IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CIVIL APPLICATION NO. 18955 of 2019
With
R/SPECIAL CIVIL APPLICATION NO. 18956 of 2019

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR. JUSTICE A.S. SUPEHIA Sd/-
and
HONOURABLE MS. JUSTICE VAIBHAVI D. NANAVATI Sd/-

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Approved for Reporting	Yes	No
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BHAVESHBHAI BHIMJIBHAI SAVANI
Versus
THE INCOME TAX OFFICER WARD 1(3)(6)

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Appearance:
MS VAIBHAVI K PARIKH(3238) for the Petitioner(s) No. 1
MR KARAN G SANGHANI, for the respondent

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CORAM:**HONOURABLE MR. JUSTICE A.S. SUPEHIA**
and
HONOURABLE MS. JUSTICE VAIBHAVI D. NANAVATI

Date : 19/08/2026

COMMON ORAL JUDGMENT
(PER : HONOURABLE MR. JUSTICE A.S. SUPEHIA)

1. Since the issue involved in the present petitions is common, the same is decided analogously by this common judgment and order.

2. In the captioned petition, Special Civil Application No.18956 of 2019, the petitioner is challenging the Show Cause Notice issued to him under the provisions of Section 148 of the Income Tax Act, 1961 (for short, “the Act”) on 30.03.2019, seeking reopening of the assessment for Assessment Year (A.Y.) 2012–13. Whereas, in Special Civil Application No.18955 of 2019, the show-cause notice of even

date is challenged for the reopening of the assessment for A.Y. 2013–14.

3. As the reasons assigned in both the show-cause notices for reopening the assessment are self-same, Special Civil Application No. 18955 of 2019 is treated as the lead matter.

4. At the outset, learned Senior advocate Mr.Tushar Hemani has urged that the impugned show-cause notices and the action of reopening of the assessment are required to be quashed and set aside in view of the decision dated 09.02.2021, rendered by the Coordinate Bench of this Court in writ petitions being Special Civil Application No.20821 of 2018 and allied matters, in the case of Myhome Developers Vs. The Assistant Commissioner of Income Tax, the present petitioner is the partner of Myhome Developers.

5. The petitioner is a partner in a partnership firm viz. “M/s. My Home Developers” (hereinafter referred to as “the partnership firm”). 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 the other partners of the said partnership firm, executed a partnership deed on 27.06.2007, which contained a discretionary clause regarding “payment of interest on capital”, but no remuneration was payable to the partners. Upon a change in the constitution of the partnership firm, another partnership deed was executed on 01.04.2008, which contained a discretionary clause regarding “payment of interest on capital”, but no remuneration was payable to the partners. On 01.04.2009, the partnership deed was amended,

and it was mutually agreed that, with effect from 01.04.2009, “no interest on capital” would be payable to the partners of the firm. Thus, from Financial Year 2009-10 (relevant to A.Y. 2010-11) 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 its return of income for the A.Y. 2012-13 on 29.09.2012, declaring total income at Rs. NIL after claiming its deduction of Rs.15,78,260/- under Section 80IB(10) of the Act.

6. The case of the partnership firm for the A.Y. 2010-11 was selected for scrutiny assessment.

7. The partnership firm carried the assessment order for the A.Y. 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.

8. In the meantime, the case of the partnership firm for the A.Y. 2012-13 was also selected for scrutiny assessment, and various details were called for by the then Assessing Officer. Eventually, the assessment was framed by the then Assessing Officer under Section 143(3) of the Act vide order dated 19.03.2015, determining the assessed income at Rs.NIL after allowing the claim of deduction of Rs.15,78,260/- under Section 80IB(10) of the Act.

9. Thereafter, the appeal for the A.Y. 2010-11 preferred by the partnership firm came up for hearing 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 Income Tax Appeal No.2966/Ahd/2014, held that the income of Rs.76,25,000/- disclosed during the course of the survey was income from developing housing projects and that the partnership firm was eligible for deduction under Section 80IB(10) of the Act on such income.

10. The cases of the partnership firm for the A.Ys. 2011-12, 2012-13 and 2013-14 were reopened by issuance of notices under Section 148 of the Act in the month of March 2018. The partnership firm challenged the reopening of the assessments for the said years by filing writ petitions being Special Civil Application No.20821 of 2018 and allied matters. By order dated 09.02.2021, the reopening of the assessments and the impugned notices were quashed and set aside.

11. Subsequently, 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.

12. The petitioner filed his return of income for the year under consideration on 09.08.2019 in response to the notice issued under Section 148 of the Act and requested the respondent to supply a copy of the reasons recorded for reopening the assessment.

13. A copy of the reasons recorded for reopening the case of the petitioner was supplied vide letter dated 23.08.2019.

14. Learned Senior Counsel Mr. Tushar Hemani has submitted that the reopening of the assessment is required to

be quashed and set aside in view of the judgment of this Court dated 09.02.2021 passed in Special Civil Application No.20821 of 2018 and allied matters.

15. In response, learned Senior Standing Counsel Mr. Sanghani has urged that the impugned notice issued under Section 148 of the Act may not be required to be quashed and set aside at this stage, as the Assessing Officer of the Revenue has reason to believe that income chargeable to tax has escaped assessment, as contemplated under Section 147 of the Act. He submitted that the petitioner may be relegated to face the assessment proceedings in accordance with law.

16. Having heard the learned advocates for the respective parties and having perused the material on record, it is not in dispute that the partnership firm, M/s. Myhome Developers, of which the present petitioner is a partner, was subjected to reopening of the assessments for the A.Ys. 2011-12, 2012-13 and 2013-14 by issuance of notices under Section 148 of the Act on 25.03.2018.

17. The reasons assigned for reopening the assessments of the partnership firm and its partners, including the present petitioner, are as follows:

> *"The petitioner has not offered "interest on capital" and "remuneration", which are alleged to have been received from the partnership firm, as income."*

18. It was alleged by the respondent that certain information was received from the Deputy Commissioner of Income Tax, Circle 2(3), Surat, to the effect that the assessment in the case of the partnership firm had been completed, wherein the claim

of deduction under Section 80-IB(10) of the Act was restricted by disallowing the eligible amount of remuneration and interest payable to the partners. The case of the partnership firm for the A.Y. 2010-11 was selected for scrutiny assessment.

19. According to the Revenue, the petitioner was eligible to receive a sum of Rs.15,78,260/- by way of remuneration and interest from the partnership firm and, accordingly, such income had escaped assessment in the hands of the petitioner. At this stage, we may refer to and incorporate the observations made by the Coordinate Bench in the judgment dated 09.02.2021 passed in Special Civil Application No.20821 of 2018 and allied matters, in the case of the partnership firm.

20. In the said judgment, similar amounts were reflected and the reopening of the assessment was also premised on the partnership deed executed on 01.04.2008, which contained a clause providing for payment of interest on capital, but no remuneration was payable to the partners.

21. The partnership deed was subsequently amended, and it was mutually agreed that, with effect from 01.04.2009, no interest would be payable to the partners on their capital.

22. The Coordinate Bench in the judgment dated 09.02.2021 passed in Special Civil Application No.20821 of 2018 and allied matters, in the case of the partnership firm has observed thus :

> *"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 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 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 :

"(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, 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.

19. Having regard to the materials on record, we hold that, the contention raised by learned Sr. counsel Mr. Hemani *merits consideration that mere incorporation of clauses in the partnership deed for interest on the partner's capital and remuneration, does not signify that, interest and remuneration is to be paid to the partners mandatorily.*

20. The issue involved in the present case is squarely covered by the case of Alidhara Taxspin (P) Ltd. (supra) and applying the principles of law as propounded by this Court, we hold that, re-opening of the assessment is not justified.

21. For the foregoing reasons, all the writ applications succeed and are hereby allowed. The impugned notices dated 23.03.2018 are hereby quashed and set aside. All subsequent proceedings pursuant thereto also stand terminated."

23. Thus, in view of the observations recorded by the Coordinate Bench, after examining the clauses of the partnership deed dated 27.06.2007, which was subsequently amended with effect from 01.04.2009, we are inclined to allow the writ petitions by adopting the same reasoning, as the respondents have failed to convince us to take a different view.

24. Accordingly, the writ petitions are allowed. As a consequence, the impugned notices are hereby quashed and set aside. Rule is made absolute.

25. The Registry shall place a copy of this order in each of the connected matters.

Sd/-
(A. S. SUPEHIA, J)

Sd/-
(VAIBHAVI D. NANAVATI,J)

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