IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.2269 OF 2023

Knight Riders Sports Pvt. Ltd.
8th Floor, Backstage, Plot No. 512
15th Road, Junction of Ram Krishna
Road, Santacruz West,
Mumbai – 400054 ... Petitioner

v/s.

1. Assistant Commissioner of Income Tax
Central Circle – 4(2)
Room No. 1918, 19th Floor,
Air India Building, Nariman Point,
Mumbai – 400021.

2. Chief Commissioner of
Income-tax (Central) – 2
Room No. 1920, 19th Floor
Air India Building, Nariman Point,
Mumbai – 400021.

3. The Union of India
Through the Secretary,
Government of India,
Ministry of Finance,
New Delhi – 110 001 ... Respondents

...

Mr. J.D. Mistri, Senior Advocate a/w. Mr. Hiten Chande i/b. Lumiere Law Partners, for the Petitioner.
Mr. Vipul Bajpayee, for the Respondent – Revenue.

...

CORAM : K. R. SHRIRAM &
KAMAL KHATA, JJ.
DATED : 26TH SEPTEMBER 2023.

ORAL JUDGMENT : (PER : K. R. SHRIRAM, J.)

1. Since the pleading are completed, by consent of the counsels we took up the Petition for hearing at the admission stage.

2. **Rule**. Rule made returnable forthwith.

3. Petitioner is impugning a notice dated 17th March 2023 received under Section 148A(b) of the Income Tax Act, 1961 ("**the Act**"), the order dated 30th March 2023 passed under Section 148A(d) of the Act and the reassessment notice dated 30th March 2023 issued under Section 148 of the Act.

4. Various grounds have been raised in the Petition but the preliminary ground is that no assessment can be reopened on change of opinion.

5. Petitioner, for the year under consideration, i.e., Assessment Year ("**A.Y.**") 2016-2017, carried on the business of operating and running a team in India Premium League, i.e., Kolkata Knight Riders. Petitioner

filed return of income on 13th October 2016 declaring total income of Rs.11,17,62,590/-. During the years Petitioner paid a sum of Rs.3,04,85,970/- as management fees towards consultancy and team management fees. A sum of Rs. 1.90 crores was paid as consultancy fees to one Insignia Sports International Ltd. (**"Insignia"**).

6. During the course of assessment proceedings, Petitioner received various notices under Section 142(1) of the Act. In the notice dated 17th January 2018 under Section 142(1) of the Act petitioner was called upon to furnish in writing and verify in the prescribed manner information to justify the outward remittances to any non-resident (not being a company) or to a foreign company and in that regard also submit relevant 15CA and 15CB certificate. Petitioner replied through its Chartered Accountant's letter dated 29th January 2018 in which Petitioner provided details of the expenses that were incurred to non residents/foreign company. As regard Form 15CA and Form 15CB Petitioner stated that since the data were voluminous it would help if a specific list of expenses in respect of which the two forms are required is made available.

7. This was followed by another notice dated 10th December 2018 under Section 142(1) of the Act by which Petitioner was called upon to

provide details of foreign payments. The name of the players/parties, their address the amount paid, Tax Deducted at Source ("**TDS**") with narration were to be provided. By its chartered accountant's letter dated 13th December 2018 Petitioner provided the details in the format asked for. Petitioner specifically provided that consultancy and team management fees of Rs.3,04,85,970/- was paid and the breakup of Rs.3,04,85,970/- was also provided. In the breakup the amount of Rs.1.90 crores paid to Insignia is mentioned and also that no TDS was deducted.

8. This was followed by another notice dated 14th December 2018 under Section 142(1) of the Act whereby the Assessing Officer ("**AO**") raised a specific query calling upon Petitioner to justify why no TDS was deducted on payment made to one Adrain Le. Roure and Jacques Kallis. This would indicate that the explanation regarding payment made to Insignia had already been accepted because in this notice and even later, no further query regarding Insignia was raised. Petitioner replied through its chartered accountant's letter dated 17th December 2018 explaining why no taxes were withheld on the payment made to these two players. Petitioner explained that the income from rendering professional services in India will be taxed only in South Africa by virtue of Article 14 of India – South Africa DTAA.

9. Thereafter an assessment order dated 25th December 2018 under Section 143(3) of the Act was passed. The assessment order specifically refers to the various notices issued to Petitioner under Section 142(1) of the Act as referred above. The payments made to Insignia or non deduction of TDS was, however, not discussed in the assessment order.

10. Subsequently, Petitioner received the impugned notice dated 17th March 2023 under Section 148A(b) of the Act alleging that there was information suggesting that income chargeable to tax for A.Y. 2016-2017 has escaped assessment within the meaning of Section 147 of the Act. The details of the information was made available and relevant portion reads as under:

> *"Audit scrutiny of the assessment records including the Financial Statements for the relevant Previous Year (PY) showed that the assessee had claimed a total amount of 31480970/- as consultancy and team management fees. Out of this, an amount of 1,90,00,000/- pertained to payment to a foreign entity, namely, Insignia Sport International Ltd., an entity based in United Kingdom. As per the submission of the assessee, no tax was deducted on this payment as per the provisions of the Act sated above. This non deduction of tax made this amount ineligible for deduction as per section 40(a)(i) of the Act quoted above. The tax effect on 1,90,00,000/- worked out to 65,75,520/- @30 percent tax, 12 percent surcharge and 3 percent cess."*

11. Petitioner replied vide letter dated 25th March 2023. Petitioner's objections were rejected and an order dated 30th March 2023 under Section 148A(d) of the Act came to be passed followed by the impugned reassessment notice also dated 30th March 2023 u/s 148 of the Act.

12. Mr. Mistri submitted that the subject matter of the information, i.e., payment to Insignia and non deduction of TDS was a subject of the consideration during the assessment proceedings. Mr. Mistri submitted that once a query is raised during the assessment proceeding and assessee has replied to it, it follows that the query raised was a subject of consideration of AO while completing the assessment and it is not necessary that an assessment order should contain reference and/or discussion to disclose its satisfaction in respect of the query raised. Mr. Mistri submitted that in view of the query being raised, answers given and considering the assessment order, it was rather obvious that the reopening of the assessment was merely on the basis of change of opinion of the AO from that held earlier during the course of assessment proceedings that led to the assessment order dated 25th December 2018. Relying on the judgment of division bench of this Court in ***Aroni Commercials Ltd vs. Assistant Commissioner of Income-tax 2(1)***[1], Mr Mistri submitted that change of opinion does not constitute justification to believe that income chargeable to tax has escaped assessment.

13. Even in the audit objection annexed to the Affidavit in Reply, it is admitted that Petitioner had submitted during the assessment proceedings that no tax was deducted on this payment of Rs.1.90 crores

1 44 taxmann.com 304 (Bombay)

made to Insignia as per the provisions of the Act. This also indicates that the submission was made during the assessment proceedings and it was accepted by the AO.

14. Mr Mistri also submitted, relying on a judgment of this Court in ***Siemens Financial Services Pvt Ltd. vs. Deputy Commissioner of Income Tax Circle-8(2)(1) & Ors.***[2], that the AO does not have any power to review his own assessment because it is settled law that proceedings under Section 148 of the Act cannot be initiated to review the earlier stand adopted by the AO.

15. Mr. Bajpayee relying upon the affidavit in reply filed through one Amit Kumar affirmed on 14th July 2023 submitted that the AO who passed the assessment order dated 25th December 2018 never applied his mind to the information that TDS were not deducted and that should result in dis-allowance of the expenses incurred. Mr. Bajpayee also submitted that an audit objection has also been raised that as per the provisions of Section 40(a)(1) of the Act non deduction of TDS would make the amount of Rs.1.90 crores paid to Insignia ineligible for deduction and the tax effect on that would work out to approximately Rs. 66 lakhs.

Mr. Bajpayee further submitted that this issue was not discussed

2 In Writ Petition No. 4888 of 2022 dated 25th August 2023.

in the assessment proceedings.

16. In our view Mr. Mistri's submission have to be accepted. This is because the law as held in *Siemens Financial Services* (supra) is clear that reopening of assessment is not permissible based on change of opinions as the AO does not have any power to review his own assessment when during the original assessment Petitioner has provided all the relevant information which was considered by the AO before passing the assessment order under Section 143(3) of the Act. This would be their position even if there is an audit objection. Paragraphs Nos. 34 to 39 of *Siemens Financial Services Pvt. Ltd.* (supra) reads as under:

> *"34 On the facts of this case, as regards change of opinion, the information made available is the same reason to believe. If one considers it clearly, it indicates change of opinion. Paragraphs 2 to 6 of the information read as under:*
>
> > *"2. Brief details of information collected/ received by AO: On perusal of the records it I noticed that the assessee company has debited an amount of Rs.6,41,87,931/- on account of Software consumables as other expenses to the Profit and Loss account.*
> >
> > *3. Analysis of information collected/received: As per the information gathered from case record, the assessee company has debited an amount of Rs.6,41,87,931/- on account of Software consumables. As the said expenses is a capital expenditure. This attract depreciation at the rate of 60%. Remaining 40% of software consumable, which comes at Rs.2,56,75,172/- should have been disallowed and added back to the business income of the assessee. This has resulted in underassessment of income of Rs.2,56,75,172/-.*

4. Enquiry made by the AO: The assessment records of assessee for year under consideration has been analysed and as per the information gathered from case record the assessee company has debited an amount of Rs.35,90,19,339/- as other expenses. On perusal of details of other expenses, it is noticed that the assessee has claimed the software consumable of Rs.6,41,87,931/- on account of Software consumable. Expenses on acquiring softwar consumable is a capital expenditure. Section 37(1) provide for deduction for any expenditure

(not being expenditure of the nature described in sections 30 to 36 and not being in the nature of capital expenditure or personal expenses of the assessee), laid out or expended wholly and exclusively for the purposes of the business or profession under the head "Profit and gain of business or profession". Hence capital expenditure incurred for acquisition of an intangible asset should have been disallowed and added back the total income after allowing depreciation at the applicable rate of 60%, which resulted into underassessment of income of Rs.2,56,75,172/-.

5. Finding of the AO: In this case, an amount of Rs.6,41,87,931/- had been debited in P&L A/c. on account of Software consumable. As expenses on acquiring computer software consumable is capita expenditure, the same is not allowable as per the provision of section 37 of Income Tax Act, 1961. Hence capital expenditure incurred for acquisition of an intangible asset should have been disallowed and added back the total income after allowing depreciation at the applicable rate of 60%, which resulted into underassessment of income of Rs. 2,56,75,172/-. 6. Basis of forming reason to believe and details of escapement of income: In view of the finding of AO (as mentioned in para 5 above), I have a reason to believe that the Income chargeable to tax of Rs. 2,56,75,172/-, has escaped assessment under the meaning of section 147 of the Income tax Act, 1961. The AO has carefully applied his mind to the facts and circumstances of the case. The information in possession of the AO gives a substantial basis for the formation of a reason to believe to initiate re-assessment u/s. 147 of the Income Tax Act, 1961."

35 During the course of assessment proceedings, notice had been issued to petitioner. In reply to the notice under Section 143(2), petitioner had by its letter dated 6th December 2018 recorded, "…… based upon our discussion during the course of the hearing ……..". The transaction wise summary of the software consumable was made available. This was considered during the assessment proceedings and the assessment order accepting revised return came to be passed.

36 We would agree with the submissions of Mr. Pardiwalla that if change of opinion concept is given a go by, that would result in giving arbitrary powers to the Assessing Officer to reopen the assessments. It would in effect be giving power to review which he does not possess. The Assessing Officer has only power to reassess not to review. If the concept of change of opinion is removed as contended on behalf of the Revenue, then in the garb of re- opening the assessment, review would take place. The concept of change of opinion is an in-built test to check abuse of power by the Assessing Officer. As held in Dr. Mathew Cherian (Supra), whether under old or new regime of reassessment, it is settled position that the issues decided categorically should not be revisited in the guise of reassessment. That would include issues where query have been raised during the assessment and query have been answered and accepted by the Assessing Officer while passing the assessment order. As held in Aroni Commercials (supra) even if assessment order has not specifically dealt with that issue, once the query is raised it is deemed to have been considered and the explanation accepted by the Assessing officer. It is not necessary that an assessment order should contain reference and/or discussion to disclose his satisfaction in respect of the query raised.

The Division Bench of this court in Aroni Commercials Ltd. (supra) held it is not necessary that the assessment order should contain reference and/or discussion to disclose its satisfaction in respect of the query raised. Paragraph 14 of Aroni Commercials Ltd. (supra) read as under:

> *"14. We are of the view that once a query is raised during the assessment proceedings and the assessee has replied to it, it follows that the query raised was a subject of consideration of the Assessing Officer while completing the assessment. It is not necessary that an assessment order should contain reference and/or discussion to disclose it satisfaction in respect of the query raised. If an Assessing Officer has to record the consideration bestowed by him on all issues raised by him during the assessment proceeding even where he is satisfied then it would be impossible for*

the Assessing Officer to complete all the assessments which are required to be scrutinized by him under Section 143(3) of the Act. Moreover, one must not forget that the manner in which an assessment order is to be drafted is the sole domain of the Assessing Officer and it is not open to an assessee to insist that the assessment order must record all the questions raised and the satisfaction in respect thereof of the Assessing Officer. The only requirement is that the Assessing Officer ought to have considered the objection now raised in the grounds for issuing notice under Section 148 of the Act, during the original assessment proceedings. There can be no doubt in the present facts as evidenced by a letter dated 8 September 2012 the very issue of taxability of sale of shares under the head capital gain or the head profits and gains from business was a subject matter of consideration by the Assessing Officer during the original assessment proceedings leading to an order dated 12 October 2010. It would therefore, follow that the reopening of the assessment by impugned notice dated 28 March 2013 is merely on the basis of change of opinion of the Assessing Officer from that held earlier during the course of assessment proceeding leading to the order dated 12 October 2010. This change of opinion does not constitute justification and/or reasons to believe that income chargeable to tax has escaped assessment."

37 The Assessing Officer does not have any power to review his own assessment when during the original assessment petitioner provided all the relevant information which was considered by him before passing the assessment order under section 143(3) of the Act dated 23rd December 2018. Petitioner had debited an amount of Rs.6,41,87,931/- on account of software consumables in the profit and loss account and a detailed break-up of the said expenses were submitted before the Assessing Officer during the course of assessment proceedings vide a letter dated 6th December 2018. It is settled law that proceedings under section 148 cannot be initiated to review the earlier stand adopted by the Assessing Officer. The Assessing Officer cannot initiate reassessment proceedings to have a relook at the documents that were filed and considered by him in the original assessment proceedings as the power to reassess cannot be exercised to review an assessment. In petitioner's case the Assessing Officer having allowed the amount of software consumables as a revenue expenditure

now seeks to treat the same as capital expenditure which is a clear change of opinion. Various judicial precedents have held that reassessment proceedings initiated on the basis of a mere change of opinion are invalid and without jurisdiction.

38 The Apex Court in Kelvinator of India Ltd.(Supra) emphasised on the difference between a power to review and the power to reassess. The Apex Court held that the Assessing Officer has no power to review but has only the power to reassess. The concept of 'change of opinion' must be treated as an in-built test to check abuse of power by the Assessing Officer. The relevant extract of the judgement is reproduced as under:

> *".....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 re-open assessments on the basis of "mere change of opinion", which cannot beper sereason to reopen. We must also keep in mind the conceptual difference between power to review and power to re-assess. The Assessing Officer has no power to review; he has the power to reassess. But reassessment has to be based on fulfilment of certain pre-condition and if the concept of "change of opinion" is removed, as contended on behalf of the Department, then, in the garb of re- opening 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 1-4-1989, 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 re-introduced the said expression and deleted the word "opinion" on the ground that it would vest arbitrary powers in the Assessing Officer....."*

39 The ***Delhi High Court in Seema Gupta v. ITO18*** *held that the order*

under section 148A(d) and notice under section 148 of the Act should be set aside when the reassessment was initiated on a change of opinion where the same was discussed and verified by the Assessing Officer at the time of original assessment proceedings."

17. The reason we say that there is a change of opinion is because once a query has been raised during the assessment and query has been answered and accepted by the AO while passing the assessment order, it follows that the query raised was a subject of consideration of the AO while completing the assessment. This would apply even if the assessment order has not specifically dealt with that issue. It is not necessary that an assessment order should contain reference and/or discussion to disclose his satisfaction in respect of the query raised. As held in *Aroni Commercials Ltd* (supra) if an AO has to record the consideration bestowed by him on all issues raised by him during the assessment proceedings even where he is satisfied, then it would be impossible for the AO to complete all the assessment which are required to be scrutinized by him under Section 143(3) of the Act.

18. In our view, therefore, it would follow that the reopening of the assessment by the impugned notice is merely on the basis of change of opinion from that held earlier during the course of assessment proceedings that led to the passing of the assessment order dated 25th December 2018. In our view, this change of opinion does not constitute

justification to believe that income chargeable to tax has escaped assessment.

19. Therefore, we allow the Petition and make the rule absolute in terms of prayer clause (a) which reads as under:

> *"(a) that this Hon'ble Court be pleased to issue a Writ of Certiorari or a writ in the nature of Certiorari or any other appropriate writ, order or direction under Article 226 and/or Article 227 of the Constitution of India calling for the records of the Petitioner's case and after examining the legality and validity thereof quash and set aside the Impugned Notice dated 17 March 2023 (Exhibit "M") the Impugned Order dated 30 March 2023 (Exhibit "O") and, Impugned Reassessment Notice dated 30 March 2023 (Exhibit "P");"*

20. Petition disposed.

(KAMAL KHATA, J.) **(K.R. SHRIRAM, J.)**