



Global Tax Alert: Dutch Supreme Court confirms dividend withholding tax exemption under treaty between South Africa and the Netherlands

Global Tax Alert

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By: Andrew Lewis

In our Global Tax Alert on February 5, 2018, we discussed the decision of the Dutch Court of Appeal ('s-Hertogenbosch) which held that dividend distributions from Dutch entities to South African entities are effectively exempt from Dutch dividend withholding tax pursuant to the most favored nation (MFN) clause in the tax treaty between the Netherlands and South Africa (NL-SA Treaty).¹

We cautioned, however, that the Dutch authorities had appealed the decision and, in a South African context, it needs to be appreciated that the decision of the Dutch Court of Appeal is not binding on the South African courts but can certainly be used by South African taxpayers as persuasive authority.

It will be welcome news to taxpayers in the Netherlands and South Africa that on the January 18, 2019 the Dutch Supreme Court confirmed that a dividend distribution from the taxpayer (a Dutch entity) to a South African entity in 2013 was subject to 0 percent Dutch dividend withholding tax as a result of the application of the MFN clause in the NL-SA Treaty, read together with the South Africa/Kuwait and South Africa/Sweden tax treaties.²

Since 2013, all of the aforementioned tax treaties have not been amended. Hence, taxpayers can still rely on the judgment of the Dutch Supreme Court to apply for the 0 percent dividend withholding tax on dividend distributions between Dutch and South African entities.

Key takeaways

Based on the ruling of the Dutch Supreme Court, dividend distributions from a Dutch entity to a South African entity should effectively be exempt from Dutch dividend withholding tax pursuant to the NL-SA Treaty. Following the same reasoning of the Dutch Supreme Court, South Africa is not allowed to levy any dividend withholding tax in the reverse situation either (ie, dividend distributions to a Dutch entity by a South African entity). However, as mentioned above, the Decision of the Dutch Supreme Court is not binding on the South African courts.

We advise taxpayers who preserved their rights after our previous Global Tax Alert to reach out to their competent Tax Authorities to claim the 0 percent dividend withholding tax rate.

For future dividend distributions, prudence is required when relying on the ruling of the Dutch Supreme Court. Please reach out to your local tax advisor before distributing dividends between Dutch and South African entities.

¹*Dutch Court of Appeal, February 5, 2018, no. 17/04584, ECLI:NL:GHSHE:2017:3641 Dutch Supreme Court,*
²*January 18, 2019, no. 17/04584, ECLI:NL:HR:2019:57*

AUTHORS



Andrew Lewis

Director

Johannesburg | T: +27 11 302 0800

andrew.lewis@dlapiper.com
