TAXATION OF HOUSE PROPERTY AND HOUSING PROJECTS

Optimetz Advisory

No notional income under income from house property for property held as stock-in-trade [Section 23]

Section 23 provides for the manner of determination of annual value of property.

Section 23(5) has been inserted with effect from assessment year 2018-19 to provide that where the house property consisting of any building or land appurtenant thereto is held as stock-in-trade and the property or any part of the property is not let during the whole or any part of the previous year, the annual value of such property or part of the property, for the period up to one year from the end of the financial year in which the certificate of completion of construction of the property is obtained from the competent authority, shall be taken to be Nil.

Paraphrasing, the provision applies if the following conditions are fulfilled:

a) the property consists of building or land appurtenant thereto;

b) the property is held as stock-in-trade;

c) the property is not let during the whole or any part of the previous year;

Or

any part of the property is not let during the whole or any part of the previous year.

If the aforesaid conditions are fulfilled,

a) the annual value of the property or part of the property shall be taken to Nil;

b) such Nil value shall be applicable for the financial year in which the certificate of completion of construction of the property is obtained from the competent authority and for the subsequent financial year.

Suppose the completion certificate of a property constructed by a developer is obtained on 15th April, 2017. In this case, if the conditions of section 23(5) are satisfied, the annual value of the property shall be deemed to be Nil for financial years 2017-18 and 2018-19.

Analysis of provision

Note the following :

The provision applies to all assessees who are holding a particular property as stock-in trade and is not confined to builders or developers.

There is no definition of competent authority unlike section 80-IBA.

Courts are divided as to the taxability of a vacant let out flat in the hands of a developer who is holding the flat as stock-in-trade:

In *CIT* v. *Neha Builders (P.) Ltd*. [2007] 164 Taxman 342 (Guj.), it was held that if a property is used as stock-in-trade, then said property would become or partake character of stock and any income derived from stock would be 'income from business' and not 'income from property'. On the other hand in *CIT* v. *Sane & Doshi Enterprises* [2015] 58 taxmann.com 111 (Bom), the Court upheld the view of Tribunal that the income earned from unsold property of the assessee-developer constituted income from house property. Further, in *CIT* v. *Ansal Housing & Construction* [2016] 72 taxmann.com 254 (Delhi), it was held that where assessee was engaged in business of construction of house property and many flats were lying unsold, the provisions of sections 22 and 23 would be applicable and assessee would be liable to pay tax on annual letting value of unsold flats as income from house property [SLP granted against High Court's ruling in *Ansal Housing & Construction Ltd*. v. *CIT* [2016] 74 taxmann.com 245 (SC)].

The amendment proceeds on the basis that the judgments holding that income is to be regarded as Income from House Property have been correctly decided.

Further, there are three landmark judgments of the Supreme Court on taxability of house property income.

a) In *Sultan Brothers (P.) Ltd.* v. *CIT* [1964] 51 ITR 353 (SC), it was held that when a building and plant, machinery or furniture are inseparably let, the rent from building is taxable under the residuary head of income under section 12 of the 1922 Act (corresponding to section 56 of the 1961 Act), and that no part of income could be assessed under section 9 or under section 10 of 1922 Act (corresponding to section 22/28(*i*) of the 1961 Act).

b) In *Shambhu Investment (P.) Ltd.* v. *CIT* [2003] 129 Taxman 70 (SC), it was held that where from agreement between two parties, it was clear that primary object was to let out portion of said property with additional right of using furniture and fixtures and other common facilities for which rent was being charged from month to month the income derived from said property was income from property which should be assessed as such

c) In *Chennai Properties & Investments Ltd.* v. *CIT* [2015] 56 taxmann.com 456 (SC), it was held that where in terms of memorandum of association, the main object of assessee-company was to acquire properties and earn income by letting out same, the said income was to be brought to tax as business income and not as income from house property.

In view of the above, if the income is taxable under other heads, then, the benefit of section 23(5) cannot be availed of by the assessee even if, the property is not let out for part of the year.

The building may be a residential building or a commercial building or a factory building or a farm house.

The amendment applies *qua* each house property and hence, if an assessee has more than one house satisfying the conditions of section 23(5), then each of them would qualify for the exemption.

It is pertinent that section 23(5) is a computation and not a charging provision. Hence, if a property is not subject to the charge under section 22, then the question of the property qualifying for relief under section 23(5) does not arise. To illustrate, in the cases mentioned above, if the income is ultimately held as not taxable under income from house property, then the relief under section 23(5) will not be available. At the same time, the newly inserted section 71(3A) would not be applicable (*see* **para 4.2**).

Since the amendment is applicable from assessment year 2018-19, it will not apply in the preceding years and an assessee will be liable to tax on the basis of the pre-amendment law as interpreted by the Courts.

The relevant portion of section 23(5) is as follows:

"Where... the property or any part of the property is not let during the whole or any part of the previous year, the annual value of such property or part of the property,... shall be taken to be nil.

The term "such" suggests that it refers to a property mentioned in the immediately preceding portion of the section that is,

a) property not let during the whole or any part of the previous year.

b) any part of the property not let during the whole or any part of the previous year."

In other words, the section covers four situations:

a) property not let during the whole previous year;

b) property not let during any part of the previous year;

c) any part of the property not let during the whole of the previous year;

d) any part of the property not let during any part of the previous year.

On a literal reading, in all the four situations, the annual value of the property or the part of the property, as the case may be, should be taken as *Nil*. This is also supported by the Explanatory Memorandum which reads as follows:

"Considering the business exigencies in case of real estate developers, it is proposed to amend the said section so as to provide that where the house property consisting of any building or land appurtenant thereto is held as stock-in-trade and the property or any part of the property is not let during the whole or any part of the previous year, the annual value of such property or part of the property, for the period up to one year from the end of the financial year in which the certificate of completion of construction of the property is obtained from the competent authority, shall be taken to be Nil.‘‘

This does not appear to be intended: the legislature could not have intended to give exemption to rent actually received.

Suppose a developer has constructed a building with 8 units and all of them are not let out. In that situation, the term 'building' would mean the entire building consisting of 8 units. Suppose the developer is able to sell 2 units. In that situation, he would be left with 6 units. At that stage, it appears that each unit should be construed as a part of the building and each would be accordingly subject to section 23(5), if applicable. This construction may also be supported by section 27(*iii*), which provides that the person referred to therein shall be deemed to the owner of a "building or part thereof".

What happens to a property which is let out for a part of the year but satisfies the conditions of section 23(5)? Is such income taxable?

There are two views regarding the taxability of rental income received during a period where the annual value is *Nil* by virtue of section 23(5).

According to one view, the rental income is taxable under section 23(1). This is because

a) section 23(1) overrides section 23(5); and

b) section 23(5) does not use the expression "notwithstanding anything contained in (1)".

According to the other view, the rental income is not taxable at all. This view is supported by the following arguments:

a) The section states that where any property is not let during any part of the previous year, the annual value of such property shall be taken to be *Nil*. Thus, on a plain reading, the value of entire property has to be taken as Nil, notwithstanding the letting out income from the property for part of a year.

b) It is now well settled that when there is a conflict between a general and a special provision, the latter shall prevail [*CIT* v. *Shahzada Nand and Sons* [1966] 60 ITR 392 (SC); *UOI* v. *Indian Fisheries (P.) Ltd.* [1965] 57 ITR 331 (SC)]. Hence, section 23(5) being a special provision will prevail over the general provision in section 23(1).

c) In *Nalinikant Ambalal Mody* v. *CIT* [1966] 61 ITR 428 (SC), the Supreme Court observed as follows:

'The income has therefore to be brought under one of the heads in section 6 and can be charged to tax only if it is so chargeable under the computing section corresponding to that head. Income which comes under the fourth head, that is, professional income, can be brought to tax only if it can be so done under the rules of computation laid down in section 10. If it cannot be so brought to tax, it will escape taxation even if it be included in total income under section 4 … That all income included in total income is not chargeable to tax may be illustrated by referring to income from the source mentioned in the third head in section 6, namely, "Income from property". The corresponding computing section is section 9 which says that tax shall be payable on income under this head in respect of *bona fide* annual value of property. It is conceivable that income actually received from the property in a year may exceed the notional figure. The excess would certainly be liable to be included in total income under section 4. It however cannot be brought to tax as income under the head "other sources"'

It held that income from profession cannot be taxed under income from other sources. The said decision was followed in *CIT* v. *Smt. T. P. Sidhwa* [1981] 6 Taxman 91 (Bom.), where the Court observed as follows:

"In our view, the correct approach on the setting of the relevant provisions would be to first classify the item under consideration under appropriate head of income as mentioned in section 6. For this purpose, the character or the nature of income has to be determined. Further, the nature of income must be decided according to common notion of practical men because the Act does not provide the guidelines. In other words, the particular head of income mentioned in section 6 must be understood in the normally accepted sense. In the present case, it cannot be disputed for a moment that the income in question is income from property as commonly understood notwithstanding the fact that the assessee was not the owner of the property. Having thus ascertained the classification of the head of income as "Income from property" the rental income received by the assessee must fall under the third head in section 6. The next step is to see whether it can be brought to tax under the corresponding computing section, *viz.*, section 9. It is common ground that the income cannot be brought to tax under section 9 because the assessee was not the owner during the relevant period. But merely because it cannot be brought to tax under the computing section under the head "Income from property", it is impermissible to make the income chargeable to tax under section 12 under the residuary head of income, *viz.*, "Income from other sources". The character or the nature of income does not cease to be the income from property because of its non-chargeability under the computing section 9."

In view of the above, if the rental income is not taxable in view of section 23(5), it could be argued that it cannot be taxed under the head profits and gains of business or income from other sources.

After the initial period of completion of one year from the end of the financial year in which the certificate of completion of construction of property is obtained from the competent authority, the income will be computed under the normal provisions of income from house property.

The provision is not applicable if the property is let out for the entire year.

Section 23(5) is applicable if the property is not let for part of the year. The term 'part' is not defined. There are divergent views regarding the meaning of the term 'part' in other contexts:

In *Municipal Corporation of Delhi* v. *Children Book Trust*, AIR 1992 SC 1456, the Supreme Court had to interpret proviso to section 115(4) of Delhi Municipal Corporation Act, 1957 using the words "supported wholly or in part by voluntary contributions. It observed as follows:

"The word 'part' must mean an appreciable amount and not an insignificant one. The "part" in other words, must be substantial part. What is substantial would depend upon the facts and circumstances of each case.“

On the other hand, in *Senja Naicken* v. *Secretary of State*, (1926) ILR 308 (Mad.), it was held that the State's contribution of one anna out of Rs. 926-8-6 for acquiring land for a road, Rs. 926-7-6 having been contributed by the ryots, was sufficient compliance with section 6(1) of Land Acquisition Act, 1894 referring to payment wholly or "partly" out of public revenues. The view taken in the Madras High Court case was accepted by the Supreme Court in *Somavanti* v. *The State of Punjab*, AIR 1963 SC 151 on the principle of *stare decisis*. However, the Supreme Court also observed as follows:

"We would like to add that the view taken in Senja Naicken's case I.L.R. (1926) Mad. 308 has been followed by the various High Courts of India. On the basis of the correctness of that view the State Governments have been acquiring private properties all over the country by contributing only token amounts towards the cost of acquisition. Titles to many such properties would be unsettled if we were now to take the view that 'partly at public expense' means substantially at public expense. Therefore, on the principle of *stare decisis* the view taken in Senja Naicken's case I.L.R. (1926) Mad. 308 should not be disturbed. We would, however, guard ourselves against being understood to say that a token contribution by the State towards the cost of acquisition will be sufficient compliance with the law in each and every case. Whether such contribution meets the requirements of the law would depend upon the facts of every case. Indeed the fact that the State's contribution is nominal may well indicate, in particular circumstances that the action of the State was a colourable exercise of power. In our opinion 'part' does not necessarily mean a substantial part and that it will be open to the Court in every case which comes up before it to examine whether the contribution made by the state satisfies the requirement of the law."

Finally, in dictionaries, it is explained as follows:

a) In Random House Compact Unabridged Dictionary, 2nd Edn., page 1413 the relevant meaning of the word 'part' appears to be *"a portion or division of a whole that is separate or distinct; piece, fragment, fraction, or section"*.

b) In the Legal Glossary published by the Government of India (1992 Edition), 'part' has been explained as *"some of the equal or unequal portions into which something is or is regarded as divided; something less than a whole"*.

In the context of section 23(5), it is not clear whether the term 'part' may be any part of the previous year or substantial part of the previous year. If it is a part of the year, howsoever small it is, then on a literal reading, even if a property is not let out for 1 day during the previous year, it would still be covered by the amended section 23(5) and the annual value will be *Nil*, possibly resulting in escapement of taxation of rental income. This is obviously unintended.

Typically in the year in which the certificate of completion of construction is obtained, a property may not be let out immediately. It is possible that there is a small gap between the date of obtainment of certificate of completion and the date of commencement of first letting out. Even in that situation, on a literal interpretation, the property would be covered by section 23(5).

Since the section has been inserted with effect from assessment year 2018-19, whether the section applies in respect of properties where certificate of completion is obtained during the year 2016-17?
The exemption is available from the end of the financial year in which the certificate of completion is obtained from the competent authority. Section 23(5) does not state that the certificate of completion ought to be obtained after 31-3-2017. Hence, a view could be taken that even if the certificate of completion is obtained in the financial year 2016-17, the benefit of exemption under section 23(5) will be available for assessment year 2018-19. It could be argued that a condition which is not there in the statute cannot be read into it.

Since the annual value is *Nil*, the assessee will not get any deduction under section 24(*a*) in respect of 30% of the annual value.

Interest on amounts borrowed by a builder for construction of flats held as stock-in-trade which is vacant and whose annual value is to be taken as *Nil* under section 23(5) – whether allowable as a deduction?

In Rajasthan State Warehousing Corporation as summarized in *Maxopp Investment Ltd.* v. *CIT* [2011] 15 taxmann.com 390 (Delhi), the Supreme Court after, *inter alia*, considering its earlier decisions in *CIT* v. *Indian Bank Ltd.* [1965] 56 ITR 77 (SC) and *CIT* v. *Maharashtra Sugar Mills Ltd.* [1971] 82 ITR 452 (SC), laid down the following principles:

I. if income of an assessee is derived from various heads of income, he is entitled to claim deduction admissible under the respective head whether or not computation under each head results in taxable income;

II. if income of an assessee arises under any of the heads of income but from different items, *e.g.*, different house properties or different securities, etc., and income from one or more items alone is taxable whereas income from the other item is exempt under the Act, the entire permissible expenditure in earning the income from that head is deductible; and

III. in computing "profits and gains of business or profession" when an assessee is carrying on business in various ventures and some among them yield taxable income and the others do not, the question of allowability of the expenditure under section 37 of the Act will depend on:

a. fulfilment of requirements of that provision noted above; and

b. on the facts whether all the ventures carried on by him constituted one indivisible business or not; if they do, the entire expenditure will be a permissible deduction but if they do not, the principle of apportionment of the expenditure will apply because there will be no nexus between the expenditure attributable to the venture not forming an integral part of the business and the expenditure sought to be deducted as the business expenditure of the assessee.

Thus, in view of the aforesaid Supreme Court judgment, if the borrowing satisfies the conditions of section 36(1)(*iii*), the entire interest on such borrowing could be allowed as a deduction under the said section.

Even otherwise, so far as section 14A is concerned, it cannot apply to a case covered by section 23(5).

It is pertinent that section 14A disallows expenditure only if the expenditure is in relation to income which does not form part of the total income under the Act. A view could be taken that although the annual value is *nil*, the fact that the house property is chargeable under section 22 shows that it is forming part of total income. Merely because the computation is *nil*, it does not mean that section 14A is applicable. The case may be regarded as one where there is "no income" as opposed to a case where there is income but which income does not form part of the total income. Further, in case of general insurance companies, governed by section 44 read with First Schedule, it has been held that section 14A is not applicable in respect of their income from sale of investments which is not taxable under rule 5(*b*) of the First Schedule :

a. *Bajaj Allianz General Insurance Co. Ltd.* v. *Addl. CIT* [2010] 130 TTJ 398 (Pune - Trib.) (assessment year 2003-04);

b. *Oriental Insurance Co. Ltd.* v. *Asstt. CIT* [2010] 40 SOT 19 (Delhi - Trib.);

c. *General Insurance Corporation of India* v. *Asstt. CIT* ITA No. 3554/Mum/2011 dated 15/02/2012 cited in *ICICI Prudential Insurance Co. Ltd.* v. *Asstt. CIT* [2012] 28 taxmann.com 257 (Mum. - Trib.) (assessment year 2008-09);

d. *Jt. CIT* v. *Reliance General Insurance Co*. ITA No. 3085/Mum/2008 (assessment year 2005-06) *vide* order dated 26/02/2010.

Applying the same principle, it could be argued that section 14A is not applicable to such interest.

Finally, Courts have held that if two provisions are applicable to an assessee, he may choose one which leaves him with lighter burden [*CIT* v. *Bosotto Brothers Ltd.* [1940] 8 ITR 41 (Mad.)]. Applying the same principle, if interest if allowable under profits and business of profession of business, it need not be claimed under section 24.

However, if interest is to be claimed under section 24, then it can be allowed only subject to fulfilment of conditions of section 24.

If on account of claim of interest, there is any loss from such property referred to section 23(5), the loss shall be first set of against income, if any, from other properties. Further, if there is any loss under the head income from house property, the maximum amount that can be set off against other heads of income is Rs. 2 lakhs under the newly inserted section 71(3A) (*see* **para 4.2**).

Restriction on set-off of loss from House property [Section 71(3A)]

Section 71 relates to set-off of loss from one head against income from another.

Section 71(3A) has been inserted with effect from assessment year 2018-19 to provide that set-off of loss under the head "Income from house property" against any other head of income shall be restricted to Rs. 2 lakhs for any assessment year.

The Explanatory Memorandum to the provisions of the Finance Bill states that the amendment has been made to bring the Indian law "in line with the international best practices".

Scope of amendment

The amendment

a. covers all types of property whether residential or commercial;
b. applies to all assessees, including companies and other entities, whether having business income or not.
c. restricts the aggregate amount of set off against any other head of income to Rs. 2 lakhs, irrespective of the number of house properties.
d. covers pre-construction interest also allowed as a deduction under *Explanation* to section 24.
e. covers all housing loans whether taken before or on or after 1-4-2017.
f. applies to all house properties whether acquired before or on or after 1-4-2017.

It is not that the amendment applies only to second property owned by an assessee. On a plain reading, the amendment applies even if the house property is the only house property belonging to the assessee.

The amendment applies only in relation to set off of losses under the head income from house property against income from other heads. There is no change in section 70 dealing with set off of losses in relation to one house property against income from another house property.

Limits for set off of losses

The amount of loss under the head income from house property which can be set off in different situations against income from other heads of income is tabulated pre-amendment and post amendment

Sl.No	*Particulars*	*Maximum loss carried forward*	
1	***as capital asset***	*Pre-Amendment*	*Post-Amendment*
(a)	Self Occupied		
(i)	First house	Rs. 30,000 or Rs. 2 lakh [first/second proviso to section 24(*b*)]	Rs.2 lakh
(ii)	Second House	No limit [section 24]	Rs.2 lakh
(b)	Vacant [section 24(2)/(3)]	No limit [section 24(b)]	Rs.2 lakh
(c)	Let out	No limit [section 24]	Rs.2 lakh
2	**as stock-in-trade**	No limit [section 24]	Rs.2 lakh
	Let out	No limit [section 24]	Rs.2 lakh

Whether carried forward loss is impacted by the amendment?

If an assessee has carried forward loss under the head income from house property from assessment year 2017-18, is this loss after set off in assessment year 2018-19 to be restricted to a sum of Rs. 2 lakh? To illustrate, suppose an assessee has carried forward loss of 60 lakhs in assessment year 2017-18. If he sets off Rs. 10 lakhs against income from house property in assessment year 2018-19, will the loss carried forward to assessment year 2019-20 be Rs. 50 lakhs (Rs. 60 lakhs – Rs. 10 lakhs) or Rs. 2 lakhs? It appears that the carry forward of loss of Rs. 50 lakhs is not impacted on account of following reasons:

a) Section 71(3A) overrides section 71(1)/(2). It does not override section 71B. Now, a loss under the head income from house property is carried forward and set off under section 71B. Since there is no reference to section 71B and there is no amendment to section 71B, such loss is not affected.

b) Section 71(3A) applies *"where in respect of any assessment year the net result of the computation under the head income from house property is the loss"*.

Thus, the starting point for applicability of section 71(3A) is the computation under the head income from house property, that is, section 22 to section 24. Now, the carry forward loss under the head income from house property does not enter the computation under those sections. It is set off independently under section 71B. Even the return of income provides that the brought forward losses are to be set off after the computation of income under the head income from house property (*see* items 2 and 8 in form ITR-2). Hence, the brought forward losses are not covered by section 71(3A).

c) In *CIT* v. *Shah Sadiq & Sons* [1987] 31 Taxman 498 (SC), the Supreme Court observed as follows:

"The fact that the right created by the operation of section 24(2) is a vested right cannot, in our opinion, be disputed. See in this connection the observations of this Court in *Gujarat Electricity Board* v. *Shantilal R. Desai* [1969] 1 SCR 580 at p. 587 and *Isha Valimohamad* v. *Haji Gulam Mohamad & Haii Dada Trust* [1975] 1 SCR 720 at p. 723.

Under the Income-tax Act of 1922, the assessee was entitled to carry forward the losses of the speculation business and set off such losses against profits made from that business in future years. The right of carrying forward and set off accrued to the assessee under the 1922 Act. A right which had accrued and had become vested continued to be capable of being enforced notwithstanding the repeal of the statute under which that right accrued unless the repealing statute took away such right expressly. This is the effect of section 6."

Amendment to provisions of section 80-IBA to promote affordable housing [Section 80-IBA]

Section 80-IBA provides that subject to specified conditions, an assessee deriving profits and gains from developing and building certain housing projects is eligible to 100% deduction of such profits. The conditions specified, *inter-alia*, included the following prior to the amendment by the Finance Act, 2017:

a) The project had to be completed within a period of three years from the date of approval by the competent authority. [Section 80-IBA(2)(*b*)]

b) The built up area of each residential unit included in the housing project should not exceed the limit of

i. 30 sq. mtrs. in respect of projects located in Chennai, Delhi, Kolkata and Mumbai ("specified Metros") or within 25 kms from the municipal limits of these four cities;

ii. 60 sq. mtrs. in respect of other places.

c) The built-up area of the shops or other commercial establishments included in the housing project should not exceed 3% of the aggregate built-up area.

Following amendments are made in section 80-IBA with effect from assessment year 2018-19:

a) The condition of period of completion of project for claiming deduction under section 80-IBA has been increased from 3 years to 5 years from the date of approval by the competent authority.

b) The restriction of 30 sq. mtrs., on the size of residential units is not applicable to the place outside the municipal limits of the specified metros.

c) For the purpose of calculating the maximum limit up to which a project could have shops and other commercial establishments, the concept of "built up area" has been substituted by "carpet area" so that the carpet area of the shops and other commercial establishment included in the housing project should not exceed 3% of the aggregate carpet area.

d) For the purpose of limit of 30 sq. mtrs. and 60 sq. mtrs., on size of residential unit, the term "built up area" has been substituted by "carpet area" with the result that the carpet area of the residential unit included in the housing project should not exceed 30 sq. mtrs., where the project is located within the specified metros or 60 sq. mtrs. where the project is located in any other place.

e) The definition of 'built up area' in section 80-IBA(6)(*a*) has been substituted by the definition of 'carpet area' as follows;

*"Carpet area shall have the same meaning as assign to it in clause (*k*) of section 2 of the Real Estate (Regulation and Development) Act, 2016" ("RERA").*

Extension of completion period

It appears that the revised time limit of 5 years applies to projects commenced in the year 2016-17 also.

What happens to a project commenced during financial year 2016-17 which was not satisfying the pre-amendment conditions? If the project now satisfies the conditions, it appears that the assessee may, with a consent of the flat purchasers, if necessary, revise the plan and get a fresh approval from the competent authority. It could be argued that, in such a case, the revised project is the housing project within the meaning of section 80-IBA(2) and the profit of the project should qualify for deduction under the said section.

Projects in municipal limits of metros

The limit of 30 sq. mtrs. and 60 sq. mtrs. applies to a project "located within the cities of Chennai, etc.". For this purpose, it appears that the project should be regarded as located within the specified metros if it is within the municipal limits of these cities.

Even if a plot of land is just 500 meters away from municipal limits, it will qualify for the additional area per residential unit.

Carpet area

The term carpet area has been defined in RERA as follows:

'(*k*) "carpet area" means the net usable floor area of an apartment, excluding the area covered by the external walls, areas under services shafts, exclusive balcony or verandah area and exclusive open terrace area, but includes the area covered by the internal partition walls of the apartment.

Explanation.—For the purpose of this clause, the expression "exclusive balcony or verandah area" means the area of the balcony or verandah, as the case may be, which is appurtenant to the net usable floor area of an apartment, meant for the exclusive use of the allottee; and "exclusive open terrace area" means the area of open terrace which is appurtenant to the net usable floor area of an apartment, meant for the exclusive use of the allottee;'

From the definition, it is clear that an exclusive balcony, verandahs or terrace balcony has to be excluded in calculation of carpet area. Similarly, a shared balcony, verandah or terrace is also not included in the carpet area, since it could be argued that such shared area may not form "net usable floor area" of an apartment.

Balcony - The term "balcony" has been defined in dictionaries as follows:

a) "'Balcony' means a horizontal cantilever projection including a handrail or balustrade to be used as passage or sit out place of the building.“

(Advance Law Lexicon by P. Ramanatha Aiyar, 4th Edn., Vol. 1)

b) "A balustrade or railed elevated platform projecting from the wall of a building.“

(Random House Compact Unabridged Dictionary, 2nd Edn.)

c) "a platform that projects from the wall of a building and is enclosed by a parapet or railing“

d) "A platform that projects from the wall of a building and is surrounded by a railing, balustrade, or parapet.“

e) "A platform enclosed by a wall or balustrade on the outside of a building, with access from an upper-floor window or door.“

f) "A place where you can stand just outside an upper window. It sticks out from the wall of a building.“

Verandah - The term "verandah" has been defined in dictionaries as follows:

a) "a large, open porch, usually roofed and partly enclosed, as by a railing, often extending across the front and sides of a house; gallery.“

b) "a usually roofed open gallery or portico attached to the exterior of a building“

c) "A roofed platform along the outside of a house, level with the ground floor.“

d) "1. a covered area along the outside of a house, often enclosed by a low wall. 2. a roof over the area where people walk on a shopping street."

Terrace - The term "terrace" has been defined as follows:

a) "an open, often paved area connected to a house or an apartment house and serving as an outdoor living area; deck.“

b) "(*a*) a colonnaded porch or promenade. (*b*) a flat roof or open platform. (*c*) a relatively level paved or planted area adjoining a building.“

c) "(*a*) A porch or walkway bordered by colonnades. (*b*) A platform extending outdoors from a floor of a house or apartment building.“

d) "a flat area outside a house, restaurant, hotel etc., used for sitting and eating meals."

Compliance of limit of 30/60 sq. meters

What happens if the AO has a different opinion regarding compliance with the limit of 30 sq. mtrs./60 sq. mtrs.? Can he unilaterally decide to hold so and refuse the exemption?

It appears that he cannot do. For various other purposes in the Act, Courts have said that the Assessing Officer has limited powers *vis-à-vis* other statutory authorities. Thus,

a) In *Kawasaki Heavy Industries Ltd.* v. *Asstt. CIT* [2016] 67 taxmann.com 47/157 ITD 847 (Delhi - Trib.), the assessee had a liaison office in India. The AO in view of various clauses of power of attorney granted by assessee to person in charge of LO, concluded that said LO constituted assessee's PE in India. The Tribunal observed as follows:

"A plain reading of the clauses in the power of attorney takes us to a conclusion that the powers given therein are L.O. specific. The AO's conclusion that the power of attorney granted unfettered powers to its L.O. employee, to do all or any acts for and on behalf of the assessee, is incorrect. In our view the finding of the AO that the power of attorney is an open ended document, which is clearly outside the scope of initial permission granted by the RBI is also perverse. No doubt the AO can investigate, call for evidences and come to a conclusion where any income earning activity has been carried out by the L.O. so as to construe it as fixed P.E. but, in our view it is beyond the jurisdiction of the AO to adjudicate and conclude that the assessee has filed false declarations before the RBI. At best, he can bring his findings to the notice of the RBI which may consider the same in accordance with law. The RBI has not found any violation of conditions laid down by it while permitting the assessee to have an L.O. In such circumstances, no adverse inference can be drawn."

b) In *Tejas Networks Ltd.* v. *Dy. CIT* [2015] 60 taxmann.com 309 (Kar.), it was held that "where once Department of Scientific and Industrial Research (DSIR), had issued certificate approving assessee's claim of deduction under section 35(2AB), Assessing Officer could not have denied weighted deduction under section 35(2AB) in respect of scientific expenditure". The Court observed as follows:

"It would be apt to point at this juncture itself that in the event of any question would arise before the assessing officer under Section 35 as to whether amounts certified by the prescribed authority is eligible for being allowed as expenditure and to what extent and whether such activity constitutes or constituted, or any asset is or was being used for scientific research in that regard, then assessing officer has to request the Board to refer such question to the prescribed authority as provided under clause (*b*) of Section 35(3). In other words, the correctness or otherwise of the order passed by the prescribed authority is not examined by the assessing officer or by the Income Tax Authority and this exercise is outsourced by the Income Tax Department and same is being done by the prescribed authority namely, Department of Scientific and Industrial Research. This is the plain meaning which can be deciphered from the perusal of above said statutory provisions."

c) In *Pact Securities & Financial Services Ltd.* v. *Asstt. CIT* [2014] 50 taxmann.com 371 (Hyd. - Trib.), in the regular course of its money lending business, the assessee NBFC advanced loans to sister concerns. Assessee claimed bad debts on account of non-recovery of these loans. The Tribunal held that bad debts cannot be disallowed on ground of violation of RBI's guidelines. The Tribunal observed as follows:

"So far as the other allegation of the AO that the assessee has not adhered to the guidelines of the RBI, in our view, the AO is not the competent authority to decide that issue. It is for the RBI to take a decision whether the assessee has actually violated any guidelines or not.“

d) In *Dy. CIT* v. *Mastek Ltd*. [2012] 25 taxmann.com 133 (Guj.), it was held that where an assessee puts forth a claim of deduction under section 35(1), but AO is not inclined to accept such a claim, a question can be stated to have arisen and in such a situation AO cannot himself take a decision; he must seek opinion of prescribed authority whose decision would be final.

Similarly, it appears that a certificate by the competent authority which has approved the plans or by the competent authority under RERA (if details of carpet area, etc. filed with the competent authority) should be binding on the Assessing Officer unless the certificate is obtained by fraud or misrepresentation. Thus, if the Assessing Officer has any doubt about the area, the desirable practice would be that he may point out his doubt to the Competent Authority but not unilaterally take a decision on the issue. The decision of the Competent Authority on the exact carpet area should be regarded as final and binding on the Assessing Officer.