

आयकर अपीलीय अधिकरण "बी" न्यायपीठ पुणे में ।
IN THE INCOME TAX APPELLATE TRIBUNAL "B" BENCH, PUNE

श्री डी. करुणाकरा राव, लेखा सदस्य, एवं श्री विकास अवस्थी, न्यायिक सदस्य के समक्ष ।
BEFORE SHRI D. KARUNAKARA RAO, AM AND SHRI VIKAS AWASTHY, JM

आयकर अपील सं. / ITA No.1501/PUN/2016

निर्धारण वर्ष / Assessment Year : 2005-06

Assistant Commissioner of Income Tax,
Ahmednagar Circle, Ahmednagar

.....अपीलार्थी / Appellant

बनाम / V/s.

Sanjivani Takli Sahakari Sakhar Karkhana Ltd.,
A/p Shahajanand Nagar, Tal.-Kopergaon,
Distt.-Ahmednagar – 423603

PAN : AAAAT3291R

.....प्रत्यर्थी / Respondent

आयकर अपील सं. / ITA No.1236/PUN/2016

निर्धारण वर्ष / Assessment Year : 2005-06

The Sanjivani Takli Sahakari Sakhar Karkhana Ltd.,
A/p Shahajanand Nagar, Tal.-Kopergaon,
Distt.-Ahmednagar – 423603

PAN : AAAAT3291R

.....अपीलार्थी / Appellant

बनाम / V/s.

Assistant Commissioner of Income Tax,
Ahmednagar Circle, Ahmednagar

.....प्रत्यर्थी / Respondent

Assessee by : Shri Prasanna Joshi
Revenue by : Shri Mukesh Jha

सुनवाई की तारीख / Date of Hearing : 23-07-2018

घोषणा की तारीख / Date of Pronouncement : 25-07-2018

आदेश / ORDER**PER VIKAS AWASTHY, JM :**

This cross appeals by the Revenue and the assessee are directed against the order of Commissioner of Income Tax (Appeals)-2, Pune dated 07-03-2016 for the assessment year 2005-06.

2. Shri Prasanna Joshi appearing on behalf of the assessee submitted at the outset that this is second round of litigation before the Tribunal. Earlier, the Tribunal in ITA No. 1120/PN/2008 for assessment year 2005-06 decided on 30-12-2008 had dismissed the appeal filed by the Revenue. The Revenue carried the matter in appeal before the Hon'ble High Court. The Hon'ble High Court while deciding the bunch of appeals including the appeal filed by the Revenue against the assessee in Tax Appeal No. 46 of 2009 remitted the issue back to the file of Commissioner of Income Tax (Appeals) with respect to payment of excess can price paid to the members and non-members. The Commissioner of Income Tax (Appeals) in remand proceedings while deciding the issue afresh has wrongly recorded the facts and has also gone beyond the directions of the Hon'ble High Court. The assessee has filed rectification application u/s. 154 on 29-05-2016 before the Commissioner of Income Tax (Appeals). The said application is still pending for final disposal.

2.1 The ld. AR further submitted that the Commissioner of Income Tax (Appeals) has erred in adjudicating the issue with respect to adding back of difference between market price of sale of sugar in the open market and concessional rate charged from the members. The said issue raised in appeal before the Hon'ble High Court was dismissed and hence, the Commissioner of Income Tax (Appeals) in remand proceedings was not

justified to take up the issue again for re-adjudication. The ld. AR placed on record copy of the order of Hon'ble Bombay High Court in Tax Appeal No. 46 of 2009 dated 10-07-2012.

3. On the other hand Shri Mukesh Jha representing the Department vehemently defended the order of Commissioner of Income Tax (Appeals). The ld. DR submitted that subsequent to the order of Hon'ble Bombay High Court, the Hon'ble Supreme Court of India has decided the similar issue in bunch of appeals lead case being Commissioner of Income Tax Vs. Krishna SSK Ltd. and Ors. reported as 27 Taxmann.com 162. The Commissioner of Income Tax (Appeals) has re-adjudicated the issues in the light of the latter judgment of Hon'ble Apex Court.

4. We have heard the submissions made by representatives of rival sides and have perused the orders of authorities below. The assessee in appeal has assailed the order of Commissioner of Income Tax (Appeals) by raising following grounds :

- “1. *By Judgement dated 10th July 2012 the Hon'ble Bombay High Court in Tax Appeal No. 46 of 2009 remitted back Question "A" to respective CIT as per directions contained in paragraph 6 of judgement delivered in Tax Appeal No. 29 of 2008, however in the impugned order the Ld. CIT(A) has not obeyed these directions and as such the impugned order passed by him is ab-initio null and void.*
2. *Without prejudice to the above, the Ld. CIT(A) ought to have followed express directions of Hon'ble Bombay High Court on the basis of which the appeal was set aside to him and .ought not to have decided the appeal following the basis of directions given by Hon'ble Supreme Court in another case.*
3. *Without prejudice to both of the above, pages 6 to 79 of the impugned order do not deal with the facts of the appellant and the CIT(A) is wrong in arriving at his conclusion at para 3.4.5 on page 80 without considering any facts of the appellant whatsoever.*
4. *By Judgement dated 10th July 2012 Bombay High Court in Tax Appeal No. 46 of 2009 the Hon'ble High Court dismissed Question "B" following its judgement in Tax Appeal No. 99 of 2008 even then the Ld. CIT(A) in the impugned order went ahead and decided a matter which was not remitted back to him by the Hon'ble Court.”*

5. The Revenue in appeal has raised following grounds against the order of Commissioner of Income Tax (Appeals):

- “1. *The order of the Commissioner of Income-tax (Appeals) is contrary to law and to the facts and circumstances of the case.*
2. *The learned Commissioner of Income-tax(Appeals) grossly erred in holding that the additional payment on account of cane price under clause 5A of the Sugar Control Order cannot be assessed in the assessee's hands as such payment represents diversion of profit by overriding title.*
3. *The learned Commissioner of Income-tax (Appeals) grossly erred in holding as above and in directing the Assessing Officer to compute the amount admissible as deduction notwithstanding that at Para 20 of the source order (in the case of Shri Dnyaneshwar SSK Ltd) it was admitted by the appellate authority that even the amount payable to the cane grower under clause 5A of the Sugar Control Order amounts to application of income and is a profit sharing nature.*
4. *The learned Commissioner of Income-tax (Appeals) grossly erred in failing to appreciate that clause 5A of the Sugar Control Order does not fasten any obligation to the source of income in the assessee's hands which is manufacture and marketing of sugar and, in the circumstances, it could by no means be said that the amount paid under the aforesaid clause represents diversion of profit at source by virtue of overriding title.*
5. *The learned Commissioner of Income-tax (Appeals) grossly erred in failing to appreciate that the payments made by the assessee over and above the Statutory Minimum Price (SMP) are in the nature of distribution of profit, hence not admissible as deduction.*
6. *For these and such other grounds as may be urged at the time of hearing, the order of the Ld. Commissioner of Income-tax (Appeals) may be vacated and that of the Assessing officer be restored.*
7. *The appellant craves to add, amend, alter or delete any of the above ground of appeal during the course of appellate proceedings before the Hon'ble Tribunal.”*

6. We observe that ground Nos. 1, 2 and 3 raised in the appeal by assessee and ground Nos. 1 to 6 of the appeal by Revenue are on the same issue. The Id. AR has pointed that the Commissioner of Income Tax (Appeals) while adjudicating the issue relating to ‘excess cane price paid to the members and non-members’ has recorded wrong facts. The assessee has filed application u/s. 154 for rectification of the mistake. The rectification application filed by the assessee before the Commissioner of

Income Tax (Appeals) is at pages 25 to 27 of the paper book. We are of considered view that the outcome of the rectification application filed u/s. 154 before the First Appellate Authority will have bearing on ground Nos. 1 to 3 raised in the appeal by assessee and the corresponding grounds i.e. ground Nos. 1 to 6 raised in appeal by the Revenue. Accordingly, we deem it appropriate to remit this issue back to the file of Commissioner of Income Tax (Appeals). The Commissioner of Income Tax (Appeals) is directed to dispose of the rectification application of the assessee dated 29-05-2016 at the earliest, preferably within a period of 3 months from the date of communication of this order and thereafter re-adjudicate the issue afresh. Accordingly, ground Nos. 1, 2 and 3 raised in the appeal by the assessee and ground Nos. 1 to 6 of appeal by the Revenue are allowed for statistical purpose.

7. In ground No. 4 of the appeal by the assessee, the assessee has assailed the action of Commissioner of Income Tax (Appeals) in adjudicating the matter which has already been disposed of by the Hon'ble High Court. We find that one of the issue before the Hon'ble High Court in Tax Appeal No. 46 of 2009 by the Revenue is :

“(B) Whether the difference between the market price of sale of sugar and price of the sale of a small quantity of sugar made by the assessee (a sugar factory) to its sugarcane producer members at a concessional rate, can be added in the income of an assessee under Section 40A of the Income Tax Act, 1961?”

The Hon'ble High Court decided this issue against the Revenue by observing as under :

“7. As regards Question “B”, relating to supply of sugar at concessional rate to sugarcane growers is concerned, the same is answered in negative vide judgment and order delivered in Tax Appeal No. 99/2008 and connected appeals. Tax Appeal No. 45/2009 and Tax Appeal No. 46/2009 are accordingly partly allowed.”

8. Once the issue has been adjudicated by the Hon'ble High Court, the Commissioner of Income Tax (Appeals) has no jurisdiction to interfere with

the findings of superior Appellate Authority. The Revenue has not placed on record any document to show that the Revenue has filed appeal against the order of Hon'ble Bombay High Court and there is direction of the Hon'ble Supreme Court of India reversing/modifying the finding of Hon'ble High Court. Under such circumstances we are of considered view that the Commissioner of Income Tax (Appeals) has travelled beyond the scope of directions of Hon'ble High Court in taking up the issue which has already been decided by the Hon'ble High Court in the case of assessee. Accordingly, the ground No. 4 raised in the appeal by the assessee is allowed.

9. In the result, the appeal of assessee is partly allowed and the appeal of Revenue is allowed for statistical purpose.

Order pronounced on Wednesday, the 25th day of July, 2018.

Sd/-	Sd/-
(डी. करुणाकरा राव/D. Karunakara Rao)	(विकास अवस्थी / Vikas Awasthy)
लेखा सदस्य / ACCOUNTANT MEMBER	न्यायिक सदस्य / JUDICIAL MEMBER

पुणे / Pune; दिनांक / Dated : 25th July, 2018

RK

आदेश की प्रतिलिपि अग्रेषित / Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant.
 2. प्रत्यर्थी / The Respondent.
 3. आयकर आयुक्त (अपील) / The CIT(A)-2, Pune
 4. The Pr. Commissioner of Income Tax-1, Pune
 5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, "बी" बेंच,
पुणे / DR, ITAT, "B" Bench, Pune.
 6. गार्ड फ़ाइल / Guard File.
- //सत्यापित प्रति // True Copy//

आदेशानुसार / BY ORDER,

निजी सचिव / Private Secretary,
आयकर अपीलीय अधिकरण, पुणे / ITAT, Pune