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MODI PROPERTIES & INV. PVT. LTD. INWARD No. 586 Date 14/9/13 SEC'BAD

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Office of the
Asst. Commissioner of Income-tax,
Circle-10(1), 5th Floor, IT Towers,
AC Guards, Hyderabad.
Ph.No. 040-23425400.

F.No.ACIT-10(1)/**147/2008-09**

Dated : 11.09.2013.

To

The Managing Partner,
M/s Mehta & Modi Homes
5-4-187/3&4, M.G Road,
Secunderabad-500003.

Sir,

Sub: Reopening u/s. 147 of I.T. Act, 1961, A.Y. 2008-09 - Objections – Reg.

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Please refer to your letter date 27-8-2013 in the above matter.

2. The e-return was filed in your case on 27.09.2008 showing total income of Rs. 76,34,100/-, after claiming deduction of Rs 2.69cr u/s 80IB(10). The return was processed u/s 143(1) on 02/09/09 by CPC. The assessee is a partnership firm with 4 partners. The major partner being a company viz. M/s. Modi Properties & Investments & Ltd holding 50% share in the assessee-firm. The assessee is a real estate developer and during the year was constructing independent residential units.

3. 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 80IB of Rs.2,69,00,096 and returned a total income of Rs. 76,43,100. The ROI was processed u/s 143(1).*
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> *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 80IB (10) of the Act from the profits derived out of the above business activity. As per sec. 80IB (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*

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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."

4. It has been 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 has relied on the following case laws and requested to drop the proceeding u/s 147:

1. CIT Vs. Kelvinator of India Ltd [2010] [SC] 320 ITR 561
2. Alpika marketing Pvt Ltd Vs ITO (2008) 21 SOT 302 (Mumbai ITAT)
3. Sheo Narain Jaiswa ITO (1989) 176 ITR 352(Patna)
4. Jindal Photo Film Vs DCIT (Delhi) 234 ITR 170
5. Garden Silk Milk Pvt Ltd Vs DCIT (Gujarat) 237 ITR 668
6. Adani exports Vs DCIT(Gujarat) 240 ITR 224
7. Apollo Hospital enterprises Ltd (Madras) 287 ITR 668
8. Ganesh housing Corp Ltd Vs DCIT (Gujarat) 341 ITR 312
9. Indian Eastern Newspaper society Vs CIT (SC)119 ITR 996

5.1. The reply of the assessee has been carefully considered. 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

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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 Ist 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 Ist 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 and 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*

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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.

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.

Notice u/s 143(2) is enclosed for further compliance.

Yours faithfully,

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