IN THE INCOME TAX APPELLATE TRIBUNAL
HYDERABAD BENCH "A", HYDERABAD

BEFORE SMT. P. MADHAVI DEVI, JUDICIAL MEMBER
AND
SHRI S. RIFAUR RAHMAN, ACCOUNTANT MEMBER

ITA No.679/Hyd/2017
Assessment Year: 2008-09

Silver Oak Realty (Formerly known as Mehta & Modi Homes, Hyderabad. PAN: AAJFM 0647 C	**Vs.**	**DCIT, Circle-10(1), Hyderabad.**
(Appellant)		(Respondent)

Assessee by: Sri S. Rama Rao
Revenue by: Smt K.J. Divya, DR

Date of hearing: 06.08.2018
Date of pronouncement: 02.11.2018

ORDER

PER Smt. P. Madhavi Devi, J.M.:

This is assessee's appeal for the Assessment Year 2008-09 against the order of the CIT(A)-6, Hyderabad dated 24.01.2017.

2. Brief facts of the case are that the assessee is a partnership firm, engaged in the business of 'real estate development'. During the relevant assessment year, the assessee was constructing independent residential units. Assessee filed its return of income on 27.09.2008 declaring total income of Rs. 76,34,100/- after claiming deduction of Rs. 2.69 Crs u/s 80IB(10) of the Act. The return was processed u/s 143(1) of the Act on 02.09.2009 and subsequently reopened u/s 147 of the

Act after recording reasons. Accordingly notice u/s 148 of the Act was issued to the assessee.

3. Assessee filed its reply on 10.04.2013 requesting to treat the return filed on 27.09.2008 as having been filed in response to notice u/s 148 of the Act and sought for the reasons recorded. Assessee filed its objections to proceedings u/s 147 of the Act which were disposed of by the A.O. vide a separate order dated 11.03.2013. Thereafter, the A.O. proceeded to consider the assessee's claim of deduction u/s 80IB(10) of the Act. He observed that the assessee had constructed independent duplex villas comprising of ground and 1st floors in each of the villas and that the ground floor comprises living room, dining area, one bed room and attached toilet, kitchen, a covered portico and a garden while the 1st floor comprises of two bed rooms with attached toilet, study room, stair case and a balcony. He observed that the built up area measurement reported by the assessee did not include the covered portico of the ground floor and the balcony on the 1st floor. According to the A.O., these two also form part of the built up area and if these are added, the area of each villa exceeded 1500 sq. ft and therefore, the assessee is not eligible for deduction u/s 80IB(10) of the Act. He accordingly, disallowed.

4. Aggrieved, assessee preferred an appeal before the CIT(A), who confirmed the order of the A.O. and the assessee is in second appeal before us by raising the following grounds:-

> "1. *On the facts and circumstances of the case, the Ld. CIT(A)-6, Hyderbad erred in dismissing the appeal of the appellant on the question of the validity of the reassessment proceedings initiated by the Assessing Officer and the disallowance of claim of deduction u/s 80IB.*
> <u>*Re-assessment u/s 147 is not valid:*</u>

the 'projected terrace' and 'portico' were included and not otherwise.

11. *The CIT ought to have appreciated the order of the Hon'ble High Court in W.P. No.27488 of 213 wherein the Hon'ble Court has held that any adverse order shall not be given effect without the leave of the Hon'ble court."*

5. As regards Grounds No.2 to 4 are concerned, the Learned Counsel for the Assessee submitted that though the initial assessment was completed u/s 143(1) of the Act, the A.O could not have reopened the assessment unless he had fresh tangible material before him to believe that the income of the assessee has escaped assessment and that such a reopening u/s 147 of the Act would be on a mere change of opinion. He also drew our attention to the fact that the reopening of the assessment is on account of audit objection raised by the CAG and therefore, according to him the A.O. has not independently formed any opinion that the income of the assessee has escaped assessment and hence, reopening of the assessment u/s 147 of the Act is not sustainable.

6. Learned Departmental Representative, however, supported the orders of the authorities below.

7. Having regard to the rival contentions and the material on record, we find that the reopening of the assessment is within a period of 4 years from the end of the relevant assessment year and the initial assessment was u/s 143(1) and not u/s 143(3) of the Act. As regards the change of opinion is concerned, we find that the A.O. has perused the assessment record to observe that the built up area of each of the residential units is more than 1500 sq. ft and that the assessee is not eligible for deduction u/s 80IB(10) of the Act. Therefore, it is clear that the formation

of belief is from the material on record only and that no fresh tangible material had come to the knowledge of the A.O. to reopen the assessment. The Hon'ble Delhi High Court in the case of Orient Craft Ltd reported in 354 ITR 536 (Delhi), has clearly held that even an assessment done u/s 143(1) of the Act, can be reopened u/s 147 of the Act, only if the Assessing Officer had tangible material which has come to his knowledge, subsequent to such an assessment u/s 143(1) of the Act. The relevant paras of the said judgment are reproduced hereunder for ready reference:-

> *"Held, dismissing the appeal, that the reasons disclosed that the Assessing Officer reached the belief that there was escapement of income "on going through the return of income" filed by the assessee after he accepted the return under section 143(1) without scrutiny, and nothing more. This was nothing but a review of the earlier proceedings and an abuse of power by the Assessing Officer. The reasons recorded by the Assessing Officer did confirm the apprehension about the harm that a less strict interpretation of the words "reason to believe" vis-à-vis an intimation issued under section 143(1) could cause to the tax regime. There was nothing in the reasons recorded to show that any tangible material had come into the possession of the Assessing Officer subsequent to the issue of the intimation. The notice reflected an arbitrary exercise of the power conferred under section 147."*

8. Therefore, respectfully following the same, we hold that the reopening of the assessment which is completed u/s 143(1) of the Act is not sustainable without there being any tangible material that has come to the knowledge of the A.O. Since the assessment itself has been held as not sustainable, the issue on merits is not adjudicated at this stage as it would only be an academic exercise.

9. In the result, appeal filed by the assessee is partly allowed.

Pronounced in the open Court on 02nd November, 2018.

Sd/-	**Sd/-**
(S. RIFAUR RAHMAN)	**(P. MADHAVI DEVI)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Hyderabad, Dated: 02nd November, 2018

OKK

Copy to:-

1) M/s. Silver Oak Realty, D.No.5-4-187/3 & 4, Soham Mansion, M.G. Road, Secunderabad – 500003.
2) DCIT, Circle-10(1), I.T. Towers, A.C. Guards, Masab Tank, Hyderabad-4.
3) The CIT(A)-6, Hyderabad
4) The Pr. CIT-6, Hyderabad
5) The DR, ITAT, Hyderabad
6) Guard File