Considered from the Perspective of International Law, Nordic Tax Journal 2015 p. 54 ff .; aM MICHAEL LANG, The Significance of the OECD Commentary and the Reservations, Observations and Positions for the DBA Interpretation, in: Festschrift Gosch, 2016, p. 238 ff .; STEFAN OESTERHELT,

4.2. The OECD last amended the commentary on the concept of beneficial owner in Art. 10 OECD-MA on July 15, 2014. According to this, persons who receive dividends as representatives or agents, as well as continuous companies whose decision-making powers are so narrow that they appear to be merely trustees or administrators in the interests of the parties concerned, are not entitled to use the dividend income, as they have the right to use them and enjoyment of the dividend is limited by a contractual and legal obligation to forward the dividend to another person. Although such a limitation will usually result from the contractual documents, the OECD considers it permissible to infer the existence of such a legal obligation from the circumstances. On the other hand, contractual or legal obligations that do not depend on the recipient receiving the dividend are harmless. This includes, for example, obligations that do not depend on the receipt of the dividend and that affect the recipient of the dividend as a borrower, as a party to a financial transaction or as a distributing collective investment scheme entitled to an agreement (OECD comment on OECD-MA, N. 12.1-12.4 on Art. 10 OECD- MA as of July 15, 2014; see also ROBERT DANON, Clarification de la notion de bénéficiaire effectif - Remarques sur le projet de modification du commentaire OCDE d'avril 2011, StR 66/2011 p. 584; WOLFGANG TISCHBIREK, in: Vogel / Lehner [Ed.], DBA, 6th ed. 2015, N. 19 to Before Art. 10-12 OECD-MA). that do not depend on the recipient receiving the dividend. This includes, for example, obligations that do not depend on the receipt of the dividend and that affect the recipient of the dividend as a borrower, as a party to a financial transaction or as a distributing collective investment scheme entitled to an agreement (OECD comment on OECD-MA, N. 12.1-12.4 on Art. 10 OECD- MA as of July 15, 2014; see also ROBERT DANON, Clarification de la notion de bénéficiaire effectif - Remarques sur le projet de modification du commentaire OCDE d'avril 2011, StR 66/2011 p. 584; WOLFGANG TISCHBIREK, in: Vogel / Lehner [Ed.], DBA, 6th ed. 2015, N. 19 to Before Art. 10-12 OECD-MA). that do not depend on the recipient receiving the dividend. This includes, for example, obligations that do not depend on the receipt of the dividend and that affect the recipient of the dividend as a borrower, as a party to a financial transaction or as a distributing collective investment scheme entitled to an agreement (OECD comment on OECD-MA, N. 12.1-12.4 on Art. 10 OECD- MA as of July 15, 2014; see also ROBERT DANON, Clarification de la notion de bénéficiaire effectif - Remarques sur le projet de modification du commentaire OCDE d'avril 2011, StR 66/2011 p. 584; WOLFGANG TISCHBIREK, in: Vogel / Lehner [Ed.], DBA, 6th ed. 2015, N. 19 to Before Art. 10-12 OECD-MA).
If the recipient of the dividend appears to be the beneficial owner, this does not mean in the opinion of the OECD that the discharge under Art. 10 OECD-MA is to be granted under all circumstances. Relief can be refused if there is an abuse of the agreement that is not covered by the concept of the beneficial owner according to Art. 10 OECD-MA (OECD comment on OECD-MA, N. 12.5 on Art. 10 OECD-MA as amended on 15. July 2014).

4.3. According to the current version of the comment from the OECD, the forwarding obligation must therefore be of a legal nature, ie based on a contract or a law. Whether such a legal forwarding obligation existed can arise not only from contract documents, but also from the circumstances. Purely "factual forwarding obligations", on the other hand, are not sufficient to deny the recipient of a dividend the right of use (see also ERIC CCM KEMMEREN, in: Reimer / Rust [ed.], Klaus Vogel on Double Taxation Conventions, 4th ed. 2015, N. 37 to Pre Arts 10-12 OECD-MC; WOLFGANG

TISCHBIREK, in: Vogel / Lehner [Ed.], DBA, 6th edition 2015, N. 19 to Before Art. 10-12 OECD-MA; OKTAVIA WEIDMANN, Beneficial Ownership and Derivatives:

4.4. Individual sections of the **BGE 141 II 447** judgment could be understood in isolation when "factual obligation to forward" - ie purely actual constraints on forwarding - question the authorization to use even if the recipient of the dividend has been shown not to be subject to any contractual or legal obligation to forward the dividend (see **BGE 141 II 447** E. 6.4.2 p. 468 f.). However, from other parts of this judgment it emerges that the Federal Court regards factual constraints as evidence from which it can be concluded that there is a contractual or legal obligation to pass on data (cf. **BGE 141 II 447**E. 5.2.2 p. 460). The OECD also considers it permissible to infer the contractual forwarding obligation from the circumstances (cf. E. 4.2 above; OECD comment on OECD-MA, N. 12.4 on Art. 10 OECD-MA as amended on July 15, 2014) . Correctly understood, there is no factual difference between the practice of the Federal Court and the current version of the OECD commentary on the OECD-MA.

4.5. It is to be examined more closely whether the complainant, as the direct recipient of the dividend affected by the dispute, has to be denied the right of use because she has been subject to a harmful contractual or legal disclosure requirement. In addition to the text of the contract documents, the circumstances can also be taken into account as evidence.

4.5.1. First of all, it is undisputed that the complainant was contractually obliged to pay the counterparties the dividends on the securities in the notional share basket. It is true that, according to the wording of the derivative contracts, such compensatory payments in relation to the net dividend were to be made even if the appellant had not held the underlying shares and had not received a dividend itself. The situation was different under the derivative contracts, however, with the amounts that were deducted from the gross dividend to settle withholding tax (or foreign dividend withholding tax). The complainant only had to compensate withholding taxes withheld in this way, insofar as they were reimbursed to her and the net dividend plus the reimbursed withholding taxes did not exceed 80% of the gross dividend. In order to have the prospect of reimbursement of withholding tax, the complainant had to hold the shares in question at the time of the distribution. With regard to the dividends on the Swiss shares in the notional share basket, the complainant's payment obligations under the derivative contracts depended directly on the fact that she acquired the shares in the amount of 15% of the gross dividend. It therefore follows directly from the text of the contract documents that the complainant was obliged to pass on part of the dividend in any case. Against this background, there can be no question that the obligation to compensate as a whole - ie

4.5.2. When assessing whether the compensation obligation not only has to be characterized in the amount of 15%, but overall as a contractual forwarding obligation, the circumstances - including the incentives and constraints that the complainant and her counterparties were subject to - must also be taken into account. According to the practice of the Federal Supreme Court and the opinion of the OECD, the circumstances in particular indicate a legal obligation to pass on data if the recipient of the dividend appears to be a mere conduit company (French société relais) (cf. **BGE 141 II 447**E. 5.2.3 p. 461; OECD Commentary on OECD-MA, N. 12.3 on Art. 10 OECD-MA, as of July 15, 2014). For the constellation of interest here, it is obvious to concretize the concept of a continuous company based on the definition of conduit arrangement (French: système de relais), which the DBA CH-GB contained from December 22, 2008 (cf. Art. 10 Para. 6 in conjunction with Art. 3 Para. 1 lit. 1 DBA CH-GB as amended by Protocol 2007; cf. for the wording above E. 2.2.2). According to Art. XIV no. 2 lit. a 2007 Protocol, the 2007 Protocol and the amendments to the DBA CH-GB contained therein should only apply to dividends from January 1, 2009. However, since Art. 10 para. 2 lit. b DBA CH-GB had always assumed the right to use, the provisions on profit flow regulations in the 2007 protocol did not mean any change, but merely a clarification of the legal situation that was already in force. Consequently, the 2007 Protocol can be regarded as an agreement in the sense ofArt. 31 para. 3 lit. a VRK when interpreting Art. 10 Para. 2 lit. b DBA CH-GB are taken into account (see RICHARD GARDINER, Treaty Interpretation, 2nd edition 2015, p. 250 ff .; see also judgment of the US Supreme Court of January 12, 1999 *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng* , 525 US 155 (1999) pp. 174 f.).

4.5.3. The UK-based complainant entered into transactions with the derivative contracts and the acquisition of the Swiss shares concerned, which were structured in such a way that they received the dividend affected by the dispute and, if applicable, further dividend income from Switzerland, which she subsequently deducted withholding tax from her counterparties paid. If the withholding tax was (partially) reimbursed, the complainant was contractually obliged to pay a further 15% of the gross dividend or 75% of the reimbursed amount to her counterparties; it was therefore allowed to withhold 5% of the gross dividend or 25% of the amount reimbursed. The counterparties were neither domiciled in a contracting state of the DBA CH-GB, nor in any other state, in which, thanks to a DBA or otherwise, they would have been entitled to at least equivalent benefits. The objective prerequisites for a profit flow regulation in accordance with Art. 3 Para. 1 lit. l DBA CH-GB (as amended by the 2007 Protocol) are thus obviously fulfilled (cf. E. 2.2.2 above).

4.5.4. From a subjective point of view, profit flow regulations are characterized by the fact that gaining agreement benefits is the main purpose of the chosen arrangement (Art. 3 Para. 1 lit. l DBA CH-GB as amended by the 2007 Protocol; ATHANASSOGLOU / BRAUCHLI ROHRER, in: Commentary on Swiss Tax Law , International Tax Law, 2015, N. 306 on Art. 1 OECD-MA). According to Art. 27 para. 7 DBA CH-GB, it is up to the complainant to provide satisfactory evidence that she is entitled to withholding tax relief (see E. 2.2.4 above). It can therefore be expected of it to show the economic reasons that motivated the chosen design, if these reflect the objective characteristics of a profit flow regulation in accordance with Art. 3 Para. 1 lit. l DBA CH-GB (as amended by the 2007 protocol). In this regard, the lower court stated that "the swap business as a whole hardly served tax optimization" (cf. E. 4.3.7.3 of the judgment under appeal). On the other hand, the judgment under appeal does not provide any reason as to why the appellant had promised her counterparties to pass on 75% of the refunded amount or an additional 15% of the gross dividend in addition to the net dividend in the event of a (partial) refund of the withholding tax and even (only) Withhold 5% of the gross dividend. For this configuration, there is no other explanation from the complainant's submissions other than that the counterparties should thereby benefit from the DBA CH-GB that they were not entitled to.

4.5.5. The design chosen by the complainant and her counterparties bears the features of a profit flow rule according to Art. 3 Para. 1 lit. l DBA CH-GB (as amended by the 2007 protocol). The agreement advantage intended with the chosen contractual arrangement - the reimbursement of withholding tax based on Art. 10 Para. 2 lit. b DBA CH-GB - was only available if the complainant acquired the underlying shares to hedge the obligation to settle from the derivative contracts

and did not hedge this position via other derivative contracts. This is to be seen as a strong indication that the complainant should acquire the Swiss shares if the parties agreed.

4.5.6. The financial incentives that the derivative contracts set for the complainant and her counterparties also suggest such a consensus. For the complainant's counterparties, it was far more lucrative if the complainant would secure its compensation obligation by purchasing shares, since only in this case could they expect an additional payment of 15% of the gross dividends. The same was true for the complainant: only if she actually acquired the Swiss shares and subsequently received the withholding tax was she allowed to withhold 5% of the gross dividend. The amount of the dividend affected by the dispute may not have been known at the time of the conclusion of the oldest derivative contracts. However, due to the volume of the share basket, it was already apparent at that point that, even taking into account the risk of the withholding of the withholding tax refund, the retention of 5% of the gross dividend was the additional effort that the share purchase along with the efforts to withhold the withholding tax compared to one Generating hedges with derivative instruments would far exceed them. As a profitable company managed according to commercial principles, the complainant had no choice but to acquire the shares in view of this financial incentive. that, even considering the risk of withholding the withholding tax refund, the retention of 5% of the gross dividend would far exceed the additional effort that the share purchase might generate, along with the efforts to withhold the withholding tax, compared to hedging with derivative instruments. As a profitable company managed according to commercial principles, the complainant had no choice but to acquire the shares in view of this financial incentive. that, even considering the risk of withholding the withholding tax refund, the retention of 5% of the gross dividend would far exceed the additional effort that the share purchase might generate, along with the efforts to withhold the withholding tax, compared to hedging with derivative instruments. As a profitable company managed according to commercial principles, the complainant had no choice but to acquire the shares in view of this financial incentive.
Against this background, the finding of the lower court that the complainant was not legally obliged to purchase the shares, but was (only) actually forced, and the complainant's claim that he was neither obliged to purchase the shares nor to provide protection as a whole relativize. The counterparties may not have had the opportunity to force the complainant to acquire the shares through legal enforcement. The retention of 5% of the gross dividend, however, was in the form of a discount, which the appellant's counterparties granted on the compensation obligation, in an exchange relationship with the transfer of the refunded withholding tax. The counterparties were released from this discount obligation, if the complainant did not purchase the shares and the withholding tax was not refunded. If the complainant threatened to lose her right to 5% of the gross dividend if she failed to acquire the shares, she was contractually obliged to purchase the shares, at least in the sense of an obligation.

4.6. There was consensus between the parties that the complainant would acquire the Swiss shares in order to give the counterparties the benefits they derive from the DBA CH-GB, and there was considerable financial incentive to ensure that the complainant would abide by this consensus Characterize the complainant's obligation to compensate as a contractual obligation to pass on the dividend affected by the dispute. The complainant was deprived of this contractual obligation to pass on the freedom to dispose of the disputed dividend and thus the right to use it in accordance with Art. 10 Para. 2 lit. b DBA CH-GB. The lower court rightly refused to refund the withholding tax.

5.
The complaint is unfounded and must be dismissed. The applicant bears the court costs (Art. 66 Para. 1 BGG). There is no party compensation owed (Art. 68 para. 3 BGG).

Accordingly, the Federal Supreme Court recognizes:

1.
The complaint is dismissed.

2nd
The court costs of CHF 50,000 will be charged to the applicant.

3rd
The complainant, the Federal Tax Administration and the Federal Administrative Court, Division I, will be informed of this judgment in writing.

Lausanne, May 19, 2020

In the name of the 2nd public service department
of the Swiss Federal Court

The President: Seiler

The clerk: Seiler