

आयकर अपीलिय अधिकरण "ए" न्यायपीठ पुणे में ।
IN THE INCOME TAX APPELLATE TRIBUNAL "A" 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 Nos. 1094 to 1096/PUN/2016

निर्धारण वर्ष / Assessment Years : 2007-08, 2009-10 & 2011-12

ACIT, Circle-1,
Kolhapur

.....अपीलार्थी / Appellant

बनाम / V/s.

Shri Warana Sah. Dudh
Utpadak Prakriya Sangh Ltd.,
A/P. Warnanagar,
Tal. Panhala, Dist. Kolhapur
PAN : AAABS0290E

.....प्रत्यर्थी / Respondent

Assessee by : Shri M.K. Kulkarni
Revenue by : Shri Rajesh Gawali

सुनवाई की तारीख / Date of Hearing : 16.08.2018
घोषणा की तारीख / Date of Pronouncement : 17.08.2018

आदेश / ORDER

PER D. KARUNAKARA RAO, AM :

There are 3 appeals under consideration involving the A.Yrs. 2007-08, 2009-10 & 2011-12. All these 3 appeals are filed by the Revenue against the common order of CIT(A)-1, Kolhapur, dated 07-03-2016.

2. The common issue raised in these appeals relate to the addition made by the AO on account of distribution of profits in the garb of payment of additional price for purchase of milk. In the assessment, the AO added Rs.2,83,79,660/-, Rs.1,45,20,711/- and Rs.4,02,52,810/- for the A.Yrs. 2007-08, 2009-10 and 2011-12 respectively. CIT(A) granted relief to the

assessee relying on the jurisdictional High Court judgment in the case of CIT Vs. Solapur District Co-op. Milk Producers & Process Union Ltd. reported in 315 ITR 0304. Aggrieved with the same, the Revenue is in appeal with the following grounds/additional grounds. The same are extracted as under :

Grounds :

“1. On the facts and in the circumstances of the case and in law, whether the Ld.CIT(A) was justified in deleting the addition of Rs.2,83,79,660/- made on account of distribution of profit in the garb of payment of additional price for purchase of milk.

2. On the facts and in the circumstances of the case and in law, whether the Ld.CIT(A) was correct in appreciating the fact that additional purchase price was paid only to the members of the society after determination of profit earned by the assessee society at the end of the financial year, which amounts to distribution of profits in terms of bye-laws of the assessee society.”

Additional Grounds :

“1. On the facts and in the circumstances of the case, and in law, the CIT(A)-1, Kolhapur has erred in deleting the addition of Rs.4,02,52,810/- made on account of distribution of profit being provision for payment of additional price for purchase of milk, without taking note and direction of Hon’ble Supreme Court of India in judgment dated 23-08-2011 in assessee’s own case in Civil Appeal No.7227.

2. The appellant prays that the order of the CIT(A) be vacated and that of the Assessing Officer be restored.

3. The appellant craves leave to add, alter, amend, modify any of the grounds or raise any other ground at the time of proceedings before the Hon’ble Tribunal which may please be granted.”

3. Before us, at the outset, Ld. Counsel for the assessee brought our attention to the fact that the CIT(A) in his consolidated order granted relief to the assessee and deleted the addition relying on the judgment of jurisdictional High Court in the case of CIT Vs. Solapur District Co-op. Milk Producers & Process Union Ltd. reported in 315 ITR 0304. Ld. Counsel also submitted that, on the same issue, relief was granted in assessee’s own case for the A.Y. 2004-05 and earlier assessment years. Stating that it is a

covered case in favour of the assessee, Ld. Counsel submitted that the additional price paid by the assessee to the suppliers of milk, the members of the society, do not constitute distribution of profits. As such, the assessee is entitled to relief on account of this additional price paid to the suppliers. Ld. Counsel brought our attention to Para Nos. 7 and 8 of the order of Tribunal in the case of Solapur District Co-op. Milk Producers & Process Union Ltd.(supra) which has been approved by the High Court. We find it relevant to reproduce the said paras of the Tribunal and the same read as under :

“7. The assessee aggrieved preferred an appeal to the Tribunal in respect of the findings recorded by the AO which we have reproduced earlier and which are affirmed by the CIT(A), the Tribunal recorded as under:

(i) The basic price itself was based on quality, any increase in basic price which was provisional was automatically linked with quality e.g. if price paid on the basis of fat and SNF content was X and Y final rate difference of say 25 paise increased the price as X+ 25 paise and Y +25 paise.

(ii) The supply by non-members was miniscule and that too only for two years. Therefore, non payment of final rate difference to outsiders does not convert the payments to members in respect of milk as appropriation of profits. Here, we may mention the case of Solapur District Co-operative Milk Producers & Process Union Ltd., a finding has been recorded that payment is made to members as well as non-members.

(iii) The Government only fixes minimum price to be paid. The board has authority under bye laws to fix the price of the milk purchased from time to time. In view of the co-operative principles, assessee tend to pass on the maximum price to its member societies. Similar situation was obtaining in CIT vs. Mehsana District Co-operative Milk Producers Union Ltd. (2005) 195 CTR (Guj) 385 : (2006) 282 ITR 24 (Guj) wherein Gujarat High Court has answered similar issue in favour of the assessee.

(iv) The resolutions to pay final rate difference were always passed in the month of March every year i.e., before the end of previous year and only the resolutions to disburse the amounts were passed after the year end. Rate difference was paid only on the basis of quantity of milk supplied during year not in proportion of shareholding so as to amount to distribution of profits. The dates on which the resolution is to pay the final milk rate difference are recorded before the end of the year. It accordingly allowed the appeal and allowed deductions of final rate.

8. At the hearing of these appeals, on behalf of the Revenue, learned counsel submits that there is material on record to show that the final rate difference was paid after accrual of the net profits and out of the net profits. The transactions which were recorded and noted during the course of survey shows that the final milk rate difference was paid after accrual of net profit

and payment of final milk rate difference was not included in the total per litre production of cost of milk. This was corroborated in the statement recorded of the finance manager of the society. It is also set out that the resolution of final rate difference in the same case was passed after expiry of the relevant financial year. There was no legal obligation on the assessee society to make payment of final rate difference to member co-operative societies. Our attention is drawn to the fact that the CIT(A) has recorded a finding that in some cases the assessee paid commercial purchase price by even excluding the amount of final rate difference to milk producers as compared by the purchase price of milk to Government and some other co-operative societies. It is submitted that there is also a finding of CIT(A), that in some cases the apex societies purchased milk under consideration at a fixed purchase price and not at provisional price. For these reasons, the appeals ought to be dismissed.

Further, Ld. Counsel requested for remanding the issue to the file of CIT(A) in view of the judgment of jurisdiction High Court in the case of CIT Vs. Solapur District Co-op. Milk Producers & Process Union Ltd. (supra) as well as the judgment of Hon'ble Apex Court dated 23-08-2011 in the assessee's own case.

4. Ld. DR for the Revenue brought our attention to the additional grounds and submitted that the issue raised is essentially the same as that of the original grounds but for the reference to Supreme Court judgment in the case of CIT Vs. Warana Sahakari Dudh Utpadak Prakriya Sangh Ltd. in Special Civil Appeal No.11120/2010 dated 23-08-2011 (from the judgment and order dated 04-04-2009 in ITA No.1361/2008) and Civil Appeal No.7227 of 2011 (Arising out of SLP (C) No.11120 of 2010. He submitted that the Hon'ble Apex Court in the assessee's own case remitted the matter to the file of CIT(A) for adjudication in view of the identical direction given by the Apex Court in the case of DCIT Vs. Shri Satpuda Tapi Parisar SSK Ltd. reported in 326 ITR 42 (SC). For the sake of completeness, we reproduce the finding the Apex Court and the same reads as under :

"2. On the above contentions, two questions were required to be considered by the Department, which are as follows :

"Whether the above-mentioned differential payment made by the assessee(s) to the cane growers after the close of the financial year or after the balance-sheet date would constitute an expenditure under section 37 of the Income-tax Act, 1961; and whether such differential payment would, applying the real income theory, constitute an expenditure or distribution of profits?"

3. In deciding the above questions the Assessing Officer will take into account the manner in which the business works, resolutions of the State Government, the modalities and the manner in which SAP and SMP are decided, the timing difference which will arise on account of the difference in the accounting years, etc. In a given case, if the assessee has made a provision in its accounts, then the Assessing Officer shall enquire whether such provision is made out of profits or from gross receipts and whether such differential payment is relatable to the cost of the sugarcane or whether it is relatable to the division of profits amongst the members of the Society?

One of the points which will also arise for determination by the Assessing Officer will be on the theory of overriding title in the matter of accrual or application of income. Therefore, in each of these cases, the Assessing Officer will decide the question as to whether the obligation is attached to income or to its source.

*4. None of these questions have been examined by the Authorities below. These questions are required to be examined because, in these cases, we are not only concerned with the applicability of section 40A(2) of the Act but we are primarily required to consider whether the said differential payment constitutes an expense or distribution of profits? Ordinarily, we would not have remitted these matters, particularly when they are for assessment year 1992-93, but, for the fact that this issue is going to arise repeatedly in future. It will also help the assessee (s) in a way that they will have to re-write their accounts in future depending upon the outcome of this litigation. **Therefore, in the interest of justice, we remit these cases to the concerned Commissioner of Income-tax (Appeals).** We make it clear that both the parties are given liberty to amend their pleadings before the Commissioner of Income-tax (Appeals) takes up the matter for final hearing. We express no opinion on the merits of the case. The parties are at liberty to argue their respective points uninfluenced by any observations made in the impugned judgments on the applicability of section 28 or section 37 of the Act. The civil appeals filed by the Department, accordingly, stand disposed of with no order as to costs."*

5. We heard both the sides and perused the orders of the Revenue and the judgment of Hon'ble Supreme Court dated 23-08-2011 in the assessee's own case remanding the issue to the file of CIT(A). On perusing the facts of the case, we find the said judgment of Hon'ble Apex Court dated 23-08-2011 was not referred by the assessee while adjudication of the issue before the CIT(A). CIT(A) passed the order on 07-03-2016. Considering the judgment of Hon'ble Apex Court in assessee's own case, which was not considered at all,

we are of the opinion that the issue should be referred back to the file of CIT(A) as requested by the Ld. Counsel for the assessee. CIT(A) is directed to examine the issue and the peculiar facts of the present case and apply the ratio laid down by the Hon'ble Apex Court dated 23-08-2011 in the assessee's own case as well as the jurisdictional High Court judgment in the case of CIT Vs. Solapur District Co-op. Milk Producers & Process Union Ltd. (supra). CIT(A) shall grant reasonable opportunity of being heard to the assessee while adjudicating the 3 appeals filed by the Revenue. Accordingly, the grounds/additional grounds raised by the Revenue are allowed for statistical purposes.

6. In the result, all the 3 appeals of the Revenue are allowed for statistical purposes.

Order pronounced on 17th day of August, 2018.

Sd/-
(विकास अवस्थी / VIKAS AWASTHY)
न्यायिक सदस्य/JUDICIAL MEMBER

Sd/-
(डी. करुणाकरा राव/D. KARUNAKARA RAO)
लेखा सदस्य/ACCOUNTANT MEMBER

पुणे / Pune; दिनांक / Dated : 17th August, 2018.
Satish

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

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The CIT(A)-1, Kolhapur
4. The CIT-1, Kolhapur
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, "ए" बेंच,
पुणे / DR, ITAT, "A" Bench, Pune.
6. गार्ड फ़ाइल / Guard File.

आदेशानुसार / BY ORDER,

// True Copy //

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