IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'D', NEW DELHI

BEFORE SH. VIKAS AWASTHY, JUDICIAL MEMBER
AND
SH. NAVEEN CHANDRA, ACCOUNTANT MEMBER

ITA No. 2411/Del/2023
(Assessment Year : 2020-21)

Travelport Global Distribution System BV [Earlier known as "Galileo Nederland BV"] Taurusavenue 33A-2132 LS Hoofddorp, The Netherlands PAN No. **AACCG 2258 D**	Vs.	**The ACIT,** Circle – 3(1)(1) International Taxation-3, Delhi
(ASSESSEE)		(RESPONDENT)

Assessee by	Ms. Ishita Farsaiya, Adv. and Shri Aryan Singh, Adv.
Revenue by	Dr. Shalini Verma, CIT-D.R.

Date of hearing:	23.06.2026
Date of Pronouncement:	14.09.2026

ORDER

PER NAVEEN CHANDRA, ACCOUNTANT MEMBER :

The above captioned appeal is preferred by the assessee against the assessment order dated 27.06.2023, passed by Income Tax Department, Circle International Taxation – 3(1)(1), Delhi (hereinafter referred to as 'ld. AO), passed u/s 143(3) r.w.s. 144C(13) of the Income Tax Act, 1961 (hereinafter 'the Act') in pursuance of directions of the ld. Dispute

Resolution Panel-2, New Delhi (in short 'ld. DRP') dated 03.05.2023 pertaining to Assessment Year 2020-21.

2. Assessee has filed following grounds of appeal, as under:

> 1. *"That on the facts and circumstances of the case and in law, the Ld. AO and Hon'ble Dispute Resolution Panel ('DRP') have erred in holding that interest income received under Section 244A of the Act of INR 1,66,05,370 is taxable at the rate of 10 percent as per Article 11 of India-Netherland Double Taxation Avoidance Agreement ('DTAA'), without appreciating the fact that on application of the beneficial provisions of Article 12 of India-Italy DTAA read with Protocol IV of India-Netherland DTAA containing the Most Favored Nation ('MFN') clause, the said income is taxable at 'Nil' rate.*
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> 2. *That on the facts and circumstances of the case and in law, the Ld. AO and DRP have erred in stating that only provisions of tax treaty with Germany, Sweden, Switzerland and United States of America will be imposed under the MFN clause contained in India-Netherland tax treaty, and India-Italy tax treaty is excluded from the preview of such MFN clause of India-Netherland tax treaty.*
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> 3. *The Ld. AO and DRP have erred in both facts and in law by not following binding jurisprudence, wherein after considering the facts, it was held that protocol to DTAA forms integral part of conventions, and no separate notification will be required insofar as the applicability of provisions of protocol is concerned.*
>
> 4. *Without prejudice to above, on the facts and circumstances of the case and in law, the Ld. AO while computing tax for captioned year, have erred in not granting allowance of eligible credit of tax deducted at source ('TDS') of INR 69,78,240, which was effected by the Ld. AO herself.*
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> 5. *That on the facts and circumstances of the case and in law, the Ld. AO has erred in charging interest under section 234A, 234B and 234C of the Act.*
>
> 6. *That on the facts and circumstances of the case and in law, on adjudication of the above grounds of appeal, the assessee shall be eligible for consequential refund along with interest under Section 244A of the Act.*
>
> 7. *The Assessee prays for leave to add, alter, amend and/or modify any of the grounds of appeal at or before the hearing of the appeal."*

3. Assessee has filed additional grounds of appeal, as under:

> *"A. That on the facts and circumstances of the case and in law, by virtue of MFN clause under the India-Netherlands DTAA read in conjunction with*

Hon'ble Apex Court decision in case of Nestle SA [2023] 155 taxmann.com 384 (SC), the beneficial provisions of Article 11(3)(c) of India-USA DTAA become applicable to the Assessee and the interest income received by Company is taxable at a 'Nil' rate, under the India-Netherland DTAA read with India-US Tax Treaty.

B. Without prejudice to above, that on the facts and circumstances of the case and in law, the AO has erred in taxing the interest on income tax refund at the rate of 10% as per India-Netherland tax treaty without appreciating the fact that the Assessee have carried forward losses for AY 2012-13, AY 2014-15 and AY 2015-16 (as per direction of Hon'ble ITAT vide order dated 13th August 2021 and 27th September 2022), which is allowed to set-off against this interest income by virtue of Income Tax Act, 1961.and in light of ITAT decision of Abu Dhabi Commercial Bank PJSC Wework India Management (P.) Ltd. vs DCIT (ITA 3404 (MUM.) OF 2023) and Hyosung Corporation vs ACIT (ITA No.2943/DEL/2023).

The Assessee craves leave to alter, amend or withdraw all or any of the grounds of appeal herein or add any further grounds as may be considered necessary and to submit such statements, documents and papers as may be considered necessary either before or during the appellate proceedings."

4. Brief facts of the case are that the assessee was incorporated in Netherlands and provide electronic global distribution services in the 'rest of the world' territory (including the Indian region) for the travel industry, utilizing the Computer Reservation System ('CRS'), an automated system which processes booking and other data, till 31st Dec, 2016. The present assessee currently has no business operation in India and all the business of providing global distribution services in the Indian region was assumed by its successor entity, Travelport International Operations Ltd. ('TIOL'), w.e.f 1st Jan, 2016.

5. For AY 2015-16, a refund of INR 8,04,72,190 (including interest u/s 244A of the Act amounting to INR 1,66,05,368 was determined by the

preceding Assessing Officer ('Ld.AO') vide order dated 02 July 2019 passed u/s 154/143(3) of the Act. Consequently, a refund amounting to INR 73,493,950 was credited in the account of the Assessee on 22 November 2019 after deduction of tax at source ('TDS') amounting to INR 69,78,240 (at the rate of 42.024%) on interest component of the refund. Subsequently, the Company filed its return of income for AY 2020-21 (since the refund was credited on 22 Nov 2019) on 03rd December 2020 wherein such interest income amounting to INR 1,66,05,368 was duly offered to tax at 10% rate as per India-Netherland tax treaty and claimed the refund of excess TDS deducted amounting to INR 53,17,700. Later, the Assessee sought to correct its claim of refund from INR 53,17,703 to INR 69,78,240. The case of the Assessee was selected for the scrutiny assessment u/s 143(3) of the Act and received the Notice u/s 143(2) on 29 June 2021.

6. The Assessee thereafter sought that interest income of INR. 1,66,05,368 be exempt from taxation under the provisions of the India-Netherlands Treaty read with the protocol and in accordance with MFN clause, sought an entire refund of INR 69,78,240 while concluding the Assessment Proceedings. The claim of the Assessee was not accepted by the AO, and the Ld DRP. Thus, vide the Assessment Order dated 27.06.2023 the Assessee's income was assessed at Rs. 1,66,05,368/- and was the interest

income was held to be taxable at ten percent as per the India Netherlands DTAA.

7. Aggrieved by the said order the Assessee is before us.

8. The assessee has filed its submissions as under:

I. As per the India - Netherlands DTAA the withholding tax rate for interest payable is prescribed to be 10 percent. The Assessee on basis of the MFN clause being a part of protocol dated 13.07.1988 to the India Netherlands DTAA sought the benefit of the Protocol in and sought to be taxed under Section 197 at NIL rate. The AO declined to tax the Assessee at NIL rate. During the pendency of the Assessee's appeal, the Hon'ble Supreme Court of India passed the order in ***Nestle SA*** [2023] 155 taxmann.com 384 (SC).

II. The relevant extracts of the decision in Nestle SA (supra) are produced below:

a. Details of notification of the India - Netherlands DTAA and the subsequent amendments and notifications are extracted at paragraph 47 (see p. 200 of the Paperbook) of the decision, the relevant extracts of which are produced below:

Contracting State #2	Signing of / entry into treaty	Date of entry into force	Notification, if any	Date of signing relevant amending protocol	Effective date of said amendment/ protocol	Notification if any	Whether member of OECD
Netherlands	Treaty & Protocol - 13.07.1988	21.01.1989	27.03.1989	13.08.1999	01.04.1997 or 01.04.1991 Or 01.04.1998 Or 01.04.1995 (based on the provision, in relation to the concerned contry)	30.08.1999	Yes (13 November 1961)
USA (earlier agreement dated	Treaty & Protocol : 12.09.1989	18.12.1990	20.12.1990	No amendment [Note - USA does not have an MFN Clause]	NA	NA	Tes (12) November 1961)

15.06.1989; also see instruction Dated 28.04.2003 and 23.10.2007)							

The decision also noted with regards the date of signing relevant amending protocol i.e. 13.08.1999 that "13/30.08.1999 (date of signing mentioned as 13.08.1999 in Protocol, but as 30.08.1988 in amending notification dated 30.08.1999)."

b. The Hon'ble Supreme Court in its decision interpreted the MFN Clause in the India-Netherlands DTAA, India - Switzerland DTAA and the India-France DTAA and the India-Spain DTAA. It is pertinent to note that the Hon'ble Supreme Court in its decision did not interpret the India-Netherlands DTAA qua Article 11 which pertains to taxation of interest.

c. The findings of the Hon'ble Court regarding treaty practice of India, in relation to DTAAs and their Protocol, and practices of Netherlands are extracted hereunder (at p. 203 of the Paperbook):

"52. The DTAA which India entered into with the Kingdom of Netherlands, was signed on 13.07.1988. Article IV of the Protocol (of the same date), to the DTAA provided that

"If after the signature of the aforesaid Convention under any Convention or Agreement 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 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"

53. The DTAA between India and Germany entered into force on 26.10.1996; the DTAA between India and Sweden entered into force on 25.12.1997, the India-Swiss Confederation DTAA entered into force on 19.10.1994, ***and the DTAA between India and the United States of America entered into force on 18.12.1990. These states were members of the OECD. The Union limited the taxation at source on dividends, interest, royalties, fees for technical services and***

payments for the use of equipment to a rate lower or a scope more restricted than that provided in the DTAA between India and the Netherlands on the said items of income. Consequently, the notification dated 30.08.1999, provided the following benefits expressly on different dates, having regard to the fact that India entered into DTAAS with OECD members and gave them effect, subsequently:

54. It is therefore, clear that the date on which the relief of rate of taxation for interest and dividends was specified to be 01.04.1997; different dates (01.04.1995 and 01.04.1998) were applied as applicable to the definition of fees and technical services and other details; the rates, too varied, depending on the period(s). The second aspect, is that the notification under Section 90 was issued on 30.08.1999. The third, and most significant aspect is that the favourable or beneficial treatment was given to other OECD nations on 26.10.1996 (India-Germany); the DTAA between India and Sweden entered into force on 25.12.1997, the India-Swiss Confederation DTAA entered into force on 19.10.1994 itself. These earlier dates, did not result in India automatically extending benefits
55. of Article IV of the India-Netherlands DTAA Protocol to Netherlands. The relevant phrase in that provision (Article IV) obliged India to grant to the Netherlands, the same benefit to it, as was granted to the other nation in that third party state's DTAA or Protocol with India:

"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"

55. ***Clearly, therefore, so far as India-Netherlands DTAA goes, there is established and clear precedent, of behaviour, in relation to treaty practise and interpretation. This was uncontested, and is a matter of record.***

(emphasis supplied)

III. The relevant extract of the amending Notification No. SO 693(E), dated 30.08.1999 to the India Netherlands DTAA is as under (p. 119 of the Paperbook):

"Amending Notification No. SO 693(E), dated 30-8-1999

WHEREAS the Convention between the Republic of India and the Kingdom of the Netherlands for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and on capital came into force on January 21, 1989, after the notification by both the Contracting State to each other of the completion of the procedures required under their laws for bringing into force the said Convention;

AND WHEREAS the Central Government, in exercise of the powers conferred by section 90 of the Income-tax Act, 1961 (43 of 1961), section 24A of the Companies (Profits) Surtax Act, 1964 (7 of 1964) and section 44A of the Wealth-tax Act, 1957

(27 of 1957), had directed that all the provisions of the said Convention annexed to the notification of the Government of India in the Ministry of Finance (Department of Revenue) (Foreign Tax Division) Number G.S.R. 382(E), dated March 27, 1989, shall be given effect to in the Union of India:

AND WHEREAS article IV of the protocol dated July 30, 1988, to the aforesaid Convention provides that if after the signature of the aforesaid Convention under any Convention or Agreement 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 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;

AND WHEREAS in the Convention between India and Germany which entered into force on October 26, 1996, the Convention between India and Sweden which entered into force on December 25, 1997, the Convention between India and the Swiss Confederation which entered into force on October 19, 1994, and the Convention between India and the United States of America which entered into force on December 18, 1990, which states are members of the Organisation for Economic Cooperation and Development, the Government of India, has limited the taxation at source on dividends, interest, royalties, fees for technical services and payments for the use of equipment to a rate lower or a scope more restricted than that provided in the Convention between India and the Netherlands on the said items of income;

NOW, THEREFORE, in exercise of the powers conferred by section 90 of the Income-tax Act, 1961 (43 of 1961), the Central Government hereby directs that the following modifications shall be made in the Convention notified by the said notification which are necessary for implementing the aforesaid Convention between India and the Netherlands, namely:

1. With effect from April 1, 1997, for the existing paragraph 2 of article 10 relating to dividends, the following paragraph shall be read:

> *"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 10 per cent of the gross amount of the dividends."*

II. With effect from April 1, 1997, for the existing paragraph 2 of article 11 relating to interest, the following paragraph shall be read:

> *"2. However, such interest may also be taxed in the Contracting State in which it arises and according to the laws of that State, but if the recipient*

is the beneficial owner of the interest the tax so charged shall not exceed 10 per cent of the gross amount of the interest."

IV. That in the above factual and legal matrix subsequent to the decision of the Hon'ble Supreme Court in ***Nestle*** (supra) the Assessee ought to be taxed at] NIL rate under the MFN clause of the India Netherlands DTAA read with the India-US DTAA and would place before this Hon'ble Tribunal the following submissions:

a. That as per Article 11(3)(c) of the India-USA DTAA interest arising in a contracting state shall be exempt to tax if it is approved by the Government of that State. Thus, interest payable by the Government of India is exempt under the India-US DTAA to a US resident under the India US DTAA. The said beneficial clause of Article 11 of the India US DTAA ought to be read into the India-Netherlands DTAA. Article 11 of the India-US DTAA is extracted hereunder:

"ARTICLE 11
INTEREST

1. Interest arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State.

2. However, such interest may also be taxed in the Contracting State in which it arises, and according to the laws of that State, but if the beneficial owner of the interest is a resident of the other Contracting State, the tax so charged shall not exceed:

a) 10 per cert of the gross amount of the interest if such interest is paid on a loan granted by a bank carrying on a bona fide banking business or by a similar financial institution (including an insurance company); and

b) 15 per cent of the gross amount of the interest in all other cases.

3. Notwithstanding the provisions of paragraph 2 of this Article, interest arising in a Contracting State:
4. a) and derived and beneficially owned by the Government of the other Contracting State, a political sub-division or local authority thereof, the Reserve Bank of India, or the Federal Reserve Bank of the United States, as the case may be, and such other institutions of either Contracting State as the competent authorities may agree pursuant to Article 27 (Mutual Agreement Procedure):

b) with respect to loans or credits extended or endorsed

i. by the Export Import Bank of the United States, when India is the first-mentioned Contracting State; and

ii. by the EXIM Bank of India, when the United States is the first-mentioned Contracting State, and

c) ***to the extent approved by the Government of that State, and derived and beneficially owned by any person, other than a person referred to in sub-paragraphs (a) and (b), who is a resident of the other Contracting State, provided that the transaction giving rise to the debt-claim has been approved in this behalf by the Government of the first-mentioned Contracting State; shall be exempt from tax in the first-mentioned Contracting State."***

(emphasis supplied)

b. As per Article 11 (3) of the India-US DTAA interest payable on refund of income tax under the Act by the Government of India to a person covered by the India-US DTAA will be exempt from tax since Interest on refunds payable under the Act is an interest on a debt claim which is approved by the Government of India. Reliance in this regard is placed on the decision of the Hon'ble Madras High Court in ***Ansaldo Energia SPA vs. CIT, (International Taxation), Chennai***, [2016] 69 taxmann.com 369 (Madras) wherein the Court while interpreting Article 12 of the India - Italy Treaty held that refund payable under the Act is a debt claim. The relevant extract of the decision is as under (p. 224 of the Paperbook):

"25. For a moment, we will keep aside the decision of the Supreme Court in Tata Chemicals Ltd.'s case (supra) and have a plain look at Section 244-A of the Income Tax Act. Under Sub-section (1) of Section 244-A, an assessee is made entitled to receive in addition to any amount of refund that has become due to him, simple interest calculated in the manner provided therein. Subsection (1) of Section 244-A uses two important expressions, namely (i) becomes cue, and (ii) be entitled to. The expression "becomes due" is a clear indication that an assessee will be entitled to the benefit of Section 244-A only if the refund of any amount has become due. If a refund has become due, interest on the refund is also automatic subject to the satisfaction of other conditions. Anything that is due and which a person is entitled to collect, is naturally in the nature of a debt claim. ***Therefore, we do not think that the Supreme Court made a very stray observation in paragraph 38 of its decision in Tata Chemicals Ltd.'s case (supra) without realizing what they were actually indicating. The statement***

found in paragraph 38 of the decision in Tata Chemicals Ltd.'s case (supra) to the effect "refund due and payable to the assessee is debt owed payable by the revenue" is actually a perfect statement of law. It is certainly a theorem, but not Euclid's theorem. Therefore, the law as we see is well settled to the effect that what was due as a refund and what was payable as interest on such refund are debt claims within the meaning of Article 12.4. *As a consequence, they satisfy the parameters of Article 12.3(a). Hence, the first question of law is answered in favour of the assessee. Consequently, the second question of law does not arise for consideration. The appeal stands allowed. There will be no order as to costs."*

(emphasis supplied)

c. That the Respondent passing the Assessment Order ought to have given the benefit the of India-US DTAA while applying the provisions of the India -Netherlands DTAA as the same is a statutory benefit available to the Assessee which ought not to have been denied and cannot be precluded from being applicable in the Assessee's case on the basis that the same has not been explicitly sought.

V. That in the present facts the Ld. AO at para 5.5. of the Assessment Order (p.12 of the Appeal Paperbook / p. 30 pf the Paperbook) also has accepted that the only certain portions of the India-US DTAA (which as per the protocol also includes interest) have been imposed under the MFN clause. In such a scenario considering Article 11 of the India-US DTAA and the protocol of the India-Netherlands DTAA the Assessee's income ought to be held to be taxed at NIL rate. Furthermore, International Law also requires that entire MFN clause be given effect to in its entirety.

VI. Thus, it is submitted that the obligation in Article IV(2) of the Protocol is, on its own terms, an obligation of substantive parity. The clause does not speak merely of a lower "rate"; it equally imports a "scope more restricted", and provides that "the same rate or scope" as in the comparator convention "shall also apply". The exemption in Article 11(3)(c) of the India-US DTAA is, in substance, a restriction on the scope of source taxation of interest. It is therefore squarely within the "or scope" limb of Article IV(2), and not dependent upon the rate limb alone. Furthermore, the US - India DTAA stood specifically notified vide amending Notification No. SO 693(E), dated 30.08.1999 (satisfying the test laid down in Nestle SA (supra). This understanding of a most-favoured-nation clause that it imports the substantive content of the comparator/specified treaty and not merely a numerical rate is well recognised[2]. In the tax-treaty context, the very Article IV(2) of the Protocol to the India-Netherlands DTAA (1988) has been independently catalogued and analysed (by experts) as a source-taxation MFN clause whose object is to secure to residents tax treatment no less favourable than that accorded to residents of third States[3] It has been observed, with specific reference to this 1988 clause, that it intends to promote non-discrimination and parity.

VII. In International law, generally, most-favoured-nation clauses are understood as instruments by which substantive standards not contained in the base treaty are imported from a comparator treaty. In fact, the right itself originates in the basic treaty containing the clause, whilst the comparator treaty supplies the favourable treatment to be extended.

VIII. The Revenue's construction that the India-US DTAA may be invoked to trigger Article IV(2) but may never thereafter be consulted to supply the content of the benefit reads the words "or scope" out of the Protocol and reduces the clause to a dead letter. That is impermissible as effect must be given to every word of the instrument, and the Hon'ble Supreme Court in ***Nestle SA*** (supra) itself recognised effectiveness as a governing principle of treaty interpretation (para 82 at p. 214 of the paperbook) and described the benefit as "the same rate or scope as provided for" in the comparator convention (para 54 at p. 206 of the paperbook).

Conclusion on Additional Ground A

IX. It is submitted that the Section 244A interest payable to the Assessee is exempt from source taxation in India and falls to be taxed at NIL, being interest on a Government-approved debt-claim within Article 11(3)(c) of the India-US DTAA, imported into the India-Netherlands DTAA through Article IV(2) of the Protocol read with the Notification S.O. 693(E) dated 30.08.1999.

X. Article 11(3)(c) of the India-US DTAA exempts from source taxation interest beneficially owned by a resident of the other Contracting State where "the transaction giving rise to the debt-claim has been approved in this behalf by the Government" of the source State. By Article IV(2) of the Protocol to the India-Netherlands DTAA, where India has, in a convention with a third OECD State, limited its source taxation of interest to "a rate lower or a scope more restricted," the same rate or scope "shall also apply" under the India-Netherlands DTAA. That benefit was given effect by Notification S.O. 693(E) dated 30.08.1999, issued under Section 90 of the Act, which expressly gives effect to Article IV of the said Protocol vis-à-vis the India-US DTAA.

XI. Thus, the following is submitted that in the present facts,

a. first, that the income in question is interest on a refund under Section 244A of the Act. It stands settled by the Hon'ble Madras High Court in ***Ansaldo Energia SpA*** (supra), following the Hon'ble Supreme Court in Union of ***India v. Tata Chemicals Ltd***., that a refund and the interest payable thereon are debt claims, the refund being a debt owed and payable by the revenue; the Section 244A interest is therefore, on binding authority, interest on a debt-claim.

b. Second, the underlying transaction is not merely approved but mandated by the Government of India: the entitlement to refund of excess tax with interest arises by operation of Section 244A itself, a statutory obligation under which the Government constitutes itself the debtor. Where the source State, by its own legislation, creates the debt and makes itself the debtor, the condition that the transaction "has been approved... by the Government" is satisfied a fortiori there being no higher form of governmental approval than a statutory command. The Section 244A interest, beneficially owned by the Assessee as a resident of the Netherlands, accordingly falls squarely within Article 11(3)(c) of the India US DTAA, which exempts taxation of such interest.

c. Third, that exemption under Article 11(3)(c) of the India-US DTAA applies to the Assessee under the India-Netherlands DTAA vide Notification S.O. 693(E) dated 30.08.1999, issued under Section 90 to give effect to Article IV of the Protocol dated 30.07.1988 (The Notification dated 30.08.1999 recognizes that India, in its Convention with the United States (in force from 18.12.1990, the United States being an OECD member), had limited its source taxation of interest to "a rate lower or a scope more restricted" than that in the India-Netherlands DTAA, and the Notification dated 30.08.1999, thus, modifies the India Netherlands DTAA on that footing). **The notification having imported the India-US treatment of interest, grants the Assessee the benefit of Article 11(3)(c) of the India-US DTAA and therefore, the interest on the Assessee's Section 244A refund is, accordingly, exempt and taxable at NIL.**

9. In rejoinder, the Revenue made its submission as under:

I. Main issues involved in the case emanating from Grounds of Appeal filed before Hon'ble ITAT-

(i) Interest income received u/s 244A is not taxable terms of Article 11 of India Netherlands DTAA and beneficial provision of Article 12 of India Italy DTAA r.w. Protocol IV of India Netherland

(ii) DTAA containing MFN clause No separate notification is required for application of provisions of aforesaid protocol

II. Additional Grounds submitted by the assessee before Hon'ble ITAT vide application dt. 12.03.2026-

(i) By virtue of MFN clause under India Netherland DTAA r.w. Hon'ble SC decision in ***Nestle SA*** (2023) and Beneficial provision of Article 11(3)(c) of India US DTAA, the interest income is not taxable.

(ii) Interest on income tax refund has been taxed @ 10% as per India Netherland DTAA without appreciating carry forward losses of the assessee against it.

III. The assessee is a foreign company incorporated in Netherlands. A refund of Rs. 8,04,72,190/-, including interest of Rs. 1,66,05,368/- u/s 244A, was determined in case of the assessee for AY 2015-16, correspondingly, refund of Rs. 7,34,93,950/- was credited in account of the assessee on 22.11.2019 after deduction of TDS of Rs. 69,78,240/- on the interest income. The said interest income was offered to tax at 10% under the India-Netherlands DTAA by the assessee. Assessee in its submission dated 28.01.2022 has claimed that the entire interest income is not taxable as per restricted scope under India Netherland DTAA r.w. India-Italy DTAA in with respect to MFN clause. Thus, Assessee has revised its refund claim from Rs. 53,17,703/- to Rs. 69,78,240/-.

IV. First the relevant documents are discussed below:

<u>Article 11 of India Netherland DTAA</u>

The relevant part of Article 11 is reproduced below:

1. Interest arising in one of the States and paid to a resident of the other State may be taxed in that other State.

> *[2] However, such interest may also be taxed in the Contracting State in which it arises and according to of that State, but if the recipient is the beneficial owner of the interest the tax so charged shall not exceed 10 cent of gross amount of the interest.]*
> *3. Notwithstanding the provisions of paragraph 2*
> *(a) the Government of one of the States shall be exempt from tax in the other State in respect of interest derived directly or indirectly by that Government from that other State:*
> *(b) interest arising in one of the States and paid in respect of a loan guaranteed or insured by the Government of the other State shall be exempted from tax in the first-mentioned State.*
> **********
> *5. The competent authorities of the States shall by mutual agreement settle the mode of application of paragraph*

India Netherland DTAA was signed on 21.01.1989 and was further amended on 30.08.1999 and 14.01.2013. In its present form sub-clause 2 of DTAA mentions that Contracting State, in this case India, where income has arisen, can tax the recipient, i.e. assessee, @ 10% of interest on gross basis. The exceptions are mentioned in sub-clause 3. Assessee does not fall in the mentioned class of exception. Sub-clause 5 states that the authorities will mutually agree to settle mode of application of para 2.

V. Before the Protocol, up to 31.03.1997, the original text of Article 11(2) provided higher taxation on interest and read as "The Contracting State in which the interest arose could tax it according to its domestic laws, but with a standard rate limit of 15% of the gross amount of the interest." After the Protocol, signed on 30.08.2019, with effect from April 1, 1997, the treaty was amended to lower the withholding tax and word 'beneficial owners' was inserted and accordingly, it came to be read as "The tax on interest for beneficial owners in the source state is reduced to a maximum of 10% of the gross amount." The treaty, thus, lowered tax on gross interest from 15% to 10% but increased restriction by way of addition of word 'beneficial owner".

Protocol IV of India Netherland DTAA

VI. The protocol, which is an integral part of DTAA, referred to by assessee in its submissions is quoted below:

"Ad Articles 10, 11 and 12
1. Where tax has been levied at source in excess of the amount of tax chargeable under the provisions of Article 10, 11 or 12, applications for the refund of the excess amount of tax have to be lodged with the competent authority of the State having levied the tax, within a period of three years after the expiration of the calendar year in which the tax has been levied.
2. 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 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."

As per the Protocol assessee can claim refund, if due, and if after signature of DTAA, India signs another DTAA with an OECD Member at lower tax for interest payments or the scope of tax on interest is more restricted, the same shall apply under this DTAA also, from the date on which such a DTAA is signed by India.

CBDT Circular No. 3/2022 dated 03.02.2022

VII. This circular is in context of the MFN clause in Protocol to India's DTAAs with some of the countries, especially European States and OECD members (The Netherlands, France, the Swiss Confederation, Sweden, Spain and Hungary). There is a discussion in the circular related to unilateral decree by Governments of Netherland, France and Switzerland decreasing tax on interest as a result of signing of DTAA by India with Slovenia, Lithuania and Colombia. The Indian government has written back to these governments not acknowledging the unilateral decree.

Various aspects of MFN clause, including conditions for its applicability, have been discussed in the circular, which have been summarised in para 5 of the circular as under: -

> *In view of the above, it is hereby clarified that the applicability of the MFN clause and benefit of the lower rate or restricted scope of source taxation rights in relation to certain items of income (such as dividends, interest income, royalties, Fees for Technical Services, etc.) provided in India's DTAAs with the third States will be available to the first (OECD) State only when all the following conditions are met:*
> *(i) The second treaty (with the third State) is entered into after the signature/ Entry into Force (depending upon the language of the MFN clause) of the treaty between India and the first State;*
> *(ii) The second treaty is entered into between India and a State which is a member of the OECD at the time of signing the treaty with it:*
> *(iii) India limits its taxing rights in the second treaty in relation to rate or scope of taxation in respect of the relevant items of income; and*
> *(iv) A separate notification has been issued by India, importing the benefits of the second treaty into the treaty with the first State, as required by the provisions of sub-section (1) of Section 90 of the Income Tax Act, 1961. If all the conditions enumerated in Paragraph 5(i) to (iv) are satisfied, then the lower rate or restricted scope in the treaty with the third State is imported into the treaty with an OECD State having MFN clause from the date as per the provisions of the MFN clause in the DTAA. after following the due procedure under the Indian tax law.*

From a plain reading of the aforesaid circular, it is clear that only if all the conditions enumerated in Paragraph 5(i) to (iv) are satisfied, then the lower rate or restricted scope in the treaty with the third State can be imported into the treaty with an OECD state having MFN clause in the DTAA. In the instant case condition no. (iv) is not satisfied as no such notification has been issued by the Indian government in context of MFN clause in India Netherland DTAA, on the contrary, Indian government has objected to decree of government of Netherland for unilateral use of MFN clause for lowering tax rates. Not only the fact that there is no notification in terms of the aforesaid circular, but also the fact that Indian government has written to the Netherland government on the very same issue of MFN under consideration in this case, clearly brings about stand of the government. Though India Netherland DTAA has MFN clauses built into their original treaty protocols, however, the same is not operational since there is no notification to this effect u/s 90 of IT Act.

The fact that MFN clause cannot be used without notification to this effect by the Indian government, renders arguments of assessee, for reading of India Netherland DTAA along with India Italy DTAA or India USA DTAA, infructuous.

<u>Notification No. S.O. 693(E), dated August 30, 1999</u>

VIII. Assessee has mentioned about this notification in its submissions. The same is quoted and discussed below:

Whereas the Convention between the Republic of India and the Kingdom of the Netherlands for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and on capital came into force on January 21, 1989, after the notification by both the Contracting State to each other of the completion of the procedures required under their laws for bringing into force the said Convention;

And whereas the Central Government, in exercise of the powers conferred by section 90 of the Income-tax Act, 1961 (43 of 1961), section 24A of the Companies (Profits) Surtax Act, 1964 (7 of 1964) and section 44A of the Wealth-tax Act, 1957 (27 of 1957), had directed that all the provisions of the said Convention annexed to the notification of the Government of India in the Ministry of Finance (Department of Revenue) (Foreign Tax Division) Number G. S. R. 382(E), dated March 27, 1989, shall be given effect to in the Union of India;

And whereas article IV of the protocol dated July 30, 1988, to the aforesaid Convention provides that if after the signature of the aforesaid Convention under any Convention or Agreement between India and a third State which is a member of the Organisation for Economic Co-operation and Development, India, for technical services or payments should limit its taxation at source on dividends, interest, royalties, fees for scope provided for for the use of equipment to a rate lower or a scope more restricted than the rate or scope 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;

And whereas in the Convention between India and Germany which entered into force on October 26. 1996, the Convention between India and Sweden which entered into force on December 25, 1997, the Convention between India and the Swiss Confederation which entered into force on October 19, 1994, and the Convention between India and the United States of America which entered into force on December 18, 1990, which states are members of the Organisation for

Economic Co-operation and Development, the Government of India, has limited the taxation at source on dividends, interest, royalties, fees for technical services and payments for the use of equipment to a rate lower or a scope more restricted than that provided in the Convention between India and the Netherlands on the said items of income;

Now, therefore, in exercise of the powers conferred by section 90 of the Income-tax Act, 1961 (43 of 1961), the Central Government hereby directs that the following modifications shall be made in the Convention notified by the said notification which are necessary for implementing the aforesaid Convention between India and the Netherlands, namely:

.....II. With effect from April 1, 1997, for the existing paragraph 2 of article 11 relating to interest the following paragraph shall be read:

"2. However, such interest may also be taxed in the Contracting State in which it arises and according to the laws of that State, but if the recipient is the beneficial owner of the interest the tax so charged shall not exceed 10 per cent. of the gross amount of the interest.".......

From a plain reading of the above notification, it is clear that both India and Netherland, acknowledge that as per 3rd "whereas", India acknowledges presence of enabling MFN clause in protocol IV of the India Netherland DTAA and as per 4th "whereas", India acknowledges that it has, through conventions restricted scope and lowered tax on interest for Switzerland and USA, both OECD members. The notification further mentions that, 'therefore', India and Netherland agree to revise and lower tax rate on interest from 15% to 10%. It can be clearly seen that, both Netherland and India, despite the knowledge that India has given greater concessions to aforesaid OECD members, agree to limit their negotiations to grant of lessor concessions to Netherland vis-à-vis the other two countries.

In this context it may be noted that, Article 11 in India USA DTAA deals with interest. In sub-clause 2 of India USA DTAA, there are two slabs of taxation on interest, 15% & 10%. Further, under sub-clause 3 of India USA DTAA, if interest is paid by govt, arising out of a debt claim, the same is exempt from tax.

In this context it may also be noted that, Article 12 of India Italy DTAA deals with interest. In sub-clause 2 of India Italy DTAA, there is only one slab of tax i.e. 15% on the gross amount of interest. Further, under sub-clause 3 of India Italy DTAA, if interest is paid by govt, arising out of a debt claim, the same is exempt from tax.

A comparison between Articles dealing with interest, in case of Netherland, USA and Italy shows that, based on its priorities Indian govt. has negotiated and agreed to tax interest rates and limit the scope of taxation. These are deliberate and specific actions.

<u>Assessing Officer v. Nestle SA (2023 INSC 928)</u>

IX. Assesee has quoted this case law under the mistaken belief that it is in its favour, however, the same is in favour of Revenue. Hon'ble Supreme Court of India vide its landmark ruling in the aforesaid case has clarified that Most Favoured Nation (MFN) clauses in Double Taxation Avoidance Agreements (DTAAs) are not automatically enforceable.

Tax Act to claim these lower tax rates. Supreme Court while ruling firmly in favour of the Revenue has set able. Taxpayers must obtain a formal notification under Section 90 of the Income forth following legal precedents:

1. **<u>No Automatic Application</u>**: An MFN clause does not automatically entitle taxpayers to the benefits of a treaty India signed with a third country later on.

2. **<u>Mandatory Notification</u>**: Issuing a notification under Section 90 of the Income Tax Act is an absolute prerequisite to grant any benefits derived from a protocol or altered DTAA.

3. **<u>Internal vs. External Treaties</u>**: While international treaties bind India externally, they do not confer rights upon taxpayers domestically until formally assimilated into Indian municipal law.

<u>Each DTAA is unique</u>

X. It is brought to notice that every word of the DTAAs signed by India with every other country is scrutinized, deliberated and discussed for long periods of time before it is signed. There are numerous back and forth letters written leading to a final position on which both the countries agreed. Every word in the DTAAs of India with other countries is a deliberate one and that is why there are different provisions in different DTAAs. Protocols which are an important part of DTAA, also contain country specific provisions. One such example of DTAAs of India with other countries is tabulated below:

Treaty wise analysis of Article on Fees for Technical Services

S.No.	Specific wordings of definition of Fees for Technical Services	No. of Treaties
1.	Payment of any kind as consideration for	29
2.	Payment of any kind in consideration for	12
3.	Payment of any amount in consideration for	11
4.	Any payment in consideration for	1
5.	Payment of any kind received as consideration for	2
6.	Payment of any kind as consideration for rendering	16
7.	Payment of any kind as consideration for rendering	2
8.	Payment of any kind received as a consideration for the rendering	1
9.	Payment for provision of service by a resident of a contracting state in the other contracting state	1
10.	Make available clause	7
	Total	82

Conclusion:

XI. If the intention of the Indian govt. had been a casual one, all the DTAAs would read the same, which they do not. A model of DTAA by OECD is available as a platter and countries are free to choose what suits them from it or have other tailor-made provisions as per their priorities with various countries. It is not open to interpretation outside the intention of the Indian govt.

Vide amended dt. 30.08.1999, tax on interest in India Netherland DTAA was reduced from 15% to 10% and word 'beneficial owner' was added to restrict the provision. It was a deliberate mutually agreed act on part of both the govts. Had the intention of the Indian govt. been to give further concessions to Netherland Govt, just as Indian govt. has given concessions to Italy and USA in DTAAs with them, it could have brought in amendment to India Netherland DTAA or India would have issued notification towards MFN clause for Netherland. The fact that there is no such amendment to DTAA or notification, highlights intention of the govt. which is a deliberate act of commission on part of the Govt rather an act of casual omission.

The presence and absence of notifications by Govt. of India related to MFN clause is also one such deliberate and specific action. It is understandable that assessee being a resident of Netherland, wishes to take benefit of NIL tax on interest as is in the case of DTAAs of Italy and US, however since the clause related to such a benefit is missing in the India Netherland DTAA and also because there is no notification making it possible for Netherland to take advantage of the MFN clause, it is not possible to grant assessee this benefit.

XII. After the Protocol to the India-Netherlands DTAA was signed on 30th July 1988, the Central Government of India notified various modifications pursuant to the MFN clause. Such modifications were notified in accordance with Section 90 of the Income-tax Act, 1961 and came into effect April 1, 1997 onwards. The modifications originated from India's DTAAs with certain OECD member nations. The relevant portion of the notification is reproduced below:

> *"AND WHEREAS in the Convention between India and Germany which entered into force on October 26, 1996, the Convention between India and Sweden which entered into force on December 25, 1997, the Convention between India and the Swiss Confederation which entered into force on October 19, 1994, and the Convention between India and the United States of America which entered into force on December 18, 1990, which states are members of the Organisation for Economic Co-operation and Development, the Government of India, has limited the taxation at source on dividends, interest, royalties, fees for technical services and payments for the use of equipment to a rate lower or a scope more restricted than that provided in the Convention between India and the Netherlands on the said items of income."*

Thus, only certain provisions of the DTAAs with Germany, Sweden, Switzerland and United States of America have been imposed under the MFN clause. Also, there is no modification relating to exemption of interest income as per India Italy DTAA and it has been categorically excluded from the modifications notified pursuant to MFN clause. Moreover, the India Italy DTAA was came into force on 23.11.1995 and treaties incorporated under MFN clause are also those which came into force after India-Italy DTAA (1997 convention between India and Sweden, and 1996 convention between India and Germany).

Reliance is placed on the decision of the Hon'ble Supreme Court in case of ***Nestle SA*** [2023] 155 taxmann.com 384 (SC) wherein it was held that MFN clauses are not self-operational and a separate notification under section 90 of the Income-tax Act is mandatory before treaty benefits arising through an MFN clause can be enforced domestically. The expression "is a member of the OECD" was interpreted strictly and thus OECD membership must exist at the time of entering the DTAA with India and it should not be case where the other state becomes a member of OECD after entering into a DTAA with India.

Since, there was separate notification under section 90 of the Act, the beneficial provisions under Article 12(3)(a) of the India-Italy DTAA exempting for certain Government-related interest income from tax is not applicable.

1. Furthermore, the assessee has placed reliance on decisions of Hon'ble Delhi High Court in cases of ***Concentrix Services Netherlands BV v. ITO*** [W.P. (C) 9051/2020] and ***Steria (India) Ltd. v. CIT*** [2016] 386 ITR 390 (Delhi) which were decided under similar circumstances but the same have been overturned and decided in favour of the Revenue by the Hon'ble SC in case of ***Nestle SA*** (supra).

2. Alternative claim regarding application of the India-USA DTAA is unsustainable

It is reiterated that this is an additional claim which was not there in the return of income and has been claimed for the first instance before the Hon'ble ITAT and hence reliance is placed on the decision of ***Goetze (India) Ltd. v. CIT*** (2006) 284 ITR 323 (SC). Additionally, there is no provision that directly authorizes a taxpayer to apply interest income tax rate from India-USA DTAA as such, in place of rate in India Netherlands DTAA. The notification only uses India-USA DTAA (along with the treaties with Germany, Sweden, and Switzerland) as a benchmark to amend and update Article 11 (Interest) of the India-Netherlands DTAA. After such amendment, applicable rate is one as amended in India Netherlands DAA itself, not the standalone rate from India-USA DTAA. Therefore, the Assessee's contention that interest provisions of India USA DAA should directly apply to India-Netherlands DTAA under MFN clause and the notification is not sustainable.

3. Set off of carried forward of loss against Interest Income

Brought-forward business losses can be set off only against "Profits and Gains of Business or Profession" and Interest Income under Section 244A is taxable under the head "Income from Other Sources". In any case, no claim for set off was made by the Assessee while filing its return of income and as such it cannot be allowed at this stage when it is claimed for the first instance.

XIII. Assessee has claimed that it should be allowed to Carry forward and set off losses for AY 2012-13, AY 2014-15 and AY 2015-16 against the Interest Income. In this regard it is submitted that, an additional claim or deduction cannot be claimed by way of a letter before the Assessing Officer. The Hon'ble Supreme Court vide its decision in the case of

Goetze (India) Ltd. v. CIT (2006) 284 ITR 323 (SC) held that a deduction cannot be claimed by way of a letter before the Assessing Officer. Assessee can claim any deduction or beneficial claim only by filing a revised return.

Remand report was called from AO on additional grounds, is on same lines as above, and is on record.

The Department/Revenue most humbly prays that the same may kindly be taken on record, considered and included in the order passed by the Hon'ble ITAT.

10. The assessee made a submission in its rejoinder to Revenue's submission as under:

1. The Revenue's contentions and reliance upon the decision of the Hon'ble Supreme Court of India in ***Nestle SA*** (supra) is misplaced. An extract of the decision is as under:

"54. It is therefore, clear that the date on which the relief of rate of taxation for interest and dividends was specified to be 1-4-1997; different dates (01-4-1995 and 1-4-1998) were applied as applicable to the definition of fees and technical services and other details; the rates, too varied, depending on the period(s). The second aspect, is that the notification under section 90 was issued on 30-8-1999. The third, and most significant aspect is that the favourable or beneficial treatment was given to other OECD nations on 26-10-1996 (India-Germany); the DTAA between India and Sweden entered into force on 25-12-1997, the India-Swiss Confederation DTAA entered into force on 19-10-1994 itself. These earlier dates, did not result in India automatically extending benefits of Article IV of the India-Netherlands DTAA Protocol to Netherlands. The relevant phrase in that provision (Article IV) obliged India to grant to the Netherlands, the same benefit to it, as was granted to the other nation in that third party state's DTAA or Protocol with India:

"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"

55. Clearly, therefore, so far as India-Netherlands DTAA goes, there is established and clear precedent, of behaviour, in relation to treaty practise and interpretation. This was uncontested, and is a matter of record."

(emphasis supplied)

2. It evident from a reading of the said paragraph that, far from supporting the proposition canvassed by the Revenue, the said paragraph in fact reinforces the Assessee's submission. The Hon'ble Supreme Court specifically noticed that under Article IV of the Protocol to the India-Netherlands DTAA, where India agreed to a lower rate of tax or a more restricted scope of taxation in a convention with another State, "the same rate or scope as provided for in that convention or agreement" would apply under the India-Netherlands DTAA. Thus, the Protocol itself identifies the third-country convention as the source from which the relevant benefit is to be derived. The United States Convention is therefore not merely a historical benchmark; it is the convention from which the "same rate or scope" is identified and ought to be applied in case of the India-Netherlands DTAA.

3. It can in no manner be contended that the provisions of the India-US DTAA are irrelevant for determining the extent of the benefit imported through the MFN clause. The Revenue's construction would render the MFN clause substantially otiose. The Protocol does not merely speak of a lower "rate" of tax. It equally refers to a "scope more restricted" than that available under the India-Netherlands DTAA and states that "same rate or scope" has to be provided of the subsequent convention (see p. 115 and 117 of the Paperbook). The obligation undertaken by the Contracting States is therefore one of substantive parity and not merely mechanical reproduction of selected treaty text. If the Revenue's submission is accepted, the comparator being the India-US DTAA treaty may be relied upon to trigger the MFN clause but may never thereafter be consulted to determine the content of the benefit promised by that very clause. Such an interpretation preserves a mutilated form of the MFN clause while depriving it of substantive

operation. Furthermore, is also negates the very purpose for which the India-US DTAA was specifically identified.

The denial of the benefit of the MFN Clause in the India-Netherlands DTAA as read with Article 11 of the India US is against Constitutional Mandate and India's obligations under International Law

4. That an interpretation of the protocol to the India-Netherlands DTAA in any manner which denies the benefit of the MFN Clause read with Article 11 of the India-US DTAA would be contrary to the Constitutional Mandate and India's obligations under International Law. Article 51(c) of India's foster respect Constitution obligates that "The State shall endeavour to for international law and treaty obligations in dealings of organized people with one another...". Article 51 of the Constitution casts an obligation on the State to respect the treaty obligations. Thus, once India had entered into an agreement with another country and mutually agreed to provide concessional treatment to the beneficiaries under the treaty, the Government cannot subsequently deny such concessional treatment claimed in accordance with the provisions of such treaty. The Government is obliged to implement the agreement entered into with other states by virtue of Article 51(c) of the Constitution.

5. That principles of customary law are enshrined in Articles 26, 27 and 31 of the Vienna Convention on the Law of Treaties, 1969 ('VCLT) 'i.e. Pacta Sunt Servanda' or 'Good Faith Principle' in Article 26 of the VCLT, viz., is that "Every treaty in force is binding upon and parties to it and must be performed by them in good faith." Article 27 of VCLT further strengthens the aforesaid principle by providing that "no party to a treaty might attempt to justify its failure to perform any of its

international treaty obligations by invocation of its municipal law." Article 31, 'General Rule of Interpretation', of the Convention too provides that a "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". The Hon'ble Supreme Court of India in Ram Jethmalani vs. Union of India (2011) 8 SCC 1' while referring to the VCLT held the following:

> *"While India is not a party to the Vienna Convention, it contains many principles of customary international law, and the principle of interpretation, of Article 31 of the Vienna Convention, provides a broad guideline as to what could be an appropriate manner of interpreting a treaty in the Indian context also"*

6. It is also settled law in India that treaty interpretation that is not in accordance with the VCLT is incorrect (see Union of India v. Azadi Bachao Andolan, [2003] 263 ITR 706)). The provisions of Article 51(c) of the Constitution when read with Article 26, 27 and 31 of the Vienna Convention clearly cast an obligation on India as a contracting State to a DTAA to not only remain bound by the terms of a treaty entered into by it but also obligès the India not to cite internal law (municipal law), as a justification for failure to perform its obligation under a DTAA.

7. The MFN Clause has been a part of many economic bilateral agreements between various countries for the past century. An OECD report on the MFN Clause (OECD, "Most-Favoured-Nation Treatment in International Investment Law," Working Paper on International Investment 2004/02 (2004). Accessed at https://www.oecd) recognized the importance of the MFN Clause and reads as under:

> *"MFN treatment has been a central pillar of trade policy for centuries. It can be traced back to the twelfth century, although the phrase seems to have first appeared in the seventeenth century. MFN treaty clauses spread with the growth of commerce in the fifteenth and sixteenth centuries. The United States included an MFN clause in its first treaty, a 1778 treaty with France. In the 1800s and 1900s the MFN clause was included frequently in various treaties, particularly in the Friendship, Commerce, and Navigation treaties. MFN treatment was made one of*

the core obligations of commercial policy under the Havana Charter where Members were to undertake the obligation "to give due regard to the desirability of avoiding discrimination as between foreign investors."

8. The MFN Clause thus, forms a crucial aspect of international economic relations and cannot be ignored by Indian tax authorities while interpretating the provisions of the treaty and the Act. It is pertinent to note that the MFN clause in the India Netherlands is a self - operating clause as is evident from its following wording:

"IV. 2. 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 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)

9. The clear wordings of the protocol as read with paragraph 54 of the Nestle SA (supra) decision of the Hon'ble Supreme Court clearly mandate that the full benefit of Article 11 of the India -US DTAA be granted.

10. Furthermore, as mandated by the Constitution of India each and every word of the protocol to the India-Netherlands DTAA has to be given effect to as per Article 51 (1) (c) and Article 73 of the Constitution of India.

11. Article 73 of the Constitution deals with power of the executive to exercise the powers of Government of India by virtue of any treaty or agreement. Article 73 enables endorsement of the rights under the treaties and agreements, which the executive is obliged to observe as part of its duties. Article 73 of the Constitution places limitations on the executive to provide for exercise of right, authority and jurisdiction in consonance with the treaty obligations. The Hon'ble Supreme Court in

Gramophone Company of India Ltd. vs. Birendra Bahadur Pandey (1984) 2 SCC 53410, laid down that the interpretation of domestic law has to be done within the legitimate limits imposed by treaty obligations. This, view is consistent with Article 73, which, specifically provides that the executive power of the Union shall extend, inter alia, "to the exercise of such rights, authority, and jurisdiction as are exercisable by the Government of India by virtue of any treaty or agreement. "11 In the case of Kesavananda Bharti v. State of Kerala (1973) 4 SCC 22512, the 13 judges of the Constitution Bench of the Supreme Court, while observing that in cases of doubt or ambiguity in the provisions of a statute, the courts would interpret the statute as not to make it inconsistent with the established rules of international laws or association/comity of nations, held the following:

"1467... It is only in cases of doubt or ambiguity that the courts would interpret a statute as not to make it inconsistent with the comity of nations or established rules of international law, but if the language of the statute is clear, it must be followed notwithstanding the conflict between municipal law and international law which results."

12. The law laid down by the Constitution bench of the Supreme Court in the aforesaid decision clearly lays down that domestic law has to be interpreted in harmony with the established rules of international law. It is trite law that if two interpretations of a statute are possible, the court should lean in favour of adopting the interpretation that would make the provisions of statute to be in harmony with the international laws or treaty obligations. Every statute thus must be interpreted to a stretch permitted by its language, so as to make it consistent with the established rules of international law. The MFN Clause and the Secondary Notification of the India-Netherlands DTAA cannot be interpreted in a manner so as to deny persons covered under the DTAA the beneficial provisions of the India-US DTAA. The application of the self-operating clause of the Protocol read with the Notification

dated 30.08.1999 cannot be precluded from application by a narrow interpretation of the revenue.

The benefit of the India - US DTAA cannot be denied under Section 90 of the Act

13. A bare perusal of Section 90 of the Act would show that it is the "Agreement", i.e. DTAA (and bilaterally agreed amendments to such "Agreement") between India and a foreign country which is required to be notified under Section 90. In present case, it is undisputed and admitted even in Nestle decision (supra) that India-Netherlands Treaty along with its Protocol which contains the most favored nation (MFN) clause in question already stands notified vide Notification No. GSR 382 (E) which clearly states that "the Central Government hereby directs that all the provisions of the said Convention shall be given effect to in the Union of India." and also states that the Protocol which contains the MFN clause "shall form an integral part of the Convention" i.e. DTAA

14. Thus, the self operating MFN clause contained in India-Netherlands Treaty is undisputedly duly notified and as per the mandate of Notification No. GSR 382 (E) shall be given effect to in India. Now relying upon the said MFN clause as per which lower rate of tax on dividend agreed between India and another member of the OECD "shall" also apply to India-Netherlands Treaty, the Assessee has relied upon India-US -Treaty which exempts tax on Interest paid by the Government the said treaty also stands notified under Section 90 and as per the Nestle SA decision vide Notification No. GSR 693 (E), dated 30.08.1999.

15. Thus, both the DTAAs i.e. (i) India-Netherlands Treaty which is the basic treaty; and (ii) the beneficial India-US Treaty which stand notified under Section 90. After this, there is no "Agreement" between Indian and other contracting states which remains to be notified under

Section 90. Once the above notification was issued under Section 90, the treaties in question stood legislated.

16. Therefore, the in the present case the 'triggering events'/ 'benefit of MFN clause already stood notified vide Notification No. GSR 693 (E) dated 30.08.1999. In fact, the plain words of Section 90 were interpreted by this Hon'ble Court in UOI v. Azadi Bachao Andolan (2003) 263 ITR 706 (para 32) had held that once India has entered into a DTAA and a requisite notification notifying it has been issued under Section 90, the beneficial provisions of the DTAA spring into operation and assessee covered by it is entitled to benefit from it. In the present case the self-operating MFN Clause of the India-Netherlands DTAA became applicable from the date of the signature of the subsequent DTAA and the India-US DTAA became applicable after notification dated 30.08.1999.

17. The plain language of Section 90 stands satisfied in the present case. The benefit of the India-US DTAA cannot be precluded from application in the case of the India-Netherlands DTAA

18. It is trite law that a statutory provision cannot be interpreted based on a practice ignoring its plain language itself. Interpreting a statutory provision basis subsequent practice of executive is completely foreign to all the permissible canons of interpretation under the law as held by the Hon'ble Supreme Court in Punjab State Traders v. State of Punjab, (1991) 1 SCC 863, by Privy Council in CIT v. Raja Bahadur Kamakhaya Narayan Singh AIR 1949 PC 14 besides multiple other decisions.

19. In the case of Engineering Analysis Centre of Excellence (P.) Ltd. v. Commissioner of Income-tax, [2021] 432 ITR 471 (SC) (para 159)15, the Hon'ble Supreme Court had observed that the VCLT is relevant for

Indian treaty interpretation even though India is not a signatory, and thus reaffirmed the good-faith principle for treaty interpretation in India. It was also observed it is settled law in India that treaty interpretation that is not in accordance with the VCLT is incorrect. Denying the benefit of the MFN Clause basis the contention of the department is against spirit of good-faith interpretation of the MFN clause.

20. A good-faith interpretation under Article 31 of the VCLT requires that the MFN clause be given effective operation in the light of its object and purpose, and forbids a construction that renders the substantive commitment illusory. It is pertinent that the very expert whose opinion was placed before the Hon'ble Supreme Court in Nestle SA (supra)" ie. Prof. Dr. Stef van Weeghel, has since, in 2025, analysed this Protocol as importing "rate or scope" with the object of securing parity and non-discrimination"' (The Revenue's argument is therefore against the very tenets of customary international law, and is inconsistent with the good-faith canon affirmed by this Hon'ble Court in Ram Jethmalani (supra) and Engineering Analysis (supra). Even on the most cautious view of most-favoured-nation clauses which would confine importation to cases of clear and unambiguous language (Pérez-Aznar, supra, at p. 55 of the Compilation)-the Assessee's case is a fortiori, as Article IV(2) does not require any depend upon any implied importation, it extends, in express terms, to "scope" and that same scope has been notified in 30.08.1999. The interpretive controversy that attends the importation of unstated standards does not arise here.

The Additional Grounds are not barred by Goetze (India) Ltd.

21. The Revenue's reliance on Goetze (India) Ltd. v. CIT [2006] 284 ITR 323 (SC) is misplaced. Goetze holds only that the Assessing Officer

cannot entertain a claim made otherwise than by a revised return; the Hon'ble Supreme Court expressly clarified that its decision does not impinge upon the power of the Appellate Tribunal under Section 254 of the Act. The power of this Hon'ble Tribunal to entertain a question of law arising on facts already on record is settled by NTPC Ltd. v. CIT [1998] 229 ITR 383 (SC), and the Assessee's Additional Grounds are pure questions of law arising directly from the subsequent decision in Nestle SA (supra). They are accordingly admissible under Rule 11 of the Income-tax (Appellate Tribunal) Rules, 1963, and Goetze presents no bar.

CBDT Circular No. 3/2022 is satisfied on the India-US route

22. The four conditions in paragraph 5 of CBDT Circular No. 3/2022 are, on the India-US route, satisfied: (i) the India-US DTAA entered into force on 18.12.1990, after the signature of the India-Netherlands DTAA; (ii) the United States was a member of the OECD at the relevant time, being a founding member since 1961; (iii) India limited its source taxation of interest in the India-US DTAA, including by the exemption in Article 11(3)(c); and (iv) a separate notification importing the benefit Notification S.O. 693(E) dated 30.08.1999 has in fact been issued, and expressly invokes the India-US DTAA. This is precisely the distinction from any reliance on the India-Italy DTAA: the notification condition that the Revenue contends is unmet is, on the India-US route, demonstrably met. The only question remaining is one of interpreting that notification harmoniously with the "or scope" limb of the clause it implements, as submitted above.

23. In any event, a circular issued under the Act cannot curtail a benefit otherwise available under a notified Convention, nor be read so as to defeat the very treaty obligation it purports to administer, a

circular operates within, and not above, the statute and the Convention.

Conclusion

24. MFN treatment "derives exclusively through the act of concluding a treaty that contains an MFN treatment clause" and constitutes "the quintessence of a treaty-based guarantee". The right originates in the basic treaty containing the MFN clause, whilst the coraparator treaty merely supplies the favourable treatment that must be extended to the beneficiary State.19 The purpose of MFN clauses is to establish and maintain equality of treatment amongst treaty partners and to ensure that one treaty partner is not placed in a less favourable position than a third State. 20

25. Across the globe an analysis of MFN clauses in tax treaties recognises that such clauses are intended to guarantee treaty partners the same benefits accorded to third States and embody an obligation not to discriminate in favour of a third State by granting only that State more favourable treatment. The classical operation of an MFN clause is that where a State subsequently grants more beneficial treatment to another treaty partner, the earlier treaty partner becomes entitled to claim the same treatment. The Revenue's interpretation would defeat this very purpose. Under its formulation, the comparator treaty like the India US DTAA may be used to trigger the MFN mechanism, but the same treaty may not thereafter be consulted to determine the content of the imported benefit. Such an approach would reduce the MFN clause to a mere drafting mechanism and negate the parity of treatment which the Contracting States expressly agreed to secure through Article IV of the Protocol.

26. The Revenue's submission, if accepted, would effectively permit a treaty commitment to be acknowledged in principle whilst denying any practical mechanism through which the promised parity of treatment can be realised. This is contrary to the accepted understanding of MFN clauses as instruments intended to secure parity and non-discrimination amongst treaty partners.23 It is also inconsistent with paragraph 54 of Nestlé SA, where the Hon'ble Supreme Court itself recognised that the benefit available under the India-Netherlands DTAA is to be determined by reference to "the same rate or scope as provided for" in the comparator convention.

27. The Assessee respectfully submits that Nestlé SA does not support the proposition canvassed by the Revenue. The ratio of Nestlé SA is that domestic enforcement of an MFN clause requires issuance of a notification under section 90 of the Act. In the present case, that requirement stands fully satisfied through Notification No. S.O. 693(E). Once such notification exists, the Protocol and the notification must be read harmoniously so as to give effect to the substantive treaty obligation embodied in the MFN clause. The Revenue's interpretation, by contrast, would amount to preserving the notification while nullifying the very MFN commitment which the notification was issued to implement."

11. We have heard the rival submission and have carefully perused the materials on record. The sole and substantive issue for our adjudication is whether interest income of INR 1,66,05,368/- received by the Assessee under Section 244A of the Act is exempt / taxable at a 'Nil' rate under the Most Favoured Nation ('MFN') clause in Protocol IV of the India-Netherlands Double Taxation Avoidance Agreement ('DTAA') read with Article 11(3)(c) of

the India-USA DTAA (or Article 12 of the India-Italy DTAA), or whether it is taxable at 10% under Article 11(2) of the India-Netherlands DTAA.

12. To summarise, the Assessee, referring to the Protocol IV MFN Clause of the India-Netherlands DTAA, contends that it obligates India to extend any lower tax rate or more restricted scope granted on interest to another OECD member state. Further the assessee imports the US DTAA Benefits under Article 11(3)(c) of the India-USA DTAA, to assert that interest derived from debt-claims mandated/approved by the Government (such as Section 244A refund interest, as affirmed in ***Ansaldo Energia SPA*** *(supra)* is exempt from source taxation ('Nil' rate). Thereafter, the Assessee contends that Notification No. S.O. 693(E) dated 30.08.1999 is an express Section 90(1) notification referencing the India-USA DTAA, thereby satisfying the notification mandate laid down by the Supreme Court in *AO v. M/s Nestle SA* [2023 INSC 928]. The assessee exhorts us to believe that denying the benefit would breach Customary international obligations under Articles 26, 27, and 31 of the Vienna Convention on the Law of Treaties ('VCLT') and Articles 51(c) and 73 of the Constitution of India.

13. On the other hand, the Revenue has contended that as per ***AO v. M/s Nestle SA*** [2023 INSC 928], MFN clauses are not self-executing; a formal notification under Section 90(1) of the Act is mandatory to assimilate third-country treaty terms into Indian domestic law. The Revenue further

contends that the Notification S.O. 693(E) dated 30.08.1999 has limited scope and the said Notification only specifically modified Article 11(2) of the India-Netherlands DTAA to substitute a 10% tax rate in place of 15% for beneficial owners. It ***did not*** notify or import any complete exemption or 'Nil' rate under Article 11(3)(c) of the India-USA DTAA. The Revenue further vehemently contends that there is Non-compliance with CBDT Circular No. 3/2022. It argues that the condition (iv) of CBDT Circular No. 3/2022 requires a separate specific notification importing the exact lower rate or restricted scope. No notification exists extending a 'Nil' tax rate for interest under the India-Netherlands DTAA.

14. In such factual matrix and circumstances, we are of the considered view that the issue that notification under Section 90(1) of the Act is mandatory for extending the benefit of MFN clause is no longer res-integra. The Supreme Court in ***Assessing Officer v. M/s Nestle SA*** (supra) has settled that a notification under Section 90(1) of the Act is an absolute prerequisite to give domestic effect to any treaty modification or MFN benefit. The hon'ble Supreme Court established that Most Favored Nation (MFN) clauses do not automatically entitle taxpayers to the benefits of a treaty that India subsequently signs with a third country. To enforce these benefits domestically, the government must issue a mandatory, formal notification under Section 90 of the Income Tax Act. Treaties do not confer enforceable

domestic rights upon taxpayers until formally notified into Indian municipal law. We are of the considered view that scope and effect of Notification No. S.O. 693(E) dated 30.08.1999 is limited only to extending explicitly to amend paragraph 2 of Article 11 of the India-Netherlands DTAA to reduce the interest tax rate from 15% to 10%. While the preamble to the notification acknowledges that India had granted concessions to OECD countries (including the USA), the Contracting States, India and Netherland, consciously limited their negotiated agreement to a 10% gross withholding tax for beneficial owners.

15. The Assessee attempts to bypass the ***Nestle SA*** barrier by arguing that Notification No. S.O. 693(E), issued on August 30, 1999, already acts as the required Section 90 notification for importing the beneficial 'Nil' rate from the India-US DTAA, is not convincing. A plain reading of that notification shows a different, deliberate agreement to explicitly lower the tax on interest from 15% to 10% for beneficial owners. While the notification acknowledges that India had restricted the scope of taxation on interest with other OECD members (like the USA and Switzerland), India and the Netherlands specifically agreed to limit their mutual concession to the 10% rate. India and Netherland through the said notification dated 30.08.1999, deliberately chose not to import the full exemptions found in the US or Italian treaties—such as the 'Nil' rate for government debt claims.

16. Further the absence of Specific Notification from CBDT, for 'Nil' Rate, is another hurdle before the assessee which has not been crossed. We find that it is unrebutted fact that the Central Government has not issued any Section 90(1) notification extending the exemption under Article 11(3)(c) of the India-USA DTAA (or Article 12 of the India-Italy DTAA) to the India-Netherlands DTAA. The CBDT Circular No. 3/2022 strictly requires a separate notification to import lower rates or restricted scopes from a third-state treaty into an existing treaty. The Indian government has so far not issued a notification under Section 90 specifically importing the 'Nil' tax rate for interest from the India-US or India-Italy DTAAs into the India-Netherlands DTAA. In fact, the Indian government has explicitly objected to the Netherlands government's unilateral decree attempting to use the MFN clause to lower tax rates. In the absence of such an express notification, we are not inclined to unilaterally import or apply a 'Nil' tax rate. The Hon'ble Supreme Court mandated that the treaties do not confer rights domestically until they are formally assimilated into Indian municipal law via a specific notification, and therefore, the Assessee cannot cherry-pick the 'Nil' rate from the US or Italian agreements. In view of the discussion as above, we conclude that the Assessee's claim for a 'Nil' tax rate under the MFN clause fails. The Assessing Officer has correctly assessed the Section 244A refund interest of INR 1,66,05,368/- at the rate of 10% as per Article 11(2) of the

India-Netherlands DTAA read with Notification No. S.O. 693(E). The ground No. 1 to 3 and additional Ground A filed by the Assessee are accordingly dismissed.

17. With respect to ground 4, we direct the AO to grant the eligible TDS against the said interest income.

18. Ground 5 regarding charging of Interest u/s 234A,234B and 234C is consequential in nature.

19. Additional ground B is not pressed. The same is dismissed as not pressed.

20. In the result, the appeal of the assessee in ITA 2411/Del/2023 is dismissed.

Order pronounced in the open court on 14.09.2026

Sd/-	Sd/-
(VIKAS AWASTHY)	**(NAVEEN CHANDRA)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Date:- 14.09.2026
*Priti Yadav, Sr. Ps**
Copy forwarded to:
1. Assessee
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI