IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 10437 OF 2011

Mrs. Parveen P. Bharucha
102A/1-B, Kalyaninagar,
Pune-411 006.
PAN NO.AAUPB1729P ...Petitioner.

Versus

1 The Deputy Commissioner of Income Tax
Circle 2, Pune,
PMT Bldg., 1st floor, B Wing,
Shankarsheth Road, Swargate,
Pune-411037.

2 Union of India,
through the Secretary,
Ministry of Finance,
North Block, New Delhi-110001. ..Respondents.

Mr. S.N. Inamdar with Mr. Mihir Naniwadekar for Petitioner
Mr. Vimal Gupta for Respondent.

CORAM : S.J.VAZIFDAR &
M.S. SANKLECHA, JJ.

DATE : 27th June 2012.

JUDGMENT : (Per M.S. SANKLECHA, J.)

Rule, returnable forthwith. Respondents waive service. At the instance and request of the Advocates for the Petitioner and the

Respondents the petition is taken up for final hearing.

2 By this Petition under Article 226 of the Constitution of India, the Petitioner challenges the following:

a) Notice dated 31.03.2011 issued by the Dy. Commissioner of Income Tax (Respondent No.1) under Section 148 of the Income Tax Act, 1961 (hereinafter referred to as the said Act) seeking to reopen the assessment for the assessment year 2006-2007 on the ground that income has escaped assessment within the meaning of Section 147 of the said Act; and

b) Order dated 14.11.2011 passed by Respondent No.1 rejecting the Petitioner's objections to initiation of proceeding under Section 147 of the said Act.

3 The facts leading to the present petition are as under :

a) During the assessment year 2006-2007, the Petitioner sold property at Pune to a builder for the consideration of Rs.9.23 crores. The Petitioner inter alia received an amount of Rs.

90.84 lacs as earnest money before the sale/execution of the conveyance which took place during assessment year 2006-07. So as to be eligible to claim a deduction under Section 54 EC of the said Act the aforesaid amount of Rs.90.84 lacs had been invested by the Petitioner in NABARD bonds and National Housing bonds on 18.12.2004 and 30.11.2004 respectively i. e. prior to the sale/execution of the conveyance.

b) On 31.10.2006, the Petitioner filed her return of income, declaring her total income to be Rs.21.58lakhs. On 28.06.2007 a notice under Section 143(2) of the said Act was issued to the Petitioner. Thereafter, during the course of assessment proceedings the Respondent No.1 by a communication dated 05.08.2008, called upon the Petitioner to inter alia submit details for purposes of assessment. The information sought by the above letter at serial No. 10 of the Annexure to the letter was with regard to the investments made by her under Section 54F and 54EC of the said Act. The Petitioner was duly represented by a Chartered Accountant during the course of the assessment proceeding before the Respondent No.1. On 28.11.2008, the Respondent No.1 passed an assessment order under Section 143(3) of the said Act, in which it is recorded that in response to the notices of the Respondent No.1

dated 28.06.2007 and 05.08.2008 the Petitioner's chartered Accountant attended and filed the required details called for. Consequently, the Petitioner's claim for exemption/deduction under Section 54EC of the said Act was also considered and a deduction to the extent of Rs. 7.40 crores on the above account was granted while assessing the income of the Petitioner to Rs.34.44 lakhs by an order dated 28.11.2008.

c) It appears there was an audit objection to the Assessment order dated 28.11.2008 with regard to grant of exemption under Section 54EC of the said Act. The Petitioner by a letter date 4.03.2010 pointed out to the Respondent No.1 that in law she is entitled to exemption as claimed under Section 54 EC of the said Act.

d) On 31.03.2011, Respondent No.1 issued a notice under Section 148 of the said Act, informing the Petitioner that for the assessment year 2006-2007, he had reason to believe that income chargeable to tax has escaped assessment within the meaning of Section 147 of the said Act. The Petitioner by her Chartered Accountant's letter dated 01.04.2011 called upon the Respondent No.1 to furnish/provide the reasons recorded for reopening the

assessment for the assessment year 2006-2007 for the purposes of reassessment.

e) On 19.04.2011, the Respondent No.1 furnished reasons for reopening of the Petitioner's assessment for the assessment year 2006-2007 which are as under:

> " The assessee has(sic) having income from House property and Long term Capital Gain and income from other source. The assessment u/s. 143(3), in this case, has been completed on 28.11.2008 for a total income of 34,44,080/- after allowing deduction under Section 54EC of Rs.7,40,00,000/-.
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> The assessee sold a land to the developer for 9,23,00,000 (Market Value as per registration deed) on indexation the capital gain worked out to 8,65,38,000/- out of this 85,36,483/- invested in purchase of House Property and 740 lakhs invested in specified bonds i.e. NABARD C.G.Bonds, Rs.200 lakh, NHB C.G.Bonds 240 Lakhs, REGCG Bonds 150 lakhs and SIDBI Bonds 150 lakhs and claimed deduction under Section 54EC. It was seen that out of the above investment 50 lakhs invested on 18th December,2004 in NABARD Bonds and 50 lakhs invested on 30th November,2004 in National Housing Bonds i.e. prior to the date transfer of long term capital assets.
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> As per Section 54EC "Where the capital gain arises from the transfer of long term capital asset and the assessee has at any time within a period of six months after the date of such transfer, invested the whole or any part of capital gain in the long term specified asset is not to be charged on investment in certain bonds." In this case assessee made an

> investment prior to transaction which is not permutable (sic) for deduction U/s 54EC. In view of this, it is submitted that, there has been escapement of income to the tune of Rs.90,84,952/- for the A. Y. 2006-07."

f) On 25.04.2011, the Petitioner filed her objection to the reasons recorded for reopening her assessment for the assessment year 2006-2007. In her objection, the Petitioner pointed out that during the course of proceeding under Section 143(3) of the said Act, the issue with regard to the Petitioner's claim for deduction under Section 54EC of the said Act was discussed in detail and particular attention at that time was also drawn to the Board Circular No. 359 dated 10.05.1983 in support of the Petitioner's case and the Respondent No.1 was satisfied. The Petitioner also submitted that the reopening of assessment was being done only on account of audit objection and would tantamount to only a change of opinion and therefore not justified.

g) On 14.11.2011, the Respondent No.1 passed an order on the objection raised by the Petitioner to reopening of the assessment for the assessment year 2006-2007 and inter alia rejected the same on the following grounds:

> "I have carefully considered the objections and the same are not accepted because the proceeding u/s. 147 has not been initiated for the change of opinion of the Assessing Officer, but for the incorrect application of the law. The provision u/s. 54EC clearly stated that the capital gain amount has to be invested in the specified bond within a period of six months after the date of transfer in order to claim exemption from the capital gain tax. The circular issued by the Hon'ble CBDT cannot override the explicit provisions of the Act. Hence, the claim of assessee that the reopening is based on change of opinion is rejected."

h) The petitioner has filed this Petition challenging the jurisdiction of the Respondent No.1 to issue a reopening notice under Section 148 of the said Act. The Respondent has also filed an affidavit dated 19/12/2012 justifying the reopening of assessment within four years even on a mere change of opinion.

3 Mr. S. N. Inamdar, Senior Counsel appearing on behalf of the Petitioner submits that i) the present proceeding for reopening an assessment completed under Section 143(3) of the said Act is without jurisdiction as the same is merely based on a change of opinion as the facts/material recorded for reopening of the assessment was already available on record at the time the assessment order dated 28.11.2008 under Section 143(3) of the said Act was passed by the Respondent no.1 and on examination of the

material and application of law to the same the benefit was extended to the petitioner. Consequently, the present proceeding is nothing more than a different view on law applicable on facts already disclosed; ii) there is no reason to believe that income has escaped assessment as the proceedings to reopen the assessment appear to have commenced in view of a different view of the auditors; iii) there is no tangible material which has come to the knowledge of the Respondent No. 1 to have a reasonable belief that there has been an escapement of income from assessment; and iv) on merits, the issue stands covered by the circular No. 359 dated 10.05.1983 issued by the Central Board of Direct Taxes in the context of Section 54E of the said Act on provisions identical to Section 54EC where the Central Board of Direct Taxes has clarified that if earnest money or advance received as a part of the sale consideration is invested in specified assets before the date of the transfer of the assets, then the net amount so invested would qualify for exemption notwithstanding the fact that Section 54E specifically provides that the investment must be made within a period of 6 months after the date of such transfer. This view according to him has been taken by the Tribunal in the matter of Ramesh Narhari Jakhadi v. ITO reported in 41 ITD308. Consequently, in view of the settled position in law, the reassessment proceeding are completely without jurisdiction.

4 As against the above, Mr. Vimal Gupta appearing for the respondent submits that the court should not exercise its writ jurisdiction as there is a prima facie view on the part of the officer that income has escaped assessment and the petitioner could justify the deduction taken by her in the proceedings before the authorities consequent to reopening; b) The powers of reopening an assessment under Section 147 for a period less than 4 years is very wide and any income chargeable to tax which has escaped assessment could be subjected to proceeding for reopening even where all facts have been disclosed by the assessee; c) The Respondent No.1 while passing the order dated 28.11.2008 has not referred to the aspect of availability of deduction under Section 54E to receipt of earnest/advance money received prior to sale and therefore they are entitled to reopen the proceedings d) The power to reopen the assessment within a period of 4 years is an unlimited power and even if there has been change of opinion the exercise of such power of reopening assessment is perfectly justified and permissible in terms of Section 147 of the said Act; and e) The circular No. 359 dated 10.05.1983 relied upon by the Petitioner is not applicable to the present case which is under Section 54EC of the said Act, while circular dated 10.05.1983 deals with Section 54E

of the said Act.

5 It is a well settled position in law that the power to reopen a completed assessment within the period of 4 years from the end of the relevant assessment year is very wide. Nevertheless this power to reopen an assessment within a period of 4 years does not permit review of an assessment Order. This is settled by the Supreme Court in the matter of CIT v. Kelvinator of India reported in 320 ITR 561 wherein it has been held as under:

> "However, one needs to give a schematic interpretation to the words "reason to believe" failing which, we are afraid, Section 147 would give arbitrary powers to the Assessing Officer to reopen assessment on the basis of "mere change of opinion", which cannot be per se reason to reopen. We must also keep in mind the conceptual difference between power to review and power to reassess. The Assessing Officer has no power to review; he has the power to reassess. But, assessment has to be based on fulfillment of certain preconditions and if the concept of "change of opinion" is removed, as contended on behalf of the Department, then, in the garb of reopening the assessment, review would take place."

The Supreme Court further held that there must be tangible material to come to the conclusion that there has been an escapement of Income. The Apex Court in fact upheld the Full Bench decision of the

Delhi High Court in matter of CIT v. Kelvinator of India Ltd. reported in 256 ITR 1 wherein it has been held that the power to reopen an assessment cannot empower an Officer of the Department to reopen the proceeding on the ground that an earlier order was passed without application of mind. An exercise of power in such a manner would amount to a review of an order which is not permissible under the law. Consequently, when jurisdiction is exercised to reopen the assessment even in respect of period of less then 4 years the authorities under the Act have to strictly satisfy the conditions which permit them to reopen the assessment under Section 147 of the said Act. This Court in the matter of Cartini (I) ltd. v. Addl. Commissioner of Income Tax reported in 314 ITR 275 has taken a view that reopening of assessment on the basis of material already on record at the time assessment was completed cannot be the basis of reopening the assessment even within the normal period of 4 years.

6 In the present case it is not disputed that during the course of assessment proceeding under Section 143(2) and (3) of the said Act, the Petitioner was asked by a letter dated 05.08.2008 of Respondent No.1 to submit details of investment made under Section 54EC of the said Act. It is also an admitted position as is evident in the assessment order dated 28.11.2008 that in response to

the questionnaire dated 05.08.2008, the Petitioner had filed the required details called for.

7 Consequently, the basic/primary document showing investment in terms of Section 54EC of the said Act was on record before Respondent No.1 when he passed his order dated 28.11.2008 granting the benefit of deduction under Section 54EC even in respect of the investment made of Rs.90.84 lacs in NABARD Bonds and National Housing Bonds prior to the sale/conveyence of land to the buyer by the Petitioner. Consequently, it follows that Respondent No. 1 while granting the above benefit to the Petitioner took a view that investment made out of earnest money/advance received as a part of the sale consideration before the date of the transfer of the assets would also be entitled to the benefit of Section 54EC of the said Act. This view was a possible view in view of the Circular No. 359 dated 10.05.1983 and the decision of the Tribunal in the matter of Ramesh Narhari Jakhdi reported in 41 ITD 368. The Circular No.359 dated 10.05.1983 inter alia provides as under:

> “1. Section 54E provides for exemption of long term capital gains if the net consideration is invested by the assessee in specified assets within a period of six months after the date of such transfer. A technical interpretation of section 54E could mean that the exemption

> from tax on capital gains would not be available if part of the consideration is invested prior to the date of execution of the sale deed as the invest cannot be regarded as having been made within a period of six months after the date of transfer.
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> 2 On consideration of the matter in consultation with the Ministry of Law, it is felt that the foregoing interpretation would go against the purpose and spirit of the section. As the section contemplates investment of the net consideration in specified for a minimum period and as earnest money or advance is a part of the sale consideration, the Board has decided that if the assessee invest the earnest money or the advance received in specified assets before the date of transfer of asset, the amount so invested will qualify for exemption under section 54E."

8 The Tribunal in the case of Ramesh Narhari Jakhdi (supra) while construing Section 54B of the said Act applied the Circular No.359 dated 10.5.1983 to hold that an investment made in Bonds out of advance received for transfer of land before the actual date of transfer would be entitled to the benefit of exemption under Section 54B of the said Act. Therefore, the view taken by Respondent No.1 in the order dated 28.11.2008 is a possible view in law and the notice issued to reopen the assessment is only on account of change of opinion. In fact in the affidavit in reply dated 19.12.2012 the Respondent No. 1 has stated that reassessment

proceedings within a period of 4 years can be initiated on account of change of opinion. This is in the face of the decision of the Apex Court in the matter of Kelvinator (supra). The reasons recorded for reopening the assessment refer only to facts which were already on record at the time when assessment order dated 28.11.2008 was passed.

9 Further, at the hearing Mr. Vimal Gupta contended that Respondent No.1 while passing the order of the assessment dated 28.11.2008 did not apply his mind and/or consider the fact that Rs. 90.84 lacs had been invested in terms of Section 54EC prior to the completion of sale. The basis of his aforesaid submission is that the same is not discussed in the order dated 28.11.2008. This ground urged by Mr. Gupta during the hearing is a new ground which does not find mention in the reasons recorded for reopening of assessment. As held by this Court in the matter of Hindustan Lever Ltd. v. R.B. Wadkar reported in 268 ITR page 332, it is not open to improve upon the reasons recorded at the time of reopening the assessment by filing an affidavit and/or making oral submissions at the hearing of the Petition. The Court very categorically held that the reasons recorded must clearly establish some facts or material which lead to escapement of income. In any view of the matter the

aforesaid submission is not sustainable for the reason that if a query is raised during assessment proceedings and the assessee meets the query and/or supplies the information called for, it must be presumed that the officer was satisfied before allowing the claim and there is no need to discuss the matter in his assessment order. As observed by the Gujarat High Court in the matter of CIT v. Nirma Chemical Works reported in 309 ITR 67.

> "The contention on behalf of the Revenue that the assessment order does not reflect any application of mind as to the eligibility otherwise under section-80-I of the Act requires to be noted to be rejected. An assessment order cannot not incorporate reasons for making/granting a claim of deduction. If it does so, an assessment order would cease to be an order and become an epic tome. The reasons are not far to seek. Firstly, it would cast an almost impossible burden on the Assessing Officer, considering the workload that he carries and the period of limitation within which an order is required to be made; and secondly the order is an appealable order. An appeal lies, would be filed, only against disallowances which an assessee feels aggrieved with".

10 Further the reasons recorded by Respondent No.1 for reopening the assessment do not state that the deduction under Section 54E was not considered in the assessment proceedings. In fact from the reasons, it appears that all facts were available on record and according to the respondents was only erroneously

granted. This is a clear case of review of an order. The application of law or interpretation of a statue leading to a particular conclusion cannot lead to a conclusion that tax has escaped assessment for this would then certainly amount to review of an order which is not permitted unless so specified in a statue. The order dated 14.11.2011 disposing of the Petitioner's objection to initiation of proceedings under Section 147 of the said Act also proceeds on the view that there has been non application of mind during the original proceedings for assessment. This is unsustainable and as held this court in Asian Paints Ltd. v. Dy. C.I.T. 308 ITR 195 a fresh application of mind by the Assessing officer on the same set of facts amounts to a change of opinion and does not warrant reopening. In fact our court followed the Full Bench decision of the Delhi High Court in the matter of Kelvinator (supra) wherein it has been held as under:

> "We also cannot accept the submission of Mr. Jolly to the effect that only because in the assessment order, detailed reasons have not been recorded an analysis of the materials on the record by itself may justify the Assessing Officer to initiate a proceeding under Section 147 of the Act. The said submission is fallacious. An order of assessment5 can be passed either in terms of sub section (1)of section 143 or sub-section (3) of section 143. When a regular order of assessment is passed in terms of the said sub-section (3) of section 143 a presumption can be raised that such an order has been passed on application of mind. It is well known that a

> presumption can also be raised to the effect that in terms of clause (e) of section 114 of the Indian Evidence Act judicial and official acts have been regularly performed. If it be held that an order which has been passed purportedly without application of mind would itself confer jurisdiction upon the Assessing Officer to reopen the proceeding without anything further, the same would amount to giving a premium to an authority exercising quasi judicial function to take benefit of its own wrong".

11 One more point very strenuously urged by Mr. Gupta for the Revenue was that the court should not at this stage quash the proceedings as the only obligation of the Revenue is to establish that prima facie material exists to show that income has escaped assessment and the party can thereafter establish in reassessment proceedings that the deductions as allowed in the original assessment proceedings are valid.

12 The issue here is one of jurisdiction to issue notice and not sufficiency of reasons in issuing a notice for reassessment. We are considering the jurisdiction to issue a notice under Section 148 to reopen proceedings. In view of what is stated earlier, we do not find any merit in this contention.

13 In view of the above, the notice under Section 148 dated 31.03.2011 is without jurisdiction and we set aside the same. Similarly, the order rejecting the objections raised by the Petitioner dated 14.11.2011 is also set aside as Respondent No.1 has not satisfied the jurisdictional requirement to issue notice under Section 148 of the said Act.

14 Rule is made absolute in terms of prayer clause (a). No order as to costs.

(M.S. SANKLECHA, J.) **(S.J.VAZIFDAR J.)**