IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 1773 of 2012

GENERAL MOTORS INDIA PVT.LTD - Petitioner

Versus

DEPUTY COMMISSIONER OF INCOME-TAX - Respondent
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Appearance :
MR S N SOPARKAR, SENIOR COUNSEL ASSISTED BY MR BANDISH SOPARKAR FOR MRS
SWATI SOPARKAR for Petitioner.
MR KM PARIKH for Respondent.
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CORAM : HONOURABLE MR.JUSTICE V. M. SAHAI
and
HONOURABLE MR.JUSTICE N.V. ANJARIA

Date : 23/08/2012
CAV JUDGMENT

(Per : HONOURABLE MR.JUSTICE V. M. SAHAI)

1. The petitioner (assessee) Company was incorporated on 15.4.1994 and since April 2000, it is a wholly owned subsidiary of the General Motors Corporation Group. Its equity is held by G.M. Asia Pacific Holding LIC, USA and Holden Limited, Australia, a nominated subsidiary of General Motors Corporation, USA. The assessee Company is a private limited Company incorporated under the Companies Act, 1956 and is engaged in manufacturing and trading of Automobiles and its parts under the brand name 'Chevrolet'.

2. The assessee filed his return of income for the assessment year (for short the A.Y.) 2006-07 on 29.12.2006 declaring total turnover at Rs.1884.51 Crores (net of excise) during the year on which net profit was shown at Rs.55.02 Crores. The total taxable income was declared at Rs.NIL under e-filing. The case of the assessee was taken up for scrutiny by issuing notice on 17.12.2007 under Section 143(2) of the Income-tax Act, 1961 (in short the Act). Thereafter, a notice under Section 143(2) along with notice under Section 142(1) was issued with detailed questionnaire. In response Chartered Accountants of the assessee attended from time to time and filed details as called for. Since there were large number of transactions of import, royalty payment, management fee etc., the Assessing Officer after considering the volume of such transactions referred the return to Transfer Pricing Officer under Section 92CA(1) of the Act after obtaining approval of Commissioner of Income Tax–3, Baroda. The Transfer Pricing Officer, namely, the Additional Commissioner of Income Tax (TPO-1), Ahmedabad passed an order under Section 92CA(3) of the Act on 29.10.2009 and directed the Assessing Officer to make an addition of Rs.53.15 Crores to the total income of the assessee.

3. The additions of Rs.53.15 Crores proposed in the income returned by the assessee was prejudicial to his interest, therefore, a draft assessment order was passed on 20.11.2009 under

Section 144C of the Act and it was forwarded and served on the assessee on the same day. The assessee filed his objections on 17.12.2009 to the draft assessment order with the Dispute Resolution Panel, Ahmedabad. A copy of the objections was also filed on 18.12.2009 in the office of the Deputy Commissioner of Income Tax, Panchmahal Circle, Godhra (for short the Assessing Officer).

4. The Dispute Resolution Panel, Ahmedabad issued direction to the Assessing Officer on 27.8.2010 to make additions under the provisions of Section 144C (6) of the Act and thereafter, the Assessing Officer following the directions of the Dispute Resolution Panel as per the provisions of Section 144C (10) of the Act passed assessment order under Section 143(3) read with Section 144C of the Act on 20.09.2010 wherein the Assessing Officer made additions under various heads to the income of the assessee, and allowed unabsorbed depreciation of A.Y. 1997-98 Rs.43,60,22,158/- and accepted the total income at Rs.NIL. The relevant additions were made to the income of the assessee but the same was set off against various unabsorbed losses and unabsorbed depreciation of the previous year.

5. Paragraph 12 and 13 of the assessment order dated 20.9.2010 is extracted below :-

“12. In view of the discussion in the forgoing paras, total income of the assessee is worked out as under :-

Profit of business as (Rs.)

per statement of income 31,13,54,500/-

Add :- Additions as discussed above :-

1. Adjustment on account of Arm's Length

Price in International transactions

(As per para 5.3) 1,52,44,00,000/-

2. Amortization of Lease Hold

Land (As per para 6.3) 3,14,830/-

3. Out of claim u/s 35D (As per para 7.2) 35,000/-

4. Out of Gift exp. (As per para 8.1) 4,16,978/-

5. Out of Cost of Wastage & Obsolete

material, etc. (As per para 9.2) 2,50,68,560/-

6. Out of depreciation on hand

furnishing exp.(As per para 10.2) 2,15,551/-

7. Out of workmen & staff welfare exp.

(As per para 11.2) 10,60,000/- **1,55,15,10,919/-**

B/f 1,86,28,62,419/-

C/f 1,86,28,62,419/-

Add :- Income from other sources (being interest) **5,41,02,567/-**

Gross Total Income 1,91,69,64,986/-

Less :-

1. Unabsorbed losses of

A.Y.2000-01 26,07,81,732/-

2. Unabsorbed losses of

A.Y.2001-02 11,31,11,045/-

3. Unabsorbed Depreciation of

A.Y.97-98 43,60,22,158/-

4. Unabsorbed Depreciation of

A.Y. 1999-2000 45,35,67,710/-

5. Unabsorbed Depreciation of

A.Y. 2000-01 37,89,38,433/-

6. Unabsorbed Depreciation of

A.Y. 2001-02 27,45,43,908/- **1,91,69,64,986/-**

Total Income NIL

* The following are allowed to be carried forward to the succeeding years

1. Unabsorbed depreciation of

A.Y. 2001-02 Rs. 7,75,83,948/-

2. Unabsorbed depreciation of

A.Y. 2002-03 Rs.14,89,50,584/-

3. Unabsorbed depreciation of

A.Y. 2003-04 Rs.33,87,96,543/-

13. Assessed u/s. 143(3) read with section 144C of the IT Act. Calculate tax. Give credit of prepaid taxes. Issue Demand notice accordingly. Issue show cause notice u/s. 274 read with section 271(1)(c) of the IT Act for the reasons discussed above in para-5.4."

6. The Assessing Officer on 29.3.2011 issued notice under Section 148 of the Act wherein it was stated that he had reason to believe that income chargeable to tax for the A.Y. 2006-07 had escaped assessment within the meaning of Section 147 of the Act and, therefore, he had proposed to reassess income/recompute loss/ depreciation allowance for the aforesaid Assessment Year. In compliance of the notice dated 29.3.2011, the assessee wrote a letter dated 4.4.2011 to the Assessing Officer requesting him to supply the reasons recorded before issuing notice under section 148 of the Act. The reasons for reopening the assessment recorded under Section 147 of the Act dated 29.3.2011 was supplied to the assessee on 29.11.2011. According to the assessee, the only ground for reopening the assessment was that the Assessing Officer had reason to believe that the unabsorbed depreciation pertaining to A.Y. 1997-98 of Rs.43,60,22,158/- was wrongly allowed to be set off against the income of A.Y. 2006-07 though Section 32(2) of the Act as amended by the Finance Act No.2, 1996, the unabsorbed depreciation for the A.Y. 1997-98 could be carried forward upto a maximum period of 8 years from the year in which it was first computed, therefore, brought forward depreciation was eligible for carry forward and set off against the income for A.Y. 2005-06 only.

7. It is pleaded by the petitioner that he raised various objections to notice under Section 148 by his objection dated 7.12.2011 before the Assessing Officer that there was no failure on his part to disclose fully and truly all material facts necessary for assessment and requested the Assessing Officer to drop the re-assessment proceedings. The Assessing Officer did not pass any order disposing of the objections dated 7.12.2011 filed by the petitioner and he passed assessment order on 27.12.2011 under Section 143(3) read with Section 147 of the Act and objection dated 7.12.2011 was also rejected by him in the assessment order.

8. By means of this writ petition, the petitioner has challenged the impugned notice dated 29.3.2011 issued under section 148 of the Act and the assessment order dated 27.12.2011 to this petition.

9. We have heard Mr. S.N. Soparkar, learned Senior counsel assisted by Mr. Bandish Soparkar holding brief of Mrs. Swati Soparkar for the petitioner and Mr. K.M. Parikh, learned Central Government Standing Counsel appearing for the revenue.

10. Mr. S.N. Soparkar, learned Senior counsel for the petitioner has urged that the notice dated 29.3.2011 under Section 148 of the Act was issued by the Assessing Officer to which objections was filed by the assessee on 7.12.2011. Therefore, the Assessing Officer was first required to dispose of the objection of the assessee by a reasoned and speaking order and thereafter, he could proceed to pass the assessment order under Section 143(3) read with Section 147 of the Act. It is vehemently urged that it was not open to the Assessing Officer to pass an assessment order under Section 143(3) read with Section 147 of the Act on 27.12.2011 and reject the objection filed by the assessee dated 7.12.2011 in the same assessment order. According to the petitioner, the order

passed by the Assessing Officer is in violation of the decision of the Apex Court in GKN Driveshafts (India) Limited (infra), therefore, it is urged that the composite assessment order dated 27.12.2011 is illegal, without jurisdiction and is liable to be quashed.

11. The other argument of learned Senior Counsel for the assessee is that the impugned notice issued under Section 148 of the Act is contrary to law and it amounts to change of opinion by the Assessing Officer, thus, the notice is bad in law. When the earlier assessment order was passed on 20.9.2010, all material facts were truly and fully disclosed. The Assessing Officer even made additions to the income of the assessee and set off the same against the unabsorbed losses and unabsorbed depreciation of the previous years including the year under question i.e. A.Y. 1997-98. The reopening of the assessment is now sought on the pretext that the unabsorbed depreciation for the A.Y. 1997-98 was inadmissible as per the provisions of Section 32(2) of the Act as amended by Finance Act No.2 of 1996 and not eligible for being carried forward and set off against the income for the A.Y. 2006-07. Mr. Soparkar also contended that an issue which had already been dealt with by the Assessing Officer during the assessment proceedings cannot be reopened on the basis of mere change of opinion of the Assessing Officer and it would amount to providing power of review to him in absence of any tangible material on record. Therefore, the notice issued under Section 148 based on mere change of opinion is liable to be quashed. He further urged that since the notice issued under Section 148 of the Act is illegal, therefore, the notice as well as the assessment order both were liable to be quashed by this Court under the writ jurisdiction.

12. Learned Senior Counsel Mr. Soparkar forcefully urged that Section 32(2) of the Act (as substituted by the Finance Act, 2001) would be applicable and unabsorbed depreciation for A.Y. 1997-98 to 2001-02 could be carried forward indefinitely. The depreciation could be claimed in any subsequent year irrespective of time limit. The 8 year limit on the ground on which the Assessing Officer has formed his opinion to reopen the assessment was no more applicable due to change in law from the A.Y. 2002-03. It was submitted that this aspect was relevant and raised in the objection dated 7.12.2011 which was required to be considered by the Assessing Officer.

13. Mr. Soparkar, lastly urged that there was no tangible material available with the Assessing Officer on the basis of which he could have formed an opinion that any income chargeable to tax had escaped assessment.

14. On the other hand, Mr.K.M. Parikh, learned Central Government Standing Counsel appearing for the revenue has urged that fresh assessment order had been passed by the Assessing Officer on 27.12.2011. Therefore, the writ petition under Article 226 of the Constitution of India would not be maintainable. The remedy of the assessee lies in filing a statutory appeal which is available to the assessee and is required to be exhausted by the assessee. In the alternative, he has urged that if this writ petition is entertained, provisions of appeal would be rendered redundant as every assessee would prefer to approach this Court bye-passing the statutory remedy of appeal. In support of his argument, he placed reliance on the decisions in **Arvind Mills Ltd. (infra) and GKN Driveshafts (INDIA) Ltd. (infra)**.

15. Mr. Parikh has further urged that the unabsorbed depreciation for the A.Y. 1997-98 can be carried forward upto maximum period of 8 years from the year in which it was first computed. Thus, brought forward depreciation for the A.Y. 1997-98 was eligible for being carried forward and set off against the income for A.Y. 2005-06 only and unabsorbed depreciation of Rs.43,60,22,158/- for the A.Y. 1997-98 was not eligible for being carried forward and set off against income of A.Y. 2006-07. Therefore, the unabsorbed depreciation for the A.Y. 1997-98

was wrongly carried forward and set off against the income for the A.Y. 2006-07. Therefore, income to the extent has escaped assessment and the Assessing Officer rightly issued notice to the assessee under Section 148 after complying with Section 147 of the Act.

16. The learned counsel for the revenue has urged that while passing the assessment order dated 27.12.2011, the Assessing Officer has considered the objections of the assessee dated 7.12.2011 and, therefore, it cannot be urged by the assessee that the assessment order has been passed without disposing of the objections filed to the notice under Section 148 of the Act. He further urged that even if the objections dated 7.12.2011 of the assessee was decided by the Assessing Officer in the assessment order, that will not make the assessment order illegal and without jurisdiction.

17. Mr. Parikh further urged that reopening of assessment was on tangible material. He urged that if there was an error in applying the provisions of law, it can be treated to be tangible material and the Assessing Officer was justified in reopening of assessment by issuing notice under Section 148 of the Act. From a bare perusal of Section 32(2) as amended by Finance Act No.2 of 1996, it is established that income chargeable to tax has escaped assessment and set off for unabsorbed depreciation could not have been allowed for the A.Y. 2006-07 as the period of 8 years expired in A.Y. 2005-06. There was a clear link between the material facts and the opinion formed by the Assessing Officer for reassessment. Therefore, the writ petition is liable to be dismissed.

18. Before we advert to the rival contentions raised by learned counsel for the parties, it is necessary to extract the reasons given by the Assessing Officer dated 29.3.2011 for reopening of assessment under Section 147 of the Act, which is reproduced below :-

> "**REASONS FOR REOPENING OF ASSESSMENT**
>
> In this case, the assessee has filed return of income on 29.12.2006 declaring total income at Rs.NIL under E-filing of return. In this case, an order was passed by the Transfer Pricing Officer, Addl. CIT (TOP-I), Ahmedabad u/s. 92CA(3) of the I.T. Act on 29.10.2009 and the case was referred to Dispute Resolution Panel. Assessment order was passed under Section 143(3) r.w.s. 144C of the I.T. Act on 20.09.2010 on total income at Rs.NIL. In the assessment order dated 20.09.2010, the unabsorbed depreciation pertaining to A.Y.97-98 of Rs.43,60,22,158/- was allowed to be set off against the income of the A.Y. 2006-07. As per provision of Section 32(2) of the I.T. Act as amended by the Finance Act No.2, 1996 w.e.f. A.Y. 97-98, the unabsorbed depreciation for A.Y. 97-98 can be carried forward upto maximum period of 8 years from the year in which it was first computed. Thus brought forward depreciation for A.Y. 97-98 was eligible for carried forward and set off against the income for A.Y. 2005-06 only. Therefore, the unabsorbed depreciation of Rs.43,60,22,158/- for A.Y. 97-98 was not eligible for carried forward and set off against the income for A.Y. 2006-07 and therefore, the unabsorbed depreciation for A.Y. 97-98 was wrongly carried forward and set off against the income for A.Y. 2006-07. Therefore, the income to the extent has escaped assessment.
>
> I have therefore reason to believe that income of Rs.43,60,22,158/- being wrong set off of unabsorbed depreciation for A.Y. 97-98 has escaped assessment within the meaning of Section 147 of the Act.

Issue notice u/s. 148 of the I.T. Act.

Date :- 29.03.2011 Sd/-

Place :- Godhra Deputy Commissioner of Income-tax

Panchmahals Circle, Godhra."

19. The first question which arises for consideration is whether the writ petition filed by the petitioner challenging the notice under Section 148 and the reassessment order is maintainable or it is liable to be dismissed as adequate alternative remedy of filing an appeal was available or remedy of appeal had been availed by the petitioner while the writ petition was pending? Recently, a Division Bench of this Court in **Parixit Industries (P.) Ltd. v. Assistant Commissioner of Income-tax (OSD) Circle-5, [2012] 207 TAXMAN 140 (Guj)** has considered the question that where the Assessing Officer has issued notice under Section 148 after recording reasons under Section 147 of the Act and if an objection is filed by the assessee to the notice under Section 148, then the order passed by the Assessing Officer could be challenged by way of writ petition. The Division Bench had considered the decisions of the Apex Court in CIT v. A. Raman & Co. [1968] 67 ITR 11, Gemini Leather Stores v. ITO, [1975] 100 ITR 1 and ITO v. Nawab Mir Barkat Ali Khan Bahadur, [1974] 97 ITR 239. The Apex Court has held that in a situation, where the case of Assessing Officer is plainly of oversight, in such a situation, the Assessing Officer cannot take recourse to Section 147 to remedy the error resulting from his own oversight. The Division Bench in Parixit Industries (supra) relying on the aforesaid decisions of the Apex Court had held that if the assessee had not suppressed any material at the time of regular assessment and no new document has come before the Assessing Officer, then if the Assessing Officer has given relief to the assessee, he cannot change his view from the selfsame material on record which would not come within the purview of Sections 147 and 148 of the Act as it would be a case of second thought on the same materials. Therefore, the Division Bench held that the condition precedent for issue of notice under Section 148 of the Act was not established from the material on record and the notice was quashed in exercise of powers under Article 226 of the Constitution as there was absence of existence of any tangible material before the Assessing Officer to come to the conclusion that there was escapement of income from assessment, therefore, the Assessing Officer exceeded his authority to reopen the assessment merely on the basis of change of opinion.

20. In another decision the Division Bench of this Court in **Vishwanath Engineers v. Assistant Commissioner of Income Tax [2012] 207 TAXMAN 121 (Guj)** had considered the decisions of other High Courts in Ispat Industries Ltd. v. Dy. CIT [2002] 253 ITR 474 (Cal), Tolin Rubbers (P.) Ltd. v. Asstt. CIT [2003] 264 ITR 439 (Kerala) and Dishman Pharmaceuticals & Chemicals Ltd. v. Dy. CIT [2011] 45 SOT 37 (Ahd) (URO). The Division Bench held in paragraph 18 that where the Assessing Officer had reopened the proceedings merely on the ground that from the material available, the view earlier adopted by him was erroneous one, such fact cannot be a good ground for reassessment. The Division Bench has further held that if reasons for issuing notice under Section 148 is demanded by the assessee which is provided to the assessee and instead of deciding the objection of the assessee, the Assessing Officer passes an assessment order, a writ petition would be maintainable in view of the law laid down by the Apex Court in Mafatlal Industries Ltd. v. Union of India [1997] 5 SCC 536. The Division Bench in paragraph 31 held as under :-

> "From the above observation it is clear that the Supreme Court in the case of *Mafatlal Industries Ltd. (supra)*, has specifically recognized the power of this court to entertain a writ-application by pointing out that such power cannot be circumscribed by the provisions of any enactment but while exercising such power, the writ–court will certainly have due regard to the legislative intent evidenced by the provisions of the concerned statute and would exercise their jurisdiction consistent with the provisions of the Act. Thus, in a given case, if the statutory authority exercises its power even in the absence of the conditions recognized by the statutory provisions, a writ-court can definitely interfere to avoid prolonged alternative remedy."

The Division Bench has further held in Vishwanath Engineers (supra) that if during pendency of the writ petition challenging the reassessment order on the ground that objection filed by the assessee to the notice under Section 148 had not been decided, the petitioner files a regular appeal, even then the writ petition would be maintainable. It held in paragraph 11 that "*It is now settled law that if a litigant has concurrent remedies against the selfsame order, it can avail of the both without prejudice to his rights and contentions made therein unless there is a specific bar created by statute in the matter of availing both the remedies.*" The Division Bench quashed the notice issued under Section 148 of the Act, on the ground of non-existence of valid ground as disclosed in the reasons and since the initiation of proceedings itself was bad, the subsequent order of reassessment was also quashed.

21. The procedure for filing and deciding objection to the notice under section 148 of the Act had been crystallized by the Apex Court in **GKN Driveshafts (INDIA) Ltd. v. Income Tax Officer and others [2003] 259 ITR 19,** wherein the Court has held as under :-

> "However, we clarify that when a notice under section 148 of the Income-tax Act is issued, the proper course of action for the noticee is to file a return and if he so desires, to seek reasons for issuing notices. The Assessing Officer is bound to furnish reasons within a reasonable time. On receipt of reasons, the noticee is entitled to file objections to issuance of notice and the Assessing Officer is bound to dispose of the same by passing a speaking order. In the instant case, as the reasons have been disclosed in these proceedings, the Assessing Officer has to dispose of the objections, if filed, by passing a speaking order, before proceeding with the assessment in respect of the abovesaid five assessment years."

22. A Division Bench of this Court in **Arvind Mills Ltd. v. Assistant Commissioner of Wealth Tax (No.2), [2004] 270 ITR 469** after considering the decision of this Court in Garden Finance Ltd. v. ACIT, (2004) 268 ITR 48 (Guj.) held in the majority opinion as under :-

> ".....What the Supreme Court has now done in the GKN case (2003) 259 ITR 19 is not to whittle down the principle laid down by the Constitution Bench of the Apex Court in Calcutta Discount Co. Ltd. case (1961) 41 ITR 191 but to require the assessee first to lodge preliminary objection before the Assessing Officer who is bound to decide the preliminary objections to issuance of the re-assessment notice by passing a speaking order and, therefore, if such order on the preliminary objections is still against the assessee, the assessee will get an opportunity to challenge the same by filing a writ petition so that he does not have to wait till completion of the

re-assessment proceedings which would have entailed the liability to pay tax and interest on re-assessment and also to go through the gamut of appeal, the second appeal before Income-tax Appellate Tribunal and then reference/tax appeal to the High Court.

Viewed in this light, it appears to me that the rigour of availing of the alternative remedy before the Assessing Officer for objecting to the re-assessment notice under section 148 has been considerably softened by the Apex Court in GKN case (2003) 259 ITR 19 in the year 2003. In my view, therefore, the GKN case (2003) 259 ITR 19 (SC) does not run counter to the Calcutta Discount Co. Ltd. case (1961) 41 ITR 191 (SC) but it merely provides for challenge to the re-assessment notice in two stages, that is,-
(i) raising preliminary objections before the Assessing Officer and in case of failure before the Assessing Officer,

(ii) challenging the speaking order of the Assessing Officer under section 148 of the Act."

9. The position in law is thus well settled. After a notice for re-assessment has been issued an assessee is required to file the return and seek reasons for issuance of such notice. The Assessing Officer is then bound to supply the reasons within a reasonable time. On receipt of reasons, the assessee is entitled to file preliminary objections to issuance of notice and the Assessing Officer is under a mandate to dispose of such preliminary objections by passing a speaking order, before proceeding with the assessment in respect of the assessment year for which such notice has been issued."

23. From the aforesaid discussion, we are of the considered opinion that writ petition under Article 226 of the Constitution of India is maintainable where no order has been passed by the Assessing Officer deciding the objection filed by the assessee under Section 148 of the Act and assessment order has been passed or the order deciding an objection under Section 148 of the Act has not been communicated to the assessee and assessment order has been passed or the objection filed under Section 148 has been decided along with the assessment order. If the objection under Section 148 has been rejected without there being any tangible material available with the Assessing Officer to form an opinion that there is escapement of income from assessment and in absence of reasons having direct link with the formation of the belief, the writ Court under Article 226 can quash the notice issued under Section 148 of the Act. The writ petition filed by the petitioner is maintainable. The Assessing Officer is mandated to decide the objection to the notice under Section 148 and supply or communicate it to the assessee. The assessee gets an opportunity to challenge the order in a writ petition. Thereafter, the Assessing Officer may pass the reassessment order. We hold that it was not open to the Assessing Officer to decide the objection to notice under section 148 by a composite assessment order. The Assessing Officer was required to, first decide the objection of the assessee filed under section 148 and serve a copy of the order on assessee. And after giving some reasonable time to the assessee for challenging his order, it was open to him to pass an assessment order. This was not done by the

> Assessing Officer, therefore, the order on the objection to the notice under section 148 and the assessment order passed under the Act deserves to be quashed.

24. The second question which arises for consideration in this petition is whether an assessment order can be reopened on the ground that in the original assessment order, the Assessing Officer had not correctly applied the provisions of Section 32(2) of the Act? The assessee filed his return of income for the A.Y. 2006-07 on 29.12.2006 declaring his total taxable income at Rs.NIL under e-filing. In his return the assessee had claimed unabsorbed losses for A.Y. 2000-01, A.Y. 2001-02 and unabsorbed depreciation for A.Y. 1997-98, A.Y.1999-2000, A.Y.2000-01, A.Y.2001-02. The case of the assessee was taken up for scrutiny and notice was issued on 17.12.2007 under Section 143(2) of the Act. Thereafter, a notice under Section 143(2) along with notice under Section 142(1) was issued with detailed questionnaire. In response the Chartered Accountants of the assessee attended from time to time and filed details as called for. Since there were large number of transactions of import, royalty payment, management fee etc., the Assessing Officer after considering the volume of such transactions referred the return to Transfer Pricing Officer under Section 92CA(1) of the Act after obtaining approval of Commissioner of Income Tax–3, Baroda. The Transfer Pricing Officer, namely, the Additional Commissioner of Income Tax (TPO-1), Ahmedabad passed an order under Section 92CA(3) of the Act on 29.10.2009 and directed the Assessing Officer to make an addition of Rs.53.15 Crores to the total income of the assessee. The Dispute Resolution Panel, Ahmedabad issued direction to the Assessing Officer on 27.8.2010 to make additions as per the provisions of Section 144C (6) of the Act and thereafter, the Assessing Officer following the directions of the Dispute Resolution Panel as per the provisions of Section 144C (10) of the Act passed assessment order under Section 143(3) read with Section 144C of the Act on 20.09.2010 wherein the Assessing Officer made additions under various heads to the income of the assessee, and allowed unabsorbed depreciation of A.Y. 1997-98 Rs.43,60,22,158/- as well as for other assessment years and accepted the total income of the assessee at Rs.NIL. The relevant additions were made to the income of the assessee but the same was set off against various unabsorbed losses and unabsorbed depreciation of the previous years.

25. From the facts stated above, it is clear that the there was no omission or failure on the part of the assessee to make a return under Section 139 of the Act. The assessee had disclosed fully and truly all material facts necessary for his assessment for the year. Nor subsequently, the Assessing Officer had any tangible material on record, on the basis of which he could have formed his opinion or could have reason to believe that income chargeable to tax had escaped assessment.

26. The Apex Court in **Commissioner of Income Tax v. Kelvinator of India Limited [2010] 320 ITR 561 (SC)** has explained the law that the Assessing Officer while exercising powers of reassessment cannot reopen an assessment on mere change of opinion. The power of reassessment could be exercised by the Assessing Officer provided there was some "tangible material" to come to the conclusion that there was escapement of income from reassessment. Reason must have a link with the formation of the brief. The relevant part of the judgment is extracted below :-

> "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 fulfillment 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 fulfillment 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 that 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."

27. A Division Bench of this court in its decision dated 30.7.2012 in Special Civil Application No.29792 of 2007, **Gujarat Power Corporation Ltd. v. Assistant Commissioner of Income Tax**, while considering a case of scrutiny assessment had in paragraphs 41 to 43 held as under:

"41.The powers under section 147 of the Act are special powers and peculiar in nature where a quasi-judicial order previously passed after full hearing and which has otherwise become final is subject to reopening on certain grounds. Ordinarily, a judicial or quasi-judicial order is subject to appeal, revision or even review if statute so permits but not liable to be re-opened by the same authority. Such powers are vested by the Legislature presumably in view of the highly complex nature of assessment proceedings involving large number of assessees concerning multiple questions of claims, deductions and exemptions, which assessments have to be completed in a time frame. To protect the interest of the revenue, therefore, such special provisions are made under section 147 of the Act. However, it must be appreciated that an assessment previously framed after scrutiny when reopened, results into considerable hardship to the assessee. The assessment gets reopened not only qua those grounds which are recorded in the reasons, but also with respect to entire original assessment, of course at the hands of the revenue. This obviously would lead to considerable hardship and uncertainty. It is precisely for this reason that even while recognizing such powers, in special requirements of the statute, certain safeguards are provided by the statute which are zealously guarded by the courts. Interpreting such statutory provisions courts upon courts have held that an assessment previously framed cannot be reopened on a mere change of opinion. It is stated that power to reopening cannot be equated with review.

42. Bearing in mind these conflicting interests, if we revert back to central issue in debate, it can hardly be disputed that once the Assessing Officer notices a certain claim made by the assessee in the return filed, has some doubt about eligibility of such a claim and therefore, raises queries, extracts response from the assessee, thereafter in what manner such claim should be treated in the final order of assessment, is an issue on which the assessee would have no control whatsoever. Whether the Assessing Officer allows such a claim, rejects such a claim or partially allows and partially rejects the claim, are all options available with the Assessing Officer, over which the assessee beyond trying to persuade the Assessing Officer, would have no control whatsoever. Therefore, while framing the assessment, allowing the claim fully or partially, in what manner the assessment order should be framed, is totally beyond the control of the assessee. If the Assessing Officer, therefore, after scrutinizing the claim minutely during the assessment proceedings, does not reject such a claim, but chooses not to give any reasons for such a

course of action that he adopts, it can hardly be stated that he did not form an opinion on such a claim. It is not unknown that assessments of larger corporations in the modern day, involve large number of complex claims, voluminous material, numerous exemptions and deductions. If the Assessing Officer is burdened with the responsibility of giving reasons for several claims so made and accepted by him, it would even otherwise cast an unreasonable expectation which within the short frame of time available under law would be too much to expect him to carry. Irrespective of this, in a given case, if the Assessing Officer on his own for reasons best known to him, chooses not to assign reasons for not rejecting the claim of an assessee after thorough scrutiny, it can hardly be stated by the revenue that the Assessing Officer can not be seen to have formed any opinion on such a claim. Such a contention, in our opinion, would be devoid of merits. If a claim made by the assessee in the return is not rejected, it stands allowed. If such a claim is scrutinized by the Assessing Officer during assessment, it means he was convinced about the validity of the claim. His formation of opinion is thus complete. Merely because he chooses not to assign his reasons in the assessment order would not alter this position. It may be a non-reasoned order but not of acceptance of a claim without formation of opinion. Any other view would give arbitrary powers to the Assessing Officer.

43. We are, therefore, of the opinion that in a situation where the Assessing Officer during scrutiny assessment, notices a claim of exemption, deduction or such like made by the assessee, having some prima facie doubt raises queries, asking the assessee to satisfy him with respect to such a claim and thereafter, does not make any addition in the final order of assessment, he can be stated to have formed an opinion whether or not in the final order he gives his reason for not making addition."

The Assessing Officer has the power to reopen the assessment proceedings if some tangible material had come to his knowledge. However, he cannot reopen the assessment merely because on the same documents considered earlier by him, another inference was possible. The reassessment can only take place if the conditions laid down under Section 147 are fulfilled otherwise under the garb of change of opinion, the Assessing Officer may review his earlier assessment order.

28. The Apex Court in Kelvinator of India Limited (supra) has observed that the concept of change of opinion is an in-built test to check abuse of power by the Assessing Officer. The Assessing Officer has wide power to reopen the assessment proceedings with effect from 1.4.1989 provided there was some tangible material to come to the conclusion that there was escapement of income from assessment and the reasons under Section 147 must have a link with the formation of the belief. The tangible material must have nexus to the escapement of income from being assessed to tax, but without there being any tangible material, it is not open to the Assessing Officer to form a belief that income of the assessee has escaped assessment from tax. The Assessing Officer while forming his opinion and recording reasons under Section 147 of the Act, in the instant case, was aware that at the time of original assessment, the Assessing Officer had considered the material on record and took a conscious decision in scrutiny assessment and allowed the unabsorbed depreciation pertaining to A.Y. 1997-98 of Rs.43,60,21,158/- to be set off against the income of A.Y. 2006-07. No tangible material was available with the Assessing Officer while forming opinion under Section 147 of the Act. Reopening of original assessment order on the ground that unabsorbed depreciation was allowed to be set off, wrongly, against the provisions of amended Section 32(2) would amount to reviewing the original assessment order which is not permissible. If on the facts disclosed by the assessee, a wrong legal inference is taken by the Assessing Officer at the time of original assessment then it would not confer any

power on him under Section 147 of the Act to commence reassessment proceedings. The Assessing Officer cannot take benefit of his own wrong and reopen the assessment proceedings under Section 147 of the Act. It would be a case of second thought on the same material and the omission to draw the correct legal presumption during the original assessment proceedings did not warrant initiation of proceedings under Section 147 of the Act. Whether the legal inference has been rightly drawn or not is none of the concern of the subsequent Assessing Officer and the assessee cannot be held responsible for the remissness on the part of Assessing Officer in not applying the correct law. The mistake of law claimed to have been committed by the Assessing Officer in allowing unabsorbed depreciation of A.Y. 1997-98 to be set off against the income of A.Y. 2006-07 was not due to assessee's omission or failure to disclose fully and truly all material facts. The mistake, if any, committed by the Assessing Officer at the time of assessment could not furnish a ground to the Assessing Officer to reopen the original assessment order as it would amount to change of opinion.

29. For the aforesaid reasons, we are of the considered opinion that since the assessee had disclosed fully and truly all material facts necessary for his assessment for the year and in response to the queries of the Assessing Officer, the assessee had placed entire material demanded by the Assessing Officer. And on the material on record, the Assessing Officer applied his mind and allowed unabsorbed depreciation for the year A.Y. 1997-98 and other assessment years, to be carried forward and set off against the income of A.Y. 2006-07, then merely because the Assessing Officer did not give reasons for allowing the claim of unabsorbed depreciation in the original assessment order would not make the assessment order illegal. The Assessing Officer, in law, must be deemed to have formed an opinion that the assessee’s claim deserves to be accepted. Thus, in such a situation, the original assessment order cannot be reopened as it would amount to change of opinion by the Assessing Officer and the reassessment order is liable to be set aside.

30. The last question which arises for consideration is that whether the unabsorbed depreciation pertaining to A.Y. 1997-98 could be allowed to be carried forward and set off after a period of eight years or it would be governed by Section 32 as amended by Finance Act 2001? The reason given by the Assessing Officer under section 147 is that Section 32(2) of the Act was amended by Finance Act No.2 of 1996 w.e.f. A.Y. 1997-98 and the unabsorbed depreciation for the A.Y. 1997-98 could be carried forward up to the maximum period of 8 years from the year in which it was first computed. According to the Assessing Officer, 8 years expired in the A.Y. 2005-06 and only till then, the assessee was eligible to claim unabsorbed depreciation of A.Y. 1997-98 for being carried forward and set off against the income for the A.Y. 2005-06. But the assessee was not entitled for unabsorbed depreciation of Rs.43,60,22,158/- for A.Y. 1997-98, which was not eligible for being carried forward and set off against the income for the A.Y. 2006-07.

31. Prior to the Finance Act No.2 of 1996 the unabsorbed depreciation for any year was allowed to be carry forward indefinitely and by a deeming fiction became allowance of the immediately succeeding year. The Finance Act No.2 of 1996 restricted the carry forward of unabsorbed depreciation and set-off to a limit of 8 years, from the A.Y.1997-98. Circular No.762 dated 18.2.1998 issued by the Central Board of Direct Taxes (CBDT) in the form of Explanatory Notes categorically provided, that the unabsorbed depreciation allowance for any previous year to which full effect cannot be given in that previous year shall be carried forward and added to the depreciation allowance of the next year and be deemed to be part thereof.

32. So, the unabsorbed depreciation allowance of A.Y. 1996-97 would be added to the allowance of A.Y. 1997-98 and the limitation of 8 years for the carry-forward and set-off of such unabsorbed depreciation would start from A.Y. 1997-98.

33. We may now examine the provisions of section 32(2) of the Act before its amendment by Finance Act 2001. The section prior to its amendment by Finance Act, 2001, read as under:-

> "Where in the assessment of the assessee full effect cannot be given to any allowance under clause (ii) of sub-section (1) in any previous year owning to there being no profits or gains chargeable for that previous year or owing to the profits or gains being less than the allowance, then, the allowance or the part of allowance to which effect has not been given (hereinafter referred to as unabsorbed depreciation allowance), as the case may be,-
>
> (i) shall be set off against the profits and gains, if any, of any business or profession carried on by him and assessable for that assessment year;
>
> (ii) if the unabsorbed depreciation allowance cannot be wholly set off under clause (i), the amount not so set off shall be set off from the income under any other head, if any, assessable for that assessment year;
>
> (iii) if the unabsorbed depreciation allowance cannot be wholly set off under clause (i) and Clause (ii), the amount of allowance not so set off shall be carried forward to the following assessment year and—
>
> (a) it shall be set off against the profits and gains, if any, of any business or profession carried on by him and assessable for that assessment year;
>
> (b) if the unabsorbed depreciation allowance cannot be wholly so set off, the amount of unabsorbed depreciation allowance not so set off shall be carried forward to the following assessment year not being more than eight assessment years immediately succeeding the assessment year for which the aforesaid allowance was first computed:
>
> Provided that the time limit of eight assessment years specified in sub-clause (b) shall not apply in case of a company for the assessment year beginning with the assessment year relevant to the previous year in which the said company has become a sick industrial company under sub-section (1) of section 17 of the Sick Industrial Company (Special Provisions) Act, 1985 (1 of 1986) and ending with the assessment year relevant to the previous year in which the entire net worth of such company becomes equal to or exceeds the accumulated losses.
>
> *Explanation.*- For the purposes of this clause, "net worth" shall have the meaning assigned to it in clause (ga) of sub-section (1) of section 3 of the Sick Industrial Companies (Special Provisions) Act, 1985."

34. The aforesaid provision was introduced by Finance (No.2) Act, 1996 and further amended by the Finance Act, 2000. The provision introduced by Finance (No.2) Act was clarified by the Finance Minister to be applicable with prospective effect.

35. Section 32 (2) of the Act was amended by Finance Act, 2001 and the provision so amended reads as under :-

"Where, in the assessment of the assessee, full effect cannot be given to any allowance under sub-section (1) in any previous year, owing to there being no profits or gains chargeable for that previous year, or owing to the profits or gains chargeable for that previous year, owing to the profits or gains chargeable being less than the allowance, then, subject to the provisions of sub-section (2) of section 72 and sub-section (3) of section 73, the allowance or the part of the allowance to which effect has not been given, as the case may be, shall be added to the amount of the allowance for depreciation for the following previous year and deemed to be part of that allowance, or if there is no such allowance for that previous year, be deemed to be allowance of that previous year, and so on for the succeeding previous years."

36. The purpose of this amendment has been clarified by Central Board of Direct Taxes in the Circular No.14 of 2001. The relevant portion of the said Circular reads as under :-

"**Modification of provisions relating to depreciation**

30.1 Under the existing provisions of section 32 of the Income-tax Act, carry forward and set off of unabsorbed depreciation is allowed for 8 assessment years.

30.2 With a view to enable the industry to conserve sufficient funds to replace plant and machinery, specially in an era where obsolescence takes place so often, the Act has dispensed with the restriction of 8 years for carry forward and set off of unabsorbed depreciation. The Act has also clarified that in computing the profits and gains of business or profession for any previous year, deduction of depreciation under section 32 shall be mandatory.

30.3 Under the existing provisions, no deduction for depreciation is allowed on any motor car manufactured outside India unless it is used (i) in the business of running it on hire for tourists, or (ii) outside in the assessee's business or profession in another country.

30.4 The Act has allowed depreciation allowance on all imported motor cars acquired on or after 1st April, 2001.

30.5 These amendments will take effect from the 1st April, 2002, and will, accordingly, apply in relation to the assessment year 2002-03 and subsequent years."

37. The CBDT Circular clarifies the intent of the amendment that it is for enabling the industry to conserve sufficient funds to replace plant and machinery and accordingly the amendment dispenses with the restriction of 8 years for carry forward and set off of unabsorbed depreciation. The amendment is applicable from assessment year 2002-03 and subsequent years. This means that any unabsorbed depreciation available to an assessee on 1st day of April, 2002 (A.Y. 2002-03) will be dealt with in accordance with the provisions of section 32(2) as amended by Finance Act, 2001 and not by the provisions of section 32(2) as it stood before the said amendment. Had the intention of the Legislature been to allow the unabsorbed depreciation allowance worked out

in A.Y. 1997-98 only for eight subsequent assessment years even after the amendment of section 32(2) by Finance Act, 2001 it would have incorporated a provision to that effect. However, it does not contain any such provision. Hence keeping in view the purpose of amendment of section 32(2) of the Act, a purposive and harmonious interpretation has to be taken. While construing taxing statutes, rule of strict interpretation has to be applied, giving fair and reasonable construction to the language of the section without leaning to the side of assessee or the revenue. But if the legislature fails to express clearly and the assessee becomes entitled for a benefit within the ambit of the section by the clear words used in the section, the benefit accruing to the assessee cannot be denied. However, Circular No.14 of 2001 had clarified that under Section 32(2), in computing the profits and gains of business or profession for any previous year, deduction of depreciation under Section 32 shall be mandatory. Therefore, the provisions of section 32(2) as amended by Finance Act, 2001 would allow the unabsorbed depreciation allowance available in the A.Y. 1997-98, 1999-2000, 2000-01 and 2001-02 to be carried forward to the succeeding years, and if any unabsorbed depreciation or part thereof could not be set off till the A.Y. 2002-03 then it would be carried forward till the time it is set off against the profits and gains of subsequent years.

38. Therefore, it can be said that, current depreciation is deductible in the first place from the income of the business to which it relates. If such depreciation amount is larger than the amount of the profits of that business, then such excess comes for absorption from the profits and gains from any other business or business, if any, carried on by the assessee. If a balance is left even thereafter, that becomes deductible from out of income from any source under any of the other heads of income during that year. In case there is a still balance left over, it is to be treated as unabsorbed depreciation and it is taken to the next succeeding year. Where there is current depreciation for such succeeding year the unabsorbed depreciation is added to the current depreciation for such succeeding year and is deemed as part thereof. If, however, there is no current depreciation for such succeeding year, the unabsorbed depreciation becomes the depreciation allowance for such succeeding year. We are of the considered opinion that any unabsorbed depreciation available to an assessee on 1st day of April 2002 (A.Y. 2002-03) will be dealt with in accordance with the provisions of section 32(2) as amended by Finance Act, 2001. And once the Circular No.14 of 2001 clarified that the restriction of 8 years for carry forward and set off of unabsorbed depreciation had been dispensed with, the unabsorbed depreciation from A.Y.1997-98 upto the A.Y.2001-02 got carried forward to the assessment year 2002-03 and became part thereof, it came to be governed by the provisions of section 32(2) as amended by Finance Act, 2001 and were available for carry forward and set off against the profits and gains of subsequent years, without any limit whatsoever.

39. For the aforesaid reasons, this writ petition succeeds and is allowed. The notice issued under Section 148 of the Income-tax Act, 1961, dated 29.3.2011 Annexure A and the assessment order dated 27.12.2011 passed by the Assessing Officer Annexure F respectively to the writ petition are quashed. Rule is made absolute. The parties shall bear their own costs.

[**V. M. SAHAI, J.**]

[**N. V. ANJARIA, J.**]