

**IN THE HIGH COURT FOR THE STATE OF TELANGANA:
HYDERABAD**

* * *

**Income Tax Tribunal Appeal No.167 of 2012;
Income Tax Tribunal Appeal No.229 of 2016;
and
Income Tax Tribunal Appeal No.230 of 2016**

Between:

M/s. Modi Builders & Realtors (P) Ltd.
and Others.

VERSUS

Appellants

Asst. Commissioner of Income Tax
Circle-16 (2), Hyderabad, and Others.

Respondents

COMMON JUDGMENT PRONOUNCED ON: 21.05.2025

**THE HON'BLE SRI JUSTICE P.SAM KOSHY
AND
THE HON'BLE SRI JUSTICE NARSING RAO NANDIKONDA**

1. Whether Reporters of Local newspapers
may be allowed to see the Judgments? : Yes
2. Whether the copies of judgment may be
marked to Law Reporters/Journals? : Yes
3. Whether His Lordship wishes to
see the fair copy of the Judgment? : Yes

P.SAM KOSHY, J

*** THE HON'BLE SRI JUSTICE P.SAM KOSHY**
AND
THE HON'BLE SRI JUSTICE NARSING RAO NANDIKONDA
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! Counsel for Appellants(s) : Mr. S. Ravi, learned Senior Counsel
appearing on behalf of Mr. C.H.
Pushyam Kiran.

^Counsel for the Respondent(s) : Mr. J.V. Prasad, learned Senior
Standing Counsel for the Income
Tax Department.

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> HEAD NOTE:

? Cases referred

1. 2016 SCC Onlilne Guj 4685

THE HONOURABLE SRI JUSTICE P.SAM KOSHY

AND

THE HONOURABLE SRI JUSTICE NARSING RAO NANDIKONDA

Income Tax Tribunal Appeal No.167 of 2012;

Income Tax Tribunal Appeal No.229 of 2016;

and

Income Tax Tribunal Appeal No.230 of 2016

COMMON JUDGMENT: (*per the Hon'ble Sri Justice P.SAM KOSHY*)

Since the issue arising in the instant batch of appeals is one and the same, we proceed to decide the instant appeals by way of this common judgment.

2. I.T.T.A.No.167 of 2012 is filed by the appellant herein under Section 260-A of the Income Tax Act, 1961 assailing the order passed by the Income Tax Appellate Tribunal, Hyderabad "A" Bench in I.T.A.No.1458/Hyd/2011 for the Assessment Year 2008-09, dated 22.03.2012 (for short, 'the impugned order'); I.T.T.A.No.229 of 2016 is filed by the appellant under Section 260-A of the Income Tax Act, 1961 assailing the order passed by the Income Tax Appellate Tribunal, Hyderabad "A" Bench in I.T.A.No.1565/Hyd/2013 for the Assessment Year 2009-10, dated 29.01.2016 (for short, 'the impugned order'); and I.T.T.A.No.230 of 2016 is filed by the appellant under Section 260-A of the Income Tax Act, 1961 assailing the order passed by the Income Tax Appellate Tribunal, Hyderabad "A" Bench in

I.T.A.No.1566/Hyd/2013 for the Assessment Year 2009-10, dated 29.01.2016 (for short, 'the impugned order').

3. Heard Mr. S. Ravi, learned Senior Counsel appearing on behalf of Mr. C.H. Pushyam Kiran, learned counsel for the appellant, in all the appeals; and Mr. J.V. Prasad, learned Senior Standing Counsel for the Income Tax Department, for the sole respondent, in all the appeals.
4. For convenience, the facts in I.T.T.A.No.229 of 2016 are discussed hereunder.
5. The appellant herein is a real estate developer, (for short, 'the assessee'). The assessee is engaged in the business of construction of residential units / bungalows which are duplexes surrounded by a compound wall. Each residential unit consists of a portico and an open terrace. In the course of business, the assessee filed its return of income for the Assessment Year 2009-10 on 21.09.2009 admitting an income of Rs.3,16,46,847/- and claimed the entire amount as deduction under Section 80-IB (10) showing taxable income at Rs.NIL. The same was processed under Section 143(1) of the Income Tax Act, 1961 on 30.03.2011. After scrutiny, the respondent had issued a notice under Section 143(2) of the Act.

6. After assessment, the respondent determined the total income of the assessee at Rs.3,41,41,862/- by making disallowances on two grounds, viz., disallowance of deduction under Section 80-IB (10) for a sum of Rs.3,16,46,847/- and disallowance under Section 14A for a sum of Rs.24,95,015/-. However, *vide* the impugned order the Tribunal rejected the claim of the assessee pertaining to deduction under Section 80-IB of the Income Tax Act, 1961 (for short, 'the Act') amounting to Rs.3,16,46,847/- on the ground that the terrace which is open to sky and portico without walls can be included in computing the built-up area of each residential unit were exceeding 1,500 sq.ft. for the purposes of determining eligibility for deduction under Section 80-IB of the Act.
7. Assailing the same, the assessee preferred the instant appeal.
8. The question of law which has cropped up for consideration in the instant appeal is : *"Whether the terrace / balcony that is in the form of open to sky or portico / porch area without walls could be added while computing the built-up area for the purpose of determining the eligibility for deduction under Section 80-IB of the Income Tax Act, 1961?"*
9. As per Section 80-IB of the Act an assessee is entitled for deduction in respect of profit and gain from certain industrial

undertakings and other infrastructural undertakings. Such deductions shall not apply to housing projects carried out in accordance with the scheme framed by the Central Government or the State Government in the course of re-construction or re-development of existing buildings in areas declared to be slum area. Such benefits shall not be however be applicable to residential units with a built-up area of less than 1,500 sq.ft., in case if the residential units are outside the metropolitan city of Delhi or Bombay.

10. For proper understanding of the issue involved, it is also necessary to refer to the definition of the "width of area" as is envisaged in Clause (14)(a) of Section 80-IB of the Act, which for ready reference is being reproduced as under, viz., :

"(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 shared with other residential units."

11. A plain reading of above Clause (14)(a) of Section 80-IB would clearly indicate that the built-up area would include the entire inner measurement of a residential unit on the floor level added by thickness of a wall and includes projections and balconies. However, common areas shared with other residential units are excluded from

the same. This, in other words, would mean that to be a part of built-up area, the same must be part of the inner measurements of a residential unit and it would exclude the open terrace space and would also exclude a balcony which is shared by more than one residential owner. The area of dispute in the instant appeal so far as the appellants are concerned is the portico for parking of cars in the ground floor and also in the open terrace space on the first floor exclusively to be used by the owner himself and is not one which is to be shared by the others. The Tribunal, in the instant case, has gone into to decide the appeal of the assessee based upon an order passed by the Tribunal in the case of the appellants themselves for the previous Assessment Year 2007-08. However, the Tribunal seems to have ignored the definition of the built-up area as defined under Clause (14)(a) of Section 80-IB of the Act. What is necessary at this juncture to take note of the fact is that as per the definition of "built-up" area, it means only inner measurement of a residential unit. This, in other words, would mean that anything which is not within the inner measurement area of the residential unit would automatically get excluded from the computation of built-up area. What is further included in the definition of "built-up" area is that area of the inner measurement even if it be the projection from a room or a balcony, increased by thickness of a wall, then what is also

necessary to be construed is that there is a vast difference between a projection or a balcony with that of an open terrace. Likewise, there is also a clear definition between the area which otherwise falls within the inner measurement of a residential unit when it is compared to a portico meant for parking of cars by the residential unit, an area which is outside the inner measurement and an area which is totally exposed to the open and is not surrounded by the thickness of its wall. A portico can neither be brought within the ambit of a projection, nor can it be termed as "parking". In the same manner, an open terrace is also quite different than that of an otherwise closed balcony or projection and it was in this context that the law-makers while redefining the term built-up area had only included those areas which could be easily brought within the inner measurement of the residential unit and which included a balcony area of projection, and the term "open terrace" or an "open space" have all been deliberately left out from the said definition.

12. In this context, it would be relevant to take note of the decision rendered by a Division Bench of the High Court of Gujarat in the case of **Commissioner of Income Tax vs. Amaltas Associates**¹ wherein the Division Bench at paragraph Nos.3 and 8 had discussed the term "built-up" area in its proper perspective, as has been discussed in the

¹ 2016 SCC Online Guj 4685

preceding paragraph. For ready reference, paragraph Nos.3 and 8 of the said decision are extracted hereunder, viz.,

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

... ..

8. Section 80-IB(14) of the Act contains definitions for the purpose of the said section. Clause (a) thereof provides that built-up area means the inner measurements of the residential unit at the floor level, including the projections and balconies, as increased by the thickness of the walls, but does not include the common areas shared with other residential units. Thus, the built-up area would include inner measurements of a residential unit on the floor level added by thickness of a wall as also projections and balconies. This would however, exclude the common areas shared with other residential units. This exclusion clause of the common areas shared by other units cannot be applied in the reverse. In other words, the moment a certain area is not shared but is exclusively assigned for the use of a particular residential unit holder, would not mean that such area would automatically be included in the built-up area. In order to be part of the built-up area, the same must be part of the inner measurements of a residential unit or projection or balcony. The open terrace space on the top floor of a building would not satisfy this description. It will also not be covered in the expression balcony. Term "balcony" has been explained in Webster's Third International Dictionary (Unabridged) as unroofed platform

projecting from the wall of a building, enclosed by a parapet or railing, and usually resting on brackets or consoles. It is often used as synonyms to gallery, loggia, veranda, piazza, porch, portico, stoop, etc. In the context of residential or even commercial complexes, term "balcony" has gained a definite common parlance meaning. It usually consists of a projection from a building covered by a parapet or railing and may or may not but usually is covered from the top. This term "balcony" certainly would not include an open terrace adjoining a bedroom or any other constructed area of a penthouse. The terrace is not a projection."

13. From the given facts and circumstances if we take the literal meaning of "built-up" area as is defined Clause (14)(a) of Section 80-IB of the Act, a built-up area includes balcony and projection. If on the inclusion of balcony and projections, if any, and if the total built-up area exceeds 1,500 sq.ft., the assessee would not be entitled for deduction Section 80-IB of the Act. Another fact which needs to be appreciated is that perusal of the impugned order passed by the Assessing Officer so also by the Appellate authority and the Tribunal, the factual matrix of the case does not seem to have been discussed as to whether the area which the assessee intends to get excluded from the built-up area is one which can be brought within the purview of an inner measurement of a residential unit or not. Admittedly, in the case of the assessee, if it is only a projection or a balcony there can be no doubt that under the definition of "built-up" area, projections and balconies are also included and by no stretch of imagination those can be excluded from computation of built-up area.

14. Nonetheless, from the drawing of the construction which is available along with the Assessment Order which is marked as Annexure-I, the portion which is being sought to be excluded is an open terrace and a portico. Both "open terrace" and an "open portico" has nowhere been mentioned to be a part of the built-up area. In the said circumstances, relying upon the decision of the High Court of Gujarat in the case of **Amaltas Associates** (1 supra), a balcony certainly would not be excluded treating it as "open terrace". So also, an open terrace can never be termed to be a balcony or a projection. Likewise, an open portico in front of the residential unit which is otherwise on the outside part of the residential unit also cannot be brought within the purview of an inner measurement of a residential unit.

15. Now what is to be seen is whether excluding the open terrace and the area of the portico, and whether the built-up is exceeding 1,500 sq.ft. or not (if it still exceeds 1,500 sq.ft.), the assessee would not be entitled for the benefit as is otherwise enshrined under Section 80-IB of the Act. However, if the built-up area falls within the 1,500 sq.ft. excluding the open space in the portico area, the appellants are entitled for the benefit under Section 80-IB of the Act.

16. From the Annexure-I attached to the assessment order, which is a drawing of the construction area and which is sought to be excluded

is an open terrace and a portico, and for the reasons stated above, an open terrace and a portico cannot be brought within the ambit of the definition of an "built-up" area as is defined under Section 80-IB (14)(a) of the Act, the definition that was inserted vide amendment that took place w.e.f. 01.04.2005. Moreover, from the drawing itself, it is evidently clear that the two spaces i.e. the open terrace and also the portico is an area which is otherwise totally open and exposed. It could not be under any stretch of imagination be brought or considered to be an area within the inner measurement of a residential unit. Since it is an open space which cannot be brought within the purview of inner measurement of the residential unit, the said two areas i.e. the open terrace and the portico has to be excluded from computation of the built-up area entitling the appellant the benefit that which is enshrined under Section 80-IB of the Act.

17. For all the aforesaid reasons, we are in unanimity in the course of endorsing the view expressed by the Division Bench in the case of **Amaltas Associates** (1 supra). Therefore, the instant appeal filed by the assessee to the aforesaid extent stands allowed. The impugned order passed by the Tribunal as well as the impugned assessment order passed by the Appellate Authority deserve to be and are accordingly set aside. As a consequence, the I.T.T.A.No.167 of 2012 and I.T.T.A.No.230 of 2016 also stand allowed. No costs.

PSK, J & NNR, J

18. As a sequel, miscellaneous petitions, pending if any in these appeals, shall stand closed.

P.SAM KOSHY, J

NARSING RAO NANDIKONDA, J

Date: 21.05.2025

Note: L.R. Copy to be Marked.
(B/o) Ndr