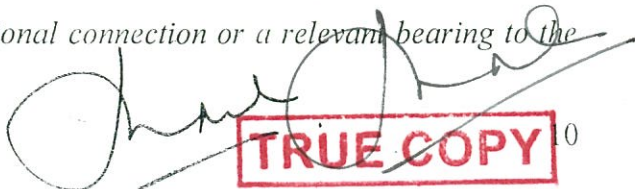


AO's view. In other words, insofar as the department is concerned, the claim was perfectly in order. If that were so, the department has had no authority to take recourse to either section 147 or section 263 of the IT Act in the matter. That the RAP did not accept the reply and reiterated its objection cannot alter the situation. It is emphasised that the matter of eligibility of deduction u/s 80-IB(10) to the assessee has attained finality.

(x) The foregoing conclusively points out that the AO did not have any record for the year under consideration which enabled him to form a belief that income has escaped assessment. Secondly, the AO relied upon the details filed in the course of the assessment for the preceding two years completed under scrutiny under section 143(3) which were completed after examination of the issue and after physical measurement by an Income Tax Authority. The AO cannot reopen the assessments for those two preceding years as the assessments were made under section 143(3) and after due verification. Consequently, the material which cannot help the AO from reopening for those years cannot help the AO in reopening the assessment for another year. Most of all, clearly the AO reopened the assessment for the year under consideration in view of an audit objection. It is pertinent to note that the audit objection did not relate to a factual error. If it related to a factual error, reopening is perhaps permissible. In our case, the issue is concerned with interpretation of built up area, interpretation of a definition, which is a legal issue. The AO rightly resisted the audit objection by furnishing a detailed reply. The CIT too concurred with that view and relied upon the decision of the ITAT Ahmedabad Bench in M/s Safal Associates case (supra) in support of his view. This has definitely and clearly shut the door under section 147 for the department.

(xi) The requirement under sec.147 is a serious matter. It requires the AO to form a belief and such belief must be based on tangible reasons. In *S. Narayanappa v. CIT* [1967] 63 ITR 219 (SC), the Court observed as under:

"Again, the expression 'reason to believe' in section 34 of the Income Tax Act does not mean a purely subjective satisfaction on the part of the Income-tax Officer. The belief must be held in good faith: it cannot be merely pretence. To put it differently, it is open to the court to examine the question whether the reasons for the belief have a rational connection or a relevant bearing to the


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formation of the belief and are not extraneous or irrelevant to the purpose of the section."

In *Sheo Nath Singh v. AAC of Income Tax* [1971] 82 ITR 147 (SC), the Court observed as below:

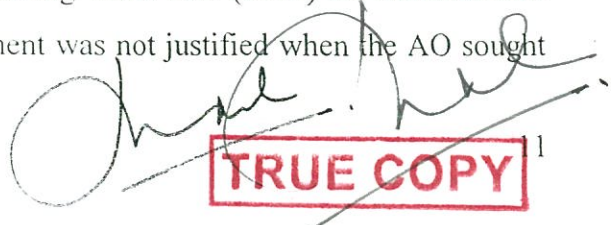
"There can be no manner of doubt that the words 'reason to believe' suggest that the belief must be that of an honest and reasonable person based upon reasonable grounds and that the Income-tax Officer may act on direct or circumstantial evidence but not on mere suspicion, gossip or rumour. The Income-tax Officer would be acting without jurisdiction if the reason for his belief that the conditions are satisfied does not exist or is not material or relevant to the belief required by the section."

In *ITO v. Lakhmani Mewal Das* [1976] 103 ITR 437 (SC), the Court laid down the principles as to what would constitute "reason to believe". Some of them are as under:

(d) The reasons to believe must have a material bearing on the question on escapement of income. It does not mean a purely subjective satisfaction of the assessing authority; the reason be held in good faith and cannot merely be a pretence.

(e) The reasons to believe must have a rational connection with or relevant bearing on the formation of the belief. Rational connection postulates that there must be a direct nexus or live link between the material coming to the notice of the Assessing Officer and the formation is belief regarding escapement of income."

(xii) We submit that the reasons supplied by the AO for reopening the assessment do not even pretend to comply with the requirements stipulated under section 147 inasmuch as his belief as explained to the RAP in his detailed reply is contrary to the reasons recorded. It may be recalled that the AO as also the CIT sent an elaborate reply to the Revenue Audit stating that there was no mistake in allowing deduction under section 80-IB(10) to the assessee. Having expressed this view in such clear terms, the AO cannot now turn around, take an exactly opposite stand and say that he has reason to believe that income has escaped assessment. This would amount to change of opinion and change of opinion cannot give rise to action under section 147. In *DCIT v. Pasupati Spinning & Weaving Mills Ltd.* (2012) 20 taxmann.com 160 (Delhi), it was held that the re-assessment was not justified when the AO sought




to reopen the assessment after stating that the audit objection was not correct and not acceptable because it amounted to change of opinion. In *IL and FS Investment Managers Ltd. v. ITO* (2008) 298 ITR 32 (Bom), it was held that reopening of assessment while disagreeing with the audit objection amounted to change of opinion and therefore reopening was bad in law. In *Cadilla Healthcare Ltd. v. ACIT (OSD)* in Spl. Civil Application No. 15566 of 2011, Gujarat High Court held that reopening was bad when the AO had categorically replied that the audit objection was not correct. In our case, the reply to Audit furnished by the AO and endorsed by the CIT is categorical, detailed and correct. Reopening the assessment subsequently has no rationale.

(xiii) We repeat our objection in our letter dated 27.8.13 that reopening in our case is bad in law for the reasons mentioned therein as also the detailed reasons mentioned in the foregoing sub paragraphs. We also rely on the decision of the Hon'ble Apex Court in *Indian Eastern News Paper Society v. CIT* (1979) 119 ITR 996 (SC) which has been followed by the Hon'ble Delhi High Court in the case of *CIT v. Usha International Ltd.* (2012) 348 ITR 485 (Del.) (FB).

(xiii) The AO's reasons for reopening the assessment do not hide the real cause. It is evident that the reason for re-opening is based on the opinion expressed by the RAP. The RAP's note reads as under.

"In all the cases, the portico, which is RCC roof is nothing but projection especially in the second cited case (West facing Plots) the entire slab area of 126.36 sft (8'x10'x15'6") of the Portico in the ground floor and includes upon the same slab, 117.6 sft open terrace in the first floor which is exclusively owned by the Bungalow owner him self so as to be classified as integral part of the bungalow as projections to be treated as built-up area."

"More over the said portico was not commonly shared with any other person".

The language in para 3 of the order sheet dated 31.3.2013 containing the reasons recorded for re-opening of the assessment is unmistakably the opinion expressed by RAP as above. It reads as under:

"The portico which is RCC roof is nothing but projection. The entire slab area of portico in the ground floor and the open terrace on the first floor is under exclusive ownership of the bungalow owner. So as to be classified as integral

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part of the bungalow as projections to be treated as built-up area. Further it was not commonly shared with any other person."

(xiv) It is clear that the AO did not have any reason to believe that income has escaped assessment but fell in line with the view of audit while reopening the assessment. It is respectfully submitted that on a mere change of opinion that too based on the audit objection of RAP the assessment cannot be opened even where the original assessment is completed u/s 143(1). The Delhi High Court in the case of NTPC Ltd v. DCIT (2014) 360 ITR 380 (Delhi) has held as under:

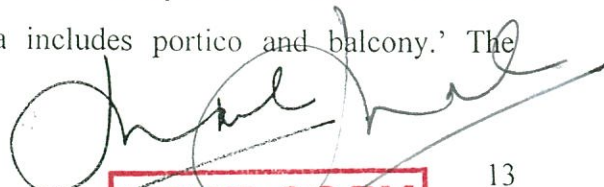
"The issue of change of opinion is equally relevant for matters in which the reopening is sought to be done beyond four years, as it is to cases where the re-opening is within four years of the end of the relevant assessment year".

Reopening, therefore, is bad in law.

(xiv) We rely, *inter alia*, on the following decisions in support of our contention that re-opening an assessment u/s 147 on mere change of opinion is impermissible:

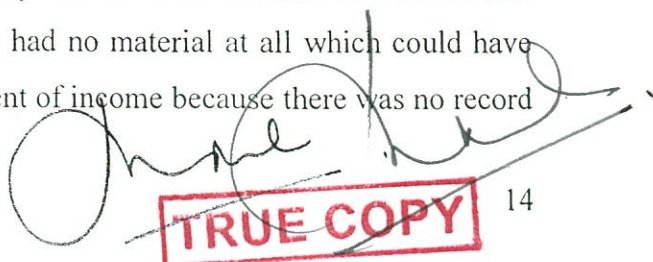
- CIT v. Kelvinator of India Ltd (2010) (SC) 320 ITR 561.
- CIT v. Indian Sugar and General Industry Export & Import Corporation Ltd. (2008) 170 Taxman 229 (Delhi)
- CIT v. Lucas TVS Ltd. (2001) 249 ITR 306
- Alpika Marketing Pvt Ltd v. ITO (2008) 21 SOT 302 (Mumbai ITAT).
- Sheo Narain Jaiswal ITO (1989) 176 ITR 352 (Patna).
- Jindal Photo Film v. DCIT 234 ITR 170 (Delhi)
- Garden Silk Milk Pvt Ltd v. DCIT 237 ITR 668 (Gujarat)
- Adani exports v. DCIT 240 ITR 224 (Gujarat)
- Apollo Hospital Enterprises Ltd 287 ITR 668 (Madras)
- Ganesh Housing Corp Ltd v. DCIT 341 ITR 312 (Gujarat)
- Indian Eastern Newspaper Society v. CIT 119 ITR 996 (SC)

(xv) The AO sought to derive support from the decision of the ITAT in Modi Builders and Realtors (P) Ltd. in ITA No. ITA No. 1541/Hyd/ 2010. This is a decision which held: 'In our opinion, built-up area includes portico and balcony.' The



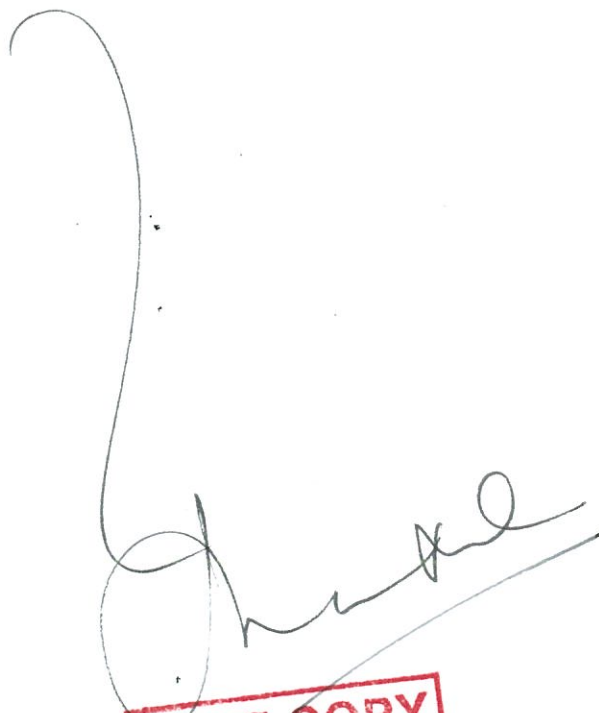

definition of 'built-up area' in sec.80-IB(14) has roped in balconies in a residential unit. This, therefore, did not call for the opinion of the ITAT. But the opinion that portico is included in built up area called for reasons. Unfortunately, this decision of the ITAT does not contain the reasons for such an opinion. It is submitted that an unsubstantiated opinion cannot be relied upon as an authority for any proposition. Therefore, the AO who is a quasi-judicial authority erred in relying on such a decision. On the other hand, the AO ought to have relied upon the reasoned decision of the Ahmedabad Tribunal in the case of Safal Associates v. ITO dated 19-5-2011 which his CIT cited in support of the assessee's claim while sending reply to the audit objection. Similarly, the AO ought to have relied upon 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. Besides, the AO ought to have taken cognizance of 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 overlooked the fact that as per judicial precedence, the judgment of a High Court has to be given primacy over that of a Tribunal. In the context of so many decisions which were rendered on merits in favour of the assessee's claim, the AO relied upon the Hyderabad ITAT decision which did not even contain any reasons for its opinion. Thus, even on merits, reopening the assessment in our case is bad in law.

(xvi) To sum up, we submit that the AO was not in doubt about our claim. He never was of the view that our claim of deduction under section 80-IB(10) was erroneous. When the RAP raised an objection, he vehemently disagreed with the Audit's view furnishing cogent reasons in support of our valid claim. His CIT also agreed with the AO. Yet, the AO reopened the assessment because the Audit reiterated the objection. This amounted to change of opinion. This cannot give rise to reopening an assessment. The AO obviously did not have reason to believe that income has escaped assessment. Further, he had no material at all which could have allowed him to hold that there was escapement of income because there was no record


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to suggest that. The record he relied upon was of the preceding years where the deduction was allowed after due enquiry and inspection. Thus, the record that the AO relied upon (which he was not entitled to look at for this year) did not help him formulate the reason to believe that income has escaped assessment. We have relied upon a large number of judgments of the Hon'ble Supreme Court and the High Courts wherein it has been held that reopening on the basis of audit objection amounts to change of opinion and change of opinion militates against reopening the assessment.

5. The Hon'ble High Court in the modified interim order has permitted us to agitate all points during the hearing before the AO. The order directs the AO to consider any judgment of the High Court or the Supreme Court cited by us. We have raised many irrefutable facts in our support. We also have relied upon many judgments in support of our contention. The Hon'ble High Court has directed the AO to take a decision and pass a speaking order. We request the AO to pass an order on the issue of jurisdiction which we hope would be in our favour considering that there is no scope at all for the department to rebut our contentions in any manner. In the circumstances, we request the AO to drop the proceedings and spare us the compliance costs.



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Note-B**M/s Mehta & Modi Homes****Asst. Year 2008-09****Note on deduction u/s 80-IB(10)**

The assessee firm is engaged in the business of real estate developers. In the course of its business the company has taken up the development of a residential housing project named as 'Silver Oak Bungalows'. During the previous year the firm has derived profits from this housing project and claimed deduction u/s 80-IB(10). In the notice u/s 142(1) dated 15.01.2014 we are asked to explain as to why the deduction claimed u/s 80-IB(10) may not be disallowed since the built-up area of a residential unit exceeds 1500 s.ft.

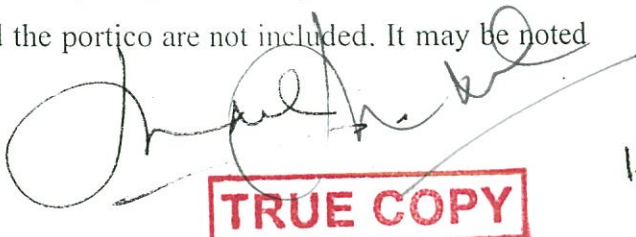
2. Provisions of section 80-IB (10) lay down certain conditions that are to be complied with in order to get 100% deductions of the profits derived from developing and building housing projects. Clause (e) of section 80-IB (10) stipulates as under:
"the residential unit has a maximum built up area of one thousand square feet where such residential unit is situated in the city of Delhi or Mumbai or within twenty five kilometers from the municipal limits of these cities and One thousand Five hundred square feet at any other place to qualify for deductions u/s 80IB (10).

The housing project of the firm is situated at place other than in the city of Delhi or Mumbai and therefore the maximum built up area of the residential unit should not exceed One thousand Five hundred square feet.

The meaning of the expression "built up area" is given in clause (a) of sub-sec. (14) of section 80-IB. The same is reproduced below.

"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"

3. It may be noted that in the housing project undertaken by the firm construction of independent houses are envisaged. The built up area of each residential unit is ranging from 1366 s.ft. to 1487 s.ft. The built up area is as per the building plans sanctioned by the local authority. While computing the built up area of a residential unit the areas of open to sky terrace and the portico are not included. It may be noted



A handwritten signature in black ink, appearing to be 'J. Mehta', is written over a red rectangular stamp that reads 'TRUE COPY' in bold, capital letters.

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that in the sanctioned plans also the areas covered is less than 1500 s.ft. The covered area is calculated excluding the portico and the open terrace and is in conformity with the Municipal Corporation Building Byelaws, 1981 and other relevant applicable standards and codes. As per the municipal bye-laws, portico and open terrace cannot be added to built-up area. Otherwise builders would add this non-built up area and sell it. For the housing project the sanction plans clearly show that the built up area is less than 1500 s.ft. The building plans for each type of residential units as sanctioned by the local authorities are enclosed herewith. (Annexure- B1). It may be noted that in the sanctions, plinth areas are mentioned. The sanctioned plinth area is in sq. mts. 1500 s.ft is equal to 139.40 sq.mts (conversion factor 1 sq.mt = 10.76 s.ft). It will be evident that the sanctioned plinth area is within 139.40 sq.mts (i.e. 1500 s.ft).

4. In various judicial pronouncements as given below, it has been held that open terrace and portico cannot be taken as part of built up area and to deny the deduction u/s 80 IB (10):

(i) Madras High Court in the case of M/s Ceebros Hotels Private Limited in tax case (Appeal) Nos 581 of 2008, 1186 of 2008 and 136 of 2009 has made the following observations (para 36) while allowing the appeal of the assessee:

"36. We agree with the view expressed in the unreported decision of Bombay High Court in Income Tax Appeal no. 3319 of 2010 (The CIT vs M/s. Tinnwala Industries), dated 13.04.2012 and the decision of Karnataka High Court reported in [2012] 21 Taxman.com 140 (Karnataka), Commissioner of Income Tax, Central Circle vs. Anriya Project Management (Services) Private Limited, that Section 80-IB (14) defining 'Built-up area' will have relevance on and from 01.04.2005. Apart from this, we have also held in the preceding paragraphs that going by the substantive part of Section 80-IB (10), what is required for grant of deduction is a Housing Project approved by the Local Authority. That being the case, the definition of 'Built-up Area', has to have the same meaning as has been given in the Development Control Rules, otherwise, the substantive part in Section 80-IB referring to the approval by the Local Authority becomes meaningless for the purpose of deduction under Section 80-IB (10) and the approval for the purpose of section 80-IB has to emanate from the Income Tax Act. We do not think the Act contemplates such exercise also by the Revenue. Given the fact that contemplation of deduction is

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to Housing Projects approved by the Local Authority, we hold that once the Local Authority have excluded Open Terrace from the working of built-up area, it is not open to the Revenue to review the approval given by the competent authority to hold that terrace would also be include in the built up area. As already held the definition also does not speak in different language from what is given in the measurement provision of Bureau of Indian Standard in the context of the definition of balcony in the Indian Standard."

Further, in CIT v. Sanghvi and Doshi Enterprise (AIT-2012-HC) in TCA No. 581 & 582 of 2011 dt. 1-11-2012, the Madras High Court held as under:

"27. As already pointed out, in view of our decision in T.C.(A)No.581 of 2011, we allow T.C.(A)Nos.314 and 315 of 2012. We have already held that the open terrace area could not be the subject matter of inclusion as a built-up area to deny the benefit of Section 80IB of the Income Tax Act."

In CIT v. Mahalakshmi Housing in TCA No. 585 of 2011 dt.2-11-2012, the Madras High Court held as under:

"7. As far as the issue in regard to inclusion of open terrace area with built up area is concerned, we have already held the said issue against the Revenue in our decision rendered in T.C.Nos. 581, 1186 of 2008 and 136 of 2009... we have already held that the open terrace area could not be the subject matter of inclusion as a built-up area to deny the benefit of Section 80IB of the Income Tax Act. "

We submit that the ratio of the above decisions squarely applies to our case.

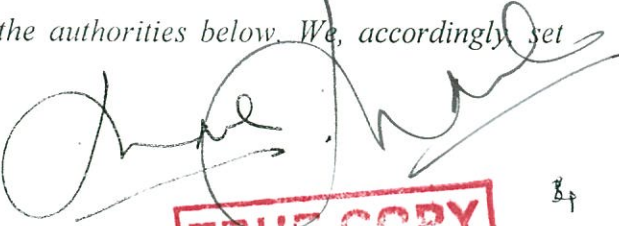
(ii) In ITA No 2401 / AHD / 2010 the Hon'ble ITAT/Ahmedabad vide its order dated 21-1-2011 in the case of Amaltas Associates vs. ITO has held that open terrace is not balcony. The relevant para 11 of the order is reproduced below:

"11. When the above meaning of "balcony" is taken into consideration with the definition of "built-up area" as provided in the Act, it is clear that findings of the authorities below are not sustainable in law. It is an admitted fact that the open terrace in front of penthouse was considered as balcony/verandah. The open terrace is not covered and is open to sky and would not be part of the inner measurement of the residential floor at any floor level. The definition of "built-up area" is inclusive of balcony which is not open terrace. The DVO has considered the open terrace as analogous to balcony/verandah without

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any basis. Therefore, the authorities below were not justified in rejecting the claim of the assessee by taking the open terrace as balcony/verandah.

Therefore, the assessee has complied with all the requirements of s. 80-IB(10) of the Act in this regard. Moreover, the Tribunal, Nagpur Bench, in the case of AIR Developers (supra) has held as under : "In view of the decision of the Kolkata Bench of the Tribunal in the case of Bengal Ambuja Housing Development Ltd. vs. Dy. CIT (ITA No. 1595/Kol/2005, dt. 24th March, 2006), which was squarely applicable to the instant case, it was to be held that if the assessee had developed a housing project wherein the majority of the residential units had a built-up area of less than 1500 sq. ft, i.e., the limit prescribed by s. 80-IB(10) and only a few residential traits were exceeding the built up area of 1500 sq. ft., there would be no justification to disallow the entire deduction under s. 80IB(10). It would be fair and reasonable to allow the deduction on a proportionate basis, i.e., on the profit derived from the construction of the residential unit which had a built-up area of less than 12500 sq. ft., i.e., the limit prescribed under s. 80-IB(10). In view of the above, the AO was to be directed that if it was found that the built-up area of some of the residential units was exceeding 1500 sq. ft., he would allow the proportionate deduction under s. 80-IB(10). Accordingly, the appeal of the Revenue was to be dismissed and cross-objection of the assessee was deemed to be partly allowed." Therefore, in the light of the decision of the Tribunal, Nagpur Bench, the authorities below should not have rejected the claim of the assessee at least on alternate contention that the assessee would be entitled for deduction under s. 80-IB(10) on pro rata basis. No other point was considered against the assessee for refusing relief under s. 80-IB(10) by the authorities below. Since we have held above that the open terrace is not part of balcony/verandah therefore according to the submissions of the assessee, the built-up area of the assessee was within the prescribed limit. Therefore, there is no need to give further finding with regard to alternate claim of the assessee. Considering the facts of the case, in the light of the above decisions, we are of the view that the assessee fulfilled the conditions and requirement of s. 80-IB(10) of the Act, therefore, the claim of the assessee for deduction should not have been denied by the authorities below. We, accordingly set



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aside the orders of the authorities below and direct the AO to grant deduction to the assessee under s. 80-IB(10) of the Act as claimed by the assessee.

(iii) The above decision has been followed by ITAT Ahmedabad in ACIT v. Yug Corporation ITA No. 2700, 2701, 2702, 2703 / AHD / 2009 dt. 17-6-2011 and Safal Associates v. ITO dt. 19-5-2011.

(iv) In ITA No 328/AHD/2010 dated 25-3-2011 in the case of Nikhil Associates v. CIT, Ahmedabad Bench of the ITAT has held that parking space is not part of built up area. The relevant para 28 of the order is reproduced below:

“28. The second argument is that if parking space is included then total area would exceed specified limit. In our considered view this reasoning also cannot be accepted. Parking space cannot be part of human inhabitation. It is a space for storing inanimate objects such as car. It cannot be a space for sleeping, resting, dining/cooking enjoying TV/Radio or carrying out other necessary daily chores. Parking space is only an appendix to the flat i.e. residential unit and it cannot be its integral part. One may have a car and may purchase a car parking space along with flat. One may not have a car and he may not prefer to purchase car parking space. If he has a car, he may prefer to keep his vehicle on the road in violation of local laws. In any case it is not show that purchase of parking space as well as flat was a combined selling unit and no option was available to any purchaser either to purchase flat and not to purchase the parking space. Even where parking becomes integral part of sale proposition it cannot be equated with a residential unit. ITAT Mumbai Bench in ITO vs. Sasiklal N. Satra (2006) 280 ITR (AT) 0243 held that residence means a building or a part of the building one can drink, eat, and sleep. A parking space does not enable and it cannot enable a person to cook, eat, drink sleep and do other daily chores. Then it cannot be an integral part of residential unit. Therefore, we cannot accept this argument that area of the parking space should be combined with area of the residential unit so as to work out the total area for the purpose of finding out whether it exceeds specified limit. In any case what should be the built up area has already been defined in the Act. Therefore, concept of built-up area cannot be extended to other items not mentioned in the definition of built up area. Built up area has been defined in the Act under section 80-IB(14) as under:-

Sec. 80-IB(14)

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For the purposes of this section,-

- [(a) "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;]

This clause was introduced by Finance Act (No.2) 2004 w.e.f. 1.4.2005. Thus it would be applicable to the facts of the present Asst. Year which is 2006-07. Impact of this amendment has been considered by ITAT Mumbai Bench in the case of ACIT vs. Sheth Developers (P) Ltd. (2009) 33 SOT 277 (Mum). It has been held therein that this amendment is effective from 1.4.2005 only. Relevant portion from that judgment is given as under :-

The definition of 'built-up area' says built-up area include projections and balconies. The accepted rules of interpretation for an inclusive definition as elucidated by the Apex Court in the case of CIT v. Taj Mahal Hotel AIR 1972 SC 168 is that if the word 'include' is used in an interpretation clause, it must be construed as comprehending not only such things as it signifies according to their nature and import, but also things which the interpretation clause declares that they shall include. So, normal meaning of built-up area, but for the definition including projections and balconies, would definitely exclude the latter. Even according to the Assessing Officer himself, built-up area as normally understood in common parlance means area enclosed within the external lines of the external walls. Therefore, there can be no doubt that prior to the introduction of the definition clause, aforesaid built-up area would not include projections and balconies as normally understood. The question as to whether the definition clause, mentioned above can be deemed as retrospective, was to be answered against the revenue. Number one, the enactment itself clearly specifies that clause will have effect from 1-4-2005. Number two, it is not a procedural section but a definition section, where an enlarged meaning is given to the term 'built-up area' and such enlarged meaning would not have been in the realm of understanding of any person prior to its introduction and the assessee would have gone

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ahead with its respective projects based on a common understanding of the term 'built-up area'. Thus, the enlarged meaning, if given a retrospective effect, will definitely affect the vested rights of an assessee. Therefore, the definition had only prospective effect from 1-4-2005. Even otherwise, the revenue was precluded from taking the plea that such definition was having retrospective effect for the simple reason that the Assessing Officer himself had accepted it to be only prospective.

Once this definition is exhaustive then no further items can be taken into account to work out built-up area. Thus built-up area would include following only:-

- (1) Inner measurement of the residential unit at the floor level.
- (2) Area projection and balconies.
- (3) Thickness of the walls.

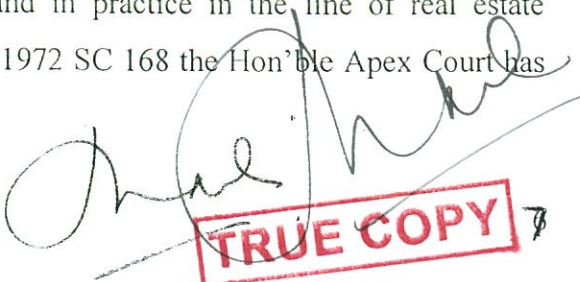
It excludes from measurement, common areas shared with other residential units. Therefore, nothing more such as parking space or common areas could be included to work out what is built up area. Since clause (a) of section 80IB(14) is a definition section then no further concept can be included except what is provided therein."

(v) In ITA No 2447 / Ahd / 2010 in the case of Tarenetar Corp., it has been held that open terrace is not balcony and not part of built up area.

(vi) Car parking area is not to be included in reckoning permissible area of residential area. (Asst Years 2001-02 , 2005-06) Asst v. C. Rajini (Smt) (2011) 9 ITR (Trib) 487 (Chennai)(Trib) and Dy CIT v. C.Subba Reddy (HUF) (2011) 9 ITR (Trib) 487 (Chennai)(Trib).

(vii) ITA no 165 /PN / 2007 Pune in the case of Tushar Developers, the Tribunal held that local law has to be followed in case of ambiguity.

5. Section 80-IB (14) (a) defines 'built-up area'. In the definition, the words 'residential unit', 'balconies' and 'projection' are used. These words are not defined or explained under the Income Tax Act and therefore they have to be necessarily understood in a sense that is prevalent and in practice in the line of real estate business. In CIT v. Taj Mahal Hotels AIR 1972 SC 168 the Hon'ble Apex Court has observed as under:

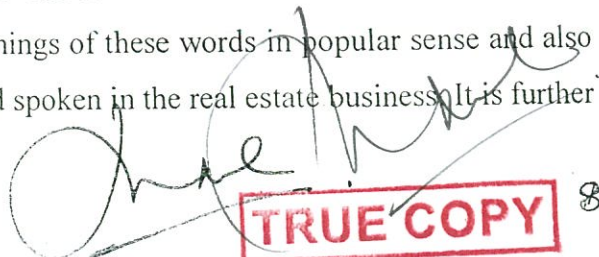

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"Now it is well settled that where the definition of a word has not been given, it must be construed in its popular sense if it is word of every day use. Popular sense means "that sense which people conversant, with the subject matter with which the statute is dealing, would attribute to it".

Where the statute does not define an expression used in the statute, it has to be understood as one in common parlance. This is the established law as pointed out by the Hon'ble Apex Court in CIT v. Jaswant Singh Charan Singh AIR 1967 SC 1454. It is also settled principle that some common sense approach or dictionary meaning if the term is of general nature should be found out or if the term is of technical nature then the definition of such term used in other laws should be taken into consideration. This is so held in ACIT v. Smt Saroj Kapoor (2010) 38 DTR 475 (Ind-ITAT). The relevant para 13 of the order is reproduced below:

"13. Having stated so, now we shall deal with other aspects. On the aspect of nature of provisions of section 80-IB(14)(a), we find that it is a settled proposition of law that when a particular term is defined by an amendment, which results into increase/levy of civil liability, the same has to be considered as the substantive one, hence prospective. The judicial decisions cited by the assessee also support this view. Accordingly, we reject the contention of the revenue that the provisions of section 80-IB(14)(a) are of retrospective nature. This view leads us to another question i.e., in the absence of any specific term in the Act how that term should be interpreted. In this regard, it is also a settled principle that some common sense approach or dictionary meaning if the term is of general nature should be found out or if the term is of technical nature, then the definition of such term used in other laws should be taken into consideration. Accordingly, we hold that the meaning of term "built-up area" prior to insertion of definition clause in the Act has to be found out as per the local law i.e., rules and regulations of Bhopal Municipal Corporation as well as from M.P. Bhoomi Vikas Rules and as a consequence thereof, the built-up area of such flats is undisputedly less than the specified limit. Hence, the assessee, in our opinion, is eligible for deduction under section 80-IB(10)."

6. Since the words 'projection' and 'balconies' are not defined under the Income Tax Act, it is imperative to derive meanings of these words in popular sense and also how they are commonly understood and spoken in the real estate business. It is further


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imperative to look and search for the meaning of these words in other relevant laws and standards. It is clearly not possible to interpret an open terrace as a balcony (which is covered and less than 1.2 m) as they have different features. Equally, it is not possible to say that a portico (covered parking below floor level) is a projection as the two have nothing in common.

7. It may be noted that **The Indian Standard Code** clearly explains the method of measurements of areas of buildings (copy enclosed-**Annexure- B2**). In the section on the measurements of plinth, carpet and rentable areas of buildings, para 3.2 explains the categories of areas which should not be clubbed together. The plinth area means the built-up covered measured at the floor level of the basement or of any storey. Section-3.2 clearly states, inter alia, that 'porch' areas do not form a part of these areas. Further, Section 4.1.2 clearly states that terrace is not a part of the plinth area.

8. **National Building code of India** in part 3 – Development Control Rules and General Building requirements defines as to what is 'Covered Area' in Para 2.6 (copy enclosed- **Annexure-B3**). The relevant Para is reproduced below:

"2.26 Covered area: Ground area covered by building immediately above the plinth level. The area covered by the following in the open spaces is excluded from covered area:

Garden rockery

Drainage culvert ...

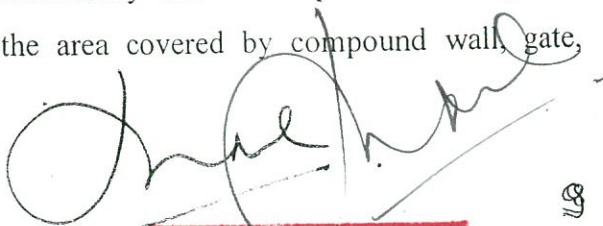
Compound wall, gate unstoreyed porch and portico, canopy, slide, swing, uncovered staircase, ramps areas covered by CHAJJA and the like and

Watchman's booth"

The above definition clearly excludes portico, porch etc as part of covered area.

9. The **MUNICIPAL CORPORATION BUILDING BYE LAWS, 1981** (Section 2 definitions) (copy enclosed- **Annexure-B4**), defines the COVERED AREA -

"means ground/area covered immediately above the plinth level by the building but does not include the area covered by compound wall, gate,




cantilevered porch, portico, slide swing, uncovered staircase, chajjas and the like”

10. It may please be noted that the income tax definition of built up area is exactly the same and is consistent with the computation of the built up area as per the Indian Standard Code, the National Building Code of India and the Municipal Bye-laws for computation of built up area. The built up area of our houses are consistent with all the above definitions. The Indian standard code and The National Building Code of India form the binding guidelines and basis of all building related laws. **In the Madras High Court judgment (supra), the court has also considered the above definitions given in The Indian Standard Code and National Building code of India, etc.**

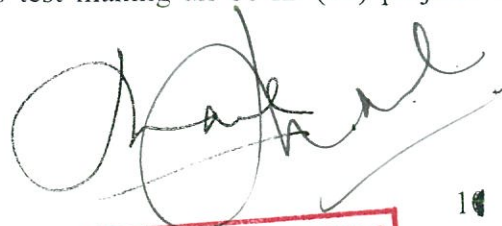
11. It may be noted that the constructed area sold by the firm under these projects is the built-up area, which excluded the portico and the terrace. It is not possible to sell under the relevant clause an open to sky terrace/car parking/portico as part of built-up area. For this reason the municipal laws/national code have clearly prohibited builders from adding these areas to built-up area. Otherwise, unscrupulous builders would add all these areas to saleable area. Various statutes such as the Maharashtra Ownership Flat Act, 1963 clearly state that there is no provision to add terrace area as a part of the carpet area and by implication to the built up area. Hence areas that cannot be sold as built-up area cannot be added to ‘built-up’ area.

12. In a note attached herewith (**Annexure –B5**) it has been explained in detail as to what is a ‘portico’ and an ‘open terrace’ as generally understood by a common person. It has been further explained that why the areas of portico and open terrace are not includible in computing the built-up area of a residential unit. In the said note, the concept of ‘horizontal development’ and ‘vertical development’ in real estate business has been explained. In brief, a portico is nothing but an area meant for parking of vehicles and is not habitable so as to form part of a residential unit. In fact and in reality, it is outside the residential unit. Similarly, open to sky terrace is not habitable for living so as to form part of the residential unit.

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13. The portico and open terrace do not have characteristics of a projection or a balcony. In a multi-storied building (a horizontal scheme of development) parking is provided in the cellar or on ground floor. The identified parking area is allotted to the flat owner for its exclusive use as 'reserved parking area'. This 'reserved parking area' is not shared with other flat owners. The allotment may be for a separate sale consideration. This 'reserved parking area' is not at all considered as built up area of the residential unit. By definition, the built up area is the inner measurements of the residential unit at the "floor level" as increased by the wall thicknesses. To this area, the area of balcony and projections, if any, is to be added so as to arrive at the total built-up area for Income- tax purposes. Thus, logically and rationally the parking area is not added to the inner measurement of the residential unit, as the same cannot be said to be a projection or a balcony. This practice is being accepted and followed in real estate transactions all over. The governing laws also adopt the same view. In a vertical scheme of development (i.e. construction of independent bungalows), the parking area is termed as 'portico' or 'porch'. Like in a multi-storied complex, a reserved parking area is not added to arrive at the built-up area of a residential unit. A portico or a porch area cannot be considered to arrive at built-up area. The reserved parking area in a multi storied complex and the portico of a bungalow have to be on the same footing. Equity also demands this. There cannot be differential treatment for the area, which in both schemes of development is meant for parking of vehicles. A parking area is neither a projection nor a balcony and it is also not a part of a residential unit. Parking area is not a habitable room so as to be treated as part of the residential unit.

14. The portico is not at the same floor level as that of the residential unit. The car parking or portico is covered by RCC roof but is not a projection as a projection is a cantilevered portion and this area is not cantilevered and hence cannot be a projection. The car parking or portico has its way below the floor level of the ground floor and is does not have walls and hence it also fails the test of inner measurement at floor level and as increased by thickness of the walls. The flooring is also rough checkered tiles. If parking is included then all apartment blocks with reserved parking (in exclusive use of apartment owner) will also not pass this test making all 80-IB (10) projects ineligible for deduction.



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15. In so far as the portico is concerned, it is used for parking purposes only and is not limited by walls, unlike in the case of balcony which is limited. Similar is the situation with respect to an open terrace (i.e. terrace that is open to sky). The roof of a building is the open terrace. It has no construction on it. Every building has to have an open terrace on it and this is not construction but the end of it. How an open area on which there is no construction can be considered as built-up area? In a multi-storied complex, the terrace area is not added to the area of each flat or an apartment. The terrace by any stretch of imagination can not be said to be a projection or a balcony.

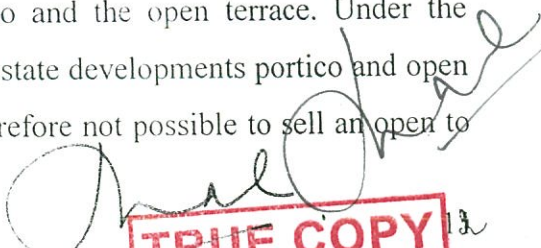
16. The issue that needs to be addressed to is whether a portico and an open terrace can be said to be a projection or a balcony. It is reiterated that the expressions 'projections' and 'balconies' are not defined under the Income-tax Act and therefore justice demands that the meaning of these expressions are adopted as they are understood in everyday use in house building industry.

17. A balcony is generally referred to as an enclosure covered with wall on three sides and a roof. A balcony has the following basic characteristics:

- (a) It has a roof i.e. it is not open to sky.
- (b) It is generally not very large in area. Typically balconies have areas of 30-40 s.ft
- (c) It is covered by walls on three sides.
- (d) The front side of the balcony will have wall or hand railing up to the height of 3-4 feet (generally up to vest height).

18. Keeping in view the above characteristics of a balcony and a projection and its meaning in a popular sense and also as per all technical and relevant laws, a portico and open terrace cannot be construed either as a projection or as a balcony. Therefore, the areas of portico and the open terrace cannot be added to the inner measurements of a residential unit to arrive at built-up area.

19. It may further be noted that the constructed area sold under this project is the built-up area as computed excluding the portico and the open terrace. Under the relevant Acts and Bye-Laws, regulating the real estate developments portico and open terrace cannot be added to built-up area. It is therefore not possible to sell an open to


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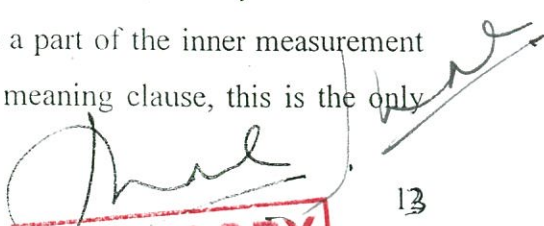
sky terrace and portico as part of the built-up area. Hence, the areas that cannot be sold as built-up area cannot be added in computation of built-up area.

20. It has been further stated in the reasons for re-opening of the assessment that the portico and open terrace, whose areas are excluded for computing the built-up area are not the common areas shared with other residential units. These areas are available for exclusive use of the house owner and as such, portico and open terrace should also form part of the built-up area. In the submissions made it has been explained that the portico and open terrace is neither a 'balcony' nor a 'projection' so as to include their areas in the computation of built-up area. Since the portico and open terrace is neither a 'balcony' nor a 'projection' the importance of whether it is a common area to be shared with other residential units or it is available for exclusive use of a house owner is lost and is irrelevant.

21. The definition of 'built-up area' is exhaustive. It says '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. That means, the definition has included everything within its amplitude. Nothing can be added to what has been mentioned. 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. Rowlatt J., in *Cape Brandy Syndicate v. IRC* [1921] 1 KB 64, held:

"... in a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used."

In view of the above, anything which is not a part of the inner measurement of the residential unit cannot be roped in to calculate 'built-up area'. 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, it cannot be counted because it is outside the residential unit. In other words, it is crystal clear that the areas of the balconies and projections which are a part of the inner measurement of the residential unit only have to be added. In a meaning clause, this is the only


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manner of interpretation permissible. In the circumstances, our claim for deduction under section 80-IB (10) is perfectly in order.

23. For the aforesaid reasons, we urge that even on merits there is no case at all for denial of the deduction claimed under section 80-IB(10). Consequently, it is requested that the proceedings may kindly be closed.

24. It may be appreciated that the provisions of Section 80 IB (10) are incentive provisions and therefore, the same must be constructed liberally and in favour of the assessee so as to give full effect to the intention of the legislative. The Hon'ble Apex Court in the case of Bajaj Tempo Ltd v.CIT 196 ITR 188 has made the following observations:

"A provision in a taxing statute granting incentives for promoting growth and development should be constructed liberally; and since a provision for promoting economic growth has to be interpreted liberally, the restriction on it has to be construed so as to advance the objective of the provisions and not to frustrate it"


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