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IN THE HIGH COURT OF JUDICATURE OF ANDHRA PRADESH
AT HYDERABAD

(Special Original Jurisdiction)

W.P. NO. OF 2013

BETWEEN

M/s. Mehta & Modi Homes,
5-4-187/3 & 4, II Floor, M.G. Road,
Secunderabad- 500 003.
Represented by its Managing Partner,
Soham Modi, S/o Satish Modi

...Petitioner

AND

Asst. Commissioner of Income Tax,
Circle- 10(1), 5th Floor, IT Towers,
AC Guards, Hyderabad.

...Respondent

AFFIDAVIT FILED BY THE PETITONER HEREIN

I, Soham Modi, S/o Satish Modi, aged 43 years, R/o Hyderabad, do solemnly affirm and state as under:

1. That I am the Managing Partner of the Petitioner Company and I am well acquainted with the facts and circumstances of the case. I am authorised to file the affidavit on behalf of the Petitioner herein. The facts leading to the filing of the present writ petition are set out hereunder.

2. The Petitioner is a partnership firm having PAN No. AAJFM0647C and is assessed to Income Tax under the provisions of the Income Tax Act, 1961 (hereinafter referred to as "the Act") by the Assessing Officer in Ward-10(4), Hyderabad. The Petitioner implemented a scheme for construction of independent houses in Cherlapally in the name and style of *Silver Oaks Bungalows*. The site is located at Cherlapally, which is approximately 26 kms from the Income Tax Towers. The total area consists of almost 6 acres. The Petitioner has constructed 76 independent duplex houses in plot Nos. 1 to 76. The construction ranges from 1366 sft to 1487 sft of built up area. Houses bearing plot Nos. 65 & 66 which are East facing consists of built-up area of 771.52 sft at ground floor and 596.09 sft at first floor.

3. Houses bearing plot nos. 18 to 24 and some more houses in East facing consists of built up area of 1475 sft which includes 831.35 sft at ground floor and 644.75 at first floor. House bearing plot no. 69 has built up area of 1487 sft including 853.57 sft and 655.50 sft at ground and first floors respectively.

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4. The Petitioner made a claim under Section 80 IB (10) of the Act, for deduction of the profits arising from the project. The claim of the Petitioner was effectively considered by the assessing officer in the course of assessment proceedings for the assessment year 2006-2007 (for which the relevant previous year was 2005-06). The assessing officer had deputed the inspector from his office for the purposes of inspecting the project site. The inspector had submitted a report noticing the number of residential units and the sizes of the individual units. Further the inspector had reported that the measured area of the duplex houses match with the specified areas as provided by the Petitioner firm, on the basis of random examination. On the above basis the assessing officer accepted the claim of the Petitioner for deduction under Section 80 IB of the Act for the assessment year 2006-2007. A true of copy of the order of the assessment for the assessment year 2006-2007 passed in the case of the Petitioner is filed as **Annexure P1.**

5. On the same basis the return of the Petitioner for the assessment year 2007-2008, for which the claim had been made for deduction under Section 80 IB of the Act had been made, was accepted by the assessing officer by a detailed speaking order passed under Section 143(3) of the Act. A true copy of the said order of assessment for the assessment year 2007-2008 is filed as **Annexure P2**.

6. In accordance with the claim of the Petitioner for the earlier two years, the Petitioner filed a return of income for the assessment year 2008-2009 (previous year ended on 31.03.2009) on the 29.09. 2008. Such return, as mandated under the provisions of the Act, had been filed in electronic form. Subsequently the Petitioner also obtained an acknowledgement for the filing of the said return. The Petitioner had, as mentioned above, claimed 100% profit from the housing project under the provisions of the Section 80 IB (10) of the Act, as a deduction.

7. The return was accompanied by a declaration dated 27.09.2008 from the statutory auditor of the Petitioner. It was stated that the undertaking satisfied the conditions stipulated in Section 80 IB of the Act, and that the amount of deduction claimed under the said section in Item 30 as the per the Income Tax met the requirement of the said section. The Charted Accountant had further certified that the Statement Affairs of the industrial undertaking/Enterprise as on 31.03.2008 as also the profit and loss account as on 31.03.2008 gave a true and fair view. A true copy of the return of the income submitted for the assessment year 2008-2009 together with the declaration signed by the Chartered Accountant as required under the provisions of the Act are filed as **Annexure P3**.

8. On 31.03.2013 the assessing officer (Respondent) issued a notice under Section 148 of the Act stating that he proposes to re-assess the income for the assessment year 2008-2009. The Petitioner was called upon to deliver a copy of a return within a period of 15 days from the date of service of the said notice. The Petitioner responded to the said notice by stating the return of income already filed electronically on 27.09.2008 and bearing E-filing acknowledgement number 40546220270908 may be treated as a return

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filed in compliance of the notice issued under Section 148 of the Act. The Petitioner also requested the Respondent to furnish a copy of the reasons recorded for re-opening of the assessment and for issuance of the notice under Section 148 of the Act. A copy of the notice issued by the Respondent on 31.03.2013 and a copy of the reply thereto submitted on 10.04.2013 are filed as **Annexures P4 & P5**.

9. The Petitioner had also received a notice under Section 142 (1) of the Act, subsequently on the 25.07.2013, calling upon the Petitioner to produce or cause to be produced the details with respect to the return of income for the assessment year 2008-2009. The Petitioner was *interalia* asked to submit as to why the claim for deduction under Section 80 IB (10) of the Act should not be disallowed, as allegedly each residential unit exceeded 1500 Sq.ft which was in violation of conditions in Section 80 IB (10) of the Act. Since the Petitioner had sought reasons recorded for re-opening of the assessment, the Petitioner did not comply with the request of the Respondent. However the Petitioner sent a letter 01.08.2013, reiterating its request for furnishing a copy of the reasons recorded for re-opening of the assessment. A copy of the notice dated 25.07.2013 issued under Section 142 (1) of the Act and a copy of the reply dated 01.08.2013 submitted by the Petitioner to the Respondent are filed as **Annexures P6 & P7.**

10. The Respondent provided a copy of the noting made in the order sheet on the 31.03.2013. This was in response to the Petitioner's request for providing the reasons recorded for reopening of the assessment. It is stated that on verification of the Assessment Record, the Assessee's claim for deduction under section 80 IB (10) of the Act was not admissible. The ground on which the Respondent sought to disallow the said claim was that each of the units exceeded an area of 1500 sq.ft. According to the Respondent on the basis of verification of the information furnished along with the sanctioned plan and brochure, as the Assessee had excluded the portico in the ground floor and open terrace in the first floor in the total built up area of the residential units, the computation of the built-up area was incorrect. If these two were included then the floor area of each residential unit exceeded 1500 sq.ft. It was further recorded that the Hon'ble Income Tax Appellate Tribunal in the case of ***Modi Builders & Realtors (Pvt) Ltd* (ITA No. 1541/Hyd/2010)** for the Assessment Year 2007-2008 on 31.03.2011 had decided that these areas had to be classified as integral part of the Bungalow, and therefore so done, the area would exceed the limit prescribed under Section 80 IB of the Act. A true copy of the Order Sheet provided by the Respondent for the Assessment Year 2008-09 is filed as **Annexure P8.**

11. As contemplated under the provisions of the Act and also in terms of the Judgment of the Hon'ble Supreme Court, the Petitioner submitted a detailed explanation on 27.08.2013. Firstly the Petitioner pointed out that there is no fresh material available with the Respondent to formulate the reason to believe that income chargeable to tax had escaped assessment due to failure on the part of the Assessee to disclose fully and truly all

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material facts. The claim of the Petitioner as a builder eligible for deduction under Section 80 IB (10) of the Act had been adjudicated by two well-reasoned orders of the Assessment for the years 2006-07 and 2007-08. The original assessment having been based on the well founded examination of the facts for these two assessment years, the subsequent year's assessment under Section 143(1) of the Act could not be construed as one without application of mind. The Petitioner relied upon the Judgment of the Hon'ble Supreme Court in the case of ***CIT VS Kelvinator of India Limited 320 ITR 561***, the decision of the Mumbai Bench of the Income Tax Appellate Tribunal for the purposes of saying that it was impermissible to reopen an assessment only on the basis of change of opinion. The Petitioner had relied upon certain other cases as well in the reply submitted to the Respondent. The Petitioner pointed out that the built up area of the individual units in the project had been measured by the Income Tax Department and the Assessments had been completed on the basis of scrutiny in respect of two immediately preceding years. The Assessing Officer had chosen not to select the return for the Assessment Year 2008-09 for scrutiny, in view of the fact that there were no altered or changed circumstances warranting such examination. The Petitioner also pointed out that perhaps the reopening was based on certain audit objections of the Auditor General's Office, and had relied upon the Judgment of the Hon'ble Supreme Court to say that the audit view was not relevant for the purposes of the reopening of the assessment. A true copy of the reply submitted by the Petitioner in response to the furnishing of reasons recorded for reopening of the assessment is filed as **Annexure P9.** The Petitioner had sought the dropping of the proceedings, and also requested for a copy of the decision of the Respondent to enable the Petitioner to take further suitable action in terms of the judgment of the Hon'ble Supreme Court in the case of ***GKN Drive Shafts (India) Ltd., Vs. Income Tax Officer 259 ITR 19 (SC).***

12. The Respondent has now passed the impugned order on 11.09.2013 rejecting the Petitioner's request for terminating the proceedings initiated under Sections 147/148 of the Act. The Respondent has noticed the submissions made by the Petitioner, and has come to the conclusion that the order of the Income Tax Appellate Tribunal passed on 31.03.2011 in Modi Builder's case constituted information which was independently applied to the facts of the case. On this basis he has tried to support the action for re-opening the assessment under provisions of Section 147 of the Act. A true copy of the impugned order dated 11.09.2013 passed by the Respondent is filed as **Annexure P10.** This order is also accompanied by a notice under Section 143(2) of the Act, calling upon the Petitioner to attend the office of Respondent on 25.09.2013 for the purposes of further proceedings in the case. A true copy of said notice dated 11.09.2013 is filed as **Annexure P11**.

13. The Petitioner independently made an application to the Principal Director of Audit (Central) Andhra Pradesh, requesting for the correspondence between the Respondent and the Audit Department pertaining to the case of the Petitioner for the Assessment

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Year 2008-09. At the request of the Petitioner, the Office of the Principal Director of Audit (Central) Andhra Pradesh has provided the copies of the correspondence that were exchanged between the Respondents as also the Assessing Officer who held jurisdiction for other assessment years, with the said Audit Department.

14. It would appear from the said correspondence that the Audit Department sent a query on 23.03.2012 to the Assessing Officer stating that if the portico area and the open terrace area were added to the floor area of the residential units then it exceeded 1500 Sq.ft, disentitling the Petitioner for the deduction under Section 80 IB of the Act. In response to this the Assessing Officer namely the Income Tax Officer - Ward 10(4), Hyderabad had submitted a detailed reply on 08.06.2012. The Assessing Officer had justified the orders of the assessment passed in the case of the Petitioner. It was stated by the Assessing Officer that just as the car park area in a multistoried complex though reserved for exclusive use of a flat owner and not shared with others is not considered as built up area, on the footing and analogy the car park area in an individual house should not be considered as part of the built up area. Even in the case of a multistoried complex the terrace on the top of the floor is not considered as built up area. On the footing and analogy the sky terrace should not be considered as part of the built up area that the portico area is not shared commonly will not alter the situation because the reserved park area in a multi storied complex is also not shared commonly with the others. The Assessing Officer had rightly pointed out that the local sanctioning authority of the building plan has also excluded the portico area and terrace area in computing the built up area. The Municipal laws do not consider these areas as built up area for levying and collecting sanction fees. The Assessing Officer had explained the provisions of Section 80 IB (14) (a) of the Act and had stated that inner measurements were required to be taken for a residential unit including the projections and balconies at floor level. According to the Assessing Officer this implied that the areas to be included should be capable of measurement. The portico which is classified as a projection is not capable of taking inner measurement as there are no surrounding walls on all the sides as the same is open. On the basis of such detailed analysis, and also on the basis of the Judgment of the Hon'ble Supreme Court which noticed the scope of Section 80 IB (10), as a provision for promoting economic growth, the said Section should be interpreted liberally, the Assessing Officer had justified the allowance of the claim of the Petitioner for the deduction under Section 80 IB of the Act. This was followed up with a further letter sent to the Commissioner of the Income Tax to the Office of the Accountant General, to which a copy of the Ahmedabad Bench of the Income Tax Tribunal was appended. The entire correspondence between the Assessing Officer and the Audit Department, as provided on the basis of an application under the R.T.I Act is filed as **Annexure P12**.

15. It is respectfully submitted that in view of the above, the order of the Respondent passed on the 11th September, 2013, rejecting the submissions made by Petitioner are incorrect, and required to be set aside.

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GROUNDS

1. It is respectfully submitted that the reasons recorded in the order sheet as supplied by the Respondent, is plainly contradictory with the exchange of correspondence between the Audit Department and the Assessing Officer. The order of the Respondent is contradictory with the submissions made by the Assessing Officer to the Audit Department. In well-reasoned correspondence with the audit department it has been clearly explained that the view expressed by the Assessing Officer in the original orders of assessment is correct. There is complete and total justification of the stand of the department in allowing the deduction under Section 80 IB of the Act. Therefore the entire exercise of reopening the assessment is based on the audit objection and not the order of the Income Tax Appellate Tribunal as is sought to be made out. The last of the correspondence rests with the letter dated 04.02.2013, where under the Senior Audit Officer has rejected the case of the department, and has come to the conclusion that necessary remedial action should be taken by the department. After the said communication dated 04.02.2013 has been issued, the Respondent has issued the notice dated 31.03.2013. This notice dated 31.03.2013, which forms the basis of reopening of the assessment, records a totally different reason. Therefore the notice is illegal and unsustainable.

It is now settled from a catena of decisions of the Hon'ble Supreme Court and also various High Courts in India that even after the amendment of Section 147 of the Act, reopening of the assessment is impermissible on a mere change of opinion. In the present case the Department had not only got a detailed inspection conducted, but also had examined all the material on facts for the purposes of the coming to the conclusion that the claim of the Petitioner for deduction under Section 80 IB of Act was valid. That being so there was no fresh material for the Respondent to come to a different conclusion. It is only the opinion that projections such as the portico, and the open terrace must also be included for computing the built up area, which in the very words of the Assessing Officer were incorrect. Therefore the present attempt is based on nothing but a change of opinion, and therefore the reopening of the assessment for the Assessment Year 2008-09 is impermissible.

It is submitted that the Petitioner has no effective alternative or efficacious remedy except to approach this Hon'ble Court by invoking its original special jurisdiction under Article 226 of the Constitution of India. The Petitioner has established a prima facie case and the balance of convenience lies in its favour in granting the relief sought for.

For the reasons stated above, it is prayed that the Hon'ble Court may be pleased to issue appropriate writ, order or direction in the nature of Mandamus declaring the notice dated 31.3.2013 issued by the Respondent under Section 148 of the Income Tax Act, 1961 and the order dated 11.09.2013 passed by the Respondent as arbitrary, illegal and unlawful

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and set aside the same and, consequently, declare that the reopening of the assessment under Section 147/148 of the Income Tax Act, 1961 for the Assessment Year 2008-09 is illegal, arbitrary and unauthorized and pass such other further orders as deemed fit and proper in the interest of justice.

It is further prayed that during the pendency of the above Writ Petition, this Hon'ble Court may be pleased to stay all further proceedings pursuant notice dated 31.3.2013 issued by the Respondent under Section 148 of the Income Tax Act, 1961 and the order dated 11.09.2013 passed by the Respondent and pass such other order or orders as this Hon'ble Court deems fit and proper in the interest of justice.

Solemnly affirmed and signed before me
on this 20th day of September, 2013
at Hyderabad.

DEPONENT

ADVOCATE::HYDERABAD

VERIFICATION

I, Soham Modi, S/o Satish Modi, Aged 43 years, R/o Hyderabad, the Managing Partner of the Petitioner, do hereby declare that the contents in Paragraphs (1) to (15) of the Affidavit filed in support of the Writ Petition are believed to be true and correct. Verified today, the 20th day of September, 2013 at Hyderabad.

COUNSEL FOR PETITIONER

DEPONENT

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IN THE HIGH COURT OF JUDICATURE OF ANDHRA PRADESH AT HYDERABAD

TUESDAY, THE TWELFTH DAY OF NOVEMBER
TWO THOUSAND AND THIRTEEN
:PRESENT:
THE HON'BLE SRI KALYAN JYOTI SENGUPTA THE CHIEF JUSTICE
AND
THE HON'BLE SRI JUSTICE SANJAY KUMAR

WVMP NO.3341 of 2013
IN
WP :27488 of 2013

WP :27488 of 2013

Between:
M/s. Mehta & Modi Homes, 5-4-187/3 & 4, II Floor, M.G. Road, Secunderabad- 500 003, Represented by its Managing Partner.

..... Petitioner

AND

Assistant Commissioner of Income Tax, Circle- 10(1), 5th Floor, IT Towers, AC Guards, Hyderabad.

.....Respondent

Petition under Article 226 of the Constitution of India praying that in the circumstances stated in the Affidavit filed herein, the High Court may be pleased to issue appropriate writ, order or direction in the nature of Mandamus declaring the notice, dated 31.3.2013 issued by the Respondent under Section 148 of the Income Tax Act, 1961 and the letter, dated 11.09.2013 passed by the Respondent as arbitrary, illegal and unlawful and set aside the same, and consequently, declare that the reopening of the assessment under Section 147/148 of the Income Tax Act, 1961 for the Assessment Year 2008-09 is illegal, arbitrary and unauthorized;

W.V.M.P. No. 3341 of 2013
Between

Assistant Commissioner of Income Tax, Circle- 10(1), 5th Floor, IT Towers, AC Guards, Hyderabad

...Petitioner
(Respondent in WP 27488 of 2013
on the file of High Court)

AND

M/s. Mehta & Modi Homes, 5-4-187/3 & 4, II Floor, M.G. Road, Secunderabad- 500 003, Represented by its Managing Partner

...Respondent
(Petitioners in WP 27488 of 2013
on the file of High Court)

Petition under Section 151 of C.P.C. praying that in the circumstances stated in the counter affidavit filed in the W.P., the High Court may be pleased to vacate the interim direction granted in WP No.27488/2013 dated 25-09-2013 as otherwise there would cause undue delay in the proceedings initiated under Section 147 of the Act in the interest of Justice.

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These petitions coming on for hearing, upon perusing the petitions and the affidavit and counter affidavit filed in Writ Petition No. 27488 of 2013 and the interim orders of the High Court dated 25-09-2013, 07-10-2013 & 29-10-2013 made in WP No. 27488 of 2013 and upon hearing the arguments of Sri Ch. Pushyam Kiran, Advocate for Petitioner in WP No.27488 of 2013 and Respondent in WVMP No.3341 of 2013 and of Sri B. Narasimha Sharma, Standing Counsel for Respondent in WP No. 27488 of 2013 and Petitioner in WVMP No. 3341 of 2013, the Court made the following:

ORDER:

It is submitted that the interim order already passed is going to expire on 26.11.2013. However, we modify the interim order passed on 25-09-2013 in the manner as follows.

Let the hearing be proceeded and the petitioner is permitted to participate in the hearing, if so advised, without prejudice to its rights and contentions, which are raised before us. We make it clear that mere participation in terms of this order will not be treated to be a waiver to maintain the writ petition. All points may be agitated before the officer concerned, who shall consider the same and decide the matter. If any judgment of the High Court or Supreme Court is cited before the Officer concerned, he must deal with the same and thereafter shall pass a speaking order. In the event any adverse order is passed, the effect thereof shall not be given effect to without the leave of the Court.

Sd/- P.V.K. SATYANARAYANA
ASSISTANT REGISTRAR

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for ASSISTANT REGISTRAR

To

1. One CC to Sri Ch. Pushyam Kiran, Advocate (OPUC)
2. One CC to Sri B. Narasimha Sharma, Advocate (OPUC)
3. One spare copy.

Tvr

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Date: 03-02-2014

From:
M/s Mehta & Modi Homes,
5-4-187/3 & 4, 2nd Floor,
Soham Mansion, M.G. Road,
Secunderabad – 500 0 03.

To:
Asst. Commissioner of Income -tax,
Circle 10 (1),
IT Towers, A.C. Guards,
Hyderabad.

Sir,

Sub: I.T. Re-assessment proceedings - Own case - Asst. Year. 2008-09 – PAN: AAJFM0647C – Submissions - reg.

Ref: Notice u/s 142(1) dated 15/01/2014.

Kindly refer to the above notice under section 142(1) wherein we have been asked to explain as to why the deduction u/s 80-IB(10) should not be disallowed on the premise that the total built-up area of each residential unit exceeds 1500 s.ft.

2. We wish to take this opportunity to reiterate our objections to the reopening of the assessment. The notice under section 148 is issued after recording reasons to believe that income has escaped assessment. The record, however, shows the contrary. The issue is that the claim of deduction u/s 80-IB(10) is incorrect since, according to the AO, the built up area of each residential unit exceeded 1500 s.ft. after including the area of the terrace and the portico. This was not the view of the AO. The AO believed the contrary to be true while dealing with an audit objection raised by the Revenue Audit in our own case. In response to our request to CAG under RTI Act, we have been furnished with the copies of the correspondence between the Dept. and the Office of the CAG. The replies by the AO and by the CIT are clinching evidence to show that the assessment has been reopened because of the Revenue Audit objection. The assessments in our case for the Assessment Years 2006-07 and 2007-08 were made under section 143(3) after a detailed and thorough examination and after physical inspection of the residential units and measurement of the built up area through an Inspector and after being satisfied that the claim of deduction was in order. Further, when the RAP raised the objection, the AO vehemently and rightly resisted the objection as untenable. The concerned CIT too in his reply to the RAP stated that the deduction was correctly allowed and he relied on the decision of Ahmedabad ITAT in the case of Safal Associates v. ITO in support of his contention. Despite this, when the RAP reiterated its objection, the AO

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reopened the assessments for those years as also the assessment for the year under consideration. Such change of opinion cannot be the basis for reopening an assessment. Such flip plop makes a mockery of the reasons to believe recorded by the AO indicating escapement of income. Further, reasons to believe escapement of income are *sine qua non* even where an assessment is sought to be reopened within 4 years. And the said reasons cannot be on account of change of opinion pursuant to yielding to someone else's view. Since the AO obviously changed his view yielding to the incorrect view of the Revenue Audit, the reasons are not *bona fide*. Consequently, the notice under section 148 issued for the year is bad in law.

3. Even on merits, the claim of deduction u/s 80-IB(10) by the assessee is perfectly valid and is in order because by no stretch of imagination can it be held that the definition of 'built-up area' for computing the deduction under section 80-IB(10) envisages inclusion of the area occupied by the terrace and portico. In the reasons recorded, the AO relied upon the decision of the ITAT, Hyderabad Bench in the case of M/s Modi Builders and Realtors Pvt. Ltd for the Asst.Year 2007-08 in ITA No 1541/HYD/2010 dated 31/03/2011 which did not even state any reasons for its decision. Surprisingly, the AO ignored the reasoned decision of the Ahmedabad Tribunal in the case of Safal Associates v. ITO dated 19-5-2011 in preference to the decision in M/s Modi Builders and Realtors Pvt. Ltd. (supra) even though he was very well aware of the decision in the case of Safal Associates. It may be noted that the CIT relied upon the decision in the case of Safal Associates in support of the assessee's claim while sending reply to the audit objection. The AO also omitted to consider the decision of the Ahmedabad Tribunal in the case of Nikhil Associates v. ITO (2011) 46 SOT 301 dated 25-3-2011 wherein the Tribunal held that parking space cannot be combined with the area of the residential unit. Moreover, the AO ignored the judgments of the Hon'ble Madras High Court in the case of M/s Ceebros Hotels Pvt. Ltd in Tax Case (Appeal) Nos. 581, 1186 of 2008 and 136 of 2009 rendered on 19-12-2012, CIT v. Sanghvi and Doshi Enterprise in TCA Nos. 581 and 582 of 2011 dated 1-11-2012 and CIT v. Mahalakshmi Housing in TCA No. 585 of 2011 dated 2-11-2012 wherein the High Court held that terrace cannot be a part of 'built-up area' for determining the eligibility for deduction under section 80-IB(10). The AO recorded the reasons for reopening the assessment on 31-3-2013. The aforesaid decisions were all available much before the assessment was reopened, and, therefore, placing reliance on a decision of Hyderabad Tribunal which does not state any reasons for its decision over the other decisions, which are well reasoned, and which ought to have been given primacy, renders the reasons to believe escapement of income not *bona fide*. It should also be noted that judicial propriety demanded that the AO should have taken note of the High Court judgments on the subject. In view of this, the assessee submits that the reopening of the assessment is absolutely without

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justification. Consequently, scrutiny into the claim of deduction is of no avail and is avoidable. It is requested that the proceedings may please be closed.

4. The definition of 'built-up area' is exhaustive. It is not an inclusive definition. As per sec.80-IB(14), 'built-up area' means 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 not include the common areas share with other residential units. So 'built-up area' has to be a residential unit. Balconies and projections within the residential unit have to be included. Thereafter, the thickness of the walls has to be added. If the projections and balconies are not an integral part of the residential unit, those areas cannot be counted as 'built-up area'. In a definition clause which is exhaustive, nothing can be added and nothing can be subtracted. That is the rule of interpretation. There is no intendment. Either the items listed are there or not there. There is no analogy. There is no question of assuming anything. That being the rule of interpretation, anything which is not a part of the inner measurement of the residential unit cannot be reckoned for 'built-up area'. If the inner measurement of the residential unit has projections and balconies, those areas have to be counted. In the case of the assessee, the open terrace is neither a balcony nor a projection. The portico is not even a part of the inner measurement of the residential unit. It is totally outside the residential unit. And it is neither a balcony nor a projection. In any case, portico cannot be counted because it is outside the residential unit. Therefore, the area of the portico is out of the reckoning. If in the definition, projections and balconies were outside the parenthesis, that is, between the two commas, then the meaning could be different. The definition, however, is not worded in this manner. The definition as it is worded means that there must be a residential unit. Its inner measurements have to be taken. This includes the area of balconies and projections. Then, the thickness of the walls has to be added to the inner measurements. In other words, it is abundantly clear that the areas of the balconies and projections which are a part of the inner measurement of the residential unit alone have to be added. Things outside the inner measurement of the residential unit do not at all count. In a meaning clause, this is the only manner of interpretation permissible. In the case of the assessee, terrace is not a projection at all and the portico is outside the residential unit. The decisions cited in the preceding paragraph also state the same. That being the case, the claim for deduction under section 80-IB (10) is perfectly in order. The attempt to disallow the claim may, therefore, be dropped.

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5. For the aforesaid reasons, the assessee once again requests and pleads that the reassessment proceedings may be closed. Detailed notes in regard to the notice u/s 148 **(Note-A)** and the correctness of the our claim u/s 80-IB(10) **(Note-B)** attached to this may also kindly be considered.

Thanking you,

Yours faithfully,

For MEHTA & MODI HOMES,

(Soham Modi)

PARTNER

Encl: As above

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Note-A

M/s Mehta & Modi Homes

Asst. Year 2008-09

Notice u/s 148 not valid

The assessment of M/s Mehta & Modi Homes for the Assessment Year 2008-2009 was re-opened u/s 147 by issue of notice u/s 148 dated 31.03.2013. We filed a reply dated 10.4.2013 requesting for supply of reasons recorded for re-opening the assessment. The AO furnished the reasons recorded in the order sheet on 31.03.2013. Vide letter dated 27.08.13, we have submitted our objections to the notice u/s 148 and requested the AO to drop the proceedings. The AO, however, vide letter dt. 11.09.2013 did not agree with our request.

2. Thereupon, we filed a writ petition in the High Court (W.P. No. 27488/2013 dated 25.09.2013). The Hon'ble High Court was pleased to pass an interim order granting stay of all proceedings. The Hon'ble High Court has since modified the interim order as follows:-

> *"Let the hearing be proceeded and the petitioner is permitted to participate in the hearing, if so advised, without prejudice to its rights and contentions, which are raised before us. We make it clear that mere participation in terms of this order will not be treated to be a waiver to maintain the writ petition. All points may be agitated before the officer concerned, who shall consider the same and decide the matter. If any judgment of the High Court or Supreme Court is cited before the Officer concerned, he must deal with the same and thereafter shall pass a speaking order. In the event any adverse order is passed, the effect thereof shall not be given effect to without the leave of the court".*

The aforesaid order enables us to agitate all points during the hearing before the AO. It enjoins the AO to consider any judgment of the High Court or the Supreme Court cited by us. The AO should take a decision thereon and pass a speaking order. Finally, if the AO passes an order which is adverse to us, it shall not be enforced without the leave of the Court.

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3. Now, the AO has issued notice under section 142(1) dated 15.01.2014 for continuing the re-assessment proceedings. In this notice we are asked to explain as to why the deduction u/s 80-IB(10) should not be disallowed since the total built-up area of each residential unit exceeds 1500 s.ft.

4. (i) In terms of the interim order of the Hon'ble High Court, we are entitled to raise all issues. In view of this, we raise the issue of jurisdiction to issue notice under section 148 for the year. An assessment can be reopened by the AO if on the basis of the assessment record, he has reason to believe that income chargeable to tax has escaped assessment. For the sake of ready reference, the reasons to believe that income chargeable to tax has escaped assessment recorded by the AO for the year under consideration are reproduced below:

"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 a 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. 80IB (14) of the Act, the built-up area is defined as the inner measurement of the residential unit at the floor level, including the projection and balconies, as increased by the thickness of the wall but does not include the common areas hared 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 build 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

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unit has been exceeded which is violation of the condition contained in Sec.80IB (10) of the Act. In view of this, the deduction claimed u/s 80IB (10) 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, dt 31.3.2011".

(ii) It can be seen from the above that the paragraph begins with the statement *'On verifications of the assessment record...'*. Further, the fifth line of the same paragraph starts as follows:

But, on a 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'.

(iii) It may be noted that the return of income for Assessment Year 2008-09, which is under consideration, was filed on 27.9.2008 electronically through e-filing. And, the return was annexureless. This was in accordance with the procedure under the then existing requirement of e-filing. Documents / details were not required to be filed as attachments along to the e-return filed. Moreover, no information or details were called for from us between the period from the date of e-filing of the return and the date of issue of notice u/s 148 on 31.3.2013. That being the factual position, the AO has had no record which he could verify which revealed that we excluded some area from our calculation of built up area. The question, therefore, is: What was the record that the AO verified which he stated that he verified?

(iv) The answer to the above question is evident from para 8 of the counter signed by the ITO, Ward 10(4), Hyd as 'ATTESTOR' and by the ACIT, Circle 10(1), Hyd as 'DEPONENT' dated 9.10.2013 filed by the department to our writ petition wherein it is stated as under:

"In reply to the averments made in para 11 of the writ affidavit, it is submitted that the e-return for the assessment year 2008-09 was processed under section 143(1) of Act on 02.09.2009 by C.P.C Bangalore. Subsequently, action under Section 147 of the Act was initiated by issuing notice under Section 148 of the Act after recording

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reasons. For the assessment year 2008-09, the case was covered by the main provision and not by first proviso to section 147 of the Act. The sanctioned plan and brochure of the project were never a part of the e-return. The position of processing and assessment in the case of the petitioner-assessee are as under:

A.Y.	*Assessment / Processing Status*
2006-07	*Assessment completed u/s. 143(3) on 31.3.2008*
2007-08	*Assessment completed u/s. 143(3) on 31.3.2009*
2008-09	*Processing completed u/s. 143(1) on 2.9.2009*

The action under Section 147 of the Act was initiated after verifying the information furnished by the petitioner-assessee in the sanctioned plan and brochure of the project. It was noticed that the petitioner-assessee has excluded the area of covered portico on the ground floor and the balcony in the first floor in the total built-up area of the independent duplex villas. If the area of the covered portico in the ground floor and the balcony in the first floor are included, the built-up area of each unit would exceed 1,500 square feet. This view is further supported by the decision dated 31.3.2011 of the Hon'ble Income Tax Appellate Tribunal, Hyderabad in the case of M/s. Modi Builders and Realtors Pvt Ltd., for the assessment year 2007-08 (I.T.A. No. 1541/Hyd/2010).

However, it is stated that during assessment for the assessment year 2006-2007 and 2007-2008 only those measurements, which were provided by the petitioner-assessee as specified areas, were taken into consideration. The petitioner-assessee did not include the measurement of the covered portico on the ground floor and the balcony in the first floor (stated as "opened terrace" by the petitioner-assessee), therefore, only the inner measurements of the residential unit were taken into consideration. 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 first floor".

(v) The above counter filed by the department shows beyond any shadow of doubt that the AO placed reliance on the assessment records for the Assessment Years 2006-07 and 2007-08. It is also evident that the AO verified the information furnished during the assessment proceedings for the Assessment Years 2006-07 and 2007-08. In other words, the AO examined the assessment records of the Assessment Years 2006-

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7 and 2007-08 in order to arrive at the reasons to believe that income has escaped assessment for the Assessment Year 2008-09.

(vi) It is beyond dispute that the assessments for the Assessment Years 2006-07 and 2007-08 were completed u/s 143(3) by the ITO, Ward 10(4), Hyd., who has sworn the counter filed against our writ petition as Attester. Thus, it is evident that there was no material separately available to the AO to frame the reasons to believe that income has escaped assessment for the Asst Year 2008-09.

(vii) While completing the assessments u/s 143(3) for the Asst Years 2006-07 and 2007-08, the AO made a detailed examination as to the built-up area of the residential units. The Inspector was deputed specifically for the purpose of measurement of the area. Based on his report, the AO took a considered decision that the area of each residential unit was within the maximum permissible built-up area of 1500 s.ft. The fact is that an Inspector visited the site and inspected the premises and measured the built up area. He furnished a report. The AO mentioned the same at page 2 of the assessment order dated 31.03.2008 for the Assessment Year 2006-07 and the assessment order dated 31.03.2009 for Assessment Year 2007-2008. The same is reproduced below:

a. *For Asst Year 2006-07 (Asst Order dated 31.03.2008)*

The following is stated at page 2 of the assessment order

"During the F.Y. 2005-06 relevant to the A.Y. 2006-07 the assessee firm has carried on the work of developing and building housing project at Cherlapally Village in the name and style of Silver Oak Bungalows. The assessee is constructing 76 independent houses on over a land admeasuring Ac 6.05. The assessee firm is claiming deductions on the entire income derived u/s. 80IB (10) of the I.T. Act. During the course of scrutiny proceedings enquiries have been conducted by the inspector of this office and his report is reproduced below.

As directed by the ITO Ward 10(4), I have visited the premises situated at Cherlapally, a the construction site for the venture by M/s. Mehta & Modi Homes in the name & style of Silver Oaks Bungalows. The site is located at Cherlapally, which is

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approximately 26 kms from IT Towers. Total area consists of about six acres. The firm as constructed 76 independent duplex houses in plot nos 1 to 76. The construction ranges from 1366 sft to 1487 sft of built up area. Houses bearing plot nos 65 & 66 which are East facing consists of built up area of 771.52 sft at ground floor and 596.09 sft at first floor.

Houses bearing plot nos 18 to 24 and some more houses in East facing consists of built up area of 1475 sft which includes 831.35 sft at ground floor and 644.75 at first floor.

Houses bearing Plot No. 69 has a built up area of 1487 sft. Including 853.7 sft and 655.50 sft at ground first floors respectively.

Randomly for inspection I have selected measured similar type of duplex houses. The built up area as measured is found correct as per specification provided by the firm.

In view of the above, it appears that the assessee firm has constructed or constructing the housing units within the prescribed limit and specified area as stated in section 80IB(10) of the I.T. Act. Hence the claim of the assessee firm is accepted".

b. For Asst Year 2007-2008 (Asst. Order dated 31.03.2009).

The following is stated at page 2 of the assessment order.

"During the course of scrutiny proceedings enquiries have been conducted by the inspector of this office to verity the genuineness and correctness of the assessee's claim u/s. 80IB (10) and his report is reproduced below.

"As directed by the ITO Ward 10(4), I have visited the premises situated at Cherlapally, at the construction site for the venture by M/s. Mehta & Modi Homes in the name & style of Silver Oaks Bungalows. The site is located at cheralapally, which is approximately 26 kms from IT towers. Total area consists of about six acres. The firm has constructed 76 independent duplex houses in plot Nos 1 to 76. The construction ranges from 1366 sft to 1487 sft built up area. Houses bearing plot nos 65 & 66 which are East facing consists of built up area of 771.52 sft at ground floor and 596.09 sft at first floor.

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Houses bearing plot nos 18 to 24 and some houses in East facing consists of built up area of 1475 sft which includes 831.35 sft at ground floor and 644.15 at first floor.

House bearing plot no. 69 has a built up area of 1487 sft. Including 831.5 sft and 655.50 sft at ground and first floors respectively.

Randomly for inspection I have selected measured similar type of duplex houses. The built up area as measured is found correct as per specification provided by the firm.

"In view of the above, it appears that the assessee firm has constructed or constructing the housing units within the prescribed limit and specified area as stated in section 820IB (10) of the I.T. Act".

(viii) We have obtained information to show that the RAP has raised an audit objection vide note dated 23.2.2012 in relation to the assessment for the Asst Year 2006-07 wherein audit held that the built-up area of the residential unit exceeds 1500 s.ft. upon inclusion of terrace and portico areas and as per audit this entailed disallowance of deduction u/s 80-IB (10). The AO did not accept the audit objection and has submitted a detailed reply as under:

"Reply:

In this connection, It is submitted that the following information is furnished to show that the assessee has not violated any of the specified conditions laid down u/s. 80(b)(10) and the deduction was allowed correctly in the assessment completed.

- *The assessee has undertaken development of housing project named as Silver Oak Bungalows. Under this project 76 individual units are being developed. Each individual unit is such designed that it provides space for a car park.*

- *This car park area in real estate business is called a portico in individual bungalows. The portico is located outside the residential unit and within the compound area of each plot.*

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- *The actual residential unit is after this portico. A portico can also be provided in a separate area of the individual plot so that the car park and the residential unit is detached.*

- *The portico provided in the project is not covered from all the three sides and has no outer walls to measure the area of a portico. The area between the compound wall and the portico thus becomes one total area.*

- *The portico is not a habitable area and is meant only for a car park and as such do not form part of the residential area.*

- *In the sanctioned plan the portico area is excluded for the purposes of computing the built-up area on which the sanctioned fee is generally charged copy of plan enclosed. Thus the municipal laws also do not consider the portico area as built-up area.*

- *Section 80IB(14) defines built-up areas as under*

"built-up area means 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 not include the common areas shared with other residential units".

- *The portico is not at the floor level that of a residential unit and is generally below 1 feet to 1.5 feet. Thus the area of the same cannot be counted as built up area of the residential unit in terms of the above definition given in section 80IB (14)(a).*

- *A shed is built over the portico area which is on the ceiling level and not on the floor level so as to consider that as balcony or a projection at the floor level. The portico area thus cannot be considered either as a balcony or as a projection.*

- *In a multi storied complex a reserved park area is provided on the ground/basement floor or stilt floor which has a RCC ceiling over it. But this reserved parking area cannot be counted as part of the built-up area of a flat which is located on upper floors. If a car park area is considered as a projection then projections such as chajjas, sun shed over windows will also become projections to be counted as built-up area. In the real estate business such projections are not understood and counted as part of the built-up area.*

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- *A portico does not have features of a balcony which can be used as a habitable area.*
- *The reserved parking area in a complex is also not available for sharing with others and it exclusively belongs to the allottee of the same. But this car park area not shared with other cannot be added in the computation of built-up area of a residential unit.*
- *The area of the individual bungalow is thus within the maximum permissible area of 1500 sft and the assessee is therefore entitled for deduction u/s 80IB (10). The same is supported by the report of the inspector working in this office which states that the built-up area of the bungalows is below 1500 sft. In view of the above, the query raised by the Audit, is not accepted and the audit is requested to drop the query raised".*

The aforesaid reply is unambiguous and absolutely categorical. The AO has a definite view in the matter and it is backed by specific and irrefutable reasons. The AO, thus, firmly believed that our claim was correct and it is very much in consonance with the requirement under section 80-IB(10).

(ix) The Commissioner of Income Tax-V, Hyderabad too concurred with the above view of the AO and, in his reply dated 6.10.2012, he requested the Accountant General (C&RA) to drop the objection raised by the RAP. The relevant portion of the reply of the CIT is as under:

"The objection is not acceptable for the reason that, Section 80IB(14)(a) and municipal laws not consider the portico area and open to sky terrace as built-up area while levying and collecting sanction fees. A copy of detailed report submitted by the Assessing Officer is enclosed herewith for ready reference. Reference is also invited to the ITAT decision of Ahmedabad Bench in ITA No. 520/Ahd/2010 the case of M/s. Safal Associates vs ITO (OSD) Range-9, Ahmedabad wherein it was held that open terrace is not part of balcony and verandah".

The above makes it known that the CIT did not simply forward the AO's reply but endorsed the AO's reply in toto in no uncertain terms. Further, he supported the reply by relying on a decision of the Tribunal. In other words, even the authority who is vested with the power of revision under section 263, i.e. the CIT, agreed with the

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