ITNS-65

INCOMETAX DEPARTMENT
PROCEEDINGS OF THE DEPUTY COMMISSIONER OF INCOME-TAX,
Circle-10(1), 5th Floor, IT Towers, AC Guards, Hyderabad
***

1.	Name & Address of the assessee	:	M/s Mehta & Modi Homes 5-4-187/3&4, M.G Road, Secunderabad-500003
2.	PAN	:	**AAJFM0647C**
3.	Status	:	Firm
4.	Assessment Year	:	**2008-09**
5.	Previous year	:	2007-08
6.	Residential Status	:	Resident
7.	Nature of Business	:	Real estate developer
8.	Method of accounting	:	Mercantile
9.	Date(s) of hearing	:	As per order sheets
10.	Section & sub-section under which assessment is made	:	143(3)/147 of the Income-tax Act, 1961
11.	Date of order	:	05.03.2015

ASSESSMENT ORDER

The assessee-firm filed its return of income on 27.09.2008, declaring total income of Rs.76,34,100/-. The assessee is a partnership firm with 4 partners as under:

1. M/s. Modi Properties & Investments Pvt Ltd, 50% (AABCM4761E)
2. Sri Bhavesh Mehta, 16.67% (ABMPM6754C)
3. Sri Suresh Mehta, 16.66% (ABMPM6740Q)
4. Sri Deepak Mehta, 16.67% (AATPM6259Q)

2. The assessee is a real estate developer and during the year was constructing independent residential units. The assessee has shown total income of Rs.76,34,100/-, after claiming deduction of Rs 2.69cr u/s 801B(10). The return was processed u/s 143(1) on 02/09/09 by CPC. Subsequently, action under the provision of section 147 was initiated by issuing notice u/s 148 on 31.03.2013 after recording reasons. The assessee filed reply dt. 10.04.2013 and requested to treat the return filed on 27.09.2008 as having been filed in response to notice u/s 148. The assessee was provided a copy of reasons recorded u/s 147. For clarity the `reasons to believe' are reproduced as under:

"The assessee filed ROI for the AY 2008-09 on 27.09.2008 through E-filing admitting business income of Rs. 3,45,34,198 against which, assessee claimed deduction u/s 801B of Rs.2,69,00,096 and returned a total income of Rs. 76,43,100. The ROI was processed u/s 143(1).

On verification of the assessment record, it is noticed that the assessee is in the real estate business and was constructing independent residential units during the year under consideration. The assessee has claimed deduction u/s 801B (10) of the Act from the profits derived out of the above business activity. As per sec. 801B (10), the assessee can claim the deduction only when the maximum built-up area of each residential unit is not more than 1500 square feet. But, on verification of the information furnished along with the sanctioned plan and brochure, the assessee has excluded the area of the portico in the ground floor and the open terrace in the first floor in the total built-up area of the residential units. If these two are included in the total built-up area of each residential unit, the total area of each of the residential unit exceeds 1500 square feet.

In this regard, it is submitted that as per Sec.801B (14) of the Act, the built-up area is defined as the inner measurements of the residential unit at the floor level, including the projections and balconies, as increased by the thickness of the walls but does include the common areas shared with other residential units. The portico which is RCC roof is nothing but projection. The entire slab area of portico in the ground floor and the open terrace in the first floor is under the exclusive ownership of the bungalow owner so as to be classified as integral part of the bungalow as projections to be treated as built up area. Further, it was not commonly shared with any other person. In view of the above, the maximum permissible built-up area of 1500 Square feet per unit has exceeded which is violation of the condition contained in sec.801B (10) of the Act. In view of this, the deduction claimed u/s 801B is not in order. This view is further supported by the decision of the Hon'ble ITAT, Hyderabad, vide its order in the case of M/s Modi Builders and Realtors (P) Ltd., for the asst. year 2007-08 in ITA NO. 1541/Hyd/2010 dated 31/03/2011.

In view of the above, I have reason to believe that income chargeable to tax to the extent of Rs.2,69,00,096/- has escaped assessment for the assessment year 2008-09. As no assessment u/s 143(3) of the Act was completed for the asst. year 2008-09 and not more than 4 years have elapsed from the end of the assessment year 2008-09, action u/s 147 of the income Tax Act is hereby initiated and notice u/s 148 of the Act is issued."

3. It was contented by assessee that there was no fresh material available with the assessing officer to form a basis for reason, that as per explanation 2(b) the assessing officer has neither noticed any under-statement of income nor any claim of excess loss or deduction, that in A.Y. 06-07 and 07-08 the then AO [ITO-10(4)] completed the assessment u/s 143(3) and rightly allowed deduction u/s 80 1B(10), that in A.Y. 2008-09 even where original assessment was completed u/s

143(1) on a mere change of opinion, the assessment cannot be reopened. The assessee requested to drop the proceeding u/s 147 by relying on various cases - CIT Vs. Kelvinator of India Ltd [2010] [SC] 320 ITR 561, Alpika marketing Pvt Ltd Vs ITO (2008) 21 SOT 302 (Mumbai ITAT), Sheo Narain Jaiswa ITO (1989) 176 ITR 352(Patna), Jindal Photo Film Vs DCIT (Delhi) 234 ITR 170, Garden Silk Milk Pvt Ltd Vs DCIT (Gujarat) 237 ITR 668, Adani exports Vs DCIT(Gujarat) 240 ITR 224, Apollo Hospital enterprises Ltd (Madras) 287 ITR 668, Ganesh housing Corp Ltd Vs DCIT (Gujarat) 341 ITR 312, Indian Eastern Newspaper society Vs CIT (SC)119 ITR 996.

4. The reply of the assessee was carefully considered and a speaking order was passed on 11.09.13 which is re-produced as under:

"5.1.....The argument of the assessee is that its assessment for the year under consideration was completed u/s 143(1) and therefore, now, there cannot be any change of opinion even when earlier years have been completed u/s 143(3). It is pertinent to bring an record here that Hon'ble ITAT, 'A' Bench, Hyderabad vide order ITAT No:1541/Hyd/2010 date 31.03.2011 in the case of M/s. Modi Builders and Realtors Pvt. Ltd. for A.Y.2007-08 denied the deduction u/s 80IB to this company by holding that built up area includes portico and balcony and that there is no ambiguity in clause (a) of sub-section (14) of section 80IB, which defines the built up area, so the need for interpretation does not arise.

5.2 When this decision of ITAT is applied to your case, it is noticed that the assessee has excluded the area of portico in the ground floor and the open terrace in the 1st floor in the total built-up area of the residential unit. However, if these two are included, the total built up area of each residential unit exceeds 1500 sft. The entire slab area of the portico in the ground floor and the open terrace in the 1st floor is under exclusive ownership of each bungalow owner and is not commonly shared with any other owner. Therefore, when the provisions of each section 801B(14) are independently applied in the case of the assessee on the basis of clear findings of ITAT, Hyderabad in order dated 31.03.2011, it is noticed that the assessee has not satisfied the conditions prescribed under section 801B.

5.3 The Hon'ble Supreme Court in the case of ACIT Vs Rajesh Jhaveri Stock Brokers Pvt. Ltd. (2007) 291 ITR 500 has clearly held that intimation u/s 143(1) is not `assessment', so there is no question of treating the re-assessment in such cases as based on change of opinion. Here in the instant case of assessee, the case is covered by the main provision and not by 1st proviso to section 147. The assessee has ignored the substantial changes made to 143(1) w.e.f. 01.06.1999. Further Hon'ble Supreme Court has held in the cited case that w.e.f. 1.6.99, the acknowledgement of return is deemed to be an intimation except as provided in 1st proviso. Acknowledgement is not done by the assessing officer but by the ministerial staff, so can it be said that any 'assessment' is done by them? The reply of Supreme Court was emphatic No & that nothing more should be inferred from the deeming provisions. Therefore, there being no "assessment" u/s 143(1), in this case for A.Y. 2008-09, the question of change of opinion as contended by assessee does not arise.

5.4 The section 147 authorizes and permits assessing officer to assess and reassess income chargeable to tax if he has reason to believe that income for any assessment year has escaped

assessment. What is required is that the assessing officer should have justification to believe that income has indeed escaped assessment. It does not mean that assessing officer should have finally ascertained the fact by legal evidence or conclusion. At the stage of initiation of action u/s.147, the requirement is a reason to believe and not the establishment of the under-assessment. Moreover, in the instant case, there was no finding either positive or negative during the course of original assessment in earlier years, so as to hold that there is a change of opinion.' This view has been upheld in the cases of M/s.Kalyanji Mavji & Co Vs CIT (SC) 102 ITR 287, M/s. Ess Kay Engg. Co Pvt. Ltd Vs CIT (SC) 247 ITR 818 and ITO Vs Purushotham Das Bangar & Others (SC) 224 ITR 362

5.5 In the instant case, the decision of ITAT in order dated 31.03.11 constituted information which was independently applied on the facts of your case and was found to be appropriate. Accordingly, information would also include true and correct state of law derived from relevant judicial decisions either of IT authorities or court of law. This view finds support from the decisions in the case of CIT Vs Raghunath Poddar (Cal.) 96 ITR 316, CIT Vs. Makhan Singh (Raj) 154 ITR 121, Kumar Engineers Vs CIT (P & H) 223 ITR 18.

5.6 The cases cited by assessee are under different set of circumstances. In the instant case, neither there is a change of opinion nor was it re-opened at the behest of any superior authority as held in the case of Sheo Narayan Jaiswal Vs. ITO, relied upon by the assessee. Similarly, in the case of M/s. Ganesh Housing Corporation Ltd cited by the assessee, it is seen that the High Court had already examined and discussed elaborately the issue of deduction u/s 80IA & 80IB in regular appeals, so the High Court held that the very edifice of reopening the case is gone. In the instant case, the issue under consideration has not been finally ascertained by any Court.

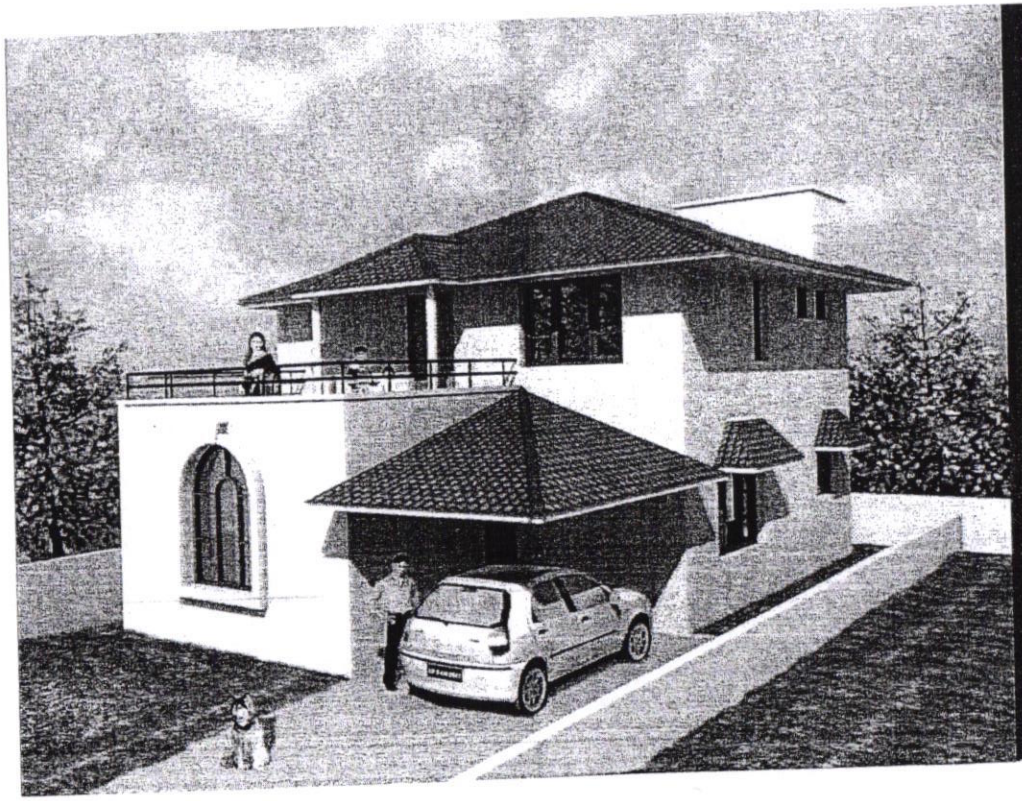
5.7. From the facts narrated above, the inevitable conclusion is that you are wrongly raising the objections to proceedings initiated u/s 147 by applying different case laws, which has no application to your case. The fact remains that your case was processed u/s 143(1) and subsequently action u/s 147 was initiated. At the stage of issue of notice u/s 147, there was relevant material in the form of the ITAT order dated 31.03.011 in ITA no.1541/Hyd/2010 as well as the built- up area measurement details specified to your case, on which any reasonable person could have formed a requisite belief for initiating action u/s 147. Consequently, your objections to proceedings u/s 147 are not accepted."

5. Thereafter, notice u/s 143(2) and 142(1) were issued and the assessee was required to explain why the claim of deduction u/s 80IB be not rejected. The assessee submitted reply and re-iterated the contentions made earlier and cited case laws to support its contentions.

6. The reply of the assessee along with the cited case laws has been considered carefully. The relevant page of the brochure showing the picture of the duplex is attached herewith for clarity and to avoid ambiguity in the understanding of the structure of the duplex unit.

PICTURE

M/s. Mehta & Modi Homes
A.Y : 2008-09



Here's a place that symbolises a lifestyle that has a class of its own. Silver Oak Bungalows, the new address for sophistication and high taste.

Quiet, serene and private abodes that will make every day of your life a memorable one.

Experience the grandeur of your own personal haven. Experience Silver Oak Bungalows.

SALIENT FEATURES

- HUDA approved layout
- Clear title
- 75 bungalows spread over 6 acres of land
- All bungalows with similar elevation, colour, size, compound wall & landscaping
- Built-up area- 1,475 sft. (approx)
- Plot area-200 sq. yds.-(approx)
- Duplex bungalows with 3 bedrooms, kitchen, drawing, dining, terrace, portico for parking & lawn
- Sloping roofs with country tiles
- 1 KVA backup power for each bungalow
- Underground cabling for power, phone & cable TV
- 24 hrs. water supply through community tank
- 2,000 lts. individual overhead tank for each bungalow
- Separate drinking water connection in kitchen
- Rainwater harvesting implemented
- Pollution-free environment
- Eco-friendly development- more than 70% open area
- Design as per Vaastu
- No shops or offices within the layout
- Possession within 18 months of booking
- Housing loans available

7. The facts of the case are that the assessee-firm is engaged in the business of real estate developers. **The assessee constructed independent duplex villas comprising ground floor and 1st floor in each villa at Cherlapally in the name of *Silver Oaks Bungalows***. The total area consists of 6 acres and the assessee constructed 76 independent duplex villas. The **ground floor** of each villa comprises living room, dining area, one bed room with attached toilet, kitchen, a covered portico and a garden. The **1st floor** comprises two bed room with attached toilet, study room, stair case and a balcony. The built up area measurement reported by the assessee does not include the covered portico of the ground floor and the balcony on the 1st floor. **The nomenclature of "open terrace" mentioned by the assessee for the 1st floor is misleading** in the sense that the 1st floor comprises bed room with toilet and a study room and is not a fully open space as conceived in the top floor of any multi-storied apartment. Similarly, the ground floor of the villa includes a covered portico for the exclusive use of the owner of the independent villa. If the measurement of the covered portico on the ground floor and the balcony in the first floor (stated as "open terrace" by the assessee) is included, the built-up area of the independent duplex villa exceeds 1,500 sft. The brochure of the project is part of the record.

8. The action u/s 147 was initiated after verifying the information furnished by the assessee in the sanction plan and the brochure of the project. **It is noticed that the assessee has excluded the area of covered portico on the ground floor and the balcony in the 1st floor (named as "open terrace" by the assessee) in the total built up area of the independent duplex villas.** Thus, the assessee took into consideration only the inner measurements of the residential unit for the purpose of claiming deduction u/s 80IB. **The area statement given in the brochure of the project does not disclose fully the areas included and excluded from the built up area of the ground floor and the 1st floor.**

9. The Hon'ble ITAT in the order dated 31.03.2011 in the case of ***M/s. Modi Builders and Realtors Pvt. Ltd.*** has held that the built-up area includes portico and balcony also and that there is no ambiguity in section 80IB(14)(a).Thus it is clear that the built up area of the independent duplex villas in the Silver Oaks Bungalow projects was wrongly calculated by the assessee without taking into consideration the correct definition prescribed in section 80IB(14).

10. It is seen that the contentions raised by the assessee are less on facts and more on legal interpretation of different case laws which are not applicable to the present case of the assessee here. The assessee has relied on the judgment dt 19.10.2012 of the Hon'ble Madras High Court in the case of M/s. Ceebros Hotels Pvt Ltd, Chennai Vs DCIT- 4(3), Chennai for A.Y. 03-04. M/s. Ceebros Hotels Pvt Ltd is a builder, it constructed 384 flats in 6 blocks of 7 floors each, on the 7th floor the open terrace was connected through the bed room of the flat at 7th floor and the assessee sold the terrace area to 7th floor flat owners as a private terrace. The claim of 80IB was rejected by the Department in toto for the entire project. The ITAT allowed proportionate deduction for other floors and held that assessee is not entitled for deduction in respect of the 7th floor flats. The definition of "built up area" u/s 80IB(14) came into effect from 01.04.05. The Hon'ble High Court allowed the appeal of the assessee after considering the totality of facts of the case in the light of section 80IB(10)(c). The High Court relied on the decision of Bombay High Court and Karnataka High Court in concluding that the definition of built up area does not include the balcony area for the period **prior to 01.04.05**. It was further held that the definition of built up area that came into force from 01.04.05 would have relevance to those housing projects which were approved subsequent to 01.04.05.

11. The facts of the present assessee here are totally different from the facts of the case of Ceebros Hotels Pvt Ltd. Here the issue is not related to the "open terrace" as mentioned in the case of Ceebros Hotels Pvt Ltd. Here the assessee has sold independent duplex villas comprising ground floor and 1st floor and has not included the covered portico on the ground floor and the balcony on the 1st floor (stated as "open terrace" by the assessee).

12. The definition of "built up area" is exhaustive. As per section 80IB(14), the "built up area" means "*the inner projections of the residential unit at the floor level, including the projections and balconies, as increased by the thickness of the walls but does not include the common areas shared with other residential units*". **The assessee has contended that the balconies and projections <u>within</u> the residential unit have to be included and thereafter the thickness of the walls has to be added.** The assessee has further argued that the space under question here on the 1st floor is an "open terrace". It is to be brought on record, as mentioned earlier that the 1st floor of the duplex villas are not an "open space"

akin to the "open space" on the top floor of any multi storied apartment. **Here the residential unit is a duplex villa with 1st floor comprising two bed rooms with attached toilet, a study room, stair case and a balcony. This balcony on the 1st floor cannot be treated as an "open space" akin to the "open space" on the top floor of any multi storied apartment.**

13. In view of the above facts and facts alone, the claim of deduction u/s 80IB is liable to be rejected and the amount of **Rs.2,69,00,096/-** is taxed accordingly.

14. The assessee filed a writ petition before Hon'ble High Court of Andhra Pradesh against the rejection of his objections for proceedings u/s 147 as per order dt 11.09.13. The Hon'ble High Court of Andhra Pradesh in writ petition no. 27488/2013 and WVMP No. 3341/2013, vide order dt 12.11.13 allowed the hearing of the proceedings and permitted the assessee to participate in the hearing. **However, the Hon'ble High Court directed that the effect of adverse order, if any, shall not be given without the leave of the court.** The relevant portion is reproduced as under:

".....in the event any adverse order is passed, the effect thereof shall not be given effect without the leave of the court"

15. Therefore, the effect of this order is not being given to presently. In accordance with, and subject to the above discussion, the total income of the assessee is computed as under:

Income shown	Rs.	76,34,100
Add: Deduction u/s 80IB disallowed:		2,69,00,096
		3,45,34,196
Total income assessed	**Rs**	**3,45,34,200**

Tax Thereon	Rs.	1,03,60,260
Add; surcharge	:	10,36,026
Add: Education CESS	:	3,41,889
Total	:	1,17,38,175
Less: Taxes Paid	:	25,10,471
Total	:	92,27,704
Add: interest u/s 234B	:	86,65,206
interest u/s 234C	:	4,21,535
Balance tax	**Rs.**	1,83,14,445 **1,83,14,450**

The demand as per the notice of demand u/s 156 would become enforceable and Penalty u/s 271(1)(c) would be initiated after giving effect to the further directions of Hon'ble Andhra Pradesh High Court.

(N. Srikanth)
Dy. Commissioner of Income-tax
Circle – 10(1), Hyderabad

Copy to the assessee

Notice of Demand under section 156 of the Income-tax Act, 1961

PAN : AAJFM0647C
Status : Firm

To
The Managing Partner
M/s. Mehta & Modi Homes
5-4-187/3 & 4, M G Road
Secunderabad - 03

Sir,

1. This is to give you notice that for the A.Y. 2011-12 a sum of Rs. 1,83,14,450/- details of which are given on the reverse, has been determined to be payable by you.
2. The amount should be paid to the Manager, authorized bank/State Bank of India, Reserve Bank of India at Hyderabad within Thirty Days of the service of this notice. The previous approval of the Deputy Commissioner of Income-Tax has been obtain for allowing a period of less than 30 days for the payment of the above sum. A challan is enclosed for the purpose of payment.
3. If you do not pay the amount within the period specified above, you shall be liable to pay simple interest at one per cent for every month or part of a month from the date commencing after end of the period aforesaid in accordance with Section 220(2)
4. If you do not pay the amount of the tax within the period specified above, penalty (which may be as much as the amount of tax in arrear) may be imposed upon you after giving you a reasonable opportunity of being heard in accordance with Section 221.
5. If you do not pay the amount within the period specified above, proceedings for the recovery thereof will be taken in accordance with Sections 222 to 229, 231 and 232 of the Income-tax Act, 1961.
6. If you intend to appeal against the assessment/fine/penalty, you may present an appeal under Part A of Chapter XX of the Income-tax Act,1961, to the Commissioner of Income-tax (Appeals)-VI, Hyderabad within thirty days of the receipts of this notice, in Form No.35, duly stamped and verified as laid down in that form.
7. ~~The amount has become due as a result of the Deputy Commissioner (Appeals) of Income-tax/Deputy Commissioner of Income-tax/Commissioner of Income-tax (Appeals)/ Chief Commissioner or Commissioner of Income-tax Under section of the income-tax Act, 1961. If you intend to appeal against the aforesaid order, you may present an appeal under part B of Chapter XX of the said Act to the Income-tax Appellate Tribunal within sixty days of the receipt of that order, in Form No.36,duly stamped and verified as laid down in that form.~~

Place: Hyderabad
Date : 05.03.2014

(N. SRIKANTH)
Dy. Commissioner of Income-tax
Circle-10(1), Hyderabad

NOTES:

1. Delete inappropriate paragraphs and words.
2. If you wish to pay the amount by cheque, the cheque should be drawn in favour of the Manager, authorized bank/ State Bank of India/ Reserve Bank of India.
3. If you intend to seek extension of time for payment of the or propose to make the payment by installments, the application for such extension, or as the case may be, permission to pay by installments, should be made to the Assessing Officer before the expiry of the period specified in paragraph 2. Any request received after the expiry of the said period will not be entertained in view of the specific provisions of section 220(3).