IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 15067 of 2011

For Approval and Signature:

HONOURABLE THE ACTING CHIEF JUSTICE

MR.BHASKAR BHATTACHARYA

AND
HONOURABLE MR.JUSTICE **J.B.PARDIWALA**

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?
2	To be referred to the Reporter or not ?`
3	Whether their Lordships wish to see the fair copy of the judgment ?
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
5	Whether it is to be circulated to the civil judge ?

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GANESH HOUSING CORPORATION LTD

Versus

DY.COMMISSIONER OF INCOME-TAX,CIRCLE 4 & ANR.

===

Appearance :
MR RK PATEL for Petitioner.
MR MANISH R BHATT, SR. ADVOCATE WITH MS MAUNA M BHATT for Respondents.
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CORAM :	HONOURABLE THE ACTING CHIEF JUSTICE MR.BHASKAR BHATTACHARYA
	and
	HONOURABLE MR.JUSTICE J.B.PARDIWALA

Date : 12/03/2012

CAV JUDGMENT

(Per : HONOURABLE THE ACTING CHIEF JUSTICE MR.BHASKAR BHATTACHARYA)

1. By this application under Article 226 of the Constitution of India, the writ-petitioner, an assessee under the Income Tax Act, 1961 [the Act, for short hereafter], has prayed for issue of mandamus to quash and set aside the notice dated 1st March 2011 under section 148 of the Act, which is Annexure 'C' to the writ-application. It has also prayed for quashing the preliminary order dated 3rd October 2011 passed by the Assessing Officer which is Annexure 'G' to the writ-application.
2. The facts leading to the filing of the above petition under Article 226 of

the Constitution of India may be summed up thus:

1. On 24th December 2006, the petitioner-Company filed a return of income electronically and subsequently, submitted the same physically on 29th December 2006 along with statement of income and the necessary annexure, like Profit and Loss Account, Balance Sheet, Audit Report in Form 3CA and 3CD.
2. After the filing of the said Return, a notice for scrutiny assessment was given and the petitioner replied to the same wherein the issue of the relief under section 80IB (10) of the Act was thoroughly scrutinized in the original assessment.
3. On 30th December 2008, the scrutiny assessment order under section 143(3) of the Act was passed after considering the contentions and documentary evidence on record for which various details were called for by the Assessing Officer.
4. On 1st March 2011, a notice under section 148 of the Act was issued by the respondent along with the reasons for initiating the proceedings under section 147 of the Act.
5. On 31st March 2011, the writ-petitioner filed a return of income pursuant to the said notice under section 148 of the Act and subsequently on 29th September 2011, the petitioner submitted written objections against the reopening of completed scrutiny assessment.

6. On 3rd October 2011, the Assessing Officer disposed of the objections filed by the writ-petitioner against the reasons for reopening. Hence the present petition.

3. The case made out by the writ-petitioners in this writ-application may be summed up thus:

    1. At the time of initial assessment under section 143(3) of the Act, the deduction of Rs.11,38,83,650/- under section 80IB(10) of the Act was claimed in the computation of total income. Such claim was duly supported by the Audit Report of the Chartered Accountants in Form No. 10CCB in respect of each of the undertakings and the Assessing Officer duly allowed such deduction after thorough scrutiny.
    2. The respondent sought to reopen the assessment under section 147 of the Act by issuing a notice under section 148 of the Act notwithstanding the fact that there is no valid reason to issue such notice.
    3. The reasons recorded for issue of notice under section 148 of the Act indicate mere change of opinion of the Assessing Officer on the selfsame issue, which was processed in the original assessment. There was no failure on the part of the petitioner either in filing the return or full furnishing of the particulars.
    4. The respondent committed grave error in rejecting the objection of

the petitioner by relying upon the inapplicable judgment of the jurisdictional High Court in the case of **DISMAN PHARMACEUTICALS** which is concerned with deemed dividend and the applicability of section 2(22)(e) of the Act.

5. The respondent also wrongly relied upon the ratio of the judgment in the case of **RAJESH JHAVERI STOCK BROCKERS** in his support since the said case dealt with the reopening under section 148 of the Act in an 'intimation order' under section 143(1) of the Act. There was no 'scrutiny order' under section 143(3) of the Act in that case.
6. The entire exercise of reopening was undertaken by the respondent on an assumption of fact contrary to the assessment record itself since the petitioner already maintained separate account as required and the land taken from the landowner was also transferred in the name of the petitioner. The capital gains tax was also reflected in the land owner's Income Tax Returns.
7. The entire initiation of jurisdiction under section 147 read with section 148 of the Act is contrary to the ratio of the recent three-judge-bench decision of the Supreme Court in the case of **KELVINATOR OF INDIA LTD reported in 320 ITR 561**.
8. At the time of initial assessment finalized under section 143 (3) of the Act, the total income of the petitioner was duly assessed

without making disallowance of the claim under section 80IB(10) of the Act after taking into due consideration of the computation of the total income, Tax Audit Report in Form 3CD and Report in Form No. 10CCB. The Tax Audit Report in Form 3CD clearly declared the details of amount inadmissible under the provisions of the Act and duly certified by the Chartered Accountants.

9. At the time of initial assessment finalized under section 143(3) of the Act, the deduction of Rs.11,38,83,650/- under section 80IB(10) of the Act was duly supported by the Audit of the Chartered Accountants. Such claim was allowed after thorough scrutiny and verification of the concerned Assessing Officer and after due consideration of all material facts as disclosed by the petitioner and as available on the records.

4. The writ-application is opposed by the Revenue by filing affidavit-in-reply thereby opposing the prayer of the writ-petitioner and the defence of the Revenue may be epitomized thus:

    1. The writ-petition filed by the petitioner is a premature one inasmuch as only a notice under section 148 of the Act has been issued and in the event the petitioner is aggrieved by the reassessment order to be passed, the statutory remedy of appeal under the provisions of the Act is available.

    2. The petitioner was allowed excessive deduction under section

80IB (10) of the Act at the time of assessment and, therefore, the assessment was required to be reopened after recording valid reasons.

3. The petitioner failed to furnish the particulars of its income and claimed deduction under section 80IB (10) of the Act although the same was not available to him. The matter is also clarified by introducing clarification with retrospective effect in the Act. Therefore, it is neither a case of 'change of opinion' nor 'review' of his own scrutiny but assessment is reopened to withdraw the excessive deduction allowed to the petitioner-assessee.

4. The deduction allowed to the writ-petitioner was not in accordance with law as the petitioner was only a 'works contractor' and not a 'developer'. Although this fact was in the special knowledge of the petitioner, it claimed deduction by giving wrong particulars about its status by claiming as a 'developer' though it was only a 'works contractor' and thus, the petitioner has failed to disclose fully and truly all the material facts necessary for its assessment.

5. At the time of passing the original assessment order, the Assessing Officer had not discussed anything on deduction under section 80IB(10) of the Act. The clarification in this regard was also introduced in the Act with retrospective effect from 1st April

2001, and, therefore, it is very much clear that the assessee is not entitled to the said deduction.

6. A further-affidavit was also filed by the respondent No.1 thereby pointing out that the assessee had not furnished any separate Profit and Loss Account for both the eligible businesses. Along with letter dated 14th November 2008, the petitioner only provided details regarding receipt from IPBP Project and Housing Project and corresponding expenditure and profit from the said project as per Exhibit-II attached to the said letter. In the light of said exhibit, the assertions made in paragraphs (vii) and (viii) of the reasons recorded are correct inasmuch as no separate and distinct accounts have been furnished by the assessee during the course of original assessment proceedings. The only annexure submitted during the course of original assessment proceedings was the above-referred Exhibit-II, which only gives a summary of net sales, closing stock and direct expenses.

5. Mr. Patel, the learned advocate appearing on behalf of the petitioner, has strongly relied upon the decision of the Supreme Court in the case of **KELVINATOR OF INDIA LTD reported in [2010] 2 SCC 723** and contended that in the case before us, no 'tangible materials' have been disclosed in coming to a conclusion that there was escapement of income from assessment. Mr. Patel, in this connection, had drawn our

attention to the reasons for initiation of proceedings and has contended that the reasons itself indicate that this is a case of mere 'change of opinion'.

6. Mr. Bhatt, the learned senior advocate appearing on behalf of the Revenue, has, on the hand, opposed the aforesaid contention of Mr. Patel and also relied upon the selfsame decision of **KELVINATOR OF INDIA LTD (***supra***)** in support of his contention that after the amendment of the Act in the year 1989, the scope of section 148 of the Act is much wider. He, therefore, prays for dismissal of the appeal.

7. In order to appreciate the question involved in this appeal, we first propose to deal with the reasons for initiating proceedings under section 147 of the Act as disclosed by the Assessing Officer. The reasons assigned by the Assessing Officer is quoted below:

> "*In view of Explanation inserted ibid with retrospective from 1.4.2001 below section 80IB (10) of the Act by the Finance (no.2) Act, 2009 which is re-produced as under:*
>
> *"Explanation – For the removal of doubts, it is hereby declared that nothing contained in this sub-section shall apply to any undertaking which executed the housing project as a works contract awarded by any person including the Central or State Government".*
>
> *Perusal of the records reveals that*

(i). the land in which the housing projects called "Shangri La" for which deduction had been availed was actually owned by other two parties, viz. Madhav [Thaltej] Complex Pvt. Ltd. And M.s., Mdhukamal [Thaltej] Complex Pvt. Ltd.

[ii]. The assessee got the development rights in the land admeasuring 30497 sq. mtrs situated in Thaltej village, Ahmedabad included in Town Planning Scheme No. 38 of Thaltej under the development agreement registered under Sl. No. 9753 dated 25.9.2006 registered with sub-registrar, Ahmedabad-3, Memnagar for Rs.9,94,50,717/-.

[iii]. The entire cost of Rs.9,94,50,717/- has been debited to P&L account under Schedule 17, "expenses of residential projects direct expenses".

[iv]. As per condition No. 3,4 of the development agreement, the owners of the land had agreed to execute the conveyance deeds of the housing units to be completed therein by the assessee in favour of the prospective purchasers as may be authorized by the assessee. Also vide condition No. 9.2 of the agreement, the owners have agreed to extend full co-operation for getting benefit u/s 80IB(10) of the Act by the assessee.

[v]. The development permission for construction of 39 residential units only as against 122 units (bungalows) proposed to be executed by the assessee has been given by the Ahmedabad Urban Development Authority under No. PRM/107/5/05 on 24.7.06 with construction area of 5325.45 sq. mtrs. However, the development permission had been issued in the favour of land owner and not in favour of the assessee.

[vi]. During the year, the assessee had booked part of the profit of the housing project following Accounting Standard 9 claiming 80% work done of Rs.18,11,29,280/- on the total sale value of Rs.22,61,44,600/- pertaining to 59 units and deduction of profit of Rs.11,38,83,650/- was claimed after adjustment of expenditure u/s 80IB(10) of the Act.

[vii]. As per the provisions of Section 801A(5) of the Act separate accounts are to be maintained as if such eligible business were the only source of income of the assessee for which deduction are claimed. But not such separate accounts were maintained in absence of which the exact amount of deduction u/s 101A (5) of the Act 801B (1) of the Act could not be ascertained.

[viii]. In respect of allocation of expenditure between the two projects, the C.A. in his 3CD report (item No.3) in Notes on Accounts) has stated that "the company follows the policy of transferring its revenue expenses up to 30% for six months to housing project Shangri La and 10% to Industrial park (IPBP) and the remaining 60% expenses are debited to P&L account. This indicated that no separate and distinct accounts were maintained for each eligible business. Thus, the assessee has violated the provisions of the Act.

[ix]. From the layout plan/map and sales brochure of the said project, it was observed that the total built up area of each unit (single bungalow, without including the thickness of walls) exceeded the maximum built up area of 1500 sq. feet [i.e. by 177.76 sq. ft] fixed for claiming deduction u/s. 801B(1) of the Act. The assessee had reduced the Built up area of the balcony and

covered parking which fall under the definition of "projection" from the wall and worked out built up area of 1469.28 sq. ft. The area covered by the said parking was also required to be included in total built up area.

In view of the above, it has become quite clear that in the Development Permission issued by AMC in respect of Shangri La Project, is not in favour of the assessee but it was actually issued in favour of the land owners. In fact, the assessee had executed the works contract for the owners. There was failure on the part of the assessee to dis-regard these facts in Form No. 10CCB while claiming deduction u/s 801B(1) of the Act. The Assessing Officer in the assessment proceedings u/s 143(3) did not give any opinion regarding the allowability or otherwise of deduction u/s 80IB (10) of the Act. If an issue has not been examined in correct perspective in the initial assessment proceedings, nothing prevents the assessing officer to take a suitable remedial action by way of re-opening the assessment.

Accordingly, the assessee company is not eligible to for claim u/s. 80IB (10) of the Act. More so, in the light of the Explanation inserted below 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.

In view of the above, I have reasons to believe that the Income chargeable to tax to the extent of Rs.11, 38, 83,650/- has escaped assessment."

8. In order to appreciate the aforesaid question, it will be profitable to refer to the provisions contained in Section 147 of the Act, which is quoted below.

Income escaping assessment.

"147. 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 matters 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 the excessive relief under this Act; or

[iv] excessive loss or depreciation allowance or any other allowance under this Act has been computed.

Explanation 3.-- For the purpose of assessment or reassessment under this section, the Assessing Officer may assess or reassess the income in respect of any issue, which has escaped assessment, and such issue comes to his notice subsequently in the course of the proceedings under this section, notwithstanding that the reasons for such issue have not been included in the reasons recorded under sub-section [2] of section 148."

9. In the case before us, the assessee having challenged the notice of reassessment in a proceeding under Article 226 of the Constitution, before proceeding further, we propose to deal with the scope of interference in such a matter.

10. The Supreme Court in the case of **THE COMMISSIONER OF INCOME TAX, GUJARAT V. M/S. A. RAMAN AND CO. reported in AIR 1968 SC 49** had the occasion to deal with such a question. We may appropriately refer to the following observations made by a three-judge-bench in the above matter by relying upon the majority view taken in an earlier decision of that court taken by a bench of five judges:

> "*4. It was held by this Court in Calcutta Discount Co. Ltd. v. Income-tax Officer, (1961) 41 ITR 191 = (AIR 1961 SC 372) that the High Court in appropriate cases has power to issue an order prohibiting the Income-tax Officer from proceeding to reassess the income when the conditions precedent do not exist. At p. 207, K. C. Das Gupta, J., delivering the majority judgment of the Court observed:*
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> *"It is well settled however that though the writ of prohibition or certiorari will not issue against an executive authority, the High Courts have power to issue in a fit case an order prohibiting an*

executive authority from acting without jurisdiction. Where such action of an executive authority acting without jurisdiction subjects or is likely to subject a person to lengthy proceedings and unnecessary harassment, the High Courts, it is well settled will issue appropriate orders or directions to prevent such consequences.

The High Court may, therefore, issue a high prerogative writ prohibiting the Income-tax Officer from proceeding with reassessment when it appears that the Income-tax Officer had no jurisdiction to commence proceeding.

5. The condition which invests the Income-tax Officer with jurisdiction has two branches: (i) that the Income-tax Officer has reason to believe that income chargeable to tax has escaped assessment; and (ii) that it is in consequence of information which he has in his possession and that he has reason so to believe. Since the learned Judges of the High Court have concentrated their attention upon the second branch of the condition and have reached their conclusion in favour of the assessees on that branch, it would be appropriate to deal with the correctness of that approach. The expression "information" in the context in which it occurs must, in our judgment, mean instruction or knowledge derived from an external source concerning facts or particulars, or as to law relating to a matter bearing on the assessment. If as a result of information in his possession the Income-tax Officer has reason to believe that income chargeable to tax had escaped assessment, the Income-tax Officer has jurisdiction to assess or reassess income under Section 147 (1) (b) of the Income-tax Act,

1961, Information in his possession that income chargeable to tax has escaped assessment furnishes a starting point for assessing or re-assessing income. If he has that information, the Income-tax Officer may commence proceedings for assessment or reassessment. To commence the proceeding for reassessment it is not necessary that on the materials which came to the notice of the Income-tax Officer, the previous order of assessment was vitiated by some error of fact or law.

6. ***The High Court exercising jurisdiction under Article 226 of the Constitution has power to set aside a notice issued under Section 147 of the Income-tax Act, 1961, if the condition precedent to the exercise of the jurisdiction does not exist. The Court may, in exercise of its powers, ascertain whether the Income-tax Officer had in his possession any information: the Court may also determine whether from that information the Income-tax Officer may have reason to believe that income chargeable to tax had escaped assessment. But the jurisdiction of the Court extends no further. Whether on the information in his possession he should commence a proceeding for assessment or reassessment, must be decided by the Income-tax Officer and not by the High Court. The Income-tax Officer alone is entrusted with the power to administer the Act; if he has information from which it may be said prima facie, that he had reason to believe that income chargeable to tax had escaped assessment, it is not open to the High Court, exercising powers under Article 226 of the Constitution, to set aside or vacate the notice for reassessment on a re-***

appraisal of the evidence.

7. ***The High Court in this case was apparently of the view that the information in consequence of which proceedings for reassessment were intended to be started, could have been gathered by the Income-tax Officer in charge of the assessment in the previous years from the disclosures made by the two Hindu undivided families. But that, in our judgment, is wholly irrelevant.*** *Jurisdiction of the Income-tax Officer to reassess income arises if he has in consequence of information in his possession reason to believe that income chargeable to tax has escaped assessment.* ***That information must, it is true, have come into possession of the Income-tax Officer after the previous assessment, but even if the information be such that it could have been obtained during the previous assessment from an investigation of the materials on the record, or the facts disclosed thereby or from other enquiry or research into facts or law, but was not in fact obtained, the jurisdiction of the Income-tax Officer is not affected."***

(Emphasis supplied).

11. At this stage, we propose to refer to two more decisions of the Supreme Court, one, in the case of **GEMINI LEATHER STORES V. THE INCOME-TAX OFFICER**, **'B' WARD AREA AND OTHERS** reported in

AIR 1975 SC 1268 and the other, in the case of **INCOME-TAX OFFICER, INCOME-TAX CUM WEALTH TAX CIRCLE II, HYDERABAD V. NAWAB MIR BARKAT ALI KHAN BAHADUR, HYDERABAD** reported in **IN AIR 1975 SC 703** which would be relevant for the purpose of this case.

12. In the case of **Gemini Leather Stores** *(supra)*, while making a best judgment assessment, the Income-tax Officer had discovered certain transactions evidenced by the drafts, which the assessee had not disclosed. In spite of this discovery and the knowledge of all the material facts, the Income-tax Officer did not make necessary enquiries and draw proper inferences as to whether the amounts invested in the purchase of the drafts could be treated as part of the total income of the assessee during the relevant year. In such a situation, it was held that it was plainly a case of oversight and the Income-tax Officer could not take recourse to Section 147 (a) to remedy the error resulting from his own oversight and that therefore the notice under Section 148 should be quashed.

13. In the case of **Nawab Mir Barkat Ali Khan Bahadur, Hyderabad** *(supra)*, the Supreme Court even went to the extent that non-production of the documents at the time of the original assessments cannot be regarded as non-disclosure of any material facts necessary for the assessment of the respondent for the relevant assessment years, where

such documents conform to the documents already filed by the assessee in material particulars.

The following observations are in this connection relevant and are quoted below:

> "*Non-production of the documents executed in 1957 at the time of the original assessments cannot therefore be regarded as non-disclosure of any material fact necessary for the assessment of the respondent for the relevant assessment years. The High Court was right in holding that the Income-tax Officer had no valid reason to believe that the respondent had omitted or failed to disclose fully and truly all material facts and consequently had no jurisdiction to reopen the assessments for the four years in question.* ***Having second thoughts on the same material does not warrant the initiation of a proceeding under Section 147 of the Income-tax Act 1961."***

(Emphasis supplied).

14. At this stage, we may rather aptly refer to a latest three-judge-bench decision of the Supreme Court in the case of **COMMISSIONER OF INCOME TAX VS. KELVINATOR OF INDIA LTD.** reported in **(2010) 2 SCC 723** where the said court after taking into consideration the effect

of Direct Tax Laws (Amendment) Act, 1987 on section 147 made the following observations while dismissing the appeals preferred by the Revenue:

> "***5.*** *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 fulfilment 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 from1-4-1989), 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-1-4-1989, 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.*
>
> ***6.*** *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 fulfilment of certain precondition 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.***

7. One must treat the concept of "change of opinion" as an in-built test to check abuse of power by the assessing officer. Hence, after 1-4-1989, the assessing officer has power to reopen, provided there is "tangible material" to come to the conclusion that there is escapement of income from assessment. Reasons must have a live link with the formation of the belief. Our view gets support from the changes made to Section 147 of the Act, as quoted hereinabove. Under the Direct Tax Laws (Amendment) Act, 1987, Parliament not only deleted the words "reason to believe" but also inserted the word "opinion" in Section 147 of the Act. However, on receipt of representations from the companies against omission of the words "reason to believe", Parliament reintroduced the said expression and deleted the word "opinion" on the ground that it would vest arbitrary powers in the assessing officer.

8. *We quote hereinbelow the relevant portion of Circular No. 549 dated 31-10-1989, which reads as follows:*

"*7.2. Amendment made by the Amending Act, 1989, to reintroduce the expression 'reason to believe' in Section 147.—A number of representations were received against the omission of the words 'reason to believe' from Section 147 and their substitution by the 'opinion' of the Assessing Officer. It was pointed out that the meaning of the expression, 'reason to believe' had been explained in a number of court rulings in the past and was well settled and its omission from Section 147 would give arbitrary powers to the Assessing Officer to reopen past assessments on mere change of*

opinion. To allay these fears, the Amending Act, 1989, has again amended Section 147 to reintroduce the expression 'has reason to believe' in the place of the words 'for reasons to be recorded by him in writing, is of the opinion'. Other provisions of the new Section 147, however, remain the same."

(emphasis supplied)

9. *For the aforestated reasons, we see no merit in these civil appeals filed by the Department, hence, dismissed with no order as to costs."*

(Emphasis given by us).

15. Bearing in mind the aforesaid principles, we now propose to consider the case before us.

16. 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.*

17. Apart from the above fact, the Assessing Officer has on the basis of the materials originally placed by Assessee held that the *Assessing Officer in the assessment proceedings u/s 143(3) did not give any opinion*

regarding the allowability or otherwise of deduction u/s 80IB (10) of the Act. If an issue has not been examined in correct perspective in the initial assessment proceedings, nothing prevents the assessing officer to take a suitable remedial action by way of re-opening the assessment.

18. It is now a settled law that if an explanation is added to a section of a statute *for the 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. Thus, it is not a case of introduction of new provision of law by retrospective operation. We find that the petitioner had disclosed all the materials relevant for the purpose of getting the benefit under Section 80IB of the Act and there was no suppression of materials. 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.

19. 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.

20. In the case of **CIT VS. EICHER LTD.** reported in **(2007) 294 ITR 310(DELHI)**, which was also the subject-matter of appeal before the

Supreme Court in the case of **Commissioner of Income tax vs. Kelvinator of India Ltd**. (supra), Delhi High Court dealt with the similar point as would appear from the following observations quoted below:

> "*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 assessee 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 assessee, 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. On the other hand, if the Assessing Officer did not apply his mind and committed a lapse, there is no reason why the assessee should be made to suffer the consequences of that lapse.*
>
> *In so far as the present appeal is concerned, we find that the assessee had placed all the material before the Assessing Officer and where there was a doubt, even that was clarified by the assessee in its letter dated November 8, 1995. If the Assessing Officer, while passing the original assessment order, chose not to give any finding in this regard, that cannot give him or his successor in office a reason to reopen the assessment of the*

assessee or to contend that because the facts were not considered in the assessment order, a full and true disclosure was not made. Since the facts were before the Assessing Officer at the time of framing the original assessment, and later a different view was taken by him or his successor on the same facts, it clearly amounts to a change of opinion. This cannot form the basis for permitting the Assessing Officer or his successor to reopen the assessment of the assessee."

21. We have already pointed out that the Supreme Court in the case of **Commissioner of Income tax vs. Kelvinator of India Ltd**. (supra), dismissed the appeal preferred by the Revenue not only against the decision of the Full Bench of Delhi High Court in the case of **CIT VS. KELVINATOR OF INDIA LTD** reported in **(2002) 256 ITR 1 (DELHI)** but also against the above case of **CIT vs. Eicher Ltd** (supra) as both were heard analogously.
22. Thus, none of the reasons assigned by Assessing Officer for reopening the assessment was tenable in eye of law.
23. On consideration of the entire materials on record, we thus find that the condition precedent for exercising power of reopening the assessment as provided in section 147 of the Act is absent and the Assessing Officer acted illegally in issuing notice of reassessment by forming a second opinion on the selfsame materials without having any "tangible material" to exercise jurisdiction.
24. We, consequently, set aside the notice of reassessment and the

reasoned order issued by the concerned officer being Annexure 'C' and Annexure 'G' to the application. The Special Civil Application is thus allowed. No costs.

[BHASKAR BHATTACHARYA, ACTING C.J.]

mathew **[J.B.PARDIWALA. J.]**

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