

CROSS-BORDER DIVIDENDS: THE LATEST GUIDELINES FROM THE SUPREME COURT ON THE CONCEPT OF «BENEFICIAL OWNER»

Supreme Court judgements No. 32149 of 10 December 2025 and No. 32467 of 12 December 2025

- ✓ The Supreme Court, in judgements no. 32149 and no. 32467 of 2025, provided clarification on the concept of “beneficial owner”, stating that this status cannot be recognized independently, i.e., on the basis of the formal ownership of the shareholding or the EU residence of the sub-holding company, as a substantive assessment is required, based on three criteria: (i) substantive business activity test, verifying that the recipient company carries a real economic activity and is not an artificial construct; (ii) dominion test, verification of the legal and economic availability of dividends, i.e., the possibility of freely disposing of them without any obligation to transfer them to third parties; and (iii) business purpose test, assessment of the economic reasons for the company’s interposition in the cross-border income flow.
- ✓ In judgement No. 32149/2025, relating to dividends distributed in 2008 by an Italian company to a Danish sub-holding company controlled by a US parent company, the Court recognized the sub-holding company as the beneficial owner. Despite the US parent company exercising management powers, the dominion test criterion was deemed to have been met, as the Danish company retained all or part of the dividends and used them for its own purposes, thus being able to enjoy the income flows. Consequently, the withholding tax exemption provided for in the Italy–Denmark Double Tax Convention (“DTT”) was confirmed.
- ✓ However, judgement No. 32467/2025 took a different view, denying the Danish sub-holding company the status of beneficial owner for the 2011 tax period, identifying instead the US parent company as the beneficial owner, with the consequent application not of the withholding tax exemption under the Italy–Denmark Convention but of the 5% withholding tax provided for under the Italy–US Convention. The decision of the judges is based on three elements:
 - Failure to pass the dominion test, since the dividends flowed into a “cash pooling” system available only to the US parent company through a branch located in Switzerland;
 - Absence of real economic activity by the Danish company; and
 - Lack of valid economic reasons for the interposition, as evidenced by internal documentation (*e.g.* emails) demonstrating the effective US management and the purely instrumental role of the sub-holding company.

Overall, these judgements confirm a case-by-case approach by the Supreme Court based on the economic and functional substance of corporate structures.

