IN THE INCOME TAX APPELLATE TRIBUNAL "H" BENCH, MUMBAI
BEFORE SHRI MANOJ KUMAR AGGARWAL,AM AND SHRI RAVISH SOOD, JM

ITA No. 1815/Mum/2017
(**निर्धारण वर्ष** / Assessment Year:2009-10)

Kotak Mahindra Asset Management Co. Ltd.,C-27 BKC, G Block, Bandra Kurla Complex, Bandra E, Mumbai 400 051.	**बनाम**/ Vs.	Assistant Commissioner of Income Tax- 14(2)(1), Mumbai.
स्थायी लेखा सं./जीआइआर सं./PAN No. AAACK5576C		
(अपीलार्थी /**Appellant)**	:	(प्रत्यर्थी / **Respondent**)

ITA No. 1794/Mum/2017
(**निर्धारण वर्ष** / Assessment Year:2009-10)

Deputy Commissioner of Income Tax- 14(2)(1), 432, 4th Floor, Aayakar Bhavan, Mumbai-400 020.	**बनाम**/ Vs.	Kotak Mahindra Asset Management Co. Ltd., C-27 BKC, G Block, Bandra Kurla Complex, Bandra E, Mumbai 400 051.
स्थायी लेखा सं./जीआइआर सं./PAN No. AAACK5576C		
(अपीलार्थी /**Appellant)**	:	(प्रत्यर्थी / **Respondent**)

अपीलार्थी की ओर से / **Appellant by**	:	Shri. Farrokh Irani & Chetan Kakka, A.R
प्रत्यर्थी की ओर से/**Respondent by**	:	Shri. Manoj Kumar Singh, D.R

सुनवाई की तारीख / **Date of Hearing**	:	19.09.2018
घोषणा की तारीख / **Date of Pronouncement**	:	31.10.2018

आदेश / **O R D E R**

PER RAVISH SOOD, JUDICIAL MEMBER:

The present cross appeals filed by the assessee and the revenue are directed against the order passed by the CIT(A)-22, Mumbai, dated. 07.12.2016, which in turn arises from the assessment order passed under Sec. 143(3) r.w.s 147 of the Income Tax Act, 1961 (for short 'Act'), dated. 31.03.2015. We shall first advert to the appeal of the assessee. The assessee has assailed the order of the CIT(A) by raising the following grounds of appeal before us:

"Grounds No. 1 – Invalid Re-assessment Proceedings

1. *The Commissioner of Income tax (Appeal)-22, Mumbai – 400 021 ("the CIT(A)") erred in confirming the re ssessment proceedings initiated by the Assessing Officer mechanically without independent application of mind u/s 147 of the Income tax A t, 1961 ("the Act").*

2. *He failed to appreciate and ought to have held that :*

   a. *the reasons mentioned in the reopening notice were merely a change of opinion and the facts and details were already submitted during the ou se of filing return of income and regular assessment proceedings.*

   b. *the regular assessment was completed on 30.09.2010, wherein all the information was available with the AO who passed the order after going through all the details and satisfying himself fully.*

   c. *the AO has reopened the assessment for disallowance of ESOP expenditure merely after having a "re-look" at the Notes to the Balance sheet & P & L A/c and Notes to Return of Income filed by the appellant during the assessment proceedings and no fresh material was available with the AO while reopening the assessment.*

   d. *the AO had allowed the deduction on account of ESOP in the original assessment proceedings, without any dispute.*

   e. *In order to reopen an assessment, the AO should have fresh and new material to form his belief where as in the Appellant's case there was no fresh material on record and once an opinion is given*

in the original assessment, it cannot be re-opened except on fresh material/evidence.

f. The reopening proceedings were initiated on the basis of Audit party query and reopening based on audit query is bad in law and needs to be quashed.

3. The appellant prays that the entire reassessment proceedings are bad in law and requires to be quashed.

The appellant craves to add, amend alter or delete any of the above grounds of appeal as may be advised in due course."

2. Briefly stated, the assessee company which is a wholly owned subsidiary company of Kotak Mahindra Bank Limited had e-filed its return of income for A.Y. 2009-10 on 27.09 2009, declaring total income of Rs. 14,16,34,540/-. Original assessment was framed under Sec.143(3) on 30.09.2010, assessing the total income at Rs. 14,21,94,540/-. Subsequently, the case of the assessee was reopened by the A.O under Sec. 147 of the Act, on the ground that while framing the assessment an irregular allowance of deduction of ESOP expense amounting to Rs 2,63,50,515/- was allowed to the assessee. Notice under Sec. 148 of the Act along with the 'reasons' for initiating the reassessment proceedings was issued to the assessee on 13.03.2014. In response to the notice issued under Sec. 148, the assessee filed a letter objecting to the reopening of its concluded assessment under Sec. 147, which however was dismissed by the A.O by a speaking order. On the basis of the aforesaid deliberations, the A.O framed the assessment under Sec. 143(3) r.w.s. 147, dated 31.03.2015, and after disallowing the ESOP expenses assessed the income at Rs. 16,85,45,055/-.

3. Aggrieved, the assessee carried the matter in appeal before the CIT(A). The assessee assailed the validity of the reopening of its

concluded assessment by the A.O on multiple grounds viz. (i) that there was no new and fresh material available with the A.O to form a belief that the income of the assessee chargeable to tax had escaped assessment; (ii) that the entire reassessment proceedings were based on details which were already available in the annual accounts of the assessee; (iii) that the assessment was reopened on the base of a query raised by the audit party; (iv) that the reopening of the concluded assessment was based on a mere change of opinion; and (v) that as the issue as regards the allowability of the ESOP expenses incurred by the assessee company was covered by an order of the jurisdictional Tribunal in the case of M/s Accenture Services Pvt. Ltd. Vs. DCIT, Circle-3(1),Mumbai [2010-TIOL-409](ITAT Mumbai); dated 23.03.2010, which was not assailed by the revenue before the Hon'ble High Court of Bombay, hence the case of the assessee could not have been reopened by the A.O on the basis of a view which clearly militated against the aforesaid order of the Tribunal, which was available as on the date when the case was reopened. However, the CIT(A) not finding favour with the aforesaid contentions advanced by the assessee, therein upheld the validity of the reopening of the concluded assessment by the A.O.

4. The CIT(A) after deliberating on the contentions advanced by the assessee on merits that no disallowance of the ESOP expenses was liable to be made, did find favour with the same. It was observed by the CIT(A), that the issue as regards the allowability of ESOP expenses was squarely covered by the order of the Tribunal in the assesses own case for A.Y. 2004-05 viz. Kotak Mahindra Asset Management Co. Ltd. Vs. DCIT-3(2), Mumbai [ITA No. 1416/Mum /2008; dated 07.04.2016]. It was noticed by the CIT(A) that the Tribunal in its aforesaid order had relied on two earlier decisions viz. (i) DCIT Vs.

Accenture Services Pvt. Ltd. [(2010) TIOL-ITAT-Mumbai]; and (ii) Novo Nordisc India Pvt. Ltd. Vs. DCIT [ITA No. 1275/Bang/2011; dated 30.09.2013] (Bangalore). The CIT(A) observed that in the aforementioned cases the shares of the parent/holding company were issued to the employees of the subsidiary companies, and the subsidiary companies had paid the difference in the market price and the exercise price of such shares by their employees to the parent/holding company. In the backdrop of the aforesaid facts, the CIT(A) observed that the Tribunal in the aforementioned cases had held that as the ESOP expenses were incurred by the assessee to motivate and award its employees for their hard work, thus the same amounted to salary cost of the assessee, which having been incurred by the assessee for the purpose of its business, was thus an allowable expenditure. The CIT(A) following the aforesaid decision of the Tribunal in the assesses own case for A.Y. 2004-05, respectfully followed the same and deleted the disallowance of ESOP expense of Rs. 2,63,50,515/-.

5. That both the assessee and the revenue being aggrieved with the order of the CIT(A) has carried the matter in appeal before us. The Learned authorized representative (for short 'A.R') for the assessee Sh. Farrokh Irani, Senior Counsel, assailed the validity of the reopening of the concluded assessment of the assessee. It was submitted by the Ld. A.R, that the claim of ESOP expense of Rs. 2,63,50,515/- was disallowed by the A.O in his order passed under Sec. 143(3) r.w.s. 147 by characterizing the same as a 'Capital expenditure'. It was averred by the Ld. A.R, that the issue as regards the allowability of the ESOP expense as a "revenue expenditure" had came up before a coordinate bench of the Tribunal i.e. ITAT "A" Bench, Mumbai in the assesses own case for A.Y. 2004-05 viz. Kotak Mahindra Asset Management Co.

Ltd. Vs. DCIT-3(2), Mumbai [ITA No. 1416/Mum /2008; dated 07.04.2016], wherein after necessary deliberations the Tribunal had concluded that the same was allowable as a revenue expenditure. It was the contention of the Ld. A.R, that on merits the issue was squarely covered by the aforesaid order of the Tribunal in the assesses own case for A.Y. 2004-05.

6. Further, the Ld. A.R assailed the validity of the jurisdiction assumed by the A.O for reopening the concluded assessment of the assessee company under Sec. 147 of the Act. It was fairly submitted by the Ld. A.R, that the case of the assessee was reopened within a period of 4 years from the end of the relevant assessment year viz. A.Y. 2009-10, and a notice under Sec. 148 dated 13.03.2014 was issued by the A.O. The Ld. A.R drew our attention to the copy of the 'Reasons to believe' ,on the basis of which he case of the assessee was reopened (Page 109) of the assesses 'Paper Book' (for short 'APB'). The Ld. A.R taking us through the reasons on the basis of which the A.O had embarked upon the reassessment proceedings in the case of the assessee, submitted that a bare perusal of the same revealed that there was no fresh material or information received by him subsequent to the culmination of the original assessment which was framed by him under Sec. 143(3), vide his order dated 30.09.2010, which would support the reopening of the concluded assessment of the assessee. In support of his aforesaid contention the Ld. A.R relied on the judgment of the Hon'ble High Court of Bombay in the case of Hindustan Lever Limited Vs. R.B. Wadkar, Assistant Commissioner of Income Tax and others (No.1) (2004) 268 ITR 332 (Bom) and that of the Hon'ble Supreme Court in the case of CIT Vs. Kelvinator of India (2010) 320 ITR 561 (SC). Further, it was submitted by the Ld. A.R that from a bare perusal of the 'Reasons to believe', it could safely be

gathered that the same were totally vague. The Ld. A.R in order to fortify his aforesaid contention submitted that it was not discernible from the reasons, as to how the A.O had inferred that the ESOP expense would be allowable only if the assessee company had first purchased the shares, and subsequently transferred the same to its employees. Interestingly, the Ld. A.R objecting to the very genesis of the aforesaid reasoning adopted by the A.O for reopening the case of the assessee, submitted that as per the mandate of law a subsidiary company was not permitted to purchase the shares of its parent/holding company. In support of his aforesaid contention, the Ld. A.R relied on Sec. 42 of Companies Act, 2013, which as per him placed a restraint on purchase of shares of a parent/holding company by its subsidiary company. It was further averred by the Ld. A.R, that as on the date on which the case of the assessee was reopened i.e 13.03.2014, the order of the jurisdictional Tribunal in the case of M/s Accenture Services Pvt. Ltd. Vs. DCIT, Circle-3(1), Mumbai [2010-TIOL-409](ITAT Mumbai); dated 23.03.2010 was available before the A.O. It was submitted by the Ld. A.R, that in the aforementioned case involving identical facts in context of the issue under consideration, it was observed by the Tribunal that ESOP expenses were allowable as a 'revenue expenditure' in the hands of the assessee. Further, it was submitted by the Ld. A.R, that as the revenue had not assailed the aforesaid order by way of an appeal before the Hon'ble High Court of Bombay, thus the same had attained finality. In the backdrop of the aforesaid facts, it was submitted by the Ld. A.R, that it was absolutely beyond comprehension that now when the jurisdictional Tribunal had held that ESOP expense was to be allowed as a revenue expenditure, then as to how by adopting a contrary view the concluded assessment in the case of the assessee could have been reopened. It was thus the contention of the Ld. A.R, that the very basis of the reopening of the

case of the assessee was bereft of any force of law, and as such could not be sustained. Rather, the Ld. A.R averred that as a matter of fact the A.O had no reason to believe that any income of the assessee chargeable to tax had escaped assessment. It was the contention of the Ld. A.R, that now when the original assessment framed by the A.O vide his order passed under Sec. 143(3), dated 30.09.2010 was in conformity with the view taken by the Tribunal in the case of M/s Accenture Services Pvt. Ltd. Vs. DCIT, Circle-3(1),Mumbai [2010-TIOL-409](ITAT Mumbai); dated 23.03.2010, thus there was no reason for the A.O to have dislodged the same. It was submitted by the Ld. A.R, that as the aforesaid order of the Tribunal in the case of M/s Accenture Services Pvt. Ltd. (supra) was not further carried in appeal by the revenue before the Hon'ble High Court, thus the same had attained finality. The Ld. A.R drawing support from the aforesaid facts submitted that as the original assessment framed by the A.O under Sec. 143(3) was in conformity with the aforementioned order of the Tribunal, thus there was no reason for the A.O to believe that any income of the assessee chargeable to tax had escaped assessment. It was further averred by the Ld. A.R, that as the power to reopen an assessment is structured by law, thus in the absence of any new information or any fresh tangible material coming before the revenue subsequent to the culmination of the original assessment, a concluded assessment could not be reopened by the A.O under Sec. 147 of the Act. Rather, as per him, merely for the reason that on the basis of the same set of facts and material the A.O had subsequently came to a different conclusion would not justify the reopening of a concluded assessment. It was the contention of the Ld. A.R, that as per the mandate of law, even where a concluded assessment was sought to be reopened within a period of 4 years from the end of the relevant assessment year, it was indispensably required that the A.O had come

across additional/fresh material or information, which had led to the formation of belief on his part that the income of the assessee chargeable to tax had escaped assessment. The Ld. A.R. vehemently objecting to the reassessment proceedings as had been embarked upon by the A.O in the absence of any new "tangible material", relied on the judgment of the Hon'ble Supreme Court in the case of CIT Vs. Kelvinator of India (2010) 320 ITR 561 (SC). The Ld. A.R in order drive home his aforesaid contention, further relied on the judgments of the Hon'ble High Court of Bombay viz. (i) NYK Lime (India) Ltd. Vs. DCIT (No.2) [2012] 346 ITR 361 (Bom); and (ii) Purity Tech Textile Pvt. Ltd. Vs. ACIT & Anr. [2010] 325 ITR 459 (Bom). Lastly, it was submitted by the Ld. A.R that the reopening of a concluded assessment framed by the A.O under Sec. 143(3), vide order dated 30.09.2010, by declining to accept the order of the Tribunal on the issue under consideration in the case of M/s Accenture Services Pvt. Ltd. Vs. DCIT, Circle-3(1), Mumbai [2010-TIOL-409](ITAT Mumbai); dated 23.03.2010 was not permissible, as the same clearly militated against the principal of judicial discipline. In support of his aforesaid contention, the Ld. A.R relied on the judgment of the Hon'ble High Court of Bombay in the case of Bank of Baroda Vs. H.C. Shrivatsava and Anr. (2002) 256 ITR 385 (Bom) and the judgment of the Hon'ble Supreme Court in the case of Union of India Vs. Kamlakshi Finance Corporation Ltd. [AIR 1992 Supreme Court 711]. The Ld. A.R taking us through the aforesaid orders submitted that the Hon'ble Courts had observed that even if the lower authorities had some reservations on the correctness of the order of the appellate Tribunal, even then they remained under a statutory obligation to follow the same.

7. Per contra, the Learned Departmental Representative (for short 'D.R') refuting the contention of the Ld. A.R that the A.O had wrongly

assumed jurisdiction for reopening the case of the assessee, submitted that the same was well in order. The Ld. D.R relied on the order of the CIT(A), who as per him, after necessary deliberations had upheld the validity of jurisdiction assumed by the A.O for reopening the case of the assessee. Further, it was submitted by the Ld. D.R that the A.O had not violated any order of a higher authority, and had validly reopened the case after recording the 'Reasons to believe'. The Ld. D.R in context of his aforesaid contention drew our attention to the copy of the 'reasons to believe' recorded by the A.O at Page 109 of the 'APB'. Further, it was averred by the Ld. D.R that there was no requirement for 'fresh material' for reopening the case of an assessee. On merits of the case, the Ld. D.R relied on the order of the A O.

8. We have heard the authorized representatives of both the parties, perused the orders of the lower authorities and the material available on record. We shall first advert to the validity of jurisdiction assumed by the A.O for reopening the case of the assessee, as had been assailed by the assessee before us. We find that the Ld. A.R had assailed the validity of the jurisdiction assumed by the A.O for reopening the case of the assessee on multiple grounds. The Ld. A.R had submitted that the A.O had traversed beyond the scope of his jurisdiction and dislodged the concluded assessment which was earlier framed by his predecessor under Sec. 143(3), dated 30.09.2010, by reopening the case under Sec. 147 of the Act. The Ld. A.R submitted that the aforesaid reopening of the case, as could be safely gathered on a perusal of the 'reasons to believe', was merely based on a change of opinion on the same set of facts which were available with the A.O while framing the original assessment under Sec. 143(3). Rather, it was the contention of the Ld. A.R that entire reassessment proceedings were based on the details which were

already available in the annual accounts of the assessee for the year under consideration. We have deliberated at length on the issue under consideration in the backdrop of the contentions advanced by the authorized representatives of both the parties, in context of the issue under consideration. Before we proceed with the adjudication of the aforesaid issue, it would be relevant to cull out the 'reasons to believe' on the basis of which the case of the assessee had been reopened by the A.O, as under :

"Reasons for initiating proceedings u/s. 147 of the I.T. Act :

In this case, the assessment for AY 2009-10 was completed after scrutiny in September 2011 assessing taxable income at Rs. 14.22 crore.

From the perusal of the records, it is seen that the assessee company is a subsidiary of Kotak Mahindra Bank. The assessee company was allowed deduction of expenditure towards ESOP of Rs. 2,63,50,515/- as claimed. As per Schedule 13-II-J to Accounts, it is passed resolution to grant stock option to the eligible employees of the Bank and its subsidiary companies. The option discount, being excess of the market price of the shares over the exercise option of Rs. 2,63,50,515/- was reimbursed to the bank and charged to employees at cost under Schedule. It is seen that the ESOP shares were directly allotted to eligible employees by the Bank and were not purchased by the assessee company. However, in order to get deduction of ESOP, the shares should have been first purchased and subsequently transferred to its employees. This has not done. Hence the same has resulted in irregular allowance of deduction of ESOP by Rs. 2,63,50,515/-.

In view of the above, I have reasons to believe that the income chargeable to tax has escaped assessment in the hands of the assessee for AY 2009-10 within the meaning of Sec. 147 of the I.T. Act, on account of failure on the part of the assessee to purchase the shares and subsequently to transfer to its employees."

9. We have perused the 'reasons to believe' and after giving a thoughtful consideration find substantial force in the contention of the ld. A.R, that the entire exercise for reopening the concluded assessment of the assessee, had been embarked upon by the A.O not on the basis of any fresh tangible material or any new information which had came to his notice subsequent to the culmination of the

original assessment proceedings, but on the basis of the same set of facts as were there before his predecessor while framing of the original assessment under Sec. 143(3), dated 30.09.2010. Rather, a careful perusal of the reasons reveals beyond any scope of doubt that the A.O in the garb of reopening the case of the assessee, had as a matter of fact tried to substitute his view on the same set of facts, as against that which was arrived at by his predecessor. On a perusal of the 'reasons to believe', we are unable to comprehend as to what new 'material' or 'information' had came up before the A.O, which would justify the reopening of a concluded assessment of the assessee. It would not be incorrect to observe, that the A.O holding a conviction that the option discount of Rs. 2,63,50,515/- that was reimbursed to the bank by the assessee was not to be allowed as a deduction, had thus characterized it as an irregular allowance, and therein sought to withdraw the same by reopening the case of the assessee for the year under consideration viz. A.Y 2009-10. We are afraid that such a substitution of view of a successor A.O cannot form a justifiable basis for reopening the case of an assessee. Rather, the Hon'ble Supreme Court in its landmark judgment in the case of CIT Vs. Kelvinator of India (2010) 320 ITR 561 (SC), observing that merely on the basis of a 'change of opinion', the case of an assessee cannot be reopened, had held as under:-

> **"***On going through the changes, quoted above, made to s. 147 of the Act, we find that, prior to Direct Tax Laws (Amendment) Act, 1987, reopening could be done under above two conditions and fulfilment of the said conditions alone conferred jurisdiction on the AO to make a back assessment, but in s. 147 of the Act (w.e.f. 1st April, 1989), they are given a go by and only one condition has remained, viz., that where the AO has reason to believe that income has escaped assessment, confers jurisdiction to reopen the assessment. Therefore, post 1st April, 1989, power to reopen is much wider. However, one needs to give a schematic interpretation to the words "reason to believe" failing which, we are afraid, s. 147 would give arbitrary powers to the AO to reopen assessments on the basis of "mere change of opinion", which cannot be per se reason to reopen. We must also keep in mind the conceptual difference*

between power to review and power to reassess. The AO has no power to review; he has the power to reassess. But reassessment has to be based on fulfillment of certain pre-condition and if the concept of "change of opinion" is removed, as contended on behalf of the Department, then, in the garb of reopening the assessment, review would take place. One must treat the concept of "change of opinion" as an in-built test to check abuse of power by the AO. Hence, after 1st April, 1989, AO 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 s. 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 s. 147 of the Act. However, on receipt of representations from the companies against omission of the words "reason to believe", Parliament re-introduced the said expression and deleted the word "opinion" on the ground that it would vest arbitrary powers in the AO. We quote hereinbelow the relevant portion of Circular No. 549, dt. 31st Oct., 1989 [(1990) 82 CTR (St) 1], which reads as follows :

"*7.2 Amendment made by the Amending Act, 1989, to re-introduce the expression 'reason to believe' in s. 147.*—A number of re*presentations were received against the omission of the words 'reason to believe' from s. 147 and their substitution by the 'opinion' of the AO. 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 s. 147 would give arbitrary powers to the AO to reopen past assessments on mere change of opinion. To allay these fears, the Amending Act, 1989, has again amended s. 147 to reintroduce the expression 'has reason to believe' in place of the words 'for reasons to be recorded by him in writing, is of the opinion'. Other provisions of the new s. 147, however, remain the same."*

Further, following the judgment of the 'Full bench' of the Hon'ble High Court of Delhi in the case of Kelvinator of India (supra), which thereafter as observed by us hereinabove had been upheld by the Hon'ble Apex Court, the Hon'ble High Court of Bombay had held in Asteroids Trading & Investment P. Ltd. Vs. DCIT (2009) 308 ITR 190 (Bom), that an A.O is precluded from assuming jurisdiction to initiate reassessment proceedings on the basis of a 'Change of opinion', observing as under:

"8. Perusal of the record shows that the petitioner had made full disclosure necessary for claiming deduction under s. 80M. The AO after applying his mind to the relevant records had made a specific order allowing the deduction. A perusal of the record shows that now respondent No. 1 proposes to reopen the assessment because according to him deduction under s. 80M was wrongly allowed, and, therefore, he was of the opinion that the income has

escaped assessment. Though, in the notice respondent No. 1 has used the phrase "reason to believe", admittedly between the date of the order of assessment sought to be reopened and the date of forming of opinion by respondent No. 1, nothing new has happened and there is no change of law, no new material has come on record, no information has been received. It is merely a fresh application of mind by the same officer to the same set of facts. Thus, it is a case of mere change of opinion, which, in our opinion, does not provide jurisdiction to respondent No. 1 to initiate proceedings under s. 148 of the Act. It can now be taken as a settled law, because of a series of judgments of various High Courts and the Supreme Court, which have been referred to in the judgment of the Full Bench of the Delhi High Court in the case of Kelvinator of India Ltd. (supra) referred to above, that under s. 147 assessment cannot be reopened on a mere change of opinion."

We further find, that the Hon'ble High Court of Bombay in the case of Asian Paints Ltd. Vs. DCIT (2008) 308 ITR 195 (Bom), observing that as no new information/material was received by the A.O, therefore, the fresh application of mind by the A.O to the same set of facts and material which were available on record at the time of framing of the assessment, but had inadvertently remained omitted to be considered would tantamount to review of order, which is not permissible as per law, had held as under: .

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

Further, the Hon'ble High Court of Bombay in the case of ICICI Prudential Life Insurance Co. Ltd. Vs. ACIT (2010) 325 ITR 471 (Bom),

relying on the judgment of the Hon'ble Supreme Court in the case of *Kelvinator of India (supra)*, had therein held as under:

> 23. *Though the power to reopen an assessment within a period of four years of the expiry of the relevant assessment year is wide, it is still structured by the existence of a reason to believe that income chargeable to tax has escaped assessment. The Supreme Court, in a recent judgment in Kelvinator of India Ltd. (supra) while drawing upon the legislative history of s. 147 held that the expression 'reason to believe' needs to be given a schematic interpretation in order to ensure against an arbitrary exercise of power by the AO. The judgment of the Supreme Court emphasises that the power to reopen an assessment is not akin to a power to review the order of assessment and a mere change of opinion would not justify a recourse to the power under s. 147. Unless the AO has tangible material to reopen an assessment, the power cannot be held to be validly exercised. The Supreme Court has held thus :*
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> *"...Therefore, post-1st April, 1989, power to reopen is much wider. However, one needs to give a schematic interpretation to the words 'reason to believe' failing which we are afraid s. 147 would give arbitrary powers to the AO to reopen assessments on the basis of 'mere change of opinion', which cannot be per se reason to reopen. We must also keep in mind the conceptual difference between power to review and power to reassess. The AO has no power to review; he has the power to reassess. But reassessment has to be based on fulfilment of certain precondition and i the concept of 'change of opinion' is removed, as contended on behalf of the Department, then, in the garb of reopening the assessment, review would take place. One must treat the concept of 'change of opinion' as an inbuilt test to check abuse of power by the AO. Hence, after 1st April, 1989, AO 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 link with the formation of the belief."*
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> 24. *In the present case, for all the assessment years in question, and a fortiorari for asst. yr. 2004-05, what the AO has purported to do is to reopen the assessment on the basis of a mere change of opinion. That the AO had no tangible material is evident from the circumstance that the reasons which have been disclosed contain a reference to the same basis, namely the existence of a nil surplus/deficit in Form 1 which was drawn to the attention of and was present to the mind of the AO during the assessment proceedings under s. 143(3). Consequently, it is evident that there is an absence of tangible material before the AO".*

Lastly, the Hon'ble High Court of jurisdiction in the case of Aventis Pharma Ltd. Vs. Asst. CIT (2010) 323 ITR 570 (Bom), reiterating its aforesaid view that reassessment proceedings cannot be permitted on the basis of a 'Change of opinion', had held as under:-

"There is merit in the submission which has been urged on behalf of the assessee that there was no tangible material before the AO on the basis of which the assessment could have been reopened and what is sought to be done is to propose a reassessment on the basis of a mere change of opinion. This, in view of the settled position of law is impermissible. No tangible material is shown on the basis of which the assessment is sought to be reopened. In the absence of tangible material, what the AO has done while reopening the assessment is only to change the opinion which was formed earlier on the allowability of the deduction. The power to reopen an assessment is conditional on the formation of a reason to believe that income chargeable to tax has escaped assessment. The power is not akin to a review. The existence of tangible material is necessary to ensure against an arbitrary exercise of power. There is no tangible material in the present case.

10. We further find substantial force in the contention of the Ld. A.R, that as per the mandate of law, even where a concluded assessment was sought to be reopened by the A O within a period of 4 years from the end of the relevant assessment year, it was must that the A.O had fresh material or information with him, that had led to the formation of belief on his part that the income of the assessee chargeable to tax had escaped assessment. The aforesaid contention of the Ld. A.R is duly supported by the judgments of the Hon'ble High Court of Bombay viz. (i) NYK Lime (India) Ltd. Vs. DCIT (No.2) [2012] 346 ITR 361 (Bom); and (ii) Purity Tech Textile Pvt. Ltd. Vs. ACIT & Anr. [2010] 325 ITR 459 (Bom). In the backdrop of our aforesaid observations, we are of the considered view that as the reopening of the case of the assessee had been resorted to by the A.O merely on the basis of a 'change of opinion' as regards the allowability of the ESOP expense of Rs. 2,63,50,515/-, on the same set of facts and material as were there before his predecessor who had allowed the said claim of expenditure of the assessee in the original assessment framed under Sec. 143(3), dated 30.09.2010, thus the same in light of the aforesaid settled position of law cannot be sustained, and on the said count itself is liable to be vacated.

11. We shall now advert to the contention of the Ld. A.R, that as the 'reasons to believe' on the basis of which the case of the assessee had been reopened were totally vague, thus, no valid jurisdiction could have been assumed by the A.O for proceeding with and therein framing the reassessment in the hands of the assessee. We have deliberated at length on the aforesaid contention of the Ld. A.R and are persuaded to subscribe to his claim, that though the A.O had observed in the reasons recorded by him that the ESOP expense would be allowable only if the assessee company had first purchased the shares and subsequently transferred the same to its employees, but what is the basis for so concluding is absolutely not at all discernible from a perusal of the same. Rather, we find substantial force in the contention of the Ld. A.R that now when as per the mandate of law i.e. Sec. 42 of the Companies Act, 1956, a subsidiary company cannot purchase the shares of its parent/holding company, thus what forms the basis for arriving at the aforesaid belief on the part of the A.O remains confined to the knowledge of the A.O, and a mystery for the assessee till date. We are persuaded to subscribe to the claim of the assessee, that the very basis on which the case of the assessee had been reopened viz. that in order to get deduction of ESOP expense, the shares should have been first purchased by the assessee company and subsequently transferred to its employees, is devoid of the necessary sanction of law. As per Sec. 42(1) of the Companies Act, 1956 (as was then available on the statute), except for under certain cases provided in the said section, a body corporate cannot be a member of a company which is its holding company, and any allotment or transfer of shares in a company to its subsidiary shall be void. The only two exceptions to the aforesaid mandate are carved out in sub-section (2) of Sec. 42 viz. (a) where the subsidiary is concerned as the legal representative of a deceased member of the holding

company; or (b) where the subsidiary is concerned as trustee, unless the holding company or subsidiary thereof is beneficially interested under the trust and is not so interested only by way of security for the purposes of transaction entered into by it in the ordinary course of its business which includes the lending of money. We are of the considered view that as the purchase of the shares by the assessee company of its parent/holding company viz. M/s Kotak Mahindra Bank Ltd. as sought by the A.O, does not fall within the sweep of either of the exceptions carved out in Sec. 42(2) of the Companies Act, 1956, thus, it can safely be concluded that the same was barred as per the mandate of law. We thus, have no hesitation in observing that though the A.O had conveyed the reason for reopening the case of the assessee, but had withheld the very basis for so concluding. Rather, in our considered view, on the basis of our aforesaid deliberations, it can safely be concluded that as the 'reasons to believe' are not only vague, but are found to militate against the mandate of law, thus, the same cannot be approved and for the said reason too are liable to be struck down.

12. Further, we have deliberated on the contention advanced by the Ld. A.R, that the reason that had weighed in the mind of the A.O while reopening the case of the assessee, was that in order to get deduction of ESOP expense, the shares should have been first purchased by the assessee, and subsequently transferred to its employees. As per the A.O, as the assessee had failed to do so, the same had thus resulted in irregular allowance of deduction of ESOP expense of Rs. 2,63,50,515/-. We find substantial force in the contention of the Ld. A.R, that as on 13.03.2014 when the case of the assessee was reopened for the aforesaid reasons, there was an order of the jurisdictional Tribunal available before him in the case of M/s Accenture Services Pvt. Ltd.

Vs. DCIT, Circle-3(1), Mumbai [2010-TIOL-409](ITAT Mumbai); dated 23.03.2010, wherein in the backdrop of identical facts as are there before us in the case of the present assessee, the Tribunal had observed that ESOP expense incurred by the assessee company on account of payments made by it for the shares of parent/holding company allotted to its employees was allowable as a revenue expenditure. We find that the aforesaid order of the Tribunal was accepted by the revenue, and no further appeal was filed before the Hon'ble High Court of Bombay. In the backdrop of the aforesaid facts, we find ourselves to be in agreement with the contentions advanced by Mr. Irani, that it is beyond comprehension as to how the A.O on the basis of a view which clearly militated against the aforesaid order of the jurisdictional Tribunal, could have reopened the case of the assessee. Rather, the aforesaid exercise undertaken by the A.O was blatantly with a purpose to dislodge and upset the view earlier taken by his predecessor in the assessment framed under Sec. 143(3), dated 30.09.2010, which we find was in absolute conformity with the aforementioned order of the Tribunal. We thus, in terms of our aforesaid observations are of the considered view that the jurisdiction assumed by the A.O to dislodge the assessment framed by his predecessor under Sec. 143(3), dated 30.09.2010, which as observed by us hereinabove was in conformity with the view taken by the Tribunal in the case of M/s Accenture Services Pvt. Ltd. (supra), cannot be sustained, and on the said count also is liable to be struck down. Before parting, we may herein observe, that we are seriously taken aback by the manner in which a concluded assessment had been reopened by the A.O. We find that the A.O had acted in complete defiance of the order of the Tribunal in context of the issue under consideration in the case of M/s Accenture Services Pvt. Ltd. Vs. DCIT, Circle-3(1), Mumbai [2010-TIOL-409](ITAT Mumbai); dated

23.03.2010, despite the fact that the same had been accepted by the revenue by not further carrying the same in appeal before the Hon'ble High Court. In this regard, it may be relevant to point out that neither any judgment/order taking a view to the contrary, as on the date on which the case of the assessee was reopened, is either discernible from the orders of the lower authorities, nor brought to our notice by the Ld. D.R during the course of hearing of the appeal, which would have persuaded us to conclude that the A.O was justified in reopening the case by taking recourse to a contrary view. Further, the said mistake on the part of the A.O had been allowed by the CIT(A) to perpetuate. We find from a perusal of the order of the CIT(A), that he had fairly admitted that the facts involved in the case of Accenture Services Pvt. Ltd. (supra) were identical as in comparison to that of the case of the assessee company. It was observed by him, that in the case of Accenture Services Pvt. Ltd. (supra) also the shares of the parent/holding were issued to the employees of the subsidiary companies, and the subsidiary company had paid to the parent/holding company the difference in the market price and the exercise price of such shares by their employees, and had claimed the same as ESOP expenses. We find that the CIT(A) despite observing as hereinabove, and therein being well conversant with the fact that the A.O had reopened the case on the basis of a view which clearly militated against the view that was arrived at by the jurisdictional Tribunal in its aforementioned case viz. M/s Accenture Services Pvt. Ltd. Vs. DCIT, Circle-3(1), Mumbai [2010-TIOL-409](ITAT Mumbai); dated 23.03.2010, however did not think it fit to dislodge the validity of the jurisdiction assumed by the A.O. We find that the aforesaid approach adopted by the lower authorities in disregarding and bypassing the order of the jurisdictional Tribunal clearly militates against the basic tenement of rule of judicial discipline. We are at this

stage reminded of the judgment of the Hon'ble Supreme Court in the case of Union of India Vs. Kamlakshi Finance Corporation Ltd. [AIR 1992 Supreme Court 711], wherein it was observed by the Hon'ble Apex Court, that there is no justification on the part of the lower authorities in not following the order of the appellate Tribunal, even where such lower authorities has some reservations as regards the correctness of the said order. It was held by the Hon'ble Apex Court, that the lower authorities have to follow the orders of the higher appellate authorities. On a similar footing, the Hon'ble High Court of Bombay in the case of Bank of Baroda Vs. H.C. Shrivatsava & Anr., had observed that the judgment delivered by the Income Tax Tribunal is binding on the assessing officer, who is bound to follow the same in its true letter and spirit. It was observed by the Hon'ble jurisdictional High Court, that for judicial unity and discipline it was necessary that all the authorities below the tribunal accept as binding the order of the Tribunal. We are of a strong conviction, that in backdrop of the aforesaid settled position of law, the conduct of the lower authorities in reopening the case of the assessee in complete disregard of the order of the jurisdictional Tribunal in the case of M/s Accenture Services Pvt. Ltd. (supra) needs to be deprecated.

13. We thus, in terms of our aforesaid observations, not being able to persuade ourselves to subscribe to the validity of the reopening of the concluded assessment in the case of the assessee, thus quash the same.

14. The appeal filed by the assessee is allowed in terms of our aforesaid observations.

ITA NO. 1794/Mum/2017

A.Y. 2009-10

15. We shall now advert to the appeal of the revenue. Though we have quashed the reopening of the concluded assessment of the assessee company, however for the sake of completeness we herein now take up the appeal of the revenue. The revenue assailing the order of the CIT(A) has raised before us the following grounds:

> *"1. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in not appreciating the fact that the Employee Stock Option Scheme (ESOP) are incurred in relation to issue or shares to employees are not relatable to profits and gains arising ore accruing from business/trade*
>
> *2. The appellant craves leave to add, amend, vary omit or substitute any of the aforesaid grounds of appeal at any time before or at the time of hearing of appeal.*
>
> *3. The appellant prays that the order of the CIT(A) on the above grounds be set aside and that of the Assessing Officer be restored.*

16. Briefly stated, the revenue has assailed the order of the CIT(A) on the ground that he had erred in failing to appreciate that as the ESOP expense of Rs. 2,63,50,515/- was incurred in relation to issue of shares to employees, and was not relatable to profit and gains arising or accruing from business/trade, thus the same was not allowable as a revenue expenditure in the hands of the assessee company.

17. We have heard the authorized representatives of both the parties in context of the issue under consideration, and are not persuaded to subscribe to the aforesaid claim of the revenue. We find that the issue involved in the present appeal is squarely covered by the order passed by a coordinate bench of the Tribunal in the assesses own case for A.Y. 2004-05 viz. Kotak Mahindra Asset Management Co. Ltd. Vs. DCIT-3(2), Mumbai (ITA No. 1416/Mum/2008; dated 07.04.2016). In

the aforementioned case, the Tribunal relying on its earlier decisions i.e. (i) DCIT Vs. Accentures Services Pvt. Ltd. [(2010) TIOL-409-ITAT-Mum] and (ii) Novo Nordisk India Pvt. Ltd. Vs. DCIT [ITA No. 1275/Bang/2011; dated 30.09.2013], had observed that the difference in the market price and the exercise price of the shares of the parent/holding company which were issued to the employees of the subsidiary company, having been paid by the latter, was thus allowable as an ESOP expense in its hands. We have perused the order of the Tribunal passed in the assesses own case for A.Y. 2004-05, and finding ourselves as being in agreement with the view therein taken, thus respectfully follow the same. Before parting, we may herein observe that the Ld. D.R had not brought to our notice any such judgment or order wherein a contrary view had been taken.

18. We thus, in terms of our aforesaid observations finding no infirmity in the order of the CIT(A), to the extent he had allowed the appeal of the assessee on merits, uphold the same.

19. The appeal of the revenue is dismissed.

20. The appeal of the assessee in ITA No. 1815/Mum/2017 is allowed, and the appeal of the revenue in ITA No. 1794/Mum/2017 is dismissed.

Order pronounced in the open court on 31/10/2018

Sd/-	Sd/-
(Manoj Kumar Aggarwal)	(Ravish Sood)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

मुंबई Mumbai; दिनांक 31.10.2018
Ps. Rohit Kumar

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई **/ ITAT, Mumbai**