NEUTRAL CITATION
2023:GUJHC:49317-DB

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CIVIL APPLICATION NO. 18957 of 2019

With
R/SPECIAL CIVIL APPLICATION NO. 20720 of 2019
With
R/SPECIAL CIVIL APPLICATION NO. 20722 of 2019

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR. JUSTICE BIREN VAISHNAV

and
HONOURABLE MR. JUSTICE BHARGAV D. KARIA

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	
2	To be referred to the Reporter or not ?	
3	Whether their Lordships wish to see the fair copy of the judgment ?	
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	

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ARTIBEN AMISHKUMAR PATEL
Versus
THE INCOME TAX OFFICER, WARD 3(2)(1)

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Appearance:
MR. TUSHAR HEMANI, SENIOR COUNSEL WITH MS VAIBHAVI K PARIKH(3238) for the Petitioner(s) No. 1
MR. KARAN SANGHANI, STANDING COUNSEL FOR MRS KALPANA K RAVAL(1046) for the Respondent(s) No. 1

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CORAM:**HONOURABLE MR. JUSTICE BIREN VAISHNAV**
and
HONOURABLE MR. JUSTICE BHARGAV D. KARIA

NEUTRAL CITATION
2023:GUJHC:49317-DB

Date : 12/09/2023

ORAL JUDGMENT
(PER : HONOURABLE MR. JUSTICE BIREN VAISHNAV)

1 Rule returnable forthwith. Mr.Karan Sanghani, learned Standing Counsel, waives service of notice of rule on behalf of the respondent. All these petitions raise a common question of law based on identical facts.

2 Facts of Special Civil Application No. 18957 of 2019 are as under:

2.1 The petitioner, is a partner in a partnership firm, namely, “M/s. My Home Developers”. The partnership firm is engaged in the business of developing housing projects. The partnership firm commenced its business with effect from 15.06.2007. The petitioner, along with other partners of the said partnership firm, executed a partnership deed on 27.06.2007 which contained a discretionary clause as to “payment of interest on capital” but “no remuneration” was payable to the partners.

2.2 On 01.04.2009, the partnership deed was amended

NEUTRAL CITATION
2023:GUJHC:49317-DB

and it was mutually agreed upon that with effect from 01.04.2009, “no interest on capital” shall be payable to the partners of the firm. Thus, Financial Year 2009-10 onwards, neither any “interest on capital” nor any “remuneration” was payable to the partners. Accordingly, the “partnership firm” did not pay either any “interest on capital” or any “remuneration” to its partners, including the petitioner, during the year under consideration. The partnership firm filed return of income for the Assessment Year 2012-13 on 29.09.2012 declaring total income at Rs.Nil after claiming deduction of Rs.15,78,260/- under section 80IB(10) of the Act.

2.3 The case of the “partnership firm” for the Assessment Year 2010-11 was selected for scrutiny assessment. The then Assessing Officer framed assessment under section 143(3) of the Act vide order dated 20.03.2013, whereby income of Rs.76,25,000/- disclosed by the petitioner during the course of survey was treated as “Income from other sources” as against

NEUTRAL CITATION
2023:GUJHC:49317-DB

"Business Income" and accordingly, the partnership firm's claim for allowing deduction under section 80IB(10) of the Act on such income was denied.

2.4 The partnership firm carried the Assessment Order for the Assessment Year 2010-11 in appeal before the Commissioner of Income Tax (Appeals), who, vide order dated 28.08.2014, dismissed the appeal preferred by the partnership firm. In the meantime, the case of the partnership firm for the Assessment Year 2012-13 was also selected for scrutiny assessment and various details were called for by the Assessing Officer. Eventually, assessment was framed by the Assessing Officer under section 143(3) of the Act vide order dated 19.03.2015 determining assessed income at Rs.NIL after allowing the claim of deduction of Rs.15,78,260/- under section 80IB(10) of the Act.

2.5 Appeal for the Assessment Year 2010-11 2010-11 preferred by the partnership firm came up for hearing

NEUTRAL CITATION
2023:GUJHC:49317-DB

before the Income Tax Appellate Tribunal (hereinafter referred to as “ITAT” for the sake of brevity) and the ITAT, vide order dated 07.08.2015, in appeal bearing Income Tax Appeal No. 2966/Ahd/2014, held that income of Rs.76,25,000/- disclosed during the course of survey was income from developing housing projects and that the partnership firm is eligible for deduction under section 80IB(10) of the Act. The case of the partnership firm for the Assessment Years 2011-12, 2012-13 and 2013-14 were reopened by issuance of notice under section 148 of the Act in the month of March 2018. The partnership firm challenged the reopening notice for all those three years before this Court by filing Special Civil Application Nos. 20821, 20850 and 20853 of 2018. The respondent issued the impugned notice dated 30.03.2019 under section 148 of the Act seeking to reopen the case of the petitioner for the year under consideration.

2.6 The petitioner filed return of income for the year under consideration on 02.08.2019 in response to the

NEUTRAL CITATION
2023:GUJHC:49317-DB

notice issued under section 148 of the Act. The petitioner, vide letter dated 22.08.2019, requested the respondent – revenue to supply copy of reasons recorded for reopening. The revenue-respondent, supplied copy of reasons recorded for reopening the case of the petitioner vide letter dated 26.08.2019. Perusal of reasons for reopening the petitioner's case, reveals that the case of the case of the petitioner has been reopened broadly on the count that the petitioner has not offered "interest on capital" and "remuneration" alleged to have been received from the partnership firm (M/s. My Home Developers) as income.

2.7 The petitioner, vide letter dated 30.08.2019, raised objections against reopening wherein various factual and legal submissions were made. The respondent – revenue, vide order dated 27.09.2019, disposed off such objections holding reopening of the petitioner's case to be valid.

SPECIAL CIVIL APPLICATION No. 20720 & 20722 of

NEUTRAL CITATION
2023:GUJHC:49317-DB

2019.

3 Basic facts of these two petitions are also the same. The petitioners are partners in a partnership firm, namely, “My Home Developers”, engaged in the business of developing housing projects. For the year under consideration, the “partnership firm’ did not pay either “any interest or capital” or any “remuneration”. Notice under sec.148 of the Income Tax Act, was issued for the reasons akin to the petitioner of Special Civil Application No. 18957 of 2019.

3.1 Mr.Tushar Hemani, learned Senior Counsel appearing with Ms.Vaibhavi Parikh, learned advocate for the petitioner, in Special Civil Application No. 18957 of 2019 would make the following submissions:

(a) That the condition precedent for the purpose of resorting to reopening proceedings is that there must be “escapement of any income chargeable to tax”. In

NEUTRAL CITATION
2023:GUJHC:49317-DB

submission of Mr.Hemani, learned Senior Counsel, in absence of any income chargeable to tax, it is not open for the Department to reopen an assessee's case. Mr.Hemani, learned Senior Counsel, would further submit that as a matter of fact, the petitioner has not at all received any "interest on capital" or "remuneration" from the partnership firm (M/s. My Home Developers), therefore, when no such income has been earned by the petitioner, question of taxing the same does not arise at all and thus, there is no escapement of income chargeable to tax.

(b) Mr.Hemani, learned Senior Counsel, further submitted that even on merits, no addition can be made in the hands of the petitioner and accordingly, there is no escapement of income chargeable to tax. Under the circumstances, in the submission of Mr.Hemani, Senior Counsel, reopening is unjustified.

(c) Mr.Hemani, learned Senior Counsel, woul relying on

NEUTRAL CITATION
2023:GUJHC:49317-DB

a decision of this Hon'ble Court in the case of ***PCIT vs. Alidhara Taxspin Engineers,*** in **Tax Appeal NO. 265 of 2017,** submit that the Hon'ble Court has held vide decision dated 02.05.2017 that mere incorporation of interest on partners' capital and remuneration does not signify that the same are mandatory in nature. Hence, even if there is a clause for payment of interest on capital and remuneration to partners, then also mere incorporation of such clause would not signify that such payments are mandatory. In the present case, the petitioner has, as a matter of fact, not received any interest on capital and remuneration from the partnership firm.

(d) Mr.Hemani, learned Senior Counsel, further submitted that reasons for reopening lacked validity and hence even on that score, reopening is unjustified. He would further submit that the respondent has, in the reasons for reopening, made a reference to partnership deed dated 01.04.2009 as per which, the firm was

NEUTRAL CITATION
2023:GUJHC:49317-DB

supposed to pay interest on capital and remuneration to partners. However, the respondent has conveniently ignored partnership deed dated 01.04.2009 which was duly placed before the Assessing Officer of the partnership firm in reassessment proceedings as per which, neither any “interest on capital” nor “remuneration” was payable by the partnership firm. Thus, when the respondent recorded reasons for reopening, the partnership deed dated 01.04.2009 was there on record and as per the said deed, neither any “interest on capital” nor “remuneration” was payable by the partnership firm to its partners. The reference made to a partnership deed by the respondent in the order disposing off objections is also on factually incorrect premise and without appreciating correct facts as well as the settled legal position.

4 For Special Civil Application No. 20720 of 2019, since the notice under section 148 of the Act was also reopened on two other counts, namely, that the petitioner

NEUTRAL CITATION
2023:GUJHC:49317-DB

sold immoveable property for Rs.32,28,800/-, but no capital gain was offered in the return of income and that the source of investment in two immoveable properties purchased along with other co-owners remained unexplained, Mr.Hemani, learned Senior Counsel, would submit that:

(1) As regards "sale of immovable property"

(i) The property sold for Rs.32,28,800/- was owned by "Lavjibhai Ambaliya HUF";

(ii) Such property was reflected in Balance-sheet of HUF as at Rs.31.03.2011 i.e. Plot(Aakar society Rs.5,48,250/-)

(iii) Sale consideration of Rs.32,28,800/- was received by cheque by HUF on 16.09.2011.

(iv) Resultant Long Term Capital Gain ("LTCG" for shor) of Rs.23,99,559/- was reflected in the rerturn of income of HUF filed on 26.03.2013.

(2) As regards purchase of immovable property:

(i) Copy of the ITS data was not provided.

(ii) Although return of income was filed u/s 44AD,

NEUTRAL CITATION
2023:GUJHC:49317-DB

petitioner maintained complete books of accounts.

(iii) All the properties purchased by the petitioner are reflected in Balance-sheet.

(iv) The respondent had not at all given the “description” and “situation” of such properties.

Thus, the income alleged to have been earned as per the respondent has not at all been earned by the petitioner. Hence, there cannot be any escapement of any income chargeable to tax.

4.1 Moreover, he would submit that even on merits it was pointed out that the property was owned by Lavjibhai Ambaliya HUF which was reflected in the Balance-sheet of HUF. Sale consideration was received by cheque by HUF and the consequential LTCG was reflected in the return of income of HUF. No description and situation of the properties were given. That the respondent failed to appreciate that books of accounts were maintained and that there were sufficient funds. There can be no roving or fishing inquiry and merely because there is some

NEUTRAL CITATION
2023:GUJHC:49317-DB

suspicion, there can be no reassessment. Mr.Hemani, learned Senior Counsel, would rely on the following decisions:

(1) ***ITO vs. Lakhmani Mewal Das.,*** reported in ***(1976) 103 ITR 437.***

(2) ***Prashant N Joshi vs. ITO.,*** reported in ***324 ITR 154 (Bom).***

(3) ***Gujarat Lease Financing Ltd vs. DCIT.,*** reported in ***360 ITR 496 (Guj).***

(4) ***Krishna Metal Industries.,*** reported in ***225 ITR 853 (Guj).***

(5) ***N.D.Bhatt, IAC vs. I.B.M World Trade Corporation.,*** reported in ***(1995) 216 ITR 811 (Bom).***

(6) ***Hindustan Lever Ltd vs. R.B. Wadkar.,*** reported in ***(2004) 268 ITR 332 (Bom).***

5 Submissions in Special Civil Application No. 20722 of 2019 are also on similar lines.

NEUTRAL CITATION
2023:GUJHC:49317-DB

6 Mr.Karan Sanghani, learned Standing Counsel appearing for Mrs. Kalpana Raval, would make the following submissions:

6.1 For SCA No. 18597 of 2019, Mr.Sanghani, would submit as under:

(a) Petitioner has submitted a copy of partnership deed on a stamp paper of Rs.100 purchased on 29.07.2008 whereby Petitioner has claimed that clause 6 of the earlier partnership deed was changed with effect from 01.04.2009 and as per this amended partnership deed it was incorporated that no interest shall be payable to any partner with effect from 01.04.2009. In this connection, the Respondent has provided a copy of partnership deed of M/s. My Home Developers, which was documented on a stamp paper of Rs. 100 purchased on 20.03.2009 and is effective from 01.04.2009. In the said partnership deed which is also applicable from 01.04.2009 the clause 6 dealing with provision of interest on capital to partner is still in the force. This abundantly proves that the partnership deed documented on a stamp paper of Rs.100

NEUTRAL CITATION
2023:GUJHC:49317-DB

purchased on 29.07.2008 is invalid and misleading.

(b) Also as per the above partnership deed with effect from 01.04.2009, the ratio of share in profit and loss of Smt. Artiben B. Ravani is 20%, whereas, as per the partnership deed purchased on a stamp paper of Rs.100 dated 23.01.2008(with effect from 01.04.2008), the ratio of share of Smt. Artiben B Ravani is 30%. Further, as per the registered partnership deed dated 27.06.2007 and effective from 15.06.2007, the ratio of share in profit and loss of Smt. Artiben B Ravani is 30%. In view of the above, it is on record that all the above unregistered partnership deeds were executed only for the purpose of misleading the facts.

6.2 For SCA 20720 and 20722 of 2019, Mr.Sanghani, learned Standing Counsel, would submit that:

(a) The respondent's action of re-opening the case is only to examine income to the tune of Rs. 64,33,445/- escaped from assessment (Rs. 2,36,739/- as remuneration

NEUTRAL CITATION
2023:GUJHC:49317-DB

and interest on capital, Sale of immovable property for document value of Rs 32,28,800/- & Investment in purchase of 02 immovable properties amounting to Rs 29,67,906/-) and is no way infringing on his fundamental night to practice any profession, or to carry on any occupation, trade & business.

(b) In this case, this office in possession of the information for the escapement of income by Lavjibhai Nagjibhai Ambaliya during the FY 2011 12 So after approval of the Pr CIT 3, Surat, this office issued notice u/ s 148 of the IT Act, 1961 vide notice No. ITBA/AST/S/148/2018-19/1015441906(1) dated 27/03/19 for AY 2012-13 The same was duly served. In response to the notice u/s 148 assessee filed return on 16 04 2019 Thereafter reasons recorded to issue notice u/s 148 of the IT Act, 1961 was provided to the assessee Further assessee filed his objections against re-opening of assessment u/s 147 of the IT Act, 1961 vide letter dated 26.08 2019 The objections filed by the assessee for

NEUTRAL CITATION
2023:GUJHC:49317-DB

reopening of the assessment u/s 147 of the Act was rejected/ disposed off vide letter No ITBA/AST/F/17/2019-20/1020384914(1) dated 13/11/2019. Therefore, escapement of income requires to be verified and subject matter of assessment proceedings Hence petitioner's contention is baseless and unwarranted subsequently rejected.

7 On the issue of reopening on the count in these three petitions on the ground that the petitioners have offered “interest on capital” and “remuneration”, in case of the partnership firm “My Home Developers”, where the assessment of the firm was sought to be reopened on similar grounds, the Division Bench of this Court in the petitions at the behest of the firm, on appreciation of the clauses in the partnership deed held as under:

> *“11. We have heard the learned counsel appearing for the respective parties and perused the material placed on record.*
>
> *12. It is settled law that, the Assessing Officer has power to reassess any income with escaped assessment for any assessment year subject to provision of the Act. However, the use of this power*

NEUTRAL CITATION
2023:GUJHC:49317-DB

is conditional upon the fact that, the assessing officer has some reason to believe that, the income has escaped assessment. Where an assessment under Section 143 or 147 of the Act has been made for the relevant assessment year, no action shall be taken after expiry of 4 years unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee to make a return under Section 139 or in response to the notice issued under sub-section 1 of Section 142 or Section 148 or to disclose fully and truly all material facts necessary for his assessment.

13. We take the notice of the fact that, the applicant firm My Home Developers is a partnership firm engaged in the construction business and the said firm came into existence w.e.f. 15.06.2007 and partnership deed was executed on 27.06.2007 and thereafter, due to change in the constitution in the partnership firm, another deed replacing the earlier was executed on 01.04.2008 and lastly, partnership deed was amended w.e.f. 01.04.2009. It is not in dispute that, earlier there was a clause in the deed as to payment of interest on capital, but no remuneration was payable and after amendment in the partnership deed, it was agreed among the partners that, from 01.04.2009, no interest shall be payable to the partners on capital.

14. The applicant has placed on record the copy of the partnership deeds. We deem it appropriate to reproduce the clause 6 and 7 of the partnership deed dated 27.06.2007, which reads thus:

> *" 6. CAPITAL : The further fund required for the purpose of the partnership business shall be brought in, --contributed or-arranged-by the-partners in their mutual consents. Interest at the rate of 12% P.A. or such lower rate as may be prescribed under Section 40 (b) (Vi) of the*

NEUTRAL CITATION
2023:GUJHC:49317-DB

> *Income Tax Act,1961, or any applicable provision as may be in force for the Income Tax Assessment of the partnership Firm for the relevant accounting period shall be payable by the partnership Firm on the amount standing to the credit of the capital and/or current or loan account or the accounts of the partners. If there is any debit balance in the account of any partner, interest at the above rate shall be payable by him. The partners shall be at liberty to increase or reduce the above rate of interest from time to time. In case of loss, no interest will be payable on Partner's Capital as well as interest will be payable at reduced rate, if after paying interest, Partnership Firm incur Loss.*
> *7. REMUNERATION The parties hereto agreed that, at present no remuneration shall be payable to any partner of the Firm. The partners shall be at liberty to pay remuneration to one or more partners, as may be agreed upon time to time by and between all the parties hereto, under the provisions of Income Tax, as may be in force for the Income Tax Assessment of the partnership Firm for the relevant accounting period.*

15. Clause 6 of the amended partnership deed dated 01.04.2009 reads thus:

> *"Clause 6- The parties here to agreed that, at present no interest shall be payable to partners of the firm on the amount standing to the credit of the capital account or current account of the partners."*

16. At this stage, it is apt to refer to and rely upon the case of Alidhara TaxSpin (supra), wherein identical issue of law was decided. The two questions of law raised by the revenue and the final conclusion arrived at by this Court reads thus :

NEUTRAL CITATION
2023:GUJHC:49317-DB

"(A) Whether on the facts and circumstances of the case and in law, the Hon'ble ITAT was justified in not appreciating the fact that by not providing interest and remuneration to the partners, the firm has claimed higher profits leading to higher claim of deduction u/s 80IB of the Act and thus, devoiding the revenue from due amount of tax?

(B) "Whether on the facts and circumstances of the case and in law, the Hon'ble ITAT was justified in not appreciating that the Section 80IB(10) enables AO to re-compute the profit of undertaking claiming deduction u/s 80IB i.e. the partnership firm as in the present case and not the case of partner's admissibility towards interest/ remuneration as held in the case of Smt. Mala Tandon?"

Conclusion:- "On interpretation of the partnership agreement and considering the wish of the partners reflected in the partnership deed, not to pay/charge interest on the partners capital and the remuneration, the learned tribunal has rightly deleted the dis-allowance made by the Assessing Officer with respect to the deduction claimed under Section 80IB of the Income Tax Act. As rightly observed by the learned tribunal, mere incorporation of interest on the partners' capital and remuneration does not signify that the same are mandatory in nature. We concur with the view taken by the learned tribunal. We see no reason to interfere with the impugned judgment and order passed by the learned tribunal. No substantial questions of law arise in the present Tax Appeal. The present Tax Appeal deserves to be dismissed and is accordingly dismissed."

17. The record indicates that, the assessee did not have provided any remuneration interest on capital payable to partners. The case of the assessee is that,

NEUTRAL CITATION
2023:GUJHC:49317-DB

both the interest and remuneration stipulations were incorporated earlier which contained clause as to payment of interest and remuneration, which was not at all paid to the partners. The revenue has considered the partnership deed 23.01.2008 and concluded that, interest and remuneration were payable to the partners.

18. We have examined the clauses of the partnership deeds as referred to above. Though the clauses of the partnership deed provided for interest on partner's capital and remuneration, the same is subject to their mutual agreement. In other words, the clauses contained are only enabling provision not mandatory in nature so as to lead to an inference that, the assessee had to pay interest on capital and remuneration to its partners. Even after 01.04.2009, interest on capital as well as the remuneration were not to be paid to the partners. We do not find any material on record to indicate that, the writ applicant has actually received any interest on capital and remuneration from the partnership firm. Record further indicates that, for the assessment year 2010-11, deduction under Section 80 IB(10) was claimed without paying any interest on capital and remuneration to partners and such claim was not disturbed by the assessing officer. In this view of the matter, the conclusion arrived at by the assessing officer that, the assessee has claimed deduction without providing interest on capital and remuneration to partners as per the clause 6 and 7 of the deed, has escaped assessment on account of failure on the part of the assessee in filing of the return of income disclosing fully and truly all material facts are contrary to law and without jurisdiction."

8 On the remaining two counts, as far as Special Civil

NEUTRAL CITATION
2023:GUJHC:49317-DB

Application Nos. 20720 and 20722 of 2019 are concerned, what is apparent is that the property sold for Rs.32,28,800/- was owned by “Lavjibhai Ambaliya HUF”. The Balance-sheet of HUF of the preceding year submitted showed the property on the asset side. No description or situation of the property purchased was given. Sale consideration of Rs.32,28.800/- was received by cheque. LTCG of Rs.23,99,559/- duly reflected as is evident from the relevant Statement of Long Term Capital Gain.

9 The reassessment was also therefore based on suspicion. As pointed out by learned Senior Counsel Mr.Hemani, that factors that indicate that income has escaped assessment consists of facts which if established will have a cause and effect relationship, whereas factors which indicate a suspicion about income escaping assessment which would warrant a further inquiry. This is not what is contemplated under section 148 of the Act. The jurisdiction cannot be used to carry out a roving

NEUTRAL CITATION
2023:GUJHC:49317-DB

inquiry.

10 In the case of ***Krupesh Ghanshyambhai Thakkar vs. Deputy Commissioner of Income Tax,*** reported in ***(2017) 77 taxmann.com 293,*** the Division Bench of this Court has held as under:

> *"11. At the outset, it is required to be noted that by the impugned notice, the assessment for AY 2009-2010 is sought to be reopened in exercise of power under Section 147 of the IT Act. The reasons recorded to reopen the assessment are already produced hereinabove. Thus, as per the reasons recorded, the notice has been issued and assessment is sought to be reopened for deep verification of the claims. Even in the order disposing of the objections, it has been specifically stated that to verify whether all the criteria are met by the and transaction of Rs. 50 lakhs routed through the group and also to verify the claim of having recorded these transactions in the regular books of account, notice under Section 148 has been issued. Even with respect to investment in shares of Ms. Rushil Decor, it has been submitted that whether the investment in shares of M Rushil Decor were acquired from the capital of the assessee and the same is duly recorded in the books of account needs to be verified and for that purpose, the assessment for AY 2009-2010 is sought to be reopened.*
>
> *12. In case of Inductotherm (India) (P) Ltd (pro), Division Bench of this Court has observed that for a nere verification of the claim the power of reopening of assessment could not be exercised. It is further observed that the Assessing Officer under the guise*

NEUTRAL CITATION
2023:GUJHC:49317-DB

of power to reopen an assessment, cannot seek to undertake a fishing or coving inquiry and seek to verify the claims, as if it were a scrutiny assessment.

12.1 Similar view has been expressed by the Division Bench in case of Deep Recycling Industries (supra) wherein it has been held and observed that for mere scrutiny, reopening of the assessment would not be permissible. It is further observed that the reopening of the assessment could be made if the Assessing Officer had formed a belief that income chargeable to tax had escaped assessment. The Court has further observed that in order to do so, the Assessing Officer must have some tangible material having live link with the escapement of the income on the basis of which he can form a bona fide belief of escapement of income chargeable to tax. It has also been observed that reopening cannot be resorted to for fishing or roving inquiry on mere suspicion that income chargeable to tax may have escaped assessment.

13. Applying the aforesaid two decisions to the facts of the present two cases on hand and the reasons recorded to reopen the assessment, we are of the opinion that under the guise of reopening of the assessment, the Assessing Officer wants to have a roving inquiry as observed hereinabove. Even as per the Assessing Officer in the reasons recorded has specifically mentioned that for the purpose of verification/deep verification of the claim, it is necessary to reopen the assessment. Under the circumstances, it cannot be said that the Assessing Officer had any tangible material to form an opinion that the income chargeable to tax has escaped the assessment. Under the circumstances, the impugned action of reopening of the assessment in exercise of power under Section 148 of the IT Act for the reasons recorded hereinabove cannot be sustained

NEUTRAL CITATION

2023:GUJHC:49317-DB

> *14. Resultantly both these writ petitions succeed Impugned Notice issued by the Assessing Officer under Section 148 of the Income-tax Act, 1961 in each case is hereby quashed and set-aside."*

11 Even when the order disposing of the objections is read, certain observations made on gain made on sale of property and change in amount of interest were not reflected in the reasons for reopening of assessment which also makes the exercise vulnerable.

12 For the aforesaid reasons, all the petitions deserve to be allowed. The impugned notices in the respective petitions are quashed and set aside. Rule is made absolute accordingly, with no orders as to costs.

(BIREN VAISHNAV, J)

(BHARGAV D. KARIA, J)

BIMAL