

(12)

23/01/2017 178.

OC

BEFORE COMMISSIONER OF INCOME TAX (APPEALS) - 6/HYD

IN THE MATTER OF

M/s Mehta & Modi Homes

vs.

Deputy Commissioner of Income Tax, Circle 10(1) / HYDERABAD

APPEAL NO. 0004/2015-16

ASST. YEAR 2008-09


TRUE COPY

BEFORE COMMISSIONER OF APPEALS - 6/HYD

Mehta and Modi Homes 5-4-187/3 & 4, 2nd Floor, Soham Mansion, M G Road, Secunderabad – 500003		Deputy Commissioner of Income Tax Circle 10(1), Hyderabad.
Appellant	v/s.	Respondent

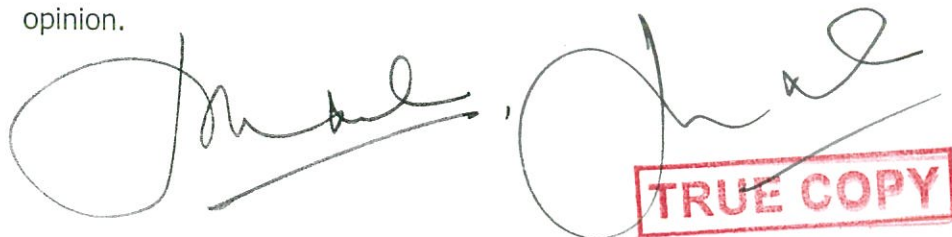
ASST YEAR 2008 – 2009

ITA NO 0004/2015-16

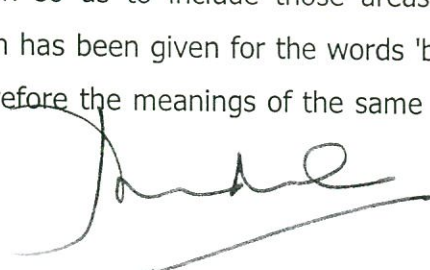
1. For Asst. Year 2008-09 the appellant filed its return of income electronically on 27.09.2008 admitting income from business of Rs. 76,34,100/- after claiming deduction of Rs.2,69,00,096/- u/s 80IB (10) of the Income Tax Act.
2. The return was processed u/s. 143(1) by CPC on 02.09.2009 as stated by the Assessing Officer in the order. The said order u/s 143(1) is not received by the appellant.
3. The case has not been selected for scrutiny u/s 143(2) within the time limit and hence the processing of the return u/s 143(1) by CPC as stated above has become final.
4. Subsequently notice u/s 148 dated 31.03.2013 got issued to re assess the income. The reasons recorded for issuance of notice are reproduced in the assessment order passed by the Assessing Officer.
5. The appellant has raised objections to the proceedings u/s 147. The objections raised are rejected by the Assessing Officer. The copy of the objections raised vide letter dated 27.08.2013 (Note A) before the Assessing Officer is enclosed herewith as **Annexure 1.**
6. The objections to the reopening has been reiterated before the Assessing Officer vide letter dated 13.02.2014 during the course of assessment proceedings. The copy of same is enclosed herewith as **Annexure 2.**

TRUE COPY

7. Aggrieved by rejection of the objections raised the appellant has filed a writ petition before Hon'ble High Court of AP and the Hon'ble High Court is pleased to pass an order whereby the appellant is permitted to participate in the proceedings for reassessment. The Hon'ble High Court has directed that the effect of adverse order, if any, shall not be given without the leave of the court. It may be noted that the Hon'ble High Court has not given its judgement as to the challenge of jurisdiction for issuance of notice u/s 148. The copy of the Hon'ble High Court's Order is enclosed herewith for your kind perusal as **Annexure 3**.
8. As submitted in our objections letters as above, the assessments for Asst. Years 2006-07 and 2007-08 were completed u/s 143(3) after due verification of all the relevant information including the inspection, verification and measurement of the Built-up area of the residential units. These completed assessment are also re-opened u/s 147 and the re assessment is completed by disallowing the claim of deduction u/s 80IB(10).
9. **It may be noted that for Asst. Year 2008-09, no assessment u/s 143(3) has happened but it is only an intimation u/s 143(1). The return of income is e-filed which an 'annexure less' return is and therefore the Assessing Officer has no tangible records and information on the assessment record for Asst. Year 2008-09. In the reasons recorded by the Assessing Officer for issuance of notice u/s 148 it is stated that "On verification of the assessment records, it is noticed that.....". Since for Asst. Year 2008-09 the Assessing Officer has no record and therefore it is obvious that he has relied upon the assessment records of earlier assessment years 2006-07 and 2007-08 which also got reopened.**
10. As submitted above, the assessments for Asst. Years 2006-07 and 2007-08 were completed u/s 143(3) allowing the deduction claimed u/s 80IB(10) after due verification and inspection of the residential units. The assessments got re-opened merely because of an audit objection by CAG and which has resulted in a change of opinion.

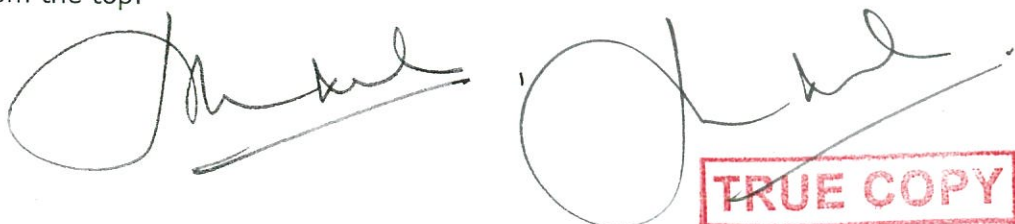


11. For Asst. Year 2008-09 the Assessing Officer had no assessment records containing the information of sanctioned plan and brouchers and which got verified as stated by the Assessing Officer in the recorded reasons so as to believe that the built-up area of the residential units exceeds 1500 sft. It is thus beyond any iota of doubt that the Assessing Officer has verified the assessment records of earlier years which again beyond doubt, had the audit objections raised by CAG and also the fact that notice u/s 148 got issued for those earlier Asst. years. The reason to believe that the income has escaped assessment is therefore 'prima facie' due to CAG audit objection. The issuance of notice u/s 148 therefor lacks jurisdiction and is bad in law.
12. Without prejudice to the above contentions on the issue on the jurisdiction of issuance of Notice u/s 148, it is also prayed that on merits, the claim of deduction u/s 80IB (10) the deduction is rightly claimed and allowable.
13. The Assessing Officer has disallowed the deduction claimed under the order of assessment dated 05/03/2015 passed under section 143(3) r.w.s 147 of the I.T. Act. The Learned Assessing Officer has disallowed the deduction claimed u/s 80IB (10) only on the ground that the built-up area of each residential unit exceeds 1500 sft. if the portico and open terrace areas are also included in computing the built-up area. The Assessing Officer is of the view that the portico and open terrace are to be included for computing the built-up area.
14. In the housing project undertaken for development, construction of independent residential units/bungalows is envisaged. The houses are so designed that each unit has a portico area on the ground floor meant for car parking and open to sky terrace on the first floor. The portico area is within the compound wall but it is outside the house area. The portico area is not habitable. There are no walls surrounded to the portico area and as such for taking inner measurements the same is not included for computing built-up area. Similarly open to sky terrace is not habitable and the same is not included for computing built-up area.
15. Further, the portico and the open to sky terrace cannot be said to be a balcony or a projection so as to include those areas in the computation of built-up area. No definition has been given for the words 'balcony' and 'projections' under the I.T. Act and therefore the meanings of the same are to be adopted as generally understood

TRUE COPY

in this line of business and also under relevant rules and standards governing the real estate business. A detailed note submitted during the assessment proceedings is enclosed herewith as **Annexure 4.**

16. The Learned Assessing Officer has not accepted the explanations given and the computation of built-up area as certified by the chartered engineer. The Learned Assessing Officer has also not appreciated the computation of covered area (built-up area) as sanctioned by the concerned authorities for building plan. The sanctioning authorities have also excluded these areas for computing the built up area and for levying of the sanction fees.
17. The Assessing Officer in the reasons recorded for initiating proceedings u/s 147 has placed reliance on the order of Hon'ble ITAT, Hyderabad in the case of Modi Builders and Realtors Pvt. Ltd for the Asst. Year 2007-08 in ITA No 1541/ Hyd /2010 dated 31.03.2011. After this judgment by ITAT/Hyd, the Hon'able Madras High Court in the case of M/s Ceebros Hotels Pvt Ltd and held that the Assessing Officer and thereafter CIT (Appeals) has erred in including the area of the projected terrace (open to sky) for the purposes of computing built-up area while examining the conditions prescribed in clause (c) of section 80IB (10).
18. In view of the judgement of the higher judicial authority of Hon'able Madras High Court subsequent to the judgment by ITAT/Hyd, the learned AO should have considered the same before issuance of notice u/s 148.
19. The learned Assessing Officer in the assessment order has attached the relevant page of the brochure showing the Picture of the duplex house. For the sake of easy reference the Picture is attached herewith as **Annexure 5.**
20. Your Honours, on perusal of the Picture it will be evident beyond any iota of doubt that the area in question on the first floor is open to sky and in can only be said as terrace and not a balcony as understood in the common parlance meaning in the real estate business. A balcony usually has three sides covered and is also covered from the top.



TRUE COPY

21. The learned Assessing Officer in para 7 (at page No 6) of the assessment order has **stated in bold** as follows:

The nomenclature of "open Terrace" mentioned by the assessee for the 1st Floor is misleading.

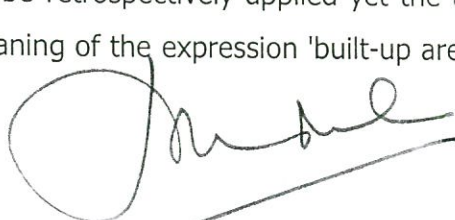
The Assessing Officer states that since the first floor comprises bed room with toilet and a study room and is not a fully open space as conceived in the top floor of any multi-storied apartment, such open space it cannot be called as terrace.

Your Honours, there is no misleading of any fact by the appellant. Part of the 1st floor can be covered and the rest of it can be kept as terrace open to sky. The Assessing Officer's observation is conceptually incorrect. Further, in the sanctioned plans also the part open space is mentioned as terrace and there is no misleading statement made as stated by the Assessing Officer. On the contrary, what is factually a terrace is being stated and referred to as balcony by the Assessing Officer in the assessment order.

22. In the course of the assessment proceedings reliance was placed on the judgement dt. 19.10.2012 of the Hon'able Madras High Court in the case of M/s Ceebros Hotels Pvt Ltd. It has been held in this case that the private terrace area connected through the bed room of the flat on the 7th Floor cannot be considered as built-up area for the purposes of claim of deduction u/s 80(IB) 10. The Assessing Officer has not accepted the ratio laid down by the Hon'able High Court stating the following:

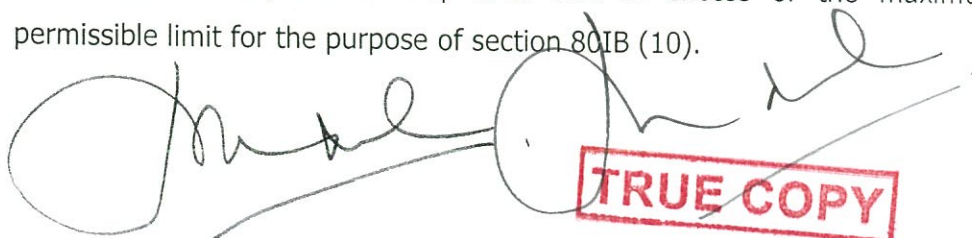
'The High Court relied on the decisions of Bombay High Court and Karnataka High Court in concluding that the definition of built up area does not include balcony area for the period **prior to 01.04.2005**. It was further held that the definition of built up area that came into force from 01.04.2005 would have relevance to those housing projects which were approved subsequent to 01.04.2005'.

23. On perusal of the judgement of the Hon'able Madras High Court, Your Honours it may be noted that though the Hon'able High Court was considering a project approved prior to 01.04.2005 yet it has taken into the consideration the definition of 'built-up area' contained in section 80IB(14)(a) of the Act, which was inserted w.e.f. 01.04.2005. As per the Hon'ble High Court even after assuming that such definition was to be retrospectively applied yet the area of open terrace would not fall within the meaning of the expression 'built-up area'. The Hon'ble High Court referred to the

 
TRUE COPY

Indian Standard Method of Measurement of Plinth, Carpet and Rentable Areas of Buildings as issued of Bureau of Indian Standards and also the meaning of the aforesaid expression assigned as per the rules and regulations of the local authority and concluded that an open terrace could not be equated to a 'projection' or 'balcony' referred to in section 80IB (14) (a) of the Act. Thus the Assessing Officer has erred to state that this case law is not applicable.

24. The Hon'able ITAT, Pune Bench in the case of Naresh T Wadhwani vs. Dy. Commissioner of Income Tax, Pune, (ITA No 18,19,&20/PN/2013) has followed the judgement of M/s Ceebros Hotels Pvt Ltd (supra).
25. The facts of the above case before Hon'able ITAT, Pune Bench are identical in so far as the residential unit has projected terrace (open to sky) and there being no room. The built-up area of a unit exceeded 1500 sq. ft. only if the area of the projected terrace (open to sky) is included and not otherwise.
26. The Assessing Officer has placed reliance on the judgement of Hon'able ITAT, Hyderabad in the case of Modi Builders and Realtors Pvt. Ltd (supra) but however the Hon'able ITAT, Pune Bench in the above case has followed the judgement of M/s Ceebros Hotels Pvt Ltd (supra) by Hon'able Madras High Court stating that the court being a superior authority than a Tribunal, the parity of reasoning laid down by the Hon'able High Court is liable to be followed.
27. The Hon'able High Court of Gujarat in the case of CIT-IV vs Amaltas Associates ([2016] 75 Taxman 183(Gujarat)/ 131 ITD 142(Ahd.) held that an open terrace adjoining a bedroom or any other area constructed area of a penthouse would not be included in built-up area. Copy of judgement is enclosed as **Annexure 6**.
In this case, the assessee had developed housing project. It claimed deduction on income arising out of said project under section 80IB (10). The Assessing Officer rejected such a claim on grounds:
 - that the assessee was not a developer of a housing project, but had acted as a contractor, and
 - that in some units, the built-up area was in excess of the maximum permissible limit for the purpose of section 80IB (10).



TRUE COPY

On appeal, the Commissioner (Appeals) affirmed the order of the Assessing Officer.

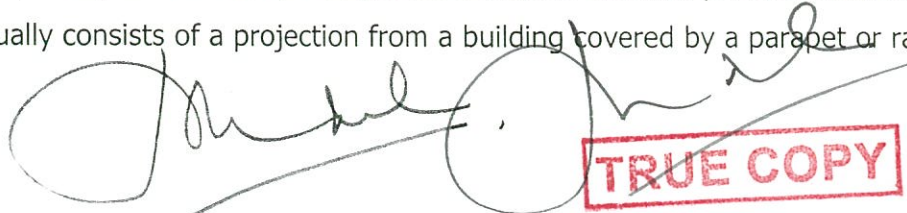
On second appeal, the Tribunal held that the assessee was a developer and it had undertaken full responsibility of constructing the residential units and was also responsible for the resultant profit or loss arising out of such venture. Thus, the assessee was eligible to claim deduction under section 80IB (10).

The Tribunal further held that the open space attached to a penthouse could not be included in the term 'balcony' and, thus, the construction area was within permissible limit so as to claim section 80IB deduction.

The revenue filed the appeal before the High Court.

The relevant para 8 of the Hon'able High Court judgement is reproduced below for the sake of convenience.

8. Section 80(14) of the Act contains definitions for the purpose of the said section. Clause (a) thereof provides that 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. Thus, the built-up area would include inner measurements of a residential unit on the floor level added by thickness of a wall as also projections and balconies. This would however, exclude the common areas shared with other residential units. This exclusion clause of the common areas shared by other units cannot be applied in the reverse. In other words, the moment a certain area is not shared but is exclusively assigned for the use of a particular residential unit holder, would not mean that such area would automatically be included in the built-up area. In order to be part of the built-up area, the same must be part of the inner measurements of a residential unit or projection or balcony. The open terrace space on the top floor of a building would not satisfy this description. It will also not be covered in the expression balcony. Term 'balcony' has been explained in Webster's Third International Dictionary (Unabridged) as unroofed platform projecting from the wall of a building, enclosed by a parapet or railing, and usually resting on brackets or consoles. It is often used as synonyms to gallery, loggia, veranda, piazza, porch, portico, stoop etc. In the context of residential or even commercial complexes, term 'balcony' has gained a definite common parlance meaning. It usually consists of a projection from a building covered by a parapet or railing



and may or may not but usually is covered from the top. This term 'balcony' certainly would not include an open terrace adjoining a bedroom or any other constructed area of a penthouse. The terrace is not a projection.

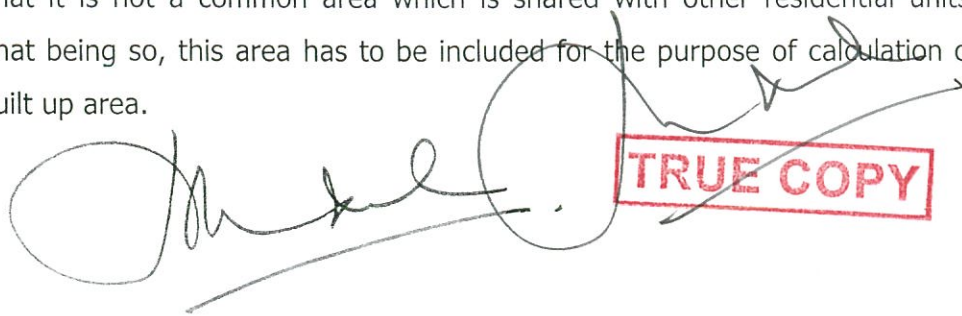
28. In above judgement the Hon'able High Court has also said that the built-up area would include inner measurements of a residential unit on the floor level added by thickness of a wall as also projections and balconies. This would however, exclude the common areas shared with other residential units. This exclusion clause of the common areas shared by other units cannot be applied in the reverse. In other words, the moment a certain area is not shared but is exclusively assigned for the use of a particular residential unit holder, would not mean that such area would automatically be included in the built-up area.

29. Hon'ble ITAT of Jaipur in the case of Deputy Commissioner of Income Tax, Circle -6, vs. M/s Ashiana Mangalm Developers, (in ITA No 588/JP/2016)(Date of Pronouncement 29.12.2016) has held that in view of the judgement of the Hon'ble Madras High Court in the case M/s Ceebros Hotels Pvt Ltd, we are unable to uphold the stand of the Assessing Officer to include area of terrace as a part of the 'built-up area' in a case where such terrace is a projection attached to the residential unit and there being no room under such terrace, even if the same is available exclusively for use of the respective unit- holders. Copy of the judgement is enclosed as **Annexure 7.**

The facts of this case are identical with those of the present appeal. In this case the assessee has undertaken housing project of developing Villas. The villa is a ground floor plus first floor unit. There is a balcony/terrace accessible from the bed rooms on the first floor. This balcony terrace is not a part of the common area. This balcony/terrace is on the first floor of the villa and is the roof of the ground floor.

In this case the AO has declined the deduction on the grounds:

- That the area taken by the assessee as "terrace" is in fact balconies, which are attached and accessible and accessible from the two bed rooms situated on the first floor of the villa.
- That it is not a common area which is shared with other residential units. That being so, this area has to be included for the purpose of calculation of built up area.



- That if this area is included, the built up area of the villa exceeds the limit of 1500 s. ft. prescribed under section 80B (10).
- That in this case, the assessee has made an attempt to exclude the balconies attached and accessible from the two bed-rooms, terming it as "terrace" so as to claim the deduction.

It has been further pointed out in the judgement that there is nothing in section 80IB(14)(a) of the Act to suggest that the factum of the terrace being available for exclusive use of the respective unit owner is a ground to consider it as a part of 'built-up area' for the purposes of clause (c) of section 80IB(10) of the Act.

The following cases got discussed by the Hon'ble ITAT of Jaipur:

- CIT vs. Mahalakshmi Housing (2014) 222 Taxman 356 (Mad), the Madras High Court has held that open terrace cannot form a part of the built up area.
- In the case of Commonwealth Developers CD Fountainhead vs. ACIT (2014) 267 CTR 297 (Bom.), the Bombay High Court has held that the rear courtyard cannot form a part of the 'built up area' of a row house.
- Sanghvi & Doshi Enterprises (2011) 12 txmann.com 240.
- Amaltas Associates vs. ITO (2011) 142 TTJ (Ahd.) 84. The ITAT Ahmedabad on a similar issue has held that the open terrace being not covered and open to sky 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 had considered the open terrace as analogous to balcony/verandah without any basis. Therefore, the lower authorities were not justified in rejecting the claim of the assessee by taking the open terrace as balcony/verandah. **It may be noted the the Revenue's appeal before High Court is dismissed vide judgemnt dated 04.10.2016.[2016] 75 Taxman 183(Gujarat).**
- The Assessing Officer has relied upon the case of Modi Builders & Realtors (P) Ltd. vs. ACIT -ITA No. 1541/Hyd/2010 of the ITAT Hyderabad, wherein it has held that balcony and portico would be included in the built-up area. On this issue there is no dispute. However, this case law is not relevant to the issue under consideration.

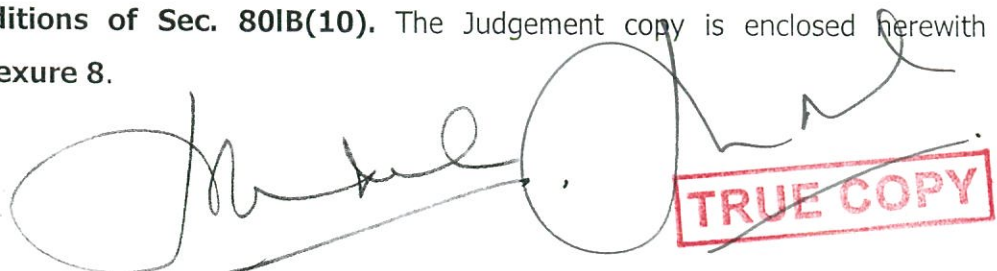
TRUE COPY

30. **Your Honours from the aforesaid judicial precedents it is clear that the terrace area need to be excluded from the built-up area.**

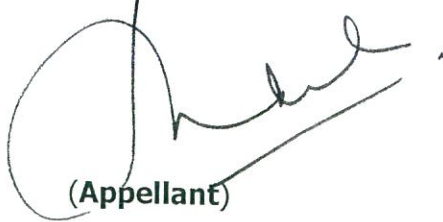
31. The jurisdictional Hon'able ITAT/Hyd in the case of Modi Builders & Realtors (P) Ltd. vs. ACIT -ITA No. 1541/Hyd/2010 held that balcony and portico would be included in the built-up area. As regards inclusion of area of a balcony in computation of built-up area there is no dispute and the appellant is also of the view that the same is to be included as the same is provided for in the definition of built-up area. But the open to sky terrace cannot be said to be a Balcony for its inclusion in the definition of built-up area. Under the income tax Act neither the term 'Balcony' nor 'terrace' is defined and therefore it is imperative to take the meaning as understood in the common parlance of the real estate business. A terrace has more open space and with an open-top whereas the Balcony is usually covered on the top and also usually from three sides. There is a distinct difference between a balcony and a terrace and it is submitted that the terrace cannot be termed as balcony or projection so as to for part of the built-up area as defined u/s 80IB (10) (14)(a).

We respectfully submit that the Hon'able ITAT/Hyd has erred in considering the 'terrace' as 'balcony'.

32. Hon'ble ITAT of Pune in the case of Deputy Commissioner of Income Tax vs. Smt. Suman Jagannath Pharande , ITA No s.711 & 712/PN/2012 & ITA No s.1729 & 1730/PN/2012, (Date of Decision 30th October 2015, Assessment year: 2006-07, 2008-09, 2007-08 & 2009-10) **has held that the canopy is not a habitable area. It could not be considered a part of built-up area and it does not come under the ambit of the terms 'Projections' and 'Balconies' as contemplated u/s 80IB(10)(14)(a). The canopy can more be equated with a portico which is provided in the houses or bungalows for the purpose of shade from sun and rain. Thus the area of the residential bungalows without the area of canopy being considered in arriving at the built up area remains below 1500 sq.ft and, therefore, no violation of the conditions of Sec. 80IB(10).** The Judgement copy is enclosed herewith as Annexure 8.



33. Your Honours it is submitted that the built-up area of the residential units does not exceed 1500 sft as the areas of terrace and portico is not a balcony and projection within the meaning of the definition of built-up area u/s s 80IB (10) (14)(a). It is therefore prayed that the claim of deduction u/s 80IB (10) is rightly claimed and allowable.



(Appellant)



TRUE COPY

190
Annexure

Date: 27.08.2013

From

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

To

The Asst. Commissioner of Income Tax,
Circle - 10(1),
I.T.Towers, A.C.Guards,
Masab Tank, Hyderabad.

Sir,

Sub: Reopening u/s 147 - A.Y.2008-09 - our own case - PAN
AAJFM0647C - objections to notice u/s 148 - submission thereof.

Vide copy of order sheet entry dated 31-03-2013, the Assessing Officer furnished the reasons for re-opening the assessment for the Assessment Year 2008-09.

2. In the reasons supplied, it is noticed that the basis for the proposed action is the view that in the return filed, the assessee claimed deduction u/s 80-1B(10) erroneously.
3. The assessee filed the e-return claiming deduction u/s 80-1B(10) for Rs. 2,69,00,096/-.
4. It is submitted that there is no fresh material available with the Assessing Officer to form the basis for the reason to believe that income chargeable to tax escaped assessment due to the failure on the part of this assessee to disclose fully and truly all material facts. In this regard it is very important to note that even in terms of clause (b) of *Explanation -2* to section 147 the Assessing Officer has not noticed under statement of income or claim of excessive deduction. The assessee being a builder - having been held to be eligible to claim deduction u/s 80-1B(10) in the immediately preceding assessment years 2006 - 07 and 2007 - 08 by virtue of orders passed u/s 143(3) - was rightly allowed deduction

TRUE COPY

u/s 80IB(10) as claimed in the return of income when processed u/s 143(1). Consequently, on the same set of material, particulars and documents this assessee cannot be held to have failed to disclose fully and truly all material facts. **As such, even where the original assessment was completed u/s. 143(1), on a mere change of opinion, such assessment cannot be reopened, it is respectfully submitted.**

5. This proposition is further supported by the decision of the Hon'ble Supreme Court in the case of CIT v. Kelvinator of India Ltd., (2010) 320 ITR 561 (SC). Even before this decision was rendered, based on the Full Bench decision of the Delhi High Court and other High Courts, the Mumbai Bench of the Tribunal held in the case of Aipita Marketing (P.) Ltd., v. Income-tax Officer, (2008) 21 SOT 302 (Mum.) – vide paragraphs 12 to 18 as under:-

"12. The Full Bench of the Delhi High Court in the case of CIT v. Kelvinator of India Ltd. (2002) 256 ITR 1 has observed that it is a well-settled principle of interpretation of statutes that the entire statute should be read as a whole and the same has to be considered thereafter chapter by chapter and then section by section and ultimately word by word. In continuation of the above observation, the Court has considered the scope and effect of section 147 as substituted with effect from 1-4-1989 by the Direct Tax Laws (Amendment) Act, 1987, and subsequently amended by the Direct Tax Laws (Amendment) Act, 1989, with effect from 1-4-1989, as also of sections 148 to 152 have been elaborated in Circular No.549 [(182 ITR (St.) 1], dated 31-10-1989. The Court referred to clause 7.2 of the said Circular, which made it clear that the amendments had been carried out only with a view to allay fears that the omission of the expression "reason to believe" from section 147 would give arbitrary powers to the Assessing Officer to reopen past assessments on a mere change of opinion. Ultimately, the Court held that it is evident that even according to the Central Board of Direct Taxes a mere change of opinion cannot form the basis for reopening a completed assessment. In this context, it is also pertinent to note the observation of the Court that the Assessing Authority does not have any jurisdiction to review

TRUE COPY

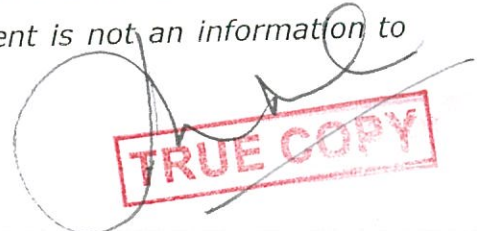
his own order. That is why the Court has reiterated that section 147 of the Income-tax Act, does not postulate conferment of power upon the Assessing Officer to initiate reassessment proceedings upon a mere change of opinion.

13. The Ranchi Bench of the High Court of Patna in the case of Sheo Narain Jaiswal v. ITO (1989) 176 ITR 352 has held that for the purpose of initiating reassessment under section 147(a), the Assessing Authority should form his own belief on the materials available before him and it is not sufficient that he acts at the behest of any superior authority. If the above principle of self-satisfaction is also not satisfied and the reopening was initiated under the direction of superior authority, the reopening of assessment would be bad for non-satisfaction of the condition precedent.

14. The Delhi High Court in the case of Jindal Photo Films Ltd. v. Dy. CIT (1998) 234 ITR 170 has held that where the Income-tax Officer attempts to reopen an assessment because the opinion formed earlier by him was in his opinion incorrect, the reopening could not be done.

15. The Gujarat High Court in the case of Garden Silk Mills (P) Ltd. v. Dy. Commissioner of Income-tax (1999) 237 ITR 668 has considered the conditions precedent to reopen an assessment under section 147 and has held that the reason to believe that income has escaped assessment should be borne out of material and a change of opinion will not be sufficient to justify a reassessment proceedings.

16. Again, the Gujarat High Court in the case of Adani Exports v. Dy. CIT (1999) 240 ITR 224 has held that the Assessing Officer must have reason to believe that income has escaped assessment and the existence of such belief is open to judicial review and in that context the audit objection raised by the department is not an information to point out an escapement of income.



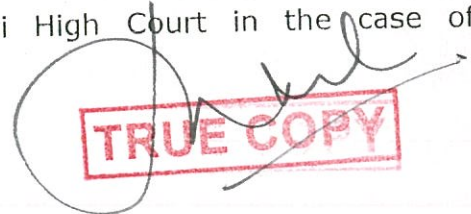
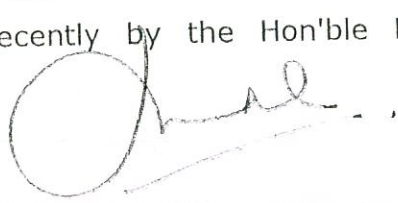
17. *The Madras High Court in the case of Apollo Hospitals Enterprises Ltd. v. Asst. CIT (2006) 287 ITR 25 has held that issue of notice under section 148 is not permissible on change of opinion of the Assessing Authority.*

18. *Therefore, in the facts and circumstances of the case and in the light of the decision of Madras High Court in the case of Bapalal & Co. Exports (supra), we find that the impugned income escaping assessment is bad in law. Therefore, it is to be set aside."*

6. Besides, the Hon'ble Gujarat High Court in the case of Ganesh Housing Corporation Ltd., vs. Dy. Commissioner of Income-tax reported in (2012) 341 ITR 312 (Guj.) held in an identical case relating to reopening on the issue of withdrawal of deduction originally allowed u/s 80IB(10) that "*the fact that the Assessing Officer in the assessment proceedings under section 143(3) of the Act did not give any opinion regarding the allowability or otherwise of deduction u/s 80IB(10) of the Act is not a ground of invoking section 147 of the Act.*"

7. Even for reopening an assessment concluded u/s 143(1) for this assessment year the above ratio is valid because in respect of the same project with identical measurements of built up area of flats the Assessing Officer found our case to be eligible in scrutiny assessments in the immediately preceding two assessment years. Therefore, the Assessing Officer found it not necessary to pick up for scrutiny because there was neither under statement of income nor excess claim of any deduction or relief or allowance. Consequently, even this ratio is applicable with equal force to this assessment year.

8. It is gleaned that the real cause for the reopening is not any failure on our part to disclose full and truly all material facts but an audit objection by A.G Audit on the interpretation of the provisions of sec. 80IB(10). It is respectfully submitted that the reopening would be bad in law in view of the categorical ratio laid down by the Hon'ble Apex Court in the case of Indian Eastern News Paper Society vs. Commissioner of Income-tax (1979) 119 ITR 996 (SC) which has been followed recently by the Hon'ble Delhi High Court in the case of



Commissioner of Income-tax v. Usha International Ltd., (2012) 348 ITR 485 (Del.) (FB).

9. In the light of the above, it is requested that the proceedings initiated u/s 147 may please be dropped.

10. The assessee invites the attention of the Assessing Officer to the decision of the Supreme Court in GKN Driveshafts (India) Ltd. v. ITO [2003] 259 ITR 19 (SC) wherein it has been held that the Assessing Officer is bound to disclose the reasons for reassessment within a reasonable time and on receipt of the reasons, the assessee is entitled to raise objections and if any such objections are filed, **the objections must be disposed of by a speaking order before proceeding to reassess in terms of the notice earlier given.** Thus, the assessee requests the Assessing Officer to drop the proceedings in view of the aforesaid objections raised and help reduce the compliance costs of the assessee.

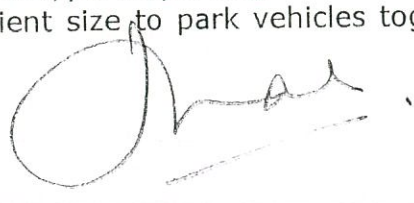
For Mehta & Modi Homes

(Soham Modi)
Partner

TRUE COPY

NOTE ON PORTICO AND OPEN TERRACE:

1. In the scheme of housing project development, there exist two basic options of development. One option is to develop and construct series of independent houses and the other option is to develop and construct blocks of multi-storied buildings having apartments/flats on each floor of the building. The first option can be said as 'horizontal development' and the second option can be said as 'vertical development'.
2. In the horizontal scheme of development, it is imperative that the one large parcel of land is sub-divided within itself and plotted into desired size of plots. This plotting necessarily involves leaving certain areas as internal road so as to form approach road to each plot. Whereas in a vertical development, blocks of multi storied buildings are planned to be constructed leaving certain areas for roads in and around the block of buildings.
3. Typically, in vertical development involving constructions of buildings having more than one floor, the ground floor (or the cellar) is meant for parking. The residential units i.e., flats/apartments starts from the first floor onwards. These parking areas can be either a reserved parking or common parking area for the flat occupants. Therefore, these parking areas obviously do not form part of a residential unit. The parking area is not habitable and is meant only for parking of vehicles. The parking area for the occupants of the multistoried building is pooled and provided at one place i.e., either on the ground floor/cellars or in the open space around the buildings.
4. In a horizontal development i.e., in an independent house the parking area is termed as 'portico'. The portico is within the plot area but definitely outside the residential unit. The portico here also is meant for parking of vehicles and is not habitable. The portico at the most, has an convenience advantage that you may approach the main door of the residential unit without having to go to upper floors to enter the flat/apartment. The location of the portico within the compound wall of a plot shall not alter the nature of that area as a parking area. The word 'portico' used generally for a bungalow is similar to word 'parking area' used in a multistoried apartment. The purpose and the meaning are also same i.e., the area meant to be utilized as parking of vehicles.
5. The meaning of the word 'Portico' can be explained as follows:
 - A portico/porch/parking area is an area covered or uncovered with sufficient size to park vehicles together with a driveway connecting



TRUE COPY

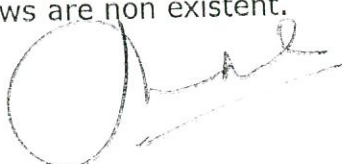
the parking space with a street or alley permitting ingress and egress of the vehicles.

- It is a paved outdoor area adjoining a residence. It adjoins the residence externally and is not part of the residential unit. A residential unit is enclosed in walls, which stretch from the floor level to the roof; it has windows and is topped by a roof.
- A portico/parking/porch, on the other hand, hardly has the features of the residential unit. Windows are non-existent. It is not competent to be used for habitable purposes.
- Portico area is not at the level of the ground floor and is below it. It doesn't even form a part of the house. The entrance of the house is after the portico. It doesn't form part of the plinth of the house.

Built up area does not include parking area and is not usable. Even for apartments parking is considered separately and cannot be part of usable built up area. For this very reason, all municipal laws and other standards and codes exclude the portico from the built-up area.

6. Considering the above meaning of the word 'Portico' it may be appreciated that the 'Portico' do not form part of a residential unit and as such, the company has rightly excluded the portico for calculating the built-up area.
7. In the design of the residential units under Silver Oak Bungalows housing project, an open terrace is provided on the first floor. The area of this open terrace is not included in calculation for the reason that the same do not form part of a residential unit. The open terrace provided is open to sky and as such the terrace area is not habitable.
8. A terrace is known as paved outdoor area adjoining a residence. It adjoins the residence externally and is not part of the structure that composes the residential unit. A residential unit is enclosed in walls, which stretch from the floor level to the roof; it has windows and is topped by a roof. A residential unit has provisions for amenities and security of the residents.

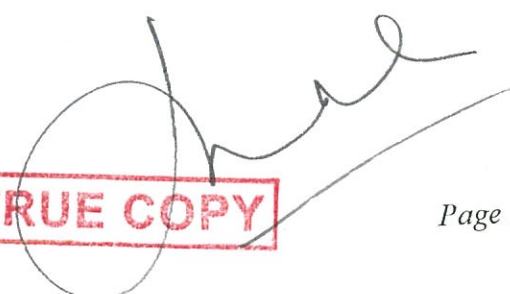
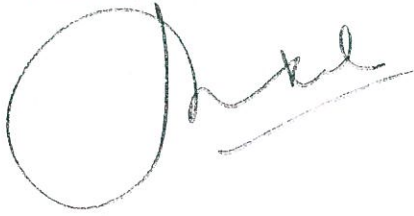
A terrace, on the other hand, hardly has the features of the residential unit. It is open to the sky and the height of its wall boundaries are nowhere similar to that of the residential unit. Windows are non-existent.



TRUE COPY

A terrace independently is not capable to be used for habitable purposes and therefore can not be considered as forming part of the residential unit. For this very reason, all municipal laws and other standards and codes exclude the open terrace from the built-up area.

9. In a multistoried building (under vertical concept of development), the terrace is the top floor which is open to sky and is not habitable. This terrace area cannot form part of the residential unit. Similarly, open terrace provided for the bungalow cannot form part of the residential unit. This can also be understood by way a example of a Pent House. A pent house is on a terrace covering certain portion of the terrace. While computing built-up area of the Pent- House, the open terrace area surrounded to the pent house is not measured.
10. Considering all the above, with respect to open terrace, we have rightly not included the open terrace on first floor in computing the built-up area.


TRUE COPY

Amr. 2 198

13.1
Date: 03-02-2014

From:
M/s Mehta & Modi Homes,
5-4-187/3 & 4, 2nd Floor,
Soham Mansion, M.G. Road,
Secunderabad – 500 003.

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

Amr

Sir,

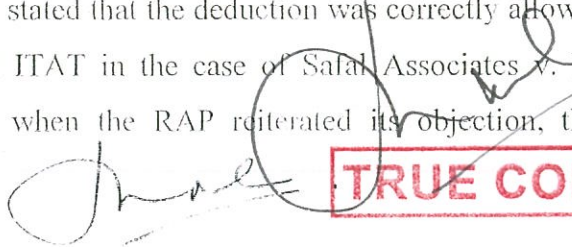
Sub: I.T. Re-assessment proceedings - Own case - Asst. Year. 2008-09 –

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 Salal Associates v. ITO in support of his contention. Despite this, when the RAP reiterated its objection, the AO


TRUE COPY

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 flop 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

TRUE COPY

200

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.

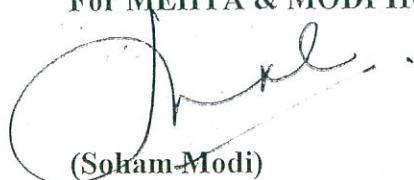

TRUE COPY

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,

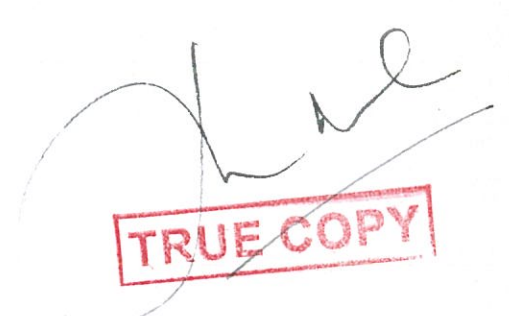
For MEHTA & MODI HOMES,



(Sokam Modi)

PARTNER

Encl: As above



TRUE COPY

202

Note-A

M/s Mehta & Modi Homes

Asst. Year 2008-09

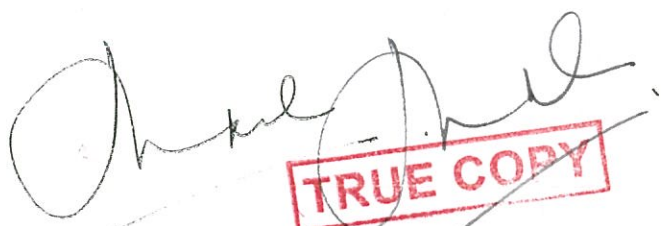
Notice u/s 148 not valid

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.


TRUE COPY

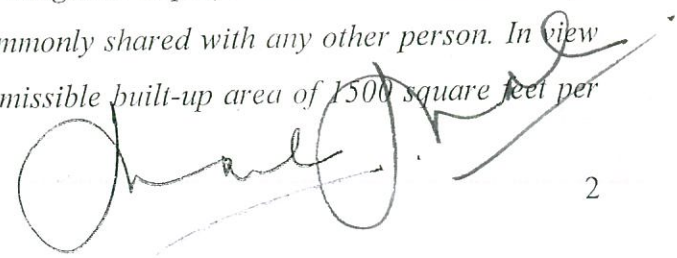
3. Now, the AO has issued notice under section 142(1) dated 15.01.2014 for continuing the re-assessment proceedings. In this notice we are asked to explain as to why the deduction u/s 80-IB(10) should not be disallowed since the total built-up area of each residential unit exceeds 1500 s.ft.

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

TRUE COPY



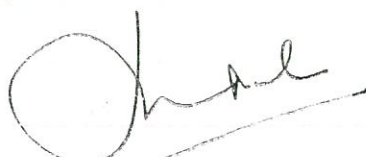
reasons. For the assessment year 2008-09, the case was covered by the main provision and not by first proviso to section 147 of the Act. The sanctioned plan and brochure of the project were never a part of the e-return. The position of processing and assessment in the case of the petitioner-assessee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

 **TRUE COPY** 

205

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.

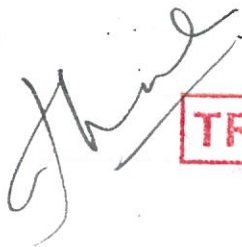
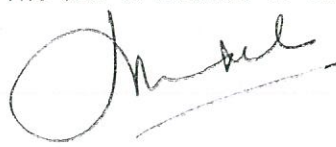
(vii) While completing the assessments u/s 143(3) for the Asst Years 2006-07 and 2007-08, the AO made a detailed examination as to the built-up area of the residential units. The Inspector was deputed specifically for the purpose of measurement of the area. Based on his report, the AO took a considered 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


TRUE COPY


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.

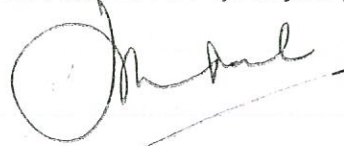
In view of the above, it appears that the assessee firm has constructed or constructing the housing units within the prescribed limit and specified area as stated in section 80IB(10) of the I.T. Act. Hence the claim of the assessee firm is accepted".

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 verify 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.

 **TRUE COPY** 

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 820B (10) of the I.T. Act".

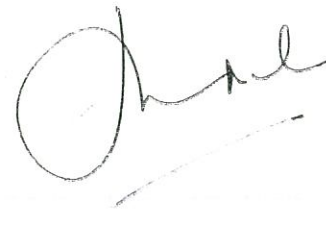
(viii) We have obtained information to show that the RAP has raised an audit objection vide note dated 23.2.2012 in relation to the assessment for the Asst Year 2006-07 wherein audit held that the built-up area of the residential unit exceeds 1500 s.ft. upon inclusion of terrace and portico areas and 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.*

- 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.

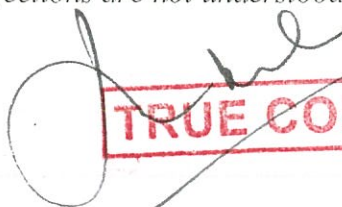
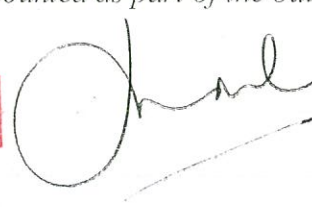
- In the sanctioned plan the portico area is excluded for the purposes of computing the built-up area on which the sanctioned fee is generally charged copy of plan enclosed. Thus the municipal laws also do not consider the portico area as built-up area.

- 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.

 **TRUE COPY** 

- 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

TRUE COPY

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

TRUE COPY

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

TRUE COPY

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

TRUE COPY

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 charge of opinion is impermissible:

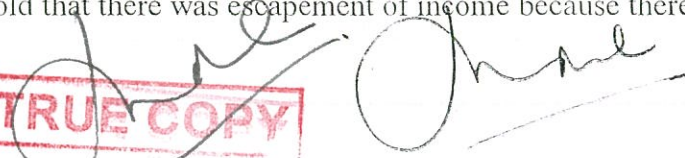
- CIT v. Kelvinator of India Ltd (2010) (SC) 320 ITR 561.
- CIT v. Indian Sugar and General Industry Export & Import Corporation Ltd. (2008) 170 Taxman 229 (Delhi)
- CIT v. Lucas TVS Ltd. (2001) 249 ITR 306
- Alpika Marketing Pvt Ltd v. ITO (2008) 21 SOT 302 (Mumbai ITAT).
- Sheo Narain Jaiswal ITO (1989) 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. 1541/Hyd/ 2010. This is a decision which held: 'In our opinion, built-up area includes portico and balcony.' The

TRUE COPY

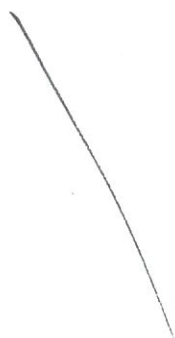
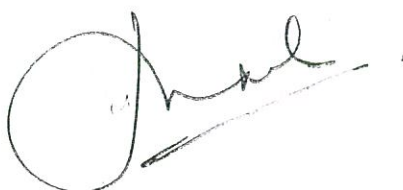
definition of 'built-up area' in sec.80-IB(14) has roped in balconies in a residential unit. This, therefore, did not call for the opinion of the ITAT. But the opinion that portico is included in built up area called for reasons. Unfortunately, this decision of the ITAT does not contain the reasons for 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


TRUE COPY

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.



TRUE COPY