

\$~37

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

%

Decision delivered on: 18.01.2023

+ **W.P.(C) 572/2023**

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

Through: Mr Porus Kaka, Sr. Adv. with Mr
Divesh Chawla, Mr Vishal Kalra and
Mr S.S. Tomar, Advs.

versus

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

Through: Mr Sunil Agarwal, Sr. Standing
Counsel and Mr Tushar Gupta, Jr.
Standing Counsel with Mr Utkarsh
Tiwari, Adv.

CORAM:

HON'BLE MR. JUSTICE RAJIV SHAKDHER

HON'BLE MS. JUSTICE TARA VITASTA GANJU

[Physical Hearing/Hybrid Hearing (as per request)]

RAJIV SHAKDHER, J. (ORAL):

1. Issue notice.
- 1.1 Mr Sunil Agarwal accepts notice on behalf of the respondent/revenue.
2. Mr Agarwal says, that in view of the directions that we intend to pass, no counter-affidavit is required to be filed at this stage.
3. Therefore, with the consent of learned counsel for the parties, the writ petition is taken up for hearing and final disposal at this stage itself.
4. This writ petition is directed against the order dated 28.07.2022 passed under Section 148A(d) of the Income Tax Act, 1961 [in short "Act"]

and the consequent notice of even date i.e., 28.07.2022 issued under Section 148 of the Act.

5. Mr Porus Kaka, learned senior counsel, who appears on behalf of the petitioner, says that the principal allegation against the petitioner is, that it purchased shares of an Indian company going by the name Agile Electric Sub-Assembly Pvt. Ltd. [“Agile”] and that according to the respondent/revenue has led to the escapement of income chargeable to tax.

6. Mr Kaka says, that the shares were purchased from various sellers including, one, Mr Jose Kattadyil Joseph.

6.1 Insofar as this limb of the transaction is concerned, the facts, as placed on record, indicate that Rs.40,16,40,093/- was paid to the aforementioned seller, *albeit*, after deducting tax at source amounting to Rs.2,67,80,000/-.

7. It is pointed out by Mr Kaka, that the withholding tax was crystallized by the respondent/revenue.

7.1 For this purpose, our attention has been drawn to a certificate issued under Section 197 of the Act, which is appended on page 134 of the case file.

8. In sum, it is Mr Kaka’s contention, that no income has accrued or arisen in India, the subject transaction is a capital account transaction and that the remittance was made to the seller after adjusting the withholding tax, as ascertained by the respondent/revenue.

9. Mr Kaka goes on to state, that there is no allegation of round-tripping, and therefore, the initiation of reassessment by the respondent/revenue is completely without jurisdiction.

9.1 In support of his submissions, Mr Kaka has relied upon the judgment dated 07.08.2019, rendered by a coordinate bench of this Court in

W.P.(C)No.12643/2018, titled *Nestle SA v. Assistant Commissioner of Income Tax (International Taxation), Circle-2(2)(2), New Delhi*.

10. Mr Agarwal, on the other hand, says that this is a case where the petitioner chose not to file a return, and therefore in terms of Explanation 2 to Section 147 of the Act, the factum of non-filing of return would by force of law result in deeming escapement of income.

10.1 However, Mr Agarwal has also, fairly, pointed out that the requirement for filing a return of income, which is set forth in Section 139 of the Act, has to be read in the case of the petitioner along with Section 115A of the Act being a non-resident company.

10.2 We may also point out, that in rejoinder, Mr Kaka has stated that neither the provisions of Section 139 nor Section 115A of the Act are applicable to the petitioner.

11. Mr Agarwal cannot but accept, that the order passed under Section 148A(d) of the Act adopts a broad-brush approach, and does not deal with the central issue and other issues raised in the objections preferred by the petitioner.

12. Having heard the learned counsel for the parties and perused the record, according to us, the central issue, to which the Assessing Officer (AO) should have applied his mind is, as to whether the investment in shares of Agile by the petitioner was a capital account transaction, given the fact that there is no allegation of round-tripping.

13. We may also note, that there is no reference to Section 115A of the Act, for whatever its worth, either in the show-cause notice dated 31.05.2022 or in the impugned order passed by the AO.

13.1 As to whether the said provisions are, at all, applicable to a non-

resident company is a moot point which the AO will have to decide.

14. Therefore, having regard to the overall facts, we are of the view, that this writ petition can be disposed of with the following directions:

(i) The impugned order dated 28.07.2022 passed under Section 148A(d) of the Act and the consequent notice of even date i.e., 28.07.2022 issued under Section 148 of the Act are set aside.

(ii) The AO will carry out a *de novo* exercise. The AO will, *inter alia*, deal with the petitioner's contention, that the transaction in issue is a capital account transaction, and that no income whatsoever chargeable to tax accrues or arises in India.

(iii) The AO will accord personal hearing to the authorized representative of the petitioner. For this purpose, the AO will issue a notice fixing the date and time of hearing.

(iv) The AO will pass a speaking order. A copy of the same will be furnished to the petitioner.

(v) In case the order passed is adverse to the interests of the petitioner, the petitioner will have liberty to take recourse to an appropriate remedy, *albeit*, as per law.

15. The writ petition is disposed of in the aforesaid terms.

16. Parties will act based on the digitally signed copy of the order.

RAJIV SHAKDHER, J

TARA VITASTA GANJU, J

JANUARY 18, 2023

aj