IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 29792 of 2007

For Approval and Signature:

HONOURABLE MR.JUSTICE AKIL KURESHI

HONOURABLE MS.JUSTICE HARSHA DEVANI

GUJARAT POWER CORPORATION LTD - Petitioner(s)

Versus

ASSISTANT COMMISSIONER OF INCOME TAX - Respondent(s)

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Appearance :

MR SN SOPARKAR, SR. ADVOCATE with MRS SWATI SOPARKAR for Petitioner

MR SUDHIR M MEHTA for Respondent

Date: 30/07/2012

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE AKIL KURESHI)

1. The petitioner has challenged a notice dated 14.11.2006 as at Annexure "A" to the petition issued by the Assessing Officer under section 148 of the Income Tax Act, 1961 ("the Act" for short). By such notice, the Assessing Officer sought to reopen the assessment of the petitioner for the assessment year 2002-03.

2. Facts may be noted in brief. The petitioner is a Company registered under the Companies Act, 1956 and is regularly assessed to tax. For the assessment year 2002-03, the petitioner filed its return of income on 22.10.2002 declaring a total income of Rs.2,81,60,753/- under section 115-JB of the Act. The return of the petitioner was selected for scrutiny. It is the case of the petitioner that during such assessment, number of queries were raised by the Assessing Officer and replies were also given by the petitioner to all such queries. Eventually, the assessment under section 143(3) of the Act was framed on 18.3.2005 for a total income of Rs.2,81,71,453/- under section 115-JB of the Act.

2.1 Thereafter, the Assessing Officer i.e. respondent herein issued the impugned notice dated 14.11.2006 under section 148 of the Act seeking to reopen such assessment which was previously framed after scrutiny. In response to such notice, the petitioner under its communication dated 27.11.2006 conveyed that the original return filed by the petitioner be treated as one filed in response to notice under section 148 of the Act. At the request of the petitioner, the respondent also supplied along with communication dated 13.11.2007 a copy of the reasons recorded for reopening the assessment.

2.2 The petitioner raised objections against reopening of the assessment under letter dated 21.11.2007. Such objections were, however, rejected by the Assessing Officer vide order dated 29.11.2007. The petitioner has, therefore, filed the present petition challenging the notice for reopening the assessment.

3. We may record that the Assessing Officer in absence of any stay granted by this Court, finalized the assessment pursuant to the impugned notice. This Court, on 25.8.2008, noted that the assessment order is served on the petitioner and the petitioner has also filed appeal against such fresh order of assessment. By way of interim relief, the Court stayed the demand raised by the Assessing Officer pursuant to such fresh order of assessment. We are informed that subsequently, the appeal was disposed of by the Commissioner (Appeals) and the petitioner had thereupon preferred further appeal before the Income Tax Appellate Tribunal ("the Tribunal" for short) and such appeal on merits was allowed on 30.11.2010. Both the sides submitted that the issue would not rest at the level of the Tribunal and this Court, therefore, may decide the question of the validity of the notice for reopening the assessment. In fact, we are informed that appeal against the said judgement of the Tribunal dated 30.11.2010 has been preferred by revenue before this Court and such appeal is pending.

4. In the return filed by the petitioner, the petitioner claimed exemption under section 10(23G) of the Act with respect to certain interest income and capital gain from sale of shares in the following manner :

> "*Profit as per Profit & Loss Account Rs.2047264570*
>
> *Add : Prior Period Adjustments Rs. 219356*
>
> ---
>
> *Rs.2047483926*
>
> *Less: Income Exempt u/s 10(23G)*
>
> *of the Act :*

Interest from SSNNL Bonds 350880

Interest from GIPCL Bonds 9681593

Capital Gain from sale of shares

of GPEC 2009280000

----------*Rs.2019312473*

Rs. 28171453"

5. Along with the return, the assessee also filed a statement in the form of "Notes forming part of return of income". In such Notes, the assessee further stated as under :

> "*2. Interest received on bonds of SSNL and GIPCL and capital gain on sale of shares of GPEC are exempt u/s 10(23G) of the Income Tax Act, 1961 and therefore, excluded from the total income."*

6. It is not in dispute that during the assessment proceedings, the Assessing Officer raised several queries and called for explanation of the petitioner on various issues. One such set of queries was raised by the Assessing Officer under his communication dated 31.1.2005. In this letter, besides other questions, the Assessing Officer asked the assessee to substantiate the claim of exemption under section 10(23G) of the Act, both for the capital gain on sale of shares as well as on the interest income earned from SSNNL and GPICL bonds. Relevant portion of said letter dated 31.1.2005 reads as under:

> *"2. To enable the undersigned to finalize the above mentioned pending assessment proceedings, you are hereby requested to kindly furnish the following information along with supporting documents and evidences, if any.*
>
> *.... ....*
>
> *[v] From the annual report, it appears that you have received long term capital gain of Rs.200.93 crores while disinvesting the equity holding of Rs.87.36 crores in GPEL. You have further claimed the complete tax exemption on such income u/s 10(23G) of the Act. Please justify your claim.*
>
> *.... ....*

[xii] Please also justify your claim of exemption u/s 10(23G) of the IT Act vis-a-vis interest earned from SSNNL/GIPCL bonds.

....”

7. In response to such letter, the petitioner replied under communication dated 11.2.2005. Regarding queries of exemption under section 10(23G) of the Act with respect to capital gain as well as interest income, the assessee replied as under :

“5. Your goodself has required us to justify the exemption claimed by us u/s 10(23G) of the Act on long term capital gain of Rs.200.93 crores received by us through disinvestments of the equity holding of Rs.87.36 crores in Gujarat Power Gen Energy Corporation (GPEC). The exemption is claimed in accordance with provisions of section 10(23G) of the Income Tax Act. A specific note was also appended to the return of income the same reads as under :

“2. Interest received on bonds of SSNL and GIPCL and capital gain on sale of shares of GPEC are exempt u/s 10(23G) of the Income Tax Act, 1961 and therefore, excluded from the total income.”

We would like to draw your goodself's kind attention to the provisions of section 10(23G) of the Act.

The relevant extract of the section reads as under :

xxx xxx xxx

xxx xxx xxx

As per provisions of section 10(23G) of the Income Tax Act interest, dividend or long term capital gains received by infrastructure capital company is exempt from tax. It is submitted that we are the infrastructure company as defined in section 10(23G) of the Act and GPEC is carrying on the infrastructure activities. GPEC is also approved also u/s 10(23G) of the Act by the Central Government. Copy of the approval is enclosed herewith marked as ANNEXURE – B. It is submitted that as the GPEC is approved u/s 10(23G) of the Act long term capital gains arising on sale of shares of GPEC are exempt u/s 10(23G) of I.T. Act.

xxx xxx xxx

xxx xxx xxx

12. Your goodself has required us to justify the claim of exemption u/s 10(23G) of the Act for the interest received from SSNNL / GIPCL bonds. The justification given at para 5 above are applicable here also.

xxx xxx xxx

xxx xxx xxx"

8. In the assessment order dated 18.3.2005, the Assessing Officer noted that the assessee had made several investments which included the debentures of GIPCL and bonds of SSNNL. He also noted that out of total return on such investments, the assessee had offered interest income to the tune of Rs.5,68,03,174/- to tax. He noticed that interest received on SSNNL bonds of Rs.3,73,880/- and interest received from GIPCL of Rs.96,81,893/- were not offered to tax as the assessee had claimed exemption on such income under section 10(23G) of the Act. He, in fact, recorded as under :

"*6.1 From the above interest income, the assessee has claimed exemption u/s 10(23G) of the IT Act in respect of the following :-*

[i] Interest from SSNNL Bonds Rs. 3,50,880

[ii] Interest from GIPCL Bonds Rs. 96,81,593

==========

TOTAL Rs.1,00,32,473

==========

6.2 From the above facts, it can be seen that on certain investment, the assessee had offered income for taxation, on balance investment the income has been shown but claimed as exempted and on certain investment no income has been shown at all. The details of investment from which no income has been shown are as under :

xxx xxx xxx

xxx xxx xxx"

9. The Assessing Officer thereupon proceeded to disallow expenditure incurred by the assessee in earning such tax free interest. He, however, did not disallow the exemption on the interest per se. We, however, note that in the assessment order, there was no discussion with respect to such exemption claimed by the petitioner under section 10(23G) of the Act.

10. In the reasons that the Assessing Officer recorded for reopening the assessment, he had stated as under :

> *"3. From the records, it is seen that the assessee Corporation has earned interest of Rs.1,00,32,473/- on investment in bonds of Gujarat Industrial Power Corporation Ltd. and Sardar Sarovar Narmada Nigam Ltd. and the same interest has been claimed exempt u/s 10(23G) of the I. T. Act, 1961. As per provisions of section 10(23G) of the I. T. Act, 1961, interest earned by an Infrastructure Capital Company on investments made by way of acquiring shares or providing long term finance to an approved enterprise is exempt.*
>
> *4. The records reveal that the interest is earned on investment made out of surplus money in bonds and no loan or advance is given by the assessee Corporation. It is further seen that the interest is not derived from the long term finance as defined in section 10(23G) r.w.s. 36(1)(viii) of the Act. Had the interest been earned on long term finance, the investment would have been classified in Schedule 8 of Balance Sheet as "Loans and Advances" and not as "investment" in Schedule 5 as is in your case.*
>
> *5. It is therefore, reason to believe that exemption u/s 10(23G) of the IT Act has been wrongly granted to the extent of interest income of Rs.1,00,32,473/- earned on bonds of Gujarat Industrial Power Corporation Ltd. and Sardar Sarovar Narmada Nigam Ltd. and income to that extent has escaped assessment within the meaning of section 147 of the Act."*

11. On the basis of the above facts, learned senior counsel Shri Saurabh Soparkar for the petitioner submitted that the notice for reopening the assessment was without jurisdiction. The Assessing Officer had examined the claim of the assessee for exemption under section 10(23G) of the Act in the original assessment which was framed after scrutiny. Any attempt on his part now to tax such income would be based on change of opinion. He, therefore, submitted that the reopening of assessment even within a period of four years from the end of relevant assessment year on such facts would not be permissible.

11.1 Counsel further submitted that from the reasons recorded, it clearly emerges that the Assessing Officer has relied on the material which was already on record at the time of original assessment. Any attempt on his part, therefore, to reopen the assessment without availability of any new material which did not form part of the original record, would be based only on change of opinion and therefore, impermissible.

11.2 Counsel further submitted that in any case in the proceedings, during the original assessment, the Assessing Officer had raised several queries with respect to these very claims. The assessee had given detailed replies. At the time of framing of assessment, the Assessing Officer did not disallow the assessee's claim for exemption. Merely because the Assessing Officer did not give reasons in his order of assessment for not making additions, would not mean that he did not form any opinion on the merits of the claim made by the assessee. Counsel submitted that once in a scrutiny assessment, the Assessing Officer examines a particular claim of the assessee, but makes no disallowance in the final order of assessment, he must be deemed to have formed an opinion and that, therefore, any attempt on his part to reopen the assessment on the basis of very claim would only amount to change of opinion and therefore, wholly impermissible in law.

11.3 In support of his contentions, counsel relied on following decisions :

[a] In case of ***Commissioner of Income Tax v. Nirma Chemicals Works P. Ltd.*** reported in (2009) 309 ITR 67 (Guj.), wherein the Division Bench of this Court had rejected the contention of the revenue that simply because the assessment order was silent on a particular claim made by the assessee, it would mean that such order does not reflect any application of mind. It was observed that an assessment order cannot incorporate reasons for making or granting claim of deduction.

[b] In case of ***Rayon Silk Mills v. Commissioner of Income Tax*** reported in (1996) 221 ITR 155, in which a Division Bench of this Court in the context of power of the Commissioner under section 263 of the Act to revise the order passed by the Assessing Officer, examined whether an assessment order which accepts certain claims without recording reasons would mean that the Assessing Officer had not at all examined such a claim.

[c] In case of ***Commissioner of Income Tax v. Kelvinator of India Ltd.*** reported in (2002) 256 ITR 1, Full Bench of the Delhi High Court held that even after the amendment in section 147 of the Act with effect from 1.4.1989, the legal position has not altered, namely, assessment previously framed cannot be reopened within four years on a mere change of opinion.

[d] In case of ***Commissioner of Income Tax v. Eicher Ltd.*** reported (2007) 294 ITR 310 (Delhi) wherein a Division Bench of Delhi High Court relying on the decision in case of ***Kelvinator of India Ltd.*** (Delhi) (supra), observed that if the entire material has been placed by the assessee before the Assessing Officer at the time when the original assessment was framed and the Assessing Officer applied his mind to that material and accepted the view canvassed by the assessee, then merely because he did not express this in the assessment order, that by itself would

not give him a ground to reopen the assessment on the belief that income had escaped assessment.

[e] In case of **Commissioner of Income Tax v. (1) Kelvinator of India Ltd. & (2) Eicher Ltd.**, reported in (2010) 320 ITR 561, the Apex Court dismissed the revenue's appeal against the decisions of the Delhi High Court in case of ***Commissioner of Income Tax v. Kelvinator of India Ltd.*** (Delhi) (supra) and ***Eicher Ltd.*** (supra).

[f] In case of ***Hari Iron Trading Co. v. Commissioner of Income Tax*** reported in (2003) 263 ITR 437, wherein a Division Bench of Punjab & Haryana High Court in the context of power of revision under section 263 of the Act, observed that generally, the issues which are accepted (by the Assessing Officer) do not find mention in the assessment order and only such points are taken note of on which the assessee's explanations are rejected and additions/disallowances are made.

[g] In case of ***Asian Paints Ltd. v. Deputy Commissioner of Income Tax and another*** reported in (2009) 308 ITR 195 (Bom.), wherein the Bombay High Court observed that the legislature has not conferred powers on the Assessing Officer to review his own order. It was further observed that, *"It is clear from the observations made above that the Full Bench of the Delhi High Court has taken a view that in a situation where according to the Assessing Officer he failed to apply his mind to the relevant material in making the assessment order, he cannot take advantage of his own wrong and reopen the assessment by taking recourse to the provisions of section 147. We find, ourself, in respectful agreement with the view taken by the Full Bench of the Delhi High Court."*.

12. On the other hand, learned counsel Shri Sudhir Mehta for the revenue opposed the petition contending that the Assessing Officer had recorded proper reasons before issuing notice under section 148 of the Act. The petition may, therefore, be dismissed.

13. Since the legal issues involved were of considerable general importance, we had also requested learned senior counsel Shri Manish Bhatt for the revenue to intervene and make submissions. Counsel submitted that only because a certain claim of deduction or exemption came up for consideration before the Assessing Officer in the original assessment, by itself without there being anything more on the record, would not mean that the Assessing Officer had formed an opinion in favour of the assessee simply because in the final order of assessment, such claim was not rejected. Counsel submitted that the question of formation of opinion would arise only if the Assessing Officer by conscious decision desired to allow such a claim. In a quasi-judicial order, such opinion must be reflected in the order itself. He, therefore, submitted that if after some scrutiny or inquiry, such claim is

not rejected in the order of assessment, would not by itself amount to the Assessing Officer forming any opinion. He, therefore, submitted that only in those cases where a claim made by the assessee is examined by the Assessing Officer and allowed by reflecting conscious decision on his part, can it be stated that he had formed an opinion, which in absence of any new material, cannot be subject matter of reopening.

13.1 In support of his submissions, Shri Bhatt relied on the following decisions :

[a] In case of ***Praful Chunilal Patel v. M. J. Makwana, Assistant Commissioner of Income Tax***, reported in (1999) 236 ITR 832 wherein the provisions of section 147 of the Act post amendment with effect from 1.4.1989 came up for consideration before this Court in context of notice for reopening having been issued within four years from the end of relevant assessment year.

[b] In case of ***Kunhayammed and others v. State of Kerala and another***, reported in (2000) 245 ITR 360, wherein it was observed that an order refusing special leave to appeal either by a speaking or a non-speaking order, does not attract the doctrine of merger and such order refusing special leave does not stand substituted in the place of the order under challenge. Reference to this decision was made to counter the contention of the counsel for the petitioner that by virtue of the decision of the Apex Court in case of ***Commissioner of Income Tax v. Kelvinator of India Ltd.*** (SC) (supra), the decisions of Delhi High Court in case of **Commissioner of Income Tax v. Kelvinator of India Ltd.** (Delhi) and **Eicher Ltd.** (supra), which were in appeal before the Apex Court, the ratio laid down therein, stood approved by the Apex Court.

[c] For the same purpose, he also relied on the decision in case of ***S. Shanmugavel Nadar v. State of Tamil Nadu and another***, reported in (2003) 263 ITR 658 wherein the Apex Court observed that, *"It follows from a review of several decisions of this court that it is the speech, express or necessarily implied, which only is the declaration of law by this court within the meaning of article 141 of the Constitution."*.

14. On the basis of the material on record and the submissions made before us by the counsel for either side, following questions arise for our consideration :

[1] Whether in case of an assessment previously framed after scrutiny, by virtue of the provisions contained in section 147 of the Act as amended with effect from 1.4.1989, reopening of the assessment within a period of four years from the end of relevant assessment year would be permissible only upon availability of some new material extraneous to the record enabling the Assessing Officer to form a belief that income chargeable to tax in case of the assessee for the said assessment

year had escaped assessment? In other words, the question is whether reopening of an assessment even within four years would be impermissible on the basis of the material already on record even if the Assessing Officer had during the original assessment, not examined a certain claim of the assessee and even in such a case, in absence of any new material, re-assessment would amount to a mere change of opinion.

[2] Whether when during the course of original assessment, the Assessing Officer had examined a certain claim put-forth by the assessee, raised queries with respect to such a claim, elicited response from the assessee with respect to the claim and thereafter at the time of framing assessment, did not reject the claim without recording reasons, could it be stated that the Assessing Officer had formed an opinion and that therefore, any attempt on his part to reopen such an assessment without any new or additional material, would amount to a mere change of opinion and therefore, reopening would be barred?

[3] In the facts of the present case, how would our answers to above two questions apply?

15. We would answer the first question first. Section 147 of the Act, as is well known, pertains to the powers of the Assessing Officer to assess, re-assess income chargeable to tax which has escaped assessment or re-compute loss or depreciation or other allowance. Prior to 1.4.1989, the provisions of section 147 were substantially different from those which stand presently. Prior to 1.4.1989, section 147 of the Act provided as under :

> "***Income escaping assessment*** -
>
> *147. If -*
>
> *[a] the Assessing Officer has reason to believe that, by reason of the omission or failure on the part of an assessee to make a return under section 139 for any assessment year to the Assessing Officer or to disclose fully and truly all material facts necessary for his assessment for that year, income chargeable to tax has escaped assessment for that year, or*
>
> *[b] notwithstanding that there has been no omission or failure as mentioned in clause (a) on the part of the assessee, the Assessing Officer has in consequence of information in his possession reason to believe that income chargeable to tax has escaped assessment for any assessment year,*
>
> *he may, subject to the provisions of sections 148 to 153, assess or reassess such income or recompute the loss or the depreciation allowance, as the*

case may be, for the assessment year concerned (hereinafter in sections 148 to 153 referred to as the relevant assessment year).

Explanation 1 : For the purposes of this section, the following shall also be deemed to be cases where income chargeable to tax has escaped assessment, namely :-

(a) Where income chargeable to tax has been under-assessed; or

(b) Where such income has been assessed at too low a rate; or

(c) Where such income has been made the subject of excessive relief under this Act or under the Indian Income-tax Act, 1922 (11 of 1922); or

[d] where excessive loss or depreciation allowance has been computed.

Explanation 2 : Production before the Assessing Officer of account books or other evidence from which material evidence could with due diligence have been discovered by the Assessing Officer will not necessarily amount to disclosure within the meaning of this section."

16. After 1.4.1989, along with section 143 of the Act, several major changes were made in section 147 also. The provision for making prima facie adjustment in the return of income filed by the assessee previously contained in section 143,were modified and later on with effect from 1.6.1999 all together done away with. Simultaneously, under section 147 of the Act also, certain major changes were made. For a brief while, section 147 of the Act contained a reference to the opinion of the Assessing Officer that income chargeable to tax has escaped assessment, which it was felt would confer too wide a power on the Assessing Officer. Therefore, upon representations from the various quarters, the expression which was restored in the said provision was "that the Assessing Officer has reason to believe". In the present state, section 147 of the Act provides as under :

"***Section 147 – Income escaping assessment -***

If the Assessing Officer has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of sections 148 to 153, assess or reassess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under this section, or recompute the loss or the depreciation allowance or any other allowance, as the case may be, for the assessment year

concerned (hereafter in this section and in sections 148 to 153 referred to as the relevant assessment year) :

Provided that where an assessment under sub-section (3) of section 143 or this section has been made for the relevant assessment year, no action shall be taken under this section after the expiry of four years from the end of the relevant assessment year, unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee to make a return under section 139 or in response to a notice issued under sub-section (1) of section 142 or section 148 or to disclose fully and truly all material facts necessary for his assessment for that assessment year.

Provided further that the Assessing Officer may assess or reassess such income, other than the income involving matters which are the subject-matter of any appeal, reference or revision, which is chargeable to tax and has escaped assessment.

Explanation 1 : Production before the Assessing Officer of account books or other evidence from which material evidence could with due diligence have been discovered by the Assessing Officer will not necessarily amount to disclosure within the meaning of the foregoing proviso.

Explanation 2 : For the purposes of this section, the following shall also be deemed to be cases where income chargeable to tax has escaped assessment, namely :-

(a) Where no return of income has been furnished by the assessee although his total income or the total income of any other person in respect of which he is assessable under this Act during the previous year exceeded the maximum amount which is not chargeable to income-tax;

(b) Where a return of income has been furnished by the assessee but no assessment has been made and it is noticed by the Assessing Officer that the assessee has understated the income or has claimed excessive loss, deduction, allowance or relief in the return;

(c) Where an assessment has been made, but -

(i) Income chargeable to tax has been under-assessed; or

(ii) Such income has been assessed at too low a rate; or

(iii) Such income has been made the subject of excessive relief under this Act; or

(iv) Excessive loss or depreciation allowance or any other allowance under this Act has been computed."

17. From the above comparison of two sets of statutory provisions, it emerges that after 1.4.1989, powers of reopening an assessment within a period of four years from the end of relevant assessment year, were substantially widened. The requirement that income chargeable to tax has escaped assessment due to failure on the part of the assessee to disclose truly and fully all material facts, was no longer relevant in case of reopening of an assessment within a period of four years.

18. Simultaneously, Explanation 1 to section 147 of the Act, which formed part of the pre 1.4.1989 section 147, was shifted to Explanation II and was also worded somewhat differently. Such Explanation 2 provides that for the purposes of this section, the following shall also be deemed to be cases where income chargeable to tax has escaped assessment, namely :-

(a) Where no return of income has been furnished by the assessee although his total income or the total income of any other person in respect of which he is assessable under this Act during the previous year exceeded the maximum amount which is not chargeable to income-tax;

(b) Where a return of income has been furnished by the assessee but no assessment has been made and it is noticed by the Assessing Officer that the assessee has understated the income or has claimed excessive loss, deduction, allowance or relief in the return;

(c) Where an assessment has been made, but - (i) Income chargeable to tax has been underassessed; or

(ii) Such income has been assessed at too low a rate; or

(iii) Such income has been made the subject of excessive relief under this Act; or

(iv) Excessive loss or depreciation allowance or any other allowance under this Act has been computed.

19. Such difference in the corresponding Explanation 1 to section 147 pre and post 1.4.1989 came up for consideration before the learned Single Judge of the Madras

High Court in case *of* ***Jayaram Paper Mills Ltd. v. Commissioner of Income Tax and another***, reported at (2010) 321 ITR 56, wherein it was observed as under :

> "*Thus it is clear that the scope of the deeming fiction which was found in Explanation 1 under Section 147, before its amendment, was enlarged in the form of Explanation 2, by the amendment under Act 4 of 1988. The effect of this deeming fiction did not fall for consideration in any of the decisions that arose even upto Sri Krishna Private Ltd. Therefore, even while keeping in mind the elementary principles laid down in the aforesaid decisions, we may have to apply them to the extent that they are now permissible in view of the Explanation-2."*

20. The change in the statutory scheme contained in sections 143 and 147 after 1.4.1989 came up for consideration before the Apex Court in case of ***Assistant Commissioner of Income Tax v. Rajesh Jhaveri Stock Brokers P. Ltd.***, reported at (2007) 291 ITR 500 (SC). We are not unmindful of the fact that in such decision, the Court was concerned with a case where the return was not processed under section 143(3) but intimation under section 143(1) of the Act was sent. However, the observations made by the Apex Court examining the vital changes in sections 143 and 147 are relevant for our purpose which read as under:

> "*The scope and effect of section 147 as substituted with effect from April 1, 1989, as also sections 148 to 152 are substantially different from the provisions as they stood prior to such substitution. Under the old provisions of section 147, separate clauses (a) and (b) laid down the circumstances under which income escaping assessment for the past assessment years could be assessed or reassessed. To confer jurisdiction under section 147(a) two conditions were required to be satisfied firstly the Assessing Officer must have reason to believe that income profits or gains chargeable to income tax have escaped assessment, and secondly he must also have reason to believe that such escapement has occurred by reason of either (i) omission or failure on the part of the assessee to disclose fully or truly all material facts necessary for his assessment of that year. Both these conditions were conditions precedent to be satisfied before the Assessing Officer could have jurisdiction to issue notice under section 148 read with section 147(a) But under the substituted section 147 existence of only the first condition suffices. In other words if the Assessing Officer for whatever reason has reason to believe that income has escaped assessment it confers jurisdiction to reopen the assessment. It is however to be noted that both the conditions must be fulfilled if the case falls within the ambit of the proviso to section 147. The case at hand is covered by the main provision and not the proviso."*

Thus, after 1.4.1989, power for reopening assessment within four years are much wider.

21. We may also notice a decision of the Punjab & Haryana High Court in case of ***Tilak Raj Bedi v. Joint Commissioner of Income Tax***, reported at (2009) 319 ITR 385 (P&H). In the said decision, the Division Bench drawing a distinction between "change of opinion" and a case of "mere change of opinion" observed as under :

> *"After hearing learned counsel for the parties, we are of the view that no substantial question of law arises as the impugned judgment of the Tribunal is consistent with the settled law on the point. The power of reassessment can be validly exercised if satisfaction is arrived at after following due procedure that income had escaped assessment. Such satisfaction may involve change of opinion but was not at par with 'mere change of opinion'. If satisfaction is arrived at on the basis of any relevant material, such satisfaction cannot be assailed. In the present case, the Assessing Officer has referred to proceedings for the subsequent assessment years. In such a situation, the judgments relied upon on behalf of the assessee are clearly distinguishable. The law for exercise of power of reassessment has been authoritatively settled by the Hon'ble Supreme court, inter-alia in A.L.A Firm v. CIT, Madras, (1991) 2 SCC 558. View of the Tribunal is consistent with settled law. It is not disputed by learned counsel for the assessee that the second proposed question is consequential and if reassessment is upheld, the levy of interest cannot be objected to. Thus, no substantial question of law arises."*

22. In case of ***Multiscreen Media Private Limited v. Union of India and another (No.2)***, reported in (2010) 324 ITR 54 (Bom), the Bombay High Court also examined the legislative amendments made in section 147 of the Act with effect from 1.4.1989 and observed that the power under section 147 cannot be exercised on a mere change of opinion. The Division Bench observed as under :

> *"Section 147 enables the Assessing Officer to assess or reassess any income chargeable to tax which he has reason to believe has escaped assessment for an assessment year. The proviso to Section 147 imposes certain additional requirements where an assessment inter alia is sought to be opened beyond a period of four years from the end of the relevant assessment year. In the present case, the exercise of power is within a period of four years and, therefore, the requirements of the proviso are not attracted. Explanation 2 to Section 147 provides a deeming fiction of cases were income chargeable to tax would be treated to have escaped assessment. Among them in clause (c) of Explanation 2 are cases where an assessment has been made, but (i) income chargeable to tax has been*

under-assessed; or (ii) such income has been assessed at too low a rate; or (iii) such income has been made the subject of excessive relief under the Act; or (iv) excessive loss or depreciation allowance or any other allowance under the Act has been computed. Where the Assessing Officer purports to exercise power under Section 147 within a period of four years of the end of the relevant assessment year, the condition precedent to the exercise of the power, is the existence of a reason to believe that any income chargeable to tax has escaped assessment. The expression 'reason to believe' must obviously be that of a prudent person and it is on the basis of the reasons recorded by the Assessing Officer that the question as to whether there was a reason to believe that income has escaped assessment, has to be determined. At the same time, the sufficiency of the reasons for reopening an assessment does not fall for determination, at the stage of a reopening of assessment. When the Court is concerned with a challenge to a notice under section 148, the issue is not as to whether it can be conclusively demonstrated that income had escaped assessment, but whether as a matter of fact, there was a reason to believe that this was so, to justify a recourse to the power under Section 147. The power under section 147 cannot be exercised on a mere change of opinion. The requirement that reasons be recorded in Section 148 is a safeguard that ensures against an arbitrary exercise of power. Similarly, judicially evolved doctrine asserts that a mere change of opinion cannot justify recourse to the power under Section 147. This is intended to ensure that the power is exercised for valid reasons when there is tangible material for the Assessing Officer to do so. The test of 'tangible material', it may be noted, has been enunciated in a judgment of the Supreme Court in Commissioner of Income Tax V/s. Kelvinator of India Ltd., wherein the Hon'ble Mr. Justice S.H. Kapadia, speaking for a Bench of the Supreme Court held thus : ...."

23. It can, thus, be seen that depending on the factual context, the Courts have been drawing distinction between the expression “change of opinion” and “mere change of opinion”.

24. In the context of our discussion, we may refer to the decision of the Apex Court in the case of ***A. L. A. Firm v. Commissioner of Income Tax***, reported in (1991) 189 ITR 285. In such decision, even with respect to assessment proceedings which arose prior to the amendment in section 147 of the Act with effect from 1.4.1989, the Apex Court referring to large number of decisions on the point, accepted that for reopening of the assessment, the belief that the Assessing Officer may form may be based on the information which may have been obtained even from the record of the original assessment from the investigation of the materials on record or the facts disclosed thereby or from other inquiry or research

into the facts or law. The Apex Court noticed the decision in the case of ***Kalyanji Mavji & Co. v. Commissioner of Income Tax***, reported in (1976) 102 ITR 287 (SC) in which four legal propositions were laid down and that the later decision also of the Apex Court in case of ***Indian and Eastern Newspaper Society v. Commissioner of Income Tax***, reported in (1979) 119 ITR 996 (SC), taking a somewhat different line. The Apex Court noted that the proposition No.(4) in the case of ***Kalyanji Mavji & Co. v. Commissioner of Income Tax*** (supra) was not doubted in the decision of ***Indian and Eastern Newspaper Society v. Commissioner of Income Tax*** (supra). Proposition (4) provided that, where the information may be obtained even from the record of the original assessment from the investigation of the materials on the record, or the facts disclosed thereby or from other inquiry or research into facts or law re-opening would be permissible. On this basis, the Apex Court observed as under :

> "*..... Even making allowances for this limitation placed on the observations in Kalyanji Mavji [1976] 102 ITR 287 (SC), the position is summarized by the High Court in the following words represents, in our view, the correct position in law. (at p. 629 of 102 ITR) :*
>
> *"The result of these decisions is that the statute does not require that the information must be extraneous to the record. It is enough if the material on the basis of which the reassessment proceedings are sought to be initiated, came to the notice of the Income-tax Officer subsequent to the original assessment. If the Income-tax Officer had considered and formed an opinion on the said material in the original assessment itself, then he would be powerless to start the proceedings for the reassessment. Where, however, the Income-tax Officer had not considered the material and subsequently came by the material from the record itself, then such a case would fall within the scope of section 147(b) of the Act."*

25. From the statutory provisions contained in section 147 of the Act, as interpreted by the decisions noted above, it would emerge that an assessment previously framed can be reopened within a period of four years if the Assessing Officer has some tangible material at his command on which he has reason to believe that income of the assessee chargeable to tax has escaped assessment. The additional requirement that such escapement of income is due to failure on the part of the assessee to disclose truly and fully all material facts is not there. When the Assessing Officer frames an assessment, but does not visit a certain claim put-forth by the assessee, neither accepts nor rejects such claim, in the final order of assessment, it can hardly be stated that the Assessing Officer had formed an opinion with respect to such a claim. It is of course true that such reopening even within a period of four years from the end of relevant assessment year would not be permissible on a mere change of opinion.

26. The term “opinion” in “Webster's Third New International Dictionary” is explained as a view, judgment or appraisal formed in the mind about a particular matter; favourable impression or estimation; belief stronger than impression and less strong than positive knowledge; a notion or conviction of probable evidence; something that is generally or widely accepted as factual; a formal expression by an expert; a formal expression by a judge or court or referee of the legal reasons and principles upon which a legal decision is based.

26.1 In “Advance Law Lexicon” by P. Ramanatha Aiyar, Third Edition, the term “opinion” is explained as to mean something more than mere retaining of gossip or of hearsay; it means judgement or belief, that is, a belief or a conviction resulting from what one thinks on a particular question. It is further stated that the opinion of the court is the reasons given for a judgement. It is explained that there is a manifest difference between a mere opinion and a decision; the former is a statement given by the court for its conclusions, while the latter is the judgement or conclusion of the court.

27. From the above discussion, it will emerge that when in an assessment framed by the Assessing Officer, if a certain claim of the assessee is not examined, no queries raised, no answers elicited, it can not be stated that merely because the Assessing Officer did not reject such a claim in the final order of assessment, he should be deemed to have expressed an opinion with respect to such a claim and any reopening of an assessment of this nature even within a period of four years from the end of relevant assessment year would amount to change of opinion. We are further of the opinion that in any such case, as long as there is some tangible material on the basis of which the Assessing Officer can form a belief that the income chargeable to tax has escaped assessment, it would be permissible to reopen the assessment in exercise of powers under section 147 of the Act, particularly after the amendments made with effect from 1.4.1989. Such tangible material need not be alien to the record.

28. We may presently deal with the contentions of the petitioner that by virtue of the decision of the Apex Court in the case of **Commissioner of Income Tax v. (1) Kelvinator of India Ltd.** (SC) (supra), the ratio of Delhi High Court expressed in the case of ***Commissioner of Income Tax v. Kelvinator of India Ltd.*** (Delhi) (supra) should be understood as the ratio of the Apex Court. With respect, we are unable to accept such a contention. Before proceeding further, we may peruse the decision of the Apex Court in the case of **Commissioner of Income Tax v. (1) Kelvinator of India Ltd.** (SC) (supra) more closely. The judgement starts with the expression *“A short question which arises for determination in this batch of civil appeals is, whether the concept of “change of opinion” stands obliterated*

with effect from 1st April, 1989, i.e., after substitution of section 147 of the Income-tax Act, 1961 by the Direct Tax Laws (Amendment) Act, 1987?". Thus, the question which the Apex Court considered in the said decision was whether the concept of "change of opinion" stands obliterated with effect from 1.4.1989 after substitution of section 147 of the Act. In the context of this question, the Apex Court examined the statutory provisions contained in section 147 of the Act after 1.4.1989. Comparing the provisions as contained prior to 1.4.1989, the Apex Court noted that post 1.4.1989, two conditions previously contained for reopening assessment have been given a go-bye and only one condition, namely, that the Assessing Officer has reason to believe that income has escaped assessment, is required to be satisfied to confer jurisdiction on him to reopen the assessment. It was observed that after 1.4.1989, the power to reopen is much wider. The Apex Court giving schematic interpretation to section 147 of the Act, however, held that even after 1.4.1989, such reopening cannot be on a "mere change of opinion". The Court was of the opinion that the concept of change of opinion is not removed after 1.4.1989 amendments in section 147 of the Act and therefore, even in such subsequent cases, the Assessing Officer has power to reopen the assessment only where there was tangible material to come to the conclusion that there is escapement of income from assessment. It was observed that such reasons must have a live link with the formation of the belief.

28.1 In such decision, the Apex Court did not hold that such tangible material must be that which did not form part of the original record of the assessment proceedings. In short, the ratio of the decision of the Apex Court in the case of **Commissioner of Income Tax v. (1) Kelvinator of India Ltd.** (SC) (supra) is that even after 1.4.1989, the concept of change of opinion is not removed. Resultantly, reopening of assessment can be made provided there is some tangible material with the Assessing Officer to form a belief that income chargeable to tax has escaped assessment.

29. It is true that by the said decision, the Apex Court rejected the revenue's appeal against the Delhi High Court judgments in the case of **Commissioner of Income Tax v. Kelvinator of India Ltd.** (Delhi) (supra) and **Eicher Ltd.** (supra). However, the ratio of the decision of the Apex Court is what the judgement lays down and not what the decisions of the High Court under challenge held. It is well settled that a decision of the Court cannot be read as a Euclid's theorem or as a statute. There is plethora of judicial pronouncements on this issue. Reference to only some of them would be sufficient. In case *of* ***Union of India and another v. Major Bahadur Singh***, reported in (2006) 1 SCC 368, the Apex Court observed as under :

> "*Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which*

reliance is placed. Observations of Courts are neither to be read as Euclid's theorems nor as provisions of the statute and that too taken out of their context. These observations must be read in the context in which they appear to have been stated. Judgments of Courts are not to be construed as statutes. To interpret words, phrases and provisions of a statute, it may become necessary for judges to embark into lengthy discussions but the discussion is meant to explain and not to define. Judges interpret statutes, they do not interpret judgments. They interpret words of statutes; their words are not to be interpreted as statutes. In London Graving Dock Co. Ltd. V. Horton (1951 AC 737 at p.761), Lord Mac Dermot observed:

"The matter cannot, of course, be settled merely by treating the ipsissima vertra of Willes, J as though they were part of an Act of Parliament and applying the rules of interpretation appropriate thereto. This is not to detract from the great weight to be given to the language actually used by that most distinguished judge."

In Home Office v. Dorset Yacht Co. (1970 (2) All ER 294) Lord Reid said, "Lord Atkin's speech.....is not to be treated as if it was a statute definition. It will require qualification in new circumstances." Megarry, J in (1971) 1 WLR 1062 observed: "One must not, of course, construe even a reserved judgment of Russell L.J. as if it were an Act of Parliament." And, in Herrington v. British Railways Board (1972 (2) WLR 537) Lord Morris said:

"There is always peril in treating the words of a speech or judgment as though they are words in a legislative enactment, and it is to be remembered that judicial utterances made in the setting of the facts of a particular case."

29.1 In case of ***Union of India and another v. Arulmozhi Iniarasu and others***, reported in (2011) 7 SCC 397, it was observed as under :

“Before examining the first limb of the question, formulated above, it would be instructive to note, as a preface, the well settled principle of law in the matter of applying precedents that the Court should not place reliance on decisions without discussing as to how the fact situation of the case before it fits in with the fact situation of the decision on which reliance is placed. Observations of Courts are neither to be read as Euclid's theorems nor as provisions of Statute and that too taken out of their context. These observations must be read in the context in which they appear to have been stated. Disposal of cases by blindly placing reliance on a decision is not proper because one additional or different fact may make a world of

difference between conclusions in two cases. (Ref.: Bharat Petroleum Corpn. Ltd. & Anr. Vs. N.R. Vairamani & Anr.3; Sarva Shramik Sanghatana (KV), Mumbai Vs. State of Maharashtra & Ors.4 and Bhuwalka Steel Industries Limited Vs. Bombay Iron & Steel Labour Board & Anr.5.)"

29.2 It is equally well settled that it is the ratio of a decision and not the final judgement which is binding. In the case of ***Davinder Singh and others v. State of Punjab and others***, reported in (2010) 13 SCC 88, the Apex Court observed that a judgement is authority for the proposition which it decides and not what can logically be deduced therefrom. It was observed as under :

"18. A judgement, as is well known, is the authority for the proposition which it decides and not what can logically be deduced therefrom. This Court in Union of India v. Major Bahadur Singh, (2006) 1 SCC 368 has observed:

"9. The Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. Observations of the courts are neither to be `read as Euclid's theorems nor as provisions of the statute and that too taken out of their context. These observations must be read in the context in which they appear to have been stated. Judgments of the courts are not to be construed as statutes. To interpret words, phrases and provisions of a staute, it may become necessary for Judges to embark into lengthy discussions but the discussion is meant to explain and not to define. Judges interpret statutes, they do not interpret judgments. They interpret words of statutes; their words are not to be interpreted as statutes."

29.3 It is not necessary to refer to large number of decisions of the Apex Court taking a similar view. In case of **Commissioner of Income Tax v. Kelvinator of India Ltd.** (Delhi) (supra), the central question that the Full Bench considered was whether even on a mere change of opinion by the Income Tax Officer, action under section 147 of the Act can be brought into operation. In the context of this question, the Full Bench observed that, *"In the event it is held that by reason of section 147 if the Income-tax Officer exercises his jurisdiction for initiating a proceeding for reassessment only upon a mere change of opinion, the same may be held to be unconstitutional. We are therefore of the opinion that section 147 of the Act does not postulate conferment of power upon the Assessing Officer to initiate reassessment proceeding upon his mere change of opinion."*. The Bench further observed that, *"We also cannot accept the submission of Mr. Jolly to the effect that only because in the assessment order, detailed reasons have not been*

recorded an analysis of the materials on the record by itself may justify the Assessing Officer to initiate a proceeding under section 147 of the Act.".

29.4 To our mind, such later observations of the Bench need to be appreciated in light of the ratio of the decision, namely, that under section 147 of the Act, assessment cannot be reopened on a mere change of opinion. We are doubtful whether the Full Bench meant to convey that a certain claim which has not been examined by the Assessing Officer in the original assessment, cannot be a subject matter of reopening on the basis of material already on record. Recently, a Division Bench of Delhi High Court in case of ***Commissioner of Income Tax-VI, New Delhi v. Usha International Ltd.***, reported in (2012) 21 taxmann.com 454 (Delhi) had occasion to examine the decision of the Full Bench in case of **Commissioner of Income Tax v. Kelvinator of India Ltd.** (Delhi) (supra). Taking note of the provisions contained in section 147 of the Act as amended with effect from 1.4.1989 and several decisions of the Apex Court, the Bench desired that the issue whether the principle of "change of opinion" will apply even when the Assessing Officer has not asked any question or query with respect to an entry or a note during the original assessment proceedings be referred to larger bench. The Bench observed as under :

> *"22. However, there can be cases when the Assessing Officer does not refer to a particular aspect in the assessment order or did not raise any written question or query during the course of original assessment proceedings. To what extent in such cases, doctrine of "mere change of opinion" is applicable and will bar re-assessment proceedings when assessment is completed under Section 143(3), is the issue or question raised. There can be different aspects/factual matrix in which this question may arise. There can be cases where the Assessing Officer could not have completed the assessment without noticing or examining the aspect/fact. There can be cases where the entry/claim is a repetition and has been allowed and considered in earlier years. There can also be cases where the note/entry in the returns/accounts is there but there is nothing to indicate that the Assessing Officer examined/considered the entry/note. To what extent the presumption under Section 114 (e) of the Evidence Act would apply is the issue. The contention/question is whether the presumption is rebuttable and when the presumption is rebutted. Further, whether the said presumption only applies to procedural aspects or even to substantive assertions relevant to the assessment.*
>
> *23. Having considered the matter in depth, we feel that the matter should be examined by a larger Bench. We may note that the decision in the case of Rajesh Jhaveri Stock Brokers Pvt. Ltd.,(supra) relates to processing of returns under Section 143(1)(a) and not to regular assessment under*

Section 143(3). The Supreme Court in their decision CIT vs. Kelvinator of India Ltd. (supra) has not specifically referred to Section 114 of the Evidence Act and has also not specifically disapproved or approved the observations of the Full Bench of Delhi High Court with reference to the said Section."

In the concluding portion of the judgement, the Court made a reference to Larger Bench for decision on following questions :

"25. Looking at the aforesaid decisions and the nature of controversy, we feel that the following substantial questions of law should be referred to a larger Bench for elucidation and examination. This is necessary as we have to examine the decision and observations made by the Full Bench of this Court in Kelvinator (supra):-

"(i) What is meant by the term "change of opinion?

(ii) Whether assessment proceedings can be validly reopened under Section 147 of the Act, even within four year, if an assessee has furnished full and true particulars at the time of original assessment with reference to income alleged to have escaped assessment and whether and when in such cases reopening is valid or invalid on the ground of change of opinion?

(iii) Whether the bar or prohibition under the principle "change of opinion" will apply even when the Assessing Officer has not asked any question or query with respect to an entry/note, but there is evidence and material to show that the Assessing Officer had raised queries and questions on other aspects?

(iv) Whether and in what circumstances Section 114 (e) of the Evidence Act can be applied and it can be held that it is a case of change of opinion?"

30. In the result, we are of the opinion that reopening of an assessment within a period of four years from the end of relevant assessment year after 1.4.1989 could be made as long as the same is not based on mere change of opinion. Merely because a certain material which is otherwise tangible and enables the Assessing Officer to form a belief that income chargeable to tax has escaped assessment, formed part of original assessment record, per se would not bar the Assessing Officer from reopening the assessment on the basis of such material. Expression "tangible material" does not mean material alien to the original record.

31. Before closing this issue, we would like to refer to two decisions of our Court which were brought to our notice. It was pointed out that a Division Bench in a

judgement dated 12.3.2012 rendered in Special Civil Application No.15067 of 2011 in case of ***Ganesh Housing Corporation Ltd. v. Deputy Commissioner of Income Tax***, quashed the notice for reopening making following observations :

> "In spite of full disclosure, the Assessing Officer gave benefit of the provision by considering the materials on record and thus, it cannot be said that any income escaped assessment in accordance with law. We find that the Assessing Officer has now given a second thought over the same materials.
>
> *Similarly, the fact that the Assessing Officer in the assessment proceedings under section 143(3) of the Act did not give any opinion regarding the allowability or otherwise of deduction u/s 80IB (10) of the Act is not a ground of invoking Section 147 of the Act."*

32. Such observations, however, must be appreciated in factual background in which such decision was rendered. It was a case where an assessment which was previously framed after scrutiny was sought to be reopened within a span of four years from the end of relevant assessment year. In the original assessment, the assessee had made a claim for deduction under section 80-IB(10) of the Act which was also granted. The assessee had contended that such claim was made duly supported by audit report of the Chartered Accountants in the prescribed form which claim was duly allowed after thorough scrutiny by the Assessing Officer. It was, therefore, the contention of the assessee that such assessment was being reopened on a mere change of opinion on the basis of same material which was processed by the Assessing Officer in the original assessment. It was noticed that in the reasons recorded, the Assessing Officer desired to disallow the claim on the basis of a retrospective clarification added to the said section on the basis of which, the Assessing Officer held a belief that the assessee was only a works contractor and not a developer. It was in this background that the court found that the notice for reopening of assessment was without jurisdiction. It was observed as under :

> "*After hearing the learned counsel for the parties and after going through the aforesaid materials on record, we find that the main reason for opening the assessment is that in the light of the Explanation inserted to Section 80-1B (10) by the Finance Act (No.2), Act 2009 with retrospective effect from 01.04.2000, deduction u/s 801B(10) shall not be admissible to a contractor in respect of works contract awarded by any person."*

33. It was in this background that the Court held that if an explanation is added to a section of a statute for removal of doubts, the implication is that the law was the same from the very beginning and the same is further explained by way of

addition of the explanation. It was in this background, the Bench made observations that we noted earlier. Such observations, in our opinion, must be appreciated in factual background in which the same were made. In any case, we do not find that this decision lays down a ratio that an assessment previously framed cannot be reopened even within four years without the Assessing Officer being able to demonstrate that the income chargeable to tax had escaped assessment due to failure on the part of the assessee to disclose material facts.

34. Our attention was also drawn to a short judgment dated 26.7.2012 passed by another Division Bench rendered in Special Civil Application No.17846 of 2011 in case of ***Metal Alloys Corporation v. Assistant Commissioner of Income Tax***. In such order, while quashing the notice for reopening of an assessment which was issued within a period of four years from the end of relevant assessment year, it was observed as under :

> "*It is well settled that the assessment order can be reopened within a period of four years if some new material is discovered or the assessee has concealed or suppressed some material relevant to the assessment year or he has failed to disclose the material relevant to the assessment year."*

35. Such observations were made in the background of the fact that during the course of original assessment proceedings, Income Tax Officer had raised queries with respect to controversial deductions, such queries were replied by the assessee. In the assessment order, the Assessing Officer had in fact dealt with the question of grant of the relevant deductions and thereafter, allowed such a deduction. It was in this background, the Division Bench quashed the notice observing that *"In our opinion, reasons given for reopening the assessment and the notice issued under section 148 of the Act is nothing, but a change of opinion."*.

36. Once again, the decision must be seen in the background of the facts in which the same was rendered. An isolated observation cannot be picked up out of context and treated as a ratio of the decision. In this case also, in our opinion, no ratio has been laid down that reopening of an assessment even within four years after 1.4.1989 would not be permissible unless the Assessing Officer has reason to believe that the income chargeable to tax has escaped assessment due to failure on the part of the assessee to disclose material facts.

37. Coming to the second question, as recorded, contention of the petitioner is that as in the present case, once the Assessing Officer examines a certain claim of the assessee in the original assessment proceedings, raises queries, receives replies, but thereafter makes no additions or disallowances, without giving reasons, it would not be permissible to reopen the assessment even within four years on very same grounds. The contention of the revenue is that in absence of any direct

discussion in the assessment order, the Assessing Officer cannot be stated to have formed any opinion and that therefore, reopening within a period of four years of such an assessment would be permissible.

38. In this context, we may recall that as held by the Apex Court in the case of **Commissioner of Income Tax v. (1) Kelvinator of India Ltd.** (SC) (supra), even after 1.4.1989, reopening of an assessment previously framed after scrutiny would not be permissible on a mere change of opinion and that the Assessing Officer must have some tangible material to form a belief that income chargeable to tax has escaped assessment. The concept of change of opinion is not done away with in the newly amended section 147 of the Act.

39. In the context of the question before us, we may re-visit some of the decisions cited before us. In case of ***Commissioner of Income Tax v. Nirma Chemicals Works P. Ltd.*** (supra), the Division Bench of this Court, of course in context of the Commissioner's power to revise the decision of the Assessing Officer under section 263 of the Act, made certain observations which are relevant for our purpose. The Court rejected the revenue's contention that the assessment order does not reflect any application of mind of the Assessing Officer as to the eligibility of section 80-IA of the Act in following manner :

> "The contention on behalf of the revenue that the assessment order does not reflect any application of mind as to eligibility or otherwise under Section 80-I of the Act requires to be noted to be rejected. An assessment order cannot incorporate reasons for making/granting a claim of deduction. If it does so, an assessment order would cease to be an order and become an epic tome. The reasons are not far to seek. Firstly, it would cast an almost impossible burden on the Assessing Officer, considering the workload that he carries and the period of limitation within which an order is required to be made; and, Secondly, the order is an appealable order. An appeal lies, would be filed, only against disallowances which an assessee feels aggrieved with."

40. The Delhi High Court in the case of ***Commissioner of Income Tax v. Eicher Ltd.*** (supra) also made certain relevant observations. This was of course a case where the assessment was reopened beyond a period of four years from the end of relevant assessment year. In that view of the matter, the additional requirement that the income chargeable to tax has escaped assessment due to failure on the part of the assessee to fully and truly disclose all material facts, was not there. However, on the question of a change of opinion, when in the original assessment order, the Assessing Officer did not record reasons for not making certain disallowances, the Division Bench of Delhi High Court observed as under :

"Applying the principles laid down by the Full Bench of this Court as well as the observations of the Punjab and Haryana High Court, we find that if the entire material had been placed by the assessed before the Assessing Officer at the time when the original assessment was made and the Assessing Officer applied his mind to that material and accepted the view canvassed by the assessed, then merely because he did not express this in the assessment order, that by itself would not give him a ground to conclude that income has escaped assessment and, therefore, the assessment needed to be reopened."

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 reasons for not making the addition.

44. At this stage, we may examine the decision of the Division Bench of this Court in the case of ***Praful Chunilal Patel v. M. J. Makwana, Assistant Commissioner of Income Tax***, (supra) more closely. This was a case wherein assessment previously framed under section 143(3) of the Act was sought to be reopened within a period of four years from the end of the relevant assessment year. The case concerned assessment year 1993-94 and therefore, the amended section 147 of the Act was applicable. On certain claims of the assessee which were not rejected by the Assessing Officer in the scrutiny assessment, the court held that in cases where the Assessing Officer has not made an assessment of any item of income chargeable to tax while passing the assessment order, it cannot be said that such income was subjected to an assessment. The court was of the opinion that in the original assessment, the Assessing Officer never really formed an opinion on a particular contentious issue. It was in this background that the Court was of the

opinion that since no opinion was formed in this regard, consequently there would be no question of a mere change of opinion. The Court also expressed an opinion that in view of the explanation 2 to section 147 of the Act, power to make assessment or re-assessment within four years would be attracted even in cases where there has been complete disclosure of all material facts.

45. The decision of this Court in case of ***Praful Chunilal Patel v. M. J. Makwana, Assistant Commissioner of Income Tax*** (supra) came up for consideration in case of ***Garden Silk Mills Pvt. Ltd. v. Deputy Commissioner of Income Tax***, reported in (1999) 237 ITR 668. To the extent the decision in case of ***Praful Chunilal Patel v. M. J. Makwana, Assistant Commissioner of Income Tax*** (supra) drew a distinction between change of opinion and finding erroneous nature of earlier assessment on detection of mistake on an issue which was not earlier considered by the Assessing Officer, the Bench found itself in complete agreement. We may notice the relevant portion of this decision of this Court in case of ***Garden Silk Mills Pvt. Ltd. v. Deputy Commissioner of Income Tax*** (supra), which reads as under :

> *"The question was again discussed at some length by another Division Bench of this Court in Praful Chunilal Patel vs. M. J. Makwana, Asstt. CIT. It was a case in which notice under s. 147 had been issued. Recording of reasons disclosed that a part of item of income though disclosed as per information submitted by the assessee, had remained to be considered for assessment and, therefore, the income has been underassessed. It was submitted on behalf of the assessee that all facts were correctly disclosed and were on record during the assessment proceedings relevant to asst. yr. 1991-92 and the order was made by the AO after seeking details. It should be assumed that he has consciously not taxed the income which is now sought to be looked into by him. It was emphasised that it should be assumed that the AO had formed an opinion that there was no transfer and hence, no capital gains accrued. ....*
>
> *The first premise which the Court took into consideration is that the cases of underassessment or excessive relief which are deemed cases of escapement of income leave no scope for an argument that they are not the cases of income having escaped assessment. There cannot be any doubt about this proposition. It arises in every case where an assessment results in lesser collection of revenue than what it ought to be. But, as it is noticed, reason to believe that there has been escapement of assessment must not be a pretence or change of opinion but must be founded on material having reasonable nexus to the formation of opinion about escapement of income. The sufficiency or adequacy of such material, so far it exists, some nexus between the material and the formation of opinion, is not subject-matter of*

judicial scrutiny nor holding of such belief on that basis can be challenged which is subjective in nature, giving jurisdiction to issue notice and initiate proceedings for reassessment. However, the Court while considering the contention about change of opinion observed, "while considering the cases referred to above change of opinion would mean where, if there is conscious application of mind on the earlier occasion and the assessment is result of such conscious application of mind to the issue which is sought to be reopened. That there has been no conscious application of mind, in the first instance, question of change of opinion would not arise. It would be then formation of opinion for the first time about the erroneous nature of assessment resulting in escapement.

....

We are in respectful agreement with the aforesaid enunciation of distinction between change of opinion and finding erroneous nature of earlier assessment on detection of mistake on an issue which was not earlier considered by the Assessing Officer.".

46. The decision in case of ***Praful Chunilal Patel v. M. J. Makwana, Assistant Commissioner of Income Tax***, however, goes beyond the above proposition. The Bench went on to hold that, *"On a proper interpretation of s. 147 of the Act, it would appear that the power to make assessment or reassessment within four years of the end of the relevant assessment year would be attracted even in cases where there has been a complete disclosure of all relevant facts upon which a correct assessment might have been based in the first instance, and whether it is an error of fact or law that has been discovered or found out justifying the belief required to initiate the proceedings. In our view, the words "escaped assessment" where the return is filed, are apt to cover the case of a discovery of a mistake in the assessment caused by either an erroneous construction of the transaction or due to its non-consideration, or, caused by a mistake of law applicable to such transfer or transaction even where there has been a complete disclosure of all relevant facts upon which a correct assessment could have been based."*.

47. The above observations of the Bench, in our opinion, need not be seen as a ratio of the decision since in the said case, the facts were that assessment was reopened within four years on the ground that a part of the income though disclosed by the assessee had not been considered for assessment in the original proceedings. Such observations, therefore, would not be in the nature of laying down a ratio as the question whether even where a particular claim had been examined by the Assessing Officer in the original assessment can be subject matter of reopening on the ground that such claim was accepted on erroneous construction of the transaction or by mistake of law applicable to such a

transaction. We are also of the opinion that by virtue of such observations if the revenue contends that post 1.4.1989, reopening of an assessment would be permissible on change of opinion, it would run counter to the decision of the Apex Court in case of **Commissioner of Income Tax v. (1) Kelvinator of India Ltd.** (SC) (supra).

48. Before closing this issue, we would like to clarify one aspect. We have expressed our opinion on the question framed by us. In a given case, it may so happen that a particular claim may have many facets. For example, a claim of deduction under section 80-HHC of the Act would have various parameters. If one of the parameters is scrutinized or accepted either with or without reasons, that by itself may not mean that the entire claim of deduction under section 80-HHC of the Act stood verified and accepted by the Assessing Officer. We hasten to add that each case must depend on facts individually and in a given case, it may be possible for the assessee to argue that all aspects of the claim were examined or that different facets of the claim were so inextricably interlinked that the assessing officer must be taken to have examined the entire claim. We only clarify that our answer to the second question must be seen within the limited scope of the question itself.

49. The last question is how would these conclusions apply in the present case. To quickly recapitulate, the petitioner – assessee put forth his claim for exemption under section 10(23G) of the Act with respect to three different incomes, namely, (1) interest from SSNNL bonds, (2) interest from GIPCL bonds, and (3) capital gain from sale of shares by GPEC. Such claim was supported by the notes forming part of the return of income. It is not as if the Assessing Officer did not notice these claims. In fact, the Assessing Officer asked the assessee to justify all the claims. In paragraph 5 of his letter dated 31.1.2005, he called upon the assessee to justify the claim of exemption of capital gain on the sale of shares. In paragraph 12, he called upon the assessee to justify the claim of exemption under section 10(23G) of the Act vis-a-vis interest earned from SSNNL/GIPCL bonds. The assessee gave detailed reply to the query raised in para 5 with respect to capital gain. The assessee, thereafter, contended that such justification would apply with respect to interest on the bonds also. Contents of the letter of the assessee would demonstrate that the assessee offered its explanation for claiming exemptions under section 10(23G) of the Act. If for some reason the Assessing Officer was not satisfied with such explanation, surely it was open for him to call for further explanation. In the final order of assessment, it is not as if the Assessing Officer totally lost sight of such claims. He in fact took into account the fact that the assessee was claiming exemption on the interest income from the bonds. He, therefore, examined as to what extent expenditure for earning such tax free income should be disallowed. In the order of assessment, he gave detailed reasons why a

portion of the expenditure relating to earning tax free interest should be disallowed.

50. In the reasons which the Assessing Officer recorded for reopening the assessment, he based his case on wrong exemption of interest from SSNNL/GIPCL Bonds claimed under section 10(23G).

51. In our opinion, any such reopening would be based on a mere change of opinion. In the reasons, the Assessing Officer started with the words, “from the records, it can be seen that .....”. Entire information and the material that the Assessing Officer, therefore, had at his command was reflected from the record itself. This coupled with the fact that in the original assessment, the Assessing Officer examined such claims in detail, would convince us that any reopening of the assessment of same claims on the basis of same material, amounts to a mere change of opinion. The fact that the Assessing Officer did not record reasons for making no disallowance on such claim of exemption, would be of no consequence.

52. In the result, we are of the opinion that the notice was issued without jurisdiction. The same, therefore, requires to be and is hereby quashed. Rule is made absolute accordingly with no order as to costs.

[AKIL KURESHI, J.]

[HARSHA DEVANI, J.]