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TAX JURISPRUDENCE

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EXECUTIVE SUMMARY OF JUDGEMENTS / ADVANCE RULINGS UNDER DIRECT AND INDIRECT TAXES

We are pleased to draw your attention to following important decisions which might be useful for you to take call on tax position.

Case & Citation	Issue Involved	Decision
Direct Tax		
Blackstone Capital Partners (Singapore) VI FDI Three Pte. Ltd [TS-41-HC-2023(DEL)]	Whether the revenue can go behind the tax residency certificate issued by the other tax jurisdiction to determine issues of residence status, treaty eligibility and legal ownership?	Tax Residency Certificate produced by resident of a contracting state to be accepted as sufficient evidence that he is a resident of that contracting state. The Income Tax Authorities in India cannot go behind the TRC and question his resident status for claiming relief under DTAA.
Indirect Tax		
Santosh Kumar Roy vs State of Jharkhand – Jharkhand High Court [W.P.(T) No.4782 of 2022]	Whether show cause notice issued without clearly stating the contravention is vague and invalid?	Honorable High Court of Jharkhand held that the principal of natural justice has not been complied with and clearly mentioning the specific charges in the show cause notice has its genesis in Article 14 of the Constitution of India.
Premier Sales Promotion Private Limited vs. Union of India & Others – Karnataka High Court [2023-TIOL-158-HC-KAR-GST]	Whether pre-paid payment instruments (gift vouchers, cash back vouchers & e-vouchers) is taxable as supply of goods or services?	Honorable Karnataka High Court held issuance of voucher is similar to pre-deposit and not liable to GST. Orders of AAR & AAAR were quashed holding that vouchers are neither goods nor services.

The brief analysis of above referred decisions and rulings are given below.

Case 1 – Blackstone Capital Partners (Singapore) VI FDI Three Pte. Ltd [TS-41-HC-2023(DEL)]

Facts in brief & Issue Involved:

- ♦ Petitioner was holding equity shares of a company incorporated in India which were acquired during FY 2012-13. During the AY 2016-17, the petitioner sold all the equity shares to third parties.
- ♦ In the return of income, the petitioner claimed the gains earned by it on sale of shares as non-taxable in India by virtue of Article 13(4) of India Singapore DTAA based on the ground that it has valid Tax Residency Certificate ('TRC'). 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.
- ♦ The return was duly processed under Section 143(1) of the Act with no demand. Further, the case was also not selected for scrutiny.
- ♦ Based on enquiry, it was revealed that the petitioner's holding entity is a USA based alternative investment management company and thus, the petitioner is controlled and managed from USA. The funds were raised by the holding entity in USA, for investing through the petitioner, therefore, the source of funds and management of affairs of petitioner was from USA. Hence, it is not entitled for treaty benefit of Singapore.
- ♦ Based on the above, the petitioner's case was reopened vide issue of notice u/s 148 dated 31st March 2021.
- ♦ Petitioner filed detailed objections stating that the transaction between the parties was genuine and the petitioner was entitled to the benefit of India-Singapore DTAA as It holds a valid TRC issued by IRA Singapore. Further, it has been emphasized that

reasons were purportedly based on information received from another officer who had no rational connection for formation of belief.


- ♦ However, the objections were disposed of by the respondent and passed order stating that the proceedings in the case of assessee have been validly initiated as there was sufficient material available with the AO to come to the belief that that income has escaped assessment and to record satisfaction.
- ♦ Aggrieved by the aforesaid order, the petitioner filed writ petition with Delhi High Court.

Contentions of Petitioner:

- ♦ 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.
- ♦ Petitioner contended that the CBDT vide its press release dated 01st March 2013, held out to the investors at large that DTAA benefits would be granted solely on the basis of TRC issued by the contracting state and will not go behind the TRC and question his resident status.
- ♦ Honorable Supreme Court in Union of India vs. Azadi Bachao Andolan, [2003] 132 Taxman 373 (SC) has upheld the validity of Circulars No.682 and 789 dated 30th March 1994 and 13th April, 2000 issued by the CBDT.
- ♦ Petitioner has satisfied the Limitation of Benefit ("LOB") conditions also.

Contentions of Respondent:

- ♦ Respondent (revenue) stated that the petitioner is a shell / conduit company with negligible / nil business operations in Singapore and contended that the petitioner is a company based in USA as its management was based there and the funds for



investments in India had come from USA. It has been also emphasized that as the ultimate holding company is in USA and that India-USA DTAA does not provide for capital gains tax exemption.

- ♦ 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.
- ♦ It is 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
- ♦ For LOB Clause, expenditure threshold of Singapore \$200,000 applies to expenditure on operations and not on any accounting entry created in account books.
- ♦ 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.
- ♦ Further, 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. Further, TRC relied upon by the petitioner is non-decisive, ambiguous and ambulatory merely recording the petitioner’s futuristic assertions without any independent verification. TRC lacks the qualities of a binding order issued by an Authority.

Observations & Decision of the Hon’ble High Court:

- ♦ 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 was also observed that the petitioner is a part of one of the largest asset management or investment adviser companies in the world. It manages fund of sovereign wealth funds (like Singapore, Qatar etc.) which belong to Governments and major pension funds set up by countries and companies. Consequently, the funds are from third-party investors and not from its holding company in USA.
- ♦ Further, the Hon'ble High Court observed that the concept of beneficial ownership 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.
- ♦ Section 90(4) of the Act provides that a non-resident taxpayer to whom DTAA applies, shall not be entitled to claim any relief under DTAA unless TRC of such country is obtained from the Government of that country. The petitioner has a valid TRC evidencing that it is a tax resident of Singapore and thereby is eligible to claim tax treaty benefits.
- ♦ All expenses incurred in Singapore, whether directly or indirectly, have to be considered as operational expenditures to satisfy the LOB clause.
- ♦ Further, the Government of India vide Press Release reiterated that TRC shall be treated as a sufficient condition for claiming relief under the DTAA.

NASA Comments:

- ♦ This judgement again re-confirms the position that TRC is sufficient documents to claim DTAA benefit, and Department's attempt to question and go behind it is wholly contrary to the Governments consistent policy and repeated assurances to Foreign Investors.
- ♦ This is a welcome decision and will give confidence to foreign investor.

INDIRECT TAX

Case 1 – Santosh Kumar Roy vs State of Jharkhand [Writ Petition No. 4782 of 2022] – Jharkhand High Court

Facts in brief & Issue Involved

- ♦ Petitioner is a civil contractor engaged in construction work.
- ♦ Notice in Form ASMT-10 for the tax period January 2019-February 2019 was issued on 9th February 2021 u/s 61 of the GST Act 2017. Since the petitioner did not reply to the said ASMT-10, DRC-01A was issued on 26th October 2021. Thereafter, a show cause notice ('SCN') in Form DRC-01 was issued on 07 January 2022 u/s 73 of the GST Act.
- ♦ However, the petitioner did not reply to the SCN and order in Form DRC-07 was issued 9th February 2022.
- ♦ Petitioner has preferred a writ application against the order on the contention that the said SCN is in a format without striking out the irrelevant particulars, the SCN is vague and does not spell out the contravention for which the petitioner is charged.

Contention of the Respondent:

- ♦ Department contended that the impugned order was passed due to non-reply to the said SCN by the petitioner and thus, there is no procedural lapse. Further, the petitioner is having an alternative efficacious remedy u/s 107 of the CGST Act, therefore, this petition should not have been preferred.

Observations & Decision of Honorable High Court

- ♦ The intent of legislature for issuing a SCN is that the SCN should be in detail giving the facts and circumstances and the grounds for levying tax. However, by going through the impugned SCN, it appears that it is in a format without striking out the irrelevant particulars.

- ♦ It is well settled that the SCN issued u/s 73(1) of the Act is not mere a formality. This Court has rendered similar decision in the case of NKAS Service Ltd.
- ♦ As a matter of fact, stating specific charges in the SCN is part of due procedure and fair play in action which are essential requirements of rule of law and has its genesis in Article 14 of the Constitution of India.
- ♦ Since the principle of natural justice has not been complied with in the instant case, the ground of alternative remedy is not acceptable by this Court. The matter is remitted back to pass a fresh order after following due procedure of law from the stage of issuing fresh SCN strictly in accordance with law.

Case 2 – Premier Sales Corporation Pvt Ltd Vs. Union of India & Others – Karnataka High Court [2023-TIOL-158-HC-KAR-GST]

Facts in brief & Contentions of Petitioner

- ♦ Petitioner is engaged in procuring pre-paid payment instruments [‘PPIs’] of gift vouchers, cash back vouchers & e-vouchers from issuers & supplying them to its clients. Its clients issue such vouchers to their employees in form of incentive or to other beneficiaries under promotional schemes for use as consideration for purchase of goods or services or both.
- ♦ Petitioner applied before Karnataka AAR & AAAR to determine taxability of supply of such vouchers. Both the authorities ruled that supply of such vouchers is taxable as goods. Aggrieved with the order, assessee presented this writ petition.

Contentions of Petitioner

- ♦ Petitioner submitted that vouchers involved are PPIs which do not disclose goods & services at the time of issuance. Hence, time of supply for such vouchers shall be the date of redemption as per Section 12(4)(b) of the CGST Act, 2017.

- ♦ Voucher would remain only as an instrument till the time of redemption. It can be considered as an actionable claim as defined u/s 2(1) of the CGST Act. Actionable claim is neither goods nor services as defined in Schedule III of the CGST Act.
- ♦ Petitioner states that actual supply of goods or services takes place only when goods or services are identifiable or when voucher itself identifies the goods or services for value mentioned. Therefore, order passed by authorities is contrary to law.
- ♦ The Reserve Bank of India recognize vouchers ['RBI'] as payment instrument to be accepted as consideration or part consideration for supply of goods and services. However, the vouchers themselves cannot be treated as 'goods or services' for the purpose of levy of GST.
- ♦ When the vouchers do not have any intrinsic value and they represent the value of future goods or services to be redeemed. The levy of tax on the vouchers is without authority of law and it also amounts to multiple levy of taxes.
- ♦ Petitioner placed reliance on following rulings:
 - Sodexo SVC India Pvt Ltd. Vs. State of Maharashtra [2015-TIOL-293-SC-MISC],
 - M/s. Kalyan Jewelers India [2021-TIOL-12-AAAR-GST]

Contentions of Respondent

- ♦ Revenue opposing the writ petition submitted that assessee would be knowing precisely what is offered to customer. Therefore, it cannot be held that goods or services are not identifiable.
- ♦ In case of M/s. Kalyan Jewelers India, since the parties involved were Kalyan Jewelers & their customers, on facts, the principle is not applicable to this case.

Observations & Decision of Honorable High Court


- ♦ Money is defined u/s 2(75) of the CGST Act. Money means 'any other instrument recognised by RBI when used as a consideration to settle an obligation'. RBI has

issued master direction [DPSS. CO. PD. No. 1164/02. 14. 006/2017-18] on issuance & operation of PPIs.

- ♦ Vouchers as defined u/s 2(118) of the CGST Act makes it clear that vouchers are mere instruments accepted as consideration for supply of goods or services. Hence, vouchers would fall under the definition of money and when accepted shall be treated as consideration or part consideration for supply of goods or services.
- ♦ CGST Act excludes 'money' from definition of goods, or service & it is not leviable to tax.
- ♦ Vouchers involved in the instant petition are semi-closed PPIs in which the goods or services to be redeemed are not identified at the time of issuance. These PPIs do not permit cash withdrawal, irrespective of whether they are issued by banks or non-banking companies, and they can be issued only with the prior approval of RBI.
- ♦ Vouchers are like currency. Value printed on voucher can be transacted only at time of redemption and not at time of delivery. Issuance of vouchers is similar to pre-deposit and not supply of goods or services. Hence, vouchers are neither goods nor services and therefore cannot be taxed.

NASA Comments

- ♦ This is a well-reasoned decision by Hon'ble High Court of Karnataka. It provides great clarity on taxability on vouchers.



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