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Can India even notify OECD membership of third country under Sec.90(1), asks Justice Bhat

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Senior Advocate Porus Kaka continues his submissions before the Supreme Court on the MFN Clause controversy; Mr. Kaka distinguishes the judgments relied upon by the Revenue and relies on various judgments to argue that the Supreme Court has always reconciled the treaty law with the domestic law and in one of the case favour the foreign takeover regulation over Indian regulation; He lays emphasis on Vienna Convention on Law of Treaties to emphasise on 'good faith' interpretation; He explains various phraseology adopted by Switzerland in negotiating MFN Clause which has prevailed prior to and after entering into MFN Protocol with India; He underscores Swiss treaties with Lithuania, Latvia and Kazakhstan to submit that MFN Clause Protocol in such treaties with respect to OECD membership of a third country is so worded that such membership is required to be seen on the date of signing the Protocol, which is not the case with India-Switzerland Protocol; Relies on South African and Dutch rulings in similar cases where the Courts gave plain meaning to the words of the treaty; Argues that the word 'is' has dynamic meaning and relates to temporal event of dividend payment, not linked with date of OECD membership; Sr. Adv. S. Ganesh brings out stark difference in Nestle's case and Steria's case in the context of respective DTAAs with Switzerland and France; Brings to the fore, numerous rulings where interpretation favouring the assessees on narrow scope of FTS has been given by HCs, AAR and ITAT against which Revenue has not preferred any appeal, thus, argues finality in law; Based on the various rulings, he makes a threefold submission: (i) MFN Clause applies automatically along with the notification of India-France DTAA, (ii) Revenue's argument on separate notification has been categorically rejected, and (iii) Protocols also has clauses which operate against the assessee and are contrary to assessee's interests; Towards the end of hearing, Justice Bhat raises piquant question on the scope of what can be notified under Section 90(1); Hearing to continue tomorrow

The batch of appeals are being heard by the Division Bench of Supreme Court comprising Justice S. Ravindra Bhat and Justice Dipankar Datta

Senior Advocates Porus Kaka, S. Ganesh, Percy Pardiwalla, along with Advocates Kamal Sawhney, Divesh Chawla, Prashant Meharchandani, Divyanshu Agrawal and others are appearing for the Assessees while the Revenue is being represented by ASG N. Venkataraman

Senior Advocate P. Chidambaram along with Advocate Mukesh Butani are appearing for the Intervenor.
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Key Submissions of Sr. Adv. Porus Kaka

1. The Supreme Court has always reconciled the domestic law with the international law. In Gramophone’s case involving copyright infringement, interpreted the word ‘import’ to reconcile with international conventions.
2. Constitution Bench ruling in Kesoram relied upon by the ASG on import of Article 253 of the Constitution is part of the dissenting judgment where Union’s power to levy cess on tea was upheld. The majority judgment did not deal with Article 253 and only decided if States were well within their rights to impose cess on tea. As far as the present case is concerned, the constitutional requirement of Article 253, List I of the Seventh Schedule has been fulfilled by enacting Section 90, thus, there is not constitutional infirmity.
3. Supreme Court in GM Exports held as follows, which applies to the present case for reconciling international obligation and domestic law: *“In a situation where India is a signatory nation to an international treaty, and a statute is made in furtherance of such treaty, a purposive rather than a narrow literal construction of such statute is preferred. The interpretation of such a statute should*

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be construed on broad principles of general acceptance rather than earlier domestic precedents, being intended to carry out treaty obligations, and not to be inconsistent with them."

4. The approach has been to first find harmony before getting into a situation of conflict. This principle will apply to all the protocols which have been notified.
5. India has no role to play in who becomes the OECD members or how a country becomes an OECD member. India is not part of OECD block. India cannot sit in judgment to decide OECD membership, thus, India cannot be expected to notify a country's entry into OECD. OECD membership is publicly available fact.
6. Diplomatic exchange between India and Switzerland prior to third protocol suggests that bargain considered automatic, non-automatic and conduit-based provisions. The countries agreed on automatic operation of MFN Clause for lower rate of tax with reference to India's treaties with other OECD countries.
7. When India entered into DTAAs with Lithuania and Colombia, they were in the process of becoming OECD members and this this fact cannot be lost sight of.
8. The words 'as from' used in DTAA with Switzerland and the Netherlands and 'with effect from' used in DTAA with France only signifies the effective date for applicability of the MFN clause and does not qualify the substantial provision contained in the protocol. This is equivalent to the effective date referred to in the Income-tax Act, the import of which has been interpreted by the Supreme Court in Sedco Forex ruling to decide if the Explanation was retrospective in nature. These words do not decide the interpretation of the substantive law.
9. The Netherlands issued a decree in Feb'12 w.e.f. 2010 and France issued Clarification in 2016 w.e.f. 2010. India did nothing about them for more than a decade India and benefited from these unilateral declarations. India, in effect, benefited from lower TDS on dividend paid to Indian companies by Dutch subsidiaries as lower withholding led to lower FTC and higher taxable income of subsidiaries in India.
10. In Technip's case involving Takeover Regulations in India and France where French regulations provided for higher threshold as triggering event, Supreme Court yielded to the French Regulations
11. Revenue is at ad idem on applicability of Vienna Convention on Law of Treaties. Articles 26 and 27 are derivate of Article 31. The treaties are to be interpreted in good faith by giving ordinary meaning to the words in the light of the object of the treaty.
12. With regard to more beneficial DTAAs with other OECD countries, Switzerland's DTAAs with Lithuania and Latvia contains the words "at the date of signature of this Convention" and DTAAs with Kazakhstan contain the words "with the present member state of the OECD". Revenue is seeking to read these words into India-Switzerland DTAA which contains the words "which is a member of the OECD".
13. There are similar treaty where France and the Netherlands have used different phraseology. India was aware of this practice and still negotiated the Protocol in the present form. It is a settled legal position that nothing can be added to or subtracted from the treaty clauses.
14. South African Tax Court rejected the argument raised by the South African Authorities in the present case in a similarly placed situation involving taxation of dividend involving a DTAA with Netherlands. The Tax Court allowed the benefit of Protocol entered into with Sweden after entering into a Protocol with Netherlands by referring to a treaty with Kuwait providing Nil rate which was entered into even prior to the Protocol with the Netherlands. Court rejected South African Authorities' submission and gave effect to plain meaning of the words in the Netherlands treaty and denied reading of words that were not contained in the treaty. Revenue, here, is trying to do what South African Authorities did which was rejected.
15. In a similar case, same interpretation was given by the Dutch Supreme Court by applying VCLT.
16. The temporal phase relevant for understanding the meaning of the word 'is' used in Protocol with Switzerland is the rate to be applied when dividend is paid Any other meaning would render the MFN meaningless.
17. The word 'is' has a dynamic meaning. International Court of Justice in Costa Rica v. Nicaragua held that a generic word has to evolve. Thus, lower rate of tax is to be seen in the DTAA with other OECD members on the payment of dividend and not with regard to their date of OECD membership.
18. Even contextual interpretation favours the Assessee, as the third protocol with Switzerland made lower rate clause automatic which was not automatic as per the prior Protocol.
19. Unilateral practice does not form a general practice but a unilateral practice not objected to binds the country that does not object to a unilateral practice. There is a principle of international law

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that acquiescence to a unilateral practice is binding on the country that acquiesces.

20. Revenue's submission on constitutional requirements would render Azadi Bachao judgment redundant. All the Protocols have been duly notified under Section 90(1) which in turn has been legislated by the Parliament, thus, requirement of Article 253 remains fulfilled.

Key Submissions of Sr. Adv. S. Ganesh – Appearing for Steria India against Delhi HC Ruling

1. Stark distinction between India-Switzerland DTAA and India-France DTAA.
2. There is only one Protocol under India-France DTAA which was notified along with the DTAA.
3. The case does not concern entering into OECD membership as the DTAAs with the USA, UK and Switzerland with narrower scope of FTS were entered into who were already OECD members.
4. There are plethora of High Court judgments, AAR and ITAT rulings upholding the invocation of MFN clause to allow narrower scope of FTS i.e., make available clause and exclusion of 'make available' clause.
5. Revenue has not preferred appeal in many case, thus, the interpretation favouring the Assessees has attained finality. E.g. AAR ruling in Poonawala Aviation, Karnataka HC judgments in Apollo Tyres and ISRO, ITAT rulings in Birla Corporation, ITC and GRI Renewable.
6. Supreme Court in South Indian Bank referred to Adam Smith's Wealth of Nations and endorsed certainty and predictability after taking into account a singular view of various High Courts in the context of Section 14A.
7. Delhi HC in Steria judgment relied on Klaus Vogel's Commentary as per which documents attached to treaty are part of the treaty and binding on the principal text of the treaty.

Piquant Remarks & Questions by Justice S. Ravindra Bhat

To Sr. Adv. Porus Kaka

1. Gramophone judgment is in conflict with larger bench judgment in Mayer Hans George. Is it a good law?
2. Is there a treaty that requires cess on tea? We can keep Kesoram aside, there are enough observations in Azadi Bachao on Section 90.
3. Something that is not consistent with domestic law cannot be implemented merely on the basis of a treaty.
4. We'll interpret the Protocol as notified, no need to go in its history.
5. India is not benefiting from lower tax rate in other DTAAs with OECD countries, Indian companies are.
6. In Technip ruling, India yielded to French law due to conflict, there is no treaty involved.
7. Are Articles 26 and 27 of VCLT part of customary international law?
8. Constitution Bench's Vatika Township is also on effective date!

To Sr. Adv. S. Ganesh

We are specially sitting to decide the conflict arising due to various judgments. Appeals may not have been preferred by Revenue due to the reasons like low tax effect.

To ASG N. Venkataraman

How can India notify OECD membership under Section 90(1)? Section 90(1) pertains only to the agreement where India is involved. Treaty partners becoming OECD members has tax impact on subjects of India's DTAAs, would it have implications under Section 4?

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