MFN Judgment - Clarifies Law or Marks New Beginning?

Oct 20, 2023

The Hon'ble Supreme Court delivered its judgment in the MFN Clause controversy that has repercussions on MNCs across the board due to the principles enunciated on India's treaty practice. It unsettles tax position as the law favoured the taxpayers until yesterday. The judgment is a scholarly exposition on the law of treaties with respect to the constitutional mandate, role of the Government and the Parliament, various practices and principles of interpretation.

Taxsutra presents a deeper insight into the judgment and its consequences on taxpayers through the reactions and comments of the experts on international tax.

N. Venkataraman

Additional Solicitor General of India, Supreme Court

In India, treaty making is neither wholly an Executive Power nor wholly a Legislative Act. Treaty making involves both these Constitutional organs and one cannot act in exclusion of the other, especially when it can impact or interfere with Municipal Laws or the Rights of its people.

India is no longer what it was 2 decades ago. Times are changing. World order may it be Political, Commercial or Economical had been maintaining standards and scales, as one who can leverage and the other who gets leveraged. Golden rules of the Games and its interpretation resulted in a regime, maintaining and recognising this distinction, emerging from the same set of facts, transactions or documents.

World order gets planned, designed and executed as a collective voice in Unison in a representative manner and gets disbursed or distributed as a one size fit all doctrine across the world.

India as a Nation is standing on a defining moment, a place of eminence after several centuries. All the three Constitutional Institutions have an obligation and duty to assimilate this reality and act in accordance with its Constitutional Powers, Choices and Discretion.

This Judgment is again one which show cases an apt, timely and meaningful interpretation of International Treaties, India’s transition as a reality and how India as a Nation should carry the baton into the future for the sustained welfare by becoming part of this world order.

It elaborately records and in detail the institutional and textual interpretation emerging out of these sources for its reliance to convey India’s arrival to this destination of maturity.

The options emerging in the world are two fold. Short term adoptions which has leads some Nations to Surrogate Sovereignty or a long term Vision, where a Nation understands its past and its future and what it can offer to the collective wisdom expressed in Unison as part of the World Order.

This Judgment is an indication of Nation’s arrival into this Think Tank of Trade and Business Ideologies of the Future World and will act as a bridge to connect both ends of the world allowing free, fair and reasonable flow of trade and commerce to the mutual benefit of one and all.

The Judgment provides certainty and uniformity and how India has matured into looking forward destination for Global Business Investments, as its now in sync with the Global Business Order.

Certainty, because the Judgment upholds Legislative mandate and Uniformity, because it reserves the interpretation which is a Constitutional right to the Judiciary.

Personally so thankful for the support extended by the Ministry and the Tax Dept and special thanks to Sri Kamlesh Varshney whose conviction became the source seed to launch.

Dinesh Kanabar

CEO , Dhruva Advisors LLP

The Supreme Court has radically altered the discourse on interpretation of Tax Treaties as was commonly understood thus far by the lower courts, tax payers and tax professionals. Holding that an amendment to a tax treaty would be applicable only if the same notification process as is applicable to the promulgation of the tax treaty, the Hon'ble Court has made far reaching observations not only on the process to be followed, though not mandated, but has upheld that the MFN my never be notified, may be notified in part or may be notified at a much later point of time. To some extent this watered down the the proposition that a bilateral agreement cannot be watered down by a unilateral action; by not notifying a MFN clause applicability, in effect a bilateral tax treaty is not being honoured by an act of one of the parties to the tax treaty.

The interpretation of the word 'is' in the context of a country becoming a member of OECD at a later point of time is also interesting and a different approach from what has been thus far

We are now staring at past tax differentials being asserted and interest being paid. Where withholding has happened at a lower tax rate and tax it to the account of the recipient, the payer may have to pay taxes without having the ability to recover from the recipients.

Kamlesh Varshney

Ex- IRS & Former Joint Secretary, Finance Ministry

This judgement has not only strengthened hands of Indian negotiators in various treaty negotiation (all treaties and not just tax) but has also underlined the supremacy of Parliament over executive action.

This judgment would also act as huge disincentive for various treaty shopping structures that are being employed to ensure that Indian Government doesn't get its due share

Rajendra Nayak
Partner, International Tax Services, EY

The ruling brings focus on policy considerations that play a role in including an MFN clause in bilateral tax treaties- particularly from a developing country perspective. Concluding a bilateral tax treaty means both countries involved May need to deviate from their domestic tax law taxing rights and provide concessions to each other to promote international trade and investment between the respective countries. Treaty negotiation is largely a bargaining process and results in a number of concessions. Having an MFN clause implies that what has been negotiated bilaterally automatically extends to a third country where the economic considerations may differ from what was negotiated with the third state. This has adverse revenue implications for developing countries that are net importers of capital and favours net exporters of capital. Hence, a developing country suffers a burden imposed by a past agreement. Hence, there is a need for India to review its tax treaty policy on including MFN clause in bilateral tax treaties. Further, even if considered appropriate there is a need for unambiguous drafting of such clauses to avoid interpretive issues which would require resolution to come from the highest Court of the land

Uday Ved
Senior Partner, KNAV

The judgement of Hon’ble Supreme Court lays down an important principle for interpretation of MFN clause and states that a formal notification/ratification under Section 90(1) is necessary to give effect to the provisions of DTAA, irrespective of different languages under various DTAAs eg in Switzerland DTAA, the ratification is necessary whereas in other DTAAs (eg Netherlands, France, Spain), it may seem automatic. The Hon’able SC has categorically laid down the principle of interpretation of MFN clause. One question which comes to my mind; Action 15 of BEPS has resulted into signing and executing MLI and due to these, number of DTAAs have already been amended. Does every amendment needs separate notification/ratification for DTTA to give effect to MLI? This may not be intended or else the very purpose or intent of MLI would be questioned.

Overall, irrespective of the final result, the Hon’ble SC has laid down an important principle of interpretation of international taxation and this should lead to the finality on the interpretation of MFN Clause.