IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CIVIL APPLICATION NO. 3526 of 2022

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR. JUSTICE ASHUTOSH SHASTRI Sd/-

and

HONOURABLE MR. JUSTICE J. C. DOSHI Sd/-

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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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ANILABEN ROHITBHAI MODI

Versus

INCOME TAX OFFICER, WARD 5(3)(1), AHMEDABAD

==========

Appearance:
MR B S SOPARKAR(6851) for the Petitioner(s) No. 1
MR.VARUN K.PATEL(3802) for the Respondent(s) No. 1,2

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CORAM:**HONOURABLE MR. JUSTICE ASHUTOSH SHASTRI**
and
HONOURABLE MR. JUSTICE J. C. DOSHI

Date : 23/06/2023

CAV JUDGMENT

(PER : HONOURABLE MR. JUSTICE ASHUTOSH SHASTRI)

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[1] ***Rule***. Mr. Varun K. Patel, learned advocate waives service of Notice of Rule on behalf of the respondents.

[2] By way of this petition under Article 226 of the Constitution of India, the petitioner has challenged the legality and validity of the impugned order dated 27.01.2022 at *Annexure-N* and also impugned notice dated 31.03.2021 at *Annexure-A*.

[3] The background of the facts which has narrated in the petition is that petitioner is an individual and citizen of India and was holding a parcels of land with other co-owners bearing Survey Nos.766, 777 and 786 at Village Khoraj, Taluka Sanand. The said parcels of land alongwith many others were required for public purposes and as such a notification was issued in the Extra Ordinary Gazette dated 07.10.2013 to acquire the same portion of lands which are narrated in the notification. In response to the said process of acquisition, the petitioner alongwith other co-owners provided the details of the land owned by them on 30.08.2013 and later on, the petitioner was served with a notice dated 30.12.2013 to receive consideration

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against the same. The petitioner alongwith other co-owners received 75% of the consideration against the acquisition of three land parcels, as indicated above, on 08.12.2015. Subsequently, the petitioner alongwith other co-owners executed an agreement to sale on 16.12.2015. Eventually, sale deeds were executed on 30.06.2017 for the sale of these lands by the petitioner alongwith other co-owners.

[3.1] It is the case of the petitioner that petitioner has filed her original return of income for Assessment Year 2016 - 2017 on 17.03.2017 declaring total income of Rs.9,10,000/- and claimed exemption on income from compulsory acquisition of land totaling around Rs.2,74,83,074/-. The said of return of the petitioner was duly processed and detailed scrutiny was undertaken. Notice under Section 142(1) of the Income Tax Act was also issued on 13.07.2018 whereby the petitioner was asked for correctness of the claim of exempt income alongwith necessary document / evidence regarding such claim. In response to the said notice under Section 142(1) of the Act, the petitioner provided all the necessary details as demanded by

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virtue of reply dated 24.08.2018 as well as 18.10.2018 and later on, after having satisfied, the respondent authority has passed an assessment order under Section 143(3) of the Act on 31.10.2018 wherein the assessing officer has accepted the claim of the petitioner and was assessed the income according to returned submitted by the petitioner. This assessment order, according to the petitioner, was passed in October, 2018 and later on after almost a period of around two years, the petitioner received notice under Section 148 of the Act on 31.03.2021 issued by respondent No.1 asking the petitioner to file a return of income for Assessment Year 2016 - 2017. The petitioner filed its return of income in compliance to notice under Section 148 of the Act on 21.04.2021 and sought for reasons recorded for reopening. Later on, the respondent authority issued notice under Section 143(2) of the Act containing the issues as per the reasons recorded and the same was issued on 22.06.2021. The petitioner submitted the preliminary objections on 28.06.2021 *inter alia* questioning the validity of notice under Section 148 of the Act. However, the objections which have been raised by the petitioner came to be rejected by respondent No.2 *vide* order

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dated 27.01.2022. Accordingly, the petitioner approached this Court by way of present petition under Article 226 of the Constitution of India for challenging the validity of action in the form of impugned notice dated 31.03.2021 issued under Section 148 of the Act as well as challenging the order disposing objections dated 27.01.2022 by raising multiple contentions.

[4] This petition was entertained on 07.03.2022 by co-ordinate bench of this Court wherein following order was passed:-

> "*We have heard Mr. S. N. Soparkar, the learned senior counsel assisted by B.S. Soparkar, the learned advocate appearing for the writ-applicant.*
>
> *Let Notice be issued to the respondents, returnable on 19.04.2022.*
>
> *Let there be an ad-interim order in terms of Para-7(b).*"

[5] Later on, after the passage of time, the petition has come up for consideration before this Court wherein the respondent authority has affirmed the affidavit on 21.04.2023 and pursuant to the said submission of the pleadings, both the learned advocates have requested the Court to take up the matter for its

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adjudication and as such, upon consent and request of both the learned advocates, the matter is taken up for hearing in which Mr. B. S. Soparkar, learned advocate has represented the petitioner and Mr. Varun K. Patel, learned advocate has represented the respondents authorities who issued the impugned action.

[6] Mr. B. S. Soparkar, learned advocate appearing for the petitioner has vehemently contended that the impugned action i.e. notice as well as order passed by respondent Nos. 1 and 2 respectively are totally impermissible and it violates the relevant proposition of law and the issue. It has been submitted that respondent No.1 authority has recorded practically only one reason to believe that income has escaped assessment. The petitioner alongwith three more co-owners have claimed that their land was compulsorily acquired by GIDC and they have received consideration against the same and such consideration is claimed exempt from taxation under Section 10(37) of the Act. In case of other two co-owners, namely, Mr. Rohit Chinubhai Modi and Mr. Saurabh Rohitbhai Modi, subsequent

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to the assessment, an order under Section 263 of the Act is passed by the Principal Commissioner of Income Tax holding that the claim of exemption requires greater examination. But, according to Mr. Soparkar, learned advocate, the same cannot said to be denied completely. As such, on the basis of such, a notice for reopening is issued and the objections also came to be rejected and this is a fundamental error committed by an authority in view of the fact that contours of Sections 147 and 263 of the Act are altogether different and authority has tried to mixup the said scope of both the provisions and as such the action sought to be initiated is fundamentally erroneous and suffers from the vice of non application of mind.

[6.1] Mr.Soparkar, learned advocate has further contended that in this case a specific notice under Section 142(1) of the Act was issued on 13.07.2018 *inter alia* specifically asking for correctness of the claim of exemption, as sought by the petitioner. In response to the same notice, the details have been provided on 24.08.2018 as well as on 18.10.2018 and then after proper application of mind, the Assessing Officer formed a

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conscious opinion not to deny the claim of exemption made by the petitioner and as such a specific assessment order came to be passed. As a result of this, now when respondent No. 1 authority is trying to reopen the assessment, the same is hit by recognized principle on the issue of change of opinion and in the absence of any distinguishable material once the assessment has already been undertaken, it is impermissible in view a mere change of opinion. Mr.Soparkar, learned advocate has submitted that the law is clear on this issue and for that he would like to rely upon the decision which may be referred hereinafter.

[6.2] Mr.Soparkar, learned advocate has further contended that the respondent authority only after re-looking at the assessment record wants to arrive at a different opinion but then during the course of original scrutiny no new material comes to the notice of authority and as such in the absence of no new tangible material, no reopening is permissible. Hence, the impugned action deserves to be quashed. It has been contended that jurisdiction under Section 147 of the Act cannot be invoked

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merely for the purpose of verification and / or for making a roving and fishing inquiry and as said earlier, the contours of Sections 147 and 263 of the Act are quite distinct and as such the issuance of notice for roving enquiry or re-verification is not sustainable. It has been further contended that reason to suspect is practically no reason to believe, the Assessing Officer has to form an opinion under Section 147 of the Act but the said opinion cannot be formulated on the basis of mere suspicion and here is the case wherein a proper scrutiny at length has been undertaken and thereafter assessment order has been passed and as such under this circumstance, the action is not sustainable in the eye of law. It has further been contended that apart from this, the assessment order has been passed way back in year 2018 wherein the present action which is sought to be initiated is in the year March, 2021 which is beyond the reasonable period as it is approximately around two years down the line. Hence, at such a belated stage, no power can be exercised in view of settled position of law.

[6.3] Mr.Soparkar, learned advocate has further reiterated that

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parameters of revision under Section 263 of the Act are altogether different as compared to Section 147 of the Act. Respondent No.1 authority believes that there is an error which is prejudicial to the interest of revenue then to correct the course of action the authority would have to revive the assessment under Section 263 of the Act. But once the opinion in the original assessment has already been framed, the same can be corrected by revising under Section 263 of the Act but the remedy or the provisions of Section 147 of the Act is impermissible since there is well recognized specific bar under Section 147 of the Act to change an opinion once formulated and as such the steps taken are quite contrary. Mr.Soparkar, learned advocate has also submitted that in any case the reliance on the order of under Section 263 of the Act dated 18.03.2021 is wholly impermissible as there is no finding arrived at by the Principal Commissioner of Income Tax regarding underestimate of income in the first place and in an order under Section 263 of the Act dated 18.03.2021 all that is said is that the issue requires greater scrutiny to ascertain the validity of the claim of exemption and as such on the basis of

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such order under Section 263 of the Act dated 18.03.2021 once opinion is formed cannot be altered by resorting to Sections 147 and 148 of the Act. The issuance of action reflects a clear non application of mind and reflects borrowed satisfaction on the part of the authority.

[6.4] Apart from that, Mr.Soparkar, learned advocate has submitted that there was no income that has actually escaped from the assessment. The claim of exemption under Section 10(37) of the Act is permissible in view of the facts since all three lands being Survey Nos. 766, 777 and 786 at Khoraj, Sanand Taluka have been acquired by the Government in terms that the petitioner is entitled to benefit of exemption under Section 10(37) of the Act and the GIDC letter dated 25.01.2022 also confirms the said facts. As such, in law and on facts of the case of the petitioner, it cannot be said that income has escaped from the assessment and therefore the very reason assigned for reopening the assessment is fundamentally erroneous and as such when that be so, there is hardly any reason to allow such action to sustain in the eye of law and for this purpose,

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Mr.Soparkar, learned advocate has referred to the decisions of Hon'ble Apex Court in case of ***Union of India versus Infopark Kerala*** reported in ***(2017) 81 taxmann.com 51 (SC)*** and in the case of ***Balakrishnan versus Union of India*** reported in ***(2017) 80 taxmann.com 84 (SC)*** which the Court would deal with at a later point of time.

[6.5] At this stage, Mr.Soparkar, learned advocate has relied upon few decisions on the issue of change of opinion and a reference is made to in the case of ***Friends of WWB, India versus Deputy Commissioner of Income-tax (Exemption)*** reported in ***(2015) 56 taxmann.com 455 (Gujarat)*** and in the case of ***Janaki Mohan versus Income-tax Officer, Non-Corporation Ward - 15(2), Chennai*** reported in ***(2021) 132 taxmann.com 109 (Madras)*** as well as in the case of ***Cliantha Research Ltd. versus Deputy Commissioner of Income-tax, Ahmedabad Circle-I*** reported in ***(2013) 35 taxmann.com 61 (Gujarat)***.

[6.6] So far as the proposition that in the absence of no new

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tangible material reopening is impermissible, Mr.Soparkar, learned advocate has made a reference to in the case of ***Shanti Enterprise versus Income-tax Officer, Ward 2*** reported in ***(2016) 76 taxmann.com 184 (Gujarat)*** as well as in the case of ***Principal Commissioner of Income-tax versus NESCO Ltd.*** reported in ***(2023) 146 taxmann.com 325 (Bombay)***.

[6.7] In respect of non application of mind and borrowed satisfaction, Mr.Soparkar, learned advocate for the petitioner has referred to cases of ***Nila Infrastructures Ltd. versus Assistant Commissioner of Income-tax*** reported in ***(2023) 146 taxmann.com 154 (Gujarat)*** as well as ***Kantibhai Dharamshibhai Narola versus Assistant Commissioner of Income Tax, Ward 3(2)(4).*** reported in ***(2021) 125 taxmann.com 348 (Gujarat)***.

[6.8] Mr.Soparkar, learned advocate has further made a reference to the decision in the case of ***Le Passage to India Tours & Travels (P.) Ltd. versus Additional Commissioner of Income-tax*** reported in ***(2015) 58 taxmann.com 144***

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(Delhi) on the issue of assessment not being permitted for the purpose of fishing and roving enquiry. Whereas in case of no income is escaped from assessment, following are the decisions referred to by the Mr.Soparkar, learned advocate:-

(i) ***Ganga Saran & Sons (P.) Ltd. versus Income-tax Officer*** reported in ***(2081) 6 Taxman 14 (SC).***

(ii) ***P.G. & W. Sawoo (P.) Ltd. versus Assistant Commissioner of Income-tax*** reported in ***(2016) 69 taxmann.com 188 (SC)***.

(iii) ***Hitachi HI REL Power Electronics (P.) Ltd. versus Assistant Commissioner of Income Tax, Circle 2(1)(1)*** reported in ***(2020) 122 taxmann.com 79 (Gujarat)***.

(iv) ***Commissioner of Income-tax versus Balbir Singh Maini*** reported in ***(2017) 86 taxmann.com 94 (SC)***.

(v) ***Principal Commissioner of Income-tax versus Shelter Project Ltd.*** reported in ***(2022) 137 taxmann.com 192 (Calcutta)***.

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(vi) ***Ushaben Jayantilal Sodhan versus Income Tax Officer*** reported in ***(2018) 93 taxmann.com 453 (Gujarat)***.

(vii) ***Commissioner of Income-tax, Chennai versus Kumararani Smt. Meenakshi Achi*** reported in ***(2007) 158 Taxman 4 (Madras)***.

(viii) ***Director of Income-tax (Exemptions) versus Escorts Cardiac Diseases Hospital Society*** reported in ***(2008) 300 ITR 75 (Delhi)***.

[6.9] By referring to the aforesaid decisions, Mr.Soparkar, learned advocate has submitted that action is unsustainable in the eye of law as the same is quite in conflict with aforesaid proposition. Yet another decision which has been referring to by the Mr.Soparkar, learned advocate is the decision, which is in the case of ***NLC India Ltd. versus Assistant Commissioner of Income-tax*** reported in ***(2022) 142 taxmann.com 26 (Madras)*** and by referring to paragraph 23 of the said decision, a contention is raised that since strong case made out by the petitioner, the impugned action may be quashed which would subserve the interest of justice.

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[7] As against this, Mr. Varun K. Patel, learned advocate appearing for the respondents has submitted that it is not correct that only on the basis of one reason about order under Section 263 of the Act action is sought to be initiated. On the contrary, after due application of mind, the action is tried to be initiated and therefore, cannot be said to be erroneous in any form. The concept of change of opinion does not apply when in respect of other co-owners the order is passed under Section 263 of the Act. It has been contended that if this order could have been placed on record probably even co-ordinate bench could not have passed any order in favour of the petitioner. Hence, the action deserves to be corrected.

[7.1] Mr. Patel, learned advocate has submitted that an assessment order has been passed in favour of the petitioner by not adding the income but then that itself is not a circumstance which can prevent the authority from exercising jurisdiction. In fact in case of this very property and in respect of claim, similar to present one, the authority could not found favour with those co-owners and an order came to be passed on 18.03.2021 under

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Section 263 of the Act and as per the said order, the assessment order has also been passed on 17.12.2018 for both those co-owners wherein the claim of exemption was not considered and therefore, when that be so, the petitioner cannot not contend that the authority is not empowered to initiate the action of reopening.

[7.2] Mr. Patel, learned advocate has further submitted that in the case on hand if the Assessing Officer discovers, finds or satisfied that taxable income has escaped from the assessment, the belief to that effect cannot be undone at the instance of the petitioner who is undisputedly the co-owner and as such when at a stage where Assessing Officer finds some justification to believe that income has been escaped from the assessment it is always open for Assessing Officer to exercise jurisdiction and that cannot be said to be hit by the principle of change of opinion as tried to be canvassed. It has been further submitted by Mr. Patel, learned advocate that no additions were made and the return of income was accepted by an Assessing Officer at a relevant point of time but when the authority rejected the

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exemption claim of other co-owners the appellant cannot be allowed to be absolved from such liability and as such, for that purpose, the authority has sought reopening of assessment and by referring to the said order under Section 263 of the Act, it has been further contended in affidavit-in-reply that even ITAT by a common order on 11.01.2023 had dismissed the appeals of co-owners and has categorically mentioned in the said order in paragraph 20 that "the assessee did not qualify for exemption under Section 10(37) of the Act since the lands were not compulsorily acquired, we find is correct". So when this is reflection of an appellate authority there is hardly any reason now to contend that petitioner being co-owner and is entitled to exemption and as such by referring to the said orders and the observations made therein more particularly on page 246 of the petition compilation, a contention is reiterated that authority is justified and is well within the right to reopen the assessment, question of delay would not come in the way in this regard.

[7.3] Mr. Patel, learned advocate has further made a reference to two decisions which are in the cases of ***Gala Gymkhana (P.)***

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Ltd. versus Assistant Commissioner of Income-tax, Circle-4 reported in ***(2012) 27 taxmann.com 294 (Gujarat)*** and ***Rajesh Jhaveri Stock Brokers Private Limited*** reported in ***2007 LawSuit (SC) 725*** and by referring to these decisions, a contention is reiterated that there is hardly any substance in the submission made by learned advocate appearing for the petitioner.

[7.4] Mr. Patel, learned advocate has further submitted that this being an action within the period of four years the concept of change of opinion would not help out the petitioner. In fact, according to Mr. Patel, learned advocate, the taxability is not examined by an authority and there was no such specific query and as such it is always open for an authority to reopen the assessment even if it has been well scrutinized.

[8] At this stage, Mr. B. S. Soparkar, learned advocate appearing for the petitioner in rejoinder has submitted that as said earlier the contours of Sections 147 and 263 of the Act are altogether different and in case of Ms. Poonamben Modi, one of the co-owner of the land, the case is dropped for this very

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property on 22.06.2021. By referring to page 190, it has been submitted that the sole reason was based upon a mere belief that appropriate remedy is under Section 147 of the Act as can be seen from later part of paragraph 2 at page 190 but then this may not be a valid reason for reopening of the assessment and it has further been submitted that in case of other co-owners to the reasonable knowledge of him the said order of ITAT has been made the subject matter of challenge and therefore, the said observations cannot be treated as final. Hence, in this background of fact, according to Mr. Soparkar, learned advocate, the authority is not justified in reopening the assessment and as such has requested to grant reliefs as prayed for in the petition.

[9] Having heard learned advocates appearing for the respective parties and having gone through the aforesaid submissions, few relevant issues deserve consideration before coming to an ultimate conclusion.

[10] A perusal of record would indicate that with respect to this very issue the petitioner was called upon to furnish certain

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details during the process of scrutiny and in response to said notice under Section 142 of the Act, necessary documents and particulars in the form of evidence have been furnished and after due verification of the said relevant material an assessment order came to be passed on 31.10.2018 accepting the claim of the petitioner and it is only after around almost two years and more the impugned notice under Section 148 of the Act is issued on 31.03.2021. So the claim of the petitioner appears to have been examined at a relevant point of time which culminated into an order of assessment. Later on, the respondent authority based upon some observations made in respect of two other co-owners is out to reopen the assessment of present petitioner by indicating that the exemption claimed under Section 10(37) of the Act was not made allowable to other co-owners and as such on that basis a remedial action tried to be initiated under Section 147 of the Act. A perusal of the reasons which are recorded, in respect of petitioner, indicates that based upon said instance of co-owners it was observed that appropriate remedial action under Section 147 of the Act if required may also be taken in case of the petitioner as well as

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other co-owners for Assessment Year 2016 - 2017 on similar line as adopted in case of other co-owners on the basis of revision proceedings under Section 263 of the Act. On this very material, a decision is taken that present assessee has wrongly availed benefit under Section 10(37) of the Act of an amount of Rs.2,74,83,073/- during the year and therefore, has arrived at a conclusion that to that extent income has escaped the assessment within the meaning of Section 147 of the Act. So on one hand, this exemption issue has already been dealt with during the scrutiny proceedings which has accepted the claim of the petitioner and passed an order of assessment in specific form and later on the opinion is formulated to reopen the assessment since in respect of proceedings under Section 263 of the Act in case of other co-owners the claim of the exemption was not allowed and as such this is not an independent exercise of power but it is based upon the very same material and on information the different opinion is now to be formed once having accepted while passing an assessment order and therefore, to some extent, the learned advocate for the petitioner has justifiably contended that it is a case of change of

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an opinion based upon the proceedings in respect of co-owners. In fact, it appears that the petitioner pursuant to previous notice for scrutiny has already furnished the information and accepted the claim of the petitioner.

[11] Now at this stage, if we may peruse the return of income as verification form, reflecting on page 171, with respect to Assessment Year 2016 - 2017, the *annexures* attached to the same are clearly indicating that in exempted income column at bottom on page 172 the petitioner has indicated the figure in titled named as land (taxfree, Government Acquisition) and on page 177 the very first query relates to the claim of exemption of income whether correct or not. Even the information which has been submitted *vide* communication dated 24.08.2018 on page 179 has also a clear reference with regard to this claim of exemption and in tabular column not only the figure is mentioned clearly by the petitioner but in last item i.e. Clause-c there is a reference about the land which was compulsory acquired by Government and was exempted by virtue of CBDT circular whether the land is agriculture or non agriculture and

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upon such information which are specifically being pointed out on 31.10.2018 a specific assessment order is passed under Section 143(3) of the Act whereby Assessing Officer has accepted the claim of the petitioner.

[12] Further since the issue relates to a claim of exemption under Section 10(37) of the Act, the taxability of compensation received by the land owners under acquisition. The relevant provisions, we deem it proper to quote hereunder:-

> "*Taxability of compensation received by land owners for land acquired under Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 (RFCTLARR ACT) - Under the existing provisions of the Income-tax Act, 1961 ('the Act') an agricultural land which is not situated in specified urban area, is not regarded as a capital asset. Hence, capital gains arising from the transfer (including compulsory acquisition) of such agricitural land is not taxable. Finance (No. 2) Act, 2004 inserted section 10(37) in the Act from 1-4-2005 to provide specific exemption to the capital gains arising to an Individual or a HUF from compulsory acquisition of an agricultural land situated in specified urban limit, subject to fulfilment of certain conditions. Therefore, compensation received from compulsory acquisition of an agricultural land is not*

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taxable under the Act (subject to fulfilment of certain conditions for spcified urban land).

2. The RFCTLARR Act which came into effect from Ist January, 2014, in section 96, inter alia provides that income-tax shall not be levied on any award or agreement made (except those wade under section 46) under the RFCTLARR Act. Therefore, compensation received for compulsory acquisition of land under the RFCTLARR Act (except those made under section 46 of RFCTLARR Act), is exempted from the levy of income-tax.

3. As no distinction has been made between compensation received for compulsory acquisition of agricultural land and non-agricultural land in the matter of providing exemption from income-tax under the RFCTLARR Act, the exemption provided under section 96 of the RFCTLARR Act is wider in scope than the tax exemption provided under the existing provisions of Income-tax Act, 1961. This has created uncertainty in the matter of taxability of compensation received on compulsory acquisition of land, especially those relating to acquisition of non-agricultural land. The matter has been examined by the Board and it is hereby clarified that compensation received in respect of award or agreement which has been exempted from levy of income-tax vide section 96 of the RFCTLARR Act shall also not be taxable under the provisions of income-tax Act, 1961 even if there is no specific provision of exemption for such compensation in the Income-tax Act, 1961—Circular No. 36 2016, dated 25-10-2016"

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[13] In addition to this, a reference also deserves to be made to a similar CBDT Circular dated 25.10.2016 reflecting on page 181 in which the subject of taxability of compensation received is clarified and observed that in view of uncertainty which was prevailing on the issue of taxability of compensation the matter was examined by the Board and it has been clarified that compensation received in respect of award or agreement which has been levied of income tax *vide* Section 96 of the RFCTLARR Act shall not be taxable under the provisions of the Income Tax Act and even if there is no specific provisions of exemption for such compensation as has been mentioned in the said circular. We deem it proper to quote the said circular hereunder:-

> "*CBDT CIRCULAR NO-36/2016, Dated: October 25, 2016*
>
> *CBDT CIRCULAR NO-36/2016, Dated: October 25, 2016*
>
> *Subject: Taxability of the compensation received by the land owners for the land acquired under the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 ('RFCTLAAR Act')-reg.*
>
> *Under the existing provisions of the Income-tax Act 1961*

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('the Act'), an agricultural land which is not situated in specified urban area, is not regarded as a capital asset. Hence, capital gains arising from the transfer (including compulsory acquisition] of such agricultural land is not taxable. Finance (No, 2) Act, 2004 inserted Section 10(37) in the Act from 01.04.2005 to provide specific exemption to the capital gains arising to an Individual or a HUF from compulsory acquisition of an agricultural land situated in specified urban limit, subject to fulfilment of certain conditions. Therefore, compensation received from compulsory acquisition of an agricultural land is not taxable under the Act (subject to fulfilment of certain conditions for specified urban land).

2. The RFCTLARR Act which came into effect from 1st January, 2014, in section 96, infer alia provides that income-tax shall not be levied on any award or agreement made [except those made under section 46) under the RFCTLARR Act Therefore, compensation received for compulsory acquisition of land under the RFCTLARR Act (except those made under section 46 of RFCTLARR Act), is exempted from the levy of incone-tax.

3. As no distinction has been made between compensation received for compulsory acquisition of agricultural land and non-agricultural land in the matter of providing exemption from income-tax under the RFCTLARR Act, the exemption provided under section 96 of the RFCTLARR Act is wider in scope than the tax-exemption provided under the existing provisions of Income-tax Act, 1961. This has created uncertainty in the matter of taxability of

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compensation received on compulsory acquisition of land, especially those relating to acquisition of non-agricultural land. The matter has been examined by the Baard and it is hereby clarified that compensation received in respect of award or agreement which has been exempted from levy of income-tax vide section 96 of the RFCTLARR Act shall also not be taxable under the provisions of income-tax Act, 1961 even if there is no specific provision of exemption for such compensation in the Income-tax Act, 1961.

4. The above may be brought to the notice of all concerned. 5. Hindi version of the order shall follow.

(F.No. 225/S8/2016-ITA.Il)

Rohit Garg Deputy Secretary to the Govt. of India"

[14] It appears that based upon aforesaid provisions as well as circular it might be possible that Assessing Officer at the time of passing assessment order must have formulated an opinion that claim made by the petitioner deserves to be accepted and as such it was not turn-down and hence, the presumption which has been drawn by the authority that income has been escaped from assessment on account of any act of the petitioner appears to be ill-founded. The record indicates that the petitioner has truly and fully disclosed the particulars with respect to this

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claim of exemption as and when called upon and after verifying such details provided by the petitioner assessment order has been passed in October, 2018 and as such by resorting to Section 147 of the Act reopening appears to be not justified.

[15] From the record, it further appears that main and substantial ground on which the reopening of assessment is tried to be undertaken is on the basis of Section 263 proceedings initiated in respect of other two co-owners where the claim has not been accepted but then the said proceedings appear to have not attain any finality as it appears from the submission made by Mr. Soparkar, learned advocate for the petitioner. The orders which are read in respect of other two co-owners under Section 143(3) read with Section 263 of the Act an order dated 21.03.2022 appears to be the subject matter of further proceedings and the same has not attain finality and as such without application of any independent mind now the authority cannot resort to Section 147 of the Act for reopening the assessment of the petitioner. We have been informed by the advocate that some proceedings are pending before this Court

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in which the order which is sought to be relied upon by the advocate for revenue is assailed and the same has not attained any finality and as such when it is not a case that there is any concealment of material or the petitioner having not truly and fully disclosed the particulars the authority ought to reopen the assessment and as such when that be so, there is hardly any justification for revenue to resort to Section 147 of the Act. It appears that authority once having accepted the claim of exemption under Section 10(37) of the Act of present petitioner has now tried to change the opinion since in respect of other co-owners the exemption is not considered but then since the issue has not attained finality with respect to other co-owners, we are not satisfied that could be a valid reason for reopening the assessment of present petitioner though once has been scrutinized and culminated in an order of assessment. It is needless to state that the moment the issue with respect to other co-owners is finally settled by the High Court, it is always open for the authority to take appropriate corrective measure if permissible in law since authorities are sufficiently couched with the power.

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[16] There is one another circumstance, which also cannot be sideline is that in case of Ms. Poonamben Modi one of the co-owner in the proceedings have been dropped with respect to this very property on 22.06.2021 and similar to present petitioner the assessment was undertaken and found no addition. The said aspect has not been controverted so specifically by the learned advocate appearing for the revenue.

[17] In the background of these circumstances, if we peruse the contentions raised by the petitioner and to justify the decisions have been brought to the notice of this Court, we may deal with the same before concluding the issue with respect to present petitioner.

[18] Here is the case where during scrutiny process a specific query was raised relating to exempt income and to satisfy the query necessary particulars by the petitioner has already been furnished and it is only thereafter the assessment order has been passed without any addition or dis-allowance and as such the action which is sought to be initiated is based upon a mere

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change of opinion. In case of ***Friends of WWB, India (supra)*** this issue has been elaborately dealt with whether reopening is permissible on the basis of mere change of opinion. The observations contained in paragraphs 3 and 9, we deem it proper to quote hereunder since we rely upon the same:-

> *"3.The petitioner is a charitable trust registered under the Bombay Public Trust Act. For the assessment year 2008-09, the petitioner had filed return of income declaring total income of nil. Along with the return, the petitioner also submitted Form 10 and necessary resolutions of the petitioner Trust. In the declaration under Form 10, the petitioner had disclosed that in the previous year relevant to assessment year 2008-09, and subsequent years, an amount of Rs.1.30 crores (rounded off), i.e. 5.35% of the income of the trust was accumulated or set apart till 31.3.2013 for the purpose of advancement and promotion of direct participation of women and their families in full use of the economy and for such purpose to provide loan guarantee or security to banks and other financial institutions to advance loan to women for their business or occupation or other related activities. It was requested that in view of this, the petitioner complied with the conditions laid down in section 11(2) of the Income Tax Act, 1961 and the benefit thereof may therefore be given exempting the income in respect of such accumulated or set apart income. The petitioner also produced a resolution of the Trust dated 3rd May 2008 resolving to accumulate*

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such income for a period of five years for the object of the Trust.

9. Having heard the learned counsel for the parties and having perused the material on record, it emerges that the entire issue on the basis of which the assessment is sought to be reopened was examined by the Assessing Officer in the original assessment. It is true that the present case pertains to notice of reopening issued within the period of four years from the end of the relevant assessment year. The additional requirement flowing from proviso to section of such income chargeable to tax having escaped assessment for the failure of the assessee to disclose truly and fully all material facts, therefore need not be satisfied. Nevertheless, if an issue had been examined by the Assessing Officer in the original assessment proceedings, any reopening on the basis of such issue without any additional material would be a mere change of opinion. As held by this Court in the case of Gujarat Power Corporation v. Asst. CIT, 350 ITR 166 (Guj.), even when the Assessing Officer in an order of assessment had accepted the assessee's stand and granted the claim as put forth, reopening on the same issue would not be permissible on the basis of selfsame material on record. Similar view is also taken by the Delhi High Court in the case of CIT v. Usha International Ltd, 348 ITR 485 (Delhi). In the present case, the Assessing Officer had raised a pointed query with respect to the amount accumulated or set apart for utilization in subsequent years. He called upon the petitioner to give details and to produce computation of income and statutory form for

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> *accumulation of amount under section 11(2) of the Act. It was in response to such query, the petitioner pointed out that an amount of Rs.93.20 lacs was accumulated or set apart for the assessment year 2007-09 and in the year under consideration, i.e., 2008-09, a further sum of Rs.1.30 crores was set apart under section 11(2) of the Act. In the return filed itself, the petitioner had produced Form 10 as well as the resolution of the Trust setting apart such amount for a period of five years to be utilized for the purpose of the Trust. It was after scrutinizing the claim of deduction under section 11(2) of the Act that the Assessing Officer framed the assessment. He made no disallowance on such claim. He disallowed part of the depreciation claimed by the petitioner. Though there was no reason given by the Assessing Officer for making any disallowance on this score, nevertheless, in the facts of the case, it cannot be stated that he had not scrutinized the petitioner's claim for deduction under the said provision.*"

[19] This issue has also been dealt with by Madras High Court in case of ***Janaki Mohan (supra)*** and reference can be made to paragraphs 22 and 23. Hence, we deem it proper to quote hereunder:-

> "*22. However in the event of tracing out new tangible material or informations which were not at all adjudicated during the original assessment may be a good ground for reopening of assessment. As Explanation 1 to Section 147 enumerates that mere book of documents is insufficient to*

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grant exemption from reopening proceedings. However, in the present case, admittedly the assessee had submitted all the documents pertaining to the purchase of the three properties and all those documents were placed before the Assessing Officer and the Assessing Officer considered all those three documents and formed an opinion that, the petitioner/assessee is eligible to grant exemption under section 54F of the Income-tax Act only in respect of one property.

23. While so, now the reopening is made based on the reasoning that the exemption under section 54F is required to be withdrawn for violation of condition under sub-section (2) of Section 54F. The Assessing Officer during the relevant point of time, when this issue was considered was very much aware of the fact regarding the implication of sub-section (2) of section 54F and by considering all those aspects, he granted exemption for only one property alone. This being the factum, the Assessing Officer clearly formed an opinion for the purpose of grant of exemption under section 54F while passing the original assessment order and now the reasons furnished for reopening of assessment would reveal that they are taking a different opinion on the same set of facts. Thus, the said reasons furnished for reopening the proceedings dated 6-4-2016 amounts to change of opinion beyond any pale of doubt. "

[20] As such when this issue has been in substance reiterated over the period of time, we are of the opinion that since very

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issue about exemption has been dealt with during the assessment proceedings, now after about almost two years, reopening is impermissible by resorting to Section 147 of the Act simply because in respect of other co-owners the claim has not been allowed but then the said issue is very much pending, has not attained finality and as such action initiated by respondent authority is impermissible.

[21] Further it appears that there is no independent application of mind by respondent authority and a bare perusal of the reasons recorded would clearly indicate that the main and substantial ground is that in respect of other co-owners in proceedings under Section 263 of the Act a different view is taken but then the authority while examining the issue about exemption as prayed for ought to have gone into the specific provisions alongwith the CBDT circular and ought to have applied its mind to the effect that contours of Sections 147 and 263 of the Act are altogether different and as such without analyzing this view is taken, which tentamounts to be a borrowed satisfaction and reflects no independent application of

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mind. At the best, the authority could have initiated Section 263 proceedings but that having not been done and after unreasonable period trying to reopen the assessment is not step which may be recognized in law. Even if the information received by Assessing Officer but has not undertaken any such exercise by independent application of mind and at this stage, the learned advocate has rightly made a reference to a decision in the case of ***Nila Infrastructures Ltd. (supra)*** and paragraph 16 which has observed that adequacy of reasons and its relevancy would form the foundation for reopening of the assessment and in the absence thereof, on borrowed opinion, reassessment proceedings cannot be commenced. Paragraph 16, we deem it proper to quote hereunder, which has propounded aforesaid proposition:-

> "*16. One another reason which has persuaded the respondent authority to issue notice for reopening the assessment is traceable to the communication dated 16.03.2018 of the ITO, Ward 10(2), Kolkata, who has stated that during the course of the assessment under Section 143(3) read with Section 263 in the case of Solvent Real Estate Private Limited (SREPL) for assessment year 2011-12 addition of Rs.101,01,50,000/- was made under*

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Section 40(a)(ia) of the Act as the said entity had not deducted tax at source on sub-contract payments. The said assessment order which was challenged before the CIT (Appeals) has resulted in a finding being recorded by the appellate authority that SREPL had no genuine business and was engaged only in providing bogus bills to various concerns for commission. Thus, it would clearly emerge from the above that the Assessing Officer has borrowed the view expressed by CIT (Appeals) for issuing the impugned notice. In fact, assessee has specifically contended in its objections that neither the order of CIT (Appeals) or the communication dated 16.03.2018 of the ITO was furnished to the petitioner. It is the opinion of the ITO, Kolkata and the finding recorded by CIT (Appeals) which perforced the AO to issue the impugned notice partakes the character of borrowed satisfaction and/or without there being independent finding recorded by AO for reopening of the assessment. In fact, Assessing Officer seems to have reopened the assessment to fish out evidence which is impermissible and the pre-requisite for reopening being 'satisfaction of income to tax having escaped', the authority should have reason to believe that income of the assessee has escaped assessment; and, secondly, he must have reason to believe that such escapement is by reason of omission or failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment. If these twin conditions are not being fulfilled, notice issued by the authority would be one without jurisdiction. The belief which the authority entertains must not be arbitrary or irrational. It must be reasonable or having nexus to the escapement of income

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> *to tax. The adequacy of the reasons and its relevancy would form the foundation for reopening of the assessment. In the absence thereof, on borrowed opinion, reassessment proceedings cannot be commenced*."

[22] This very principle has also been further reiterated in yet another decision delivered by co-ordinate bench of this Court in the case of ***Kantibhai Dharamshibhai Narola (supra)*** which has also emphasis the efficacy of independent application of mind. The said relevant observation is reproduced hereunder:-

> "*35. The power to reopen a completed assessment under Section 147 of the Act 1961 has been bestowed on the Assessing Officer, if he has reason to believe that any income chargeable to tax has escaped assessment for any assessment year. However, this belief that income has escaped assessment has to be the reasonable belief of the Assessing Officer himself and cannot be an opinion and/or belief of some other authority. On the basis of the information by itself received from another agency, there cannot be any reassessment proceedings. However, upon receipt of the information/material received from other source, the Assessing Officer is required to consider the material on record in case of the assessee by applying his mind and thereafter is required to form an independent opinion on the basis of the material on record that the information has bearing on the income of the assessee and*

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> *such income has escaped assessment. Without forming such an opinion, solely and mechanically relying upon the information received from other source, there cannot be any reassessment. It is also established principle of law that if a particular authority has been designated to record his/her satisfaction on any particular issue, then it is that authority alone who should apply his/her independent mind to record his/her satisfaction and further mandatory condition is that the satisfaction recorded should be* '*independent*' *and not* '*borrowed*' *or* '*dictated*' *satisfaction. Law in this regard is now well-settled*."

[23] Now in the context of aforesaid observations, if we peruse the reasons which are recorded it reflects no independent application of mind and as such we do not recognize this routine exercise of reopening of assessment and thereto after a period of almost two years. The authority is sufficiently couched with the power of revision under Section 263 of the Act and as such when the authority has resorted to Section 147 of the Act is appearing to be impermissible especially when there appears to be no subjective satisfaction independently arrived at that any income chargeable to tax has escaped the assessment for any assessment year. This reason to belief contemplated under Section 147 of the Act requires proper application before

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initiating the step which here appearing to be missing and as such we are quite satisfied that case is made out by the petitioner to call for any interference.

[24] The background of facts as such has led to a situation where yet another decision which has been brought to our notice has some impact on the conclusion which we may arrived in the present case on hand. In case of ***NLC India Ltd. (supra)*** the Madras High Court has also touched the said issue and as such we deem it proper to quote hereunder the observations contained in paragraphs 54, 55, 56 and 58:-

> *"54. Likewise, section 148 must be resorted to only in those cases where the reasons disclose prima facie satisfaction that there is escapement of turnover. In a case where orders of assessment have been passed under scrutiny, the specific issues set out in the reasons have been identified at the time of original assessment and information in that regard has been solicited and furnished by the assessee, the legal assumption is that these orders have taken note of the ROI and accompanying statutory forms and all the material available on that account.*
>
> *55. All the more, in a case where the officer has been careful in his analysis of the issues that arise and has raised queries that relate to the issues in question, the only conclusion to be arrived at is that the proceedings constitute a review and not reassessment.*

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> *56. The Hon'ble Supreme Court in the case of Parashuram Pottery Works Co. Ltd. v. ITO [(1977] 106 ITR I has reiterated the importance of finality in matters of revenue assessments. In fact, they say that finality is the hallmark of a civilised society. In the present situation, it is not the revenue's case, and the reasons do not so disclose, that there was anything available to the officer over and above what the assessee has clearly, categorically and conspicuously disclosed in the primary documents accompanying the ROI.*
>
> *57. In such an event, it is my considered view, Explanation (2) would be of no avail to the Department. Explanation (2) cannot be read in isolation, but has to be read harmoniously with other propositions that are equally applicable in determining the veracity of a reassessment.*
>
> *58. In light of the discussion as above, the impugned proceedings for AYs 2014-15 and 2015-16 are found to constitute merely a review of the original assessment proceedings, impermissible in the context of Section 147, and the same are set aside. W.P.Nos.30019 and 30020 of 2019 are also allowed. No costs. Connected Miscellaneous Petitions are closed.* "

[25] Hence, the conclusion of an authority on the issue as to whether income is escaped from the assessment is also not so cogent enough upon which we may permit the authority to reopen the assessment in view of the settled position of law as

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discussed hereinabove. On the issue whether income has escaped the assessment or not, learned advocate for the petitioner has also rightly referred to yet another decision of Hon'ble Apex Court in the case of ***Balakrishnan (supra)*** wherein in case of compulsorily acquisition the Hon'ble Apex Court has dealt with the issue which we may refer hereunder:-

> *"6. As it is clear from the above, on the transfer of agricultural land by way of compulsory acquisition under any law, no capital gain tax is payable. It is clear from the above that the initial view of the Income Tax Department, while refunding the aforesaid TDS amount to the appellant, was that the land in question was compulsorily acquired under the LA Act and, therefore, capital gain tax was not payable. The appellant filed income tax return for the Assessment Year 2009-10 and the income was also assessed accordingly. However, thereafter on 30.05.2012, a notice was issued to the appellant under Section 148 of the Act whereby the Income Tax Department decided to re-open the assessment on the ground that income which was assessable to income tax escaped assessment during the year 2009-10. The stand which was taken by the Revenue in this notice was that the amount of compensation/consideration received by the appellant against the aforesaid land was not the result of compulsory acquisition and on the contrary it was the voluntary sale made by the appellant to the Techno Park and, therefore, the provisions of Section 10(37) of Act were not applicable. The appellant objected to the re-opening of the said*

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assessment by filing his reply dated 30.11.2012. However, respondent no. 2 namely, the Joint Commissioner, Income Tax Range-I, Kawadiar, Thiruvananthapuram, took the view that the case did not come under compulsory acquisition and directed the Assessing Officer to compute the income accordingly. This direction dated 11.03.2013 of respondent no. 2 was challenged by the appellant by filing a Civil Writ Petition in the High Court of Kerala. The learned Single Judge, however, dismissed the said writ petition vide judgment dated 11.07.2013 relying upon the earlier judgment of the same High Court in case of Info Park Kerala vs. Assistant Commissioner of Income Tax (2008) 4 KLT 782. The writ appeal preferred by the appellant met the same fate as it was dismissed affirming the view of the learned Single Judge.

7. XXXXX

8. In our view, insofar as acquisition of the land is concerned, the same was compulsorily acquired as the entire procedure prescribed under the LA Act was followed. The settlement took place only qua the amount of the compensation which was to be received by the appellant for the land which had been acquired. It goes without saying that had steps not been taken by the Government under Sections 4 & 6 followed by award under Section 9 of the LA Act, the appellant would not have agreed to divest the land belonging to him to Techno Park. He was compelled to do so because of the compulsory acquisition and to avoid litigation entered into negotiations and settled the final compensation. Merely because the compensation amount is agreed upon would

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not change the character of acquisition from that of compulsory acquisition to the voluntary sale. It may be mentioned that this is now the procedure which is laid down even under the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 as per which the Collector can pass rehabilitation and resettlement award with the consent of the parties/land owners. Nonetheless, the character of acquisition remains compulsory.

9. This Court has doubts about the correctness of the judgment in the case of Info Park Kerala vs. Assistant Commissioner of Income Tax (2008) 4 KLT 782. The Court in the said case took the view that since the title in the property was passed by the land owners on the strength of sale deeds executed by them, it was not a compulsory acquisition. We are not in agreement with the aforesaid view. It is clear that but for Notification under Section 4 and Award under Section 9 of the LA Act, the appellant would not have entered into any negotiations for the compensation of the consideration which he was to receive for the said land. As far as the acquisition of the land in question is concerned, there was no consent. The appellant was put in such a condition that he knew that his land had been acquired and he cannot reiterate the same. The appellant, therefore, only wanted to salvage the situation by receiving as much compensation as possible commensurate with the market value thereof and in the process avoid the litigation so that the appellant is able to receive the compensation well in time. If for this purpose the appellant entered into the negotiations, such

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> *negotiations would be confined to the quantum of compensation only and cannot change or alter the nature of acquisition which would remain compulsory. We, therefore, overrule the judgment of the Kerela High Court in Info Park Kerala vs. Assistant Commissioner of Income Tax (2008) 4 KLT 782.*"

[26] Here also the land appears to be compulsory acquired and the income is rightly claimed as exempted and therefore, the conclusion of an authority that income has escaped assessment, appears to be erroneous. At this stage, learned advocate appearing for the petitioner has pointed out that co-owners Poonamben Modi whose assessment was also sought to be reopened under Section 148 of the Act for very same reasons and thereafter, an order was passed by revenue under Section 143(3) read with Section 147 order while accepting the submission of the assessee did not make any addition. So when that be so, it is ill-founded that in case of present petitioner reopening is justified.

[27] In the context of aforesaid discussion and in view of facts on hand the decisions which are cited by the learned advocate appearing for the revenue are not possible to assist the respondent authority in any manner since principles based on

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peculiar background of those cases and as such, we do not incline to accept the submissions as tried to be canvassed.

[28] So a conjoint reading of aforesaid discussion in the context of preposition of law laid down on each of the issue, we are of the opinion that case is made out by the petitioner to grant the relief as prayed for in the petition. Accordingly, for the foregoing reasons, we hereby quashed and set aside the impugned order dated 27.01.2022 at *Annexure-N* and also impugned notice dated 31.03.2021 at *Annexure-A* and deem it proper to allow the petition. Rule is made absolute.

[29] However, while parting with the present order, we may observe that the observations which are made in the present order are in the context of Section 148 proceedings and the same may not be construed as any expression on Section 263 pending proceeding of the Income Tax Act.

Sd/-

(ASHUTOSH SHASTRI, J.)

Sd/-

(J. C. DOSHI, J.)

DHARMENDRA KUMAR

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