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Article

Benefit of Most Favoured Nation clause for dividend income of non-resident – Interesting battle to watch out for before Apex Court

By **Harshit Khurana and Devashish Jain**

Introduction

In the tax treaties entered by India with countries such as Netherlands, France, Swiss Confederation, and Sweden, India has agreed for Most Favoured Nation clause ('**MFN clause**') with the treaty Partner. The MFN clause finds presence in the protocol to the tax treaty, which forms an integral part of the tax treaty[1]. The objective of entering into MFN clause is to ensure that party to one tax treaty provides equal treatment as provided in tax treaty entered later with other countries in terms of scope of taxation and rate of taxation. The scope of MFN clause agreed in different treaties varies depending upon the agreement reached between the respective parties.

Lately, in the context of dividend income, the applicability of MFN clause has been a subject matter of dispute between the taxpayers and the Revenue authorities. The taxpayers have argued that MFN clause is applicable on dividend income received by Netherlands and French shareholders, and as a result, the dividend income is taxable in India at the rate of 5% (provided in tax treaty with Slovenia) instead of higher rate of 10% provided in respective treaties.

The High Court of Delhi has decided the above matter in favour of the taxpayers[2]. The Revenue authorities have preferred SLP against said Orders which is pending for consideration before the Supreme Court. The Revenue authorities have also clarified their stance by issuing a circular[3].

This article attempts to explain the controversy and the key arguments which in authors' view weigh in favour of both the taxpayer and the Revenue authorities.

Controversy on applicability of MFN clause

To understand the controversy, let us take an example of India-Netherlands tax treaty. Article 12 of the said tax treaty grants source country the right to tax dividend income of the shareholder at a maximum rate of 10%. The MFN clause of India-Netherlands tax treaty, agreed as part of the Protocol to the said tax treaty, reads as follows:

> ***If after the signature of this convention under any Convention or Agreement between India and a third State which is a member of the OECD India should limit its taxation at source on dividends****, interests, royalties, fees for technical services or payments for the use of equipment* ***to a rate lower or a scope more restricted than the rate or scope provided for***

[1] *Steria India Ltd.* v. *Commissioner of Income Tax* [2016] 72 taxmann.com 1 (Delhi), *Commissioner of Income Tax* v. *ISRO Satellite Centre* [2013] 218 Taxman 74 (Kar).

[2] *Concentrix Services Netherlands B.V.* v. *ITO* (2021) 127 taxmann.com 43 (Delhi); *Cotecna Inspection SA* v. *ITO* [2022] 136 taxmann.com 368 (Delhi); *Deccan Holdings BV* v. *Income Tax Office* [2021] 133 taxmann.com 94 (Delhi).

[3] Circular No. 3 of 2022.

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***in this Convention** on the said items of income, then as **from the date** on which the relevant Indian Convention or Agreement **enters into force** the **same rate or scope** as provided for in that Convention or Agreement on the said items of income shall also apply under this Convention.*

[Emphasis Supplied]

India has entered into tax treaties with countries such as Slovenia, Colombia and Lithuania which provides for a lower rate of source taxation on dividend income of 5%. Said tax treaties were entered by India after entering into tax treaty with Netherlands. However, at the time of entering into said tax treaties, the third countries (i.e., Slovenia, Colombia and Lithuania) were not OECD member countries. The countries became member of OECD later.

The taxpayers have argued that for claiming benefit of MFN clause, the country needs to be an OECD member country at the time when the applicability of MFN clause is being tested. Whereas the Revenue authorities have taken a position that the third country need to be OECD member country at the time of entering into tax treaties with said countries and if a country becomes OECD member later, the MFN clause will not be applicable.

In addition, the Revenue authorities have also taken a position that for applicability of MFN clause, a separate notification must have been issued by India importing the benefit of second treaty into the first tax treaty. In absence of notification, MFN clause is inapplicable.

Taxpayer v. Revenue – Strength assessment

Date when the third country should be OECD member

On this aspect, their lies arguments both in favour of the Revenue and the taxpayer.

Argument in Revenue's favour

The Revenue may contest that once MFN clause is agreed, India remains mindful of the impact which a subsequent treaty may have on the earlier treaties entered by India due to MFN clause. India may agree to offer lower rate of source taxation to a non-OECD member country considering the economic condition of said country and India's relations with said country. One of the critical factors for agreeing for lower rate of taxation is the fact that the country is not a member of OECD. Had this been an OECD member country, India may not have agreed for lower rate considering the ripple effect on other treaties.

Therefore, for applicability of MFN clause, the third country must be an OECD member country at the time of signing of tax treaty with said country. Interpreting the MFN clause to be applicable otherwise will lead to absurdity and produce effects which were not intended at the time of entering into tax treaty.

Arguments in taxpayer's favour

- The word 'is' as used in the phrase 'which is a member of the OECD' appearing in MFN clause to India-Netherlands tax treaty, describes the state of affairs that should exist when the request is made by taxpayer for lower withholding and not when the tax-treaty was executed *(in the case of Concentrix Services Netherlands B.V.* v. *ITO[4])*.
- MFN clause is inserted in the Netherlands tax treaty to treat all OECD members on an equal footing. As a result of MFN clause, it is binding upon India to accord equal treatment among

[4] (2021) 127 taxmann.com 43 (Delhi).

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the OECD network countries, irrespective of when they became OECD member. If India denies said benefit, India is not fulfilling its commitment towards Netherlands. If the intention was not to make Slovenia treaty applicable by inter play of MFN clause, a separate clause would have been agreed between India and Slovenia stating that the rights granted under said treaty will be required to be revisited if Slovenia becomes an OECD member country.

- It is an accepted principle that treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose[5]. To understand the ordinary meaning which can be accorded to the MFN clause, reference can be made to the uniform interpretation given by other countries by way of unilateral statements issued by them. France, Netherlands and Swiss Confederation, all three countries have issued unilateral statements stating that post entering of treaties with Slovenia, the rate of dividend tax will be reduced to 5%.
- The MFN clause does not lay emphasis upon the third country being an OECD member country at the time of signing tax treaty. If the intention of the parties was to impose such a condition, specific mention in this respect must have been made in the MFN clause. In such scenario, the above would have read as 'if under any Convention, Agreement or Protocol signed after 1-9-1989, between India and a third State which is a member of the OECD at the time of signing this agreement'. Importing words/ phrases in the text of the treaty which are not expressly mentioned is against the principles of interpretation of tax treaty.

Requirement for notification

It is an accepted principle that protocol forms an integral part of the tax treaty. Once a tax treaty is notified, the protocol to the tax treaty also gets notified and stands applicable. There is no requirement for separate notification for applicability of MFN clause.

Therefore, in authors' view, there is no need for a separate notification for applicability of MFN clause.

Concluding remarks

As analysed, there exists good arguments both in favour of taxpayer and the Revenue. In authors' view, applying the principles of treaty interpretation, the case weighs more in favour of the taxpayer. Nevertheless, the tussle before the Apex Court will be an interesting one to watch out for. Considering the tax impact of the debate, a pro-active analysis must be conducted by MNEs paying dividend to group companies in countries with which India has agreed for MFN clause such as Netherlands, France, Swiss Confederation, and Sweden.

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[5] Article 31(1) of Vienna Convention.

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Notifications and Circulars

Faceless Appeal Scheme, 2021 – Jurisdiction of Commissioners of Income-tax (Appeals) notified

The Faceless Appeal Scheme, 2021 necessitated the designation of Commissioners of Income-tax (Appeals) (‘**CIT(A)**’) to deal with the appeals arising under Sections 246A and 248 of the Income-tax Act, 1961 (‘**IT Act**’).

The Central Board of Direct Taxes (‘**CBDT**’) in exercise of powers conferred under Section 120(1) read with Section 120(3) of the IT Act has directed the CIT(A) to exercise power and perform functions in respect of appeals in their designated jurisdiction. The notification has provided a schedule enlisting the jurisdiction designated to the CIT(A) officers as per the classes of cases.

TDS statement – Due date for filing extended

To incorporate changes introduced by the Finance Act, 2022 with respect to tax deduction at source, CBDT revised and updated Form 26Q *vide* the Income-tax (19th Amendment) Rules, 2022[6].

Considering the difficulties faced by taxpayers in filing TDS statement electronically in the revised and updated Form 26Q, the CBDT has extended the due date of filing Form 26Q for the second quarter of Financial Year 2022-23 from 31 October 2022 to 30 November 2022.

Form 10A for exemption to trusts, institutions, universities, etc. – Condonation of delay in filing

To avail exemptions, all trusts/ funds/ institutions/ universities/ hospitals, etc. (whether new or old) are required to make an application in the prescribed format under Section 10(23C) of the IT Act. In this regard, the application for registration, intimation or approval was required to be filed in Form 10A on or before 30 June 2021. Considering the difficulties faced by taxpayers in filing of Form 10A, this due date was extended to 31 March 2022[7].

Representations were received by CBDT stating that Form 10A in some cases could not be filed by 31 March 2022. With a view to avoid genuine hardship to taxpayers, the CBDT *vide* Circular No. 22 of 2022 has recently condoned the delay in filing Form 10A till 25 November 2022.

Draft common Income-tax return for all taxpayers notified

As per the current Income-tax return (‘**ITR**’) filing format, taxpayers are required to furnish their tax return in ITR-1 to ITR-7, depending upon the type of person and nature of income. Presently, taxpayers are required to go through all schedules of ITR while filing their tax return irrespective of the fact whether the concerned schedule is applicable or not.

To ease compliance burden on taxpayers, CBDT has proposed a new common income tax return. Under this new return, CBDT has merged all the existing returns of income except ITR-7. Accordingly, going forward, the taxpayers will have an option to file their return of income either in the existing forms (i.e., ITR-1 or ITR-4) or *via* the proposed new form.

The newly proposed common ITR has been uploaded on income-tax portal for taking inputs from stakeholders and general public. The deadline for sharing these inputs is 15 December 2022.

[6] Notification No. 67 of 2022 dated 21 June 2022.

[7] Circular No. 16 of 2021 dated 29 August 2021.

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Ratio Decidendi

Relaxation provided by first proviso to Section 43B is not applicable to deduction with respect to employees' contributions to EPF, ESI etc. under Section 36(1)(va)

The issue involved in the case was whether the deduction under Section 36(1)(va) of the Income-tax Act, 1961 (‘**Act**’) would be available if the payments stipulated therein were made beyond the ‘due date’ provided therein but within the time limit laid down in the first proviso to Section 43B. Since there were conflicting decisions of various High Courts on this issue, the Supreme Court had granted special leave to appeal in all such cases.

The facts of the lead matter were that the Assessee-company had claimed deduction under Section 36(1)(va) of the Act on account of the deposit of employee contributions under the Employees’ Provident Fund and Miscellaneous Provisions Act, 1952 (‘**EPF Act**’) and Employees’ State Insurance Act, 1948 (‘**ESI Act**’). However, since the aforesaid deposit of the employee contribution had taken place beyond the ‘due dates’ for such deposits provided under the EPF Act and the ESI Act, the Assessing Officer (‘**AO**’) disallowed the assessee’s aforesaid claim for deduction and treated the same as its income under Section 2(24)(x) of the Act. Such disallowance was upheld by the High Court of Gujarat in appeal.

While deciding the issue, the Supreme Court differentiated between employer’s contributions (Section 36(1)(iv)) and employees’ contributions (Section 36(1)(va)) towards EPF and ESI. It noted that the employer’s contributions were paid out of the employer’s income, whereas employees’ contributions were deemed to be the employer’s income by virtue of Section 2(24)(x). Only by complying with the conditions laid down in Section 36(1)(va) would the employer get a deduction for the amount forming part of the deemed income under Section 2(24)(x).

The Court took into account the above discussion while noting that Section 43B was inserted to ensure that certain deductions which were otherwise allowable and claimed on mercantile basis would only be allowed on actual payment. This included payments of employer’s contributions to the EPF and ESI. However, employees’ contributions were not covered within the purview of Section 43B since the said amounts were held in trust by the employers and were not paid out of the employer’s income and were not heads of deduction in the form of statutory pay outs. Rather, they were the income of the employees, that had only been deemed to be the employer’s income to ensure that the employers deposited the employees’ contributions within the due dates specified under the relevant laws. Only upon deposit on or before the due dates stipulated within those laws would the amount of employees’ contribution, which is otherwise retained and deemed an income, is treated as a deduction. Thus, it held that the non-obstante clause under Section 43B or anything contained in that provision would not absolve an assessee from its liability to deposit the employee’s contribution on or before the due date as a condition for deduction.

The Court also referred to the settled principle of interpretation in relation to tax statutes that if a deduction is available on compliance on certain conditions, those conditions have to be strictly complied with. Thus, it held that in order to claim the deduction under Section 36(1)(va), the condition relating to deposit on or before the ‘due

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dates' has to be mandatorily fulfilled. The Court also noted that the High Court decisions which had been given in favour of assessees had relied on its earlier decision in *Alom Extrusions Ltd.,* (2010) 1 SCC 489. However, such reliance was held to be misplaced since the Court in *Alom Extrusions Ltd.* had not considered Sections 2(24)(x) and 36(1)(va) of the Act. [*Checkmate Services P. Ltd.* v. *CIT* – Decision dated 12 October 2022 in C.A. No. 2833 of 2016, Supreme Court]

Depreciation allowable on exclusive business rights recorded as 'goodwill' in the books of accounts, and not 'goodwill' itself

During the years under consideration, the Assessee-company entered into two agreements. Under the 1st Agreement, it purchased a company's marketing and business rights, and goodwill for a certain consideration. The Assessee capitalized this amount under the head 'goodwill' in its books of account and claimed depreciation at the rate of 25% on the same. Under the 2nd Agreement, the Assessee purchased another company's manufacturing business, including certain intellectual property ('**IP**') rights, such as trademarks, for a certain consideration and claimed depreciation on this amount at the rate of 25%.

However, the AO rejected the Assessee's claim of depreciation on both counts. With respect to the rights acquired under the 1st Agreement, the AO held that 'goodwill' was not covered under the definition of intangible assets under Section 32(1)(ii) of the Act. Whereas with respect to the IP rights acquired under the 2nd Agreement, the AO held that said rights had not been transferred and registered in the name of the Assessee and therefore not eligible for depreciation.

The CIT(A) overturned the assessment order by firstly holding that the exclusive rights acquired under the 1st Agreement were akin to licenses, and hence, fell within the meaning of intangible assets under Section 32(1)(ii). Secondly, with respect to the IP rights acquired under the 2nd Agreement, the CIT(A) placed reliance on the decision of the Supreme Court in *Mysore Minerals* [1999] 239 ITR 775 and *Dalmia Cement (Bharat) Ltd.* [2001] 247 ITR 267 to hold that upon payment of consideration the assessee had become the owner of the IP rights, who was also using the said rights, and the absence of registration would not affect its claim of depreciation.

In second appeal, the ITAT upheld the CIT(A)'s findings with respect to the assessee's claim of depreciation on the IP rights acquired under the 2nd Agreement. However, with respect to the claim of depreciation on the rights and 'goodwill' acquired under the 1st Agreement, the ITAT held that the assessee could only claim depreciation on that portion of the consideration which was paid for the acquisition of the exclusive business rights though recorded as 'goodwill' and not on the portion which was actually paid for the 'goodwill'. This was because 'goodwill' was not an intangible asset covered under the purview of Section 32(1)(ii) of the Act. In further appeal, the High Court upheld the order of the ITAT in its entirety. [*CIT* v. *Daikins Shree Ram Aircon Pvt. Ltd.* – Order dated 17 October 2022 in ITA 905 of 2010, Delhi High Court].

'Deemed dividend' under Section 2(22)(e) must be computed by excluding current year's profits and opening balance of advances previously given

The assessee was an individual holding agricultural land. He entered into an agreement with three companies, in which he was a director and shareholder, for the sale of the said land. Pursuant to the same, the companies paid certain advances to the assessee. However, in assessment proceedings, the AO treated the said advances received by the assessee as 'deemed

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dividend' under Section 2(22)(e) of the Act and made an addition to his income. The said addition was confirmed by the CIT(A).

In further appeal before the ITAT, the assessee contended that the advances had been received by him for the benefit of the companies themselves on account of commercial exigency and thus, could not be considered to be 'deemed dividend' under Section 2(22)(e) of the Act. However, the ITAT rejected the said contention by holding that the said property was not purchased for the sole benefit of the companies. It was also contended that the quantum of addition made was incorrect since the AO had included advances received by him during previous years as well while making the addition. The ITAT concurred with the said contention to hold that each assessment year ('**AY**') was an independent assessable unit and income of each assessment year would be assessed distinctively and separately. Thus, the addition had to be restricted to the amounts received during the year under consideration and not those made in earlier years.

The Assessee also contended that the AO had wrongly computed the 'accumulated profits' by including the current year's profits and the opening balance of advances given, thus resulting in an incorrect computation of 'deemed dividend'. The said contention of the assessee was also accepted by the ITAT.

Referring to the decision of *P. Satya Prasad* [2013] 141 ITD 403 (Visakhapatnam – Trib), wherein the Supreme Court's decision in *V. Damodaran* (1980) 121 ITR 572 had been followed, the ITAT held that for computing 'accumulated profits' of the three companies, only the profits earned up to the last date of the previous financial year had to be considered. The ITAT also referred to *Gordhandas Khimji,* [1985] 11 ITD 158 (Coch.) to hold that the opening balance of advances had to be excluded from 'accumulated profits' irrespective of whether they were treated as 'deemed dividend' in previous years or not. [*Dr. L.S. Ravi Prakash* v. *DCIT Circle-5(1), Bangalore* – Order dated 28 October 2022 in ITA No.30 of 2021, ITAT Bangalore]

Exemption under Section 10(5) for LTC payments not available if journey undertaken by employees involved foreign leg

In this case, the assessee-company had been held to be an assessee-in-default by the AO under Section 201 of the Act for its failure to deduct tax under Section 192 while releasing payments to its employees as leave travel concession ('**LTC**'). The said order of the AO was upheld by all appellate authorities.

Before the Supreme Court, though admitting that its employees had taken a circuitous route involving a foreign leg on their journey, the assessee contended that the payments made by it were exempt under Section 10(5) of the Act read with Rule 2B of the Income-tax Rules, 1962. As per the assessee, this was because the designated places between which the travel took place were both in India and also because the actual payment was for the shortest route of travel between the said designated places.

However, the 3-Judge Bench of the Supreme Court rejected both these contentions. Discussing the provisions of Section 10(5) and Rule 2B, the Supreme Court firstly held that there was no ambiguity that LTC was exclusively for travel within India. Secondly, it held that the question regarding the payment being made for the shortest route taken becomes irrelevant the moment employees undertook travel with a foreign leg. The Court also observed that the objective behind the introduction of LTC was to enable civil servants and Government employees to gain perspective of Indian culture by travelling within the country. It also agreed with the Revenue's contention that the legislature never

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had the intention of allowing foreign travel under the garb of LTC available by virtue of Section 10(5). Further, the Court rejected the assessee's contention that it had made a *bona fide* mistake by holding that all the relevant information and documentation was available to it at the time of settlement of the LTC bills. [*State Bank of India* v. *ACIT* – Decision dated 4 November 2022 in C.A. No. 8181 of 2022, Supreme Court]

Income from managerial training service is not exempt under Section 11, being non-incidental to the charitable trust's main objective of imparting 'education'

The assessee was a charitable trust registered under Section 12A of the Act, having objects relating to promotion of education, which ran a higher education institute. During the year under consideration, the assessee received certain sums from two hotels for providing training to their employees but claimed that its entire income was exempt by virtue of Section 11 of the Act. During assessment, the AO placed reliance on Section 11(4A) of the Act to hold that the said training services rendered by the assessee-trust were a commercial activity which were not incidental to the attainment of its objectives. Accordingly, it treated the sums received by the Assessee from the two hotels to be its income. In appeal, the CIT(A) upheld the assessment order.

In further appeal before the ITAT, the Assessee contented that the lower authorities had failed to take into consideration that the training services given to the hotels was permitted under its primary objects, which were *inter-alia* related to '*imparting education in workmanship and for providing employment and means of earning adequate wages for the unemployed and needy*'. It was also contended that even if the said activity could not be treated as 'education', it was still incidental to the objects of the assessee-trust. However, after perusing the terms of the agreements between the assessee and the hotels, the ITAT rejected the aforesaid contentions of the assessee. The ITAT noted that the assessee-trust was conducting the training program for newly recruited, managerial level employees and not for enhancing the workmanship. While the object of the assessee-trust, to give training to persons seeking employment by rendering the aforesaid services, the assessee-trust was only benefitting the hotels and not its employees. The ITAT also noted that the assessee was merely organizing trainers for conducting the programme, whereas the remaining infrastructure for the programme was being provided by the hotels. Merely providing a certificate at the end of the training did not change the nature of the activity from commercial to charitable.

Thus, ITAT upheld the CIT(A)'s order and held that neither did the training service had any nexus with the objects of the assessee-trust nor could they be said to be incidental to its main activities. [*UMAK Education Trust* v. *JCIT(E)* – Order dated 2 November 2022 in ITA No. 690 of 2019, ITAT Delhi]

Applicability of Section 144C – Conflicting decisions of two non-jurisdictional High Courts – ITAT follows decision by division bench over single-judge bench

In this case, the question before the ITAT was whether the provisions of Section 144C of the Act would become applicable from AY 2009-10 and result in the assessment order passed in the case of the assessee becoming time barred.

The ITAT noted that Section 144C of the Act states that the AO "*shall forward a draft of the proposed order of assessment if he proposes to make, on or after 1st day of October 2009, any variation which is prejudicial to the interest of the assessee*". The Assessee contended that the High Court of Madras in the case of *Vedanta Ltd.*

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[2020] 422 ITR 262 had held that the said provision would only be applicable from AY 2010-11. However, the Revenue contended that the High Court of Andhra Pradesh in the case of *Zuari Cement Ltd.,* WP No. 5557 of 2012 had held that the provisions of Section 144C would come into play with respect of all proceedings after 1 October 2009 and thus for AY 2009-10 as well.

The assessee contended that since there was no decision of the jurisdictional High Court on this issue, the decision which was favourable to the assessee was required to be followed. However, the ITAT held that the said principle of following the view in favour of assessees was subject to several riders. Instead, the ITAT placed reliance on various decisions relating to judicial discipline, to adopt the objective criteria of considering the strength of the bench passing the order. Thus, the ITAT took the view that since the decision in *Zuari Cement Ltd.* had been passed by a division bench, it would have to be followed over the decision passed by a single-judge bench in *Vedanta Ltd*. [*Wockhardt Limited* v. *DCIT* – Order dated 11 October 2022 in ITA Nos. 2633 and 2738 of 2015, ITAT Mumbai]

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