

**IN THE HIGH COURT OF GUJARAT AT AHMEDABAD****R/SPECIAL CIVIL APPLICATION NO. 20607 of 2018****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 ?	NO
2	To be referred to the Reporter or not ?	NO
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

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**DEVENBHAI MAFATLAL PATEL**

Versus

**THE ASSISTANT COMMISSIONER OF INCOME TAX CIRCLE 1(3)**

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Appearance:

MR TUSHAR HEMANI, SR.ADVOCATE with MS VAIBHAVI PARIKH(3238)  
for the Petitioner(s) No. 1

MRS KALPANA K RAVAL(1046) for the Respondent(s) No. 1

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**CORAM: HONOURABLE MR. JUSTICE J.B.PARDIWALA**

and

**HONOURABLE MR. JUSTICE ILESH J. VORA**

**Date : 07/01/2021**

**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 2011-12;*
- (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. The subject matter of this writ-application is the impugned notice issued under Section 148 of the Income Tax Act, 1961 (for short, 'the Act 1961') for re-opening of the assessment for the Assessment Year 2011-12 on the ground that the income chargeable to tax had escaped assessment within the meaning of Section 147 of the Act 1961. The notice dated 31<sup>st</sup> March 2018 issued under Section 148 of the Act 1961 is at page-16 (Annexure-A) to this writ-application. The reasons recorded and conveyed to the writ-applicant are at page-66 (Annexure-G) to this writ-application.

3. It appears that the writ-applicant filed his return of income on 30<sup>th</sup> September 2011 for the Assessment Year 2011-12 declaring the total income at Rs.84,20,950=00 and agriculture income for the rate purpose of Rs.7,38,235=00 Thereafter, a

revised return of income was filed on 24<sup>th</sup> September 2012 showing the income of Rs.2,18,400=00 from a house property, Rs.5,36,22,727=00 from the business and profession for which deduction under chapter VIA of Section 80IB of Rs.5,36,62,553=00 was claimed, long term capital gain of Rs.84,23,837=00 was claimed exempt under Section 54B of the Act 1961. The writ-applicant also showed income from the other sources of Rs.1,38,120=00 and agriculture income of Rs.7,38,230=00 for the rate purpose. The case of the writ-applicant was selected for scrutiny under the CASS. The assessment proceedings came to be completed on 25<sup>th</sup> February 2014 by passing order under Section 143(3) of the Act 1961. An addition of Rs.6,55,538=00 on account of STCG was made.

4. The record reveals that the writ-applicant is a partner in a partnership firm running in the name of M/s.Vijya Laxmi Exports. It appears that the Revenue Audit Party raised an audit objection in the case of M/s.Vijya Laxmi Exports. As per the audit objection, the partnership deed of M/s.Vijya Laxmi Exports contains a clause to provide interest and remuneration to its partners as per the provision of Section 40(b) of the Act 1961.

5. It is the case of the department that the firm did not make any provision for the said interest and remuneration to be provided to the partners in accordance with the provisions of the partnership deed during the Assessment Year 2011-12.

6. It has come to the notice of the department that M/s.Vijya Laxmi Exports paid Rs.12,74,351=00 as interest on the partners capital and Rs.44,97,148=00 as remuneration to its partners,

but at the same time, claimed excess deduction of Rs.57,71,499=00 under Section 10AA of the Act 1961 which was liable to be taxed in the hands of the partners. According to the department, the income of Rs.57,71,499=00 was required to be taxed in the hands of the partners. According to the Revenue, the writ-applicant, being one of the partners of the firm M/s.Vijya Laxmi Exports, has a share capital of 30 per cent.

7. Having regard to what has been stated above, it is the case of the Revenue that the writ-applicant had received interest on capital of rs.3,82,305=00 and Rs.13,49,145=00 respectively as remuneration from the partnership firm and the said amount had not been offered or disclosed for the purpose of taxation.

8. In such circumstances referred to above, the department has thought fit to re-open the assessment proceedings beyond the period of four years on the ground that the amount of Rs.17,31,450=00 had escaped assessment within the meaning of Section 147 of the Act 1961 for failure on the part of the writ-applicant to disclose all the material facts fully and truly.

9. Upon receipt of the reasons for the re-opening of the assessment proceedings, objections were filed dated 20<sup>th</sup> July 2018 and the same came to be disposed of by the Revenue vide order dated 20<sup>th</sup> September 2018.

10. Being dissatisfied with the decision to re-open the assessment, the writ-applicant is here before this Court with the present writ-application.

11. This Court, while issuing the notice, passed the following order dated 26<sup>th</sup> December 2018 :

“1. Mr.Tushar Hemani, learned advocate for the petitioner has invited invited the attention of the Court to the order dated 20.12.2018 passed by this Court in the case of Vijya Laxmi Exports in Special Civil Application No.20132 of 2018 to submit that in the case of the partnership firm also, the Assessing Officer sought to reopen the assessment on the ground that the firm had claimed excess deduction of Rs.57,71,499/- under Section 10AA of the Income Tax Act, 1961 which was liable to be taxed in the hands of the partners. It was pointed out that in that case the court has issued notice and has restrained the respondents from passing the final order.

2. Referring to the reasons recorded, it was submitted that in the case of the partners, the Assessing Officer seeks to reopen the assessment on the ground that M/s.Vijya Laxmi Exports has paid Rs.12,74,351/- as interest on partners capital and Rs.44,97,148/- as remuneration to its partners but has claimed excess deduction of Rs.57,71,499/- under section 10AA of the Act. Reference was made to the computation of total income of Vijya Laxmi Exports to point out that interest and remuneration therein is shown as nil, which is also reflected in clause (g) in column No.17 in the statement of particular required to be furnished under Section 44AB of the Act. It was submitted that therefore, the Assessing Officer seeks to reopen the assessment on the basis of conjectures and surmises and

*that on the reasons recorded, the Assessing Officer could not have formed the belief that income chargeable to tax has escaped assessment. It was further pointed out that in this case the impugned notice has been issued on 31<sup>st</sup> March, 2018 in relation to Assessment Year 2011-12 which is clearly beyond a period of four years from the end of the relevant assessment year without there being any failure on the part of the petitioner to disclose fully and truly all material facts necessary for his assessment, therefore, the assumption of jurisdiction on the part of the Assessing Officer under section 147 of the Act, is invalid.*

3. *Having regard to the submission advanced by the learned counsel for the petitioner, issue Notice returnable on 5th February, 2019. By way of ad-interim relief, the respondent is permitted to proceed further pursuant to the impugned notice; he, however, shall not pass the final order without the prior permission of this Court. Direct service is permitted today.”*

12. Mr.Tushar Hemani, the learned senior counsel assisted by Ms.Vaibhavi Parikh and Mr.Parimal Parmar, the learned counsel appearing for the writ-applicant, submitted that the Revenue is not justified in re-open the assessment proceedings on the grounds as assigned in the reasons. He would submit that from the computation of total income, tax audit report and annual accounts of the partnership firm, no interest or remuneration had been paid by the firm to its partners. The case of the writ-applicant for the year under consideration was taken up for scrutiny assessment under Section 143(3) of the Act 1961. The

Assessing Officer, at the relevant point of time, framed the assessment under Section 143(3) of the Act 1961 vide order dated 25<sup>th</sup> February 2014 without making any addition in respect of the interest on capital and remuneration to the partners.

13. It is further pointed out by Mr.Hemani that the partnership firm, namely Vijya Laxmi Exports, was also selected for scrutiny assessment for the Assessment Year 2011-12 and the Assessing Officer had disallowed the entire claim of deduction of Rs.86,19,599=00 under Section 10AA while framing the assessment under Section 143(3) of the Act 1961 vide order dated 26<sup>th</sup> February 2014. The assessment order was carried in appeal before the CIT(A) who, vide order dated 2<sup>nd</sup> May 2014, deleted the disallowance of Rs.86,19,599=00 made by the Assessing Officer under Section 10AA of the Act 1961.

14. He would submit that the re-opening is beyond the period of four years from the end of the relevant assessment years. There is no failure on the part of his client in fully and truly disclosing all the material facts. The action of re-opening beyond the period of four years is not justified in any manner.

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

16. On the other hand, this writ-application has been vehemently opposed by Ms.Raval, the learned senior standing

counsel appearing for the Revenue. Ms.Raval would submit that having regard to the reasons assigned for re-opening of the assessment, this Court may not interfere. According to Ms.Raval, tangible material has come to the notice of the department, and on the basis of which, the department could be said to be justified in issuing the notice for the purpose of re-opening of the assessment.

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

18. Having heard the learned counsel appearing for the parties and having gone through the materials on record, the only question that falls for our consideration is, whether the Revenue is justified in re-opening the assessment beyond the period of four years under Section 147 of the Act 1961.

19. We take notice of the fact that the decision to re-open the assessment is substantially on the ground that the writ-applicant failed to offer 'interest on capital' and 'remuneration' as income alleged to have been received from the partnership firm, namely M/s.Vijya Laxmi Exports.

20. It is the settled position of law that the condition precedent for the purpose of resorting to re-opening of the assessment is that the Assessing Officer should be satisfied based on some cogent or tangible material, that the case is one of 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

re-open the case of the assessee.

21. Mr.Hemani is right in his submission that mere incorporation of interest on partners capital and remuneration does not necessarily mean or should be construed as mandatory. There has to be some material on record to indicate that the writ-applicant had actually received any 'interest on capital' or 'remuneration' from the partnership firm. Where no such income has been earned by the writ-applicant, the question of taxing the same does not arise at all.

22. At this stage, we may look into the decision of this High Court in the case of PCIT vs. Alidhara Taxspin Engineers (Tax Appeal No.265 of 2017, decided on 2<sup>nd</sup> May 2017), wherein this Court considered two questions of law as proposed by the Revenue in the said appeal. The two questions of law which came to be considered by this Court are as under :

*“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?"*

23. While dismissing the appeal of the Revenue and answering the aforesaid two questions in favour of the assessee, this Court held as under :

*"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."*

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24. Applying the very same dictum of law as laid in the case of Alidhara Taxspin Engineers (supra), we have no hesitation in arriving at the conclusion that the re-opening of the assessment is not justified.

25. In the result, this writ-application succeeds and is hereby allowed. The impugned notice is hereby quashed and set-aside.

All the consequential proceedings pursuant thereto stand terminated.

**(J. B. PARDIWALA, J.)**

**(ILESH J. VORA, J.)**

/MOINUDDIN

