Nuances of MFN clause in various India DTAAs

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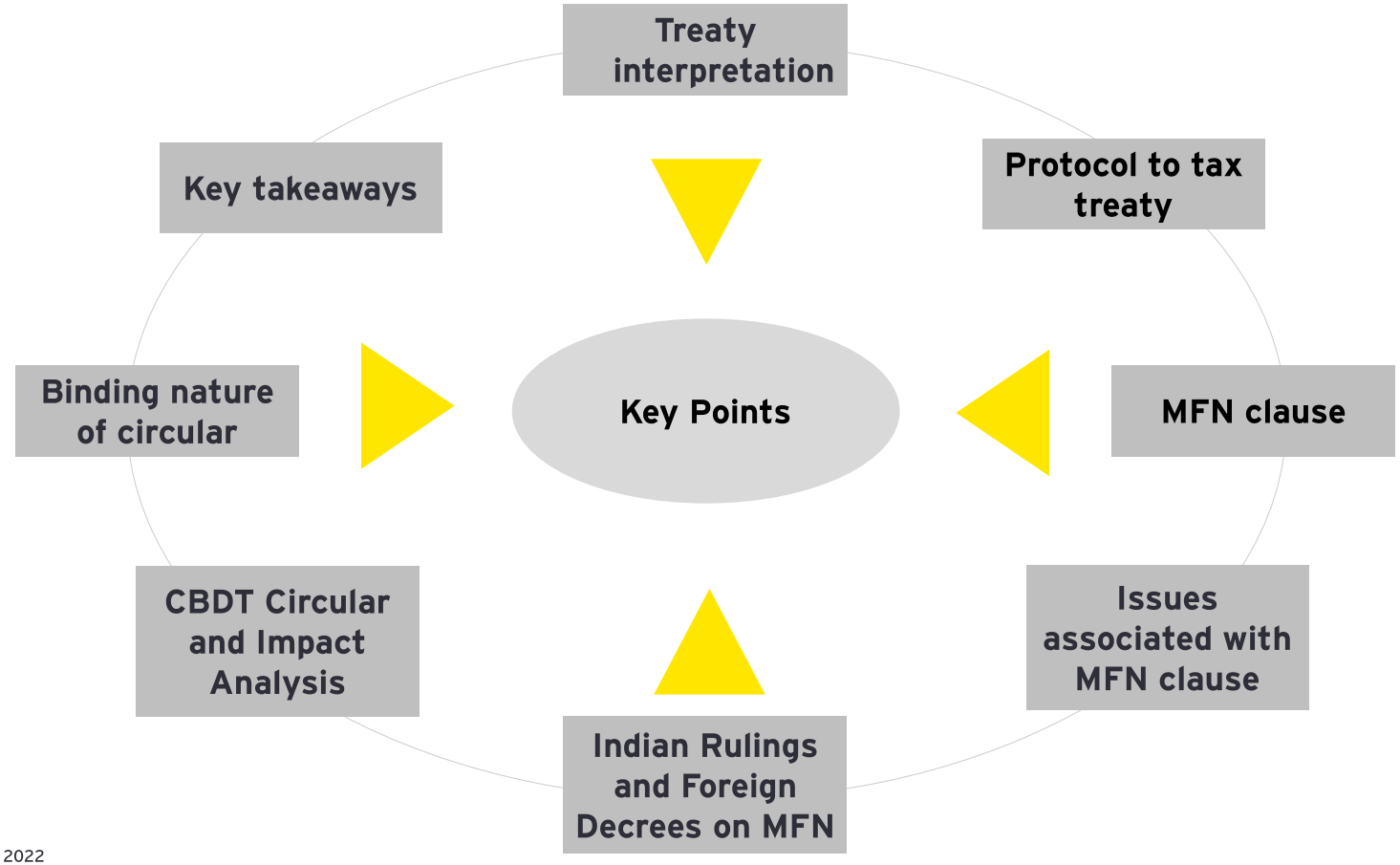
Key Points for Discussion



Tax treaty and its interpretation

Tax treaty
Basics

Vienna Convention on Law of Treaties 1969:
"an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument and whatever its particular designation"

- Treaties are signed by two national jurisdictions to regulate matters concerning taxes
- Taxpayer is not a party to a tax treaty
- Desire of signatories to make business environment in their jurisdictions tax friendly
- Treaty represents understanding as to rights and obligations of respective country
  - to forego its right to tax,
  - to limit scope or rate of taxation,
  - to grant credit of tax paid directly or indirectly in other jurisdiction/s etc.
- Understanding between Governments is to share tax revenues equitably as between themselves, while mitigating hardship for taxpayers

Vogel : "A tax treaty neither generates a tax claim that does not otherwise exist under domestic law nor expands the scope or alters the type of an existing claim"

Tax treaty *Interpretation*

Vienna Convention on the Law of Treaties ('VCLT')

- India not a signatory to the convention.

- **Azadi Bachao ((2003) 71 CCH 0817 ISCC) / Ram Jethmalani vs. UOI (WP (Civil) No. 176 of 2009)** - Supreme Court has relied on the convention since it provides a broad guideline as to what could be an appropriate manner of interpreting a treaty.

- Article 26 of VCLT 'Pacta Sunt Servanda' – ***Every treaty must be performed in good faith***

- Article 31 of VCLT – General Rule of Interpretation
  - A treaty shall be interpreted in good faith with the ordinary meaning given to terms in their context and in light of treaty's object/purpose.
  - The context for interpretation shall include text, preamble, annexures, agreement related to treaty conclusion and instrument which was made by one/more parties in connection with conclusion of treaty and accepted by the other parties as an instrument related to the treaty.

Tax treaty *Interpretation*

Foreign Jurisprudence/Legal Commentaries

- Francis Bennion: Statutory Interpretation - The interpretation of a treaty imported into municipal law by indirect enactment is unconstrained by technical rules of English law/legal precedent, but conducted on *broad principles of general acceptation*. *The words are to be given their general meaning, general to lawyer and layman alike, the meaning of the diplomat rather than the lawyer.*

- David R. Davis: Principles of International Double Taxation Relief - The main function of a tax treaty should be seen in the context of aiding commercial relations between treaty partners and as being essentially a bargain between two treaty countries as to the division of tax revenues between them.

Accordingly, interpretation of tax treaties should not be as per the technical rules which govern the interpretation of Income-tax Act, 1961. The core function of a treaty should be seen to aid commercial relations and equitable distribution of tax revenues.

Understanding Protocol to a tax treaty

Understanding Protocol to a tax treay

- The Indian judiciary has largely settled the issue of Protocol being an important and binding part of a tax treaty.
- IBFD defines the term 'Protocol' as follows:

  "Signed document containing the points on which agreement has been reached by the negotiating parties preliminary to a final treaty. A protocol is also an agreement reached by the parties to a tax treaty and signed and ratified by them, in addition to an existing tax treaty. The protocol may be signed simultaneously with the tax treaty or later, and it clarifies, implements or modifies treaty provisions."

  Protocol is more like an addendum to the tax treaty which has similar binding force as the treaty and would form part of the treaty.
- The Indian judiciary has ruled in following judicial precedents that a **"Protocol"** is an indispensable and integral part of the treaty with the same binding force as the main clauses:
  - Maruti Udyog Ltd., Vs. ADIT (2010) 37 DTR 85 (Delhi)
  - Steria (India) Ltd. vs. CIT (2016) 386 ITR 0390 (Delhi)
  - Concentrix Services Netherlands BV vs. ITO (TDS)
  - DCIT vs. ITC Ltd. (82 ITD 239) (Calcutta Tribunal)
  - Sandvik AB vs. DDIT (2014) 41 CCH 0535 PuneTrib

Understanding Protocol to a tax treay

- Support can also be drawn from legal/ tax treaty commentaries:

  Klaus Vogel in his commentary on Double Tax Conventions (Fourth and Fifth edition) –

  ".....As previously mentioned, (final) protocols and in some cases other completing documents are frequently attached to treaties. Such documents elaborate and complete the text of a treaty, sometimes even altering the text. Legally they are a part of the treaty, and their binding force is equal to that of the principal treaty text. When applying a tax treaty, therefore, it is necessary carefully to examine these additional documents"

  NAP Commentary on section 90 –

  "Protocols are exchanges between the States pursuant to finalisation of the treaty. These are part of the treaty and have equal binding force. They need not be notified separately."

MFN clause

MFN Clause
Introduction

- Meaning of **Most Favoured Nation** ('MFN') clause in tax treaties:
  - The treaty extends similar benefits to one country as extended to certain other countries
  - Generally triggered or activated when India enters into a more beneficial provision with a third country under a bilateral agreement.
  - Attempts to avoid discrimination between a subset of countries/resident of different countries
  - Normally benefit under this clause is restricted to a specific group like OECD countries or developing countries
  - MFN clause usually found in Protocols, Exchange of notes and sometimes in the Treaty itself
  - Eliminates tax planning through a particular set of countries

- Indian tax treaties having MFN Clauses
  - **OECD Member States** – Belgium, France, Netherlands, Spain, Sweden and Switzerland, etc
  - **Non-OECD States** – Saudi Arabia, Philippines etc

MFN Clause
Objective

- The underlying principle is, if a country extends favourable treatment to another country on a particular subject under a given agreement, it must treat other parties to the agreement equally with regard to that subject.
- The MFN clause in tax treaties also intends to promote non-discrimination and parity in business and investment opportunities among treaty partner countries.
- The MFN principle ensures that a treaty partner under one agreement is not subjected to a treatment which is less favourable than treatment provided to other treaty partners under similar agreements.
- Thus, MFN clauses are generally intended to bring parity, non-discrimination and a level playing field among treaty partners.
- In recent times, the MFN provisions in the tax treaties between developed and developing countries have started demonstrating disadvantageous effects for the source jurisdictions.

MFN Clause
Few other aspects

- The MFN benefit is not necessarily required to be reciprocal – Eg in India – France DTAA

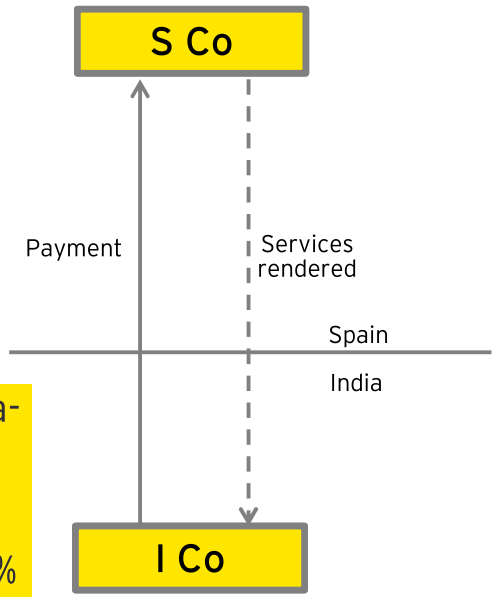
- MFN benefit may be available on business profits and not limited to popular income streams (royalty/ FTS/ dividend etc) – Eg treaty with UK, Saudi Arabia

- MFN benefit can be invoked in either ways i.e. Automatically orh Non Automatically (where an affirmative action may be required by the Governments. For eg in case of treaty wit Switzerland)

- Relevant dates:
  - Cut-off date for selection of treaty to be imported through MFN clause
  - Date when MFN clause can be said to be effective

MFN Clause
Illustrative impact

- S Co rendered certain technical services to I co
- WHT rate under India-Spain DTAA is 20%
- S Co contemplates that a lower WHT rate is possible



- Invoke MFN clause in India-Spain DTAA
- Apply the WHT rate of 10% under India-Germany DTAA (If restricted scope not possible)

DTAA with MFN clause	Particulars	DTAA with beneficial provisions	Revised
Netherlands	Broad definition of FTS	US	FIS concept
Hungary	Interest on Government securities taxable	Portugal/ Italy	Interest on Government securities exempt
Belgium	Royalty definition wide to cover equipment royalty	Sweden	Royalty excludes equipment royalty

MFN Clause
Tax Treaty Examples

Treaty	Extract of MFN Clause
Sweden	*In respect of Articles 10 (Dividends), 11 (Interest) and 12 (Royalties and fees for technical services) if under* ***any Convention. Agreement or Protocol between India and a third State which is a member of the OECD, India limits its taxation at source on dividends, interest, royalties, or fees for technical services to a rate lower or a scope more restricted than the rate or scope*** *provided for in this Convention on the said items of income, the same rate or scope as provided for in that Convention, Agreement or Protocol on the said items of income shall also apply under this Convention*
France	*And whereas paragraph 7 of the Protocol dated 29th September, 1992, to the aforesaid Convention provides that if after the 1st day of September, 1989,* ***under any Convention Agreement or Protocol concluded between India and a third State which is a member of the Organisation for Economic Co-operation and Development, India should limit its taxation at source on dividends, interest, 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 in this Convention*** *on the said items of income, then, as from the date on which the Convention between India and France or the relevant India Convention, Agreement or Protocol enters into force, whichever enters into force later, the same rate or scope as provided for in that Convention, Agreement or Protocol on the said items of income shall also apply under this Convention*
Switzerland	*4. If after the signature of the Protocol of 16th February, 2000 under any Convention, Agreement or Protocol between India and a third State which is a member of the OECD India should limit its taxation at source on dividends, interest, royalties or fees for technical services to a rate lower or a scope more restricted than the rate or scope provided for in this Agreement on the said items of income, then,* ***Switzerland and India shall enter into negotiations without undue delay*** *in order to provide the same treatment to Switzerland as that provided to the third State*
Philippines (Non OECD)	*4. With reference to Articles 8 and 9 if at any time after the date of signature of the Convention the Philippines agrees to a lower or nil rate of tax with a third State the Government of the Republic of the Philippines shall without undue delay inform the Government of India through diplomatic channels and the two Governments* ***will undertake to review these Articles*** *with a view to providing such lower or nil rate to profits of the same kind derived under similar circumstances by enterprises of both Contracting States*

MFN Clause
OECD Members Tax Treaty Examples

Treaty	Extract of Articles
Slovenia	**Article 10 – Dividends** *2. However, such dividends may also be taxed in the Contracting State of which the company paying the dividends is a resident and according to the laws of that State, but if the recipient is the beneficial owner of the dividends the tax so charged shall not exceed :* *(a) 5 per cent of the gross amount of the dividends if the beneficial owner is a company which holds directly at least 10 per cent of the capital of the company paying the dividends;* *(b) 15 per cent of the gross amount of the dividends in all other cases.*
Lithuania	**Article 10 – Dividends** *2. However, such dividends may also be taxed in the Contracting State of which the company paying the dividends is a resident and according to the laws of that State, but if the beneficial owner of the dividends is a resident of the other Contracting State, the tax so charged shall not exceed:* *(a) 5 per cent of the gross amount of the dividends if the beneficial owner is a company (other than a partnership) which holds directly at least 10 per cent of the capital of the company paying the dividends;* *(b) 15 per cent of the gross amount of the dividends in all other cases.*

MFN

Developments so far

21-Jan-89	India - Netherlands tax treaty
01-Aug-94	India - France tax treaty
29-Dec-94	India - Switzerland tax treaty
17-Feb-05	India - Slovenia tax treaty
21-Jul-10	Slovenia becomes OECD Member
28-Feb-12	Netherlands vide decree declared that tax rate shall be reduced pursuant to MFN clause retroactively from 21 July 2010 since Slovenia became OECD member
10-Jul-12	India - Lithuania tax treaty
07-Jul-14	India - Colombia tax treaty
04-Nov-16	France vide decree declares that tax rate shall be reduced pursuant to MFN clause retroactively from 21 July 2010 since Slovenia became OECD member
05-Jul-18	Lithuania becomes OECD Member
28-Apr-20	Colombia becomes OECD Member
13-Aug-21	Switzerland published that the lower rate of 5% apply for shareholding above 10% retrospectively from 5th July, 2018 and for dividends arising from qualified interests and portfolio dividends retrospectively from 28th April, 2020

Issues with respect to application of MFN clause

MFN Clause
Dissecting the issues

1

Whether third state has to be a member of OECD both at the time of conclusion of the DTAA with India as well as at the time of applicability of MFN clause

- Whether beneficial provisions can be imported from tax treaties with countries which were not OECD members at the time of signing of treaty?
- Decrees issued by treaty partners invoking benefit from such countries due to MFN
- Judicial precedents?

2

Whether a separate notification from Indian government is needed to implement MFN clause or whether MFN clause is self-operative

- Whether trigger of MFN qualifies as amendment to treaty which becomes effective only when separately notified
- Provisions under the Act with respect to issue of notifications
- Judicial precedents?

Issue 1 - Foreign Decrees

Swiss Authorities statement dated 13 August 2021 on application of MFN Clause -

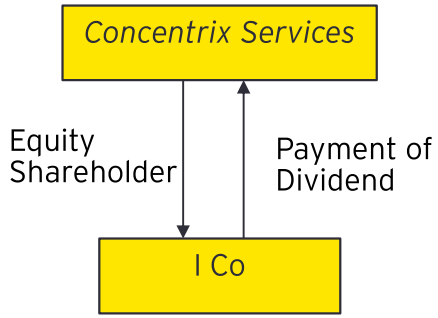
- Article 11 of the amending protocol in the Treaty contains an MFN clause, limiting taxation at source on dividends, interest, royalties or fees for technical services to a lower rate as prescribed in any subsequent tax treaty with an OECD member country.
- Following the signing of the amending protocol, India concluded two new tax treaties - Lithuania (26 July 2011) and Colombia (13 May 2011) (which are now OECD members as of 5 July 2018, and 28 April 2020 respectively).
- Lithuania's and Colombia's accession to the OECD has the effect of retroactively (from 5 July 2018 and 28 April 2020 resp.) reducing the tax rate in the source state for dividends from 10% to 5%.

Directorate General for Fiscal Affairs, Netherlands

- On 17 February 2005 a tax treaty between India and Slovenia entered into force. On 21 July 2010 Slovenia became a member of the OECD.
- Due to the fact that Slovenia became member of the OECD, this lower tax rate will also apply in relation to the Netherlands and India with retroactive effect as of 21 July 2010.
- As a result, if a company in the Netherlands pays a dividend to a company in India and the Indian company owns at least 10% of the capital in the Dutch company, the tax rate is reduced from 15% to 5%.

MFN Clause

Judicial Rulings - Concentrix Services Netherlands BV



Facts
▸ I Co was subsidiary of Concentrix Services ▸ I Co applied for a certificate to deduct withholding tax at a lower rate of 5% as per MFN Clause under India-NL tax treaty r.w. India-Slovenia tax treaty. ▸ Tax authorities issued certificate stipulating tax withholding @ 10% basis tax rate under Article 10(1)/(2) of India-NL tax treaty ▸ Benefit of MFN Clause not given by authorities

Issues	Delhi HC ruling
❑ Slovenia was not an OECD member at the time of signing tax treaty with India which is required to trigger application of MFN clause under India-NL tax treaty	The use of the word in MFN clause "is" in the sentence "which is a member of the OECD" requires countries to be OECD members when source taxation is triggered in India and not at the time when the subject treaty was executed.
❑ No notification was issued by India for enforcing the MFN clause	Plain reading of the protocol would show that the protocol forms an integral part of the Convention. Therefore, no separate notification is required, insofar as the applicability of provisions of the protocol is concerned.

Issue 2 – Whether notification is required?

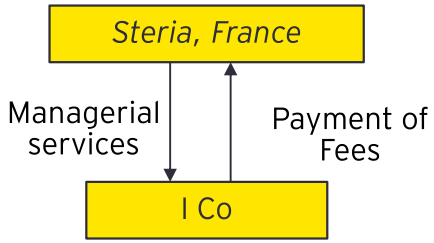
- CBDT seems to suggest that the applicability of MFN is an amendment to tax treaty and hence any amendment can be implemented by a separate notification.

Some of the counter arguments to CBDT view:

- Protocol forms integral part of a tax treaty
- Wherever additional notification or negotiation is required, there is specific mention in tax treaties:
  - India-Swiss tax treaty are subject to additional negotiation with respect to MFN clause application royalty and fees for technical services.
  - Ahmedabad ITAT – Torrent Pharma (TS-609-ITAT-2016 (Ahd) – Application of MFN clause was subject to the additional renegotiation with Swiss Government.
  - Subjecting MFN clause applicability to a notification issuance, may significantly hamper the purpose of the MFN clause and lead to breach of bilaterally concluded tax treaty terms.
- Requirement of notification for every provision of validly notified tax treaty to trigger, same may render various tax treaty provisions non-operational. (e.g., Article 12 of India-US tax treaty, Article 7(6) of India-UK tax treaty)
- If unilateral interpretations/instruments are not binding, the unilateral notifications for implementation of tax treaties by India are also not binding – Double edged sword
- Only rulings of judiciary are left to be relied upon for interpretation of treaty/MFN clause

MFN Clause

Judicial Rulings – Steria India Ltd



Facts
▸ I Co entered into management service agreement with Steria France for various management services ▸ Payment made by I Co to Steria qualify to be FTS under the India-France DTAA taxed at 20% on gross

Issues	AAR Ruling [TS-285-AAR-2014]	Delhi HC ruling [TS-416-HC-2016 (DEL)]
❑ **Notification restricts applicability of MFN clause with respect to lower rate, whether, MFN clause can be applied to invoke restricted definition of FTS given under India-UK DTAA?**	No. The restriction in the MFN clause of the France DTAA is in relation to rates of taxes and the "make available" clause cannot be read into the Protocol.	Yes. Benefit of "lower rate" or "more restricted scope" cannot be mutually exclusive and could accrue under more than one DTAA
❑ **Can it be argued that the Notification is unilateral and does not dilute the auto-executory power of the Protocol?**	No. Notification which was issued pursuant to the Protocol, gave effect to the MFN clause and hence, does not dilute the power of the protocol.	MFN clause is an integral part of DTAA. No need to separately notify MFN clause, once the DTAA is notified, MFN clause

What is the recent CBDT Circular?

MFN Clause
Clarificatory Circular

- On 03 February 2022, CBDT issued a circular[1] for clarifications regarding MFN clause in the Protocol to India's tax treaties with certain countries
- The CBDT has attempted to render clarity regarding application and conditions for accessing the benefit of MFN clause in tax treaties
- Taxpayers have taken benefit of the MFN clause present in the respective treaties by either exempting the income from tax or offering the same at lower rates
- The position of reduced tax rate has been revalidated by Dutch, French and Swiss tax officials vide unilateral decree or publication
- CBDT Circular clarifies that the stand of reduced tax rate adopted by foreign tax officials and taxpayers is grossly invalid
- The circular has stirred up controversy across the board since it is perceived as going against the settled law basis various landmark judicial precedents and denying treaty benefits to the taxpayers.

1 Circular No. 3/2022 (F. No. 503/1/2021-FT&TR-I)

MFN Circular

- MFN Clause clearly provides that the third state has to be a member of OECD at the time of signing of tax treaty with the third state
- Unilateral decree given by other treaty partner doesn't represent shared understanding of MFN Clause
  - The unilateral instrument issued by Netherlands, Switzerland and France have no binding effect as the same has been issued without any consultation with India.
  - Benefit of lower rate in Slovenia treaty cannot be extended under MFN clause since Slovenia was not an OECD member when India entered into tax treaty
- Wording of MFN clause requires application of lower rate from date of entry into force of tax treaty with third OECD state and not from date when third state becomes OECD entry.
- As per Supreme Court ruling in case of Azadi Bachao Andolan (2004, 10 SCC), a notification is required to implement the provisions of tax treaty and India has not issued any notification importing tax treaty provisions of Slovenia, Lithuania and Colombia into tax treaties of Netherlands, Switzerland and France.

MFN Circular

- Selective invocation and application of MFN clauses as reflected in decrees of NL/France/Switzerland is not permitted as per the rules of interpretation

- Circular laid down following conditions for applicability of MFN clause:
  - Treaty with third state is entered after signature of India's tax treaty.
  - Third state has to be an OECD member at the time of signing its treaty with India.
  - India limits its taxing rights in relation to rate/scope of taxation in its treaty with the third state.
  - India issues a separate notification under the Income Tax Law for importing the favourable benefits of third state treaty into the original treaty.

- The circular shall not be applicable to those taxpayers in whose case there is a favourable decision by any court on this issue

Impact of the circular on popular income streams

Impact of the circular on popular income streams

Analysis

- Some of the popular use cases of MFN clause in the Indian context include application of restricted scope / taxation at lower rate w.r.t
  - Dividend, interest, technical fees or payment for use of equipment etc

Impact on various income streams

Particulars	Probable impact
Dividend declared before 1 April 2020 (i.e. during DDT regime)	• Where many taxpayers have filed AAR applications or additional claims for restricting DDT rate to the rate prescribed under tax treaty by relying on the MFN clause present in the subject treaty ➔ The Circular may act as additional ammunition for the tax authorities to deny the claim of DDT refund • In cases where additional claims are not founded based on MFN clause, the Circular may have no play
Dividend declared after 1 April 2020	• Larger part of the circular focuses on tapping dividend income which are getting taxed at lower rate pursuant to MFN clause • The circular would certainly bolster the argument of tax administration for denying benefit where the conditions mentioned in the circular are not followed (i.e. in absence of notification, third state being an OECD member, etc)
Other income streams viz interest, FTS, etc	• Circular largely focuses on dividend taxation, however, the conditions for invoking MFN clause would also have a bearing on other income streams and hence, taxpayers may need to assess the impact of this circular for these income streams as well

Impact of the circular on popular income streams

Analysis

Payee

Particulars	Where income has been considered as exempt	Where lower rate of tax has been considered
Position taken by taxpayer	Income claimed as exempt (FTS/ FIS/ Interest)	Tax @ 5% paid on dividend income
Effect of circular	Income is taxable	Dividend taxable @ 10%/ 15%
Interest liability	Interest liability inevitable since no TDS	234B/C liability could be mitigated
Penalty	Potential 270A penalty➔ Could be defended though	No 270A penalty since no underreporting of income
Prosecution	Bonafide MFN benefit claimed ➔ No risk	
Return filing	No relief from non-filing of return; For past years, Updated return could be filed	If differential tax is paid – no revision required

Payer

Particulars	Where income has been considered as exempt	Where lower rate of tax has been considered
Position taken by taxpayer	Income claimed as exempt (FTS/ FIS/ Interest)	Tax @ 5% paid on dividend income
Effect of circular	Income is taxable	Dividend taxable @ 10%/ 15%
Risk of recovery of principal tax	No, if payee files ROI - as per proviso to S 201(1)	
Interest liability	Yes, but restricted to date of filing ROI by payee – as per proviso to S 201(1)	
Disallowance of expenditure	Yes (subject to compliance u/s 40(a)(i))	NA for dividend; for others Yes
Penalty	Defensible, if claim made is bonafide, based on legal advice/ favourable view of courts	
Prosecution	No	

MFN circular vs Delhi HC in case of Concentrix Services

MFN circular vs Delhi HC in case of Concentrix Services

Quick comparison of department's contentions

Revenue's arguments	Circular's guidance
A bare reading of Clause IV (2) of the protocol appended to the subject DTAA would show that the *benefit of the lower rate of withholding tax or a scope more restricted would be available only if the country with which India enters into a DTAA was a member of the OECD* at the time of the execution of the subject DTAA.	*The Circular lays down following conditions for invoking benefits under MFN clause:* ➢ Treaty with third state is entered after signature of India's tax treaty. ➢ Third state has to be an OECD member at the time of signing its treaty with India.
Several amendments have been made to the subject DTAA which have been ratified by both India and the Netherlands and therefore, *if the benefit of a lower rate of withholding tax or a scope more restricted as provided in the DTAA(s) executed between India and Slovenia, Lithuania and Colombia is to be extended to those governed by the subject DTAA it could only be done by amending the subject DTAA followed by the issuance of notification.* Since no such amendment has been made to the subject DTAA, the withholding tax cannot be lower than 10%.	*The Circular lays down following condition for invoking benefits under MFN clause:* ➢ India issues a separate notification under the Income Tax Law for importing the favourable benefits of third state treaty into the original treaty.

The guidance/ conditions laid down by the circular have already been adjudicated against the revenue by the HC in case of Concentrix Services ➔ **Whether circular has adopted correct legal position?**

Whether Circulars are binding in nature?

Whether Circulars are binding in nature?

- It is well settled principle that instruction/ order/ circular issued by the Board are binding on tax authorities
  - Various landmark rulings viz Navnit Lal C Jhaveri vs K Sen [1965] 56 ITR 198, Ellerman Lines Ltd vs CIT [1971] 82 ITR 913
- However, the same are not binding on Courts which is established in case of the following:
  - Various SC rulings in case of Hindustan Aeronautics Ltd vs CIT [2000] 243 ITR 808, CCE vs Kores (India) Ltd [1997] 89 ELT 441
- As regards binding nature of circular on taxpayers, following judicial precedents throw some thoughts:

Ruling	Observations of the courts
CCE vs Kores (India) Ltd [1997] 89 ELT 441 (SC)	*"4. A Tariff advice or a Trade Notice issued by the Board certainly does not bind the Tribunal or the courts **and an assessee may argue that it is erroneous**; but it is not open to the Revenue to advance arguments that are contrary to the terms thereof. Upon this short ground alone, the appeals must be dismissed."*
COC vs Indian Oil Corporation Ltd [2004] 267 ITR 272 (SC)	*"The principles laid down by these decisions are:* *(1) Although a **circular is not binding on a Court or an assessee, it is not open to the Revenue to raise the contention that is contrary to a binding circular by the Board**. When a circular remains in operation, the Revenue is bound by it and cannot be allowed to plead that it is not valid nor that it is contrary to the terms of the statute.*

Whether Circulars are binding in nature?

Ruling	Observations of the courts
Catholic Syrian Bank Ltd vs CIT [2012] 343 ITR 270 (SC)	*"18. Now, we shall examine the effect of the circulars which are in force and are issued by the CBDT in exercise of the power vested in it under Section 119 of the Act. Circulars can be issued by the Board to explain or tone down the rigours of law and to ensure fair enforcement of its provisions.* ***These circulars have the force of law and are binding on the income tax authorities, though they cannot be enforced adversely against the assessee."***
CCE vs Minwool Rock Fibers Ltd [Civil Appeal No. 4988 of 2003 dated 2 February 2013] SC	*"14. The learned Senior Counsel Shri Bhatt invites our attention to the circular instructions issued by the Board.* ***In our view , the departmental circulars are not binding on assessee or quasi judicial authorities or courts and therefore, in that view of the matter, the circular/ instructions issued by the Board, would not assist them"***

- Considering the above, view can be taken that Circular is binding on taxpayers only if it is favourable to taxpayers and not in cases where it is considered to be inconsistent with correct legal position
- Taxpayers could adopt a divergent view where it creates a higher burden
  - Therefore, taxpayers who have adopted a benevolent view of the matter are expected to continue to rely on plethora of judicial precedents to keep the fight alive until the same is tested and settled by a higher court

Recent Pune Tribunal ruling

MFN Circular

Recent Pune Tribunal ruling in case of GRI Renewable Industries S.L.

- **GRI Renewable Industries S.L vs. ACIT(IT) [ITA No 202/PUN/2021]**
  - Observes that once DTAA is notified all its integral parts, including Protocol, get automatically notified and there remains no need to again notify the individual limbs of the DTAA
  - Observes that the Circular specifying the need for a separate notification for importing the beneficial treatment from another tax treaty as a corollary of Section 90(1) overlooks the plain language of the provision in juxtaposition to the language of the Protocol, which treats the MFN clause an integral part of the DTAA
  - Opines that it is trite law that a CBDT Circular is binding on the AO and not on the assessees or the ITAT or other appellate authorities
  - Observes that the Circular attaches a new disability of a separate notification for importing the benefits of a tax treaty with the second State into the treaty with first State, thus, cannot operate retrospectively

MFN Nuances - A Sum up..

MFN Nuances - A Sum up..

- While the circular rejects unilateral decrees/ notifications, it itself is a Unilateral measure taken by the Government ➔ Whether it would be acceptable to the treaty partners? **Switzerland has already given some tough reactions for granting tax credits**

- With multiple bulletins/ circulars issued by treaty partners on application of MFN clause which reflect conflicting positions, how the same can be addressed? Should there be a framework/ consultation process to address such issues viz MAP

- Whether closed cases can be reopened on account of this circular?

- Indirect application of MFN clause

- MFN is one of the forms of treaty benefit and would be subject to LOB, GAAR, PPT, TRC compliance, BO conditions, etc ➔ All these would be independent exercises

- STTR agreed as part of Pillar Two discussions prescribe a minimum withholding rate of 9% ➔ Is the controversy short term?


THANK YOU!!!