BEFORE COMMISSIONER OF INCOME TAX (APPEALS) – VI / HYD

IN THE MATTER OF

M/s Mehta & Modi Homes

vs.

Income Tax Officer Ward 10(4) / HYDERABAD

APPEAL NO. 0727/2014-15

ASSESSMENT YEAR ('AY') 2007-08

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BEFORE COMMISIONER OF INCOME TAX (APPEALS) - VI/HYD

M/s Mehta & Modi Homes 5-4-187/ 3 & 4, 2nd Floor Soham Mansion, M. G. Road Secunderabad – 500 003		Income Tax Officer Ward 10(4) Hyderabad.
Appellant	V/s.	Respondent

Appeal No. 0727/2014-15 - AY 2007-08

In connection with the above appeal the following submissions are made before YOUR HONOURS for your kind consideration.

The facts of the present appeal are enunciated as below:

1. The appellant is a Partnership Firm and is engaged in the business of a real estate developer and has carried on the work of developing and building housing project at Cherlapally Village in the name and style of 'Silver Oak Bungalows '. Under the housing project, development of 76 residential units on over a land admeasuring about 6 acres is envisaged.

2. The appellant filed its return of income for the Assessment Year 2007-08 on 30.10.2007 in the status of firm admitting total income of Rs. 1,21,31,066/- which comprises business income for Rs. 1,17,67,655/- after claiming deduction of Rs. 96,33,962/- u/s 80IB (10) and Income from other sources amounting to Rs. 2,63,411/- .

3. The return has been processed u/s. 143(1) of the Act and subsequently the assessment was completed u/s 143(3) vide order dated 31.12.2009. The claim of deduction u/s 80IB (10) of the appellant was duly scrutinized, verified and allowed by the learned Assessing Officer in the course of original assessment proceedings. Copy of the said order in enclosed as **Annexure –1 [PB-1].**

4. The learned Assessing Officer issued a notice u/s 148 to the appellant on 19.03.2013 proposing to re-assess the income. The appellant was also called upon to deliver a copy of return within a period of 30 days from the date of service of the said notice.

5. It is pertinent to note here that the issuance of notice under section 148 of the said Act is beyond the period of four years from the end of the relevant assessment year i.e. assessment year 2007-2008. Copy of the said notice is enclosed as **Annexure -2 [PB-1]**.

6. The appellant vide its reply dated 08.04.2013 responded to the 148 notice by stating that the return of income for the Assessment Year 2007-08 had already been filed u/s. 139(1) of the Act on 30.10.2007 in the status of a partnership firm bearing Acknowledgement No. 100100776 and may be treated as return filed in compliance of such notice issued under Section 148 of the Act. Copy of the said reply is enclosed as **Annexure -3 [PB-1].**

7. The appellant also in its reply requested the Assessing Officer to furnish a copy of the reasons recorded for re-opening of the assessment and for issuance of the notice under Section 148 of the Act.

8. In response to the appellant's request for providing of reasons recorded for reopening of the assessment, the Assessing Officer furnished reasons vide its letter dated 30.07.2013. Copy of the reasons recorded submitted are enclosed as **Annexure -4 [PB-1]**.

9. The Assessing Officer along with the letter dated 30.07.2013 furnishing reasons for re-opening, issued a Show Cause Letter dated 30.07.2013 asking the appellant to show cause as to why the deduction claimed by the appellant u/s. 80IB(10) of the Act amounting to ` 96,33,962/-should not be disallowed. Copy of the show cause letter is enclosed as **Annexure -5 [PB-1]**.

10. The appellant, without prejudice to the right of raising objections against the proposed re-opening and pending disposal of such objections, responded to the Show Cause Notice vide its reply dated 21.08.2013 in which the appellant elaborately explained its stand taking into consideration the current position of law. This letter was submitted to the Assessing Officer on 28.08.2013. A copy of the said reply letter is enclosed as **Annexure-6 [PB-1].**

11. The appellant filed its objections to the proposed re-opening vide reply letter dated 27.08.2013. Copy of the objections filed is enclosed as **Annexure -7 [PB-1]**.

12. The Assessing Officer passed an order dated 13.03.2014 rejecting the appellant's request for disposing of the proceedings initiated under Section 148 of the Act. Copy of the said order is enclosed as **Annexure -8 [PB-1]**.

13. The Assessing Officer passed an order dated 20.03.2014 u\s. 143(3) r.w.s. 147 disallowing the deduction claimed u/s 80IB(10). The learned Assessing Officer has disallowed the claim u/s 80IB(10) solely on the view that the built-up area of each residential unit exceeds 1500 sq.ft if the portico and open terrace areas are also included in computing the built-up area.

It may be noted YOUR HONOURS that the issue involved and the facts of the case are identical and similar to that of an Asst.Year 2006-07 which is also before YOUR HONOURS for your kind hearing and disposal. Thus the submissions made here under are identical to that of the submissions made for Asst.Year 2006-07. For the sake of ready reference and convenience the same are again submitted here under. It may be noted that RAP has not raised any audit objection for Asst.Year 2007-08 but the Learned A.O has changed his opinion basing on the audit objections raised by RAP for Asst.Year 2006-07. YOUR HONOURS with a view to avoid duplication, Judgement Copies and Annexure no's. 9 to 12 with regard to correspondence between A.O, CIT,RAP & CAG as referred to in PB-1 of Asst.Year 2006-07 are not attached herewith. For Asst.Year 2007-08 also we place reliance on various Judicial Pronouncements submitted for Asst.Year 2006-07.

The submissions under this appeal are grouped as follows:

a. The notice issued u/s 148 r.w.s 147 of the Act, lacks jurisdiction and is bad in law due to the following reasons:

   i. The reasons recorded u/s 148 for re-opening does not specifically indicate the failure on part of the appellant to disclose fully and truly all material facts;

   ii. The assessing officer has no "reasons to believe". It is a mere change of opinion which is solely based on audit objections with no new "tangible material";

   iii. There is no failure on part of the appellant to disclose fully and truly all material facts;

   and

   iv. There is no new "tangible material" with the AO for reopening the assessment.

b. The assessment has been completed u/s 143(3) r.w.s 147 without first issuing of notice u/s 143(2) which is a mandatory requirement rendering the assessment void-ab-initio and is liable to be quashed.

c. On the merits of the allowability of the claim made u/s 80IB(10) of the Act.

The submissions made under each group are without prejudice to each other.

14. **<u>The reasons recorded u/s 148 for re-opening do not specifically indicate the failure on part of the appellant to disclose fully and truly all material facts:</u>**

14.1 It is pertinent to note that the issuance of notice under section 148 of the said Act is beyond the period of four years from the end of the relevant assessment year i.e. assessment year 2006-2007. Consequently, the first proviso of section 147 of the said Act would be relevant. The first proviso of the section 147 of the said Act is reproduced herein below:-

> "147....Provided that where an assessment under sub-section (3) of section 143 or this section has been made for the relevant assessment year, no action shall be taken under this section after the expiry of four years from the end of the relevant assessment year, unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee to make a return under section 139 or in response to a notice issued under sub-section (1) of section 142 or section 148 or to disclose fully and truly all material facts necessary for his assessment, for that assessment year."

14.2 From the above, it is very clear that to confer jurisdiction u/s 147 after the expiry of four years from the end of the relevant assessment year, the following **two conditions** have to be satisfied:

i. any income chargeable to tax has escaped assessment for such assessment year ; and

ii. such income should escape by reason of the failure on part of the assessee to disclose fully and truly all material facts necessary for his assessment, for that assessment year.

14.3 Section 148(2) of the Act requires the Assessing Officer to record the reasons for re-opening before issuing a notice under section 148(1). The provisions of section 148(2) of the Act are reproduced herein below:-

> " ...148 (2) The Assessing Officer shall, before issuing any notice under this section, record his reasons for doing so."

14.4 On a combined reading of the first proviso of section 147 and section 148(2), it is clear that before issuing a notice under this section, the Assessing Officer has to first record his reason for doing so. **Such reasons recorded shall clearly indicate the following two aspects:**

i. any income chargeable to tax has escaped assessment for such assessment year; and

ii. such income should escape by reason of the failure on part of the assessee to disclose fully and truly all material facts necessary for his assessment, for that assessment year.

14.5 In response to the appellant's request for providing of reasons recorded for reopening of the assessment, the Assessing Officer furnished reasons vide its letter dated 30.07.2013. Copy of the reasons recorded submitted are enclosed as **Annexure -4 [PB-1].**

For the sake of convenience the reasons recorded are reproduced below:

> "In this case, as per the ROI filed for the A.Y. 2006-07, it is observed that deduction u/s.80-IB(10) amounting to Rs.87,60,134/- was claimed from the business income and the same was allowed in full while completing the assessment u/s.143(3) on 31-12-2008.
>
> The deduction u/s. 80-IB(10) is allowable when the maximum built-up area of the residential unit constructed is not more than 1500sq.ft. In this case the built up area of each unit is arrived at 1500 sq.ft only after excluding the area of the portico in the ground floor and open terrace in the first floor. According to the provisions of sec.80IB(14) of the Act, the built up area is defined which specifies that 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. Hence, it is clear from the definition that the portico which is an RCC roof is nothing but projection. The entire slab area of portico in the ground floor and the open terrace in the first floor is under the exclusive ownership of the bungalow owner so as to be classified as integral part of the bungalow as projections to be treated as built up area. Further, it was not commonly shared with any other person.
>
> In view of the above, the maximum permissible built up area of 1500 sq.ft per unit has been exceeded after inclusion of the area of portico in the ground floor and open terrace in the first floor, in violation of the specified conditions contained in Sec.80IB(10) of the Act. Therefore, the assesse is not eligible for the deduction claimed u/s. 80IB(10). However, it is noticed that the deduction u/s 80IB(10) has been claimed and allowed which resulted in under assessment of income to that extent. In view of the above, I have reason to believe that income chargeable to tax has escaped assessment within the meaning of section 147 of the I.T. Act. Hence, a notice u/s 148 has been issued."

14.6 On perusal of the reasons recorded for re-opening as above, it is clearly evident that the Assessing Officer has not recorded any failure on the part of the assessee to fully and truly disclose all the material facts.

14.7 The appellant submits that the return filed by it was accompanied by Form No.10CCB. The Form states that the built up area of each unit ranged from 1366 sq.ft. to 1487 sq.ft. and this was certified by a Chartered Engineer.

14.8 In the assessment order made u/s 143(3), the AO enquired into the correctness of the claim u/s 80-IB(10). After examination of the documents and the report in Form No.10CCB, he sent his Inspector to the project site to verify the details. The report of the Inspector is reproduced by the AO in paragraph 3 of the assessment order in which the Inspector has reported that

'the built up area as measured is found correct as per specification provided by the firm'. From these facts, it is obvious that the assessee disclosed all material facts. Then, the AO scrutinised the return, called for details of the claim u/s 80-IB(10), caused field enquiries through the Inspector and allowed the deduction thereafter. A deduction allowed after consideration of the facts disclosed in the return which have been examined by the AO and subjected to field enquiries cannot be withdrawn by issue of a notice u/s 148. As per the first proviso under section 147, reopening after 4 years is permissible only where the AO is satisfied that the assessee did not make full and true disclosure. In the case of the assessee, full and true disclosure was made and such disclosure was completely examined by the AO. Consequently, the AO cannot reopen the assessment for the year.

14.9 The Assessing Officer has thus failed in satisfying the pre-requisite for re-opening an assessment beyond four years that the assesse has failed in fully and truly disclosing all the material facts. Thus the notice has no jurisdiction and is bad in law and shall be quashed.

14.10 Reliance is placed on a decision of the Honorable Delhi High Court in the case of **Haryana Acrylic Manufacturing Co. vs. Commissioner of Income Tax and Another: [2009] 308 ITR 38 (Delhi).** While considering the provisions of sections 147 and 148 of the said Act, in particular the first proviso thereof, this court observed as under:-

> "29. In the reasons supplied to the petitioner, there is no whisper, what to speak of any allegation, that the petitioner had failed to disclose fully and truly all material facts necessary for assessment and that because of this failure there has been an escapement of income chargeable to tax. Merely having a reason to believe that income had escaped assessment is not sufficient to reopen assessments beyond the four year period indicated above. The escapement of income from assessment must also be occasioned by the failure on the part of the assessee to disclose material facts, fully and truly. This is a necessary condition for overcoming the bar set up by the proviso to section 147. If this condition is not satisfied, the bar would operate and no action under section 147 could be taken. We have already mentioned above that the reason supplied to the petitioner does not contain any such allegation. Consequently, one of the conditions precedents for removing the bar against taking action after the said four year period remains unfulfilled. In our recent decision in Wel Intertrade Private Ltd. [2009] 308 ITR 22 (Delhi) we had agreed with the view taken by the Punjab and Haryana High Court in the case of Duli Chand Singhania [2004] 269 ITR 192 that, in the absence of an allegation in the reasons recorded that the escapement of income had occurred by reason of failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment, any action taken by the Assessing Officer under section 147 beyond the four year period would be wholly without jurisdiction. Reiterating our view-point, we hold that the notice dated March 29, 2004, under section 148 based on the recorded reasons as supplied to the petitioner as well as the consequent order dated March 2,

2005, are without jurisdiction as no action under section 147 could be taken beyond the four year period in the circumstances narrated above."

14.11 The above referred decision has also been followed by the Honorable Delhi High Court in the case of **Global Signal Cables (India) Pvt. Ltd. versus Deputy Commissioner of Income Tax W.P.(C) 747/2014 pronounced on 17.10.2014. Annexure-A [PB-2] of Asst.Year 2006-07.**

14.12 The same principle is also followed in **Rural Electrification Corporation Ltd. vs. Commissioner of Income Tax: [2013] 355 ITR 356. Annexure-B [PB-2] of Asst.Year 2006-07.** Also in **Microsoft Corporation (I) Pvt Ltd vs. Deputy Commissioner of Income Tax & Anr: [WP(C) 284/2013 decided on 23.05.2013] Annexure-C [PB-2] of Asst.Year 2006-07,** a Division Bench of the Honorable Delhi High Court had observed as under:-

> "From the above, it is evident that merely having a reason to believe that income had escaped assessment is not sufficient for reopening the assessment beyond the four year period referred to above. It is essential that the escapement of income from assessment must be occasioned by the failure on the part of the assessee to, inter- alia, disclose material facts, fully and truly. If this condition is not satisfied, there would be a bar to taking any action under Section 147 of the said Act."

14.13 The facts of the present appeal are squarely covered by the decision of a Division Bench of the Honorable Delhi High Court in **M/s Swarovski India Pvt. Ltd. vs. Deputy Commissioner of Income Tax: W.P.(C) 1909/2013 decided on 08.08.2014 Annexure-D [PB-2] of Asst.Year 2006-07,** wherein the notice under section 148 of the said Act was quashed for being issued after the expiry of 4 years from the relevant assessment year wherein there was no specific mention of which material facts were not disclosed by the assessee in the course of its original assessment proceedings under section 143(3) of the said Act. The relevant paragraph is reproduced herein below:-

> "12 It is clear that the escapement of income by itself is not sufficient for reopening the assessment in a case covered by the first proviso to Section 147 of the said Act unless and until there is failure on the part of the assessee to disclose fully and truly all the material facts necessary for assessment. In the present case, it has not been specifically indicated as to which material fact or facts was/were not disclosed by the petitioner in the course of its original assessment under Section 143(3) of the said Act...."

14.14 The notice u/s 148 is based on re-view of the same material on record. The Assessing Officer has not whispered in the reasons recorded as to which material facts were not disclosed by the assessee in the course of the original assessment proceedings.

14.15 In case of **Prashant S. Joshi v. Income Tax Officer & Anr. [(2010) 324 Itr 154 (Bom)], Annexure-E [PB-2] of Asst.Year 2006-07,** the Division Bench of the Bombay High Court in context of the requirement of the Assessing Officer to hold reason to believe that the income chargeable to tax has escaped assessment, before assuming jurisdiction to reopen the assessment already closed, held that the validity of reassessment has to be determined on the basis of the reasons recorded. Referring to the observations of the previous judgment of the Court in case of Hindustan Lever Limited v. R.B Wadkar, Asstt. CIT (No.1), reported in [(2004) 268 ITR 332 (Bom)], the Bench, recorded with approval, the observations of the previous judgment to the effect that the reasons are required to be read as recorded by the Assessing Officer and no substitution or deletion is permissible.

14.16 In case of **Hindustan Lever Ltd vs R.B Wadkar 268 ITR 332 (Bom) Annexure-F [PB-2] of Asst.Year 2006-07,** referred to in above it has been held

> The reasons recorded by the Assessing Officer nowhere state that there was a failure on the part of the assesse to disclose fully and truly all material facts for the assessment of that assessment year. It is needless to mention that the reasons are required to be read as they were recorded by the Assessing Officer. No substitution or deletion is permissible. No additions can be made to those reasons. No inference can be allowed to be drawn based on reasons not recorded. It is for the Assessing Officer to disclose and open his mind through reasons recorded by him. He has to speak through his reasons. It is for the Assessing Officer to reach the conclusions fully and truly all material facts necessary for his assessment for the concerning assessment year. It is for the Assessing Officer to form his opinion. It is for him to put his opinion on record in black and white. The reasons recorded should be clear and unambiguous and should not suffer from any vagueness. The reasons recorded must disclose his mind. Reasons are manifestation of mind of Assessing Officer. The reasons recorded should be self-explanatory and should not keep the assesse guessing for the reasons. Reasons provide link between conclusion and evidence. The Assessing Officer, in the event of challenge to the reasons, must be available to justify the same based on material available on record. He must disclose in the reasons as to which fact or material was not disclosed by the assesse fully and truly necessary for the assessment of that assessment year, so as to establish vital link between the reasons and evidence. That vital link is the safeguard against arbitrary reopening of concluded assessment. The reasons recorded by the Assessing Officer cannot be supplemented by filing an affidavit or making oral submission, otherwise, the reasons which were lacking in the material particulars would get supplemented, by the time the matter reaches to the court, on the strength of affidavit or oral submissions advanced"

14.17 Keeping in view of the aforesaid submissions and judicial pronouncements, YOUR HONOURS it is submitted that the notice dated 28.03.2013 issued by the Assessing Officer u/s 148 is without jurisdiction as the learned AO has in his recorded reasons for re-opening not mentioned that the income has escaped assessment on account of failure to disclose fully and truly all material facts. In the course of original assessment proceedings the building

sanction plans, built-up area computation as certified by Chartered Engineer has been submitted as called for by the learned AO. The reopening is therefore bad in law and is liable to be quashed.

15. **The assessing officer has no "reasons to believe". It is a mere change of opinion which is solely based on audit objections.**

15.1 YOUR HONORS at this point, it is pertinent to note that RAP had raised an audit objection. Under RTI Act the appellant has obtained the relevant letters and correspondences between the RAP, AO and the Commissioner. The same are submitted herewith at the appropriate paras of submissions. A copy of the letter recording the audit objections by RAP vide note dated 23.2.2012. along with a typed copy is enclosed as **Annexure -9 [PB-1] of Asst.Year 2006-07.**

15.2 The RAP audit objection, in a nutshell is with respect to non-inclusion of areas of open terrace and portico is computing the built-up area. Upon inclusion of these areas, the built-up area of the residential unit exceeds 1500 sft and therefore the claim of deduction u/s 80IB (10) needs to be disallowed and brought to tax.

15.3 The Assessing Officer vide letter dated 24/02/2012 replied to the RAP, submitting reasons as to why the audit objections are not tenable and shall be dropped. Copy of the said letter is enclosed as **Annexure- 10 [PB-1] of Asst.Year 2006-07.**

For the sake of convenience the reply of the A.O. is reproduced below:

"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. 80IB(10) and the deduction was allowed correctly in the assessment completed.

1. 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.

2. 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.

3. 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.

4. 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.

5. 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.

6. 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.

7. 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".

8. 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).

9. 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.

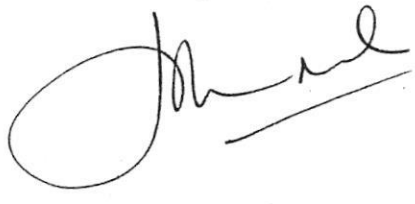
10. In a multi storied complex a reserved park area is provided on the ground/basement floor or stilt floor which has a RCC ceiling over it. But this reserved parking area cannot be counted as part of the built-up area of a flat which is located on upper floors. If a car park area is considered as a 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.

11. A portico does not have features of a balcony which can be used as a habitable area.

12. 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.

13. 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".



15.4 The A.O. vide letter dated 08/06/2012 communicated to the Commissioner of Income Tax (C.I.T) giving detailed reasons as to why the objections raised by the RAP are not acceptable. A copy of the said letter is enclosed as **Annexure-11 [PB-1] of Asst.Year 2006-07.**

For the sake of convenience the concluding para of the above letter is reproduced herein under:

> " 10. In view of the facts mentioned above, it is to submit that the deduction of Rs 87,60,134/- u/s 80IB(10) claimed by the assessee has been rightly allowed and the assessee has not violated any conditions of Sec.80IB(10) as interpreted by the RAP. Therefore, the objection raised by the RAP is not acceptable and the Audit may be requested to drop the objection raised. The file is submitted for the kind perusal and instructions of the Commissioner of Income Tax."

15.5 The CIT vide letter dated 16/10/2012 communicated to The Accountant General(C& RA) indicating reasons as to why the objections raised by the RAP are not acceptable. Copy of the said letter is enclosed as **Annexure-12 [PB-1] of Asst.Year 2006-07.**

The relevant para 3 of the letter 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".*

15.6 YOUR HONORS from the above it is evident that at the time of the original assessment the Assessing Officer had applied his mind on all the relevant aspects including the measurements of the residential units and framed an opinion regarding the allowability of the deduction claimed u/s 80IB(10).

15.7 Further, even when RAP raised an audit objection regarding the calculation of built-up area of the residential units, the Assessing Officer has tried to sustain his original assessment order by submitting elaborate explanations. Similar submissions were also made to the Commissioner of Income Tax.

15.8 YOUR HONORS it is thus clear from this communication that the Assessing Officer himself was convinced that audit party's query was raised on wrong understanding of the position of law.

15.9 YOUR HONORS the Assessing Officer had no independent reason to hold a belief that income chargeable to tax has escaped assessment. It is only at the insistence and at the behest of the audit party that he had issued notice for reopening.

15.10 Reliance is placed on the order of the Gujarat High Court in case of **Adani Exports v. Deputy C.I.T., 240 ITR 224 - Annexure-G [PB-2] of Asst.Year 2006-07,** wherein Division Bench of this Court held as under:

> "It is true that satisfaction of the assessing officer for the purpose of reopening is subjective in character and the scope of judicial review is limited. When the reasons recorded show a nexus between the formation of belief and the escapement of income, a further enquiry about the adequacy or sufficiency of the material to reach such belief is not open to be scrutinised. However, it is always open to question existence of such belief on the ground that what has been stated is not correct state of affairs existing on record. Undoubtedly, in the face of record, burden lies, and heavily lies, on the petitioner who challenges it. If the petitioner is able to demonstrate that in fact the assessing officer did not have any reason to believe or did not hold such belief in good faith or the belief which is projected in papers is not belief held by him in fact, the exercise of authority conferred on such person would be ultra vires the provisions of law and would be abuse of such authority. As the aforesaid decision of the Supreme Court indicates that though audit objection may serve as information, the basis of which the ITO can act, ultimate action must depend directly and solely on the formation of belief by the ITO on his own where such information passed on to him by the audit that income has escaped assessment. In the present case, by scrupulously analysing the audit objection in great detail, the assessing officer has demonstrably shown to have held the belief prior to the issuance of notice as well as after the issuance of notice that the original assessment was not erroneous and so far as he was concerned, he did not believe at any time that income has escaped assessment on account of erroneous computation of benefit u/s 80HHC. He has been consistent in his submission of his report to the superior officers. The mere fact that as a subordinate officer he added the suggestion that if his view is not accepted, remedial actions may be taken cannot be said to be belief held by him. He has no authority to surrender or abdicate his function to his superiors, nor can the superiors arrogate to themselves such authority. It needs hardly to be stated that in such circumstances conclusion is irresistible that the belief that income has escaped assessment was not held at all by the officer having jurisdiction to issue notice and recording under the office note on 8.2.97 that he has reason to believe is a mere pretence to give validity to the exercise of power. In other words, it was a colourable exercise of jurisdiction by the assessing officer by recording reasons for holding a belief which in fact demonstrably he did not held that income of assessee has escaped assessment due to erroneous computation of deduction u/s 80HHC, for the reasons stated by the audit. The reason is not far to seek."

15.11 Reliance is also placed on the order of the Gujarat High Court in case of **Jagat Jayantilal Parikh Versus Deputy Commissioner Of Income Tax - Annexure-H [PB-2] of Asst.Year 2006-07,** wherein it was held as under:

> "Under the circumstances, it clearly emerges from the record that the Assessing Officer was of the opinion that no part of the income of the assessee has escaped assessment. In fact, after the audit party brought the relevant aspects to the notice of the AO, she held correspondence with the assessee. Taking into account the assessee's explanation regarding non-requirement of TDS collection and ultimately accepted the explanation concluding that in view of the Board's circular, tax was not required to be deducted at source. No income had therefore escaped assessment. Despite such opinion of the Assessing Officer, when ultimately the impugned notice came to be issued the only conclusion we can reach is that the Assessing Officer had acted at the behest of and on the insistence of the audit party. It is well settled that it is only the Assessing Officer whose opinion with respect to the income escaping assessment would be relevant for the purpose of reopening of closed assessment. It is, of course true, as held by the decisions of the Apex Court in the case of P.V.S.Beedies Pvt. Ltd. (supra) and Indian & Eastern Newspaper Society (supra), if the audit party brings certain aspects to the notice of the Assessing Officer and thereupon, the Assessing Officer forms his own belief, it may still be a valid basis for reopening assessment. However, in the other line of judgment noted by us, it has clearly been held that mere opinion of the Audit Party cannot form the basis for the Assessing Officer to reopen the closed assessment that too beyond four years from the end of relevant assessment year.
>
> As is more than apparent, assessment was completed on scrutiny. In post assessment period, audit party raised the objection and Assessing Officer had strongly objected to such objections by communicating internally as mentioned hereinabove.
>
> 7. In such background, reasons for reopening if are noted, they are almost identically worded as that of audit report. No material worth the name emerges to indicate any independent application of mind. Facts are quite glaring on the contrary & they clearly establish absence of subjective satisfaction of Assessing Officer. Thus, the ground raised by the petitioner that such notice of reopening is invalid for the Assessing Officer having not formed his independent belief requires to be sustained. "

15.12 Reliance is also placed on the order of the Gujarat High Court in case of Mayur Wovens Pvt. Ltd. Vs. Income tax officer and Anr. in Special Civil Application No. 3707 of 2014 and Special Civil Application No. 3708 of 2014 wherein the Court has observed and held as under at Para-8:

> "8. The issue involved in the present Special Civil Applications is squarely covered by the decision of the Division Bench of this Court in the case of Shilp Gravures Ltd. (Supra) and in the case of Vodafone West Ltd. (Supra) by which a view is taken that if the reassessment proceedings are initiated merely and solely at the instance of the audit party and when the Assessing Officer tried to justify the Assessment Orders and requested the audit party to drop the objections and there was no independent application of mind by the

Assessing Officer with respect to subjective satisfaction for initiation of the reassessment proceedings, the impugned reassessment proceedings cannot be sustained and the same deserves to be quashed and set aside."

15.13 Thus, YOUR HONORS it is submitted that the Assessing Officer has no 'reasons to believe'. It is a mere change of opinion based on audit objections. The notice issued u/s 148 has no jurisdiction, is bad in law and is liable to be quashed.

16. **<u>There is no failure on part of the appellant to disclose fully and truly all material facts.</u>**

16.1 YOUR HONORS where re-assessment is sought to be done u/s 147 beyond a period of four years from the end of the relevant assessment year, it is essential that the income should have escaped assessment due to the failure on the part of the assessee to disclose truly and fully all material facts.

16.2 In the present case no such failure on the part of the assessee is brought on record.

16.3 The attention of YOUR HONORS is invited to the para 2 of the original assessment order. The said para is reproduced below:

"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 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".

16.4 It is evident from the speaking order of the learned AO that he has applied his mind and after due verification of the information submitted has arrived at the conclusion that the assessee has constructed or constructing housing units within the specified maximum permissible built-up area of 1500 sft.

16.5 The above stated reply of the Assessing Officer makes it evident that the A.O. is aware of the primary fact that as per the common trade parlance as well as the local municipal laws certain areas are to be excluded while arriving at the built-up area. The A.O. is also aware that similar nature of exclusions is to be made for the purposes of obtaining sanction plans and for calculating the sanction fees.

16.6 The Inspector has acted upon the directions of the A.O. and thus being aware of the above stated facts has submitted his report confirming that the built-up area of the bungalows is below 1500 sft.

16.7 YOUR HONORS it is pertinent to note here that the Inspector had personally visited the construction site and physically measured the areas of the residential unit which is an immoveable property. The impugned areas of the immoveable property cannot be hidden from the Inspector during measurements. The Inspector has rightly applied the definition of built-up area as contained in section 80IB(14)(a) for the purposes of taking measurements.

16.8 YOUR HONORS attention is invited to the concluding para 10 of the communication sent by the A.O. to the Commissioner of Income Tax. The said para is reproduced below for the sake of convenience:

" 10. In view of the facts mentioned above, it is to submit that the deduction of Rs 87,60,134/- u/s 80IB(10) claimed by the assessee has been rightly allowed and the assessee has not violated any conditions of Sec. 80-IB(10) as interpreted by the RAP. Therefore, the objection raised by the RAP is not acceptable and the Audit may be requested to drop the objection raised. The file is submitted for the kind perusal and instructions of the Commissioner of Income tax."

16.9 It may be noted that the Assessing Officer is of the opinion that the RAP has not correctly interpreted the definition of built-up area. This makes it clear beyond any iota of doubt that the disagreement is due to the interpretation of the statute and not due to the failure on the part of the appellant to disclose all the material facts truly and fully.

16.10 Thus it is submitted YOUR HONORS that there was no failure on part of the appellant to disclose truly and fully all the material facts.

16.11 Reliance is placed on the decision in the case of **Calcutta Discount Co. Ltd. v. Income-Tax Officer, 41 ITR 191,** wherein the Apex Court observed as under:

> ".. that provisions of the Act postulates a duty on every assessee to disclose fully and truly, all material facts necessary for his assessment. However, what facts are material and necessary for assessment will differ from case to case. It was further observed that the duty of disclosing all primary facts relevant to the decision of the question before the Assessing Authority lies on the assessee. It was held that assessee will not be able to contend successfully that by disclosing certain evidence, he should be deemed to have disclosed other evidence, which might have been discovered by the assessing authority, if he had pursued investigation on the basis of what has been disclosed, however, once all primary facts are before the assessing authority, he requires no further assistance by way of disclosure. It is for him to decide what inferences of facts can be reasonably drawn and what legal inferences have ultimately to be drawn. It is not for the assessee to tell the assessing authority what inferences, whether of facts or law, should be drawn."

16.12 Reliance is also place on the decision of the Apex Court in **Parshuram Pottery Works Co. Limited vs. Income-Tax Officer, Circle I, Ward-A, Rajkot [106 ITR p-1 (SC)] - Annexure-I [PB-2] of Asst.Year 2006-07,** wherein it was observed as under:

> "....The words, "omission or failure to disclose fully and truly all material facts necessary for his assessment for that year" postulate a duty on the assessee to disclose fully and truly all material facts necessary for his assessment. What facts are material and necessary for assessment will differ from case to case. In every assessment proceeding, the assessing authority will, for the purpose of computing or determining the proper tax due from an assessee, require to know all the facts which help him in coming to the correct conclusion. From the primary facts in his possession whether on disclosure by the assessee, or discovered by him on the basis of the facts disclosed, or otherwise, the assessing authority has to draw inference as regards certain other facts; and ultimately from the primary facts and the further facts inferred from them, the authority has to draw the proper legal inferences, and ascertain on a correct interpretation of the taxing enactment, the proper tax leviable."

16.13 Keeping in view of the aforesaid submissions and judicial pronouncements, YOUR HONOURS it is submitted that the notice dated 28.03.2013 issued by the Assessing Officer u/s 148 is without jurisdiction, is bad in law and is liable to be quashed.

17. **<u>There is no new "tangible material" with the learned AO for issuance of Notice u/s 148 for the purpose of making an re- assessment.</u>**

17.1 The learned AO for the issuance of the notice u/s 148 has recorded the reason stating that the built-up area of residential houses exceeds the maximum permissible area of 1500 sft on the same set of information that got examined while passing the original assessment order.No new set of new tangible material that got placed on the record and therefore the learned AO's recorded reason that the built-up area of residential houses exceeds the maximum permissible area of 1500 sft is a mere of change of opinion and nothing beyond that.

17.2 The change of opinion is certainly founded by the learned AO on the audit objection of the RAP and therefore the notice u/s 148 lacks jurisdiction.

17.3 Reliance is placed on the case law of **Purity Techtextile Private Limited vs. ACIT and Another [2010] 325 ITR 459 (Bom) - Annexure-J [PB-2] of Asst.Year 2006-07,**

As regards submissions with regard to the lack of jurisdiction of the learned Assessing Officer for issuance of Notice u/s 148, reliance is also placed on the objections raised to the re-opening vide letter dated 27.08.2013 submitted by the appellant before the AO and cases cited therein - Annexure-7 [PB-1].

18. **<u>Non issuance of notice u/s 143(2) renders the re-assessment proceedings void-ab-initio.</u>**

18.1 YOUR HONORS it is submitted that no notice u/s 143(2) was issued and assessment u/s 143(3) r.w.s 147 was completed.

18.2 YOUR HONORS it is a well settled law that issue of notice u/s 143(2) is a mandatory requirement for completing an assessment u/s 143(3).

18.3 Reliance is placed on the decision of the Hon'able Apex Court in the case of **Asstt. CIT vs. Hotel Blue Moon [2010] 321 ITR 362 (SC) - Annexure-K [PB-2] of Asst.Year 2006-07**. In this case the the Hon'able Court has held that omission on the part of the assessing authority to issue notice u/s 143(2) cannot be a procedural irregularity and is not curable. Therefore, the requirement of notice u/s 143(2) cannot be dispensed with.

18.4 Reliance is placed on the decision of the Delhi High Court in the case of **Alpine Electronics Asia Pte Ltd V/S Director General Of Income Tax & Others Writ Petition (CIVIL) NO. 7932/2010 - Annexure - L [PB-2] of Asst.Year 2006-07** where in it is observed as under:

"24. Section 143(2) is applicable to proceedings under Sections 147/148 of the Act. Proviso to Section 148 of the Act protects and grants liberty to the Revenue to serve notice under Section 143(2) of the Act before passing of the assessment order for returns furnished on or before 1st October, 2005. In respect of returns filed pursuant to notice under Section 148 of the Act after 1st October, 2005, it is mandatory to serve notice under Section 143(2) of the Act, within the stipulated time limit."

18.5 Reliance is also placed on the following judgements where the decision of the Delhi High Court in **Alpine Electronics Asia Pte Ltd V/S Director General Of Income Tax & Others (supra)** was followed:

i. ITAT, Bangalore in the case of **Shri G.N.Mohan Raju vs The Income-tax Officer ITA No.242 & 243(Bang) 2013 - Annexure - M [PB-2] of Asst.Year 2006-07.** The following relevant discussion by ITAT in its order is reproduced below:

"Once the original return filed by the assessee was subject to processing u/s 143(1) of the Act, the procedure of assessment pursuant to such a return, in our opinion came to an end, since AO did not issue any notice within the 6 months period mentioned in proviso to section 143(2)(ii). No doubt, if the income has been understated or the income has escaped assessment, an AO is having the power to issue notice u/s 148 of the IT Act. Notice u/s 148 of the Act, issued to the assessee required it to file a return within 30 days from the date of service of such notice. There is no provision in the Act,which would allow an AO to treat the return which was already subject to a processing u/s 143(1) of the IT Act, as a return filed pursuant to a notice subsequently issued u/s 148 of the Act. However, once an assessee itself declare before the AO that his earlier return could be treated as filed pursuant to notice u/s 148 of the IT Act, three results can follow. Assessing Officer can either say no, this will not be accepted, you have to file a fresh return or he can say that 30 days time period being over I will not take cognizance of your request or he has to accept the request of the assessee and treat the earlier returns as one filed pursuant to the notice u/s 148 of the IT Act. In the former two scenarios, AO has to follow the procedure set out for a best of judgment assessment and cannot make an assessment under section 143(3). On the other hand, if the AO chose to accept assessee's request, he can indeed make an

assessment under section 143(3). In the case before us, assessments were completed under section 143(3) read with section 147. Or in other words AO accepted the request of the assessee. This in turn makes it obligatory to issue notice u/s 143(2) after the request by the assessee to treat his earlier return as filed in pursuance to notices u/s 148 of the IT Act was received. This request, in the given case, has been made only on 05-10-2010. Any issue of notice prior to that date cannot be treated as a notice on a return filed by the assessee pursuant to a notice u/s 148 of the Act. Or in other words, there was no valid issue of notice u/s 143(2) of the IT Act, and the assessments were done without following the mandatory requirement u/s 143(2) of the IT Act. This in our opinion, render the subsequent proceedings all invalid. Learned CIT(A) had only adjudicated on a position where there was no service of notices u/s 143(2) of the IT Act. He had not dealt withthe scenario, where notice was issued prior to the filing of return by the assessee. We therefore,quash the assessment done for the impugned assessment years."

ii. Dy. Commissioner of Income-tax vs M/s Silver Line ITA Nos.1809, 1504, 1505 & 1506 /Del/ 2013 where in it is held as under:

"7.9. Taking into account the facts and circumstances of the issue as deliberated upon in the fore-going paragraphs and also in view of the judicial pronouncements (supra), we are of the view that the re-assessments made for the assessment years under consideration have become invalid for not having served the mandatory notices u/s 143(2) of the Act on the assessee. It is ordered accordingly."

iii. Shri Mohinder Kumar Chhabra vs Income Tax Officer ITA No.3523/Del/2013.

iv. Income-tax Officer vs Tilak Raj Satija ITA No. 391/Del/2010.

18.6 Reliance is also placed on the following case laws.

[2009] 319 ITR 151 (Delhi) CIT vs. Vishnu & Co. Pvt. Ltd.

[2010] 323 IT2421 (P & H) CIT vs. Avi Oil India Pvt. Ltd.

18.7 In light of the above judicial pronouncements and facts of the case, it is submitted YOUR HONORS that the re-assessment without issue of notice u/s 143(2) is void-ab-initio and is liable to be quashed.

18.8 Apart from the above YOUR HONOURS the observations made by the Bombay High Court in the case of **Asian Paints vs Dy.CIT [2008] 296 ITR 90 (Bom) Annexure - N [PB-2] of Asst.Year 2006-07** are also relevant to be noted. In this case the AO has rejected the objections filed by the assesse and proceeded to complete the assessment without giving any opportunity to the assessee to take any other legal remedy available. The court has stated that if the A.O does not accept the objections so filed, he shall not proceed further in the matter within a period of four weeks from the date of receipt of service of the said order on objections, on the assessee.

18.9 In the case of the appellant the 148 objections got rejected wide order dated 13.3.2014 and served on 18.3.2014 and within next 2 days on 20.3.2014 the assessment order is passed. The appellant is deprived of its legal right of filing a writ petition before the High Court seeking for an appropriate directions and relief as the court may deem fit and proper. To this extent there is a miscarriage of principles of natural justice.

18.10 It may also be noted that section 292BB does not cure the defect of non-issuance of a mandatory notice that is required to be issued. It can only cure the defects if any in serving the notice. Resort cannot be had to section 292BB to validate mandatory requirement of service as applicable in section 143 (2). The following case laws support this legal position.

[2013] 353 IT623 1 (Kar) Dy. CIT vs. Pai Vinod

[2012] 204 Taxman 114 (Mag) (All).

[2012] 345 ITR 29 (All) CIT vs. Mukesh Kumar Aggarwal

19. On the merits as to whether or not the built-up area exceeds the maximum permissible area of 1500 sq.ft and whether open to sky terrace and portico area is to be considered in computing the built-up area the submissions are as under:

19.1 The firm is engaged in the business of real estate developers. In the course of its business the company has taken up the development of a residential housing project named as 'Silver Oak Bungalows'. During the previous year the firm has derived profits from this housing project and claimed deduction u/s 80-IB(10).

19.2 Provisions of Section 80 IB (10) lays down certain conditions that are to be complied with in order to get 100% deductions of the profits derived from developing and building housing projects. Clause (e) of section 80-IB (10) stipulates as under:

"the residential unit has a maximum built up area of one thousand square feet where such residential unit is situated in the city of Delhi or

Mumbai or within twenty five kilometers from the municipal limits of these cities and One thousand Five hundred square feet at any other place to qualify for deductions u/s 80IB (10).

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

19.4 The meaning of the expression "built up area" is given in clause 14(a) of Section 80IB. The same is reproduced below.

"built up area means the inner measurements of the residential unit at the floor level, including the projections and balconies as increased by the thickness of the walls but does not include the common areas shared with other residential units"

19.5 It may be noted that in the housing project undertaken by the firm construction of independent houses are envisaged.

19.6 The built up area of each residential unit is ranging from 1366 sft to 1487 sft. The built up area is as per the building plans sanctioned by the local authority. While computing the built up area of a residential unit the areas of open to sky terrace and the portico is not included.

19.7 It may be noted that in the sanctioned plans also the areas covered is less than 1500 sft. The covered area is calculated excluding the portico and the open terrace and is in conformity with the Municipal Corporation Building Byelaws, 1981 and other relevant applicable standards and codes. As per the municipal bye-laws, portico and open terrace cannot be added to built-up area. Otherwise builders would add this non-built up area and sell it.

19.8 For the housing project the sanction plans clearly show that the built up area is less than 1500 sft. The list of building plans as sanctioned by the local authorities is enclosed herewith. It may be noted that in the sanctions, plinth areas are mentioned. The sanctioned plinth area is in sq. mts and the same is converted into Sft by taking conversion factor of 10.76 (i.e. 1 sq.mt = 10.76 sft). It will be evident that all the residential units are within 1500 sft.

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

- Madras High Court in the case of **M/s Ceebros Hotels Private Limited in tax case (Appeal) Nos 581 of 2008, 1186 of 2008**

(order copy in PB-1 on page no.) has made the following observations. The relevant paras of the order is reproduced hereunder.

"31. As far as the introduction of definition portion in Section 80-IB(14) w.e.f. 01.04.2005 is concerned, even assuming that the definition Section has retrospective effect, we do not think that the definition given under Section 80-IB (14) would in any manner prejudice the claim of the assessee herein, for the definition given under Section 80-IB (14) does not appear to go against what has been defined to include the measurement of the plinth area of building under the Building Regulations and Indian Standard Method of Measurement of Plinth, Carpet and Rentable Areas of Buildings as issued by Bureau of Indian standard. Since, Clause 4.1.2 clearly excludes open terrace for plinth area and what is included in Clause 4.1.1. is as stated in Clause (d),which reads as under :

"e) In case of open verandah with parapats:

1) 100 percent areas 1fo1r the portion protected by the projections above, and

2) 50 percent, area for the portion unprotected from above."

Revenue does not dispute the fact that the open terrace is not a project-ion like a balcony to fit in with the definition under Section 2.4 of Indian Standard Method of Measurement of Plinth, Carpet and Rentable Areas of Buildings as issued by Bureau of Indian Standard.

"32. Thus, going by the definition under Indian standard Method of Measurement of Plinth, Carpet and Rentable Areas of Buildings, even by making a reference to the definition of "Built-up area" under Sub-Section 14 (a) as applicable to the year under Consideration, we do not find any justifiable ground for the Revenue to include the open terrace as part of the built-up area. This we say for the reason that as already pointed out, Sub-Section 10 of Section 80-IB of Income Tax Act contemplates grant of deduction only in respect of projects, which are approved by the Local Authority, in which event, an understanding that one has to give to the definition of "Built-up area" including the projections and balcony must, necessarily go along with the understanding placed on such expressions as per the relevant Regulation of the statutory authority under the Development Control Rules. In any event,

even taking the definition as giving a different meaning, the same cannot control the substantive provision which contemplates deduction to projects approved by the Local Authority, the approval being as per the Regulations and Rules of the Local Authority. In such circumstances, we reject the contention of the Revenue and thereby, we agree with the view expressed by the assesses."

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

"37. In the circumstances, we have no hesitation in allowing the assessee's appeal, by setting aside the order of the Tribunal. Thus, we hold that the assessee is entitled to deduction in respect of flats in the 7th floor, which do not exceed the required extent as per Section 80-IB (10)(c) that open terrace area, cannot form part of the built-up area."

This ratio squarely applies in our case.

- ITAT,Pune in the case of **Shri Naresh T. Wadhwani vs. Dy. Commissioner of Income Tax in ITA Nos.18, 19 & 20/PN/2013 – Annexure – O [PB-2] of Asst.Year 2006-07** has followed the ratio laid down by the Madras High Court in the above case. In para 23 of the ITAT Order the following is held:

  "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 unitholders."

- Reliance is also placed on the judgment of the Goa High Court in the case of M/s. Commonwealth Developers Vs. ACIT in Tax APPEAL NO. 4 OF 2014 wherein it is held that rear open court yard cannot be added to compute the built-up area. It has followed the judgment of The Division Bench of the Madras High Court in the judgment reported in 2012- TIOL-951-HC MAD-IT in the case of the Commissioner of Income Tax, Channai V/s M/s Mahalakshmi Housing has held at para 5 thus :-

  "5.. 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 square feet....."(emphasis supplied).

  Considering the ratio laid down in the aforesaid judgments, we find that the area of courtyard cannot be included to calculate the built-up area in terms of Section 80-IB(10) of the Income Tax Act. The learned Tribunal was not justified to come to the conclusion that the said area of the courtyard is to be included to calculate the built-up area and thereby holding that the residential unit was more than 1500square feet which would disentitle the appellant to claim such deduction. The contention of the learned counsel appearing for the respondent that the findings of the fact arrived at by the learned Tribunal cannot be interfered in the present appeal cannot be accepted in the facts of the present case as the Tribunal has misconstrued

the provisions of Income Tax Act and the material on record to deny the benefit of deduction to the appellant in terms of Section 80-IB(10) of the said Act. The first substantial question of law is answered accordingly.

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

> "11. When the above meaning of "balcony" is taken into consideration with the definition of "built-up area" as provided in the Act, it is clear that findings of the authorities below are not sustainable in law. It is an admitted fact that the open terrace in front of penthouse was considered as balcony/verandah. The open terrace is not covered and is open to sky and would not be part of the inner measurement of the residential floor at any floor level. The definition of "built-up area" is inclusive of balcony which is not open terrace. The DVO has considered the open terrace as analogous to balcony/verandah without any basis. Therefore, the authorities below were not justified in rejecting the claim of the assessee by taking the open terrace as balcony/verandah.
>
> Therefore, the assessee has complied with all the requirements of s. 80-IB(10) of the Act in this regard. Moreover, the Tribunal, Nagpur Bench, in the case of AIR Developers (supra) has held as under :
>
> "In view of the decision of the Kolkata Bench of the Tribunal in the case of Bengal Ambuja Housing Development Ltd. vs. Dy. CIT (ITA No. 1595/Kol/2005, dt. 24th March, 2006), which was squarely applicable to the instant case, it was to be held that if the assessee had developed a housing project wherein the majority of the residential units had a built-up area of less than 1500 sq. ft, i.e., the limit prescribed by s. 80-IB(10) and only a few residential traits were exceeding the builtup area of 1500 sq. ft., there would be no justification to disallow the entire deduction under s. 80IB(10). It would be fair and reasonable to allow the deduction on a proportionate basis, i.e., on the profit derived from the construction of

the residential unit which had a built-up area of less than 12500 sq. ft., i.e., the limit prescribed under s. 80-IB(10). In view of the above, the AO was to be directed that if it was found that the built-up area of some of the residential units was exceeding 1500 sq. ft., he would allow the proportionate deduction under s. 80-IB(10). Accordingly, the appeal of the Revenue was to be dismissed and cross-objection of the assessee was deemed to be partly allowed." Therefore, in the light of the decision of the Tribunal, Nagpur Bench, the authorities below should not have rejected the claim of the assessee at least on alternate contention that the assessee would be entitled for deduction under s. 80-IB(10) on pro rata basis. No other point was considered against the assessee for refusing relief under s. 80-IB(10) by the authorities below. Since we have held above that the open terrace is not part of balcony/verndah therefore according to the submissions of the assessee, the built-up area of the assessee was within the prescribed limit. Therefore, there is no need to give further finding with regard to alternate claim of the assessee. Considering the facts of the case, in the light of the above decisions, we are of the view that the assessee fulfilled the conditions and requirement of s. 80-IB(10) of the Act, therefore, the claim of the assessee for deduction should not have been denied by the authorities below. We, accordingly, set aside the orders of the authorities below and direct the AO to grant deduction to the assessee under s. 80-IB(10) of the Act as claimed by the assessee.

- The above ratio has been followed by ITAT Ahmedabad in following cases.

  ITA NO 2700, 2701, 2702, 2703 / AHD / 2009 ITAT/Ahmedabad on 17-6-2011 ACIT vs. Yug Corporation.

  ITA No 520 /AHD/2011 on 19-5-2011 Safal Associates vs ITO.

- In ITA No 328/AHD/2010 dated 25 -3-2011 in the case of Nikhil Associates vs CIT the Ahmedabad ITAT has held that Parking space is not part of built up area. The relevant para 28 of the order is quoted below:

  "28. The second argument is that if parking space is included then total area would exceed specified limit. In our considered view this

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

Sec. 80IB(14)

For the purposes of this section,-

[(a) "built-up area" means the inner measurements of the residential unit at the floor level, including the projections and balconies, as increased by the thickness of the walls but does not include the common areas share with other residential units;

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

The definition of 'built-up area' says built-up area include projections and balconies. The accepted rules of interpretation for an inclusive

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

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

(1)Inner measurement of the residential unit at the floor level.

(2)Area projection and balconies.

(3) Thickness of the walls.

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

- ITA No 2447 / Ahd / 2010 Tarenetar corp. Open terrace is not balcony and not part of builtup area.

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

- ITA no 165 /PN / 2007 Pune Tushar Developers - follow local law in case of ambiguity and remanded back to AO.

- ITA no 145/IND/2001, ITA434/Ind/2010 and ITA no 86/ Ind / 2011 held that built up area should be as per local laws and has many similarities with our case.

- ITAT Mumbai bench on ITO Vs. Rasiklal N satra (2006) 280 ITR (AT) 0243 held that a residence means a building or part of a building where one can eat drink and sleep.

19.10 Section 80IB (14) (a) defines 'built-up area'. In the definition, the words 'residential unit', 'balconies' and 'projection' are used. The meaning of these words are not defined or explained under the Income Tax Act and therefore it is necessarily to be understood in a sense that is prevalent and in practice in the line of real estate business. In CIT Vs Taj Mahal Hotels AIR 1972 SC 168 the Hon'able Apex Court has made the following observation.

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

19.11 Where the statute does not define an expression used in the statute, it has to be understood as one in common parlance. This is established law pointed out by the Hon'able Apex Court in CIT Vs. Jaswant Singh Charan Singh, AIR 1967 SC 1454.

19.12 It is also settled principle that some common sense approach or dictionary meaning if the term is of general nature should be found out or if the term is of technical nature than the definition of such term used in other laws should be taken into consideration. This is so observed in ACIT vs. Smt Saroj Kapoor (2010) 38 DTR 475 (Ind-ITAT). The relevant para 13 of the order is reproduced below:

"13. Having stated so, now we shall deal with other aspects. On the aspect of nature of provisions of section 80-IB(14)(a), we find that it is a settled proposition of law that when a particular term is defined by an amendment,