

\$~

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

+ **W.P.(C) 11968/2016**

Reserved on: October 10, 2017

Date of decision: October 31, 2017

**M/S ESS DISTRIBUTION (MAURITIUS) S.N.C.ET
COMPAGNIE**

..... Petitioner

Through: Mr. Porus Kaka, Senior Advocate
with Mr. Prakash Kumar, Mr. Manish Kanth,
Mrs. Rashmi Singh, Mr. Divesh Chawla,
Advocates.

versus

**ASSISTANT COMMISSIONER OF INCOME TAX, CIRCLE -
1(2)(2) INTERNATIONAL TAXATION,
NEW DELHI**

..... Respondent

Through: Mr. Rahul Chaudhary, Senior
standing counsel with Mr. Sanjay Kumar,
Advocate.

With

+ **W.P.(C) 11971/2016**

**M/S ESS ADVERTISING (MAURITIUS) S.N.C.ET
COMPAGNIE (EARLIER KNOWN AS M/S ESPAN STAR
SPORTS MAURITIUS S.N.C.ET COMPAGNIE)**

..... Petitioner

Through: Mr. Porus Kaka, Senior Advocate
with Mr. Prakash Kumar, Mr. Manish Kanth,
Mrs. Rashmi Singh, Mr. Divesh Chawla,
Advocates.

versus

**ASSISTANT COMMISSIONER OF INCOME TAX, CIRCLE-
1(2)(2) INTERNATIONAL TAXATION,
NEW DELHI**

..... Respondent

Through: Mr. Rahul Chaudhary, Senior

standing counsel with Mr. Sanjay Kumar,
Advocate.

With

+

W.P.(C) 11972/2016

M/S ESS ADVERTISING (MAURITIUS) S.N.C.ET
COMPAGNIE (EARLIER KNOWN AS M/S ESPAN STAR
SPORTS MAURITIUS S.N.C.ET COMPAGNIE) Petitioner

Through: Mr. Porus Kaka, Senior Advocate
with Mr. Prakash Kumar, Mr. Manish Kanth,
Mrs. Rashmi Singh, Mr. Divesh Chawla,
Advocates.

versus

ASSISTANT COMMISSIONER OF INCOME TAX, CIRCLE -
1(2)(2), INTERNATIONAL TAXATION,
NEW DELHI

..... Respondent

Through: Mr. Rahul Chaudhary, Senior
standing counsel with Mr. Sanjay Kumar,
Advocate.

And

+

W.P.(C) 12031/2016

M/S ESS DISTRIBUTION (MAURITIUS) S.N.C.ET
COMPAGNIE

..... Petitioner

Through: Mr. Porus Kaka, Senior Advocate
with Mr. Prakash Kumar, Mr. Manish Kanth,
Mrs. Rashmi Singh, Mr. Divesh Chawla,
Advocates.

versus

ASSISTANT COMMISSIONER OF INCOME TAX CIRCLE -
1(2)(2), INTERNATIONAL TAXATION, NEW
DELHI

..... Respondent

Through: Mr. Rahul Chaudhary, Senior
standing counsel with Mr. Sanjay Kumar,
Advocate.

**CORAM:
JUSTICE S.MURALIDHAR
JUSTICE PRATHIBA M. SINGH**

**J U D G M E N T
31.10.2017**

%

Dr. S. Muralidhar, J.

1. These are four writ petitions under Article 226 of the Constitution of India. Two are by M/s. ESS Distribution (Mauritius) SNCET Campagnie [Writ Petition (C) Nos. 11968 of 2016 and 12031 of 2016] and two by M/s. ESS Advertising (Mauritius) SNCET Campagnie [Writ Petition (C) Nos. 11971 of 2016 & 11972 of 2016]. The writ petitions arise from a similar set of facts and are being disposed of by this common judgment. While W.P. (C) Nos. 11968 and 11971 of 2016 pertain to Assessment Year (AY) 2010-11, W.P. (C) Nos. 12031 and 11972 of 2016 pertain to AY 2008-09.

Facts concerning ESS Distribution for AY 2010-11

2. The facts as far as M/s. ESS Distribution (Mauritius) SNCET Campagnie (hereinafter referred to as 'ESS Distribution') are concerned, is that ESS Distribution is a partnership firm established under the laws of Mauritius by ESPN Mauritius Limited (EML) (now known as Worldwide Wickets, Mauritius). During the AY 2010-11, EML has 99.9% share in the profit of ESS Distribution. ESS Asia Limited (EAL) (incorporated in Labuan, Malaysia), had the remaining 0.01% share.

3. ESS Distribution is engaged in the business of distribution of sports and sports related television programmes broadcast by ESPN Star Sports, Singapore (ESS) via Non-standard television. ESS Distribution had entered into agreements with ESPN Software India Private Limited

(now known as Star Sports India Private Limited since merged with Star India Private Limited) (hereinafter referred to as “ESPN India”) for distribution of the channels.

4. Since ESS Distribution is a tax resident of Mauritius, it is entitled to the protection under the India-Mauritius Double Taxation Avoidance Agreement (‘DTAA’). ESS Distribution filed its return of income for AY 2010-11 on 1st October 2010 as a partnership firm. The case of ESS Distribution is that its revenue from distribution being business profit was, in terms of Article 7 (1) of the DTAA, not taxable in India, in the absence of it having a Permanent Establishment (‘PE’) in India as contemplated by Article 5 of the DTAA. In the notes to the return of income, ESS Distribution described itself as a partnership firm incorporated under the laws of Mauritius on 29th March 2002.

5. In the notes to the return of income, ESS Distribution also mentioned that it had entered into an agreement with Scorpio Television India Private Limited (‘Scorpio’) where Scorpio was granted a licence to use the live feed. However, it is stated that during AY 2010-11 no such feed was shared and therefore, ESS Distribution did not receive any sum from Scorpio. In the Form 3CEB appended to the income tax return, ESS Distribution declared the amount received on account of subscription remittance. As regards the agreement with Scorpio, in the notes to the return, ESS Distribution mentioned as under:

"ESSD has entered into an agreement with Scorpio Television India Private Limited ('Scorpio') granting the latter the license to use the live main feed to produce content to be used in Interactive Guide, including but not limited to edit, modify, add, delete, dub, cut, sub-title, voice over, reformat, rebroadcast and distribute (including all technical process associated therewith) such live feed on DTH platform for ESPN and Star Sports channels. However, no such feed has been shared during the year under consideration and

accordingly, ESSD has not received any sums from Scorpio. "

6. The income tax return of ESS Distribution for AY 2010-11 was picked up for scrutiny by the Assessing Officer ('AO'). The AO raised queries regarding taxability of the subscription/distribution revenue. ESS Distribution provided to the AO the details of the revenue received by it. ESS Distribution stated that it had not received revenue from any other customer (including Scorpio) during the AY in question. A query was raised by the AO as to why the status of the firm should not be treated as foreign company and taxed accordingly. By its letter dated 27th March 2014, ESS Distribution pointed out the difference between a partnership firm and a company.

7. Nevertheless the AO concluded the assessment proceedings and passed a draft assessment order on 28th March 2014 under Section 143 (3) read with Section 144C of the Income Tax Act, 1961 ('Act'). ESS Distribution filed its objections against the said order before the Disputes Resolution Panel ('DRP') *inter alia* contended that since ESS Distribution was a foreign partnership it was not an 'eligible Assessee' within the meaning under Section 144C (15) (b) of the Act. This was accepted by the DRP by an order dated 26th December 2014 holding that it did not have jurisdiction over the case of ESS Distribution. The DRP, therefore, declined to issue any direction.

8. Although the AO was bound by the aforementioned decision of the DRP, he decided to ignore it and proceeded to pass the final assessment order on 28th January 2015 under Section 144C read with Section 143 (3) of the Act. The AO held that DRP had failed to deal with the other objections of the Petitioner. The AO described the decision of the DRP to be "grossly illegal against the intent of the legislature and not in

accordance with the provisions of the Act”.

9. ESS Distribution then filed Writ Petition (Civil) No. 2397 of 2015 in this Court challenging both the draft and final assessment orders passed by the AO. Even while the said writ petition was pending, the AO issued notice dated 30th March 2015 to ESS Distribution under Section 148 of the Act seeking to reopen the assessment for the AY 2010-11 on the ground that there were “reasons to believe” that income has escaped assessment. In a reply to the said notice, ESS Distribution by its letter dated 5th May 2015 requested that the reasons for reopening be provided. ESS Distribution also stated therein that the tax return already submitted by it for the AY in question on 1st October 2010 should be treated as return filed in response to a notice under Section 148 of the Act.

10. On 9th December 2015 ESS Distribution received the reasons for reopening of the assessment for AY 2010-11. This was nearly seven months after ESS Distribution informed the AO that the return already filed should be treated as the one filed pursuant to the notice under Section 148 of the Act. The reasons mentioned therein were as under:

“Income earned from the Scorpio agreement would be taxable in the hands of the Petitioner, as royalty under Section 9 (1) (vi) of the Act and also under DTAA. The income has escaped assessment for AY 2010-11 as no such receipts were disclosed by the Assessee in its return of Income and neither the same had been offered for taxation during the scrutiny proceeding of the said year.

Perusal of 26AS for AY 2010-11 as on 30 March 2015 shows that the receipts from ESPN Software India Pvt. Ltd. during the AY 2010-11 are 439,83,22,056 (4,40,80,29,406 - 97,07,350), whereas the assessment was completed in this case, considering the gross subscription revenue of Rs. 4,05,98,53,517 (as submitted by the Assessee in reply during assessment proceedings). Therefore, subscription revenue of Rs. 33,84,68,539/- received by the Assessee from ESPN Software India Pvt. Ltd. has escaped

assessment.”

11. ESS Distribution then filed a detailed objection *inter alia* pointing out that during the AY in question, as already disclosed in notes to the computation, although ESS Distribution entered into agreement with Scorpio it did not have any transaction with or receive any remuneration from Scorpio. It was further pointed out that the notes to the computation of income were duly filed by ESS Distribution before the AO in which it clearly mentioned that during the AY in question ESS Distribution did not have any transaction with Scorpio.

12. The second reason mentioned by the AO for reopening of the assessment was with respect to the difference between Form 26 AS and assessed income. This was always available with the AO and therefore, did not have fresh tangible evidence. It was explained by ESS Distribution that:

“As the Petitioner discloses the amount on an accrual basis, the amount that has been assessed to tax in the current year (Rs. 4,05,98,53,517) also includes revenue (Rs 2,45,24,601) which has been disclosed in the current year however the same is reflected in the Form 26AS of the Petitioner in the subsequent year but does not include the amount assessed in the prior year (Rs. 36,29,93,140) however the same has been reflected in the Form 26AS of the instant AY 2010-11. It pertinent to point out that the taxes were duly deducted upon the entire amount of Rs.4,39,83,22,056.”

13. Even while the above objections were pending consideration by the AO, ESS Distribution's writ petition came to be disposed of by this Court by an order dated 23rd March 2016 in Writ Petition (Civil) No. 2397 of 2015. This Court held as follows:

(i) Once the DRP held that the ESS Distribution was not an

“eligible Assessee” the AO could not unilaterally make adjustments to the income of ESS Distribution by totally ignoring the views of the DRP.

(ii) None of the objections raised by the Petitioner were in fact considered in the order dated 25th November 2016 passed by the AO rejecting them. Aggrieved by the rejection of the objections, ESS Distribution filed Writ Petition (Civil) No. 11968 of 2016 in this Court. While directing notice to issue in the petition on 21st December 2016, the Court granted liberty to the Income Tax Department (‘Department’) to continue with the assessment proceedings but not pass any final order during the pendency of the writ petition. That interim order was made absolutely by the Court on 19th July 2017 during the pendency of the writ petition.

14. Although the above order was passed by the Court on 21st December 2016, the Petitioner subsequently received another draft assessment order dated 19th December 2016 passed by the AO. The amendment sought by ESS Distribution to challenge the said draft assessment order was allowed by the Court and accordingly, the amended writ petition was taken on record. A reply has been filed to the amended writ petition by the Department.

Facts concerning ESS Advertising for AY 2010-11

15. Now turn to the facts in Writ Petition (Civil) No. 11971 of 2016 filed by ESS Advertising (Mauritius) S.N.CT Campagnie (‘ESS Advertising’) (earlier known as M/s. ESPN Star Sports Mauritius SNCET Compagnie). It again pertains to AY 2010-11.

16. ESS Advertising is a partnership firm established under the laws of

Mauritius by EML having 99.9% share in its profit and the balance 0.1% held by ESS Asian Network Private Limited (EANPL) (incorporated in Singapore).

17. ESS Advertising is engaged in the business of allotting advertising time and programme sponsorship (Ad time) in connection with television programming. ESS Advertising has entered into agreements with ESPN Software India Private Limited (now known as Star Sports India Private Limited since it emerged with Star India Private Limited) for allotting advertisement time to various advertisers and advertising agencies in India.

18. ESS Advertising filed its return of income for AY 2010-11 on 1st October 2010 as a firm. The stand of ESS Advertising was that its revenue from sale of advertisement time being business profits, is not taxable in India since it has no PE in terms of Article 5 of the DTAA read with Article 7 (1) thereof.

19. The return filed by ESS Advertising was picked up by the AO for scrutiny. During the course of the assessment proceedings the AO enquired why the firm should not be treated as foreign company. By its letter dated 27th March 2014 ESS Advertising drew a distinction between a company and a partnership firm. Nevertheless the AO concluded the assessment proceedings and passed the draft assessment order under Section 144 C read with Section 143 (3) of the Act. ESS Advertising then went before the DRP which agreed that it was not an 'eligible Assessee' in terms of Section 144 C (15) (b) of the Act. The DRP accordingly declined to issue any direction to the AO.

20. Notwithstanding that the AO was bound by the order of the DRP

under Section 144C (15) (b) of the Act, the AO proceeded to pass a final assessment order under Section 144C read with Section 143 (3) of the Act. In effect the AO disregarded the binding directions issued by the DRP by characterising the DRP's order as 'grossly illegal'.

21. The aforementioned draft assessment order and the final assessment order were challenged by the ESS Advertising in this Court by filing Writ Petition (Civil) No. 2384 of 2015. While the said writ petition was pending, a notice dated 30th March 2016 was issued by the AO to ESS Advertising seeking to reopen the assessment for the AY 2010-11 on the ground that income had escaped assessment.

22. ESS Advertising replied to the notice on 5th May 2015 stating that the tax return submitted on 1st October 2010 should be treated as return filed in response to the notice under Section 148 of the Act. ESS Advertising also requested for the "reasons recorded" for reopening of the assessment.

23. More than seven months thereafter, on 9th December 2015, ESS Advertising received the reasons for reopening of the assessment. The reasons furnished to ESS Advertising for reopening of the assessment were as under:

"The Assessee has declared the interest on Indian income tax in its return of income. Further during assessment proceedings the Assessee has declared gross advertising revenue as non-taxable but finally 30% of them were assessed as attributable income to Indian PE. But the other income amounting to USD 418,939 left to be considered for inclusion in the income of the Assessee. Therefore, the other income of USD 418,939 has escaped assessment."

24. ESS Advertising raised the following contentions in its detailed objections for reopening of the assessment. Some of these contentions are

as under:

“(i) The Revenue has refused to consider the accounts of the Assessee and thereby held that the business income attributable to the Indian operations is estimated at 30 percent of the gross advertising revenue. Such determination of business income attributable to the India PE on an estimated percentage basis is deemed to have considered and taken all business incomes and expenses into its fold and does not leave any scope for picking any particular item reflected in the accounts for a specific treatment.

(ii) Therefore, after having considered and rejected the accounts of the Assessee, the action of the AO in stating that amount of USD 418,939 credited in Profit and Loss Account has escaped assessment is invalid and contrary to his own action in the original assessment proceedings.

(iii) The profit and loss account of the Assessee, which was filed during the assessment proceedings vide letter dated October 7, 2013 with the Respondent No 2 (copy of the letter dated October 7, 2013 filed during the original assessment proceeding annexed and marked as Annexure-9). The AO during the course of hearing raised a specific query in the questionnaire issued for filing of complete audited balance sheet and profit and loss account including all the schedules. The "other income" was duly reflected and formed part of the profit and loss account submitted and such Profit and Loss account was duly observed by the AO but he refused to consider the same during the assessment proceedings.

(iv) Therefore, it is explicitly clear that there is no new material found by the Respondent and the action is merely representing examination of same material which is on records to review the original assessment order. As there is neither any new material on record nor any finding as to the basis of forming the belief that the income has escaped assessment, a mere suspicion of escapement of income on review of order and material already on record cannot form a valid reason for reopening of assessment.”

25. While the objections of ESS Advertising were pending, this Court by an order dated 23rd March 2016 allowed the Writ Petition (Civil) No. 2384 of 2015 holding that the order of the DRP was binding on the AO.

Accordingly, a draft and final assessment order of the AO was set aside by this Court.

26. Thereafter on 25th November 2016, i.e., more than eight months after the judgment of this Court, the AO rejected the objections raised by ESS Advertising for reopening of the assessment. This was done without considering the objection raised by the ESS Advertising

27. At this stage ESS Advertising filed Writ Petition (Civil) No. 11971 of 2016 in this Court in which notice was issued on 21st December 2016. Liberty was granted to the Revenue to proceed with the assessment proceedings but it was restrained from making any final order during the pendency of these proceedings.

28. It transpired that on 19th December 2016 itself a draft assessment order was passed by the AO under Section 144C (1) read with Section 147/143 (3) of the Act making addition as proposed in the notice under Section 147 and 148 of the Act. This led to ESS Advertising filing an application to amend the writ petition to challenge the draft assessment order as well. An amendment was allowed by the Court by its order dated 27th January 2017. The Respondents were directed to main *status quo* and not enforce the draft assessment order. That interim order was subsequently directed to be made absolute during the pendency of the writ petition.

Revenue's reply

29. The reply filed by the Revenue to both Writ Petition (Civil) Nos. 11968 of 2016 and 11971 of 2016 is more or less similar. It is *inter alia* pointed out that while allowing both the writ petitions this Court by its order dated 23rd March 2016 clarified that it had expressed no opinion

regarding the validity of the proceedings against the Petitioners under Section 147/148 of the Act and that “the rights and contentions of the parties in those proceedings are left open to be urged and decided by the appropriate authority in accordance with law.”

30. It is then contended that “acting under *bonafide* belief and in compliance with the directions of the Hon’ble Delhi High Court Draft Assessment Order was passed.” It is further contended that since the earlier final assessment order was declared void *ab initio*, the net result was that the return filed by the Assessee “remains unassessed and therefore, no opinion can be said to have been formed by the AO.”

31. Relying on the decision of the Supreme Court in ***Deputy Commissioner of Income Tax v. Zuari Estate Development & Investment Co. Ltd. (2015) 373 ITR 661*** and ***Assistant CIT v. Rajesh Jhaveri Stock Brokers (P) Limited (2007) 291 ITR 500*** it is contended by the Revenue that there was no change of opinion by the AO and there was no valid assumption and jurisdiction under Section 147/148 of the Act. It is submitted that the necessary ingredients for exercise of jurisdiction under Section 147/148 of the Act have been duly satisfied before invoking its power of reassessment.

32. It is pointed out in para 23.3 of the counter affidavit, that against the finding of the DRP that the Assessee was not an eligible assessee, an appeal had been filed by the Revenue before the ITAT.

33. As regards ESS Distribution, it is contended that reasons for reopening of assessment was a matter of record and that the order disposing of the objections substituted. It is further submitted that the amount received by ESS Distribution was taxable income under Section

96 of the Act as well as DTAA. Notice was, therefore, rightly issued under Section 148 of the Act.

34. This Court has heard the submissions of Mr. Porus Kaka, learned Senior counsel appearing for the Petitioners and Mr. Rahul Kaushik, learned Senior standing counsel for the Revenue respectively.

Analysis and reasons

35. For the reasons that follow, the Court is of the view that the both the Writ Petition (Civil) Nos. 11968 and 11971 of 2016 pertaining to AYs 2010-11 by ESS Distribution and ESS Advertising respectively deserve to be allowed.

36. In respect of these very Assesseees and for the same AY 2010-11, the earlier draft assessment order passed by the AO under Section 144C of the Act has already been set aside by its judgment dated 23rd March 2016. That judgment referred to the order of the DRP which had held that both the Assesseees were not eligible Assessee under Section 144C (15) of the Act and that order of the DRP was binding on the AO. It was further held by this Court that the AO could not have disregarded the finding directions of the DRP and passed the final assessment order. This was an issue of jurisdiction of the AO to proceed under Section 144C of the Act against an entity which is a partnership firm incorporated outside India.

37. The fact that is undeniable is that the AO continues to be bound by the order of the DRP which was by this Court by its decision dated 23rd March 2016 in respect of the same Assesseees for the same AY 2010-11. Since the Revenue has not challenged that judgment, the AO had no option but follow the DRP's order. Further, the AO was aware that the earlier attempt at disobeying the DRP's order led to invalidation of the

draft and the final assessment order.

38. What is surprising is that while disposing of the objections to the reopening of the assessment, the AO again chose to only record that the DRP held that both the Assesseees were not eligible Assesseees. The AO did not refer to this Court's order dated 24th March 2016. This is despite the fact that the AO was disposing of the objections more than nine months after the judgment of this Court. This conduct of the AO is simply unacceptable.

39. The passing of the draft assessment order pursuant to reopening of the assessment under Section 147/148 of the Act, in respect of both the Assesseees and for the same AY 2010-11, is clearly in the teeth of the order of the DRP as well as judgment of this Court and is therefore, unsustainable in law. On this ground, both the draft assessment orders in respect of ESS Distribution and ESS Advertising for AY 2010-11 dated 19th December 2016 are liable to be set aside.

40. Nevertheless the Court has also examined the reasons for reopening of the assessments in respect of both the Assesseees for the AY in question. As far as ESS Distribution is concerned, two reasons have been adduced for reopening of the assessment. One was that the amount received by ESS Distribution from Scorpio, pursuant to the agreement entered into between them, was taxable under Section 9 (1) (i) of the Act read with the relevant provisions of the DTAA. The second was that the Assessee received from ESPN Software India Pvt. Ltd in the form of subscription revenue of Rs. 33,84,68,539 which had escaped assessment on account of failure by ESS Distribution to make appropriate disclosures in its return of income.

41. The Court has been shown a computation of income and notes to computation filed by ESS Distribution in the original assessment proceeding. It is clearly mentioned therein that during the year in question ESS Distribution has not conducted any business with Scorpio and accordingly, there were no receipts from Scorpio. Therefore, the said reason recorded for reopening the assessment was apparently invalid.

42. Even as regards the second reason viz., the difference between form 26 AS and the assessed income of the Assessee is as under:

Amount as assessed	4,06,98,53,517
Less: Amount included in revenue but received in subsequent year	(2,45,24,601)
Add: Amount already taxed/assessed in earlier year but received in current year	36,29,93,140
Amount as per Form 26 AS	4,39,89,22,056

43. All this forms part of the assessment proceeding. There was no new material for the AO to come into the conclusion that any other income arose during the AY in question that was left out from consideration. There was no nexus between the reasons to believe that income has escaped assessment and any new tangible material placed on record before the AO. The reopening was, therefore, based on a mere change of opinion which has been disapproved by the Supreme Court in ***CIT v. Kelvinator of India Ltd (2010) 320 ITR 561 (SC)*** law. There, the Supreme Court observed 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 be per se reason to re-open. 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 re-assess. But re-assessment has to be based on fulfillment 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 1st April, 1989, Assessing Officer has power to re-open, 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.

44. Further in *Asian Paints Limited v. ACIT (2009) 308 ITR 195 (Bom)*, the Bombay High Court observed as under:

“It is further to be seen that the Legislature has not conferred power on the Assessing Officer to review its own order. Therefore, the power under Section 147 cannot be used to review the order. In the present case, though the Assessing Officer has used the phrase “reason to believe”, admittedly between the date of the order of assessment sought to be reopened and the date of formation of opinion by the Assessing Officer, nothing new has happened, therefore, no new material has come on record, no new information has been received, it is merely a fresh application of mind by the same Assessing Officer to the same set of facts and the reason that has been given is that the same material which was available on record while assessment order was made was inadvertently excluded from consideration. This will, in our opinion, amount to opening of the assessment merely because there is change of opinion. The Full Bench of the Delhi High Court in its judgment in the case of *Kelvinator (2002) 256 ITRs* referred to above, has taken a clear view that reopening of assessment under Section 147 merely because there is a change of opinion cannot be allowed. In our opinion, therefore, in the present case also, it was not permissible for Respondent No. 1 to issue notice under Section 148.”

45. It requires to be noticed that the Special Leave Petition filed by the Revenue against the aforementioned decision was dismissed by the Supreme Court.

46. In *Commissioner of Income Tax v. Orient Craft Limited (2012) 354*

ITR 536 (Del), this Court relied upon the decision of the Supreme Court in **CIT v. Kelvinator** (supra) and held as under:

“..... In the present case, the reasons disclose that the Assessing Officer reached the belief that there was escapement of income “on good through the return of income” filed by the Assessee after he accepted the return under Section 143 (1) without scrutiny, and nothing more. This is nothing but a review of the earlier proceedings and on abuse of power by the Assessing Officer, both strongly deprecated by the Supreme Court in **CIT v. Kelvinator** (supra). The reasons recorded by the Assessing Officer in the present case do confirm our apprehension about the harm that a less strict interpretation of the words “reason to believe” vis-a-vis intimation issued under Section 143 (1) can cause to the tax regime. There is no whisper in the reasons recorded, of any tangible material which came to the possession of the Assessing Officer subsequent to the issue of the intimation. It reflects an arbitrary exercise of the power conferred under Section 147.”

47. As regards ESS Advertisement, there was only one reason for reopening of the assessment which is that 30% of the gross advertising revenue was assessed as an attributable income to Indian PE amounting to USD 418,939 had been left out for being considered.

48. In the final assessment order passed by the AO in the first round it was observed in para 10.3 which reads as under:

“10.3 The Assessee is receiving the advertisement revenue from ESPN India. The Assessee has submitted the profit and loss account for the year ended 31st March 2010. The Assessee’s activity has been the purchase and sale of advertising time. As discussed earlier, the purchase of airtime is not recorded properly in the accounts. In addition to this, it is not demonstrated that the purchase of airtime by it from ESPN Software Singapore is at arm’s length. Considering this, the accounts maintained by the Assessee in Mauritius are not considered in this order, for working out the profits earned by it through the activities of ESPN India in India.”

49. Thus, the determination of business income attributable to the India

PE on an estimated percentage basis was deemed to have considered and taken into account all business income and expenses into its fold. There was no occasion for lifting any particular item reflected in the accounts for a specific treatment.

50. Further the above aspect was already a part of the original assessment and there was no fresh tangible material available with the AO to form reasons to believe that any income of the Assessee escaped assessment. This order, therefore, is mere change of opinion.

51. In ***CIT v. Smt. Paramjit Kaur (2008) 311 ITR 38 (P&H)*** it was held as under:

"Section 147 empowers the Assessing Officer to assess or reassess income chargeable to tax if he has reasons to believe that the income for any assessment year has escaped assessment. The power conferred under this section is very wide, but at the same time, it cannot be stated to be a plenary power, the Assessing Officer can assume jurisdiction under the said provision, provided there is sufficient material before him. He cannot act on the basis of his whim and fancy, and the existence of material must be real. Further, there must be nexus between the material and escapement of income. The Assessing Officer must record reasons showing due application of mind before taking recourse to reassessment proceedings. The Assessing Officer can assume jurisdiction for reassessment proceedings, provided he has reasons to believe, but the same cannot be taken recourse to on the basis of reasons to suspect. [Para 4]

In the instant case, it was undisputed that the Assessing Officer had initiated reassessment proceedings on the basis of information received from the survey circle that the assessee had got prepared a demand draft which was not accounted for in the books of account of the assessee. But the Assessing Officer had not examined and corroborated the information received from the survey circle before recording his own satisfaction of escaped income and initiating reassessment proceedings. The Assessing Officer had, thus, acted only on the basis of suspicion and it could not be said that the same was based on belief that the income chargeable to tax had escaped

assessment. The Assessing Officer has to act on the basis of 'reasons to believe' and not on 'reasons to suspect'. The Tribunal had, thus, rightly concluded that the Assessing Officer had failed to incorporate the material and his satisfaction for reopening the assessment and, therefore, the issuance of notice under section 148 for reassessment proceedings was not valid. [Para 6]”

52. As already noticed, the above position is consistent with ***CIT v. Kelvinator India Pvt. Ltd*** (supra). Consequently, even in the case of ESS Advertisement, the Court is of the view that the reopening of the assessment under Section 147/148 of the Act for the AY in question was bad in law.

Conclusion concerning AY 2010-11

53. For the aforementioned reasons, the Court quashes the notices issued to both ESS Advertisement and ESS Distribution under Sections 147/148 and all consequential proceedings thereto including the order disposing objections to the draft assessment orders passed on 19th December 2016 under Section 144C of the Act for AY 2010-11. Writ Petition (Civil) Nos. 11968 of 2016 and 11971 of 2016 are accordingly allowed.

Facts concerning AY 2008-09

54. Now turning to the facts in Writ Petition (Civil) No. 11972 of 2016 by ESS Advertisement for AY 2008-09 and Writ Petition (Civil) No. 12031 of 2016 by ESS Distribution for the same AY 2008-09.

55. One difference as far as the facts are concerned is that the original assessment was under Section 143 (1) of the Act and not under Section 143 (3) of the Act. However, what is similar to AY 2010-11 is that in both these cases what has been issued by the AO is a draft assessment under Section 144C of the Act. This was for the reasons explained hereinbefore impermissible in law. There is no valid explanation for the

AO to repeatedly ignore the order of the DRP which held both the Assesseees to be not eligible for the purpose of Section 144C of the Act. The AO has persisted in issuing legally unsustainable draft assessment orders.

56. Even on merits, the reasons for reopening of the assessment in these two cases do not bear scrutiny. As far as ESS Distribution is concerned, during the original assessment proceedings, notice was issued by the AO under Section 143 (1) as well as under Section 143 (2) raising some queries on the basis of which the decision the assessment is now sought to be reopened. Those notices were not taken to logical end.

57. In this connection, a reference was made to the decision of this Court in *KLM Royal Dutch Airlines v. Assistant Director of Income Tax (2007) 292 ITR 49 (Del)* where it was observed as under:

“Applying this line of decisions to the facts of the present case, the inescapable conclusion that would have to be reached is that while assessment proceedings remain inchoate, no “fresh evidence or material” could possibly be unearthed. If any such material or evidence is available, there would be no restrictions or constraints on its being taken into consideration by the Assessing Officer for framing the then current assessment. If the assessment is not framed before the expiry of the period of limitation for a particular assessment year, it would have to be assumed that since proceedings had not been opened under Section 143 (2), the return had been accepted as correct. It may be argued that thereafter recourse could be taken to Section 147, provided fresh material had been received by the Assessing Officer after the expiry of limitation fixed for framing the original assessment. So far as the present case is concerned we are of the view 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.”

58. The question whether the Assesseees had a PE in India has engaged the

Revenue from AY 2003-04 onwards. The Court has been shown an assessment order dated 28th March 2006 in the case of ESPN Star Sports Mauritius for AY 2003-04 where this issue was specifically discussed. Likewise in the case of ESS Distribution an assessment order dated 28th March 2010 for AY 2005-06 also refers to the assessment history where the question of the Assessee having PE in India is discussed. Likewise the assessment order dated 21st October 2011 for AY 2007-08 in the case of ESPN Star Sport Mauritius.

59. Consequently, when the Assessee had filed their respective returns for 2009-10 and intimation was sent under Section 143 (1) of the Act, it is difficult to believe that the Revenue was unaware of the Assessee having a PE in India particularly when in each of the other AYs the matter was contested and is pending at various levels of the hierarchy. All this goes to show that the Revenue was unable to point out any fresh tangible material which could form the basis for believing the argument on this aspect.

Conclusion for AY 2008-09

60. For all the aforementioned reasons, the Court is of the view that reopening of the assessment for AY 2008-09 in respect of both the Assessee is unsustainable in law.

61. As a result, the notice dated 27th March 2015 issued to each of the Assessee under Section 147/148 of the Act and all proceedings consequential thereto including the order dated 25th November 2016 passed by the AO rejecting objections to the draft assessment order dated 19th December 2016 passed under Section 144C of the Act are hereby quashed.

62. The writ petitions are allowed in the above terms but, in the facts and circumstances of the case, with no order as to costs.

S. MURALIDHAR, J.

PRATHIBA M. SINGH, J.

OCTOBER 31, 2017

rk

