## SLOVAK REPUBLIC

## RESOLUTION

## of the Constitutional Court of the Slovak Republic

# IV. ÚS 553/2024-20

The Constitutional Court of the Slovak Republic, in a panel composed of the President of the Senate Libor Duľa and Judges Ladislav Duditš (Judge-Rapporteur) and Rastislav Kaššák, in proceedings pursuant to [Article 127 of the Constitution of the Slovak Republic](https://www.aspi.sk/products/lawText/4/4604703/1/ASPI%253A/460/1992%20Zb.%2523%25C8l%5C.127) on the constitutional complaint of  **the applicant Slovenský plynárenský průmysl, a.s.**, Mlynské nivy 44/a, Bratislava, represented by Advocatur Gémeš, Filipová & Partner AG, Städtle 17, 9490 Vaduz, Principality of Liechtenstein, practising law through the organisational unit BOOM & SMART Slovakia, Dolná 6A, Banská Bystrica, against the judgment of the Supreme Administrative Court of the Slovak Republic file no. [8Sžfk/54/2017](https://www.aspi.sk/products/lawText/4/4604703/1/u%253AJUD%253A/) of 24 August 2023 as follows

**Decided:**

He rejects the constitutional complaint.

## Recital:

**I. Constitutional complaint of the complainant, factual context, course of administrative and administrative**

**Trial**

1. On 19 January 2024, the Constitutional Court received the applicant's constitutional complaint regarding the alleged violation of his fundamental right to judicial protection pursuant to [Article 46(1](https://www.aspi.sk/products/lawText/4/4604703/1/ASPI%253A/460/1992%20Zb.%2523%25C8l%5C.46.1)) and [Article 48(1) of the Constitution of the Slovak Republic](https://www.aspi.sk/products/lawText/4/4604703/1/ASPI%253A/460/1992%20Zb.%2523%25C8l%5C.48.1) (hereinafter referred to as the "Constitution"), [Article 36(1)](https://www.aspi.sk/products/lawText/4/4604703/1/ASPI%253A/23/1991%20Zb.%2523%25C8l%5C.36.1)  and [Article 38(1) of the Charter of Fundamental Rights and Freedoms](https://www.aspi.sk/products/lawText/4/4604703/1/ASPI%253A/23/1991%20Zb.%2523%25C8l%5C.38.1) and the right to a fair trial pursuant to [Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms](https://www.aspi.sk/products/lawText/4/4604703/1/ASPI%253A/209/1992%20Zb.%2523%25C8l%5C.6.1) (hereinafter referred to as the "Convention") by the judgment of the Supreme Administrative Court indicated in the header of this resolution. The complainant proposes to declare a violation of fundamental rights by the contested judgment, which he proposes to annul, and to refer the case back to the Supreme Administrative Court for further proceedings.

2. The following state of affairs emerges from the constitutional complaint and the contested decision annexed to the constitutional complaint by the applicants:

3. The Tax Office carried out a tax audit of the applicant's withholding income tax for the 2003 tax year, the result of which was drawn up by Protocol No 500/323/1491/10/Reh of 22 January 2010, on the basis of which the tax authority issued on 12 March 2010 an additional tax assessment No 500/230/6159/10/Bri ('the additional tax assessment'), by which it assessed the applicant 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 a total tax differential assessed in the amount of SKK 465 000 713, consisting of the sums of SKK 464 988 403 in respect of the difference found in respect of withholding tax on dividends (subject matter of the present proceedings) and SKK 12 310 in respect of the difference in tax found in connection with the taxation of royalties.

4. With regard to the withholding tax on dividends, the following findings were taken into account in the decision: On the basis of Decision No 262 of the Government of the Slovak Republic of 14 March 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, a contract for the purchase and sale of shares No 2140/2002 of 18 March 2002 was concluded and both purchasers became shareholders with 24.5% of the shares. On 20 December 2002, there was a change in the structure of the complainant'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 complainant. On 10 February 2003, those subsidiaries set up, under Netherlands law, Slovak Gas Holding B.V. ('SGH'), a company established in the Netherlands with a share capital of EUR 18 000, each of the partners making a basic contribution of EUR 9 000 and subsequently acquiring a 50% share. On 11 February 2003, Ruhrgas Mittel – und Osteuropa GmbH and G.D.F Investissement 2 SA applied to the complainant's Board of Directors for approval of the transfer of the complainant's shareholdings to SGH. At the extraordinary general meeting of the complainant held on 21 March 2003 (notarial deed No. NZ 21271/2003), the transfer of the complainant's shares was approved and on 29 May 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.

5. At the annual general meeting of the complainant held on 16 June 2003 (notarial deed No NZ 48034/2003), it was decided to distribute the dividends to the shareholders for the year 2002. The dividends to be paid amounted to SKK 7,591,647,939.55, of which 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 a 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 its amount by the shareholders Ruhrgas Mittel – und Osteuropa GmbH and G.D.F. Investissement 2 SA and at the same time it was paid up by both shareholders.

6. From the amount of dividends paid to SGH, the complainant did not withhold or remit the withholding income tax, but automatically applied 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 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/4/4604703/1/ASPI%253A/138/1974%20Zb.) ('the Netherlands Agreement'). It did not tax dividends flowing to SGH with reference to Article 10(3) of the said agreement.

7. SGH received dividends in the amount of EUR 87 954 446.46 into its account on 25 June 2003. On 28 July 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 1 August 2003). On 28 November 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 would be paid advances on dividends from 2003 to 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 offsetting of receivables and liabilities took place on the maturity date of the loan, i.e. by 30 November 2003.

8. The decision of the tax authorities in so far as it relates to the non-payment of withholding tax on income from the amount of dividends paid to a shareholder of SGH was based, inter alia, on the conclusion that there was no clear economic justification for the contribution of shares to a newly established holding company in the Netherlands and that SGH was established primarily for tax purposes. The tax administrator emphasized that the dividends paid to shareholders through SGH actually "flowed" through loans provided 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 the 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 already described, because 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.

9. In view of the conclusion that SGH erred in its assessment as a resident of the Kingdom of the Netherlands and that it failed to withhold and withhold income tax paid to the German and French shareholders (the actual beneficiaries), the tax authorities assessed, in accordance with Article 10 of the Double Taxation Convention with Germany, 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 278 993 042 and to the French shareholder G.D.F. In accordance with Article 10 of the Double Taxation Treaty with France, the tax authorities assessed a withholding tax corresponding to SKK 185 995 361 on dividends paid in the same amount.

10. The Tax Directorate of the Slovak Republic decided on the complainant's appeal against the additional tax assessment filed in the part relating to the withholding tax on dividends paid to SGH by decision of 28 June 2010 ('the decision of the Tax Directorate'), by which it upheld the tax administrator's additional tax assessment in its entirety, that is to say, in the scope of the assessment of the difference in income tax levied by withholding tax for the 2003 tax year 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.

11. The complainant challenged the decision of the Tax Directorate by an administrative action before the Regional Court in Bratislava, which dismissed the action by judgment No. k. [4S/233/2010-496](https://www.aspi.sk/products/lawText/4/4604703/1/u%253AJUD%253A/) of 27 January 2012.

12. The Supreme Court of the Slovak Republic, as an appellate court, decided on the applicant's appeal against the judgment by a resolution No. [2Sžf/18/2013](https://www.aspi.sk/products/lawText/4/4604703/1/u%253AJUD%253A/) of 23 October 2012 (hereinafter referred to as the "first decision of the Supreme Court"), by which it quashed the contested judgment and referred the case back to the Regional Court for further proceedings with a binding legal opinion ordering the Regional Court to deal in particular with the question of the applicability of the OECD Model Tax Convention and its Commentaries in the version in force in 2003 to the applicant's proceedings.

13. The Regional Court, in its judgment No. k. [4S/233/2010-766](https://www.aspi.sk/products/lawText/4/4604703/1/u%253AJUD%253A/) of 28 March 2014 ('the second judgment of the regional court'), dismissed the action. Proceeding in accordance with the intentions of the first decision of the Supreme Court, it referred to [Article 5(b) of the OECD Convention](https://www.aspi.sk/products/lawText/4/4604703/1/ASPI%253A/209/1992%20Zb.%2523%25C8l%5C.5.0.b) published in the Collection of Laws of the Slovak Republic by the notification of the Ministry of Foreign Affairs of the Slovak Republic under No. [141/2001 Coll.](https://www.aspi.sk/products/lawText/4/4604703/1/ASPI%253A/141/2001%20Z.z.), according to which the organisation can make recommendations to members. This article is also referred to in the 1997 OECD Council Recommendation published together with updates to the Model Contract. Referring to paragraph 13 of the introduction to the Model Tax Convention, it 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 essentially relied on the OECD Model Tax Convention when concluding a double taxation treaty with the Netherlands.

14. After the plaintiff's appeal, the case was again decided by the Supreme Court, which in its judgment No. [2Sžf/76/2014](https://www.aspi.sk/products/lawText/4/4604703/1/JUD%253A/JUD1548578SK) of 15 April 2015 ('the second decision of the Supreme Court') amended the second 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 the verdict by the fact that the Regional Court did not deal with the issue of the binding nature of the OECD Model Tax Convention and comments on it due to the fact that it has never been officially published in the Collection of Laws of the Slovak Republic. The Supreme Court stated that the conclusion of the Regional Court on the application  [of Article 10(3) of the treaty with the Netherlands](https://www.aspi.sk/products/lawText/4/4604703/1/ASPI%253A/138/1974%20Zb.%2523%25C8l%5C.10.3) only in the case when 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. 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 valid for the complainant's conduct and to decide the matter again.

15. By the contested Decision No 1799721/2015 of 21 December 2015, the Financial Directorate of the Slovak Republic reaffirmed the first-instance decision issued by the tax administrator on 12 March 2010 and, in assessing the established facts, complied with the legally binding opinion of the Supreme Court precluding the decision from being based on the conclusion that it had not been proved that the Netherlands company was the beneficial owner of the income within the meaning on which the defendant's arguments referring to the wording applied by him were based OECD Model Contract with a commentary on the [Vienna Convention on the](https://www.aspi.sk/products/lawText/4/4604703/1/ASPI%253A/157/1964%20Zb.) Law of Treaties. In its new decision-making, the Financial Directorate primarily focused on the importance of the conclusions that there was demonstrably a purposeful creation of legal acts, i.e. also the establishment of SGH with the intention of abusing the relevant treaty on the avoidance of double taxation and tax evasion in Slovakia, on the basis of which it concluded that SGH is not entitled to draw benefits from the agreement with the Netherlands with regard to income, which actually belongs to its founders.

16. The complainant challenged the decision of the Financial Directorate by an administrative action of 24 February 2016, in which he argued that his conduct was in accordance with the treaty with the Netherlands, referred to the legal opinion expressed in the second decision of the Supreme Court and objected, inter alia, that the tax authorities had failed to comply with the binding legal opinion of the Supreme Court and that the defendant's legal opinion on the application of the OECD Model Tax Convention was incorrect.

17. In the administrative proceedings, the Tax Directorate argued that, in assessing the case, it had found a serious abuse of national tax legislation as well as of the relevant double taxation conventions. The abuse of these regulations occurred through legal acts that have no economic justification and which result in purposeful circumvention of tax liability. The essence of these legal acts is a group of closely interconnected special-purpose transactions. According to the Financial Directorate, the primary question in this case was 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 treaty on the avoidance of double taxation and reduction of tax liability in Slovakia. It further stated that it was clear that the actual performance of functions related to a massive investment in the scope of its management, control and also evaluation took place mainly at the headquarters of the real investors (in the companies of the German and French shareholder) and therefore it was necessary to allocate the income in question in the form of dividends, which are the actual reward for the risks they took with regard to the implementation of the investment in the form of privatization of the taxpayer. It also emphasised that the determination of the tax liability did not take into account legal acts which were intended not to tax the remuneration of investors in the form of dividends in the Slovak Republic, and that this was to be achieved by redirecting the dividends "at the last minute" and "overflowing" them through a letterbox holding company in the Netherlands.

18. The Finance Directorate 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 domiciled or established in one or both States and income in the other or both Contracting States. Another purpose of the Convention is to prevent tax evasion in the field of taxes on income and capital, or to prevent tax fraud or tax evasion. 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 laid down in [Article 10(3) of the Treaty with the Netherlands](https://www.aspi.sk/products/lawText/4/4604703/1/ASPI%253A/138/1974%20Zb.%2523%25C8l%5C.10.3) , 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. It is clear from this that, in the present case, the exemption under [Article 10(3) of the Treaty with the Netherlands](https://www.aspi.sk/products/lawText/4/4604703/1/ASPI%253A/138/1974%20Zb.%2523%25C8l%5C.10.3) was unjustified, since SGH had only its formal registered office in the Netherlands, but not its place of management.

19. According to the Financial Directorate, SGH is represented by a formal registered office declared at a specific address in the Netherlands, which lacks the content – the actual exercise of management functions characteristic of holding companies. It was an "imitation" by means of which investors from Germany and France tried to create an impression of the real existence of SGH in a third jurisdiction (the Netherlands), but it was only a "shell company" and the real and full presence of the decision-making body was elsewhere (Slovakia, France, Germany). In conclusion, the Financial Directorate stated that the contested decision was not based on the OECD Model Tax Convention and the commentary on it, which were mentioned in the decision only to illustrate the overall understanding of the case.

20. The Regional Court decided on the new administrative action by judgment No. k. [6S/34/2016-270](https://www.aspi.sk/products/lawText/4/4604703/1/JUD%253A/JUD2496230SK) of 3 May 2017 ('the third judgment of the regional court'), by which it dismissed the action. In the grounds of the judgment, it stated that the fundamental factual finding of the administrative authority is a sufficiently substantiated 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 contract with the Netherlands, namely through a shell company in the jurisdiction of the Netherlands to which the shares were transferred. This conclusion was based on the following:

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

- as a result of the transfer, there was no change regarding the more efficient management of SPP a.s., 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. were possible in their entirety without change even before the transfer of the shares to the Dutch company;

- the original shareholders and the new Netherlands 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, had no personnel or material capacities (the administration of the company was provided by the original shareholders);

- the 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 the companies concerned 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;

- in a Dutch company, management 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 tax), the entire amount of dividends was paid proportionately to the original shareholders within 36 days; in the transfer order, the payments were even explicitly marked as dividends from SPP a.s. for the original shareholders;

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

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

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

21. The Regional Court found that the applicant had not disputed or challenged the above factual conclusions in the application. The pleas in law are based on a reference and argumentation by the second decision of the Supreme Court, on the basis of which the applicant considered that the administrative authority had not respected the binding legal opinion stated therein, while the essence of the judgment was the legal opinion that the provisions of the contract with the Netherlands (the question of examining not only the registered office of the shareholder under Article 10 of the Act, but also the persons of the beneficial owner of dividends) cannot be interpreted using the Commentary to the OECD Model Tax Convention, which is not a relevant source of law and at the same time the prerequisites for the application of the rules of interpretation under [the Vienna Convention are not met](https://www.aspi.sk/products/lawText/4/4604703/1/ASPI%253A/157/1964%20Zb.), as the provision of the treaty with the Netherlands is clear in this regard when the non-taxation of dividends is linked to the concept of the company's registered office. On this basis, the Supreme Court built a legal opinion by which the administrative authority was bound that the complainant, as a taxpayer, could not be required to examine the question of the beneficial owner of dividends and to proceed according to the contracts with France and Germany. He emphasized that the complainant did not put forward any other arguments in the complaint.

22. The Regional Court stated that the essence of the case in the case stemmed from circumstances other than those dealt with by the reasoning of the second decision of the Supreme Court, since the Financial Directorate based the new decision in the case on a different legal assessment. The fact that the beneficial owner of the dividends was established was perceived only as a secondary issue to the substantive assessment of those acts, which were primarily assessed as abusive tax acts and were therefore not taken 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 complainant as a taxpayer 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.

23. With regard to the question of the misuse of double taxation treaties and the directly related question of determining the beneficial owner, the Regional Court emphasised that a taxable person should not obtain the benefits arising from them when the main purpose of his entry into a particular transaction or legal structure would be to secure a more favourable tax position, the acquisition of which is contrary to the objective of double taxation treaties. The conclusion that the undue use of the benefits of double taxation treaties can be penalised on the basis of the general concept of the prohibition of abuse of tax law and, as a consequence, not to grant those advantages is of great importance in the context of the legal order. In most cases, the acts carried out are not contrary to the law, but in their result they lead to an objective that was not intended by the legislation, in this case double taxation treaties. In such a case, the concept of abuse of tax law constitutes an effective tool for punishing such conduct.

24. The Regional Court assessed as unfounded the objection of non-compliance with the binding legal opinion in the decision-making of the administrative authorities, since the legal opinion is binding only in relation to the legal issue on which it was formulated and duly substantiated, while in the present case the administrative authority did not deviate from the binding legal opinion expressed in the second decision of the Supreme Court, which was based on the assessment of the question of the applicability of the interpretative Commentary to the OECD Model Tax Convention. In the new decision, which is the subject of judicial review, the administrative authority respected this conclusion, did not consider the comment to be a source of law and applied the contract with the Netherlands. In the second decision, the Supreme Court did not express a binding legal opinion on the application of the institute of abuse of law, therefore the court was not bound by a cassation-binding legal opinion when assessing the abusive conduct.

25. The applicant lodged a cassation appeal against the third judgment of the Regional Court, in which he raised the following objections to cassation:

- the judgment is based on an error of law in that it did not apply to the established facts the correct rule of law, which is [Article 10(3) of the Treaty with the Netherlands](https://www.aspi.sk/products/lawText/4/4604703/1/ASPI%253A/138/1974%20Zb.%2523%25C8l%5C.10.3);

- the justification for the application  [of Section 3 (6) of the Tax Code](https://www.aspi.sk/products/lawText/4/4604703/1/ASPI%253A/563/2009%20Z.z.%25233.6) by the Regional Court is doubtful, stating that the GAAR clause was not part of the legal order and the presence of the concept of prohibition of abuse of public subjective rights claimed by the Regional Court was not supported by any case law;

- there has been a violation of the right to a fair trial, as the administrative court did not deal with all relevant facts in the proceedings and at the same time violated the right to a proper reasoning of the decision;

- the Regional Court did not respect the binding legal opinion expressed in the second decision of the Supreme Court, the complainant did not agree with the conclusion of the Regional Court that the contested decision of the Financial Directorate did not deviate from the binding legal opinion of the Supreme Court, which was based on resolving the issue of the applicability of the interpretative commentary of the Model Tax Convention to the OECD, and the decision of the Financial Directorate was based on the assessment of abuse of tax law.

**II. Starting points and basis of the Supreme Administrative Court's argumentation**

26. A tax inspection found that the contract with the Netherlands had been unlawfully applied in the light of abusive practices resulting in the payment of dividends to an economic operator which did not meet the definition requirements of the contract with the Netherlands not only in the literal sense, but resulting from an interpretation of the purpose of the contract in accordance with the rules of interpretation enshrined in [Articles 30](https://www.aspi.sk/products/lawText/4/4604703/1/ASPI%253A/157/1964%20Zb.%2523%25C8l%5C.30) and [31 of the](https://www.aspi.sk/products/lawText/4/4604703/1/ASPI%253A/157/1964%20Zb.%2523%25C8l%5C.31) Vienna Convention on the law of contracts. The tax authorities therefore applied the international double taxation conventions applicable to the beneficial owners of the dividends who are tax residents of Germany and France and, in accordance with those conventions, assessed the withholding tax applicable to the dividend paid to the German owner Ruhrgas Mittel – und Osteuropa GmbH (Article 10(2)(b) of the convention with Germany) at 15% of the gross amount of the dividends and the withholding tax applicable to the dividend paid to the French owner GDF Investissements 2 SA (Article 10(2) of the Treaty with France) to the extent of 10% of the gross amount of the dividends.

27. According to the Supreme Administrative Court, there was an abusive practice, the creation of a company without economic justification as a tax resident of the Netherlands, which resulted in the avoidance of tax liability by the French and German shareholders. The basic starting point of the argumentation was that in view of the described course and content of the acts and in particular the participation of the complainant (through the actions of persons in the management structures of the complainant and its shareholders and their knowledge of the circumstances and conditions of individual changes of ownership) in individual acts related to the change of the shareholder structure of the complainant, it considers it obvious that this is a purposeful and abusive change of jurisdiction for the purpose of tax avoidance.

28. In that regard, the appeal on a point of law focused on the question whether, in 2003, there was a general principle of prohibition of abuse of tax law, whether on the basis of doctrine or case-law, which could be applied to an international agreement with the Netherlands.

29. In the case, doc. JUDr. PhDr. Miroslav Slašťan, PhD., prepared an expert opinion entitled *"Taxation of dividends under Article 10 of 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 of 1974 and the Manner of Interpretation of this Convention"*, from which it has emerged that, in accordance with the case-law of the International Court of Justice and the Court of Justice of the European Union ('the Court of Justice'), the rules of interpretation contained in [Articles 31 to 33 of the Vienna Convention on the](https://www.aspi.sk/products/lawText/4/4604703/1/ASPI%253A/157/1964%20Zb.%2523%25C8l%5C.31-%25C8l%5C.33) Law of Treaties are a codified international custom which is fully applicable even to contracts which do not fall within the temporal scope  [of the Vienna Convention](https://www.aspi.sk/products/lawText/4/4604703/1/ASPI%253A/157/1964%20Zb.) on the Law of Treaties within the meaning of Article 4 thereof, or contracts concluded by non-contracting parties  [to the Vienna Convention on the](https://www.aspi.sk/products/lawText/4/4604703/1/ASPI%253A/157/1964%20Zb.) Law of Treaties. The rules of interpretation enshrined in [Articles 31 to 33 of the Vienna Convention](https://www.aspi.sk/products/lawText/4/4604703/1/ASPI%253A/157/1964%20Zb.%2523%25C8l%5C.31-%25C8l%5C.33) on the Law of Treaties are also applicable as customary international rules to the interpretation of a treaty with the Netherlands. In accordance with [Article 31(1) of the Vienna Convention on the Law of Treaties, this must be](https://www.aspi.sk/products/lawText/4/4604703/1/ASPI%253A/157/1964%20Zb.%2523%25C8l%5C.31.1)  interpreted with regard to the subject matter and purpose of the contract. 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. The clear subject matter and purpose of the agreement with the Netherlands is, among other things, according to the title, preamble and subject matter of the treaty, to prevent tax evasion, or to prevent tax fraud and tax evasion.

30. The Supreme Administrative Court concluded that [Article 4(1) of the Treaty with the Netherlands](https://www.aspi.sk/products/lawText/4/4604703/1/ASPI%253A/138/1974%20Zb.%2523%25C8l%5C.4.1) 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 as meaning the place from which the actual exercise of managerial functions with all real economic consequences is exercised. 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 taxation 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 foreign owners; is logically contrary to the purpose of the treaty as it follows from its very name.

31. The concept of abusive conduct has been defined by the Supreme Administrative Court, in accordance with legal literature, as the avoidance of tax liability on the basis of cross-border and speculative construction of a stylised structure of relations and arrangements between companies of different Member States without achieving an economic effect, taking advantage of the different parallel operation of tax regimes of different States for the purpose of achieving double non-taxation (DURAČINSKÁ, M., DURAČINSKÁ, J. Abuse of tax law from the perspective of EU law. In: *The Impact of Inaccuracies in Legal Definitions and Legal Regulation on Law Enforcement. Proceedings of the international scientific conference Bratislava Legal Forum 2015.*). Abuse of tax law is characterized by the fact that tax avoidance occurs formally within the limits of the law, but contrary to the spirit of the law.

32. According to the Supreme Administrative Court, the principle of the prohibition of abusive practices, or its applicability for the purposes of tax law, could be inferred from the principles of the functioning of the rule of law and judicial practice which recognises the existence and possibility of applying the principle of the prohibition of abuse of law even if it is not explicitly enshrined in the legal order (e.g. judgment of the Supreme Administrative Court of the Czech Republic, file no. 1 Afs 107/2004 of 10 November 2005, judgment of the Supreme Administrative Court of the Czech Republic, file no. 1 Afs 61/2015 of 10 November 2015).

33. According to the Supreme Administrative Court, the doctrine of the prohibition of abuse of rights exists and has existed irrespective of its reference in decision-making practice and professional literature, since the role of the court cannot be simplified to the conclusion that, in the absence of a well-established doctrine of abuse of rights, conduct fulfilling its conceptual characteristics cannot be penalized. However, later legal doctrine and practice confirmed the existence of a prohibition of abuse of law.

34. Following the objection of disregard for the earlier binding legal opinion of the Supreme Court, the Supreme Administrative Court took into account the fact that the Supreme Court stated in the grounds of the second decision: *"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*](https://www.aspi.sk/products/lawText/4/4604703/1/ASPI%253A/138/1974%20Zb.%2523%25C8l%5C.10)*.'* (p. 38(3) 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 again in the case."* (p. 39 para. 2).

35. Since the Financial Directorate and the Regional Court have abandoned the arguments pointing to the importance of the OECD Model Tax Convention and its Commentary on the interpretation and application of the Agreement with the Netherlands and on the assessment of the fulfilment of the conditions for granting a tax exemption to a shareholder residing in the Netherlands, after supplementing the evidence with an expert opinion by doc. JUDr. PhDr. Miroslav Slašťan, PhD., there was a change in the that the new decision of the Financial Directorate, assessing the same established facts, applied the doctrine of the prohibition of abusive conduct, the application and applicability of which were derived from the institutes and content  [of the Vienna Convention on the Law of](https://www.aspi.sk/products/lawText/4/4604703/1/ASPI%253A/157/1964%20Zb.)  Treaties in conjunction with the Treaty with the Netherlands. After returning the case for further proceedings, the Financial Directorate therefore respected the legal opinion of the Supreme Court to the extent that it was expressed unambiguously and with sufficient certainty, i.e. in the relationship between the OECD Model Tax Convention and the Commentary thereon and the consequences of the failure to prove their publicity on the assessment of the method of application of the agreement with the Netherlands.

36. The Supreme Administrative Court concluded that 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 the second decision of the Supreme Court also covered the evaluation of the consequences of proven abusive conduct, which, at the time of the Supreme Court's decision, was not the legal basis for the arguments of the Financial Directorate.

**III. The complainant's arguments**

37. In relation to the contested judgment of the Supreme Administrative Court, the applicant put forward the following constitutionally relevant arguments:

(a) the Supreme Administrative Court applied an incorrect rule of law to the taxation of dividends, namely the incorrect wording of the preamble to the treaty with the Netherlands on which it based its decision (retroactive application of the preamble);

(b) the Supreme Administrative Court has infringed the right to a fair trial by departing from the previous decision of the Supreme Court in the case before it without referring the case to the Grand Chamber;

(c) the Supreme Administrative Court bases its reasoning on the argument that the facts of the case are legally regarded as abusive conduct which cannot benefit from protection, on account of the presence of 'actual dividend recipients' who are not established in the Netherlands. The complainant disagrees with this legal assessment and in this context sees a violation of his right guaranteed by [Article 46(1) of the Constitution](https://www.aspi.sk/products/lawText/4/4604703/1/ASPI%253A/460/1992%20Zb.%2523%25C8l%5C.46.1)  primarily in the absence of a distinction between the temporal significance of case law and legal doctrine, as a result of which the Supreme Administrative Court resorts to the retroactivity of the legal basis applied by it. It is therefore contrary to the rule of law for the facts of a case set in 2003 to be legally assessed on the basis of legal doctrine or case-law that arose several years later. Contrary to the above, the Supreme Administrative Court seeks the justification of its opinion in case law that does not fall on the relevant period, similarly in professional publications that were published decades later (retroactive application of case law).

**IV. Preliminary hearing of the constitutional complaint**

38. Under [Article 56(2)(g) of Law No 314/2018 Coll.](https://www.aspi.sk/products/lawText/4/4604703/1/ASPI%253A/314/2018%20Z.z.%252356.2.g) on the Constitutional Court of the Slovak Republic and on the Amendment of Certain Acts, as amended (hereinafter referred to as the "Act on the Constitutional Court"), the Constitutional Court may also reject a proposal under [Article 127 of the Constitution](https://www.aspi.sk/products/lawText/4/4604703/1/ASPI%253A/460/1992%20Zb.%2523%25C8l%5C.127) at a preliminary hearing that is manifestly unfounded. According to settled case-law, a constitutional complaint in which the Constitutional Court has not found any possibility of violation of a designated fundamental right or freedom, the reality of which it could assess after its admission for further proceedings (e.g. [I. ÚS 391/2019](https://www.aspi.sk/products/lawText/4/4604703/1/JUD%253A/JUD3325157SK), [I. ÚS 403/2019](https://www.aspi.sk/products/lawText/4/4604703/1/JUD%253A/JUD3350689SK), [I. ÚS 418/2019](https://www.aspi.sk/products/lawText/4/4604703/1/JUD%253A/JUD3350684SK), [II. ÚS 69/2021](https://www.aspi.sk/products/lawText/4/4604703/1/JUD%253A/JUD3759696SK)).

39. In ruling on constitutional complaints against decisions of the ordinary courts, the Curtea Constituțională (Constitutional Court) takes into account its position as an independent judicial body for the protection of constitutionality, which is distinct from that of the ordinary court exercising jurisdiction under the procedural legal system, whose task is to review the decision of a lower court and, where procedural law so permits, to rectify the facts established and/or the subsequent legal conclusion. The Constitutional Court therefore examined the contested decision solely from the point of view of compliance with procedural safeguards and its compatibility with the articles [of the Constitution](https://www.aspi.sk/products/lawText/4/4604703/1/ASPI%253A/460/1992%20Zb.) and the Convention alleged to have been violated. In doing so, it confronted the contested decisions with the complainant's arguments, bearing in mind that the decision of the public authority does not have to be identical to the expectations and ideas of the party to the proceedings, but from the point of view of reasoning, it must meet the parameters of a legal decision, while it must provide the party with an answer to the essential questions and objections questioning the conclusions of the contested decision in a serious and influencing context of the decision itself.

40. The essence of deciding on complaints under [Article 127(1) of the Constitution](https://www.aspi.sk/products/lawText/4/4604703/1/ASPI%253A/460/1992%20Zb.%2523%25C8l%5C.127.1) is to assess the constitutional acceptability of the contested decision of the general court or other public authority, and not to assess its legal perfection or its possible "improvement" (m. m. [IV. ÚS 325/08](https://www.aspi.sk/products/lawText/4/4604703/1/JUD%253A/JUD55829SK), [IV. ÚS 218/2010](https://www.aspi.sk/products/lawText/4/4604703/1/JUD%253A/JUD54104SK)). The mission of the Constitutional Court is not to control judicial activity in all directions and aspects and to examine any possible illegality or procedural error, or even obvious incorrectness, which may occur in individual proceedings before ordinary courts, but exclusively to assess the conformity of the act of applying the law (in the case under consideration, the court decision) with the Constitution or the international treaty for the protection of human rights and freedoms. The Constitutional Court does not constitute a corrective instance of the ordinary courts and therefore in principle cannot intervene in substance in those decisions in which the ordinary courts have complied with the requirements arising from the content of the fundamental rights laid down in Section 7 of the Second Title of the [Constitution](https://www.aspi.sk/products/lawText/4/4604703/1/ASPI%253A/460/1992%20Zb.) ([Articles 46 to 50 of the Constitution](https://www.aspi.sk/products/lawText/4/4604703/1/ASPI%253A/460/1992%20Zb.%2523%25C8l%5C.46-%25C8l%5C.50)). Even if the Constitutional Court does not agree with the interpretation and application of legal regulations by ordinary courts in some respects, it is entitled to replace the contested legal opinion of the general court with its own decision only if it is arbitrary, manifestly unjustified, or constitutionally non-conforming.

41. Nor is it for the Constitutional Court to examine which of the several interpretative alternatives that can be considered is correct, since its mission is limited exclusively to assessing the constitutional sustainability of the contested decision through the prism of assessing the violation of a fundamental right and freedom, i.e. whether the decision does not show signs of arbitrariness, arbitrariness and whether it is duly reasoned. The interpretation of laws is the primary competence of the ordinary courts. If the interpretation adopted by the ordinary court in the case can be regarded as constitutionally compliant, the Constitutional Court has no reason to intervene in that interpretation. The role of the Constitutional Court is not to represent the ordinary courts, which are primarily responsible for the interpretation and application of laws.

42. The Constitutional Court also relied on the above considerations when examining the possible interference with the applicant's fundamental rights by the contested judgment of the Supreme Administrative Court, in the light of his objections, since he is bound by the scope and grounds of the constitutional complaint ([Article 45 of the Law on the Constitutional Court](https://www.aspi.sk/products/lawText/4/4604703/1/ASPI%253A/314/2018%20Z.z.%252345)).

43. The Constitutional Court has already stated at this point that it considers the legal conclusions set out in the grounds of the judgment of the Supreme Administrative Court to be sufficient and convincing in the context of the applicant's objections and, on the contrary, not in any way arbitrary or manifestly unjustified. This opinion of the Constitutional Court is supported by more detailed argumentation in the next part of this resolution. The Supreme Administrative Court responded in a standard and constitutionally acceptable manner to the cassation objections raised by the complainant, justifying its conclusion on the rejection of the cassation complaint in a comprehensible and adequate manner. The legal conclusions of the Supreme Administrative Court do not show signs of arbitrariness or arbitrariness. The fact that the applicant does not agree with their conclusions and has a different opinion on the matter cannot in itself lead to the conclusion that the contested decision is arbitrary, nor does it establish the right of the Constitutional Court to substitute its own legal opinion for that of the General Court.

44. In particular, the Constitutional Court points out that it considers the central legal conclusion that even for the purposes of the application of Article 10(3) of the Treaty with the Netherlands (even in the version in force at the material time), the concept  *of 'person established in another State' must be* interpreted in conjunction with Article 4(1) thereof, is not constitutionally contradictory. The term *"place of management or any other criterion of a similar nature" used here is*  to be interpreted in the case of a legal person as the place from which the actual exercise of management functions with all real economic consequences is realized. Restriction of the concept of *'legal person established in one of the two States and which is subject to taxation under the laws of that State 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 is apparent from its very name, which is not only to prevent double taxation but also to prevent tax evasion. Given that the condition under Article 4(1) of the agreement with the Netherlands for the entitlement to tax exemption (the requirement to prove the actual recipient contained in the interpretation) was not met, Article 4(1) was applied in such a way that the condition establishing the right to tax exemption for a tax recipient with a (formal) registered office in the Netherlands was not established. In this respect, the Constitutional Court does not consider the opinion of the Supreme Administrative Court to be arbitrary.

45. The Constitutional Court goes on to add, in general terms, that the concept of abuse of tax law (which will be discussed in more detail in the next part of the reasoning) serves to eliminate the legal effects of an act that is outwardly consistent with positive law, but in its consequences negates its meaning and purpose. In the case under consideration, the right (positive law and the subjective entitlement resulting from it) is abused by a complete substantive denial of its purpose, since the double taxation treaty is not only intended to prevent the tax from being paid twice in the context in question, but also not from being paid at all. Legal acts performed in their previously described content and sequence obviously without any further economic or other pragmatic significance apart from the right and only "zeroing" of the tax liability by transferring the formal registered office of the company to a third state can also be qualified from the point of view of the Constitutional Court as abusive to the meaning of the international treaty institute on which they relied.

46. In providing judicial protection, the Supreme Administrative Court may not approve conduct that constitutes an abuse of rights, even taking into account one of the fundamental principles of administrative judicial procedure, which is formulated as an order not to exceptionally provide protection to the rights or interests protected by law of a natural person and a legal person, if the application submitted by them pursues a manifest abuse of rights ([Article 5(12) of the Code](https://www.aspi.sk/products/lawText/4/4604703/1/ASPI%253A/162/2015%20Z.z.%25235.12) of Administrative Procedure). In other words, a right or a legally protected interest will remain unprotected by the court if there is a manifest abuse of rights in conjunction with exceptional circumstances. Such cumulation occurred by the designated abusive conduct of establishing a legal entity only for the purpose of non-taxation of dividends, while the exceptional circumstances of the case are given by the nature of the controlled entity of exceptional economic importance (which is also reflected in the competence of the tax office) and the negative value aspect of the fact that the abuse of tax law to the detriment of the state occurred by a company with a majority ownership interest of the state.

47. In view of the immediate applicability of that procedural concept, the intertemporal element in which it would be necessary to assess the relationship between the time of the abuse of rights and the time of the adjudication is irrelevant. At the same time, it can be added that manifest abuse of rights does not enjoy judicial protection even in the private law area, i.e. in proceedings under [the Code of Civil Procedure](https://www.aspi.sk/products/lawText/4/4604703/1/ASPI%253A/160/2015%20Z.z.) (Article 5), or before its entry into force in proceedings under [the Code of Civil Procedure](https://www.aspi.sk/products/lawText/4/4604703/1/ASPI%253A/99/1963%20Zb.) (Section 2). These conclusions also eliminate a possible conflict between the substance of the challenged decision and [Article 2(3) of the Constitution](https://www.aspi.sk/products/lawText/4/4604703/1/ASPI%253A/460/1992%20Zb.%2523%25C8l%5C.2.3), which binds the non-prohibited conduct of entities other than state bodies to the legal framework, which is narrowed in application by the previously indicated legal provisions (eliminating the state-power protection of abuse of rights by judicial decision-making).

48. In addition to the foregoing, and in order to emphasise the correctness of the other conclusions of the contested decision, the Constitutional Court puts forward the following arguments.

**IV.1. On the prohibition of abuse of tax law:**

49. The principle of the prohibition of abuse of tax law allows the tax authorities to disregard, for example, artificial transactions and structures created for the purpose of undesirable optimisation of tax liability in the administration of taxes. This is one of the measures in the fight against tax evasion, which is based on the legitimate efforts of the state to achieve fair and equal taxation of all entities, or to discourage taxpayers from actions that will result in the achievement of unjustified advantages in the form of a reduction in tax liabilities. For this reason, the principle of non-abuse of tax law is an integral part of the tax system, without which the basic fiscal objectives of tax law would be difficult to achieve. One of the goals at the international level is fair taxation, allocating a fair share of tax to a particular country and minimizing the shifting of profits where no value has been created.

50. The principle of the prohibition of abuse of tax law is present and results from the very essence of tax rules and the State's obligation to ensure the functionality and efficiency of the tax system. Tax abuse encompasses unlawful practices in the form of tax fraud, tax evasion and tax avoidance understood in their own right. Courts use the application of judicial doctrines of abuse of tax law in relation to abusive transactions and tax avoidance, which, although they consist in the fulfilment of formal conditions, are materially contrary to the purpose of tax rules.

51. At the European level, the Court has held in its earlier case-law on direct taxation that the need to prevent tax evasion or abuse may be in the public interest which could constitute a sufficient reason for a restriction on the fundamental freedoms (Eg. Case C-324/00 Lankhorst, paragraph 37). However, the definition of tax evasion is limited to *'wholly artificial arrangements designed to circumvent the application of the legislation of the Member State concerned'*. In order to be legally permissible, national tax rules must be proportionate and aimed at the specific purpose of preventing wholly artificial arrangements.

52. In its judgment of 12 September 2006 in Case C-196/04 Cadburry Schweppes as the first to identify abuses of tax law in the field of direct taxation, the Court, after accepting that a restriction on freedom of establishment under primary law was justified, narrowed the concept of tax avoidance to combating *'wholly artificial arrangements'*, which seek to circumvent the legislation of the Member State concerned. European case-law thus approximates the concept of tax avoidance by obtaining a tax advantage in a way that is contrary to the object and purpose of the tax rule (Cadburry Schweppes, paragraph 51). According to the Court, the prohibition of abuse of rights is also directly applicable in the field of direct taxation, even in the absence of a national legislative provision – the so-called statutory GAAR (judgment in joined cases C-115/16 N Luxembourg 1, C-118/16 X Denmark A/S, C-119/16 C Danmark I and C-299/16 Z Denmark ApS). In so doing, it confirmed the existence of a general principle of prohibition of abuse of rights in tax matters. In absolute terms, the principle of the prohibition of abuse of rights in tax matters means the prohibition of wholly artificial arrangements devoid of economic reality and created solely with the aim of obtaining a tax advantage (e.g. Case C-162/07 Ampliscientifica and Amplifin [2008[] ECR](https://www.aspi.sk/products/lawText/4/4604703/1/u%253AJUD%253A/) I 4019, paragraph 28).

53. At national level, it was only with the introduction of [Article 3(6) of the Code of Tax Procedure that the prohibition of abuse of tax law was given a legislative form](https://www.aspi.sk/products/lawText/4/4604703/1/ASPI%253A/563/2009%20Z.z.%25233.6)  by an amendment in force from 1 January 2014. Its content reflected the previously established decision-making practice of Slovak courts, as well as the aforementioned case law of the Court of Justice. The professional literature evaluates that it was not the introduction of a new substantive rule of conduct, but only a legislative emphasis on the existence of the principle of prohibition of abuse of law, which follows from its very nature and which has been applied in established judicial practice [PRIEVOZNÍKOVÁ, K. *Implementation of the prohibition of abuse of rights in* [*the Tax Code*](https://www.aspi.sk/products/lawText/4/4604703/1/ASPI%253A/563/2009%20Z.z.)*. Tax Law vs. Tax Fraud and Tax Evasion (non-conference proceedings of scientific papers, Part II).* Košice : UPJŠ, 2015].

54. A similar conclusion applies to other applicable legal institutes. The fact that selected international instruments in connection with tax evasion were created, codified or ratified only later does not mean that the rules resulting from them were not previously present in the form of other international sources of law (e.g. international customs, general principles of law recognized by civilized nations, the decision-making practice of the Court of Justice, etc.).

55. The requirement of a prohibition of abuse of tax law is also linked to the rules preventing double taxation and the prevention of tax avoidance, otherwise their meaning and significance would not be preserved. Prevention of tax evasion cannot be objectively ensured if proceedings showing the fulfilment of formal and legal conditions are tolerated, but at the same time they will be proceedings based on artificially created constructions, the obvious aim of which is to avoid or reduce tax liability without any economic justification. Similarly, aggressive tax planning, like tax avoidance, consists in reducing tax liability or obtaining a tax advantage in a way that is contrary to the intentions of the tax system. Without the doctrine of the prohibition of abuse of tax law, international treaties in the tax area would be easily abused in tax evasion, in which otherwise taxable income is shifted outside the tax jurisdiction of a given state (so-called profit shifting).

56. Procedures and proceedings aimed at obtaining an undue advantage from a contract may be denied legal protection directly by applying an existing (express) provision to suppress them. In the absence of such a provision, the Constitutional Court considers it a sustainable practice for the authorities of a Contracting State to unilaterally refuse to grant and use the benefit of a treaty if they consider that specific transactions abuse its purpose, as is the case with the purpose of preventing tax evasion in a double taxation treaty. In such a case, an interpretation based on the principles of public international law may be applied in accordance with customary public international law, as codified in [the Vienna Convention on the Law of](https://www.aspi.sk/products/lawText/4/4604703/1/ASPI%253A/157/1964%20Zb.) Treaties, according to which treaties are to be interpreted in good faith and within the scope of their object and purpose. [The Vienna Convention](https://www.aspi.sk/products/lawText/4/4604703/1/ASPI%253A/157/1964%20Zb.) should apply to all international double taxation treaties concluded after its entry into force for the States concerned. In relation to older treaties, 'its principles should also be applicable, since the [[Vienna Convention](https://www.aspi.sk/products/lawText/4/4604703/1/ASPI%253A/157/1964%20Zb.)] codifies the customary rules of public international law' (Gerzova, L., Popa, O. *Compatibility of Domestic Anti- Avoidance Measures with Tax Treaties. European taxation.* 2013, 53).

**IV.2. The contested retroactive application of the preamble to the Treaty with the Netherlands:**

57. According to the complainant's objection, the Supreme Administrative Court, contrary to written law and contrary to the rule of law, retroactively applied the preamble to the treaty with the Netherlands, while it was the preamble of the treaty with the Netherlands in the version in force from 1 January 2020 that, according to the complainant, was the main source of public international law referred to by the Supreme Administrative Court. In this regard, the complainant argues that it was only the new preamble to the treaty with the Netherlands effective from 1 January 2020 that defined the purpose of preventing the creation of opportunities for non-taxation or reduction of taxation through tax evasion or avoidance. *The argumentum a contrario* then submits that the agreement with the Netherlands before the adoption of the new version of the preamble did not make it possible to prevent such undesirable practices from the point of view of the full functioning of the tax systems.

58. Such a view is rejected by the Constitutional Court as manifestly erroneous, since it is clear from the original designation (title) of the agreement with the Netherlands that it is also intended to prevent tax evasion in the field of taxes on income and capital. The preamble is the introductory part of a written document, which usually establishes the intention, intent, meaning or meaning of the text following the preamble. Its nature means that the preamble can serve at most as an interpretative aid, but not as a legally binding rule of conduct. Moreover, not every subsequent amendment of a legal document necessarily means that a new rule or meaning of a legal text is introduced – it is common practice that entities with a legal will often incorporate such additions into the legal text, the aim of which, for example, is to remove legal uncertainty in the context of different decision-making practice, or to highlight the correctness of the interpretation used so far and to remove any doubts in the future regarding the application and interpretation of a legal norm (proclamatory-declaratory character).

59. The amendment of the preamble to the Treaty with the Netherlands was intended to clarify its pre-existing meaning and purpose. It is clear from the very title of the convention with the Netherlands that, in addition to the avoidance of double taxation, its fundamental objective was to prevent tax evasion, that is to say, situations which the new wording of the preamble merely gives more specific expression in the words *'... without creating opportunities for non-taxation or reduced taxation through tax evasion or tax avoidance (including treaty shopping schemes in order to obtain the benefits that such a treaty provides as an indirect advantage to third-country residents)'.*

60. The [Vienna Convention](https://www.aspi.sk/products/lawText/4/4604703/1/ASPI%253A/157/1964%20Zb.) on the Law of Treaties (published as Decree of the Minister for Foreign Affairs No. [15/1988 Coll.](https://www.aspi.sk/products/lawText/4/4604703/1/ASPI%253A/15/1988%20Zb.)) accepts that the interpretation should take into account not only a purely textualist and isolated interpretation, but also take into account the overall systematic connection of the legal text of the Treaty and its consistency with the spirit and purpose of the Treaty.

**IV.3. The contested retroactive application of the subsequent case-law:**

61. With regard to the objected retroactive application of the case-law, the Constitutional Court states that a new, i.e. renewed, or differently formulated legal opinion is also applied to the past (retrospectively). It is based on the prevailing approach that the court does not create law, but only finds. If there is a change in case-law without a change in the rule of law, there is no change in the rule of law; It is the same standard, only its content is re-expressed. It follows that the effects of a change in case-law cannot be limited solely to the future. This distinguishes the permissible retrospective effect of jurisprudence from the inadmissible retrospective effect of legal norms (e.g. the resolution of the Supreme Court, file no. [3 Cdo 198/2017](https://www.aspi.sk/products/lawText/4/4604703/1/JUD%253A/JUD2862424SK) of 19 March 2018). It is completely logical that the court interprets the law in a particular case only *ex post* (after a certain case has arisen), so the interpretative finalization of the case law occurs late – in decision-making practice, naturally, there are always legal issues that have not yet been resolved, which need to be answered and the jurisprudence needs to be re-formed.

**IV.4. Being bound by the legal opinions expressed in an earlier decision in the same case:**

62. The applicant alleged infringement of the right to a lawful judge as a result of the failure to refer the case to the Grand Chamber. In the opinion of the complainant, the Supreme Administrative Court in this respect omits the legal doctrine accentuated by the binding of the legal opinion formulated as *ratio decidendi*, but also by the legal opinion *obiter dictum*.

63. In this regard, the applicant referred to a part of the reasoning of the second decision of the Supreme Court, according to which: *"Moreover, his conclusions regarding the connection between the place of the company's registered office (SGH) at the time of the origin of the source of taxable income and the transfer of the company's registered office at the time of payment (dividends), which the Regional Court identified as key issues for the assessment of the whole case, do not have internal logic and do not reflect the fundamental problems of the present case."*

64. On that objection, the Supreme Administrative Court stated: *'after supplementing the evidence with the provision of the expert opinion referred to in paragraph 62 of the 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, while its application and applicability was derived from the institutes and content* [*of the*](https://www.aspi.sk/products/lawText/4/4604703/1/ASPI%253A/157/1964%20Zb.) *Vienna Convention on the law of contract in conjunction with the Treaty with the Netherlands. After the case was referred back 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 thereon and the consequences of failure to prove their publicity for the assessment of the manner of application of the Treaty with the Netherlands."*

65. In the original second decision, the Supreme Court primarily concluded that the second judgment of the Regional Court under appeal suffered from the defect of non-reviewability, as it was not properly reasoned and showed signs of arbitrariness (failure to deal with the question of the binding nature of the OECD Model Tax Convention and its commentaries). The Supreme Court stated that the OECD Model Tax Convention and its commentaries are not legally binding, but can have an effect on the interpretation of international treaties. In addition to the above, the Supreme Court further dealt with considerations and factual research in relation to the applicability of the OECD Model Tax Convention and comments on it, with the aim that the administrative body (Financial Directorate) would deal with the issue of its applicability to the complainant's conduct in further proceedings. The Supreme Court did not make a binding statement on other possible aspects of a comprehensive legal assessment of the case.

66. According to the Constitutional Court, it does not follow from the part of the reasoning of the Supreme Court to which the applicant refers that the Supreme Court formulated a qualified legal opinion on the issue of abusive conduct in an earlier decision. From the point of view of the legal assessment of the case by the second judgment of the Regional Court, it is essential that the Supreme Court in the second decision took a binding legal opinion only on a specific line of argumentation (the question of the legally binding nature of the model contract in relation to the textualist interpretation of the contract with the Netherlands as regards the conditions of tax exemption) used by the Regional Court in its second judgment. However, the subject of the Regional Court's legal considerations in its second judgment was not the question of assessing the applicant's conduct as abusive, as this legal argument was applied by the Financial Directorate only in the decision of 21 December 2015, which was reviewed and assessed only by the third judgment of the Regional Court. His legal opinions in this regard were only the subject of the assessment of the complainant's cassation complaint by the contested judgment of the Supreme Administrative Court.

67. Thus, in the circumstances of the present case, neither the Supreme Administrative Court (nor the administrative court) was unconditionally bound by the legal opinion expressed in the previous cassation decision, precisely because the decision challenged by the constitutional complaint (and the previous decision of the administrative court) was based on a different normative and applicable legal basis (the doctrine of prohibition of abuse of tax law). In the contested decision, the Supreme Administrative Court decided on the basis of a different configuration of the applied legal norms and principles. In this regard, it should be noted that in the previous cassation decision, the opinion of the Supreme Court (affecting the prohibition of abuse of law) was expressed marginally and implicitly, as part of the *obiter dictum*, which is a part that (unlike the substantive reasons of the decision, i.e*. the ratio decidendi*) does not establish the cassation binding of the court in its new decision. Moreover, the appellate court itself is not bound by its previously expressed legal opinion, especially in a situation where the new decision under consideration by it is based on a different legal basis.

68. In the light of the foregoing, the Constitutional Court concluded that there was no causal link between the contested judgment of the Supreme Administrative Court and the applicant's identified fundamental rights that would actually signal the possibility, after the possible receipt of the complaint, to declare a violation of the rights identified by him, and therefore rejected the constitutional complaint pursuant to [Article 56(2)(g) of the Law on the Constitutional Court](https://www.aspi.sk/products/lawText/4/4604703/1/ASPI%253A/314/2018%20Z.z.%252356.2.g) as manifestly unfounded. Since the constitutional complaint was rejected, the decision on other procedural motions lost its justification, and therefore the Constitutional Court no longer dealt with them.

 **Note: This decision of the Constitutional Court cannot be appealed.**

In Košice, November 5, 2024

**Libor Duľa**

**President of the Senate**