SATURDAY INTERNATIONAL TAX GYAN !!!

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SITG No. 183

M/s Nestle SA

v.

A.O. Circle(International Taxation)

Any modification in DTAA shall be available to the first nation only via notification by Union of India

Civil Appeal No. 1432/ 2023

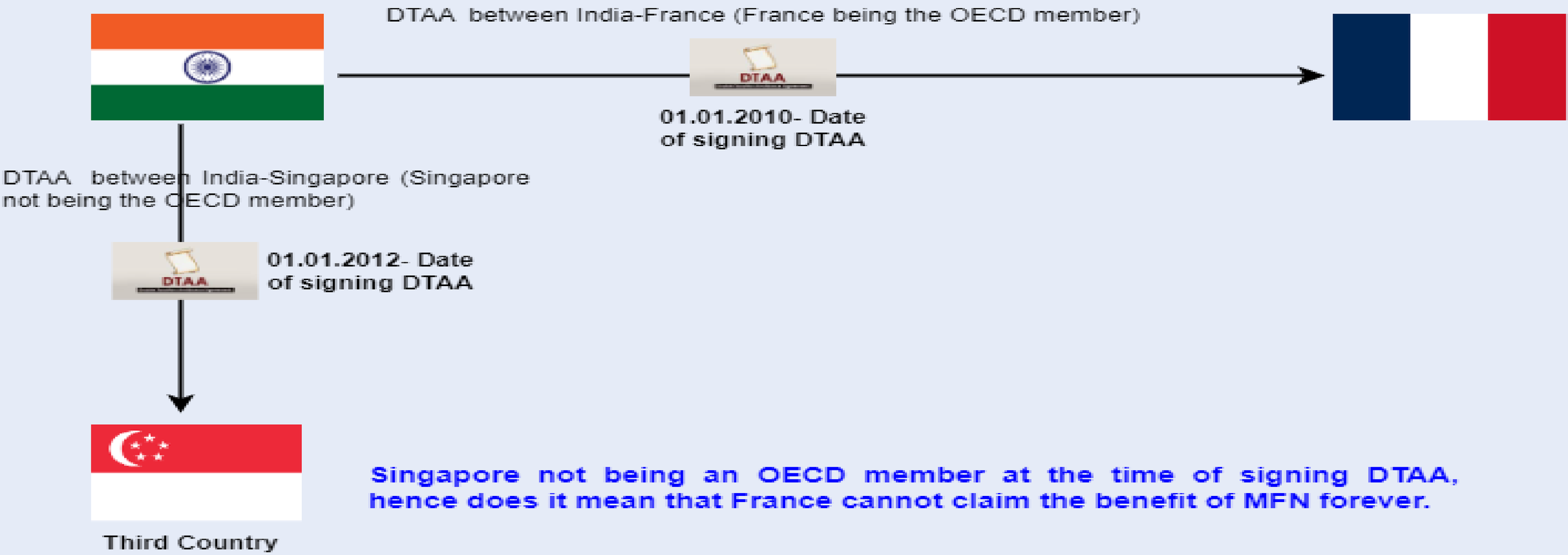
09.12.2023

Jain Shrimal & Co.

Issues of the Case

Issue-1: Eligibility of MFN Clause

Whether the Most Favored Nation (MFN) Clause can be invoked when the third country with which India has entered into DTAA, was not an OECD member yet. The major issue herein is if the third country is not an OECD member on the date of signing the DTAA, then such country shall not be able to claim the benefit of MFN forever, even if such country becomes a member of OECD at the future date.



Issues of the Case

Issue-2: Requirement of notification for claiming the benefit of MFN Clause

Whether the effect and the benefits of the MFN Clause are to be given automatically, i.e., from the date when DTAA is signed between the two countries or such benefit shall be given only after a separate notification by the union for the application of MFN clause is issued.

The issue herein is whether a notification is necessary to be issued by Union of India for claiming the 'same benefit' by first nation (France) as available to third country.

Issue- 1 (Eligibility of MFN clause)

Revenue's contention

- **'Trigger' to MFN clause:** It occurs when India enters into DTAA with another country, however, it should be an OECD member at the time of signing the agreement, and if such DTAA provides for a lower rate of tax or any other benefit over and above the one which is provided in the existing DTAA. **(subjected to other requirements discussed in the next slide)**

- **Interpretation of 'Is':** 'Is' signifies the time when the treaty is to be applied. MFN clause explicitly signifies that the third country is required to be an OECD member, as of the date of the signing of the treaty, and not on any future date.

Assessee's contention

- **Interpretation of 'Is':** Let's try and understand the interpretation of the expression 'Is' in context of Article 10. While claiming the benefit of Article 10, the assessee needs to be a resident of India or another country only for the year in which the benefit is sought. Therefore, for Article 10 'Is' does not amount to continuous requirement of residence, but only at the time when the benefit of the MFN clause is invoked.

- However, drawing inference from the revenue's contention, it means that the country needs to be an OECD member at the time of
  i. Signing DTAA,
  ii. Execution of DTAA,
  iii. Invoking MFN clause

Issue- 2 (Notification for claiming benefit of MFN clause)

Revenue's contention

- **Mere entering into treaty:** Mere entering into a treaty or protocol does not tantamount to acquiring the right to invoke the MFN clause. Hence, the notification would be required to be issued to give effect of such consequence.
- **Difficult to verify:** It becomes difficult for any revenue authority to verify the claim of the assessee, without the notification at hand with regards to MFN benefit.
- **Dualist or Monist:** As per Article 253, India follows a 'Dualist' approach, i.e., International treaties are not automatically incorporated into domestic law, rather they would require enabling legislation.

Assessee's contention

- **Section 90:** It requires notification of a treaty or protocol, but it does not require each clause or article of already notified agreement to be further notified separately, especially when such amendment is a consequence of **self- operative MFN clause**.
- **Automatic operation:** The MFN Clause does not require the issue of any notification, or through notified protocol for bringing any beneficial provision of already notified DTAA. On the contrary, as per MFN clause, any reduced rate of tax for OECD member "shall also apply", which proves that such clause is automatic under current convention.

Issue- 2 (Notification for claiming benefit of MFN clause)

Revenue's contention

- **Exclusive power of Parliament (Article 253):** Any treaty or convention entered into by India with any other country, shall require parliamentary legislation and as per Article 253, a treaty without such legislation shall be enforceable.
- **Necessity of notification:** Notification triggers when lowering of rate of tax or treatment of various kinds of income needs to be done.
- There are possibilities that one such notification grants one benefit, and denies other benefits. Therefore, it becomes important that such notifications are issued, and there could not be any automatic application of the benefits given to other OECD members.

Assessee's contention

- **Notification dt. 30.08.1999:** Every bilateral amendment to treaty shall always has a date of entry into force agreed by both states.
- The said notification was a unilateral one because the scope of FTS was restricted by India w.e.f. 01.04.1997, where as limited scope of FTS agreed in India-USA DTAA came into force from 18.12.1990, hence such notification was unilateral and not otherwise.

Ruling

- **Notification u/s 90:** It is the mandatory condition for the court, authority, or tribunal to give effect to any DTAA or any protocol, for changing terms or conditions, which has the effect of altering its existing provisions of law.

- **Automatic benefit:** The DTAA done with another country, which is also an OECD member and given better treatment, does not automatically lead to integration of such extended benefit to the first nation (entered into DTAA with India) as well. In such cases, the article of DTAA of first nation shall be required to be amended through a separate notification u/s 90.

- **Interpretation of 'Is':** Such expression shall have a present significance. Therefore, for claiming the 'extended benefit' as made available to another country who is also an OECD member and have a DTAA, the relevant date is entering into treaty with India, and not a later date. Countries becoming member of OECD at the later date after the date of signing the DTAA, in terms of India's practice, shall not be eligible for the 'extended benefit'

Hence, after analyzing all the facts stated in the court of law and the conclusions drawn (as stated above), it is held that the reasonings and findings in the impugned orders cannot survive, hence they are set aside. The **revenue's appeal therefore shall succeed and are allowed**. Pending applications, including those seeking intervention for impleadment, shall stands disposed off.

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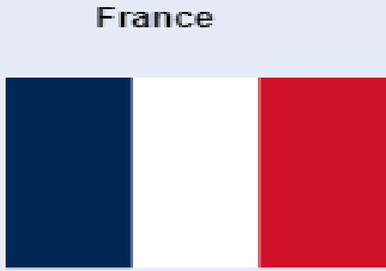
India signed DTAA with France with MFN clause



Case study for discussing the timeline for claiming benefit w.r.t. third country

Case-1

In Case-1, the third country becomes OECD member after the date of signing DTAA, therefore the benefit of MFN clause shall not be available to France forever in relation to third country in the present case.

Case-2

In Case-2, the assessee 'is' the OECD member at the time of signing DTAA, therefore the benefit of MFN clause shall be available to France.

However, such benefit shall only be available from the year 2003, when the notification for claiming such benefit is issued.

Our Comments

- **Mandate for issuing notification:** While entering into DTAA or making an amendment in any of the Article of DTAA, a bilateral notification is issued by both the countries which is mentioned in DTAA. Further DTAA itself is incorporated by way of notification u/s 90. Hence, **will it be mandatory to issue a separate notification** for claiming the benefit arising because of a third country due to MFN clause already present in the existing DTAA of another country which has been already accepted by way of notification, just because the concessional rate of tax is being offered to the third country.
- It is also important to note that Section 90 explicitly says that the assessee can claim the rate of tax mentioned in the act or the rate of tax specified in DTAA, whichever is more beneficial to the assessee. Therefore, whether it is still necessary to have the notification issued by the Union of India, for claiming the 'same benefit' as was provided to the another country.

- **Retrospective effect:** According to the merits of the judgement of Hon'ble SC, the judgement might have a retrospective effect in the sense that all the financial benefit passed on to the assessee according to the earlier judgements of lower courts in this regard, shall be reversed.

- In the present scenario, it is high time that the government rises up to an occasion and settle the dust around it, through addressing the issue and the genuine taxpayers' concern, so that the possibility of prolonged litigation in future does not arise.

Section/Article	Section 90/ Protocol of DTAA
DTAA/Country	-
Court	Supreme Court of India
Date of decision	19.10.2023

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