Court: Supreme Administrative Court of the Slovak Republic
File number: 8Sžfk/54/2017
File identification number: 1016200284
Date of issuing the decision: 24 August 2023
Name and surname: JUDr. Katarína Benczová
Function: President of the Senate
ECLI: ECLI:SK:NSSSR:2023:1016200284.2

## VERDICT

The Supreme Administrative Court of the Slovak Republic in a panel composed of the President of the Senate JUDr. Katarína Benczová and members of the Senate JUDr. Zuzana Šabová PhD. and JUDr. Michal Dzurdzík PhD. in the legal case of the plaintiff: Slovenský plynárenský průmysl, a.s., ID No. 35 815, with its registered office at Mlynské Nivy 44/A, 825 11 Bratislava, legally represented by Advocateur Gémeš, Filipová and Partner AG, law firm, Stadtle 17 Vaduz 9490, Principality of Liechtenstein, in the case of the organizational unit BOOM and SMART Slovakia, Dolná 6A, 974 01 Banská Bystrica, ID No. 530096 428 against the defendant Financial Directorate of the Slovak Republic, with its registered office at Lazovná 63, 974 01 Banská Bystrica, for review of the legality of the defendant's decision No. 1799721/2015 of 21 December 2015, in the proceedings on the plaintiff's cassation complaint against the judgment of the Regional Court in Bratislava, file no. [6S/34/2016-270](https://www.aspi.sk/products/lawText/4/4389345/1/JUD%253A/JUD2496230SK) of 3 May 2017, as follows

**Decided:**

I. The Supreme Administrative Court of the Slovak Republic dismisses the cassation complaint.

II. The court does not award the defendant the costs of the cassation proceedings.

## Recital

I.

Administrative and prior court proceedings

Decision of the tax administrator of 12.3.2010 confirmed by the defendant on 28.6.2010

1. The Tax Office carried out a tax audit of the income tax levied by withholding tax for the 2003 tax period at the applicant's premises, the result of which was drawn up by protocol No. 500/323/1491/10/Reh of 22.01.2010 and on the basis of which on 12.03.2010 the tax administrator issued an additional payment notice No. 500/230/6159/10/Bri, by which it assessed the difference in income tax levied by withholding tax for the 2003 tax year in the amount of EUR 15 435 195.94. The amount in question represented the total tax difference calculated in the amount of SKK 465,000,713 consisting of the amounts of SKK 464,988,403 on account of the difference in the withholding tax on dividends (the subject matter of the present proceedings) and SKK 12,310 on account of the difference in tax found in connection with the taxation of royalties.

2. In the justification of the decision, the following findings were taken into account in relation to the withholding tax on dividends: On the basis of the decision of the Government of the Slovak Republic No. 262 of 14.03.2002 on the direct sale of 49% of the temporary ownership interest of the National Property Fund of the Slovak Republic to foreign investors Ruhrgas Aktiengesellschaft Essen, Germany and G.D.F. International, Paris, France, the Agreement on the purchase and sale of shares No. 2140/2002 of 18.3.2002 was concluded and both buyers became shareholders with a share of the 24.5% of shares each. On 20.12.2002 there was a change in the structure of the plaintiff's foreign shareholders and the 100% subsidiaries of the foreign shareholders Ruhrgas Mittel - und Osteuropa GmbH and G.D.F. Investissement 2 SA, located at the same address as the registered office of the parent companies, were registered in the list of shareholders of the plaintiff. On 10.02.2003, Ruhrgas Mittel - und Osteuropa GmbH and G.D.F. Investissement 2 SA established Slovak Gas Holding B.V. (hereinafter referred to as "SGH") with its registered office in the Netherlands with a registered capital of EUR 18,000, whereby each of the partners made a basic contribution of EUR 9,000 and subsequently acquired an equity share of 50%. On 11.02.2003, Ruhrgas Mittel - und Osteuropa GmbH and G.D.F Investissement 2 SA applied to the Board of Directors of the plaintiff for approval of the transfer of the plaintiff's shares owned by them to SGH. At the extraordinary general meeting of the plaintiff held on 21.03.2003 (notarial deed NZ 21271/2003), the transfer of the plaintiff's shares in question was approved and on 29.05.2003 the shares in question with a nominal value of SKK 1,000 and a total of 12,810,383 shares were transferred to the acquirer of SGH.

3. At the ordinary general meeting of the plaintiff held on 16.06.2003 (notarial deed NZ 48034/2003), it was decided to distribute dividends to shareholders for the year 2002. The dividends to be paid amounted to SKK 7,591,647,939.55. Of this, 51% of the total amount of dividends was a share for the shareholder of the National Property Fund of the Slovak Republic and a 49% share of the total amount of dividends was a share for the shareholder of SGH. The amount of SKK 3,719,907,231.94 corresponding to the full amount of the share (49%) was paid to the account of SGH and subsequently the company's registered capital was increased by the shareholders Ruhrgas Mittel - und Osteuropa GmbH and G.D.F. Investissement 2 SA by the shareholders and at the same time it was paid up by both shareholders.

4. From the amount of dividends paid to SGH, the plaintiff did not deduct and pay withholding income tax, but automatically applied the Treaty between the Czechoslovak Socialist Republic and the Kingdom of the Netherlands on the Avoidance of Double Taxation and the Prevention of Tax Evasion in the Field of Income and Property Taxes (by which the Slovak Republic as the successor state of the Czechoslovak Socialist Republic is bound) published under No. [138/1974 Coll.](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/138/1974%20Zb.) (hereinafter referred to as the "Agreement with the Netherlands") did not tax the dividends flowing to SGH with reference to the provision of Article 10(3) of that agreement.

5. SGH received dividends in the amount of EUR 87,954,446.46 on its account on 25.06.2003. On 28.07.2003, two loan agreements of EUR 43,900,000 each, totalling EUR 87,800,000, were concluded between SGH and Ruhrgas Mittel - und Osteuropa GmbH and GDF International (the loans were granted on 01.08.2003). On 28.11.2003, i.e. two days before the maturity date of the loans, it was decided at the General Meeting of Shareholders of SGH that both shareholders will be paid advances for dividends from 2003 - each shareholder in the amount of EUR 44,150,000. SGH's shareholders' receivables arising from the entitlement to an advance on dividends were settled by offsetting the liability from the unpaid principal of the loan granted and the unpaid part of the interest. The set-off of receivables and liabilities took place on the maturity date of the loan, i.e. by 30.11.2003.

6. The tax administrator's decision on the additional payment assessment in the part relating to the non-payment of withholding tax on income from the amount of dividends paid to a shareholder of SGH was based on conclusions on:

- violation of the provisions of Act No. 366/1999 Coll. on Income Taxes Governing the Taxation of Income from Dividends of Taxpayers with Limited Tax Liability,

- the groundlessness of the application of Article 10 of the Double Taxation Treaty between the Slovak Republic and the Netherlands, with regard to its application and interpretation contrary to [the Vienna Convention on the Law of](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/157/1964%20Zb.)  Treaties, with reference to the need to apply the current wording of the commentaries to the individual articles of the OECD Model Tax Convention to prevent double taxation of income from property,

- the conclusion that the contribution of the shares of SPP owned by Ruhrgas Mittel - und Osteuropa GmbH and G.D.F. Investissement 2 SA to the newly established holding company in the Netherlands did not have a clear economic justification and that SGH was established primarily for tax purposes (in particular, the evaluation of the original shareholders' agreement, the transfer of the exercise of shareholder rights in SPP to SGH actually carried out by the same persons), ownership structure and business activities of SGH),

- the circumstances of the provision of a loan to SGH shareholders in the amount of EUR 44,150,000 and its repayment by offsetting it against dividend entitlements,

- only the formalities of the nature of SGH's tax residence in the Netherlands,

- SGH does not meet the characteristics of the term "beneficial owner of income" within the meaning of Article 10(2) of the OECD Model Tax Convention as a prerequisite for the application of the double taxation treaty,

- non-standard limitation of SGH in the disposal of dividend income in relation to a third party,

- taking into account the fact that with the original share of less than 25% in the registered capital of SPP a.s., none of the shareholders of SGH as direct shareholders of SPP would have been entitled to a preferential rate under the double taxation treaties with France and Germany, on the other hand, after the establishment of SGH, the indirect shareholders of SPP a.s., as direct shareholders of a Dutch company, could benefit from the tax relief guaranteed to a Dutch tax resident regardless of this, that it has demonstrably not carried out any other significant activities (other than the lending transaction), and that its only significant economic activity entailed minimal credit risk.

7. The tax administrator emphasized the importance of the fact that the dividends paid to shareholders through SGH were in fact "overflowing" through loans granted to the German and French shareholder SPP a.s., changed their content structure, which resulted in the fact that the income from dividends was not taxed anywhere. SPP a.s., as a tax payer, took full responsibility for the correct application of this treaty when applying the double taxation treaty, as the refund system leaves the responsibility for the correctness of taxation of the non-resident's income to the taxpayer. The tax administrator pointed out that the taxpayer must have known from the beginning about the purpose and meaning of the transactions described above, as the entire process associated with the payment of dividends was decided in SPP a.s. by persons who also had job positions and the resulting decision-making powers in Ruhrgas, Gaz de France, SPP a.s. and Slovak Gas Holding B.V.

8. In view of the conclusion that SGH erred in its assessment as a resident of the Kingdom of the Netherlands and the failure to withhold and withhold income tax paid to the German and French shareholders (the actual beneficiaries), the tax authorities therefore assessed a withholding tax in the amount of SKK 1 859 953 615.97 on the dividend paid to the German shareholder Ruhrgas Mittel - und Osteuropa GmbH in the amount of SKK 1 859 953 615.97, in accordance with Article 10 of the Double Taxation Convention with Germany, In accordance with Article 10 of the Double Taxation Treaty with France, the tax administrator assessed a withholding tax corresponding to SKK 185,995,361 on dividends paid in the same amount on dividends paid in the same amount.

9. The Tax Directorate of the Slovak Republic (the legal predecessor of the defendant) decided on the plaintiff's appeal against the additional payment assessment filed in the part relating to the withholding tax on dividends paid to SGH B.V. by decision No. I/221/10739-70352/2010/990311 - r of 28.06.2010 by confirming the contested additional payment assessment of the tax administrator in its entirety, i.e. in the scope of the assessment of the difference in income tax collected by withholding tax for the 2003 tax period in the amount of EUR 15,435,195.94, the statement of reasons dealing only with the appeal of the contested part relating to withholding tax on dividends.

Decision of the Regional Court Bratislava No. [4S/233/2010](https://www.aspi.sk/products/lawText/4/4389345/1/u%253AJUD%253A/)- 496 of 27.01.2012

10. The decision of 28.6.2010 was challenged by the taxpayer in the proceedings file no. [4S/233/2010](https://www.aspi.sk/products/lawText/4/4389345/1/u%253AJUD%253A/), which was decided by the judgment No. [4S/233/2010](https://www.aspi.sk/products/lawText/4/4389345/1/u%253AJUD%253A/) - 496 of 27.01.2012 by the Regional Court in Bratislava dismissing the action. It considered it decisive for its conclusion to be the agreement with the conclusion that the Netherlands company is not the beneficial owner of the dividends, which is a substantive condition for the application of Article 10(3) of the double taxation treaty concluded with the Netherlands, interpreted in the spirit  [of the principles of the Vienna Convention on the Law](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/157/1964%20Zb.) of Treaties as well as the commentary to the OECD Model Tax Convention. It evaluated as correct and lawful the procedure of international obtaining of information on the basis of Act No. [76/2007 Coll.](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/76/2007%20Z.z.) as well as the related procedural procedure of the tax authorities, pointed to the correct reasoning contained in the defendant's decision, based both on the decisions of the courts of other countries and on professional literature.

Decision of the Supreme Court of the Slovak Republic [2Sžf/18/2013](https://www.aspi.sk/products/lawText/4/4389345/1/u%253AJUD%253A/) of 23.10.2012

11. The Supreme Court of the Slovak Republic, as an appellate court, decided on the defendant's appeal against that judgment by a resolution file no. [2Sžf/18/2013](https://www.aspi.sk/products/lawText/4/4389345/1/u%253AJUD%253A/) of 23.10.2012, by which it quashed the contested judgment and returned the case to it for further proceedings with a binding legal opinion ordering the regional court to deal primarily with the question of the applicability of the OECD Model Tax Convention and its comments in the version valid in 2003 to the plaintiff's proceedings. In the relevant part of the reasoning of the decision, it stated that the Regional Court erred in automatically adopting the defendant's opinion that the plaintiff should have proceeded according to the OECD Model Tax Convention and the Commentary thereto and should have taxed dividends paid in 2003 according to the treaty with France and Germany, in view of Art. [Articles 31](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/157/1964%20Zb.%2523%25C8l%5C.31) and [32 of the Vienna Convention](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/157/1964%20Zb.%2523%25C8l%5C.32) on the Law of Contracts, despite the failure to comply with the principle of publicity in relation to the Model Agreement and the Commentary on it, even though this fact was objected. He further criticized the failure to deal with the fact that the term "beneficial owner of dividend income" is defined differently in different bilateral agreements and that the Regional Court did not sufficiently deal with the relevant content and the question of applicability of the Model Agreement in relation to the present case.

Decision of the Regional Court Bratislava No. [4S/233/2010](https://www.aspi.sk/products/lawText/4/4389345/1/u%253AJUD%253A/)- 766 dated 28.03.2014

12. The Regional Court in Bratislava re-examined the case and ruled in its judgment No. [4S/233/2010-766](https://www.aspi.sk/products/lawText/4/4389345/1/u%253AJUD%253A/) of 28.03.2014, by which, proceeding in accordance with the decision of the Supreme Court, it referred to No. 5 (b) of the OECD Convention published in the Collection of Laws by the notification of the Ministry of Foreign Affairs of the Slovak Republic under No. [141/2001 Coll.](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/141/2001%20Z.z.) according to which the Organization may make recommendations to members, and this article is also referred to in the recommendation of the OECD Council from 1997 published together with updates to the Model Agreement. Referring to paragraph 13 of the Introduction to the Model Tax Convention, he concluded and justified that the member states of the Czechoslovak Socialist Republic (as the legal predecessor of the Slovak Republic) and the Kingdom of the Netherlands, when concluding a double taxation treaty with the Netherlands, were essentially based on the OECD Model Tax Convention. He pointed out the primacy of international treaties (including [the Vienna Convention](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/157/1964%20Zb.) and double taxation treaties) over national law, the need to perceive the institute of "beneficial owner of income", referred to in Article 10 of the Commentary to the OECD Model Tax Convention, in the context of the aim and purpose of the double taxation treaty and the prevention of tax evasion. Referring to the wording of Articles 12.1 and 12.2 of the Commentary to the Model Tax Agreement, it considered it reasonable to require that the concept of "dividends paid to a resident", irrespective of the different wording of the Agreement with the Netherlands and the Model Agreement (in so far as the presence and definition of the concept of "beneficial owner of income" is concerned), be interpreted in the sense of dividends paid to the beneficial owner of dividends. At the same time, he emphasized the question of the possibility of applying the Double Taxation Treaty with the Netherlands in a situation where at the time of the creation of the source of taxable income (2002) the Dutch company did not exist, it was established only in 2003, i.e. after the taxable income had arisen, and considered the central question to be whether it was possible to transfer the registered office of the company (the beneficial owner of the dividends) at the time of payment, without so that this company can demonstrate the rationality of its action. In its absence, it found that the economic reason for the (described) procedure was only to profit from the double taxation treaty, which is not worthy of protection, and given that the defendant did not commit such conduct in its conduct that would be a reason for annulment of the contested decision on the basis of the pleas, it dismissed the action.

The judgment of the Supreme Court of the Slovak Republic, file no. [2Sžf/76/2014](https://www.aspi.sk/products/lawText/4/4389345/1/JUD%253A/JUD1548578SK) dated 15.04.2015

13. After the plaintiff's appeal, the case was again decided by the Supreme Court of the Slovak Republic, which in its judgment file no. [2Sžf/76/2014](https://www.aspi.sk/products/lawText/4/4389345/1/JUD%253A/JUD1548578SK) of 15.04.2015, changed the judgment of the Regional Court by annulling the contested decision of the Tax Directorate and returning the case to it for further proceedings and decision. He justified his decision by the fact that the Regional Court did not deal with the issue of the binding nature of the OECD Model Tax Convention and the Commentaries thereon due to the fact that it was never officially published in the Collection of Laws of the Slovak Republic and did not compare the wording of the OECD Model Tax Convention and the Commentary thereto before the decisive date (i.e. no later than the date of payment, remittance or crediting of dividend payments), the text of this Treaty after that date and the text of the relevant article of the Treaty with the Netherlands. The Supreme Court of the Slovak Republic further stated that the conclusion of the Regional Court on the application of Article 10(3) of the Treaty with the Netherlands only in the case where the dividends were paid to a resident (of the Netherlands), who must also be the beneficial owner of the income (from dividends), does not correspond to the wording of the international treaty and the Regional Court created a new term that was not found in any international or national legally binding document.

14. The Supreme Court concluded that in 2003 the applicant did not have at its disposal the Slovak version of the OECD Model Tax Convention and the Commentary thereon and, on the other hand, it had at its disposal the Convention with the Netherlands, which, in Article 10, clearly and comprehensibly regulated the procedure for the taxation of dividends in a case such as the present one, i.e. when the distributing company had its registered office in Slovakia and the shareholder, to whom the dividends were paid, was undoubtedly established in the Netherlands. In the opinion of the Supreme Court, the plaintiff acted correctly in the application of the Treaty with the Netherlands. It was not possible to require him to proceed under the Treaty with Germany and the Treaty with France because of the existence of the registered office of the beneficial owners of the income. The obligation to examine the beneficial owners of the income from dividends paid to the applicant in 2003 did not arise from any legally binding document. In such factual and legal circumstances, in the absence of the condition of publicity of the legal norm, the absence of sufficiently developed practice, the unavailability of the authentic wording of the OECD Model Tax Convention and the Commentaries in the official language, and ambiguous expert opinions on the binding nature of the interpretative rules and their effect on existing bilateral international treaties, the taxpayer cannot be required to follow and respect such interpretative rules, unless they become part of the international treaty in question. Nor can he be required to behave according to a later practice which is not binding and, moreover, is contrary to the wording and definition of the terms contained in the international treaty.

15. At the end of its decision, it ordered the administrative authority, in particular, to deal with the question of the applicability of the OECD Model Tax Convention and its comments in the version applicable to the applicant's proceedings and to decide the case again.

II.

Administrative and judicial procedure following referral back to the defendant

Defendant's decision of 21.12.2015

16. By the contested Decision No. 1799721/2015 of 21.12.2015, the defendant reaffirmed the first-instance decision issued by the tax administrator on 12.3.2010, in evaluating the established facts, it respected the legally binding opinion of the Supreme Court, which excludes basing the decision on the conclusion that it was not proven that the Dutch company was the beneficial owner of the income, in the sense on which the defendant's arguments referring to the wording of the OECD Model Tax Convention with the Commentary applied by him were based, following the [Vienna Convention](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/157/1964%20Zb.) on the law of contracts. In the new decision, the defendant primarily focused on the importance of the conclusions that there was demonstrably purposeful creation of legal acts, i.e. also the establishment of SGH with the intention of abusing the relevant double taxation and tax liability reduction treaty in Slovakia, on the basis of which it concluded that SGH is not entitled to draw benefits from the contract with the Netherlands with regard to income, which actually belongs to its founders. The plaintiff, as a taxpayer who is responsible for the correct taxation of the taxpayer's income with withholding tax, and in view of the circumstances described he must have known from the beginning about the purpose and meaning of the group of transactions, nevertheless did not withhold and remit the income tax paid to the Dutch shareholder, which was in fact intended for the original German and French shareholder, thereby infringing Art. [Section 52 of the Income Tax Act](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/595/2003%20Z.z.%252352). Therefore, the defendant repeatedly confirmed the correctness of the additional tax assessment corresponding to the shares of the German and French shareholder determined in the decision of the tax administrator.

The lawsuit of 24.2.2016 filed under file no. [6S/34/2016](https://www.aspi.sk/products/lawText/4/4389345/1/u%253AJUD%253A/)

17. The plaintiff, who challenged the defendant's decision in another action dated 24.2.2016, objected that his procedure was in accordance with the valid convention concluded with the Kingdom of the Netherlands on the avoidance of double taxation and the prevention of tax evasion in the field of income and capital taxes of 04.03.1974, referred to the legal opinion of the Supreme Court of the Slovak Republic expressed in the judgment file no. [2Sžf/76/2014](https://www.aspi.sk/products/lawText/4/4389345/1/JUD%253A/JUD1548578SK) (hereinafter referred to as the judgment of the Supreme Court), which decided in the same case on the basis of the plaintiff's appeal against the decision of the local court file no. [4S/233/2010](https://www.aspi.sk/products/lawText/4/4389345/1/u%253AJUD%253A/) on the review of the legality of decisions of tax authorities. He objected to the following:

- failure to respect the binding legal opinion of the Supreme Court by the tax authorities,

- violation of the principle of legality expressed in [Section 3(1) of the Tax Code](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/563/2009%20Z.z.%25233.1),

- the tax authorities incorrectly refer to Article 10 of the OECD Model Tax Convention on Income and Wealth and paragraph 12 of the Commentary to Article 10 of the OECD Model Tax Convention. According to the plaintiff, the basic contradiction in the course of the tax and subsequently court proceedings consisted in the claim of the tax authorities that the plaintiff was obliged to proceed in accordance with the Treaty between the Czechoslovak Socialist Republic and the Federal Republic of Germany on the Avoidance of Double Taxation in the Field of Income and Property Taxes of 19 December 1980, published in the Collection of Laws of the Slovak Republic (hereinafter referred to as the "Treaty with Germany") and the Treaty between the Government of the Czechoslovak Socialist Republic of the Republic and the Government of the French Republic on the Avoidance of Double Taxation in the Field of Income Taxes of 01.06.1975, published in the Collection of Laws of the Slovak Republic (hereinafter referred to as the "Treaty with France"). According to him, this contradiction was eliminated by the binding legal opinion of the Supreme Court of the Slovak Republic expressed in the judgment file no. [2Sžf/76/2014](https://www.aspi.sk/products/lawText/4/4389345/1/JUD%253A/JUD1548578SK) dated 15.04.2015. The plaintiff quoted part of the reasoning of the above-mentioned judgment of the Supreme Court, as well as part of the reasoning of the contested decision and pointed to the obligation of administrative authorities to respect the legal opinion of the appellate court. He emphasized that the decisions of the tax authorities were annulled by the Supreme Court due to the incorrect application and interpretation of international treaties on the avoidance of double taxation.

- violation of [Article 2(2) of the Constitution of the](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/460/1992%20Zb.%2523%25C8l%5C.2.2)  Slovak Republic by the conduct of the defendant, who de facto usurped the status of a judicial body.

- incorrectness of the defendant's legal opinion on the application of the OECD Model Tax Convention. In the justification of its decision, the Supreme Court of the Slovak Republic acknowledged that the OECD Model Tax Convention is the most common reference document used for the preparation of bilateral agreements, including in the field of double taxation avoidance. However, according to the plaintiff, it is essential that the Supreme Court also concluded that in 2003 it was not possible to fairly require the taxpayer to proceed according to the provisions of the OECD Model Tax Convention and the Commentary thereto, as it was not published in the Collection of Laws of the Slovak Republic, or at least the taxpayer did not have its Slovak version available in its entirety, within the framework of individual updates made in the years 1991-2011. As the OECD Model Tax Convention is not part of the Slovak legal system, it cannot be directly applicable by the taxpayer. Thus, the tax authorities wrongly preferred the non-binding commentary on the OECD Model Tax Convention, which is only of a recommendatory nature, to another international treaty - the Treaty with the Netherlands, which the Slovak Republic has ratified and from which the rights and obligations of Slovak natural and legal persons directly arise. Moreover, neither the 1977 OECD Model Tax Convention nor the Commentary thereon contained a definition of the term 'beneficial owner' or the reasons for its use. The definition of this term was introduced into point 12 of the Commentary to Article 10 of the OECD Model Tax Convention only in 2003. At this point, it pointed out that the revision of the OECD Model Tax Convention in 2003 and its Commentary did not have to be in the form of the publication of the revisions of the international treaty itself for a certain period of time and, according to the plaintiff, it is questionable in what form the OECD Model Tax Convention was published at all at the time of the dividend payment. It considered that at the time when it paid the dividend to SGH as a taxpayer, the interpretation of the term "beneficial owner of the dividend" was not defined by the OECD in its present form, that is to say, in the wording to which the defendant refers.

- With regard to the applicability of the Model Tax Convention, the OECD further stated that tax authorities derive from the [of the Vienna Convention](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/157/1964%20Zb.) on the Law of Contract of 23.05.1969 (hereinafter referred to as "[Vienna Convention](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/157/1964%20Zb.)"), which in Articles 31 to 33 provides interpretative rules for the interpretation of international treaties, despite the fact that in the present case the application of the [of the Vienna Convention](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/157/1964%20Zb.) It contradicts Article 4 thereof, which excludes the retroactive effect of the Convention and which expressly states that it applies only to treaties concluded between States only after the Convention has entered into force against them. [Vienna Convention](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/157/1964%20Zb.) was adopted in 1969, but entered into force on the basis of Article 84 (1) on 27 January 1980, for the Czechoslovak Socialist Republic it came into force in accordance with Article 84 (2) on 28 August 1987. The treaty with the Netherlands came into force in 1974, i.e. [Vienna Convention](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/157/1964%20Zb.) cannot be used to interpret it. Therefore, the plaintiff considered the defendant's legal conclusions regarding the evaluation of the applicability of international treaties to be incorrect. It pointed out that, in so far as the rules of interpretation contained in the [Vienna Convention](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/157/1964%20Zb.) It is necessary to look at both international custom and the application of customary international law by a national court is a rather unusual phenomenon. [Constitution of the Slovak Republic](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/460/1992%20Zb.) does not provide support for the direct application of customary international law, and therefore only an internationally conforming interpretation of national law in the sense of [1 par. 2 of the Constitution](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/460/1992%20Zb.%2523%25C8l%5C.1.2) SR. In addition, the applicant referred to the [Article 31](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/157/1964%20Zb.%2523%25C8l%5C.31) and [32 of the Vienna Convention](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/157/1964%20Zb.%2523%25C8l%5C.32), according to which the meaning of the terms in the contract must be taken into account in order to determine the rules of interpretation. The text of the Treaty with the Netherlands is from the textual interpretation required by the [Vienna Convention](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/157/1964%20Zb.), clear, intelligible, definite without any doubt or ambiguity, since it is clear from the words and sentences used in Article 10(3) of the Treaty with the Netherlands that the place of residence of the company to which the dividends are distributed is decisive for the taxation of dividends.

- He emphasized that at the time of concluding the Agreement with the Netherlands, there was only a Draft Treaty for the Avoidance of Double Taxation on Income and Wealth (hereinafter referred to as the "OECD Draft Agreement"), which was adopted at the OECD on 30 July 1963. Pursuant to Article 10(2) of this Draft OECD Convention, under certain conditions, dividends may also be taxed in the Contracting State of which the company distributing the dividends is resident, in accordance with the legislation of that State. However, it argued that in the OECD Draft Convention, which was in force at the time of the conclusion of the Agreement with the Netherlands, it used the phrase "tax resident" and not "beneficial owner of the dividend". The wording of Article 10(3) of the Treaty with the Netherlands itself differs from Article 10(2) of the OECD Draft Treaty in any version thereof. Although OECD members generally agreed with the principles enshrined in the OECD Model Tax Convention, almost all member states reserved the right to derogate from some of its provisions. The then Czechoslovak Socialist Republic and the Kingdom of the Netherlands, in drafting and concluding the Treaty with the Netherlands itself, also departed in Article 10(3) thereof from the first Draft OECD Convention of 1963 and its wording in Article 10(2), whereby, according to the applicant, they clearly expressed their intention not to be bound by the OECD Draft Convention, but by the wording contained in the Treaty with the Netherlands itself.

- objected to its binding only by the applicable legal regulations and also referred to the guidelines of the Ministry of Finance of the Slovak Republic, which were available to it as a taxpayer in 2003, i.e. Guideline No. 5005/2000-7 and Communication No. 818/2000-75, according to which the decisive condition for the application of the relevant double taxation treaty was to prove the taxpayer's place of tax residence in one of the contracting states. He fulfilled this obligation and before the dividend was paid, SGH B.V. obtained a certificate of residence dated 05.06.2003 issued by the Dutch tax administration, which shows that SGH B.V. is a Dutch tax resident and is subject to taxation in accordance with Dutch tax regulations. It stressed that the guidance does not in any way explain the concept of 'beneficial owner of a dividend' and lacks any reference to and commentary to the OECD Model Tax Convention. On the contrary, it refers only to bilateral treaties which, in the event of the exercise of tax residence, are to be applied automatically. In connection with the said notification, it stated that it regulates the procedure for the payment of dividends to a tax resident of the Slovak Republic by a Dutch company and the procedure for the application of the refund system. It took the view that the notification in question did not apply to the present case at all, nor did it make any reference to the OECD Model Tax Convention and did not explain the concept of 'beneficial owner of a dividend'.

- In support of the argumentation on the inapplicability of the Model Contract, he referred to the judgment of the ECJ of 11 December 2007 in the case C-161/06, Skoma-Lux v Customs Directorate Olomouc, according to which a Community law not published in the language of a Member State is not applicable to individuals. On its basis, the Court expressed its conviction that if, at the relevant time of dividend payment (19.06.2003), the term "beneficial owner of dividend" was not defined in the Slovak Republic in the manner and to the extent referred to by the tax authorities, the taxpayer did not have a translation of the OECD Model Tax Convention and the Commentary thereto, he was not obliged to examine who is the beneficial owner of the dividend paid. This concept was explained by the Ministry of Finance of the Slovak Republic through its guidelines only in a later period, and it is a concept that is often discussed at the OECD.

Statement of the defendant

18. In its arguments seeking to establish the unfounded nature of the action, the defendant first of all referred to the circumstances of the applicant's privatisation and the change in the structure of its foreign shareholders, which, in his view, was clearly motivated, approved and implemented primarily for the purpose of obtaining an advantage from the Treaty with the Netherlands. He also pointed to the connection between a group of transactions connected with the payment of the applicant's dividends, the transactions from the establishment of SGH to the payment of the applicant's dividends through the The original shareholder of the plaintiff - Ruhrgas and GDF, is closely linked, as evidenced by the fact that the entire process associated with the payment of dividends, i.e. all transactions related to the payment of dividends, were decided by persons who also had decision-making power in all the companies concerned. According to the defendant, the establishment of SGH was not necessary to ensure the effective and joint exercise of the rights of the plaintiff's foreign shareholders, as evidenced by the articles of association of SGH and also by the shareholders' agreement, which forms an annex to the Agreement on the purchase and sale of the plaintiff's shares. In addition, it is also apparent from the memorandum of association of SGH that the decisions of the management of that company must in all circumstances be in accordance with the interests of the German and French shareholders, since three of the four directors of SGH are in managerial positions in the companies of the German and French shareholder. If the shareholder rights had not been combined into a special purpose vehicle in the Netherlands, none of the applicant's shareholders would have been entitled to exemption from withholding tax on dividends. In the next part of the statement, the defendant, arguing the justification for the application  [of the Vienna Convention](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/157/1964%20Zb.) to the case, pointed to the subject and purpose of double taxation treaties and the impact of the OECD Model Tax Convention and the Commentary on the interpretation of specific treaties. It considered that the applicant had applied the provisions of the Agreement with the Netherlands incorrectly, as he had incorrectly assessed the tax residence of SGH and at the same time had incorrectly assessed the person of the beneficial owner of the income.

19. It did not agree with the plaintiff's opinion that it did not respect the binding legal opinion of the Supreme Court of the Slovak Republic and incorrectly applied Article 10 of the OECD Model Tax Convention in conjunction with Article 12 of the Commentary to this Article. It drew the court's attention to those statutory provisions on which it based its new decision ([Section 3(6) of the Tax Code](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/563/2009%20Z.z.%25233.6)), as well as the argumentation used in the reasoning of the contested decision, which is crucial for the assessment of the case and which the plaintiff does not mention at all in the complaint. He argued that in assessing the case, he had found a serious abuse of national tax rules as well as of the relevant double taxation treaties. It considered that the abuse of those provisions had been committed by means of legal acts which had no economic basis and which resulted in purposeful avoidance of tax liability. The essence of these legal acts is a group of closely interconnected special-purpose transactions.

20. It stated that the tax authorities were obliged to proceed in accordance with [Article 3(3) of the Tax Code](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/563/2009%20Z.z.%25233.3) (formerly [Article 2(3) of Law No 511/1992 Coll.](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/511/1992%20Zb.%25232.3)) and were therefore required to take into account in the decision all the relevant factors that came to light. The dividends in question were paid abroad, so the tax authorities examined not only whether this income paid to a non-resident is taxable in the territory of the Slovak Republic under the provisions of national law, but also whether any double taxation treaty does not take precedence over the national provisions (Section 57(1) of the Income Tax Act). In the present case, after a thorough analysis, it was found that the provisions of Section 22 (1) (d) (4) and Section 36 (2) (c) (1) of the Income Tax Act take precedence over the provisions of Article 10 of the Treaty with Germany and the Treaty with France. The Tax Authority did not derive the taxpayer's obligation to examine the person of the beneficial owner of income from the Commentary to the OECD Model Tax Convention, as the only interpretative rule for the interpretation of Article 10 of the Treaty with the Netherlands. In fact, this obligation for each payer was enshrined in the Guideline of the Ministry of Finance of the Slovak Republic and the Notice on the Application of the Treaty with the Netherlands (Guideline No. 5005/2000-7), while the binding nature of these documents resulted from [Section 103 (8) of Act No. 511/1992 Coll.](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/511/1992%20Zb.%2523103.8) With regard to the procedure described in those documents, the defendant pointed out that, although Article 57(1) of the Law on Income Taxes implies the primacy of double taxation treaties to national tax legislation, the law does not specify whether the conventions are to be applied automatically or whether a refund system is to be applied, both of which involve the application of a double taxation treaty.

21. It considered that the primary question in this case is the assessment of whether there was a purposeful creation of legal acts, i.e. the establishment of SGH with the intention of abusing the relevant double taxation and tax liability reduction treaty in Slovakia. It follows from the facts of the case that there was a misuse of legal forms and concepts and the use of the legal form of the holding company without filling it with real economic content, which should be the real performance of functions with adequate staffing, which the company externally declares that it performs. It is clear that the actual performance of the functions related to the massive investment in the scope of its management, control and evaluation took place mainly at the headquarters of the real investors (in the companies of the German and French shareholders), and therefore it is necessary to allocate the income in question in the form of dividends, which are a real reward for the risks they took with regard to the implementation of the investment in the form of privatization of the taxpayer. It emphasized that when determining the tax liability, legal acts that were intended not to tax the remuneration of investors in the form of dividends in the Slovak Republic are not taken into account and that this should have been achieved by redirecting dividends "at the last minute" and "flowing" them through a shell holding company in the Netherlands.

22. Next, the defendant agreed that neither the text of the 1977 OECD Model Tax Convention nor the Commentary thereto contained a definition of the concept of 'beneficial owner' or the reasons for its use, and that that term was not introduced into the Model Tax Convention until 2003. At the same time, however, it held that the State of origin of the dividend was not required to waive the right to tax a dividend solely because it was paid immediately to a recipient resident or established in the other Contracting State. The term 'beneficial owner' cannot therefore be applied only in a narrow technical sense, but must be taken into account, in particular, of the subject matter and purpose of double taxation treaties, including the avoidance of double taxation and the prevention of tax avoidance.

23. With regard to the applicability of [the Vienna Convention](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/157/1964%20Zb.), he pointed out that the provision of [Article 4 of the Vienna Convention](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/157/1964%20Zb.%2523%25C8l%5C.4) consists of two distinct parts. One confirms that the applicability [of the Vienna Convention](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/157/1964%20Zb.) is 'without prejudice to all the rules contained therein applicable to treaties under international law independently of this Convention', thus expressing the existence of customary rules independent of that codification convention. The second part of Article 4 constitutes the exclusion of the retroactive effect of  [the Vienna Convention](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/157/1964%20Zb.), which applies only to treaties concluded between States only after the [Vienna Convention](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/157/1964%20Zb.) has legally entered into force against them. This is a general supplementary rule that applies to all Contracting Parties, without excluding an agreement on the retroactive application of [the Vienna Convention](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/157/1964%20Zb.). All rules under international law shall mean all other sources of international law within the meaning of Article 38(1)(a) to (c) of the Statute of the International Court of Justice, in particular international customs relating to the law of treaties. These customs may be codified in [the Vienna Convention](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/157/1964%20Zb.), but this does not affect their temporal scope or their existence before the [Vienna Convention entered into](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/157/1964%20Zb.)  force. It justified the principle of bona fidae (good faith, good faith) enshrined in the first place [in Article 31(1) of the Vienna Convention](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/157/1964%20Zb.%2523%25C8l%5C.31.1), which is the only priority in the interpretation of the treaty, also with regard to the principle of pacta sunt servanta set out in [Article 26 of the Vienna Convention](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/157/1964%20Zb.%2523%25C8l%5C.26). The principle of good faith is undoubtedly relevant to linguistic interpretation in the context and in the light of the purpose and purpose of the Treaty. Its use should lead to an interpretation that all the main interpretative methods use together, so that the linguistic (grammatical or semantic) interpretation is not taken out of the overall context and thus does not come into conflict with the aim and purpose of the parties' agreement. In the light of the above, the defendant took the view that the Convention with the Netherlands had to be interpreted in the light of its main object and purpose, which is, inter alia, to prevent double taxation of natural and legal persons residing or having their registered office in one or both States and receiving income in the other or both Contracting States. Another purpose of this treaty is to prevent tax evasion in the field of income and wealth taxes, or to prevent tax fraud or tax evasion.

24. With regard to the application of the Treaty with the Netherlands, it referred to the wording of Articles 1, 4(1) and 10(3) thereof and argued that, in order for dividends to be exempt from tax in the State of source of income under Article 10(3) of the Treaty with the Netherlands, it is not sufficient that dividends be paid to a company established in the other Contracting State, if that seat is only formal, but within the meaning of Article 4(1), it is necessary that they flow to a person who also has a place of management in that other Contracting State. This clearly shows that in the case under consideration, the exemption from taxation under Article 10(3) of the Treaty with the Netherlands was unjustified, as SGH had only its formal registered office in the Netherlands, but not its place of management. SGH is represented by a formal registered office declared at a specific address in the Netherlands, which lacks content - the actual performance of management functions characteristic of holding companies. The defendant considered that it was an "imitation" by means of which investors from Germany and France tried to create the appearance of the real existence of SGH in a third jurisdiction (the Netherlands), but that it was only a "shell company" and the real and full presence of the decision-making body was elsewhere (Slovakia, France, Germany).

25. It reiterated that the reason for the contested decisions was not the obligation to tax dividends paid on the basis of the Treaty with Germany and the Treaty with France, but that this adjustment of the resulting tax liability was carried out by the tax authorities, which were obliged to strictly comply with [Article 3(3)](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/563/2009%20Z.z.%25233.3) and [(6) of the Tax Code](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/563/2009%20Z.z.%25233.6) (the actual content of legal acts). The applicant was obliged to proceed in accordance with the 2000 Guidelines of the Ministry of Finance of the Slovak Republic when taxing dividends in 2003 - apply the refund system, i.e. tax the income according to the national tax regulation at the 15% withholding tax rate. The beneficial owners of the dividend income subsequently had the right to claim the benefits of the relevant double taxation treaty after proving the decisive facts to the tax administrator. In the light of the foregoing, the defendant considered that the applicant should have applied in 2003 the practice of the Slovak tax authorities clearly declared in 2000. In any event, he was not required to behave in accordance with any subsequent practice in 2003. The contested decision was not based on the OECD Model Tax Convention and the Commentary thereto, which were mentioned in the decision only to illustrate the overall understanding of the case

III.

The reviewed judgment of the administrative court of 3.5.2017.

26. In its new ruling on the case, the Administrative Court dismissed the action by judgment No. [6S/34/2016](https://www.aspi.sk/products/lawText/4/4389345/1/JUD%253A/JUD2496230SK) - 270 of 3 May 2017. In the reasoning of the judgment, it stated that the fundamental factual finding of the administrative authority is the sufficiently reasoned conclusion that the change in the shareholder structure, regardless of its legal assessment, was motivated, approved and implemented primarily for the purpose of obtaining benefits from the Agreement with the Netherlands (p. 20 et seq. of the contested decision), namely through a shell company in the jurisdiction of the Netherlands to which the shares were transferred. The conclusion of the administrative authority is based on the following facts:

- if the shareholder rights were not combined into one Dutch entity, no shareholder would be entitled to exemption from withholding tax on dividends (a German shareholder would be taxed on the basis of a treaty with Germany at the rate of 10%, a French shareholder under the treaty with France at the rate of 15%),

- there was no change in the more efficient management of SPP, a.s. as a result of the transfer, the transfer did not pursue any other justified economic interest,

- the joint exercise of the shareholder rights of the original shareholders as well as the managerial control over SPP, a.s. was possible in its entirety unchanged even before the transfer of the shares to the Dutch company,

- the original shareholders and the new Dutch company were represented by the same persons in the exercise of shareholder rights,

- the original shareholders as well as the new Dutch company were also represented in the Board of Directors of SPP, a.s. by the same persons, even after the transfer, the same persons representing the original shareholders remained in the Board of Directors of SPP, a.s.,

- the Dutch company did not carry out any economic activity, did not have any personnel or material capacities (the administration of the company was provided by the original shareholders),

- persons managing the Dutch company and coordinating the control and management of the investment in SPP, a.s., performed the functions of statutory bodies in all affected companies, both before and after the transactions (i.e. in the original shareholders, in SPP, a.s. as well as in the Dutch company),

- the administrative authority refuted the claim of SPP, a.s. that another purpose of the transaction was to secure a foreign exchange swap transaction,

- the management of the Dutch company was carried out exclusively by the original shareholders (three of the four directors of the company were at the same time in relation to the original shareholders),

- after the payment of dividends from SPP, a.s. to a Dutch company (excluding taxation), the entire amount of dividends was paid proportionally to the original shareholders within 36 days; in the transfer order, the payments were even explicitly designated as dividends from SPP, a. s. (page 37 of the decision) for the original shareholders,

- the dividend income was paid immediately to the original shareholders on the basis of loan agreements to be provided by the original shareholders of the Netherlands company;

- the said transactions were concluded by the same natural persons who were simultaneously authorized to act on behalf of SPP, a.s., the original shareholders and the Dutch company (or had a different personal position in them),

- After all, neither the Dutch company nor the original shareholders taxed the dividends anywhere.

27. The administrative court found that the applicant had not disputed or challenged those factual conclusions in any way in the application. The pleas are based on the reference and argumentation of the judgment of the Supreme Court of the Slovak Republic file no. [2Sžf/76/2014](https://www.aspi.sk/products/lawText/4/4389345/1/JUD%253A/JUD1548578SK), on the basis of which the plaintiff believed that the administrative authority did not respect the binding legal opinion stated in this judgment, while the essence of the judgment of the Supreme Court of the Slovak Republic file no. [2Sžf/76/2014](https://www.aspi.sk/products/lawText/4/4389345/1/JUD%253A/JUD1548578SK) is of the legal opinion that the provisions of the Agreement with the Netherlands (the question of examining not only the registered office of the shareholder under Article 10, but also the person of the beneficial owner of dividends) cannot be interpreted using the Commentary to the OECD Model Tax Convention, as it is not a relevant source of law and at the same time the prerequisites for the application of the rules of interpretation according to the OECD Model Tax Convention are not met. [of the Vienna Convention](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/157/1964%20Zb.), since the provision of the Treaty with the Netherlands is clear in that regard when the non-taxation of dividends is linked to the concept of the registered office of the company. On this basis, the Supreme Court of the Slovak Republic in its judgment file no. [2Sžf/76/2014](https://www.aspi.sk/products/lawText/4/4389345/1/JUD%253A/JUD1548578SK) the legal view that the applicant, as a taxable person, could not be required to examine the question of the beneficial owner of the dividends and to comply with the agreements with France and Germany by which the administration was bound. He emphasized that the plaintiff did not put forward any other arguments in the lawsuit, except that the contested decision did not respect the above-described legal opinion of the Supreme Court of the Slovak Republic and therefore, as a payer, he was not obliged to examine the beneficial owner of dividends and apply the contract with France and Germany.

28. The Regional Court stated that the essence of the case in question stems from facts other than those dealt with by the reasoning of the judgment [in 2Sžf/76/2014](https://www.aspi.sk/products/lawText/4/4389345/1/JUD%253A/JUD1548578SK), as the defendant based the new decision in the case on a different legal assessment. The administrative authorities of both instances are based on the issue of assessing the legal acts of the former shareholders and the plaintiff as a taxpayer. They perceive the fact that the beneficial owner of the dividends has been established only as a secondary issue to the substantive assessment of these acts, which they primarily assessed as acts abusive to tax law and therefore did not take them into account. The contested decision was based on an assessment of the findings that the acts of the original shareholders as taxpayers, carried out with the direct participation of the applicant as a taxable person, are abusive acts, without economic justification, carried out solely for the purpose of obtaining a tax advantage to which it would not have been legally entitled without the execution of the chain of transactions. Therefore, the administrative authority based its assessment on the findings that the performance of the legal acts in question resulted in an abuse of rights, i.e. its procedure was in accordance with Art. [Section 3 (6) of the Tax Code](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/563/2009%20Z.z.%25233.6). The principle contained in [Section 3 (6) of the Tax Code](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/563/2009%20Z.z.%25233.6) corresponds to the regulation of the so-called GAAR clause, which was not part of the legal order at the time of the transactions (transfer of shares). He emphasized that in tax jurisprudence, or in general in the case law concerning public subjective rights, the concept of the prohibition of abuse of public subjective rights was and is present, regardless of its normative anchoring. In support of his conclusions, he pointed to the case law, e.g. the judgment of the Supreme Administrative Court of the Czech Republic 2Afs/86/2010, the judgment of the Supreme Administrative Court of the Czech Republic sp.

8Afs/34/2015, the judgment of the Supreme Court of the Slovak Republic, file no. [1Sžr/68/2011](https://www.aspi.sk/products/lawText/4/4389345/1/JUD%253A/JUD79276SK), the judgment of the Supreme Administrative Court of the Czech Republic file no. 6Afs/156/2014, which also agree that it does not have to be a disguised legal act in which the will and its expression would be different, but it also affects abusive legal acts, which is also given in the present case, as it is not disputed that a Dutch company actually became a shareholder of SPP, a.s.

29. Referring to the extensive case-law of the Supreme Administrative Court of the Czech Republic on the issue of abuse of double taxation treaties (hereinafter referred to as the "DTT") and the directly related issue of determining the beneficial owner, it emphasized that a taxpayer should not obtain the benefits resulting from the DTT if the main purpose of its entry into a certain transaction or legal structure would be to ensure a more advantageous tax position and the acquisition of such a more advantageous position is contrary to the objective of the DTT. The conclusion that the unlawful use of the benefits of DTT can be penalized on the basis of the general concept of abuse of tax and legal regulations and, as a consequence, not to grant these benefits, is very important in the context of the legal order. Taxpayers most often do not simulate any actions when performing certain transactions or creating legal structures aimed at unauthorized use of the benefits of DTT and therefore, in most cases, it is not possible to sanction these proceedings on the basis of provisions on disguised legal acts. The taxpayer's will is aimed at obtaining an unjustified advantage from the DTT, while the individual expressions of will (execution of the transaction, establishment of the company, etc.) are in accordance with the content of their will. The actions performed are usually not contrary to the law, but in their result they lead to a goal that was not intended by the legislation, in our case the DTT. In view of the above, the provisions on disguised legal acts are often not applicable in the case of misuse of DTDs. In such a case, the concept of abuse of tax law constitutes an effective tool for penalising such conduct.

30. In support of the above, he also referred to the case-law dealing with the institute of abuse of law (SAC CR in judgment file no.: 8 Afs 66/2009, Supreme Court of the Slovak Republic in judgment file no. [2Sžf 44/2013](https://www.aspi.sk/products/lawText/4/4389345/1/JUD%253A/JUD3472637SK), SAC ČR, file no. 2 Afs 178/2005) and reminded that the prohibition of abuse of subjective public rights is also contained in the [Convention for the Protection of Human Rights and Fundamental Freedoms](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/209/1992%20Zb.).

31. The following parts of the reasoning can be described as an essential part of his legal arguments:

'74. In the present case, in addition to the facts established exhaustively and correctly by the administration, it is necessary to take into account, in particular, the absence of any legitimate expectation on the part of the applicant. Although he was not burdened as a taxpayer of dividend tax by the obligation to examine the person of the beneficial owner of the dividends based on objective law, he was undoubtedly aware of the purpose and meaning of the transactions, since the natural persons carrying out these transactions (the establishment of a Dutch company, the transfer of shares, the immediate payment of dividends through loan agreements) were directly members of the board of directors of the applicant himself (and at the same time they were personally linked to the original shareholders and the Netherlands company). It is not a situation where the plaintiff is "blamed" for the actions of shareholders, the purpose of which he did not know, or that he should have known about. The plaintiff was directly involved in these proceedings, he must have known the reasons for and the essence of those proceedings, so there is no justification for taking into account the protection of his good faith. Notwithstanding the absence of a legislative prohibition of abuse of public authority (inter alia, in the form of a tax advantage for the exemption of dividends from taxes), the plaintiff could not have had any legitimate expectation that his conduct, based on proven participation in purposeful transactions without any other economic basis, would not be sanctioned by the tax administrator. It was also an abuse of law at the time of the act, after all, the described case law of the ECJ or the Supreme Administrative Court of the Czech Republic, penalized legal acts and proceedings also performed at a time when the prohibition of abuse of law was not legislatively enshrined.

75. The binding nature of state authorities by law within the meaning  [of Article 2(2) of the Constitution of the](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/460/1992%20Zb.%2523%25C8l%5C.2.2) Slovak Republic does not mean the exclusive and unconditional necessity of a literal grammatical interpretation of the applied legal provisions. The provision  [of Article 2(2) of the Constitution of the](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/460/1992%20Zb.%2523%25C8l%5C.2.2) Slovak Republic does not only represent the binding of state authorities by the text, but also by the meaning and purpose of the law. ([II. ÚS 426/2012](https://www.aspi.sk/products/lawText/4/4389345/1/JUD%253A/JUD85535SK))

76. In this context, it is also important to point out that the equivalent purpose of double taxation conventions is not only to prevent repeated taxation of the same income in two States, but also to prevent non-taxation of income in either State or to prevent tax evasion. From an economic point of view, these contracts should be neutral (i.e., no state should be deprived of tax revenues by applying it). In the present case, however, the tax on dividends was not even paid and paid anywhere (Slovakia, Germany, France or the Netherlands; the funds from the Netherlands company were paid to the original shareholders by means of an alleged loan repayment), which is quite clearly contrary to any meaning and purpose of the agreement, especially where the dividends were subject to tax (albeit at different amounts) in all the States concerned. In view of the above arguments and case law, in the context of the prohibition of abuse of law, the tax administrator correctly assessed the tax taking into account the amount of tax on dividends under the agreement with France and Germany, thus ensuring the protection of the legitimate interests of the original shareholders (it did not assess it in full as it would be in Slovakia). The Court considers it necessary to add that if the plaintiff wanted to strictly proceed according to the Agreement with the Netherlands, he should have taxed the dividends paid in the Netherlands, which did not happen.

77. It is clear from the facts, the temporal succession of the legal acts and, in particular, from the direct participation of the applicant that this is a purposeful and abusive change of jurisdiction for the purpose of avoiding tax liability, not only in part, but in full. The plaintiff was involved in the events through personal connections and acting persons, so it can be fairly expected that he should and should have known about the purpose and meaning of the transaction. As a taxpayer he is directly responsible for the correct payment of tax on dividends in accordance with the law, he can also be fairly required to pay the withheld tax liability.

78. That interpretation, findings of fact and legal assessment have not been challenged in any way in the application. The lawsuit challenges partial legal considerations in the decision and relies exclusively on the above-mentioned judgment of the Supreme Court of the Slovak Republic (argumentation leading to the interpretation of the concept of beneficial owner), which, however, in no way excluded the assessment of legal acts of the plaintiff and his former shareholders as abusive acts. However, the applicant completely omitted to challenge that line of argument in the application. The administrative authority justified the additional tax assessment on the basis that these were acts abusing tax law and fully respected the legal opinion of the Supreme Court of the Slovak Republic regarding the non-binding nature of the commentary to the OECD Model Tax Convention. However, the plaintiff again argues in the lawsuit only on the basis of the legal opinion stated in the last judgment of the Supreme Court of the Slovak Republic and does not question the reasons for the decision aimed at proving the abuse of tax regulations and, finally, does not dispute the established facts.

79. With regard to the procedural procedure of the local administrative court, the court considers it necessary to state the following. The administrative authorities have established and evaluated the established facts in detail. However, the legal consideration itself regarding the evaluation of this factual situation as an abuse of rights is not emphasized in detail in the reviewed administrative decisions, although it is undoubtedly stated. In the lawsuit, the plaintiff practically does not comment on the legal assessment of the case as an abuse of rights.

80. A more detailed argument concerning the legal assessment of the facts as an abuse of rights is presented by the administrative court in this judgment.

81. That situation has already been addressed in the decision-making activities of the supreme judicial authorities. In the outlined procedure, they did not take into account the violation of procedural rights, directly in relation to the application of the doctrine of abuse of law in tax proceedings, which was carried out only by the review court beyond the grounds stated in the lawsuit. They took the view that the assessment of the facts established in tax proceedings as an abuse of tax law is also entitled to be carried out by an administrative court in court proceedings, even if the administrative authorities did not carry out such a legal assessment in the contested decisions. The application of the doctrine of abuse of law is the result of a legal assessment of the established facts, which the administrative court is in principle entitled to carry out, even if the party to the proceedings has not commented on the possibility of such a legal assessment in the complaint. In other words, for the application of the doctrine of abuse of law as a legal assessment, it is not necessary to annul the administrative decisions themselves, nor can its application be automatically required from the administrative authority. The Supreme Court of the Slovak Republic in its judgment of 27.11.2014, file no. [5Sžf/137/2013](https://www.aspi.sk/products/lawText/4/4389345/1/JUD%253A/JUD1464386SK) (Annex 1), explicitly in relation to tax proceedings, stated: "The Court of Justice of the European Union has unequivocally stated in its opinion that the issue of abuse of law should be examined by the national court. In the opinion of the Supreme Court, it is not necessary to adopt any speculative legal interpretation of this concept, that in fact this national court should be another authority in the territory of the Slovak Republic (administrative authority). After all, it is a completely standard procedure that the legal issue of abuse of law is examined by a court. The Supreme Court of the Slovak Republic cannot agree with the plaintiff's legal opinion that the Regional Court exceeded its competences and deviated from the petition when examining the issue of abuse of law. Here the Supreme Court notes that in administrative justice there can be no question of a violation of the principle iudex ne eat petita partium, because the administrative court is bound only by the grounds of the action, but not by the petition in the administrative judiciary. The plaintiff erroneously states in the appeal that the Regional Court did not respect the decision of the Supreme Court of the Slovak Republic when it did not annul the defendant's decision and did not return the case to him for further proceedings - the taking of evidence regarding the abuse of law. On the contrary, the Regional Court acted correctly and complied with the obligations imposed on it in the annulment decision when assessing the legal issue of abuse of law."

82. The Constitutional Court of the Slovak Republic also assessed these issues exhaustively when, as part of the test of the constitutionality of the above-mentioned judgment of the Supreme Court of the Slovak Republic, in its resolution of 07.06.2016, file no. [III. ÚS 357/2016](https://www.aspi.sk/products/lawText/4/4389345/1/JUD%253A/JUD1811336SK) (Annex 2) rejected the constitutional complaint of the plaintiff for the following reasons: "The submitted complaint is essentially based on a single fundamental objection. According to the complainant, the Regional Court and the Supreme Court violated the requirement that the administrative court be bound by the scope and grounds of the action when deciding on his action. A thorn in the complainant's side is the raising of the issue of abuse of tax law by the Supreme Court, which the Regional Court subsequently respected and dismissed the lawsuit on this basis. According to the complainant, the tax authorities did not deal with the abuse of rights at all. If the courts then operated with this institute when reviewing their decisions, they dealt with an issue that was not the subject of evidence in tax proceedings at all, and in this way they actually replaced the substantive focus of the decision on the complainant's right to deduct tax, which should have been reserved for public (tax) administration bodies. (...) First of all, it should be noted that the conclusion on the fulfilment of the facts of abuse of law, which is made by any public authority in an individual case adjudicated, is the result of a legal assessment of the established facts. (...) It is clear from the recapitulated opinions of the case law (repeated many times in other decisions of the Court of Justice and Slovak courts) that abuse of rights is a purely legal category, while its very conceptual features prove that the conclusion that they have been fulfilled cannot be solely the result of clarifying the facts of the case, but is the result of a legal assessment of the established facts. Therefore, the abuse of rights to which the public authority pays attention in the exercise of its decision-making power cannot be the subject of evidence as a legal institute. The facts resulting from the evidence can only be legally assessed after they have been established in such a way that the facts of the abuse of rights have been met. Therefore, if the complainant critically suggests that the abuse of rights in his tax case was not the subject of evidentiary activities of the tax administration authorities, this aspect of his criticism cannot be given justification. Thus, the fact that the courts acting in the administrative judiciary found an abuse of rights by the complainant does not automatically mean that they dealt with issues that were not the subject of evidence in the tax (administrative) proceedings. (...)  [The Code of Civil Procedure](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/99/1963%20Zb.) does not stipulate that when refuting the merits of individual pleas, the court in administrative justice may not use legal arguments not mentioned by the plaintiff in the lawsuit. If the court proceeds in this way, it does not mean that it is dealing with a plea that the plaintiff did not present in the lawsuit. At the same time, it cannot be required to avoid appropriate, appropriate and intelligible terminology and relevant legal instruments simply because the applicant does not mention it in the application. In the opinion of the Constitutional Court, the fact that the Regional Court and the Supreme Court introduced a "touch" of abuse of rights in the legal assessment of relevant facts into the present tax case as part of the judicial review of a final tax decision cannot, in the opinion of the Constitutional Court, lead to the conclusion that there was a violation of the binding nature of the administrative court by the pleas or a violation of the principle of "iudex ne eat petita partium". By the way, with regard to the principle in question, the Supreme Court in the contested judgment aptly pointed out its essence reflecting the configuration of the statement of claim, not the grounds of action. (...) In the complaint, the complainant did not and could not object to the illegality of the defendant's decision on the grounds of abuse of law, because the decision was not based on this reason. With regard to the cited reason, the Constitutional Court states that the use of the institute of abuse of rights by courts in administrative justice did not exceed the scope of the judicial review set out by the complainant. The courts examined the defendant's tax decision to the extent and for the reasons stated in the lawsuit and the plea alleging the incorrectness and illegality of the tax authorities' conclusion that the conditions for deduction of tax pursuant to [Section 49 (2) of Act No. 222/2004 Coll.](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/222/2004%20Z.z.%252349.2) were not met. on value added tax, as amended, as unfounded, because, in their opinion, the facts established by the tax authorities constitute an abuse of rights. It is precisely in the complainant's case that the annulment of the defendant's tax decision by the administrative courts and the subsequent return of the case to the stage of tax proceedings could not lead to a substantively different decision of the tax authorities on the claim for a refund of excess value added tax, precisely because the tax authorities are bound by the legal opinion of the administrative courts ([Section 250j (7) of the Code of Civil Procedure](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/99/1963%20Zb.%2523250j.7)) on the abuse of tax law by the complainant."

32. At the same time, the Administrative Court assessed as unfounded the objection of non-compliance with a binding legal opinion in the decision-making of administrative authorities, since a legal opinion is binding only with regard to the issue in respect of which it was formulated and duly substantiated, while in the present case the administrative authority did not deviate in any way from the binding legal opinion expressed in the judgment of the Supreme Court of the Slovak Republic No.

Zn. [2Sžf/76/2014](https://www.aspi.sk/products/lawText/4/4389345/1/JUD%253A/JUD1548578SK), the essence of which is the conclusion on the applicability of the explanatory commentary to the OECD Model Tax Convention. In the new decision, which is the subject of these court proceedings, the administrative authority respected this conclusion, did not consider the comment to be a source of law and applied the Treaty with the Netherlands. In the binding legal opinion of the Supreme Court of the Slovak Republic, no legal opinion was expressed on the application of the institute of abuse of law, the court was not bound by any cassation-binding legal opinion when determining the abuse.

IV.

Proceedings before the Court of Cassation

33. On 1 January 2021, the amendment entered into force [of the Constitution of the Slovak Republic](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/460/1992%20Zb.), Constitutional Act No. [422/2020 Coll.](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/422/2020%20Z.z.) amending the Constitution of the Slovak Republic No. [460/1992 Coll.](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/460/1992%20Zb.) as amended, establishing the Supreme Administrative Court of the Slovak Republic, ([Article 143 (1) of the Constitution of the Slovak Republic](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/460/1992%20Zb.%2523%25C8l%5C.143.1)). On 1 August 2021, the Supreme Administrative Court of the Slovak Republic (hereinafter referred to as the 'Court of Cassation') took over the cassation agenda of the Administrative Collegium of the Supreme Court of the Slovak Republic ('the Supreme Court of the Slovak Republic' or 'the Supreme Court of the Slovak Republic') in administrative justice, including the present case ([Article 154g(4)](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/460/1992%20Zb.%2523%25C8l%5C.154g.4), [5](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/460/1992%20Zb.%2523%25C8l%5C.154g.5) and [6 Constitutions](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/460/1992%20Zb.%2523%25C8l%5C.154g.6) in conjunction with [Section 101e (1)](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/757/2004%20Z.z.%2523101e.1) and [2](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/757/2004%20Z.z.%2523101e.2) and [8a par. 1 of Act No. 757/2004 Coll.](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/757/2004%20Z.z.%25238a.1) on Courts and on Amendments to Certain Acts, as amended). In accordance with the work schedule of the Supreme Administrative Court of the Slovak Republic for 2021, the case under consideration was randomly assigned to the decision of Chamber 3 S and was conducted in cassation proceedings under the original file number.

34. Given that in the period between the establishment of the SAC SR and the subsequent assignment of the case to the Senate composed of JUDr. Katarína Benczová, JUDr. Zuzana Šabová PhD., Mgr. Kristína Babiaková, Addendum No. 5 to the Work Schedule of the SAC SR for 2023 effective from 1.6.2023 changed the composition of the Senate hearing the case, the Senate composed of the President of the Senate JUDr. Members of the Senate JUDr. Zuzana Šabová PhD. and JUDr. Michal Dzurdzík PhD., the participants were informed about the change in the composition of the Senate.

35. With regard to the duration of the dispute and the substantive connection of the present case with the previous proceedings, the Chamber recalls that the decision-making practice of the Supreme Court of the Slovak Republic may be regarded as the decision-making activity of the Court of Cassation for the purposes of ensuring the continuity of decision-making and ensuring legal certainty. Since Act No. [162/2015 Coll.as](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/162/2015%20Z.z.)  of 1 August 2021, the competences of the Administrative Collegium of the Supreme Court of the Slovak Republic were transferred to the Supreme Administrative Court of the Slovak Republic (continuity of competence), in accordance with the principle of legal certainty and legitimate expectations based also on the established decision-making activity of the highest judicial authorities ([Section 5 (1) of the Code of Civil Procedure in](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/162/2015%20Z.z.%25235.1)  conjunction with [Article 2 (1) to (3) of Act No. 160/2015 Coll. Code of Civil Procedure](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/160/2015%20Z.z.%2523%25C8l%5C.2.1-%25C8l%5C.2.3) as amended], the Court of Cassation is bound by the previous decision-making activities of the Administrative Collegium of the Supreme Court of the Slovak Republic.

36. The Supreme Administrative Court of the Slovak Republic, as a court of cassation ([Article 438(2) of the SSP](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/162/2015%20Z.z.%2523438.2)), after finding that the cassation complaint was lodged properly and in good time ([Paragraphs 443 of the SSP](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/162/2015%20Z.z.%2523443) and [444 of the SSP](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/162/2015%20Z.z.%2523444)), by an authorised person ([Article 442 of the SSP](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/162/2015%20Z.z.%2523442)), is directed against the decision against which it is admissible ([Article 439 of the SSP](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/162/2015%20Z.z.%2523439)), has the prescribed requirements ([Paragraphs 445(1) of the SSP](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/162/2015%20Z.z.%2523445.1) and [57 of the SSP](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/162/2015%20Z.z.%252357))), examined the judgment under appeal for the reasons and to the extent set out in the appeal on a point of law ([Sections 440 of the CCA](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/162/2015%20Z.z.%2523440), [441 of the CCA](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/162/2015%20Z.z.%2523441) and [453 of the CCA](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/162/2015%20Z.z.%2523453)) and concluded that the cassation complaint was unfounded

Grounds of cassation

37. It is decisive for the decision of the Court of Cassation that the plaintiff sought the annulment of the contested decision of the defendant in the part by which it was decided on the assessment of income tax in connection with the payment of dividends for 2003 on grounds within the meaning of Art. [Section 440 (1) (g)](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/162/2015%20Z.z.%2523440.1.g), [f),](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/162/2015%20Z.z.%2523440.1.f) [e)](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/162/2015%20Z.z.%2523440.1.e), [i) SSP](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/162/2015%20Z.z.%2523440.1.i) .

38. With regard to the plea under [Article 440(1)(g) of the SAP,](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/162/2015%20Z.z.%2523440.1.g) it stated that the judgment was based on an error of law in that it did not apply to the established facts the administrative rule of law, namely Article 10(3) of the Treaty with the Netherlands. He questioned the justification for the application  [of Section 3(6) of the Tax Code](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/563/2009%20Z.z.%25233.6) by the Regional Court, as only its wording effective from 2013 (while the relevant period refers to 2003) allows the tax administrator to disregard acts that have no economic justification if their aim is to avoid tax liability or obtain a tax advantage. At the same time, he objected that the provision in question binds the tax administrator, not the taxpayer, for whom the primacy of the principles of the rule of law (including the principle of legitimate expectations) to the principles of tax administration is decisive. When imposing and enforcing taxes as part of ownership, tax authorities are obliged to safeguard the essence and meaning of fundamental rights and freedoms. According to the applicant, the decisive factor was therefore the application of the primacy of the international agreement with the Netherlands and the fact that, in 2003, there was nothing to oblige it to preserve the actual content of the shareholders' legal transactions. He considers the reference to the GAAR clause, which was not part of the legal order, to be unfounded, the presence of the concept of the prohibition of abuse of public subjective rights claimed by the Regional Court was not supported by any specific case law.

39. In so far as the Regional Court asserted, in view of the personal links between the management of the German and French shareholder and the management of the Netherlands entity, that the applicant had the necessary knowledge of the purpose and meaning of their transactions, it criticised the applicant for failing to assess the knowledge of the shareholder's knowledge of such intentions in view of the fact that the various acts relating to the transfer of shares were approved by a vote of all the shareholders at the general meeting. The conclusion on the purposefulness of the establishment of the Dutch company also denies that it remained a shareholder even after the tax on dividends was abolished in Slovakia. With regard to the court's arguments pointing to the granting of a loan to the shareholders of a Dutch holding de facto paid by dividends, he stated that he, as a taxpayer, does not have a direct influence on the conduct of his shareholder in economic relations with other entities. With regard to the finding that the plaintiff's conclusions on the issue of abuse of law were not challenged by the plaintiffs, he pointed to the court's own assertion that this conclusion was not accentuated in detail in the decisions and at the same time emphasized that from the beginning it had objected to the merits of the conclusions on abuse of tax law.

40. With regard to the application of Article 10 of the Treaty with the Netherlands, he pointed out that he, as a taxpayer, could not rely on the law of the Netherlands to assess the tax, and at the same time the Regional Court illogically considered the so-called automatic application of the contract to be correct, as well as a reference to the practice in the Netherlands which applies the so-called refund system. Given the clarity of the text of the agreement with the Netherlands, there was no reason to use the interpretative rules, the valid guideline of the Ministry of Finance of the Slovak Republic 5005/2000-7 for the application of the double taxation treaty did not require an examination of the beneficial owner of the income, but only imposed the obligation to examine the taxpayer's tax residence, which was also confirmed by the Supreme Court of the Slovak Republic in its judgment. Following the case law issued after the relevant period (payment of dividends), it pointed to the statement of the Supreme Court of the Slovak Republic that in the absence of sufficiently developed practice, the taxpayer cannot be required to respect the rules of interpretation unless they become part of an international treaty and it is not possible to fairly require the taxpayer to behave according to later practice. He commented on the groundlessness of the argumentation based on the specific case law of Czech courts on the issue of abuse of law following the case law of the CJEU and presented detailed argumentation, concluding that even if the present case were subjected to judicial review according to the Czech Republic's model, the conditions for concluding an abuse of law were not met. It pointed out that the judgment of the Regional Court contained ambiguous conclusions and did not provide an answer to the fundamental contradiction between the parties to the proceedings consisting in answering the question of what legal regulation the applicant should have followed when taxing dividends to a Dutch shareholder in 2003. The conclusion of the plaintiff was also unambiguous (there would be no abuse of the contract with the Netherlands if he examined the beneficial owner in accordance with the guideline / the obligation to apply the refund system in case of doubt), but it was based on the fact that doubts should have arisen in the plaintiff.

41. In the ground of appeal referring to [Article 440(1)(f) of the SAP,](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/162/2015%20Z.z.%2523440.1.f) it stated that there had been a violation of the right to a fair trial as the administrative court had failed to deal with all the relevant facts of the proceedings and at the same time had violated the right to a proper statement of reasons for the decision

42. In the ground of cassation referring to [Article 440(1)(e) of the SAP](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/162/2015%20Z.z.%2523440.1.e), he argued that the case had been decided by an incorrectly appointed regional court, there had been a violation of the right to a lawful judge enshrined in [Article 48(1) of the Constitution of the](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/460/1992%20Zb.%2523%25C8l%5C.48)  Slovak Republic and to judicial and other legal protection within the meaning  [of Article 46 of the Constitution of the](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/460/1992%20Zb.%2523%25C8l%5C.46) Slovak Republic. The reason for the objection is the fact that the change in the work schedule of the Regional Court in Bratislava effective from 1 May 2017 resulted in a change in the composition of the 6S Senate, the former member of the Senate JUDr. Beáta Jurgošová was replaced by Judge JUDr. With regard to the short time between the discussion of the change in the work schedule by the Judicial Council of the Communist Party in Bratislava on 28 April 2017, the effective date of the change in the work schedule on 1 May 2017 and the date of the announcement of the decision on 3 May 2017, he concluded that due to the length of the proceedings and the extensiveness of the file material, it is very unlikely that the new member of the Senate, JUDr. Otília Belavá, properly studied the court file. In connection with the change in the work schedule in question, he drew attention to the fact that on the basis of a request submitted under the Information Act, he was not presented with the minutes of the meeting of the Judicial Council on 28 April 2017, as they were apparently not prepared and were not published at all, which justifies doubts as to whether the change in the work schedule made by Amendment No. 5 was made in a lawful manner and subsequently whether the dispute in question was decided by a statutory judge.

43. In the ground of cassation referring to [Article 440(1)(i) of the SSP,](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/162/2015%20Z.z.%2523440.1.i) he argued that the Regional Court had not respected the binding legal opinion expressed in the judgment of the Supreme Court of the Slovak Republic No. [2Sžf 76/2014](https://www.aspi.sk/products/lawText/4/4389345/1/JUD%253A/JUD1548578SK) of 15.4.2015. In the first place, it did not agree with the conclusion of the Regional Court that the contested decision of the defendant did not deviate from the binding legal opinion of the Supreme Court expressed in the said judgment, which was based on the resolution of the question of the applicability of the interpretative commentary of the OECD Model Tax Convention and the defendant's decision was based on the assessment of abuse of tax law. He emphasized that the issue of the application of the Model Contract and the commentary on it, resolved by the Supreme Court of the Slovak Republic, cannot or expediently be separated from the issue of abuse of law or abuse of the contract with the Netherlands. In addition, in its judgment, the Supreme Court of the Slovak Republic dealt with the issue of abuse of tax law in response to the conclusions of the Regional Court expressed in the judgment [4S/233/2010,](https://www.aspi.sk/products/lawText/4/4389345/1/u%253AJUD%253A/)  where it stated that the economic reason for the described procedure of the plaintiff was only to profit from the contract with the Netherlands, which clearly represents an abuse of the agreement to prevent double taxation, while such conduct is not worthy of protection according to the Regional Court. The Supreme Court dealt with the plaintiff's appellate objection in relation to the plaintiff's lack of obligation to examine the rationality of the shareholders' actions and the consequent objection of non-abuse of the double taxation agreement by the plaintiff and found (p. 38 of the judgment) that the plaintiff acted in accordance with the agreement with the Netherlands and applied it correctly, and in the opinion of the appellate court, it was not possible to require the plaintiff as a taxpayer to follow the procedure specified by the defendant in the contested decision, i.e. taxation of dividends according to the treaty with Germany and France on the grounds that the beneficial owners of the income had their registered office there. In this context, he also pointed to the expert opinion of the author Prof. Dr. Adolf J. Martín Jiménez, from the Faculty of Law of the University of Cadiz, quoted by the Supreme Court, contained in the article: "The 2003 Revision of the OECD Commentaries on the Improper Use of Tax Treaties: A Case for the Declining Effect of the OECD Commentaries?", stating the unacceptability of discretion in assessing abusive conduct, Because, after the revision of the model contract in 2003, it allows the tax authorities to combat not only abuse (double taxation) but also tax planning. He further pointed out the contradiction when the Regional Court was undoubtedly satisfied with the above-mentioned consideration of the evaluation of the facts as an abuse of law in the defendant's decision, while in the judgment of the Supreme Court of the Slovak Republic it did not see any legal opinion on the application of the abuse of law.

Defendant's response to the cassation complaint

44. In its response to the appeal on a point of law, the defendant maintained its argument that it had been established beyond doubt that there was a close link between the transactions which resulted in the abuse of national legislation and the relevant double taxation conventions by means of legal acts which have no economic basis and are intended to circumvent tax liability. The obligation of the taxpayer to examine the person of the beneficial owner of the income was enshrined in the Guidelines of the Ministry of Finance of the Slovak Republic and the Notice on the Application of the Double Taxation Treaty with the Netherlands, while the binding nature of these documents results from the provisions of Section 103 (8) of Act No. [511/1992 Coll.](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/511/1992%20Zb.) The merits of the case were to conclude whether there was an abuse of law by performing disguised legal acts. With regard to the described course and content of the acts, and in particular the direct participation of the plaintiff, he considers it obvious that this is a purposeful and abusive change of jurisdiction for the purpose of avoiding tax liability not only in part, but in full. He demanded that the verdict of the regional court be confirmed as factually correct.

Preliminary ruling procedure under Article 267 TFEU

45. On 28 November 2019, the competent chamber of the Supreme Court of the Slovak Republic, to which the case was assigned for hearing, decided to stay the proceedings and, in accordance with the procedure under Article 267 TFEU, referred to the Court of Justice of the EU for a preliminary ruling questions concerning the applicability of Council Provisions 90/435/EEC of 23 July 1990 on the common system of taxation applicable to parent companies and subsidiaries in different Member States, as amended by Council Directive [2003/123/EC](https://www.aspi.sk/products/lawText/4/4389345/1/EU%253A/32003L0123) of 22 December 2003, to the assessment proceedings in the present case.

46. On 1.10.2020, the Court of Justice issued an order in Case C-113/20, which ruled that Council Directive [90/435/EEC](https://www.aspi.sk/products/lawText/4/4389345/1/EU%253A/31990L0435) of 23 July 1990 on the common system of taxation applicable to parent companies and subsidiaries in different Member States does not apply to a situation in which the tax authority of a Member State has levied on a taxpayer income tax which has not been paid in respect of the tax period preceding the accession of that Member State to the European Union. Union by means of a supplementary payment notice issued after that accession. Subsequently, the Supreme Court of the Slovak Republic decided by resolution No. 8Sžfk 54/2017 of 1.2.2021 to continue the proceedings

Subsequent opinions of the participants.

47. By document dated 13.4.2021, the applicant responded to the delivery of the preliminary ruling by carrying out a legal assessment of its consequences, in the sense that if it follows from the operative part of the CJEU's order that the provisions of Directive [90/435/EEC](https://www.aspi.sk/products/lawText/4/4389345/1/EU%253A/31990L0435) will not apply to the case before the court, it is possible to conclude that no legal acts of the European Union are applicable to it and that the case-law of the CJEU on the issue of abuse of tax law is not relevant either. From the point of view of national law, it pointed out the inapplicability of the tax authority's obligation to assess abuse of tax law within the meaning  [of Article 3(6) of the Tax Code](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/563/2009%20Z.z.%25233.6) to the present case concerning the tax on dividends for 2003 due to the infringement of the principle of non-retroactivity, referred to the constitutionally guaranteed principle of the protection of legitimate expectations and stated in relation to the agreement with the Netherlands that it did not contain anywhere a prohibition of abuse of tax law, while double non-taxation was accepted by the OECD Model Tax Convention at least until 2003 and was implicitly assumed by the Member States. Given that, at the time of the transfer of part of the plaintiff's shares, there was no legal norm regulating a general prohibition of abuse of tax law or obtaining a tax advantage, it considered decisive (presumed) the conclusion of the court as to whether in 2003 there was a generally formulated principle of prohibition of abuse of tax law, whether on the basis of doctrine or case-law, which could be applied to an international treaty with the Netherlands, which, within the meaning [of the Constitution,](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/460/1992%20Zb.) takes precedence over national law.

48. In its response to the plaintiff's submission delivered on 7 June 2021, the defendant pointed to the practice-induced need to enshrine the legislation on basic anti-evasion measures (GAAR), which came into law only after the relevant period, the regulation of the relationship of the OECD Model Tax Convention to double taxation treaties, explained in the Instruction of the FR SR on the interpretation of international treaties on the avoidance of double taxation and the prevention of tax evasion in the field of income and wealth taxes. At the same time, it stated that even before the adoption of this model text, ambiguities and disputes arose before national courts about the extent to which the title of the Treaty and the preamble could serve as a binding expression of the intention of the Contracting States to be able to deny the Contracting States the benefits of transactions which, under domestic law, would constitute circumvention of the law or abuse of law. He pointed to the decision of the French Council of State of 25.10.2017 (396954, Cts Verdannet) which confirmed the possibility of denying benefits to entities that were not created to achieve economic substance, in a situation where the law excludes abuse of law. He also referred to the decision of the Austrian Supreme Court in the dispute N A.G. v. Finanzlandesdirektion für Oberösterreich, according to which acting by means of illegal tax optimisation schemes is automatically contrary to the object and purpose of an international double taxation convention. It stated that, in the course of the proceedings, it had dealt in detail with the question of the purpose and interpretation of international double taxation treaties and, subsequently, had assessed the circumstances relating to the legal acts preceding the payment of dividends for 2003. It disagreed with the plaintiff's opinion that the resolution in Case C-113/2020 leads to the conclusion that the application of the decision-making activity of the CJEU as a source for its further application is excluded. Especially in the case of the institute of abuse of law, he emphasized the need for a systematic interpretation, and in connection with the above-mentioned decisions of courts of other countries, he emphasized the fact that domestic doctrines of economic substance, or (taking into account) the content before the form, were also linked to the prohibition of abuse of law in decision-making. He recalled the case law of the Supreme Administrative Court of the Czech Republic, file no. 1Afs 107/2004, according to which an abuse of law is a situation when someone exercises their subjective rights to the unjustified detriment of someone else or society, and pointed to the professional literature dealing with the definition of abuse of law.

49. By its submission of 21.7.2021, the plaintiff again responded to the defendant's statement and emphasized that due to the decisive period, which was 2003, it is not possible to apply the OECD Model Tax Convention with the Commentary to the development of decision-making in the present case, the transactions carried out were legal, in accordance with the content and purpose of the agreement with the Netherlands, and the assessment of the prohibition of abuse of rights contained in [Section 3(6) of the Tax Code](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/563/2009%20Z.z.%25233.6) cannot be applied to the proceedings. The doctrine of the prohibition of abuse of law is a national interpretative principle that has no place in the interpretation of international law, and considers the defendant's procedure (examination of abuse of law) to be a consequence of the violation of the prohibition of retroactivity.

50. In its statement of 15.6.2022, the defendant maintained the line of argumentation presented in the response to the cassation complaint. By a notice dated 30.8.2022, the Court of Cassation, in view of the content of the reasoning of the contested decision, asked the defendant to submit court decisions of courts of other states cited in the contested decision, while admitting the possibility of submitting them in a language other than Slovak. By a submission dated 21.9.2022, the defendant submitted the decisions/materials available to him, on which he relied for his argumentation (art. of the court file), which were subsequently sent to the plaintiff for information.

51. By a submission dated 7.11.2022, the plaintiff responded to the delivery of the decisions submitted by the defendant, commented in the case along the lines of the previous arguments, emphasizing the resolution of the issue of the need to accept the concept of beneficial ownership of income and the existing binding legal opinion on the correctness of the procedure for the application of the Agreement with the Netherlands, at the same time expressing its disagreement with the requirement and submission of decisions in a foreign language. Referring to the court's binding nature by the wording of Section 7(1) of the Act on the State Language and the procedural regulation of the conduct of proceedings and the taking of evidence, he questioned the relevance of the documents submitted by the defendant.

52. By another submission dated 26.4.2023, the applicant objected

- the inapplicability of the EU doctrine of abuse of law in the field of direct taxation to the case under consideration

- the inapplicability of the case law of the CJEU and the case law of other countries to the case under consideration

- the substantive nature of the doctrine of abuse of rights

- the need to assess the doctrine of abuse of law in the light of the legal situation in 2003

- submitted the Expert Opinion No. 1/2023 secured by him on the assessment of the application of Council Directive [90/435/EEC](https://www.aspi.sk/products/lawText/4/4389345/1/EU%253A/31990L0435) of 23 July 1990 on the common system of taxation applicable in the cases of parent companies and subsidiaries in different Member States, the EU principle of prohibition of abuse of law in the field of direct taxation and the related case law of the CJEU.

In.

Relevant legislation

Laws published in the Collection of Laws

53. In the new decision in the case, the relevant substantive regulation was the provisions of Act No. [366/1999 Coll.](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/366/1999%20Z.z.) on income taxes, in particular § 52 (1)-(3), § 57 (1), § 22 (1) (d) point 4, § 36 (2) (c) point 1. The basic procedural regulation should be considered to be Art. [§ 2 par. 1](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/511/1992%20Zb.%25232.1), [3](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/511/1992%20Zb.%25232.3), [6 of Act No. 511/1992 Coll.](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/511/1992%20Zb.%25232.6) (with regard to the provisions of Section 165 (2) of Act No. 563/2009 [of the Tax Code](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/563/2009%20Z.z.)) according to which:

(1) Tax proceedings shall be conducted in accordance with generally binding legal regulations, the interests of the state and municipalities shall be protected, and care shall be taken to preserve the rights and legally protected interests of taxpayers and other persons involved in tax proceedings.

(3) The tax administrator evaluates the evidence according to its own discretion, namely each piece of evidence individually and all the evidence in their mutual connection, taking into account everything that has come to light in the tax proceedings.

(6) In the application of tax regulations in tax proceedings, the actual content of the legal act or other fact decisive for the assessment or collection of tax shall always be taken into account.

International treaties

54. With regard to the Treaty between the Czechoslovak Socialist Republic and the Kingdom of the Netherlands for the Avoidance of Double Taxation and the Prevention of Tax Evasion in the Field of Taxes on Income and on Capital, published in the Collection of Laws under No. [138/1974 Coll.](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/138/1974%20Zb.), effective from 5 November 1974, (the Slovak Republic is also a successor contracting party to the Czechoslovak Socialist Republic), as legal regulations in the field of international law, the following parts of it should be considered as relevant parts: Preamble:

The Government of the Czechoslovak Socialist Republic and the Government of the Kingdom of the Netherlands, desiring to further develop economic relations and strengthen cooperation in tax matters, with a view to avoiding double taxation in respect of taxes covered by this Treaty, without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance (including schemes for the search for the most favourable tax conditions in the form of a treaty In order to obtain the concessions conferred by such a treaty as an indirect advantage for third-country residents), they have agreed as follows:

Article 4(1) The term "person domiciled in one of the two States" means, for the purposes of this Treaty, any person who is subject to tax under the laws of that State by reason of his domicile, residence, place of management or any other criterion of a similar nature.

Article. 10 Dividends

(1) Dividends paid by a company having its registered office in one of the two States to a person resident or having its registered office in the other State may be taxed in the other State.

3. Notwithstanding the provisions of paragraph 2, the State in which the company distributing the dividends is established shall not tax dividends paid by that company to a company whose assets are wholly or partly divided into shares and which has its registered office in another State and owns directly at least 25% of the assets of the company distributing the dividends.

4. The competent authorities of the States shall regulate by common accord the manner in which paragraphs 2 and 3 are to be applied.

55. The [Vienna Convention](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/157/1964%20Zb.) on the Law of Treaties, adopted on 23 May 1969, published under no. [15/1988 Coll.](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/15/1988%20Zb.) which came into force and binding for the Czechoslovak Socialist Republic on 28 August 1987 and subsequently also for the Slovak Republic on the basis of the notification of 28 May 1993 to the succession of the Slovak Republic to multilateral contractual documents whose depositary is the UN Secretary-General.

According to the Preamble, it was concluded by the States Parties to that Convention, taking into account the fundamental role of treaties in the history of international relations, and being aware, inter alia, that the principles of free consent, good faith and pacta sunt servanda are universally recognized

According to Article 3

The fact that this Convention does not apply to international agreements negotiated between States and other subjects of international law or between such subjects of international law, or to international agreements which have not been negotiated in writing, does not have the effect:

(a) the validity of such agreements;

(b) to apply any rules contained in this Convention which would apply to such agreements under international law independently of this Convention;

(c) to apply the Convention to relations between States governed by international agreements to which other subjects of international law are parties.

According to Article 4

This Convention shall apply only to treaties concluded between States only after the Convention has entered into force in respect of them, without prejudice to any rules contained therein applicable to treaties under international law independently of this Convention.

Subordinate Implementing Regulations

56. During the relevant period, the following were in force in the Slovak Republic in relation to the Double Taxation Treaty with the Netherlands:

Notice of the Financial Administration of the Slovak Republic No. 83/1998 F. s. <aspi://module='ASPI'&link='83/1998%20(FS)'&ucin-k-dni='30.12.9999'> effective as of 1 November 1999, regulating the conditions and procedures for applying to Slovak recipients for a refund of tax paid in the Netherlands. However, it cannot be overlooked that in Articles 4, 5, 6, the term "tax resident of the Slovak Republic, recipient (beneficial owner) of dividends" was used in connection with the application of the right to a tax refund. From this it is also clear that both contracting parties in the given period understood the beneficiary as the beneficial owner of the income and there is no reason to assume or follow from anything that the institute of the beneficiary - a person based in the Netherlands should have been understood differently from a person who is also the beneficial owner of the income.

Guideline of the Ministry of Finance of the Slovak Republic for the Application of Double Taxation Treaties No.: 5005/2000-7, the relevant parts of which are:

Art. 1

The place of tax residence of the taxpayer is the Contracting State in which the taxpayer is subject to unlimited tax liability under the law of that Contracting State, and the determination of the tax is determined according to the relevant article of the double taxation treaty

Article 3

Conditions for the application of the relevant double taxation treaty.

A decisive condition for the application of the relevant double taxation treaty is proof of the taxpayer's place of tax residence in one of the contracting states with which the double taxation treaty has been concluded. A conclusive proof of this fact is, in particular, a certificate of the taxpayer's place of tax residence in the relevant tax period, issued by a foreign tax administrator. The confirmation must be requested from the taxpayer in case of any doubts about the place of his tax residence by the domestic tax administrator or the taxpayer. Once the doubts are removed, the relevant contract is applied automatically, so the taxpayer does not have to apply for the application of the contract.

Article 4

Application of the exemption or reduced rate of income tax in the nature of dividends, interest and royalties

4.1 From income of the nature of dividends, interest and royalties arising from sources in the territory of the Slovak Republic, the taxpayer shall apply an exemption from tax or a reduction of the withholding tax rate to a taxpayer with limited tax liability, who is the beneficial owner of such income (hereinafter referred to as the "beneficial owner of income"), to the extent and under the conditions set out in the relevant articles of the double taxation treaties, only if the taxpayer's place of tax residence is proved in accordance with Article 3 of this Instruction, at the latest by the date of payment, remittance or crediting of the payment in his favour.

4.2 If the conditions for the application of the procedure under point 4.1 have not been met, the taxpayer shall withhold the withholding tax at the rate set out in Section 36 of the Income Tax Act.

VI.

Basic Background of the Court of Cassation

57. The subject matter of the cassation review is the judgment of the administrative court, which dismissed the action against the defendant's decision confirming the decision of the tax authority on the additional assessment of income tax on dividends paid by the taxpayer of SPP a.s. without withholding tax to the foreign shareholder of the applicant SGH, a tax resident of the Kingdom of the Netherlands, who is the legal successor of the applicant's foreign shareholders, Ruhrgas Mittel - und Osteuropa GmbH (tax resident of the Federal Republic of Germany) and Gaz de France Investissement 2 SE (tax resident of the French Republic).

58. The tax authority considered it justified to make additional assessment of the tax in question, referring to the legal liability of the plaintiff as a taxpayer, for the proper payment of the tax. After examining the correctness of the procedure consisting in the direct application of the double taxation treaty with the Netherlands, which resulted in the non-payment of income tax, it came to the conclusion that the taxpayer's procedure was incorrect. If SPP, as a taxpayer, were to properly examine the conditions for the automatic application of the relevant provisions of the Agreement with the Netherlands (in view of the information indicating that SGH was inserted into the corporate structure for a specific purpose), it would have to have doubts as to whether SGH can be considered a resident of the Netherlands, who, if it is the beneficial owner of the dividends paid, is entitled to benefit from Article 10 of the Treaty with the Netherlands. If SPP proceeded in accordance with the Guideline of the Ministry of Finance of the Slovak Republic No. 5005/2000-7 when paying dividends, it would be the task of the tax administrator (in the refund procedure) to find out that SGH cannot be assessed as a resident of the Netherlands for the purposes of the Agreement with the Netherlands and the beneficial owner of the income. The plaintiff, as a taxpayer, is responsible for the withholding of tax in the correct amount within the meaning of Section 52 of the Income Tax Act. If he decided not to apply the refund principle in the case of dividend payment to SGH, he exposed himself to the risk that the consequence of such action may be a situation contrary to the double taxation treaty, e.g. as a result of an incorrect assessment of the condition of the company's residence within the meaning of Articles 1 and 4 (1) of the Agreement with the Netherlands and the importance of proving the person of the beneficial owner of dividends.

59. A tax inspection found that the Treaty with the Netherlands had been unlawfully applied in view of the abusive conduct found, as a result of which the distribution of dividends was made to an economic operator which did not meet the definitional requirements of the Treaty with the Netherlands not only in the literal sense, but also resulting from an interpretation of the Treaty based on an interpretation of its purpose in accordance with the rules of interpretation laid down in the Treaty with the Netherlands. [Articles 30](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/157/1964%20Zb.%2523%25C8l%5C.30) and [31 of the Vienna Convention](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/157/1964%20Zb.%2523%25C8l%5C.31) on the law of contracts. The tax administrator in accordance with the procedure [2 par. 6 of Act. No. 511/1992 Coll.](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/511/1992%20Z.z.%25232.6) applied international double taxation treaties relating to the beneficial owners of dividends, who are tax residents of Germany and France, and in accordance with these Treaties, calculated the withholding tax relating to the dividend paid to the German owner Ruhrgas Mittel und Osteuropa GmbH (Article 10(2)(b) of the Treaty with Germany) in the amount of 15% of the gross amount of dividends, i.e. 278,993,042,- Sk, and the withholding tax relating to the dividend paid to the French owner GDF Investissements 2 SA (Article 10 (2) of the Treaty with France) in the amount of 10% of the gross amount of the dividends, i.e. SKK 185,995,361. The aggregate tax levied by withholding in connection with the dividend payment in question, which the tax administrator added to the plaintiff in accordance with Section 52 (2) of the Income Tax Act or Section 43 (12) of Act No. 595/2003 on Income Tax, amounted to SKK 464,988,403. Sk, i.e. 15,435,195.94 euros.

60. In the previous court proceedings concerning the additional assessment of the tax in question, the Supreme Court of the Slovak Republic, in its judgment [2Sžf/76/2014](https://www.aspi.sk/products/lawText/4/4389345/1/JUD%253A/JUD1548578SK) of 15 April 2015, together with a binding legal opinion on the obligation to deal with the question of the applicability of the OECD Model Tax Convention and its commentary in the version of 2003 to the applicant's conduct, expressed an unequivocal legal opinion on the inapplicability of the Model Convention and its comments (p. 38 of the judgment of the Supreme Court of the Slovak Republic, set out in paragraph 14 of the judgment of the Court of Cassation) and the consequent impossibility of examining the content of the term 'beneficial owner' of dividends, which was subsequently introduced, considered the procedure under the contract with the Netherlands to be justified. At the end of its decision, it ordered the administrative authority to deal with the issue of the applicability of the OECD Model Tax Convention and its comments in the wording applicable to the plaintiff's proceedings and to re-decide the case.

61. In the preliminary ruling proceedings, the CJEU's Order C-113/20 negatively resolved the applicability of the provisions of Council Directive [90/435/EEC](https://www.aspi.sk/products/lawText/4/4389345/1/EU%253A/31990L0435) of 23 July 1990 to the present case, from which the applicant inferred that no legal acts of the European Union were applicable to the present case and that the case-law of the CJEU on abuse of law was not relevant either. In support of his arguments, he submitted expert opinion No. 1/2023 of 2.4.2023 prepared by the expert J. Y. R. H.. R.. Z.., R.., D. on the assessment of the application of Council Directive [90/435/EEC](https://www.aspi.sk/products/lawText/4/4389345/1/EU%253A/31990L0435) of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries in different Member States, the EU principle against abuse of law in the field of direct taxation and the related case law of the Court of Justice of the EU. The result of the expert opinion were also conclusions on the binding nature of the administrative and judicial authorities of the Slovak Republic by the decision of the Court of Justice of the European Union C-113/20, as well as the interpretation of EU law that the Court of Justice gave in its decisions. The forensic expert stated in paragraph 23 on page 16 of the opinion: "Since the case-law of the Court of Justice of the EU, by analogy with other sources of Union law, has been applied in the Slovak Republic only since the entry into force of the Treaty of Accession on 1 May 2004, it cannot be applied to the factual situation described in the order of the Court of Justice of the EU of 1 October 2020 in the case of Slovenský plynárenský průmysl a. s. v Financial Directorate of the Slovak Republic, C-113/20.'

62. The defendant disagreed with the conclusion that EU legal acts and the relevant case-law were inapplicable, arguing that, especially in the case of the institution of abuse of law, it is necessary to apply a systematic interpretation following the decisions of courts of other countries in which domestic doctrines of economic substance or consideration of content before form have also been linked to the prohibition of abuse of law. In support of his arguments, he submitted an expert opinion No. 14/2015 prepared by expert D. H.. R.. J. Y. R. in the matter of taxation of dividends pursuant to Article 10 of the 1974 Treaty between the Czechoslovak Socialist Republic and the Kingdom of the Netherlands for the Avoidance of Double Taxation and the Prevention of Tax Evasion in the Field of Taxes on Income and Capital and the Manner of Interpretation of this Convention. Expert questions related to

1/ the possibility of applying the rules of interpretation enshrined in the [Articles 31-33 of the Vienna Convention](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/157/1964%20Zb.%2523%25C8l%5C.31-%25C8l%5C.33) on the law of contracts by means of sec. [Article 4 of the Vienna Convention](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/157/1964%20Zb.%2523%25C8l%5C.4) in interpreting a treaty with the Netherlands;

2/ the interpretation of the content of the terms used in [Article 31 of the Vienna Convention](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/157/1964%20Zb.%2523%25C8l%5C.31) and, with regard to them, the manner of interpretation of the Treaty with the Netherlands,

3/ sources for ascertaining the subject and purpose of the Agreement with the Netherlands and the possibility of using the OECD Model Tax Convention on Income and Assets and its Commentary,

4/ questions whether the addition of the term "beneficial owner" to later versions of the model tax treaty and comments to it was a radical change or only a clarification of the previously used concept

5/ the question of whether it is necessary to examine the person of the beneficial owner of the income when applying the agreement with the Netherlands to income of the nature of dividends, interest and royalties. The conclusions of the expert opinion were transferred to the reviewed decision and subsequent statements of the defendant.

63. At the same time, it should be emphasized that after the case was referred back for further proceedings by the decision of the Supreme Court of the Slovak Republic [2Sžf/76/2014](https://www.aspi.sk/products/lawText/4/4389345/1/JUD%253A/JUD1548578SK), the definition of decisive facts for legal argumentation was changed in the defendant's new decision-making in that the defendant did not derive the plaintiff's obligation to pay tax from the application of the Agreement with the Netherlands in violation of the OECD Model Tax Convention in the version of 2003 and the Commentary thereto, but on the fact that, by the practice described, there was an abusive practice, the creation of a company without economic justification as a tax resident of the Netherlands, with the consequence that the French and German shareholders avoided the tax liability.

64. There is no doubt that the basic obligations of the tax authorities in the period in question included ensuring the revenue part of the state budget of the Slovak Republic by means of effective tax collection and protecting the economic interests of the state while respecting the protection of taxpayers' rights guaranteed by the Constitution and laws. In this context, in order to assess the correctness of the procedure of the tax authorities in the assessment of the advance tax within the meaning of Section 52 of the Income Tax Act, it was necessary to resolve the questions

1/ whether SPP a.s., as a company whose activities generated income for its shareholder/shareholders - dividends subject to income tax, acted in accordance with the law if it chose the automatic application of the contract with the Netherlands derived from the proven fact that SGH has its registered office in the territory of the Kingdom of the Netherlands, even though in view of the circumstances of the case it must have known that the consequence of a possible incorrect conclusion on the admissibility of the direct application of the contract would be an exemption from taxes contrary to the Income Tax Act and the consequent absence of the relevant tax in the state budget revenues

2/ whether SPP a.s. was obliged to examine and evaluate the above-described procedure of the shareholders of SPP Ruhrgas Mittel - und Osteuropa GmbH and G.D.F. Investissement 2 SA leading to the establishment of SGH with the subsequent registration of this company in the list of shareholders of SPP, as a result of which the shareholder of SGH benefits from a tax advantage resulting from a double taxation treaty with the Kingdom of the Netherlands only on the basis of Dutch tax residence. Following whether it was obliged to examine and evaluate that practice in relation to the conclusion that it could be assessed as abusive and whether there had been an abuse of public subjective right

3/ whether, in the event of finding an abusive act, the tax administrator acted correctly if it determined the tax liability of the plaintiff in the amount determined on the basis of the conclusion on the beneficial owners, i.e. the German and French shareholders and the subsequent direct application of double taxation treaties with Germany and France.

65. The need to answer them is based on the fact that the defendant essentially based its arguments on the fact that, in view of the course and content of the acts described, and in particular on the participation of the applicant (through the actions of persons in the management structures of the applicant and its shareholders and their knowledge of the circumstances and conditions of the individual changes of ownership) in the individual acts related to the change in the shareholder structure of  [the SSP](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/162/2015%20Z.z.) considers it obvious that this is a purposeful and abusive change of jurisdiction for the purpose of tax avoidance. Given that, at the time of the transfer of part of the applicant's shares from the ownership of the German and French shareholder to the newly created Netherlands shareholder, there was no rule of law governing a general prohibition of abuse of tax law or obtaining a tax advantage, the applicant considered the court's conclusion as decisive as to whether in 2003 there was a generally formulated principle of prohibition of abuse of tax law, whether on the basis of doctrine or case-law, which could be applied to an international treaty with the Netherlands, which takes  [precedence over national law](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/460/1992%20Zb.) under the Constitution.

66. In the proceedings, the applicant complained that the decision-making of the tax authorities was governed by the legislation  [of the Tax Code](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/563/2009%20Z.z.), which, in its current wording, Article 3(6), expressly provides for the possibility of disregarding a legal act, a number of legal acts or other facts carried out without a proper business reason or any other reason reflecting economic reality, and at least one of the purposes of which is to avoid tax liability or to obtain such a tax advantage, to which the taxpayer would otherwise not be entitled.

67. In so far as the applicant has pointed to the fact that, in the course of the assessment of an abuse of law in connection with a procedure under an international treaty, there is a conflict between the national legislation and an international treaty which takes precedence over the Constitution, the question of that conflict was raised and resolved in the administrative proceedings in the context of the evaluation of the documents for the preparation of the answers to the questions referred to in paragraph 62 of the present judgment in the expert report of D. H.. R.. J. Y. R. prepared in the case: Taxation of dividends under Article 10 of the 1974 Treaty between the Czechoslovak Socialist Republic and the Kingdom of the Netherlands for the Avoidance of Double Taxation and the Prevention of Tax Evasion in the Field of Taxes on Income and Capital and the Manner of Interpretation of this Convention.

68. It follows from the content of the expert's report that the expert relied on the [Constitution of the](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/460/1992%20Zb.)  Slovak Republic, Act No. [366/1999 Coll.](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/366/1999%20Z.z.) on Income Taxes effective as of 31 December 2003, the Treaty between the Czechoslovak Socialist Republic and the Kingdom of the Netherlands for the Avoidance of Double Taxation and the Prevention of Tax Evasion in the Field of Taxes on Income and Capital signed in Prague on 4 March 1974, the [Vienna Convention on the Law](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/157/1964%20Zb.) of Treaties (promulgated in the Collection of Laws under No. [15/1988 Coll.](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/15/1988%20Zb.)) , the proposal and the OECD Convention (published under no. [141/2001 Coll.](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/141/2001%20Z.z.) of 1974), the OECD Model Tax Convention on Income from Property and the Commentary thereon of 1977 and 2003, professional literature and case law of the International Court of Justice, the Supreme Administrative Court of the Czech Republic and the Court of Justice of the EU.

69. The Court of Cassation considers the summary of the task and the answer to the questions referred, contained on pages 26 to 28 of this expert report, to be relevant in relation to the objections relating to the application, from which it selects: [The Vienna Convention on the](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/157/1964%20Zb.) Law of Treaties of 1969 has been in force and binding in the territory of the Czechoslovak Socialist Republic since 28 August 1987, or also in the Slovak Republic, having regard to the notification of the succession of the Slovak Republic to the multilateral treaty documents of 28 May 1993, the depositary of which is the Secretary-General of the United Nations, including [the Vienna Convention](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/157/1964%20Zb.) on the Law of Treaties (Notification No.[53/1994 Coll.](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/53/1994%20Z.z.), paragraph 93). On the basis of the case law of the International Court of Justice and the Court of Justice of the EU, the rules of interpretation contained in [Articles 31 to 33 of the Vienna Convention on the](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/157/1964%20Zb.%2523%25C8l%5C.31-%25C8l%5C.33) Law of Treaties are a codified international custom, which are fully applicable also to contracts that do not fall within the temporal scope  [of the Vienna Convention on the Law of](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/157/1964%20Zb.)  Treaties within the meaning of Article 4 thereof, or to contracts concluded by non-contracting parties  [to the Vienna Convention on the](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/157/1964%20Zb.) Law of Treaties.

The rules of interpretation laid down in [Articles 31 to 33 of the Vienna Convention](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/157/1964%20Zb.%2523%25C8l%5C.31-%25C8l%5C.33) on the Law of Treaties are, in the light of the provision of [Article 4 of the Vienna Convention](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/157/1964%20Zb.%2523%25C8l%5C.4) on the Law of Treaties, applicable as customary international rules in the interpretation of the 1974 Double Taxation Treaty with the Netherlands. In accordance with [Article 31(1) of the Vienna Convention on the Law of Treaties, the 1974 double taxation convention with the Netherlands must be interpreted in good](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/157/1964%20Zb.%2523%25C8l%5C.31.1)  faith, in accordance with the usual meaning given to the terms in that convention in connection with them, and also in the light of the subject matter and purpose of the convention. The subject matter and purpose of the contract is the ratio legis of the parties and a certain goal that the parties intended to achieve by the concluded contract. According to the name, preamble and subject matter of the Convention, the unambiguous object and purpose of the 1974 Double Taxation Treaty with the Netherlands is to prevent double taxation of natural and legal persons who have their residence or registered office in one or both States and income in the other or both Contracting States and to prevent tax evasion, or to prevent tax fraud and tax evasion.

VII.

Evaluation of the grounds of cassation

70. In cassation proceedings, the scope of a cassation appeal is also determined by the content of the grounds of cassation to which the Court of Cassation is bound in its decision ([Article 445 of the CCA](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/162/2015%20Z.z.%2523445)). The Court of Cassation therefore focused on the various grounds of cassation as put forward by the applicant.

VII. a)

71. The Court of Cassation does not consider the ground of appeal raised under [Article 440(1)(g) of the SAA](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/162/2015%20Z.z.%2523440.1.g) to be well founded. It was of fundamental importance for the decision of the Court of Cassation in relation to the interpretation of the Treaty with the Netherlands that, in accordance with the Preamble [of the Vienna Convention](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/157/1964%20Zb.), the Contracting States, including the Czechoslovak Socialist Republic and the Kingdom of the Netherlands, concluded it: " ... Being aware that the principles of free consent, good faith and pacta sunt servanda are universally recognized, ..."It is therefore reasonable to assume that even when concluding the Double Taxation Treaty with the Netherlands, both parties considered the principle of good faith to be universally recognized. The Court of Cassation emphasizes the content and importance of the preamble of the Treaty, as its introductory part, which, although it does not contain specific rights and obligations of individual contracting parties, contains an expression of intention and constitutes an important rule of interpretation in the interpretation of the meaning and text of individual provisions.

72. According to the preamble to the Treaty for the Avoidance of Double Taxation and the Prevention of Tax Evasion in the Field of Taxes on Income and on Capital, published under No. [138/1974 Coll.](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/138/1974%20Zb.):

The Government of the Czechoslovak Socialist Republic and the Government of the Kingdom of the Netherlands, desiring to further develop economic relations and strengthen cooperation in tax matters, with a view to avoiding double taxation in respect of taxes covered by this Treaty, without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance (including schemes for the search for the most favourable tax conditions in the form of a treaty shopping in order to obtain the concessions which such a treaty provides as an indirect advantage for residents of third countries), provides for one taxation, not none, they agreed....

73. According to the Court of Cassation, the preamble gives unequivocal guidance to the interpretation and application of the treaty as meaning that its purpose is to protect taxpayers from double taxation, but at the same time to prevent the creation of opportunities 'for non-taxation or reduced taxation through tax evasion or avoidance (including schemes to seek the most favourable tax terms in the form of 'treaty shopping' in order to obtain concessions, which such a treaty confers as an indirect advantage for residents of third countries), presupposes a single taxation, not none.

74. With regard to the question of the plaintiff's unjustified requirement of the taxpayer's obligation to examine and evaluate abusive conduct to the extent that it is for the tax administrator, the Court of Cassation states that the defendant did not require the plaintiff to examine the taxpayer's conduct to the extent pertaining to the plaintiff, i.e. to the extent that Section 2 of Act No. 511/1992 prescribes for the tax authority. The taxpayer was required to secure all the documents required by law and international treaty to conclude whether the priority of the international treaty by which the Slovak Republic is bound is possible in the event that the Income Tax Act primarily provides for the payment of an advance tax in the amount of 15% is possible. The primacy of an international treaty over a national regulation within the meaning of Article I(2) of the Constitution is not questioned (the Slovak Republic recognizes and complies with the general rules of international law, international treaties by which it is bound, and its other international obligations). However, this does not change the fact that all entities that apply international treaties in accordance with the Constitution take responsibility for verifying and proving whether the conditions for the application of the international treaty in question are met in a particular case, while the obligation to comply with the general principles of international law cannot be overlooked in this context.

75. In a situation where, in terms of accounting, the recipient of the dividends was a company established in the Netherlands, SPP acted in accordance with the legislation in a manner which entailed the application of the Treaty with the Netherlands. The fact that leads to a contradictory result in the question of the justification for the application of the Agreement with the Netherlands is the conclusion on the question of the justification for the examination and fulfilment of the defining features of the person entitled to the application of the tax exemption. Referring to the current text of Article 10(3) of the Agreement with the Netherlands, the plaintiff was satisfied with the confirmation of the relevant Dutch institution that SGH has its registered office in the territory of the Netherlands. In the light of the interpretation of the content of the contract with the Netherlands and the substantively related provisions, the tax authorities considered it decisive whether the SGH entity established in the Netherlands was the 'actual recipient of the dividends'. In view of the findings leading to the conclusion on the special purpose establishment of a company in which the German and French shareholders have a 50% stake, while the income - dividends (formally) paid to the Dutch shareholder of SPP were transferred in a very short period of time in the form of loans and related artificially fabricated transactions to the real beneficiary - the German and French shareholder, the tax authorities concluded that in this particular case the fulfilment of the conditions for the application of the Agreement with the Netherlands was not proven.

76. In so far as it was disputed that the results of the evidence taken in accordance with the procedure under [Section 2 of Act No. 511/1992 Coll.](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/511/1992%20Zb.%25232) It is possible to review the fulfilment of the conditions specified in the international treaty, in addition to which the Court states that the tax administrator was obliged to proceed in accordance with [the Act on the Administration of Taxes and Fees](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/511/1992%20Zb.) (in particular §2 par. 1, 3, 6), according to which, among other things, when applying tax regulations in tax proceedings, the actual content of a legal act or other fact decisive for the determination or collection of tax is always taken into account. Such a fact can undoubtedly be considered to be the fulfilment of the conditions of the double taxation treaty, including the provisions of Article 4(1), which, in conjunction with the preamble, must be interpreted as meaning that, in the case of a legal person, the concept of 'place of management or any other criterion of a similar nature' must be interpreted in the sense of the place from which the actual exercise of management functions is carried out with all the real economic consequences. Restriction of the concept of 'legal person having its registered office in one of the two States which, under the laws of that State, is subject to tax by reason of its place of management or any other criterion of a similar nature' to a legal person which has only its formal registered office in a Contracting State and whose real economic activity is limited to the receipt of dividends and their subsequent transfer under a loan agreement to a foreign owner; is logically contrary to the purpose of the Treaty, which follows from its very name and preamble. It was therefore a legal obligation and fully within the competence of the tax administrator and the defendant to verify whether the circumstances following the transfer of dividends without withholding tax showed that the international treaty was applied justifiably. In the event of a contrary interpretation, this would constitute an obstacle to the performance of its basic obligation within the meaning of [Section 2 (1) of Act No. 511/1992 Coll.](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/511/1992%20Zb.%25232.1)

77. The applicant was ordered to pay the relevant withholding tax as a result of the incorrect application of the Agreement with the Netherlands as a result of the failure to verify whether the recipient of the dividends assessed for the purposes of Article 4(1) was a 'beneficial owner of the income'. Following the objection that this requirement is unfounded, as the Agreement with the Netherlands does not use this term, the Court of Cassation agrees with the defendant that both the rules of interpretation contained in [the Vienna Convention](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/157/1964%20Zb.) and Article 4(1) of the Guideline of the Ministry of Finance of the Slovak Republic 5005/2000-7, which used the term beneficial owner of income, must be consistently applied to the present case. The Court of Cassation considers it a logical assumption that, given the importance and assets of the plaintiff, he had or should have had at his disposal the relevant professional apparatus, acquainted with the conditions for taxation and the application of the exemption from paying tax on dividends. Even if this is not the case, it should be emphasized that the law regulates the taxpayer's obligation to pay withholding tax as a priority. It is his responsibility to correctly evaluate the fulfilment of the conditions for the direct application of an international treaty allowing for tax exemption. The taxpayer's responsibility for the correct application of legislation (including those allowing for tax exemptions) cannot be ignored. In the event of an incorrect withholding of income tax, the legislation clearly gives rise to the legitimate right of the tax authorities to recover from him the tax not paid or the tax not withheld in the correct amount.

78. In the opinion of the Court of Cassation, taking into account the already historical circumstances relating to the privatisation of 49% of the State's share in SPP, š.p. after its transformation into a.s., and the repeatedly approved changes in the list of shareholders owning 49% of the assets of SPP a.s., namely the two original acquirers, who transferred their shares in their entirety to subsidiaries and which subsequently established SGH with its registered office in the Netherlands, which obviously had no real economic reason, it would be reasonable to expect a responsible taxpayer to make a withholding tax in the interest of proper fulfilment of tax obligations in relation to the state budget. It goes without saying that, once it has been paid, there would be nothing to prevent the rightful owner of the dividends, on the basis of proof of fulfilment of the conditions under the contract with the Netherlands, from applying for a refund of the tax paid, which should be covered (in respect of the shareholding) by the exemption from tax in its entirety. The possibility of punishing abusive conduct

79. The judgment of the administrative court, reviewed on a point of law, accepted as a relevant ground for penalising the failure to pay the withholding tax the fact that the failure to pay it was the result of an incorrect application of an international treaty guaranteeing exemptions 'obtained' as a result of the abusive conduct of the applicant's shareholders. Such a procedure consisted in the creation of a company established in the Netherlands which, on the basis of a shareholding consisting of shares of two shareholders, satisfied the conditions for an exemption. Both the Administrative Court and the Court of Cassation were confronted with objections pointing out that it was impossible or unfounded to examine, evaluate and take into account whether the creation of SGH as a shareholder of the plaintiff and the subsequent disposal of dividends that it acquired as a direct shareholder constitutes abusive conduct that is prohibited. The correctness of the conclusion that it was an abusive act, the legally established existence of its prohibition and the possibility of inferring liability from its proof were questioned.

The concept of abusive conduct

80. With regard to the concept of abusive conduct and its use in the context of the present case, the Court of Cassation refers to the available professional literature (Duračinská M., Duračinská J., Abuse of Law in the Field of Taxes from the Perspective of EU Law, In: The Impact of Inaccuracies of Legal Definitions and Legal Regulations on Law Enforcement, Proceedings of the International Scientific Conference Bratislava Legal Forum 2015, (cited 20.08.2023)), which dealt with the issue of the definition of the terms "tax evasion" and "abuse of law" and their relationship, while the applicability of the expressed opinions does not change the fact that in the end the considerations were expressed in connection with the solution of the issue of tax abuse from the point of view of EU law. With regard to the characterization of tax abuse in the international context, the authors stated: "... Avoidance of tax liability on the basis of the cross-border and speculative construction of a stylised structure of relations and arrangements between companies of different Member States without achieving an economic effect, while taking advantage of the different parallel effects of the tax regimes of different States in order to achieve double non-taxation, constitutes an abuse of rights. Its starting feature is the difference between the form and the material basis, or the material substance of a legal act or transaction that is carried out only for the purpose of tax avoidance. Tax avoidance is a term that is generally used to describe such adjustments to the affairs of a taxpayer that are intended to reduce his tax liability and, even if they would be on a strictly legal basis, are usually contrary to the intention of the law that should be followed. That term is concisely defined as 'the rearrangement of the taxpayer's tax affairs within the limits of the law in such a way that he reduces his tax liability'. When transactions are constructed primarily for the purpose of tax avoidance, they are contrary to the spirit of the law, thus fulfilling the characteristics of an abuse of law. In the professional literature, there is basically a well-established opinion on the tax law institute of tax avoidance, according to which a reduction in tax liability can be achieved within the limits of the law, or through abuse of law, i.e. dishonestly..... The fundamental principle of law according to which abuse of rights is not protected by law is generally recognised, which means in practice that the exercise of subjective rights prohibits their abuse if the limits of the social acceptability of the exercise of subjective rights are exceeded, even though the limits of subjective law are not formally exceeded ... Abuse of public law in most cases results in the creation of a sanction, especially in the case of abuse of financial law rules. In particular, legal theory deals with the abuse of subjective rights in the context of private law, given that its implementation gives rise to the right of the holder of subjective rights against other entities, which are obliged not to defend or interfere with these rights. ..... Subjective rights also arise in the area of public law, although within these relationships there is a relationship of superiority and subordination between the state or self-government and natural or legal persons, e.g. in the implementation of tax law norms when determining the tax base, the taxpayer exercises his subjective right by incurring certain costs incurred in connection with the achievement, securing and maintenance of his business income, includes or does not include in tax expenses, or decides to claim expenses in the amount of a statutory lump sum from the total income, if it is more advantageous for him. „

Absence of a clearly formulated principle of prohibition of abuse of rights in the relevant legislation

81. It is the duty of the Court of Cassation to deal with the objection that the legislation in the relevant period ([Section 2 of Act No. 511/1992 Coll.](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/511/1992%20Zb.%25232)) in contrast to the current legislation ([Section 3(6) of the Tax Code](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/563/2009%20Z.z.%25233.6)), it did not contain an unambiguous formulation of the principle of prohibition of abusive practices. The question thus arose whether it was possible to infer its applicability on the basis of categories such as the purpose of the law, social interest, justice, the principle of not providing legal protection to bad faith conduct, while on the other hand not neglecting the objected principle of protection of rights acquired in good faith and the principle of legitimate expectations. Legal principles represent the most general rules of conduct, which in a normative form express the general goals of the law (welfare, goodness, justice, legal certainty, peace). They are a kind of optimization commands, i.e. they command that something (goal, value) be implemented to the greatest (maximum) possible extent. They are relatively abstract normative sentences condensed expressing the content of the law.

82. The principle of non-abuse of rights is one of the fundamental principles on which the functioning of the rule of law is based. For its application, it is not necessary to be anchored in positive law, it was undoubtedly accepted and applied in the legal theory and practice of Czechoslovak, Czech and Slovak courts and administrative authorities even before it was explicitly incorporated (for the purposes of decision-making in tax proceedings) into Art. [Section 3 (6) of the Tax Code](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/563/2009%20Z.z.%25233.6). The Court of Cassation points to the conclusions of the professional literature (e.g. <[https://viaiuris.sk/wp-content/uploads/2020/04/Analyza\_II.cast\_.pdf](file:///C%3A%5CUsers%5CMiriam.Galandova%5CDownloads%5Chttps%253A%5Cviaiuris.sk%5Cwp-content%5Cuploads%5C2020%5C04%5CAnalyza_II.cast_.pdf)> cit. 20.8.2023, p. 99 et seq. ) which repeatedly states that the principle of prohibition of abuse of law in the field of public law is applicable in very specific cases and its application is typical for its casuistry. It is therefore difficult to formulate general rules for the application of the principle of prohibition of abuse of rights in public law. The principle of the prohibition of abuse of rights can undoubtedly be inferred from the [Article 1(1) of the Constitution of the Slovak Republic](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/460/1992%20Zb.%2523%25C8l%5C.1.1), according to which the Slovak Republic is a democratic and law-abiding state. Courts recognise the existence and possibility of applying the principle of non-abuse of law even if it is not explicitly enshrined in the legal order.

83. In this regard, the inspiring judgment of the Supreme Administrative Court of the Czech Republic file no. 1 Afs 107/2004 of 10 November 2005, which also responds to the risky application of the institute: "The Supreme Administrative Court notes that the institute of prohibition of abuse of subjective rights (to the unjustified harm of others or to the unjustified harm of society, i.e. ultimately its members) represents a material corrective to the formal conception of law, through which the aspect of equity (justice) is introduced into the legal order. A law that is general in nature cannot conceptually take into account all conceivable life situations that may arise under its effectiveness. As a result, it may happen that certain behaviour formally speaking - in reality, however, only apparently, as explained above - corresponds to a legal norm (or rather: the wording of a legal regulation), but at the same time it is perceived as manifestly unjust, because it causes harm to others in conflict with certain fundamental values and a reasonable arrangement of social relations. Such behaviour is then not in the nature of the exercise of a subjective right, but of its (legally reprobated) abuse. At the same time, it should be emphasized that the prohibition of abuse of law is an exception to the rule...... In other words, it is not possible to determine in advance and in general terms with mathematical precision - after all, law is not mathematics - when the prohibition of abuse - as an exception to the rule - applies and when it does not. It all depends on the circumstances of the specific case and on the judge's discretion and deliberation. Setting precise rules would deny the meaning and very essence of the institute of prohibition of abuse of subjective rights; This institute must be characterized by a certain flexibility of content so that it can respond to an infinite number of life situations that cannot be taken into account in general by the legal norm."

"The Supreme Administrative Court justifies the prohibition of abuse of subjective public law in the field of tax law as a public law requirement for a reasonable arrangement of social relations. However, this view completely 'tramples' on justice and legal certainty of all addressees of legal norms in the field of tax law. A kind of parallel and unwritten arrangement thus arises here, which gradually becomes customary. This is despite the fact that in the field of public law the principle of legality applies strictly."

84. The Supreme Administrative Court of the Czech Republic also drew attention to the simplicity of the abuse and application of the principle of the prohibition of abuse of law by the right authorities and in its judgment file no. 1 Afs 61/2015 from 10.11.2015 states: "... The concept of abuse of law is in itself easily abusive. In general, public authorities should resist the temptation to go the way of the public in their arguments, if there is another way. (…) The prohibition of abuse of law is indeed an "ultima ratio" means that serves as an emergency brake in case specific rules, when applied literally, lead to a conflict with the concept of material justice, because they are used in conflict with the essence of the given law, or its meaning and purpose." The professional literature also states the following about the risks of applying the principle of prohibition of abuse of law: „... The principle of prohibition of abuse of law is dangerous because it expands the authority of judges - it does not work with the normal structure of the norm, but works with the extent to which certain behaviour contradicts the meaning and purpose of the law. The boundaries of its applicability are fragile, and they are found by judicial case-law. Ideally, the principle of prohibition of abuse of law would not be used at all. An infallible and perfectly casuistic legislator would cover all situations that may arise in life. However, this situation has not yet arisen in our law."

85. In Slovak legal practice, there are few court decisions available to which reference can be made, so the opportunity to refer to the case-law of the Czech courts, which is based on a similar legal culture, is very welcome. At the same time, it can be stated that the available judicial practice and professional literature therefore agree that the application of the principle of prohibition of abuse of law should be only an exceptional and last resort - ultima ratio , as the application of the principle of prohibition of abuse of law without the existence of an explicit legal regulation of this principle brings great risks. In order to ensure legal certainty for the addressees of legal norms, it is therefore important that the person who is to bear the adverse consequence of his or her culpable faulty conduct is able to recognize in advance from the content of the legislation that a law with a specific way of exercising a public subjective right or freedom, which interferes with the rights protected by law or the legally protected interests of third parties or interferes with the public interest protected by law, will associate an adverse consequence in its legal position by law or on the basis of a decision or procedure of a public authority. A special corrective mechanism for the prohibition of abuse of a public subjective right or freedom is based on the fact that when a public administration body identifies an abuse of a public subjective right or freedom by a specific person in a specific case, it uses its authority to remedy the defective situation, which explicitly results from the applicable legal regulation (in accordance with [Article 2(2) of the Constitution of the Slovak Republic](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/460/1992%20Zb.%2523%25C8l%5C.2.2)).

86. The Court of Cassation is aware of all the abovementioned context and the specific features of the sanctioning of abusive practices. In view of the described circumstances of the establishment of SGH, the plaintiff's undoubted knowledge of the ongoing changes (personal connection described in the defendant's decision on page 69 et seq.), the tax administrator's findings regarding the nature of SGH's activities, the circumstances of the acquisition of dividends and the subsequent payment of a de facto identical amount to the shareholders (indirect shareholders of the plaintiff), with the objective demonstration that in this way the indirect shareholders avoided tax liability in the the scope of the relevant double taxation treaties, the court considers that there is an abuse of law consisting in tax avoidance on the basis of cross-border and speculative construction of relations and arrangements between companies of different states without achieving an economic effect, while using the different parallel operation of tax regimes of different countries for the purpose of achieving double non-taxation, within the meaning of the substantive definition set out in paragraph 80 of the present judgment. Undoubtedly, the Income Tax Act contains a corrective mechanism, which is the possibility of disregarding the alleged justification for proving the exemption under the agreement with the Netherlands and to assess the relevant tax, or to examine whether the conditions for the preferential application of another international treaty are not met.

87. On the basis of that correction mechanism, the tax authorities assessed tax in the amount corresponding to the relevant international conventions, which ultimately constituted an act in favour of the applicant, in the light of the conclusion that the dividends were the beneficial owner of the dividends, namely the German and French shareholders. (the amount of tax in the case of a French shareholder is less than 15%).

88. For the reasons set out above, the Court of Cassation does not consider the arguments relating to [Article 440(1)(g) of the CCA](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/162/2015%20Z.z.%2523440.1.g) to be well founded. As mentioned above, the tax authorities examined the possibility of applying the Treaty with the Netherlands. Given that the condition of Article 4 for the creation of the right to tax exemption (the requirement to prove the actual recipient contained in the interpretation) has not been established, the provisions of Article 4 (1) have been applied in such a way that the condition establishing the right to tax exemption for the tax recipient with a (formal) registered office in the Netherlands has not been established. Therefore, the plaintiff did not proceed correctly when he directly applied the international treaty and subsequently was justifiably prescribed an advance tax.

89. Insofar as it was also alleged that the tax authorities applied the procedure under [Section 3(6) of the Tax Code](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/563/2009%20Z.z.%25233.6), the Court of Cassation states that it is clear from the reasoning of the second-instance decision that the decisive general procedural regulation in the present case was. Section 2 of Act No. [511/1992 Coll.](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/511/1992%20Zb.), specifically the provisions of paragraphs 1, 3, 6: Tax proceedings shall be conducted in accordance with generally binding legal regulations, the interests of the state and municipalities shall be protected, while ensuring that the rights and legally protected interests of taxpayers and other persons involved in the tax proceedings are preserved, the tax administrator evaluates the evidence at its discretion, namely each evidence individually and all evidence in their mutual connection, In doing so, it takes into account everything that has come to light in the tax proceedings, and the actual content of the legal act or other fact decisive for the determination or collection of tax is always taken into account when applying tax regulations in tax proceedings.

90. In view of the generally applicable principles and purpose of tax proceedings, it is logical that Law No. [511/1992 Coll.](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/511/1992%20Z.z.) as well as Act No.[563/2009 Coll.](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/563/2009%20Z.z.) They are based on the same basic principles, and even though the wording in [the Tax Code](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/563/2009%20Z.z.) is more precise, it does not change the fact that the above-mentioned amendment to Act No. [511/1992 Coll.](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/511/1992%20Zb.) established a sufficient framework for establishing the facts essential for the examination of the reality of the basis for the assessment of the tax and the expression of the conclusions on which the contested decision is based.

VII (b)

91. The Court of Cassation does not consider the ground of appeal under [Article 440(1)(f) of the CCA,](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/162/2015%20Z.z.%2523440.1.f)  alleging infringement of the right to a fair trial as a result of failure to deal with all the relevant facts of the proceedings and, at the same time, infringement of the right to a proper statement of reasons. As is clear from the above, the administrative court dealt with all relevant legal arguments, including questioning the possibility of basing the defendant's new decision on objections concerning the amendment of the legal ground for the incorrect application of the Agreement with the Netherlands, based on the inadmissibility of the legal protection granted to the tax advantage obtained as a result of changes in the person and registered office of the shareholder receiving the dividends.

92. With regard to the objection that the concept of the prohibition of abuse of law is not supported by any specific case-law in the judgment of the administrative court, the Court of Cassation states that it would be contrary to the very nature and purpose of the court proceedings to require the necessary element of justification, for example, the presence of a certain legal concept - the justification for the application of a legal principle to be substantiated by the case-law existing at the time of the defendant's decision. According to the Court of Cassation, the justification and correctness of the application of the principle of prohibition of abuse of rights is evidenced by the legal doctrine presented in the narrow sense (opinio communis doctorum), which confirmed the correctness of the procedure of the tax authorities as well as their conclusions. Similarly, the court, being aware of the extraordinary nature of such a procedure, considers that the doctrine of the prohibition of abuse of law was applied justifiably. With regard to the fact that, to his knowledge, in connection with the issue of tax on income paid to a foreign owner in connection with the possibility of abuse of law for the purpose of tax avoidance, there have been no similar cases in the decision-making activities of courts and the doctrine of abuse of law in the field of public law has not been addressed by legal theory or legal practice, it is not possible to simplify the role of the court to determine: that if there was no established doctrine of abuse of law, it is not possible to penalize conduct fulfilling its conceptual characteristics. The court is obliged to decide in all proceedings, including proceedings whose legal basis has not been resolved anywhere, the limits of its decision-making competence are given by Article 141 (1) and [Article 144 (1) of the Constitution of the](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/460/1992%20Zb.%2523%25C8l%5C.144.1)  Slovak Republic, an alibi justification consisting in pointing out the possible absence of legal doctrine would represent a procedure referred to as denegatio iustitiae, i.e. a violation of the obligation to administer justice.

VII (c)

93. The Court of Cassation does not consider the ground of cassation under [Article 440(1)(e) of the SAA,](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/162/2015%20Z.z.%2523440.1.e)  consisting in the objection of violation of the right to a lawful judge enshrined in [Article 48(1) of the Constitution of the](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/460/1992%20Zb.%2523%25C8l%5C.48)  Slovak Republic and to judicial and other legal protection within the meaning  [of Article](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/460/1992%20Zb.%2523%25C8l%5C.46) 46 of the Constitution of the Slovak Republic as a result of the incorrect appointment of the regional court. The plaintiff alleged a violation of the right to judicial and other legal protection guaranteed [by Article 46(1) of the Constitution](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/460/1992%20Zb.%2523%25C8l%5C.46.1) <aspi://module='ASPI'&link='460/1992%20Zb.%2523%25C8l.46'&ucin-k-dni='30.12.9999'>, with reference to changes in the composition of the panel of the administrative court hearing the case

(i) within a short period of time before the judgment is delivered;

(ii) without a hearing in the Council of Judges certified in accordance with the Courts Act by the content of the available minutes

iii) with the denial ("it is very unlikely") that the new member of the Senate would have been able to sufficiently study the facts and the subsequent legal assessment in the period between the discussed entry into force of the change in the work schedule on 1 May 2017 and the date of the announcement of the decision on 3 May 2017.

94. The relevant legislation on this point:

According to [Article 48(1) of the Constitution of the Slovak Republic](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/460/1992%20Zb.%2523%25C8l%5C.48.1), no one may be deprived of his or her lawful judge. The jurisdiction of the court is determined by law.

Pursuant to Section 3 of the Act on Courts and on the Amendment of Certain Acts in the version valid and effective as of the date of the judgment of 3 May 2017

(3) A statutory judge is a judge who performs the function of a judge at the competent court and has been designated in accordance with the law and the work schedule to proceed and decide on the case under consideration. If the court decides in a chamber, statutory judges are all judges designated according to the work schedule to hear and decide in the senate. A party to the proceedings or a party to proceedings before a court sitting in a panel does not have the right to a pre-appointed Judge-Rapporteur. A judge designated pursuant to paragraph 4 shall also be a statutory judge.

(4) A change in the person of a statutory judge may be made only in accordance with the law and the work schedule.

Pursuant to Section 52(7) of the Courts Act, changes and amendments to the work schedule affecting judges and court clerks entrusted with proceedings and decision-making are made by the president of the court in the manner specified in the work schedule after they have been discussed in the Council of the Judiciary. After any change in the timetable, the president of the court is obliged to ensure that the full text of the timetable is drawn up. The full text of the timetable will be published by the president of the court in the same way as the timetable.

Pursuant to Section 45(7)(c) of the Courts Act, the Judicial Council discusses the draft schedule of the court's work and takes a position on it

Pursuant to Section 45(11) of the Act on Judges, the President of the Judicial Council shall ensure the publication of information on the activities of the Judicial Council in an appropriate manner, in particular the date of the Judicial Council meeting, the draft agenda, the resolutions of the Judicial Council and the minutes of the Judicial Council meeting. The president of the court is obliged to publish information on the activities of the council for the judiciary at the request of the president of the council for the judiciary.

95. In order to establish whether a particular judge qualifies for recognition as a 'lawful judge', it is necessary to show that (1) he or she fulfils the qualifications for judicial office, (2) he or she has been permanently or temporarily assigned to serve as a judge in a particular court, (3) he or she has been assigned to hear a particular case in accordance with the court's work schedule. The requirement to prove that a judge has been appointed to decide a particular case in accordance with the court's work schedule stems from the need to prevent the president of the court, who is also responsible for managing the court's activities in this regard. Its fulfilment is ensured by the creation of a work schedule in which judges are predetermined for each type of decision-making (agenda) so that a random selection of a judge is possible, while the law sets out the conditions for both the adoption of the work schedule for the relevant calendar year and its changes caused by the needs of ensuring the court's activities ([II.ÚS 560/2018](https://www.aspi.sk/products/lawText/4/4389345/1/JUD%253A/JUD3568747SK) of 30 May 2020).

96. In the present case, an infringement of the right to judicial protection within the meaning of [Article 46 of the Constitution was alleged](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/460/1992%20Zb.%2523%25C8l%5C.46)  on the ground that there had been a change in the composition of the panel, which is a statutory judge for the purposes of the proceedings, in the sense that by a change in the work schedule carried out under the competence of the President of the Regional Court, Amendment No. 5, discussed by the Judicial Council on 28 April 2017, the former member of the Senate, JUDr. complaint, where she was listed as JUDr. Otília Belová). It is not disputed that no minutes of the meeting of the Judicial Council of the Communist Party on this issue were made. It follows from the legislation laid down in the Courts Act that, in particular by drawing up the work schedule and its amendments, the president of the court ensures the management of the courts in the field of the administration of justice. The Judicial Council, as a body of judicial self-government, discusses the draft work schedule as well as the draft of its amendments and amendments. However, failure to discuss the work schedule, its amendments and amendments by the Judicial Council does not in itself automatically render them invalid/non-binding or illegal. The Court of Cassation does not dispute that the work schedule is of key importance for the exercise of the right to a lawful judge. On the other hand, no relevant reasons were raised in the proceedings capable of calling into question the lawfulness of the change of the member of the panel. Only on the basis of the failure to prepare and make available the minutes of the Judicial Council, which discussed the amendment to the work schedule No. 5, it is not possible to question the justification for the inclusion of JUDr. Belavá as a member of the panel competent to hear the case. Similarly, the Court of Cassation does not consider it justified to question the competence and competence of a judge who has become a member of the panel to study even extensive file material in an extremely short time and to participate in the decision-making in the case.

VII d)

97. The Court of Cassation does not consider the ground of cassation under [Section 440(1)(i) of the SASP](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/162/2015%20Z.z.%2523440.1.i) – failure to comply with the binding legal opinion of the appellate court by both the defendant and the administrative court to be justified. Of fundamental importance for that conclusion is the fact that the decision of the administrative court under review was based on an assessment of the consequences of proven abusive conduct in the exercise of claims under the Treaty with the Netherlands, which resulted in the imposition of a tax in the amount corresponding to the tax that the taxpayer should have paid in the event of distribution of dividends to the beneficial owners of income.

98. The defendant emphasised the fundamental importance of the part of the reasoning set out on page 38 of the written version of the judgment [2Sžf/76/2014,](https://www.aspi.sk/products/lawText/4/4389345/1/JUD%253A/JUD1548578SK)  starting with the second line above, where it was stated: 'As is apparent from the documents in the file, the applicant acted in accordance with the Treaty with the Netherlands and applied it correctly.

Finally, his procedure in 2003 was not questioned by the plaintiff's 51% shareholder, the National Property Fund of the Slovak Republic, which voted both for the transfer of shares from the original shareholders to SGH and for the payment of dividends for 2002 to this shareholder.

In the opinion of the appellate court, it was not possible to require the applicant, as a taxable person, to follow the procedure referred to by the defendant in the contested decision, that is to say, the taxation of dividends under the Treaty with Germany and the Treaty with France, on the ground that the 'beneficial owners of the income' had their registered office there. The obligation to examine the beneficial owners of income from dividends paid to the plaintiff in 2003 did not arise from any legally binding document, and it is clear from the file that the defendant deduced this only on the basis of the use of the Commentary to the OECD Model Tax Convention as the only interpretative rule for the interpretation of Article 10 of the Treaty with the Netherlands."

99. In the view of the Court of Cassation, in order to resolve the question of what in that judgment must be regarded as an 'express binding legal opinion', it is necessary to take into account the whole context of the reasoning, which dealt in detail with the question of the applicability of the relevant texts of the OECD Model Tax Convention and the Commentary thereto to the assessment of the correctness of the application of the Treaty with the Netherlands to the present case. This is evidenced by the follow-up text of the reasoning, which, starting from the fifth paragraph from the bottom on page 36 of the written version, the Court of Cassation states:

"From the above, it is clear that the revision of the OECD Model Tax Convention and its Commentaries in 2003 (the practice of the OECD itself until 2003 in assessing the abuse of bilateral double taxation treaties was rather formalistic), gave rise to many discussions about whether it is possible to make a decision, or rather an opinion, of a body of an international institution, to which the member states have not ceded legislative powers, in the interpretation of international treaties concluded between individual Member States, as a binding rule of interpretation.

In the present case, however, in the opinion of the appellate court, it is not only a question of assessing the binding nature of the rule of interpretation, but of assessing the question whether a non-binding Commentary, which "explains" certain provisions of the treaty and the terms used therein, can de facto generate a new concept that does not appear in the original international treaty by "interpretation".

It did not escape the attention of the appellate court that the new versions of the Articles of the OECD Model Tax Convention and the Commentaries thereto may apply to contracts concluded before this amendment, but only if two cumulative conditions are met. Not only will individual Member States not raise objections to the new wording, but the aim of changing the wording of the articles of the Model Agreement, resp. Commentary on it, must only be a clarification and not a change in the meaning of the provisions in question.

'In that regard, the question then arises as to whether an entity subject to the jurisdiction of a Contracting State may be required to act in accordance with a new rule thus created, which, moreover, was not known to it at the time when that conduct was required, since it was not available in any form in the official language.

In the opinion of the Court of Appeal, in countries where written law applies and state authorities can act only on the basis  [of the Constitution](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/460/1992%20Zb.), within its limits and to the extent and in the manner established by law, and the Slovak Republic is such without any doubt, decisions regarding changes in the content of international treaties and their effects cannot be transferred to an institution - the OECD and its Committee on Fiscal Affairs - without any doubt. The obstacle to such a transfer is constitutional principles and, in this case, specifically the protection of taxpayers' rights. While the OECD's activities in the fight against tax evasion and abuse of international treaties should be evaluated positively, it should also be remembered that: "... In the event that a non-legal norm is celebrated because it circumvents the obstacles involved in the creation of a legal norm, it must not be forgotten that many of these obstacles, however unpleasant they may seem to the particular decision-making body, have reasons in their own essence ..." (see Bothe, M., 'Legal and Non-legal Norms - A Meaningful Distinction in International Relations?', Netherlands Yearbook of International Law, Vol. 11 (1980), p. 93; and Snyder, F., 'Soft- law and Institutional Practice', EUI Working Paper, Law No. 93/5 (1993), p. 28.

It is necessary to bear in mind that the OECD Model Tax Convention and the Commentaries on it have not been published in the Collection of Laws of the Slovak Republic to date. And not only have they not been published in the Collection of Laws, but to this day they have not been published anywhere in the official language, either in full or in the original version with individual updates. It is clear from the above that the applicant did not have the Slovak version of the OECD Model Tax Convention and the Commentary thereon at his disposal in 2003.

On the other hand, in 2003, the applicant had at its disposal a Convention with the Netherlands which, in Article 10, laid down in a clear and intelligible manner the procedure for the taxation of dividends in a case such as the present one, that is to say, where the company making the distribution was established in Slovakia and the shareholder to whom the dividends were paid was undoubtedly established in the Netherlands. In the contested decision, the defendant itself pointed out that, when paying dividends to SGH, the applicant had applied the Agreement with the Netherlands, thereby assuming full responsibility for the correct application of that agreement. Depending on the circumstances of the case, the taxpayer must decide for himself whether to apply the refund system to the taxation of income accruing to a non-resident or to apply the double taxation treaty automatically and, if he applies a specific double taxation treaty, he assumes full responsibility for the correct application of this treaty.

As is apparent from the case file, the plaintiff proceeded in accordance with the Treaty with the Netherlands and applied it correctly. Finally, his procedure in 2003 was not questioned by the plaintiff's 51% shareholder, the National Property Fund of the Slovak Republic, which voted both for the transfer of shares from the original shareholders to SGH and for the payment of dividends for 2002 to this shareholder. In the view of the appellate court, it was not possible to require the applicant, as a taxable person, to follow the procedure referred to by the defendant in the contested decision, namely the taxation of dividends under the Treaty with Germany and the Treaty with France, on the ground that the 'beneficial owners of income' were established there. The obligation to examine the beneficial owners of income from dividends paid to the plaintiff in 2003 did not arise from any legally binding document, and it is clear from the case file that the defendant derived this only on the basis of the use of the Commentary to the OECD Model Tax Convention as the only interpretative rule for the interpretation of Article 10 of the Treaty with the Netherlands.

Moreover, it is not even possible to find out what wording of the Model Agreement and the Comments to it was applied by the defendant, as the Commentary itself has been updated several times and the interpretation of some terms has evolved over time. In these factual and legal circumstances, in the absence of the condition of publicity of the legal norm, the absence of sufficiently developed practice, the unavailability of the authentic wording of the OECD Model Tax Convention and the Commentaries in the official language, and the contradictory expert opinions on the binding nature of the rules of interpretation and their effect on existing bilateral international treaties, the taxpayer cannot be required, as a behaviour prescribed by the legal order, to follow and respect such rules of interpretation, unless they become part of the international treaty in question. It is also not fair to require him to behave according to a later practice that is not binding and, moreover, is contrary to the wording and definition of terms contained in an international treaty.

For the above reasons, the Supreme Court of the Slovak Republic upheld the plaintiff's appeal and, taking into account all the individual circumstances of the case, changed the judgment of the Regional Court in Bratislava pursuant to [Section 220](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/99/1963%20Zb.%2523220) of the Code of Civil Procedure , as the conditions for its confirmation ([Section 219](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/99/1963%20Zb.%2523219) of the Code of Civil Procedure) and its annulment ([Section 221 (1) of the Code of Civil Procedure](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/99/1963%20Zb.%2523221.1)) and the defendant's decision under [Section 250j (1) of the Code](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/99/1963%20Zb.%2523250j.1) of Civil Procedure were not met annulled and returned to the defendant for further proceedings, as it concluded that the defendant's decision and procedure within the limits of the lawsuit were not in accordance with the law.

In the new proceedings, the administrative body, bound by the legal opinion of the Supreme Court of the Slovak Republic, will first of all deal with the question of the applicability of the OECD Model Tax Convention and its Commentaries, as amended in 2003, to the plaintiff's conduct and will decide the case again."

100. In the present case, there is a clear contradiction between the parties as to what constitutes the content of the binding legal opinion expressed in the judgment [2Sžf/76/2013](https://www.aspi.sk/products/lawText/4/4389345/1/JUD%253A/JUD1820626SK), which bound the defendant in the new proceedings. With regard to the concept of a binding legal opinion, which is also applicable to the procedure under [Section 250ja (4) of the Code](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/99/1963%20Zb.%2523250ja.4) of Civil Procedure and similarly [Section 469 of the Code of Civil Procedure,](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/162/2015%20Z.z.%2523469)  it should be noted that in accordance with the case law, which, to the knowledge of the Court of Cassation, has not yet been overcome, not every legal assessment by a higher court expressed in the reasoning of the annulment decision can be considered a binding legal opinion, only the legal assessment is binding on the court of lower instance, which concerns the resolution of such a legal question as was the actual basis for the annulment of the original decision ([R 68/1971](https://www.aspi.sk/products/lawText/4/4389345/1/JUD%253A/JUD70059SK)). In the analogous application of the legislation of [Section 442 of the CCP](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/162/2015%20Z.z.%2523442) in conjunction with 383 and 384 [of the CCP, it](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/160/2015%20Z.z.)  is acceptable to disregard the legal opinion when changing the established facts (basis) of the case as a result of supplementing the evidence.

101. According to the commentary on [Article 262 of the Code of Civil Procedure](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/99/1963%20Zb.%2523262), ASPI 'The Court of Appeal must set out its legal opinion in the grounds of the decision. The binding nature of the first-instance court presupposes that the appellate court clearly explains and justifies its legal opinion on the case in the annulment decision. His instructions on the next steps must also be unambiguous. The legal opinion of the appellate court is binding whether it relates to legal issues (substantive law, procedural - procedure, defects) or to questions of facts, especially its completeness. In the event of a certain change in the facts on which the appellate court relied, the binding effect may not be applied in further proceedings, especially if it becomes necessary to apply other substantive legal regulations to the changed facts."

That commentary cites as relevant case-law:

[The Code of Civil Procedure](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/99/1963%20Zb.) does not have a provision that would make the court that expressed the original legal opinion binding, if the case becomes the subject of appeal proceedings again as a result of an appeal lodged against another decision. [R 68/1971](https://www.aspi.sk/products/lawText/4/4389345/1/JUD%253A/JUD70059SK) (p. 237)

If the court of appeal annuls the decision of the court of first instance and refers the case back for further proceedings and a new decision, it must duly explain in the grounds of its decision the legal opinion by which the court of first instance is to be bound.

Z IV (p. 62)

For the appellate court, it does not follow from [Section 226 of the Code of Civil Procedure](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/99/1963%20Zb.%2523226)

<aspi://module='aspi'&link='99/1963%20Zb.%2523P226'&ucin-k-dni='30.12.9999'> his own legal opinion. Thus, the appellate court may change its earlier binding legal opinion (e.g. also under the influence of a binding legal opinion of the Constitutional Court expressed in proceedings under [Article 127(1) of the Constitution](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/460/1992%20Zb.%2523%25C8l%5C.127.1) <aspi://module='aspi'&link='460/1992%20Zb.'&ucin-k-dni='30.12.9999'>). This is also confirmed by the court case law, according to which the appellate court does not act contrary to procedural regulations if it changes its previous legal opinion expressed in the case and confirms such a decision of the court of first instance by which it did not respect its previous legal opinion.

Although a change in the earlier legal opinion of the appellate court, which was binding on the court of first instance, is in principle undesirable, it cannot be considered inappropriate, especially with regard to the constitutional principle of judicial independence, which is generally bound only by law. A valid reason for a different legal opinion may be, among other things, the influence of the practice of lower courts by the case law of the Supreme Court or the Constitutional Court.

Judgment of the Constitutional Court of the Slovak Republic, file no. [III. ÚS 46/2013](https://www.aspi.sk/products/lawText/4/4389345/1/JUD%253A/JUD823631SK) <aspi://module='JUD'&link='[JUD823631SK](https://www.aspi.sk/products/lawText/4/4389345/1/JUD%253A/JUD823631SK)'&ucin-k-dni='30.12.9999'>.

102. In connection with the above, the Court of Cassation took into account that the Supreme Court of the Slovak Republic stated in the grounds of the judgment: The obligation to examine the beneficial owners of income from dividends paid to the plaintiff in 2003 did not arise from any legally binding document, and it is clear from the case file that the defendant deduced this only on the basis of the use of the Commentary to the OECD Model Tax Convention as the only interpretative rule for the interpretation of Article 10 of the Treaty with the Netherlands." (p. 38 para. 3. from the bottom of the judgment). At the same time, it stated in the next part: "In the new proceedings, the administrative body, bound by the legal opinion of the Supreme Court of the Slovak Republic, will first of all deal with the question of the applicability of the OECD Model Tax Convention and its Commentaries, as amended in 2003, to the plaintiff's conduct and will decide the case again." ( p 39 paragraph 2. from above )

103. The defendant has therefore abandoned the arguments pointing to the importance of the OECD Model Tax Convention and its Commentary on the Interpretation and Application of the Netherlands Agreement for assessing the fulfilment of the conditions for granting an exemption to a shareholder resident in the Netherlands. After supplementing the taking of evidence with the provision of an expert opinion referred to in paragraph 62 of the present judgment, there was a change in that the new decision of the defendant, assessing the same established facts, applied the doctrine of the prohibition of abusive conduct, the application and applicability of which was derived from the institutes and content of [the](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/157/1964%20Zb.) Vienna Convention on the law of contract in conjunction with the Treaty with the Netherlands . After the case was returned for further proceedings, the defendant therefore respected the legal opinion of the Supreme Court to the extent that it was clearly and sufficiently definitely, i.e. in the relationship between the OECD Model Tax Convention and the Commentary on it and the consequences of not proving their publicity on the assessment of the manner of application of the Treaty with the Netherlands.

104. According to the Court of Cassation, it would be illogical to consider as justified the argument that the legal opinion on the correctness of the application of the contract with the Netherlands expressed in [2Sžf/76/2013](https://www.aspi.sk/products/lawText/4/4389345/1/JUD%253A/JUD1820626SK) also covered the evaluation of the consequences of proven abusive conduct, which, at the time of the decision in Case [2Sžf/76/2013,](https://www.aspi.sk/products/lawText/4/4389345/1/JUD%253A/JUD1820626SK)  was not the legal basis for the defendant's arguments. The binding legal opinion in the judgment [2Sžf/76/2013](https://www.aspi.sk/products/lawText/4/4389345/1/JUD%253A/JUD1820626SK) was expressed only in relation to the scope of the pleas, the reasoning of the judgment and the facts that were assessed as relevant by the Supreme Court of the Slovak Republic.

VIII.

Conclusion.

105. The Court of Cassation assessed the scope and grounds of the appeal in the light of the judgment under appeal by the Regional Court in such a way that it did not consider them to be well founded and dismissed the appeal on a point of law.

106. The Court of Cassation ruled on the claim for reimbursement of the costs of the cassation proceedings by refusing to grant the successful defendant the right to reimbursement of the costs of the proceedings, since the statutory conditions for an award within the meaning  [of Article 467 of the CCA](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/162/2015%20Z.z.%2523467) in conjunction with [Article 168 of the CCA](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/162/2015%20Z.z.%2523168) were not met.

107. That decision was adopted by the Supreme Administrative Court of the Slovak Republic by a vote of 3:0. ([Section 463 of the Code of Civil Procedure](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/162/2015%20Z.z.%2523463) in conjunction with Section 463 of the Code of  [Civil Procedure).139 (4](https://www.aspi.sk/products/lawText/4/4389345/1/ASPI%253A/162/2015%20Z.z.%2523139.4)) of the SSP).

 **Edification:**

There is no appeal against that judgment.