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On 31 August 2017, the Dutch Court of Appeals of 's-Hertogenbosch issued judgment in a case dealing with the application of the most-favoured-nation (MFN) clause contained in the Netherlands/South Africa Double Tax Agreement (the Treaty).

Generally, the MFN term means the country which is the recipient of this treatment must nominally receive equal trade advantages as the "most favoured nation" by the country granting such treatment.

The facts of the case were that a South African resident taxpayer (the Taxpayer) held all of the shares in a limited liability company that is tax resident in the Netherlands.

During the relevant tax year, the Dutch company made available to the Taxpayer a dividend of EUR10 851 096. In the same tax year, the Dutch company filed a dividend withholding tax return in the amount of EUR542 554 (i.e. at a rate of 5% as provided for in the Treaty). The Dutch company withheld and paid the tax due.

The Dutch company subsequently requested a refund of EUR542 554 on the basis of the MFN clause contained in article 10(10) of the Treaty.

In a 2008 protocol to the Treaty, an MFN clause was inserted that would be triggered if in "... any convention for the avoidance of double taxation concluded after the date of conclusion of this Convention...South Africa limits its taxation on dividends as contemplated in subparagraph (a) of paragraph 2 of this article to a rate lower, including exemption from taxation or taxation on a reduced taxable base, than the rate provided for in subparagraph (a) of paragraph 2 of this article."

In a 2010 protocol to the South Africa/Sweden Double Tax Agreement, a MFN clause was added that would grant a lower withholding rate on dividends. It was also noted that South Africa had concluded treaties with Cyprus (1998), Oman (2003) and Kuwait (2006) that provided for exclusive residence state taxation on dividends.

The issue was whether the MFN clause in the Treaty could, through the South Africa/Sweden treaty, lead to a refund of the EUR542 554 dividend withholding tax. The court held that the MFN clause could be interpreted in favour of the Taxpayer and found for the Taxpayer.

The principles established in the case have also been considered in two advance tax rulings issued by the South African Revenue Service where it was held that the inclusion of a MFN clause in a tax treaty would entitle the taxpayer to the relevant relief.

The case and rulings issued by the South African Revenue Service are important in demonstrating that in the context of international transactions, the provisions of a tax treaty must also be read in the context of other treaties that have been concluded and it is possible that the taxpayer will benefit if there is a MFN clause.

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