

**(2014) 11 GUJ CK 0015**  
**In the Gujarat High Court**

**Case No :** Income Tax Reference No. 15 of 2003

C.I.T.

APPELLANT

Vs

Abhishek Corporation

RESPONDENT

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**Date of Decision :** 07-11-2014

**Acts Referred:**

Income Tax Act, 1961 — Section 143(3), 158BC, 256(1)

**Citation :** (2014) 11 GUJ CK 0015

**Hon'ble Judges :** Kaushal Jayendra Thaker, J;K.S. Jhaveri, J

**Bench :** Division Bench

**Advocate :** Sudhir M. Mehta, Advocate for the Appellant; Swati Soparkar, Advocate for the Respondent

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**Judgement**

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K.S. Jhaveri, J.—The following two questions have been referred by the Income Tax Appellate Tribunal, Ahmedabad under Section 256(1) of the Income Tax Act, 1961 arising out of the Tribunal's order dated 04.08.1998 in ITA No. 153/Ahd/1997:

"(1) Whether on the facts and in the circumstances of the case, the ITAT was justified in law in admitting a new plea contrary to the facts on record that the net profit in respect of supervision charges should be linked to the receipts of booking of flats to the tune of Rs. 2.63 crores contrary to the provisions of Rule 29 read with rule 10 of the Appellate Tribunal Rules and to base its finding thereon.

(2) Whether on the facts and circumstances of the case, the ITAT having held that assessee has received unaccounted receipts was justified in law in holding that the assessing officer has to discharge onus in respect of on-money by showing that assessee has invested Rs. 1,58,59,400 out of such receipts whereas claim of assessee for extra expenditure was found to be incorrect."

2. The assessee had filed appeal against the order of DCIT(Asstt.) Spl., Surat

Under section 143(3) of the Act for the assessment years 1987-88 to 1997-98. The only effective ground taken by the assessee was regarding the assessment of undisclosed income of Rs. 1,88,59,400/- as "On Money"/Premium charged by the assessee as against the undisclosed income of Rs. 30 lakhs disclosed by the assessee as net income earned in the project of Uday Towers in the return of undisclosed income filed in response to notice u/s 158BC. The Tribunal allowed the appeal and deleted the addition made by the Assessing Officer.

2.1 The Hon"ble Supreme Court of India vide order dated 29.11.2011 directed the Tribunal to draw up a statement of Case and refer the question of law stated in the said order to this Court and accordingly this reference has come before us for consideration.

3. Mr. Sudhir Mehta, learned advocate for the revenue submitted that the Tribunal committed a serious error in reversing the order of the Assessing Officer. He submitted that the on money collection by the respondent -assessee was established and having confirmed such findings, the Tribunal ought not to have rescinded the directions for collection of tax, interest etc.

4. Mr. Soparkar, learned advocate for the respondent opposed the reference contending that no question of law arises. He contended that even if the on money collection is believed, what could be taxed in the hands of the assessee is only the income and not the entire receipt. He has relied upon the decision of this Court in the case of Commissioner of Income Tax Vs. President Industries, wherein this Court rejecting the appeal took a view that unless there is a finding to the effect that investment by way of incurring the cost in acquiring the goods which have been sold has been made by the assessee and that has also not been disclosed, such addition could not be sustained.

4.1 Mr. Soparkar has also relied upon decision of this Court in the case of Commissioner of Income Tax Vs. Gurubachhan Singh J. Juneja, wherein this Court has observed that in absence of any material on record to show that there was any unexplained investment made by the assessee which was reflected by the alleged undisclosed sales, the finding of the Tribunal that only the gross profit on the said amount can be brought to tax does not call for any interference. He also relied on the decision in the case of Commissioner of Income Tax Vs. Samir Synthetics Mill, , wherein the High Court confirmed the view of the Tribunal accepting only the profit of unaccounted sale for the purpose of collecting tax. Reliance has also been placed on an unreported decision rendered by this Court on 16.06.2012 in Tax Appeal No. 323 of 2000 with Tax Appeal No. 325 of 2000 wherein the aforesaid decisions have been considered by this Court on similar facts.

5. The questions referred to this Court for consideration are now squarely covered by the decision of this Court rendered in Tax Appeal No. 323 of 2000 with Tax Appeal No. 325 of 2000. While considering the said appeals, the coordinate bench of this Court considered the decisions in the cases of President

Industries (supra), Gurubachhan Singh Juneja (supra) and Samir Synthetics Mill (supra) as relied upon by learned advocate for the respondent. The relevant paragraphs are reproduced as under:

"9. Having heard the learned counsel for the parties and having perused the orders under consideration, what emerges is that the findings arrived at by the Assessing Officer that the respondent - partnership firm received on money of Rs. 62 lakhs during the block period for sale of the flats, is not seriously in dispute. The Tribunal confirmed such findings arrived at by the Assessing Officer. However, the Tribunal did not permit the revenue to collect the tax on the entire receipt believing the it was only the income embedded in such receipt which can be subjected to tax.

10. As pointed out by the counsel for the respondent, this Court in the case of Commissioner of Income Tax Vs. President Industries, had taken a similar view. In the said case, during the course of survey conducted on the premises of the assessee, from the excise records found, an inference was drawn by the Assessing Officer that sales accounting to Rs. 29 lakhs and odd had not been disclosed in the books of account. The Assessing Officer made addition of the entire sum of the said undisclosed sales as income of the assessee for the assessment year 1994-95. Such addition was confirmed by the Commissioner (Appeals). The Tribunal, however, held that the entire sales could not have been added as income of the assessee, but only to the extent the estimated profits embedded in the sales for which the net profit rate was adopted entailing addition of income on the suppressed amount of sales. Such decision was carried in appeal by the revenue before the High Court. The High Court rejected the appeal, observing that unless there is a finding to the effect that investment by way of incurring the cost in acquiring the goods which have been sold has been made by the assessee and that has also not been disclosed, such addition could not be sustained. It was observed that in absence of such findings of fact, the question whether the entire sum of undisclosed sale proceeds can be treated as income of the relevant assessment year answers by itself in the negative. The High Court rejected the appeal holding that no question of law which requires to be referred arises.

11. In the case of Commissioner of Income Tax Vs. Gurubachhan Singh J. Juneja, , once again a somewhat similar issue came up before this Court. In the said case, the assessee was engaged in the business of trading of tyres. Search proceedings were carried out at the residential and business premises of the assessee. On the basis of loose sheets which were seized during such search operation, the Assessing Officer held that sales to the extent of Rs. 10.85 lakhs was not found in the books of account. Such amount was included in the total income of the assessee. The Commissioner (Appeals) gave substantial relief to the assessee and reduced the income on the basis of gross profit rate. The Tribunal confirmed the order of the Commissioner (Appeals). On further appeal before the High Court by the revenue, the High Court refused to refer any

question holding that in absence of any material on record to show that there was any unexplained investment made by the assessee which was reflected by the alleged undisclosed sales, the finding of the Tribunal that only the gross profit on the said amount can be brought to tax does not call for any interference.

12. Counsel also relied on the decision in the case of Commissioner of Income Tax Vs. Samir Synthetics Mill, , wherein the High Court confirmed the view of the Tribunal accepting only the profit of unaccounted sale for the purpose of collecting tax.

13. Our attention was also drawn to the decision of the M.P. High Court in the case of Man Mohan Sadani Vs. Commissioner of Income Tax, , wherein referring to and relying upon the decision of this Court in the case of Commissioner of Income Tax v. President Industries (supra) and other decisions of other High Courts, the M.P. High Court had also taken a similar view. It was observed that entire sale proceeds of the assessee should not be added in his income and that the Tribunal has erred in doing so.

14. We may recall that the Tribunal, in the impugned judgement, relied on its previous judgement in case of Kishor Mohanlal Telwala. The said judgement of the Tribunal was apparently carried in appeal by the revenue. The High Court by a speaking order dated 24.4.2000, dismissed the appeal holding that no question of law was involved. Significantly, in case or Kishor Mohanlal Telwala, the assessee was engaged in the business of construction. In his case, unaccounted receipt of Rs. 1.47 crores was detected. In this background, the Division Bench confirmed the view of the Tribunal and did not accept the contention of the revenue that as no accounts had been maintained to substantiate the expenditure incurred by the assessee, the entire amount received by the respondent should be treated as income. The Court concluded that the Tribunal was justified in considering that the respondent - assessee ought to have spent reasonable amount for the purpose of receiving such gross receipt.

15. It can, thus, be seen that consistently, this Court and some other Courts have been following the principle that even upon detection of on money receipt or unaccounted cash receipt, what can be brought to tax is the profit embedded in such receipts and not the entire receipts themselves. If that be the legal position, what should be estimated as a reasonable profit out of such receipts, must bear an element of estimation.

16. In view of the legal position that not the entire receipts, but the profit element embedded in such receipts can be brought to tax, in our view, no interference is called for in the decision of the Tribunal accepting such element of profit at Rs. 26 lakhs out of total undisclosed receipt of Rs. 62 lakhs. In other words, we accept the legal proposition, the Tribunal accepting Rs. 26 lakhs disclosed by the assessee as profit out of total undisclosed receipt of Rs. 62 lakhs, would not give rise to any question of law."

6. In view of the aforesaid legal position that not the entire receipts, but the

profit element embedded in such receipts can be brought to tax, in our view, no interference is called for in the decision of the Tribunal accepting such element of profit out of total undisclosed receipt. We therefore uphold the order passed by the Tribunal. Reference stands answered against revenue and in favour of assessee.