



# Tax Flash News



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## Petition to review the decision on Most Favoured Nation clause in tax treaties dismissed by the Supreme Court

The Indian tax treaties with some of the countries have a Most Favoured Nation (MFN) clause. The MFN clause provides that if after the signature/ entry into force<sup>1</sup> of the tax treaty with a country (original treaty), India enters into a tax treaty with a third country, which is an OECD<sup>2</sup> member, providing a lower rate of tax or restrictive scope of taxation with respect to the specified incomes<sup>3</sup>, a similar benefit should be accorded for such incomes under the original treaty.

In this regard, an issue had arisen as to whether a benefit under the MFN clause can be adopted based on its inclusion in the tax treaty/protocol or a separate notification is needed to give effect to it.

Last year, the Supreme Court in the case of *Nestle*<sup>4</sup> had held that a notification under section 90 of the Income-tax Act, 1961 is necessary and a mandatory condition to give effect to a tax treaty or any protocol that has the effect of altering the existing provisions of the law. With reference to the MFN clause already agreed as part of the original treaty, the beneficial provisions entered into with the third country cannot be made applicable automatically unless a notification is issued.

<sup>1</sup> Depending on the language of the relevant MFN clause. This could be any other date as well.

<sup>2</sup> Organisation for Economic Cooperation and Development

<sup>3</sup> Which could be interest, dividend, royalties, fees for technical services (FTS)

<sup>4</sup> AO v. *Nestle SA* [2023] 458 ITR 756 (SC)

A petition was filed to review the above decision. Recently, the Supreme Court has dismissed the review petition.<sup>5</sup> Accordingly, the above-mentioned Supreme Court decision shall continue to apply.

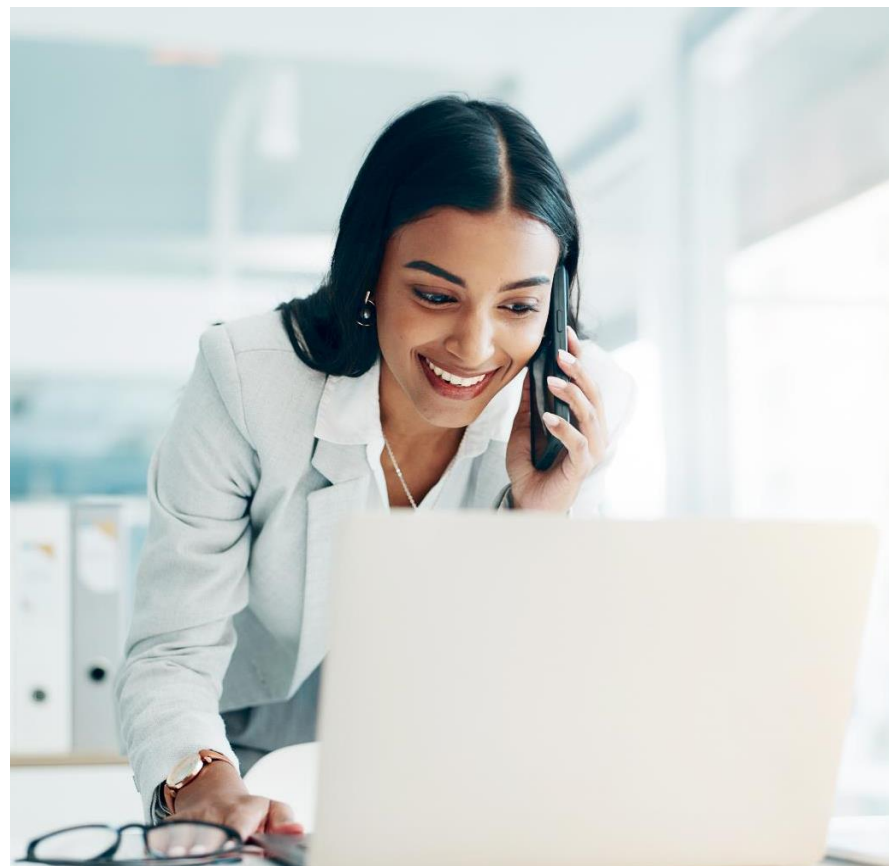
## Our comments



On 19 March 2024, the Government<sup>6</sup> issued a notification to give the benefit of the MFN clause in the India-Spain treaty (1995). The notification was issued with the prospective effect (i.e., assessment year 2024-25). It would be interesting to see how quickly the notification is issued for the MFN clause in other tax treaties.

Many taxpayers have taken the position that a benefit under the MFN clause can be adopted based on its inclusion in the tax treaty/protocol and a separate notification is not needed to give effect to it. Such a position has been taken by taxpayers in their corporate tax returns or at the time of withholding tax from the payments to the non-residents.

The taxpayers need to assess the effects of the decision on their pending proceedings, the potential reassessment and the consequential tax and interest liability. Such taxpayers may also need to analyse whether their case is fit for a waiver of interest liability, especially in view of the favourable High Court decisions and the CBDT circulars.



<sup>5</sup> *Nestle SA v AO* (Review Petition (C) No. 77 of 2024 dated 6 August 2024)

<sup>6</sup> Ministry of Finance (Department of Revenue)

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