IN THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD "A" BENCH

Before: Sri D.K Tyagi, Judicial Member
and Shri T.R. Meena Accountant Member

ITA Nos. 981 to 985/Ahd/2009
Asstt. Years 2001-02, 02-03, 03-04, 04-05 & 06-07

Addl. Commissioner of Income-tax, Vapi Range, Vapi (Appellant)	Vs	Bilakhia Holdings P. Ltd, Bilakhia House, Muktanand Marg, Chala, Vapi PAN: AADCS4420J (Respondent)

ITA Nos. 1034 to 1038/Ahd/2009
Asstt. Years 2001-02, 02-03, 03-04, 04-05 & 06-07

Bilakhia Holdings P. Ltd, Bilakhia House, Muktanand Marg, Chala, Vapi PAN: AADCS4420J (Appellant)	Vs	Addl. Commissioner of Income-tax, Vapi Range, Vapi (Respondent)

Revenue by: **Sri Subhash Bains, CIT-DR with Sri O.P. Batheja, Sr.D.R.**
Assessee by: **Shri S.E. Dastur, Sr. Advocate with Sri M.K. Patel, A.R.**

Date of hearing : 21-03-2014
Date of pronouncement : 30-05-2014

आदेश/ORDER

PER BENCH:-

All these cross appeals have been filed against the separate orders of Ld. CIT(A) dated 20-01-2009. Since all these appeals belong to same assessee, we are disposing them by passing a consolidated order.

2. At the time of hearing both the parties agreed that ITA Nos. 982/Ahd/2009 & 1035/Ahd/2009 for assessment year 2002-03 are lead cases as Ld. CIT(A) has followed the order for assessment year 2002-03 in rest of the assessment years. So both the parties advanced their arguments in respect of grounds for assessment year 2002-03 which will take care rest of the years as grounds in those years are similar. Synopsis of the arguments was also filed on behalf of the assessee, Revenue did not file any such synopsis despite opportunity for the same was given on 21.03.2014. Ld. CIT-DR was of the view that revenue's submission/arguments have been fairly incorporated in the synopsis of arguments filed by assesssee-company. So these synopsis were relied upon by us for the arguments advanced by both the parties.

We will first take up revenue's appeal in ITA No. 982/Ahd/2009 A.Y. 2002-03

3. Revenue has taken following grounds:-

"1) On the facts and circumstances of the case and in law, the learned CIT(A) erred in holding that shares were received by the assessee as gift without consideration whereas the same were received under Family Arrangement.

2) On the facts and circumstances of the case and in law, the learned CIT(A) failed to appreciate that transfer under Family Arrangement is for a consideration which is monetary and therefore cannot be termed as gift.

3) On the facts and circumstances of the case and in law, the learned CIT(A) failed to appreciate that Clause-6 of Family Arrangement clearly records the consideration being "to avoid any further disputes ,.,.,, " and therefore transfer being a consideration cannot be termed as gift.

4) On the facts and circumstances of the case and in law, the learned CIT(A) failed to appreciate that basic ingredient i.e. natural love and affection was not there in these share transactions and hence these share transaction cannot be treated as gift.

5) The leaned CIT(A) has erred in observing that the AO has considered the transactions as a discounted purchase when in fact the AO has held that in view of Family Arrangement, the transaction cannot be considered as gift without consideration.

6) On the facts and circumstances of the case and in law, the ld. CIT(A) erred in deleting the addition of Rs. 14,17,11,839/- being amount received by the assessee from its directors by way of gift and on account of assignment of right to receive back the loans without considering the facts brought in by the AO in its entirety."

4. Ground No. 1 to 5 relate to nature of receipts of shares by the assessee-company

5. Brief facts of the case are that assessee-company filed its return of income on 28-10-2002 declaring total income of Rs. 89,960/- under regular proceedings of the Act. The original proceedings u/s. 143(3) of the Act was completed on 16-02-2005. Subsequently, the same was re-opened and assessment was completed u/s. 143(3) r.w.s. 147 of the Act on 12th December, 2007. During assessment proceedings on perusal of the return of the income and having submissions it was found that assessee-company has credited Rs. 45,58,654/- directly to its capital reserve being profit on sale of shares of Nestle India Ltd and Hindustan Lever Ltd. received as gift. This sum was not routed through the profit and loss account of the company and hence was not considered for calculation of book profit u/s. 115JB of the Act. As per the details of capital gain arising from the transfer of shares which was transferred to capital reserve account, the asssessee-company earned capital gain of Rs. 45,58,654/-. The capital reserve was also credited by a sum of Rs. 14,17,11,839/- being gift/loans from the promoters of the company. Before AO assessee-company's claim was that the transaction of transfer of shares as per family arrangement from various persons belonging to Bilakhia family was gift to the assessee. However AO was of the view that since the members of the Bilakhia family have transferred their shares to the asssessee –company in pursuance of deed of family arrangement dated 16-02-2001, the transfer of shares was not voluntary and without consideration. In view of these facts, the amounts of Rs. 45,58,654/- and Rs. 14,17,11,839/- were added to the total income of the assessee.

5.1 Moreover, the profit shown on sale of shares amounting to Rs. 45,58,654/- was added to the book profit computed u/s. 115JB of the Act on

the ground that book profit was not computed as per the provisions of Companies Act read with Part II and III of Schedule VI of Companies Act. While doing so, ratio laid down in the case of Hon'ble Mumbai High Court in the case of CIT vs. Veekayalal 249 ITR 597 was followed. Assessment u/s. 143(3) r.w.s. 147 of the Act was completed determining the total income at Rs. 14,18,1800/- under regular provisions of the Act and Rs. 14,09,37,186/- under special provisions of Section 115JB of the Act.

6. Aggrieved by this order of AO, assessee went in appeal before Ld. CIT(A) who decided the appeal of the assessee as under:-

(i) Reopening of assessment was held to be valid.

(ii) Transfer of shares to the assessee-company by three brothers of Bilakhia were directed to be considered as gift, cost to previous owner and holding period of previous owner was available to the asssessee.

(iii) He directed the AO to re-compute the book profit u/s. 115JB of the Act at Rs. 45,58,654/-

(iv) He deleted the addition of Rs. 14,17,11,839/- received by the assessee-company from its director as gift on account of assignment of right to receive back the loans holdings that the same represent gift without consideration.

7. At the time of hearing Ld. DR's submission in respect of shares was that transfer of shares to the assessee-company cannot be regarded as a gift since:-

(i) For the transfer to be a gift it must be out of natural love and affection which can exist only between living bodies and assesseee, a company, is inanimate and hence incapable of receiving gifts.

(ii) Attaining peace and harmony in the family is good consideration and hence transfer under family arrangement cannot be said to be without consideration. For making this submisison reliance was placed on the decision of the Supreme Court in the case of CWT vs. HH Vijayaba, Dowger Maharani Saheb of Bhavnagar Palace (117 ITR 784)

(iii) The transfer is not made voluntarily by the members of the family but as mandated by the family arrangement arrived at between various family members. It was further submitted on behalf of the revenue that the shares have in fact been purchased by the assessee at the cost to the previous owner.

7.1 Ld. DR concluded his argument by submitting that the assessee was not entitled to take the period of holding of the previous owner and hence the gain arising on the sale of shares was in fact short term capital gain and not long term capital gain as claimed by the assessee.

8. The arguments advanced by Ld. Sr. counsel of the assessee as per the synopsis of arguments are as under:-

"a) Whether the transfer of shares was a gift?

i. It is submitted that there is no requirement that a gift can be only out of natural love and affection:

1. Since gift has not been defined under the Act, its meaning as per the Transfer of Property Act, 1882 becomes relevant. S.122 of the Transfer of Property Act, 1882 defines gift thus:

122 " Gift" defined.-" Gift" is the transfer of certain existing moveable or immoveable property made voluntarily and without consideration, by one person, called the donor, to another, called the donee, and accepted by or on behalf of the donee.

From the above definition it is clear that there is no requirement in law for the existence of natural love and affection between the donor and the donee. All that is necessary is that the transfer be made voluntarily and without consideration.

2. Question then arises as what is the meaning of "consideration" as understood in S.122 of the Transfer of Property Act, 1882. Can natural love and affection be regarded as consideration?

The Supreme Court in the case of Km.Sonia Bhatia Vs. State of UP (AIR 1981 SC 1274) held that the consideration is not to be confused with motive. It observed thus:

"19. ... It has been rightly pointed out in one of the books referred to above that we should not try to confuse the motive or the purpose of making a gift with the consideration which is the subject matter of the gift. Love, affection, spiritual benefit and many other factors may enter in the intention of the donor to make a gift but these filial considerations cannot be called or held to be legal considerations as understood by law. It is manifest, therefore, that the passing of monetary consideration is completely foreign to the concept of a gift having regard to the nature, character and the circumstances under which such a transfer takes place.

Furthermore, when the legislature has used the word 'transfer' it at once invokes the provisions of the Transfer of Property Act. "

The Hon'ble Court thereafter cited with approval the following findings of the Sahay, J.:

'21 ...

"Now, Section 122, T.P. Act defines "gift" as a transfer of certain existing movable or immovable property made voluntarily and without consideration, by one person, called the donor, to another, called the donee, and accepted by or on behalf of the donee.

To my mind consideration in Section 122, T.P Act, means valuable consideration and not consideration in the shape of conferring spiritual benefit to the donor. If valuable consideration be not the consideration referred to in Section 122, I fail to understand how any gift can be made without consideration at all. There must be some sort of consideration in every gift, for instance, a consideration of an expectation of spiritual or moral benefit or consideration of love and affection. Such considerations are not contemplated in Section 122. ***The consideration there, contemplated must be valuable consideration, that is consideration either of money or of money's worth." '***

(Emphasis supplied)

From the above and insofar as the donee is concerned, it follows that for the transfer to be regarded as a gift in the hands of the donee, no consideration, in money or monies worth must have been paid by or on behalf of the donee. In the present case it cannot be disputed that no consideration in monies or monies worth has been paid by the Assessee Company.

ii. Insofar as the contention of the Learned DR that the transfer is not voluntary since it is effected pursuant to the family arrangement, it is submitted that if the Learned DR's contention is to be accepted then no transfer effected pursuant to an agreement to transfer can be regarded as voluntary. It is undisputed that the brother executed the family arrangement voluntarily and of their own free will, in that, it is nobody's case that any of the brothers have been forced into signing the family arrangement. Once that is so, the transfer of shares to the Assessee -company is only in continuation and to give effect to the family arrangement. Hence to say that the transfer is not voluntary since its pursuant to a family arrangement is to be stated only to be rejected.

iii Reliance has been placed by the Learned DR on the case of CWT Vs. HH Vijayaba, Dowger Maharani Saheb of Bhavnagar Palace (111 ITR 784) to say that the transfer family arrangement are executed for good consideration. This decision is wholly distinguishable for the reason explained hereinafter:

a. The issue raised for the consideration of the Apex Court was whether the obligation of a mother (the Appellant) under a family arrangement to pay Rs… to son 'A' in the event son 'B' failed to make that payment to son 'A' from the estate of the father which devolved

upon son 'A' under such condition, could be allowed as a deduction in computing the wealth of the mother.

b. The contention of the Revenue was that the mother's agreement to pay being without any consideration was not an enforceable contract and hence could not constitute a debt such as was deductible under while computing the assessable wealth of the mother.

c. It was the above argument that commitments under a family arrangements are not binding was rejected by the Apex Court stating by observing thus:

"5 .,. Taking the totality of the fact as found by the Tribunal and mentioned in the impugned judgment of the High Court it was a case of family settlement or family arrangement which is binding on the parties concerned. The assessee agreed to purchase peace for the family, and to pay to her son the amount which fell short of Rs. 50,00,000/- if her elder son did not pay any portion thereof. It is well established that such a consideration is a good consideration which brings, about an enforceable agreement between the parties. Section 25 of the Contract Act does not hit this. "

The question therefore was whether the arrangement could be regarded unenforceable for want of consideration in view of S.25 of the Indian Contract Act, 1872 which provides that a contract without consideration is unenforceable. It was therefore the meaning of word "consideration" for the purposes of section 25 of the Indian Contract Act, 1872 that the court was concerned with and it was in that context that the court held that family arrangements cannot be regarded as being without consideration so as to render them as unenforceable. The court was not concerned with the nature of the transfer had the mother paid the monies to the son under the arrangement; i.e. whether or not such payment would constitute gift by the mother to the son under section 122 of the Transfer of Property Act.

d. ***In present case, there is no dispute that the family arrangement between the brothers is binding and enforceable****. The question in the present case is whether the transfer of shares was gift under section 122 of the Transfer of Property Act, 1882. As stated earlier the Apex Court has in Km.Sonia Bhatia Vs. State of UP (AIR 1981 SC 1274) held that consideration as referred to in section 122 must be consideration in money or monies worth.* ***Hence the decision in the case relied upon by the Learned DR is completely distinguishable both on facts and in law.***

b) Insofar as the contention of the Learned DR that the shares have in fact been purchased by the assessee at a discounted price at the price recorded in the books of accounts. This contention is factually incorrect. The fallowing finding of the CIT(A) remains unassailed and in any event is not shown to be incorrect in any manner:

…… The family arrangement has been entered into between the parents, the three brothers their wives and children. The rearrangement has been mainly in the form of transfer without consideration of almost all the shares held in different companies by the various -family members to the appellant company where in the shares of the three brothers are equal. All the family members who have transferred the shares by way of gift have reflected the transaction as such as a gift in their individual accounts as well as in the return of income filed with their assessing officer. The company, vide resolution dated 31.03.2001 & 13.02.2002 accepted and received the gifts and the copy of acknowledgement of gift has been submitted to the AO during the course of assessment proceedings. ***This facts has not been disputed the AO either during the course of assessment proceedings or in the remand report submitted to this office.***

The appellant has recorded the transaction as a gift and has credited the sale proceeds of shares received as gift to capital reserve account and argued that gifts cannot be profit. The AO has observed that the accounting of the shares @ Rs. 1/- per gift transaction should be taken as a sale consideration. I am not agreement with the observation of the AO The value adapted by company @ Rs. 1/- per gift is only a national value for accounting purpose. It is important to note that this amount has neither been paid nor shown as payable to any of the donors in the final accounts. The AO has not disputed these facts in the remand report.

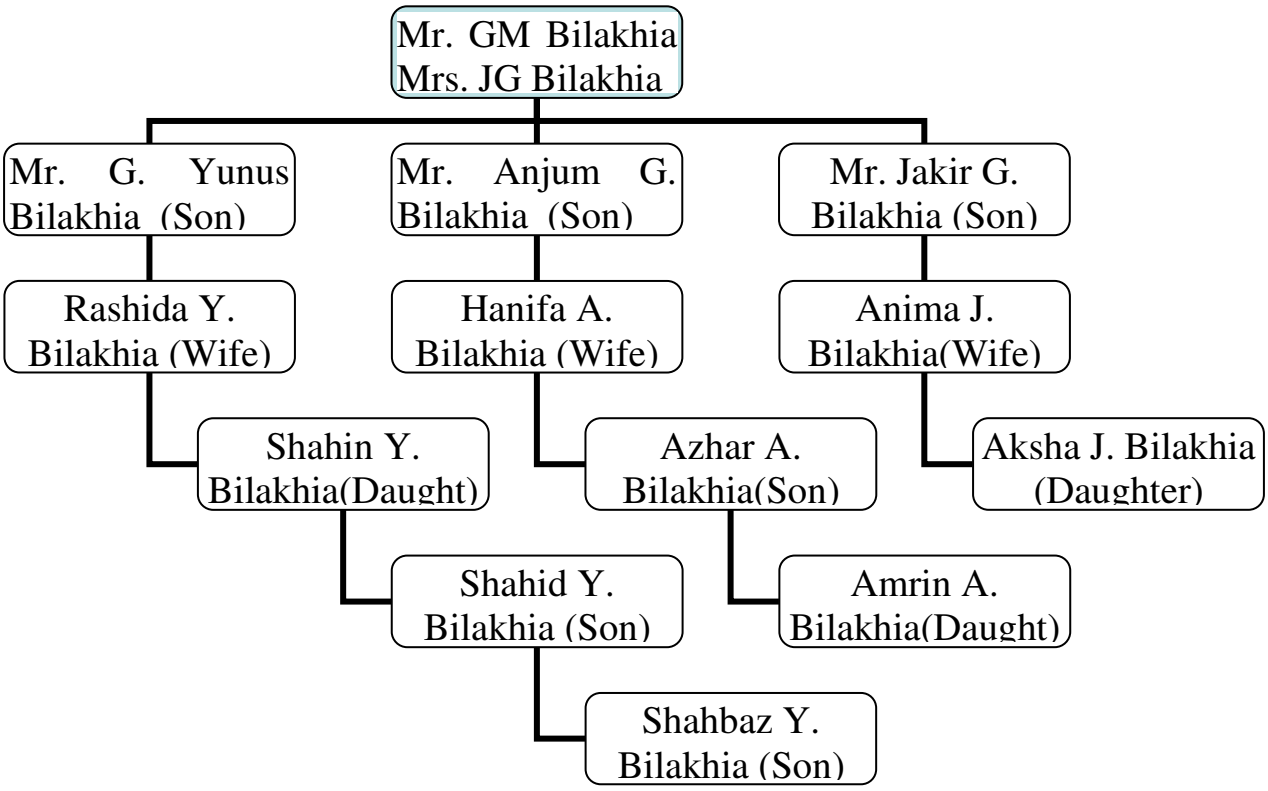
(Emphasis Supplied - reproduced from Page No. 16 & 17 of the CIT(A) order)

Additional Arguments by the company

1. The Apex Court in the case of B C Srinivasa shetty 128 ITR 294 (SC)

If the cost of acquisition is not capable of being determined in monetary terms, the same has to be considered as non ascertainable and in that case the computation provisions fails and there cannot be a charge of capital gains."

9. After hearing both the parties and perusing the record, we find that assessee is an investment holding company in which the three brothers namely, Mr. Yunus G. Bilakhia, Mr. Anjum G. Bilakhia & Mr Jakir G. Bilakhkia had equal interest and share holding. On 16th Feb, 2001, the various members of the Bilakhia family entered into a deed of family arrangement with a view to consolidate and equalize values of the assets held by each of the parties. Name and relationship of the family members who were parties to the family arrangement are as under:-



In pursuance to this family arrangement, the family members transferred the shares of Nestle India Ltd and Hindustan Lever Ltd (HLL) held by them as investment to assessee -company which was claimed by assessee-company a gift. The AO issued a show cause notice to the assessee company as to why this transfer of shares effected by the members of Bilakhia family to the assessee-company be treated as gift. It was also asked as to why the period of holding shall not be counted from the date of acquisition of the shares by the assessee-company. The asssessee company's contention before the AO was that shares received from the family members were gifts and for making this submission reliance was placed on the decision of Apex Court in the case of Kale and others vs. Dy. Director of Consolidation and other and therefore holding period of the shares be accordingly calculated in accordance with the provisions of explanation 1(b) of section 2(42A) of the Act. The AO however did not agree with the assessee-company and relying on the same decision of Hon'ble Apex Court held that the family arrangement was an agreement with consideration and therefore considered the receipt of shares by the assessee-company as a purchase of shares at a price which was the cost of the shares of the previous owner. Accordingly the AO did not consider the holding period of the alleged doners and considered only the holding period by the assessee-company to determine the nature of capital gain earned by the assessee-company during the year under appeal. Thereby assessment was completed treating the gains as short term capital gain and the entire consideration of Rs. 4,68,072/- (Gains Rs. 16,44,776- Losses Rs. 11,76,704/-) was accordingly treated as short term capital gain. Ld. CIT(A) however agreed with the assessee-company and held that shares received were gifts therefore cost of previous owner and

holding period of previous owner was available to the assessee-company, and thus the addition made by AO was deleted.

10. The issue before us is whether the transfer of the shares of Nestle India Ltd and Hindustan Lever Ltd held by the members of Bilakhia family as investment by them to the assessee-company as per family arrangement dated 16-02-2001 claimed to have been transferred without any monetary consideration can be held to be gift or not?

10.1 As per Transfer of Property Act 1882 section 122 gift has been defined as under:-

> *"Gift as a transfer of certain existing moving or immovable property made voluntarily and without consideration by one person, called the doner, to another, called the donee and accepted or on behalf of the donee."*

It is clear from the above that any transfer of any moveable or immovable property can be treated as gift only if the same is made voluntarily and without any consideration. The revenue's contention is that since this transfer of shares by the family members to the assessee-company has been made in pursuance of a family agreement, the same cannot be called voluntary or without consideration. For making this submission reliance was placed on the decision of Supreme Court in the case of CWT vs. HH Vijayaba, Dowgner Maharani Saheb of Bhavnagar Palace (117 ITR 784) wherein it was held as under:-

"5 . Taking the totality of the facts as found by the Tribunal and mentioned in the impugned judgment of the High Court it was a case of family settlement or family arrangement which is binding on the parties concerned.

The assessee agreed to purchase peace for the family, and to pay to her son the amount which fell short of Rs. 50,00,000/- if her elder son did not pay any portion thereof. It is, well established that such a consideration is a good consideration which brings, about an enforceable agreement between the parties. Section 25 of the Contract Act does not hit this. "

It is clear from the above that Hon'ble Apex Court held that family arrangement cannot be regarded as being without consideration so as to render them unenforceable. **Since it is an admitted position that family arrangement in the present case is enforceable and binding**, the assessee cannot take the plea that transfer of shares by the family members to the assessee in pursuance to the family arrangement was without consideration.

11. The next question arises whether this consideration can be measured in money or monies worth or not. To answer this question we will have to examine the various clauses of the family arrangement dated 16-02-2001. The main clauses of which are as under:-

> *"5. The various business and companies of the parties hereto are under the control and joint management of the three-brothers viz. Yunus, Anjum and Zakir*
>
> *6.* ***To avoid any future disputes, differences and disagreements which may affect the peace, harmony, honour, and prestige of the family or the parties as also affect the various business and assets and with a view to always remain a joint close knit family****, the parties have agreed that each of the three brother: namely Yunus, Anjum and Zakir should have equal rights and owner ship in the various business and assets except when specifically provided otherwise.*
>
> *7. Yunus, Anjum and Zakir have equal shareholding in Bilakhia Holdings P Limited ("BHL ") Each of Yunus, Anjum and Zakir shall create a separate trust and transfer to such trust and transfer to such*

trust their shareholding in BHL so that the existing share capital of BHL shall be held by the individual trusts so created.

8. Pursuant to the arrangement arrived at between the parties and with a view to consolidate their respective assets, investments and interests in the family business and assets, the parties hereto have agreed that BHL shall he the main holding company which shall hold all investments in other companies and business present and future.

9. The parties here to hold disproportionate and unequal shares and securities in the companies specified in Annexure "A" here to. the details of the shareholding of the parties in the shares and securities of the Companies specified in Annexure "A. " here to are specified in Annexure "B-l" to "B-12" respectively.

10. With a view to consolidate and equalize the holdings between the respective families of Yunus, Anjum and Zakir , ***it has been agreed by and between all the parties hereto that each party will gift and transfer to BHL all the shares and securities held by such party in the Companies specified in Annexure "A " hereto.***

11. Yunus, Anjum, and Zakir will jointly fund separately family maintenance trusts to be created by each of Yunus, Anjum and Zakir for the maintenance and benefit of the respective families of Yunus, Anjum and Zakir.

12. In addition, Yunus, Anjum and Zakir will jointly fund separate trusts for each of the children of Yunus, Anjum and Zakir where by certain amount will be settled for benefit of each child.

13. The other investments held by the parties hereto i.e. the assets other than the shares and securities of the Companies specified in Annexure "A" hereto are specified in Annexure "C-1", "C-2", "C-3" and "C-4" respectively. ***With a view to consolidate and equalize the values of the assets held by each of the parties herein and specified in Annexure C-1 to C-4 hereto the parties will gift to BHL all the assets held by each party in the Companies specified in Annexure C-l to C-4. " (Emphasis provided) "***

It is clear from the above that family arrangement was to equalize the holdings between the respective families of three brothers. Therefore, it cannot be said that consideration for transfer of shares cannot be measured in terms of money or monies worth. The equalization of wealth has only monetary connotation. It is also pertinent to mention that assessee-company in its synopsis of argument has emphasized on the fact that Bilakhia family was a closely knit family and was living in peace and to avoid any future dispute this family arrangement was signed and acted upon. To avoid disputes cannot be said to be without monetary consideration as it is common knowledge that family disputes ruin the family financially. The family disputes are being settled in monetary terms by resorting to arbitration and in case such settlements is not done, matter travels to the court and the family suffers heavily not only mentally but also financially. There is a proverb according to which it is said that a person who wins a case actually looses it as by the time matter is settled in his favour he is already a ruined person. Thus, in this case it cannot be said that the consideration for transfer of shares was not for monetary consideration. Now coming to the aspect whether this act of transfer of shares was voluntary or not. Since this transfer was in pursuance of family arrangement, the same was not voluntary as the family arrangement was enforceable and binding on the parties. The argument made on behalf of the assessee that since the family arrangement was voluntary the subsequent action of the parties to the arrangement was also be considered voluntary and for making this submission it was submitted that if ld. DR's contention is accepted then no transfer effected pursuant to an agreement be regarded as voluntary. We find this argument advanced by asssessee devoid of any

merit because if this argument of the assessee is accepted then what was the need of signing enforceable binding family agreement in the first place. We further find that in the Mitra's Legal and Commercial Dictionary word "voluntary" is defined as under:-

> *"Free choice; done with free will; without any compulsion, obligation or valuable consideration. Freely, without compulsion, not under any obligation. A-G v Ellis (1895) QB 466: 64 LJ QB 813"*

Since transfer of shares was for equalization of wealth of the family members which had monetary connotation, the same cannot be said to be voluntary. In the light of the above facts and circumstances of the case, the judgment of Hon'ble Apex Court in the case of Kri Sonia Bhatia Vs. State of U.P. (AIR 1981 SC 1274) is of no help to the assessee rather it supports the case of revenue.

12. In view of our above discussion, we have no hesitation in holding that transfer of shares of Nestle India Ltd and Hindustan Lever Ltd held as investment by members of Bilakhia family to the assessee-company as per family arrangement dated 16-02-2001 claimed to have been transferred without any monetary consideration cannot be held to be a gift and therefore order passed by Ld. CIT(A) holding the transfer of shares as gift is hereby reversed and that of AO is restored.

13. Ground No. 1 to 5 of the revenue's appeal are allowed.

14. Ground No. 6 relates to gifts received from the family members to the tune of Rs. 14 crores and Rs. 17,11,839/- received on account of the assignment of the right to receive back the loans and advances given to third

parties by the directors of the assessee-company. During the course of assessment proceedings AO observed that certain sums to the tune of Rs. 14 crores and Rs. 17,11,839/- were received by the assessee from the directors as gifts and on account of assignment of the right to receive back the loans given to third parties by the directors of the assessee-company. The directors in the earlier years have given certain loans and the right to receive the loans were assigned to the company as a gift without consideration to the assessee-company. The assessee-company credited the amount to the capital reserve account and contended that the receipt has no relation with its investment activities. The AO did not accept the contention of the assessee and concluded that transfer of assignment of right cannot be treated as gift in the absence two factors i.e. voluntary and without consideration. It was further observed that assessee-company being investment company received loans and advances in the regular course of carrying its business. The amounts were treated as loans and advances at the point of time when it was received. However the amount changed its character when it became the assessee's own money. The assessee-company itself has treated the money as its own money and taken the amount to the capital reserve, therefore, the full amount was treated as income of the assessee by the AO while finalizing the assessment under regular provisions and under special provisions of section 115JB of the Act. The Ld. CIT(A) following his findings in respect of the shares received from the Bilakhia family members treating them gift in the hands of the company treated these amounts also as gift and not taxable in the hands of the assessee-company. Accordingly the addition made by the AO on account that these receipts construed income/profit for the purpose of computing income under the regular provisions of the Act and book profit

u/s. 1115JB respectively was directed to be deleted. Since Ld. CIT(A)'s finding in respect of shares has been reversed by us and since there is no dispute about the fact that gift of Rs. 14 crores by the family members to the assessee-company and Rs. 17,11,839/- received by the company on account of the assignment of the right to receive back loans and advances given to third party by the directors of the assessee-company, to equalize the wealth of three brothers of the family as per the understanding reached by way of family agreement, this total sum of Rs. 14,17,11,839/- cannot be treated as gift in the hands of the asssessee-company for the reasons given by us while holding that transfer of shares by the family members to the asssessee-company was not a gift in the hands of the assessee-company. In view of this the order passed by Ld. CIT(A) is reversed and that of AO is restored back. This ground of the revenue is also allowed.

15. In the result, revenue's appeal is allowed.

Now coming to assessee's appeal in ITA No. 1035/Ahd/2009 for A.Y. 2002-03

16. Assessee has taken following grounds of appeal:-

"1. The order of assessment is contrary to the facts and prejudicial to the assessee.

2. On appreciation of the facts and circumstances of the case and law, the additions made by the Learned Assessing Officer and confirmed by the Learned Commissioner of Income Tax (Appeals) are contrary to law and based on erroneous understanding of the facts.

3. On appreciation of the facts and circumstances of the case and law, the Learned Commissioner of Income Tax (Appeals) has erred in confirming the action of the Learned assessing Officer in re-opening the assessment without recording proper reasons or bringing on record new facts not disclosed by the appellant in its Return of Income which can lead to a proper inference / reason to believe that income has escaped assessment. The action of the Learned Commissioner of Income Tax (Appeals) is contrary to the facts and law and deserves to be deleted.

4. On appreciation of the facts and circumstances of the case and law, the Learned Commissioner of Income Tax (Appeals) has erred in confirming the action of the earned assessing Officer in making the re-assessment under the regular provisions of the Act after issuing notice U/s.148 of the Act for re-computing the book profit U/s. 115JB of the Act. The action of the Learned Commissioner of Income Tax (Appeals) is contrary to the facts and law and deserves to be deleted.

5. On appreciation of the facts and circumstances of the case and law, the Learned Commissioner of Income Tax (Appeals) has erred in confirming the action of the Learned assessing Officer in re-computing the book profit U/s. 115JB of the Act without jurisdiction and contrary to the decision of honorable Supreme Court in the case of Apollo Tyres Ltd V/s Deputy CIT [2002] reported in 255 ITR 0273. The action the Learned Commissioner of Income Tax (Appeals) is contrary to the facts and law and deserves to be deleted.

6. On appreciation of the facts and circumstances of the case and law, the Ld. CIT(A) has erred in confirming the addition made by the Ld. AO to the tune of Rs. 45,58,654/- being surplus on sale of shares received as gift to the book profit for taxation U/s. 115JB. The action of the Learned Commissioner of Income Tax (Appeals) is contrary to the facts and law and deserves to be deleted."

17. Ground No. 1& 2 are general and do not require any adjudication on our part. Ground no. 3 and 4 relate to re-opening of the assessment by AO u/s. 147 of the Act.

18. Brief facts of the case in respect to this ground are that assessee-company filed its return of income for the year under appeal on 28-10-2002 declaring total income of Rs. 89,960/- under the regular provisions of the Act. Assessment was completed u/s. 143(3) on 16-02-2005 accepting the income returned by the assessee company. Subsequently on perusal of the case file, AO noticed that assessee company had credited a sum of Rs. 45,58,654/- directly to its capital reserve being profit on sale of shares received as gift. This profit on sale of shares was not routed through profit and loss account of the company and hence this profit was not considered for calculation of book profit u/s. 115JB of the Act by the assessee company. Accordingly, the assessment was re-opened u/s. 143(3) r.w.s. 147 of the Act on the ground that income to the extent of Rs. 45,58,654/- chargeable to tax had escaped assessment within the meaning of section 147 for which a notice u/s. 148 of the Act was issued on 13-03-2007 which was served upon the assessee company on 15-03-2007. In response to this notice, assessee company vide letter dated 16-03-2007 submitted that the return of income filed originally on 28-10-2002 may be treated as the return of income filed in response to notice u/s. 148. Thereafter, following reasons for re-opening of assessment were communicated to the assessee-company.

> *"Subsequently, it was noticed that the assessee in its notes to the accounts has mentioned that "during the year the company has received 18901000 equity shares of Rs. 10/- each of its group and subsidiary companies as gift from promoters and relatives pursuant to a family arrangement. These shares are accounted for and disclosed at Re. 1/- per gift. (emphasis supplied).*
>
> *These shares in companies other then group companies received with out consideration pursuant to the family arrangement of the*

promoters of the company have been accounted at the cost to the original owner and the profits and gains arising out of sale of such shares have been treated as capital receipts and credited to the capital reserve account."

And thus the company has credited a sum of Rs.45,58,654 directly to its capital reserve being profit on sale of shares received as gift. This sum was not routed through the P&.L a/c of the company and hence this was not considered for calculation of book profit u/s 115 JB. However, the treatment given by the company is patently wrong and is not in accordance with the generally accepted accounting principles. Assessee is involved in investment activities. Hence any gain or loss on sale of securities/ shares will be treated as normal income accruing to the company and should be credited to profit and loss account. Assessee company has credited gain on sale of shares directly to capital reserve account. As per the generally accepted accounting principles only those items are credited to the capital reserve which is not in the normal course of activities of the assessee.

To invest in shares and earn income on sale is not an unusual item or any extraordinary item which has happened for the first and last time to the assessee company. Even extra ordinary items are routed through profit and loss account by the companies, though as a separate disclosure.

Further, if, for the sake of argument, it is accepted that receiving gift from promoters/directors of the company is a transaction of capital nature, then only gifts have to be credited to the capital reserve. In this case Re. l/- per gift. Once shares are received as gift, it becomes normal investments for the company and it is included in the common pool of investments of the company. Subsequently when these shares are sold it should be treated as normal transaction of the company and the same accounting treatment should be given to these transactions. Receiving of gift may be a transaction of special nature and capital reserve may arise on that transaction but any subsequent event related to that gift should be treated as normal income. For the same transaction capital reserve cannot arise at two events. Firstly, when the shares are received as gift and subsequently when these shares are sold to others.

In view of this fact, I have reason to believe that income to the extent of Rs. 45,58,654/- has escaped assessment within the meaning of Section 147 of the I.T. Act."

19. Assessee-company raised its objections against re-opening of assessment which were disposed off by a speaking order and the same was made part of the assessment order by the AO as Annexure-A

20. The arguments of the assessee in respect of validity of reopening of the assessment have been summarized by Ld. CIT(A) as under:-

"(i) That in the order disposing off the objections on reopening of the assessment, the AO had held that the Income earned on sale of shares had not been brought to tax as per the provisions of section 115JB of the Act. However the AO had not mentioned that it was the sale proceeds of the gift given by the directors and accordingly he wrongly assumed it to be income. Hence the assumption that income chargeable to tax had escaped assessment was not correct.

(ii) That there was a change in opinion which the AO had formed earlier while framing the order for A.Y. 2002-03.

(iii) That the AO recomputed the book profit which had been certified by the statutory auditor as being in compliance with Schedule VI of the Companies Act, without any audit qualification. The appellant company also stated that the AO wrongly assumed the notes to the accounts as an audit qualification and accordingly the reopening of the assessment to re-compute the book profit u/s. 115JB was contrary to the ratio laid down by the Apex Court in the case of Apollo Tyres Ltd.

(iv) That the notice u/s. 148 was issued by the AO to re-compute the book profit u/s 115JB and no notice was issued to re-compute the income under the regular provisions of the Act and accordingly

reassessment framed determining the total income under the regular provisions was without jurisdiction."

21. After taking into consideration these submissions of the assessee, Ld. CIT(A) confirmed the action of AO by observing as under:-

" I have considered the submissions. The appellant company is trying to state that the profit on sale of gifts was not income and therefore the reopening was bad. However, I do not agree with the appellant company since as per the accounting standards and even as per Schedule VI of the Companies Act, 1956, the sale proceeds of any item has to be credited in the profit and loss account and the facts as to whether the same is purchased by the appellant or is received as a gift would be irrelevant in determining the profit from the said sales proceeds. In this case the appellant company has not credited the sales proceeds of the shares in the profit and loss account but has directly taken the same to the capital reserve account which is patently wrong and not in accordance with the accepted accounting principles as also Schedule VI of the Companies Act, 1956. Hence this is prima-facie case of income escaping assessment and thus the reopening of assessment is justified and held to be in order.

Further, under the Income Tax Act, the principles of res-judicata are not applicable and every year is an independent year. In the year under consideration, in the assessment the AO has not noticed the non compliance of Schedule VI while framing the assessment order and subsequent notice of the same do not amounts to change of opinion and hence there is no question of any change in opinion by the AO in the year under appeal."

22. Further aggrieved now the assessee is in appeal before us.

23. At the time of hearing learned counsel of the assessee challenged the reopening of the assessment on two grounds:

(i) The reopening is based on change of opinion and hence invalid in law.

(ii) No income has escaped assessment.

In respect of its first ground of change of opinion assessee company has summarized its submission as under:-

"a. Disclosures made by the Appellant Company alongwith the computation of income:

i. P4- working of long-term capital gains on sale of gifted units/ shares.

ii. P10- Form 29B, computation u/s 115JB alongwith auditors report

iii. P-14 r/w P 16-BS showing the break-up of reserves which includes surplus on sale of shares

iv. P15- P & L A/c disclosing gain/ loss on sale of shares other than those gifted

v. P24- Notes to accounts disclosing the factum of gift and the accounting treatment of gains on sale of gifted shares.

b. Questions & Answers during original assessment

Notice dated 18.8.04- P29, AO specifically enquires into capital gains on sale of shares.

ii A'e response dated 14.12.04-

1. *P-46- gives details of gains on sale of shares which was credited to P& L A/c*
2. *P48- gives details of gains on sale of gifted shares credited to Capital Reserve.*
3. *P92 & P 93- Computation of gains under the Act on sale of gifted shares.*

c. Following decisions were relied upon by the Appellant in support:

i. Parixit Industries [207 Taxman 140 (Guj)]

ii Telco Dadjee (Mumbai Tribunal "F" Bench) & (3rd Member)

iii CIT vs Mysore Paper Mills Ltd. (322 ITR 428 Ker)

iv HV Transmissions (Mumbai Tribunal "H" Bench)

v CIT vs. Orient Craft Ltd (2013 354 ITR 536 Delhi)"

And in respect of no income has escaped assessment assessee's submission is as under:-

a. *"The loss under MAT as returned is Rs. 53,33,307 (P2) and hence original assessment concluded on the basis of income of Rs. 89,960/- returned under normal provision*
b. *As per reasons recorded Rs. 45,58,654 is required to be added to MAT computed (P117)*
c. *Even if the above is carried out- the loss returned under MAT will stand reduced to 7,74,553 and once again the income returned under normal computation would prevail viz. Rs. 89,960.*
d. *Hence there is no escapement of tax and the reassessment ought to be quashed on this count alone."*

Ld. DR on the other hand relied on the orders of lower authorities.

24. After hearing both the parties and perusing the record, we find that shares of Nestle India Ltd and HLL which were transferred to the assessee-company under the family agreement were sold during the year. The AO initiated proceedings for re-opening as he found subsequent to passing order u/s. 143(3) that assessee-company had taken capital gain on sale of these shares to capital reserve account and had not routed it through the profit and loss account and to that extent income u/s. 115JB of the Act escaped assessment. It is clear even from the submissions of the assessee which we have reproduced above that during the original assessment proceedings no query was raised by the AO in this respect. Therefore, it cannot be said that there was change of opinion on the part of the AO in this case. Therefore, case laws relied by assessee-company are not applicable to the facts of this case.

24.1 In the case of Parixit Industries Ltd vs. ACIT assessee company was engaged in manufacturing and supply of different types of irrigation products and in some cases assessee had worked as contractor. Assessee company claimed deduction u/s. 80-IA which was allowed by the AO after considering assessee's reply to detailed questionnaire. Later on, AO issued notice u/s. 147 on the ground that assessee was a contractor or supplier of irrigation products and could not be called a developer of any new infrastructure facilities so as to be eligible for deduction u/s. 80-IA. Assessee filed objections pointing out that the notice for re-opening was based on mere change of opinion because the benefit u/s. 80-IA was allowed after the relevant points underwent the process of inquiry and assessment during the proceedings u/s. 143(3). On these facts Hon'ble jurisdictional High Court held that it was a case of second thought on similar material by the AO and therefore order passed by him was liable to be quashed. But as we have already observed that in this case no query admittedly was ever raised by the AO in respect of the fact that assessee had taken capital gain on sale of shares to capital reserve account and had not routed it through profit and loss account and to this extent income u/s. 115JB has escaped assessment. Therefore ratio of Gujarat High Court in the case of Parixit Industries Pvt. Ltd is not applicable to the facts of this case.

24.2 Assessee also placed reliance on the decision dated 12th May, 2010 of Third Member in the case of Telco Dadajee vs. DCIT for the proposition that proceedings initiated by the AO u/s. 147 were liable to be quashed, where there was no fresh material available with the AO and the assessment had been completed originally u/s. 143(1). Assessee further relied on a

decision of Special Bench ITAT Delhi in the case of DCIT vs. Padam Prakash (HUF) to submit that decision in Third Member case is entitled to as much weight and respect as a decision of a Special Bench and it should be followed and applied by regular benches and same cannot be disregarded by them. In the case of Telco Dadajee returned filed by the assessee on 31-11-1998 was accepted u/s. 143(1). In the return, the assessee had claimed deduction for payment of non compete fee at Rs. 75 lacs which included payment of Rs. 15 lacs to a director. The assessee had also claimed depreciation of Rs. 1,41,858 on leased premises. The AO issued notice u/s. 148 on the ground that these were not allowable expenses and income chargeable to tax had escaped assessment. He accordingly disallowed both the items in the reassessment order. Ld. Judicial Member has taken the view that there was no fresh material to support the formation of the belief that income chargeable to tax had escaped assessment. The balance sheet, profit and loss account and other details were filed with the return of income and it was not permissible for the AO after a gap of five years and in the absence of any fresh tangible material to come to the conclusion that income chargeable to tax had escaped assessment. Ld. Accountant Member took the view dissenting from the Ld. Judicial Member that the case is covered by the judgment of Supreme Court in the case of ACIT vs. Rajesh Jhavei Stock Broker Pvt Ltd. He opined that in a case where return u/s. 143(1) was merely processed and no assessment was made u/s. 143(3), if the AO forms the belief that income chargeable to tax has escaped assessment on the basis of material available in the return itself it is not a case of mere change of opinion. The reopening in such as a case would be valid. The Third Member in his order agreed with the Ld. JM and observed as under:-

"11. What the assessee contended before me and which contention had found favour with the learned Judicial Member is that there was no such tangible material before the AO from which he can entertain the belief that the allowance of the non compete fees and the depreciation resulted in escapement of income chargeable to tax. In the reassessment order the Assessing Officer has stated in paragraph 3.2.3 that after the return was processed, it was noticed that the assessee had understated its income by claiming the aforesaid two items of expenditure. He has not referred to any tangible material before him, in terms of the judgment of the Supreme Court in CIT vs. Kelvinator of India Ltd (supra), on the basis of which he entertained prima facie belief that income chargeable to tax has escaped assessment. Though it is not possible to challenge the action of the Assessing Officer on the ground of change of opinion because in the present case the return was earlier merely processed under section 143(1) his action can be challenged on the basis of the law declared by the Supreme Court in the aforesaid judgment. The Ld. Judicial Member has held in paragraph 13 that there was no material before the Assessing Officer for such a belief. The Ld. Accountant Member has not disputed that there was no tangible material before the Assessing Officer on the basis of which he can reopen the assessment. He has, however held that it is not necessary for the Assessing Officer to have some tangible material before him to issue notice under section 148 in a case where the return was originally processed under section 143(1). With respect, I am unable to subscribe to this view for the reasons stated in the earlier paragraphs. In my humble opinion, on a proper understanding of the judgments of the Supreme Court both in the case of ACIT vs. Rajesh Jhaveri stock Brokers P Ltd (supra) and CIT vs. Kelvinator of India Ltd (supra), it is still open to an assessee to challenge the notice under section 148, in a case where the return was earlier processed under section 143(1), on the ground that the there was no tangible material before the AO to enable him to entertain a prima facie belief that income chargeable to tax has escaped assessment. I may also add that neither before the learned Members who heard the appeal originally nor before me did the Department produce any tangible material on the basis of which the reasons were recorded to demonstrate that there was a live link or nexus between them and the requisite belief."

24.3 It is clear that Ld. Third Member agreed with the Ld. Judicial Member in this case only to hold that there was no tangible material before the AO to enable him to entertain prima facie belief that income chargeable to tax has escaped assessment, therefore 147 proceedings were quashed and it was not quashed on the ground that there was change of opinion on the part of the AO for which the assessee has placed reliance on this decision hence not applicable to the facts of this case. Now coming to the decision of Special Bench in the case of DCIT vs. Padma Prakash relied by the assessee for the proposition that Third Member cases were entitled to as much weight and respect as a decision of Special Bench and it should be followed by regular benches, we find that Third Member in the case of Telco Dadajee sitting with another member in the case of ACIT vs. Kanga & Co. vide its order 14th May, 2010 i.e. subsequent to the order passed by him in Telco Dadajee i.e. on 12th May, 2010 did not follow his own order and on a similar facts reopening of the assessment after processing the return u/s. 143(1) was held to be valid by following the decision of Hon'ble Supreme Court in the case of Rajesh Jhaveri Stock Brokers Pvt. Ltd. It will be pertinent to mention the following observation of the Bench in that case about the tangibility of the material:-

> *"10. Coming to the submission of Shri Pardiwala that there was no tangible material and that the AO just relooked at the return of income and recorded reasons for reopening and there is no new fact, we refer to the judgment of the Supreme Court in the case of ACIT vs. Rajesh Jhaveri Stock: Brokers P Ltd. 291 ITR 500 wherein under similar circumstances the AO first processed the return of income u/s 143(1) and thereafter issued notice u/s 148 of the Act, on the ground that the claim for bad debts has explained was not acceptable. In that case also there was no fresh material except the claims of the assessee made in the return of income which was earlier processed u/s 143(1).*

> *Tangible material, in our humble opinion, cannot be held as that which is collected by the AO from sources other than, what is present in the return of income itself. When return was processed u/s 143(1), as held by the Hon'blc Supreme in the case of Rajesh Jhaveri Slock Brokers P. Ltd, (supra), it cannot be said that the AO has looked into till all the aspects contained in return of income. When he has not looked into the return of income, question of relooking and coining to a new conclusion does not arise. In cases where, the returns are processed u/s 143(1), and where at a later date, the AO notices certain wrong claims etc. in the return of income, and forms a prima facie opinion that income has escaped assessment, he is authorized to record reasons and reopening of the assessment u/s 147."*

In view of the above, we have no hesitation in holding that ratio as laid down in the case of Telco Dadajee is not applicable to the facts of this case in view of the decision of M/s. Rajesh Jhaveri Stock Brokers P. Ltd which was followed by the Mumbai Bench in the case of Kanga & Co.

24.4 As far as decision of Karnataka High Court in the case of CIT vs. Mayur Paper Mills reported in 322 ITR 424 relied by the assessee, we find that reopening of assessment u/s. 147 was not the issue before the court, therefore the same is not relevant.

24.5 As far as decision of Mumbai Tribunal in the case of HV Transmissions Ltd is concerned, the same was passed by the Bench by following the Third Member case in the case of Telco Dadajee. We have already decided in the earlier para as to why the Third Member case is not applicable to the facts of this case. Therefore, this order is also not applicable to the facts of this case.

24.6 So far as judgment of Delhi High Court in the case of CIT vs. Orient Craft Ltd is concerned, we find that in that case assessee company filed return of income for assessment year 2002-03 on 31 October, 2002 declaring the total income of Rs. 4,45,35,395/-. The return was processed u/s. 143(1) on 27th February, 2003 accepting the return income. Included in the return was a claim of Rs. 8,74,20,642/- u/s. 80HHC and Rs. 13,35,65,316/- u/s. 10B. Assessee was a 100% export oriented undertaking and was entitled to substantiate amounts as duty drawback, DEPB, premium on DEPB and sale of quota. These were all declared in profit and loss account and the computation of income. On August, 2005 a notice u/s. 148 of the Act was issued reopening the assessment on the ground that income chargeable to tax had escaped assessment. According to the reasons recorded u/s. 147(2) for re-opening the assessment, the assessee was wrong in treating the proceeds of sale of quota as part of the export turn-over for claiming deduction u/s. 80HHC. It was also the opinion of the AO that the sale proceeds of the quota cannot be considered as export turn-over but represented business income covered u/s. 28(iv) and had to be reduced to the extent of 90% from the business income as provided by explanation (baa) to section 80HHC. Not doing so resulted in excess allowance of the deduction u/s. 80HHC and consequently in escapement of income chargeable to tax. In response to notice u/s. 148 assessee filed a return declaring total income as the same figure as in the original return of income and questioned the jurisdiction of the AO to re-open the assessment. The AO dealt with the assessee's objections to the issue of notice u/s. 148 and held that assessee's case was covered by clause (c) of explanation 2 below section 147, which provides that claiming excess deduction would amount to a case of income escaping

assessment. The matter reached the Hon'ble High Court with the following substantial question of law.

" was the Tribunal right in law in holding that in the absence of tangible material available with the AO to form the requisite belief regarding escapement of income, the re-opening of the assessment made u/s. 143(1) is bad in law. The hon'ble High Court answered this question in the affirmative in favour of assessee and against the revenue by observing as under:-

> *"13. Having regard to the judicial interpretation placed upon the expression "reason to believe," and the continued use of that expression right from 1948 till date, we have to understand the meaning of the expression in exactly the same manner in which it has been understood by the courts. The assumption of the Revenue that somehow the words "reason to believe" have to be understood in a liberal manner where the finality of an intimation under Section 143(1) is sought to be disturbed is erroneous and misconceived. As pointed out earlier, there is no warrant for such an assumption because of the language employed in Section 147; it makes no distinction between an order passed under section 143(3) and the intimation issued under section 143(1). Therefore it is not permissible to adopt different standards while interpreting the word "reason to believe" vis-à-vis Section 143(1) and Section 143(3). We are unable to appreciate what permits the Revenue to assume that somehow the same rigorous standards which are applicable in the interpretation of the expression when it is applied to the reopening of an assessment earlier made under Section 143(3) cannot apply where only an intimation was issued earlier under Section 143(1). It would in effect place an assessee in whose case the return was processed under Section 143(1) in a more vulnerable position than an assessee in whose case there was a full-fledged scrutiny assessment made under Section 143(3). Whether the return is put to scrutiny or is accepted without demur is not a matter which is within the control of assessee; he has no choice in the matter. The other con sequence, which is somewhat graver, would be that the entire rigorous procedure involved in reopening an assessment and the burden of proving valid*

reasons to believe could be circumvented by first accepting the return under Section 143(1) and thereafter issue notices to reopen the assessment. An interpretation which makes a distinction between the meaning and content of the expression "reason to believe" in cases where assessments were framed earlier under Section 143(3) and cases where mere intimations were issued earlier under Section 143(1) may well lead to such an unintended mischief. It would be discriminatory too. An interpretation that leads to absurd results or mischief is to be eschewed.

14. Certain observation made in the decision of Rajesh jhaveri (supra) are sought to be relied upon by the revenue to point out the difference between an "assessment" and an "intimation". The context in which those observations were made has to be kept in mind. They were made to point out that where an "intimation" is issued under section 143(1) there is no opportunity to the assessing authority to form an opinion and therefore when its finality is sought to be disturbed by issuing a notice under Section 148, the proceeding cannot be challenged on the ground of "change of opinion". It was not opined by the Supreme Court that the strict requirements of section 147 can be compromised. On the contrary, from the observations (quoted by us earlier) it would appear clear that the court reiterated that "so long as the ingredients of section 147 are fulfilled" an intimation issued under section 143(l) can be subjected to proceedings for reopening. The court also emphasised that the only requirement for disturbing the finality of an intimation is that that assessing officer should have "reason to believe" that income chargeable to tax has escaped assessment. In our opinion, the said expression should apply to an intimation in the same manner and subject to the interpretation as it would have applied to an assessment made under section 143(3). The argument of the revenue that an intimation cannot be equated to an assessment, relying upon certain observations of the Supreme Court in Rajesh Jhaveri (supra) would also appear to be self-defeating, because if an "intimation" is not an "assessment"' then it can never be subjected to section 147 proceedings, for, that section covers only an "assessment and we wonder if the revenue would be prepared to concede that position. It is, nobody's case that an "intimation" cannot be subjected to section 147 proceeding; all that is contended by the assessee, and quite

rightly, is that if the revenue wants to invoke section 147 it should play by the rules of that section and cannot bog down. In other words, the expression "reason to believe" cannot have two different standards or sets of meaning:, one applicable where the assessment was earlier made under section 143(3) and another applicable where an intimation was earlier issued under section 143(1). It follows that it is open to the assessee to contend that notwithstanding that the argument of "change of opinion" is not available to him, it would still be open to him to contest the reopening on the ground that there was either no reason to believe or that the alleged reason to believe is not relevant for the formation of the belief that income chargeable to tax has escaped assessment, In doing so, it is further open to the assessee to challenge the reasons recorded under section 148(2) on the ground that they do not meet the standards set in the various judicial pronouncements.

14. In the present case the reasons disclose that the Assessing Officer reached the belief that there was escapement of income 'on going through the return of income" filed by the assessee after he accepted the return under Section 143(1) without scrutiny, and nothing more. This is nothing but a review of the earlier proceedings and an abuse of power by the Assessing Officer, both strongly deprecated by the Supreme Court in CIT vs. Kelvinator (supra). The reasons recorded by the Assessing Officer in the present case do confirm our apprehension about the harm that a less strict interpretation of the words "reason to believe" vis-à-vis an intimation issued under section 143(1) can cause to the tax regime. There is no whisper in the reasons recorded, of any tangible material which came to the possession of the assessing officer subsequent to the issue of the intimation. It reflects an arbitrary exercise of the power conferred under section 147.

15. For the above reasons, we answer the substantial question of law framed by us in the affirmative, in favour of the assessee and against the Revenue. The appeal of the Revenue is accordingly dismissed. There shall be no order as to costs."

The ratio of this judgment is not applicable to the facts of this case as there was valid material and reason to believe that income has escaped assessment in the case before us. During the original assessment proceedings u/s. 143(3) admittedly there was no application of mind on the part of AO on the fact that capital gain on sale of shares had not been routed through the profit and loss account and the same had been credited to capital reserve directly thereby to that extent income u/s. 115JB of the Act had escaped assessment. As during the assessment proceedings neither any query was raised by the AO nor any submission was made on behalf of the assessee. This view of ours gets support from the judgment of Mumbai High Court in the case of Export Credit Warranty Corporation of India vs. ACIT wherein within 4 years after completion of assessment u/s. 143(3), the AO issued notice u/s. 148 seeking to reopen the assessment stating five grounds which formed his reasons to believe that income had escaped assessment. The arguments before the court were that notice was issued without jurisdiction as there was complete disclosure on the part of the assessee of material facts during the course of assessment and there was absence of fresh or tangible material on the basis of which assessment could be re-opened. The fact that AO had relied upon the notes forming part of the accounts was indicative of the fact that that there was no failure on the part of the assessee to disclose material facts. The argument of the revenue on the other hand was that notice was issued as during assessment proceedings no query was raised by the AO in respect of five points with reference to which assessment was sought to be reopened nor were they referred to in the assessment order. Therefore, it was not a case of review of earlier finding or change of opinion and therefore there was a complete failure on the part of the AO to apply his

mind to the five points when the original order of assessment was passed. On these facts and submissions of both the parties Hon'ble Bombay High Court held as under:-

> *"10. The salient aspect of the case that merits emphasis is that the order of assessment that was passed by Assessing Officer under Section 143(3) is completely silent in respect of each one of the five points on the basis of which the assessment is sought to be reopened. There is merit in the contention which has been urged on behalf of the Revenue that no query had been raised during the course of the assessment and the assessment order would ex-facie disclose that the Assessing Officer has not applied his mind at all to any of the points on the basis of which the assessment is now sought to be reopened. That there exists tangible material for the Assessing Officer to reopen the assessment in the present case is evident from the record. For instance, as we have noted earlier, in respect of one of the grounds. Ground (ii), the reasons which have been disclosed to the assessee would indicate that reliance has been placed on paragraph 6.1 of the Notes forming part of the accounts in Schedule 17. Paragraph 6,1 posits that an amount of Rs.27.96 crores is the estimated amount of recovery expected out of the claims paid or payable by the assessee which had been recognized on an individual assessment/estimate basis on the basis of the accounting practice followed by the assessee. During the year in question, there was a change in accounting policy as a result of which the provision for estimated recovery in respect of claims paid and outstanding for recovery for a period of three years or more as on the balance-sheet date been estimated at Rs.100/- for each claim in substitution of the individual assessment/estimate made earlier. The assessee has stated that the change in policy has the effect of the existing provision for estimated recovery being written off by about Rs.20 crores to the revenue account and reducing the profit of the accounting year consequently. Evidently the Assessing Officer had not considered paragraph 6.1 of the Notes forming part of the accounts. At this stage, it would be necessary for the Court to record that we have not been called upon to decide as to whether any addition to the income would have to be made on that ground since that is a matter which has to be decided after the assessment opened. All that is relevant at this stage is whether there is reason to believe*

on the part of Assessing Officer that income had escaped assessment. The answer is in the affirmative. It would not be appropriate for this Court to preempt an enquiry whatsoever by the Assessing Officer, once a tangible basis has been disclosed for reopening, the assessment. Similarly, in respect of the revision of pay scales, Assessing Officer has sought to reopen the assessment on the ground that the liability had not crystallized before the balance-sheet date. Here again, it is apparent that there has been no application of mind to the relevant facts by the Assessing Officer during the course of the assessment proceedings. As regards the first ground, on the basis of which the assessment is sought to be reopened, it has been sought to be urged that under Section 44 read with Rule 5(a), it would not be open to the Assessing Officer to make an income addition. Moreover, it has been urged that in the past, the same practice had been accepted by the Revenue. These are matters which on merits will be considered by the Assessing Officer and it would be inappropriate for this Court to express any opinion on the merits of issue. Moreover, once the Court has come to the conclusion that even a single ground on the basis of which the assessment is sought to be reopened is valid and within jurisdiction, the notice for reopening of the assessment would have to be upheld. Consequently, we clarify that though submissions have been urged on the merits of each of the grounds, we keep all rights and contentions of the parties open to be urged before the Assessing officer, once the assessment is reopened in exercise of the power conferred by Section 147. The Assessing Officer has acted within jurisdiction in reopening the assessment."

In view of the above, we see no merit in the argument advanced on behalf of the assessee that in this case there was change of opinion on the part of the AO while re-opening the assessment of the assessee.

25. Now coming to the another ground on which the reopening has been challenged that there was no escapement of income. In this case, we find from assessee's own admission which is clear from the submission of the assessee which we have reproduced above that if as per reasons recorded Rs.

45,58,654/- which required to be added to MAT computation the loss returned under MAT will stand reduced to Rs. 7,74,553/- from Rs. 53,33,307/- which clearly shows that there was escapement of income to the extent of Rs. 45,58,654/-. The assessee in his submission has stated that no income has escaped assessment while in the last line it is mentioned that there is no escapement of tax which means he also admitted escapement of income. The provisions of the act are clear that reopening of assessment is permissible if there is escapement of income and for doing so it is not necessary that there should also be escapement of tax which in certain circumstances as in the case of assessee there is escapement of income while there is no escapement of tax. Thus both grounds on which re-opening of assessment was challenged by the assessee are devoid of merit.

26. In view of the above, the order passed by Ld. CIT(A) upholding the action of AO in reopening of assessment is hereby upheld. Ground No. 3 & 4 of assessee's appeal are dismissed.

27. Ground no. 5 & 6 relate to adjustment to book profit u/s. 115JB of the Act. The AO during the assessment proceedings made an addition of Rs. 45,58,654/- being surplus to sale of shares to the book profit for taxation u/s. 115JB which has been confirmed by Ld.CIT(A). Before us reliance was placed on the following submission:-

> *"1. The AO has no authority to adjust book profits once the accounts are audited and accepted by the general body, save and except such adjustment as are provided for in Explanation to section 115JB. Reliance was placed on the decision of the Supreme Court in the case of the Apollo Tyres Vs. CIT (255 ITR 273), where the Supreme Court had*

held that while determining the book profit under Section 115JB, the Assessing Officer could not re-compute the profit and loss account by excluding the provisions made for arrears or depreciation. The decision of the Apex Court has been followed in the following other decisions:-

a. *Malayala Manorama Co. Ltd vs. CIT [2008] 300 ITR 251 (SC)*
b. *CIT vs. HCL Comnet Systems and Services Ltd [2008] 305 ITR 409 (SC),*
c. *CIT-I Vs. Vijayashree Finance and Investment Co. Pvt. Ltd 2 DTR 38 [216 CTR (Madra) 191],*
d. *CIT Vs. Rubamin P. Ltd [2009] 312 ITR 18 (Guj),*
e. *CIT Vs. Kovai Maruthi Paper and Board P. Ltd [2007] 294 57 (Mad),*
f. *CIT Vs. Adbhut Trading Co. P. Ltd [2011] 338 ITR 94 (Bom), and*
g. *CIT Vs. Akshay Textiles Trading and Agencies P. Ltd [2008] 304 ITR (Bom)*

2. *Proceeds on sale of gifted shares cannot be credited to P &L A/c*

a. Shares received as gift do not constitute 'investment' and hence gains on sale of the aforesaid shares are not required to be routed through the profit and loss account. Learned Sr. Counsel submitted that since the gift cannot be equated with investment, the Appellant is justify in crediting the sale proceeds of the gifted shares directly to capital account without routing through profit and loss account. He therefore submitted that the said credit should not be taken into account for purposes of calculation of profits under Section 115JB and the provisions of Section 115JB is not applicable in such situation.

b. Reliance is placed on the following decisions:

i. CIT Vs. Insanyat Trust (173 ITR 248)
ii. 203/349 (Guj)
iii. 209/390 (Guj)
iv. 209/865 (Guj)
v. 252/610 (Guj)
vi. 258/712 (Guj)

3. Adopting notes to accounts does not amount to qualification. Reliance is placed on Paragraph 3.9 and in particular 3.12 of the ICAI's guidelines specify the manner of qualification-adoption of notes of accounts (as contained in Para 4.6 at Pg. 11 of the paper book) cannot amount to a qualification.

> *4. The decision in the case of Veekaylal (Bom)-249 ITR 597 relied upon by the AO is no longer good law in view of the later decisions of the Bombay High Court in the case of Commissioner of Income-tax Vs. Adbhut Trading Co. P. Ltd. [2011] 338 ITR 94 (Bom) and Commissioner of Income-tax Vs. Akshay Textiles Trading and Agencies P. Ltd [2008] 304 ITR 401 (Bom) which have held that in view of the decision of Apollo Tyres Vs. CIT (2555 ITR 273)."*

Since in revenue's appeal we have held that shares received by the assessee-company were not gifts in the hands of assessee-company, the argument advanced on behalf of the assessee-company that shares received as gift do not constitute investment and hence gain on sale of these shares were not required to be routed through profit and loss account falls flat (**case laws in support of this argument are therefore not applicable to the facts of this case),** the assessee was not justified in crediting the sale proceeds of the shares directly to capital reserve account without routing through profit and loss account. We are therefore of the considered opinion that AO has rightly taken these credits for the purpose of adjustment to book profit u/s. 115JB of the Act. The order passed by Ld. CIT(A) confirming the action of AO is hereby upheld. Ground No. 5 & 6 of assessee's appeal are also dismissed.

28. In the result, assessee's appeal is dismissed.

29. In the combined result, revenue's appeal is allowed and assessee's appeal is dismissed.

Now coming to other cross appeals for the assessment years 2001-02, 2003-04, 2004-05 and 2006-07.

30. Since the Ld. CIT(A) has followed his order for assessment year 2002-03 in rest of the assessment years grounds of which being similar, following our order for assessment year 2002-03, we hereby dismiss appeals filed by the assessee for assessment years 2001-02, 2003-04, 2004-05 and 2006-07 and allow appeals filed by the revenue for these years..

31. In the combined result, appeals filed by the revenue are allowed and that of assesssee are dismissed.

Order pronounced in open court on the date mentioned hereinabove at caption page

Sd/-	**Sd/-**
(T.R. MEENA)	**(D.K. TYAGI)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Ahmedabad : Dated 30 /05/2014

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आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. Assessee
2. Revenue
3. Concerned CIT
4. CIT (A)
5. DR, ITAT, Ahmedabad
6. Guard file.

By order/आदेश से,

उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण,
अहमदाबाद