ITNS-55

IN THE OFFICE OF THE COMMISSIONER OF INCOME-TAX (APPEALS)-6, HYDERABAD.

Smt.PALLAVI AGARWAL, IRS,
Commissioner of Income-tax (Appeals)-6,
Hyderabad.

ITA No.0004/2015-16/CIT(A)-6/16-17 Date: 24.01.2017

Instituted on the 6th April, 2015 from the order of Dy. Commissioner of Income Tax, Circle-10(1), Hyderabad (Sri N. Srikanth)

01	Assessment Year	2008-09
02	PAN	AAJFM0647C
03	Name and address of the appellant	M/s Mehta & Modi Homes, 5-4-187/3, 4, M.G. Road, Secuderabad.
04	Income assessed	Rs.3,45,34,200/-
05	Demand payable	Rs.1,83,14,450/-
06	Section under which order appealed against was passed	U/s 143(3) r.w.s. 147 of the I.T. Act, 1961
07	Date(s) of hearing	23.01.2017
08	Present for appellant	Sri Ajay Mehta, AR
09	Present for Department	--

APPELLATE ORDER AND GROUNDS OF DECISION

This appeal has been filed against the order passed by Dy. Commissioner of Income Tax, Circle-10(1), Hyderabad u/s 143(3) r.w.s. 147 of the Income-tax Act (the Act) for A.Y. 2008-09. The present proceedings arise out of reassessment made u/s 143(3) r.w.s. 147 of the I.T. Act as the Assessing Officer had reason to believe that income had escaped assessment on account of wrong claim of deduction u/s 80IB(10) by the assessee.

02.0 The assessee is a real estate developer and has carried the work of building raising project at Cherlapally Village in the name of 'Silver Oak Bungalows'. It envisaged development of 76 residential units on a land admeasuring over 6 acres and had claimed deduction u/s 80IB(10) on the said project.

02.1 The assessee had filed its return of income on a total income of Rs.76,34,100/- after claiming deduction u/s 80IB(10) of Rs.2.69 crores. The return was processed u/s 143(1) and later the assessment was reopened as on verification of the record, the Assessing Officer noticed that the assessee had wrongly claimed deduction u/s 80IB(10) as according to the Assessing Officer the maximum built-up area of the houses exceeded the prescribed limit of 1500 Sq.ft. per unit after inclusion of the portico on the ground floor and balcony, on the 1st floor (which according to the assessee is open terrace). According to the Assessing Officer, the area of portico and balcony was to be included for considering the total built-up area of 1500 Sq.ft. per unit which was supported by the decision of the Hon'ble ITAT in case of M/s Modi Builders & Realtors Pvt. Ltd. in ITA No.1541/Hyd/2010 dated 31.03.2011 for A.Y. 2007-08 wherein it was held that the built-up area included portico and balcony. The assessee objected to the reopening of assessment u/s 147. But, according to the Assessing Officer, 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 Assessing Officer, it was not an open terrace as conceived in the top floor of any multi-storied apartment. If the measurement of both covered portico and balcony was included, the built-up area of independent duplex villa exceeded 1500 sq.ft. He also rejected the contention of the assessee that there was no understatement on its part and that where original assessment was completed u/s 143(1), the assessment could not be reopened u/s 147 of the Act. The Assessing Officer held that intimation u/s 143(1) was not an assessment and therefore there was no question of treating an assessment in such cases as a change of opinion on the part of the Assessing Officer. According to the Assessing Officer, the decision of the ITAT (supra) in order dated 31.03.2011 constituted information which was independently applied on the facts of assessee's case. Correct and true state of law derived from relevant judicial decision of ITAT, thus constituted information. According to the Assessing Officer, the definition of 'built-up area' was exhaustive. As per Section 80IB(14), it meant "*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 coomon areas shared with other residential units.*" He rejected the

assessee's argument that the space on the 1st floor was an "open terrace" and held that the 1st floor of the duplex villas was not an "open space" akin to the "open space" on the top floor of any multi storied apartment. The 1st floor comprised of two bed rooms with attached toilet, a study room, stair case and a balcony and that balcony could not be treated as an "open space" akin to the "open space" on the top floor of any multi storied apartment. The Assessing Officer held that the assessee was not eligible for deduction under Sec 80IB(10) of the Act and he disallowed the claim of Rs.2,69,00,096/- and recomputed the total income at Rs.3,45,34,200/-.

03. The assessee has challenged the reopening of assessment on technical grounds and also on merit. It has questioned the validity of assessment on the following grounds:

i) Notice u/s 148 was issued without the Assessing Officer getting any fresh tangible material on record.

ii) The reopening made u/s 147 was a mere 'change of opinion' on the part of the Assessing Officer.

iii) The reopening was prima-facie in pursuance to the CAG audit objection in earlier years.

Decision :

04.0 The submission of the appellant and the facts of the case have been carefully considered. Each of the grounds on which the validity of assessment is challenged is discussed below:

i) (a) Change of opinion and no tangible reasons on record : According to the assessee, the reopening made u/s 147 of the Act was a mere change of opinion and a review in the garb of reassessment and therefore invalid and bad in law. It was submitted that the Assessing Officer had relied on the assessment records of A.Ys. 2006-07 and 2007-08 to reopen the case.

(b) The submission has been considered. The return was processed u/s 143(1) of the Act and the Assessing Officer had not formed any opinion in the 1st place and therefore there is no question of any change of opinion by the Assessing Officer. According to the assessee, the assessment record for

the A.Y. 2008-09 did not contain any information / details and therefore the Assessing Officer was not correct in saying that "on verification of the assessment records, it is noticed ....." and as there was no tangible information on records, the reopening was not valid. This is a too restrictive of an interpretation u/s 147 of the Act. The section states that the Assessing Officer may assess or reassess the income in respect of any issue, which has escaped assessment. The information should have a nexus with his reason to believe that income chargeable to tax had escaped assessment and he should record his reasons for reopening. It is settled law that 'assessment records' of the assessee includes all 'assessment records' and not relating to one year only and for reopening a case, all information from whatever source can be taken. Coming to the issue whether there was valid ground on the reason recorded by the Assessing Officer. The Assessing Officer has mentioned in the assessment order that assessment proceeding was initiated in view of the decision of the Hon'ble ITAT, Hyderabad in the case of M/s Modi Builders & Realtors Pvt. Ltd. (supra) to the effect that the portico and balcony have to be considered for purposes of calculating the built-up area. He has also referred to and relied on the decision of Hon'ble Supreme Court in the case of Kalyanji Mavji & Co V CIT (102 ITR 287), Indian & Eastern Newspaper Society vs. CIT (119 ITR 996) & A.L.A Firm vs. CIT (189 ITR 285) as an authority for the proposition that a decision of ITAT / Court holding that a particular item of receipt which was not considered as income actually constituted income; initiation of proceeding u/s 147 of the I.T. Act is valid. The decision of the ITAT dated 31.03.2011 constituted information which was independently applied by the Assessing Officer. Hence, the ratio of that decision was a valid ground for forming a reason to believe that the deduction claimed by the assessee was not allowable to it and hence income chargeable to tax had escaped assessment.

ii) (a) RAP objection : According to the assessee, the proceeding u/s 147 of the Act for A.Ys. 2006-07 and 2007-08 was initiated on the basis of Revenue Audit Objection. In those years, the deduction claimed u/s 80IB(10) was initially allowed after due verification and inspection of residential units. Hence, according to the assessee, the assessments in those years got

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reopened merely because of audit objection by the CAG and which had resulted in change of opinion.

(b) As discussed above, as per the assessment order, proceeding u/s 147 was initiated in view of the decision of Hon'ble ITAT, Hyderabad (supra). The existence of any audit objection was therefore incidental and immaterial for the present purpose. More over, the scope of audit is limited to finding whether, on the basis of the given facts and the available proposition of law, the Assessing Officer's decision to tax any receipt is correct or not? For the A.Ys. 2006-07 and 2007-08, the Assessing Officer had allowed deduction as he did not have the benefit of the ITAT decision while making the original assessment in those years. For the assessment year under consideration, there was no assessment done u/s 143(3) of the Act and as discussed above, the Assessing Officer reopened the case on the basis of the ITAT decision (supra) when the decision of the ITAT holding that the deduction in such cases should not be allowed came to his notice. The challenge to the validity of the proceeding on this ground fails.

04.1 In view of the aforesaid, the challenge to the validity fails.

Merits :

05.0 The assessee has challenged the decision to treat the area of portico and balcony as part of built-up area and consequently to deny the claim of deduction on merit. It is to be seen that the assessee had claimed deduction u/s 80IB(10) for the same project in A.Ys. 2006-07 and 2007-08 and after a detailed discussion, it was held that the claim for deduction u/s 80IB(10) was not allowable. The relevant part of the decision for A.Y. 2006-07 (ITA No.0726/2014-15/CIT(A)-6/15-16 dated 06.11.2015) is reproduced as below:

"05.1 Reliance has been placed on the decision of Hon'ble Madras High Court in the case of M/s Ceerbros Hotels (P) Ltd. V DCIT (Appeal No.581 of 2008 dated 19.10.2012) & Pune, ITAT in case of Shri Naresh T. Wadhwani Vs DCIT (ITA No.18-20/PN/2013 dated 28.10.2014) in support of such proposition. On perusal of these

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decisions, it is clear that they relate to the area of open terrace and not to balcony and portico. This distinguishing feature was also noted by the Hon'ble ITAT, Pune Bench. Hence, those decisions are distinguishable on facts. On the other hand, the decision of ITAT, Hyderabad on the case of Modi Builders (Supra) is a direct authority in support of the Assessing Officer's conclusion. Respectfully following the same, it is held that the Assessing Officer was correct in denying the claim for deduction u/s 80IB(10) of the Act.

06.0 It may be added that no one can claim a vested right in deduction of income and the consequent concession in taxation. Taxation is the norm. Deduction is an exception and can be allowed only if the attendant conditions are satisfied fully. If an assessee fails to satisfy these conditions, he has to pay tax which was anyway payable by him. It is not a case where tax is charged by the Assessing Officer on notional / fictional income. The income was earned by the assessee and appropriated by it. No hardship has been caused to it, if it has been asked to pay tax on such income for the reason that the conditions attached to the deduction were not satisfied by it. If the assessee has earned income and is not eligible for deduction of the same, it should be subjected to tax and such substantive liability should not be dislodged by resorting to hyper technical considerations."

07.0 In view of the foregoing discussion and in keeping with the decision of the undersigned in A.Ys.2006-07 and 2007-08, it is held that proceeding was validly initiated by Assessing Officer and the claim of deduction u/s 80IB of the Act was correctly disallowed by the Assessing Cfficer.

08.0 In the result, **appeal for A.Y. 2008-09 is dismissed.**

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(PALLAVI AGARWAL)
Commissioner of Income-tax
(Appeals)-6, Hyderabad

// CERTIFIED TO BE TRUE COPY //

Copy forwarded to:

1. The Appellant with Demand Notice, in original.
2. The CCIT, Hyderabad.
3. The Pr. Commissioner of Income-tax-6, Hyderabad.
4. The Addl./Jt.CIT, Range-10, Hyderabad.
5. The DCIT, Circle-10(1), Hyderabad.

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(SAI LATHA P)
Private Secretary,
O/o. CIT(A)-6, Hyderabad.

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)