INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "D": NEW DELHI

BEFORE SHRI G.D. AGRAWAL, HON'BLE PRESIDENT
AND
SHRI AMIT SHUKLA, JUDICIAL MEMBER

ITA No. 5470/Del/2011
ITA No. 4997/Del/2012
Asstt. Years 2008-09, 2009-10

ACIT, Circle-1, Muzaffarnagar	Vs.	Tikaula Sugar Mills Ltd. 25-B, Gher Khatti, Gaushala Road, New Mandi, Muzaffarnagar PAN AACCT5815B
(Appellant)		**(Respondent)**

CO No. 404/Del/2012
Asstt. Year: 2009-10

Tikaula Sugar Mills Ltd. 25-B, Gher Khatti, Gaushala Road, New Mandi, Muzaffarnagar PAN AACCT5815B	Vs.	ACIT, Circle-1, Muzaffarnagar
(Appellant)		**(Respondent)**

Department by:	Shri Amit Jain, Sr. DR
Assessee by :	Shri Akhilesh Kumar, Advocate, Shri Arun Kumar Agarwal, Advocate
Date of Hearing	14/06/2018
Date of pronouncement	07/09/2018

O R D E R

PER AMIT SHUKLA

The aforesaid appeals have been filed by the revenue for the assessment year 2008-09 against order dated 3.8.2011; and for the assessment year 2009-10 against order dated 22.11.2012; and cross objection has been filed by the assessee for the assessment year 2009-10, passed by Ld. CIT(Appeals) Muzaffarnagar for the quantum of assessment passed u/s 143(3).

2. We will first take the revenue's appeal for the assessment year 2008-09 wherein revenue has raised following three grounds: -

1. *"On the facts and in the circumstances of the case, the CIT(A) has erred in law by treating the contingent liability of Rs.9,28,56,512/- as "ascertained liability" while the amount of liability to be paid is still not certain and the assessee himself challenged the order of Hon'ble High Court Allahabad.*
2. *On the facts and in the circumstances of the case, the CIT(A) has erred in law by treating the expenditure of Rs.4,91,898/- shown by the assessee under the head "Molasses Reserve Fund" as revenue expenditure without appreciating the full facts of the case.*
3. *On the facts and in the circumstances of the case, the CIT(A) has erred in law by treating the receipt of Rs.29,94,7801- shown by the assessee under the head "Incentive on sale of Sugar" as capital receipt without appreciating the full facts of the case."*

3. The facts in brief qua the first issue is that, assessee is a limited company engaged in the business of manufacturing and sale of sugar, alcohol and power. AO noted that assessee in the return of income had not claimed contingent liability of Rs. 9,28,56,512/- but such claim was made during the assessment proceedings on 20.7.2010. Ld. AO required the assessee to explain why such a contingent liability should not be disallowed as it had not paid the liability within the time

as per the order of the Hon'ble Allahabad High Court dated 7.7.2008. In response the assessee submitted as under: -

> *"It is submitted that UP. Govt. has fixed the rate of sugar cane for the year under consideration of Rs.130/- and Rs.125/- per qntls. For early variety of crops and general variety of sugar cane. The Association of Sugar mill owner filed a writ before the Hon'ble Allahabad High Court. The hon'ble Allahabad High Court stayed the order of UP. Govt. with the direction to make payment of sugar cane @Rs.110/- per qtls. Accordingly, the assessee company provided the amount in. respect of sugar cane @Rs.110/- per qtl. Later on the Lucknow Bench of Allahabad High Court passed the final order and directed to make payment a s per order of UP. Govt. fixed the rate of sugarcane and directed to make payment of the remaining amount within two months. Against this order the Sugar Mills Association filed SLP before the Hon'ble Supreme Court who stayed the order of Lucknow Bench of Allahabad High Court with the direction to make payment @Rs.110/- per qntls. And this has resulted into ascertained liability of Rs.9,28,56,512/-."*

4. AO rejected the assessee's claim on the ground that, *firstly*, assessee itself has challenged the order of Hon'ble High Court which implies that assessee has not accepted the court order at the same time wants to take the benefit by calling it ascertained liability; and *secondly*, assessee has filed three computation of income; one for the original return; second for the revised return; and third during the course of the assessment proceedings which shows that assessee is not sure about the allowability of the deduction of the liabilities.

5. Ld. CIT(A) in order to understand the entire facts and the claim of the assessee noted that the Hon'ble High Court of Allahabad

(Lucknow Bench) vide their interim order dated 15.11.2007, had asked the sugar mill owners to pay to the cane growers @ Rs. 110/- per quintal which shall be subject to further order of the Hon'ble Court as against the fixing of the State Advised Price which was fixed @ Rs.125/- per quintal. In the books of accounts, for the season of 2007-08 assessee has claimed the purchase price of sugar cane price @ Rs. 110/- per quintal in view of the interim order of the Hon'ble High Court. While auditing the books of accounts, the auditors have given a note in this regard in the 'notes of account' which is incorporated at page 15 of the appellate order which is by and large the same as incorporated above in the reply filed by the assessee. The difference of the rate profit @ Rs. 110/- per quintal in the books of accounts and the order of the State Government to pay the cane price @ Rs. 125 per quintal and Rs. 130/- per quintal, worked out to Rs. 9,28,56,512/-. Since the assessee was maintaining its accounts on mercantile system, the liability therefore, stated to fall during the assessment year 2008-09. He further held that the Government of UP as per notification fixed the purchase price of sugar cane and such state advice price was definitely binding on the sugar mills and was obliged to follow the Govt. price in the mercantile system of accounting irrespective of the fact that same was challenged before the Hon'ble High Court. Assessee has made provision for such a payment in its books of accounts although the final payment could be made after the finality of the issue by the Hon'ble Courts. Thus, he held that claim of the price difference was definitely ascertained liability. He further noted that Hon'ble Allahabad High Court has finally upheld the decision of the UP Govt. fixing the purchase price and even if there was any confusion during the interim period regarding the nature of liability but moment the final decision was known dispute stood settled. Thus, he rejected the AO's action in treating the liability of Rs.

9,28,56,512/- as contingent liability. Lastly, on the issue whether such a claim could have been made during the course of the assessment proceedings, he held that the same is arising out of facts on records and notes of accounts and therefore such an issue can always be entertained at the time of assessment proceedings and in support he referred to various decisions.

6. Before us Ld. DR strongly relied upon the order of the AO and submitted that assessee has not paid the amount as per the rate fixed by the State Government or as upheld by the Hon'ble High Court and instead preferred an appeal before the Hon'ble Supreme Court therefore it was not ascertained liability.

7. On the other hand, Ld. Counsel for the assessee submitted that the price of sugar cane is fixed by the UP Government which is statutory price and ascertained liability. The assessee has mainly gone in appeal for some relief in the price declared but this does not bar for claiming it as ascertained liability. Moreover, in the present case liability was quantifiable in the current year itself as per the Govt. notification and ultimately Hon'ble Apex Court had upheld the notification price and also filed the copy of the judgment. Thus, this issue now remains set as rest.

8. After considering the aforesaid submissions and on perusal of the relevant findings given in the impugned orders, we find that it is not in dispute that the assessee had initially failed to debit the liability on account of difference in the price fixed by the State Govt. for purchase of sugarcane and the price paid by the assessee as per interim order of the Hon'ble High Court in its books of accounts. However, it does not debar the assessee from claiming the same as deduction, because assessee is following mercantile system of accounting and is entitled to deduct from the profit and gains of the

business such liability which had accrued as per statutory/ Govt. order obligation during the period for which the profit and gains were being computed. Here in this case the State Government had fixed the cane price for the season 2006-07 @ Rs. 125 per quintal for general variety and Rs. 130 per quintal for early variety. Such a State Advice Price by the State Government as per notification was binding on all the sugar mills including the assessee to pay such price to the cane growers for the purchase of sugar cane. Against the said fixation of price assessee had filed a writ petition before the Hon'ble Allahabad High Court, which vide interim order asked to pay the cane price @ Rs. 110/- per quintal. However, vide final order dated 7.7.2008, the price fixed by the State Government was upheld by the Hon'ble High Court and now as brought on record by the Ld. Counsel, the Hon'ble Supreme Court has upheld the same price. The assessee company had already paid and provided in the books of accounts the rate of Rs. 110/- per quintal in the books of accounts and the difference between the price fixed by the State Government and the rate as per the interim order of the High Court has been claimed by the assessee on the ground that it was purely ascertained liability. Once the liability is ascertainable from a Government notification and has ultimately been upheld by the Hon'ble Supreme Court later on, then it cannot be held that such a liability was contingent anymore, therefore, such a claim made by the assessee before the AO rightly been allowed by the Ld. CIT(A). Accordingly, we do not find any infirmity in the order of the Ld. CIT(A) and the same is affirmed.

9. In so far as the issue raised on account of addition of Rs. 4,91,898/- on account of 'molasses reserve fund' for molasses storage tank, Ld. Counsel for the assessee submitted that this issue stands covered by the decision of the Tribunal in the earlier assessment years passed in ITA No. 63/Del/2006 and ITA No. 924/Del/2007,

443/Del/2006, ITA No. 116/Del 2007 for the assessment year 2001-02 and 2003-04, vide order dated 4.4.2016 and also by the Tribunal order for the assessment year 2006-07 and assessment year 2007-08. Ld. DR also admitted that this issue stands covered in favour of the assessee.

10. After considering the aforesaid submissions and on perusal of the impugned order, we find that this issue has been decided by the Tribunal in all the earlier years following the order for the assessment year 2000-01 dated 2.11.2016 which has been followed subsequently in other assessment years. Thus, following the precedent of the earlier years we decide this issue in favour of the assessee and accordingly dismiss the grounds raised by the revenue.

11. Lastly, in so far as the addition of Rs. 29,94,780/- on account of treating the incentive on sale of sugar, it has been admitted by both the parties that this issue too stands covered by the Tribunal (supra) in the earlier years right from the assessment year 2000-01 to 2007-08. The detailed finding in this regard was given by the Tribunal in assessee's own case for the assessment year 2000-01 in the following manner: -

> *"5. The first reason taken by the AO for initiating reassessment is treating the sale of additional quota of sugar in free market amounting to Rs.35,11,976/- as revenue receipt against the assessee's claim of capital receipt. The assessee earned profit of Rs.35.11 lac from the sale of additional free sugar under Incentive scheme of the Government of India, which amount was not offered for taxation on the ground that it was a receipt of capital nature. The assessee was called upon to show cause as to why this amount be not treated as a revenue receipt in the light of the judgment of the Hon'ble Supreme Court in the case of KCP Ltd. 245 ITR 421 (SC). The assessee submitted that the facts of the case of KCP Ltd. (supra) were distinguishable. It was further explained that the said*

amount of Rs.35.11 lac was in the nature of incentive given by the Government for repayment of term loans. The assessee relied on certain judgments in support of its contention that the amount was not a revenue receipt. Not convinced with the assessee's contentions, the AO came to hold that since the said receipt was to ITA NOS. 63&443/Del2006 & 116&924/Del2007 6 be used for the running of business and, hence, constituted a trading receipt. The ld. CIT(A) upheld the action of the AO by noticing that the assessee did not produce any evidence to show that the amount of Rs.35.11 lac was utilized for repayment of loan during the year.

6. We have heard the rival submissions and perused the relevant material on record. It is noticed that the Government of India came out with an Incentive scheme for setting up of new sugar factories and expansion projects licensed/to be licensed during the period 7.9.1990 to 31.3.1994, a copy of which has been placed at page 22 of the paper book. The object of this scheme is `augmenting indigenous sugar production' and providing assistance to the entrepreneurs in setting up sugar factories 'through higher free sale quota for repayment of term loans advanced by the Central financial institutions.' Clause 12 of this Scheme provides that the beneficiaries of the Incentive scheme shall ensure that the surplus funds generated through sale of the incentive sugar are utilized for the repayment of term loans, if any, outstanding from the Central financial institutions/Sugar Development Fund. It further provides that the sugar factories shall submit utilization certificate annually from a Chartered/Cost ITA NOS. 63&443/Del2006 & 116&924/Del2007 7 Accountant. The above clause of the scheme fairly indicates that higher free sale quota was granted to new sugar factories licensed between 7.9.1990 to 31.3.1994 for enabling them to repay the term loans advanced by the central financial institutions for their setting up. This shows that the object of this scheme is to encourage the setting up of new sugar factories and higher free sale quota is a mode of giving incentive for repayment of term loans utilized for their setting up. It is a settled legal position that if subsidy or incentive is given for setting up new units, then, it is a capital receipt. The decisive factor in this regard is to see the `object'

of the incentive and not the source or mode of payment. So long as the object of an incentive scheme remains to encourage the setting up of new units, the incentive given in any shape or at any time, whether before or after the commencement of business, retains its capital nature. If, on the other hand, subsidy is given to incentivize the running of business more appropriately, whose object is not to encourage the setting up of units, but, to facilitate the carrying on of business, it assumes the character of a revenue receipt. The Hon'ble Supreme Court in CIT vs. Ponni Sugar and Chemicals Ltd. and Ors. (2008) 306 ITR 392 (SC) has held that the subsidy for setting up sugar mills, to be utilized for repayment of term loans undertaken for setting up new units/expansion of existing ITA NOS. 63&443/Del2006 & 116&924/Del2007 8 business, is a capital receipt and not chargeable to tax. Adverting to the facts of the instant case, we find that the assessee is covered under the Incentive scheme dated 10.3.1993 as it was set up in 7.3.1994. It is so borne out from the letter dated 10.7.2000 issued to the assessee by the Government of India, Ministry of Food, Directorate of Sugar, a copy of which is placed at page 175 of the paper book, giving licence and covering it under the Incentive scheme dated 10.3.1993. Pursuant to the requirement of submission of Utilization certificate from a Chartered Accountant, the assessee submitted such certificate, a copy of which is available at pages 38 and 39 of the paper book. Such certificate indicates repayment of interest on loan to the financial institutions to the tune of Rs.2.65 crore against which the amount of subsidy is only a sum of Rs.35.11 lac. This exhibits that the object of subsidy given to the assessee is setting up of sugar mill and the mode of discharge of subsidy is free sale of additional quota, which is meant to be utilized for the repayment of term loans taken from the financial institutions etc. 7. The reliance of the AO on the judgment of the Hon'ble Supreme Court in KCP Ltd. vs. CIT (2000) 245 ITR 421 (SC) is misconceived. In that case, the excess amount was realized and ITA NOS. 63&443/Del2006 & 116&924/Del2007 9 retained though the right to realize the amount was subject of dispute. Interim order was passed by the Hon'ble High Court pursuant to which the excess realization was

made. It was under those circumstances that the Hon'ble Supreme Court held that the price of sugar realized by the sugar manufacturer in excess of levy price fixed by the Government and retained as such was trading receipt liable to tax. In contrast to the factual position prevailing in KCP Ltd. (supra), we find that in the instant case, the assessee has simply realized excess price in terms of Incentive scheme dated 10.3.1992 and there is no excess realization over and above the sanctioned realizable amount. Thus, it is manifest that the facts of the instant case are strictly governed by the judgment in the case of Ponni Sugar rather than KCP Ltd. We, therefore, overturn the impugned order on this issue."

12. This decision has been followed in all the subsequent years. Therefore consisting with the earlier year precedents, we decide the issue in favour of the assessee and against the revenue.

13. In the result appeal of the revenue is dismissed.

14. Now we shall come to the appeal of the revenue and cross objection of the assessee for the assessment year 2009-10. In the grounds of appeal the revenue has raised following grounds: -

"1. On the facts and in the circumstances of the case, the Ld. CIT{A) has erred in law in deleting the addition of Rs. 35,96,751/- made by the Assessing Officer on account of contingent liability by ignoring the fact that the assessee has not claimed the same in the return of income and has itself challenged the order of the Hon'ble High Court as a result of which the contingent liability arises, before the Hon'ble Supreme Court.

2. On the facts and in the circumstances of the case, the CIT {A} has erred in law in deleting the addition of Rs. 3,56,784/- which was treated by the Assessing Officer as capital expenditure by ignoring the fact that the Molasses Reserve Fund is of a capital nature.

3. On the facts and in the circumstances of the case, the CIT(A) has erred in law in deleting the addition of Rs. 15.52,384/- out of Rs. 29,26,642/- made by the Assessing Officer on account of generation of scrap out of repair & Maintenance of Plant & Machinery without any evidence regarding which item generates scrap and which not. "

CO No. 404/D/2012

15. Grounds of Cross Objection raised by the assessee reads as under: -

1. *"That the Learned CIT(Appeals) has erred in law and on facts in confirming addition of Rs.22,43,712/- (should be Rs.13,74,257/- for which application U/s 154 pending) on account of generation of scrap out of repair and maintenance of plant and machinery relying on the decision of IT AT in the case of M/s. Ganga Kishan Sahakari Chinni Mills Ltd, wherein generation of scrap @10% has been held as reasonable by observing that the contention of appellant has no merit as ultimately the estimate is the best method of computing the scrap generation in as much as no details of the case was furnished despite the fact the same were called specifically to know the working of that party and thus the action of learned CIT(A) in confirming the addition is against the law and may kindly be deleted.*
2. *Learned CIT(A) is wrong and unjustified in not relying the calculation of generation of scrap while some of the items were physically produced before him giving the purchase price and the amount of scrap recoverable.*
3. *That relief claimed by cross objector may kindly be allowed and the order of learned CIT(A) may kindly be modified accordingly".*

16. In so far as the issues raised in the ground No. 1 is concerned, admittedly it is similar to the ground No. 1 raised by the revenue for

the assessment year 2008-09; and therefore, our finding therein will apply *mutatis mutandis* for this year also. Consequently, ground No. 1 is allowed in favour of the assessee and against the revenue. Resultantly ground No. 1 raised in the CO is treated as allowed and ground No. 2 raised in the CO is treated as allowed.

17. In so far as the issue of addition of Rs. 3,56,784/- on account of 'molasses reserve fund' for molasses storage tank, we have already held that this issue is covered in favour of the assessee by the earlier years of the Tribunal and therefore, ground No. 2 raised by the revenue is dismissed.

18. Lastly, coming to the third issue regarding addition of Rs. 15,52,384/- out of total addition of Rs. 29,26,642/- against which assessee has challenged the part relief, in its cross objection vide ground No. 3. Ld. Counsel at the outset submitted that there was certain clerical mistake in the order of the Ld. CIT(A) for which a petition under section 154 was filed before the Ld. CIT(A), which has been rectified and consequently relief of Rs. 15,52,384/- has been granted. Accordingly, the revenue's appeal is against the deletion of addition of Rs. 15,52,384/-; and assessee's CO should be taken against sustaining the addition of Rs. 13,74,257/-.

19. The facts in brief of *qua* this issue are that, assessee had shown repair and maintenance of plant and machinery at Rs. 3,79,60,965/- and assessee has shown sale of scrap of Rs. 5,94,455/- and closing stock of scrap of Rs. 2,75,000/-. Ld. AO held that scrap generation shown by the assessee against the machine repair is very less in comparison to the repair and maintenance of plant and machinery expenses, while in the case of 'Ganga Kisan Sahkari Chinni Mills' Ld. CIT(A) has estimated generation of scrap @ 10%; accordingly, he estimated 10% on account of sale of scrap in the case of the assessee

also. Before the Ld. CIT(A) assessee has furnished the working of the scrap value which has been incorporated at page 9 & 10 of the appellate order and after considering the same and taking into account the details sale of scrap value and the details of repair and machinery and plant, Ld. CIT(A) noted that certain expenses debited to repair and maintenance account cannot generate scarp and accordingly, he estimated the scrap generation @ 10% on the net repair of Rs. 22,43,712/-.

20. Ld. Counsel clarified that now after rectification the addition sustained is Rs. 13,74,257/-. He further submitted that assessee's books of account were audited and certified by the auditors which gives fair view of the scrap sold and no discrepancy has been found in such book of account. Assessee has filed detailed explanation of working of a scrap which has neither been found to be incorrect nor has been rejected and there is no material or basis for adhoc rate of 10% estimate of sales based on first appellate order in some other case which cannot be the basis as facts of each case are different and lastly, no such addition was made in the earlier years.

21. On the other hand, Ld. DR strongly relied upon the order of the AO.

22. After considering the relevant finding given in the impugned order as well as material referred to before us, we find that the estimate of the scrap sale has been made taking into account the expenditure incurred for repair and maintenance of machinery. The assessee has shown total amount of repair and maintenance of machinery at Rs. 3,79,60,965/- from which it has been stated that there are items which do not generate scrap which amounted to Rs. 1,55,23,844/-. After giving the details of the scrap sold, stock of scrap and stock of repair and plant machinery, it was pointed out that the

amount left would be Rs. 11,19,455/-. This was stated by the assessee to be around 5% of the total amount of repair and plant machinery and which should be accepted. Both the authorities have resorted to make estimate of scrap sale; however, we find that the Ld. CIT(A) has analysed the working given by the assessee and found that the assessee's computation of generation of scrap sold and closing stock suffers from infirmity. There is no denying fact that there is a generation of scrap and its valuation is always a subjective for which some kind of reasonable view or estimate has to be made. Ld. CIT(A) has already given the benefit of the items of the expenses which are incapable which cannot be the part of generation of scrap and for other expenses relating to plants and machinery he has estimated 10%, whereas the assessee has stated it should be 5% for which no substantial basis has been given. Accordingly, the order of the Ld. CIT(A) confirming the addition of Rs. 13,74,257/- after rectification order is affirmed. Consequently, the revenue's ground No. 3 and assessee's ground No. 3 of CO are dismissed.

23. In the result appeal of the revenue are dismissed and CO partly allowed.

Order pronounced in the Open Court on 7th September, 2018.

sd/- sd/-

(G.D.AGRAWAL) **(AMIT SHUKLA)**
PRESIDENT **JUDICIAL MEMBER**

Dated: 07/09/2018

Veena

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi