



## Dutch Supreme Court: Redeemable Preference Shares Covered by the Dutch Participation Exemption

The Dutch Supreme Court recently concluded that Australian Redeemable Preference Shares (RPS) should be regarded as equity for the purposes of the Dutch participation exemption.

### Facts

A private limited liability company (BV) incorporated under Dutch law held RPS in an Australian subsidiary. The Australian company in turn held RPS in another Australian company. The consideration paid under the RPS qualifies as a tax deductible interest expense in Australia. In parallel, the received consideration is considered taxable interest income under Australian law. The BV took the position that the RPS qualified as equity for Dutch tax purposes and therefore the connected income received should be exempted from Dutch corporate income tax under the participation exemption.

Some of the key RPS characteristics were as follows:

- > The RPS can be redeemed after 10 years (if all conditions under Australian law have been complied with);
- > The RPS bears an annual cumulative remuneration (started with eight percent and could increase up to 12 percent);
- > The issuance of the RPS can – based on economic terms – be in line with entering into a (subordinated) loan; and
- > Under Dutch and Australian accounting principles, the RPS are considered to be debt.

### What Did the Dutch Supreme Court Rule?

The lower court decided that RPS' are similar to cumulative preference shares, which are equity under Dutch law and hence the participation exemption should apply. The Dutch Supreme Court based itself

initially on the corporate law qualification of the form of the RPS. In case the RPS could be considered debt from a Dutch corporate law point of view, it would have been possible to reclassify such debt to equity for Dutch tax purposes.

Based on its prior case law on comparable matters, the Supreme Court came, however, to the same conclusion as the lower court, i.e., that the RPS classifies as equity. Irrespective of the key RPS conditions as explained above, the Supreme Court ruled that it is not possible for a capital injection that qualifies as equity under Dutch corporate law to be reclassified for Dutch tax purposes into debt. After all, the application of the Dutch participation exemption does not depend on whether or not the relevant consideration paid by the (foreign-based) participation is tax deductible in its home country.

### Conclusion

Based on this recent case law, when structured comparably as in the case ruled upon by the Dutch Supreme Court, RPS should be considered as equity under Dutch corporate law and consequently for Dutch tax purposes as well. As a result, the consideration received under the RPS qualifies as a dividend and, if the interest held in the participation is sufficient (over-simplified: an equity interest of at least 5%), it will be exempt under the participation exemption for Dutch corporate income tax purposes. Due to possible classification differences between the Netherlands and the source country (in this case, Australia), this may mean that the RPS consideration is tax deductible in the source country, while the consideration in the Netherlands remains untaxed.

This *GT Alert* was prepared by **Thomas van der Vliet** and **Job Leusink**. Questions about this information can be directed to:

- [Thomas van der Vliet](#) | +31 20 30 17 387 | [tvv@gtlaw.com](mailto:tvv@gtlaw.com)
- [Job Leusink](#) | +31 20 30 17 361 | [leusinkj@gtlaw.com](mailto:leusinkj@gtlaw.com)
- Or your [Greenberg Traurig](#) attorney

<b>Albany</b> +1 518.689.1400	<b>Denver</b> +1 303.572.6500	<b>New York</b> +1 212.801.9200	<b>Shanghai</b> +86 (0) 21 6391 6633
<b>Amsterdam</b> +31 (0) 20 301 7300	<b>Fort Lauderdale</b> +1 954.765.0500	<b>Northern Virginia</b> +1 703.749.1300	<b>Silicon Valley</b> +1 650.328.8500
<b>Atlanta</b> +1 678.553.2100	<b>Houston</b> +1 713.374.3500	<b>Orange County</b> +1 949.732.6500	<b>Tallahassee</b> +1 850.222.6891
<b>Austin</b> +1 512.320.7200	<b>Las Vegas</b> +1 702.792.3773	<b>Orlando</b> +1 407.420.1000	<b>Tampa</b> +1 813.318.5700
<b>Boca Raton</b> +1 561.955.7600	<b>London*</b> +44 (0) 203 349 8700	<b>Philadelphia</b> +1 215.988.7800	<b>Tel Aviv^</b> +972 (0) 3 636 6000
<b>Boston</b> +1 617.310.6000	<b>Los Angeles</b> +1 310.586.7700	<b>Phoenix</b> +1 602.445.8000	<b>Warsaw~</b> +48 22 690 6100
<b>Chicago</b> +1 312.456.8400	<b>Mexico City+</b> +52 (1) 55 5029 0000	<b>Sacramento</b> +1 916.442.1111	<b>Washington, D.C.</b> +1 202.331.3100
<b>Dallas</b> +1 214.665.3600	<b>Miami</b> +1 305.579.0500	<b>San Francisco</b> +1 415.655.1300	<b>West Palm Beach</b> +1 561.650.7900
<b>Delaware</b> +1 302.661.7000	<b>New Jersey</b> +1 973.360.7900	<b>Seoul<sup>∞</sup></b> +82 (0) 2 369 1000	<b>White Plains</b> +1 914.286.2900

*Tax Advice Disclosure: To ensure compliance with requirements imposed by the IRS under Circular 230, we inform you that any U.S. federal tax advice contained in this communication (including any attachments), unless otherwise specifically stated, was not intended or written to be used, and cannot be used, for the purpose of (1) avoiding penalties under the Internal Revenue Code or (2) promoting, marketing or recommending to another party any matters addressed herein.*

*This Greenberg Traurig Alert is issued for informational purposes only and is not intended to be construed or used as general legal advice nor as a solicitation of any type. Please contact the author(s) or your Greenberg Traurig contact if you have questions regarding the currency of this information. The hiring of a lawyer is an important decision. Before you decide, ask for written information about the lawyer's legal qualifications and experience. Greenberg Traurig is a service mark and trade name of Greenberg Traurig, LLP and Greenberg Traurig, P.A. \*Operates as Greenberg Traurig Maher LLP. \*\*Greenberg Traurig is not responsible for any legal or other services rendered by attorneys employed by the strategic alliance firms. +Greenberg Traurig's Mexico City office is operated by Greenberg Traurig, S.C., an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. ∞Operates as Greenberg Traurig LLP Foreign Legal Consultant Office. ^Greenberg Traurig's Tel Aviv office is a branch of Greenberg Traurig, P.A., Florida, USA. ~Greenberg Traurig's Warsaw office is operated by Greenberg Traurig Grzesiak sp.k., an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. Certain partners in Greenberg Traurig Grzesiak sp.k. are also shareholders in Greenberg Traurig, P.A. Images in this advertisement do not depict Greenberg Traurig attorneys, clients, staff or facilities. No aspect of this advertisement has been approved by the Supreme Court of New Jersey. ©2014 Greenberg Traurig, LLP. All rights reserved.*