

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

INCOME TAX REFERENCE NO. 5 OF 2002

Parmanand Builders Pvt. Ltd. .. Applicant.
v/s.
Commissioner of Income-Tax Mumbai City-VI .. Respondent.

**WITH
WRIT PETITION NO.107 OF 1999**

Parmanand Builders Pvt. Ltd. & Anr. .. Petitioners.
v/s.
Union of India & Ors. .. Respondents.

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Mr. Narendra Jain, a/w. Ms. Shilpi Jain, i/b. N.S. Patel & Co., for the Applicant in ITR/5/2002 and for the Petitioner in WP/107/1999.

Mr. Ashok Kotangale, a/w. Mr. Arun Nagarjun, i/b. Padma Divakar, for Respondent Nos.2 and 3 in WP/107/1999.

Mr. Abhay Ahuja, for the Respondent in ITR/5/2002.

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**CORAM: M.S.SANKLECHA, &
S.C. GUPTE, JJ.**

RESERVED ON : 26 OCTOBER 2016.

PRONOUNCED ON : 15 NOVEMBER, 2016.

JUDGEMENT (Per S.C. Gupta,J.):

. This reference and connected writ petition raise an important question of law concerning the scope of an appeal before the Income Tax Appellate Tribunal ("Tribunal") and the Tribunal's powers to pass orders thereon. The reference and the petition relate to Assessment Years 1987-88 and 1989-89.

2. The assessee, who is the applicant and petitioner before us, was engaged in the business of construction and sale of buildings. During the period from 1980–81 to 1987–88, the assessee entered into various agreements for sale of flats in its project for an aggregate consideration of Rs.3,77,34,000/-. During a search of the premises of the assessee on 11 May 1987, the revenue noticed that 'on-money' was charged by the assessee from its purchasers over and above the consideration disclosed in the agreements for sale. This was on the basis of statements of various employees of the assessee recorded during the course of the search. Though these statements were subsequently retracted by the concerned employees, in the course of proceedings under Section 132 (5) of the Act, the assessee itself came forward with a disclosure of Rs.66 Lakhs 'on-money', which was offered for taxation in the two assessment years, namely, 1987–88 and 1988–89, at Rs.26 Lakhs and Rs.40 Lakhs, respectively. This offer was purportedly on the basis that the assessee was following the project completion method of accounting and the project was said to be substantially completed during these two assessment years.

3. The Assessing officer did not accept the project completion method proposed by the assessee, and held, firstly, that 'on-money' should be assessed in every year in which the agreements for sale were made by the assessee. Secondly, he also did not accept the quantum of on-money offered to taxation and held that on-money should be assessed at the rate of 25% of the aggregate of the agreement value plus on-money. He accordingly, made additions on account of 'on-money' to the income disclosed by the assessee in the assessment years 1981–82 to 1986–87 in the following manner:

Assessment Year	Agreement value of flats sold during the year	Addition of 'on-money' made by the A.O.
1981-82	8,12,000	2,71,000
1982-83	65,74,000	21,91,000
1983-84	27,86,000	9,28,000
1984-85	87,21,000	29,07,000
1985-86	81,64,000	27,21,000
1986-87	76,25,000	25,42,000

The Assessing Officer, however, did not make any addition on account of 'on-money' for the assessment years 1987-88 and 1988-89 in view of the fact that the assessee-company had itself disclosed 'on-money' of Rs.26 lakhs and 40 lakhs respectively for these two years. He simply chose to accept the assessee's case concerning the quantum of 'on-money' offered to taxation for these two years.

4. In the assessee's appeal, for the assessment years 1985-86 and 1988-89 the Commissioner of Income Tax (Appeals) ("CIT(A)") accepted the assessee's contention that the amount disclosed should be assessed on the project completion method, but for the assessment years 1986-87 and 1987-88 he did not agree with either the project completion method for assessment or the quantum of 'on-money' offered for taxation. For these two assessment years, the CIT(A) agreed with the Assessing Officer that the rate of 25% for estimating 'on-money' was fair.

5. Being aggrieved, both the assessee (for A. Y. 1986-87 and 1987-88) and the revenue (for A. Y. 1985-86 and 1988-89) filed appeals

before the Tribunal. During the course of hearing of the appeals, the assessee not only contested the accounting method applied by the authorities below, namely, the percentage completion method, and the quantum of 'on-money' assessed to tax, but also contended in the alternative that if the authorities were right in assessing the quantum of 'on-money' and the method of its accounting, the working of such 'on-money' for assessment years 1987-88 and 1988-89 ought to be at Rs.8,16,000/- and Rs.2,02,000/- respectively, and not at Rs.26,00,000/- and Rs.40,00,000/- as disclosed originally by the assessee. According to the assessee, the assessment at the latter mentioned amounts resulted into double addition of 'on-money'. The Tribunal allowed the revenue's appeals (rejecting the project completion method adopted by the CIT(A) for the assessment years 1985-86 and 1988-89) and dismissed the assessee's appeals (upholding both the quantum as well as the method of accounting the 'on - money' for assessment years 1986-87 and 1987-88). At the same time, whilst doing so, the Tribunal did not grant any relief to the assessee on his alternative plea requiring the assessment of 'on-money' for the assessment years 1987-88 and 1988-89 on the normative basis worked out for the project instead of actual 'on-money' disclosed by the assessee for the two particular years.

6. The assessee thereafter filed a miscellaneous application under Section 254 of the Act pointing out that there was an excess addition on account of 'on-money'. The basis of the assessee's plea was the very same ground urged in the appeals, namely, that if the Tribunal were not to accept the assessee's case that 'on-money' of Rs.26,00,000/- and Rs.40,00,000/- should be added in the last two years, i.e. Assessment

Years 1987–88 and 1988–89, on the basis of project completion method, the Tribunal could only take the normative ‘on–money’ (worked out for the whole project on percentage completion method) for addition in the last two years and not what was originally disclosed by the assessee. The contention was that since such disclosure of ‘on–money’ was not accepted by the Department and instead normative figures were worked out, such normative figures ought to be consistently applied for the last two years as well. The Tribunal rejected the assessee’s miscellaneous application. What weighed with the Tribunal for such rejection was that though the issue was raised by the assessee in the appeals, no ground was taken in the assessee’s appeal for Assessment Years 1987–88, and no cross objections were filed for Assessment Years 1988–89 in the revenue’s appeal. The Tribunal was also of the view that the assessee not having taken any objection regarding the income returned by it in its returns of income for the particular assessment years, i.e. Assessment Years 1987–88 and 1988–89, the Tribunal had no scope or necessity to substitute the ‘on–money’ disclosed by it in its returns.

7. The assessee has challenged the order passed by the Tribunal in the miscellaneous application by way of the writ petition herein. Simultaneously, on its application, the Tribunal has framed the following question of law for our consideration:

“Whether, on the facts and in the circumstances of the case and in law, the Tribunal was justified in not accepting the plea taken by the assessee during the course of hearing of the appeals before the Tribunal that for the assessment years 1987–88 and 1988–89 the Assessing Officer was not correct in assessing the amount of 'on-money' as disclosed by the assessee

in its returns of income instead of the sums of Rs.8,16,000/- and Rs.2,02,000/- as worked out by the Assessing Officer himself at page 5 of the assessment order for the assessment year 1987-88?”

8. The real question which falls for our consideration both in the reference and the petition is whether the Tribunal is duty-bound to grant relief to the assessee as claimed during the hearing on the basis of the case eventually found by it, even if there is no specific ground of appeal raised before it in support of such relief. The assessee's case before the Tribunal was that it had received a total 'on-money' of Rs.66,00,000/- in the whole project which it offered to tax in the last two assessment years, i.e. Assessment Years 1987-88 and 1988-89, on the basis of project completion method. The department did not accept this case. The authorities below did not accept either the quantum of on-money (i.e. Rs.66,00,000/-) or the method of accounting (i.e. project completion method) proposed by the assessee. Instead the authorities proceeded on a normative basis and concluded that the total on-money received in the project worked out to Rs.1,25,78,000/-. They spread this 'on - money' over all eight years on the basis of percentage completion method, the figures for Assessment Years 1987-88 and 1988-89 coming to Rs.8,16,000/- and Rs.2,02,000/- respectively. (The assessments for Assessment Years 1981-82 to Assessment Years 1986-87, were on the basis of the respective normative figures for these years, which were accepted by the assessee.) The question is, having done so, can the authorities disregard the normative figures (of Rs.8,16,000/- and Rs.2,02,000/-) for Assessment Years 1987-88 and 1988-89 and instead take Rs.66,00,000/- (i.e. Rs.26,00,000/- and Rs.40,00,000/- for Assessment Years 1987-88 and 1988-89) offered in the assessee's returns

for the particular assessment years.

9. The answer lies really in the question itself. Rs.66,00,000/- was the total 'on-money' offered by the assessee to tax. This was said to be the whole of the 'on-money' received in the project. The project itself was spread over eight assessment years, i.e. from Assessment Years 1981-82 to Assessment Years 1988-89. The assessee claimed that it followed the project completion method and accordingly offered this 'on-money' as part of its income in the last two years of the project, i.e. 1987-1988 and 1988-1989, when the project was said to be substantially completed. The revenue did not accept either that the total 'on-money' received was Rs.66,00,000/- or that the 'on-money' ought to be brought to tax in the year/s of completion of the project. The Assessing Officer assessed the total 'on-money' at a normative figure of 25 per cent of the agreement value received by the assessee plus on-money for each year in which such value was received by the assessee. Accordingly, he worked out the on-money by (a) dividing the agreement value for the flats sold during the particular year by 0.75 and (b) multiplying the dividend by 0.25. Based on this, the total on-money for the project assessed by the revenue was worked out to Rs.1,25,78,000/- and spread over eight years of the project in the following manner:

A/c Year	A.Y.	Total agreement value for the flats sold during the year	% on money @25%- 0.25(Col.1/0.75)	% on money 15% undisputed
1980	81-82	8,12,000	2,71,000	1,42,000
1981	82-83	65,74,000	21,91,000	11,50,000
1982	83-84	27,86,000	9,28,000	4,87,000

1983	84-85	87,21,000	29,07,000	15,25,000
1984	85-86	81,64,000	27,32,000	14,25,000
1985	86-87	76,25,000	25,42,000	13,34,000
1986	87-88	24,47,000	8,16,000	4,28,000
1987	88-89	6,05,000	2,02,000	2,06,000
		3,77,54,000	1,25,78,000	66,00,000

Obviously, this 'on-money' of Rs.1,25,78,000/- was **as against** the amount of Rs.66,00,000/- offered by the assessee itself and **not over and above** it. This is clear from the 'undisputed on-money' shown in each year in Column No. 5 of the table set out above. The column shows a total of Rs.66,00,000/-. Having rejected the assessee's case of a total quantum of Rs.66,00,000/- to be brought to tax in the last two years and instead worked out a normative figure of Rs.1,25,78,000/- for the whole length of the project, i.e. from Assessment Years 1981-82 to 1988-89 with corresponding figures for individual years (making up a total of Rs.1,25,78,000/-), the revenue cannot possibly hope to bring to tax the amount of Rs.66,00,000/- originally offered by the assessee in the last two years, i.e. Assessment Years 1987-88 and 1988-89. The normative figures for individual assessment years adding upto Rs.1,25,78,000/- must substitute Rs.66,00,000/- wholly. So substituted, the individual figures, according to the Tribunal itself, for Assessment Years 1987-88 and 1988-89 would work out Rs.8,16,000/- and Rs.2,02,000/-, respectively. If one were to add instead Rs.26,00,000/- and Rs.40,00,000/- the result would be that the total on-money would go up to Rs.1,81,60,000/- (i.e. Rs.1,25,78,000/- plus Rs.66,00,000/- less the total of Rs.8,16,000 and Rs.2,02,000). That would be an absurd result completely unintended by the department itself. The correct relief, if the

department were to assess the assessee in the manner proposed, was to add the 'on-money' figures of Rs.8,16,000/- and Rs.2,02,000/- in Assessment Years 1987-88 and 1988-89 instead of Rs.26,00,000 and Rs.40,00,000, respectively.

10. The only reasons why the Tribunal denied this relief to the assessee were that (a) the assessee had not taken such ground in its appeal and (b) the assessee had not objected to its own returns for Assessment Years 1987-88 and 1988-89, which *inter alia* disclosed on-money of Rs.26,00,000 and Rs.40,00,000. Both reasons are clearly non-germane. The assessee was contesting the normative figure of Rs.1,25,78,000/- as also its spread over eight assessment years. It was not willing to give up that case. There was no occasion for it to even contest its own returns for Assessment Years 1987-88 and 1988-89 in such a case. These returns were consistent with its case in the appeals, namely, that the amount of Rs.66,00,000/- is correctly brought to tax in Assessment Years 1987-88 and 1988-89 on the basis of project completion method. The tribunal, however, rejected that case. The very consequence of rejecting that case is addition of 'on-money' of Rs.8,16,000 and Rs.2,02,000 in Assessment Years 1987-88 and 1988-89. The Tribunal has clearly erred in law by not making such addition, and instead proceeding on the basis of 'on-money' of Rs.66,00,000/- offered in the returns for Assessment Years 1987-88 and 1988-89.

11. When an appeal from an assessment is brought before the Tribunal under Section 254(1) of the Act, all questions arising therefrom, including questions which are incidental or consequential to such

assessment, are open to be agitated before the Tribunal. The Tribunal is empowered to “*pass such orders thereon as it thinks fit*”. It is one thing to say that the Tribunal must confine itself to the subject matter of the appeal and not go beyond it, but quite another to say that whilst deciding such subject matter it cannot consider questions which are incidental to, or would follow as a consequence of, its determination. If the Tribunal rejects the assessee's case on a particular ground, and if such ground affords a certain relief to the assessee without his having to aver any new facts, such relief cannot be denied on the footing that the assessee never claimed it. If the assessee did not claim it, the Tribunal must grant it *suo motu*, as a matter of law, if the relief does follow as a legal incident.

12. Our Court in **CIBA of India Ltd. Vs. CIT**¹ was concerned with an assessee, a pharma company, which had set up a new plant for manufacturing additional pharmaceutical goods. The assessee claimed this plant to be part of its existing business and on that footing claimed deduction of certain travelling expenses in connection with this plant as revenue expenditure. The assessing officer disallowed that claim on the ground that the expenditure was not incurred wholly and exclusively for its existing business. The CIT(A) allowed a part of the expenditure as revenue expenditure. The tribunal, however, affirmed the order of the assessing officer and held the entire expenditure to be capital expenditure. In a reference from that order, our Court upheld the tribunal's order. Having done so, it considered the further question, namely, whether the amount of expenditure (disallowed as revenue expenditure) should have been added to the “actual cost” of the plant and benefits allowed accordingly. The assessee's plea was that if the expenditure was held to be

1 (1993) 202 ITR 0001

capital expenditure, suitable directions be given to the lower authorities to include the same in the cost of the asset and to allow the assessee the benefit of development rebate and depreciation accordingly. This alternative submission made before the tribunal was turned down by it on the ground that it amounted to raising of an additional ground of appeal. Our Court did not countenance this approach and held that the alternative submission did not amount to raising of an additional ground of appeal but the submission was a different facet of the same controversy; it was merely consequential to the finding of the tribunal against the assessee. The submission would not arise in case the tribunal accepts the assessee's contention for deduction of the amount as revenue expenditure; but where the tribunal turns down the assessee's claim and holds it to be capital expenditure, *"it is the duty of the Tribunal, even without an alternative submission, to pass necessary consequential orders, suo motu, to give further directions in the matter as the situation may warrant"*. This is what our Court observed in this connection, quoting the decision of the Supreme Court in **CIT Vs. Mahalakshmi Textile Mills Ltd.**²:

"In this connection, it may be observed that the powers of the Tribunal are expressed in the widest possible terms as is evident from the use of the expression "pass such orders thereon as it thinks fit" in s. 254(1) of the Act. Thus, there is no restriction in regard to the nature of orders that the Tribunal can pass. The only restriction on the powers of the Tribunal can be inferred from the expression "thereon" which indicates that while passing orders it should confine itself to the subject-matter of the appeal and should not go beyond it. That is the only limitation on the power of the Tribunal. No other limitation is there. This view of ours gets full support from the decision of the Supreme Court in CIT vs. Lakshmi Textile Mills Ltd. (1967) 66 ITR 710 (SC), where dealing with the scope of the powers of the Tribunal under s. 33(4) of the Indian IT Act, 1922 [corresponding to s. 254(1) of

2 (1967) 66 ITR 0710

the present Act] it was held :

“... There is nothing in the IT Act which restricts the Tribunal to the determination of questions raised before the Departmental authorities. All questions whether of law or of fact which relate to the assessment of the assessee may be raised before the Tribunal: If, for reasons recorded by the Departmental authorities in rejecting a contention raised by the assessee, grant of relief to him on another ground is justified, it would be open to the Departmental authorities and the Tribunal, and indeed they would be under a duty, to grant that relief. The right of the assessee to relief is not restricted to the plea raised by him *Emphasis, italicised in print, supplied*)

In that view of the matter, we are of the clear opinion, that the Tribunal was not justified in refusing to consider the alternative submission of the assessee that, in the event the expenditure in question was held by it to be capital in nature, suitable direction should be given for allowing appropriate development rebate and depreciation as admissible under the law on such amount on the appeal that it was an additional ground raised by the assessee. In our opinion, it was the duty of the Tribunal even in the absence of alternate argument of the assessee to make such a direction suo motu. We, therefore, answer the second question in the negative and in favour of the assessee.”

13. In the foregoing premises, we are of the view that the Tribunal was bound in law to consider the alternative plea raised by the assessee at the hearing of the appeals. The question now is, what relief should be granted on the applications before us. The miscellaneous application taken out before the Tribunal by the assessee clearly brings out an error apparent on record insofar as the original order passed by the Tribunal is concerned. It is particularly so since both the decisions in **CIBA India** (supra) and **Mahalakshmi Textile Mills** (supra) were already available when the Tribunal considered the matter. We are, therefore, of the view that it would be more appropriate to allow the

miscellaneous application and direct the Tribunal to consider the alternative plea of the assessee in the light of what we have stated above. Since the final order of the Tribunal on the appeal can only be crystallized after the plea is so considered by the Tribunal, the Reference may have to be returned unanswered.

14. The writ petition is, accordingly, allowed and the impugned order dated 29 June 1998 passed by the Tribunal on the miscellaneous application to the extent it relates to assessment years 1987-88 and 1988-89, is set aside and the miscellaneous application is allowed by directing the Tribunal to consider the alternative plea raised by the assessee in the light of what we have observed above. The Tribunal shall now decide the appeal on merits. The reference is returned unanswered.

15. No order as to costs.

(S.C. GUPTE,J.)

(M.S.SANKLECHA,J.)