IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CIVIL APPLICATION NO. 19336 of 2021

==========

AXIS BANK LIMITED

Versus

ASSISTANT COMMISSIONER OF INCOME TAX CIRCLE 1(1)(1)

==========

Appearance:
MR B S SOPARKAR(6851) for the Petitioner(s) No. 1
for the Respondent(s) No. 1
MR DEV D PATEL for MR.VARUN K.PATEL(3802) for the Respondent(s) No. 1

==========

CORAM:HONOURABLE MR. JUSTICE ASHUTOSH SHASTRI
and
HONOURABLE MR. JUSTICE J. C. DOSHI

Date : 20/04/2023

CAV ORDER

(PER : HONOURABLE MR. JUSTICE ASHUTOSH SHASTRI)

1. By way of this petition under Article 226 of the Constitution of India, the petitioner has challenged the legality and validity of the impugned order dated 09.11.2021 and the impugned notice dated 26.03.2021 issued by the respondent authority and in the meantime, sought for the implementation and execution of the impugned notice at Annexure-A and stay further proceedings for assessment and recovery for Assessment Year 2015-16.

2. The brief background of fact which has given rise to the filing of this petition is that the petitioner is a private sector Bank and limited company and some of the shareholders are the citizens of India. The petitioner Bank filed its original return of income for Assessment Year 2015-16 on 24.11.2015 and later on a revised return of income was also submitted on 30.03.2017 *inter alia* declaring the total income of Rs.112,53,09,30,950/-. This return of income was processed by the respondent authority and the case of the petitioner was selected for limited scrutiny. It is the case of the petitioner that thereafter the assessing officer informed the petitioner Bank vide communication dated 22.09.2017 that the case of the petitioner has been converted from limited scrutiny into complete scrutiny whereby the assessing officer has assumed unrestricted power to verify or deal with any issue for Assessment Year 2015-16 and later on, the notice came to be issued under Section 142 (1) of the Income Tax Act (hereinafter referred to as the "Act") on 22.09.2017 calling upon the petitioner to tender specific details relating to the issue of bad debt and NPA in view of Section 36(1) (vii) and Section 36(1) (viia) of the Act. In response to the

said notice, detailed reply was forwarded by the petitioner on 16.10.2017 and thereafter as per the say of the petitioner, after having been satisfied, the assessing officer has not made any addition on this issue and passed an assessment order dated 12.12.2017 under Section 143(3) of the Act determining the total income of the petitioner at Rs.117,33,85,52,868/- for Assessment Year 2015-16.

2.1. It is the case of the petitioner that subsequently, the case of the petitioner was selected for revision under Section 263 of the Act by the higher authority of then assessing officer i.e. Principal Commissioner of Income Tax and under Section 143(3) read with Section 263 of the Act, the total income of the petitioner was revised and determined as Rs.122,00,22,24,051/-. The petitioner was then served with the notice under Section 148 of the Act on 26.03.2021 asking the petitioner to file return of income of Assessment Year 2015-16. The petitioner without prejudice to the stand that may be taken submitted return of income in compliance of notice under Section 148 of the Act and submitted return of income on 28.05.2021 and sought for reasons recorded for re-opening of assessment. It is the case of

the petitioner that reasons dated 22.03.2021 were provided on 14.06.2021 vide E-mail. As a result of this, preliminary objections vide communication dated 07.07.2021 were submitted questioning the validity of notice under Section 148 of the Act. The respondent authority thereafter has disposed of the objections on 09.11.2021 and simultaneously, on 09.11.2021, issued two notices calling upon the petitioner to supply details in relation to the reassessment by 24.11.2021. Since this is in clear conflict with the guidelines which are prescribed by the decision of this Court, wherein a clear period is prescribed to be given to the petitioner to challenge the notice under Section 148 of the Act after the order disposing of the objections are issued. The said decisions relied upon are in the case of ***Doshion Ltd., v. I.T.O.,*** reported in ***[2012] 342 ITR 6 (Gujarat)*** and in the case of ***Bharat Jayantilal Patel, Mumbai v. Department of Income Tax*** reported in ***378 ITR 596 (Bombay)*** and since this impugned notice is in clear conflict with the guidelines and the re-opening under the circumstances is not permissible, by way of present petition the petitioner has assailed the impugned notice dated 26.03.2021

issued under Section 148 of the Act and simultaneously also prayed for setting aside the order dated 09.11.2021 by declaring it to be unsustainable.

3. The present petition by detailed order dated 20.12.2021 is entertained wherein while issuing notice, the authorities were directed not to issue any final order without the leave of the Court. Since the said decision is after recording the submissions of learned advocates, the Court deems it proper to reproduce the same hereunder :-

> *"1. The petitioner under Article 226 of the Constitution of India seeks to challenge the notice issued by the respondent under section 148 of the Income Tax Act, 1961 directing the petitioner to furnish the return of income for the assessment year 2015-16. The petitioner also challenges the order of disposing the objections passed by the respondent on 09.11.2021 by urging that the same is contrary to law and without jurisdiction.*
>
> *2. The issue is pertinently raised and after scrutiny assessment the order has been passed on 12.12.2017 determining the total income of the petitioner.*
>
> *3. The petitioner was selected for revision under section 263 of the Income Tax Act and then the Assessing Officer under section 143 r/w section 263 passed the order revising the assessment order. Petitioner is therefore aggrieved and before this Court with the following prayers:*
>
> > *"7.The petitioner, therefore, prays that this Hon'ble*

court be pleased to issue a writ of mandamus or a writ in the nature of mandamus or a writ of certiorari or a writ in the nature of certiorari or any other appropriate writ, direction or order and be pleased to:

(a) quash and set aside the impugned notice dated 26.03.2021 at Annexure-A to this petition;

(b) quash and set aside the impugned order dated 09.11.2021 at Annexure-I to this petition;

(c) pending the admission, hearing and final disposal of this petition, to stay implementation and operation of the notice at Annexure-A to this petition and stay further proceedings for assessment and recovery for A.Y. 2015- 16;

(d) any other and further relief deemed just and proper be granted in the interest of justice;

(e) to provide for the cost of this petition.

4. We have heard learned senior advocate Mr. Soparkar who has strenuously urged that the reasons recorded for reopening of the assessment of the year 2015-16 is nothing but an impermissible act on the part of the respondent authority in as much as the very issue has been gone into at the time of the assessment and he has chosen to finalize the assessment without any addition. It is the reopening beyond the period four years where there is nothing to indicate that the petitioner has not disclosed fully and truly all material facts.

5. According to learned counsel, while disposing off the objections raised against the reasons recorded, all the aspects have been brought to the notice of the respondent officer however, he has disposed of the same by holding that he would be examining this aspect at a future date without addressing the same at the time of disposing of.

> *6. Issue notice returnable on 10.01.2022. Over and above the regular mode of service, Direct service is permitted through speed post as well as e-mode. The final order shall not be passed without the Court's prior permission."*

4. Later on, after completion of pleadings, the petition has come up for consideration and as per the request of learned advocates, hearing was taken up on 05.04.2023, wherein Mr. Bandish S. Soparkar, learned advocate has represented the petitioner and learned advocate Mr. Dev Patel for Mr. Varun K. Patel, learned advocate has represented the respondent authority.

5. Mr. Bandish S. Soparkar, learned advocate appearing for the petitioner has submitted that apparently the impugned action is unsustainable in the eye of law since there is no fresh tangible material distinct from what was made part of the assessment proceedings which was available with the authority and since issuance of impugned notice is beyond the period of four (4) years, in the absence of fresh tangible material, the action is impermissible. Learned advocate appearing for the petitioner has submitted that re-opening which is sought to be done by the authority on the basis of the material which was

already examined, scrutinized in assessment proceedings and as such, in view of the proposition laid down in the case of ***Shanti Enterprise v. I.T.O.,*** reported in ***(2016) 76 Taxmann.com 184,*** the action is impermissible. It has further been contended that here is a case where re-opening is sought to be made beyond the period of four (4) years from the end of assessment order and despite the fact that there is no failure on the part of the assessee in truly and fully disclosing the material as sought for and as such, in the absence of allegation of failure on the part of the assessee, this re-opening beyond the period of four (4) years is impermissible and for this submission, learned advocate Mr. B.S. Soparkar has referred to decision in the case of ***Intercontinental (India) v. Dy. CIR*** reported in ***(2016) 73 Taxmann.com 232 (Gujarat)*** and ***Jivraj Tea Limited v. Assistant Commissioner of Income Tax*** reported in ***(2016) 386 ITR 298.***

5.1. In addition to this, learned advocate Mr. Soparkar has further submitted that here is a case wherein the authority on the basis of mere change of opinion is trying to re-open the

assessment which has already been final. In fact, during the assessment proceedings, proper scrutiny has been undertaken, specific questions in the form of queries were raised and the same was adequately answered by supplying detailed material and the assessing officer after having accepted the said explanation and reply of the assessee has not made any addition and as such, this is merely a case of re-opening on the basis of the change of opinion which is impermissible in view of the settled proposition of law. To canvass the submission, learned advocate Mr. B.S. Soparkar has made a reference to two decisions in the case of ***Premium Finance Pvt. Ltd.,*** v. ***Assessee*** reported in ***(2016) 73 Taxmann.com 369*** and ***Gujarat State Board of School Textbooks v. Assistant CIT*** reported in ***(2016) 75 Taxmann.com 281*** and by relying upon these decisions, contention is reiterated that since re-opening is sought to be made on the basis of the change of opinion, the same is impermissible. Yet another contention which has been raised is that in any case, the assessee has correctly furnished details of bad debts and bad debts reserve made by the petitioner and no income in any manner has escaped

assessment and for that learned advocate Mr. Soparkar has made a reference to the particulars which are stated in reply to the notice as well as other relevant documents attached to the petition compilation and by referring to the assessment order, a contention is reiterated that no income has escaped from the assessment and as such, the view taken by the respondent authority for re-opening the assessment is impermissible.

5.2. Learned advocate Mr. B.S. Soparkar has drawn attention to the assessment order wherein a specific query has been put to with regard to this very issue on the basis of which, reassessment is sought. The said specific question has been clearly answered in the reply and for that purpose a reference is made to reply dated 16.10.2022 at Annexure-D and by referring to column 8 of the said reply on the said page 22, this very issue relating to bad and doubtful debt and write off of bad debt in view of RBI directives is specifically explained and further a reference is made to paragraph 25 on page 31 at Annexure-H wherein also, this very figure of Rs.24.63 crores on account of NPA sell down is pointed out and despite the aforesaid material being supplied, after proper scrutiny the assessment order is

passed by the authority on 12.12.2017 wherein no addition is made of any nature and that being the situation, there is hardly any justifiable reason for the authority to re-open once the issue has been dealt with and considered.

6. As against this, Mr. Dev D. Patel, learned advocate appearing for Mr. Varun K. Patel, learned advocate for respondent authority has submitted that that scope of scrutiny is very very limited and it is always open for the authority to re-open the assessment and as such there is no illegality in the impugned order nor in issuance of notice under Section 148 of the Act. It has been submitted that simply because during the assessment proceeding, the issue might have gone into and no addition might have been made but that would not preclude the authority from re-examining as there is no concept of constrictive *res judicata*. By referring to explanation to Section 147 under the old provision precisely explanations 1 and 2, it has been submitted that authority is thoroughly justified in issuing notice under Section 148 of the Act. Though, the query might have been raised during the assessment period but on the said issue of excess amount of bad debt no conscious decision

was taken and as such the general quires having not been dealt with by Assessing Officer even in the absence of any fresh material, it is always open for the authority to re-examine and such satisfaction of an authority may not be the subject matter of extraordinary jurisdiction at the instance of present petitioner and has requested that no relief be granted. In fact, according to Mr. Patel, learned advocate, a false claim was generated to the extent of Rs.24.63 crores by claiming excess bad debt and if a perusal of table which is tired to be relied upon, there is no reference to such amount, as indicated in table, reflecting on page 29, and as such stand taken by the petitioner is not a valid stand, deserves to be deprecated.

6.1. To substantiate his stand, Mr. Patel, learned advocate has made a reference to a decision in the case of ***Gruh Finance Ltd. versus Joint Commissioner of Income Tax*** reported in ***(2002) 123 Taxman 196 (Gujarat)*** and after referring to this, Mr. Patel, learned advocate has submitted that no case is made out by the petitioner to call for any interference.

7. In rejoinder to this stand, Mr. B. S. Soparkar, learned

advocate appearing for the petitioner has reiterated that in fact, in specific terms, the quires were raised by an authority with regard to this issue of claim of excess amount of bad debt and after convincing itself, the assessing authority has not made any addition while passing an order of assessment and as such once the assessment order is passed merely on the basis of change of opinion in the absence of any other material tangible enough, no re-opening is permissible. Had there been a case that there was no reference at all to such issue and the assessment order is passed it was justified on the part of authority to re-open but here is the case where specific quires were raised, specifically explained and after assessment proceeding consciously addition is not made. Hence, that being the situation, there is hardly justifiable reason for authority to re-open.

7.1. At this stage, Mr. Soparkar, learned advocate has made a reference to explanation 1 of Section 147 of the Act as analyzed by the Bombay High Court in the case of ***Vodafone Idea Ltd. versus Assistant Commissioner of Income Tax, Mumbai*** reported in ***(2022) 135 taxmann.com 169 (Bombay) (Paragraph No.3)*** and yet another judgment is also relied upon

is of Gujarat High Court in the case of ***Anupam Rasayan India Ltd. versus Income-tax Officer*** reported in ***(2016) 76 taxmann.com 39 (Gujarat) (Paragraphs 9, 13 and 20*** and a further decision which is in the case of ***Gujarat Power Corporation Ltd. versus Assistant Commissioner of Income Tax*** reported in ***2013 350 ITR 266 (Paragraph 30)*** and has submitted that the case is made out by the petitioner to call for interference. Hence, has requested that if interference is not made, the same would result in grave injustice to the petitioner.

7.2. In respect of the decision which has been cited by Mr. Dev Patel, learned advocate for revenue authority, Mr. Soparkar, learned advocate has submitted that if the facts are seen in detail, the said judgment was in a different circumstance which is not possible to be pressed into service on the present issue on hand. Hence, has submitted that there is no case made out by the respondent authority to oppose the petition.

8. Having heard the learned advocates appearing for the parties and having gone through material on record few

circumstances before dealing with the proposition deserves considerations.

9. A perusal of notice dated 22.09.2017 issued under Section 142(1) of the Act upon the petitioner indicates in paragraph 4 that during the year under consideration, bad debts of Rs.1217,81,18,170/- have been shown as written-off u/s 36(1)(vii) of the Act in the revised computation of income furnished by the petitioner. However, it was seen by authority that in the revised ITR the bad debt figure is Rs.11,93,17,70,137/- and as such the petitioner by way of this notice was requested to reconcile the figure or to justify the anomaly of figures and as such was directed to furnish the relevant copies of ledger account showing the amount has been actually written-off. Paragraph 4 of the said notice thus reads as under:-

> *"4. During the year under consideration, bad debts of Rs.1217,81,18,170/- have been shown as written-off u/s 36(1)(vii) of the Act in the revised computation of income furnished by you. (However, it is seen by authority that in the revised ITR the bad debt figure is Rs.11,93,17,70,137/-. You are requested to reconcile the figure or justify the anomaly of figures). Out of this amount, the opening balance of Rs.376,35,25,258/- has been subtracted and balance amount of Rs.841,45,92,912/- has been claimed as expenditure or deduction or allowable. In this connection, please furnish*

the list of the parties with their complete addresses and PAN in respect of whom such debts have been written-off as bad debts. Please substantiate your claim with substantiating material which you may rely upon. Also, please clarify as to whether the assets offered by such debtors either movable or immovable have been auctioned or transferred to any of the Debt Recovery Companies or entities. If such assets are transferred to such debt recovery entities, the value of the same may please be specified. Also, please specify as to whether such assets have been transferred or sold or given to any of the subsidiary company or entity. Also, please furnish the relevant copies of ledger account showing the amount has been actually written-off. "

10. Further, in paragraph 7, again the information was sought for specifically to justify the claim of deduction being amount equivalent to NPA provision under Section 36(1)(viia) of the Act and the petitioner was called upon to justify and explain with regard to the claim. In paragraph 13 of the said notice i.e. dated 22.09.2017, reflecting on page 18 of the petition compilation, it was also indicated to furnish the copy of ledger account in respect of provision related to bad debts. By this detailed notice, the petitioner was called upon to furnish the particulars and attend the Office on 04.10.2017.

11. In response to this notice under Section 142(1) of the Act, a reply is given by the petitioner on 16.10.2017 indicating the

particulars in addition to what has been submitted for Assessment Year 2015 - 2016 and in tabular form in Item No.8 the particulars have been provided *vide Annexure-H* to the said explanation dated 16.10.2017. *Annexure-H* on page 24 is a further detailed particulars provided to the authority wherein since the petitioner was asked to reconcile the figures of bad debts claimed in the revised income tax computation in paragraphs 24 and 25, it was specifically provided the particulars. Paragraphs 24 and 25 thus reads as under:-

> "*24. We submit that the Bank has duly complied with provisions of section 36(1)(vii) r.w.s. 36(2)(v)/23(1)(viia) of the Act and the claim of the Bank is fully allowable as has been so allowed in the preceding years. We reiterate that the Hon. Gujarat HC in the Bank's own case for the earlier years, as above, has been accepted by the Department and hence now settled law. The foundational law during A.Y. 1998-99 to 2001-02 before the Hon. Gujarat HC and during the previous year is same.*
>
> *25. Further, your goodself has asked to reconcile the figures of bad debts claimed in the revised income tax computation and revised ITR from. In this regard, we submit that in the revised computation, amount claimed as Bad debts of Rs.1217.81 crores comprises of writ off on account of bad debts of Rs.1,193.18 crores and loss of Rs.24.63 crores on account of NPA sell down.*"

12. In view of aforesaid submissions and particulars, a detailed assessment order has been passed on 12.12.2017,

reflecting on page 34 on-wards *Annexure-E* to the petition and undisputedly in the said assessment order, no addition is made with regard to claim of excess amount of bad debt of Rs.24.63 crores.

13. Despite in the light of aforesaid situation on record, the authority has chosen to re-open the issue again and called upon the petitioner to furnish the explanation since authority is intending to re-open the assessment of the petitioner for Assessment Year 2015 - 2016 under Section 147 of the Act.

14. In the reasons recorded for re-opening of assessment indicated that the authority is inclined to re-open on perusal of assessment records for the year under consideration since it was found that assessee has debited Rs.1788.61 crores pertaining to doubtful debts of this an amount of Rs.1217.81 crores pertaining to bad debt written-off and in view of the provision, it was actually found by an authority on verification that NPA provision provided by the assessee is actually found to be Rs.570.80 crores instead of Rs.595.42 crores as claimed by the assessee. It was also found by respondent authority that

total bad debts claimed is Rs.1217.81 crores which includes bad debt written off of Rs.1193.18 crores and Rs.24.63 crores on account of NPA sell down. Thus, the authority found that aforesaid figure of Rs. 24.63 crores is required to be added with bad debt written off, as it is not added with bad debt written off while calculating the provision of bad debt. Hence, on perusal of assessment record, the authority found that case is required to be re-opened with respect to aforesaid amount for the relevant year. In fact, while recording of reasons, it was observed in paragraph 6 that during the course of assessment proceeding the figure of 24.63 crores bad debt as written off was not verified. This it was failure on the part of assessee to disclose fully and truly all necessary facts during the assessment proceedings and as such it cannot be termed as a mere change of opinion. Hence, after necessary sanctioned being obtained Section 148 notice came to be issued which is made the subject matter of present petition.

15. On the teeth of aforesaid background of facts which are very much prevailing on record, it seems that the reason which has been recorded to re-open that there is a failure on the part

of assessee to disclose fully and truly all necessary fact during the assessment proceedings is not possible to be accepted. The reason is that in response to the notice under Section 142(1) of the Act a specific question was asked for with regard to bad debt written off under Section 36 of the Act and in response to the said specific quires put in paragraphs 4, 7, 8 and 13 of the notice dated 22.09.2017, the explanation has been tendered by the petitioner *vide* communication dated 16.10.2017 disclosing the particulars in detailed by *Annexure-H* to the petition and as such this non disclosure part appears to be not accepted as contained in paragraph 6 of the reasons recorded.

16. However, undisputedly this attempt of re-opening is made beyond the period of four years and there is no failure on the part of petitioner to disclose truly and fully the material which has been sought for. Further from the reasons which are recorded, it is clearly mentioned in paragraph 2 on page 146 that justification to re-open is on the basis of perusal of assessment record for the year under consideration and what was found is that total bad debts claimed was Rs. 1217.81 crores which include bad debt written-off of Rs.1193.18 crores

and Rs.24.63 crores on account of NPA sell down. Thus, on the basis of very same material which was made available during the course of assessment proceeding, the authority has come out with a case that this figure of Rs.24.63 crores deserves to be added and for that purpose re-opening tried to be justified. So essentially there is no tangible material or fresh material on the basis of which an attempt is made to re-open the assessment and undisputedly this figure of controversy was very much placed by the petitioner before Assessing Officer and while passing assessment order, the Assessing Officer has not made any addition and as such on the basis of very same material, now a view is taken by an authority that this figure deserves to be added and as such this be a change of opinion whether is permissible or not is an issue under consideration before this Court in the present proceedings.

17. In the light of aforesaid background of facts, the case law on the subject as propounded by various decisions deserve to be applied to arrive at an ultimate conclusion.

18. In the case of ***Anupam Rasayan India Ltd. (supra),*** the

Division Bench of this Court in the said case was dealing with a controversy whether an assessee can be blamed for non consideration of true and full facts under the explanation to Section 147 of the Act especially when the particulars were very much on record in assessment. While examining this, since in that case, it was found by the Court that in response to a query, the assessee had already submitted a ledger extract of legal and license fees which contained the details of payment of Rs. 1.10 lakhs towards penalty for the license and it was observed that since the assessee had pointed out along with the return of income, the assessee did produce a debit note, there was no failure on the part of the assessee to disclose true and full facts and thereby did not permit the re-opening assessment and notice impugned is set aside. Now here also, as indicated above, that in the notice under Section 142(1) of the Act specifically informations were sought for, which was undisputedly provided in a detailed explanation in a tabular form with relevant *annexures* at *Annexure-H* as indicating from page 22, a communication dated 16.10.2017 and in the said *annexure,* attached to the said explanation in paragraphs 24 and

25, as stated above, the said aspect of loss of Rs. 24.63 crores on account of NPA sell down was provided and as such it is not possible to construe that there was a failure on the part of petitioner assessee not to fully and truly disclose the material.

19. Yet in a decision which is in the case of ***Intercontinental (India) (supra)*** as well as in the case of ***Jivraj Tea Limited (supra)***, it was observed that re-opening beyond the period of four (4) years from the end of Assessment Year is impermissible in the absence of failure on the part of assessee to truly disclose and as such the background of facts on hand are clearly indicating that it is not possible to construe that there was any failure on the part of the petitioner to disclose truly and fully the material. Hence, the impugned action appears to be impermissible.

20. As indicated above that this re-opening is sought for is on the basis of assessment record itself, which assessment record undisputedly consist of the explanation about excess claim of bad debts and this re-opening is not on the basis of any fresh tangible material from what was forming part of assessment

proceeding itself and as such in view of this when there is no fresh tangible due material distinct from what was very much available, the re-opening in such circumstance is impermissible as is well propounded in case of ***Shanti Enterprise (supra)***. The observations in paragraph 11 since relevant to the issue, we deem it proper to quote hereunder:-

> "*11. The contention of the Revenue that the impugned action is within the period of four years and, therefore, it is always open for the authority to reopen the assessment cannot be accepted. Simply because the action is within the period of four years would not give a leverage to the authority to just go on repeating the exercise of examining the issue which has already been gone into. There appears to be no tangible material distinct from what was made a part of the assessment proceedings and, therefore, reopening of the assessment is not permissible. The proposition of law is aptly clear, as stated above and, therefore, in our opinion, permitting the authority to reopen the assessment would not be valid. We cannot shut our eyes over the aforesaid circumstance simply because it is within the period of four years and having regard to the decisions of Apex Court which propounded that the Courts would be failing to perform their duty, if reliefs were refused without adequate reasons, we see that the action on the part of the respondent authority is impermissible in view of aforesaid set of circumstance. The observations made by the Apex Court in case of Calcutta Discount Co. Ltd. v. ITO [1961] 41 ITR 191 at page 195 head-note SB (v) are worth to be reproduced hereafter:—*
>
> > "*That though the writ of prohibition or certiorari would not issue against an executive authority, the High Courts had 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 subjected, or was likely to subject, a person to lengthy proceedings and unnecessary harassment, the High Courts would issue appropriate orders or directions to prevent such consequences. The existence of such alternative remedies as appeals and reference to the High Court was not, however, always a sufficient reason for refusing a party quick relief by a writ or order prohibiting an authority acting without jurisdiction from continuing such action. When the constitution conferred on the High Courts the power to give relief it becomes the duty of the Courts to give such relief in fit cases and the courts would be failing to perform their duty if relief were refused without adequate reasons.*"

21. Yet another issue which is also lying in favour of petitioner is that here is the case on which undisputedly notice for re-opening is issued beyond a period of four years and in the absence of any fresh tangible material and during the course of assessment the specific questions have been raised, which is already indicated above, and the answers and explanations were put-forth for consideration and scrutiny during the assessment proceedings and despite such material available on hand, the Assessing Officer has not thought it fit to make any addition with regard to aforesaid claim of Rs.24.63 crores and as such when the material was very much available and accepted by the

Assessing Officer while passing the assessment order now to re-open that issue again is appearing to be based upon change of opinion and in view of law laid down by the Court in case of ***Premium Finance Pvt. Ltd. (supra)*** and ***Gujarat State Board of School Texbooks (supra)*** such change of opinion cannot **formed** on the basis of re-opining of assessment. Hence, the observations made in paragraphs 15 and 16 in the case of ***Premium Finance Pvt. Ltd. (supra),*** we deem it proper to quote hereunder:-

> "*15. Now in the background of these proposition of law, if we analyze the record of the present petition on hand, it would quite clear that the petitioner was asked to furnish details regarding the claim of bad debt written off. It is also found from the record that the same has been cogently explained and replied and therefore, while completing the scrutiny assessment, this issue has been gone into by the Assessing Officer and the perusal of record further indicates that while assessment order came to be passed, the accountant of the petitioner did attend the hearing. The case was discussed at length and submitted by the detailed information as called for from time to time and therefore, considering this material which is available on record, it appears to this Court that the issue pertaining to provision for bad and doubtful debt has been gone into and only thereafter this scrutiny assessment came to be passed. To arrive at such conclusion, we have also gone through the stand taken by the respondent-revenue authority. We have taken note of the contents stated by the deponent on behalf of the revenue contained in additional affidavit submitted before the Court. It was categorically stated by the deponent on*

additional affidavit that on account of workload and pressure of various files getting time barred assessment of various assessees and on account of corporate assessees being under jurisdiction of that Assessing Officer he had categorically deposed that he could not incorporate the details of bad debts written off furnished by the petitioner assessee. This would clearly indicate that the details have already disclosed before the Assessing Officer and while framing the assessment, the Assessing Officer has considered the same. It is only because of pressure of work he could not incorporate the details in an order under Section 143(3) of the Act and therefore, considering this overall view of the matter we are of the opinion that if the records speak like this it would not be permissible for respondent-authority to reopen the assessment otherwise the same would be based on change of opinion and since the change of opinion is already spelt out by this Hon'ble Court and the decision which has been referred to above. In the background of these facts and circumstances we are of the opinion that the case is squarely covered by the ratio laid down by the above mentioned two decisions viz.Gujarat Power Corporation Ltd. (supra) and Kelvinator of India Ltd. (supra). Counsel for the SUNIL petitioner has further taken up yet another decision in case of Swati Saurin Shah v. ITO [2016] 386 ITR 256/240 Taxman 758/70 taxmann.com 72 (Guj.) and has drawn the attention of this Court to relevant para of the said decision. Having perused the same we found that the same is also profitable to be considered by this Court. Hence, the extract of the same contained in para 12 is reproduced hereafter:—

> *"12. Insofar as the second ground for reopening the assessment, namely, deduction under section 54EC of the Act is concerned, it is evident that during the course of proceedings under section 143(3) of the Act, the Assessing Officer had called for details in this regard and the petitioner had produced the certificates issued by the Rural Electrification Corporation Ltd. for a total amount of Rs. 81,00,000/-*

and had also placed reliance upon the decision of the Tribunal in the case of Aspi Ginwala v. ACIT, Baroda (supra) and the Assessing Officer after being satisfied as regards the claim of the petitioner, had allowed the deduction of Rs.81,00,000/- under section 54EC of the Act. From the reasons recorded, it appears that the ground for reopening is that according to the Assessing Officer the assessee is entitled to deduction of only Rs.50,00,000/- under section 54EC of the Act and that against the decision of the Tribunal in the above case, an appeal is pending consideration before the High Court. Thus, it appears that the present Assessing Officer now believes that the Assessing Officer who had framed the assessment under section 143(3) of the Act had made a mistake in allowing deduction in excess of Rs.50,00,000/- and now wants to correct the mistake. From the facts as emerging from the record, it appears that the Assessing Officer while allowing deduction in excess of Rs.50,00,000/- under section 54EC of the Act has placed reliance upon a decision of the jurisdictional Tribunal, under the circumstances, the view adopted by the Assessing Officer cannot be said to be erroneous. Moreover, assuming that the Assessing Officer made a mistake, section 147 of the Act cannot be availed of for the purpose of correcting a mistake. In effect and substance, therefore, the present Assessing Officer wants to sit in appeal over the decision of his predecessor Assessing Officer, who has examined the claim and allowed the claim of deduction of Rs.81,00,000/- under section 54EC of the Act, on the ground that the assessee was eligible for deduction only to the extent of Rs.50,00,000/- for the year under consideration. Thus, the reopening of assessment is not sustainable on either of the two grounds. The assumption of jurisdiction on the part of the Assessing Officer by issuance of the impugned notice under section 148 of the Act is, therefore, without authority of law and consequently, the

impugned notice cannot be sustained."

> *16. Considering this overall set of circumstances coupled with the fact that there is no other tangible material available to justify the reopening more particularly when the issue has been gone into in detail during the course of regular scrutiny assessment, it is hardly justify for the revenue to reopen the issue which has relied upon, examined and even if it is within a period of four years. The ratio laid down by the aforesaid decision referred to above would clearly clinch the issue and therefore, the action of revenue in reopening the assessment is not justified as it would tantamount to be on the basis of mere change of opinion which is not permissible as the conditions which has been retained under Section 147 is also not satisfied*."

22. In view of aforesaid observations, we are of the opinion that no re-opening is permissible merely on the basis of change of opinion.

23. Further, to some extent, an issue was tried to be raised by Mr. Dev D. Patel, learned advocate appearing for the revenue by referring to explanation attached to Section 147 of the Act and made a valiant attempt that authority is justified in re-opening the assessment but at this stage, we are benefited with the observation made by the Bombay High Court in case of ***Vodafone Idea Ltd. (supra)*** wherein on analysis of explanation attached to Section 147 of the Act, it was

propounded that re-opening is impermissible and at this stage, we may deem it proper to quote hereunder the relevant observations contained in paragraphs 3, 4 and 5 of the said decision:

> *"3. Thereafter, petitioner received notice dated 2nd August, 2019 under section 148 of the Act saying that there are reasons to believe that petitioner's income chargeable to tax for A.Y. 2013-14 has escaped assessment within the meaning of section 147 of the Act. Since the notice has been issued after the expiry of 4 years from the relevant assessment year and petitioner has been assessed under section 143(3) of the Act, the proviso to section 147 as it was then previously would apply. As per the proviso, the onus is on respondents to show that there was failure on the part of petitioner to fully and truly disclose all material facts required for assessment. Simply stating that as per Explanation (1) to section 147 of the Act, production of books of account or other documents from which the Assessing Officer could have, with due diligence have been discovered by the Assessing Officer will not necessarily amount to disclosure within the provisio of section 147 is not enough. This is because as held by the Apex Court in Calcutta Discount Co. Ltd. v. ITO [1961] 41 ITR 191 the duty of disclosing all the primary facts relevant to the decision of the question before the assessing authority lies on the assessee. To meet a possible contention that when some account books or other evidence has been produced, there is no duty on the assessee to disclose further facts, which on due diligence, the Income-tax Officer might have discovered, the Legislature has put in Explanation to section 147. The duty, however, does not extend beyond the full and truthful disclosure of all primary facts. Once all the primary facts are before the assessing authority, he requires no further assistance by way of disclosure. It is for him to decide what inferences of facts can be*

reasonably drawn and what legal inferences have ultimately to be drawn. It is not for somebody else-far less the assessee to tell the assessing authority what inferences, whether of facts or law, should be drawn. Indeed, when it is remembered that people often differ as regards what inferences should be drawn from given facts, it will be meaningless to demand that the assessee must disclose what inferences - whether of facts or law - he would draw from the primary facts. If from primary facts more inferences than one could be drawn, it would not be possible to say that the assessee should have drawn any particular inference and communicated it to the assessing authority. How could an assessee be charged with failure to communicate an inference, which he might or might not have drawn? It maybe pointed out that the Explanation to the sub-section has nothing to do with "inferences" and deals only with the question whether primary material facts not disclosed could still be said to be constructively disclosed on the ground that with due diligence the Income-tax Officer could have discovered them from the facts actually disclosed. The Explanation cannot enlarge the scope of the section by casting a duty on the assessee to disclose "inferences", to draw the proper inferences being the duty imposed on the Income-tax Officer. Therefore, it can be concluded that while the duty of the assessee is to disclose fully and truly all primary relevant facts, it does not extend beyond this.

4. We have considered the reasons and in our view, it is nothing but a change of opinion. Reasons to believe cannot be arbitrary or irrational. Apex Court in CIT v. Kelvinator of India Ltd. [2010] 187 Taxman 312/320 ITR 561 held that one needs to give a schematic interpretation to the words reason to believe failing which, 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. Apex Court also held that the Assessing Officer has no power to review and he has power to reopen provided there is tangible material to come to the conclusions that there is

escapement of income from assessment and there was failure on the part of assessee to truly and fully disclose material facts. The Assessing Officer cannot simply say that he has reasons to believe that income which was chargeable to tax has escaped reassessment by reasons of failure on the part of assessee to disclose fully and truly all material facts necessary to take the case out of the restrictions imposed by proviso to section 147 of the Act as held in Sesa Goa Ltd. v. Jt. CIT [2008] 168 Taxman 281/ [2007] 294 ITR 101 (Bom.).

5. The entire basis for proposing to reopen, as can be seen from the reasons, is on the documents and submissions which were available before the Assessing Officer, before passing of the original assessment order. In fact, in the reasons, it is also recorded that the same issue was considered by the earlier Assessing JYOTI Officer during the assessment proceedings. The Assessing Officer notes that the assessee had made submissions on these items earlier but still states that income chargeable to tax has escaped because in his opinion certain amounts are required to be added back in profit and loss account and certain amounts should not have been disallowed. Where on consideration of material on record, one view is conclusively taken by the Assessing Officer, it would not be open to reopen the assessment based on the very same material with a view to take another view. We are satisfied that petitioner had truly and fully disclosed all material facts necessary for the purpose of assessment. Not only material facts were disclosed by petitioner truly and fully but they were carefully scrutinized and figures of income as well as deduction were reworked carefully by the Assessing Officer. In the reasons for reopening, there is not even a whisper as to what was not disclosed. In our view, this is not a case where the assessment is sought to be reopened on the reasonable belief that income had escaped assessment on account of failure of the assessee to disclose truly and fully all material facts that were necessary for computation of income but this is a case wherein the assessment is sought to be reopened on

account of change of opinion of the Assessing Officer. In a similar case where the notice to reopen the assessment was founded entirely on the assessment records and the entire basis for reopening the assessment was the disclosure which has been made by the assessee in the course of the assessment proceedings and where no material to which a reference was to be found, a Division Bench of this Court in 3i Infotech Ltd. v. Asstt. CIT [2010] 192 Taxman 137/329 ITR 257 in paragraph 12 held as under:

> *"12. The record before the Court, to which a reference has been made earlier, is clearly reflective of the position that during the course of the assessment proceedings the assessee had made a full and true disclosure of all material facts in relation to the assessment. As a matter of fact, it would be necessary to note that the notice to reopen the assessment on the first issue is founded entirely on the assessment records. There is no new material to which a reference is to be found and the entire basis for reopening the assessment is the disclosure which has been made by the assessee in the course of the assessment proceedings. In Cartini India Limited v. Additional Commissioner of Income-tax [(2009) 314 ITR 275 (Bom.)], a Division Bench of this Court has observed that where on consideration of material on record, one view is conclusively taken by the Assessing Officer, it would not be open to the Assessing Officer to reopen the assessment based on the very same material with a view to take another view. The principal which has been enunciated in Cartini must apply to the facts of a case such as the present. The assessee had during the course of the assessment proceedings made a complete disclosure of material facts. The Assessing Officer had called for a disclosure on which a specific disclosure on the issue in question was made. In such a case, it cannot be postulated that the condition precedent to the reopening of an assessment beyond a period of four*

years has been fulfilled."

24. Mr. B. S. Soparkar, learned advocate appearing for the petitioner has also pressed reliance upon a decision which is in the case of ***Gujarat Power Corporation Ltd. (supra)*** but since the same is almost on the similar analogy, we deem it proper not to overburden the present order and as such we are of the opinion that case is made out by the petitioner to call for interference.

25. At this stage, the judgment which has been cited by the Mr. Patel, learned advocate appearing on behalf of revenue in the case of ***Gruh Finance Ltd. (supra)*** wherein the said judgment is *ex facie* not applicable in view of the fact that it was a case in which the assessee for the Assessment Year 1996 - 1997 had claimed depreciation as deduction on non-existent machinery and the same was allowed under Section 32, read with Section 43(6) of the Act and later on it was found that a bogus claim was generated and the mistake was discovered and thereby Section 148 proceedings were initiated and closely on perusal of paragraph 10 of the said judgment, it was found that it was upon information, the department noticed that such

depreciation was claimed which was not available to the assessee whereas here there was no fresh information, there was no tangible material and the re-opening is sought on the basis of assessment record itself and as such *ex facie* this judgment is not of any assistance to the revenue and as such we are of the opinion that case is made out by the petitioner to extend the relief as sought for. Accordingly, we allow this petition.

26. The impugned notice dated 26.03.2021 as well as impugned order dated 09.11.2021 are hereby quashed and set aside and petition is allowed.

(ASHUTOSH SHASTRI, J)

(J. C. DOSHI,J)

phalguni/Dharmendra