

**IN THE INCOME TAX APPELLATE TRIBUNAL,  
MUMBAI BENCH "E", MUMBAI**

**BEFORE SHRI RAJESH KUMAR, ACCOUNTANT MEMBER AND  
SHRI RAM LAL NEGI, JUDICIAL MEMBER**

**ITA No.6604/M/2017  
Assessment Year: 2008-09**

M/s. Twin Earth Securities P. Ltd., 301/302 Prime Plaza, 38-A, S.V. Road, Santacruz (West), Mumbai – 400 054 <b>PAN: AABCT3066F</b>	Vs.	Dy.CIT, Range - 4(2)(1), Room No.642, 6 <sup>th</sup> Floor, Aayakar Bhavan, M.K. Road, Mumbai - 400020
(Appellant)		(Respondent)

**Present for:**

Assessee by : Shri K. Gopal, A.R.  
Revenue by : Shri Amit Pratap Singh, D.R.

Date of Hearing : 11.09.2020  
Date of Pronouncement : 25.09.2020

**ORDER**

**Per Rajesh Kumar, Accountant Member:**

The present appeal has been preferred by the assessee against the order dated 16.08.2017 of the Commissioner of Income Tax (Appeals) [hereinafter referred to as the CIT(A)] relevant to assessment year 2008-09.

2. The various grounds raised by the assessee are as under:

"1. The Ld. Commissioner of Income Tax (Appeals) - 9, Mumbai [hereinafter referred to as the "Ld. CIT(A)"] erred in passing the order dated 16/08/2017 upholding the re-assessment order dated 29/03/2016 passed by Ld. A.O. under section 143(3) r.w.s. 147 of the Act determining total income of the Appellant at Rs.8,76,49,690/- as against returned income of Rs.7,56,54,711/- without appreciating the fact and circumstances of the case. The Appellant strongly objects to the additions/deletions made by Ld. A.O. and upheld by Ld. CIT(A) on the following grounds:

**2. Re-opening of assessment under section 147 of the Act beyond the period of four years unjustified**

i. The Ld. CIT(A) erred in upholding the action of the Ld. A.O. in issuing notice under section 148 of the Act without appreciating that the reasons as recorded does not allege any failure on the part of the Appellant to disclose any material fact fully and truly for completion of its assessment. The invocation of the additional period of 2 years beyond 4 years is uncalled for. Hence, the notice issued under section 147 of the Act is bad in law and the same may be quashed.

ii. The Ld. CIT(A) further failed to appreciate that nothing has been mentioned in the reasons recorded to show that any new tangible material is in the possession of the Ld. A.O. post the assessment order passed under section 143(3) of the Act which show that any income chargeable to tax has escaped assessment. Thus, the reasons recorded by Ld. A.O. is bad in law. Hence, the notice issued under section 148 of the Act as well as subsequent assessment order passed under section 143(3) r.w.s. 147 of the Act is bad in law and the same may be quashed.

**3. Disallowance of exemption claimed under section 54EC of the Act is unjustified - Rs.50,00,000/-**

i. The Ld. CIT(A) erred in upholding the action of the Ld. A.O. in disallowing the exemption claimed under section 54EC of the Act amounting to Rs.50,00,000/- without appreciating the fact that the Appellant satisfies all the conditions to claim the exemption under section 54EC of the Act. Hence, disallowance of exemption amounting to Rs.50,00,000/- under section 54EC of the Act is unjustified and the same may be deleted.

**4. Disallowance of rebate claimed under section 88E of the Act unjustified - Part of Rs.1,50,87,946/-**

i. The Ld. CIT(A) erred in confirming the action of Ld. A. O, in disallowing rebate on arbitrage income & conversion of stock in trade to investment under Section 88E of the Act amounting to Rs.1,50,87,946/- without appreciating the facts and circumstances of the case. The Appellant prays that the disallowance of rebate under Section 88E amounting to Rs.1,50,87,946/- is not at all justified and the same may be deleted.

ii. The Ld. CIT(A) failed to appreciate that the arbitrage income and income generated on conversion of stock into investment is done for the purposes of share and securities trading. Hence, the same forms part of the income arising from taxable securities transactions. The Appellant, therefore, prays that disallowance of rebate claimed under section 88E is unjustified and the same may be deleted.

5. The Appellant craves leave to add, alter, rescind or amend any of the above grounds of appeal.”

3. The assessee has challenged the order of Ld. CIT(A) on legal issue as well as on merit. First of all ,we are adjudicating the legal ground first which is ground No.2. Vide ground No.2 the

assessee has challenged the reopening of assessment under section 147 of the Act for various reasons such as the issue already examined by the AO in the original assessment proceedings, reopening of assessment mere a change of opinion as the AO has reopened the assessment on the same issue which stood examined by the AO in the original assessment proceedings and secondly, the assessment is challenged on the ground that proviso to section 147 of the Act is not applicable to the present case as the case is reopened beyond a period of four years from the end of the relevant assessment year as there being no fault on the part of the assessee to disclose all the information during the course of original assessment proceedings and thus the escapement of income can not be attributed to the assessee.

4. The facts in brief are that the assessee has filed the return of income on 26.03.2010 declaring an income of Rs.7,56,54,711/-. The case of the assessee was selected for scrutiny and assessment was framed under section 143(3) of the Act vide order dated 16.11.2010 assessing the total income at Rs.7,66,74,400/-. Thereafter, the case of the assessee was reopened by issuing notice under section 148 of the Act on 25.03.2015 which was complied with by the assessee by submitting that return originally filed on 26.03.2010 may kindly be treated as return filed in compliance to notice under section 148 of the Act. Thereafter, the assessee requested the AO vide letter dated 20.07.2015 to supply the reasons recorded for reopening the assessment and statutory notices were duly issued and served upon the assessee. The AO reopened the case of the assessee to assess Rs.50 lakhs claimed as exempt under section

54EC of the Act being the amount invested in bonds of REC Ltd out of long term capital gain earned by the assessee during the year on sale of shares of BSE Ltd. The reasons recorded are reproduced as under for the sake of ready reference:

“1. The assessee is engaged in the Business of Share Broking. Return of Income, declaring total income of Rs.8403960/- was e-filed on 21.09.2008. The return was processed u/s 143(1) of the Income Tax Act, 1961. Thereafter, the case was selected for scrutiny and the order u/s. 143(3) of the Income-tax Act, 1961 was passed on 16.11.2010 determined the assessed income at Rs.7,66,74,400/-.

2. The assessee has sold 9123 shares of BSE Ltd. on date 15.03.2008 earned Long Term Capital Gain of Rs. 1,45,80,661/-. Further, in computation assessee had claimed deduction of Rs.50,00,000/- u/s 54EC for investment in REC Bonds. Verification of the copy of REC bond allotted to the assessee revealed that bond were issued on 31.03.2007 ie. 5 months before the date of transfer of capital asset. Thus, as the investment made prior to transfer of capital asset the same would not be qualify for deduction u/s. 54EC.

3. In view of the facts mentioned above, I have reasons to believe that assessee has failed to disclose fully and truly all material facts necessary for assessment. Thus I have reasons to believe that the income chargeable to tax has escaped assessment. Thus, in view of explanation 2 of Section 147 of the Income Tax Act, 1961 income of Rs. 50,00,000/- Escaping assessment is required to be reassessed, for the aforesaid AY. and same needs to be reassessed.

4. Issue notice u/s 148 of the Income Tax Act, 1961 after seeking prior approval of Pr. Commissioner of Income Tax-4, Mumbai vide her letter No. \_\_\_\_\_ as required u/s. 151 of the Income Tax Act, 1961.”

5. It is clear from the reasons recorded that AO has sought to assess Rs.50 lakhs which were invested under section 54EC of the Act out of long term capital gain earned by the assessee during the year on sale of shares of BSE Ltd. The assessee earned a long term capital gain of Rs.1,45,80,661/- on the said sale. The said shares were sold on 15.03.2008 whereas the investments in the bonds were made on 31.03.2007 nearly five months before the date of transfer of shares. According to the AO, the investments made prior to transfer of capital asset would not qualify for exemption under section 54EC of the Act. Pertinent to mention that the assessee's assessment was framed

under section 143(3) of the Act vide order dated 16.11.2010 assessing total income at Rs.7,66,74,400/- as against the declared income of Rs.7,56,54,711/-. Finally the assessment was framed under section 143(3) r.w.s. 147 of the Act vide order dated 29.03.2016 assessing the total income at Rs. 8,76,49,693/- after making an addition of Rs. 50,00,000/-.

6. The aggrieved assessee preferred an appeal before Id. CIT(A) which was also dismissed on legal as well on merits.

7. The Ld. A.R. vehemently submitted before us that the case of the assessee was reopened on incorrect appreciation of facts. The reasons recorded mention the number of shares sold as 9123 and the date of transfer as 31.03.2007. The details furnished during the course of the assessment as well as the application moved u/s 154 dated 14.12.2010 provided the details of the sales transactions. The Ld. AO has not dealt with the objections even filed by the assessee. Thus, the reasons recorded are invalid as the same are based on incorrect facts. The Appellant relies on the following decisions.

- i. BhanumatiKabalivs ITO-(WP No: 3595 of 2018)- Bombay High Court. [A copy of this decision is attached along with this note]
- ii. Giriraj Enterprises vs. ACIT- [2019] 102 taxmann.com 188 (Bombay)-Bombay High Court.

8. The Id AR further submitted that the notice u/s 148 of the Act is issued beyond a period of four years from the end of the assessment year 2008-09 as the same was issued on 26.03.2015. The first proviso to Sec. 147 of the Act is attracted as the assessment order u/s 143(3) was passed on 16.11.2010.

Thus, the notice issued u/s 148(1) dated 26.03.2015 is without jurisdiction as there was no failure on part of the Appellant to provide full and true material facts during the course of the original assessment proceedings. The notice dated 26.03.2015 is void ab initio in the light of the first proviso to Sec. 147 of the Act. In defence of his arguments, the ld. AR relied on the following decisions:

- i. German Remedies Ltd vs DCIT- [2006] 287 ITR 494 (Bombay)-
- ii. Rajbhushan Omprakash Dixit vs DCIT-(WP No: 3546 of 2018) - Bombay High Court.

9. The ld. AR argued that the Ld.AO initiated the reassessment proceedings based on change of opinion since all the documents were duly submitted to the Ld. AO during the course of original assessment proceedings and after considering the same, a deduction u/s 54EC was allowed to the Appellant. The ld AR contended that re-opening is just a change of opinion based on the same facts which is not permissible under the Act. Ld. AR placed reliance on the following decisions to defend its arguments:

- i. CIT vs Kelvinator of India Ltd- [2010] 320 ITR 561 (SC)- Supreme Court
- ii. CIT vs. Usha International Ltd.-[2012] 348 ITR 485 (Delhi)- Delhi High Court (Full Bench).

10. The ld. AR also argued that the notice issued u/s 148 of the Act and the entire reassessment proceedings are without jurisdiction since there was no tangible/fresh material in

possession of the Ld. AO and all material facts were considered in the original assessment proceedings while allowing a claim of the Appellant. Thus, the notice dated 26.03.2015 issued u/s 148(1) of the Act is without jurisdiction as has been held in the following decisions:

- i. Aventis PharmaLtd. vs. ACIT (2010) 323 ITR 570 (Bom)-  
Bombay High Court.
- ii. Rushabh Enterprises vs. ACIT- [2015] 60 taxmann.com  
134 (Bombay)- Bombay High Court

11. The notice issued u/s 148(1) of the Act is without jurisdiction as the Ld. AO carried out reassessment proceedings to rectify his earlier stand for which proceedings u/s 154 of the Act could have been carried out. It is submitted that In light of the direction of the Ld. CIT(A)-24, Mumbai It is now an accepted position between the parties that the subject matter of re-opening (i.e. claim of Sec 54EC of the Act) is rectifiable u/s 154 of the Act. Thus, the reassessment proceedings are bad in law and without jurisdiction as has been held in the decision namely Hindustan Unilever Ltd vs. DCIT- [2010] 325 ITR 102 (Bombay).

12. The Ld. D.R., on the other hand, relied heavily on the order of AO and Ld. CIT(A).

13. We have heard the rival submissions of both the parties and perused the material on record. We find that in this case the of the assessee has apparently been re-opened after a period of four years from the end of relevant assessment year and therefore the re-opening has to be in accordance with terms and conditions of 1<sup>st</sup> proviso to section 147 of the Act. The case of the assessee can only be re-opened after a period of four years if

the escapement of income is attributable to the failure of the assessee to disclose fully and truly all material facts during the original assessment proceedings. However, we note that the assessee has fully disclosed all material facts regarding investment in capital gain bond scheme of REC in which the assessee has invested Rs.50 lakhs out of long term capital gain earned on sale of BSE shares. Here, we note that the issue was thoroughly examined during the original assessment proceedings as the assessee has filed all the necessary documents after the same were called for by the AO specifically in the questionnaire issued under section 142(1) of the Act. Both the copy of the questionnaire and the reply filed by the assessee are attached in the paper book. In our opinion, in this case the reopening of the assessment which is sustained by the Ld. CIT(A) appears to be wrong as no fault can be attributed to the assessee qua non disclosure of material facts during the original assessment proceedings. Therefore, in our considered opinion the reopening is invalid and bad in law. The case of the assessee is supported by the decision of jurisdictional High Court in the case of German Remedies Ltd. vs. DCIT (supra) wherein the Hon'ble Court has held as under:

“23. Having said so, it is necessary to consider two more submissions advanced on behalf of the petitioners. Firstly, the impugned notice is barred by limitation since it was issued beyond period of 4 years from the end of relevant assessment year. Failure on the part of petitioners to disclose full and true material has not been alleged. In this case, power to reopen has been exercised after expiry of 4 years from the end of relevant assessment year to which they relate. In the circumstances, the impugned notice having been issued beyond 4 years from the last date of the relevant assessment year without alleging any failure to disclose full and true material facts is liable to be set aside.”

14. Similar ratio has been laid down by another decision of the Hon'ble Bombay High Court in *Rah Bhushan Om Prakash Dixit vs. DCIT (Supra)*. Besides since the issue has been examined in the original assessment proceedings and the assessment is framed thereafter under section 143(3) vide order dated 16.11.2010. Therefore, this is nothing but a perfect case of change of opinion by the AO as the AO has examined all the facts and documents pertinent to investment in REC bonds under section 54 EC of the Act in the original assessment. The case of the assessee is supported by the decision of Hon'ble Apex Court in the case of *CIT vs. Kelvinator India Ltd. (supra)* and *CIT vs. Usha International Ltd. Delhi HC (supra)* wherein it has been held that reopening of assessment can not be allowed on mere change of opinion as it amounts to review of the order which is not permissible under the Act. We also note that there is no tangible and fresh material in the possession of AO and AO relied on the information/facts which were considered in the original assessment proceedings in which the claim under section 54EC of Rs.50 lakhs was allowed. On this count also the reopening of assessment under section 147 is bad in law. The case of the assessee is squarely covered by the decision of Hon'ble Jurisdictional High Court in the case of *Aventis Pharma Ltd. vs. ACIT (Bombay HC) (supra)*. Therefore, considering the above facts and circumstances and various judicial decisions as discussed above, we are inclined to quash the reopening of the assessment as being bad in law and void ab initio. The ground is allowed.

15. Since we have allowed the appeal of the assessee on legal issue, the grounds on merit need not to be adjudicated.

16. In the result, the appeal of the assessee is partly allowed.

**Order pronounced in the open court on 25.09.2020.**

**Sd/-  
(Ram Lal Negi)  
JUDICIAL MEMBER**

**Sd/-  
(Rajesh Kumar)  
ACCOUNTANT MEMBER**

Mumbai, Dated: 25.09.2020.

\* Kishore, Sr. P.S.

Copy to: The Appellant  
The Respondent  
The CIT, Concerned, Mumbai  
The CIT (A) Concerned, Mumbai  
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.