आयकर अपीलीय अधिकरण, दिल्ली पीठें, नई दिल्ली
INCOME TAX APPELLATE TRIBUNAL, DELHI BENCHES, NEW DELHI

BENCH: D
BEFORE SHRI VIKAS AWASTHY, JUDICIAL MEMBER AND SHRI BRAJESH KUMAR SINGH, ACCOUNTANT MEMBER

ITITA 107/DEL/2026 **SA No. 181/DEL/2026** निर्धारण वर्ष/Assessment Year: **2023-24**)		
GILEAD AVIATION IRELAND 1 LIMITED C/O DMD ADVOCATES 30 NIZAMUDDIN EAST NEW DELHI 110013	**Vs.**	**ASSISTANT COMMISSIONER OF INCOME TAX INT TAX CIRCLE 1(3)(1)** CIVIC CENTRE MINTO ROAD NEW DELHI 110002
अपीलार्थी Appellant)		**प्रत्यर्थी Respondent)**
Permanent Account Number of Assessee**:**		**AAJCG4985A**

ITITA 108/DEL/2026 **SA No. 182/DEL/2026** निर्धारण वर्ष/ Assessment Year: **2023-24**)		
AWAS 3 IRELAND LIMITED C/O DMD ADVOCATES 30 NIZAMUDDIN EAST NEW DELHI 110013,	**Vs.**	**ASST. COMMISSIONER OF INCOME TAX** INT TAX CIRCLE 1(1)(1) CIVIC CENTRE MINTO ROAD NEW DELHI 110002
(अपीलार्थी Appellant)		**(प्रत्यर्थी Respondent)**
Permanent Account Number of Assessee**:**		**AAWCA4224D**

ITITA 109/DEL/2026 **SA No. 183/DEL/2026** निर्धारण वर्ष/ Assessment Year: **2023-24**)		
CELESTIAL AVIATION TRADING 100 LIMITED C/O DMD ADVOCATES 30 NIZAMUDDIN EAST NEW DELHI 110013	**Vs.**	**ASSISTANT COMMISSIONER OF INCOME TAX** INT TAX CIR 1(2)(1) CIVIC CENTRE MINTO ROAD NEW DELHI 110002
(अपीलार्थी Appellant)		**(प्रत्यर्थी Respondent)**
Permanent Account Number of Assessee**:**		**AAICC6623Q**

ITITA 113/DEL/2026 **SA No. 180/DEL/2026** निर्धारण वर्ष/ Assessment Year: **2023-2024**)		
ACCIPITER INVESTMENTS AIRCRAFT 2 LIMITED C/O DMD ADVOCATES 30 NIZAMUDDIN EAST NEW DELHI 110013	**Vs.**	**ASSTANT COMMISSIONER OF INCOME TAX INT TAX CIRCLE 1(1)(1) NEW DELHI** INT. TAX CIRCLE 1(1)(1) CIVIC CENTRE MINTO ROAD NEW DELHI 110002
(अपीलार्थी Appellant)		**(प्रत्यर्थी Respondent)**
Permanent Account Number of Assessee**:**		**AAUCA4349M**

ITITA 117/DEL/2026 **SA No. 184/DEL/2026** निर्धारण वर्ष/Assessment Year: **2023-24**)		
CALF (A1) AVIATION IRELAND DESIGNATED ACTIVITY COMPANY C/O DMD ADVOCATES 30 NIZAMUDDIN EAST NEW DELHI 110013	**Vs.**	**ASSISTANT COMMISSIONER OF INCOME TAX INT. TAX CIRCLE 1(2)(1)** NEW DELHI 110002
(अपीलार्थी Appellant)		**(प्रत्यर्थी Respondent)**
Permanent Account Number of Assessee**:**		**AAKCC5919M**

ITITA 118/DEL/2026 **SA No. 185/DEL/2026** निर्धारण वर्ष/Assessment Year: **2023-24**)		
APF 4 PROJECT NO 8 LIMITED C/O DMD ADVOCATES 30 NIZAMUDDIN EAST NEW DELHI 110013	**Vs.**	**ASSISTANT COMMISSIONER OF INCOME TAX INT TAX CIRCLE 1(1)(1)** CIVIC CENTRE MINTO ROAD NEW DELHI 110002
(अपीलार्थी Appellant)		**(प्रत्यर्थी Respondent)**
Permanent Account Number of Assessee**:**		**AAUCA9387M**

ITITA 119/DEL/2026 **SA No. 186/DEL/2026** निर्धारण वर्ष/Assessment Year: **2023-24**)		
APF 3 PROJECT NO.3 LIMITED C/O DMD ADVOCATES 30 NIZAMUDDIN EAST NEW DELHI 110013	**Vs.**	**ASSISTANT COMMISSIONER OF INCOME TAX INT TAX CIRCLE 1(1)(1) NEW DELHI** 110002
(अपीलार्थी Appellant)		**(प्रत्यर्थी Respondent)**
Permanent Account Number of Assessee**:**		**AAUCA9388E**

ITITA 121/DEL/2026 **SA No. 187/DEL/2026** निर्धारण वर्ष/Asseesment Year: **2023-24**)		
CELESTIAL AVIATION TRADING 32 LIMITED C/O DMD ADVOCATES 30 NIZAMUDDIN EAST NEW DELHI 110013, NEW DELHI-110013, DELHI	**Vs.**	**ASSISTANT COMMISSIONER OF INCOME TAX INT TAX CIRCLE 1(2)(1)** NEW DELHI-110013,
(अपीलार्थी Appellant)		**(प्रत्यर्थी Respondent)**
Permanent Account Number of Assessee**:**		**AAJCC3531G**

ITITA 122/DEL/2026 **SA No.188/DEL/2026** निर्धारण वर्ष/Assessment Year: **2023-24**)		
CELESTIAL AVIATION TRADING 15 LIMITED C/O DMD ADVOCATES 30 NIZAMUDDIN EAST NEW DELHI 110013, NEW DELHI-110013, DELHI	**Vs.**	**ASSISTANT COMMISSIONER OF INCOME TAX INT TAX CIRCLE 1(2)(1)** CIVIC CENTRE MINTO ROAD NEW DELHI NEW DELHI-110002, DELHI
(अपीलार्थी Appellant)		**(प्रत्यर्थी Respondent)**
Permanent Account Number of Assessee**:**		**AAJCC3534D**

ITITA 123/DEL/2026 **SA No.189/DEL/2026** निर्धारण वर्ष/ Assessment Year: **2023-24**)		
CELESTIAL AVIATION TRADING 38 LIMITED C/O DMD ADVOCATES 30 NIZAMUDDIN EAST NEW DELHI 110013, NEW DELHI-110013, DELHI	**Vs.**	**ASSISTANT COMMISSIONER OF INCOME TAX INT TAX CIRCLE 1(2)(1)** CIVIC CENTRE MINTO ROAD NEW DELHI 110002
(अपीलार्थी Appellant)		**(प्रत्यर्थी Respondent)**
Permanent Account Number of Assessee**:**		**AAKCC6845L**

ITITA 124/DEL/2026 **SA No. 190/DEL/2026** निर्धारण वर्ष/Assessment Year: **2023-24**)		
CAVIC 17 DESIGNATED ACTIVITY COMPANY C/O DMD ADVOCATES 30 NIZAMUDDIN EAST NEW DELHI 110013, NEW DELHI-110013, DELHI	**Vs.**	**ASSISTANT COMMISSIONER OF INCOME TAX INT TAX CIRCLE 1(2)(1) NEW DELHI** 110002
(अपीलार्थी Appellant)		**(प्रत्यर्थी Respondent)**
Permanent Account Number of Assessee**:**		**AAJCC1220A**

ITITA 125/DEL/2026 **SA No.191/DEL/2026** निर्धारण वर्ष/Assessment Year: **2023-24**)		
EINN VOLANT AIRCRAFT LEASING IRELAND 1 LIMITED C/O DMD ADVOCATES 30 NIZAMUDDIN EAST NEW DELHI 110013	**Vs.**	**ASSISTANT COMMISSIONER OF INCOME TAX INT TAX CIRCLE 1(2)(2)** CIVIC CENTRE MINTO ROAD NEW DELHI 110002
(अपीलार्थी Appellant)		**(प्रत्यर्थी Respondent)**
Permanent Account Number of Assessee**:**		**AAGCE3759B**
अपीलार्थी द्वारा/Appellant represented by:	**Sh. Sachit Jolly, Sr. Advocate with Ms. Vyushti Rawat, Advocate**	
प्रत्यर्थी द्वारा/Respondent represented by:	**None**	

सुनवाई की तारीख / Date of conclusion of hearing:	**23-Apr-2026**
घोषणा की तारीख / Date of pronouncement:	**-June-2026**

आदेश / ORDER

PER BENCH:

These bunch of twelve appeals by twelve different assessees/appellants are taken up together for adjudication as facts germane to the issues raised in these appeals and the grounds raised by the assessees assailing the assessment order in the respective cases are similar. All the appeals by the assessees/appellants are directed against the assessment orders passed u/s.143(3) r.w.s. 144C (13) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') in the respective cases, for AY 2023-24.

2. Shri Sachit Jolly, Sr. Advocate, appearing on behalf of the assessees/appellants at the outset submitted that he would not be pressing legal issue raised in appeals challenging validity of the assessment order on the ground of limitation.

3. The ld. Counsel for the assessees/appellants submits that all the appeals involve identical issues and have common set of facts. He submits that the assessees are companies incorporated in Ireland and are tax residents of Ireland. The assessees are engaged in the activity of leasing of commercial aircrafts. The assessees have leased aircrafts to various airlines across the globe including India. The assessees in India have primarily leased out their aircrafts to Inter Globe Aviation Ltd. (Indigo). The common issues that emerge for adjudication in these appeals by different assessees are:-

(i) The nature of lease i.e. Finance Lease or Operating Lease;

(ii) Whether the assessees/appellants are eligible for benefit of Article 8 of India-Ireland Double Tax Avoidance Agreement (DTAA); &

(iii) Applicability of Article 6 and 7 of Multilateral Instrument (MLI), resulting in denial of benefits under India-Ireland DTAA to the assessee.

4. The ld. Counsel stated that all these issues have been considered by Coordinate Bench of Tribunal in the case of *Celestial Aviation Trading 15 Ltd. vs. ACIT, 176 taxmann.com 92 (Delhi Trib.), Kosi Aviation Leasing Ltd. vs. ACIT, 173 taxmann.com 166 (Delhi Trib.)* and *Sky High Appeal XLIII Leasing Company Ltd. vs. ACIT, 177 taxmann.com 579 (Mumbai Trib.).* The Tribunal has decided all the three issues in favour of the assessees/appellants.

The ld. Counsel submits that in assessment proceedings, the Assessing Officer (AO) has re-characterized Operating Lease as Finance Lease. Further, the AO held that the assessees are not eligible to claim the benefit of India-Ireland DTAA, as the said DTAA is a 'covered tax agreement', therefore, provisions of Article 6 and 7 of MLI would automatically override the provisions of India-Ireland DTAA. The AO also denied benefit of Article 8 of India-Ireland DTAA to the assessee, holding that the same has no application. The ld. Counsel prayed for reversing findings of the AO in light of aforesaid decisions of the Tribunal.

The ld. Counsel for the appellants pointed that the Dispute Resolution Panel-1 (DRP) in its directions has takes note of the decisions rendered by the Tribunal in the case of *Celestial Aviation Trading 15 Ltd. vs. ACIT (supra), Kosi Aviation Leasing Ltd. vs. ACIT (supra)* and Sunflower Aircraft Leasing in ITA No.1107/Mum/2025. The DRP after acknowledging the said decisions not only failed to follow the binding decisions of the Superior Appellate Authority but was audacious to make adverse critical comments on findings of the Tribunal.

5. None appeared to represent the Department. In fact, the CIT-DR who is regularly posted to assist the Bench on behalf of the Department proceeded on Casual Leave. No Officer from the Department was deputed in place of regular CIT-DR to assist the Bench. On behalf of the CIT-DR, the reasons for seeking adjournment were filed by officials of the office of Departmental Representative. The relevant extract of the same are reproduced herein under:-

> *1. On Thursday, 23rd April 2026, there are totally 51 matters listed, and it is said that all are covered matters, like the Kosi Aviation judgment passed last year. On the stay petition, the honorable bench may grant a stay till the next day of hearing, and*

the department will not oppose this on account of the earlier years' order. However, the department is seeking time in these cases for making fair submissions since there are certain new dimensions that need to be submitted before the bench. Pointwise reasons are submitted.

a. These are new appeals filed only in 2026, and it is first stated that the department has not received paper books in all these cases. Only in 19 matters is the department in possession of paper books; in the rest of the matters, the department is yet to receive paper books.

b. The list of paper books received along with the number of pages is listed below

S.No.	Name of the Assesses	Income Tax (International Taxation) Appeal No«	Stay Application No.	**A.Y.**	PAN	Date of Hearing	Date of Paper Book Received	S'o. of Pages
1	ACCIPITER INVESTMENTS AIRCRAFT 2 LIMITED	ITITA 130/Del/2026	SA 180/Del/2026	2023-2024	AAUCA4349	23.04.2026	16.04,2026	560
2	APF 3 PROJECT NO 3	IT(IT)A 119/Del/2026	SA 185/Del/2026	2023-24	AAUCA9388	23.04.2026	16.04.2026	**1630**
3	APF 4 PROJECT NO 8	IT(IT)A 185/Del/2026	SA 118/Del/2026	2023-24	AAVCA9387	23.04.2026	16.04.2026	1613
4	AWAS 3 IRELAND	IT(IT)A 186/Del/2026	SA 119/Del/2026	2023-24	AAWCA4224	23.04.2026	16.04.2026	2035
5	CAI J* (A 1) AVIATION IRELAND DESIGNATED	IT(IT)A 117/DEL/2026	SA 184/DEIJ202	2023-24	AAKCC59191	23.04.2026	16.04.2026	472
6	CAVIC 17 DESIGNATED ACTIVITY COMPANY	IT(1T)A 124/DEL/2026	SA 190/De/2026	2023-24	AAJCC1220A	23.04.2026	16.04.2026	1406
7	CELESTIAL AVIATION TRADING 100 LIMITED	IT(IT)A 109/DEL/2026	SA I83/Del/2026	2023-24	AA1CC6623C	23.04.2026	16.04.2026	1013
8	CELESTIAL AVIATION TRADING 15 LIMITED	ITITA 122/DELZ2026	SA 188/Del//2026	2023-24	AAJCC3534L	23.04.2026	16.04.2026	985
9	CELESTIAL AVIATION TRADING 32 LIMITED	IT(IT)A 121/DELZ2026	SA 187/DEL/202	2023-24	AAJCC353K	23.04.2026	16.04.2026	1382
10	CELESTIAL AVIATION TRADING 38 LIMITED	ITITA 123/DEL/2026	SA 189/Del/2026	2023-24	AAKCC6845I	23.04.2026	16.04.2026	**1366**
11	EINN VOLANT AIRCRAFT LEASING	IT(IT)A 125/Del/2026	SA 191/DEL/202	2023-24	AAGCE3759I	23.04.2026	16.04.2026	1088
12	GILEAD AVIATION	IT(IT)A 107/Del/2026	SA 181/Del/2026	2023-24	AAJCG4985?	23.04.2026	16.04.2026	1085
13	JACKSON SQUARE AVIATION IRELAND	IT(IT)A 130/Del/2026	SA 179/Del/2026	2023-24	AAECJ7129C	23.04.2026	16.04.2026	6272
14	NAVIGATORAVIATIONIRELAND 7	IT(IT)A 133/DEL/2026	SA 177/Del/2026	2023-24	AAICN4946P	23.04.2026	16.04.2026	996
15	ORIENTALLEASINGS COMPANY LIMITED	IT(IT)A 128/DEI/2026	SA 178/DEL/202	2023-24	AADCO3337	23.04.2026	16.04.2026	896
16	PEMBROKE AIRCRAFT LEASING 11 LIMITED	1T(IT)A I29/DEL/2026	SA 176/Del/2026	2023-24	AALCP0697C	23.04.2026	16.04.2026	1626
17	PEMBROKE AIRCRAFT LEASING 4 LIMITED	IT(IT)A 127/DEL/2026	SA 174/DEL/202	2023-24	AALCP0694I	23.04.2026	16.04.2026	2244
18	RADIOHEAD ISSUER DESIGNATED ACTIVITY	IT(IT)A 126/Del/026	SA 192/DEL/202	2023-24	AAMCR3593	23.04.2026	16.04.2026	1984
19	VERMILLION AVIATION (EIGHT) UMITED	IT(IT)A 116/Del/2026	SA 175/DEL/202	2023-24	AAHCV751Z	23.04.2026	16.04.2026	1255
							Total	29,908

The department is in possession of 19 paper books, which were filed just on 16.04.2026, and the number of pages is 29908. It is to be understood that 51 matters are listed, and such massive submissions in the last minute of time cannot be handled. On perusal of the sample paper books, an earlier ITAT order is distinguished on facts, and the application of MLI has been dealt with differently

in these orders. Each case is different, and there is no basis for clubbing all the cases together, and the same should be rescheduled, fixing not more than 10 cases per day so that the department can make detailed submissions on each case. However, in case common issues arise in a set of cases, the department would not have any issues with clubbing those cases. However, in the absence of the paper books for all the cases and the different treatment done by AOs, the detailed paper books need to be studied in their entirety. These are not entirely covered issues and are treated differently.

Hence, the department should be given sufficient time to study all the paper books and file written submissions so that the case can be heard fairly. One month's time to file written submissions on the issues arising in the current year may be provided. If the matters are covered, the department would concede the same in the written submissions. However, the new facts and new legal submissions all need to be placed before the bench. It is also to be decided whether the earlier years' order is applicable here or not. It was felt by the department in the first round of litigation that the department was not fairly represented since the order itself does not quote anything mentioned by the senior standing counsel, and detailed written paper books were not filed. Hence, the department seeks time to file detailed paper books and sufficient time to prepare the matter.

2. It is to be noted that all the IRISH Aviation cases in the initial years were handled by the senior standing counsel appointed by the department. In this year also, the department made a study of the issues and has requested me to send a proposal for appointing senior standing counsel in this case since the discussions on MLI and other factual matters are different in this case. The appointment of standing counsel would be expedited, and a reasonable time may be given in this regard.

3. The matter in the ITAT Mumbai ruling of Sky-High Appeal Leasing Company has been taken up for hearing in the High Court of Bombay. It is submitted that the matter has been listed this month and is being heard. The issue of MLI is being argued by the honorable ASG and whether interim directions, if any, are still not available at the CIT-DR's office. The department has already requested the judicial sections to let us know the status of any interim order that is passed. The copy of the hearing notices was also submitted to the bench two days before, and it is requested that since the High Court is hearing the matter, the present case needs to be kept in abeyance till the question of law is answered by the court. At least the orders will be heard only after seeing any interim order passed by the High Court of Mumbai. It is stated that in Roca bathrooms, the Honorable Supreme Court had stayed the proposition of law, and in DIN, the entire order was stayed by the high court. In view of the favorable views in almost all procedural issues or hypertechnical issues coming from the high court and Supreme Court, the matter may be heard only after the order in the honorable Mumbai High Court is pronounced. Ld. ASG is appearing in the matter. It is also submitted the department seeks time also to file a common legal submission that has been made in the High Court from the Ld. ASG since the same can be considered by the Hon'ble Bench.

4. The ruling on the MLI has far-reaching consequences for the tax department. It is, hence, requested that adequate time be provided for making fair representations in this case.

It is submitted that the above-written submissions may be considered and speaking order may be passed in case adjournment is not granted."

6. We have heard the submissions made by ld. Counsel for the assessees and have considered the decisions on which reliance has been placed. As regards the reasons for seeking adjournment from the Department side, we are of considered view that the reasons given by the DR for seeking adjournment are superfluous. It is CIT-DR's own admission that the paper books in respect of the appeals that are decided vide this order have already been provided by the assessees on 16.04.2026 i.e. one week in advance from the date of hearing of appeal as specified under Income Tax (Appellate Tribunal) Rules, 1963. The contention of the DR that each case has a different fact is contrary to the documents available on record. One of the reason citied for seeking adjournment is, the Department has challenged order of Tribunal in the case of Sky-High Appeal Leasing Co. (supra) before the Hon'ble Bombay High Court. No order of stay or any order restraining the Tribunal to proceed with hearing of similar issues is brought before us by the Department. It is a settled principle that adjournment is not a matter of right but only a courtesy extended by the Court. In absence of valid reason for seeking adjournment, we see no impediment in taking up these appeals for adjudication. Hence, the request made on behalf of the Department for seeking adjournment is rejected.

7. We have gone through the impugned assessment orders and the orders of the DRP-1. The examination of the assessment orders and the Directions of the DRP in each case reveals that they are similarly worded. The ld. Counsel for the assessees has pointed that in the written submissions filed before the DRP it was specifically brought to the notice of DRP that the issues involved in each of the cases are squarely covered by the decision in the case *Kosi Aviation Leasing Ltd. vs. ACIT (supra)* and *Sky High Appeal XLIII Leasing Company Ltd. vs. ACIT (supra).* The DRP-I after taking note of the same, in complete violation of judicial discipline decided the issues against the assessee.

8. The findings on the issues that are common across all the appeals by the assessees/appellants are as under:-

Operating Lease vs. Finance Lease:

The lease agreements have been entered into between the assessees as the lessors on the one side and the aviation companies as lessee on the other side for leasing of Airbus Aircrafts. The lease agreements in all the cases are more or less identical, and the nature of the transactions is pari materia to the lease transaction of aircraft examined in the case of Celestial Aviation Trading 15 Ltd. vs. ACIT (supra). The finding of the Coordinate Bench on this issue is as under:-

> *"13. To begin with, it would be relevant to refer to the Lease Agreement entered into between the assessee, the lessor and Indigo, the lessee. The assessee has placed on record Aircraft Specific Lease Agreement (in short 'ASLA) dated 15.04.2021 at page 162 to 209 of the paper book in respect of aircraft bearing MSN 10689. The assessee has also placed on record a copy of Aircrafts Lease Common Terms Agreement (CTA) dated 20.06.2006 entered into between GE Commercial Aviation Services Ltd. and Indigo. To understand the issue, both agreements have to be read together. Aircraft Specific Lease Agreement as the name suggests is in respect of a particular aircraft, whereas, the terms and conditions spelled out in Aircraft Lease Common Terms Agreement is the standard agreement which would be applicable to all the aircrafts taken on lease by Indigo. A perusal of ASLA would show that the assessee is the Lessor and Indigo is the Lessee. The duration of agreement is for a period of 120 months extendable at the option of Lessee to be conveyed in writing to the Lessor before the expiry of 18 months prior to the original scheduled expiry date. Clause 3 of ASLA specifically states that the owner of the aircraft shall be the 'Lessor'. In the entire ASLA there is no covenant which refers to the condition that after the end of duration of lease term, the ownership in aircraft shall be transferred to the lessee or the lessee at any point of time can exercise option to purchase the aircraft. Clause 10 of ASLA requires the Lessee to pay deposit in cash or in the form of Letter of Credit prior to delivery of aircraft. The Lessor shall return such deposit to the Lessee upon occurrence of the events specified in ASLA which includes, 'on completion of the Return Occasion. "Return Occasion" is defined in Schedule-I of CTA as:*
>
> > *"Return Occasion means the date on which the Aircraft is redelivered to Lessor in accordance with Clause 12".*
> > *Clause 12 of CTA reads as under:*
> >
> > *"12. RETURN OF AIRCRAFT*
> >
> > *12.1 RETURN*
> > *On the Expiry Date or redelivery of the Aircraft pursuant to Clause 13.2 or termination of the leasing of the Aircraft under the Lease, Lessee will, unless an Event of Loss has occurred, redeliver the Aircraft and the Aircraft Documents and Records at Lessee's expense to Lessor at the Redelivery Location, in accordance with the procedures and in compliance with the conditions set out in Schedule 6, free and clear of all Security Interests (other than Lessor Liens) and in a condition suitable for immediate operation under FAR Part 121 or as otherwise agreed by Lessor and Lessee and, in any case, qualifying for and having a valid and fully effective certificate of airworthiness issued by the Air Authority. If requested by Lessor, Lessee shall thereupon cause the Aircraft to be deregistered by the Air Authority Lessor shall*

reasonably cooperate (and shall procure that the Owner reasonably cooperates) with the Lessee in order to effect such deregistration."

The above clause makes it unambiguously clear that at the end of Lease period, Lessee is under obligation to return aircraft to the lessor. And on the return of aircraft the lessor shall refund the deposit.

14. Some of the vital covenants of the CTA are examined to determine the nature of lease as under:-

(i) Schedule-I to CTA contains definitions. "Owner" has been defined as under:
"Owner means the Person identified in the Aircraft Specific Lease Agreement as Owner or, subject to clause 14.3, such other person as Lessor may notify Lessee from time to time."
The owner as per ASLA is the assessee.
(ii) Clause 8.4 of CTA deals with sub-leasing.
"8.4 Subleasing
(a) At no time prior to the Return Occasion will Lessee sub-lease, wet-lease or otherwise give possession of the Aircraft to any Person except:
(i) when the prior written consent of Lessor has been obtained (not to be unreasonably withheld or delayed); or
(ii) where the Aircraft is delivered to a manufacturer or maintenance facility for work to be done on it as required or permitted under the Lease; or
(iv) to a Permitted Sub-Lessee as set forth in Clause 8.4(b); or
(v) on a wet lease complying with the provisions of the following of this clause 8.4(a)."
Clause 8.4 of the CTA restricts the lessee to sub-lease, wet lease or otherwise give possession of aircraft to any person except under certain conditions with prior consent of lessor.
(iii) Clause 8.6 of CTA explains Ownership; Property Interest; Related matters. The relevant extract of the same is reproduced as under:

"8.6 Ownership; Property Interests; Related Matters
(a) Lessee will:
(i) fix and maintain Nameplates in a prominent position in the cockpit or cabin of the Aircraft and on each Engine stating
"This Aircraft/Engine is owned by (insert name of Owner and is leased to [insert name of Lessee] and may not be or remain in the possession of or be operated by, any other person without the prior written consent of linsert name of Lessor]"; and
(ii) take all reasonable steps to make sure that other relevant Persons know about the interests of Owner and Lessor as owner and lessor respectively in the Aircraft, including (without limitation) ensuring that wherever necessary as a matter of applicable Law in the State of Registry or in the jurisdiction of incorporation of any Permitted Sub-Lessee or the State of Incorporation, the interests of Lessor and Owner are duly registered in the International Registry.
(b) Lessee will not:
(i) represent that it is the owner of the Aircraft or that it has an economic interest (equivalent to ownership) in the Aircraft for Tax treatment or other purposes;
(ii) take any action or fail to take any action if it might reasonably be expected to put Owner's and / or Lessor's rights at risk;
(iii) represent to others that Owner or Lessor is associated with or responsible for the business activities and / or flight operations of Lessee; or
(iv) allow the Aircraft or Owner's or Lessor's interest in it to become or remain subject to any Security Interest (other than a Permitted Lien); nor
(v) consent to any interests conflicting with (whether or not taking priority over) the interests of Lessor or Owner to be registered at the International Registry without the prior written consent of Lessor or Owner (as the case may be)."

The aforesaid covenant ensures that the name of the owner at all times is displayed on the aircraft. The reason for having this clause is obviously to display the name of owner and lessee during the period of Lease Agreement which is substantially less than the Economic Life of the Aircraft.

(iv) In Clause 8.13 Aircraft Lease Common Terms Agreement deals with title on equipment change, the same reads as under:-

> *"8.13 Title on an Equipment Change*
> *Date (whether by way of replacement, as the result of an Equipment Change or otherwise) shall, save as otherwise provided in a bill of sale or similar instrument delivered by Lessee in favour of Owner) vest in Owner solely by virtue of its attachment to the Airframe or an Engine and it shall then be subject to the Lease as if it were attached to the Aircraft at Delivery. If so requested by Lessor, Lessee will provide a properly executed bill of sale or similar instrument to evidence the vesting of title to any such equipment, free and clear of all Security Interests, in Owner."*

A perusal of aforesaid Clause shows that in case of change in any equipment which is part of engine. The ownership in that equipment shall solely vest with the owner by virtue of its attachment of the airframe to the engine.

(v) The Clause 9 of the CTA lays down the condition and responsibility on lessee to get the aircraft insured. A perusal of Clause 9.1 reveals that it is the responsibility of lessee to maintain the insurance in full force during the term of lease only. After the expiry of lease, the lessee is not responsible for the insurance of the aircraft.

(vi) Clause 10 of CTA binds the lessee to indemnify the lessor. The relevant extract from the said clause is reproduced herein under:-

10. INDEMNITY

10.1 General
(a) Lessee agrees to assume liability for and indemnifies each of the Indemnitees against and agrees to pay on demand Losses which an Indemnitee may suffer at any time whether directly or indirectly as a result of any act or omission in relation to:
(i)the ownership (but only to the extent arising out of the use, possession, leasing, operation or maintenance of the Aircraft by Lessee or any Permitted Sub-Lesse), maintenance, repair, possession, transfer of ownership or possession, import, export, registration, storage, modification, leasing, insurance, inspection, testing, design, sub-leasing, use, condition or other matters relating to the Aircraft; or
(ii) any breach by Lessee of its obligations under the Lease.

'Indemnity' has been defined in Schedule-I as under:-

Indemnitee means each of Lessor, Owner, GECC, GECAS, the Financing Parties and each of their respective successors and assigns, shareholders, subsidiaries, affiliates, partners, contractors, directors, officers, representative, servants, agents and employees.

13.4 Sale or Re-lease of Aircraft

If an Event of Default occurs and is continuing, Lessor may sell or re-lease or otherwisde deals with the Aircraft at such time and in such manner and on such terms as Lessor considers appropriate in its absolute discretion, free and clear of any interest of Lessee, as if the Lease had never been entered into.

Thus, in the event of default the Lessee has to return aircraft to the Lessor and thereafter, the Lessor can sale or re-lease the aircraft.

14. From perusal of above terms and conditions it can be deduced that the ownership in the aircraft vest with the assessee/lessor at all the time during the period of lease. From conjoint reading of the terms and conditions of CTA and ASLA it emerges that there is no change in the ownership of the aircraft during the currency of lease agreement and at the end of agreement, the lessor continues to be the owner and the Lessee shall pay lease rentals to the assessee/lessor during lease period.

15. Now to understand the difference between financial lease and operating lease, we need to refer to the definition of 'Financial Lease' under other Acts as the expression financial lease and operating lease are not defined under the Income Tax Act. Section 2(ma) of the SARFAESI Act, 2002 defines 'financial lease' as under:-

> *"financial lease" means a lease under any lease agreement of tangible asset, other than negotiable instrument or negotiable document, for transfer of lessor's right therein to the lessee for a certain time in consideration of payment of agreed amount periodically and where the lessee becomes the owner of the such assets at the expiry of the term of lease or on payment of the agreed residual amount, as the case may be"*

The Recovery of Debts & Bankruptcy Act, 1993 defines financial lease as under:-

> *"financial lease" means a lease under a lease agreement of tangible asset, other than negotiable instrument or negotiable document, for transfer of lessor's right therein to the lessee for a certain time in consideration of payment of agreed amount periodically and where lessee becomes the owner of the such assets at the expiry of the term of lease or on payment of the agreed residual amount, as the case may be"*

From the aforesaid definitions a subtle trait of financial lease can be identified i.e. "At the end of the lease period, lessee becomes the owner of the leased asset."

16. In the instant case although the AO and the DRP have characterized the nature of lease as financial lease but both the authorities have ignored the fact that at no point of time, ownership in the asset i.e. aircraft is transferred to the lessee, which is the hallmark of financial lease.

17. The assessee has drawn our attention to RBI Circular No. 24 dated 01.03.2002 at page 234 of the paper book which deals with Import of Aircraft/Aircraft engine/Helicopter on lease basis. A perusal of RBI Circular No. 24 dated .01.02.2022 would show that there are separate conditions to be satisfied for acquiring aircraft on operating lease basis and under financial lease. For the sake of ready reference relevant excerpts from the said Circular are reproduced herein below:-

> *"To*
> *All Authorized Dealers in Foreign Exchange*
> *Madam/Sirs,*
>
> *Import of Aircraft/Aircraft Engine/ Helicopter on lease basis*
>
> *Authorised dealers are aware that the Reserve Bank is considering applications from airline companies and air taxi operators for payment of the lease rentals for import of aircraft/aircraft engine/helicopter on lease basis, based on the approval issued by the Director General of Civil Aviation (DGCA), Government of India.*
>
> *2. It has been decided that authorised dealers may allow remittance of payment of lease rentals, opening of letter of credit towards security deposit etc. in respect of import of*

aircraft/aircraft engine/helicopter on operating lease basis, after verifying documents to show that necessary approval from the appropriate authorities, like Ministry of Civil Aviation/Director General of Civil aviation, Government of India has been obtained. In this connection attention is also invited to paragraph 8 of Annexure I to A.D.(M.A. Series) Circular No.11 dated May 16, 2000.

3. It is clarified that financial lease transaction i.e. the lease transaction containing option to purchase the asset at the end of the lease period will continue to require prior approval from the Reserve Bank of India."

The contention of the assessee is that the lessee is paying lease rentals in accordance with aforesaid RBI Circular and for the financial lease transaction where the ownership in the asset is transferred to the lessee, the lessee was required to take prior approval from the RBI, no such approval has been taken by the lessor in the present case. This fact remains un-rebutted. No material is available on record to suggest that the above RBI Circular has been violated by the lessor or the lessee.

18. Further, the ld. Counsel for the assessee has drawn our attention to the observations of the DRP in para 17.3 (ii) of the Directions, where the DRP has determined economic life of the Aircraft as 8 years. Referring to DGCA Circular issued in 1993 the DRP concluded that since lease of the aircraft covers substantial commercial life, therefore, the lease should be termed as financial lease. We find above observations of the DRP contrary to the facts on record and the DGCA Circular. The DGCA vide its communiqué dated 29.07.1996 (at pages 231 to 233 of the paper book) has prescribed economic life of an aircraft as 20 years or 60,000 landings/pressurization cycles. In the instant case the lease agreement has been entered between the parties for a period of 120 months i.e. for 10 years, in other cases the lease period is for lesser period i.e. 72 months as is in the case of MSN 9382 (at page no. 210 to 275 of the paper book) and for MSN 9561 (at pages 276 to 341 of the paper book). Substantial economic life of the aircraft is still left after the end of lease period. Therefore, observations of the DRP on Economic Life of the aircraft being utilized under lease agreement is without any basis, hence, the conclusion to re-characterize nature of lease agreement is erroneous.

19. The ld. DR has vehemently argued that the lessee (Indigo) had originally entered into an agreement for purchase of aircraft with Airbus and it was subsequently that the present assessee stepped in at the time of delivery of aircraft and financed Indigo for acquiring the aircraft from Airbus. The ld. Counsel for the assessee to counter argument of the Revenue has brought to our notice the decision of Special Bench in the case Inter Globe Aviation Ltd. (Indigo) vs. ACIT (supra). Similar arguments were raised by the Revenue in said case. The questions for consideration before the Special Bench was:

"(1) Whether FIA (Fleet Introductory Assistance) credit received by the Assessee from IAE and other equipment manufacturers is a Capital or revenue receipt arising out of the transaction?
(2) Whether credits so received are taxable under section 28(i) or 28(iv) of the I.T. Act, 1961 or as a "Commission" income or "Income from capital gains"?
(3) Whether the Ld. CIT(A) is right in making disallowance of Rs.268,91,48,934/- out of lease rental payments under section 37(1) of the I.T. Act, 1961?
(4) Whether payment of Supplementary Lease Rent of Rs.328,09,64,412 l-is an allowable business expenditure and TDS is not deductible thereon?"

20. While answering the aforesaid questions the Special Bench took note of the agreement between Indigo and Howth Aircraft Leasing Ltd., assignee and observed that Indigo is not the owner of Aircraft and the Revenue failed to demonstrate that the lease is in the nature of operating lease. The Special Bench further observed that the lower authorities have admitted the fact that ownership of the aircraft is with the lessor and depreciation on these aircraft is claimed by the lessor. The relevant extracts of findings of the Special Bench on this issue are reproduced herein below:-

"31.4. It is relevant to note under this agreement that there is no consideration flowing from the lessor to the assessee for the assignment of right to acquire the aircraft from Airbus. Post above assignment, the assessee has acquired the aircraft on lease from the lessors. The parties have filed before us copies of lease i) agreement dated 15.12.2016 with M/s MeR. Aviation Limited (ii) agreement dated 14.06.2007 with M/s Genesis Acquisition Limited (paper book pages 481 to 589) (iii) agreement dated 04.07.2007 with Lara Leasing Ltd. (Paper book pages 590 to 600). It is the submission of the learned senior counsel for the assessee that all these agreements are in the nature of operating lease and that generally the terms of the agreement are for six years. This fact is also not disputed by the lower authorities. Learned Special Counsel for the Revenue has filed copies of the 03 Lease Agreements before us in his paper book. However, he was not able to demonstrate from any of these 03 Agreements that the nature of lease is Finance Lease and not Operating Lease. The Hon'ble Supreme Court in the case of Asea Brown Boveri Limited vs Industrial Finance Corporation of India Ltd., reported in 154 Taxman 512 (SC) and Association of Leasing & Financial Services vs Union of India reported in [2011] 2 scc 362 has differentiated and highlighted characteristics of both Operating Lease and Finance Lease. The Learned Special Counsel for the Revenue has not been able to demonstrate how the nature of present lease are not Operating Lease in accordance with the ratio highlighted in the above decisions cited (supra). The Assessing Officer also in his order accepts that the ownership of the aircraft is with the lessor and that the depreciation on these aircrafts, where the engine supplied by the lAE is fitted, is claimed by the lessor. We find the learned CIT(A) has also not disputed this fact and have held that "since, the delivery schedule of Aircraft spread-over a very long period, the appellant normally replaces its old fleet with new fleet, after the expiry of lease period which is usually six year."

[Emphasized by us]

21. Further, the Special Bench on plea taken by the Revenue that lease rents are taxable in India as interest in accordance with Article 11 of India-Ireland DTAA, held as under:-

*44.1 We are not convinced by the submissions made by the ld. Special Counsel for the Revenue. It is an undisputed fact that the basic lease Rent of Rs.673.42 crores paid under the lease agreement is an allowable expenditure and its nature is that of "Rent." In our opinion, the nature of supplementary lease rent cannot be treated otherwise as both these expenses are payments made under the same agreement for use of aircraft. The Id. Special Counsel for the Revenue has filed copies of 3 lease agreements before us in his paper book. However**, from none of these agreements he has been able to demonstrate that the nature of lease is financial lease and not operating lease. We have already held above in the preceding paragraph that the nature of lease in the year under consideration is operating lease. Moreover, both the lower authorities have also accepted this fact. We are, therefore, not convinced by the arguments of the Id. Special Counsel for the Revenue that the present leases are financial merely because lease rent is determinable using LIBOR rate or that delivery of aircraft is taken by the assessee from Air Bus.** We find that in the present case the aircrafts were leased for a period of six years. Therefore, the lease rent paid cannot be characterized as "interest." We, therefore, find no merit in the above submissions raised by the Revenue."*

[Emphasized by us]

Once in the case of Indigo, the Revenue accepts that ownership in the Aircraft is with the lessor, the Revenue on similar set of agreements cannot take a reverse position in the case of lessee and argue that lessee is the owner. The Revenue cannot be allowed to approbate and reprobate on the same set of documents and re-characterize the nature of lease agreement to be a financial lease.

22. Before the Special Bench in the case of Indigo, the Revenue had vehemently argued that the lease rentals paid by Indigo to the lessee are in the nature of interest, hence, the provisions of Article 11 of India-Ireland DTAA would operate. The Special Bench negating the arguments of the Revenue held that the lease rentals paid by Indigo are in the nature of rent and not interest as the Revenue has failed to demonstrate that the nature of lease is finance lease and not operating lease. Hence, the payments made by lessee are not in the nature of interest. Thus, in light of findings of the Special Bench, we hold that the provisions of Article 11 of India-Ireland DTAA would not operate in the present case."

9. Similar view has been taken by the Tribunal on this issue in the case of *Kosi Aviation Leasing Ltd. vs. ACIT, (supra)* and *Sky High Appeal XLIII Leasing Company Ltd. vs. ACIT, (supra).* Thus, in facts of the appeals in hand and in light of the orders of the Coordinate Bench, we hold that the Lease Agreement entered into between the assessees and the Aviation Companies are in the nature of operating lease. Thus, the assessees succeed on this issue.

Eligibility for the Benefit of Article 8 of India-Ireland DTAA:

10. The assessees in their respective appeals have assailed denial of benefit of Article 8 of India-Ireland Tax Treaty. In similar set of facts in the case of Kosi Aviation Leasing ltd. vs. ACIT(supra), the Tribunal examined this issue and held as under:-

> "*43. We have heard the submissions made by rival sides on the issue of applicability of Article 8. The issue has already been considered by the Coordinate Bench of the Tribunal in the case of Sky High Appeal XLIII Leasing Company Ltd. (supra). The Coordinate Bench, while dealing with the issue of applicability of Article 8 has in turn followed the decision in the case Sunflower Aircraft Leasing Limited (surpa). In the said case, the Tribunal inter-alia took note of Article 8 as mentioned in OECD Model Convention and as it exist in India-Ireland DTAA and held as under:-*
>
> > *"38. Having so concluded on the primary issue, we turn to the assessee's alternative plea that the lease rentals are, in any event, governed by Article 8(1) of the India–Ireland DTAA, and therefore taxable exclusively in Ireland. For the sake of ready reference, the difference in the language of Article 8 of India-Ireland DTAA as compared to Article 8 of OECD model convention is as under:-*
>
> | | |
> |---|---|
> | *Article 8(1) of the India-Ireland DTAA reads as under:*
"… Article 8 SHIPPING AND TRANSPORT 1.Profits derived by an enterprise of a Contracting State from the operation or rental of ships or aircraft in international traffic the rental and of containers and related equipment which is incidental to the operation of ships or aircraft in international traffic shall be taxable only in that Contracting State. …" | *Article 8 of the OECD Model Convention reads as under:*
"… Article 8 SHIPPING AND TRANSPORT 1.Profits derived by an enterprise of a Contracting State from the operation of ships or aircraft in international traffic shall be taxable only in Contracting State. …" |
>
> > *39. Article 8(1) of this treaty reads in material part: "Profits derived by an enterprise of a Contracting State from the operation or rental of ships or aircraft in international traffic and the rental of containers and related equipment which is incidental to the operation of ships or aircraft in international traffic shall be taxable only in that Contracting State." The text is notable in two respects: first, it disjunctively pairs "operation" and "rental" as independent*

income-yielding activities; second, it contains no requirement that the rental be merely ancillary to the lessor's own operation of ships or aircraft. This wording differs from the OECD Model's narrower formulation, and its deliberate adoption by the Contracting States reflects a conscious policy choice to extend the exclusive taxing right to rental income from ships and aircraft, as a distinct category, when such assets are employed in "international traffic".

40. The assessee's case is that it is an Irish enterprise engaged in the business of dry leasing aircraft to IndiGo, that the leased aircraft formed part of IndiGo's integrated fleet and were deployed interchangeably on domestic and international routes, and that such integration necessarily brought them within the scope of "international traffic" as defined in Article 3(1)(g) of the treaty. That definition excludes only those cases where the ship or aircraft is "operated" solely between places in the other Contracting State; the moment the operation is not exclusively domestic, it satisfies the definition. The assessee points out that IndiGo is an international carrier with scheduled flights to multiple foreign destinations, and that the aircraft type and configurations leased were suitable and certified for such operations. It was emphasised that the treaty text does not stipulate any predominance or threshold of international usage; a single non-incidental use on an international sector suffices to displace the "solely" domestic exclusion. Counsel relied on decisions such as ABN Amro Bank NV and GE Capital Aviation Services, where similar leasing clauses were given their plain, broad meaning.

41. The Revenue, however, has urged that Article 8 was intended to protect the core transport operations of an airline and that the "rental" limb is to be read as ancillary to such operations. Since the assessee is a pure lessor with no airline operations of its own, and since, according to the Revenue, the leased aircraft were predominantly used on domestic Indian routes, it was contended that the income was not covered by Article 8 but instead constituted business profits taxable in India if a PE existed. The LD.DRP adopted this line, essentially importing the OECD Model's narrower structure into the India-Ireland text.

42. We are unable to subscribe to this restrictive reading. Treaty interpretation proceeds on the ordinary meaning of the terms used, read in their context and in light of the treaty's object and purpose. Where the Contracting States have consciously departed from the OECD Model to insert "rental" as an alternative head to "operation" the text must be given effect in its ordinary sense. To superimpose a requirement that the lessor must itself be an operator in international traffic, or that the rental must be subordinate to such operation, is to read into the provision words which are not there. Likewise, to insist on a quantitative predominance of international usage is to graft a test not found in the treaty. The definition in Article 3(1)(g) sets a binary criterion either the aircraft is operated solely domestically (in which case the exclusion applies) or it is not (in which case it falls within "international traffic"). Once it is shown, as it is here, that the leased aircraft formed part of a fleet used on both domestic and international sectors, the rental income falls within the protective ambit of Article 8(1). 43. We also take note of the commercial reality that airlines today operate fleets on a network basis, with aircraft rotated between domestic and international sectors depending on operational exigencies, maintenance schedules, and route economics. It is artificial, and contrary to industry practice, to freeze an aircraft's character by reference to its predominant usage in a given period. The treaty drafters, in our view, intended to avoid such disputes by linking the test simply to whether the aircraft was "operated solely" domestically. In the present case, the factual matrix including IndiGo's undisputed status as an international carrier and the unchallenged deployment of the leased aircraft on at least some international sectors brings the income squarely within the Article 8(1) scope.

44. The allocation rule in Article 8(1) is a specific provision which prevails over the general rule for business profits as provided in Article 7. Even if we had found that the assessee had a PE in India, Article 8(1) would nonetheless require the profits from such rental to be taxed only in the State of residence, Ireland. In light of our earlier conclusion that no PE exists, the operation of Article 8(1) fortifies the non-taxability of the lease rentals in India. The LD.DRP's contrary view is founded on an impermissible narrowing of treaty language, and cannot be sustained."

In the case of Sky High Appeal XLIII Leasing Company Ltd.(supra) the Coordinate Bench of the Tribunal adopted the above findings rendered in the case of Sunflower Aircraft Leasing Limited (surpa) and concluded that the assessee is entitled to avail benefit of Article 8 of the Treaty.

44. The Special Counsel for the Department has raised some additional arguments on issues with regard to applicability of Article 8. We find that in the case of Sunflower Aircraft Leasing Limited (Supra), the Tribunal has already examined Article 8 in OECD Convention viz a viz India-Ireland DTAA. The provisions of Article 8 as given in India-Ireland DTAA are much broader than the OECD Convention. If the submissions of the ld. Special Counsel for the Department are to be accepted then it would mean that the lessor of the aircraft should also be an operator in international traffic as is the case in wet lease. This amounts to inserting the condition in the treaty which cannot be done. This is contrary to the principles of Vienna Convention on the laws of treaties. The treaties are to be interpreted in the ordinary meaning of the text in its context and object. The treaty cannot be read in a manner which would result in absurdity.

45. The argument of Special Counsel for the Revenue was that "international traffic "must be read with reference to each voyage/journey and not the aircraft. Before proceedings further, it would be relevant to refer to the provisions of Article 8(1) of India-Ireland DTAA, the same reads as under:-

> *"1. Profits derived by an enterprise of a Contracting State from the operation or rental of ships or aircraft in international traffic and the rental of containers and related equipment which is incidental to the operation of ships or aircraft in international traffic shall be taxable only in that Contracting State.*
>
> *Here it would also be relevant to refer to the definition of 'international traffic' as defined under Article 3(1)(f) of the Treaty:*
>
> *"the term "international traffic" means any transport by a ship or aircraft operated by an enterprise of a Contracting State, except when the ship or aircraft is operated solely between places in the other Contracting State,"*

The definition of "international traffic "if applied in context to facts of the instant case, international traffic means any transport by aircraft operated by an enterprise of India, except when aircraft is operated solely between places in Ireland. Accordingly, an aircraft operated by Indian lessee (Indigo) shall be considered as operating in international traffic. The lessee operates aircraft in and outside India and does not operate aircraft solely in Ireland. Further, neither Article 8(1) nor Article 3(1)(f) defining 'international traffic' refers to voyage/journey. Therefore, argument of the ld. Special Counsel for the Department referring to voyage/journey to test check international traffic is misplaced, hence, unsustainable. When the meaning are self-explanatory in the DTAA there is no need to travel to OECD Conventions which are only guiding light and have no binding force.

46. The third limb of the argument by Special Counsel is that each aircraft has to be seen whether it has flown outside and has operated in international traffic. The assessee earns rentals from lease of aircraft. The lessor has no control on the schedule of the aircrafts or the destination of the aircraft where they are operated. The lessor/assesseedoes not lay down any restrictions in the lease agreement as to whether the aircraft shall operate in domestic territory or operate internationally. It is the discretion of the lessee to schedule the operation of the aircraft. It is no denying that lessee/Indigo is operating internationally. Therefore, to presume that the aircraft are not operated internationally is superfluous. Nevertheless, the assesses being the lessor of the aircraft would continue to receive rentals even if the aircraft is not put to operation by the lessee. The assessee has filed a certificate of deployment of aircraft issued by the lessee which confirms the fact that leased aircraft has not been deployed anywhere in Ireland during the relevant period and is operated in international traffic. Thus, the condition of Article 8(1) is satisfied.

> *47.* ***For the reasons mentioned above and in light of order in the case of Sky High Appeal XLIII Leasing Company Ltd. (supra), we hold the lease rental received by the assessee/appellant are covered by Article 8 of India-Ireland Treaty. Hence, the assessee would get the benefit of Article 8. In the result, this issue is decided in favour of the assessee/appellant and against the Department****.***"*

11. Since, facts in the impugned assessment year with respect to the claim under Article 8 are identical to the one adjudicated in Kosi Aviation Leasing ltd. vs. ACIT (supra), findings given by the Co-ordinate Bench in the aforesaid case would mutatis mutandis apply to the instant set of appeals. Following the order of Coordinate Bench, we hold that assessees would be eligible for the benefit of Article 8 of India-Ireland DTAA. Accordingly, the assessee succeeds on this issue.

Applicability of MLI to India-Ireland DTAA

12. The Coordinate Bench in the case of *Kosi Aviation Leasing ltd. vs. ACIT (supra*) has adjudicated this issue as under:-

> *"19. The ld. DR has vehemently argued that the lessee (Indigo) had originally entered into an agreement for purchase of aircraft with Airbus and it was subsequently that the present assessee stepped in at the time of delivery of aircraft and financed Indigo for acquiring the aircraft from Airbus. The ld. Counsel for the assessee to counter argument of the Revenue has brought to our notice the decision of Special Bench in the case Inter Globe Aviation Ltd. (Indigo) v. ACIT (supra). Similar arguments were raised by the Revenue in said case. The questions for consideration before the Special Bench was:*
>
> > *"(1) Whether FIA (Fleet Introductory Assistance) credit received by the Assessee from IAE and other equipment manufacturers is a Capital or revenue receipt arising out of the transaction?*
> >
> > *(2) Whether credits so received are taxable under section 28(i) or 28(iv) of the I.T. Act, 1961 or as a "Commission" income or "Income from capital gains"?*
> >
> > *(3) Whether the Ld. CIT(A) is right in making disallowance of Rs.268,91,48,934/- out of lease rental payments under section 37(1) of the I.T. Act, 1961?*
> >
> > *(4) Whether payment of Supplementary Lease Rent of Rs.328,09,64,412/- is an allowable business expenditure and TDS is not deductible thereon?"*
>
> *20. While answering the aforesaid questions the Special Bench took note of the agreement between Indigo and Howth Aircraft Leasing Ltd., assignee and observed that Indigo is not the owner of Aircraft and the Revenue failed to demonstrate that the lease is in the nature of operating lease. The Special Bench further observed that the lower authorities have admitted the fact that ownership of the aircraft is with the lessor and depreciation on these aircraft is claimed by the lessor. The relevant extracts of findings of the Special Bench on this issue are reproduced herein below:-*
>
> > *"31.4. It is relevant to note under this agreement that there is no consideration flowing from the lessor to the assessee for the assignment of right to acquire the aircraft from Airbus. Post above*

assignment, the assessee has acquired the aircraft on lease from the lessors. The parties have filed before us copies of lease (i) agreement dated 15.12.2016 with M/s MeR. Aviation Limited (ii) agreement dated 14.06.2007 with M/s Genesis Acquisition Limited (paper book pages 481 to 589) (iii) agreement dated 04.07.2007 with Lara Leasing Ltd. (Paper book pages 590 to 600). It is the submission of the learned senior counsel for the assessee that all these agreements are in the nature of operating lease and that generally the terms of the agreement are for six years. This fact is also not disputed by the lower authorities. Learned Special Counsel for the Revenue has filed copies of the 03 Lease Agreements before us in his paper book. However, he was not able to demonstrate from any of these 03 Agreements that the nature of lease is Finance Lease and not Operating Lease. The Hon'ble Supreme Court in the case of Asea Brown Boveri Limited v. Industrial Finance Corporation of India Ltd. , reported in 154 Taxman 512 (SC)and Association of Leasing & Financial Services v. Union of India reported in [2011] 2 scc 362 has differentiated and highlighted characteristics of both Operating Lease and Finance Lease. The Learned Special Counsel for the Revenue has not been able to demonstrate how the nature of present lease are not Operating Lease in accordance with the ratio highlighted in the above decisions cited (supra). The Assessing Officer also in his order accepts that the ownership of the aircraft is with the lessor and that the depreciation on these aircrafts, where the engine supplied by the lAE is fitted, is claimed by the lessor. We find the learned CIT(A) has also not disputed this fact and have held that "since, the delivery schedule of Aircraft spread-over a very long period, the appellant normally replaces its old fleet with new fleet, after the expiry of lease period which is usually six year."

[Emphasized by us]

21. Further, the Special Bench on plea taken by the Revenue that lease rents are taxable in India as interest in accordance with Article 11 of India-Ireland DTAA, held as under:-

44.1 We are not convinced by the submissions made by the ld. Special Counsel for the Revenue. It is an undisputed fact that the basic lease Rent of Rs.673.42 crores paid under the lease agreement is an allowable expenditure and its nature is that of "Rent." In our opinion, the nature of supplementary lease rent cannot be treated otherwise as both these expenses are payments made under the same agreement for use of aircraft. The Id. Special Counsel for the Revenue has filed copies of 3 lease agreements before us in his paper book. However, from none of these agreements he has been able to demonstrate that the nature of lease is financial lease and not operating lease. We have already held above in the preceding paragraph that the nature of lease in the year under consideration is operating lease. Moreover, both the lower authorities have also accepted this fact. We are, therefore, not convinced by the arguments of the Id. Special Counsel for the Revenue that the present leases are financial merely because lease rent is determinable using LIBOR rate or that delivery of aircraft is taken by the assessee from Air Bus. We find that in the present case the aircrafts were leased for a period of six years. Therefore, the lease rent paid cannot be characterized as "interest." We, therefore, find no merit in the above submissions raised by the Revenue."

[Emphasized by us]

Once in the case of Indigo, the Revenue accepts that ownership in the Aircraft is with the lessor, the Revenue on similar set of agreements cannot take a reverse position in the case of lessee and argue that lessee is the owner. The Revenue cannot be allowed to approbate and reprobate on the same set of documents and re-characterize the nature of lease agreement to be a financial lease."

***12.** The lease agreements considered by the Coordinate Bench in the case of Celestial Aviation Trading 15 Ltd. (supra) are substantially similar to the lease agreement in the case under appeal. The primary reasons given by Coordinate Bench to hold that the lease agreement is in the nature of operating lease are summed up as under:-*

(i) *The prominent character of the Financial Lease - i.e. transfer of ownership in the leased asset, is conspicuously absent in the Aircraft Specific Lease Agreement (ASLA). There is no provision of transfer of ownership in the leased asset i.e. aircraft, in ASLA at any stage.*

(ii) *As per RBI Circular No.24 (supra) in the case of financial lease i.e. where in the lease agreement there is option to purchase asset at the end of lease period, prior approval is required from RBI. No such approval was ever sought and no such approval has been brought on record.*

(iii) *As per DGCA the life span of an aircraft is 20 years or 60,000 pressurization/landing cycles. In the present case the aircraft has been leased for a period of 120 months i.e. 10 years. Thus, even after the end of lease period substantial economic life of the asset i.e. the aircraft, is still available for further lease.*

(iv) *The Department in the case of Indigo (lessee) has accepted the fact that the nature of lease is that of operating lease.*

(v) *The Special Bench of Tribunal in the case of lessee, Inter Globe Aviation Ltd. (Indigo) (supra) has held the nature of lease as operating lease. In the case of lessor/appellant, on same set of agreements and facts, the nature of lease cannot be recharacterized as financial lease.*

13. *The Revenue has not been able to distinguish either facts or findings of the Coordinate Bench in the case of Celestial Aviation Trading 15 Ltd. (supra). Following the aforesaid decision, for parity of reasons we hold that the agreement to lease aircrafts is in the nature of operating lease and not financial lease. The issue is thus decided in favour of the assessee and against the department.*

(ii) Applicability of MLI to India-Ireland DTAA:

14. *The next issue for our consideration is applicability of Article 6 & 7 of MLI. The contention of Revenue is that India and Ireland have ratified MLI and India has notified MLI on 9/8/2019. Since, India-Ireland DTAA is a Covered Tax Agreement, provisions of Article 6 & 7 would apply automatically. The ld. Counsel for the assessee at the outset placing reliance on the decision rendered in the case of Sky High Appeal XLIII Leasing Company Ltd. v. Asstt. CIT (International Tax) [2025] 177 taxmann.com 579 (Mumbai - Trib.), submitted that the Coordinate Bench of the Tribunal has examined the issue in detail. The Tribunal in the said case has held that in the absence of specific notification u/s. 90(1) of the Act, MLI does not become a binding force under Domestic law and is not legally enforceable. The general omnibus notification issued on 09/8/2019, is not sufficient to implement the modifications to the India-Ireland DTAA as a result of MLI. A separate notification u/s. 90(1) of the Act is mandatorily required for each country to validate the amendments in the DTAA. The ld. Counsel further submitted that merely for the reason that IndiaIreland DTAA is 'Covered Tax Agreement' (CTA) the modifications as a result of MLI would not be validated automatically. A separate notification incorporating consequential amendments to the tax treaty is necessary. Article 6 and 7 of MLI cannot be applied unless they are backed by domestic Legislation in the form of notification u/s.90(1) of the Act. The ld. Counsel submitted that the order of Mumbai Bench of the Tribunal in the case of Sky High Appeal XLIII Leasing Company Ltd. (supra) is quite comprehensive and covers all possible facets on the issue arising on applicability of MLI.*

15. *Per contra, the ld. Special Counsel for the Department submits that the decision rendered by the Mumbai Bench of Tribunal is distinguishable as certain vital aspects have not been considered by Mumbai Bench while dealing with the issue of applicability of MLI. The ld. Special Counsel for the Department submits that MLI is effective and is in force within the Union of India from 01.10.2019, pursuant to notification u/s. 90(1) of the Act dated 09.08.2019. Referring to Explanatory Statement to the Multilateral Convention To Implement Tax Treaty related measures to prevent Base Erosion Profit Shifting (BEPS), he submitted that before deciding the issue it would be first relevant to understand the need of having MLI instead of separate agreements with each Sovereign to modify each DTAA separately. He submitted that implementation of the final BEPS package requires changes to model tax conventions, as well as to the bilateral tax treaties based on those model conventions. Since, the number of bilateral treaties was quite large, it would be cumbersome and time consuming to make bilateral updates to each treaty separately. Thus, it would limit the effectiveness of multilateral efforts. In this backdrop MLI was conceptualized and the same has been universally accepted. He further submitted that MLI does not function in the same way as amending protocol to a single existing treaty. MLI would run parallel to DTAA. MLI works on matching principles. Countries could state their own position and probable list of countries to whom MLI would apply. Only those provisions of an existing treaty would be modified, where there was a match of the positions set out by two countries to the MLI. Where there is no match, the MLI provisions would not modify the CTA. Referring to Compatibility Clause of Explanatory Statement to the Multilateral Convention, he submits that certain provisions of the conventions may overlap with the provisions of Covered Tax Agreements. Where*

there is a conflict with existing provisions, it is addressed through one or more compatibility clauses. He pointed that provisions of MLI would supersede DTAA provisions wherever there is a conflict between the two and where CTA does not contain relevant provisions as required by MLI, MLI provides for the same.

***15.1**. Referring to section 90(1) of the Act, the ld. Counsel submits that section 90(1) of the Act empowers the Central Government to enter into an agreement with another Government, which is to be followed by a notification in official gazette for implementation. Without prejudice to the fact that MLI only seeks to modify existing bilateral tax treaties i.e. CTA, section 90(1) of the Act empowers entering into Multilateral Agreements with multiple governments. Section 90(1) of the Act does not cast any restrictions on the Central Government regarding the form, manner and nature of the notification including providing for a future date of coming into effect of the provisions of such notification. MLI provides for antiavoidance under existing DTAA and only seeks to limit the concessions given under the existing DTAA hence, does not per se require Section 90(1) notification to limit the existing concessions granted i.e. the Central Government does not need further right to limit what it has right to grant in first place. Nonetheless, the Central Government has issued the notification dated 09.08.2019 to implement the MLI.*

***15.2**. The ld. Special Counsel for the Department/Respondent further submitted that the past practice is that the Central government by way of a single omnibus notification under section 90(1)of the Act have notified MLI. For example:*

- *Agreement among the Governments of SAARC Member States was brought into effect in India by single notification dated 10.01.2011 u/s 90(1). No separate notification qua each country was made. The SAARC agreement had similar features to MLI including entry into force, depository, effective at a future date, expansion of scope for certain countries etc.*
- *Another Multilateral Convention on Mutual Administrative Assistance in Tax Matter (MAAC) was signed by India at OECD Headquarters on 26/1/2012. The said MLI was ratified and deposited in OECD and thereafter was notified u/s 90(1) on 28/8/2012. No separate notification was issued for each country.*
- *Another Multilateral Competent Authority Agreement(CBCR)was signed by India on 12/5/2016 and notified u/s 286(9) on 28.07.2017, which further refers to agreement u/s 90(1), that had significant impact on rights of taxpayers and casted severe reporting obligations followed by severe penalties in case of default.*

***15.3**. Sh. Indruj Singh further submitted that the global practice amongst most dualist and monist countries is to assimilate MLI into their domestic law by way of single omnibus notification. In fact, countries like Ireland, South Africa etc. also notified MLI under delegated legislative provisions, akin to section 90(1) of the Act. Ireland's MLI position was ratified on 29.01.2019 and notified on 26.10.2018 to have entry into force from 01.05.2019 i.e. before India ratified and notified its own MLI position. Therefore, at the time of India's notification, the MLI provisions that matched and modified the Indo-Irish DTAA were already known.*

***15.4** The ld. Counsel for the Department to buttress his argument, referred to the Note by the OECD Directorate of Legal Affairs at page 628 to 636 of the paper book - Vol-Iand submitted that OECD also clarifies that MLI is a multilateral treaty, to be applied alongside existing bilateral tax treaties modifying their applications. The bilateral treaties can be modified in a synchronized and consistent way in order to swiftly implement the tax treaties related BEPS measures. He specifically referred to para 11 to 17 of the aforesaid note by the OECD. The ld. Counsel to explain how the MLI works refer to the flow charts at pages 637 and 638 of the paper book wherein step by step procedure is explained and also refer to flow chart covering Article 7 relating to PPT at page 647 of the paper book Volume I furnished by the Department.*

***15.5** Shri Indruj Singh Rai, Special Counsel for the Department referring to the judgment rendered by Hon'ble Apex Court in the case of Assessing Officer (International Taxation) v. Nestle SA, [2023] 155 taxmann.com 384/296 Taxman 580/458 ITR 756 (SC) submitted that the Hon'ble Court in the said case has given emphasis on the "treaty practice" being followed for issue of*

separate notifications for allowing benefit pursuant to Most Favored Nation (MFN) clause provided in protocol. Whereas, in the present case as mentioned earlier there is no practice of issuing separate notification for each country after signing of MLI. Thus, the decision rendered in the case of Nestle SA (supra) will have no impact on the MLI as the "treaty practice" in the case of MLI is to issue signal omnibus notification and no separate notifications are issued for enforcement of MLI for each country. Thus, the observation of the Hon'ble Supreme Court of India on requirement of a subsequent notification was only in the specific facts and pattern with respect to implementation of MFN clause and not for all amendments which are already notified once u/s. 90(1) of the Act. The ld. Special Counsel submitted that the ratio laid down in Nestle SA (supra) rather supports the case of the respondent/Revenue as there is a specific notification u/s. 90(1) of the Act dated 09.08.2019 giving effect to the MLI and also supports the historic behavior and precedent of single omnibus notification for MLI. For example: SAARC agreement, MAAC and CBCR. He pointed that in the case of Sky High Appeal XLIII Leasing Company Ltd. (supra), the Bench was not assisted with the submissions and was not made aware of the practice of issuing omnibus notification for MLI.

***15.6** The ld. Counsel for the Department further referred to the Finance Act, 2020, whereby provisions of section 90 of the Act were amended. He pointed that even Finance Act, 2020, recognizes that MLI is in force w.e.f. Financial Year 202021 onwards.*

***15.7** The ld. Counsel for the Department finally submitted that the coordinate Bench of the Tribunal in the case of SC Lowy P.I. (LUX) S.A.R.L. v. ACIT (International Taxation) [2025] 170 taxmann.com 475 (Delhi - Trib.), adjudicated the issue where reference was made to MLI and PPT by the Department. The Bench did not question validity of MLI.*

***16.** Rebutting the submissions made by ld. Special Counsel on behalf of the Department, Shri Sachit Jolly asserted that the same very set of arguments qua single omnibus notification u/s. 90(1) of the Act were made in the case of Sky High Appeal XLIII Leasing Company Ltd. (supra). The written submissions filed by the Department were taken note of and reproduced in the order. The Tribunal after examining the issue rejected all the arguments advanced by the Department and followed the ratio laid down in the case of Nestle SA (supra). The Revenue in the present set of appeals have all together taken a stand inverted to what was taken in the case of Nestle SA (supra). The ld. Counsel referring to the judgment in the case of Nestle SA (supra) submits that the Hon'ble Apex Court in an unambiguous terms has held that a notification u/s 90(1) of the Act is necessary and a mandatory condition for a Court, Authority or Tribunal to give effect to DTAA or any protocol changing its terms and conditions, which has the effect of altering the existing provisions of law. The MLI has the effect of modifying/altering bilateral tax treaties. The amendments to bilateral tax treaty consequent to the terms of MLI are not enforceable till the time they're notified.*

***16.1** He further submitted that the MLIs referred by the Special Counsel for the Department are prior to the judgment rendered in the case Nestle SA (supra) and were never subjected to judicial scrutiny. Nevertheless, the said MLIs are distinguishable. The ld. Counsel pointed that SAARC agreement notified on 10/1/2012 is altogether a different species of agreement. All the parties to the agreement have signed the agreement on the same day. The taxes to be modified are identified, the date from which it is applicable is also identified and the scope of amendments were also identified. There was no scope of any uncertainty regarding the language or effective date for amendments sought to be made. In respect of CbCR he submitted that the said agreement was notified u/s 286(9) of the Act. The said section allows notification of Multilateral Instruments, as the section defines agreement to mean a combination of all existing DTAAs. In any case said MLI does not alter tax liability of any taxpayer.*

***16.2** Shri Jolly submitted that the Hon'ble Apex Court in penultimate paragraph of the judgement in the case of Nestle SA (supra) emphatically held that a separate notification is necessary u/s 90(1) of the Act to give effect to any DTAA or where any protocol has changed the terms and conditions of any existing provision of law. Therefore, to say that the judgment rendered in the case of Nestle SA (supra) was only with respect to past conventions would be misleading. By nature, MLI is a unilateral instrument that depends on matching principles being satisfied by the respective treaty partner resulting in amendment to existing DTAA on a future date that is yet to be known. He submits that MLI has the effect of amending the DTAA provisions and after each amendment varying the terms and conditions, the DTAA is required to be notified under the provisions of section 90(1) of the Act.*

***16.3**. On the argument of global practice in notifying MLI by single notification Sh. Jolly submitted that the OECD in the note itself states that the position in international law and domestic law is entirely different. Referring to para 28 to 31 of OECD Note he pointed that OECD itself suggested that whatever has been proposed by the OECD BEPS project or the international practice will not dilute or obviate the requirement in domestic legal system. Thus, how to give effect to amendment/modification to the existing DTAA caused by MLI under domestic law is left to each country.*

***16.4** The learned counsel for the assessee finally submitted that if the contention of Department with respect to Memorandum explaining amendment to section 90 by the Finance Act, 2020 is accepted, the notification of 2019 will not survive, as it is prior to the said amendment and on the date of notification there was no provision under law for notification of MLI.*

***17.** Shri Percy Pardiwalla, Senior Advocate supplementing the submissions made by Shri Sachit Jolly Sr. Advocate, filed written submissions. The relevant excerpts from the same are asunder:-*
"Rebuttal on single omnibus notification as past practice:

All the above notifications were issued prior to Nestle SA (supra) decision and have not been tested in light of the legal principles laid down by the Hon'ble Supreme Court in the said case. They cannot, therefore, be relied on to circumvent the mandatory requirement of specific notification of consequences of MLl on tax treaties as required under the provisions of section 90(1) of the Act.
Without prejudice, the Appellant submits that the notifications mentioned by the Ld. DR cannot be compared to the MLI which by its very nature drastically amends the scope and ambit of the provisions of the tax treaty and the requirement of a notification under section 90(1) of the Act is mandatory:

a.	*The SAARC agreement is not comparable with the MLl and its operation. The SAARC agreement was signed by all the Member States, fully agreeing to the terms of the Agreement stated therein. Therefore, there is no uncertainty / ambiguity in the application of the provisions of the SAARC agreement, unlike MLI which works on a matching principle.*
b.	*The Multilateral Convention on Mutual Administrative Assistance in Tax Matter is primarily an administrative tool for tax authorities to co-operate and share information. It does not amend or override existing bilateral tax treaties and does not change substantive rights and obligations of taxpayers under the tax treaties.*
c.	*The MCAA does not amend or override existing tax treaties. It is an administrative arrangement for information exchange, enabled by the Convention, and operates in parallel to bilateral treaties. There is no direct modification of taxpayer rights or obligations under existing tax treaties. In fact, the said notification was issued under section 286 of the Act and is not a notification under section 90(1) of the Act.*

Furthermore, the contention of the Ld. DR that principles laid down in Nestle SA (supra) give primacy to'past practice' is also untenable. While the said case was decided in the backdrop of past FN practice, such practice was always carried out strictly in line with section 90(1) of the Act. There was no conflict between past practice and statutory mandate in the MFN context. Unlike this, in instant case the Revenue seeks to apply the MLI without any notification of its consequence on the Tax Treaty as required by section 90(1) of the Act, which is contrary to the provisions of the Act as well as the principle enunciated by the Hon'ble Supreme Court.

Rebuttal on global practice:
Practices in foreign jurisdictions cannot determine India's legal position on treaty implementation. The Hon'ble Supreme Court in Nestle SA (supra) (Para 46) made it abundantly clear that enforceability in India depends solely on compliance with section 90(1) of the Act. Further, Para 31 of the OECD's Legal Note, relied upon by the Ld. DR (Pg 635 of the Ld. DR's compilation (Vol 1)) itself records that treaty partners need not to have identical domestic procedures for the MLI

to operate and the implementation depends on each country's legal framework. The fact that some countries use omnibus notification to implement the consequences of MLI on tax treaties does not dilute India's requirement of separate notifications of consequences of MLI for the respective treaties under section 90(1) of the Act.

Rebuttal on Note by the OECD
As held by the Hon'ble Supreme Court in Nestle SA (supra) and also considered by the Hon'ble Tribunal in the case of Sky High (supra), a notification under section 90(1) of the Act incorporating the changes to the Tax Treaty by the MLI is mandatory as it has the effect of amending the bilateral tax treaties to the extent of the consensus of both the contracting states The practice suggested by the OCD cannot override the express provisions of the Act.

Rebuttal on Memorandum to the Finance Act, 2020:
The reliance on Memorandum to Finance Act, 2020 is misplaced. The Memorandum merely notes MLI ratification and aligns section 90(1) with BEPS objectives. It nowhere dispenses with the statutory requirement of treaty-specific notifications as confirmed by the Hon'ble Supreme Court in Nestle SA (supra).

5. Without prejudice to the above submission, the Appellants also humbly submits that Notification No. S.O.2887(E) dated 09.08.2019 ('MLI Notification'), issued by the Central Government under section 90(1) of the Act, purporting to give effect to the provisions of the MLI is not enforceable, as it is invalidly issued

6. Subsequent to the issuance of the MLI Notification in 2019, the provisions of section 90(1)(b) of the Act were amended vide the Finance Act, 2020, with effect from 1 April 2021 which introduces a substantive limitation by inserting the following words into Section 90(1)(b) of the Act:

".for the avoidance of double taxation of income under this Act and under the corresponding law in force in that country or specified territory, as the case may be, [without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance (including through treatyshopping arrangements aimed at obtaining reliefs provided in the said agreement for the indirect benefit to residents of any other country or territory)]

The above amendment fundamentally alters the statutory basis for the Central Government's power to enter into and notify agreements for the avoidance of double taxation.

7. The Memorandum to the Finance Bill, 2020, explains the need for the said amendment. It explains that India has signed, ratified and deposited the Multilateral Convention to bring into force the MLI in India, which will modify India's tax treaties to curb revenue loss through treaty abuse and base erosion and profit shifting strategies by ensuring that profits are taxed where substantive economic activities generating the profits are carried out, and will be applied alongside existing tax treaties, modifying their application in order to implement the BEPS measures. Accordingly, it is provided that an amendment to section 90 of the Act is necessary in order to achieve the said purpose.
8. The intent of the subsequent amendment to section 90 of the Act, as explained in the Memorandum, makes it clear that the MLI Notification issued in August 2019, is invalid and does not have the legal sanction to restrict the tax treaty benefits under the existing and notified agreements as the right to enter into an agreement to curb non-taxation or reduced taxation through tax evasion or avoidance, was only given once the amendment in section 90 of the Act was made.
9. In light of the foregoing, it is submitted that MLI Notification is invalid and, further, in any event, it is not enforceable in absence of a separate notification for consequences of MLI as agreed upon between the contracting states as can be discerned from the respective instruments of ratification and incorporation into the synthesized text on the Tax Treaty under section 90(1) of the Act. This position has been conclusively affirmed by the Hon'ble Supreme Court in Nestle SA (supra) and also followed by the Hon'ble Mumbai Bench in Sky High Appeal XVIII Leasing Company Limited (supra)."

18. *Here we would also like to mention that Sh. Ravi Sharma Advocate and Sh. Sriram Seshadri, Advocate have also filed their respective written submissions which are largely on the same lines on which Sh. Sachit Jolly has made his arguments, hence, for the sake*

of brevity and to avoid repetitiveness their submissions are not reproduced in the order, though, they are taken on record.

19. *We have extensively heard both sides on the issue of applicability of MLI. India signed the MLI in 2017 and deposited its instrument of ratification with the OECD in June 2019, along with its final list of choices and reservations. It is an undisputed fact that India-Ireland DTAA is a 'Covered Tax Agreement' in the list of documents convey to the OECD. India has notified MLI vide single omnibus notification dated 09/8/2019. The issue for consideration before us is;*

Whether the MLI lacks legal binding force in the absence of specific notification country wise or the omnibus notification already issued on 09.08.2019 is sufficient to invoke the provisions of MLI that has the effect of modifying/altering tax treaty (in the present case India-Ireland DTAA)?.

20. *The issue of applicability of MLI and its impact on India-Ireland DTAA has already been considered in detail by Mumbai Bench of the Tribunal in the case of Sky High Appeal XVIII Leasing Company Limited (supra). The Special Counsel for the Revenue fairly admitted that the Mumbai Bench of the Tribunal has decided the issue but he raised his reservations that certain vital aspects were not brought to notice of the Bench when the matter was argued. The crucial aspects not brought to the notice of Bench could have changed the course of decision. He made thus made his submissions on the points which accorded to him were not considered/brought to notice of the Bench in the case of Sky High Appeal XVIII Leasing Company Limited (supra).*

21. *We find that the Coordinate Bench in a comprehensive order after considering submissions of rival sides, examining provisions of section 90(1) of the Act, India-Ireland DTAA, notification dated 09.08.2019 vide which MLI was notified, need and objective of MLI and the ratio laid down by the Hon'ble Supreme Court of India in the case of Nestle SA (supra) held as under:-*

"38. Thus, the Hon'ble Supreme Court in Nestle has rendered a landmark ruling on the constitutional status and domestic enforceability of Double Taxation Avoidance Agreements (DTAAs), emphatically clarifying that the assimilation of such international instruments into the Indian legal framework is neither automatic nor mechanical. A DTAA, even when duly signed and ratified, does not per se acquire enforceability within the municipal legal system, unless and until it is expressly brought into force through a notification issued under Section 90(1) of the Income-tax Act. In the absence of such notification, treaty provisions, however binding they may be in international law do not confer enforceable rights upon taxpayers before Indian courts and tribunals.

39. The Court further rejected the contention that benefits granted to a foreign State at a subsequent point of time, whether on account of its accession to the OECD or pursuant to later negotiations and protocols, are automatically grafted onto an earlier DTAA with another State. Unlike domestic legislation, which emanates from parliamentary will, treaties are the product of diplomatic engagement and negotiated consensus, reflecting the constitutional and economic realities of the contracting States. Each DTAA is therefore a selfcontained instrument, the interpretation of which must remain tethered to its own text, structure and definitional scope; it cannot be expanded by implication merely because similar expressions appear in another DTAA or because a party has subsequently joined a multilateral organisation. Accordingly, the Court held that any extension of treaty benefits to a new OECD member State can take effect only if India consciously accepts such extension, communicates this position to the treaty partner, and issues a fresh notification under Section 90(1). In the absence of such a deliberate and notified amendment, no parity of treatment or "triggerevent-driven" integration can be presumed.

In crystallising these principles, the Supreme Court has reaffirmed that:

- *Parliament retains the exclusive authority to legislate upon treaty provisions where they affect the rights of citizens;*
- *notification under Section 90(1) is a mandatory precondition for the enforceability of any DTAA or protocol that alters existing provisions of law; and*
- *domestic courts cannot apply a rigid black-letter interpretive approach, but must account for the constitutional, diplomatic and practical realities attending upon different treaties.*

In essence, Nestle lays down that treaty benefits do not cascade automatically by reason of external developments such as OECD membership or subsequent bilateral arrangements, and that only a deliberate, notified act of incorporation can elevate such benefits into enforceable domestic law.

40. In our considered view, the factual matrix of the present case bears a close parallel to that examined by the Hon'ble Supreme Court in Nestle SA (supra). In that decision, as in the matter before us, the original bilateral tax treaty in this case the India-Ireland DTAA stood duly notified. Equally, the subsequent multilateral instrument (MLI) had also been formally notified. The pivotal question, however, was not the mere existence of notifications in respect of both instruments, but rather whether the consequential modification of the earlier DTAA, brought about by virtue of the later multilateral instrument, had itself been separately notified for the purposes of domestic application. On the material available on record, it is expressly admitted that although both the India-Ireland DTAA and the MLI have been notified, "the consequence/impact of the MLI on the India Ireland DTAA is not admittedly and separately notified."

41. The ratio of the Supreme Court in Nestle SA (supra) leaves no room for ambiguity on this issue. Summarising its conclusions in paragraph 88 of the judgment, the Court emphatically held that a notification under Section 90(1) of the Income-tax Act is an indispensable and mandatory condition for any court, authority or tribunal to give effect to a Double Taxation Avoidance Agreement, or to any protocol or instrument that purports to alter the terms or conditions of such agreement. Put differently, any subsequent treaty-based modification of an existing DTAA can be enforced under municipal law only where a specific Section 90(1) notification has been issued incorporating that modification into Indian law.

42. The Revenue has argued that, since the MLI has been duly notified and the India-Ireland DTAA is a "Covered Tax Agreement", Articles 6 and 7 (i.e., the PPT suite) automatically apply. With respect, this contention cannot be reconciled with the constitutional and statutory mandate articulated by the Hon'ble Supreme Court in Nestle SA. Indeed, the Revenue's own explanatory note acknowledges that the MLI "operates to modify tax treaties", while at the same time conceding that it is "not an amending protocol", and that the widely circulated "synthesised text" is not in itself a legally binding document.

43. In truth, the so-called synthesised text which incorporates the MLI provisions into the covered tax agreement is nothing more than an expository compilation intended to facilitate understanding. It has neither been notified in the Official Gazette under Section 90(1) nor admitted by the Revenue to be a binding legal instrument. The reason for this is self-evident, unless and until the MLI-based modifications themselves are separately notified, a step which, in light of the principles laid down in Nestle SA, is a mandatory pre-condition the synthesised text, however convenient for reference, cannot be treated as a source of enforceable law. Consequently, the Department cannot rely on the

synthesised text to apply the PPT provisions, for that text has no greater legal sanctity than the unincorporated MLI provisions themselves.

44. The structural design of the MLI itself reinforces this conclusion. Under its operational framework, each contracting State is required to deposit with the OECD a list of bilateral treaties that it wishes to designate as "covered agreements" along with its specific positions and reservations. The effectiveness of those positions, however, remains contingent upon the principle of reciprocity and, most importantly, upon the manner in which each State gives effect to such positions under its own domestic law. It is, therefore, not enough that India has merely notified the MLI or identified the India-Ireland DTAA as a covered tax agreement. Unless the changes contemplated in the MLI are expressly incorporated into Indian law through the statutory mechanism, namely, a specific notification under Section 90(1) those changes cannot operate to alter the manner in which the domestic authorities apply the DTAA. That position now constitutes the law of the land by virtue of the judgment of the Hon'ble Supreme Court in Nestle SA, which makes it clear that neither the MLI nor any synthesised text can have domestic legal efficacy unless duly notified under Section 90(1) of the Act.

45. Against this settled backdrop, the approach adopted by the Assessing Officer and the learned DRP in treating the Principal Purpose Test under the MLI as selfexecuting in relation to the India-Ireland DTAA is wholly unsustainable. Not only does it run counter to the Revenue's own description of the MLI, namely, that it "modifies existing treaties" but it is also directly inconsistent with the binding precedent of the Supreme Court. The contradiction is plain: the Revenue recognises that the MLI modifies tax treaties, yet it sidesteps the very legal requirement that Nestle SA describes as an indispensable precondition, namely, a separate Section 90(1) notification incorporating those treaty modifications into Indian law.

46. When the ratio of Nestle SA (supra) is applied to the facts of the present case, the inevitable conclusion is that the MLI cannot be invoked to curtail or otherwise restrict the benefits available to the assessee under the India-Ireland DTAA unless the specific consequence of the MLI has been notified under Section 90(1). In the absence of such notification, neither the bare provisions of the MLI nor any synthesised text reflecting its intended application can form the basis for altering the application of an already notified DTAA.

47. We are therefore constrained to hold, as a threshold matter, that Articles 6 and 7 of the MLI cannot be invoked against the assessee in the present assessment year, inasmuch as there is no Section 90(1) notification incorporating those provisions into the India-Ireland DTAA. Consequently, the Revenue's attempt to deny treaty benefits by invoking the MLI's Principal Purpose Test must, on this ground alone, fail. The assessment must proceed on the footing that the MLI has no application in the absence of a statutorily issued notification under Section 90(1).

48. Having thus resolved the threshold question in favour of the assessee, it bears reiteration that this conclusion is not reached on a technicality divorced from substance, but rests on the very constitutional and statutory architecture governing how international agreements enter the domestic legal order. The Hon'ble Supreme Court in Nestle SA (supra) did not propound an abstract procedural nicety; it articulated a substantive safeguard that treaty modifications altering existing rights or liabilities cannot be judicially enforced until procedure is followed in line with Section 90(1) of the Act.

49. This safeguard is especially critical in the MLI context, where multiple jurisdictions opt into certain provisions, reserve on others, and often apply them with modifications or deferrals. Without a domestic notification that identifies the exact contours of the

modification to a given DTAA, there is a real risk that an Indian court or authority may apply an MLI provision in a form or scope that was never domestically assented to. Section 90(1) operates as a bulwark against that risk, ensuring that only those changes consciously adopted into Indian law acquire binding force.

50. We also note that the OECD's own commentary on the MLI recognises the role of each jurisdiction's domestic law in determining how the MLI takes effect. It expressly acknowledges that a "synthesised text" is a non-binding explanatory aid; it does not, and cannot, supplant the requirement for a legally valid act of incorporation in each jurisdiction. Thus, even on the OECD's own terms, the Revenue's reliance on a non-notified synthesised text is misplaced.

51. The Department's suggestion that the MLI, once notified in general terms, becomes immediately self-executing vis-a-vis all covered agreements, would in effect render otiose the careful statutory scheme of Section 90(1). That interpretation would also run counter to the binding pronouncement in Nestle SA, which squarely holds that each modification with the effect of altering existing law must itself be the subject of a distinct notification.

52. We are conscious that the MLI was conceived as a swift and efficient vehicle for implementing the BEPS treaty-related measures across jurisdictions without the need to bilaterally renegotiate each covered agreement. However, efficiency in the multilateral sphere cannot displace the domestic rule of law requirement that any such modification be consciously received into municipal law through the statutorily prescribed process.

53. The principles enunciated by the Hon'ble Supreme Court in Nestle SA (supra) apply to the facts of the present case with full force.

- *First, the India-Ireland DTAA, which was duly notified in 2002, continues to remain the operative and governing instrument for determining the tax treatment between the two Contracting States. Under domestic law, this position endures unless and until any modification to the DTAA is expressly incorporated by way of a separate notification issued under Section 90(1) of the Income-tax Act.*
- *Second, although the Multilateral Instrument was notified in India in 2019, the mere fact of such notification does not, by itself, alter, curtail or restrict the operative provisions of the India-Ireland DTAA. Such alteration or restriction can take effect only where the specific provisions of the MLI sought to be applied have been expressly incorporated into domestic law through a distinct notification under Section 90(1).*
- *Third, and most material to the present dispute, in the absence of any domestic notification incorporating Articles 6 and 7 of the MLI into the India-Ireland DTAA, the Principal Purpose Test contained in those Articles cannot be invoked against the assessee.*

In light of the foregoing, we hold that the absence of a specific Section 90(1) notification incorporating Articles 6 and 7 of the MLI into the India-Ireland DTAA is fatal to the Revenue's case. Consequently, the invocation of the MLI to deny the treaty benefits otherwise available under the DTAA cannot be upheld in law."

***22.** The Coordinate Bench following the ratio laid down in Nestle SA(supra) held that MLI has the effect of modifying/altering India-Ireland DTAA. For giving effect to the altered/modified DTAA notification u/s 90 (1) of the Act is mandatory. Omnibus single notification issued on 9/8/2019 u/s 90(1) does not assimilate DTAA modified/altered by MLI into Municipal laws. A separate notification qua each DTAA is necessary to give the amended DTAA a legislative status. In the absence of specific notification u/s. 90(1) of the Act amendment/modification MLI cannot be invoked to deny benefit of India-Ireland DTAA.*

***23.** The Coordinate Bench further held that PPT provisions as encompassed in Article 6 & 7 of MLI would also not operate. Though not necessary at this stage but for the sake of*

completeness the concluding findings of the Coordinate Bench to this effect are reproduced here in under:-

> *"77. It is well settled that the object and purpose of a treaty must be ascertained in a holistic and purposive manner, having regard to the intention of the Contracting States. In the present case, a careful reading of Articles 8 and 12 of the India-Ireland DTAA shows that the treaty consciously departs from the OECD and UN Model Conventions in so far as it limits the source country's taxing rights in respect of aircraft-leasing income. This represents a deliberate and considered policy choice of the two sovereign States. We therefore find merit in the assessee's submission that the very object and purpose of the treaty is to exclude aircraft-leasing income from source-based taxation.*
> *78. The Hon'ble Supreme Court in Azadi Bachao Andolan (supra) has unequivocally recognised that States are entitled, for legitimate policy reasons, to contractually restrict their own taxing rights in order to promote trade, attract investment, and foster economic cooperation. Applying that principle to the facts at hand, it becomes clear that the Principal Purpose Test is not intended to negate treaty benefits that are claimed in furtherance of the very purpose for which the treaty was concluded. Articles 8 and 12 of the India-Ireland DTAA are specifically designed to remove aircraft-leasing income from the ambit of source-country taxation. A taxpayer claiming such treaty relief is not seeking to subvert the treaty; on the contrary, it is availing a benefit that the treaty itself was designed to confer.*
> *79. In light of the foregoing analysis, we hold that relief from source-country taxation of aircraft-leasing activity constitutes a stated and substantive object of the India-Ireland DTAA. Accordingly, even de hors our threshold finding regarding the non-applicability of the Principal Purpose Test on account of the absence of a Section 90(1) notification, the assessee would, in any event, be entitled to treaty protection. The relief claimed aligns squarely with the treaty's object and purpose. We accordingly so hold."*

24. *Thus, the Coordinate Bench on the issue of operation of MLI gave a conclusive finding that in the absence of specific notification in accordance with section 90(1) of the Act, the MLI would not be operative as the MLI has the effect of amending/overriding provisions of DTAA.*

25. *The ld. Special Counsel for the Revenue has urged that in case of Sky High Appeal XVIII Leasing Company Limited (supra)some vital aspects remain to be submitted, hence, were not examined which will have bearing on the outcome of the issue. According to him following substantive points remain to be considered:-*

i.	*The decision rendered in the case of Nestle SA (supra) was not examined in the light of specific behavior and precedent of historic MLIs implemented in India by way of a single omnibus notification u/s. 90(1) of the Act.*
ii.	*Global practice followed by other dualist and monist countries in assimilation of MLI in domestic law by a single omnibus notification.*
iii.	*The working of MLI framework including the flow chart that reflect that all consequences were completed by the MLI with certainty of available options and there was no requirement for further dialogue or negotiation for implementation of MLI.*
iv.	*Memorandum of Finance Act, 2020 while providing for amendment to section 90(1) of the Act with respect to new DTTA's to be entered into by India reflect that MLI was in effect from FY 2020-21 onwards, whereby, putting the issue of legislative assimilation to rest.*
v.	*The order of the Tribunal in the case of SC Lowy P.I. (LUX) S.A.R.L.vs.ACIT (International Taxation) 170 taxmann.com 475, where provisions of MLI i.e. PPT were interpreted in the context of modification of existing DTAA between India-Luxembourg.*

The ld. Special Counsel focused his submissions on the above aspects.

26. *To begin with it would be pertinent to first refer to the relevant provisions of section 90(1) of the Act that mandates for the notification whenever the Central Govt. enter into an agreement with the Government of any country outside India or any amendment/alteration to*

existing DTAA is made by way of subsequent protocol, agreement, etc. The provisions of section 90(1) of the Act are reproduced herein under:

"90(1) The Central Government may enter into an agreement with the Government of any country outside India or specified territory outside India,-

(a) for the granting of relief in respect of-

(i) income on which have been paid both income-tax under this Act and income-tax in that country or specified territory, as the case may be, or

(ii) income-tax chargeable under this Act and under the corresponding law in force in that country or specified territory, as the case may be, to promote mutual economic relations, trade and investment, or

(b) for the avoidance of double taxation of income under this Act and under the corresponding law in force in that country or specified territory, as the case may be, or

(c) for exchange of information for the prevention of evasion or avoidance of income-tax chargeable under this Act or under the corresponding law in force in that country or specified territory, as the case may be, or investigation of cases of such evasion or avoidance, or

(d) for recovery of income-tax under this Act and under the corresponding law in force in that country or specified territory, as the case may be, and may, by notification in the Official Gazette, make such provisions as may be necessary for implementing the agreement.

and may, by notification in the Official Gazette, make such provisions as may be necessary for implementing the agreement."

27. *Before the Hon'ble Apex court in the case of Nestle SA (supra) one of the issue for consideration was;*

"Whether the Most Favoured Nation (MFN) clause is to be given effect automatically or it is to only come into effect after notification is issued?"

The argument of the assesses in the said case was when the DTAA and the Protocols - including the MFN clause contained in the concerned Article of the Protocol was already notified under section 90(1) and it has come into force, there is further no legal requirement to notify any subsequent amendment to the DTAA which becomes operative automatically as a consequence of the trigger of the MFN clause to the DTAA.

28. *On behalf of the Revenue inter alia on the issue of applicability of amendments to the DTAA following submissions were made:*

"7. The revenue argues, through the Additional Solicitor General, Shri N. Venkatraman (hereafter "ASG") that the impugned judgments are unsustainable. The revenue points out that under the Indian Constitution, especially by operation of Articles 253 (read with Entries 13, 14 and 15 of List I of the Seventh Schedule) of the Constitution of India, Parliament has exclusive power to legislate in respect of any treaty or convention, entered into by India, with any other nation; such treaty can only be entered into in exercise of executive power of the Union. It was urged that without Parliamentary legislation, such treaties are unenforceable, having regard to the express terms of Article 2531-2 which clothe Parliament alone with the power to make laws "notwithstanding" other provisions in that chapter- which delineates and distributes legislative power between the Union and States. Counsel submitted that India follows the "dualist" practise, which means that international treaties and conventions are not, upon their ratification, automatically assimilated into municipal law (i.e. the national legal system) but would require enabling legislation. This is in contrast to those countries which are "monist", wherein the treaty provisions are enforceable like municipal law, and are to be given equal weight by courts.

8. The ASG relied upon the decisions in Gramaphone Co. of India Ltd. v. Birendra Bahadur Pandey 1984 [2] SCR 664 and Union of India v. Azadi Bachao Andolan [2003] 132 Taxman 373/263 ITR

706 /2003 (Supp 4) SCR 222 to urge that the position in India is entrenched that without enabling legislation, any convention or event flowing from a convention, as in creation of rights and liabilities of third parties to conventions or treaties, do not operate on their own, and needs an intervening action by the Union, giving effect to such obligation.

9. The ASG relied on section 90 which requires the issuance of a notification, to give effect to any treaty or convention. It is argued that in the absence of any law, mere entering into a treaty or convention or protocol cannot give rise to any right under the taxation laws having regard to the structure of section 90. Therefore, in the present case, the trigger to the MFN clause can occur at a later point in time when India enters into a treaty or convention with other nations which happens to be a member of the OECD at the time it enters into treaty or convention with India and if the DTAA with such country provides for taxation at rate lower than or benefit over and above conferred upon the parties of the existing DTAA between India and the other nation. However, it would still require issuance of a notification to give effect to such consequence. The incident involved in the present case - i.e., the mere fact that India entered into DTAAs with Slovenia, Lithuania, and Columbia at certain points in time and that some of them gained membership of OECD, ipso facto could not lead to claims by the respondents assessees that similar or identical treatment had to be extended to them as tax residents of Netherlands, France, and Switzerland respectively."

[Emphasized by us]

Thus, the Revenue emphatically argued that the amendment to DTAA by way of Protocol would only assimilate into the legal system if it is notified. Having regard to provisions of section 90 of the Act, mere entering into a treaty or convention or protocol cannot give rise to any right under taxation laws.

***29.** The Hon'ble Apex Court after considering submissions of the Revenue, examining provisions of section 90 of the Act, Article 253 of the Constitution and various decisions summed up as under:-*

"44. 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;*
(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."*

The Hon'ble Apex Court, after accepting contentions of the Revenue that issuance of notification u/s 90(1) of the Act is necessary to give effect to any amendment in the existing DTAA and to make it legally enforceable held:

"46. 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)."

The Hon'ble Court in an explicit manner held that notification u/s. 90(1) of the Act is mandatory to give effect to a DTAA that has been altered/modified by way of any protocol or treaty or convention.

30. *India has notified 93 DTAAs as Covered Tax Agreements, these DTAAs are subject to modifications. Though, the Special Counsel for the Revenue has not accepted in too many words that the MLI has the effect of amending the DTAA but from the submissions made by ld. Counsel for the assessee it emerges that provisions of MLI would override the provisions of DTAA where there is conflict. In other words the provisions of MLI as the effect of amending/altering DTAA provisions and wherever the provisions of DTAA are amended/altered they would assimilate into legal framework only after mandatory notification u/s. 90(1) of the Act.*

31. *Before proceeding further, it would be relevant to understand the stage of effectuating MLI. India has signed MLI and has included over 90 DTAA's in the list as Covered Tax Agreements and has conveyed it to the OECD which is the depository under Article 39 of MLI. The depository maintains database of Covered Tax Agreements conveyed by the parties to the depository. The MLI operates matching principles. However, it does not specify the date and text. Thus, the date of acceptance and the text can be amended by the other country. The MLI would come into force with the other country only when both countries notify MLI in their respective countries. The acceptance of MLI in full or in part by the other country at a future datehas the effect of modifying tax treaty between the parties. The fact that MLI operates to modify tax treaty between two or more parties have been accepted by the Revenue in the written submissions filed before Mumbai Bench of the Tribunal in the case of Sky High Appeal XLIII Leasing Company Ltd. (supra). Sequitur to modification to covenants of DTAA by the MLI, to give a legal binding force is issuance of notification u/s. 90(1) of the Act.*

32. *The contention of the Revenue is that while rendering the judgment in the case of Nestle SA (supra) emphasis has been given on the 'past practices' of issuance of notification for each country to give effect to MFN clause that was introduced by way of protocol. Whereas, in the case of MLI the past practices is only to issue one omnibus notification u/s. 90(1) of the Act and not separate notifications for each country. In support, the Department has referred to MLI with SAARC nations. In so far as MLI in respect of SAARC countries is concerned (available at page no. 1 to 16 of the paper book Vol- II filed by the Department). We find that the said agreement has been signed by all the member countries on the same date accepting all the Terms and Conditions in the said agreement. Thus, there is no concept of a matching principle therein. Further reliance is also placed on MAAC MLI. It is an administrative pact to cooperate and share information and does not amend or override existing bilateral tax treaties. Hence, it does not modify /alter substantive rights and obligations under Treaty. Reference has also been made to CBCR. We find that it does not override existing tax treaties. It is administrative arrangement for information exchange. The said MLI was in fact notified u/s 286 of the Act. The provisions of said section provides for notifications of MLI, hence, cannot be equated with the provisions of notification under section 90(1) of the Act.*

Be that as it may, one relevant fact that needs to be noted here is that omnibus notification in respect of aforementioned MLIsnever faced judicial scrutiny. The question of validity of MLI having effect of modifying/altering existing treaty first faced legal test in the cases where MFN protocols were signed and had the effect of amending relevant DTAAs with the other countries. The Hon'ble Apex Court in Nestle SA (supra) made it clear that any amendment to DTAA would come into force only after notification u/s.90(1) of the Act. The same analogy has to be applied in the case of MLI which have the effect of amending existing DTAAs.

33. *The next argument advanced by the Revenue is that, as per global practice, single omnibus notifications are issued for the assimilation of MLI into domestic law. The global practice of*

single omnibus notification does not determine India legal position on treaty implementation. Section 90(1) of the Act mandates for notification of any treaty. The Hon'ble Apex Court in the case of Nestle SA (supra) in para 46 (reproduced above) made it explicit that the amendment to DTAA is enforceable only on notification u/s. 90(1) of the Act. The Note by the OECD on MLI (at page 628 to 636 of the paper book Vol- I of the department) also explains the situation in domestic implementation of MLI. While dealing with the situation in domestic law OECD explained:-

> *"28. In terms of domestic law, jurisdictions will have different methods for ensuring the implementation at the domestic level of the modifications made by the MLI to bilateral tax treaties. The method will depend on the legal framework which governs the implementation of international rights and obligations in each jurisdiction, e.g. whether the ratification of an international treaty automatically results in the integration of the rights and obligations set out in that treaty into domestic law (a "monist" system) or whether domestic legislation is required in order to transpose the rights and obligations in the treaty into domestic law (a "dualist" system). In the first case, changes to the rights and obligations of taxpayers may flow directly from the ratification of the MLI while, in the second case, such changes to the rights and obligations of taxpayers will generally flow from domestic legislation.*
>
> *29. The approach to the domestic implementation of the MLI will generally follow the way in which bilateral tax treaties themselves are implemented at the domestic level. In some jurisdictions, the reference to the applicable rule in domestic law will be directly to the bilateral treaty (typically in monist systems) while in other jurisdictions, the reference to the applicable rule in domestic law will be to domestic legislation which transposes the bilateral treaty (typically in dualist systems). Accordingly, when the MLI has modified a tax treaty, the reference to the applicable rule in domestic law may either be to the bilateral treaty itself as modified by the MLI (the same answer as in public international law terms) or it may be to domestic legislation which transposes the modifications made by the MLI to the bilateral treaty (hence a different answer in public international law terms and domestic law terms).*
>
> *30. xxxxxx*
>
> *31. It is important to note that, while the answer to question (a) above is the same for all jurisdictions, the answer to question (b) may well be different for each Contracting Jurisdiction to a bilateral tax treaty. In line with well-established treaty law and practice, it is not necessary for two treaty partners to adopt the same approach to the domestic implementation of a treaty, and the approach adopted will depend on their domestic legal system. Accordingly, it is not necessary for pairs of Contracting Jurisdictions to agree on a common approach for domestic implementation of the modifications made by the MLI to their tax treaty."*
>
> *[Emphasized by us]*

Thus, global practice would not define as to how MLI is to be made effective in India and practice of single omnibus notification is not suffice in India to make MLI workable. The OECD also clarifies that when MLI modifies tax treaty, the domestic legislation which transposes the modification made by MLI to the bilateral treaty has to be followed for domestic implementation of the MLI. Thus what emanates from Note by OECD Directorate of Legal Affairs is:

- *MLI has the effect of modifying DTAA;*
- *For giving effect to MLI the provisions under domestic law has to be complied with for legislating the modifications made by MLI.*

34. *The argument made on behalf of the Revenue is that MLI is applied alongside existing tax treaties modifying their application with respect to BEPS measure. All consequences were contemplated by the MLI with certainty of available option and there is no requirement for further dialogue or negotiations for implementation of MLI. Eventually, the MLI has the effect of altering/modifying bilateral treaty provisions. The Hon'ble Supreme Court of India in the case of Nestle SA(supra) and the decision rendered by the Coordinate Bench of the Tribunal in the case of Sky High Appeal XLIII Leasing Company Ltd. (supra) after considering the ratio laid down in Nestle SA (supra), has held that notification u/s. 90(1) of the Act incorporating the changes to the tax treaty by MLI is mandatory as it has effect of amending the bilateral tax treaties to the extent of the consensus of both contracting states.*

35. *The ld. Special Counsel has placed reliance on the Memorandum to the Finance Act, 2020, where the reasons to amend the provisions of section 90 of the Act have been explained.*

The provisions of section 90(1) of the Act have been amended to align DTAA with MLI. That means prior to said amendment there was no substantive provision for assimilating MLI into legislation. As a corollary the notification u/s 90 of the Act is valid only after the section makes provision for the same. Further, it is discernable from the said amendment that MLI has the effect of amending DTAA to implement BEPS measures. Such amendments are not enforceable in absence of separate notification for effectuating amended provisions of the DTAA.

***36.** The last argument of the ld. Special Counsel for the department is that in the case of SC Lowy P.I. (LUX) S.A.R.L. (supra) provision of MLI i.e. PPT were interpreted in the context of modification of existing DTAA between India and Luxemburg. We find that Revenues reliance on the said case is misplaced. The issue of applicability of MLI was never raised before the Tribunal in the said case. The issue before the Coordinate Bench in the said case was denial of DTAA benefits on wrong assumption of facts. The appellant in the said case never challenged applicability of MLI in the absence of specific notification U/s 90(1) of the Act, which has the effect of modifying India-Luxembourg DTAA. A specific query was made to ld. Special Counsel for the Department, i.e. as to whether issue of notification u/s 90(1) of the Act was before the Tribunal in the said case. He fairly answered in negative. Hence, there was no occasion for the Coordinate Bench to give findings on this issue.*

***37.** We have considered all the alleged substantive issues purportedly not raised before the Coordinate Bench in the case of Sky High Appeal XLIII Leasing Company Ltd. (supra). We have answered the same in detail above and find no substance therein. In the case of Sky High Appeal XLIII Leasing Company Ltd. (supra) all the issues have already been dealt with. Thus, in light of our above findings and the decisions referred above we hold that single omnibus notification u/s 90(1) of the Act already issued would not legislate the amendments/modifications in existing DTAA. A specific notification for each country is required u/s. 90(1) of the Act where the MLI has the effect of amending /altering bilateral treaties. Hence, this issue is decided in favour of the appellants and against the Revenue.*

13. The reasons for invoking provisions of MLI in present set of appeals are identical, hence, following the order of Coordinate Bench, we hold that since MLI has the effect of amending/altering Bilateral treaties, the amended provisions of DTAA cannot be given effect unless separate notification as mandated u/s.90(1) of the Act is issued. Ergo, this issue is decided in favour of the assessees/appellants.

14. In light of our above findings, appeals of the assessees/appellants are allowed *protanto*.

15. Before parting we would like to add that, we are live to the fact that the orders passed by the Tribunal may not be palatable to the lower revenue authorities, but that does not give liberty to the lower authorities to make insolence comments and disregard binding orders of the Superior Appellate Authority. The orders of Tribunal are subject to appeal, till the time order of the Tribunal is not reversed or stayed by the Higher Appellate Authority it is binding on the lower authorities. The Hon'ble Supreme Court of India in the case of *UOI vs. Kamlakshi Finance Corporation Ltd., AIR 1992 SC 711* has held that **subordinate Revenue Authorities must unreservedly**

follow the orders of Higher Appellate Authorities. In the instant case, the DRP-1 disregarding the principles of judicial discipline overstepped its limits in making objectionable and intemperate comments on the order of the Tribunal. It is expected that the DRP while discharging its judicial functions respect '*Laxman Rekha'* of judicial discipline and judicial propriety.

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16. Since the appeals have been decided, the Stay Applications in the respective appeals have become infructuous, hence, the same are dismissed as such.

Order pronounced in the open court on Monday the 29th of June, 2026.

Sd/-	**Sd/-**
BRAJESH KUMAR SINGH	**VIKAS AWASTHY**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Delhi
Dated: **29-June-2026**

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