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W.P. No.25040 of 2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 21.12.2023

CORAM

THE HONOURABLE MR.JUSTICE MOHAMMED SHAFFIQ

W.P. No.25040 of 2021 and
W.M.P. NoS.26373, 26375 and 26376 of 2021

M/s.Valeo S.A.

43, Rue Bayen,

Paris, Foreign

France

Represented by its Authorized Signatory

Mr.Meenakshi Sundaram, Age 50

.. Petitioner

Vs.

The Assistant Commissioner of Income Tax,

International Taxation Circle 2(2), Chennai

Room No.410, BSNL Building, 4th Floor,

Income Tax Office- BSNL Tower,

No.16, Greams Road, Chennai,

Tamil Nadu 600 006.

..Respondent

PRAYER: Writ Petition filed under Article 226 of the Constitution of India, praying to issue a Writ of Certiorarified Mandamus to call for the records in DIN No.ITBA/COM/F/17/2021-22/1036949583(1) dated 15/11/2021 under Section 197 of the Income Tax Act, 1961 for the Financial Year 2021-22 on the file of the Respondent and quash the same and direct the Respondent to issue certificate under Section 197 with rate of withholding tax at 5 percent.

For Petitioner : Mr.R.Sandeep Bagmar

For Respondent : Mr.B.Ramanakumar
Standing Counsel



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ORDER

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It is submitted by both the learned counsel for the petitioner and respondent in unison that the issue raised in the present writ petition stands covered by the recent judgment of the Supreme Court in the Case of *Assessing Officer Circle (International Taxation) vs. Nestle SA* reported in 2023 SCC Online SC 1372.

2. During the course of hearing the learned counsel for the petitioner placed reliance on the following paragraphs which I would also think is relevant and thus extracted hereunder:

"1.....The bilateral treaties in question are between India and Netherlands, France, and Switzerland, respectively. Broadly, the issues arising are whether there is any right to invoke the MFN clause when the third country with which India has entered into a Double Tax Avoidance Agreement (hereafter 'DTAA') was not an OECD member yet (at the time of entering into such DTAA); and secondly whether the MFN clause is to be given effect to automatically or if it is to only come into effect after a notification is issued.

.....

39. Treaty making power vests exclusively with the Union, per Article 253 of the Constitution, and the relative entries in the Union List (List I, VIIth Schedule). Entering into a treaty is an attribute of sovereignty, and the power to do vests solely in the Union executive - as opposed to the states, or the shared (concurrent) domain within the distribution of administrative powers under the Constitution; thus, it can be traced to Article 73 of the Constitution. The structure and phraseology of Article 253 leaves one in no doubt, that it is when a treaty is enacted by law, or enabled through legislation, which assimilates it, that such provisions are enforceable in India.

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47. The holding in the decisions discussed above may thus be summarized:

(i) The terms of a treaty ratified by the Union do not ipso facto acquire enforceability;



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(ii) *The Union has exclusive executive power to enter into international treaties and conventions under Article 73 [read with corresponding Entries - Nos. 10, 13 and 14 of List I of the VIIth Schedule to the Constitution of India] and Parliament, holds the exclusive power to legislate upon such conventions or treaties.*

(iii) *Parliament can refuse to perform or give effect to such treaties. In such event, though such treaties bind the Union, vis a vis the other contracting state(s), leaving the Union in default.*

(iv) *The application of such treaties is binding upon the Union. Yet, they “are not by their own force binding upon Indian nationals”.*

(v) *Law making by Parliament in respect of such treaties is required if the treaty or agreement restricts or affects the rights of citizens or others or modifies the law of India.*

(vi) *If citizens' rights or others' rights are not unaffected, or the laws of India are not modified, no legislative measure is necessary to give effect to treaties.*

(vii) *In the event of any ambiguity in the provision or law, which brings into force the treaty or obligation, the court is entitled to look into the international instrument, to clear the ambiguity or seek clarity.*

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49. The legal position discernible from the previous discussion, therefore is that upon India entering into a treaty or protocol does not result in its automatic enforceability in courts and tribunals; the provisions of such treaties and protocols do not therefore, confer rights upon parties, till such time, as appropriate notifications are issued, in terms of Section 90(1).

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C. The interpretation of the term “is”

51. The High Court had interpreted the term “is” occurring in the DTAA [see Clause IV(2)36 of the India-Netherlands DTAA - the other two clauses in relation to France and Switzerland being similar], which according to it “describes a state of affairs that should exist not necessarily at the time when the subject DTAA was executed but when a request is made by the taxpayer or deductee for issuance of a lower rate withholding tax certificate under Section 197 of the Act. The word ‘is’- is both autological and heterological. An autological word is one that expresses the property that it possesses. Opposite of that is a heterological word, i.e., it does not describe itself”. According to that interpretation of ‘is, when the request for parity is made by a party seeking aid of the DTAA and the Protocol containing a “same treatment” or in other words, a pull in clause, the court has to consider whether at that time the third party state is enjoying better benefits. Integral to this interpretation is whether the “is a member” means the present tense, which is that the third party state should be a member of OECD when it enters



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into DTAA with India. This is relevant, because the India-Lithuania DTAA was signed on 26.07.2011; and notified on 25.07.2012³⁷. The date of membership of Lithuania into OECD was 05.07.2018. The India-Colombia DTAA was signed on 13.05.2011; its date of Notification was 23.09.2014. Colombia was admitted to membership of OECD on 28.04.2020. Slovenia signed a DTAA with India on 13.01.2003; this was notified on 31.05.2005, and Slovenia became a member of OECD on 21.07.2010. An amending Protocol was entered into, between India and Slovenia, on 16.05.2016, which was notified on 27.10.2017.

52. Thus, in all three cases, the three “third party” nations : Lithuania, Colombia and Slovenia, were initially not members of OECD when they entered into treaties and protocols with India; they became members later.

53. In *Jagir Kaur v. Jaswant Singh*³⁸ Section 488 of the erstwhile Criminal Procedure Code read as follows:

“Proceedings under this Section may be taken against any person in any district where he resides or is, or where he last resided with his wife, or, as the case may be, the mother of the illegitimate child.”

54. This court considered the meaning of “is” in the above provision:

“The crucial words of the sub-Section are, “resides”, “is” and “where he last resided with his wife”. Under the Code of 1882 the Magistrate of the District where the husband or father, as the case may be, resided only had jurisdiction.”

55. The court then emphasized that the term “is” was fact dependent, and had to be read contextually:

“The purpose of the statute would be better served if the word “resides” was understood to include temporary residence. The juxtaposition of the words “is” and “last resided” in the sub-Section also throws light on the meaning of the word “resides”. The word “is”, as we shall explain later, confers jurisdiction on a Court on the basis of a casual visit and the expression “last resided”, about which also we have something to say, indicates that the Legislature could not have intended to use the word “resides” in the technical sense of domicile. The word “resides” cannot be given a meaning different from the word “resided” in the expression “last resided” and, therefore, the wider meaning fits in the setting in which the word “resides” appears.”

56. In *P. Anand Gajapati Raju v. P.V.G Raju*³⁹ in the context of the Arbitration and Conciliation Act, 1996, this court explained that “is” normally has present signification:

“the phrase which is the subject of an arbitration agreement does not, in the context, necessarily require that the agreement must be already in



existence before the action is brought in the Court. The phrase also connotes an arbitration agreement being brought into existence while the action is pending. Blacks Law Dictionary has defined the word is as follows:

“This word, although normally referring to the present, often has a future meaning, but is not synonymous with shall have been. It may have, however, a past signification, as in the sense of has been.”

57. Again, in *Vijay Kumar Prasad v. State of Bihar*⁴⁰ this court reiterated the same view, that “is” refers to the present:

“Although the expression normally refers to the present, often it has a future meaning. It may also have a past signification as in the sense of “has been”. (See F.S. Gandhi v. CWT [(1990) 3 SCC 624 : 1990 SCC (Tax) 364 : AIR 1991 SC 1866].) The true intention has to be contextually culled out.”

58. From the above discussion, it is clear that the expression “is” has a present signification and it derives meaning from the context. Given this interpretation, the conclusion is that when a third-party country enters into DTAA with India, it should be a member of OECD, for the earlier treaty beneficiary to claim parity.

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78. The decree issued by the Republic of France, inter alia, after narrating and reciting the India-France DTAA, the amending Protocols, the date on which India-Germany DTAA was entered into, and the date on which the Protocol, amending India-France DTAA on the basis of the Indo-German DTAA, provided as follows:

“I. Withholding tax rate on dividends and interest under the most-favoured-nation clause

A. Dividends referred to in Article 11

The rate of 15 % provided for in paragraph 2 of Article 11 of the Franco-Indian convention shall be replaced by that of 10% provided for in the tax treaty concluded by India with Germany.

This rate shall be replaced by the rate of 5 % of the gross amount of dividends provided for in the tax treaty concluded between India and Slovenia if the ‘beneficial owner is a company which directly holds at least 10 % of the capital of the company paying those dividends.

B. Interest referred to in Article 2, Paragraph 12

(a) The rate of 10 per cent provided for in paragraph 2 (a) of Article 12 of the Franco-Indian Convention applies to interest paid on loans granted by insurance companies as a result of India's tax treaty with the United States.



(b) The rate of 15 % provided for in paragraph 2 (b) of Article 12 shall be replaced by that of 10 % following the tax treaty concluded by India with Germany.

.....

81. As far as France is concerned, the French Constitution of 1958, by Article 52 empowers the President to negotiate and ratify treaties. Treaty ratification is authorized by the National Assembly and Senate when that treaty would affect the sovereignty of France or alter an existing statute, though such authorization has no normative value. A treaty affecting the rights of the citizens has to be published; after publication it prevails over French legislation. Article 55 confers upon treaties a status superior to that of domestic legislation and provides that concluded treaties do not require any implementing legislation to be enforceable.⁴⁵

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83. In the opinion of this court, the status of treaties and conventions and the manner of their assimilation is radically different from what the Constitution of India mandates. In each of the said three countries, every treaty entered into the executive government needs ratification. Importantly, in Switzerland, some treaties have to be ratified or approved through a referendum. These mean that after intercession of the Parliamentary or legislative process/procedure, the treaty is assimilated into the body of domestic law, enforceable in courts. However, in India, either the treaty concerned has to be legislatively embodied in law, through a separate statute, or get assimilated through a legislative device, i.e. notification in the gazette, based upon some enacted law (some instances are the Extradition Act, 1962 and the Income Tax Act, 1961). Absent this step, treaties and protocols are per se unenforceable.

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98. This court is of the opinion that the treaty practice of Switzerland, Netherlands and France is dictated by conditions peculiar to their constitutional and legal regimes. Could it conceivably be argued that in the event of failure of the Swiss Confederation to secure the requisite majority in a referendum or approval by the Swiss Parliament, or in the absence of approval by both houses of the States General in Netherlands, a DTAA provision or trigger event could nevertheless be assimilated into executive decrees? The answer is obviously in the negative. Likewise, the treaty practice in India points to a consistent pattern of behaviour when the signatory to an existing DTAA, points to the event of a third state entering into OECD membership, and a resultant trigger event, the beneficial effect given to the later third-party state has to be notified in the earlier DTAA, as a consequential amendment, preceded by exchange of communication (and perhaps, negotiation) and acceptance of that position by India. The essential



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requirement of a notification under Section 90 of the consequences of the trigger (or causative) event cannot be undermined.

V. Conclusions

99. *In the light of the above discussion, it is held and declared that:*

(a) A notification under Section 90(1) is necessary and a mandatory condition for a court, authority, or tribunal to give effect to a DTAA, or any protocol changing its terms or conditions, which has the effect of altering the existing provisions of law.

(b) The fact that a stipulation in a DTAA or a Protocol with one nation, requires same treatment in respect to a matter covered by its terms, subsequent to its being entered into when another nation (which is member of a multilateral organization such as OECD), is given better treatment, does not automatically lead to integration of such term extending the same benefit in regard to a matter covered in the DTAA of the first nation, which entered into DTAA with India. In such event, the terms of the earlier DTAA require to be amended through a separate notification under Section 90.

(c) The interpretation of the expression “is” has present signification. Therefore, for a party to claim benefit of a “same treatment” clause, based on entry of DTAA between India and another state which is member of OECD, the relevant date is entering into treaty with India, and not a later date, when, after entering into DTAA with India, such country becomes an OECD member, in terms of India's practice.

100. *In view of the foregoing analysis and conclusions, it is held that the reasoning and findings in the impugned orders cannot survive; they are set aside.*

101. *The revenue's appeals, therefore, succeed and are allowed. There shall be no order on costs. Pending applications, including those seeking intervention for impleadment, are disposed of."*

3. In view of the same the impugned proceeding is set aside with a direction to the respondent to reconsider the issue afresh taking into account the above judgment of the Hon'ble Supreme Court within a period of 12 weeks



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after providing the petitioner an opportunity of hearing. Accordingly, the writ petition stands disposed of on the above terms. No costs. Consequently, connected miscellaneous petitions are closed.

21.12.2023

Speaking (or) Non Speaking Order

Index: Yes/No

Neutral Citation: Yes/No

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MOHAMMED SHAFFIQ, J.

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