

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

WRIT PETITION NO.1199 OF 2008

Messers D.K. Enterprises
having its office at Mangrol Mansion,
Gunbow Street, Fort,
Mumbai – 400 001.

.... Petitioner

- Versus -

1. Income-tax Appellate Tribunal
Mumbai Bench, Mumbai through
Registrar having its office at
Old CGO Building, 101,
Maharshi Karve Road,
Mumbai – 400 020.

2. The Assistant Commissioner of
Income-tax 12(1),
Room No.117, 1st Floor,
Aayakar Bhavan, M.K. Road,
Mumbai – 400 020.

3. The Union of India,
through the Secretary, Ministry
of Finance, Government of India,
North Block, New Delhi – 110 001.

.... Respondents

WITH
INCOME TAX APPEAL NO.144 OF 2002

WITH
INCOME TAX APPEAL NO.145 OF 2002

WITH
INCOME TAX APPEAL NO.220 OF 2002

WITH
INCOME TAX APPEAL NO.227 OF 2002

WITH
INCOME TAX APPEAL NO.228 OF 2002

M/s D.K. Enterprise
Mangrol Mansion, Fort,
Mumbai.

.... Appellant

- Versus -

1. The Dy. Commissioner of Income Tax,
Central Circle No.15,
CGO Annex, Mumbai.

2. The Commissioner of Income Tax,
Central Circle 15,
CGO Annex, Mumbai.

.... Respondents

Mr. J.D. Mistri, Senior Advocate, with Mr. Atul
K. Jasani for the Petitioner/Appellant.
Mr. A.R. Malhotra with Mr. N.A. Kazi for the
Respondents in all matters.

**CORAM: S.C. DHARMADHIKARI &
B.P. COLABAWALLA, JJ.**

DATE : OCTOBER 03, 2018

ORAL JUDGMENT (Per Shri S.C. DHARMADHIKARI, J.):

1. This writ petition under Article 226 of the Constitution of India challenges an order, dated 28-9-2007, passed by the Income Tax Appellate Tribunal (“**ITAT/Tribunal**”

for short), Bench at Mumbai, in Miscellaneous Application Nos.316, 317, 318, 319 & 320/Mum/2007, for Assessment Years 1989-90, 1990-91, 1991-92, 1992-93 & 1993-94.

2. The miscellaneous applications filed on 3-12-2003 by the present petitioner prayed for the order of the ITAT, initially passed and a consolidated one, to be corrected.

3. What we have found from a reading of the order initially passed by the ITAT is that the appeals of the Revenue and that of the assessee were decided by a common order and both were partly allowed. When they were partly allowed by a common order, but the assessee being concerned with certain issues and arising out of the appeals for particular assessment years, filed a miscellaneous application invoking Section 254(2) of the Income Tax Act, 1961 (**“the IT Act”** for short).

4. A copy of the miscellaneous application is at Exhibit-V (page 357) to the petition. In that application, it is stated by M/s. D.K. Enterprise, the petitioner before us, that the appeals were disposed of by a common order of the Tribunal on

29-6-2001. There are certain mistakes in this order which need rectification.

5. The application said that the core or major issue was an addition on account of “**on-money**”.

6. It is stated that there was a search and seizure action under Section 132 of the IT Act on 9-3-1992 and 26-10-1994 during which certain incriminating papers were seized. During the search and seizure, statement of Shri D.K. Shah (since deceased), the main partner of the applicant/petitioner, was recorded under Section 132(4) of the IT Act wherein he had declared that Rs.30,00,000/- was received as on-money over and above the agreement value of the units booked in their project at Dadar Manish Market.

7. Due to the search and seizure actions, the assessments were reopened either under Section 147 or under Section 263 of the IT Act. Particularly, assessments for the Assessment Years 1989-90 and 1993-94 were reopened under Section 147, and assessment for the Assessment Year 1990-91

was reopened under Section 263 of the IT Act.

8. It was alleged by the petitioner/applicant that in the initial order of the Tribunal, which is a common order, in para No.12, internal page 11, the Tribunal came to the conclusion that 40% of the on-money be taken as income after observing that the assessee had disclosed 21% of gross receipts in the Assessment Year 1992-93 and therefore it can be reasonably estimated that at least double the percentage, as disclosed by the assessee, constituted the element of profit in the on-money.

9. The petitioner/applicant alleged that this estimate was without any basis. It is stated that the issue as regards the estimation of profit at 40% of on-money was never raised and therefore, it is an apparent mistake. At the most and without prejudice, double the percentage of profit from the project at Dadar Manish Market would be 4.86%. Since the total profit declared from the project comes to Rs.39,52,784/- (2.43%), which after adding the declared amount of Rs.30,00,000/- comes to Rs.69,52,784/-, percentage-wise it comes to 4.27%. It

is stated that from the assessment order for the Assessment Year 1998-99, it was observed that the profit from the project was finally arrived at Rs.39,52,784/-, but the Assessing Officer assessed the profit from the project at Rs.64,24,841/- just because it was so offered. If these facts and figures are taken into account, the profit from the said project comes to 3.95%, that too after considering the disclosure of Rs.30,00,000/- and thus the estimate of on-money would workout double of 3.95% to 7.90% and not 40%, as held.

10. This is how the mistakes were pointed out, ground-wise and appeal-wise.

11. It was, therefore, prayed that the mistakes be corrected.

12. The important prayer in this application is that the initial order be recalled and the appeals be re-heard.

13. The miscellaneous application was placed before the Tribunal and it passed an order on the same, partly allowing it.

That order was passed on 12-7-2002.

14. It appears that the Tribunal also had before it other miscellaneous applications but the petitioner was of the view that the Tribunal's discussion in the order dated 12-7-2002 on one miscellaneous application, revolves around the on-money issue and that the entire on-money cannot be added to income. However, the first ground of appeal raised by the petitioner as regards the quantum of on-money worked out by the Assessing Officer had remained to be considered. Hence, again miscellaneous applications were filed by the petitioner/applicant for the Assessment Years 1989-90 to 1993-94, pointing out in the application for the Assessment Year 1989-90 the first ground of appeal had remained to be considered and that application, so also the other applications were taken on record. They were styled as miscellaneous applications dated 3-11-2003, copies of which are at Exhibits "X-1" to "X-5" (pages 371-380).

15. Since they were not being heard for a considerable period, the petitioner/applicant followed up the matter. The

petitioner was informed by the Registry of the Tribunal under its covering letter about the rejection of the applications in chamber. That letter is dated 12-10-2004. Together with that, copy of the order dated 5-5-2004 (Exhibit-Y, page 381) was forwarded to the petitioner.

16. The Tribunal's order of 5-5-2004 was challenged by filing a writ petition in this Court being O.S. Writ Petition No.1259 of 2005. This Court passed an order thereon, dated 24-10-2005, setting aside the Tribunal's order dated 5-5-2004. It is stated that the petitioner filed an appeal before this Court in respect of a question of law arising out of the Tribunal's order dated 29-6-2001, but as the ground of appeal regarding the quantum of on-money was not decided, no question in that behalf was raised. The Tribunal by its order dated 28-9-2007 dismissed the miscellaneous applications and while dismissing them, it held that the initial order, as also the order passed by the Tribunal and impugned in the appeals, decided the matter properly. It is not necessary to allow these miscellaneous applications.

17. The Tribunal noted the rival contentions and held that the on-money issue has been discussed. In para 9 of the initial order that came to be discussed and there is a reference thereto to the search and seizures and the statement of Shri D.K. Shah. In that statement, Shri Shah admitted to having collected Rs.30,00,000/- on-money over and above the agreement value. A reference was made to the answer in relation to one question and that is also extracted in the initial order. In para 10 of the initial order, the contention of the then Advocate for the assessee has been recorded and he had urged that addition of the entire on-money cannot be accepted. This means that the assessee had accepted the position that indeed on-money was received. There was no serious issue with regard to non-receipt of on-money. It is only the extent to which the money could be brought to tax, was an issue before the Tribunal. That is how the Tribunal refused to accept the argument of the assessee that there was any mistake apparent from the record in the initial order. It has, therefore, dismissed the miscellaneous applications by order dated 28-9-2007.

18. Aggrieved and dissatisfied with such an order, the present writ petition has been filed.

19. It has been argued before us by Mr. Mistri, learned Senior Counsel, that if the initial as also the subsequent orders are perused, it would be evident that the ground was indeed urged. The assessee never accepted the position that on-money was received. The assessee never, therefore, gave any concession nor could the argument be construed as an acceptance of the receipt of on-money. The Tribunal could not have held that the arguments focused only on the extent of the on-money received and to be offered to tax. In fact, if the impugned order of the Tribunal is perused, it would be evident that this is not the position.

20. Mr. Mistri has taken us through the initial order of the Tribunal, copy of which is at Exhibit-U, from page 333 of the paper-book. Mr. Mistri has taken us through the grounds and he would submit that ground Nos.2, 3, 4 and 5 clearly reflects the above position. Ground No.6 can be said to be a repetition of

ground No.4. Then, our attention is invited to paras 6, 7, 8 and 9 of the initial order of the Tribunal to submit that the issue was in respect of on-money received by the assessee. If indeed the arguments revolved around the extent to which the on-money could be brought to tax, then, the Tribunal should have clearly held that there is a clear admission of the assessee that such on-money was received. If the Tribunal was of that view and that is how it relied upon the statement of Shri D.K. Shah, then, there was no occasion to observe, in para 13 of the initial order, that in Income Tax Appeal No.1708/Bom/95, the assessee had taken an additional ground of appeal in regard to the addition in respect of on-money which had not been originally taken due to oversight. If that ground has been admitted as one of the main ground of appeal, then, the finding in para 12 is clearly inconsistent with what the Tribunal held in para 13 of the initial order. Thus, there was indeed a ground raised before the Tribunal. There is an inconsistency in the findings and conclusions. Our attention is, therefore, invited to para 13 of the Tribunal's order in that behalf. It is submitted by Mr. Mistri that

it is erroneous to hold that the ground was not raised at all. The finding is rendered on alternate submissions and not on the main plea or ground. Mr. Mistri would submit that there is a distinction and which is accepted and recognised in law that, an argument which is canvassed by the assessee through its representative as a main plea remains intact and merely because some alternate or without prejudice arguments are raised, does not mean that the main plea or the main argument is given up. If it is to be held that such a main plea or main argument is given up, then that must be expressly observed. Rejection of the alternate argument by an alleged consideration thereof cannot be construed as displacing or rejecting the main plea or argument. Even on the alternate arguments, there are inconsistent findings, according to Mr. Mistri. For these reasons, he would submit that the writ petition be allowed. Mr. Mistri has taken us through the grounds in this writ petition and to urge that the Tribunal has completely lost sight of the ambit and scope of the powers conferred in it by Section 254(1) and subsection (2) of the said section. Thus, the Tribunal may rectify the

mistake apparent from the record either *suo moto* or on an application in that behalf. Mr. Mistri submits that throughout the endeavour of the petitioner was to point out to the Tribunal that the first ground of appeal remained to be considered. This non-consideration of a ground of appeal is a mistake apparent on record. For these reasons, Mr. Mistri would submit that the writ petition be allowed.

21. Pertinently and without prejudice to the above arguments, Mr. Mistri fairly tenders before us some charts. He says that these charts would demonstrate the additions. He relies upon a chart which is, according to him, very crucial. That is chart 2. Mr. Mistri submits that this shows the actual rate at which the Income Tax Department itself was able to auction the appellant/petitioner's shops in the Financial Year 2001-02 for recovery of tax arrears and a comparison thereof with the rates adopted by the Assessing Officer in the assessment of the petitioner/appellant for the Assessment Years 1989-90 to 1993-94.

22. Mr. Mistri would submit that since he is arguing not only the writ petition but pointing out even the grounds raised in the memo of appeals and which have been held to be substantial questions of law on which the accompanying income tax appeals have been admitted, then, all the more, his request is that the initial order must be set aside and the appeals be directed to be re-heard.

23. Further, without prejudice and strictly in the alternative, Mr. Mistri would submit that the petitioner would like to put an end or a quietus to these matters. These are fairly old matters. Even the records may be scattered and it would be difficult, if not impossible, to retrieve and collate them. Even if the petition succeeds and the appeals before the Tribunal are revived, still, both sides would find it difficult to trace out the old records and make appropriate submissions. The petitioner is not averse to buying peace and, therefore, relying upon the charts Mr. Mistri submits that it is possible to leave the matter to this Court and after inviting our attention to the total amount received from the auction by the Revenue and stated to be

Rs.7,04,83,875/-, Mr. Mistri would submit that the assumption by the Tribunal, in the initial order, is highly excessive, exorbitant and arbitrary. Now, on the own showing, the Assessment Officer's conclusions for the Assessment Year 1992-93 and the estimate of on-money should be Rs.3,000/- per sq. ft. for the ground floor shops, Rs.1,500/- per sq. ft. for the first floor shops and Rs.450/- for residential flats, cannot be sustained. More so, in the light of the further developments.

24. On the other hand, Mr. Malhotra, appearing on behalf of the Revenue, would submit that the petitioner is trying to delay the recovery of taxes. The writ petition is nothing but an attempt to postpone the payment of taxes. These taxes are admittedly due and payable. In the business that the assessee is, namely of construction and development, the subject-project was undertaken as a part thereof. This was of construction of a commercial market. The shops and units therein have not been sold by the assessee strictly in accordance with the terms and conditions of the agreement for sale. Particularly, the price charged in the agreement and the sum actually received by the

assessee would reflect that huge amounts over and above the agreement sum have been collected. These have been termed as on-money. On facts, there has been no dispute ever raised and with regard to the admission in the statement of Shri D.K. Shah. If relying upon that statement, the Counsel or representative of the assessee thought it fit to raise before the Tribunal only some grounds and not all, then, now with the change of Advocate or representative, the assessee cannot be permitted to have a second inning. In other words, what has been admittedly voluntarily, intentionally and deliberately given up, should not be now permitted to be re-opened. Mr. Malhotra would submit that a representative or Advocate takes a conscious decision. He has a freedom and latitude which he enjoys as a professional. A client like the assessee may insist on raising all the grounds of memo of appeal but depending upon the position in law and the ambit and scope of appellate powers, such representative or Advocate exercise their discretion. That is strictly as a professional. They know best what is in the interest of their client and how the interest can be protected. Hence, they project

and on most occasions like this an alternate plea or ground, though they may only mention in the passing the main plea or main ground. It is really the alternate ground which they are pressing and therefore an inference can be drawn by the adjudicating authority and like the ITAT in this case that the main plea or ground is not advisedly raised. In such circumstances, as an afterthought, if such writ petitions are entertained, that would send a wrong signal and message. The assessee would go on taking chances and by change of Advocate and authorised representative re-agitate concluded issues. The factual matters then would be reopened and to the detriment of the public revenue. We must, therefore, not uphold the arguments of Mr. Mistri and dismiss this writ petition.

25. Mr. Malhotra submits that for the Assessment Year 1993-94, the assessee has advisedly not brought any appeal to this Court under Section 260A of the IT Act. In that order, the Tribunal has upheld 40% of the addition. That is now final. The on-money calculation cannot be now reduced and below 40%. On merits, the Department has accepted the work-in-progress

method. The assessee suddenly went and changed the method to an estimation of profits at a percentage of the gross receipts. This is not a *bona fide* act at all. In that regard, our attention is invited to page 210 to 212 of the paper-book and it is submitted that the findings in the order of the First Appellate Authority are eloquent enough. Mr. Malhotra highlights page 211 of the paper-book, which is para 2.3 in the order of the First Appellate Authority. It is in these circumstances, according to Mr. Malhotra, that the findings of the Tribunal and on this change of method, which is now a third one, namely, project completion method, should not be accepted. No findings of fact can be set aside unless they are demonstrably perverse or vitiated by an error of law apparent on the face of the record. Hence, according to Mr. Malhotra, we must dismiss the writ petition.

26. For properly appreciating these contentions, we must go to the initial order of the Tribunal. The initial order was rendered in eight appeals for Assessment Years 1989-90 to 1993-94. The title of the order itself reflects the income tax appeal numbers assessment year-wise (see page 333 of the paper-book).

27. From page 334 of the paper-book, it is evident that in the initial order the Tribunal expressed its opinion that eight appeals by the assessee and two appeals of the Revenue can be disposed of by a common order. All of them are directed against the orders of the First Appellate Authority. Therefore, the common order. In para 2, the Tribunal records that the assessee is a partnership firm. It had undertaken the project, namely, of construction of Dadar Manish Market at Dadar (West), Mumbai. That started in the year 1985 and continued upto the Financial Year 1998-99. The assessee was following the project completion method basis for income tax purposes, which basis was not accepted by the Department and it taxed the income every year on the basis of 15% of the work-in-progress as per the assessee's account. In this backdrop, the first ground of appeal which is common to income tax appeals for the Assessment Years 1989-90 to 1992-93 is whether this approach of the Revenue is erroneous. The ground was, that the Revenue wrongly rejected the assessee's method of accounting which was project completion method basis. In para 3, the argument of the

assessee on this ground has been noted. That argument continues in para 4 as well. In para 5, the argument of the Departmental representative is noted. In para 6, the Tribunal records its finding. It says that the assessee itself switched over from its original stand in regard to the project completion method of accounting to the estimation of profits at a percentage of the gross receipts and therefore did not consistently follow the same method of accounting. There was a Tribunal's order in the field which the Assessing Officer has distinguished on the ground that it was rendered when no construction work had started and there was nothing received as no flats were in fact sold. However, the situation changed from the Assessment Year 1989-90. The assessee had shown more than Rs.1.7 crores as receipts from the prospective buyers and there was a pooja performed in the beginning of the accounting year relevant to the Assessment Year 1989-90. It is in these circumstances and by applying the legal principles, the Tribunal, in para 7, finally opined that the profits of each year should be computed and if the method of accounting adopted by the

assessee does not serve this objective, then, that method of accounting should be rejected by invoking Section 145 of the IT Act. The Assessing Officer has rightly rejected the method of accounting of the assessee and computed the profits at 15% of the work-in-progress for the respective assessment years. There is no quarrel or dispute raised with regard to this ground in the writ petition.

28. Then, in para 8 the ground raised in respect of method of accounting and common to income tax appeals, which are referable to Assessment Years 1989-90, 1992-93, 1990-91, 1991-92 and 1993-94, is therefore rejected.

29. Then comes the core issue and that is in respect of the on-money received by the assessee.

30. Prior thereto and for completion of the narration, we must refer to a relevant document, namely, letter of 30-12-1999. A copy of this letter is at page 332 of the paper-book.

31. This is a letter of the assessee's partner Shri D.K.

Shah, addressed to the Hon'ble Members of the ITAT. This letter says that in Income Tax Appeal No.1708/B/1995, for the Assessment Year 1991-92, there were additional grounds available which have not been raised due to oversight. The additional grounds are that, the Commissioner of Income Tax (Appeals) has erred in confirming the addition made by the Assessing Officer in respect of the on-money. The addition made in respect of the on-money is exorbitant, excessive and not in conformity with the factual position and the Commissioner of Income Tax (Appeals) ought to have considered the facts and circumstances and deleted/reduced the additions made on this count. The other ground was, the Assessing Officer be directed to work out the on-money collection after considering the various facts and circumstances. Then, there is another ground with regard to reduction of project expenses incurred in cash from the on-money in arriving at the assessee's total income. These four grounds have been indeed noted and what we find is that there is a reference made to it in para 13 of the initial order of the Tribunal. That para 13 reads as under:-

“13. In ITA No.1708/Bom/95, the assessee has taken an additional ground of appeal in regard to the addition in respect of on-money which had not originally been taken due to oversight. We admit this ground as it was one of the main subject matter of appeal. As we have decided this issue in para 12 above, we direct accordingly.”

32. To continue the narration and in relation to this on-money, we find that the Tribunal, in para 9 of the initial order, has recorded that there were search and seizure actions under Section 132 of the Act on 9-3-1992 and 26-10-1994 during which incriminating documents were seized and the statement of Shri D.K. Shah, the partner, was recorded. He admitted to having collected Rs.30,00,000/- as on-money over and above the agreement value. A reference is made to the answer to question No.9, and both the question and the answer are reproduced. Below that reproduction, there is a reference to the finding by the Assessing Officer in the assessment order pertaining to the Assessment Year 1992-93. The Tribunal's observation that the Assessing Officer in detail has discussed this finding and gathered during the search and estimated the on-money at the rates which we have already enumerated

above.

33. In para 10 the argument of the assessee's representative, who submitted that addition of the entire on-money cannot be accepted, is noted. Then, the Advocate urged that it is an accepted fact that out of the on-money reasonable expenses have to be deducted and the balance profit is to be taxed. The entire on-money does not represent income. There is a legal argument then canvassed that the proviso to Section 69C of the IT Act was inserted with effect from 1-4-1999 and is not retrospective in operation. Thus, this is how the Tribunal sums up the assessee's arguments on the point. There is a reference to several case laws relied upon by him.

34. The Departmental representative referred to the order of the Commissioner of Income Tax (Appeals) for the Assessment Year 1992-93 in-reply and submitted that the First Appellate Authority has appreciated and appraised the evidence – oral and documentary – and gathered by the Assessing Officer and that is how the ground of the assessee was rejected. The

Departmental representative pointed out that estimation of the on-money by the Assessing Officer was on the basis of the contents of the seized material which had been properly analysed by him and the fact of receipt of on-money was actually accepted by late Shri D.K. Shah and his son Manish D. Shah. The Departmental representative submitted that there are no reasons for these unrecorded expenses. Then, the Departmental representative referred to the assessment order for the Assessment Year 1990-91, which was passed in pursuance of the exercise carried out under Section 263 of the IT Act, and then the Departmental representative refuted the contention of the assessee and to the effect that the addition under Section 69C should be reduced to nil because the said addition represented revenue expenditure and therefore was allowable, even if not claimed in the return, but that has been rejected since the Commissioner of Income Tax (Appeals) was of the opinion that the expenditure incurred in cash was in any case disallowance under Section 40A(3) of the Act. Section 69C does not contemplate such allowance. Section 69 was the applicable

provision.

35. Para 12 of the order, passed initially, reads as under:-

“12. We have considered the rival submissions and find force in the arguments of the learned counsel for the assessee. It is the fundamental principle of tax jurisprudence that income is to be taxed and not the receipt. In plethora of judgments of the Tribunal, it has been held that a portion of on-money receipt should be taxed as income of the assessee. The Hon'ble Supreme Court in the case of CIT v. Piara Singh (124 ITR 40) held that if there is a business unlawfully carried on by the assessee, neither the profits earned nor the losses incurred would be enforceable in law. But that does not take the profits out of taxing statute. Similarly, the taint of illegality of the business cannot detract from the losses being taken into account for computation of the amount which can be subjected to tax as 'profits' u/s.10(1) of 1922 Act. This view has also been accepted in the case of CIT V. S.C. Kothari (82 ITR 794)(SC). From the aforementioned two decisions, it is clear that if a business is illegal neither the profits earned nor the losses incurred would be enforceable in law. But the profits from such business would be taxable and in calculating the same expenses relatable to that business have to be allowed. Main object is to compute real income of the assessee. As regards the allowability of expenses, we find that in the assessment year 1990-91, the A.O. while scrutinising the documents found a substantial evidence regarding on-money marked as Annexure A-3, on the Dadar Manish Market Project site. This annexure A-3 contained the detailed chart regarding the work done for every month. During the financial year 1989-90 the project expenses incurred on the site comes to Rs.1.09 crores, while the total project expenses debited in the return for the

assessment year 1990-91 was only Rs.77.12 lakhs, after excluding Rs.12 lakhs towards water proofing charges which were provisional. The A.O. found that there was difference in the total project expenditure of about Rs.44 lakhs. He also pointed out that from the estimated rates of on-money of Rs.3000/- per sq. ft. for ground floor shops, Rs.1500/- per sq. ft. For 1st floor shops and Rs.450/- per sq. ft. for Residential flats the total on-money worked out to Rs.44,82,560/- which was almost the same figures as mentioned above. The A.O. computed the expenditure of the total work done at Rs.2.03 crores by including therein the figure of on-money and applied the rate of 15%. The CIT under Sec. 263 revised the order of the A.O. and directed for inclusion of total on-money of Rs.44.07 lakhs in the income of the assessee. The assessee's contention was that the figures in the seized papers were for submission to the bank and, therefore, much reliance could not be placed on them. Normally profit element is more in the on-money receipt than in the normal business activity because in the normal business activity almost all the expenses incidental to business are accounted for. The assessee had disclosed 21% of gross receipts in the assessment year 1992-93 and therefore, it can reasonably estimated that at least double the percentage as disclosed by the assessee constituted the element of profit in the on-money. In our opinion, the A.O. was not justified in adopting the same rate in respect of on-money as was applied to work-in-progress as shown by the assessee in his books of account. There is no evidence on record to suggest the invoking of the provisions of Sec.40A(3). In this view of the matter, we hold that 40% of on-money be taken as income of the assessee and 15% of the work-in progress as computed by the A.O. on the basis of the work done as per the books be added."

36. A bare perusal of this para would indicate that the Tribunal indeed found substance in the assessee's argument.

After summing up the facts and focusing on the fundamental principle of tax jurisprudence that income has to be taxed and not the receipts, the Tribunal concludes that the Assessing Officer was not justified in adopting the same rate in respect of the on-money as was applied to work-in-progress, as shown by the assessee in the books of account. There is no evidence on record to suggest that Section 40A(3) can be invoked. Still, the Tribunal holds that 40% of the on-money be taken as income of the assessee and 15% of the work-in-progress as computed by the Assessing Officer on the basis of the work done as per the books be added.

37. In para 13, which we have reproduced above, all the additional grounds have been admitted and in para 14 it is held that, the issue of on-money raised in Income Tax Appeal Nos.2872/M/97, 3340/Bom/94, 2873/M/97, 1929/M/99 and 1708/Bom/95 is decided as above.

38. Upon a reading of this paragraph, we find some substance in the complaint of Mr. Mistri. It is difficult, if not

impossible, to reconcile this conflict and contrary conclusions, if the Tribunal admits the additional grounds of appeal and indeed refers to them, then, how these grounds of appeal have been dealt with ought to be clarified in the order itself. The Tribunal is a last fact finding authority. It is obliged to consider the appeal on facts and law. The aggrieved parties before the Tribunal must get an opportunity to demonstrate that the findings of the Assessing Officer even if confirmed by the First Appellate Authority, are indeed erroneous both on facts and law. Such an opportunity ought to be extended and no technicalities should come in the way of a proper and complete adjudication of the contested issues. Ultimately, Courts and Tribunals are set up and established for rendering justice. All procedural provisions are but handmaids of justice. If additional grounds are introduced and found to be worthy of acceptance, then, there is an obligation and duty to deal with and consider them. Shortcuts are always dangerous. Such shortcuts always result in remand of cases back to the authorities who are in-charge of deciding factual and legal issues. As the last fact finding

authority, the Tribunal was, therefore, not empowered to apply the formula and which was invented by it. If there was a discretionary power to correct that mistake, which it discovered and discerned from its order and it was apparent from it, then, that should have been utilised. The order on the miscellaneous application was passed in a haphazard manner. The initial order passed on the miscellaneous application was sought to be recalled by the petitioner by filing other set of miscellaneous applications and which came to be disposed of, without hearing the petitioner, in chambers by an order of 5-5-2004. That order and the approach generally adopted in that regard could not be supported by the Revenue before this Court in the first round of challenge by the petitioner. Therefore, virtually by consent, this order of 5-5-2004 was set aside and the Tribunal was directed to reconsider the applications for rectification of mistake and pass a fresh order thereon. We do not think that the Tribunal has performed its duty as a last fact finding authority and in the manner expected by this Court. This Court, without assigning detailed reasons as that would prejudice the case of both sides,

found that the manner and methodology of disposal of the appeals and the miscellaneous applications does not satisfy the requirement in law. After this Court's intervention, ample opportunity was available to the Tribunal and it could have safely referred to the materials, including the admitted record. It could have also considered the matter from the angle that if the Department of Income Tax auctioned the petitioner/appellant's shops in the Financial Year 2001-02 (unsold shops) for recovery of tax arrears, then, the auction or sale price could have been compared with the rates adopted by the Assessing Officer for assessment of taxes for the Assessment Years 1989-90 to 1993-94.

39. We have carefully considered the charts submitted by Mr. Mistri.

40. Though Mr. Malhotra would like us to go through the entire record and would like us to uphold the order impugned in the petition, in the light of our foregoing observations and findings, we find it difficult to accede to

Mr. Malhotra's submissions. If we accept them, we would be putting our seal of approval or imprimatur on the perfunctory manner of disposal of legal proceedings by the last Appellate Authority. That would make a mockery of the law. It is now very difficult even for the Revenue and might prejudice it in the event the matters are sent back, for afresh adjudication, to the Tribunal. The matters are appeals pertaining to the Assessment Years 1989-90 to 1993-94. The initial order of the Tribunal, which is a common order on these appeals, has been delivered and pronounced on 29-6-2001. The miscellaneous application filed to rectify the mistakes allegedly crept in this order came to be rejected some time in October, 2001. Thereafter, fresh miscellaneous applications were filed and which were rejected on 5-5-2004. This order of the Tribunal came to be set aside in a writ petition filed in this Court by the assessee. That order of this Court has already been noted by us. That order is dated 24-10-2005. The miscellaneous applications were sent back for reconsideration and they were dismissed by the impugned order on 28-9-2007.

41. We have before us the appeals of these assessment years a writ petition filed in the year 2008. Though Mr. Malhotra would submit that this writ petition should be dismissed on account of delay alone, for there is not just a delay in bringing the petition but laches, what we find is that this writ petition was pending along with the appeals for the above assessment years. They were pending and not disposed of. It would be difficult, therefore, to accede to this argument of Mr. Malhotra that the writ petition deserves to be thrown out on this ground alone.

42. We are of the firm opinion that no useful purpose will be served by now sending the matters back to the Tribunal. The matters, if sent back now, may not necessarily benefit the Revenue. It is only a conjecture and surmise or pure guess work that when sent back, the Revenue will necessarily succeed. There is no such guarantee. In fact, what we have found is that in the ground of appeal for the Assessment Year 1989-90 in an appeal which was brought before the Tribunal and challenging

the order dated 7-3-1996 of the First Appellate Authority, there is a specific plea or grievance. The ground No.2 of this memo says that the Commissioner of Appeals has erred in confirming that the assessee/appellant had collected on-money to the extent of Rs.2,19,47,700/- [see page 287 of the paper-book]. Then there is a specific ground that the additions made by the Assessment Officer on this ground be deleted and the income be recomputed. Thereafter, ground No.4 is clearly a without prejudice and alternate ground of appeal. If all this was indeed present to the mind of the Tribunal, then, why it resorted to this manner of disposal of the appeals, remains unexplained and unclarified to us. None, including the Revenue's Counsel can attempt, and outside the record, to justify what the Tribunal has done in this case. With all his persuasive abilities, Mr. Malhotra was unable to justify the approach of the Tribunal.

43. However, the end result would be to set aside the order impugned in the writ petition and allow the miscellaneous applications on the file of the Tribunal for rectification of the mistakes in its initial order. The outcome would be a fresh

adjudication of all the appeals and after a good 22 years from the end of the assessment year. It would be a travesty of justice if after 22 years from the date of the order of the First Appellate Authority and seventeen-and-half years after the order of the Tribunal these appeals are re-heard.

44. Today, we have a position where the on-money additions which have been made by the Income Tax Department are to the extent of Rs.11,52,15,097/-. The additions sustained by the First Appellate Authority are to the extent of Rs.4,64,59,769/-.

45. On our suggestion, charts were made and handed over. They are all on record. Though the Income Tax Department would justify the gross additions to the extent of Rs.11,52,15,097/-, but the additions to the extent of Rs.4,64,59,769/- have been sustained by the Income Tax Appellate Tribunal. Therefore, the amount of Rs.11,52,15,097/- has never been sustained. Even if the appeals brought by the Revenue before the Tribunal were only partly allowed and that

order has gained finality, the Department could not recover anything above and what is sustained by the Income Tax Appellate Tribunal. The sustenance is to the extent of Rs.4,64,59,769/-.

46. In the facts and circumstances peculiar to this case and because there are on-money details which were in issue, but such transactions having been flatly denied much less the quantum derived therefrom, all the additions were in the realm of guess work. They were pure conjectures and surmises. Now, sending back both the parties to the Tribunal serves the interest of none and particularly of public revenue. Hence, we dispose of the appeals and the writ petition with the following order and directions:-

- (a) In the event a sum of Rs.3,25,00,000/- (Rupees Three Crores Twenty Five Lakhs) is deposited by the petitioner (if not already paid/deposited) with the respondent/Revenue within a period of two months from the date of receipt of a copy of this order, each of the

Income Tax Appeals before the Tribunal and the proceedings before us would stand disposed of.

- (b) Nothing over and above this amount is then due and payable in relation to the subject-transaction by the petitioner-assessee. This would be a conclusive assessment for the assessment years involved in these appeals and the writ petition.
- (c) In the event there is a default and the amount is not paid/deposited within the time stipulated above, the additions as sustained under the initial order of the Tribunal would then be upheld and the Revenue can then collect and recover the amount of taxes on that basis by adopting such procedures as are permissible in law.
- (d) Rule in the writ petition is made absolute in the above terms.
- (e) There will be no order as to costs.

(f) All income-tax appeals are disposed of accordingly.

(B.P. COLABAWALLA, J.)

(S.C. DHARMADHIKARI, J.)