

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

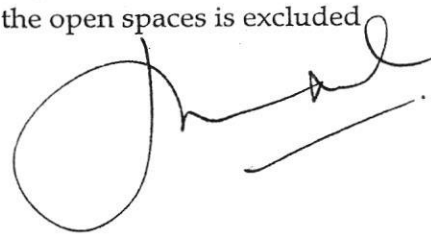
19.13 Since the words 'projection' and 'balconies' are not defined under the Income Tax Act, it is imperative to derive meanings to these words in its popular sense and also what it is commonly understood and spoken in the real estate business. It is further imperative to look and search the meaning of these words in other relevant laws and standards that governs and regulates the real estate business. It is clearly not possible to interpret an open terrace as an balcony (which is covered and less than 1.2 m) as they have different features and a portico (covered parking below floor level) as a projection as these have nothing in common.

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

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

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

Garden rockery ....



Drainage culvert ...

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

Watchman's booth ...."

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

- 19.16 The MUNICIPAL CORPORATION BUILDING BYE LAWS, 1981 (Section 2 definitions), defines the COVERED AREA

"means ground/area covered immediately above the plinth level by the building but does not include the area covered by compound wall, gate, cantilevered porch, portico, slide swing, uncovered staircase, chajjas and the like"

- 19.17 It should also be noted that the income tax definition of built up area is exactly the same and is consistent with the computation of the built up area as per the Indian Standard Code, the National Building Code of India and the Municipal Bye- laws for computation of built up area. The built up area of our houses are consistent with all the above definitions. The Indian standard code and The National Building Code of India form the binding guidelines and basis of all building related laws.

- 19.18 In the Madras High Court judgment (supra) the court has also considered the above definitions given in The Indian Standard Code and National Building code of India etc.

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

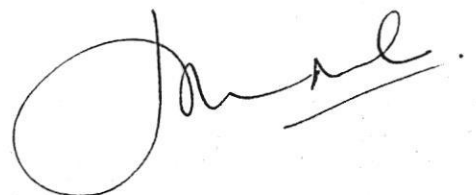
- 19.20 In brief, a portico is nothing but an area meant for parking of vehicles and is not habitable so as to form part of a residential unit. In fact and in reality, it is outside the residential unit. Similarly, open to sky terrace is not habitable for living so as to form part of the residential unit.



- 19.21 The portico and open terrace do not have characteristics that of a projection or a balcony. In a multi-storied building a parking is provided in the cellar or on ground floor. The identified parking area is allotted to the flat owner for its exclusive use as 'reserved parking area'. This 'reserved parking area' is not shared with other flat owners. The allotment may be for a separate sale consideration. This 'reserved parking area' is not at all considered as built up area of the residential unit. By definition, the built up area is the inner measurements of the residential unit at the "floor level" as increased by the wall thicknesses. To this area, the area of balcony and projections, if any, is to be added so as to arrive at the total built-up area for Income- tax purposes. Thus, logically and rationally the parking area is not added to the inner measurement of the residential unit, as the same cannot be said to be a projection or a balcony. This practice is being accepted and followed in real estate transactions all over. The governing laws also adopt the same view. In construction of independent bungalows, the parking area is termed as 'portico' or 'porch'. Like in a multi-storied complex, a reserved parking area is not added to arrive at the built-up area of a residential unit, a portico or a porch area cannot be considered to arrive at built-up area. The reserved parking area in a multi storied complex and the portico of a bungalow has to be on the same footing. The equity also so demands. There cannot be differential treatment for the area, which in both schemes of development is meant for parking of vehicles. A parking area is neither a projection nor a balcony and it is also not a part of a residential unit. Parking area is not a habitable room so as to be treated as part of the residential unit.
- 19.22 The Portico is not at the same floor level that of the residential unit. The car parking or portico is covered by rcc roof but is not a projection as a projection is a cantilevered portion and this area is not cantilevered and hence cannot be a projection. The car parking or portico has its way below the floor level of the ground floor and is doesn't have walls and hence it also fails the test of inner measurement at floor level and as increased by thickness of the walls. The flooring is also rough checkered tiles. If parking is included then all apartment blocks with reserved parking (in exclusive use of apartment owner) will also not pass this test making all 80IB projects ineligible.
- 19.23 In so far as the portico is concerned, it is used for parking purposes only and is not limited by walls, unlike in the case of balcony which is limited.
- 19.24 Similar is the situation with respect to an open terrace (i.e. terrace that is open to sky). The roof of a building is the open terrace. It has no construction on it. Every building has to have an open terrace on it and this is not construction but the end of it. How an open area on which there is no construction can be considered as built-up area? In a multi-storied complex, the terrace area is not added to the area of each flat or an apartment. The terrace by any stretch of imagination cannot be said to be a projection or a balcony.



- 19.25 The issue that needs to be addressed to is whether a portico and an open terrace can be said to be a projection or a balcony. It is reiterated that the expressions 'projections' and 'balconies' are not defined under the Income-tax Act and therefore justice demands that the meaning of these expressions are adopted as they are understood in everyday use in house building industry.
- 19.26 A balcony is generally referred to a enclosure covered with wall on three sides and a roof. A balcony has the following basic characteristics:
- (a) It has a roof i.e. it is not open to sky.
  - (b) It is generally not very large in area .Typically balconies have areas of 30-40 sft
  - (c) It is covered by walls on three sides.
  - (d) The front side of the balcony will have wall or hand railing upto the height of 3-4 feet (generally upto vest height).
- 19.27 Keeping in view the above characteristics of a balcony and a projection and its meaning in a popular sense and also as per all technical and relevant laws, a portico and open terrace cannot be construed either as a projection or as a balcony. Therefore, the areas of portico and the open terrace cannot be added to the inner measurements of a residential unit to arrive at built-up area.
- 19.28 It may further be noted that the constructed area sold under this project is the built-up area as computed excluding the portico and the open terrace. Under the relevant Acts and Bye-Laws, regulating the real estate developments portico and open terrace cannot be added to built-up area. It is therefore not possible to sell an open to sky terrace and portico as part of the built-up area. Hence, the areas that cannot be sold as built -up area cannot be added in computation of built-up area.
- 19.29 It has been further stated in the reasons for re-opening of the assessment that the portico and open terrace, whose areas are excluded for computing the built-up area are not the common areas shared with other residential units. These areas are available for exclusive use of the house owner and as such, portico and open terrace should also form part of the built-up area.
- 19.30 In the submissions made it has been explained that the portico and open terrace is neither a 'balcony' nor a 'projection' so as to include their areas in the computation of built-up area. Since the portico and open terrace is neither a 'balcony' nor a 'projection' the importance of whether it is a common area to be shared with other residential units or it is available for exclusive use of a house owner is lost and is irrelevant.





19.31 Keeping in view the above facts and circumstances and the various judicial pronouncements it is submitted that the area of open to sky terrace and the portico cannot be added to compute the built-up area of a residential house and therefore there is no violation of the condition u/s 80IB (10) with respect to the maximum permissible built-up area of 1500 sft. The appellant is therefore entitled for deduction u/s 80IB(10).

For Mehta and Modi Homes

Partner

(Appellant)

1230

35

## 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. : 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, 0812.09
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 Eungalows 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.

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 Cheralapally, which is approximately 26 Kms from IT Towers. Total area consists of about six acres. The firm has constructed 76 independent duplex houses in plot Nos 1 to 76. The construction ranges from 1366 sft to 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/-.

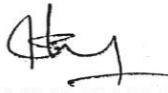
After claiming the expenditure the assessee has declared the business income at Rs 2,14,01,167/- and income from other sources at RS 2,63,411/-. As discussed above out of the business income the assessee is claiming deduction U/s. 80IB(10) amounting to Rs 96,33,962/-. After allowing the deduction the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

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.



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

Copy to the assessee

38

NOTICE UNDER SECTION 148 OF THE INCOME-TAX ACT, 1961

Office of the  
Income Tax Officer,  
Ward-10(4), Hyderabad.

PAN: AAJFM0647C

Dated: 19-03-2013

To  
M/s. Mehta and Modi Homes,  
5-4-187/3,4, G. ROAD  
Secunderabad.

Sir,

Where as I have reason to believe that the Income in respect of which, You are assessable to tax for the Assessment Year 2007-08 has escaped assessment, within the meaning of Section 147 of the Incometax Act, 1961.

I, therefore propose to assess/re-assess the income/re-compute loss/depreciation allowance for the said assessment year and I hereby require you to deliver to me within 30 days from the date of service of this notice, a return in the prescribed form of your Income in respect of which you are assessable for the said assessment year.

This notice is being issued after obtaining the necessary approval of the Commissioner of Income tax – V, Hyderabad.

Seal.



Yours faithfully,

*D. V. Hara Gopal*  
(D.V. Hara Gopal)  
Incometax Officer,  
Ward-10(4), Hyderabad



From:  
Mehta and Modi Homes,  
5-4-187/3&4, II Floor,  
Soham Mansion, M.G.Road,  
Secunderabad- 500003.

Date: 10<sup>th</sup> April, 2013

To,  
Income Tax Officer,  
Ward - 10(4),  
5<sup>th</sup> Floor, A - Block,  
IT Towers, A.C. Guards,  
Hyderabad.

Sir,

Sub: Reply to Notice u/s 148 of IT Act, 1961 - AY 2007-08  
PAN-AAJFM0647C -Reg

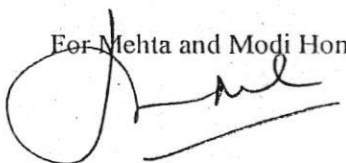
Ref: Notice u/s 148 dated 19.03.2013 for AY 2007 -08

We acknowledge the receipt of the above referred notice on 21.03.2013. In reply we submit that the Income tax return for AY 2007-08 filed u/s 139(1) electronically on 31<sup>st</sup> October 2007 in the status of firm, bearing E-filing acknowledgement no. 7074500311007 be treated as return filed in compliance to your notice u/s 148 of IT Act, 1961. Copy Form ITR-V is filed on 31<sup>st</sup> October, 2007 with Range 10/Hyd. under inward no 100100776. The copy of the same is enclosed herewith.

Kindly provide us with the reasons recorded for re-opening of the assessment and for issuance of notice u/s 148 of IT Act, 1961.

Yours faithfully,

For Mehta and Modi Homes



(Soham Modi)  
Partner

ASK No: 694120413003458  
Date/A.Y: 12-04-2013/2007-08  
PAN: AAJFM0647C  
Name: MEHTA AND  
AO: ITO, WARD-10  
(4), HYDERABAD



Office of the  
Incometax Officer, Ward-10(4)  
Hyderabad  
Dt: 30-07-2013

AAJFM0647C/2007-08/Ward-10(4)

To

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

Sir,

Sub: Incometax assessment – A.Y. 2007-08 – your own - reasons for  
reopening of assessment – Reg.

Ref: 1. Notice u/s.148 issued on 19/03/2013.

2. Your letter dated 10/04/2013

.....  
Please refer to the above.

2. While acknowledging the receipt of the notice u/s.148 on 21-03-2013, issued in the assessee's case, for the A.Y. 2007-08, the assessee requested for communicating the reasons recorded for reopening of the case. As per the request made by the assessee the reasons for reopening the assessment are communicated as under.

In this case, as per the ROI filed for the A.Y. 2007-08, it is observed that di  
IB(10) amounting to Rs.96,33,962/- was claimed from the business income and  
allowed in full while completing the assessment u/s.143(3) on 31-12-2009.

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 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 assessee 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.

Yours faithfully,

*D.V. HARA GOPAL*  
(D.V.HARA GOPAL),

INCOMETAX OFFICER, WARD-10(4)  
HYDERABAD.



From,  
Mehta & Modi Homes,  
5-4-187/3 & 4, Soham Mansion  
M.G Road, Secunderabad-03

Date: 27.08.2013

To,  
The Income Tax Officer,  
Ward 10(4)/Hyd,  
I.T Tower, A.C Guards,  
Hyderabad.

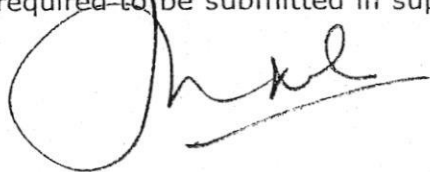
Sir,

**Sub: Objections to the Proposed Reassessment – Own Case –  
PAN: AAJFM0647C - A.Y 2007-08**

Kindly refer to your letter No. AAJFM0647C/2007-08/ Ward 10(4) dt. 30-07-2013 furnishing the reasons for re-opening the assessment for the Assessment Year 2007-08.

2. In the reasons supplied, it is noticed that the basis for the proposed action is the view that in the assessment order dated 31-12-2008 made u/s 143(3), deduction u/s 80IB(10) had been allowed erroneously as the maximum permissible built-up area of 1500 sft 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 section 80IB (10) of the Act.

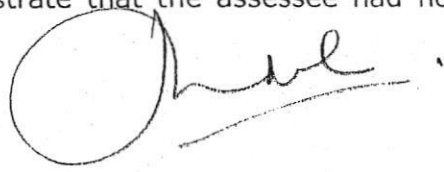
3. The assessee submits that the return filed by the assessee was accompanied by prescribed audit report in Form No.10CCB which is required to be submitted in support of claim of deduction u/s 80 IB (10).



The Form states that the built up area of each unit ranged from 1366 sq.ft. to 1487 sq.ft. The built-up area is certified by a Chartered Engineer and is enclosed to form 10CCB.

4. In the assessment order made u/s 143(3), the AO enquired into the correctness of the claim u/s 80-IB(10). In the course of assessment proceedings, the building sanction plans as sanctioned by the local authority were furnished. After examination of the documents, sanctioned plans 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 below 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.

5. The assessee relies upon a number of judgments, including Calcutta Discount Co. Ltd. v. ITO [1961] 41 ITR 191 (SC), CIT v. Kelvinator of India Ltd. [2010] 320 ITR 561 in support of its claim that the reopening is not valid. (Please see annexure). The Supreme Court in CIT v. Kelvinator of India Ltd. [2010] 320 ITR 561 has approved the observations of the Full Bench of the Delhi High Court in Kelvinator of India Ltd. v. CIT [2002] 256 ITR 1 (Delhi) [FB] to the effect that change of opinion is inferable where the original assessment had been made u/s 143(3). The AO has to demonstrate that the assessee had not made full and true disclosure in



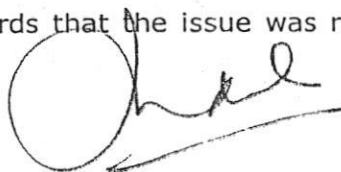
order to visit him with a notice u/s 148. In the FB decision, the law on the subject has been stated to be as below:

*"My answer to the third question is this. So long as the assessee has furnished full and true particulars at the time of original assessment and so long as the assessment order is framed under section 143(3) of the Act, it matters little that the Assessing Officer did not ask any question or query with respect to one entry or none but had raised queries and questions on other aspects."*

The Supreme Court in CIT v. Kelvinator of India Ltd. [2010] 320 ITR 561 at page 564 has observed as under:

*"Therefore, post-April 1, 1989, power to reopen is much wider. However, one needs to give a schematic interpretation to the words 'reason to believe' failing which, we are afraid, section 147 would give arbitrary powers to the Assessing Officer to reopen assessments on the basis of mere 'change of opinion', which cannot be per se reason to reopen. ... The Assessing Officer has no power to review; he has the power to reassess. But reassessment has to be based on fulfilment of certain preconditions and if the concept of 'change of opinion' is removed, as contended on behalf of the department, then, in the garb of reopening the assessment, review would take place. One must treat the concept of 'change of opinion' as an in-built test to check abuse of power by the Assessing Officer. Hence, after April 1, 1989, the Assessing Officer has power to reopen, provided there is 'tangible material' to come to the conclusion that there is escapement of income from assessment. There must be a live link with the formation of the belief."*

In CIT v. Usha International Ltd. [2012] 348 ITR 485 (Delhi) [FB], which after relying extensively on the judgment of the Supreme Court CIT v. Kelvinator of India Ltd. [2010] 320 ITR 561 has categorically held that the reassessment proceedings will be invalid if the assessment order itself records that the issue was raised and has been decided in favour of the



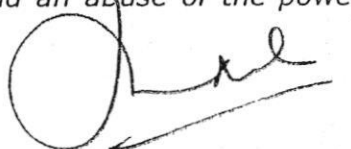
assessee. Reassessment proceedings in such a case would be hit by the principle of 'change of opinion'.

6. The assessment in the case was made originally u/s 143(3). The Assessing Officer had closely scrutinised the claim of the assessee. He had also deputed the Inspector to cause field enquiries. The Inspector furnished his report which is incorporated in the assessment order on this very issue. In the circumstances, the AO erred in reopening the assessment u/s 147 on a mere change of opinion. In this regard kind attention is drawn to the Full Bench decision of the Delhi High Court in the case of CIT v. Usha International Ltd., (2012)348 ITR 485 (Del.) (FB) at page 516 vide paragraphs 53 and 54 as under:

*"53. The Supreme Court emphasised the difference between the power to reassess and the power to review and in terms stated that the Assessing Officer has no power to review, but has only the power to reassess. If the contention of the Revenue is to be accepted, then all that is required of the Assessing Officer is a statement in the reasons recorded which could run like this: "*

*"The assessee has no doubt disclosed fully and truly all material facts necessary for the assessment. The assessment was also completed under section 143(3). However, I have not examined those particulars while completing the assessment. I, therefore, did not form any opinion. I now want to reopen the assessment so that I can take the opportunity to examine the full and true particulars furnished by the assessee and form an opinion. I am, therefore, issuing notice under section 148".*

54. The dangerous consequence that would follow need hardly be stated. This is a clear and present danger, not merely an unfounded apprehension. The two vices, namely, the power to review masquerading as the power to reassess and an abuse of the power to reopen the assessment (only



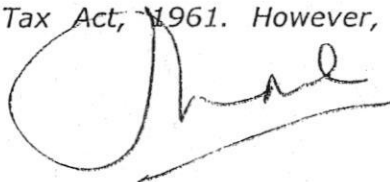


*on satisfaction of certain stipulated conditions), as pointed out by the Supreme Court, would come into full play if such a contention is accepted."*

7. The above ratio is squarely applicable our case. Further, in the case of *M/s.Doshi Housing Ltd., v. ACIT the Hon'ble Madras High Court* allowed the writ petition No.29069 of 2011 challenging the reopening in an identical situation on the issue of deduction u/s 80IB(10) – vide paragraphs 32 to 34 of the judgment as under:

*"32. In reply, the learned counsel appearing on behalf of the petitioner had submitted that the case of the respondent should stand or fall based on the reasons stated in the notice issued by the respondent for the re-opening of the assessment, under Section 147 of the Act. When it had been stated that it had been gathered, from the contents of the construction agreement, that the assessee was operating only as a contractor and not as a builder, in the light of the explanation to Section 80IB(10) of the Income Tax Act, 1961, introduced by the Finance Act, 2009, with retrospective effect, from 1.4.2001, it would not be open to the respondent to re-open the assessment on the ground that the assessee had not disclosed the relevant facts, fully and truly, at the time of the passing of the original assessment order. No such reason has been shown in the notice issued by the respondent, for the re-opening of the assessment. As such, the decision of the High Court of Gujarat, in *Aayojan Developers Vs. Income Tax Officer 2011 (335) ITR 234*, is squarely applicable to the present case, in all fours.*

*33. In view of the contentions raised on behalf of the petitioner, as well as the respondent, and in view of the records available, and on considering the decisions cited supra, it could be seen that the respondent had issued a notice, dated 1.3.2011, for the re-opening of the assessment, under Section 147 of the Income Tax Act, 1961. However, in the said notice, issued by the*



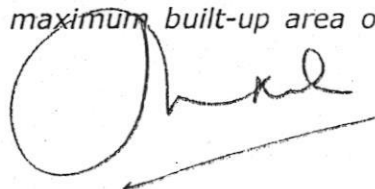
respondent, it has not been stated that the petitioner had failed to fully and truly disclose the material facts, relevant for the passing of the original assessment order. As such, it would not be open to the respondent to re-open the assessment, in respect of the assessment year, 2007-2008.

34. It is not in dispute that the petitioner had placed all the relevant records, including the construction agreement, before the passing of the original assessment order. Further, it is not the case of the respondent that the petitioner had suppressed certain material facts, due to which the original assessment order, passed by the respondent is liable to be re-assessed. In such circumstances, in the absence of the failure on the part of the petitioner to disclose fully and truly all material facts necessary for the assessment year under consideration, the assumption of jurisdiction, by the respondent, under Section 147 of the Income Tax Act, 1961, after the expiry of four years, from the end of the relevant assessment year, is illegal and invalid. Accordingly, the proceedings, under Section 147 of the Act, which had been initiated by the issuance of the impugned notice, under Section 148 of the Act, cannot be sustained. As such, this Court finds it appropriate to allow the writ petition. Accordingly, the writ petition stands allowed. Consequently, connected miscellaneous petition is closed."

[Copy of the Judgement Enclosed]

8. Further, in the case of Ganesh Housing Corporation Ltd v. DCIT [2012] 341 ITR 312 (Guj.), one of the reason stated by the Assessing Officer for initiating proceedings under 147 of the I.T Act in SI no (ix) is as follows:

[ix] From the layout plan/map and sales brochure of the said project, it was observed that the total built-up area of each unit (single bungalow, without including the thickness of walls) exceeded the maximum built-up area of 1500 sq ft (i.e. by 177.76 sq. ft.)



*fixed for claiming deduction under section 80IB (10) of the Act. The assessee had reduced the built-up area of the balcony and covered parking which fall under the definition of "projections" from the wall and worked out built-up area of 1469.28 sq. ft. The area covered by the said parking was also required to be included in the built-up area.*

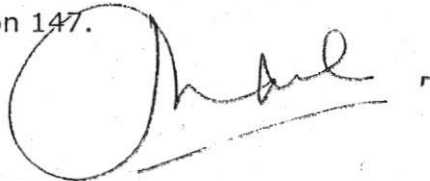
The Hon'ble Court in Para No 18 of the Order stated as under:

*"We find that the petitioner had disclosed all the materials relevant for the purpose for getting the benefit under section 80IB of the Act and there was no suppression of materials. In spite of full disclosure, the Assessing Officer gave benefit of the provision by considering materials on record and thus, it cannot be said that any income escaped assessment in accordance with the law. We find that the Assessing Officer has now given the second thought over the same materials."*

Further, the Hon'ble Court in its conclusion in para 22 has held that none of the reasons assigned by the Assessing Officer for re-opening the assessment was tenable in eye of law.

9. This ratio also is on all fours to the facts of our case. Your analysis of "built up area" is only on a mere change of opinion and not on any 'fresh material'.

10. In the reasons supplied, it is nowhere stated that the income has escaped assessment by reason of the failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment. Since the assessment was made under section 143(3) and the notice under 147 is after the expiry of 4 years from the end of relevant assessment year, the failure to disclose fully and truly all material facts by the assessee has to be established as provided in proviso to Section 147. No such failure has been recorded in the reason supplied to us for issuance of notice under section 147.



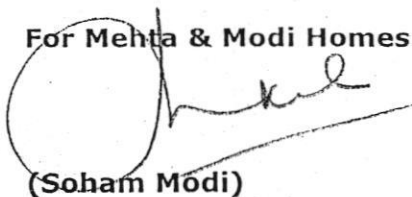
11. It is gleaned that the real cause for the reopening is not any failure on our part to disclose full and truly all material facts but an audit objection by A.G Audit on the interpretation of the provisions of sec. 80IB(10). It is respectfully submitted that the reopening would be bad in law in view of the categorical ratio laid down by the Hon'ble Apex Court in the case of Indian Eastern News Paper Society vs. Commissioner of Income-tax (1979) 119 ITR 996 (SC) which has been followed recently by the Hon'ble Delhi High Court in the case of Commissioner of Income-tax v. Usha International Ltd., (2012) 348 ITR 485 (Del.) (FB).

12. In view of the above, the assessee requests that the proceedings initiated u/s 147 may please be dropped.

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

14. The assessee requests the AO to drop the proceedings in view of the aforesaid objections raised and help reduce the compliance costs of the assessee.

For Menta & Modi Homes



(Soham Modi)

Partner

## ANNEXURE

- CIT v. Orient Craft Ltd. [2013] 354 ITR 536 (Delhi)

This was a case of deduction u/s 80HHC. For earlier years, the claim was allowed. For the current year, though there was no regular assessment, there having been only intimation u/s 143(1), the High Court found that the AO having chosen not to issue notice u/s 143(2), he cannot infer escapement of income in a return accepted u/s 143(1). The Court held that the condition that there should be 'reason to believe' has still to be satisfied and the AO has no unbridled freedom to disturb the finality of intimation u/s 143(1).

- CIT v. Jet Airways (I.) Ltd. [2011] 336 ITR 236 (Bom)

Held, notice of reassessment not valid.

- Ranbaxy Laboratories Ltd. v. CIT [2011] 336 ITR 136 (Delhi)

Held, notice of reassessment not valid.

- Vishwanath Engineers v. Asst. CIT [2013] 354 ITR 211 (Guj)

Regular assessment made. In scrutiny, 28 questions were raised including the details of expenditure which were furnished. Notice u/s 148 issued for reassessment to examine the details of expenditure held not valid.

- Vodafone West Ltd. v. Asst. CIT (No.1) [2013] 354 ITR 520 (Guj)

All the details were furnished in the course of regular assessment. There was no failure on the part of the assessee to make full and true disclosure of facts. Notice of reassessment not valid.

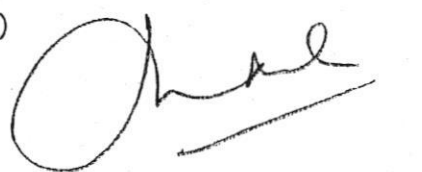
- Dishman Pharmaceuticals and Chemicals Ltd. v. Deputy CIT (OSD) (No.1) [2012] 346 ITR 228 (Guj)

If the reasons disclosed do not reveal the AO's satisfaction that income had escaped assessment and that it was occasioned by failure to disclose material facts, the reassessment notice must fail.

- H. K. Buildcon Ltd. v. CIT [2011] 339 ITR 535 (Guj)

Change of opinion by the succeeding AO not a valid reason for reassessment.

- Ashokjyot Oxygen Pvt. Ltd. v. H. N. Patel, ITO [2012] 346 ITR 199 (Guj)



Notice issued after 4 years. Reasons did not show that the assessee failed to disclose material facts. Notice not valid.

- Balar Exports v. Deputy CIT [2013] 353 ITR 422 (Guj)

Regular assessment made after detailed scrutiny. Notice of reassessment issued on the ground of under valuation of stock. Notice u/s 147 held not valid.

- FAG Bearings India Ltd. v. Deputy CIT [2013] 353 ITR 405 (Guj)

Even though the assessment order does not deal with the issue, but since the claims and facts were disclosed, the same are deemed to have been accepted by the AO. That the issue has not been mentioned in the assessment order is of no avail. Notice of reassessment not valid.

- Satish C. Partikh v. ITO [2013] 353 ITR 505 (Guj)

There was full disclosure in the regular assessment. Reassessment notice not valid.

- Manukant C. Shah HUF v. Deputy CIT [2011] 245 CTR 224 (Guj)

There was full disclosure in the regular assessment. Reassessment notice not valid.

- Ashank D. Desai v. Asst. CIT [2012] 346 ITR 326 (Guj)

There was full disclosure in the regular assessment. Reassessment notice not valid.

- Parle Blue Industries Pvt. Ltd. v. ITO [2011] 337 ITR 203 (Guj)

There was full disclosure in the regular assessment. Reassessment notice not valid.

- Priya Blue Industries Pvt. Ltd. v. Deputy CIT [2012] 346 ITR 204 (Guj)

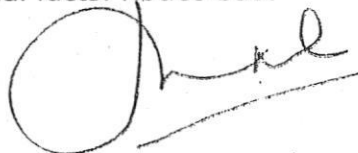
Notice after 4 years. No indication in the reasons of the assessee's failure to disclose material facts. Notice quashed.

- Sayaji Industries Ltd. v. Joint CIT (Asst) [2011] 336 ITR 360 (Guj)

Notice after 4 years. Reasons did not indicate the assessee's failure to disclose material facts. Notice not valid.

- Ketan B. Mehta v. Asst. CIT [2012] 346 ITR 254 (Guj)

Notice after 4 years. No indication in the reasons of the assessee's failure to disclose material facts. Notice bad.





- Priya Blue Industries Pvt. Ltd. v. Deputy CIT [2012] 346 ITR 204 (Guj)

Notice after 4 years. No indication in the reasons of the assessee's failure to disclose material facts. Notice quashed.

- Sun Pharmaceutical Industries Ltd. v. Deputy CIT (No.1) [2013] 353 ITR 450 (Guj)

Notice after 4 years. No indication in the reasons of the assessee's failure to disclose material facts. Notice bad.

- Garden Finance Ltd. v. Asst. CIT [2013] 353 ITR 522 (Guj)

No failure to disclose material facts. Notice bad.

- Tulsi Developers v. Deputy CIT [2013] 353 ITR 530 (Guj)

No failure to disclose material facts. Notice issued merely pursuant to change of opinion. Notice not valid.

- NDDDB v. Deputy CIT [2013] 353 ITR 538 (Guj)

Notice after 4 years. Reasons did not indicate the assessee's failure to disclose material facts. Notice not valid.

- Gujarat Power Corporation Ltd. v. Joint CIT [2011] 238 CTR 91 (Guj)

✓ Claim for 100% depreciation examined and allowed in regular assessment. Notice purporting to withdraw excessive depreciation amounts to change of opinion. Notice not valid.

- ILAG Industries Ltd. v. Asst. CIT [2013] 353 ITR 393 (Guj)

Notice after 4 years after scrutiny assessment. Reason stated that the AO had made a mistake in allowing claim u/s 80HHC. This amounts to change of opinion. Notice not valid.

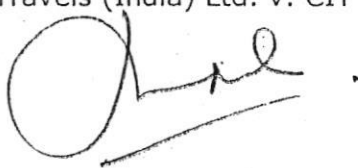
- CIT v. S M S Investment Corporation P Ltd. [1994] 207 ITR 364 (Raj)

✓ The assessee had disclosed the method of valuation of stock which was accepted in the original assessment. Notice for reassessment on the premise that the method followed was incorrect held not valid.

- CIT v. Bhanji Lavji [1971] 79 ITR 582 (SC)

✓ When primary facts have been disclosed in the original assessment, initiation of reassessment proceedings not valid upon change of opinion.

- Sita World Travels (India) Ltd. v. CIT [2000] 274 ITR 186 (Del)



In the regular assessment, the assessee was allowed deduction u/s 80HHD on receipts of foreign exchange. Notice issued after four years to withdraw the said deduction not valid.

• ITO v. Nawab Mir Barkat Ali Khan Bahadur [1974] 97 ITR 239 (SC)  
Having second thoughts on the same material cannot be a valid ground for initiation of reassessment proceedings.

• G B Brothers & Konda Rajagopal Chetty Beedi Factory (P) Ltd. v. ITO [2004] 267 ITR 774 (AP)

In the original assessment, full details of manufacturing process filed. The AO did not examine if any part of the profit was outside backward area for exclusion of deduction u/s 80HH. Notice of reassessment held not valid as there was no failure on the part of the assessee to disclose material facts.

• General Motors India P. Ltd. v. Deputy CIT [2013] 354 ITR 244 (Guj)

✓ Set off of unabsorbed depreciation allowed after considering material in regular assessment. Notice u/s 148 to withdraw unabsorbed depreciation allowed as set off not valid.

• Bharat Sanchar Nigam Ltd. v. ITO [2013] 355 ITR 188 (Del)

✓ Regular assessment made u/s 143(3). Reassessment to withdraw excess depreciation on change of opinion not permissible.

• Cadilla Healthcare Ltd. v. Asst. CIT (OSD) [2013] 355 ITR 393 (Guj)

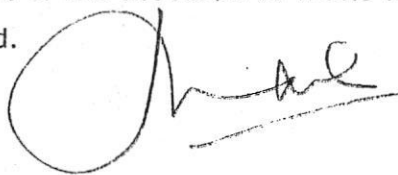
Notice u/s 148 issued after 4 years. Notice issued at the instance of audit. No omission on the part of the assessee to make full and true disclosure of facts. Notice not valid.

• CIT v. Mysore Cements Ltd. [2013] 355 ITR 136 (Karn)

Notice u/s 148 after 4 years. No omission on the part of the assessee to make full and true disclosure of facts. Notice not valid.

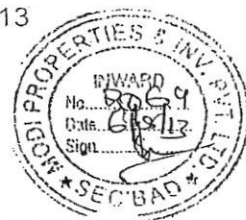
• REC Ltd. v. CIT (No.2) [2013] 355 ITR 356 (Del)

No failure on the part of the assessee to make full and true disclosure of facts. Notice not valid.



Office of the  
Incometax Officer, Ward-10(4)  
Hyderabad.  
Dt: 30-07-2013

AAJFM0647C/2007-08/Ward-10(4)  
To  
M/s. Mehta & Modi Homes,  
5-4-187/3 & 4, M.G. Road,  
Secunderabad-500003.  
Sir,



Sub: Incometax assessment – A.Y. 2007-08 – your own - show cause letter-  
Issue of – Reg.

The assessee filed return of income for the A.Y. 2007-08 on 30.10.2007 admitting a gross total income from business of Rs.2,14,01,617/- and net income from business at Rs.1,17,67,665/- after duly claiming the deduction u/s.80IB(10) of the Act amounting to Rs.96,33,962/-. The net business income admitted is Rs.1,17,67,655/-. Besides, the assessee admitted income from other sources amounting to Rs.2,63,411/-. The total taxable income admitted by the assessee is Rs.1,20,31,070/-. The same was accepted while completing the assessment on 31.12.2009.

During the year under consideration, it is noticed that the assessee is in the real estate business and constructed independent residential units. The housing project undertaken at Cherlapally village by the assessee was named as Silver Oak Bungalows and claimed deduction u/s.80IB(10) of the Act, from the profits derived out of the above business activity. As per Sec.80IB(10), an assessee can claim the deduction u/s.80-IB(10) only when the maximum built up area of each residential unit constructed is not more than 1500sq.ft. But on a verification of the information furnished along with the sanctioned plan and brochure issued, the assessee has excluded the area of portico in the ground floor and the open terrace in the first floor in the total built up area of residential house. Whereas, 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. Thus, as per the provisions of section 80IB(14) of the Act the area of portico and open terrace are to be included in the built up area which resulted in the built up area of each residential unit exceeding the maximum built up area of 1500sq.ft.

In view of the above the maximum permissible built up area of 1500sq.ft per unit has been exceeded in your case in violation of the specified conditions contained in Sec.80IB(10) of the Act. However, the claim for deduction u/s.80IB(10) is allowed in the assessment order passed u/s.143(3) on 31-12-2009. Thus, the original assessment made in this case by allowing the deduction u/s.80IB(10) has resulted in under assessment of income, in order to assess the income escaped assessment, notice u/s.148 has been issued.

Contd..2..

From,

Date: 21/08/2013

M/s Mehta & Modi Homes

5-4-187/ 3 & 4, M.G road,

Secunderabad – 500003.

To,

Income Tax Officer,

Ward 10(4)/HYD

I.T Towers, A.C Guards,

Hyderabad.

Sir,

Sub: Reply to show cause letter dated 30.07.2013 – A.Y 2007– 08

Vide above show cause letter it has been requested to show cause as to why the deduction claim u/s 80IB (10) amounting to Rs. 96,33,962/- should not be disallowed.

The show cause letter issued is under the re-assessment proceedings initiated under section 147/148 of the Income Tax Act. The reasons recorded for reopening of the case has been communicated to us vide your letter dated 30.07.2013.

We have submitted our objections for such reopening by a separate letter.

Without prejudice to such objections raised and pending disposal of such objections, a detailed note as to why the deduction claimed under section 80IB (10) should be allowed is submitted herewith in compliance to your show cause letter.

For Mehta and Modi Homes,

(Soham Modi)

Partner

**NOTE ON CLAIM OF DEDUCTION U/S 80-IB(10)**

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).
2. The salient facts and features of the above projects is as given in Annexure I to Form No 10CCB. This has already been furnished in the course of original assessment proceedings u/s 143(3). For the sake of convenience and ready reference, the same is enclosed herewith. (Annexure-1).
3. In the show cause letter dated 30.07.2013 it is proposed to disallow the entire claim of deduction u/s 80-IB(10) on the ground that the built-up area of a residential unit exceeds 1500 sqft. after inclusion of the portico in the ground floor and open terrace in the first floor.
4. 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).

5. 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.
6. The meaning of the expression "built up area" is given in clause 14(a) of Section 80IB. The same is reproduced below for the sake of convenience.

"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"

7. It may be noted that in the above said project, construction of independent houses are envisaged.
8. The computation of built up area as certified by the Chartered Engineer, building sanction plans and other details were furnished in the course of original assessments proceedings.



9. The built up area of each residential unit is ranging from 1366 sft to 1487 sft
10. The reasons, explanations and the rationale as to why the area of Portico and open terrace cannot be considered as a built up area is enclosed herewith [Annexure-2]
11. 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 every day use. Popular sense means "that sense which people conversant, with the subject matter with which the statute is dealing, would attribute to it".

12. Since the words 'projection' and 'balconies' are not defined under the Income Tax Act, it is imperative to derive meanings to these words in its popular sense and also what it is commonly understood and spoken in the real estate business. It is further imperative to look and search the meaning of these words in other relevant laws and standards that governs and regulates the real estate business. It is clearly not possible to interpret an open terrace as an balcony (which is covered and less than 1.2 m ) as they have different features and a portico (covered parking below floor level) as a projection as these have nothing in common.

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

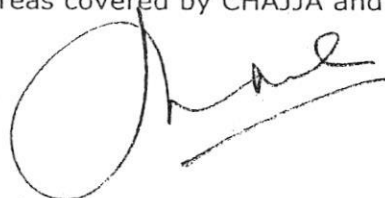
Further, Section 4.1.2 clearly states that terrace is not a part of the plinth area.

14. **National Building code of India** in part 3 – Development Control Rules and General Building requirements defines as to what is 'Covered Area' in Para 2.6 (copy enclosed). The Para 2.6 is reproduced below;  
 "2.26 Covered area: Ground area covered by building immediately above the plinth level. The area covered by the following in the open spaces is excluded from covered area:

Garden rockery ....

Drainage culvert ...

Compound wall, gate unstoreyed porch and portico, canopy, slide, swing, uncovered staircase, ramps areas covered by CHAJJA and the like and Watchman's booth ...."





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

15. The MUNICIPAL CORPORATION BUILDING BYELAWS, 1981 (Section 2 definitions), defines the COVERED AREA

"means ground/area covered immediately above the plinth level by the building but does not include the area covered by compound wall, gate cantilevered porch, portico, slide swing, uncovered staircase, chajjas and the like",

16. 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

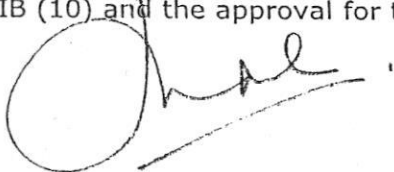
For the housing project the sanction plans submitted clearly show that the built up area is less than 1500 sft. Copies already submitted.

17. It should also be noted that the income tax definition of built up area is exactly the same and is consistent with the computation of the built up area as per the Indian standard code, the National Building Code of India and the Municipal Bye-laws for computation of built up area. The built up area of our houses are consistent with all the above definitions. The Indian standard code and The National Building Code of India form the binding guidelines and basis of all building related laws.

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

19. 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 541 of 2008, 1186 of 2008 and 136 of 2009 in its concluding para 36 as held that 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 u/s 80 IB (10) and the approval for the purpose of section

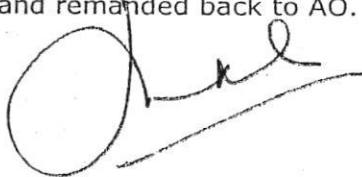




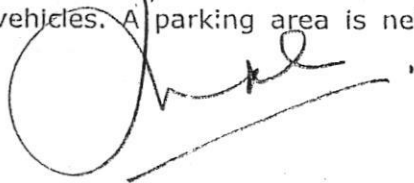
80IB has to emanate from the Income Tax Act. It further held that once the local authority have excluded open terrace from the working of built up area, it is not open to the revenue to review the approval given by the competent authority to hold that terrace would also be included in the built-up area.

This ratio squarely applies in our case as the local authority has sanctioned the building plans in which open terrace and the portico has been excluded in computing the built-up area.

- Karnataka High court in ITA 177/2011 in order dated 28th Feb 2012 held that common areas even if shared by 2 units cannot be added. The order also states that if construction has "not made any special gains of money" the authorities should lean in favour of the assessee. It also mentioned in that case that common balcony was not in the sale deed which is relevant to our case.
- ITA NO 2700, 2701, 2702, 2703 / AHD / 2009 on 17-6-2011 ACIT vs. Yug Corporation - "Open terrace is not a part of built up area is not Balcony or Verandah"
- ITA No 520 /AHD/2011 on 19-5-2011 Safal Associates vs ITO - "Open terrace is not balcony"
- ITA No 2401 / AHD / 2010 dated 21-1-2011 Amaltas Associates
- ITA No 5404/MUM/2008 dated 12 - 1-2011 Johar Hassan Zojwalla vs CIT - " Foyer Area and open area are not built up area"
- ITA No 35(ii) /IND/2000 CIT vs Saroj Kapoor - " In case a term is not defined then its technical term should be taken from local law - in this case municipal corporation"
- After the judgment of the Supreme Court in CA No 2544 of 2010 it is now clear that parking which is not covered on 3 sides cannot be saleable. Hence the fact that the portico / car parking area cannot be added to built-up area is now indisputable.
- ITA No 328/AHD/2010 dated 25 -3-2011 Nikhil associates vs CIT - " Parking Area is not built up area"
- 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.
20. 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.
21. 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).
22. In a note attached it has been explained in detail as to what is a 'Portico' and an 'open terrace' and what is generally understood by a common person. It has been further explained that why the areas of portico and open terrace is not includible in computing the built -up area of a residential unit. In the said note, the concept of 'horizontal development' and 'vertical development' in a real estate business has been explained. In brief, a portico is nothing but an area meant for parking of vehicles and is not habitable so as to form part of a residential unit. In fact and in reality, it is outside the residential unit. Similarly, open to sky terrace is not habitable for living so as to form part of the residential unit.
23. The portico and open terrace do not have characteristics that of a projection or a balcony. In a multi-storied building (a horizontal scheme of development) a parking is provided in the cellar or on ground floor. The identified parking area is allotted to the flat owner for its exclusive use as 'reserved parking area'. This 'reserved parking area' is not shared with other flat owners. The allotment may be for a separate sale consideration. This 'reserved parking area' is not at all considered as built up area of the residential unit. By definition, the built up area is the inner measurements of the residential unit at the "floor level" as increased by the wall thicknesses. To this area, the area of balcony and projections, if any, is to be added so as to arrive at the total built-up area for Income- tax purposes. Thus, logically and rationally the parking area is not added to the inner measurement of the residential unit, as the same cannot be said to be a projection or a balcony. This practice is being accepted and followed in real estate transactions all over. The governing laws also adopt the same view. In a vertical scheme of development (i.e. construction of independent bungalows), the parking area is termed as 'portico' or 'porch'. Like in a multi-storied complex, a reserved parking area is not added to arrive at the built-up area of a residential unit, a portico or a porch area can not be considered to arrive at built-up area. The reserved parking area in a multi storied complex and the portico of a bungalow has to be on the same footing. The equity also so demands. There can not be differential treatment for the area, which in both schemes of development is meant for parking of vehicles. A parking area is neither a projection nor a

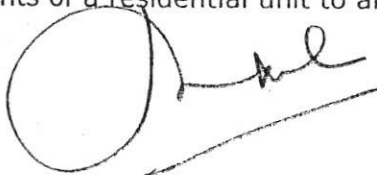


balcony and it is also not a part of a residential unit. Parking area is not a habitable room so as to be treated as part of the residential unit.

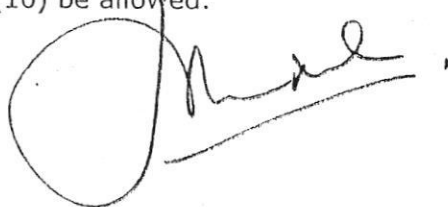
24. The Portico is not at the same floor level that of the residential unit. The car parking or portico is covered by rcc roof but is not a projection as a projection is a cantilevered portion and this area is not cantilevered and hence cannot be a projection. The car parking or portico has its way below the floor level of the ground floor and is doesn't have walls and hence it also fails the test of inner measurement at floor level and as increased by thickness of the walls. The flooring is also rough checkered tiles. If parking is included then all apartment blocks with reserved parking (in exclusive use of apartment owner) will also not pass this test making all 80IB projects ineligible.
25. In so far as the portico is concerned, it is used for parking purposes only and is not limited by walls, unlike in the case of balcony which is limited.
26. Similar is the situation with respect to an open terrace (i.e. terrace that is open to sky). The roof of a building is the open terrace. It has no construction on it. Every building has to have an open terrace on it and this is not construction but the end of it. How an open area on which there is no construction can be considered as built-up area? In a multi-storied complex, the terrace area is not added to the area of each flat or an apartment. The terrace by any stretch of imagination can not be said to be a projection or a balcony.
27. The issue that needs to be addressed to is whether a portico and an open terrace can be said to be a projection or a balcony. It is reiterated that the expressions 'projections' and 'balconies' are not defined under the Income-tax Act and therefore justice demands that the meaning of these expressions are adopted as they are understood in every day use in house building industry.
- A balcony is generally referred to a enclosure covered with wall on three sides and a roof. A balcony can be more easily described and depicted with the help of a photograph of a building, which has balconies. In the enclosed photograph, a balcony is marked with red in colour.
- A balcony has the following basic characteristics:
- (a) It has a roof i.e. it is not open to sky.
  - (b) It is generally not very large in area. Typically balconies have areas of 30-40 sft
  - (c) It is covered by walls on three sides.
  - (d) The front side of the balcony will have wall or hand railing upto the height of 3-4 feet (generally upto vest height).

A projection is a structure that extrudes externally to the building line. This can also be explained in a better way with the help of a drawing/photograph.

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

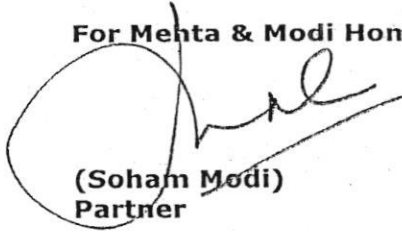


28. It may further be noted that the constructed area sold under this project is the built-up area as computed excluding the portico and the open terrace. Under the relevant Acts and Bye-Laws, regulating the real estate developments portico and open terrace cannot be added to built-up area. It is therefore not possible to sell an open to sky terrace and portico as part of the built-up area. Hence, the areas that cannot be sold as built-up area cannot be added in computation of built-up area.
29. The learned Assessing Officer has further stated that the portico and open terrace, whose areas are excluded for computing the built-up area are not the common areas shared with other residential units. These areas are available for exclusive use of the house owner and as such, portico and open terrace should also form part of the built-up area.
30. In the submissions made it has been explained that the portico and open terrace is neither a 'balcony' nor a 'projection' so as to include their areas in the computation of built-up area. Since the portico and open terrace is neither a 'balcony' nor a 'projection' the importance of whether it is a common area to be shared with other residential units or it is available for exclusive use of a house owner is lost and is irrelevant.
31. It is relevant to point out that the provisions of Section 80 IB (10) are incentive provisions and therefore, the same must be constructed liberally and in favour of the assessee so as to give full effect to the intention of the legislative. The Honourable Apex Court in the case of *Bajaj Tempo Ltd v. CIT* 196 ITR 188 has made the following observations:
- "A provision in a taxing statute granting incentives for promoting growth and development should be constructed liberally; and since a provision for promoting economic growth has to be interpreted liberally, the restriction on it has to be construed so as to advance the objective of the provisions and not to frustrate it"
- A case of liberal view for allowing deduction under Section 80 IB(10) is evident in a judgement *CIT v Sheth Developers PVT Ltd* (2009) 33 SOT 277 (Mum). In this case, some of the units in the housing complex exceeded the area limit but relief under Section 80 IB was given on pro-rata basis. Similar liberal view has been taken in the case of *ITO v. AIR developers* (2009) TTJ (Nag).
- The liberal views taken are that if an assessee has developed a housing project wherein majority of residential units have a built up area of less than 1500 sq ft i.e., limit prescribed u/s 80IB (10) and only a few residential unit are exceeding the built up area of 1500 sq ft, there would be no justification to disallow the entire deduction u/s 80 IB (10).
32. It is submitted that in our facts of the matter, a liberal view that the area of portico and open terrace is not to be included in computation of built up area as they are not a projection nor a balcony in common parlance be taken and the deduction u/s 80 IB (10) be allowed.



33. Keeping in view the above facts and circumstances of the case and also judicial pronouncements, once again it is pleaded that your proposed action to disallow deduction claimed under section 80IB (10) may kindly be dropped.

**For Menta & Modi Homes**



(Soham Modi)  
Partner

**FORM NO. 10CCB**  
**[See rule 18BBB]**  
**Audit report under section 80-I(7)/80-IA(7)/80-IB/80-IC**

- 1 Name of the assessee
- 2 PAN
- 3 Status
- 4 Ownership status of the undertaking/enterprise :  
 (a) Fully owned by assessee  
 (b) Partly owned by assessee  
 If yes, please specify the percentage of ownership
- 5 Address
- 6 Name of the enterprise or undertaking eligible for deduction under section 80-IA, 80-IB or 80-IC
- 7 Section and sub-section of the Income-tax Act, 1961, under which deduction is being claimed
- 8 Date of commencement of operation/activity by the undertaking or enterprise.
- 9 Initial assessment year from when deduction is being claimed
- 10 Address (with District and State) of the enterprise/ undertaking claiming deduction
- 11 Excise/service tax registration number and office where registered
- 12 Sales-tax registration number and office where registered
- 13 Local/State authorities from whom approval is taken (attach copy of approval)

**MEHTA & MODI HOMES**  
**AAJFM 0647 C**  
**Partnership Firm (05)**

Yes ☒ No ☐  
 Yes ☐ No ☐

5-4-187/3&4 3rd Floor, Soham Mansion,  
 M.G.Road, Ranigunj, Secunderabad - 500 003

**MEHTA & MODI HOMES**

**80 IB (10)**  
**02.07.2005 (First Building Plan Sanction)**

**Assessment Year 2006-2007**  
 5-4-187/3&4 3rd Floor, Soham Mansion,  
 M.G.Road, Ranigunj, Secunderabad - 500 003

**AAJFM0647C 25001**

**28840298894**  
**Kapra Municipality, Uppal Mandal, Ranga Reddy District**

**ELIGIBLE BUSINESS UNDER SECTION 80-IA**

- 14 Development, operation, maintenance of an infrastructure facility:  
 (a) With respect to the infrastructure facility, does the enterprise (please tick) :  
  
 (b) Please specify the nature of the infrastructure facility \*\*\*  
 [e.g., road, bridge, rail system, port, etc.  
 [Explanation to section 80-IA(4)(i)]]  
 (c) Has the operation and maintenance of the infrastructure facility been received on transfer from its developer in accordance with the agreement with the Central/State Government/local authority/any other statutory body  
 (d) If yes, please specify the first year of claim of deduction under section 80-IA by the developer

Develop ☐ operate and maintain ☐  
 Develop, operate and maintain, the infrastructure facility ☐

Yes ☐ No ☐

