

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**R/SPECIAL CIVIL APPLICATION NO. 16304 of 2019****FOR APPROVAL AND SIGNATURE:****HONOURABLE MR. JUSTICE J.B.PARDIWALA****Sd/-****and****HONOURABLE MR. JUSTICE ILESH J. VORA****Sd/-**

1	Whether Reporters of Local Papers may be allowed to see the judgment ?	Yes
2	To be referred to the Reporter or not ?	Yes
3	Whether their Lordships wish to see the fair copy of the judgment ?	No
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	No

NISHARAHMAD VAJIRKHAN PATHAN**Versus****THE INCOME TAX OFFICER****Appearance:****MR. TUSHAR HEMANI, LD. SR. COUNSEL WITH MS VAIBHAVI K PARIKH(3238) for the Petitioner(s) No. 1****MRS MAUNA M BHATT(174) for the Respondent(s) No. 1****CORAM: HONOURABLE MR. JUSTICE J.B.PARDIWALA****and****HONOURABLE MR. JUSTICE ILESH J. VORA****Date : 18/01/2021**

ORAL JUDGMENT**(PER : HONOURABLE MR. JUSTICE J.B.PARDIWALA)**

1. By this writ application under Article 226 of the Constitution of India, the writ applicant has prayed for the following reliefs;

“(A) quash and set aside the impugned notice at Annexure-A to this petition;

(B) pending the admission, hearing and final disposal of this petition, to stay the implementation and operation of the notice at Annexure-A to this petition and stay the further proceedings for the Assessment Year 2012-13;

(C) any other and further relief deemed just and proper be granted in the interest of justice;

(D) to provide for the cost of this petition.”

2. For the sake of convenience, the following details may be stated as under;

Assessment Year	2012-13
Assessment History	143(1)
Date of notice under section 148	Beyond four years

3. It appears from the materials on record that the writ applicant is one of the partners in a partnership firm running in the name and style of “M/s. Shree Khodiyar Developers”. The said partnership firm purchased two immovable properties (Block Nos.533 and 534 respectively, situated at Moje Palaswada, Dabhoi, District: Baroda) vide the sale deeds dated 30th May, 2011 for the total sale consideration of Rs.30,01,548/- and Rs.53,25,452/- respectively. The writ applicant herein is a signatory to the said conveyance deed in

his capacity as a partner of the firm.

4. It is not in dispute that the sale consideration for the purchase of the two immovable properties, referred to above, was paid from the account of the partnership firm.

5. It appears that the partnership firm had not filed its return of income for the A.Y.2012-13.

6. The Income Tax Department thought fit to issue notice under Section 148 of the Act, 1961 to the writ applicant in his individual capacity proposing to reopen the assessment for the A.Y.2012-13 on the ground that the income chargeable to tax for the relevant year had escaped assessment within the meaning of Section 147 of the Act, 1961. The following reasons came to be assigned for the reopening of the assessment.

"1. Brief details of the Assessee:

Assessee is an individual and he has filed the return for the year under consideration declaring total income at Rs.3,64,000/- on 19.03.2013 vide acknowledgment no.580507250190313.

2. Brief details of information collected/received by the AO:

In this case the information was received from the ITO Ward-1(2)(4), Vadodara vide letter No. BRD/ITO/Wd.1(2)(4) Inf./2018-19 dated 18.02.2019 that assessee along with five others, has purchased two immovable property situated at Block No.533 and 534, Moje Palaswada, Dabhoi, Dist. Baroda for a consideration of Rs.30,01,548/- and Rs.53,25,452/- respectively.

3. Analysis of information collected/received.

It is seen that assessee has purchased two properties valuing Rs.88,13,060/- including registration and stamp

charges in which his share is $1/6^{\text{th}}$ (Rs.14,68,843).

4. Enquiries made by the AO as sequel to information collected/received:

The ITO, Ward-1(2)(4), Vadodara vide above mentioned letter forwarded the information and the addition made by the AO in case of one of the co-owner of the property is confirmed by the CIT (A) with a direction to ensure that assessment of unexplained investment in the hands of the other partners of the firm. Under these circumstances, there is no need to conduct separate enquiry for satisfaction of reason of escapement of income.

5. Findings of AO:

From the above facts available, it appears that assessee has made investment in the property to the tune of Rs.14,68,843/- as unexplained investment.

6. Basis of forming reason to believe and details of escapement of income:

Therefore, from the above facts I have reason to believe that entries to the extent of Rs.14,68,843/- has escaped assessment and I am satisfied that this is a fit case for reopening the assessment u/s.147 for A.Y.2012-13.

7. No information about any asset outside India.

8. Applicability of the provision of section 147/151 to the facts of the case.

In this case return of income was filed for the year under consideration but no assessment was made and the only requirement to initiate proceeding u/s.147 is reason to believe which has been recorded above.
(refer paragraph 6).

It is pertinent to mention here that in this case the assessee has filed return of income for the year under consideration but no assessment at stipulated u/s.2(40) of the Act was made and the return of income was only processed u/s.143(1) of the Act. In view of the above, the provisions of clause (b) of Explanation 2 to section 147

are applicable to facts of this case and the assessment year under consideration is deemed to be a case where income chargeable to tax has escaped assessment.

This case is within four years from the end of the assessment year under consideration. Hence, necessary sanction to issue the notice u/s. 148 has been obtained separately from joint commissioner of income tax as per the provisions of section 151 of the Act.

Or

In this case more than four years have lapsed from the end of assessment year under consideration. Hence, necessary sanction to issue notice u/s. 148 has been obtained separately from Principle Commissioner of Income Tax as per the provisions of section 151 of the Act."

7. The writ applicant responded to the above referred notice by filing his objections as under:-

"A. I have received letter dated 19.06.2019 stating reasons for reopening of the assessment for A.Y.2012-13 as under:

"Reason for reopening of assessment in case of Shri Nishar Ahemad Vazirkhan Pathan for A.Y.2012-13 u/s.147 of the Act.

1. *Brief details of the assessee:*

Assessee is an individual and he has filed the return for the year under consideration declaring total income of Rs.3,64,000/- on 19.03.2013 vide acknowledgment no.580507250190313.

2. *Brief details of information collected/received by the AO:*

In this case the information was received from the ITO Ward-1(2)(4), Vadodara vide letter no.BRD/ITO/Wd. 1(2)(4) Inf./2018-19 dated 18.02.2019 that assessee along

with five others, has purchased two immovable properties situated at Block No.533 and 534, Moje Palaswada, Dabhoi, Dist. Baroda for a consideration of Rs.30,01,548/- and Rs.53,25,452/- respectively.

4. Analysis of information collected/received.

It is seen that assessee has purchased two properties valuing Rs.88,13,060/- including registration and stamp charges in which his share is $1/6^{\text{th}}$ (Rs.14,68,843).

5. Enquiries made by the AO as sequel to information collected/received:

The ITO, Ward-1(2)(4), Vadodara vide above mentioned letter forwarded the information and the addition made by the AO in case of one of the co-owner of the property is confirmed by the CIT (A) with a direction to ensure that assessment of unexplained investment in the hands of the other partners of the firm. Under these circumstances, there is no need to conduct separate enquiry for satisfaction of reason of escapement of income.

6. Findings of AO:

From the above facts available, it appears that assessee has made investment in the property to the tune of Rs.14,68,843/- as unexplained investment.

7. Basis of forming reason to believe and details of escapement of income:

Therefore, from the above facts I have reason to believe that entries to the extent of Rs.14,68,843/- has escaped assessment and I am satisfied that this is a fit case for reopening the assessment u/s.147 for A.Y.2012-13.

B. On perusal of the above and without prejudice to the above and under protest, please note our following objections:

a. The reason for reopening inter-alia stated vide para 2 that "Brief details of information collected/received by the AO; in this case the information was received from the ITO Ward-1(2)(4), Vadodara vide letter

No.BRD/ITO/Wd. 1(2)(4) inf./2018-19 dated 18.02.2019 that assessee along with five others, has purchased two immovable property situated at Block No.533 and 534 Moje Palaswada, Dabhoi, Dist: Baroda for a consideration of Rs.30,01,548/- and Rs.53,25,452/- respectively”.

In this respect, I would like to inform you that I have not purchased the immovable property bearing Block No.534/1 moje Palaswada for total purchase consideration of Rs.53,25,452/- and Block No.533 Moje Palaswada for total purchase consideration of Rs.30,01,548/- vide registered sale deed no.1169 of 2011 and 1170 of 2011 respectively dated 30.05.2011 but the immovable property have been purchased by the M/s.Shree Khodiyar Developers. The purchase consideration was paid by the firm M/s. Shree Khodiyar Developers. Copy of the sale deeds and bank statements of M/s. Shree Khodiyar Developers are hereby enclosed for your verification.

It seems that the wrong information is collected/gathered. The property subject matter of the reopening was not purchased by me at all. The reason for reopening of the assessment itself is on wrong premise and fact and it is completely base on wrong reason, so reasons lacks validity. When the notice itself is thus, defective, it would have no effect of reopening on the assessment.

b. The reason for reopening inter-alia stated vide para 4 that “enquiries made by the AO as sequel to information collected/received. The ITO , Ward-1(2)(4), Vadodara vide above mentioned letter forwarded the information and the addition made by the AO in case of one of the co-owner of the property is confirmed by the CIT(A) with a direction to ensure that assessment of unexplained investment in the hands of the other partners of the firm. Under these circumstances there is no need to conduct separate enquiry for satisfaction of reason of escapement of income.

I would like to state that the addition made by the other AO and confirmed by the CIT(A) in case of other co-owner of the property, is not relevant. It cannot be the base for not making separate inquiry for the satisfaction of reason for reopening on the basis of escapement of income.

Because in case of the other co-owner Shri Hasitkumar Bhatt case while making inquiry about the source of the investment in the subject matter immovable property situated at Block No.534/1 moje Palaswada for total purchase consideration of Rs.53,25,452/- and Block No.533 moje Palaswada for total purchase consideration of Rs.30,01,548/- vide registered sale deed no.1169 of 2011 and 1170 of 2011 respectively dated 30.05.2011, the Income Tax Officer has appreciated the fact that the immovable property was purchased by M/s. Shri Khodiyar Developers. He has concluded the matter at inquiry level and has not initiated proceeding u/s.147 r.w.s. 148 of the Act. Copy of the inquiry letter and copy of reply is herewith enclosed.

Hence AO is required to inquire the matter independently of information received and to satisfy himself about reason for reopening. Hence, the reopening of the assessment under Section 147 of the Act stating that "there is no need to conduct separate enquiry for satisfaction of reason of escapement of income" is bad in law. The reasons to believe must have a material bearing on the question on escapement of income. It does not mean a purely subjective satisfaction of the assessing authority; the reason be held in good faith and cannot merely be a pretence. Thus the reason recorded is totally erroneous and invalid reason and is not in terms of Section 147 of the Act.

c. I have filed my return of income for the A.Y. 2012-13 dated 19.03.2013 vide E-filing Acknowledgment Number 580507250190313 disclosing fully and truly all material facts necessary for his assessment. I have also suo motu informed the Income Tax Officer, Ward-2, Mehsana that the immovable property of the subject matter was not purchased by me but it is purchased by the M/s. Shree Khodiyar Developers vide letter dated 19.03.2019. Copy of the acknowledged letter is enclosed herewith.

It seems that no cognizance has been taken of the letter submitted by me. When return has been filed disclosing fully and truly all material facts and letter explaining the things has already submitted. I am totally surprised to receive notice u/s.148 on the basis of purchase of immovable property. The reopening of an assessment after the lapse of many year is a serious matter. I can't

see any genuine reason to reopen the assessment after so long duration has been lapsed that too on the basis of untrue reason. The reopening of the assessment is without the authority permitted u/s.147 of the Act.

d. I have filed his return of income for the A.Y.2012-13 dated 19.03.2013 vide E-filing Acknowledgement Number 580507250190313 disclosing fully and truly all material facts necessary for my assessment. An intimation u/s.143(1) has been issued stating NIL Income Tax demand amount. Hence first accepting the return under Section 143(1) and thereafter issue notice to reopen the assessment is mere change of opinion. There shall not be any distinction between cases where assessments were framed earlier under Section 143(3) and cases where mere intimations were issued earlier under section 143(1). Otherwise an assessee in whose case the return was processed under section 143(1) would be 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. Thus change of opinion is not permissible u/s.147 of the Act.

C. In the case of GKN Driveshafts Ltd (259 ITR 19), the Hon. Supreme Court made remarks, when a notice u/s.148 of the Income Tax Act is issued, the proper course of action for the notice is to file return and if he so desires, to seek reasons for issuing notices. The AO is bound to furnish reasons within a reasonable time. On receipt of reasons, the noticee is entitled to file objections to issuance of notice and the AO is bound to dispose of the same by passing a speaking order."

8. The objections, referred to above, came to be overruled vide the order dated 3rd July, 2019 as under:-

"2.1 In this connection, with the objection raised in the para (B)(a) of letter dated 03.07.2019, assessee have stated that the property was purchased by M/s. Shree Khodiyar Developers (Firm) and not by me. It is seen that all the partners have signed the registered deed. Further

in this matter the copy of reason was provide in which it was clearly mentioned that CIT(A) vide order dated 25.10.2017 have confirmed the addition of Rs.14,68,843/- in hand of one of the partners of Firm of Shree Khodiyar Developers (Shri Manish Rameshwarprasad Guar). As the assessee Shri Manish Rameshwarprasad Gaur has not contended in front of the Ld. CIT(A), the genuineness of addition is confirmed. Further in the para (b.1.) of the assessment order of the said assessee, the AO has mentioned that Firm has not submitted its return of income for the year under consideration, so the investment remain unexplained. In this case the reopening is as per the provisions of the I.T. Act, 1961 is applicable.

2.2 Para (B)(b) the assessee has raised issued of to inquire the matter independently of information received and to satisfy himself. In this it is to state that the information was already made available to the office and in return no any capital gain was disclosed for the A.Y.2012-13.

2.3 In relation to para B(c) it is to state that as per the I.T. Act, 1961 the cases can be reopened for not more six years, have elapsed from the end of the relevant assessment year. Therefore, it is stated that the case is reopened as per the provisions of the I.T. Act, 1961 and it is within the time allowed.

2.4 In relation to Para B(d) of the letter dated 03.07.2019, it is to state that in this case the law is enforceable as per the provisions of the I.T. Act, 1961. Further, in this matter it is to state that material is available on which the addition is made and in this there is no any change of opinion as no any assessment was made previously for the A.Y.2012-13.

3. Disposal of objection:

I have given due consideration to the submission of the assessee. However, the same is not acceptable therefore being disposed of by way of passing a speaking order on the basis of the above facts. Further it is to also to state that in place of the partner Shri Manish Rameshwarprasad Gaur has option to approach Hon'ble ITAT against addition made by the Ld. CIT (A). Once one

of the partner addition is confirmed by the Ld. CIT(A), and the partner has no objection, the same rule is applicable to all the partners. On this basis and other facts the objection raised by the assessee is disposed of.

4. Reason to believe:-

The belief that the AO was not arbitrary or irrational. The belief that income has escaped assessment was based on reasons which were relevant and material also available on the records. There exists a rational and intelligible nexus between the reasons and belief therefore. There was independent formation of opinion by the AO as per the IT Act, 1961 that income has escaped assessment as the addition is confirmed in case of one of the partner. Therefore, the notice of reopening is sustainable.

5. To conclude, it is emphasized that the reopening in the case of the assessee is valid in the light of the facts and the established law. The procedural requirements such as proper recording of reasons, service of notices and forwarding of reasons, have been met. In addition, the matters raised by the assessee have been dealt with in an elaborate manner. It is requested that the assessee/its AR to co-operate in the re-assessment proceedings. The above order is passed in view of the observation of the Hon'ble Supreme Court in the case of GKN Diveshafts (India) Ltd. vs. ITO and others (259 ITR 19) (SC)."

9. Being dissatisfied with the aforesaid action, the writ applicant is here before this Court with the present writ application.

Submissions on behalf of the writ applicant:-

10. Mr. Tushar Hemani, the learned senior counsel assisted by Ms. Vaibhavi Parikh, the learned counsel appearing for the writ applicant submitted that the Department seeks to reopen the assessment broadly on the ground that in the case of one

of the partners of the partnership firm, the investments were found to be not satisfactorily explained. The writ applicant, being a co-partner, has also not been able to explain the investments during the year under consideration. It is submitted that the notice under Section 148 is not sustainable in law as the properties in question were purchased by the partnership firm wherein the writ applicant is one of the partners. The writ applicant, in his individual capacity, is not the purchaser of the two immovable properties.

11. It is argued that the condition precedent for resorting to reopening is that there must be “escapement of income chargeable to tax”. In the absence of escapement of any income chargeable to tax, it is not open for the Department to reopen the case of the assessee.

12. The learned senior counsel would submit that the Department has failed to appreciate the following:-

“The writ applicant has not purchased the properties in question.

Rather, such properties were purchased by the partnership firm namely M/s. Khodiyar Developers”, wherein the writ applicant is a partner. This fact was conveyed to the respondent immediately upon receipt of the reasons for reopening.

Even payment has been made by the said firm through the banking channel.

The writ applicant was a signatory to the said conveyance deeds in the capacity of partner of the said firm.

Thus, the properties in question were purchased by firm wherein writ applicant is a partner and not by the writ

applicant.”

13. It is argued that it is the partnership firm which derived lawful title over the properties in question. In such circumstances, no addition can be made in respect of the alleged unexplained investment in the hands of the writ applicant.

14. It is argued that merely because in the hands of one of the partners, the investment is treated as unexplained, would not necessarily mean that such investment should also be treated as unexplained in the hands of the writ applicant. The Department seeks to reopen the assessment merely on the ground that certain investment made by some other person has remained unexplained.

15. In the last, Mr. Hemani submitted that even otherwise there cannot be any “reason to believe” for the following reasons:-

“Investments in question were made by the partnership firm and not by the writ applicant.

Such investments were made through banking channel.

The mere fact that certain investment has been made by an assessee cannot be a ground so as to have reason to believe that income chargeable to tax has escaped assessment in the hands of such assessee.

If such a stand of the Department is entertained, then it would result into a very dangerous proposition whereby in each and every case where some investment is made, the case of such assessee shall be reopened merely on the alleged count that such investments are unexplained. That has never been the intention of the Legislature.”

16. In such circumstances, referred to above, Mr. Hemani prays that there being merit in his writ application, the same may be allowed and the impugned notice may be quashed and set aside.

Submissions on behalf of the Revenue:-

17. Ms. Mauna Bhatt, the learned senior standing counsel appearing for the Revenue has vehemently opposed this writ application. She would submit that the writ application has been preferred at a premature stage inasmuch as only a notice under Section 148 read with section 147 of the Act has been issued. It is argued that in the event if the final assessment order is passed, then the assessee can always prefer an appeal against such order before the CIT (A) and, thereafter, before the Appellate Tribunal. Ms. Bhatt took the Court through the averments made in the affidavit-in-reply upon which due reliance has been placed on behalf of the Revenue.

"4. The facts are that in this case an information was received from the ITO, Ward (1)(2)(4), Vadodara vide letter dated 18.2.2019; in relation to the properties purchased by the six co-owners i.e. Shri Nisharahmed Vajir Pathan, Shri Manish R. Gaur, Shri Manoj H. Patel, Shri Manish Mulchand Patel, Shri Hashitkumar D. Bhatt and Shri Ganpat Amrutlal Patel at Block Nos.533, 534 mouje Palaswada, Dabhoi, Dist: Vadodara of Rs.39,01,548/- and Rs.53,25,452/- respectively. The assessee had also paid stamp duty and registration charges of Rs.4,86,060/-.

5. It is submitted that the case of one of the partner Shri Manish Rameshbhai Gaur was selected under the CASS for A.Y.2012-13 and addition of Rs.14,68,843/- was made for unexplained investment of the said properties, During assessment proceedings of Shri Manish Gaur, it was contended by him before the AO that the properties

belong to a firm however Shri Manishbhai Gaur failed to prove that properties were purchased by firm viz. M/s. Shri Khodiyar Developers bearing PAN No.ABWFS2637J.

6. *It is submitted that as observed in the assessment order in the case of Shri Manish Gaur, the firm viz. Shri Khodiyar Developers has not filed its return of income for the year under consideration. In the said assessment order, AO had further observed that firm is represented by the partners and firm has not filed its return of income for the year under consideration and therefore, investment in purchase of land is treated as unexplained. As the assessee viz. Manish Gaur failed to prove the purchase of properties in question by the firm the share of the property was equally divided and Rs.14,68,843/- (1/6th of Rs.88,13,060/- total of the amount paid as mentioned has been added to the total income for A.Y.2012-13 in case of Shri Manish R. Gaur. Thereafter, Shri Manish Gaur filed an appeal before the CIT (2), Vadodara but he did not appear and CIT(A)(2), Vadodara framed assessment under order dated 25.10.2017. In the order dated 25.10.2017 it has been observed by CIT(A) that the AO shall ensure assessment of unexplained investment in the hands of the other partners of the firm.*

7. *It is submitted that order of CIT(A) being tangible material in the hands of the AO of the petitioner- assessee, the AO verified the details and reopened the assessment, which is valid and legal.*

8. *It is further submitted that the contention of the petitioner that firm has purchased the property is not correct. As observed in case of Mahesh Gaur no evidence was placed on record to justify the ownership by the firm. Moreover, the firm has not filed the return of income for A.Y.2012-13 and therefore, the investment could not be verified in hands of the firm. In this event merely when there is no return of income by the firm nor any evidence suggesting investment made by the firm i.e. M/s.Shri Khodiyar Developers, it is clear that investment has been made by the respective co-owners from their unexplained income.*

9. *It is submitted that in this case original assessment was framed under Section 143(1), therefore, there was no opinion formed at the original assessment stage. Even*

the information received which was the tangible material was not available at the time of original assessment.

10. It is submitted that the contention of the petitioner that there is no escapement of income chargeable to tax since the property in question were purchased by partnership firm wherein the petitioner is partner is without any basis. As the firm has not filed its return of income, there is no evidence to show that the property was purchased by firm. Moreover, the order of CIT(A) in the case of co-owner is the tangible material in the hands of AO to form a reasonable belief that income chargeable to tax has escaped assessment.

11. The contention of the petitioner that there is no reason to believe that income chargeable to tax has escaped assessment is not correct. As stated in the earlier para, assessment framed in case of one of the co-owners which has been upheld by the order of CIT(A) supported by the fact that no return has been filed by the partnership firm, is the tangible material to form belief that income chargeable to tax has escaped assessment.

12. It is submitted that the contention of the petitioner that reopening is based on the borrower satisfaction is not correct. As stated earlier, it is reiterated that AO based on the information received verified the details. Even in the order of the CIT(A) it has been directed to verify the details in the case of co owners. There is no evidence to support that the purchase was made by the partnership firm. Therefore, the belief formed by the AO is based on the information available on record and sufficient to form a belief that income chargeable to tax has escaped assessment. It is further submitted that at this stage A.O. Is not required to conclusively prove the escapement of income. In the present case there is tangible material available in the hands of the AO to form a belief that income chargeable to tax has escaped assessment and therefore, notice under Section 148 is legal and valid notice."

18. On 7th January, 2021, this Court passed the following order:-

“This matter was heard yesterday and was adjourned to come up today to enable Ms. Bhatt, the learned Senior Standing Counsel appearing for the Revenue to take appropriate instructions with regard to the other partners of the partnership namely M/s. Shree Khodiyar Developers. Ms. Bhatt has been able to collect the necessary information and would like to place it on record by way of an additional affidavit. Post this matter on 18th January 201 on top of the Board. By that time, the additional affidavit shall be placed on the record of the case.”

19. Pursuant to the aforesaid order passed by this Court dated 7th January, 2021, an additional affidavit-in-reply has been filed on behalf of the Revenue stating as under:-

“1. This additional affidavit is filed to place further information/documents on record. It is submitted that as stated in the affidavit dated 24.11.2019, income chargeable to tax has escaped assessment and therefore, notice under Section 148 was issued for A.Y.2012-13. The assessee had purchased two properties valuing Rs.88,13,060/- where his share is 1/6th in the property. Though purchased, the said property was not shown in the return of income filed. The objection of the assessee that the property was purchased by firm and not by partners was considered in the order disposing of objections, therefore, investment remained unexplained. Thus, there is no illegality in issuing notice to the assessee.

2. It is submitted that M/s. Khodiyar Developers is partnership firm consisting of five partners. Out of these five partners in case of partner of M/s.Shri Manish Rameshwarprasad Gaur and Shri Ganpatbhai Amthabhai Patel reassessment proceedings were initiated. The additions u/s.69 of the Act were made as unexplained investment in both the cases and CIT(A) has confirmed the addition made by the AO. In other three partners reassessment proceedings were not initiated. Details of assessment proceedings in relation to all five partners of M/s.Khodiyar Developers is annexed hereto and marked as Annexure-R.1.

3. *It is submitted that income chargeable to tax has escaped assessment. No scrutiny was done at the original assessment stage. Moreover in absence of return filed by the firm, verification was not done at the original assessment stage. Therefore, if the Hon'ble Court is of the opinion that the notice under Section 148 ought to have been issued to the firm and not to the partners then it is submission of the respondent that in view of Section 150 of the Act, findings/directions may be issued so that appropriate proceedings under the provisions of the Act can be initiated against the firm.*

4. *In view of the above, there is no illegality in initiation of the proceedings u/s.148 of the Act."*

20. Ms. Bhatt vehemently submitted that the Department could be said to be justified in reopening the assessment of the writ applicant for the relevant year as the partnership firm had failed to file its return of income. The Department wants to understand the source of funds pumped in by the writ applicant in the partnership firm. It has not been explained by the writ applicant in his return of income for the relevant year. It is pointed out that the assessment was under Section 143(1) of the Act and not Section 143(3) of the Act.

21. In the last, Ms. Bhatt submitted that if this Court is inclined to hold that the reopening is not sustainable in law, then the Department may be permitted to invoke Section 150 of the Act for the purpose of proceeding against the partnership firm.

22. In such circumstances, referred to above, Ms. Bhatt prays that there being no merit in this writ application, the same may be rejected.

23. Having heard the learned counsel appearing for the parties and having gone through the materials on record, the following two questions fall for our consideration;

(I) Whether the impugned notice of reassessment issued under Section 148 of the Act is sustainable in law on the reasons as assigned by the Department? and

(ii) Whether Section 150 of the Act has any applicability so far as the present case is concerned?. In other words, whether by virtue of Section 150 of the Act, the Department can now proceed against the partnership firm?

24. The following principles of law are discernible from the various decisions of the Supreme Court and the High Courts so far as reopening of the assessment under Section 147 of the Act is concerned.

(i) The Court should be guided by the reasons recorded for the reassessment and not by the reasons or explanation given by the Assessing Officer at a later stage in respect of the notice of reassessment. To put it in other words, having regard to the entire scheme and the purpose of the Act, the validity of the assumption of jurisdiction under Section 147 can be tested only by reference to the reasons recorded under Section 148(2) of the Act and the Assessing Officer is not authorized to refer to any other reason even if it can be otherwise inferred or gathered from the records. The Assessing Officer is confined to the recorded reasons to support the assumption of jurisdiction. He cannot record only some of the reasons and keep the others upto his sleeves to be disclosed before the Court if his action is ever challenged in a

court of law.

(ii) At the time of the commencement of the reassessment proceedings, the Assessing Officer has to see whether there is prima facie material, on the basis of which, the department would be justified in reopening the case. The sufficiency or correctness of the material is not a thing to be considered at that stage.

(iii) The validity of the reopening of the assessment shall have to be determined with reference to the reasons recorded for reopening of the assessment.

(iv) The basic requirement of law for reopening and assessment is application of mind by the Assessing Officer, to the materials produced prior to the reopening of the assessment, to conclude that he has reason to believe that income has escaped assessment. Unless that basic jurisdictional requirement is satisfied-a postmortem exercise of analysing the materials produced subsequent to the reopening will not make an inherently defective reassessment order valid.

(v) The crucial link between the information made available to the Assessing Officer and the formation of the belief should be present. The reasons must be self evident, they must speak for themselves.

(vi) The tangible material which forms the basis for the belief that income has escaped assessment must be evident from a reading of the reasons. The entire material need not be set out. To put it in other words, something therein, which is critical to the formation of the belief must be referred to. Otherwise, the link would go missing.

(vii) The reopening of assessment under Section 147 is a potent power and should not be lightly exercised. It certainly cannot be invoked casually or mechanically.

(viii) If the original assessment is processed under Section 143(1) of the Act and not Section 143(3) of the Act, the proviso to Section 147 will not apply. In other words, although the reopening may be after the expiry of four years from the end of the relevant assessment year, yet it would not be necessary for the Assessing Officer to show that there was any failure to disclose fully or truly all the material facts necessary for the assessment.

(ix) In order to assume jurisdiction under Section 147 where assessment has been made under sub-section (3) of section 143, two conditions are required to be satisfied;

(i) The Assessing Officer must have reason to believe that the income chargeable to tax has escaped assessment;

(ii) Such escapement occurred by reason of failure on the part of the assessee either (a) to make a return of income under section 139 or in response to the notice issued under sub-section (1) of Section 142 or Section 148 or (b) to disclose fully and truly all the material facts necessary for his assessment for that purpose.

(x) The Assessing Officer, being a *quasi judicial* authority is expected to arrive at a subjective satisfaction independently on an objective criteria.

(xi) While the report of the Investigation Wing might constitute the material, on the basis of which, the Assessing Officer forms the reasons to believe, the process of arriving at such satisfaction should not be a mere repetition of the report

of the investigation. The reasons to believe must demonstrate some link between the tangible material and the formation of the belief or the reason to believe that the income has escaped assessment.

(xii) Merely because certain materials which is otherwise tangible and enables the Assessing Officer to form a belief that the income chargeable to tax has escaped assessment, formed part of the original assessment record, *per se* would not bar the Assessing Officer from reopening the assessment on the basis of such material. The expression “tangible material” does not mean the material alien to the original record.

(xiii) The order, disposing of objections or any counter affidavit filed during the writ proceedings before the Court cannot be substituted for the “reasons to believe.

(xiv) The decision to reopen the assessment on the basis of the report of the Investigation Wing cannot always be condemned or dubbed as a fishing or roving inquiry. The expression “reason to believe” appearing in Section 147 suggests that if the Income Tax Officer acts as a reasonable and prudent man on the basis of the information secured by him that there is a case for reopening, then Section 147 can well be pressed into service and the assessments be reopened. As a consequence of such reopening, certain other facts may come to light. There is no ban or any legal embargo under Section 147 for the Assessing Officer to take into consideration such facts which come to light either by discovery or by a fuller probe into the matter and reassess the assessee in detail if circumstances require.

(xv) The test of jurisdiction under Section 143 of the Act is not the ultimate result of the inquiry but the test is whether the

income tax officer entertained a “bona fide” belief upon the definite information presented before him. Power under this section cannot be exercised on mere rumours or suspicions.

(xvi) The concept of “change of opinion” has been treated as a built in test to check abuse. If there is tangible material showing escapement of income, the same would be sufficient for reopening the assessment.

(xvii) It is not necessary that the Income Tax Officer should hold a quasi judicial inquiry before acting under Section 147. It is enough if he on the information received believes in good faith that the assessee's profits have escaped assessment or have been assessed at a low rate. However, nothing would preclude the Income Tax Officer from conducting any formal inquiry under Section 133(6) of the Act before proceeding for reassessment under Section 147 of the Act.

(xviii) The “full and true” disclosure of the material facts would not include that material, which is to be used for testing the veracity of the particulars mentioned in the return. All such facts would be expected to be elicited by the Assessing Officer during the course of the assessment. The disclosure required only reference to those material facts, which if not disclosed, would not allow the Assessing Officer to make the necessary inquiries.

(xix) The word “information” in Section 147 means “instruction or knowledge derived from the external source concerning the facts or particulars or as to the law relating to a matter bearing on the assessment. An information anonymous is information from unknown authorship but nonetheless in a given case, it may constitute information and not less an information though anonymous. This is now a recognized and accepted source for

detection of large scale tax evasion. The non-disclosure of the source of the information, by itself, may not reduce the credibility of the information. There may be good and substantial reasons for such anonymous disclosure, but the real thing to be looked into is the nature of the information disclosed, whether it is a mere gossip, suspicion or rumour. If it is none of these, but a discovery of fresh facts or of new and important matters not present at the time of the assessment, which appears to be credible to an honest and rational mind leading to a scrutiny of facts indicating incorrect allowance of the expense, such disclosure would constitute information as contemplated in clause (b) of Section 147.

(xx) The reasons recorded or the material available on record must have nexus to the subjective opinion formed by the A.O. regarding the escapement of the income but then, while recording the reasons for the belief formed, the A.O. is not required to finally ascertain the factum of escapement of the tax and it is sufficient that the A.O. had cause or justification to know or suppose that the income had escaped assessment [vide *Rajesh Jhaveri Stock Brokers (P.) Ltd.*'s case (supra)]. It is also well settled that the sufficiency and adequacy of the reasons which have led to the formation of a belief by the Assessing Officer that the income has escaped the assessment cannot be examined by the court.

25. The powers under [section 147](#) of the Act are special powers and peculiar in nature where a quasi-judicial order previously passed after full hearing and which has otherwise become final is subject to reopening on certain grounds. Ordinarily, a judicial or quasi-judicial order is subject to appeal, revision or even review if statute so permits but not liable to

be re-opened by the same authority. Such powers are vested by the Legislature presumably in view of the highly complex nature of assessment proceedings involving large number of assessees concerning multiple questions of claims, deductions and exemptions, which assessments have to be completed in a time frame. To protect the interest of the revenue, therefore, such special provisions are made under [section 147](#) of the Act. However, it must be appreciated that an assessment previously framed after scrutiny when reopened, results into considerable hardship to the assessee. The assessment gets reopened not only qua those grounds which are recorded in the reasons, but also with respect to entire original assessment, of course at the hands of the revenue. This obviously would lead to considerable hardship and uncertainty. It is precisely for this reason that even while recognizing such powers, in special requirements of the statute, certain safeguards are provided by the statute which are zealously guarded by the courts. Interpreting such statutory provisions courts upon courts have held that an assessment previously framed cannot be reopened on a mere change of opinion. It is stated that power to reopening cannot be equated with review.

26. At the cost of repetition, we shall once again look into the reasons for the issue of notice under Section 148 of the Act. The partnership firm is said to have purchased two immovable properties for total sale consideration of Rs.83,13,060/- including the registration and stamp charges. According to the Assessing Officer, the 1/6th share of the writ applicant herein, as one of the partners, comes to Rs.14,68,843/-. The Assessing Officer proceeds on the footing as if all the partners

equally contributed for the purchase of the two properties. The Assessing Officer, thereafter, proceeds on the footing that the investment of Rs.14,68,843/- remains unexplained by the writ applicant in his individual return filed by him in the ITR Form:-ITR-4 for A.Y.201-13. The Assessing Officer, thereafter, proceeds on the footing that in the case of a co-partner, the assessment was reopened and an appeal before the CIT(A) is pending against the assessment order. In such circumstances, referred to above, the Assessing Officer, ultimately, concludes that the writ applicant had failed to fully and truly disclose his investment of his share in the two properties in his individual return of income.

27. It is also the case of the Revenue that the partnership firm had failed to file its return for the relevant assessment year. Of course, in this regard, the Department thought fit not to initiate any proceedings against the partnership firm including any criminal prosecution.

28. A lot was argued on behalf of the Revenue as regards the rights and liabilities of a partnership firm and also as regards the legal status of a partnership firm. We may give a fair idea in this regard by referring to few judgments.

29. In **Addanki Narayanappa v. Bhaskara Krishnappa**, 1966 AIR 1300, the Supreme Court, while considering a question of similar nature, held as under (page 1303) :

"From a perusal of these provisions it would be abundantly clear that whatever may be the character of the property which is brought in by the partners when the partnership is formed or which may be acquired in the course of the business of the partnership, it becomes

the property of the firm and what a partner is entitled to is his share of profits, if any, accruing to the partnership from the realisation of this property, and upon dissolution of the partnership to a share in the money representing the value of the property. No doubt, since a firm has no legal existence, the partnership property will vest in all the partners and in that sense every partner has an interest in the property of the partnership. During the subsistence of the partnership, however, no partner can deal with any portion of the property as his own. Nor can he assign his interest in a specific item of the partnership property to any one. His right is to obtain such profits, if any, as fall to his share from time to time and upon the dissolution of the firm to a share in the assets of the firm which remain after satisfying the liabilities set out in Clause (a) and sub-clauses (i), (ii) and (iii) of Clause (b) of [Section 48](#)."

30. So also in [***Malabar Fisheries Co. v. CIT***](#), 1980 AIR 176, the Supreme Court, while considering the provisions of [Sections 2\(47\)](#), [34\(3\)\(b\)](#) and [155\(5\)](#) of the Income-tax Act, held as under (head-note) :

"A partnership firm under the [Indian Partnership Act, 1932](#), is not a distinct legal entity apart from the partners constituting it and equally in law the firm as such has no separate rights of its own in the partnership assets and when one talks of the firm's property or the firm's assets all that is meant is property or assets in which all partners have a joint or common interest. It cannot, therefore, be said that, upon dissolution, the firm's rights in the partnership assets are extinguished. It is the partners who own jointly or in common the assets of the partnership and, therefore, the consequence of the distribution, division or allotment of assets to the partners which flows upon dissolution after discharge of liabilities is nothing but a mutual adjustment of rights between partners and there is no question of any extinguishment of the firm's rights in the partnership assets amounting to a transfer of assets within the meaning of [Section 2\(47\)](#) of the Income-tax Act, 1961. There is no transfer of assets involved even in the sense of any extinguishment of the firm's rights in the

partnership assets when distribution takes place upon dissolution."

31. The Madras High Court had an occasion to consider a question of similar nature while dealing with [Section 5\(1\)\(iv\)](#) of the Wealth-tax Act, 1957, in **R. Venkatavaradha Reddiar R. v. CWT**, [1995] 214 ITR 76. In that decision, this court after considering all the decisions on this aspect, culled out the legal principles in the following manner (page 90) :

"(1) a firm has no legal existence and as such it cannot hold any property ;

(2) it is the partners, who own the partnership property as such;

(3) partners alone should have the benefit of the exemption under [Section 5\(1\)\(iv\)](#), when their individual assessments are taken up to the extent of their respective shares in the net wealth of the partnership firm ;

(4) the mere fact that a partner cannot claim to be entitled to any portion of the property owned by a firm as exclusively belonging to him will not completely disentitle him from seeking the benefit of exemption under [Section 5\(1\)\(iv\)](#) of the Act, so long as he is the owner of the house property even though as a partner in a firm ;

(5) For the purpose of the exemption under [Section 5\(1\)\(iv\)](#), it is not necessary that the partner should be able to say that the property or any specific part thereof exclusively belongs to him."

32. The Madhya Pradesh High Court in **[Ratansi Narayan Patel v. CIT](#)**, [1988] 173 ITR 547, while considering the provisions of [Sections 2\(29\)](#), [2\(42A\)](#) and [45](#) of the Income-tax Act, 1961, held as under (headnote) :

"The whole concept of partnership is to embark upon a joint venture and for that purpose to bring in as capital, money or even property including immovable property

and once that is done, whatever is brought in would cease to be the exclusive property of the person who brought it in. A partner has no exclusive right over any such property and he cannot also exercise any right in such property even to the extent of his share in the partnership because his right during the subsistence of the partnership is to get his share of profits from time to time as may be agreed upon among the partners and after dissolution of the firm to get the value of his share in the net partnership assets as on the date of dissolution. These are restrictions over the right of ownership of partners and they do not militate against the legal position that the partners collectively own the partnership property. The property really vests in the partners collectively in proportion to their shares."

33. In **CIT v. K. Saraswathi Ammal**, [1981] 127 ITR 404, this court, while considering the provisions of Section 85 of the Income-tax Act, 1961, as modified by Section 31 of the Finance Act, 1968, extracted a passage, which runs as under (page 407) :

"The property of the firm' is statutorily defined in Section 14 of the Partnership Act ; the property that has been brought in by the partners and the property that is acquired by a firm will be the property of the firm. According to Section 14 of the Partnership Act, when one talks of the property of the firm, it has to be remembered that a firm as such is not a legal entity ; nor can a firm as such, according to the English concept, hold property. This is the reason why the Supreme Court in two decisions held that when the firm is dissolved and the partnership assets are distributed among the partners, there will be no transfers of the property of the firm in favour of the partners so as to attract the provisions of the Income-tax Act, for capital gains. The decisions are CIT v. Bankey Lal Vidya , CIT v. Dewas Cine Corporation . These two decisions clearly show that in general law, the firm cannot be treated as the owner of the shares in Kalinga Tubes Ltd. But, for the purpose of the Income-tax Act, the firm has been made a legal entity just as a person, as a firm is included in the definition of the term 'person' under the Income-tax Act. The firm is a separate

entity for the purpose of assessment and, therefore, a firm will be entitled to the exemption under [Section 85](#). Whatever that be, we are not concerned with that now, and we do not wish to express any opinion on that matter. As far as the individuals who make up the partners of the firm are concerned, we have no doubt that the properties, which are called the assets of the firm, really vest in the partners of the firm. This has also been said by the Supreme Court in the decision in [Narayanappa v. Bhaskara Krishnnappa](#), ."

34. In [K.I. Viswambharan and Brothers v. CIT](#), [1973] 91 ITR 588, a Full Bench of the Kerala High Court, while considering the provisions of [Sections 45](#), [54\(i\)](#) and [114](#) of the Income-tax Act, 1961, [Section 2](#) of the Finance (No. 2) Act, 1967, and Section. 14 of the [Indian Partnership Act](#), 1932, held (head-note) :

"That for purposes of assessment to tax, the [Income-tax Act](#) treats a registered firm as an entity distinct from the partners. Under the specific provisions of the [Partnership Act](#) relating to the property of a firm and the judicial pronouncements on the matter, a firm is legally competent to own or hold property and also to deal with such property. Any property or gain derived by a firm in pursuance of the sale of a capital asset, owned or held by the firm is, therefore, exigible to tax in accordance with the relevant provisions of the [Income-tax Act](#)."

35. Thus, the ratio discernible from the aforesaid case law is that the abstract proposition that the partnership is not a legal entity is not correct. It is true that under the law of partnership, a firm has no legal existence apart from its partners and it is merely a compendious name to describe its partners. But under the Income Tax Law, the position is different. The firm and the partners are distinct assessable entities. The law has thus for some specific purposes relaxed its general rigid notions and extended a limited personality to

a firm. There is nothing in the partnership law to suggest that a firm cannot be treated as an entity for the purpose of dealing with the property.

36. Bearing the aforesaid in mind, we need to consider the question whether or not the writ applicant was obliged in law to disclose the investment alleged to have been made by him in the partnership firm for the purpose of the purchase of the two immovable properties. The answer to such question is whether there had been a failure on the part of the writ applicant to disclose fully and truly all material facts necessary for the assessment. We are of the view that it would depend on the nature of the obligation which is enjoined upon the assessee in this regard by virtue of various provisions of the Income Tax Act. If an assessee fails to disclose or furnish to the Assessing Officer, all such facts and other related information which he is obliged under the law to disclose, and which are necessary for the purpose of making his assessment, then surely he can be accused of having failed to disclose fully and truly all the material facts for the purpose of his assessment. It is a trite law by now commencing from the decision of the Supreme Court rendered in the case of *Calcutta Discount Co. Ltd. vs. ITO*, (1961) 41 ITR 191 that it is always the duty of an assessee to disclose fully and truly all primary facts, but not inferential facts, which are necessary and relevant for the purpose of making the assessment by the Assessing Officer. But, as stated above, the nature of disclosure that the assessee is obliged to do so by the statute will necessarily depend upon the nature of information or disclosure that the assessee is obliged to do so by the statute.

In the instant case, originally, the assessee filed his return in Form ITR-4 wherein the disclosure of investment is not required to be disclosed as writ applicant had disclosed his income on presumptive basis under Section 44AD of the Act and his assessment was completed accordingly for the relevant assessment year. We are of the view that the writ applicant was not obliged to furnish any information as regards the partnership firm or the investment if any in the partnership firm. This issue, according to us, is not, at all, germane for the purpose of Section 148 of the Act.

37. After the receipt of the return of income either under [Section 139\(1\)](#) or under Section 139(2) the ITO has power under [Section 143\(1\)](#) to make the assessment without requiring the presence of the assessee or production by him of any evidence. This means the ITO believes the assessee and accepts the returned income without any inquiry about the correctness or completeness of the return of income filed. If the ITO is not satisfied about the correctness or completeness of the income returned, he has been empowered under two different provisions of the Act to embark upon an enquiry. One provision is [Section 142\(1\)](#) of the Act which empowers the ITO to issue a notice to an assessee and call for such information on such points as he considers necessary for the purpose of making assessment. Once such notice is issued by the ITO under [Section 142\(1\)](#) it is incumbent upon the assessee to furnish and disclose all such information as is required and demanded by the ITO. The other provision is [Section 143\(2\)](#) of the Act which also empowers the ITO to issue a notice to any person who has filed the return either under [Section 139\(1\)](#) or

under [Section 139\(2\)](#) to appear or cause appearance and to produce before him any evidence as the assessee may rely in support of the return filed. The notices under [Section 142\(1\)](#) and under [Section 143\(2\)](#) are issued to ensure that the income declared in the return is correct and complete. After issue of notices under Sections 142 and 143 the ITO is then expected to make the assessment after taking into consideration such evidence as the person concerned wanted to produce as also such other evidence as he might have directed the assessee to produce on the points raised by him. On analysing these provisions we see that the beginning is made in this process of assessment by the filing of return by the assessee and he is obliged and commanded to furnish such particulars of his income as are laid down and mentioned in the various columns of the return of income form prescribed by the relevant rules. In other words, the assessee is required to truly and fully supply the information and other particulars sought for in the various columns of the prescribed form of return of income. Now if the Assessing Officer was of the opinion that the Information conveyed as per the prescribed form of return of income was complete, correct and sufficient for making the assessment, he could proceed and assess the person filing the return on the basis of such return and at that stage no question, of the assessee furnishing any information other than that required to be furnished in the prescribed form of return, could arise. It, therefore, follows that if the assessee discloses true and full information which he is required to supply in the prescribed form of return no question of his failing to disclose any other particulars of his income at that stage could arise. Then the next stage in the process of making an assessment upon a person was where a return is filed by him in the

prescribed form but the ITO felt that the information conveyed by such person in the prescribed return form was inadequate and required further inquiry and verification for the purpose of making assessment, the ITO then acts by issuing notices, requiring the assessee to produce such evidence, material, particulars or information either upon his direction under [Section 142\(1\)](#) or under [Section 143\(2\)](#) directing the assessee to produce such evidence as he (assessee) may rely in support of the return filed. It is at this third and crucial stage when the assessee is required by the ITO to elucidate on some particular points that the assessee has been obliged to disclose truly and fully all necessary facts in respect of those points to enable the assessing officer to make a valid and proper assessment. Therefore, unless this third stage was reached there can be no obligation on an assessee to disclose and produce any evidence in respect of points other than those in respect of which the assessee was, as provided in the form of return, obliged to furnish.

38. As far back as 1969 the Supreme Court was concerned with a question whether or not an assessee is bound to disclose in its return information which is relevant for his assessment but which is not specifically required to be supplied or furnished in the prescribed form, came up for consideration in the case of V.D.M.R.M.RM. Muthiah Chettiar (supra). In that case one Muthiah who had been assessed to income-tax in respect of his share in the income of a firm as also income from other sources, while disclosing the amount of income from the firm received by his sons did not disclose the facts that they were minors. The ITO while assessing Muthiah

did not include in his income the share income of the minor sons received from the firm in which Muthiah was a partner as provided in [Section 16\(3\)\(a\)\(ii\)](#) of the Income-tax Act, 1922. After the completion of the assessment the ITO realised that the share income of the minor sons from the partnership firm in question was liable to be included in the income of Muthiah under the provisions of [Section 16\(3\)\(a\)\(ii\)](#) of the 1922 Act. The Assessing Officer, therefore, initiated proceedings under [Section 34\(1\)\(a\)](#) of the 1922 Act [corresponding to [Section 147\(a\)](#) of the Income-tax Act, 1961] on the ground that the information given by Muthiah in his return was not full in the sense that he had not stated therein that his three sons who had received a share in the income of the partnership firm were in fact, minors. After examining the facts of the case the Hon'ble Supreme Court held that Muthiah was not guilty of failure to disclose true and full facts relating to his assessment. The Supreme Court observed at p. 187 as under:

"The Act and the Rules accordingly impose no obligation upon the assessee to disclose to the ITO in his return information relating to income of any other person by law taxable in his hands. "

39. It was then held by the Supreme Court in the said case that the Assessing Officer cannot resort to [Section 34\(1\)\(a\)](#) of the 1922 Act and reopen the assessment. This judgment of the Supreme Court was followed by the Hon'ble Calcutta High Court in the cases of [Radheshyam Ladia v. ITO](#) [1971] 82 ITR247 and also [Madanlal Maheswart v. ITO](#) [1973] 87 ITR 295.

40. The aforesaid observations made by the Supreme Court clearly make out that while filing a return an assessee is not

bound or obliged to disclose any information in relation to any fact other than what is required to be supplied and furnished by him in the various columns of the prescribed form of return of income or which he is bound under the provisions of the Act to furnish even though that fact may otherwise be relevant for the purpose of his assessment. For the simple reason that such information has not been furnished in the return it would not mean that the assessee had failed or omitted to disclose fully and truly all material facts which are necessary for the purpose of his assessment.

41. In the aforesaid context, we may also refer to a decision of this High Court in the case of **Bhavik Bharatbhai Padia vs. Income Tax Officer Ward 3(3)(1)**, rendered in the Special Civil Application No.17021 of 2018, decided on 19.08.2019. One of us J.B. Pardiwala, J., speaking for the Bench, observed as under;

“16. It is not in dispute that the form of return of income i.e. ITR2, then in force had no separate column for the disclosure of any investment. The question is whether the assessee was under any legal obligation to disclose about his investment of Rs.50,00,000/in the LIC policies. In the aforesaid context, we would like to refer to and rely upon a decision of the Supreme Court in the case of CIT Vs. Smt. P.K. Kochammu Amma reported in [1980] 125 ITR 624 (SC).

17. In that case, the assessee filed her return for the assessment year 1964-65, disclosing therein income from property and income from other sources and against item (b), under the column “Profits and gains of business and profession” stated: “please ascertain from the firms’ files”.

Though the prescribed form of return did not contain a

separate column for that purpose, there was a note in the return stating that, if the income of any other person is includible in the total income of the assessee under the provisions of the Incometax Act, 1961, inter alia, of Section 64, such income should also be shown under the appropriate head. The respondent, however, did not show in the return the amounts representing the shares of her husband and minor daughter in the two firms, though they were includible in her total income under Section 64(1)(I) and (iii). The question was whether penalty could be imposed on the respondent under Section 271(1)(c), on the ground that the assessee had concealed the particulars of her income because she had not shown the shares of her husband and her minor daughter in the two firms as forming part of the total income in the return submitted by her. The Supreme Court held (at page 627):

“There is a decision of this court which is directly in point and it concludes the determination of the question arising in this appeal against the Revenue but before we refer to that decision, we might first examine the question on principle as a matter of pure interpretative exercise. Section 271, Subsection (1), Clause (c), provides for imposition of penalty on an assessee if it is found, inter alia, that the assessee has concealed the particulars of ‘his income’. The question is what is the scope and content of the words ‘his income’ occurring in this penal provision. Do they refer only to the income of the assessee himself or do they also take in the income of others which is liable to be included in the computation of the total income of the assessee by reason of the relevant provisions of the Act, such as Section 64, Subsection (1), Clauses (I) and (iii) ? The answer to this question obviously depends upon as to what is ‘his income’ which the assessee is liable to disclose for the purpose of assessment, for, concealment can only be of that which one is bound to disclose and yet fails to do so. Section 139 provides for filing of a return of income by an assessee and Subsection (1) of this section lays down that every person whose total income during the previous year exceeds the maximum amount which is not chargeable to income tax, shall furnish a return of his income in the prescribed form and verified in the prescribed manner, and setting forth such

other particulars as may be prescribed. The return of income is required to be filed in order to enable the Revenue authorities to make a proper assessment of tax on the assessee. It must, therefore, follow a fortiori that the assessee must disclose in the return every item of income which is liable to be taxed in his hands as part of his total income. The charge of income tax is levied by Section 4 on the total income of the assessee, and 'total income' is defined in Section 2, Subsection (45), to mean 'the total amount of income referred to in Section 5 computed in the manner laid down' in the Act. It is no doubt true that the definition of 'total income' in Section 2, Subsection (45), refers to Section 5 and this latter provision lays down that all income, profits and gains accrued or arising to the assessee or received by or on behalf of the assessee shall be liable to be included in his total income but this provision is subject to the other provisions of the Act, and, therefore, if the income of any other person is declared by any provision of the Act to be includible in computing the total income of the assessee, such income would form part of the total income exigible to tax under Section 4 of the Act. Now, Section 64, Subsection (1), is one such provision which provides for inclusion of the income of certain other persons in computing the total income of an assessee. Clauses (i) and (iii) of this subsection provide that in computing the total income of an assessee there shall be included all such income as arises directly or indirectly to the spouse of such assessee from the membership of the spouse in a firm carrying on a business in which such individual is a partner as also to a minor child of such assessee from the admission of the minor to the benefits of the partnership firm. It is clear from this provision that though the share of the spouse or minor child in the profits of a partnership firm in which the assessee is a partner is not the income of the assessee but is the income of such spouse or minor child, it is liable to be included in computing the total income of the assessee, and it would be assessable to tax in the hands of the assessee. The total income of the assessee chargeable to tax would include the amounts representing the shares of the spouse and minor child in the profits of the partnership firm. If this be the correct legal position, there can be no doubt that the assessee must disclose in the return submitted by him, all amounts representing the shares of the spouse and minor child in the profits of

the partnership firm in which he is a partner, since they form part of his total income chargeable to tax. The words 'his income' in Section 139, Subsection (1), must include every item of income which goes to make up his total income assessable under the Act. The amounts representing the shares of the spouse and minor child in the profits of the partnership firm would be part of 'his income' for the purpose of assessment to tax and would have to be shown in the return of income filed by him. The assessee then contended that the return of income which was required to be filed by her under Section 139, Subsection (1), was a return in the prescribed form and the form of the return prescribed by Rule 12 of the Income Tax Rules, 1962, did not contain any column for showing the income of the spouse and minor child which was liable to be included in the total income of the assessee under Section 64, Subsection (1), Clauses (i) and (iii), and there was, therefore, no obligation on the assessee to disclose this income in the returns filed by her. This contention is also, in our opinion, fallacious and deserves to be rejected. It is true that the form of return prescribed by Rule 12, which was in force during the relevant assessment year did not contain any separate column for showing the income of the spouse and minor child liable to be included in the total income of the assessee, but did contain a note stating that if the income of any other person is includible in the total income of the assessee under the provisions, inter alia, of Section 64, such income should also be shown in the return under the appropriate head. This note clearly required the assessee to show in the return under the appropriate head of income, namely, 'profits and gains of business or profession', the amounts representing the shares of the husband and minor daughter of the assessee in the profits of the two partnership firms. But even so, the assessee failed to disclose these amounts in the return submitted by her and there was, therefore, plainly and manifestly a breach of the obligation imposed by Section 139, Subsection (1), requiring the assessee to furnish a return of her income in the prescribed form. It is difficult to see how the note in the prescribed form of the return could be ignored by the assessee and she could contend that, despite the note, she was not liable to show in her return the amounts representing the shares of her husband and minor daughter in the two partnership firms. The contention of the assessee, if

accepted, would render the note meaningless and futile and turn it into dead letter and that would be contrary to all recognised canons of construction. There can be no doubt that the assessee was bound to show in her return the amounts representing the shares of her husband and minor daughter in the two partnership firms and in failing to do so, she was guilty of concealment of this item of income which plainly attracted the applicability of Section 271, Subsection (1), Clause (c)."

18. Although, on this view, the order imposing penalty on the assessee could have been sustained but, in view of the decision of the Supreme Court in V.D.M.R.M.R.M. Muthiah Chettiar v. CIT [1969] 74 ITR 183, which is a larger Bench decision where a different view had been taken by a Bench of three judges of the Supreme Court, the contention of the assessee that imposition of penalty in his case is illegal had to be upheld. There, the Supreme Court proceeded to hold (at page 629 of 125 ITR):

"It was held in this case (Muthiah Chettiar) that even if there were any printed instructions in the form of the return requiring the assessee to disclose the income received by his wife and minor child from a firm in which the assessee was a partner, there was, in the absence in the return of any head under which the income of the wife or minor child could be shown, no obligation on the assessee to disclose this item of income, and the assessee could not be deemed to have failed or omitted to disclose fully and truly all material facts necessary for his assessment within the meaning of Section 34(1)(a) of the Indian Income tax Act, 1922. With the greatest respect to the learned judges who decided this case, we do not think, for reasons already discussed, that this decision lays down the correct law on the subject, and had it not been for the fact that since July 1, 1972, the form of the return prescribed by Rule 12 has been amended and since then, there is a separate column providing that 'income arising to spouse/minor child or any other person as referred to in Chapter V of the Act' should be shown separately under that column and consequently there is no longer any scope for arguing that the assessee is not bound to disclose such income in the return to be furnished by him, we would have referred the present case to a larger Bench. But we do not propose to do so since the question has now become

academic in view of the amendment in the form of the return carried out with effect from July 1, 1972. We would, therefore, follow this decision in Muthiah Chettiar's case , which being a decision of a Bench of three judges of this court, is binding upon us, and following that decision, we hold that the assessee could not be said to have concealed her income by not disclosing in the return filed by her the amounts representing the shares of her husband and minor daughter in the two partnership firms."

The next decision cited is in ITO v. Radheshyam Ladia. There the Supreme Court affirmed the decision of the Calcutta High Court in Radheshyam Ladia v. ITO [1987] 166 ITR 135 which was relied on by the Appellate Assistant Commissioner, In Radheshyam Ladia [1987] 166 ITR 135 (SC), the assessment years involved were 1960-61, 1961-62 and 1962-63. The Supreme Court followed the decisions in Smt. P.K. Kochammu Amma and Muthiah Chettiar's case in and Malegaon Electricity Co. P. Ltd's case . The Supreme Court extracted the aforesaid passage from Smt P. K. Kochammu Amma and observed (at page 141 of 166 ITR):

"We agree with what has been stated in Kochammu Amma's case , and for the reasons indicated therein, we do not propose to refer the case to a larger Bench. Following the law as laid down in the two cases in Muthiah Chettiar's case and Malegaon Electricity Co. P. Ltd's case , we dismiss this appeal."

19. The aforesaid two decisions of the Supreme Court have been referred to and relied upon by the Calcutta High Court in the case of Commissioner Of IncomeTax Vs. Sarala Devi Birla reported in [1993] 203 ITR 953 (Calcutta).

20. In the said case before the Calcutta High Court, the original assessment for the relevant assessment year was completed under Section 143(3) of the Act. Later, the reassessment was made on a higher income. The assessee had given a cash gift to her minor daughter and the said amount was invested in shares. The Income tax Officer was of the view that the income arising from the assets transferred to the minor child was to be treated as the income of the individual under Section 64(4) of the Act and, therefore, such income had escaped assessment due to failure on the part of the assessee to disclose fully

and truly all material facts necessary for assessment. Since such income was not disclosed in the original return, the Income tax Officer initiated reassessment proceedings under Section 147(a) and included the capita gains arising on the transfer of shares and dividend income from the shares in the total income already determined. On appeal, the Assistant Commissioner held that the Income tax Officer had no jurisdiction to reopen the assessment under Section 147(a) of the Act. On revenue's appeal, the tribunal affirmed the order of the Appellant Assistant Commissioner. The Revenue went in appeal before the High Court. The High Court framed the following two substantial questions of law for consideration:"

1. Whether, on the facts and in the circumstances of the case, the Tribunal is right in law in holding that the assessee was under no obligation to disclose in her return of income, the income of her minor daughter?

2. Whether, on the facts and in the circumstances of the case, and on a correct interpretation of Section 64(4) of the Income tax Act, 1961, the Tribunal misdirected itself in law in holding that the Income tax Officer was not justified in reopening the assessment of the assessee under Section 147(a) of the Income tax Act, 1961, in respect of her omission or failure to disclose the income of her minor daughter in her own assessment?"

21. The first question came to be answered in the affirmative and the second question in the negative and both in favour of the assessee. The observations made by the learned Judge of the Calcutta High Court are as under:

10. Mr. Bajoria, learned counsel for the assessee, contended that the principles laid down in the aforesaid decisions of the Supreme Court will govern this case as the assessment year involved in one of the decisions was 1962-63 and in the other 1964-65. This is, however, not relevant. The question is whether, at the material time, when the return was filed by the assessee, the form of return contained a separate column to include the income under Section 64. The Supreme Court in *Kochammu Amma* [1980] 125 ITR 624 mentioned that the amendment in the form of return was carried out with effect from April 1, 1972, long after the original return was filed in this case.

11. It appears that the Income tax (Second Amendment) Rules, 1967, came into force with effect from April 1, 1967. Rule 12 of the Income tax Rules has been amended by the said amendment which provides as follows (see [1967] 64 ITR (St.) 13):

“12. Return of income.(1) The return of income required to be furnished under Subsection (1) or Subsection (2) or Subsection (3) of Section 139 shall,

(a) in the case of a company, be in Form No. 1 and be verified in the manner indicated therein;

(b) in the case of a person not being a company, be in Form No. 2 and be verified in the manner indicated therein; Provided that in the case of a person, not being a company or a cooperative society or a local authority, whose total income (as computed by such person) does not exceed fifteen thousand rupees, the return of income may be furnished in Form No. 3 and shall be verified in the manner indicated therein.

(2) Notwithstanding anything contained in Subrule (1), (a) where a return of income relates to the assessment year commencing on April 1, 1961, or any earlier assessment year, it shall be furnished in the appropriate form prescribed in Rule 19 of the Indian Income tax Rules, 1922, and shall be verified in the manner indicated therein;

(b) where a return of income relates to the assessment year commencing on April 1, 1962, or April 1, 1963, or April 1, 1964, it shall be furnished in the appropriate form in force immediately before April 1, 1967, and shall be verified in the manner indicated therein.”

12. Thus, for the assessment year 1962-63, the old return form which was considered by the Supreme Court in those decisions remained in force.

13. The return form which has been prescribed by the said Amendment of 1967 Rules, also contains a note which is as follows : “3. If the income of any other person is includible in your total income under the provisions of Section 60, 61, 62, 63 or 64 of the Income tax Act, 1961, such income should also be shown in this return under the appropriate heads.”

14. But no separate column has been provided for inclusion of the income under Section 60, 61, 62, 63 or

64 of the Incometax Act, 1961.

15. The rules were amended by the Incometax (Amendment) Rules, 1971, which came into force on April 1, 1971. In the return form prescribed by the Rules, there is no separate column indicated but only a note was appended being Note No. 1 which is as follows : "If the income of any other person is includible in your total income under the provisions of Section 60, 61, 62, 63 or 64 of the Incometax Act, 1961, such incomes should also be shown separately in this return under the appropriate heads."

16. Surprisingly, even after the judgment of the Supreme Court in *V.D.M.R.M.R.M. Muthiah Chettiar v. CIT* [1969] 74 ITR 183, the Central Board of Direct Taxes, while amending the Rules, did not provide any separate column for inclusion of the income under Section 64 of the Act. In *V.D.M.R.M.R.M. Muthiah Chettiar v. CIT*, a similar note was considered by the Supreme Court and it was held that, in the absence of any head under which the income of the wife or minor child of a partner whose wife or minor child was a partner in the same firm, could be shown, by not showing that income, the taxpayer cannot be deemed to have failed or omitted to disclose fully and truly all material facts necessary for his assessment ; it is only by the Incometax (Second Amendment) Rules, 1972, which came into force on July 1, 1972, in the return form prescribed thereunder, a column has been added being column 12(b) where income arising to spouse/minor child or any other person as referred to in Chapter V of the Act is required to be shown. This amendment was noticed by the Supreme Court in *Kochammu Amma* [1980] 125 ITR 624.

17. In our view, therefore, at the material time when the original return was filed by the assessee some time in 1962, the form of return in force did not provide for any separate column to disclose the income arising under Section 64 of the Act. Even assuming that there was escapement in the subsequent return filed in 1968, in response to the notice under Section 148 read with Section 147(b), the position would not be different inasmuch as the 1967 Rules, which came into force with effect from April 1, 1967, did not also provide for any separate column for inclusion of such income under Section 64 of the Act. On the contrary, the form with a

note continued to remain in force until a new form with a separate column came into force with effect from July 1, 1972.

18. For the reasons aforesaid and in view of the principles laid down by the Supreme Court as mentioned hereinbelow, it must be held that there was no omission or failure on the part of the assessee to disclose all her income.

23. Applying the aforesaid principle of law to the facts of the present case, we are of the view that the impugned notice for reopening of the assessment is not sustainable in law."

42.. We are not convinced with the argument canvassed on behalf of the Revenue that once an addition has been made in the hands of one of the partners of the firm and affirmed by the CIT (A), it should necessarily follow with respect to the other partners also. We take notice of the fact that in the case of one of the partners, namely, Shree Hasitkumar Bhatt, the concerned Assessing Officer, after considering the reply filed by him, dropped the reassessment proceedings. In the case of one another partner, namely, Harshitkumar Devendrakumar Bhatt, the inquiry in respect of the very same properties was made by the concerned Assessing Officer vide notice dated 11th March, 2019. Pursuant thereto, the said assessee filed his reply dated 19th March, 2019, pointing out that such properties were purchased by the partnership firm (M/s. Shree Khodiyar Developers) and the sale consideration was paid by the said firm. Having regard to such reply, the Assessing Officer thought fit not to initiate the reassessment proceedings in his hands.

43. In our opinion, there is no escapement of income chargeable to tax. The conditions precedent for resorting to

reassessment under Section 147 of the Act are not satisfied in the present case. Just because the partnership firm failed to file its return of income for the relevant year, by itself, will not confer jurisdiction upon the authority concerned to issue notice against the individual partners of the firm with respect to their individual return of income for the relevant year in consideration.

44. The aforesaid takes us to consider the arguments of the learned senior standing counsel appearing for the Revenue as regards Section 150 of the Act. Section 150 reads thus;

“150. Provision for cases where assessment is in pursuance of an order on appeal, etc.

(1) Notwithstanding anything contained in section 149, the notice under section 148 may be issued at any time for the purpose of making an assessment or reassessment or re-computation in consequence of or to give effect to any finding or direction contained in an order passed by any authority in any proceeding under this Act by way of appeal, reference or revision ¹ or by a court in any proceeding under any other law].

(2) The provisions of sub- section (1) shall not apply in any case where any such assessment, reassessment or recomputation as is referred to in that sub- section relates to an assessment year in respect of which an assessment, reassessment or recomputation could not have been made at the time the order which was the subject- matter of the appeal, reference or revision, as the case may be, was made by reason of any other provision limiting the time within which any action for assessment, reassessment or recomputation may be taken.”

45. Section 149 of the Act prescribes the maximum period of four or six years depending upon the quantum of tax as

mentioned in the said section for initiating the reassessment proceedings. Section 150 (1) of the Act, referred to above, states that the period of limitation prescribed in Section 149 is not applicable if the reassessment is proposed on the basis of any order passed by “any authority in any proceedings under the Act by way of appeal, reference or revision” or “by a Court in any proceeding under any other law”. Sub-section (2) of Section 150, however, makes it clear that the reassessment permissible under sub-section (1) of section 150 would not be applicable to the Department where the period of limitation for such assessment or reassessment has expired at the time it proposes to be reopened.

46. The plain reading of [Section 150](#) reveals that it deals with a situation where an assessment or re-assessment for a particular year or for a particular person is necessitated by an order passed by an appellate or revisional authority or on a reference. In such cases, it may not be possible for the Revenue to adhere to the time limits prescribed under [Section 149](#), as the order of appeal, reference or revision or by a Court, proceeding under any other law may be passed beyond the period contemplated under [section 149](#). It is for this reason, the legislature has not placed any time limit for making the assessment or re-assessment in such circumstances and for this reason, [Section 150](#) begins with a non-obstante clause. At the same time, it does not mean that the power under [Section 150\(1\)](#) is uncanalised or unrestricted. The safeguard has been built under Sub-section (2) of [Section 150](#). The entire object of [Section 150](#) (2) is to bar the proceedings under Sub-Section (1) in the matter of assessment/re-assessment or re-computation, which has become the subject matter of the reference or

revision by reason of any other provisions limiting the time limit. [Section 150](#) (1) provides that the power to issue notice under [Section 148](#) in consequence of or giving effect to any finding or direction of the Appellate/Revisional Authority or the Court, is subject to the provision contained in [Section 150\(2\)](#), which provides that directions under [Section 150\(1\)](#) cannot be given by the Appellate/Revisional Authority or the Court if on the date on which the order impugned in the appeal/revision was passed, the re-assessment W.P.(C) 11452/2017 Page 31 of 34 proceedings had become time barred. In other words, as per [section 150\(2\)](#), the Appellate Authority could give directions for the re-assessment only in respect of an assessment year, which was within the limitation stipulated under [Section 148](#) in respect of which re-assessment proceedings could be initiated on the date of passing of order under appeal.

47. At this stage, we may refer to a decision of the Supreme Court in the case of **Commissioner of Income-Tax, Shimla vs. The Green World Corporation, Parwanoo**, (2009) 7 SCC 69. In para-45 of the judgment, the Court, after quoting Section 150 of the Act, has observed as under:

“The aforementioned provision although appears to be of a very wide amplitude, but would not mean that recourse to reopening of the proceedings in terms of [Sections 147](#) and [148](#) of the Act can be initiated at any point of time whatsoever. Such a proceeding can be initiated only within the period of limitation prescribed therefor as contained in [Section 149](#) of the Act.

[Section 150](#) (1) of the Act is an exception to the aforementioned provision. It brings within its ambit only such cases where reopening of the proceedings may be necessary to comply with an order of the higher

authority. For the said purpose, the records of the proceedings must be before the appropriate authority. It must examine the records of the proceedings. If there is no proceeding before it or if the Assessment year in question is also not a matter which would fall for consideration before the higher authority, [Section 150](#) of the Act will have no application. “

48. In our opinion, the argument canvassed on behalf of the Revenue that this Court may permit the Department to invoke Section 150 of the Act for the purpose of proceeding against the partnership firm for the relevant year is not at all palatable or rather sustainable in law.

49. In the overall view of the matter, we have reached to the conclusion that the decision to reopen the assessment is not just and proper.

50. In the result, this writ application succeeds and is hereby allowed.

(J. B. PARDIWALA, J)

(ILESH J. VORA, J)

Vahid