IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "A", MUMBAI

BEFORE SHRI C.N. PRASAD, HON'BLE JUDICIAL MEMBER AND SHRI RAJESH KUMAR, HON'BLE ACCOUNTANT MEMBER

ITA NO.583/MUM/2016 (A.Y: 2006-07)

A.C.I.T, Circle – 21(1) Room No. 116, 1ST Floor, Piramal Chambers, Parel, Mumbai – 400 012	*v.*	Shri Dhruv Kumar Khaitan 411, 11th Floor, Samudra Mahal, Dr. Annie Besant Road, Worli, Mumbai - 400 018 **PAN: AAFPK 4467 N**
(Appellant)		**(Respondent)**

ITA NO. 584/MUM/2016 (A.Y: 2006-07)

A.C.I.T, Circle – 21(1) Room No. 116, 1st Floor, Piramal Chambers, Parel, Mumbai – 400 012	*v.*	Smt. Archana Khaitan 411, 11th Floor, Samudra Mahal, Dr. Annie Besant Road, Worli, Mumbai - 400 018 **PAN: AIMPK 6377 J**
(Appellant)		**(Respondent)**

CO.No. 135/MUM/2016
[Arising out of ITA NO.583/MUM/2016 (A.Y: 2006-07)]

Shri Dhruv Kumar Khaitan 411, 11th Floor, Samudra Mahal, Dr. Annie Besant Road, Worli, Mumbai - 400 018 **PAN: AAFPK 4467 N**	*v.*	A.C.I.T, Circle – 21(1) Room No. 116, 1st Floor, Piramal Chambers, Parel, Mumbai – 400 012
(Appellant)		**(Respondent)**

CO. No. 136/MUM/2016
[Arising out of ITA NO. 584/MUM/2016 (A.Y: 2006-07)]

Smt. Archana Khaitan 411, 11th Floor, Samudra Mahal, Dr. Annie Besant Road, Worli, Mumbai - 400 018 **PAN: AIMPK 6377 J**	*v.*	A.C.I.T, Circle – 21(1) Room No. 116, 1st Floor, Piramal Chambers, Parel, Mumbai – 400 012
(Appellant)		**(Respondent)**

Assessee by : **Shri Dr. K. Shivaram &**
Ms. Neelam Jadhav
Department by : **Ms Neha Thakur**

Date of Hearing : **10.10.2018**
Date of Pronouncement : **08.01.2019**

O R D E R

PER C.N. PRASAD (JM)

1. These are the appeals and cross objections filed by the revenue and the assessees against the separate orders passed by the Ld. Commissioner of Income Tax (Appeals)- 33, Mumbai [hereinafter in short as Ld. CIT(A)] dated 03.11.2015, for the assessment year 2006-07 arising out of the order passed u/s 143(3) r.w.s. 147 of the Income Tax Act, 1961. Since common issues are involved in these appeals / cross objections,

they are being clubbed and heard together and a consolidated order is passed for the sake of convenience.

2. As the dispute in case of both the assessees are similar we first take up the cross appeals in case of Shri Dhruv Kumar Khaitan in ITA.No. 583/Mum/2016 & CO.NO.135/Mum/2017.

ITA NO.583/MUM/2016 & CO NO.135/MUM/2017:

3. In this case, revenue has raised the following grounds of appeal: -

> *"1. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the addition u/s 68 of the Income Tax Act, 1961 made by Assessing Officer.*
>
> *2. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in treating the income of Short Term Capital Gain as long term capital gain.*
>
> *3. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in treating the income of Rs. 4,96,40,000/- as Long Term Capital Gain and allowing deduction u/s 54F of the Income Tax Act, 1961.*
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> *4. The appellant prays that the order of Ld. CIT(A) on the above grounds be set aside and that of the AO be restored.*
>
> *5. The appellant craves leave to amend or alter any ground or add a new ground, which may be necessary."*

4. Grounds of cross objection raised by the assessee read as follows:

> *1. "The Ld. CIT (A) erred in upholding reopening of assessment u/s 148 without appreciating that:*
>
> *i) The original assessment was completed u/s 143(3) and the assessment was reopened beyond four years and there was no failure on part of the assessee to disclose truly and fully all material facts required for assessment. Therefore, as per proviso to section 147, such reopening is invalid.*
>
> *ii) The original assessment was made u/s 143(3) and after original assessment no new tangible material has come into possession of the Assessing Officer which is even confirmed by the Assessing Officer in the remand report. Therefore, such reopening of the assessment is nothing but "change of opinion", hence, invalid.*

iii) There was no "reason to believe" as there was no material to prove that income has escaped assessment.

2. The Ld. CIT (A) erred in not deciding the alternate contention of the assessee on merit that if cost of shares received from private trust is treated as "gift", even in that case, resultant profit is Long Term Capital Gain (LTCG), hence, eligible for exemption u/s 54F.

3. The Ld. CIT (A) erred in not deciding the alternate contention of the assessee on merit that if cost of shares received by the assessee from private trust is not determinable; in that case, Capital Gain cannot be computed; in the absence of computation, charge also fails as held by the Hon'ble Supreme Court in the case of CIT Vs. B.C. Srinivas Shetty reported in 128 ITR 294 (SC).

4. The Respondent prays that reopening of assessment may be quashed and held to be void ab-initio and on merits such additions made may be deleted.

5. The respondent craves leave to add, alter or amend any or all the above grounds of cross-objection at the time of hearing or before."

5. Brief facts of the case are that there was a private trust named Nirmaan Nidhi and the assessee and his wife were among its beneficiaries. The trust had come into existence on 18th April, 1995 and had been independently filing its return of income all along. The trust had acquired shares of a company named DEI Ltd. on 30.03.1999. During the year under consideration, on 04.05.2005, the trust distributed the shares of DEI Ltd. to its beneficiaries i.e. Shri Dhruv Kumar Khaitan and his wife, Smt. Archana Khaitan. Part of such distributed shares were sold by the assessee to an overseas party, M/s. Avondale Ltd. on 20.05.2005 for ₹.4,96,40,000/-. The assessee claimed deduction of ₹.4,95,91,475/- by way of exemption u/s 54F on account of investment made by him in purchase of residential flat at Mumbai and further offered the balance sum of ₹. 48,525/- for tax as Long Term Capital Gain (LTCG).

6. The assessee filed original return of income on 29.07.2006 declaring total income at ₹.58,84,970/- and assessment was made u/s 143(3) vide order dated 30.12.2008 accepting the returned income. Subsequently, this case was reopened by issue of notice u/s 148 dated 7.02.2012. The Assessing Officer passed the re-assessment order on 06.07.2012 u/s 143(3) r.w.s. 147 of the Income Tax Act, 1961. In the reassessment order, the Assessing Officer concluded that as the assessee has shown capital gain on the shares received by him on dissolution of trust, the period of holding of the previous owner i.e., Nirmaan Nidhi Trust cannot be included in the period of holding by the assessee as per provisions of section 49(1)(iii)(b) of the I.T. Act. Accordingly, LTCG declared by the assessee was treated as Short Term Capital Gain (STCG) considering the holding period of shares in the hands of assessee as less than one year and was taxed as such.

7. The AO further held that the assessee has sold shares to an overseas party, identity, credit worthiness and genuineness of which was not proved, therefore entire sale proceeds of ₹.4,96,40,000/- were treated as unexplained cash credit u/s 68 of the Act.

8. It was also held that the capital gain on distribution of assets on dissolution of AOP/ BOI is to be assessed in its own hands and not in the

hands of beneficiaries as per section 45(4). Accordingly, LTCG declared by the assessee was added in his hands on protective basis and substantively to be added in the hands of Nirmaan Nidhi Trust. The Assessing Officer also sent information to the Assessing Officer of Nirmaan Nidhi for taxability of such receipt.

9. Based on the information sent by the Assessing Officer of the assessee Shri. Dhruv Kumar Khaitan, Assessment of Nirmaan Nidhi Trust was re-opened and order under section 143(3) r w.s. 147 was passed. Similarly, the assessment of Mrs Archana Khaitan was re-opened and order under section 143(3) r.w.s. 147 was passed.

10. Against the reassessment order passed in the case of Shri Dhruv Kumar Khaitan, the assessee filed an appeal before Ld. CIT(A) wherein the action of the AO in re-opening of assessment u/s 147 of the Act was challenged. Similarly, the assessee has also challenged the additions made by the Assessing Officer. The Ld. CIT(A) called for a Remand Report from the Assessing Officer, and considering the same and the submissions of the assessee he upheld the re-opening of assessment, therefore, the assessee has filed the cross objection challenging the reopening of assessment. On merits, the submission of the assessee was accepted by Ld. CIT(A) and the addition made in the assessment order

was deleted. The Ld.CIT(A) held that while calculating the period of holding the period for which shares held by the trust shall be included, therefore, resultant capital gain was long term capital gain and therefore, the assessee was entitled to deduction u/s 54F of the Act. The Ld. CIT(A) also deleted addition made u/s 68 of the I. T. Act, 1961. Aggrieved, the revenue is in appeal before us.

11. As the assessee in his cross objection challenged the very jurisdiction of Assessing Officer in re-opening the assessment and the validity of the Assessment Order passed u/s. 143(3) r.w.s. 147 of the Act, we first adjudicate the grounds raised by assessee in his cross objection.

12. The assessment was reopened by recording the following reasons:

> *"The assessee had joinly purchased a flat alonwith his wife in Mumbai for a total consideration of Rs.9,06 03,600/-. The total Stamp Duty plus Registration charges paid were Rs.46,82,750/-. Accordingly, half of this Stamp Duty and Registration charges should have been added by the assessee to his half share worth Rs.4 53,01,800/-i.e. Rs.23,41,375/- to arrive at the qualifying figure for claiming deduction u/s.54F against at LTCG of Rs.4,96,40,300/- earned by him from the sale of shares held in a private Ltd. Company. However, the assessee added Rs.42,89,675/- by way of Stamp Duty and Registration charges to his cost of purchase and thereby claimed excess deduction of Rs.19,48,300/- (Rs.42,89,675/- - Rs.23,41,375/-) u/s.54F of the Income Tax Act,1961.*
>
> *The assessee made the investment for the purchase of the flat by borrowing a sum of Rs.4,52,00,000/- on 13.04.2005 from his solicitor M/s. Khaitan & Co. and received the sale deeds of the shares sold by him from HSBC Bank, New York on 02.06.2005 i.e. two months after the purchase of flat. As on 01.04.2005, the assessee's capital was a mere Rs.12,46,280/- The moot question is how could the assessee be so sure of receiving such a huge sum of money and a gain of Rs.7,475/- per share on a paid up share of Rs.10/- while borrowing in Apri1,2005, when the valuation of shares has taken place later on 02.05.2005 as per the valuation report of M/s. Dawn Consulting, Bangalore. The book value of shares at the time of sale was Rs.780/- per share, which has been valued at highly exaggerated value of Rs.7,475/- per share. It is also interesting to note-that the so called purchaser of shares M/s. AVONDALE Ltd., itself has come into existence on 03.05.2005 and the assessee has offered his shares to the buyer on 20.05.2005. The assessee did not receive the sale proceeds from*

the alleged purchaser of the shares i.e. AVONDALE Ltd., but received the same from a solicitor, Mr. Markus Hugeishofer from Switzerland, who was authorized by a Co. called, Professional Directors Ltd., Kingston, St. Vincent & the Grenadines, on behalf of the purchaser. Further the assessee on receiving the sale proceeds did not return it to Khaitan & Co. till 18.03.2006.

From the above facts it is clear that the identity of the actual purchaser of the assessee's shares is not known. As per the documents submitted by the assessee the details of the actual beneficial owner of the shares has not been revealed. The purchaser is a Off Shore Company registered under the secrecy laws of the tax haven of St. Vincent & the Grenadines. As per the OECD reports, St. Vincent & the Grenadines has been held to be a territory which allows harmful legal vehicles as per the International Anti Money Laundering Standards. The manner in which the assessee had brought huge LTCG in the garb of sale of shares, made it clear that it was a mere facade to disguise the real nature of the source of money coming in. The good news however is that St. Vincent & Grenadines has signed a treaty with the OECD In 2002 to allow exchange of information on civil tax matters with the overseas regulators by 2005. Accordingly information can now be sought from the Revenue authorities in St. Vincent & the Granedines about the actual purchaser of shares and the source of money for the said purchase.

The assessee is a Managing Director and a majority share holder of a Co. called, DEI Pvt Ltd, incorporated in 1991 and even after the sale of 7% shares to AVONDALE LTD., continues to own 58% shares of DEI Pvt Ltd. The so called FDI investor purchasing the minority shares at such an exaggerated value in a trading concern makes no commercial sense at all by any investment standards or theories. Enquiries were made and Information was accordingly gathered to unravel the actual truth. It was found that DEI Pvt. Ltd., has been in the business of importing plastic cards (used as credit cards) and card personalization machines and supplying the same to various banks in India. It was found that the plastic cards sold by the local manufacturers were available at Rs.3/- to Rs.4/- per piece, while the audited final accounts of DEI Pvt. Ltd., for A.Y. 2005-06 and 2006-07 revealed that it had imported the same at an average price of 8/- per piece. Copy of the final accounts of DEI Pvt. Ltd., for A.Y. 2005-06 & 2006-07 is enclosed herewith for your kind perusal. ***Hence, in all probability, it could be a case at over invoicing of purchases for first transferring taxable income to a tax haven and then launder ng it back by way of share investment in the name of a Front Company*** *AVONDALE Ltd, registered under the secrecy laws of International Business Company's Act, 1996 of St.Vincent & the Grainedines. There are reasonable grounds to believe that the assessee has received money from the parties from whom his company DEI Pvt. Ltd., is importing the plastic cards, by way of secret commissions or director's kickbacks, which he has laundered as LTCG by way of sale of shares to a non-identifiable party located in a tax haven. In either case the assessee has failed to disclose the said income in his returns and accordingly notice u/s.148 needs to be issued for A.Y. 2005-06 and 2006-07 as there are reasonable grounds to believe that the income has escaped assessment in terms of Sec.147 of the Income Tax Act, 1961.*

Another interesting aspect of the case is that the assessee has tried to avoid the payment of short term capital gain tax on the sale of the said shares by misinterpreting the provisions of Sec. 49(1){iii}(a) of the Income Tax Act,1961.The assessee had received the 6,800 shares sold by him on the dissolution of a Private Trust called, Nirman Nidhi during the same year i.e. A.Y. 2006-07 in which they were sold. The assessee contended that the cost of acquisition and the consequential period of holding will be that of the Trust, as prescribed by sec49(1)(iiixa). As per the said section, the cost of acquisition of the asset shall be deemed to be the cost for which the previous owner of the of property acquired in the case of any distribution of assets on the dissolution of a Firm, Body of individual or other association of persons where such dissolution has

taken place at any time before the first day of Apri ,I987 – Sec.49{I)(iii)(b). The assessee has wrongly relied on subclause {a) instead of sub-clause (b) as applicable to the facts of his case. The assessee has intentionally wrongly tried to claim the receipt of shares on dissolution of the Trust as devolution and get away with a period of holding which would render the capital gain as LTCG. The assessee knew that were he to sell the shares in the hands of the Trust then the exemption u/s.54F would be lost as the same is available only to an individual assesses. Accordingly, the assessee first claimed a dissolution to bring the shares in his individual hands and later also claimed that the period of holding should be taken as that applicable to the Trust. It is a simple case of eating the cake and keeping it too. The assessee's case needs to be reopened on this count too.

As a result, the assessee has taken wrong deduction u/s.54F to the tune of Rs.4,96,40,000/-. Hence, I have reason to believe that the income chargeable to tax has escaped assessment. The Income which has escaped is Rs.4,96,40,000/-."

13. During the course of hearing, the Ld. Senior Counsel for the assessee submitted that the original assessment was made u/s 143(3) on 30.12.2008 and reopening notice u/s 148 was issued on 17.02.2012 and since the concerned assessment year is A.Y. 2006-07, the reopening of assessment is beyond four years and therefore second proviso to section 147 of the Act would apply.

14. It was claimed that the assessment was re-opened on the basis of all the documents already available on record. The reasons state that there is a possibility of money laundering through transaction in Tax Havens, thus, there is no failure on part of the assessee to disclose truly and fully all material facts necessary for completion of Assessment. Ld. Sr. Counsel submitted that, the reasons recorded do not allege any failure on part of the assessee, therefore, such reopening of assessment is bad in law within the meaning of proviso

to section 147 of the Income Tax Act, 1961. The Ld. Counsel has placed his reliance on the following decisions:

a. *CIT v. Former Finance (2003) 264 ITR 566 (SC);*
b. *Cedric De Souza Faria v. DCIT (2018) 400 ITR 30 (Bom); and*
c. *Nirmal Bang Securities (P) Ltd. v. ACIT (2016) 382 ITR 93 (Bom).*

15. The Ld. Counsel was further submitted that there is no new or fresh tangible material after completion of original assessment. Hence, in the absence of new tangible material, re-opening is bad in law. The Ld. Sr. Counsel drew our attention towards the allegation made in para 3 of the assessment order which states that certain information were received that the assessee has laundered has undisclosed income from foreign sources. This allegation was found to be false as during the course of appellate proceedings, a remand report was called upon from the Assessing Officer to make specific comment on this allegation. The Assessing Officer in his remand report dated 04.08.2014 has conceded that no such information exists. Thus, this is an undisputed fact that after passing of original assessment order under section 143(3), no new tangible material has come to the notice of the department. Thus, it is submitted that such reopening of assessment is bad in law. In this regard, reliance was placed on the following judicial precedents:

a. *CIT v Kelvinator of India Ltd. (2010) 320 ITR 561 (SC);*
b. *CIT v. Jet Speed Audio Pvt. Ltd. (2015) 372 ITR 762 (Bom);*
c. *Rushab Enterprises v ACIT (2015) 60 taxmann.com 134 (Bom).*

16. The Ld. DR relied on the order of Ld.CIT(A) and argued that reopening should be upheld. However, she could not controvert the factual finding that no new tangible material has come to the notice of Income Tax Department.

17. We have heard both the parties and have perused the orders of the lower authorities. We have also gone through the reasons recorded. Prima facie, we find that entire reasons recorded are based upon the material already available on records. Further the allegation made in para 3 of the reassessment order that certain information was received indicating that the appellant has laundered his undeclared income from foreign sources was found to be false as the same conceded by the Assessing Officer in its remand report dated 04.08.2014. Further, the Ld. DR could not point out any infirmity in this factual findings that after the original assessment new tangible material has come into existence and how there was a failure on part of the assessee to disclose truly and fully all material facts necessary for completion of assessment.

18. It is an undisputed fact that the provisions of section 147 have been enshrined in the statute with a view to enable the Assessing Officer to assess the escaped income. For this purpose, the Assessing

Officer has been conferred with the requisite powers under the law to reopen an already concluded assessment. The provisions of section 147 to 151 of the Act deal with the issues of reopening of the assessment and framing of the re-assessment order by the Assessing Officer. In these provisions, on the one hand, requisite powers have been given to Assessing Officer to carry out the task of bringing to tax the escaped income but simultaneously, on the other hand, certain restraints have been provided within the frame work of these provisions to ensure that these provisions are only used in deserving cases and no undue hardship is caused to the taxpayers by reopening their cases, after lapse of so many years. Various courts have held that since these provisions deal with the jurisdictional issues, these have to be followed strictly and applied literally, by the officers for reopening of the assessment and for framing the re-assessment orders.

19. Thus, in the facts and circumstances of the case before us, we are required to examine the first thing i.e., whether in this case, there was any fresh tangible material in the possession of the Assessing Officer at the time of recording of reasons. In the present case, it is established beyond doubt that there was no fresh tangible material in the possession of AO at the time of recording of above reasons.

20. Under these facts and circumstances, let us now examine settled position of law on this issue. It is an established position of law that availability of fresh tangible material in the possession of Assessing Officer at the time of recording of impugned reasons is a *sine qua none* before the Assessing Officer can record reasons for reopening. The Hon'ble Supreme Court in the case of CIT v. Kelvinator of India Ltd. 320 ITR 561 (SC), laid down that for reopening of assessment, the Assessing Officer should have in its possession 'tangible material'. The term 'tangible material' has been understood and explained by various courts subsequently. There has been unanimity of the courts on this issue that in absence of fresh material indicating escaped income, the Assessing Officer cannot assume jurisdiction to reopen already concluded assessment.

21. The Hon'ble Delhi High Court in the case of Madhukar Khosla *v*. ACIT [367 ITR 165] held that the reopening is not permitted under the law unless it is based on fresh tangible material and that if the "reasons to believe" are not based on **"**new, tangible material**",** the reopening amounts to an impermissible review. It has been further observed that:

> *"The foundation of the AO's jurisdiction and the raison d'etre of a reassessment notice are the "reasons to believe". Now this should have a relation or a link with an objective fact, in the form of information or facts external to the materials on the record. Such external facts or material constitute the driver, or the key which enables the authority to legitimately reopen the completed assessment. In absence of this objective "trigger", the AO does not possess jurisdiction to reopen the assessment. It is at the next*

*stage that the question, whether the re-opening of assessment amounts to "review" or "change of opinion" arises. In other words, if there are no "reasons to believe" based on new, "tangible material", then the reopening amounts to an impermissible review. Here, there is nothing to show what triggered the issuance of notice of reassessment – no information or new facts which led the AO to believe that full disclosure had not been made (**Kelvinator of India Ltd.** [(2010) 320 ITR 561 (SC)] and [**Orient Craft Ltd**. (2003) 354 ITR 536 (Delhi)] followed, [**Usha International** (2012) 348 ITR 485 (Delhi)] referred)."*

22. Mumbai Bench of ITAT in the case of HV Transmissions Ltd. in ITA No. 2230/Mum/2010 held that even though original assessment was made under section 143(1) and not under section 143(3), assessee having made full disclosure of its income, Assessing Officer was not justified in reopening the assessment in the absence of any new material. Hon'ble Bench has relied upon third member judgment from Mumbai Bench of ITAT in the case of Telco Dadajee Dhackjee Ltd. *v* DCIT (ITA No. 4313/Mum/2013 dt 12.05.2010) in support of this view.

23. Similar view has been expressed by Mumbai Bench of ITAT in the case of Motilal R. Todi *v* ACIT (ITA No. 2910/Mum/2013 dt 22.09.2015) wherein it has been held that there was no fresh tangible material in the possession of the Assessing Officer at the time of recording of impugned reasons. A perusal of the 'Reasons' recorded by the Assessing Officer in this case reveals that at the time of recording of these 'Reasons' the Assessing Officer had examined original assessment records only and no fresh material had come in the possession of the

Assessing Officer. Thus, reopening done by the Assessing Officer in the absence of fresh tangible material is invalid and bad in law. Therefore, the reassessment order framed in pursuance to invalid reopening is illegal; the same is hereby quashed.

24. In the recent decision of Gay Travels (P.) Ltd. *v*. DCIT [2017] 85 taxmann.com 131 (Madras) the Assessing Officer sought to reopen on the ground that the sale of agricultural lands was not taxed. The scrutiny assessment was already completed. The Court held that if a notice is quashed after examining the material relied on by the Assessing Officer and after recording a finding that on the basis of such material the additional income cannot be said to have escaped assessment, then it will be impermissible for the Assessing Officer to issue a fresh notice. However, in case some fresh material comes into the possession of the Assessing Officer suggesting escapement of income under the same head or some other head, no fetters could be imposed on his power to issue a fresh notice.

25. In the present case, it has already been observed that admitted facts are that there was no fresh material coming into the possession of the Assessing Officer, at the time of recording of the reasons. The Assessing Officer himself, in the remand report has accepted that no such

information as alleged in the assessment order is in existence as per records. These facts have not been rebutted by Ld. DR also. Thus, since there are no "new tangible material", there would be no "reason to believe" and consequently, reopening would be an impermissible review. Under these circumstances, there would not arise any need to go to the next stage to examine the next question, i.e., whether there was "review" or "change of opinion" and whether there is any failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment.

26. Even if these aspects are examined, these will also go undoubtedly in favour of the assessee in the present case, as original assessment u/s 143(3) has been completed and re-opening has been done to examine issue of capital gain, details relating to which were submitted by the assessee and were examined by the AO during original assessment. Therefore, this will certainly amount to "change of opinion". Reliance is placed on the judgment of Hon'ble Supreme Court in the case of CIT *v.* Kelvinator of India Ltd (supra) wherein it has been held that the Assessing Officer has no power to review; he has the power to re-assess and therefore, one must treat the concept of "change of opinion" as an inbuilt test to check abuse of power by the Assessing Officer.

27. Further, in the present case, condition prescribed under proviso to section 147 i.e., assessment can be re-opened beyond four years only when there is a failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment; is also not fulfilled, hence, reassessment is bad in law. As is evident from the materials available on record, there is no failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment. All facts relating to capital gain earned on sale of shares were disclosed by the assessee during the course of original assessment. During the course of hearing, Ld. Senior Counsel also submitted certified copy of order sheet of original assessment which specifies hearing on various dates, details called upon and submitted.

28. Hon'ble Jurisdict onal High Court in the case of Shriram Foundry Ltd *v.* DCIT (2013) 350 ITR 115 (Bom) quashed the reopening as the original assessment was completed u/s 143(3) and all the facts in terms of accounts, audit reports, sales / purchase register etc were disclosed to the AO in the original assessment. The AO proposed to reopen the case on the ground that the assessee had claimed excess melting loss. The Hon'ble High Court held that it was a mere change of opinion and further it was covered by the first proviso to Section 147 of the Act.

29. The Jurisdictional High Court in the case of Sitara Diamond P Ltd *v.* DCIT [345 ITR 91] wherein the case was reopened on the ground that in the subsequent year's assessment, the assessee was denied exemption u/s 10AA of the Act, the Court quashed the reopening since there was no failure to disclose material facts during the original scrutiny assessment and it was beyond four years.

30. Thus, in view of judgments directly on the issue under consideration and settled position of law, as discussed above reopening done by Ld. Assessing Officer in the absence of fresh tangible material and in the absence of failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment, is invalid and bad in law. Therefore, the initiation of reassessment proceedings itself was not valid. Thus, reassessment order framed in pursuance to invalid reopening is illegal and the same is hereby quashed. Hence, assessee's grounds of cross-objections No. 1 & 4 related to reopening are allowed.

31. Even on merits i.e. the question as to whether the Capital Gain in question is Short Term or Long Term, we find that if the holding period of the Trust is included in the holding period of the assessee, the gain in

question is Long Term, otherwise, it is Short Term. The order of ld. CIT(A) on this issue reads as under:

"17.4 After considering the entire factual and legal position, I am of the view that there are merits in the case of the appellant. Under the scheme of taxation; a trust is a "representative assessee", it does not have a separate identity than the person to whom it represents. The law on this issue is well settled. The Hon'ble Gujarat High Court in the case of CIT Vs. Dr. Anand Sarabhai (Supra) held that if a particular benefit is available to the trustee as a representative assessee, then the same needs to be allowed to the beneficiary of the trust as well. The trustee always holds the property for the benefit of the beneficiary. The property always belongs to the beneficiary, since the trust always holds the property on behalf of the beneficiary. Hence, holding period of the trust needs to be included while deciding the holding period. Accordingly, I hold that holding period of the trust is available to the beneficiary.

17.5 The above position of law is further strengthened from the ruling in the case of Arun Shungloo Trust Vs. CIT (Supra) whereby the Hon'ble Court held that if a property is introduced in the trust; then in that case holding period of the person who introduced the property into the trust shall be available to the trust. So in the case of sale by beneficiary, the holding period of trust is available. The Hon'ble Mumbai ITAT in the case of Sunanda Bhassin Vs DCIT (Supra) has decided an identical issue. In that case, a family trust acquired certain property prior to 01-04-1981, such property was ultimately transfe red to the beneficiary on 01-09-1997 and thereafter, such property was sold to an outside party. The assessee has adopted value of property on 01-04-1981 and claimed indexation from 01-04-1981. The AO has denied such treatment and held that value of property shall be that of 01-04-1981; but, indexation shall be available effective from 1997-98 i.e. when the property was first held by the assessee.

17.6 The Hon'ble ITAT after relying on the ruling of Hon'ble Jurisdictional Court in the case of Manjula J Shah (Supra) held that indexation is to be allowed from 1981-82 and not from 1997-98. The Hon'ble Court further held that for the purpose of computing the Long Te m Capital Gains, the AO has taken cost of the property as cost on 01.04 1981 being the cost to the previous owner or value as on 01.04.1981 whichever is higher. Therefore, the index cost of acquisition of such capital assets has to be computed with reference to the year in which the previous owner first held the assets or 1.4.1981 whichever is later. I find that the above ruling squarely covers the facts of the instant case. Since the holding period of the trust needs to be included while determining period of holding, the shares sold during the year were held for more than a year. Therefore, what is transferred is a Long Term Capital Asset and the resultant gain is Long Term Capital Gain (LTCG). Thus, the contention of the assessee that what is transferred is a Long Term Capital Asset, therefore, the resulted capital gain is Long Term Capital Gain (LTCG) is upheld and action of the AO to treat such gain as Short Term Capital Gain (STCG) is reversed. The AO is accordingly directed to work out the Long Term Capital Gain after taking into consideration the cost of inflation index as on 1.4.1981 as against cost inflation index applied by the AO applicable for the Financial Year 1997-98. The grounds nos. 9(a)-(b) and 9(e)-(h) taken by the assessee are, therefore, allowed."

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20. On perusal of the documents such as profile of Mr. Balbinder Singh Sohal who is the only shareholder of the overseas party M/s. Avondale Ltd., the certificate from the bank certifying credentials of Mr. Balbinder Singh Sohal, incorporation certificate and

articles of incorporation and bye laws of M/s. Avondale Ltd., copy of Board resolution of M/s. Avondale Ltd. and copy of letter by Mr. Balbinder Singh Sohal authorizing Mr. Markus Hugelshofer as his attorney, I find that these documents establish the identity and credit worthiness of the party. I also find that the appellant has also established the genuineness of the transaction through documents such as share certificates of M/s. DEI Pvt. Ltd., Foreign Inward Remittance Certificate, FC-TRS Form submitted to RBI, bank statement of the appellant reflecting receipt of money from the overseas party in respect of sale of shares. Thus, it can be fairly concluded that the aforesaid documents substantiate the claim of the assessee with regard to sale of shares to overseas party and undoubtedly prove the identity and credit worthiness of the overseas party as also the genuineness of the transaction.

21. It is also a fact on record that in case of appellant's wife Mrs. Archana Khaitan where the facts were identical and the case was reopened on the basis of assessment order passed in case of the appellant, on similar set of documents, no addition was made u/s 68 of the Income Tax Act, 1961. Therefore, there is no reason on the basis of which the same set of documents, which are accepted in one case; can be rejected in another case. It is also claimed by the appellant that in the case o Nirmaan Nidhi Trust also, assessment was reopened considering the assessment order of the appellant. However, no addition was made in the trust case.

22. Looking to the overall facts & circumstances of the case, I am of the opinion that the addition made u/s 68 in this regard is not warranted. Hence the same is deleted. Thus, ground nos. 9(c) and (d) are ***allowed."***

32. We find that the Ld. CIT(A) has passed a well-reasoned order, therefore, we do not find any reason to interfere with the same. Hence, grounds 1 to 3 raised by the revenue are dismissed.

33. In the result appeal filed by the revenue is dismissed and cross objection filed by the assessee is partly allowed.

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34. Now we take up the appeal filed by revenue in case of assessee's wife Smt. Archana Khaitan. The revenue has raised following grounds of appeal: -

"1. *On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in treating the income of Rs. 7,07,13,000/- as Long Term Capital Gain."*

2. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in allowing the deduction u/s 54EC and 54F of the Income Tax Act, 1961 as income from Short Term Capital.

3. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in treating the Short Term Capital Gain as Long Term Capital Gain and allowing deduction u/s 54EC and 54F of the Income Tax Act, 1961.

4. The appellant prays that the order of Ld. CIT(A) on the above grounds be set aside and that of the AO be restored.

5. The appellant craves leave to amend or alter any ground or add a new ground, which may be necessary."

35. Grounds of cross objection raised by the assessee read as follows:

"1. The Ld. CIT (A) erred in upholding reopening of assessment u/s 148 without appreciating that:

i) The original assessment was completed u/s 143(3) and the assessment was reopened beyond four years and there was no failure on part of the assessee to disclose truly and fully all material facts required for assessment. Therefore, as per proviso to section 147, such reopening is invalid.

ii) *The original assessment was made u/s 143(3) and after original assessment no new tangible material has come into possession of the Assessing Offic r. Therefore, such reopening of the assessment is nothing but "change of opinion", hence, invalid.*

iii) There was no "reason to believe" as there was no material to prove that income has escaped assessment.

2. The Ld. CIT (A erred in not deciding the alternate contention of the assessee on merit that if cost of shares received from private trust is treated as "gift", even in that case, resultant profit is Long Term Capital Gain (LTCG), hence, eligible for exemption u/s 54F.

3. *The Ld. CIT (A) erred in not deciding the alternate contention of the assessee on merit that if cost of shares received by the assessee from private trust is not determinable; in that case, Capital Gain cannot be computed; in the absence of computation, charge also fails as held by the Hon'ble Supreme Court in the case of CIT Vs. B.C. Srinivas Shetty reported in 128 ITR 294 (SC).*

4. The Respondent prays that reopening of assessment may be quashed and held to be void ab-initio and on merits such additions made may be deleted.

5. The respondent craves leave to add, alter or amend any or all the above grounds of cross-objection at the time of hearing or before."

36. Smt. Archana Khaitan is wife of Shri Dhruv Kumar Khaitan. The nature of the transaction entered is the same. Smt. Archana Khaitan has claimed exemption u/s 54EC & 54F. The assessment of Smt. Archana Khaitan was re-opened after the re-assessment order in the case of Shri Dhruv Kumar Khaitan was passed. Rather the assessment of Smt. Archana Khaitan was re-opened on the basis of information passed on by the Assessing Office of Shri Dhruv Kumar Khaitan.

37. We find that the facts of the present case are identical to the facts of Shri Dhruv Kumar Khaitan, the only difference is in the case of Archana Khaitan, no addition was made under section 68 of the Income Tax Act, 1961. Therefore, in the department appeal, ground related to section 68 is not there. The other ground of revenue in appeal as well as cross objections raised by the assessee s same.

38. As we have dismissed the appeal of the revenue and partly allowed the cross objection raised by the assessee Shri Dhruv Kumar Khaitan, these appeal and cross objection of Smt Archana Khaitan are disposed off in similar lines and for similar reasons. Our decision in the case of Shri Dhruv Kumar Khaitan applies mutatis mutandis to the appeal and Cross objection of Smt Archana Khaitan.

39. In the result, appeal filed by revenue is dismissed and cross-objection raised by the assessee is Partly Allowed.

Order pronounced in the open court on the 01st January, 2019

Sd/-	Sd/-
(RAJESH KUMAR)	**(C.N. PRASAD)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Mumbai / Dated 01/01/2019
Giridhar, Sr.PS

Copy of the Order forwarded to:

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER

(Asstt. Registrar)
ITAT, Mum