

Assessing Officer Circle (International Taxation) 2(2)(2), New Delhi v. M/s Nestle SA

Civil Appeal No. 1420 of 2023 and connected proceedings (full list below)

[2023] 16 S.C.R. 1139 : 2023 INSC 928 | 2023-10-19

Whether the MFN clauses in the India-Netherlands, India-France and India-Switzerland treaties/protocols automatically import a later treaty concession without a separate section 90 notification, and whether a third country that joined the OECD only after entering its treaty with India can supply the relevant parity benefit.

90(1)

Two-judge bench | S. Ravindra Bhat, J. | Dipankar Datta, J.

Assessment years: See the source-scope notes; no year inferred.

01 FACTS OF THE CASE

The Revenue appealed Delhi High Court decisions applying MFN provisions in India's DTAAAs with the Netherlands, France and Switzerland. In Steria India, the taxpayer relied on clause 7 of the India-France Protocol to import the narrower India-UK definition of fees for technical services, including its make-available condition. The AAR rejected automatic operation without a specific section 90 notification; the Delhi High Court reversed that position on 28 July 2016. In the Netherlands group, Concentrix Services Netherlands BV and Optum Global Solutions International BV, with their Indian counterparts in which they respectively held 99.99%, sought 5% withholding on dividends. Their Indian counterparts applied under section 197 in 2020; certificates dated 16 September 2020 and 4 January 2021 specified 10%. The High Court allowed the writ petitions on 22 April 2021, treating the MFN clause as operating without a fresh notification and OECD membership as relevant when the benefit was claimed. The High Court followed Concentrix in Nestle SA's India-Switzerland case, W.P.(C) 3243/2021, decided on 4 June 2021; other impugned judgments followed Steria and Concentrix. Nestle relied particularly on the 2010 amending Protocol and the lower dividend rates in India's later treaties with Lithuania and Colombia, which became OECD members after signing those treaties. The judgment addresses these common legal issues rather than setting out a separate assessment computation for every respondent.

Source: [reported collected rendition / paragraphs 1-6 / PDF pages 7, 8, 9, 10, 11, 12 / judgment](#); [reported collected rendition / paragraphs 30-35 / PDF pages 21, 22, 23, 24 / judgment](#); [official signed judgment / paragraphs 1-6 / PDF pages 2, 3, 4, 5, 6 / judgment](#)

02 DISCUSSION BY THE HON'BLE COURT

The Court separated a treaty's international binding force from its domestic enforceability. Drawing on the constitutional authorities and Azadi Bachao Andolan, it held that section 90(1) supplies the domestic legal mechanism: treaty or protocol provisions that alter existing law require the appropriate notification before courts and tax authorities can enforce them. An existing notification of a treaty and its MFN clause does not, by itself, notify every later concession said to arise from that clause. On OECD timing, the Court read the word "is" in context. The third state must be an OECD member when it enters into the relevant DTAA with India; joining the OECD later does not satisfy that condition for the earlier treaty beneficiary. Slovenia, Lithuania and Colombia were not OECD members when they entered their cited treaties with India. The Court rejected the High Court's claim-date approach. The treaty-practice analysis was specific. For the Netherlands, the 30 August 1999 section 90 notification supplied identified concessions with different effective dates; the earlier third-country treaties had not automatically imported those concessions. For France, the 10 July 2000 notification, S.O. 650(E), conferred particular benefits but omitted the make-available condition invoked from the UK and Portugal treaties. The Court treated that selective implementation and differences between treaty structures as inconsistent with indiscriminate automatic importation. For Switzerland, the earlier Protocol required negotiations for lower rates or narrower scope. The 2010 amending Protocol used a same-rate clause for qualifying later OECD treaties but separately retained negotiations for a narrower scope of royalties or FTS. The Court recognised the changed wording yet held that Switzerland could not thereby escape section 90's notification requirement. The Swiss instruments were given effect through notifications of 21 April 1995, 7 February 2001 and 27 December 2011. The Canada example reinforced the point: even emphatic automatic-rate wording had been implemented by a later notification. The foreign executive decrees and the VCLT/ILC/ICJ materials informed interpretation and subsequent practice; they did not replace India's constitutional and statutory implementation requirements. The Court stressed the different domestic treaty systems of France, the Netherlands and Switzerland and India's practice of notified consequential amendments.

Source: [reported collected rendition / paragraphs 36, 38-46 / PDF pages 24, 25, 26, 27, 28, 29, 30, 31, 32, 33 / judgment](#); [reported collected rendition / paragraphs 48-51 / PDF pages 36, 37, 38 / judgment](#); [reported collected rendition / paragraphs 52-66 / PDF pages 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52 / judgment](#); [reported collected rendition / paragraphs 67-87 / PDF pages 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69 / judgment](#); [official signed judgment / paragraphs 46, 51 / PDF pages 28, 33 / judgment](#); [official signed judgment / paragraphs 59-63 / PDF pages 39, 40, 41, 42 / judgment](#)

03 JUDICIAL DECISION

Paragraph 88 declares three propositions: (1) a notification under section 90(1) is mandatory to give effect domestically to a DTAA or protocol altering existing legal provisions; (2) an MFN or same-treatment stipulation does not automatically incorporate a later third-country concession into the earlier treaty, whose terms require a separate section 90 notification for that consequence; and (3) the relevant OECD status is membership when the third country enters its treaty with India, not its later accession to the OECD. The impugned orders were set aside and the Revenue's appeals allowed, with no order as to costs. Pending applications, including intervention/impleadment applications, were disposed of. CA 1428/2023, concerning the India-Spain DTAA, was expressly de-tagged for listing before the appropriate bench because that treaty had not been considered.

Source: [reported collected rendition / paragraphs 88-90 / PDF pages 69, 70 / judgment](#); [official signed judgment / paragraphs 88-90 / PDF pages 58, 59 / judgment](#)

04 OUTCOME / IN WHOSE FAVOUR

In whose favour: Revenue in the appeals decided; no merits outcome for the de-tagged India-Spain appeal

Revenue appeals allowed and impugned orders set aside; no costs; pending applications disposed of; CA 1428/2023 de-tagged for separate listing

Common MFN notification and OECD-timing issues decided for the Netherlands, France and Switzerland treaty disputes; India-Spain interpretation left undecided

This is a historical judgment on the specified MFN clauses and section 90 implementation. It does not announce a universal current 5% or 10% withholding rate, decide the India-Spain treaty question, or certify present treaty eligibility, subsequent notifications or later judicial treatment.

Source: [reported collected rendition / paragraphs 89-90 / PDF pages 70 / judgment](#); [official signed judgment / paragraphs 89-90 / PDF pages 59 / judgment](#)

05 AKHB REVIEW POINT

An MFN claim needs a treaty-by-treaty, income-by-income chronology. Identify the governing treaty and protocol version, the particular rate or scope concession claimed, the third-state treaty's signature/entry-into-force dates, that state's OECD accession date, and the Indian notification actually implementing the claimed benefit and its effective date. Keep the two tests separate: OECD membership at the relevant treaty-entry point does not dispense with notification, and notification cannot be presumed merely because a comparator country later joined the OECD. For Steria-type FTS claims, do not equate a notified rate reduction with incorporation of a make-available test. For Swiss claims, preserve the 2010 Protocol's distinct treatment of rate and scope and the after-signature condition; treaty residence, beneficial ownership, ownership thresholds and the quoted conduit-arrangement restriction still require their own factual and legal checks where applicable. Do not read the foreign decrees reproduced in the judgment as a present Indian rate instruction. Before using this note for a current payment or a legacy-year dispute, verify the operative law, applicable notifications, subsequent treaty developments and later treatment. No substantive equivalence or automatic precedent carryover to the Income-tax Act, 2025 is asserted.

Source: [reported collected rendition / paragraphs 48-51 / PDF pages 36, 37, 38 / judgment](#); [reported collected rendition / paragraphs 54-63 / PDF pages 44, 45, 46, 47, 48, 49, 50 / judgment](#); [reported collected rendition / paragraphs 87-90 / PDF pages 68, 69, 70 / judgment](#); [official signed judgment / paragraphs 88-90 / PDF pages 58, 59 / judgment](#)

APPEAL AND PROCEEDING NUMBERS

Civil Appeal No. 1420 of 2023 / Civil Appeal No. 1423 of 2023 / Civil Appeal Nos. 1421-1422 of 2023 / Civil Appeal No. 1424 of 2023 / Civil Appeal No. 1425 of 2018 / Civil Appeal Nos. 1426, 1427, 1428, 1429, 1430, 1431 and 1432 of 2023

DETAILED DISPOSITION AND CONNECTED GROUPS

Appeals allowed as printed: 1420/2023; 1421/2023; 1422/2023; 1423/2023; 1424/2023; 1425/2018; 1426/2023; 1427/2023; 1429/2023; 1430/2023; 1431/2023; 1432/2023

Appeals not decided

1.

Case number: 1428/2023

Treaty: India-Spain DTAA

Disposition: De-tagged; to be listed before the appropriate bench

Paragraph: 90

SOURCE-RENDITION BOUNDARIES

Reported headnotes and front matter: PDF pp. 1-5 contain case details, editorial headnotes and citations; PDF p. 6 has further case details/appearances followed by the judicial heading and table of contents

Reported judgment: Judicial heading/table of contents begins PDF p. 6; numbered judicial text paragraphs 1-90 spans PDF pp. 7-70 (SCR pp. 1145-1208)

Reported end matter: After paragraph 90, PDF p. 70 has the editorial headnote credit and Appeals allowed label; these are not the operative order

Official judgment: PDF pp. 1-59; cover/table of contents at pp. 1-2, numbered paragraphs 1-90 at pp. 2-59, signatures and date at p. 59

Separate opinions: One common judgment authored by S. Ravindra Bhat, J., signed by both judges; no separate or dissenting opinion in either rendition

Adjacent case contamination: None observed; all 70 collected pages belong to this report. Quoted earlier judgments and foreign decrees are distinguished from this Court's holdings.

PROVISION-SPECIFIC SCOPE

1.

Section: 90(1)

Role: Controlling domestic-law provision for implementing a DTAA or protocol through an Official Gazette notification; the necessity of a further notification for the MFN consequence is the ratio

Paragraphs: 36, 45-46, 54-66, 87-88

2.

Section: 197

Role: Procedural route for the lower withholding certificates sought in the Netherlands-group cases; the Court did not construe all conditions of section 197

Paragraphs: 3-5, 48

3.

Section: 90(2)

Role: Treaty-benefit framework quoted with section 90 and discussed through Azadi Bachao Andolan; no separate finding granting an unnotified MFN benefit

Paragraphs: 36, 45

4.

Section: 90(2A), 90(3)-(5), Explanations 1-4

Role: Reproduced statutory context, not separately adjudicated GAAR, residence-certificate or undefined-term issues

Paragraphs: 36

5.

Section: 4, 5

Role: Charging and total-income provisions discussed within the quotation from Azadi Bachao Andolan as being subject to section 90

Paragraphs: 45

TREATY-SPECIFIC QUALIFICATIONS

1.

Treaty: India-Netherlands

Provision: Protocol clause IV(2), with relevant Articles 10-12

Qualification: The clause addresses subsequent OECD-state concessions in rates or scope for the specified income categories. Paragraph 52 identifies signature on 13 July 1988; the table and paragraph 3 distinguish entry into force on 21 January 1989 and notification on 27 March 1989. The later implementing notification of 30 August 1999 did not give every concession one uniform effective date.

Pinpoints

1.

Source url: [Open cited source](#)

Paragraphs: 3-5, 47-48, 52-55

Pdf pages: 8; 9; 10; 11; 34; 36; 39; 40; 41; 42; 43; 44; 45

Source role: judgment

Scr pages: 1146; 1147; 1148; 1149; 1172; 1174; 1177; 1178; 1179; 1180; 1181; 1182; 1183

2.

Treaty: India-France

Provision: Protocol clause 7 (Steria claim); Articles 11-13 as discussed in implementation history

Qualification: The challenge concerned importing a narrower FTS definition from India-UK, with India-Portugal also argued. The Court relied on the omission of the make-available condition from S.O. 650(E), 10 July 2000. It did not hold that a notified rate concession necessarily narrows FTS scope.

Pinpoints

1.

Source url: [Open cited source](#)

Paragraphs: 2, 56-60

Pdf pages: 7; 8; 45; 46; 47

Source role: judgment

Scr pages: 1145; 1146; 1183; 1184; 1185

3.

Treaty: India-Switzerland

Provision: Article 11 of the amending Protocol of 30 August 2010, replacing paragraph 4 of the Protocol; references to treaty Articles 10, 11, 12 and 22

Qualification: The lower-rate clause refers to a qualifying third-state instrument signed after the amending Protocol's signature. A narrower scope of royalties/FTS retains a negotiation requirement. The quoted replacement also excludes specified conduit arrangements. The Court did not accept the same-rate wording as an exception to section 90 notification.

Pinpoints

1.

Source url: [Open cited source](#)

Paragraphs: 34, 61-63

Pdf pages: 23; 24; 47; 48; 49; 50

Source role: judgment

Scr pages: 1161; 1162; 1185; 1186; 1187; 1188

4.

Treaty: India-Spain

Provision: Not interpreted in this judgment

Qualification: CA 1428/2023 was de-tagged rather than allowed on the common reasoning.

Pinpoints

1.

Source url: [Open cited source](#)

Paragraphs: 90

Pdf pages: 70

Source role: judgment

Scr pages: 1208

2.

Source url: [Open cited source](#)

Paragraphs: 90

Pdf pages: 59

Source role: judgment

SOURCE & VERIFICATION

[Hon'ble Supreme Court source PDF \(reported collected rendition\)](#)

Identified source rendition: 70 PDF pages; SHA-256

86a61bf532dd1ea86ef093077a1dc6327c5a2d87d411164323a3045db46c09f0. Original bytes preserved.

[Open cited source rendition](#)

CA 1428/2023 is expressly de-tagged. It must not inherit the Revenue-win label when displayed as a separate case.

Both renditions print CA 1425/2018 in the connected list; this review preserves that year without silently changing it to 2023.

Paragraph 3 gives both 30 March 2021 and 31 March 2021 for certificate validity/expiry. The note uses the confirmed certificate issue dates and does not resolve that internal one-day inconsistency.

Historical treaty dates and labels contain inconsistencies: paragraph 14 mentions 27 February 2001 and footnote 18 refers to a 13 August 2011 notification, whereas paragraph 61 expressly identifies the Swiss notifications of 21 April 1995, 7 February 2001 and 27 December 2011. The note follows the reasoned paragraph 61 for that implementation chronology and does not silently treat the earlier references as verified dates.

The Netherlands table footnote 34 itself flags inconsistent signing dates. Signature, entry into force, notification and effective date are kept conceptually distinct; the note is not a substitute for the relevant Gazette instruments.

The statement concerning unaffected rights in paragraph 44(vi) has a double negative in the source. The note relies on the clear constitutional distinction explained in the preceding quotation, rather than reproducing the apparent drafting anomaly as a rule.

The statutory history footnote accompanying paragraph 36 is not adopted as a current consolidation or a verified legislative timeline.

The 5% comparator rates and foreign executive decrees are historical material in the judgment, not recommendations for any present payment.

No assessment year was invented; quoted earlier cases, scholarship and foreign-law propositions were not counted as separately reviewed decisions.

Official PDF metadata/signature rendering includes a 2024 processing timestamp; the decision date is the judicially printed 19 October 2023. Cryptographic signature validity is not certified.

SCR citation, neutral citation, date and bench verified on the reported first page; neutral citation and lead/connected appeal numbers also verified on official PDF p. 1, with judicial signatures and judgment date on official PDF p. 59.

The common judgment does not specify an assessment year for the lead Nestle appeal or the Steria dispute. Paragraph 3 records Netherlands-group section 197 applications in 2020 and certificates dated 16 September 2020 and 4 January 2021; these dates are not converted into an inferred assessment year.

These are the numbers printed in the official cover and SCR case details. In particular, 1425/2018 is retained as printed. CA 1428/2023 is included in the cover list but expressly de-tagged in paragraph 90, not decided on its India-Spain treaty merits.

STATUTORY SCOPE

Income-tax Act, 1961 provisions and historical treaty materials discussed in the 19 October 2023 judgment only

No independent consolidation of subsequent treaty notifications, 2025 Act provisions, repeal/savings or later amendments has been performed. No section-equivalence mapping or current treaty-rate certification is asserted.

LATER TREATMENT

Source checked 2026-10-04. Subsequent appeals, review proceedings, stays, reversals and later judicial treatment have not been comprehensively checked. This note is not a citator status certificate.

IDENTIFIED SOURCE LINKS

[reported collected rendition - PDF pages: 70](#)

SHA-256: 86a61bf532dd1ea86ef093077a1dc6327c5a2d87d411164323a3045db46c09f0

[official signed judgment - PDF pages: 59](#)

SHA-256: b1806479dcfc3397b2098e881ce54a85e46dfdb917937c621d7138393ea3d961

AI DISCLOSURE

AI-assisted research checked against the identified source. Extraction, interpretation or omission errors remain possible. Source review does not mean independent approval by a practising professional. Verify every material statement against the complete original judgment.

PROFESSIONAL DISCLAIMER

General research information only; not legal or tax advice, a certified judgment or a substitute for the full order. Applicability depends on facts, assessment year, statutory version and jurisdiction. Subsequent treatment is unverified unless identified sources are expressly stated. Downloading does not create a professional engagement. Obtain case-specific advice before reliance.