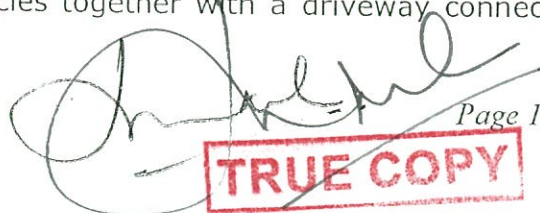


Annexure-B5

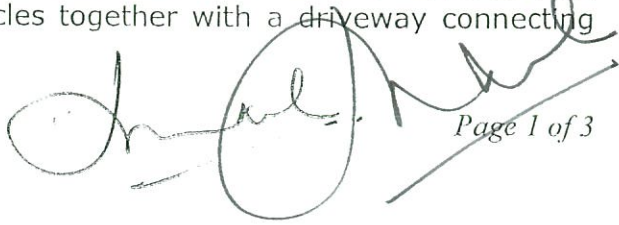
NOTE ON PORTICO AND OPEN TERRACE:

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


Page 1 of 3
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Page 1 of 3

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 residential 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.

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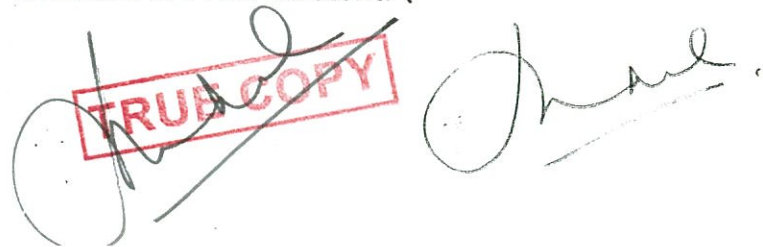
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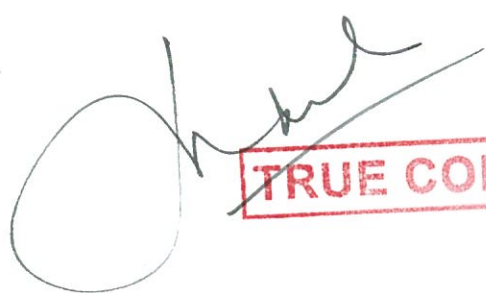
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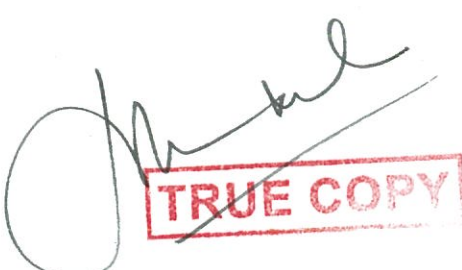
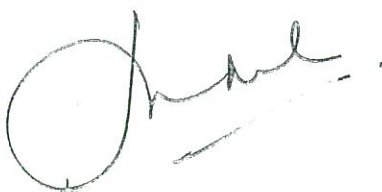
9. In a multistoried building (under vertical concept of development), the terrace is the top floor which is open to sky and is not habitable. This terrace area cannot form part of the residential unit. Similarly, open terrace provided for the bungalow cannot form part of the residential unit. This can 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.



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M/s. Mehra & Modi, Flomus

A.Y : 2008-09

-5-

SALIENT FEATURES

- HUDA approved layout
- Clear title
- 75 bungalows spread over 6 acres of land
- All bungalows with similar elevation, colour, size, compound wall & landscaping
- Built-up area- 1,475 sq. ft. (approx)
- Plot area- 200 sq. yds. (approx)
- Duplex bungalows with 3 bedrooms, kitchen, drawing, dining, terrace, portico for parking & lawn
- Sloping roofs with country tiles
- 1 KVA backup power for each bungalow
- Underground cabling for power, phone & cable TV
- 24 hrs. water supply through community tank
- 2,000 lts. individual overhead tank for each bungalow
- Separate drinking water connection in kitchen
- Rainwater harvesting implemented
- Pollution-free environment
- Eco-friendly development- more than 70% open area
- Design as per Vaastu
- No shops or offices within the layout
- Possession within 18 months of booking
- Housing loans available

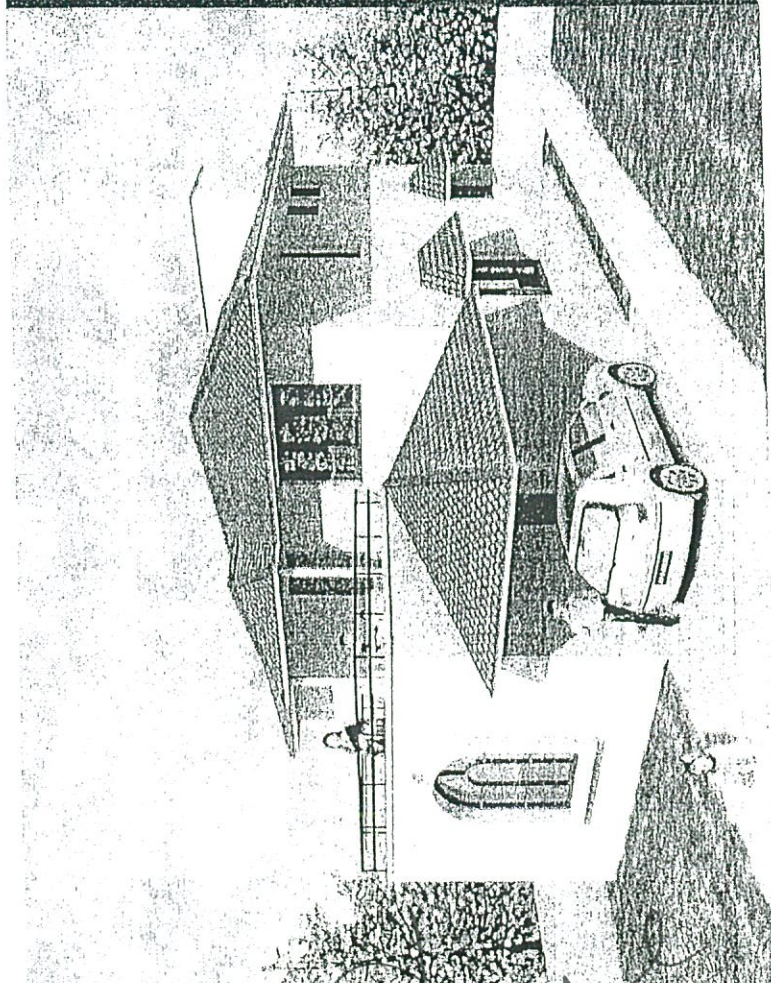
AM



Here's a place that symbolises a lifestyle that has a class of its own. Silver Oak Bungalows, the new address for sophistication and high taste.

Quiet, serene and private abodes that will make every day of your life a memorable one.

Experience the grandeur of your own personal haven. Experience Silver Oak Bungalows.



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for

Open terrace space would not be included in built up area for sec. 80-IB relief: Gujarat HC

November 23, 2016 | [2016] 75 taxmann.com 183 (Gujarat) / 131 ITD 142 (Ahd.)

IT: Where entire planning, construction and development work of a housing project was done by assessee, assessee was a developer and not merely a contractor; assessee would be eligible for deduction under section 80-IB(10)

IT: Open terrace space adjoining any constructed area of a penthouse would not be included in built-up area for purpose of section 80-IB deduction

■ ■ ■

[2016] 75 taxmann.com 183 (Gujarat)

HIGH COURT OF GUJARAT

Commissioner of Income-tax-IV

v.

Amaltas Associates*

AKIL KURESHI AND A.J. SHASTRI, JJ.

TAX APPEAL NO. 1372 OF 2011

OCTOBER 4, 2016

I. Section 80-IB of the Income-tax Act, 1961 - Deductions - Profits and gains from industrial undertakings other than infrastructure development undertakings (Housing project) - Assessing Officer rejected assessee's claim of deduction under section 80-IB(10) on ground that assessee was not a developer of housing project but had acted merely as a contractor - Tribunal culled out that entire planning, sanctioning of plan, work of construction, development of property was done by assessee - Assessee would enroll members and accept payments from such members for allocating residential units - Entire sale consideration was received by assessee from such members - Assessee had also to provide payment for construction, engage architect, engineer and site supervisor and obtain necessary permission from development authority - Whether assessee was a developer and not a contractor and was, thus, eligible to deduction under section 80-IB(10) - Held, yes [Para 7] [In favour of assessee]

II. Section 80-IB of the Income-tax Act, 1961 - Deductions - Profits and gains from industrial undertakings other than infrastructure development undertakings (Housing project) - Whether in order to be part of built-up area, area in question must be part of inner measurements of a residential unit or projection or balcony; open terrace space on top floor of a building would not satisfy this description - Held, yes - Whether, thus, an open terrace adjoining a bedroom or any other constructed area of a penthouse would not be included in built-up area - Held, yes [Para 8] [In favour of assessee]

FACTS

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- The assessee had developed housing project. It claimed deduction on income arising out of said project under section 80-IB(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 80-IB(10).
- 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 80-IB(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 80-IB deduction.

HELD

- The Tribunal in the impugned judgment has referred to the terms and conditions between the assessee and the society, from which, the Tribunal culled out that entire planning, sanctioning of plan, work of construction, development of the property was done by the assessee. The assessee would enroll the members and accept payments from such members. Entire sale consideration was received by the assessee from such members. As per the agreement, the assessee had to provide the payment from construction, engage architect, engineer and site supervisor and also obtain necessary permission from AUDA. The Tribunal concluded that these conditions would show that the assessee was a developer and not a contractor. The case of the assessee would in background of such findings of the Tribunal be covered by the judgment of this Court in case of *CIT v. Radhe Developers* [2012] 341 ITR 403/204 Taxman 543/17 taxmann.com 156 (Guj.). [Para 7]
- Section 80(14) 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, stop 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. [Para 8]

CASE REVIEW

CIT v. Radhe Developers [2012] 341 ITR 403/204 Taxman 543/17 taxmann.com 156 (Guj.) (para 7) followed.

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Amaltas Associates v. Income-tax Officer [2011] 11 taxmann.com 420 (Ahd. - Trib) (para 9) affirmed.

CASES REFERRED TO

Radhe Developers v. ITO [2008] 23 SOT 420 (Ahd.) (para 3), *ITO v. Shakti Corpn.* [2009] 32 SOT 438 (Ahd.) (para 3) and *CIT v. Radhe Developers* [2012] 341 ITR 403/204 Taxman 543/17 taxmann.com 156 (Guj.) (para 4).

Nitin K. Mehta, Adv. for the Appellant.

JUDGMENT

Akil Kureshi, J. - Tax Appeal was admitted for consideration of following substantial question of law:

"Whether the Appellate Tribunal is right in law and on facts in allowing the deduction claimed by the assessee u/s. 80IB (10) of the Income Tax Act ?"

2. Respondent assessee for the assessment year 2006- 07 had filed the return of income of declaring income of Rs. 5,15,340/- after claiming deduction under section 80IB of the Income Tax Act, 1961 ('the Act' for short) on a sum of Rs. 4.33 crores (rounded off). Case of the assessee was that the assessee had developed a housing project, income from which would be exempt in terms of section 80IB(10) of the Act. The Assessing Officer as well as the Commissioner rejected such a claim primarily on two grounds; one that the assessee was not a developer of a housing project, but had acted as a contractor. Secondly, that in some of the units, the built-up area was in excess of the maximum permissible limit, for the purpose of section 80IB(10) of the Act.

3. The Tribunal, allowed the assessee's appeal by the impugned judgment and held that the assessee was a developer. The assessee had undertaken full responsibility of constructing the residential units and had also been responsible for the resultant profit or loss arising out of such venture. The assessee thus, had undertaken full risk. Regarding the Revenue's contention regarding excess built-up area, the Tribunal held that the open space attached to a penthouse, cannot be included in the term 'balcony'. The Tribunal was of the view that the case of the present assessee was same as the cases of *Radhe Developers v. ITO* [2008] 23 SOT 420 (Ahd.) and *ITO v. Shakti Corpn* [2009] 32 SOT 438 (Ahd.), two sets of appeals, where the Tribunal had allowed the deduction under section 80IB(10) of the Act.

4. The decision of the Tribunal in case of *Radhe Developers* and *Shakti Corporation*, came up for consideration before this Court in case of *CIT v. Radhe Developers* [2012] 341 ITR 403/204 Taxman 543/17 taxmann.com 156. The Division Bench of this Court confirmed the view of the Tribunal making following observations:

"36. We have noted at some length, the relevant terms and conditions of the development agreements between the assessee and the land owners in case of *Radhe Developers*. We also noted the terms of the agreement of sale entered into between the parties. Such conditions would immediately reveal that the owner of the land had received part of sale consideration. In lieu thereof he had granted development permission to the assessee. He had also parted with the possession of the land. The development of the land was to be done entirely by the assessee by constructing residential units thereon as per the plans approved by the local authority. It was specified that the assessee would bring in technical knowledge and skill required for execution of such project. The assessee had to pay the fees to the Architects and Engineers. Additionally, assessee was also authorized to appoint any other Architect or Engineer, legal adviser and other professionals. He would appoint Sub-contractor or labour contractor for execution of the work. The assessee was authorized to admit the persons willing to join the scheme. The assessee was authorised to receive the contributions and other deposits and also raise demands from the members for dues and execute such demands through legal procedure. In case, for some reason, the member already admitted is deleted, the assessee would have the full right to include new member in place of outgoing member. He had to make necessary

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financial arrangements for which purpose he could raise funds from the financial institutions, banks etc. The land owners agreed to give necessary signatures, agreements, and even power of attorney to facilitate the work of the developer. In short, the assessee had undertaken the entire task of development, construction and sale of the housing units to be located on the land belonging to the original land owners. It was also agreed between the parties that the assessee would be entitled to use the full FSI as per the existing rules and regulations. However, in future, rules be amended and additional FSI be available, the assessee would have the full right to use the same also. The sale proceeds of the units allotted by the assessee in favour of the members enrolled would be appropriated towards the land price. Eventually after paying off the land owner and the erstwhile proposed purchasers, the surplus amount would remain with the assessee. Such terms and conditions under which the assessee undertook the development project and took over the possession of the land from the original owner, leaves little doubt in our mind that the assessee had total and complete control over the land in question. The assessee could put the land to use as agreed between the parties. The assessee had full authority and also responsibility to develop the housing project by not only putting up the construction but by carrying out various other activities including enrolling members, accepting members, carrying out modifications engaging professional agencies and so on. Most significantly, the risk element was entirely that of the assessee. The land owner agreed to accept only a fixed price for the land in question. The assessee agreed to pay off the land owner first before appropriating any part of the sale consideration of the housing units for his benefit. In short, assessee took the full risk of executing the housing project and thereby making profit or loss as the case may be. The assessee invested its own funds in the cost of construction and engagement of several agencies. Land owner would receive a fix predetermined amount towards the price of land and was thus insulated against any risk."

5. The judgment of the High Court in case of *Radhe Developers (supra)* was carried in appeal before the Supreme Court. The Special Leave Petition was dismissed.

6. Learned counsel for the Revenue however, sought to draw two distinctions. He contended that in the present case, the terms of the agreement between the assessee and the society were different and the case of this assessee therefore, would not be governed by the ratio of *Radhe Developers (supra)*. His second contention was that some of the units exceeded the maximum permissible built-up area. In a penthouse, according to the counsel, the open space adjoining the top floor constructed area of the unit would also form part of the built-up area of the unit.

7. Neither of these contentions can be accepted. The Tribunal in the impugned judgment has referred to the terms and conditions between the assessee and the society, from which, the Tribunal culled out that entire planning, sanctioning of plan, work of construction, development of the property was done by the assessee. The assessee would enroll the members and accept payments from such members. Entire sale consideration was received by the assessee from such members. As per the agreement, the assessee had to provide the payment from construction, engage architect, engineer and site supervisor and also obtain necessary permission from AUDA. The Tribunal concluded that these conditions would show that the assessee was a developer and not a contractor. The case of the assessee would in background of such findings of the Tribunal be covered by the judgment of this Court in case of *Radhe Developers (supra)*.

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

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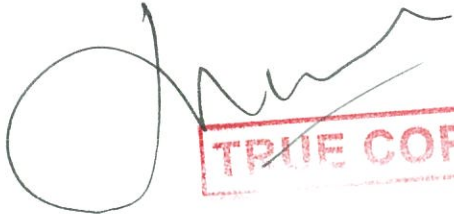
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9. In the result, question is answered against the Revenue and tax appeal is dismissed.

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*In favour of assessee.


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Income Tax Appellate Tribunal - Jaipur

Acit, Jaipur vs Ashiana Mangalam Developers, ... on 29 December, 2016

vk;dj vihyh; vf/kdj.k] t;iqj U;k;ihB] t;iqj

IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES, JAIPUR

Jh HkkxpUn] ys[kk lnL; ,oa Jh dqy Hkkjr] U;kf;d lnL; ds le{k

BEFORE: SHRI BHAGCHAND, AM AND SHRI KUL BHARAT, JM

vk;dj vihy la-@ITA No. 588/JP/2016

Assessment Years : 2012-13.

The Dy Commissioner of Income-tax,

Circle-6,

Jaipur.

cuke

Vs.

M/s. Ashiana Mangalam Developers,

401, 3rd Floor, Apex Mall, Lal Kothi, Tonk Road, Jaipur.

LFkk;h ys[kk la-@thvkbZvkj la-@PAN No. AANFA 4297 N

vihykFkhZ@Appellant

izR;FkhZ@Respondent

jktLo dh vksj ls@ Revenue by : Shri R.A. Verma (Addl. CIT) fu/kZkfjrh dh vksj ls@ Assessee by :
Shri P.C. Parwal (CA) lquokbZ dh rkjh[k@ Date of Hearing : 28.12.2016.

?kks"k.kk dh rkjh[k@ Date of Pronouncement : 29/12/2016.

vkns'k@ ORDER PER SHRI KUL BHARAT, JM.

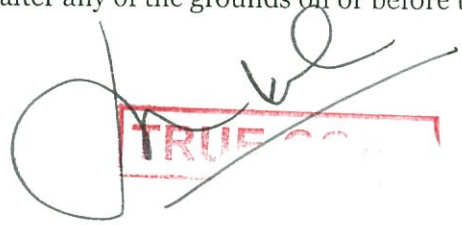
This appeal by the revenue is directed against the order of ld. CIT (A)-2, Jaipur dated 29.03.2016 pertaining to assessment years 2012-13. The revenue has raised the following grounds of appeal :-

" Whether on the facts and circumstances of the case and in law, the ld. CIT (A) has erred in deleting the addition of Rs. 1,00,43,117/- made by the AO on account of disallowance of claim of deduction u/s 80IB(10) without appreciating the fact that the 'built up area' of the Villas constructed by the assessee is 1620.81 sq. ft. that exceeds the prescribed limit of 1500 sq. ft., thereby ignoring the definition as given in section 80IB(14)(a) of Income-tax Act, 1961."

(ii)(a) Whether on the facts and circumstances of the case and in law, the ld. CIT (A) has erred in deleting the addition of Rs. 23,310/- made for depositing the employees' contribution to PF beyond the prescribed time limit provided in the respective Acts.

(ii)(b) Whether on the facts and circumstances of the case and in law, the ld. CIT (A) has erred in holding that employees contribution to PF & ESI are governed by the provision of section 43B and not by section 36(1)(va) read with section 2(24)(x) of the IT Act.

The appellant craves its rights to add, amend or alter any of the grounds on or before the hearing.



2. Briefly stated the facts are that the case of the assessee was picked up for scrutiny assessment and the assessment was framed under section 143(3) of the Income Tax Act, 1961 (hereinafter referred to as the Act) vide order dated 23.01.2015. While framing the assessment, the AO rejected the claim of deduction under section 80IB(10) of the Act, on the ground that the residential units exceeded the specified limit of 1500 sq. ft. The AO also made disallowances in respect of delay in deposit of PF of Rs. 23,310/-. The assessee aggrieved by this order, preferred appeal before Id. CIT (A), who after considering the submissions of the assessee and relying upon the judgments of the Hon'ble Madras High Court and Hon'ble Bombay High Court and the decision of the Coordinate Bench of the Tribunal allowed the deduction under section 80IB(10) of the Act and also allowed the deduction of account of contribution to PF & ESI by relying upon the Hon'ble Jurisdictional High Court rendered in the case of Jaipur Vidhyut Vithran Nigam Ltd., 265 CTR 62 (Raj.), CIT vs. State Bank of Bikaner & Jaipur, 99 DTR 131 (Raj.).

3. Now the revenue is in appeal before the Tribunal.

4. The Id. D/R supported the order of the A.O. He, however, conceded that the facts in the present appeal are similar and identical to the facts pertaining to A.Y. 2010-11 and 2011-12.

4.1. At the outset, the Id. Counsel for the assessee submitted that under the identical facts in the case of the assessee for the assessment years 2010-11 and 2011-12, the Coordinate Bench of the Tribunal in ITA No. 204 and 270/JP/2015 has decided the issue of entitlement of deduction under section 80IB(10) in favour of the assessee.

4.2. We have heard rival contentions, perused the material available on record and gone through the orders of the authorities below. Apropos ground no. 1, we find that the Coordinate Bench in ITA No. 204/JP/2015 in para 4.2 has decided the issue in favour of the assessee by observing as under :-

"4.2. We have heard rival contentions, perused the material available on record and gone through the orders of the authorities below. The AO declined the deduction under section 80IB(10) by observing at pages 13 & 14 as under :-

" As discussed above, the area taken by the assessee as "terrace" is in fact balconies, which are attached and accessible from the two bed rooms situated on the first floor of the villa. This 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. If this area is included, the built up area of the villa exceeds the limit of 1500 s. ft. prescribed under section 80B(10). Even otherwise, the assessee himself has included 33.33% of the area taken by it as terrace (i.e. 105 s.ft) in the calculation, but this has been excluded for working out built up area. If we add this area of 105 S.ft, the total comes to 1580.81 S.ft, which is more than the prescribed limit of 1500 S. ft. 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. As discussed above, if the area of the balconies is included, the built up area comes to 1772.81 S. ft, which is much more than the prescribed limit of 1500 S. ft. Since the basic eligibility condition as laid down in clause (c) of Sec. 80IB(10) is not fulfilled, the benefit of deduction u/s 80IB(10) cannot be allowed to the assessee.

The built-up area of the shops and other commercial establishments included in the housing project does not exceed (three) per cent of the aggregate built-up area of the housing project or [five] thousand square feet, whichever is higher];

It has been stated that the no commercial establishment is included in the housing project and there is no violation of this condition.

Not more than one residential unit in the housing project should be allotted to a person being an individual and in case where a residential unit in such housing project is allotted to a person being an individual, no other residential unit should be allotted to spouse or minor children of his HUF.

During the course of assessment proceedings, vide letter dated 17.1.2013, the assessee stated that no flat has been allotted to any spouse or minor children of the allottee. Further, an affidavit dated 05.02.2013 was also filed by the authorized signatory, Shri Sanjeev Rawat duly notarized to the effect that not more than one residential unit in the housing project has been allotted to an individual, his spouse, or minor children or HUF by the assessee.

From the detailed discussion made above, it is clear that the assessee has not fulfilled the basic eligibility condition for deduction u/s 80IB(10) of the IT Act as there is violation of clause (c) as discussed above. On the basis of these findings, it is hereby held that the assessee is not entitled to the deduction claimed by it and according, the claim for deduction u/s 80IB(10) amounting to Rs. 7,13,77,130/- is hereby disallowed."

However, the ld. CIT (A) after considering the submissions has observed as under :-

"3.2. The facts of this issue are :

The residential unit whose built up area is under consideration is a ground floor plus first floor unit having a common boundary wall with an adjoining unit. Therefore, this residential unit is in the nature of a 'row house' which has been marketed as a villa.

The built up area of the villa without inclusion of the terrace/balcony is 1475.81 sq. ft. while the area of the terrace/balcony is 297 sq. ft.

This balcony/terrace is accessible from the bed rooms on the first floor.

This balcony/terrace is not a part of the common area. The owner of the residential unit has exclusive rights over this area. Therefore, this area is the exclusive, private area of the owner of the villa.

This balcony/terrace is on the first floor of the villa and is the roof of the ground floor.

As per plan of the first floor of the residential unit, annexed to the assessment order, the brochure and photographs of the residential unit, there is no construction in this area and it is open to sky.

33.33% of the area of this balcony/terrace was charged from the customers. However, this fact may not be directly relevant to the issue at hand in view of the definition of built up area, given expressly in the Act.

3.3. At this stage, it will be pertinent to discuss the case laws on this issue -

(a) In the case of 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.

(b) 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.

In this case, the ITAT, Panaji had earlier held that rear courtyard would form part of the built up area of the row house. The Bombay High Court quashed the above decision by holding that - for including any area as built up area there should be something built in such area. When an area was open to sky, question of holding that there was anything built there, to be included as built up area, would not arise at all. The relevant extract of the head notes of this case law is as under -

"Held, it was held by Madras High Court in CIT vs. M/s. Mahalakshmi Housing, 2012-TIOL-951-HC MAD-IT, that open terrace area cannot form part of built up area- For including any area as 'built-up area' there should be something built in such area - When area was open to sky question of holding that there was anything built therein to be included as 'built up area' would not arise at all - Following ratio laid down by Madras High Court, area of courtyard was to be excluded to calculate built-up area - on exclusion of courtyard area, residential unit came to be less than 1500 square feet which would entitle appellant/assessee to claim deduction u/s 80-IB(1) - Appellant/assessee was eligible for deduction u/s 80-IB(10) - Judgment of ITAT quashed and set aside - Assessee's appeal allowed."

(c) In the case of Sanghvi & Doshi Enterprises (2011) 12 txmann.com 240, the ITAT Chennai Bench held that area of the terrace will be included in the built up area. The issue that was adjudicated upon was similar to the instant case. The relevant extract of this order is given below -

" Coming to the issue as to whether the private terrace is to be included in the computation of built up area, it is noticed that the term "built up area" has been defined in section 80-IB(14)(a) to include the projections and the balconies. Thus the private terrace is nothing but the projection of the flat. It can also be termed as an open balcony. The learned authorized representative has specifically agreed that the access to the private terrace is only through the specified flat. A perusal of the agreement in respect of the flats which have the private terrace clearly shows that the private terrace is for the exclusive use of the purchaser. Once the private terrace is for the exclusive use of the purchaser of the flat then, obviously, the said private terrace does not fall within the common areas shared with the other residential units and consequently would have to be included in the measurement for arriving at the "built up area". It also took note of the fact that this private terrace was adjoining the dwelling unit and had to be considered as a projection of the dwelling unit and

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therefore had to be included in the built up area.

In appeal, the Madras High Court, in the above case (2013) 81 DTR (Mad) 75, reversed the above decision of the ITAT Chennai and held that open, private terrace area could not be the subject matter of inclusion to built up area to deny the benefit of section 80IB of the I.T. Act, 1961.

(d) In the case of Amaltas Associates vs. ITO (2011) 142 TTJ (Ahd.) 849, the ITAT Ahmedabad on a similar issue has held as under :-

" Built-up area means inner measurement 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. It was an admitted fact that the open terrace in front of pent-house was considered as balcony/verandah. 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. Therefore, the assessee had complied with all the requirements of section 80-IB(10) in this regard." (Emphasis supplied)

(e) 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.

3.4. From the decisions of the Madras High Court, Bombay High Court and the ITAT Ahmedabad, discussed above in para 3.3 above, it is seen that the area under consideration cannot be included in the 'built up area' if it is uncovered, open to sky, and without any construction on it, notwithstanding the fact that it is a private, exclusive area of the owner, accessible only through the dwelling unit (bed room) and adjoining to it. In this case, the area under consideration is the roof of the ground floor, is uncovered, open to sky, and without any construction on it although it is accessible exclusively to the owner through the bedroom (and not a part of the common area). Therefore, following the above case laws (discussed in para 3.3, above), this private, open terrace, cannot be included in the 'built up area' of the residential unit, as defined in Sec 80IB(14)(a). Therefore, the built up area of the residential units is less than 1500 sq. ft. and consequently, the assessee is eligible for deduction u/s 80IB(10). These grounds are allowed."

There is no dispute with regard to the fact that the AO rejected the claim of deduction under section 80IB(10) only on the ground that a terrace is an entirely open and large space on the top most level of a building, whereas balconies are relatively smaller areas affixed to a room of the house. He further observed that balconies are accessible only through the room that they are attached with and terraces will usually have independent entrances. The assessee has demonstrated from the pictures of the building that the area is a terrace as it is completely open and is a roof of a room underneath. Merely because the first floor rooms of villa has an opening on the terrace, in our considered view

would not make the terrace as a balcony as the balcony normally is attached with the rooms and covered by enclosure but it is not supported by the walls of the room underneath. We find that the Coordinate Bench under the identical facts in ITA No. 12/Kol/2014 in the case of M/s. Ashina Amar Developers vs. ITO after considering the case law and provisions of section 80IB has decided the issue by observing as under :-

"4.2.1. We find that the Learned AO during the course of assessment proceedings asked the assessee inter alia to submit before him the copies of brochure issued by the assessee to the prospective buyers for effecting the sale of residential units during the asst year under appeal. The assessee duly made available the copies of the brochure issued in order to attract prospective buyers and also copies of original sale deeds before the Learned AO which were duly returned by the Learned AO after verification. We find that the Learned AO calculated the super built up area of each building based on the brochures by including the area of open terrace and therefrom estimated the built up area by taking 90% of the super built up area of each building as built up area. We find that the Learned AO brushed aside the argument of the assessee that the brochures are only indicative in nature and the actuals may vary from what is stated in the brochures. The assessee also tried to explain that as per the sale deed which was registered with Registrar for stamp duty purposes, the total built up area of each building was below the maximum area specified in section 80IB(10) of the Act. The Learned AO simply ignored the sale deeds that were produced before him and placed reliance on the brochures issued by the assessee to attract prospective buyers and estimated the built up area by including the terrace area. We find that the actual built up area of residential building should not exceed the maximum area specified in the Act and there is no scope for making the assumptions and estimates.

4.2.2. Reliance is placed on the co-ordinate bench decision of Mumbai Tribunal in the case of ACIT vs Sheth Developers reported in 33 SOT 277 (Mum) wherein it was held that the built up area has to be calculated on an actual basis and not on the basis of estimates. In that case, the AO relied on a ratio worked out from the map attached with the occupancy certificate, for arriving at the built up area from the carpet area which was turned down by the Tribunal.

4.2.3. We also find lot of force in the alternative arguments of the Learned AR that the term 'terrace' is not defined in the Act. However the word 'terrace' originates from a French term and is known as terrasse, terrazzo in Italian and spelled as terraza in Spanish. This is an outdoor extension that can be occupied by lots of people and is beyond ground level. A terrace has more space and with an open-top. We find that the definition of built up area means inner measurement 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. Hence it could be concluded that the open terrace is not covered within the meaning of built up area as it is open to sky and would not be part of the inner measurement of the residential floor at any floor level. Reliance in this regard is made on the decision of the co-ordinate bench of Ahmedabad Tribunal in the case of Amaltas Associates vs ITO reported in 131 ITD 142 (AHD.) wherein it was held that the definition of built up area is inclusive of balcony but not open terrace. It further held that DVO has considered the open terrace as analogous to balcony/ verandah without any basis. Therefore, it took the view that the authorities below were not justified in taking the open terrace as balcony /

verandah rejecting the claim of the assessee.

4.2.4. Reliance in this regard is placed on the decision of Hon'ble Madras High Court in the case of CIT vs M/s Mahalakshmi Housing in Tax Case (Appeal) Nos. 583 & 584 of 2011 and 316 & 317 of 2012 dated 2.11.2012, wherein the questions raised before their Lordships and the decision rendered thereon are as under:-

Whether on the facts and circumstances of the case, the Appellate Tribunal is right in law in holding that the private terrace area should be included in the built up area of the flats for the purpose of making out statutory extent of built up area as per Clause (a) of Section 80IB(14) of the Income Tax Act ?

Held:

5. It is seen from the facts narrated herein that the assessee is engaged in the business of construction. The assessee entered into an agreement of sale with one Ashok Kumar for joint development of the property. The assessee's claim for deduction under Section 80IB(10) of the Income Tax Act is rejected on the ground that the assessee was not the owner of the land. Aggrieved by the same, the assessee went on appeal before the Commissioner of Income Tax (Appeals), who dismissed the appeal. Aggrieved by the same, the assessee went on further appeal before the Income Tax Appellate Tribunal. 6. The Tribunal considered the assessee's appeal along with two other assessee's appeals involving similar questions of law and passed a common order. One such assessee's case came up for consideration in T.C.Nos.581, 1186 of 2008 and 136 of 2009 in the case of Ceebros Hotels P\It. Ltd. Vs. Deputy Commissioner of Income "Tax. 8y judgment dated 19.10.2012, this Court allowed the assessee's appeal, holding that the open terrace area cannot form part of the built up area; in the result, the assessee would be entitled to deduction under Section 80-IB(10) of the Act and that the assessee would be entitled to proportionate relief as regards the units having built up area not more than 1500 sq.ft.

7. Even though learned standing counsel for the Revenue raised additional grounds regarding the principle of proportionality for grant of relief, yet, we find by reason of exclusion of open terrace area from the built up area, application of proportionality theory does not arise. In the circumstances, we find no justifiable ground to accept the plea of the Revenue on this aspect.

8. As far as the Revenue's contention that for the purpose of Section 80-IB(10) deduction, the assessee should have owned the property is concerned, the same is liable to be rejected by reason of our decision rendered in T.C.Nos. 581, 1186 of 2008 and 136 of 2009 - CEEBROS HOTELS PVT LTD v. DEPUTY COMMISSIONER OF INCOME TAX dated 19.10.2012. Hence, the appeals filed by the Revenue viz., T.C. (A). Nos. 583 and 584 of 2011 stands dismissed and this portion of the Tribunal's order stands confirmed. The assessee's appeals in T.C.Nos.316 and 317 of 2012 stand allowed, holding that the terrace area . No costs."

4.2.5. Reliance is also placed on the decision of the co-ordinate bench decision of Pune Tribunal in the case of Shri Naresh T. Wadhvani vs DCIT in ITA No.s 18, 19 & 20 /PN/2013 for Asst Years

2007-08, 2008-09 & 2009-10 dated 28.10.2014, wherein it was held that :-

" 18. A bare perusal of the aforesaid question of law before the Hon'ble Madras High Court would reveal that the issue related to whether open space of the terrace would fall within the expression 'built-up area'. The facts before the Hon'ble High Court were that assessee had constructed various apartment blocks and each block had 64 apartments. The apartments located at first to sixth floor were of areas less than 1500 sq.ft.. However, the flats located on the 7th floor had the advantage of exclusive open terrace. While considering the relief u/s 801B(10) of the Act, the Assessing Officer took into consideration the area of such exclusive/private open terrace as a part of the built-up area of the units located at the 7th floor. After considering the above aspect, the built-up area of the flats located at the 7th floor exceeded 1500 sq.ft. and hence the Assessing Officer held that the condition prescribed in clause (c) of section 8018(10) of the Act was not fulfilled. The said position taken by the Assessing Officer was upheld right up to the Tribunal. However, the Hon'ble High Court disagreed with the stand of the Revenue and held that such open terrace would not be includible in the calculation of 'built-up area' for the purpose of examining the condition prescribed in clause (c) of section 8018(10) of the Act. In this view of the matter, the aforesaid judgement of the Hon'ble Madras High Court and which has been further affirmed in a subsequent decision in the case of Sanghvi and Doshi Enterprise (supra), covers the issue before us. 19. However, in the course of hearing, the learned CIT -OR attempted to distinguish the judgement of the Hon'ble High Court by pointing out that the same related to assessment year 2003-04, a period during which the definition of 'built-up area' contained in section 801B(14)(a) of the Act was not on the statute and also the fact that the housing project under consideration of the Hon'ble High Court was approved by the concerned local authority prior to 01.04.2005 i.e. prior to the date when the definition of 'built-up area' was brought on the statute by way of section 80IB(14)(a) of the Act.

20. We have carefully perused the judgement of the Hon'ble Madras High Court and find that though the Hon'ble High Court was considering a project approved prior to 01.04.2005 yet it has taken into consideration the definition of 'built-up area' contained in section 801B(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 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.

21. Notably, the Hon'ble High Court also considered an argument from the side of the Revenue to the effect that the sale of the area of open terrace by the assessee to the respective purchaser would justify the inclusion of such terrace area into the calculation of 'built-up area'. Before us also, the learned CIT-DR has raised the said issue though she has fairly conceded that such a finding was not emerging from the orders of the lower authorities. Be that as it may, the Hon'ble High Court has noted and dealt with the said argument in the following words :-

'29. Thus, in the face of terrace being an open area, not being a projection and hence, not included in the plinth area, the question herein is as to whether the Tribunal is justified in confirming the order of assessment to include the terrace area into the built-up area solely by reason of the fact that the assessee had sold it to purchasers of the 7th floor as a private terrace.

30. We do not think, the Tribunal is justified in taking the view that open terrace would form part of the built-up area for the purpose of sub-clause (c) of section 80-IB(10). As already seen in the preceding paragraphs, an assessee having an Approved Plan project alone has the right to claim deduction under section 80-IB. Any project undertaken not approved by the Local Authority is outside the purview of the Act. Thus, when a Local Authority, endowed with the jurisdiction to grant the approval is guided in its approval by Regulation as to what constitutes the plinth area, which is the built-up area, it is difficult for us to agree with the contention of the Revenue as well as the reasoning of the Tribunal that for the purpose of considering the claim under section 80-IB, the built-up area would be different from what has been given approval by the Local Authority, on a building project. Given the fact that during 2003-04 there was no definition at all on what a built-up area is, the understanding of the Revenue, which is evidently contrary to the approval of the Local Authority based on the Rules and Regulations could not be sustained. Consequently, we have no hesitation in agreeing with the assessee's contention that open terrace area, even if be private terrace cannot form part of the built-up area"

22. As per the Hon'ble High Court, terrace area would not form part of the built-up area by the reason of the fact that assessee sold it to the purchaser as a private terrace. At this stage, we may also point out 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. Thus, the argument of the learned CIT-OR is hereby rejected.

23. In view of the aforesaid judgement of the Hon'ble Madras High Court, 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."

4.2.6. In view of the aforesaid judicial precedents, the terrace area needs to be excluded from the built up area and if the same is excluded , then the resultant built up area is well within the 1500 sq.ft limit prescribed in the statute and hence rejection of deduction u/s 80IB(10) of the Act on this ground by the Learned AO is not in order."

Therefore, we do not find any reason to interfere in the order of ld. CIT (A). The same is hereby upheld. The ground raised by the revenue is dismissed."

Since there is no change in the facts and circumstances of the present case, we do not see any reason to interfere into the order of ld. CIT (A), the same is hereby upheld. The ground of the revenue is dismissed.



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5. Apropos ground no. 2, it is contended by the ld. Counsel that the issue is no more res integra in favour of the assessee and the ld. CIT (A) has rightly followed the judgments of the Hon'ble Jurisdictional High Court in the case of Jaipur Vidhyut Vithran Nigam Ltd. and CIT vs. State Bank of Bikaner & Jaipur (supra).

5.1. On the contrary, the ld. D/R has supported the order of the AO.

5.2. We have heard rival contentions, perused the material available on record and gone through the orders of the authorities below. The issue of payment of employees contribution to PF & ESI has been decided by the Hon'ble Jurisdictional High Court in the case of Jaipur Vidhyut Vithran Nigam Ltd. and CIT vs. State Bank of Bikaner & Jaipur (supra) following the judgment of Hon'ble Supreme Court in the case of Vinay Cement, 213 CTR 268 (SC). Therefore, we do not see any reason to interfere with the finding of the ld. CIT (A), the same is hereby upheld. The ground is rejected.

6. In the result, the appeal of the revenue is dismissed.

Order pronounced in the open court on 29/12/2016.

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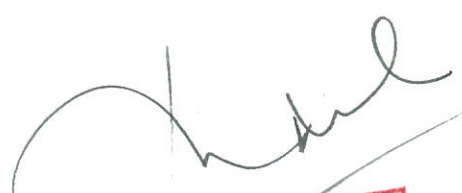
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1. The Appellant- The DCIT Circle-6, Jaipur.
2. The Respondent- M/s. Ashiana Mangalam Developers, Jaipur.
3. The CIT(A).
4. The CIT,
5. The DR, ITAT, Jaipur
6. Guard File (ITA No. 588/JP/2016)

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Acit, Jaipur vs Ashiana Mangalam Developers, ... on 29 December, 2016

ITA No. 588/JP/2016

M/s. Ashiana Mangalam Developers.

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S. 80IB(10) -Canopy/ Porch cannot be treated as part of Built up Area as it is not habitable

Case Law Citation: Deputy Commissioner of Income Tax vs. Smt. Suman Jagannath Pharande (ITAT Pune), ITA No s.711 & 712/PN/2012 & ITA No s.1729 & 1730/PN/2012, Date of Decision – 30th October 2015, Assessment year: 2006-07, 08-09, 07-08 & 09-10

Brief Facts and Question of Law:

Brief Facts of the Assessee:

The Assessee is engaged in the business of construction and had undertaken a residential cum commercial project in Nanded. In assessment year 2008-09, the assessee had claimed deduction under section 80IB(10) of the Act at Rs.45,40,947/-. The Assessing officer (herewith "AO") rejected the Assessee's claim of deduction on the ground that the project included residential as well as commercial units. Also the project was not completed within the time limit specified in the provisions of section 80IB(10) of the Act. The area of some of the residential units exceeded 1500 sq. ft. Since the assessee had failed to comply with the provisions of section 80IB(10) of the Act, the claim of deduction was denied to the assessee.

Held by CIT (A):

The CIT(A) accepted the Assessee's contentions and allowed the deduction u/s 80IB(10) of the Act.

Question of Law:

Whether, Canopy/porch area can be included in the definition of Built up Area u/s 80IB(10)(14)(a) of the Act?

Contention of the Revenue:

- The Revenue contended that as per Survey reports, the assessee was conducting the construction activity on a single project which was a commercial cum residential project. Such project was not eligible for deduction u/s 80IB(10) of the Act.
- It was also contended that as per the audit report submitted by the assessee, the project had commenced construction on 21.03.2004 while the Certificate for the project was given on 15.05.2004. Since the assessee had already started incurring expenses for development the commencement date was considered as 21.03.2004 and hence, the project was supposed to be completed before 31.03.2008. However, during the course of Survey some units were not completed as on 09.12.2008.
- Also some of the units exceeded the specified limit of 1500 sq ft. after including the canopy/porch area which was a part of built up area of the unit. Hence, the Assessee violated the provisions of section 80IB(10) and hence no deduction was allowed.

Contention of the Assessee:

- The Assessee contended that there were two different projects one being residential and another

Commercial cum residential and the deduction u/s 80IB(10) was claimed for only one project i.e. residential. However, the AO denied the deduction by treating both the projects as one. The Assessee had also maintained separate books of accounts, bank accounts, offices, shops and establishment licenses for two projects.

- Secondly the local authority had sanctioned the plan on 15-5-2004 and, therefore, the appellant was under obligation to complete the project before 31-3-2009 as contemplated u/s 80IB(10), however, the project was completed 31-3-2008 itself. The pending work was related to renewal and replacement such as glass & door & windows work etc. and the major construction work was completed by 31-3-2008.
- Also the Assessee argued that the area of canopy cannot be included in the built up area. For this he relied upon the certificates submitted by the Architect certifying that built up area of none of the units exceeded 1500 sq.ft. It was further contented that 'canopy' was allowed by all local authorities within the open space around housing unit and the canopy is a "Means of access" and to protect the person from sun and rain while getting down from the vehicle and entering the premises, thus it is a weather shed without any side wall and not a habitable room.

Held by the ITAT:

- The ITAT noticed that the Assessee had received separate permission from Local Authority for the sanction of two projects and even for their completion. The assessee had maintained separate books of account under two proprietary concerns, one for the construction of row houses and the second for the construction of commercial area. Hence, the residential project was an eligible project for deduction.
- Further ITAT held that the project was completed well within the time specified as was confirmed from the completion certificate received from Grampanchayat. And the pending work related to renewal and replacement.
- For the contention of inclusion of Canopy area in total built area, the ITAT held that "built up area" means the inner measurement of the residential unit at the floor level, including the projection and balconies, as increased by the thickness of the walls but does not include the common area shared with other residential units. 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).

Tags: ITAT judgments, Priya Fulwani, Section 80IB

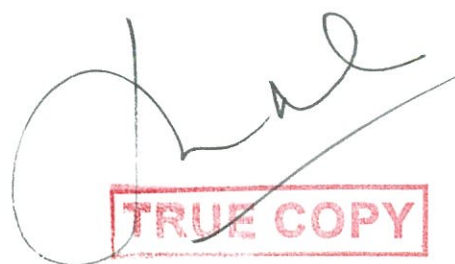
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I.T.N.S.-65

INCOME TAX DEPARTMENT

Sri J. Shivaji Yadav,
Income-tax Officer,
Ward-10(4), Hyderabad

1. Name & address of the assessee : M/s. Mehta & Modi Homes,
5-4-187/3,4, M.G. Road,
Secunderabad.
2. P A.No. / GIR No. : AAJFM0647C
3. Status : Firm
4. Assessment year : 2006-07
5. Previous year : 2005-06
6. Whether residential/ R & OR /
non-resident : Resident
7. Method of accounting : Mercantile
8. Dates of hearing : 03.11.08, 11.11.08,
20.11.08, 03.12.08,
15.12.08 & 24.12.08
9. Date of order : 31.12.08
10. Section & sub-section
under which asst.is made : U/s.143 (3) of the I.T.Act.

ASSESSMENT ORDER

For the asst.year 2006-07, the assessee filed the return of income on 30.10.2006 in the status of firm admitting income of Rs 2,13,281/-. The return has been processed U/s. 143(1). The case has been taken up for scrutiny as per the scrutiny guidelines.

Accordingly, notice U/s. 143(2) was served on the assessee. In response to the notice, Sri Ajay Mehta CA, appeared and filed power of attorney. The AR


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has appeared from time to time produced books of accounts with supporting vouchers and bills and also filed the information called for.

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, 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 Cherlapally, 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 1487sft 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.

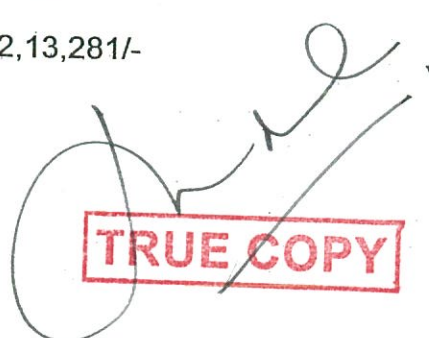
Houses bearing plot Nos 18 to 24 and some more houses in East facing consists of built up area of 1475 sft which includes 831.35 sft at ground floor and 644.75 at first floor

House bearing Plot No. 69 has a built up area of 1487sft. including 853.57 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 80IB (10) of the I.T. Act. Hence the claim of the assessee firm is accepted. The books of accounts produced were verified and the income of the assessee is computed as under:

		(Rs.)
Income from Business	:	87,60,134/-
Less : Deduction U/s. 80IB (10)	:	87,60,134/-
Business Income	:	Nil
Income from other sources	:	2,13,281/-


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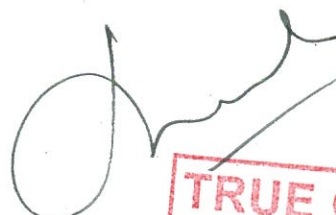
Tax thereon	:	63,984/-
Add: Surcharge	:	6,398/-
Add: Edu. Cess	:	1,408/-
Payable	:	71,790/-
Less TDS	:	21,933/-
Payable	:	49,857/-
Add: Int. U/s. 234B	:	3,493/-
Int. U/s. 234C	:	1,792/-
Payable	:	55,142/-
Less: Self Asst. Paid	:	55,142/-
Balance Payable	:	Nil

This should be paid as per the Demand Notice and Challan enclosed.



(J. SHIVAJI YADAV)
Income tax Officer Ward 10(4),
Hyderabad.

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04/01/10

INCOME TAX DEPARTMENT

Sri J. Shivaji Yadav,
Income-tax Officer,
Ward-10(1), Hyderabad

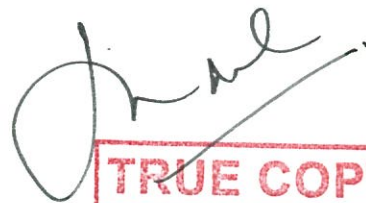
1. Name & address of the assessee : M/s. Mehta & Modi Homes,
5-4-187/3 & 4, M.G.Road,
Secunderabad.
2. P A.No. / GIR No. : AAJFM0617C
3. Status : Firm
4. Assessment year : 2007-08
5. Previous year : 2006-07
6. Whether residential/ R & OR /
non-resident : Resident
7. Method of accounting : Mercantile
8. Dates of hearing : 27.10.09, 08.12.09
9. Date of order : 31.12.09
10. Section & sub-section
under which asst.is made : U/s.143(3) of the I.T.Act.

ASSESSMENT ORDER

For the asst.year 2007-08, the assessee filed the return of income on 30.10.07 in the status of firm admitting an income of Rs 1,20,31,066/-. The same has been processed U/s. 143(1). The case has been selected for scrutiny as per the CBDT guidelines.

Accordingly, notice U/s. 143(2) was served on the assessee. In response to the notice, Sri Ajay Mehta, CA appeared for the assessee and filed power of attorney. The AR appeared from time to time produced books of accounts with supporting vouchers and bills and also filed the information called for.

During the F.Y. 2006-07 relevant to the A.Y. 2007-08 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 under phase-I. 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.


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The assessee has received instalments from the customers to the tune of Rs 16,95,67,506/- during the year and the same has been declared as estimated profit @ 15% of the instalments received. The assessee is constructing two phases in the same project. Under Phase-1, the assessee firm has received Rs 7,74,90,121/- in the form of instalments from the customers. The AR has stated the assessee has estimated profit @ 15% which comes to Rs 1,16,23,356/- and after allowing the expenditure claimed the income under this phase comes to Rs 96,33,962/-. The assessee firm is claiming deduction U/s. 80IB(10) and claimed the entire amount as deduction U/s. 80IB(10).

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 Cherlapally, 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 1487sft 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 644.15 at first floor

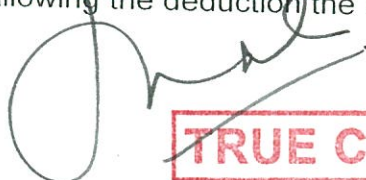
House bearing Plot No. 69 has a built up area of 1487sft. including 831.5 sft and 655.50 sft at ground and first floors respectively.

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 80IB (10) of the I.T. Act.

The assessee firm is also constructing in phase-2 of the project and received instalments of Rs. 9,20,77,385/- from the customers and the AR has stated the assessee has estimated profit @ 15% which comes to Rs 1,38,11,607/-.

After claiming the expenditure the assessee has declared the business income at Rs 2,14,01,167/- and income from other sources at RS 2,63,411/-. As discussed above out of the business income the assessee is claiming deduction U/s. 80IB(10) amounting to Rs 96,33,962/-. After allowing the deduction the income of the assessee comes to Rs 1,20,31,066/-.



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Hence the income of the assessee is computed as under:

	(Rs.)
Income from Business	: 2,14,01,617/-
Less : Deduction U/s. 80IB (10)	: 96,33,962/-
Business Income	: 1,17,67,655/-
Income from other sources	: 2,63,411/-
Tax thereon	: 36,09,320/-
Add: Surcharge	: 3,60,932/-
Add: Edu. Cess	: 79,405/-
Payable	: 40,49,657/-
Less TDS	: 60,069/-
Payable	: 39,89,588/-
Less Adv Tax	: 10,00,000/-
Payable	: 29,89,588/-
Add: Int. U/s. 234B	: 2,09,272/-
Int. U/s. 234C	: 1,10,615/-
Payable	: 33,09,475/-
Less: Self Asst. Paid	: 32,41,916/-
Balance Payable	: 67,559/-

This should be paid as per the Demand Notice and Challan enclosed.



Copy to the assessee

(J. SHIVAJI YADAV)
Income tax Officer Ward 10(4),
Hyderabad.

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501-272

**IN THE INCOME TAX APPELLATE TRIBUNAL
HYDERABAD BENCHES "B", HYDERABAD**

**BEFORE SHRI D. MANMOHAN, VICE PRESIDENT
AND
SHRI B. RAMAKOTAIAH, ACCOUNTANT MEMBER**

ITA No.	Asst. Year	Appellant	Respondent
1428/Hyd/2015	2006-07	Mehta & Modi Homes, SECUNDERABAD [PAN: AAJFM0647C]	Income Tax Officer, Ward-10(4), HYDERABAD
1429/Hyd/2015	2007-08		

For Assessee : Shri S. Rama Rao, AR
For Revenue : Shri K.J. Rao, DR

Date of Hearing : 01-03-2017
Date of Pronouncement : 22-03-2017

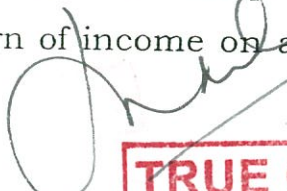
ORDER

PER B. RAMAKOTAIAH, A.M. :

These two appeals are by assessee against the separate but similar orders of the Commissioner of Income Tax (Appeals)-6, Hyderabad dated 06-11-2015. Assessee is aggrieved on reopening of assessment as well as on merits of disallowance made by the Assessing Officer (AO) u/s. 80IB of the Income Tax Act [Act].

2. Briefly stated, assessee is a real estate developer and has carried the project at Cherlapally Village in the name of *Silver Oak Bungalows*. It envisaged development of 76 residential units on a land admeasuring over six acres and assessee has claimed deduction u/s. 80IB(10) on the income of the said project. For the year 2007, assessee filed its return of income on a total income




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building exceeds 1500 Sq. Ft., prescribed and accordingly, he denied the deduction u/s. 80IB in both the years.

3. Before the Ld.CIT(A), assessee took objection that :

- a. Reopening after four years from the end of the assessment year without establishing any failure on the part of assessee in furnishing necessary details is bad in law;
- b. Re-assessment was completed without issuing the notice u/s. 143(2);
- c. That the issue of built-up area has been examined by the ITO in the course of scrutiny assessment as stated in the assessment order and so any other opinion is change of opinion not permitted in the re-assessment proceedings and;
- d. Even on merits, the terrace and balconies are not part of structure as terrace is a projection of the building for the purpose of car parking and balcony also has to be excluded being not part of the building. Accordingly, on facts also, assessee is eligible for deduction u/s. 80IB.

Ld.CIT(A) however, rejected all the contentions and dismissed the appeals. Hence present appeals. Grounds raised are on the above two issues

4. Ld. Counsel mainly objected to the re-assessment proceedings stating that the notices were issued after four years and all the relevant details were furnished at the time of original assessment and in fact the Inspector has physically inspected the premises and gave a finding that assessee satisfies the conditions



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Radhe Developers [341 ITR 403] which in turn relied on by the Hon'ble Gujarat High Court in the earlier case of CIT-IV Vs. Amaltas Associates [75 Taxmann.com 180 (GJ)] (supra). It was submitted that both on facts and on law, re-assessment and denial of 80IB is not correct.

5. Ld.DR however, in reply submitted that audit objection is only an incidental to the proceedings but when audit point out, certain legal propositions, reopening can be done and relied on the decision of the Hon'ble Supreme Court in the case of CIT Vs. P.V.S. Beedies (P) Ltd., [237 ITR 13] and it was further submitted that ITAT in the group case of M/s. Modi Builders & Realtors Pvt. Ltd., in ITA No. 1541/Hyd/2010 dt. 31-03-2011 has considered similar issue and gave in favour of the AO wherein built up area was counted after including the portico and balcony areas and therefore, the denial of Section 80IB(10) in assessee's case, as relied on by the ITO in the order, is proper. Further, he has shown the satisfaction recorded to state that the ITAT order in group case was relied by the AO for reopening the assessment, but in the communication to assessee, the same was not communicated properly. Ld.DR relied on the decision of Kartikeya International Vs. CIT & another [329 ITR 539] for the proposition that the notice issued is valid.

6. In reply, Ld. Counsel submitted that there is no external information and whatever assessee has submitted in the course of assessment is the basis for audit objection which indicates that assessee has duly furnished all the relevant information so that the reopening after four years will be hit by the



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"Held, allowing the petition, (i) that the assessee had challenged the very initiation of proceedings for reopening of assessment as being without jurisdiction and also in complete defiance of the statutory prescriptions. Therefore, it was not a case which could be thrown out on the ground of availability of alternative remedy.

(ii) That the Department could not deny the fact that there was a full and true disclosure by the assessee of all material facts necessary for assessment. The case of the assessee fell under the category of true and full disclosure upon which the assessment order was passed on the opinion that the lands sold by the assessee were agricultural lands and did not fall under the category of mere production of books of account and other records. The replies submitted by the assessee to the questionnaire indicated that the claim of the assessee was examined by the Assessing Officer before he passed the original assessment order under section 143(3). Therefore to say after four years that the lands were sold to a real estate company for the purpose of forming a special economic zone amounted to a change of opinion which was not permitted by law.

(iii) That by virtue of proviso to section 147, no action could have been taken, after the expiry of four years from the end of the relevant assessment year, unless any income had escaped assessment, by reason of anyone of the three contingencies on the part of the assessee, namely, (a) failure to file return under section 139, (b) failure to file return in response to a notice under section 142(2) or section 148 or (c) to disclose fully and truly all material facts necessary for assessment. The reassessment proceedings were to be set aside".

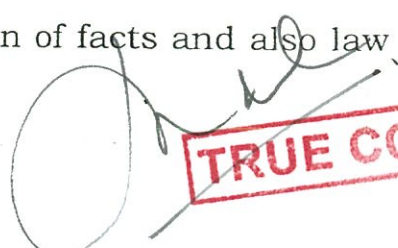
8. Since the facts are similar and law is also being clear, respectfully following the jurisdictional High Court, we are of the opinion that reopening of the assessments after the end of limitation period, without establishing that there is failure on the part of assessee in making full and complete disclosure of relevant information is bad in law.

8.1. Not only that, as can be seen from the assessment orders originally completed by the officer, he has deputed his inspector who has randomly inspected the premises and gave a certificate that assessee satisfies the conditions prescribed.




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as it may, the fact is that whether portico and terrace can be included or excluded depends on the facts of each case and the law on the issue. ---As rightly pointed out by the Ld. Counsel, the Hon'ble High Court of Gujarat has excluded the portico area from computation of built up area. Here, assessee's contention is that the terrace also is to be excluded, as it was not part of the building, either at the time of approval of project or subsequently. Therefore, the issue becomes one of disputed issues, on which there can be two opinions. Since AO has taken one opinion at the time of assessment after duly examining the contentions by deputing Inspector to the premises, a successor officer of the same rank cannot differ from the earlier opinion unless there is an intervention by a superior authority. Had CIT has undertaken the proceedings u/s. 263 to disturb the findings of the AO, then, the matter would stand in a different footing. However, the AO was directed to reopen the assessment after the end of four years, when the law does not permit the same. In view of that, we are of the opinion that on both reopening of the assessment without there being any failure on the part of assessee in furnishing the particulars and subsequent completion of assessment without issuance of notices u/s. 143(2), the assessments completed are bad in law. Since the very basis for re-assessment is not valid, there is no need to adjudicate whether assessee is eligible for deduction u/s. 80IB(10) in the re-assessment proceedings, which becomes academic in nature. Since, AO has already allowed after due examination in the order u/s. 143(3), that issue is to be concluded as settled as far as these two assessment years are concerned. We are not expressing any opinion on the claim of assessee since it requires examination of facts and also law on the


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IN THE INCOME TAX APPELLATE TRIBUNAL
HYDERABAD BENCH "B", HYDERABAD
BEFORE SHRI V. DURGA RAO, JUDICIAL MEMBER
AND SHRI D.S. SUNDER SINGH, ACCOUNTANT MEMBER

ITA No. 847/Hyd/2014
Assessment Year: 2009-10

M/s Golden Palms
Constructions,
Secunderabad.

vs. The Income Tax Officer,
Ward-10(4) Hyderabad.

PAN - AAFFG0608M

(Appellant)

(Respondent)

Assessee by : Shri S. Rama Rao
Revenue by : Smt. G. Aparna Rao

Date of hearing : 04-07-2017
Date of pronouncement : 07-07-2017

ORDER

PER D.S. SUNDER SINGH, A.M:

All the grounds in this appeal are against the order passed by the CIT-5 Hyderabad u/s 263 of the IT Act. In this case, the assessee filed return of income admitting total income of Rs. Nil. The case was selected for scrutiny and the assessment was completed u/s 143(3) of the Act and the total income was determined at Rs. 4,45,514/-.

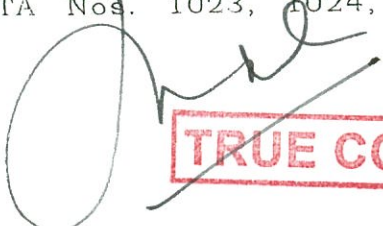
2.0 The Assessee is in the business of real estate / development. During the A.Y 2009-10, the assessee constructed housing projects comprising of residential buildings along with certain amenities and claimed the deduction of Rs. 34,81,341/- u/s 80IB (10) of the Income Tax Act. The A.O computed the gross total income at Rs.

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39,25,855/- and allowed the deduction of Rs. 34,81,341/- u/s 80-IB(10) of the IT Act and computed the taxable income at Rs. 4,45,510/- u/s 143(3) of I.T. Act. Subsequently, the CIT-5, Hyderabad has taken up the case for revision u/s 263 of the IT Act, and observed that the Assessee has constructed the independent residential units and the built up area of the each residential unit exceeded 1,500 Sq. feet including the portico and the open terrace. Hence the assessment made u/s 143(3) was erroneous and prejudicial to the interest of revenue. Accordingly, the CIT has issued the showcase notice calling for the explanation of the assessee. The assessee filed the explanation and not being convinced with the explanation of the assessee, the Ld. CIT passed the order u/s 263, directing the A.O to modify the order passed u/s 143(3) of the IT Act by disallowing the deduction u/s 80IB of the IT Act. The CIT has relied on the decision of Ceebros Hotels Pvt Ltd vs. DCIT of the Hon'ble Madras High Court. The CIT also relied on the orders of this Tribunal ITAT 'A' Bench Hyderabad in the case of M/s. Modi Builders & Realtors (P) Ltd in ITA No. 1541/Hyd/2010, dated 31-03-2011, wherein, the Hon'ble ITAT held that

"being so, we cannot adopt meaning as contended by the Ld Counsel for the assessee. In our opinion, built-up area includes portico and balcony also and in this case, it exceeds 1500 sq.ft per residential unit. Accordingly, the assessee is disentitled for the benefit u/s 80IB of the Act..."

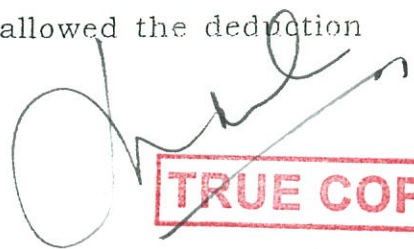
2.1 Further, CIT also relied on the decision of the ITAT, Hyderabad "A" Bench in the case of M/s. Nagarjuna Construction Company Limited (ITA Nos. 1023, 1024,


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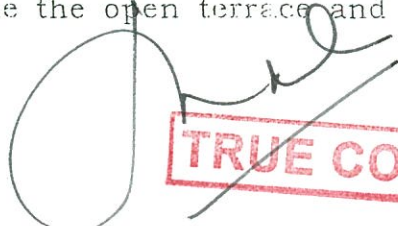
1025/Hyd/2010, ITA Nos. 1237, 1238, 1239/Hyd/2010, dated 23.10.2013).

3.0 Aggrieved, by the order of the CIT, the assessee is in appeal before us. During the appeal the Ld. AR drawn our attention to page No. 2 of paper book which contain the statement of computation of income and the auditor's report u/s 10CCB of the IT Act; page Nos. 48 and 49 of paper book relating to the plan approval given by the HUDA and the approval of final layout accorded by the HUDA; page No. 51 of the paper book, which is Occupancy Certificate issued by the Panchayat Secretary, Ameenapur Village, Patancheru Mandal; page No. 60 of the paper book, the notice issued by the A.O u/s 142(1) of the IT Act calling for the *evidence for deduction claimed under Chapter VI of the Income Tax Act*; page No. 62 of the paper book, copy of the reply submitted by the assessee which *includes evidences in support of Chapter VI, deduction u/s 80-IB of the IT Act*; page No. 63 of the paper book, a copy of layout for each residential unit; page No. 70 of the paper book was workings of built up area. Ld. AR referring to the evidences discussed in the paper book, submitted that at the time of assessment, the A.O called for all the details and the assessee has submitted the details, how the built-up area is computed, approval given by the HUDA, occupancy certificate issued by the Patancheru and built-up area of each independent residential unit and demonstrated that built-up area of each independent unit was 1405 Sq feet and after verification of complete details, the A.O has accepted the claim and allowed the deduction

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of Sec. 80IB(10) of the IT Act. Hence revisiting the same issue which was already considered and decided by the AO is nothing but a difference of opinion and is not permissible for revision u/s 263 of the IT Act. Therefore, the Ld. AR argued that the order passed u/s 263 of the IT Act is required to be set aside and the order of the A.O should be restored. Even otherwise also, the Ld AR submitted that for the purpose of computing the deduction u/s 80IB built-up area has to be considered only inner part of measurement of residential units and the projection of balconies and open terrace portico etc., would not be included in the built-up area. The Ld.AR relied on the decision of Hon'ble Gujarat High Court in the case of CIT vs. Amaltas Associate [2016] 75 taxmann.com 183 (Guj) wherein it was held that open terrace space would not be included in the built-up area for deduction u/s 80IB. Thus, even on merits the assessee has correctly computed the built-up area and the A.O has rightly allowed the deduction u/s 80-IB and hence, no revision is necessary in this case. Accordingly, the Ld. AR argued that even on merits, the CIT order u/s 263 required to be set aside.

4.0 On the other hand, the Ld. DR argued that the A.O allowed deduction u/s 80IB of the IT Act without considering the built-up area properly. She argued that for independent residential units both the portico and the open terrace to be included since the entire unit is the complete possession and the enjoyment of the beneficiary. The A.O has not examined the case of independent residential units whether to include the open terrace and

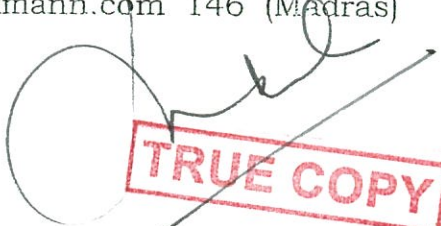

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the portico or not to compute the built up area. This issue was not discussed by the AO in the assessment order, the difference of opinion comes into the picture only when the A.O has considered the issue and formed an opinion. In the assessee's case, there was no discussion on this issue and there is no evidence to hold that the A.O considered the issue whether the unit comprising of 1500 sq feet was inclusive of portico and open terrace or not. Therefore the Ld. DR contented that the CIT has rightly taken up the case for revision and there is no difference of opinion. Further, the Ld. DR argued that, Hon'ble ITAT Hyderabad has considered this issue and given a ruling that the built-up area includes portico and balcony and if it exceeds 1500 sq feet, the assessee is disentitled for the deduction u/s 80IB of the Act. Accordingly, the Ld. DR contented that there is no error in the order of the CIT and the same is to be upheld.

5.0 We have heard the rival submissions and perused the material placed on record. The assessee has constructed the independent residential buildings and claimed the deduction under sub Sec. 10 of section 80IB of Income Tax Act. According to the assessee, built up area of each residential unit is 1408 sq feet, which is less than 1500Sq.ft excluding portico and the open terrace and entitled for deduction u/s 80IB. The assessee placed the approval of the HUDA before the AO and in the plan approval, each independent unit was stated to be less than 1500 sq feet. The assessee

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has submitted that the Occupancy Certificate, the layout of each independent unit and furnished the working of built-up area at the time of assessment with working of built up area less than 1500 Sq feet and demonstrated the same at the time of assessment. The assessee also furnished the Form No. 10CCB and claimed the deduction u/s 80IB of the IT Act. The A.O considered the entire material placed before him and allowed the deduction u/s 80IB of the IT Act. In fact the only issue involved in this case is the deduction u/s 80IB of the IT Act and it is not correct to say that the AO has not examined the issue. Therefore, we did not find any merit in the argument of Ld. DR that the A.O has not formed the opinion with regard to deduction u/s 80IB of the IT Act. Since, the A.O has allowed the deduction after examining the details, revisiting the same issue by the CIT u/s 263 of the IT Act amounts to difference of opinion and there is no error in the order passed by the A.O, which require revision u/s 263 of the IT Act. Even otherwise also, Hon'ble Gujarat High Court considered this issue in the case of Amaltas Associates (supra) and held that portico and open terrace should not be included for the purpose of computation of deduction u/s 80 IB of the IT Act. Similarly Hon'ble Madras High court in Commissioner of Income-tax, Chennai v. Mahalakshmi Housing reported in [2014] 41 taxmann.com 146 (Madras)


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also held that To claim deduction under section 80-IB(10), open terrace area cannot form part of built up area. Therefore, respectfully following the decision of Hon'ble High Courts of Gujarat and Madras we set aside the order of the CIT and allow the appeal of the assessee.

6.0 In the result, the appeal of the assessee is allowed.

Pronounced in the open court on 07th July, 2017.

Sd/-
(V. DURGA RAO)
JUDICIAL MEMBER

Sd/-
(D.S. SUNDER SINGH)
ACCOUNTANT MEMBER

Hyderabad, Dated: 07th July, 2017.

KRK

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- 2 ITO, Ward -10(4), Hyderabad.
- 3 CIT(A)-5, Hyderabad.
- 4 The Commissioner of Income Tax (OSD) Range-10, Hyderabad.
- 5 The DR, ITAT Hyderabad
- 6 Guard File



CERTIFICATE

AND
JUDICIAL MEMBER
Income Tax Appellate Tribunal
Hyderabad

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