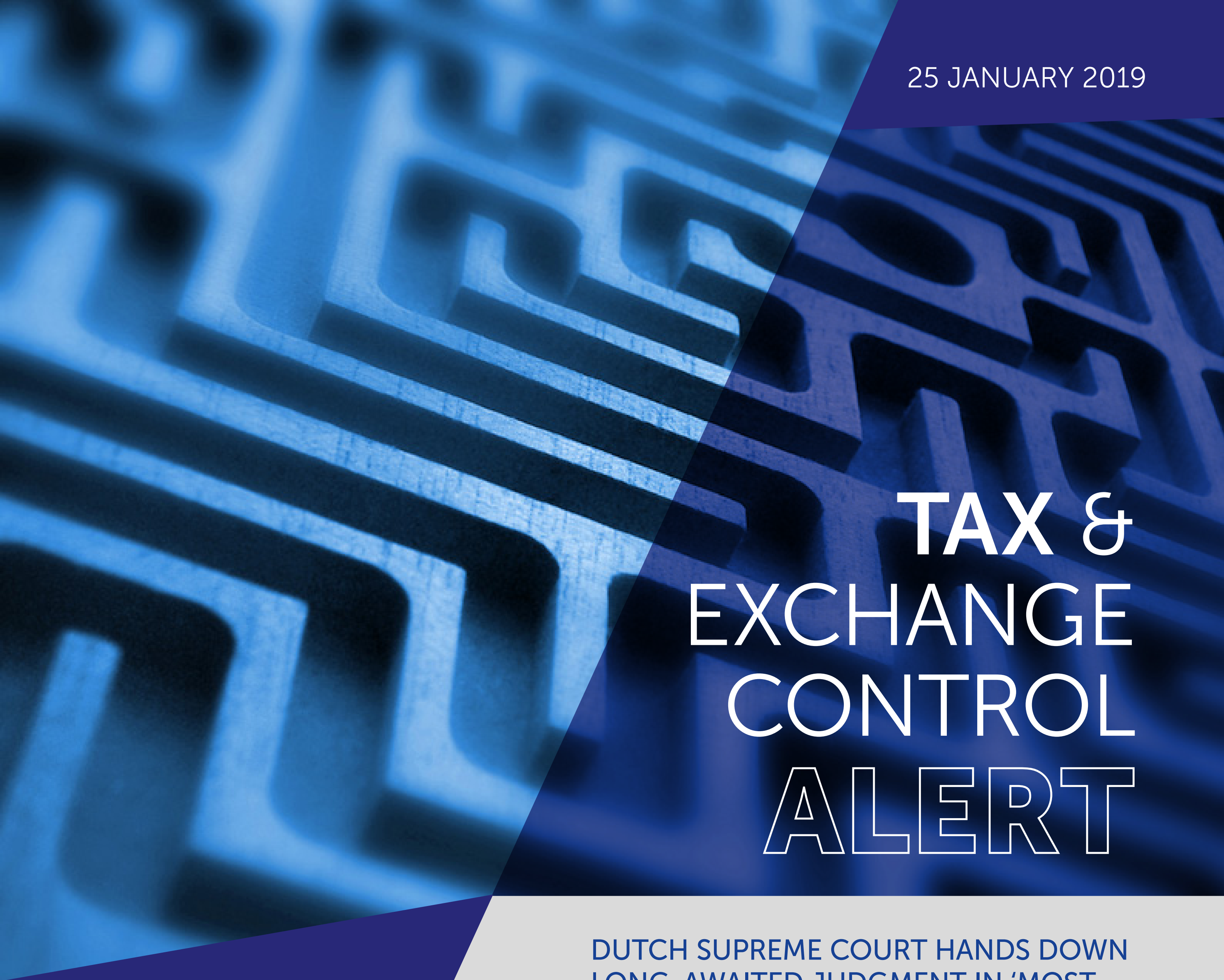

25 JANUARY 2019

TAX & EXCHANGE CONTROL ALERT

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DUTCH SUPREME COURT HANDS DOWN LONG-AWAITED JUDGMENT IN 'MOST FAVOURED NATION' CLAUSE DISPUTE

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ONE LESS ISSUE WHEN ISSUING TAX INVOICES

A tax invoice plays a pivotal role in the VAT system for suppliers and recipients alike. In terms of the Value-Added Tax Act, No 89 of 1991 (VAT Act), a supplying vendor is obliged to issue a tax invoice that complies with the requirements of the VAT Act within 21 days of making a taxable supply to a recipient.

CLIFFE DEKKER HOFMEYR

DUTCH SUPREME COURT HANDS DOWN LONG-AWAITED JUDGMENT IN 'MOST FAVOURED NATION' CLAUSE DISPUTE

The Dutch Supreme Court judgment is of great importance to a number of South African taxpayers who are currently engaged in similar disputes with the South African Revenue Service (SARS) pertaining to the interpretation of the Dutch MFN Clause.

The wait is finally over. On 18 January 2019 the Dutch Supreme Court (*Hoge Raad*) found in favour of the taxpayer in its judgment under case number 17/04584, (*Hoge Raad* Judgment) pertaining to the interpretation of the 'most favoured nation' provision (Dutch MFN Clause) in the double taxation agreement (DTA) between South Africa (SA) and the Netherlands dated 10 October 2005, as amended by the Protocol concluded on 8 July 2008 and which entered into force on 28 December 2008 (SA/Netherlands DTA).

The taxpayer subsequently requested a refund of the dividend tax paid to the Dutch Tax Authorities on the basis that Article 10(10) of the SA/Netherlands DTA (the Dutch MFN Clause) read with Article 10(6) of the SA/Sweden DTA dated 24 May 1995 ...

The case was an appeal by the Dutch Tax Authorities against an earlier decision of the Dutch High Court (*Gerechtshof 's-Hertogenbosch*) under case number 15/01361. In that decision the Dutch High Court ruled that the Dutch MFN Clause can apply to exempt taxpayers from dividends tax where a Dutch resident company pays dividends to a South African resident.

The Dutch Supreme Court judgment is of great importance to a number of South African taxpayers who are currently engaged in similar disputes with the South African Revenue Service (SARS) pertaining to the interpretation of the Dutch MFN Clause. One of those cases has been selected by SARS as a test case and Cliffe Dekker Hofmeyr acts as the attorneys for the taxpayer in that case.

Background to the Dutch Supreme Court Decision

The taxpayer was a South African tax resident company. The taxpayer held shares in a Dutch company. The Dutch company declared a dividend to the South African taxpayer, in respect of which it withheld dividends tax at the rate of 5% and which tax was paid over to the Dutch Tax Authorities.

The taxpayer subsequently requested a refund of the dividend tax paid to the Dutch Tax Authorities on the basis that Article 10(10) of the SA/Netherlands DTA (the Dutch MFN Clause) read with Article 10(6) of the SA/Sweden DTA dated 24 May 1995, as amended by the Protocol concluded on 7 July 2010 and which entered into force on 18 March 2012 (SA/Sweden DTA) (Swedish MFN Clause) and further read with SA's DTAs with Cyprus, Kuwait and Oman limited the dividend withholding tax rate to 0%.

Taxpayer's application and interpretation of relevant DTAs

Article 10 of the SA/Netherlands DTA allowed for a dividend withholding tax of 5% of the gross amount of the dividends if the beneficial owner was a company

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... if a DTA between SA and a third party state was concluded after the date of conclusion of the SA/Netherlands DTA and that third party DTA provided for a lower dividends tax rate than the dividends tax rate provided for in the SA/Netherlands DTA, then that lower dividends tax rate would also apply to dividends paid between SA and the Netherlands.

holding at least 10% of the capital in the company paying the dividends. Article 10(10) (the Dutch MFN clause) read as follows:

(10) If under any convention for the avoidance of double taxation concluded after the date of conclusion of this Convention between the Republic of South Africa and a third country, 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, the same rate, the same exemption or the same reduced taxable base as provided for in the convention with that third State shall automatically apply in both Contracting States under this Convention as from the date of the entry into force of the convention with that third State.

The Dutch MFN clause thus stated that if a DTA between SA and a third party state was concluded *after the date of conclusion of the SA/Netherlands DTA* and that third party DTA provided for a lower dividends tax rate than the dividends tax rate provided for in the SA/Netherlands DTA, then that lower dividends tax rate would also apply to dividends paid between SA and the Netherlands.

The taxpayer applied the SA/Sweden DTA as the third-party state DTA referred to in the Dutch MFN Clause. The Protocol to the SA/Sweden DTA entered into force after the SA/Netherlands Protocol entered into force. Even though the SA/Sweden Protocol did not contain a direct exemption from dividends tax, the SA/Sweden Protocol introduced Article 10(6) (the Swedish MFN clause) to the SA/Sweden DTA, which read as follows:

(6) If any agreement or convention between South Africa and a third state provides that South Africa shall exempt from tax dividends (either generally or in respect of specific categories of dividends) arising in South Africa, or limit the tax charged in South Africa on such dividends (either generally or in respect of specific categories of dividends) to a rate lower than that provided for in subparagraph (a) of paragraph 2, such exemption or lower rate shall automatically apply to dividends (either generally or in respect of those specific categories of dividends) arising in South Africa and beneficially owned by a resident of Sweden and dividends (either generally or in respect of those specific categories of dividends) arising in Sweden and beneficially owned by a resident of South Africa, under the same conditions as if such exemption or lower rate had been specified in that subparagraph.

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As the DTAs with these third party states were concluded prior to the SA/Netherlands Protocol coming into force, the taxpayer could not rely on these DTAs directly (which is why the SA/Sweden Protocol was "interposed" between the SA/Dutch DTA and the third party state DTAs).

The Swedish MFN Clause therefore stated that if a DTA between SA and a third party state was concluded and that third party state DTA provided for a lower dividends tax rate than the dividends tax rate provided for in the SA/Sweden DTA, then that lower dividends tax rate would also apply between SA and Sweden. The Swedish MFN Clause did not contain a limitation provision, ie that the DTA with the third party state must be concluded after the SA/Sweden DTA (as was the case with the SA/Netherlands DTA).

At the time that the dividend was paid to the taxpayer, several DTAs between SA and third party states provided for a 0% dividends tax rate. These third party states were Kuwait, Cyprus and Oman (currently the SA/Kuwait DTA is the only DTA that still provides for the 0% dividend tax rate). As the DTAs with these third party states were concluded prior to the SA/Netherlands Protocol coming into force, the taxpayer could not rely on these DTAs directly (which is why the SA/Sweden Protocol was "interposed" between the SA/Dutch DTA and the third party state DTAs).

Decision of the Dutch Supreme Court

Briefly, the Dutch Supreme Court was of the view that:

- The SA/Sweden Protocol was concluded after the date of conclusion of the SA/Netherlands DTA. Accordingly, for purposes of Article 10(10) of the SA/Netherlands DTA, the SA/Sweden DTA could be regarded as a DTA between SA and a third party state concluded after the date of *conclusion of the SA/Netherlands DTA*.
- In terms of the SA/Sweden Protocol, South Africa agreed with Sweden not to levy tax on certain outbound dividends. It does not matter that the exemption from dividends tax may be temporary and that the exemption is as a result of the SA/Kuwait DTA that was concluded prior to the conclusion of the SA/Netherlands DTA.

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South Africa caused the problem when it concluded the SA/Sweden Protocol – it could have agreed that the SA/Sweden Protocol only entered into force once all of the other DTAs which provided for an exemption from dividends tax were renegotiation.

- The fact that South Africa in certain instances already exempted dividends paid to Sweden from dividends tax prior to the conclusion of the SA/Sweden Protocol and that South Africa therefore did not limit its taxation of dividends as a result of the SA/Sweden Protocol did not change the situation. To assess whether South Africa limited its taxation under a later DTA within the meaning of Article 10(10) of the SA/Netherlands DTA, it was decisive whether South Africa entered into new DTA obligations with another country and thereby agreed to waive all or part of the tax on dividends in certain instances. The SA/Sweden Protocol can be regarded as such a DTA which introduced new obligations with regard to dividends tax as the conditions under which South Africa waived dividends tax under the SA/Sweden Protocol changed compared to the arrangement that previously existed between South Africa and Sweden.
- The Netherlands in any event wanted to exempt dividends from dividends tax in the original SA/Netherlands DTA.
- The context within which the SA/Netherlands Protocol was negotiated was that South Africa wished to remove the 0% dividends tax rate from the SA/Netherlands DTA as it wanted to implement a dividends tax regime in South Africa. At the time of negotiation of the SA/Netherlands Protocol the Netherlands was aware that there were at least four other South African DTAs which still contained the 0% dividends tax rate. Both the Netherlands and Sweden were willing to accommodate South Africa's wish to renegotiate the DTAs to remove the exemption, however, they had different conditions for doing so.
- The Court considered it unlikely that the South African Government would have agreed to amend the SA/Sweden Protocol in the way that it did had it known that it would be used in the interpretation of Article 10(10) of the SA/Netherlands DTA.
- South Africa caused the problem when it concluded the SA/Sweden Protocol – it could have agreed that the SA/Sweden Protocol only entered into force once all of the other DTAs which provided for an exemption from dividends tax were renegotiated. In addition, the problem with the SA/Kuwait DTA is only temporary – until that treaty is renegotiated or terminated.
- This interpretation of Article 10(10) of the SA/Netherlands DTA does not conflict with any known common intention of the contracting parties.

Based on the above, the Dutch Supreme Court found in favour of the taxpayer.

Mareli Treurnicht

CLIFFE DEKKER HOFMEYR

ONE LESS ISSUE WHEN ISSUING TAX INVOICES

Until now, there was no mechanism to correct mistakes in respect of the other particulars required to be reflected on a tax invoice, for example, the recipient's name, address or VAT registration number.

A tax invoice plays a pivotal role in the VAT system for suppliers and recipients alike. In terms of the Value-Added Tax Act, No 89 of 1991 (VAT Act), a supplying vendor is obliged to issue a tax invoice that complies with the requirements of the VAT Act within 21 days of making a taxable supply to a recipient. Similarly, a recipient vendor will only be entitled to claim an input tax deduction in respect of a VAT cost incurred for the purpose of making taxable supplies, to the extent that he or she is in possession of a valid tax invoice at the time of claiming the deduction.

On the basis that the VAT Act makes it unlawful to issue more than one tax invoice for each supply, this created a real problem for recipient vendors who wished to claim input tax deductions, but who were issued with tax invoices containing incorrect information.

A tax invoice is therefore an essential part of the audit trail of a vendor and its enterprise activities, and the failure to issue a tax invoice is a contravention of the VAT Act and an offence in terms of the Tax Administration Act, No 28 of 2011.

The VAT Act sets out the requirements for a valid tax invoice and provides that the document must contain the words 'tax invoice', 'invoice' or VAT invoice'; the name, address and VAT registration number of the supplier and the recipient; an individual serialised number and the date upon which the tax invoice was issued; a full and proper description of the goods or services supplied as well as the quantity thereof; and the value of the supply and the amount of VAT charged thereon.

A supplier will typically generate a tax invoice based on the information supplied to it by the recipient, and upon issuing such tax invoice, the supplier will have fulfilled its obligation of issuing a valid tax invoice in respect of a taxable supply made. However, to the extent that any information on the tax invoice (other than the information pertaining to the VAT, value or consideration of the supply) is incorrect, the document will technically not constitute a valid tax invoice, and the recipient vendor will not be entitled to rely on the document to support its claim for an input tax deduction. The recipient vendor will accordingly require the supplier to re-issue the tax invoice with the correct details. However, in terms of the VAT Act, it is unlawful and an offence for a supplier to issue more than one tax invoice for each taxable supply. In practice, where there is an error with the amount of VAT or the value or consideration reflected on a tax invoice, this does not invalidate a tax invoice and may simply be remedied by the issuing of a credit or debit note, as the case may be. However, until now, there was no mechanism to correct mistakes in respect of the other particulars required to be reflected on a tax invoice, for example, the recipient's name, address or VAT registration number. Furthermore, on the basis that the VAT Act makes it unlawful to issue more than one tax invoice for each supply, this created a real problem for recipient vendors who wished to claim input tax deductions, but who were issued with tax invoices containing incorrect information.

This issue was identified by National Treasury, and an amendment to s20 of the VAT Act has now been introduced in the Tax Administration Laws

CLIFFE DEKKER HOFMEYR

ONE LESS ISSUE WHEN ISSUING TAX INVOICES

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The amendment to s20 of the VAT Act which took effect on 17 January 2019, although seemingly quite insignificant, is a very welcome amendment and creates certainty regarding a supplier's ability to correct a tax invoice that has already been issued

Amendment Act, No 22 of 2018, which was promulgated on 17 January 2019, with effect from such date. In terms of the amendment to s20, where a tax invoice contains an error in the particulars required in terms of the VAT Act, and it would not be appropriate to issue a credit note or debit note in respect thereof, the supplier must correct that tax invoice with the correct particulars within 21 days from the date of the request to correct it. In terms of the amendment, the correction of the tax invoice will not constitute a contravention of the prohibition to issue more than one tax invoice for the same supply and will not affect the time of supply contemplated in s9 of the VAT Act. The amendment also requires the supplier to obtain and retain information sufficient to identify the transaction to which that tax invoice and the corrected tax invoice refers.

The amendment to s20 of the VAT Act which took effect on 17 January 2019, although seemingly quite insignificant, is a very welcome amendment and creates certainty regarding a supplier's ability to correct a tax invoice that has already been issued, as well as provides a remedy to recipient vendors who previously had difficulty obtaining a corrected tax invoice from suppliers.

A practical consideration is, however, whether the supplier's invoicing systems will allow for any particulars to be amended on an invoice already issued. It is also not clear as to whether the supplier will be allowed to issue a manual tax invoice reflecting the correct details, where its system does not allow for the particulars of an issued tax invoice to be amended. Hopefully SARS will clarify this aspect by way of an interpretation note in due course.

Varusha Moodaley

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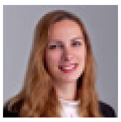

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BBBEE STATUS: LEVEL TWO CONTRIBUTOR

Cliffe Dekker Hofmeyr is very pleased to have achieved a Level 2 BBBEE verification under the new BBBEE Codes of Good Practice. Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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