# 印蘭租税条約議定書の最恵国待遇条項の解釈に関するデリー高裁判決

PwC インド・ニュースフラッシュ

2021 年 4 月 22 日、デリー高裁は、オランダ親会社がインドの子会社から受け取る配当に適用される源泉所得税率について、同親会社が行った低税率申請に基づき、インド課税当局が当初示した 10%ではなく、5%とする証明書（Certificate)を発行するよう課税当局に指示しました。

事実関係

- オランダの親会社（オランダの居住者、以下「納税者」）は、99.99%の株式を所有するインド子会社から配当を受領していた
- 納税者は、当該配当に対する源泉徴収税率を 5%であるとする（1961 年インド所得税法セクション 197 に基づく）低源泉税率申請を行った
- 課税当局は、源泉徴収税率を 10%とする証明書を発行した
- 納税者はこれに対し、デリー高裁に特別抗告の申立（writ petition）を行った

納税者の主張

- 印蘭租税条約第 10 条(2)に規定された配当に関する源泉地における限度税率は 10%であるが、同条約議定書のクローズ IV には最恵国待遇条項が含まれており、インドが他の OECD 加盟国との間で締結した租税条約により低い税率や課税の制限が規定されている場合には、それが印蘭租税条約に自動的に適用される
- したがって、インドがスロベニア、リトアニアおよびコロンビアとの間で締結した租税条約に規定された 5%の源泉税率が、本件配当の支払いにも適用されるべきである

課税当局の主張

- 印蘭租税条約議定書クローズ IV (2) に記載された「OECD 加盟国」とは、印蘭租税条約が締結された時点においての OECD 加盟国に限られる。スロベニア、リトアニアおよびコロンビアはいずれもその時点においては OECD 加盟国ではなかった
- 議定書に基づく取扱いを変更するには、Notification の届け出が必要

高裁の判断の根拠

- 租税条約はそれ自体により効力を発生し、そのための Notification の届け出を必要としない
- OECD 国との租税条約との議定書の条件を満たしていればよい（印蘭条約が締結された時点での加盟国に限定されるとの解釈を退けた）

- オランダ側においても、そのような議定書の解釈が行われている

詳細については、下記の英文ニュースフラッシュをご確認ください。また、ご質問などございましたら下記担当者にお気軽にお問い合わせください。

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April

# What's New

News Flash

**High Court applies MFN clause provided in the protocol to India-Netherlands DTAA and holds that 5% WHT rate should apply on dividend payments by an Indian company to its Dutch parent company**

The Delhi High Court[1] sets aside a lower withholding certificate rate of 10% issued by the Department of Revenue and directs them to issue a fresh certificate at a lower rate of 5% on dividend payments from Indian subsidiary to the Netherlands parent company.

## Facts

- The taxpayers, who are tax residents of the Netherlands, were in receipt of dividends from their respective wholly owned Indian subsidiaries (99.99% shareholding).
- The taxpayers had approached the Revenue to issue a lower withholding tax (WHT) certificate under section 197 of the Income-tax Act, 1961 (the Act) for a 5% rate to be applied on the dividend payments, based on a reading of Article 10 of the India-Netherlands Double Taxation Avoidance Agreement (subject DTAA) read along with the protocol appended thereto.
- The Revenue issued a certificate providing a WHT rate of 10% on the dividend payment.
- The taxpayers filed a writ petition before the Delhi High Court to quash this certificate and permit a WHT tax rate of 5% on the dividend payment.

## Taxpayers' contentions

- Although Article 10(2) of the subject DTAA provides for a WHT rate of 10% on dividends, reliance can be placed on the Most Favoured Nation (MFN) clause (Clause IV) in the protocol appended to the subject DTAA. This provides that when India enters into DTAAs with other countries that are members of the Organisation for Economic Co-operation and Development (OECD)[2], and if such DTAAs provide a lower rate or restricted scope in the DTAA executed between India and such country, it would automatically apply to the subject DTAA.
- This argument was based on the provision made in the preface of the protocol, which *inter alia*, stated that the protocol 'shall form part an integral part of the Convention', i.e. the subject DTAA.
- Therefore, relying on the above, the 10% rate provided under Article 10(2) of the subject DTAA can be replaced with the 5% rate provided under the DTAAs India entered with countries such as Slovenia, Lithuania, and Columbia, which were notified after the date of notification of the subject DTAA.[3]
- No fresh notification was required to apply the provisions of the protocol[4] appended to the subject DTAA.

## Revenue's contentions

- Clause IV (2) of the Protocol to the subject DTAA is like a contingent contract subject to the fulfilment of the following conditions:
    - The other country should be a member of the OECD on the date when the subject DTAA was executed and on the date when a resident of the Netherlands makes a claim for the lower rate of withholding tax.

- The more beneficial provisions should have been extended to the residents of countries that are members of the OECD after the execution of the subject DTAA.

- As Slovenia, Lithuania and Columbia, which the taxpayers are relying on for the 5% WHT rate, were not members of the OECD when the subject DTAA was executed or when India signed DTAAs with them, the MFN clause, as provided in the protocol to the subject DTAA, cannot be applied.
- The Amendment/ Protocol to the subject DTAA should be followed by the issuance of a notification for it to be applied to the subject DTAA.

**High Court's decision**

- The Delhi High Court, in its own Division bench ruling,[5] has already held that the Protocol to a DTAA is self-operational, and hence, there is no need for the Protocol to be notified separately.
- The High Court observed that the protocol incorporates the principle of parity between the subject DTAA and the DTAAs executed thereafter, *qua* the WHT rate or the scope of the DTAA with respect to the items of income including dividend, on the fulfilment of the following conditions:

  - The third State with whom India enters into a DTAA should be a member of the OECD.
  - India should have limited its rate of withholding tax, on subject remittances, at a rate lower or a scope more restricted, than the rate or scope provided in the subject DTAA.

- The High Court held that once the conditions provided in the protocol are fulfilled, then from the date on which the DTAA entered into by India with third countries comes into force, the same rate of WHT or scope, as provided in the DTAA executed between India and the third State would necessarily have to apply to the subject DTAA. The High Court did not accept the Revenue's argument that the beneficial provisions contained in the DTAAs entered with third countries cannot be applied to the subject DTAA, although such countries are members of the OECD.
- In the absence of any guidance available to interpret the protocol, the High Court held that the best interpretative tool to confirm the intent of the Contracting States in framing the protocol would be to see how the other Contracting State (i.e. the Netherlands) has interpreted the provision.
- Accordingly, the High Court relied on the decree issued by the Netherlands,[6] which provides guidance on how the Netherlands has interpreted the MFN clause. The decree states that on reading the MFN clause, the tax rate of 5% provided under the India-Slovenia tax treaty will apply to participation dividends paid by a company resident in the Netherlands to a body resident in India, with retroactive effect from 21 July 2010, when Slovenia became a member of the OECD. Also, as a corollary, the same would equally apply on the dividends paid by a company resident in India to a body resident in the Netherlands.
- Therefore, applying the principles of Common Interpretation,[7] and to allocate taxes equally between both countries, the High Court held that a converse view could not be adopted in India.
- Accordingly, the High Court quashed the certificates under section 197 of the Act (suggesting a WHT rate of 10%) and ordered the Revenue to issue a fresh certificate indicating a WHT rate of 5%.

[1] W.P.(C) 9051/ 2020 and W.P.(C) 882/ 2021, CM Appl. 2302/ 2021
[2] Organisation for Economic Co-operation and Development
[3] DTAA with Netherlands notified on 21 January 1989, DTAA with Slovenia notified on 31 March 2005, DTAA with Lithuania notified on 25 July 2012 and DTAA with Columbia notified on 23 September 2004
[4] Reliance placed on the judgement of the Division Bench in Steria (India) Limited *v.* Commissioner of Income-tax-VI, [2016] 386 ITR 390 (Delhi) Karnataka High Court in Apollo Tyres Limited *v.* Commissioner of Income-tax, International Taxation, (2018) 167 DTR 0051 (Kar)
[5] Steria (India) Limited *v.* Commissioner of Income-tax-VI, [2016] 386 ITR 390 (Delhi)
[6] No. IFZ 2012/54M, Tax Treaties, India dated 28 February 2012 and published on 13 March 2012
[7] Klaus Vogel, Double Tax Treaties and their Interpretation, (1986)

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## 資料に関するお問い合わせ先（PwC インド）

本件に関しましてご不明点などございましたら、以下の担当者までお知らせください。


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