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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ W.P.(C) 2562/2022 & CM APPL. 7332/2022 (for stay)

BLACKSTONE CAPITAL PARTNERS (SINGAPORE)
VI FDI THREE PTE. LTD. ..... Petitioner

Through: Mr. Porus F. Kaka, Senior Advocate along with Mr. Vishal Kalra, Mr. S.S. Tomar and Mr. Divesh Chawla, Advocates.

Versus

THE ASSISTANT COMMISSIONER OF INCOME TAX, CIRCLE INTERNATIONAL TAXATION 1(1)(2), DELHI ..... Respondent

Through: Mr. Sunil Kumar Agarwal, Senior Standing Counsel for Revenue along with Mr. Tushar Gupta, Junior Standing Counsel for Revenue and Mr. Utkarsh Tiwari, Advocate.

Reserved on : 22nd December, 2022
% Date of Decision: 30th January, 2023

CORAM:
HON'BLE MR. JUSTICE MANMOHAN
HON'BLE MS. JUSTICE MANMEET PRITAM SINGH ARORA

J U D G M E N T

MANMOHAN, J:

ISSUE

1. The core issue that arises for consideration in the present writ petition is whether the respondent-revenue can go behind the tax residency certificate issued by the other tax jurisdiction and issue re-assessment notice under Section 147 of the

Income Tax Act, 1961 (for short 'the Act') to determine issues of residence status, treaty eligibility and legal ownership.

FACTS

2. The relevant facts of the present case are that during the Assessment Year 2014-15, the petitioner-Blackstone Capital Partners (Singapore) VI FDI Three Pte. Ltd. acquired equity shares of Agile Electric Sub Assembly Private Limited, a Company incorporated in India ("Agile") in two tranches, i.e. on 16th August, 2013 and 31st October, 2013.

3. During the year under consideration, i.e. Assessment Year 2016-17, the petitioner sold all the equity shares of Agile to Igarashi Electric Works Limited ("Igarashi") and other parties on 30th July, 2015.

4. The petitioner electronically filed its return of income for the Assessment Year 2016-17 on 29th September, 2016. In terms of the said return of income, the petitioner claimed that the gains earned by it on sale of Agile shares were not taxable in India by virtue of Article 13(4) the Double Tax Avoidance Agreement entered into and subsisting between India and Singapore ("India-Singapore DTAA") based on the Tax Residency Certificate ('TRC'). In its return of income, the petitioner made all the requisite disclosures with regard to the investment and sale of shares like the petitioner is a non-resident in India and majority of its Directors were residents of Singapore.

5. The petitioner's return of income was processed under Section 143(1) of the Act with no demand, on 8th October, 2016.

6. On 31st March, 2021 a notice was issued to the petitioner under Section 148 of the Act for the Assessment Year 2016-17. The petitioner filed a return of income on 28th April, 2021 and vide letter dated 28th April, 2021 requested for the reasons.

After eight months the reasons were supplied to the petitioner vide letter dated 02nd December, 2021. The 'Reasons' are reproduced hereinbelow:-

"***RECORDING OF REASONS FOR REOPENING THE CASE OF BLACKSTONE CAPITAL PARTNERS (SINGAPORE) VI FDI THREE PTE. LTD., A.Y. 2016-17***
PAN: AAFCB5584L

1. ***Background:-***

The assessee is a company and filed ITR for the AY 2016-17 at nil income. ITR was processed u/s 143(1) of the Act, however no scrutiny assessment was made in this case.

Subsequently vide letter F.No. ITO/Intl.Tax (2)(1)(1)/2020-21/88 dated 19.03.2021; following information was received from ITO, TDS, Ward 2(1)(1), lntl. Taxn., New Delhi related to the assessee.

2. ***Information received from the ITO, TDS, Ward 2(1)(1), Intl. Taxn., New Delhi***

In the case of M/s Igarashi Electric Works Ltd., (PAN AABC16394M), verification u/s 133(6) of the act was made w.r.t. foreign remittances made during FY 2015-16. On perusal of the documents furnished by the assessee as well as the information available on ITBA portal, it is revealed that during the year under consideration M/s Igarashi Electric Works Ltd., (PAN AABC16394M) made total foreign remittance of Rs.4,01,31,77,340/-, to M/s Black Stone Capital Partners (Singapore) VI FDI Three PTE Ltd., stating nature of Payment as consideration paid for acquisition of Shares. Further, the reason for non-deduction of tax was explained that M/s Black Stone Capital Partners (Singapore) VI FDI Three PTE Ltd., is a resident of Singapore and as such not subject to tax in India on Sale of said shares as per the provisions of India-Singapore DTAA. As per submission of the assessee, M/s Black Stone Capital Partners (Singapore) VI FDI Three PTE Ltd., has sold the shares of M/s Agile Electric Sub Assembly Pvt Ltd., to M/s Igarashi Electric Works Ltd., for sale consideration of Rs. 4,01,31,77,340/- M/s Igarashi Electric Works Ltd., has relied upon the advice of Deloitte Haskins & Sell LLP for taxation of capital gain on part of M/s Black Stone Capital Partners (Singapore) VI FDI Three PTE Ltd. On open source enquiry it is revealed that Black Stone Group Inc is a USA based alternative investment Management Company and thus controlled and managed from USA. As per filings of Blackstone Group with Securities Exchange Commission, USA, the funds were raised by Blackstone Group Inc., for investing through Blackstone Capital Partner VI (BCP VI), therefore, it appears that the source of funds and management of affairs of Blackstone Capital Partners (Singapore) VI FDI Three Pte Ltd., was from USA. Hence, M/s Black Stone Capital Partners (Singapore) VI FDI Three PTE Ltd., is not entitled for treaty benefit of Singapore. There is an apprehension that M/s Black Stone Capital Partners (Singapore) VI FDI Three PTE Ltd., is not beneficial owner of this transaction.

As per the information received in case of the assessee, the assessee has indulged in following transactions during the year:

Shares sold by	*Purchased by*	*Amount received*	*Nature of Transaction*
BLACKSTONE CAPITAL PARTNERS (SINGAPORE) VI FDI THREE PTE. LTD.	*M/s Igarashi Electric Works Ltd.*	*4,01,31,77,340/-*	*Sale of shares*

3. ***Analysis of ITR:-***

a. The assessee has filed ITR for the AY 2016-17 at Nil income. The assessee has not furnished any information in the· ITR while all the columns has been filled as 'zero'. Amount of Rs. 354,16,16,101/- has been declared in the column STCG on transactions on which securities transaction tax (STT) is not paid. Therefore, the information received is established in this case. However no scrutiny in this case has been made. Therefore it clearly indicates the fact that genuineness and taxability of above transaction need to be established by the assessee.

4. ***Reasons for formation of belief***

4.1 I have carefully perused and analyzed the facts of the case as detailed above and the following facts emerge from the same:-

1) The assessee has sold shares of M/s. Agile Electric Sub Assembly Pvt Ltd., to M/s lgarashi Electric Works Ltd., for sale consideration of Rs 4,01,31,77,340/-, however genuineness and taxability of above transaction need to be established by the assessee. Further no assessment was made in case of the assessee for the AY 2016-17. Therefore the nature and genuineness of above transaction remained unverified.

3) Further ITS details from ITBA, 360 Degree data, E-filing portal and 26AS data from CPC TDS has been verified and found that the assessee has disclosed the STCG in its ITR while as per information received transactions amounting to Rs 4,01,31,77,340/- has been carried out during the year under consideration.

In view of above facts, genuineness and taxability of the above transaction carried out by the assessee during the year remained unverified.

5. ***Income chargeable to tax escaping assessment***

5.1 As per information on record, the full and true disclosure with regard to the above transactions have not been made by the assessee company. In view of explanation 2 to clause (b) of proviso of Section 147 of the Income Tax Act, 1961, where a return of income

has been furnished by the assessee but no assessment has been made and it is noticed that the assessee has understated the income or has claimed excessive loss, deduction, allowance or relief in the return, deemed to be cases where income chargeable to tax has escaped assessment. Keeping in view all the above, I have reason to believe that an amount at least of Rs.4,01,31,77,340/- has escaped assessment in case of BLACKSTONE CAPITAL PARTNERS (SINGAPORE) VI FDI THREE PTE. LTD. for the A.Y. 2016-17 within the meaning of Section 147/148 of Income Tax Act, 1961.

5.2 It would be worthwhile to submit here that in the case of Rajesh Jhaveri Stock Brokers Pvt Ltd V ACIT (2007) 291 ITR 500/161 Taxman 316 (SC), Hon'ble Supreme Court has held that:

> *"All that is required for the Revenue to assume valid jurisdiction u/ s 148 is the existence of cogent material that would lead a person of normal prudence, acting reasonably, to an honest belief as to the escapement of income from assessment."*

It is also pertinent to mention that on similar lines, in the case of CIT v. Nova Promoters & Finlease (P) Ltd (ITA NO. 342 of 2011), the Hon'ble Delhi High Court, which is the jurisdictional High Court, has held as below:

> *"We are aware of the legal position that at the stage of issuing the notice under Section 148 the merits of the matter are not relevant and the Assessing Officer at that stage is required to form only a prima facie belief or opinion that income chargeable to tax has escaped assessment."*

5.3 The assessment / re-assessment proceedings in this case for A.Y. 2016-17 pertain to period within four years from the end of relevant assessment years at the time of issue of notice, necessary sanction has to be obtained from Addl. Commissioner of Income Tax, in view of the amended provisions of section 151 w.e.f. 01.06.2015. The necessary sanction in this regard is being obtained separately from Addl. Commissioner of Income Tax, Range 1(1)(Intl Taxn.-01), New Delhi before the issue of notice u/s 148."

7. The petitioner vide its letter dated 28th December, 2021 filed detailed objections. The broad objections were that the transaction between the parties was genuine and the petitioner was entitled to the benefit of India-Singapore DTAA. In support of its contention, the petitioner relied upon the following:

(i) Demat statements and share certificate evidencing the legal ownership of Agile shares.

(ii) Bank statement (with relevant entries pertaining to sale transaction) establishing that investment and sale through banking channels.

(iii) Copies of FIRCs evidencing the transaction.

(iv) Audited financial statements for Financial Years 2013, 2014 and 2015 disclosing investments and sale of Agile shares.

(v) Copies of resolution passed by the Board of Directors for undertaking key decisions with regard to investments in Agile and sale.

(vi) Memorandum and Articles of Association.

(vii) Copy of Certificate of incorporation in Singapore

(viii) Business Profile of the petitioner, list of board of Directors and copies of minutes of Board of Directors to demonstrate the decision making on behalf of the petitioner in Singapore.

(ix) Valid TRC dated 03rd February, 2015 issued by the Inland Revenue Authorities of Singapore ('IRAS') evidencing tax residency of Singapore.

(x) Copy of the report from independent Chartered Accountant certifying expenses and satisfaction of Limitation of Benefit ('LOB') clause as per Article 13 of the India-Singapore DTAA.

8. The petitioner submitted that reopening of assessment cannot be done on "apprehension" or to verify the genuineness and taxability of transaction. It was stated that the reasons recorded were based on mere suspicion and surmises. It was emphasised that reasons were purportedly based on information received from another officer who had no rational connection for formation of belief.

9. However, the objections were disposed of by the respondent vide the impugned order dated 10th January, 2022 which is reproduced hereinbelow:-

"To, *BLACKSTONE CAPITAL PARTNERS (SINGAPORE) VI FDI THREE PTE. LTD.* *1, MARINA BOULEVARD , 28-00 ONE MARINA BOULEVARD SINGAPORE 999999, FOREIGN* *India*	

PAN:	*Assessment Year*	*Dated:*	*DIN & Letter No:*
AAFCB5584L	*2016-17*	*10/01/2022*	*ITBA/AST/F/17/2021-22/1038599433(1)*

Sir/Madam/ M/s,

Subject: Order disposing objections filed by assessee vide letter dated 28.12.2021 against reason recorded-regd.

1. Attention is drawn towards the reply dated 28.12.2021 vide which objections have been filed by the assessee (Although compliance date for filling objection was given of 09.12.2021 w.r.t letter dated 02.09.2021 containing reasons for opening of case) in response to notice under section 148 of the Income Tax Act, 1961 issued for AY 2016-17 on 31.03.2021. I have gone through the objections. The assessee has broadly raised objections related to the transactions forming the basis of reopening of the case and secondly, on the initiation of proceedings under section 148 of the Act.

2. The objections raised by the assessee related to initiation of proceedings under Section 147 are summarized as follows:

a. Inaccurate Reasons for formation of belief
b. Re-assessment cannot be done in absence of any tangible material
c. Income chargeable to tax escaping assessment
d. eligibility to claim tax treaty benefits between India and Singapore.

Assessee submitted that

At this juncture, it will be appreciated that the reasons recorded for re-opening on mere suspicions, surmises and conjectures and / or to make fishing and roving enquiries based on information allegedly received from another Assessing Officer(s) have no rational connection for formation of belief.

In the case under consideration, reasons shared with the Assessee provides that there is reasons to believe that the assessee is controlled and managed from USA is based on open source enquiry and not based on any concrete or tangible material on record. In view of the foregoing, it is submitted that the reasons so recorded are nothing but the information received by you from ITO, TDS, Ward 2(1)(1), international taxation, New Delhi which alone cannot be the basis for re-opening and hence the reopening of the assessment is bad in law and ought to be dropped.

"At the outset, the Assessee submits that the impugned reassessment is bad in law as it is without jurisdiction and there is no concrete 'reason to believe' that the income has escaped assessment for issuance of re-assessment notice"

"It is submitted that in the case under consideration no income which is chargeable to tax has escaped assessment and hence, the re-opening made is misconceived/erroneous and bad in law"

"The Assessee being a tax resident of Singapore regularly files its tax return and undertakes its tax compliances in terms of the Singapore tax laws. It holds a valid TRC issued by IRA Singapore and thereby is eligible to claim tax treaty benefits between India and Singapore."

"Therefore, it is submitted that the in terms of Article 13(4) of the India Singapore DTAA, the gains arising from the sale of said investments is taxable only in the resident state i.e. Singapore. Thus, the assessee objects to the reasons recorded for denial of benefits under the India-Singapore DTAA"

"Based on the above contentions and facts in the case of the Assessee, it is submitted that the funding raised from Blackstone Group Inc. USA, does not impact the beneficial ownership of the Assessee and being a tax resident of Singapore it is eligible to claim benefits in terms of Article 13(4) of the India-Singapore DTAA"

"Under the circumstances, it is submitted, and it will be appreciated that there is no chargeable income which has escaped assessment and hence, we request your goodself to drop re-assessment proceedings"

3. In this context, it is stated that the objections raised pertain to the issue under consideration and forms the legal claim which is to be examined during the course of assessment proceedings. Here, it is pertinent to note that the Hon'ble Delhi High Court in the case of CIT vs Nova Promoters & Finlease (P) Ltd.[2012] 18 taxmann.com 217 (Delhi)held, "We are aware of the legal position that at the stage of issuing notice u/s 148 the merits of the matter are not relevant and the assessing officer at that stage is required to form only a prima facie belief or opinion that income chargeable to tax has escaped assessment"

4.1t is pertinent to note here that the Delhi High Court in the case of Convergys Customer Management vs Assistant Director of Income Tax [2013] 357 ITR 177 (Delhi) has held,
"It is a well settled proposition that at the time of issuance of notices under section 148, the Assessing Officer is not expected to form any definitive or conclusive opinion about the taxability of the disputed amounts and that he is only expected to form a tentative or prima facie belief regarding the escapement of income chargeable to tax The mere failure to file the return of income (though liable to) would invite action to reopen the assessment on the ground of escapement of income and this has been provided in Para 2(a) below section 147."

5. The objections of the assessee filed have been considered in the light of the provisions of the Income Tax Act, 1961 pertaining to the re-opening of assessments and the 'Reasons to believe' recorded in the present case. The understanding of the scheme of reassessment is being summed up as under:

5.1 Issuance of the notice under section 148 is nothing, but an initiation of the proceedings for reopening of the assessment. Undoubtedly, such re-openings are to be done cautiously and the reasons for reopening are also mandatory. In the absence of any substantial reason, the Assessing Officer cannot reopen the assessment which was closed long back.

5.2 The very object of the provision under the Income Tax Act is to ensure that the suppressed materials or facts and the new availability of materials to the Department are also to be dealt with for the purpose of taxation. In order to cover the loopholes in the Tax Regime, the provision of reopening of assessments are made and such provisions are to be certainly invoked by following the procedures contemplated under the Act.

5.3 Mere issuance of notice cannot be construed as a final order. Initiation of the proceedings is to be construed as information to the assessee and can never be concluded as a final proceeding. Thus, the issuance of notice is information provided to the assessee, enabling it to avail of all further opportunities contemplated under the statutes.

5.4 Thus, certain aspects which are contemplated under the provisions of the Act, cannot be interpreted, so as to defeat the purpose for which such a provision was enacted by the Legislators. Constructive interpretation of the Act and the Rules are of paramount importance. The Rule of constructive interpretation requires that the possible object and the purpose to be achieved is met out by adopting not only the balancing approach, but also by providing all reasonable opportunities to the persons, who all are connected or aggrieved.

5.5 The purpose of the Income-tax Act, more specifically, sections 147 and 148, is to ensure that the assessees, who have suppressed the fact at the time of filing of their income tax returns or if the Department is in possession of certain new materials in respect of the assessment of a particular year, then the assessee must be informed about the decision to reopen the assessment and after such information is provided, the procedures must be followed for the purpose of concluding the reassessment.

5.6 The intention of the statute is that the authorities on receipt of new material facts or regarding any suppression of materials by the assessee, is bound to initiate proceedings by invoking sections 147 and 148 of the Act.

5.7 The amended phraseology of 'reason to believe' must be interpreted that the Assessing Officer on receipt of any such new material or materials in relation to

suppression of fact by the assessee has made out a prima facie opinion that it is a fit case for reopening of the assessment, then he can issue notice under section 148 and thereafter the procedure of furnishing the reasons, receiving objections and conducting scrutiny and all other procedures contemplated under the provisions of the Act will follow.

5.8 The very meaning of the word 'Notice' is that 'information that tells you or warns you about something that is going to happen'. Thus, the mere notice providing an information to the assessee that the authorities have got every reason to believe to reopen the assessment does not mean that all opinions and reasons formulated by the Assessing Officer must be communicated to the assessee in the very notice issued under section 148.

5.9 Thus, the notice is issued based on certain materials available with the Department and on receipt of the notice, the assessee, after compliance of the said notice, has got right to seek for the reasons from the Department and the Department is bound to provide reasons, enabling the assessee to submit his explanations/objections in order to defend his case.

5.10 In view of the fact that the requirement under section 147 i.e., the reason to believe, does not mean that the authorities at the time of issuance of notice under section 148 should furnish all the reasons and the decisions taken by the authorities to reopen the closed assessment which is certainly unwarranted. Such a procedure is not contemplated and not intended by the provision of law. By adopting the principles of constructive interpretation, any law enacted should achieve its purpose and the object sought to be achieved. If such argument is envisaged, then the very purpose and object of the provisions and the amendments made there-under will be defeated and the Authorities Competent would not be in a position to reopen any assessment at all.

5.11 Thus, the reason to believe has been incorporated for the subjective satisfaction of the Assessing Officer and not for the purpose of communicating all the reasons even at the initial stage of issuance of notice to the assessee under section 148. The provision is a check for the Income Tax Officials.
Such a check provided under the Statute to the officials, cannot be taken undue advantage of by the assessee. The word 'reason to believe' incorporated is to indicate the Officials that, they cannot reopen the assessment in a routine and mechanical manner. The Assessing Officer in the event of receipt of any new material or information regarding the suppression, must have a reason to believe and the reasons must be recorded in the files and thereafter issue notice to the assessee and the assessee on receipt of the notice & after compliance thereof, is entitled to seek the reasons from the department enabling them to adjudicate the matter in the manner known to law.

5.12 The very concept of income tax assessment is that the assessee is taxed by the Department based on the returns filed by the assessee. Section 2 provides 'definitions'. Section 2(8) defines 'assessment includes reassessment'. Thus, the very meaning of the

assessment provided under the Act includes reassessment also. Thus, the re-assessment is not a separate concept and it is included within the meaning of the assessment under Section 2(8). Thus, an assessment and reassessment are part and parcel of the procedures and, therefore, there cannot be any doubt in respect of the power of reassessment provided under the Act.

5.13 The Income Tax Department may not be aware of the income of the assessees. They are assessing the tax based on the returns filed by the respective assessees. Thus, the very concept of assessment is that the Officer who is scrutinizing the returns is not aware of the income of an individual. For this reason only Act provides adequate power to deal with the cases, where there is evasion or suppression or otherwise by the assessees. The very source of assessment is the returns filed by the assessee concerned. Only after filing of the returns, the Department of Income Tax can come to know about the income of the person concerned. Thus, the reassessment may arise on several occasions and on several grounds. The Income Tax Department may receive information from many other sources. The Income Tax Department may get some external materials as well as from various other sources. It is the process of investigation. On receipt of such materials or information from various other sources, the authorities may be in a position to reopen the assessment and impose tax. In the absence of any such lucid provision, enabling the Department to reopen a case, there is a possibility of escapement of payment of tax by large number of assessees. The very nature of the Act is to ensure that the information and the materials collected or received from various other sources are also dealt with by the Department of Income-tax appropriately and with reference to the provisions of the Act.

5.14 The power of reopening of the assessment is certainly wide in nature. If it is restricted, then the very purpose and object of the Income tax Act will be defeated. The wide power provided to the authorities competent are to reopen the assessment and to ensure that all external materials and the information received from various sources are also dealt with in accordance with the provisions of Law. Thus, it does not mean that the Income tax Authorities may reopen at any point of time. In order to protect the assessees a definite time limit has been provided under the Act itself. Thus, in the event of receiving any information or materials from any other sources, it can be a ground for reopening of the assessment and the period of limitation is four years and six years respectively.

5.15 The procedure of reopening of the assessment is contemplated under sections 148 to 153. Once again looking into the spirit of section 147, it is unambiguously enumerated that 'assess or reassess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under this section, or recompute the loss or the depreciation allowance'.

5.16 The language employed in section 147(1) is that 'which comes to his notice subsequently in the course of the proceedings under the section'. Thus, even after

initiation of reopening of assessment proceedings under section 147. If during the course the proceedings any materials or information are received by the Assessing Officer that also can be taken into consideration for the purpose of reassessment. It is crystal clear that the reasons recorded before the initiation of the reopening of the assessment alone need not be a ground for reassessment. Even after reopening of the assessment if any materials or information are received by the Assessing Officer that also shall be included part and parcel of the proceedings and sufficient explanations shall be called for from the assessee and, accordingly, a reassessment order can be passed. Thus, two circumstances arise after the conclusion of the assessment. Firstly, if the assessment is finalized, the reopening in respect of the escaped assessments can be made if any new materials or suppression of materials are identified. On such reopening of the assessment and during the course of the proceedings, if the Assessing Officer noticed any other materials or information in respect of escaped assessment and the same also can be treated as part and parcel of the reassessment proceedings which is reopened.

5.17 The proviso to section 147 states that 'provided further that the Assessing Officer may assess or reassess such income, other than the income involving matters which are the subject matters of any appeal, reference or revision, which is chargeable to tax and has escaped assessment'. This also provides various circumstances enabling the Assessing Officer to assess or reassess such income other than the income involving the matters which are the subject matters of any appeal, reference or revision. The wideness of the power has been further clarified in the said proviso.

5.18 Explanation 2 to sub-clause (b) to section 147 also provides power to the Assessing Officer where a return of income has been furnished by the assessee but no assessment has been made and it is noticed by the Assessing Officer that the assessee has understated the income or has claimed excessive loss, deduction, allowance or relief in the return.

5.19 The circumstances are narrated wherein certain materials and information are provided by the assessee at the time of filing of the returns and if the same has not been assessed by the Assessing Officer during the relevant assessment year and if it is subsequently noticed, then also the Assessing Officer is empowered to reopen the assessment in respect of the escaped assessments.

5.20 On a perusal of various circumstances incorporated under section 147 for reopening of the escaped assessment, flexible and wider power has been provided, enabling the Assessing Officer to reopen the assessment in the interest of revenue and to ensure that the assessees pay the correct tax with reference to the provisions of the Act.

5.21 Where certain doubts in respect of the reasons or otherwise have been raised by the assessee, such benefit of doubt should be held in favour of the revenue and not in favour of the taxpayer. Contrariness is to be established by the assessee, while scrutinising the materials available with the Assessing Officer.

5.22 It is for the assessee to convince the Assessing Officer in respect of all such escaped assessments, information and materials available and submit the returns. This being the legal principles to be followed, the provisions are to be interpreted to achieve its purpose and the object and, therefore, the wider powers provided under Section 147 for reopening of the escaped assessments can never be restricted by imposing certain conditions on the Assessing Officer.

5.23 Considering the fact that there were some materials on record and the information with the Department of Income-tax, the reopening of the assessment of assessee has been upheld in various cases.

Further, on various occasions the validity of the reassessment proceedings has been upheld in various cases. Reliance in this regard is placed on the following judicial pronouncements:

In case of Raymond Woollen Mills Ltd. vs ITO [1999] 236 ITR 34 (SC), the case of the Revenue was that the assessee was charging to its profit and loss account, fiscal duties paid during the year as well as labour charges, power, fuel, wages, chemicals, etc. However, while valuing its closing stock, the elements of fiscal duty and the other direct manufacturing costs were not included. This resulted in undervaluation of inventories and understatement of profits. This information was obtained by the Revenue in a subsequent year's assessment proceeding. It has been held as under:

"In this case, we do not have to give a final decision as to whether there is suppression of material facts by the assessee or not. We have only to see whether there was prima facie some material on the basis of which the Department could reopen the case. The sufficiency or correctness of the material is not a thing to be considered at this stage. We are of the view that the court cannot strike down the reopening of the case in the facts of this case. It will be open to the assessee to prove that the assumption of facts made in the notice was erroneous. The assessee may also prove that no new facts came to the knowledge of the Income-tax Officer after completion of the assessment proceeding. We are not expressing any opinion on the merits of the case. The questions of fact and law are left open to be investigated and decided by the assessing authority. The appellant will be entitled to take all the points before the assessing authority. The appeals are dismissed."

In case of Rajat Export Import India (P.) Ltd. vs ITO [2012] 18 taxmann.com 311 (Delhi), it has been held as under:

"In the present case it cannot be disputed at all that the material present before the Assessing Officer at the time of recording reasons for reopening the assessment did show a link between 'S' Ltd., described as an entry provider, with the assessee herein. Not only was there a link between the two names, but the material also disclosed the date on which the entry was taken, the cheque or DD number, the name of the bank and branch and the account number. With such precise material before the Assessing Officer, the existence of which is beyond challenge, it can hardly be said that the Assessing Officer could not have had even a prima facie belief that income chargeable to tax had escaped assessment in the hands of the assessee for the assessment year 2004-05. [Para 11]"

In case of Max Ventures Investments Holdings (P.) Ltd. vs ITO [2019] 105 taxmann.com 124 (Delhi), it was held as under:

Section 68, read with sections 147 and 148, of the Income-tax Act, 1961 -Cash credit (Share application money)- Assessment year 2012-13- Assessee was engaged in business of rendering financial services -During financial year 2009-10, it received share application money of Rs. 87 crores from its promoter/founder AS towards fresh allotment of equity shares while authorised capital of assessee was Rs. 20 lakhs only- Application to SEBI seeking permission for allotment of shares was made as late as in 2014 only after questionnaire was issued by Assessing Officer- There was nothing to justify huge premium of Rs. 4,569 per share over face value of only Rs. 10 per share- Market value of shares at time of receipt of share application money was only Rs. 318 per share- Further, necessity for issuing shares worth Rs. 87 crores was unanswered - Assessee retained money received – No reason was shown for issuing shares - Further, genuineness of transaction on creditworthiness of individual providing money were apparently not established – Whether revenue was justified in issuing reassessment notice – Held yes [Paras 11, 12 and 13]

6. The objection raised by the assessee are vague and not based on tangible material and do not carry any substance. As explained in the reasons recorded, there was specific, concrete and relevant information/material exposing the real nature of the transactions. As per information available at the time of recording reasons for reopening, the assessee, during the financial year 2015-16 relevant to A.Y. 2016-17 has been involved in following transactions:

Shares sold by	*Purchased by*	*Amount received*	*Nature of Transaction*
Blackstone Capital Partners (Singapore) VI FDI Three PTE. LTD.	*M/s Igarshi Electric Works*	*4,01,31,77,340*	*Sale of shares*

7. Therefore, the above objections raised by the assessee are vague and not based on tangible material which do not carry any substance. There was sufficient material available with the AO to come to the belief that that income has escaped assessment and to record satisfaction, get approval and then issue the impugned notice in this case u/s 148.

8. Further, reliance is place on the case of Kalyanji Mavji & Co Vs CIT (SC) IOZ ITR 287, wherein the court has held that the expression "has reason to believe" is wider than "is satisfied". It has even been held that the tax payer would not be allowed to take advantage of an oversight or mistake committed by taxing authority.

9. Reliance is also placed on the following judgements: i) ITO Vs Lakhmani Mewal Das (SC) 103 ITR 437 ii) Phool Chand Bajrang Lal and others Vs ITO & Anr. (SC) 203 ITR 456 iii) Raymond Woollen Mills Vs ITO & Anr. (SC) 236 ITR 34 iv) Dosh Raj Udyog Vs

ITO n(All) 318 ITR 6 v) Sri Krishna (P) Ltd. Vs CIT (SC) 221 ITR 538 vi) Central Provinces Manganese Ore Co. Vs ITO (SC) 191 ITR 662

10. In the case of ACIT Vs Tube lnvestments of India Ltd. (ITAT, Chennai-TM)-133 ITD 79 & Rajat Export Import India Pvt. Vs ITO (del) 341 ITR 135, the court has held that "What is necessary to reopen an assessment is not final verdict but a prima facie reason- once such reason is recorded by assessing authority he assumes jurisdiction to issue notice u /s 148".

11. The information available with the AO was from credible source. Further on the basis of information available, the Assessing Officer formed a prima facie or tentative opinion that the assessee had indeed received income during the year on which tax has not been paid. The phrase "reasons to believe" meant to be the cause or justification for the Assessing Officer to know or suppose that income had escaped assessment. It does not mean that the Assessing Officer should have finally ascertained that the fact by legal evidence or conclusion. At that stage, the final outcome of the proceedings is not relevant. The only question is whether there was relevant material on which a reasonable person could have formed a requisite belief. Whether or not the material would conclusively prove escapement is not the aspect or concern at that stage but this aspect has to be examined subsequently in the reassessment proceedings. Reliance is placed on the decision of Hon'ble jurisdictional High Court in the case AGR INVESTMENT LTD. V. ADDL. COMMISSIONER OF INCOME TAX [2011]333 ITR 146 (DELHI) / [2011] 197 TAXMAN 177 (DELHI). The notice has been issued after due application of mind. A perusal of the reasons recorded for the issue of the notice would clearly show that AO has independently considered the information received. The information has been considered and the belief of escapement notice has been made after due application of mind by the AO.

12. Further, it is stated that there is nothing on record to doubt the fact that the information was reflected on ITS-AIR details. It is submitted that at the stage when reasons are recorded under Section 148(2), the Assessing Officer is not expected to hold an enquiry, with the participation of the assessee, and come to a final determination that the amount in question represented the income of the assessee. He is required only to reach prima facie or tentative belief. The formation of the belief must be based on some valid material. It cannot be disputed that the information received from a governmental agency constitutes valid material on the basis of which the Assessing Officer could form a tentative or prima facie belief regarding escapement of income. In the decision rendered be the Supreme Court LE1. Income Tax Officer vs. Selected Dalurband Coal Co. Pvt. Ltd. (1996) 217 ITR 597, Against notice under Section 147(a) of the Act, issued to the assessee on the basis of a letter from the Chief Mining officer showing that a joint inspection was conducted in the colliery of the assessee by the officers of the mining department in the presence of the representatives of the assessee and that according to the information of all the officers of the mining department there was under-reporting of the raising figure (of coal) to the extent indicated in the letter, the assessee filed a writ petition before the Calcutta High Court which was allowed. The Revenue carried the matter in appeal to the Supreme Court. Reversing the judgment of the High Court, the Supreme Court held as under:- "3. It is

well settled by various decisions of this Court that the notice under Section 148 read with Section 147 can be issued only where the Income tax officer has reason to believe that the income profits or gains chargeable to tax had been under assessed or escaped assessment and further that such escapement or under assessment was occasioned by reason of the failure of the assessee to disclose fully and truly all material facts necessary or the assessment of that year. (We are not concerned with Clause (b) of Section 147 here but only with Clause (a). In other words, there must be relevant material be are the assessing officer upon which he must reasonably and rationally arm the requisite opinion (belief). The question, therefore, is whether the letter of the Chief Mining Officer aforesaid does not constitute relevant material upon which the Income-tax Officer could have formed the requisite belief? It must be remembered that the formation of belief by the Income-tax Officer is essentially within his subjective satisfaction."

13. Therefore in view of the above, it can be concluded that there was alive and intelligible nexus between the reasons and the belief. There was sufficient material available with the AO to come to the belief that that income has escaped assessment and to record satisfaction, get approval and then issue the impugned notice in this case u/s 148.

14.1n view of the above discussion, it is justified that the proceedings in the case of assessee have been validly initiated. The contentions raised by the assessee have been dealt on merits in great detail and objection to the re-opening of the case are accordingly disposed off as not maintainable and this communication should be considered as a speaking order.

15. Assessee stated "We also request your goodself that once the objection is disposed off and before framing of assessment pursuant to the aforesaid notice, kindly provide us an opportunity to make detailed submission on the merits of the case and also provide us a personal hearing"

15.1 During the course of assessment proceedings the assessee will be afforded adequate opportunity (if required personal hearing) to explain the case and the resultant order will be passed after an objective appraisal of the evidences available.

MANOJ KUMAR
CIRCLE INT TAX 1(1)(2)"

10. Aggrieved by the aforesaid order, the petitioner filed the present writ petition. On 10th March, 2022, this Court passed the following interim order:-

"*Keeping in view the limitation for passing the assessment order, the Assessing Officer is permitted to pass the assessment order. However, it is directed that the same shall not be given effect to and shall be subject to further orders to be passed by this Court."*

Thereafter, a draft assessment order dated 31st March, 2022 was passed under Section 147 read with Section 144C of the Act, against the petitioner. However, the same was not given effect to and subsequently the parties on various dates of hearing advanced arguments.

ARGUMENTS ON BEHALF OF THE PETITIONER

11. Mr. Porus F. Kaka, learned senior counsel for the petitioner submitted that the reasons to reopen the assessment were erroneous, contrary to law inasmuch as no reasonable person properly instructed in law could have entertained a belief that income had escaped assessment. He also stated that no new tangible material/fact had been disclosed by the respondent in the reasons to show any escapement of income.

12. He stated that reasons erroneously stated that the Assessing Officer got information about the petitioner's income from the TDS officer of Igarashi, as all the details were available in the petitioner's return which had been processed under Section 143(1) of the Act. He contended that the respondent's reasons for reopening are verbatim copies of the communication (with errors) received from the ITO-TDS (TDS ward) dated 19th March, 2021 like the individual entity being Blackstone Capital Partners VI (BCP VI)- which did not exist. He clarified that "*BCP VI*" is the collective reference to (i) Blackstone Capital Partners VI L.P., a Delaware limited partnership and (ii) any Alternative Investment Vehicles or Parallel Funds (each as defined in the partnership agreement for the partnership referred to in clause (i) above). He emphasised that the impugned letter demonstrated that the reassessment had been initiated based on the information received by the respondent from another office of the Income-tax Department to which there was no independent application of mind or verification by the respondent. Hence, he submitted that the same

tantamounted to 'borrowed satisfaction' which made the reassessment erroneous, arbitrary and contrary to law.

13. He contended that the respondent's reasons for reopening only stated that the respondent wanted to verify the nature and genuineness of the transaction. According to him, reopening could not have been ordered for the purpose of verification, if Department had not undertaken the same within the time limit stipulated in Section 143(2) of the Act. In any event, he submitted that re-assessment cannot be ordered for verification or making roving and fishing enquiries on mere suspicion and/or for examination of genuineness of the claim.

14. He further stated that all the following details were duly filed along with the objections dated 28th December, 2021:-

i. Demat statements and share certificate evidencing the legal ownership of Agile shares;
ii. Bank statement (with relevant entries pertaining to sale transaction) establishing that investment and sale through banking channels;
iii. Copies of FIRCs evidencing the transaction;
iv. Audited financial statements for FY 2013, FY 2014 and FY 2015 disclosing investments and sale of Agile shares;
v. Copies of the resolution passed by the Board of Directors for undertaking key decisions concerning investments in Agile and sale;
vi. Memorandum and Articles of Association.

15. He contended that at no stage, on the basis of the aforesaid documents, the Assessing Officer or Department dealt with or controverted the detailed submission of the petitioner, that its businesses were fully controlled and managed from Singapore, as the shareholders/directors of the petitioners were all situated in Singapore with no role played by any outsider.

16. He stated that the petitioner is a company incorporated in Singapore, holding a valid TRC issued by the IRAS and is, therefore, a non-resident for the purposes of the Act and eligible to claim benefits under Article 13(4) of the India-Singapore DTAA, which merely allocates the taxing rights vis-à-vis capital gains to Singapore. The TRC dated 3rd February, 2015 issued by IRAS and Article 13(4) of India-Singapore DTAA are reproduced hereinbelow:-

"**A. TRC issued by the IRAS**

Tax Reference No: 201317050C
Date: 03 Feb 2015

ANNEXURE-4 74

BLACKSTONE CAPITAL PARTNERS (SINGAPORE)
VI FDI THREE PTE. LTD.
3 ANSON RD
#27-01
SINGAPORE 079909

INLAND REVENUE
AUTHORITY OF
SINGAPORE

55 Newton Road
Singapore 307987
For enquiries, please call:
Tel: 1800-3568622
ctmail@iras.gov.sg

1-1

Dear Sir/Madam

CERTIFICATE OF RESIDENCE FOR THE PURPOSE OF CLAIMING BENEFIT UNDER THE SINGAPORE / INDIA DTA FOR CAPITAL GAINS

I refer to your request dated 16 Jan 2015.

Based on your confirmation that the control and management of your business for the whole of 2015 will be exercised in Singapore, it is confirmed that your company will be regarded as resident in Singapore for income tax purposes for the Year of Assessment 2016.

Yours faithfully

ONG JOON LIM WILSON
ASSISTANT COMMISSIONER
CORPORATE TAX DIVISION
for COMPTROLLER OF INCOME TAX

B. Article 13(4) of India-Singapore DTAA as it then stood

ARTICLE 13
CAPITAL GAINS

1. Gains derived by a resident of a Contracting State from the alienation of immovable property, referred to in Article 6, and situated in the other Contracting State may be taxed in that other State.
2. Gains from the alienation of movable property forming part of the business property of a permanent establishment which an enterprise of a Contracting State has in the other Contracting State or of movable property pertaining to a fixed base available to a resident of a Contracting State in the other Contracting State for the purpose of performing independent personal services, including such gains from the alienation of such a permanent establishment (alone or together with the whole enterprise) or of such fixed base, may be taxed in that other State.
3. Gains from the alienation of ships or aircraft operated in international traffic or movable property pertaining to the operation of such ships or aircraft shall be taxable only in the Contracting State of which the alienator is a resident.
4. Gains derived by resident of a Contracting State from the alienation of any property other than those mentioned in paragraphs 1, 2 and 3 of this Article shall be taxable only in that State.

(emphasis supplied)"

17. He contended that the Central Board of Direct Taxes vide its press release dated 1st March, 2013 had held out to the investors at large that DTAA benefits would be granted solely on the basis of TRC issued by the contracting state. The press release dated 1st March, 2013 is reproduced hereinbelow:-

"FINANCE MINISTRY'S CLARIFICATION ON TAX RESIDENCY CERTIFICATE (TRC)

PRESS RELEASE, DATED 1-3-2013

Concern has been expressed regarding the clause in the Finance Bill that amends Section 90 of the Income-tax Act that deals with Double Taxation Avoidance Agreements. Sub-section (4) of Section 90 was introduced last year by Finance Act, 2012. That subsection requires an assessee to produce a Tax Residency Certificate (TRC) in order to claim the benefit under DTAA.

DTAAs recognize different kinds of income. The DTAAs stipulate that a resident of a contracting state will be entitled to the benefits of the DTAA.

In the explanatory memorandum to the Finance Act, 2012, it was stated that the Tax Residency Certificate containing prescribed particulars is a necessary but not sufficient condition for availing benefits of the DTAA. The same words are proposed to be introduced in the Income-tax Act as sub-section (5) of Section 90. Hence, it will be clear that nothing new has been done this year which was not there already last year.

However, it has been pointed out that the language of the proposed sub-section (5) of Section 90 could mean that the Tax Residency Certificate produced by a resident of a contracting state could be questioned by the Income Tax Authorities in India. The government wishes to make it clear that that is not the intention of the proposed subsection (5) of Section 90. ***The Tax Residency Certificate produced by a resident of a contracting state will be accepted as evidence that he is a resident of that contracting state and the Income Tax Authorities in India will not go behind the TRC and question his resident status.***

In the case of Mauritius, circular No.789, dated 13-4-2000 continues to be in force, pending ongoing discussions between India and Mauritius.

However, since a concern has been expressed about the language of sub-section (5) of Section 90, this concern will be addressed suitably when the Finance Bill is taken up for consideration.

(emphasis supplied)"

18. He submitted that the Supreme Court in ***Union of India vs. Azadi Bachao Andolan, [2003] 132 Taxman 373 (SC)*** has upheld the validity of similar Circulars No.682 and 789 dated 30th March, 1994 and 13th April, 2000 issued by the CBDT. The Circular No.682 dated 30th March, 1994 and Circular No.789 dated 13th April, 2000 issued by the CBDT are reproduced hereinbelow:-

"A. CIRCULAR NO. 682

SECTION 90 OF THE INCOME-TAX ACT, 1961 - DOUBLE TAXATION AGREEMENT - AGREEMENT FOR AVOIDANCE OF DOUBLE TAXATION AND PREVENTION OF FISCAL EVASION WITH FOREIGN COUNTRIES

CIRCULAR NO. 682, DATED 30-3-1994

1. A Convention for the avoidance of double taxation and prevention of fiscal evasion with respect to taxes of income and capital gains was entered into between the Government of India and the Government of Mauritius and was notified on 6-12-1983. In respect of India, the Convention applies from the assessment year 1983-84 and onwards.

2. Article 13 of the convention deals with taxation of capital gains and it has five paragraphs. The first paragraph gives the right of taxation of capital gains on the alienation of immovable property to the country in which the property is situated. The second and third paragraphs deal with right of taxation of capital gains on the alienation of movable property linked with business or professional enterprises and ships and aircrafts.

3. Paragraph 4 deals with taxation of capital gains arising from the alienation of any property other than those mentioned in the preceding paragraphs and gives the right of taxation of capital gains only to that State of which the person deriving the capital gains

is a resident. In terms of paragraph 4, capital gains derived by a resident of Mauritius by alienation of shares of companies shall be taxable only in Mauritius according to Mauritius tax law. Therefore, any resident of Mauritius deriving income from alienation of shares of Indian companies will be liable to capital gains tax only in Mauritius as per Mauritius tax law and will not have any capital gains tax liability in India.

4. Paragraph 5 defines 'alienation' to mean the sale, exchange, transfer or relinquishment of the property or the extinguishment of any rights in it or its compulsory acquisition under any law in force in India or in Mauritius.

B. CIRCULAR NO.789

CLARIFICATION REGARDING TAXATION OF INCOME FROM DIVIDENDS AND CAPITAL GAINS UNDER THE INDO-MAURITIUS DOUBLE TAX AVOIDANCE CONVENTION (DTAC)

CIRCULAR NO.789, DATED 13-4-2000

1. The provisions of the Indo-Mauritius DTAC of 1983 apply to 'residents' of both India and Mauritius. Article 4 of the DTAC defines a resident of one State to mean "any person who, under the laws of that State is liable to taxation therein by reason of his domicile, residence, place of management or any other criterion of a similar nature." Foreign Institutional Investors and other investment funds, etc., which are operating from Mauritius are invariably incorporated in that country. These entities are 'liable to tax' under the Mauritius Tax law and are, therefore, to be considered as residents of Mauritius in accordance with the DTAC.

2. Prior to 1-6-1997, dividends distributed by domestic companies were taxable in the hands of the shareholder and tax was deductible at source under the Income-tax Act, 1961. Under the DTAC, tax was deductible at source on the gross dividend paid out at the rate of 5% or 15% depending upon the extent of shareholding of the Mauritius resident. Under the Income-tax Act, 1961, tax was deductible at source at the rates specified under section 115A, etc. Doubts have been raised regarding the taxation of dividends in the hands of investors from Mauritius. ***It is hereby clarified that wherever a Certificate of Residence is issued by the Mauritian Authorities, such Certificate will constitute sufficient evidence for accepting the status of residence as well as beneficial ownership for applying the DTAC accordingly.***

3. ***The test of residence mentioned above would also apply in respect of income from capital gains on sale of shares****. Accordingly, FIIs, etc., which are resident in Mauritius would not be taxable in India on income from capital gains arising in India on sale of shares as per paragraph 4 of article 13.*

(emphasis supplied)"

19. He submitted that the Supreme Court in the subsequent judgment of ***Vodafone International Holdings B.V. vs. Union of India and Anr., (2012) 6 SCC***

613 has held that ***Union of India vs. Azadi Bachao Andolan*** (supra) is correct law and TRC is sufficient evidence to show residence of the contracting state.

20. Learned senior counsel for the petitioner also pointed out that the petitioner fulfilled the expenditure test stipulated in Article 3 of the Protocol of the India-Singapore DTAA as its total annual expenditure on operations in Singapore was not less than SGD 200,000 or Indian Rs.50,00,000/- in the immediately preceding period of twenty-four months from the date the gains arose. Amended Article 3 of the Protocol of the India-Singapore DTAA vide Protocol No.1022 (E) dated 18th July, 2005 governing the instant case is reproduced hereinbelow:-

"Singapore

Amended Protocol /Notification No 1022(E)/18-7-2005 (2005) 276 ITR 142(St.)

Whereas the annexed protocol amending the Agreement between the Government of the Republic of India and the Government of the Republic of Singapore for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income shall enter into force on 1st August, 2005, under Article 7 of the protocol amending the Agreement for giving effect to the provisions of the said Protocol;

Now, therefore, in exercise of the powers conferred by section 90 of the Income-tax Act, 1961 (43 of 1961), the Central Government hereby directs that all the provisions of the said protocol amending the Agreement between the Government of the Republic of India and the Government of the Republic of Singapore for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income shall be given effect to in the Union of India with effect from the 1st day of August, 2005.

Annexure

Protocol amending the agreement between the Government of the Republic of India and the Government of the Republic of Singapore for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income signed in India on 24th January 1994.

The Government of the Republic of India and the Government of the Republic of Singapore,
Desiring to conclude a protocol to amend the agreement between the Government of the Republic of India and the Government of the Republic of Singapore for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to taxes on income signed in India on 24th January 1994 (hereinafter referred to as "the Agreement"),

Have agreed as follows:

Article 1

Paragraphs 4, 5 and 6 of article 13 (Capital gains) of the agreement shall be deleted and replaced by the following:

"4. Gains derived by a resident of a Contracting State from the alienation of any property other than those mentioned in paragraphs 1, 2 and 3 of this article shall be taxable only in that State."

Article 2

With regard to the article on "Exchange of information" (article 28), on a request made by a Contracting State, the Revenue Authority of the other Contracting State shall collect, and share with the first mentioned Contracting State, through its Competent Authority, whatever information it is competent to obtain for its own purposes under its law.

Article 3

1. A resident of a Contracting State shall not be entitled to the benefits of article 1 of this protocol if its affairs were arranged with the primary purpose to take advantage of the benefits in article 1 of this protocol.

2. A shell/conduit company that claims it is a resident of a Contracting State shall not be entitled to the benefits of article 1 of this protocol. A shell/conduit company is any legal entity falling within the definition of resident with negligible or nil business operations or with no real and continuous business activities carried out in that Contracting State.

3. A resident of a Contracting State is deemed to be a shell/conduit company if its total annual expenditure on operations in that Contracting State is less than S$200,000 or Indian Rs. 50,00,000 in the respective Contracting State as the case may be, in the immediately preceding period of 24 months from the date the gains arise.

4. A resident of a Contracting State is deemed not to be a shell/conduit company if:
(a) it is listed on a recognised stock exchange of the Contracting State; or
(b) its total annual expenditure on operations in that Contracting State is equal to or more than S$200,000 or Indian Rs. 50,00,000 in the respective Contracting State as the case may be, in the immediately preceding period of 24 months from the date the gains arise.
(Explanation: The cases of legal entities not having bona fide business activities shall be covered by article 3.1 of this protocol.)

Article 4

Paragraph 2 of article 12 (Royalties and fees for technical services) of the agreement shall be deleted and replaced by the following paragraph:
"2. However, such royalties and fees for technical services may also be taxed in the Contracting State in which they arise and according to the laws of that Contracting State, but if the recipient is the beneficial owner of the royalties or fees for technical services, the tax so charged shall not exceed 10%."

Article 5

It is agreed that there shall be an inter-governmental group consisting of representatives of the revenue authorities of the two Contracting States which shall review the working of the provisions of this protocol at least once a year or earlier at the request of either Contracting State and may make recommendations for improvements including improvements to the provisions of this protocol.

Article 6

Articles 1, 2, 3 and 5 of this protocol shall remain in force so long as any Convention or Agreement for the Avoidance of Double Taxation between the Government of the Republic of India and the Government of Mauritius provides that any gains from the alienation of shares in any company which is a resident of a Contracting State shall be taxable only in the Contracting State in which the alienator is a resident.

Article 7

This protocol, which shall form an integral part of the agreement, shall come into force on 1 August 2005.

In witness whereof, the undersigned, being duly authorized by their respective Governments have signed this protocol.

Done at New Delhi, India, this twenty-ninth day of June 2005, in two originals in English language each text being equally authentic.

(emphasis supplied)"

21. He stated that as per the audited financial statements for the year ending 31st December, 2013, the assessee had incurred an expenditure of USD 284,212 equivalent to SGD 360,949 approx and as per financial statements for the year ending 31st December, 2014, the assessee had incurred an operational expenditure of USD 468,718 equivalent to SGD 618,708 approx. The total business spending of the petitioner in the Assessment Year 2016 as reported to the Singapore Tax Authorities was as under:-

Total Business Spending "TBS")	*Expenses paid*	*Amount (S$)*
	Remuneration	*0*
	Management fees	*356,882*
	Other operating costs (please specify top 5)	
	(i) Professional fees	*148,657*
	(ii) GST expenses	*27,498*
	(iii) Admin fees	*7,582*
	(iv) Audit fees	*4,248*
	(v) Custodian fees	*2,757*
	(vi) Other operating costs	*2,062*
	(vii) Total TBS	*549,686*

22. He emphasised that the assessee had submitted all the details viz. financial statements, submissions on the satisfaction of LOB clause, Deloitte opinion, etc.

Even the certificate obtained from independent chartered accountant in Singapore with regard to the said expenses and satisfaction of LOB conditions was duly shared along with the objections. The Assessing Officer, while passing the order dated 10th January, 2022, had not questioned the satisfaction of the LOB clause. Consequently, he contended that the petitioner is entitled to benefits of the India-Singapore DTAA read with the LOB clause in the Protocol.

23. He lastly submitted that the order disposing of the objections was totally arbitrary and non-speaking as it did not deal with the petitioner's submissions at all. He stated that the order disposing of the objections showed no justification whatsoever for the reopening and in view of the same, the reopening ought to be quashed.

ARGUMENTS ON BEHALF OF THE RESPONDENT

24. *Per contra*, Mr.Sunil Agarwal, learned senior standing counsel for the respondent-revenue submitted that ordinarily no writ lies against the Show Cause Notice. He emphasised that scope of interference with the Show Cause Notice in a writ jurisdiction is extremely restricted in comparison to the appellate jurisdiction that this Court exercises under Section 260A of the Act. In support of his submission, he relied upon the judgment of the Supreme Court in ***Special Director and Another vs. Mohd. Ghulam Ghouse and Another, (2004) 3 SCC 440***, wherein it has been held as under:-

> "*5. This Court in a large number of cases has deprecated the practice of the High Courts entertaining writ petitions questioning legality of the show-cause notices stalling enquiries as proposed and retarding investigative process to find actual facts with the participation and in the presence of the parties. Unless the High Court is satisfied that the show-cause notice was totally non est in the eye of the law for absolute want of jurisdiction of the authority to even investigate into facts, writ petitions should not be entertained for the mere asking and as a matter of routine, and the writ petitioner should invariably be directed to respond to the show-cause notice and take all stands highlighted in the writ petition. Whether the show-cause notice was*

founded on any legal premises, is a jurisdictional issue which can even be urged by the recipient of the notice and such issues also can be adjudicated by the authority issuing the very notice initially, before the aggrieved could approach the court. Further, when the court passes an interim order it should be careful to see that the statutory functionaries specially and specifically constituted for the purpose are not denuded of powers and authority to initially decide the matter and ensure that ultimate relief which may or may not be finally granted in the writ petition is not accorded to the writ petitioner even at the threshold by the interim protection granted."

25. He further submitted that the Supreme Court in ***Income Tax Officer, Cuttack and Others Vs. Biju Patnaik, 1991 Supp (1) SCC 161*** has held that it is settled law that in an administrative action the order may not ex facie disclose the satisfaction by the officer of the necessary facts, but if the record discloses the same, the notice or the order does not *per se* become illegal.

26. Learned senior standing counsel for the respondent-revenue stated that the present case is a case of re-opening of Section 143(1) assessment within four years. Consequently, according to him, no fresh tangible material was required to re-open the assessment. He submitted that the only condition that had to be satisfied was that the satisfaction was not a pretence or a sham. He submitted that though there was no requirement of independent material, yet in the present case there was enough material on record warranting re-opening of the assessment. In support of his submission, he relied upon the judgment of this Court in ***Indu Lata Rangwala vs. Deputy Commissioner of Income Tax, 2016 SCC Online Del 3006***, wherein it has been held as under:-

"51. The upshot of the above discussion is that where the return initially filed is processed under Section 143 (1) of the Act, and an intimation is sent to an Assessee, it is not an 'assessment' in the strict sense of the term for the purposes of Section 147 of the Act. In other words, in such event, there is no occasion for the AO to form an opinion after examining the documents enclosed with the return whether in the form of balance sheet, audited accounts, tax audit report etc.

xxx xxx xxx xxx

57. . ..... where reopening is sought of an assessment in a situation where the initial return is processed under Section 143(1) of the Act, the AO can form reasons to believe that income has escaped assessment by examining the very return and/or

> *the documents accompanying the return. It is not necessary in such a case for the AO to come across some fresh tangible material to form 'reasons to believe' that income has escaped assessment.*"

27. He also relied upon the judgment of the Supreme Court in ***Raymond Woollen Mills Ltd. Vs. Income-Tax Officer, [1999] 236 ITR 34 (SC)***, wherein it has been held has under:-

> "*In this case, we do not have to give a final decision as to whether there is suppression of material facts by the assessee or not. We have only to see whether there was prima facie some material on the basis of which the Department could reopen the case. The sufficiency or correctness of the material is not a thing to be considered at this stage. We are of the view that the court cannot strike down the reopening of the case in the facts of this case. It will be open to the assessee to prove that the assumption of facts made in the notice was erroneous. The assessee may also prove that no new facts came to the knowledge of the Income-tax Officer after completion of the assessment proceeding. We are not expressing any opinion on the merits of the case. The questions of fact and law are left open to be investigated and decided by the assessing authority. The appellant will be entitled to take all the points before the assessing authority. The appeals are dismissed. There will be no order as to costs.*"

28. He submitted that Explanation 2 to sub-clause (b) to Section 147 empowers the Assessing Officer to order reopening where a return of income has been furnished by the assessee but no assessment has been made and it is noticed by the Assessing Officer that the assessee has understated the income or has claimed excessive loss, deduction, allowance or relief in the return.

29. He stated that the petitioner is a shell / conduit company with negligible / nil business operations in Singapore / or with no real and continuous business activities carried out in Singapore. He vehemently contended that the petitioner is a company based in United States of America (USA) as its management was based there and the funds for investments in India had come from the USA. He emphasised that in the present case, the ultimate holding company is in USA and that India and USA DTAA does not provide for capital gains tax exemption.

30. He contended that from the Form-10K filed by Blackstone Group before United States Securities Exchange Commission in December, 2011 and relied upon by the Assessing Officer in the impugned order, it was apparent that Mr. Stephen A. Schwarzmann, founder of the Group is the sole commanding voice of the entire Blackstone Group with absolute powers.

31. He even placed on record Form-10K filed by the Blackstone Group for the year ending 31st December, 2015 relevant to Assessment Year 2016-17. The relevant portion of the said Form-10K relied upon by learned counsel for the respondent-revenue is reproduced hereinbelow:-

> *"In this report, references to "Blackstone," the "Partnership", "we", "us" or "our" refer to The Blackstone Group L.P. and its consolidated subsidiaries. Unless the context otherwise requires, references in this report to the ownership of Mr.Stephen A.Schwarzman, our founder, and other Blackstone personnel include the ownership of personal planning vehicles and family members of these individuals.*
>
> *"Blackstone Funds," "our funds" and "our investment funds" refer to the private equity funds, real estate funds, funds of hedge funds, credit-focused funds, collateralized loan obligation ("CLO") and collateralized debt obligation ("CDO") vehicles, real estate investment trusts and registered investment companies that are managed by Blackstone.*
>
> ***Private Equity***
>
> *We are currently investing from our sixth general private equity fund, Blackstone Capital Partners VI ("BCP VI") and our second energy fund, Blackstone Energy Partners II ("BEP II")*
>
> ***Private Equity Funds***
>
> *Our Private Equity investment professionals are responsible for selecting, evaluating, structuring, diligencing, negotiating, executing, managing and exiting investments, as well as pursuing operational improvements and value creation. After an initial selection, evaluation and diligence process, the relevant team of investment professionals (i.e., the deal team) submits a proposed transaction for review by the review committee of our private equity funds. Review committee meetings are led by an executive committee of several senior managing directors of our Private Equity segment. Following assimilation of the review committee's input and its decision to proceed with a proposed transaction, the proposed investment is vetted by the investment committee. The investment committee of our private equity funds is composed of Stephen A.Schwarzman, Hamilton E.James and selected senior managing directors of our Private Equity segment as appropriate based on the location and sector of the proposed transaction. The investment committee is*

responsible for approving all investment decisions made on the behalf of our private equity funds.

Our general partner, Blackstone Group Management L.L.C., which is owned by our senior managing directors, manages all of our operations and activities. Our founder, Stephen A.Schwarzman will have the power to appoint and remove the directors of our general partner. The limited liability company agreement of our general partner provides that at such time as Mr.Schwarzman should cease to be a founder, Hamilton E.James will thereupon succeed Mr.Schwarzman as the sole founding member of our general partner, and thereafter such power will revert to the members of our general partner (our senior managing directors) holding a majority in interest in our general partner.

	" December 31	
	2015	*2014*
	(Dollars in Millions)	
Private Equity		
BCP IV Carried Interest	*$ 144*	*$ 282*
BCP V Carried Interest	*288*	*1,050*
BCP VI Carried Interest	*359*	*233*"

32. He contended that it was unbelievable that the petitioner with USD 1 only paid-up capital, independently took the commercial decision to acquire assets worth USD 53 Million, held them for two years and thereafter sold the same for USD 109 Million and earned a commercial gain of USD 55 Million. He emphasised that a single impugned transaction had been shown in the petitioner's books and it is now under member's voluntary liquidation.

33. He also stated that the petitioner failed to satisfy LOB Test necessary to claim capital gains tax exemption under Article 13(4) of India-Singapore DTAA vide Protocol No. 1022(E) dated 18th July, 2005 governing the instant case. He stated that expenditure threshold of Singapore $200,000 applies to expenditure on operations and not on any accounting entry created in account books. He stated that the petitioner's AFS shows that major part of expenditure being Management expenses had been paid to a Group company. He contended that it was the holding company which incurred expenditure in control and management of petitioner and then directed the petitioner just to make a mere accounting entry in its books. He stated

that Audit expenses could not qualify as operational expenditure because audit expenses are incurred even by a company in liquidation. Without prejudice, he stated that even if Audit expenses were considered as operational expenses, the amount is much below the threshold amount necessary to satisfy India-Singapore DTAA test.

34. He submitted that Section 90(4) of the Act only talks about TRC as "eligibility condition". It does not say that TRC is "sufficient" evidence of residency, which is a slightly higher threshold. He contended that the TRC is not binding on any statutory authority / courts unless the authority or courts enquires into it and comes to its own independent conclusion. He submitted that the TRC relied upon by the petitioner is non-decisive, ambiguous and ambulatory merely recording that the petitioner's futuristic assertions without any independent verification. According to him, TRC lacks the qualities of a binding order issued by an Authority.

35. He submitted that the ***Union of India vs. Azadi Bachao Andolan*** (supra) and ***Vodafone International Holdings B.V.*** (supra) give credence to a TRC subject to a caveat that if it were to be found that the entity in the treaty country is just an agent/puppet of a parent company in another country, then the asset will be treated as that of the parent company and the treaty with the country in which the parent company is situated would have application and not the treaty with the country in which the agent company is located.

36. He contended that Press Release dated 1st March, 2013 neither qualifies as Circular nor statute. He stated that the Circular 789 is Mauritius-specific and does not apply to India-Singapore DTAA. He submitted that in any event the Supreme Court in ***Union of India vs. Azadi Bachao Andolan*** (supra) had stated that the Circular 789 does not crib, cabin or confine Assessing Officer's jurisdiction to make

assessments in individual cases. He clarified that had the Supreme Court not carved out this exception in favor of assessment by the Assessing Officer in individual cases, Circular 789 would have been quashed on grounds of being *ultra vires* Section 119, as the CBDT has only the power to issue "general" directions and not restrict the Assessing Officer's jurisdiction in individual cases. He pointed out that on parity of reasoning, this Court in ***Tata Teleservices Limited Vs Central Board of Direct Taxes & Anr., 2016 SCC OnLine Del 2912*** had quashed CBDT Instruction No.1/2015 dated 13th January, 2015 as it denuded the statutory jurisdiction of Assessing Officer in individual cases of assessments.

37. He submitted that the Bombay High Court in ***Aditya Birla Nuvo Ltd. vs. Dy. Director of Income-Tax (International Taxation) 4(2), Mumbai, [2012] 342 ITR 308 (Bom)*** on the basis of facts on record, by detailed speaking judgment expressly rejected assessee's reliance on Circular 789. He stated that similarly, this Court in ***GE Capital Mauritius Overseas Investments vs. Deputy Commissioner of Income-Tax., [2021] 433 ITR 270 (Del)*** on the basis of facts on record by detailed speaking judgment expressly rejected assessee's reliance on Circular 789 and allowed the Assessing Officer to complete the assessment.

REJOINDER ARGUMENTS

38. In rejoinder, learned senior counsel for the petitioner re-emphasised that the petitioner had made a full disclosure as it had filed its return of income for Assessment Year 2016-17, wherein all the particulars, i.e. the petitioner being a non-resident, details of the holding petitioner, directors of the petitioner and the claim of benefit as per Article 13(4) of the India-Singapore DTAA had been disclosed. He stated that the tax authorities had duly processed the said tax return by passing an intimation under Section 143(1) of the Act and after processing the same,

the Department had chosen not to take up the petitioner's return for verification or examination. He pointed out that the time limit for issuing the notice under Section 143(2) of the Act had expired on 31st December, 2018. Therefore, he submitted that Section 148 could not have been invoked to verify or examine the genuineness of any claim that had become time-barred under Section 143(2) of the Act.

39. He emphasised that the alleged open source enquiry was neither done by the Assessing Officer nor was there any independent application of mind to the documents and nothing had been brought out in the reason to show application of mind by the Assessing Officer on the information received from another officer of the Income Tax Department. He reiterated that no notice for reopening the assessment could have been issued under the Act for making a fishing and roving enquiry based on suspicion.

40. He submitted that the judgment in ***Biju Patnaik*** (supra) dealt with different provisions of law and is no longer good law as held by this Court in the case of ***Alcatel-Lucent France v. Assistant Director of Income-tax, [2016] 69 taxmann.com 379 (Delhi)***. The relevant portion of the said judgment is reproduced hereinbelow:-

> *"31. As far as the reliance of the decision in Biju Patnaik's case (supra) is concerned, as rightly pointed out by Mr. Aggarwal, that dealt with Section 147(a) as it then stood. Section 147(a) has undergone a change that has been explained in some detail by the Supreme Court in Kelvinator of India Ltd.'s case (supra) and in particular the following extract:*
>
> > *"On going through the changes, quoted above, made to section 147 of the Act, we find that, prior to the Direct Tax Laws (Amendment) Act, 1987, reopening could be done under the above two conditions and fulfilment of the said conditions alone conferred jurisdiction on the Assessing Officer to make a back assessment, but in section 147 of the Act (with effect from 1st April, 1989), they are given a go-by and only one condition has remained, viz., that where the Assessing Officer has reason to believe that income has escaped assessment, confers jurisdiction to reopen the assessment. Therefore, post-1st April, 1989, power to reopen is much wider. However, one needs to give a schematic interpretation to the words "reason to believe" failing which, we are afraid, section 147 would give arbitrary*

powers to the Assessing Officer to reopen assessments on the basis of "mere change of opinion", which cannot be per se reason to reopen. We must also keep in mind the conceptual difference between power to review and power to reassess. The Assessing Officer has no power to review; he has the power to reassess. But reassessment has to be based on fulfilment of certain preconditions and if the concept of "change of opinion" is removed, as contended on behalf of the Department, then, in the garb of reopening the assessment, review would take place. One must treat the concept of "change of opinion" as an in-built test to check abuse of power by the Assessing Officer. Hence, after 1st April, 1989, the Assessing Officer has power to reopen, provided there is "tangible material" to come to the conclusion that there is escapement of income from assessment. Reasons must have a live link with the formation of the belief. Our view gets support from the changes made to section 147 of the Act, as quoted hereinabove. Under the Direct Tax Laws (Amendment) Act, 1987, Parliament not only deleted the words "reason to believe" but also inserted the word "opinion" in section 147 of the Act. However, on receipt of representations from the companies against omission of the words "reason to believe", Parliament reintroduced the said expression and deleted the word "opinion" on the ground that it would vest arbitrary powers in the Assessing Officer. We quote herein below the relevant portion of Circular No. 549 dated October 31, 1989 ([1990] 182 ITR (St.) 1, 29), which reads as follows:

> *"7.2 Amendment made by the Amending Act, 1989, to reintroduce the expression 'reason to believe' in section 147. - A number of representations were received against the omission of the words 'reason to believe' from section 147 and their substitution by the 'opinion' of the Assessing Officer. It was pointed out that the meaning of the expression, 'reason to believe' had been explained in a number of court rulings in the past and was well settled and its omission from section 147 would give arbitrary powers to the Assessing Officer to reopen past assessments on mere change of opinion. To allay these fears, the Amending Act, 1989, has again amended section 147 to reintroduce the expression 'has reason to believe' in place of the words 'for reasons to be recorded by him in writing, is of the opinion'. Other provisions of the new section 147, however, remain the same."*

32. In view of the above authoritative enunciation of the legal position in light of the amended Section 147, the reliance by the Revenue on the decision of Biju Patnaik's case (supra) is to no avail."

41. He submitted that the minimum requirement of paid-up share capital for incorporating the Company in Singapore is USD 1 as per the guidelines of the Accounting and Corporate Authority of Singapore. He stated that the petitioner had complied with the same. During FY 2013, the petitioner had issued ordinary shares

of USD 1,32,65,731 and redeemable preference shares of USD 3,97,97,196, i.e. total share capital of USD 5,30,62,928 [i.e. INR 344.6 Crores]. The same was apparent from financials of 2013. Accordingly, the data extracted from Recordowl.com was irrelevant. He contended that had the respondent even cursorily examined the website 'Recordowl.com', it would have realized that several companies, including major companies have been incorporated initially with a minimum paid-up capital of around USD 1.

42. Learned senior counsel for the petitioner stated that the petitioner had made a genuine investment in its hundred per cent (100%) subsidiary which had carried out real and continuous business, inasmuch as, the net profit and net worth of petitioner's Indian subsidiary had grown many times and therefore the petitioner had sold its stake for a huge profit. He had handed over the following chart which is reproduced hereinbelow:-

"***Agile Electric Sub – Assembly Private Limited*** ***FY 2013-14 to FY 2015-16***
(Rs. in Crores)

Particulars	***FY 2013-14***	***FY 2014-15***	***FY 2015-16***	***Amount Increase***	***% Increase***
Net Worth	*155.01*	*169.83*	*196.3*	*41.29*	*26.64%*
Income from Operations	*251.21*	*290.7*	*353.22*	*102.01*	*40.61%*
Total Income	*253.22*	*296.59*	*366.41*	*113.19*	*44.70%*
Profit before Tax	*8.05*	*22.99*	*40.81*	*32.76*	*406.96%*
EPS	*0.85*	*2.8*	*4.98*	*4.13*	*485.88%*

Source: XBRL F5 from MCA website"

43. As regards the nature of expenditure incurred, he stated that the petitioner paid management fees to Blackstone Singapore Pte Ltd., Singapore (under an advisory agreement), who acted as fund manager to the petitioner. The petitioner's

financial statement which reflected this expenditure was duly audited as per the Singapore law and the audited financial statement was on record. Further, the expense in the nature of audit fees was a pre-requisite for undertaking business operations and in undertaking other statutory compliances in Singapore. The management fees in the case was incurred in Singapore and paid to another Singapore-based entity; therefore, the same satisfied the requirement in terms of the said protocol. The petitioner had also obtained a certificate from an independent chartered accountant Deloitte Singapore on the incurrence of expenditure and satisfaction of LOB conditions which was duly shared along with the said objections filed on 28th December, 2021. He emphasised that the Assessing Officer had not disputed the same.

44. He stated that the petitioner had based its claim for DTAA benefit on a TRC dated 03rd February, 2015 issued by IRAS. He also stated that the petitioner had obtained Form 10F dated 07th May, 2015 as required under Rule 21AB regarding the claim of the DTAA benefits in terms of Section 90(5) of the Act. Till date, IRAS has not withdrawn the TRC. Further, the language in the TRC is the prerogative of the IRAS, and the petitioner has no control over the same.

45. He stated that the respondent's submission that TRC is not conclusive is contrary to law. He emphasised that the ***Vodafone International Holdings B.V.*** (supra) was a non-treaty case and the majority view of the ***Vodafone International Holdings B.V.*** (supra) decision clarified that ***Union of India vs. Azadi Bachao Andolan*** (supra) is correct law and TRC is sufficient evidence to show residence of the contracting state. He stated that the respondent had erroneously relied upon some comments in the minority judgment. Further, according to him, in the minority judgment, the comment that TRC is not conclusive is specifically restricted to round-tripping cases. He submitted that even in the minority judgment, the finality

of the TRC qua foreign investors routing their investments through Mauritius, etc., is made emphatically clear as under:-

> "*No presumption can be drawn that the Union of India or the Tax Department is unaware that the quantum of both FDI and FII do not originate from Mauritius but from other global investors situate outside Mauritius*".

46. In any case, according to him, a dissenting minority judgment cannot overrule either the majority of ***Vodafone International Holdings B.V.*** (supra) or the Division Bench judgment of ***Union of India vs. Azadi Bachao Andolan*** (supra). He further stated that the respondent's reliance on the decision of the Bombay High Court in ***Aditya Birla Nuvo Ltd*** (supra) is misconceived as an appeal had been filed and the Supreme Court had specifically allowed ***Aditya Birla Nuvo Ltd*** (supra) to intervene in the ***Vodafone International Holdings B.V.*** (supra). The said fact had been noted in the Andhra Pradesh High Court ruling in the case of ***Sanofi Pasteur Holding SA V. Department of Revenue, Ministry of Finance, [2013] 354 ITR 316 (AP)***, wherein it has been held, "*In any event, the prima facie analyses by the Bombay High Court in Aditya Birla Nuvo Ltd. (supra) must yield to the binding precedents inter alia, Azadi Bachao Andolan and Vodafone*". Hence, he submitted that the respondent ought to be estopped in line with the Supreme Court judgment of estoppel in ***Pepsico India Holdings Private Limited Vs. State of Kerala and Ors., (2009) 13 SCC 55***.

47. Additionally, the petitioner drew attention to certain paragraphs of Supreme Court's ruling in the case of ***Vodafone International Holdings B.V.*** (supra), wherein it has been observed that the group parent company is involved in giving principal guidance by providing general policy guidelines to group subsidiaries. He pointed out that the Supreme Court has held "*Setting up of a WOS Mauritius subsidiary/SPV by principal/genuine substantial long-term FDI in India*

from/through Mauritius, pursuant to the DTAA and Circular No.789 can never be considered to be set up for tax evasion". The Andhra Pradesh High Court, in the case of ***Sanofi Pasteur Holding SA*** (supra) has held that the "*creation of wholly owned subsidiaries or joint ventures either for domestic or overseas investment is a well-established business/commercial organizational protocol; and investment is of itself a legitimate established and globally well recognized business/commercial avocation*".

COURT'S REASONING

PRESENT WRIT PETITION IS MAINTAINABLE

48. The preliminary objection raised by learned counsel for the respondent that no writ lies against the show cause notice is untenable in law, inasmuch as, the order impugned in the present petition is not only the show cause notice but also the 'reasons to believe' for reopening the proceedings and the order disposing of the objections.

49. In fact, in ***Calcutta Discount Co. Ltd. vs. Income-tax Officer, [1961] 41 ITR 191 (SC)***, the Supreme Court has held that the alleged existence of 'reasons to believe' that income chargeable to tax has escaped assessment is an issue of jurisdiction and is therefore amenable to writ jurisdiction. The relevant portion of the said judgment is reproduced hereinbelow:

> "*26. Mr Sastri next pointed out that at the stage when the Income Tax Officer issued the notices he was not acting judicially or quasi-judicially and so a writ of certiorari or prohibition cannot issue. It is well settled however that though the writ of prohibition or certiorari will not issue against an executive authority, the High Courts have power to issue in a fit case an order prohibiting an executive authority from acting without jurisdiction. Where such action of an executive authority acting without jurisdiction subjects or is likely to subject a person to lengthy proceedings and unnecessary harassment, the High Courts, it is well settled, will issue appropriate orders or directions to prevent such consequences.*

27. Mr Sastri mentioned more than once the fact that the Company would have sufficient opportunity to raise this question viz. whether the Income Tax Officer had reason to believe that underassessment had resulted from non-disclosure of material facts, before the Income Tax Officer himself in the assessment proceedings and if unsuccessful there before the appellate officer or the Appellate Tribunal or in the High Court under Section 66(2) of the Indian Income Tax Act. The existence of such alternative remedy is not however always a sufficient reason for refusing a party quick relief by a writ or order prohibiting an authority acting without jurisdiction from continuing such action.

28. In the present case the Company contends that the conditions precedent for the assumption of jurisdiction under Section 34 were not satisfied and come to the court at the earliest opportunity. There is nothing in its conduct which would justify the refusal of proper relief under Article 226. When the Constitution confers on the High Courts the power to give relief it becomes the duty of the courts to give such relief in fit cases and the courts would be failing to perform their duty if relief is refused without adequate reasons. In the present case we can find no reason for which relief should be refused.

29. We have therefore come to the conclusion that the Company was entitled to an order directing the Income Tax Officer not to take any action on the basis of the three impugned notices.

30. We are informed that assessment orders were in fact made on March 25, 1952, by the Income Tax Officer in the proceedings started on the basis of these impugned notices. This was done with the permission of the learned Judge before whom the petition under Article 226 was pending, on the distinct understanding that these orders would be without prejudice to the contentions of the parties on the several questions raised in the petition and without prejudice to the orders that may ultimately be passed by the Court. The fact that the assessment orders have already been made does not therefore affect the Company's right to obtain relief under Article 226. In view however of the fact that the assessment orders have already been made we think it proper that in addition to an order directing the Income Tax Officer not to take any action on the basis of the impugned notices a further order quashing the assessment made be also issued."

The aforesaid principle has been reiterated in ***Principal Commissioner of Income-tax vs. Sheetal Dushyant Chaturvedi, [2022] 134 taxmann.com 328 (SC)***, ***Jeans Knit (P.) Ltd. Vs. Deputy Commissioner of Income-tax, Bangalore, [2017] 77 taxmann.com 176 (SC)***, ***Ganga Saran & Sons (P.) Ltd. Vs. Income-tax Officer, [1981] 6 taxman 14 (SC)*** and ***Synfonia Tradelinks (P.) Ltd. Vs Income Tax Officer, Ward-22(4), [2021] 435 ITR 642 (Delhi)***.

50. The judgment in ***Ghulam Ghouse*** (supra) deals with a challenge to the show cause notice and not with the subsequent order rejecting the objections, as in the present case. Consequently, the judgment in ***Ghulam Ghouse*** (supra) is inapplicable to the present case and the objection urged by the respondent is contrary to the decision of the Supreme Court in ***Calcutta Discount Ltd.*** (supra).

RECOURSE TO SECTION 147 TO EXTEND THE TIME PERIOD FOR VERIFICATION / CLARIFICATION IS ILLEGAL

51. The reason given in the present case for reopening the assessment, namely, for verifying the nature and genuineness of the transaction of the petitioner in the assessment year is untenable in law as the return of income had been filed by the petitioner within time with full particulars (including the fact that the amount of short-term capital gain had not been offered to tax in accordance with Article 13(4) of the India-Singapore DTAA) and the time period for verification as well as for seeking clarifications or additional documents and information had expired. In ***KLM Royal Dutch Airlines v. Assistant Director of Income-tax, [2007] 159 Taxman 191 (Delhi)***, this Court has held, *"that it is evident that, faced with severe paucity of time, the Assessing Officer had attempted to travel the path of Section 147 in the vain attempt to enlarge the time available for framing the assessment. This is not permissible in law."*

IMPUGNED NOTICE ISSUED ON BORROWED SATISFACTION

52. The Assessing officer in the present proceedings has sought to place reliance upon the data extracted from a third-party online source having URL: *https://recordowl.com*. In this regard, it would be instructive to note here that the Supreme Court, recently in the case of ***Hewlett Packard India Sales Pvt. Ltd. (Now***

HP India Sales Pvt. Ltd.) v. Commissioner of Customs (Import), Nhava Sheva, 2023 SCC OnLine SC 31, has issued a note of caution to the governmental authorities such as Commissioner of Customs (Appeal), to refrain from using online sources to arrive at any conclusion, since the information available therein is based on crowd – sourced and user – generated editing model, veracity whereof may be disputed and might promote misleading information. The relevant extract of the aforesaid judgment is as under: -

> *"14. At the outset, we must note that the adjudicating authorities while coming to their respective conclusions, especially the Commissioner of Customs (Appeal) have extensively referred to online sources such as Wikipedia to support their conclusion. While we expressly acknowledge the utility of these platforms which provide free access to knowledge across the globe, but we must also sound a note of caution against using such sources for legal dispute resolution. We say so for the reason that these sources, despite being a treasure trove of knowledge, are based on a crowd-sourced and user-generated editing model that is not completely dependable in terms of academic veracity and can promote misleading information as has been noted by this court on previous occasions also. The courts and adjudicating authorities should rather make an endeavor to persuade the counsels to place reliance on more reliable and authentic sources."*
>
> (emphasis supplied)

53. Undoubtedly, information from a third party can form the basis for an examination/investigation by the Assessing Officer but the decision to reopen the assessment has to be of the Assessing Officer and not of the third party. In the present case, this Court finds that the respondent has merely done a '*cut and paste*' job as it has issued the notice under Section 148 of the Act based on information forwarded by the TDS Officer of Igarashi without any independent application of mind or verification or investigation. Consequently, the impugned notice has been issued on borrowed satisfaction — which is impermissible in law.

COMMON FOR COMPANIES TO BE INCORPORATED INITIALLY WITH MINIMUM PAID-UP SHARE CAPITAL

54. This Court takes judicial notice that it is quite common for companies to be incorporated as a special purpose vehicle for a particular investment / project and that too initially with a minimum paid-up share capital of USD 1. It is not in dispute that the petitioner was subsequently adequately capitalized and a genuine investment was made in India which had grown exponentially and from which the petitioner had exited.

NO LIVE LINK BETWEEN THE MATERIAL AND THE FORMATION OF BELIEF

55. This Court is further of the opinion that the powers of the Assessing Officer to reopen assessment, though wide, are not plenary. The words of the statute are "reason to believe" and not "reason to suspect". The reopening of the assessment after the lapse of many years is a serious matter. In ***Krown Agro Foods (P.) Ltd. v. Assistant Commissioner of Income-tax, Circle 5(1), New Delhi, [2015] 57 taxmann.com 355 (Delhi)***, this Court has held as under:-

> "*13. The reason to believe recorded by the Assessing officer is not based on any material that had come to the knowledge of the Assessing Officer. There is a mere suspicion in the mind of the assessing officer and the notice under section 147/148 has been issued for the purpose of verification and for clearing the cloud of suspicion. The reasons to believe recorded do not show as to on what basis the Assessing Officer has formed a reasonable belief that the said amount of Rs. 2,00,000/- had escaped assessment. It is apparent the Assessing Officer suspects that the income has escaped assessment. However, mere suspicion is not enough. The reasons to believe must be such, which upon a plain reading, should demonstrate that such a reasonable belief could be formed on some basis/ foundation and had in fact been formed by the Assessing Officer that income has escaped assessment. No such reasonable belief can be inferred from the purported reasons to believe recorded.*
>
> *14. The words "reason to believe" indicate that the belief must be that of a reasonable person based on reasonable grounds emerging from direct or circumstantial evidence*

> *and not on mere suspicion, gossip or rumour. The "reason to believe" recorded in the case do not refer to any material that came to the knowledge of the Assessing Officer whereby it can be inferred that the Assessing Officer could have formed a reasonable belief that the said amount had escaped assessment. The purported belief that income has escaped assessment is not based on any direct or circumstantial evidence and is in the realm of mere suspicion. The requirement of law is "reason to believe" and not "reason to suspect". In the present case, since the purported reasons to believe recorded indicate that the Assessing Officer has acted on mere surmise, without any rational basis, the action of reopening of the Assessment is thus clearly contrary to law and is unsustainable….."*

56. This Court is also of the view that the reasons for reopening should show that the Assessing Officer has recorded its satisfaction after considering all the facts. The requirement of recording reasons is a check against arbitrary exercise of power, for it is on the basis of the reasons recorded and on those reasons alone that the validity of the order reopening the assessment is to be decided. Consequently, the Assessing Officer has to show that there is a live link or close nexus between the material before the Assessing Officer and the belief that there has been escapement of the income chargeable to tax. In fact, the Supreme Court in ***Income-tax Officer v. Lakhmani Mewal Das, [1976] 103 ITR 437 (SC)*** has held as under:-

> *"……It is, therefore, essential that before such action is taken the requirements of the law should be satisfied. The live link or close nexus which should be there between the material before the Income-tax Officer in the instant case and the belief which he was to form regarding the escapement of the income of the assessee from assessment because of the latter's failure or omission to disclose fully and truly all material fact was missing in the case. In any event, the link was too tenuous to provide a legally sound basis for reopening the assessment....."*

57. In the present case, there is no live link between the material disclosed and the formation of belief that any income chargeable to tax has escaped assessment. Form 10K relied by the respondent in the reasons recorded is for the year ended 31st December, 2011, whereas the petitioner was incorporated on 25th June, 2013. Thus,

the said Form 10K does not pertain to the petitioner and does not show any live-link between the reasons and the material shown in the reasons for reopening.

58. Though, the Form 10K for the year ended 31st December 2015 was not before the Assessing Officer and not relied upon by the Assessing Officer at any stage of the proceedings, yet the said Form 10K now produced does not include the petitioner in the list of subsidiaries. In fact, the decision making power of Mr.Stephan A. Schwarzmann is *qua* the entities to which the Form 10K pertains and not towards the petitioner – as the petitioner is not a part of the list of subsidiaries mentioned in Form 10K.

59. Admittedly, Blackstone Group is one of the largest asset management or investment adviser companies in the world. What it primarily does is to manage fund of others like sovereign wealth funds (like Singapore, Qatar etc.) which belong to Governments and major pension funds set up by countries and companies. Blackstone does not have proprietary funds but as a group at times to show its confidence in the investments made by the funds, it invests up to 5% of its own funds. Consequently, the funds are from third-party investors and not from 'The Blackstone Group L.P. USA'.

60. The respondent has not furnished any documents to show that the petitioner is a tax resident of USA. The petitioner is incorporated in Singapore and is managed by its board of directors based in Singapore. There is no dispute that Mr.Stephan A. Schwarzmann is not part of the board of directors of the petitioner and there is no material on record to rebut the petitioner's contention that he does not have any participation in the affairs/management of the petitioner. Consequently, the petitioner is neither a US based company nor its affairs are managed from USA. It is

an Investment Fund governed by and complying with Singapore law rules and regulations.

CONCEPT OF BENEFICIAL OWNERSHIP UNDER DTAA WAS ONLY QUA DIVIDEND, INTEREST AND ROYALTY AND NOT FOR CAPITAL GAINS

61. Under the India Singapore DTAA, at the relevant time, capital gain was to be taxed on the basis of legal ownership and not on the basis of beneficial ownership. In fact, the concept of beneficial ownership, at the relevant time under the India Singapore DTAA, was attracted for taxation purposes only qua three transactions i.e. dividend, interest and royalty and not for capital gains The relevant provisions of the India Singapore DTAA are reproduced hereinbelow:-

"ARTICLE 10
DIVIDENDS

1. Dividends paid by a company which is a resident of a Contracting State to a resident of the other Contracting State may be taxed in that other State.
2. However, such dividends may also be taxed in the Contracting State of which the company paying the dividends is a resident and according to the laws of that State, but if the recipient is the beneficial owner of the dividends, the tax so charged shall not exceed: xx……xx

ARTICLE 11
INTEREST

1. Interest arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State.
2. However, such interest may also be taxed in the Contracting State in which it arises, and according to the laws of that State, but if the beneficial owner of the interest is a resident of the other Contracting State, the tax so charged shall be exceed: xx……xx

ARTICLE 12
ROYALTIES AND FEES FOR TECHNICAL SERVICES

1. Royalties and fees for technical services arising in a Contracting State and paid to resident of the other Contracting State may be taxed in that other State.
2. [However, such royalties and fees for technical services may also be taxed in the Contracting State in which they arise and according to the laws of that Contracting State, but if the recipient is the beneficial owner of the royalties and fees for technical services, the tax so charged shall not exceed 10 per cent.] xx……xx

ARTICLE 13
CAPITAL GAINS

1. Gains derived by a resident of a Contracting State from the alienation of immovable property, referred to in Article 6, and situated in the other Contracting State may be taxed in that other State.
2. Gains from the alienation of movable property forming part of the business property of a permanent establishment which an enterprise of a Contracting State has in the other Contracting State or of movable property pertaining to a fixed base available to a resident of a Contracting State in the other Contracting State for the purpose of performing independent personal services, including such gains from the alienation of such a permanent establishment (alone or together with the whole enterprise) or of such fixed base, may be taxed in that other State. xx……xx

(emphasis supplied)

EXPLANATION 2(b) TO SECTION 147 OF THE ACT IS NOT APPLICABLE AS THE CLAIM OF BENEFIT IN ARTICLE 13(4) OF THE DTAA MERELY ALLOCATES THE TAXING RIGHTS TO SINGAPORE

62. This Court is of the view that the respondent has incorrectly referred to Explanation 2(b) to Section 147 of the Act as the same applies only if the assessee understates its income or claims excessive loss, deduction, allowance or relief in its return of income.

63. In the case under consideration, the petitioner has claimed benefit in terms of Article 13(4) of the India-Singapore DTAA, which only provides for the allocation of taxation rights among the parties, as held by Supreme Court in the case of ***Union of India vs. Azadi Bachao Andolan*** (supra). Consequently, the claim of benefit in Article 13(4) of the DTAA does not qualify as a deduction, relief or exemption. The claim of benefit in Article 13(4) of the DTAA merely allocates the taxing rights vis-à-vis capital gains to Singapore. Consequently, the provisions of Explanation 2(b) to Section 147 of the Act is not applicable.

64. In addition, apart from merely citing the provision, the impugned order does not give any reason as to how the said Explanation applies. In the case of ***Prashant***

S. Joshi vs. Income-tax Officer, Ward 19(2)(4), (2010) 324 ITR 154 (Bom) while dealing with the same Explanation, the Bombay High Court has held that when the Assessing Officer applies the Explanation, he has to provide reasons in the order itself and not supplement it with an affidavit.

REASONS RECORDED CANNOT EVOLVE OR BE ALLOWED TO GROW WITH AGE AND INGENUITY

65. In the present proceedings, the respondent has sought to raise additional pleas, which admittedly, did not form part of the reasons for reopening and have thereby sought to supplement the reasons for reopening during the course of arguments. For instance, the Form 10-K filed by the Blackstone Group L.P. for the year ending on 31st December, 2015, was neither before the Assessing Officer nor it was relied upon by the Assessing Officer at any stage of the proceedings. The respondent seeks to enlarge the reasons for reopening, which is not permissible. Similarly, with respect to the issue of satisfaction of the requirement under the Limitation of Benefit Clause ('LOB'), as per the India-Singapore DTAA, it is apparent from the record that the petitioner had placed on record its Audited Financial Statements as well as Independent Chartered Accountant Certificate to show that the LOB clause was satisfied. The said fact has not been disputed by the Assessing Officer and the respondent cannot raise the said disputes for the first time in writ proceedings.

66. It is settled law that the reasons recorded cannot evolve or be allowed to grow with age and ingenuity. The reasons which are recorded cannot be supplemented by affidavits. If the reasons are allowed to be added, subtracted or deleted, then by the time the matter reaches the Court, the Assessing Officer would be allowed to change its reasons for believe. The Supreme Court in ***New Delhi Television Ltd v Deputy***

Commissioner of Income Tax, [2020] 116 taxmann.com 151 (SC) has held that the Assessing Officer is not allowed to alter its reasons, which must be considered only based on their recordings. The relevant portion of the said judgment is reproduced hereinbelow:-

> "*If the Revenue is to rely upon the second proviso and wanted to urge that the limitation of 16 years would apply, then in the notice or at least in the reasons in support of the notice, the assessee should have been put to notice that the revenue relies upon the second proviso. The assessee could not be taken by surprise at the stage of rejection of its objections or at the stage of proceedings before the High Court that the notice is to be treated as a notice invoking provisions of the second proviso of Section 147 of the Act. Accordingly, it is held that the notice issued to the assesse and the supporting reasons did not invoke provisions of the second proviso of Section 147 of the Act and, therefore, at this stage the Revenue cannot be permitted to take benefit of the second proviso*".

LIMITATION OF BENEFIT (LOB) CLAUSE IN THE AMENDED PROTOCOL IS SATISFIED

67. The amended Protocol to the India-Singapore DTAA vide Notification No.1022 (E) dated 18th July, 2005 provides for an objective and not a subjective test, namely, the LOB clause. The Protocol limits the application of the DTAA to entities that are not shell/conduit companies in Singapore with negligible or nil business operations or with no real and continuous business activities carried out in Singapore.

68. The Protocol clarifies that a resident of Singapore is deemed not to be a shell/conduit company if its total annual expenditure on operations in Singapore is equal to or more than S$200,000, in the immediately preceding period of twenty four months from the date the gains arise. Consequently, requirement under the LOB clause as per the India-Singapore DTAA is on incurrence of specified amount of expenses in Singapore.

69. In the present case, the expenditure has admittedly been incurred in Singapore as required under the LOB clause and is confirmed as per the audited financial

statement as well as the independent chartered accountant certificate. The same is also duly reported in the annual filing as required under the respective regulations and has been recognized by the regulators in Singapore, like the Monetary Authority of Singapore as an expense incurred in Singapore. Consequently, all expenses incurred in Singapore, whether directly or indirectly, have to be considered as operational expenditures to satisfy the LOB clause.

70. In the objections dated 28th December, 2021, the petitioner has furnished the details of compliance with the LOB clause to the India-Singapore DTAA. The Assessing officer has not questioned the satisfaction of the LOB clause or the Independent Chartered Accountant certificate at any stage except in the present proceedings. Consequently, the petitioner is a bonafide entity and not a shell / conduit entity as it complies with the LOB clause to the India-Singapore DTAA as the expenditure has been incurred in Singapore and the same has been certified by an independent chartered accountant and accepted by the authorities in Singapore i.e. Income Tax authorities, Monetary Authority of Singapore. Accordingly, the allegation of treaty shopping is irrelevant in the present case as the India-Singapore DTAA has a limitation of benefit clause which the petitioner satisfies

RESPONDENT-REVENUE CANNOT GO BEHIND THE TRC

71. This Court is in agreement with the argument of learned senior counsel for the petitioner that the entire attempt of the respondent in seeking to question the TRC is wholly contrary to the Government of India's repeated assurances to foreign investors by way of CBDT Circulars as well as press releases and legislative amendments and decisions of the Courts in ***Union of India vs. Azadi Bachao Andolan*** (supra) ***Vodafone International Holdings B.V.*** (supra)***, Commissioner of Income-tax (International Taxation)-3, Mumbai vs. JSH (Mauritius) Ltd., [2017] 297 CTR 275 (Bom)*** and ***Sanofi Pasteur Holding SA*** (supra).

72. In fact with the increased expansion of international trade and commerce after the Second World War, the taxation of cross border transactions has been a critical challenge for both Parliament and the Courts.

73. It is a fundamental rule of international taxation that every nation has a sovereign right to impose tax on the global income of its residents and on income that accrues or arises within its territorial limits. These twin rights are referred to as residence-based or source-based taxation.

74. A combination of the source and residence rules inevitably led to double taxation and this, in turn, led to signing of numerous Double Taxation Avoidance Agreements (for short 'DTTAs') which are bilateral treaties that enable tax being levied in any one of the Contracting States.

75. The Act recognizes and gives effect to the DTAAs. Section 90(2) of the Act stipulates that in case of a non-resident taxpayer with whose country India has a DTAA, the provisions of the Act would apply only to the extent the same are more beneficial than the provisions of such DTAA. Accordingly, the taxability of income derived by petitioner would be governed by the provisions of India-Singapore DTAA to the extent that it is more favorable than the Act.

76. Section 90(4) of the Act provides that a non-resident taxpayer to whom a DTAA applies, shall not be entitled to claim any relief under DTAA unless a certificate of it being a resident (i.e. Tax Residency Certificate) of such country is obtained from the Government of that country. Section 90(4) of the Act clarifies that a non-resident taxpayer is eligible to claim DTAA benefits.

77. Article 1 of the India-Singapore DTAA states that the tax treaty applies only to one or more person who is a resident of one or more contracting state. Article 3(1)(j) of the said DTAA defines a person to include an individual, a company, a body of persons and any other entity which is treated as a taxable unit under the

taxation laws in force in the respective Contracting States. The relevant extract of Article 3(1)(j) is provided below:

> *"(j) the term "person" includes an individual, a company, a body of persons and any other entity which is treated as a taxable unit under the taxation laws in force in the respective Contracting States"*

78. Further, as per Article 3(1)(d) of the India-Singapore DTAA, a Company has been inter-alia defined as *"any body corporate or any entity which is treated as a company or body corporate under the taxation laws in force in the respective Contracting States"*.

79. Article 4 of the India-Singapore DTAA states that the term *"resident of a Contracting State"* means any person who is a resident of a Contracting State in accordance with the taxation laws of that State. As per Singapore tax laws, a company is resident in Singapore if the management and control of its business is exercised in Singapore.

80. The petitioner has a valid TRC dated 3rd February, 2015 from the IRAS Singapore evidencing that it is a tax resident of Singapore and thereby is eligible to claim tax treaty benefits between India and Singapore.

81. As early as March 30, 1994, CBDT issued Circular No.682 in which it was emphasised that any resident of Mauritius deriving income from alienation of shares of an Indian company would be liable to capital gains tax only in Mauritius as per Mauritius tax law and would not have any capital gains tax liability in India. This circular was a clear enunciation of the provisions contained in the DTAA, which would have overriding effect over the provisions of Sections 4 and 5 of the Act by virtue of Section 90 of the Act.

82. The CBDT vide Circular No.789 dated 13th April 2000 once again clarified that the TRC shall serve as sufficient evidence of the taxpayer's residence and beneficial ownership for applying the DTAA.

83. The Supreme Court, in the case of ***Union of India vs. Azadi Bachao Andolan*** (supra), upheld the validity and efficacy of the Circular No. 682 dated 30 March 1994 and the Circular No.789 dated 13th April 2000, issued by the CBDT. The Apex Court further held that the certificate of residence is conclusive evidence for determining the status of residence and beneficial ownership of an asset under the DTAA. The Supreme Court emphasised that the tax authorities were obliged to grant tax treaty relief to Mauritius entities so long as they were tax resident in Mauritius as confirmed by the Mauritius Revenue Authorities and that this was the only condition required to be satisfied to claim treaty relief; that there were no other provisions either in the domestic law or the tax treaty that permitted the tax authorities to exercise any discretion in disregarding the provisions of the treaty. The relevant portion of the Supreme Court judgment in ***Union of India vs. Azadi Bachao Andolan*** (supra) is reproduced hereinbelow:-

> *"9……Sometime in the year 2000, some of the income tax authorities issued show cause notices to some FIIs functioning in India calling upon them to show cause as to why they should not be taxed for profits and for dividends accrued to them in India. The basis on which the show cause notice was issued was that the recipients of the show cause notice were mostly 'shell companies' incorporated in Mauritius, operating through Mauritius, whose main purpose was investment of funds in India. It was alleged that these companies were controlled and managed from countries other than India or Mauritius and as such they were not "residents" of Mauritius so as to derive the benefits of the DTAC. These show cause notices resulted in panic and consequent hasty withdrawal of funds by the FIIs. The Indian Finance Minister issued a Press note dated April 4, 2000 clarifying that the views taken by some of the income-tax officers pertained to specific cases of assessment and did not represent or reflect the policy of the Government of India with regard to denial of tax benefits to such FIIs.*
>
> *Thereafter, to further clarify the situation, the CBDT issued a Circular No.789 dated 13.4.2000. Since this is the crucial Circular, it would be worthwhile reproducing its full text. The Circular reads as under….*

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49. As early as on March 30, 1994, the CBDT had issued circular no.682 in which it had been emphasised that any resident of Mauritius deriving income from alienation of shares of an Indian company would be liable to capital gains tax only in Mauritius as per Mauritius tax law and would not have any capital gains tax liability in India. This circular was a clear enunciation of the provisions contained in the DTAC, which would have overriding effect over the provisions of sections 4 and 5 of the Income-tax Act,1961 by virtue of section 90(1) of the Act. If, in the teeth of this clarification, the assessing officers chose to ignore the guidelines and spent their time, talent and energy on inconsequential matters, we think that the CBDT was justified in issuing 'appropriate' directions vide circular no.789, under its powers under section 119, to set things on course by eliminating avoidable wastage of time, talent and energy of the assessing officers discharging the onerous public duty of collection of revenue. The circular no.789 does not in any way crib, cabin or confine the powers of the assessing officer with regard to any particular assessment. It merely formulates broad guidelines to be applied in the matter of assessment of assessees covered by the provisions of the DTAC…..

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122. Many developed countries tolerate or encourage treaty shopping, even if it is unintended, improper or unjustified, for other non-tax reasons, unless it leads to a significant loss of tax revenues. Moreover, several of them allow the use of their treaty network to attract foreign enterprises and offshore activities. Some of them favour treaty shopping for outbound investment to reduce the foreign taxes of their tax residents but dislike their own loss of tax revenues on inbound investment or trade of non-residents. In developing countries, treaty shopping is often regarded as a tax incentive to attract scarce foreign capital or technology. They are able to grant tax concessions exclusively to foreign investors over and above the domestic tax law provisions. In this respect, it does not differ much from other similar tax incentives given by them, such as tax holidays, grants, etc.

123. Developing countries need foreign investments, and the treaty shopping opportunities can be an additional factor to attract them. The use of Cyprus as a treaty haven has helped capital inflows into eastern Europe. Madeira (Portugal) is attractive for investments into the European Union. Singapore is developing itself as a base for investments in South East Asia and China. Mauritius today provides a suitable treaty conduit for South Asia and South Africa. In recent years, India has been the beneficiary of significant foreign funds through the "Mauritius conduit". Although the Indian economic reforms since 1991 permitted such capital transfers, the amount would have been much lower without the India-Mauritius tax treaty.

124. Overall, countries need to take, and do take, a holistic view. The developing countries allow treaty shopping to encourage capital and technology inflows, which developed countries are keen to provide to them. The loss of tax revenues could be

insignificant compared to the other non-tax benefits to their economy. Many of them do not appear to be too concerned unless the revenue losses are significant compared to the other tax and non-tax benefits from the treaty, or the treaty shopping leads to other tax abuses.……..

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134. We may also refer to the judgment of Gujarat High Court in Banyan & Berry v. CIT [1996] 222 ITR 831/ 84 Taxman 515 where referring to McDowell & Co. Ltd.'s case (supra), the Court observed:

". . . The facts and circumstances which lead to McDowell's decision leave us in no doubt that the principle enunciated in the above case has not affected the freedom of the citizen to act in a manner according to his requirements, his wishes in the manner of doing any trade, activity or planning his affairs with circumspection, within the framework of law, unless the same fall in the category of colourable device which may properly be called a device or a dubious method or a subterfuge clothed with apparent dignity." (p. 850)

This accords with our own view of the matter……

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146. We are unable to agree with the submission that an act which is otherwise valid in law can be treated as non-est merely on the basis of some underlying motive supposedly resulting in some economic detriment or prejudice to the national interests, as perceived by the respondents."

84. It is a settled position of law that the Circulars issued by CBDT are binding on the tax authorities. The Supreme Court of India in ***UCO Bank Vs. CIT 237 ITR 889 (SC)*** has categorically held that Circulars issued by the CBDT are binding on the revenue authorities. Moreover, the respondent's reliance on the judgment in ***Tata Teleservices Ltd*** (supra) is untenable in law as in the present case, the validity of Circular No.682, dated 30th March 1994 and Circular No.789, dated 13th April 2000, has already been upheld by the Supreme Court in ***Union of India vs. Azadi Bachao Andolan*** (supra).

85. Subsequently, the Supreme Court, in ***Vodafone International Holdings B.V.*** (supra) reiterated the law in ***Union of India vs. Azadi Bachao Andolan*** (supra) and held that what is rightly not acceptable is the use of artificial devices to avail treaty benefits, resulting in double non-taxation. The Supreme Court in the said judgment emphasised that in view of Circular No.789 dated 13th April 2000, the TRC

certificate is sufficient evidence to show residence and beneficial interest/ownership and the Revenue cannot at the time of sale/disinvestment/exit from such FDI, deny benefits of the DTAA.

86. In the Finance Bill, 2013 as introduced in the Lok Sabha on 28th February, 2013, the Union of India sought to insert sub-Section 5 in Section 90 of the Act to stipulate precisely what the learned counsel for the respondent had argued namely that TRC shall be a necessary eligibility condition but shall not constitute sufficient evidence of residency and shall not be binding on the authorities. Sub-Section 5 of Section 90 of the Act sought to be introduced by way of proposed amendment is reproduced hereinbelow:-

> *"21. In section 90 of the Income Tax Act,-*
> *(a) to (b) ***
> *(c) after sub-section (4) and before Explanation 1, the following sub-section shall be inserted, namely:—*
> *"(5) The certificate of being a resident in a country outside India or specified territory outside India, as the case may be, referred to in sub-section (4), shall be necessary but not a sufficient condition for claiming any relief under the agreement referred to therein."*

87. However, serious concerns were expressed by the Foreign investors with regard to the aforesaid proposed amendment. On the very next day, namely 1st March, 2013 the Finance Minister vide Press release clarified, "*The Tax Residency Certificate produced by a resident of a contracting state will be accepted as evidence that he is a resident of that contracting state and the Income Tax Authorities in India will not go behind the TRC and question his resident status*".

88. Consequently, the Government of India vide Press Release dated 1st March, 2013 once again reiterated that TRC shall be treated as a sufficient condition for claiming relief under the DTAA. It is pertinent to mention that Press Release dated 1st March, 2013 was not Mauritius-specific and it clarified beyond doubt that the TRC produced by a resident of a contracting state would be accepted as evidence

of tax residency, and the Income Tax authorities in India will not go behind the TRC and question the resident status of the assessee. Moreover, the proposed sub-Section 5 of Section 90 was not inserted in the Act.

89. The Punjab and Haryana High Court, in the case of petitioners group company i.e. ***Serco BPO (P.) Ltd vs Authority for Advance Rulings, New Delhi, (2015) 60 taxmann.com 433 (Punjab & Haryana)*** after tracing the entire history of CBDT Circulars, legislative amendments and judicial pronouncements held that TRC is sufficient to claim relief under the DTAA. The relevant portion of the said judgment is reproduced hereinbelow:-

> *"4. The petitioner was incorporated on 20.01.2002. Barclays (H&B) Mauritius Limited. (hereinafter referred to as 'Barclays') was incorporated on 02.08.2004 in Mauritius. Blackstone GPV Capital Partners (Mauritius) V-B Ltd. (hereafter referred to as 'Blackstone Mauritius') was incorporated on 10.05.2006 in Mauritius. On 01.06.2007, SKR BPO Services Pvt. Ltd. was incorporated in India..…*
>
> *xxx xxx xxx xxx*
>
> *14. The DTAC is itself clear. We are however, saved the exercise of analyzing it in depth on its own terms in view of the circulars issued by the Central Board of Direct Taxes under Section 119 in respect of DTAC which are of crucial importance. Our task is made simpler still in view of the judgment of the Supreme Court in Union of India v. Azadi Bachao Andolan, [2004] 10 SCC 1. We will, therefore, refer to the circulars immediately.*
>
> *15. (A) Circular No. 682 dated 30-3-1994, issued "Clarification regarding agreement for avoidance of double taxation with Mauritius".....*
>
> *(B) Circular No.789 dated 13.04.2000 is important and reads as under:-….*
>
> *xxx xxx xxx xxx*
>
> *26. This brings us to a consideration of Mr. Joshi's submission on merits before us.*
> *Mr. Joshi contended that the real beneficiaries of the transaction do not actually reside and carry on business for gain in Mauritius and therefore, the entire transaction was nothing but a device for taking advantage of the DTAC between India and Mauritius. This he contended was a clear case of treaty shopping. He submitted that Blackstone Mauritius and Barclays cannot be considered to be residents of Mauritius as they have absolutely no business interest in Mauritius. They do not do any business in Mauritius. They have no manufacturing unit in Mauritius. They do not render any services in Mauritius and therefore, they cannot even to be considered to be residents of Mauritius. He submitted that in any event the real beneficiaries are the shareholders of these companies and they do not reside in Mauritius. Therefore, the Residency Certificate*

issued in favour of Blackstone Mauritius and Barclays are irrelevant and is f no consequence whatsoever.....

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30. In view of the circular, it is incumbent upon the authorities in India to accept the certificates of residence issued by the Mauritian authorities. Circular No. 789 is a statutory circular issued under section 119 of the Act. It is obviously based upon the trust reposed by the Indian authorities in the Mauritian authorities. Once it is accepted that the certificate has been issued by the Mauritian authorities, the validity thereof cannot be questioned by the Indian authorities. This is a convention/treaty entered into between two sovereign States. A refusal to accept the validity of a certificate issued by the contracting States would be contrary to the convention and constitute an erosion of the faith and trust reposed by the contracting States in each other. It is for the Government of India to decide whether or not such a certificate ought to be accepted. Once it is established that it has been issued by the contracting State i.e. Mauritius, a failure to accept the residence certificate issued by the Mauritian authorities would be an indication of breakdown in the faith reposed by the Government of India in the Government of Mauritius and the Mauritian authorities reiterated in and evidenced by statutory Circulars issued under section 119 of the Act.…..…

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32. Mr. Kaka's reliance in this regard upon the proposed amendment to section 90 of the Act is well founded. It sets at rest the doubt, if any, in this regard.

(A) Section 90(4) of the Act as is stood at the relevant time i.e. in respect of the assessment year 2010-11 reads as under:-

"90(4) An assessee, not being a resident, to whom an agreement referred to in sub-section (1) applies, shall not be entitled to claim any relief under such agreement unless [a certificate of his being a resident] in any country outside India or specified territory outside India, as the case may be, is obtained by him from the government of that country or specified territory."

(B) The Finance Bill, 2013 as introduced in the Lok Sabha on 28.02.2013 was to give effect to the financial proposals of the Central Government for the financial year 2013-14. Clause 21 of the bill proposed the following amendment:-

"21. In section 90 of the Income Tax Act,-

*(a) to (b) ***

(b) after sub-section (4) and before Explanation 1, the following sub-section shall be inserted, namely:—

"(5) The certificate of being a resident in a country outside India or specified territory outside India, as the case may be, referred to in sub-section (4), shall be necessary but not a sufficient condition for claiming any relief under the agreement referred to therein."

The proposed sub-section (5) was not implemented….

(C) The reason for Parliament not implementing the amendment is also evident from the clarification dated 01.03.2013 issued by the Finance Ministry specifically regarding Tax Residency Certificates.....
34. The entire sequence of events namely the Finance Bill, 2013, the clarification issued by the Finance Ministry regarding the Tax Residency Certificate dated 01.03.2013 and the Finance Act, 2013 establish beyond doubt that the Residence Certificate issued by the Mauritius authorities must be accepted provided of course it is established that it has been issued by the appropriate Mauritius Authorities. As we mentioned earlier it is not disputed that the Residence Certificate relied upon by Blackstone Mauritius and Barclays were issued by the Mauritius authorities.

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35. This is a convenient stage to introduce the judgment of the Supreme Court in Union of India v. Azadi Bachao Andolan [2003] 263 ITR, 706/132 Taxman 373. We will be referring to this judgment more than once for it also answers the other questions conclusively…….These observations are a complete answer to Mr.Joshi's submissions on behalf of the respondents on this point."

90. The aforesaid judgment of the High Court has been accepted by the Tax Department and has not been challenged before the Supreme Court.

91. Consequently, the TRC is statutorily the only evidence required to be eligible for the benefit under the DTAA and the respondent's attempt to question and go behind the TRC is wholly contrary to the Government of India's consistent policy and repeated assurances to Foreign Investors. In fact, the IRAS has granted the petitioner the TRC after a detailed analysis of the documents, and the Indian Revenue authorities cannot disregard the same as doing the same would be contrary to international law.

92. The respondent's reliance on the decision in ***GE Capital Mauritius Overseas Investments*** (supra), is misconceived on facts, as in the case of ***GE Capital***

Mauritius Overseas Investments (supra), the Court was concerned with examining the validity of the reasons given in an order under Section 241A of the Act (dealing with withholding refunds). During the course of the hearing before this Court, the assessee, a non-resident, tried to expand its arguments to include that the income earned was not taxable under the treaty. Though accepting the arguments, the Court decided not to intervene in the matter.

93. Accordingly, this Court is of the view that the respondent-revenue cannot go behind the TRC issued by the other tax jurisdiction as the same is sufficient evidence to claim treaty eligibility, residence status, legal ownership and accordingly there is no capital gain earned by the petitioner liable to tax in India. Even the clarificatory press release dated 1st March, 2013 issued by the Finance Ministry pursuant to the 2013 amendment makes it clear that a TRC is to be accepted and tax authorities cannot go behind it. Further, since on the basis of repeated assurances by the Government of India which have been upheld by the Apex Court, the petitioner had invested in India, the respondent is estopped from arguing to the contrary.

CONCLUSION

94. Keeping in view the aforesaid findings, this Court is of the view that no income chargeable to tax has escaped assessment in the present case. In ***Indu Lata Rangwala*** (supra), this Court has held that reopening of assessment based on the return of income must show 'reasons to believe' that income chargeable to tax has escaped assessment. The relevant portion of the said judgment is reproduced hereinbelow:-

> *"35.8 ….. it will be open to the Assessee to contest the reopening on the ground that there was either no reason to believe or that the alleged reason to believe is not relevant for the formation of the belief that income chargeable to tax has escaped assessment."*

RELIEF

95. Consequently, the impugned reassessment proceedings are without jurisdiction and the impugned Notice dated 31st March, 2021 under Section 148 of the Act, impugned Reasons undated and the impugned Order dated 10th January, 2022 and the subsequent draft Assessment Order under Section 144C of the Act dated 31st March, 2022 are quashed.

MANMOHAN, J

MANMEET PRITAM SINGH ARORA, J

JANUARY 30, 2023
AS/TS