

IN THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD òCö BENCH

**Before: Shri Rajpal Yadav, Judicial Member
And Shri Amarjit Singh, Accountant Member**

**ITA Nos. 2285 & 2288/Ahd/2017 &
Cross Objection Nos. 30 & 31/Ahd/2019
Assessment Year 2013-14 & 2014-15**

The Dy. CIT, Gandhinagar Circle, Gandhinagar (Appellant)	Vs	The Gujarat State Civil Suppliers Corporation Ltd., Gandhinagar, PAN: AA ACT5736F (Respondent)
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**Revenue by: Shri O.P. Sharma, Sr. D.R.
Assessee by: Shri S.R. Shah, A.R.**

Date of hearing : 15-05-2019
Date of pronouncement : 27-05-2019

आदेश/ORDER

PER BENCH:-

These two revenue's appeals and assessee's cross objection for assessment year 2013-14 & 2014-15 arise against the decision of Id. CIT(A), Gandhinagar dated 17th July, 2017.

2. It is noticed that common issue on similar facts are involved in both the appeals of the revenue, therefore, for the sake of convenience both the grounds of appeals are adjudicated by this common order by taking facts of

ITA No. 2285/Ahd/2017, assessment year 2013-2014 and its findings will be applicable to ITA No. 2288/Ahd/2017.

3. The revenue has raised following grounds of appeal:-

ITA No. 2285/Ahd/2017

- “1. The Ld.CIT(A) has erred in law & on facts in deleting addition of Rs.119,21,78,000/- to total income by holding that it is surplus out of activities carried out for and on behalf of Government of Gujarat.*
- 2. The Ld.CIT(A) has failed to appreciate that the assessee is a separate legal entity and profit accruing to it are taxable.*
- 3. It is, therefore prayed that the order of the Ld. Commissioner of Income-tax(Appeals) may be set aside and that of the Assessing Officer be restored.”*

4. The assessing officer has completed the assessment u/s. 143(3) of the act on 3rd March, 2016 and disallowed the surplus of Rs. 1192178000/- claimed in the P & L account as expenditure payable to Govt. of Gujarat and added to the total income of the assessee.

5. On appeal, the Id. CIT(A) has deleted the addition after referring the decision of Id. CIT(A) on the similar issue pertaining to assessment year 2012-13. The relevant part of decision of Id. CIT(A) is reproduced as under:-

“5.3 I have considered the facts of the case, assessment order and submission filed by the appellant. On perusal of the facts of the case, it is seen that: similar addition made during the AY 2012-13 has been allowed by me vide order dated 12/02/20.16, contending as under:

5.3 I have carefully considered the assessment order, submission filed by appellant and contentions made by the AR of the appellant. The undisputed facts of the present case is that the appellant company was set up by the Government of Gujarat (GoG) under the Companies Act 1956 vide its Government Resolution (GR) and has been set up for smoothening the Public Distribution System(PDS) like distribution of goods grains, edible oils etc among the poor people. On careful consideration of details submitted by appellant and from assessment order, it is observed that appellant is mainly carrying out two types of activities i.e. one activity being appellant manages the PDS and various public welfare schemes on behalf of the GoG and as per the instructions of the GoG with the

motive of providing social and economic welfare and second activity being operating Petrol Pumps, Gas Agencies, Departmental Stores, etc. which are carried out by the appellant on its own behalf. The GoG is also providing handling commission to the appellant as percentage of turnover achieved by it for first type of activity and such commission is considered as part of income by appellant as part of second activity. i.e per details submitted by appellant and accepted by Assessing Officer during assessment proceedings, appellant has shown surplus of Rs.67,16,76,275/- from first type of activity and as such activity was carried out on behalf of Government, appellant has transferred such surplus to GoG and claimed as expenditure in Profit & loss account which has been disallowed by the AO on the ground that profit/surplus is earned by appellant and not government hence same is required to be taxed in hands of appellant. On careful, perusal of the entire facts, it is noticed that similar issue has been decided in the case of the appellant for AY 2010-11 in appeal No. CIT(A)GNR/152/2012-13 dated 18/11/2013. The findings given are as under:-

5.4 I have carefully considered the assessment order, submission filed by appellant and remand report submitted by Assessing Officer, The undisputed facts of the present case as observed by Assessing Officer at para 3 of the assessment order are that appellant company was set up by the Government of Gujarat (GoG) under the- Companies Act 13S6 vide its Government Resolution (GR) and has been set i.e. for smoothening the public Distribution System(PiS) like distribution :rf goods ('rains, edible oils etc. among the poor people.

On careful consideration of details submitted by appellant and from assessment order, it is observed that appellant is mainly carrying out two types of activities i.e. one activity being appellant manages the PDS and various public welfare schemes on behalf of the GoG and as per the instructions of the GoG with the motive of providing social and economic welfare and second activity being operating Petrol Pumps, Gas Agencies, Departmental Stores, etc, which are carried out by the appellant on its own behalf. The GoG is also providing handling commission to the appellant as percentage of turnover achieved by ii for first type of activity and such commission is considered as part of income by appellant as part of second activity.

As per details submitted by appellant and accepted by Assessing Officer during assessment proceedings, appellant has shown surplus of Rs.67,16,76,275/- from first type of activity and as such activity was carried out on behalf of Government, appellant has transferred such surplus to GoG and claimed as expenditure in Profit & loss account which has been disallowed by Assessing Officer or the ground that profit/surplus is earned by appellant and not government nonce same ii required to be taxed in hands of appellant.

3.5 During the course of appellate proceedings, appellant has submitted copies of various GR explaining various PDS carried out by it on behalf of GoG. G.R, No, CSC-1083 -40S9-D dated 78th March 1985, states as under :

"Since the obligation of Government to provide at reasonable prices, food grains and edible oil through fair price shops was being discharged for some time post now through the agency of the Gujarat State Civil Supplies Corporation limited.. Government was considering the basis on which this work should be entrusted to the corporation keeping in view the proposal made by the said corporation.

In the circumstances explained above, Government is pleased to decide that the public distribution system operations in respect of foodgrains and edible oils, transferred to the Gujarat State Civil Supplies Corporation Limited should be carried out by the said corporation from the date of its inception for and on behalf of the Government one- the resultant profit / loss arising in the transaction of the said items; will be: on government account, The Government is also pleased to allow hand'ing commits/ans at ^% rate on the total turnover on the aforesaid items on Government account effected by the Corporation for first two years and at the rate of K% for the subsequent 3 years against consideration of services rendered by the said Corporation in this respect. Government is also pleased to allow the said corporation to retain the net surplus funds on account of Government transactions covered under Public Distribution operation, and these surplus funds will be treated as analogous to loan and the Gujarat State Civil Supplies Corporation will pay to the Government on funds so retained 12% interest per annum. Detailed terms of this loan arrangement would be separately issued

Further, G.R. dated 06/07/1991 states as under:

"Government vide G.R. of even No. dated. 28.03.1985 read at (i) above had decided that the Public Distribution System Operation in respect of food-grains and eligible oils transferred to the Gujarat State Civil Supplies Corporation Limited should be carried out by said corporation from date of its incorporation, for and on behalf of the State Government and the resultant profit / loss arising in the transaction of the said items will be on Government Account..

... 2. Government is further pleased to clarify that all direct expenses such as freight, gunny bags, labour charges, transport charges, packing expenses, guarantee charges, commission on sales relating to procurement of food grains and edible oils carried out on Government account shall be debited to Government Account subject to General supervision and instructions of the Government issued from time to time. As regards interest charges on borrowed funds including the surplus in Government account and other financing charges incurred by the Gujarat State Civil Supplies Corporation Limited for carrying out business on Government account and its own account... may be apportioned between two operations on the basis of annual average inventory held during the year."

3. Government is also pleased to allow the said corporation to retain to the credit of Gujarat Government account the net surplus funds i.e. after deducting the aforesaid commission payable to Gujarat State Civil Supplies Corporation Limited on account of Government transactions covered under the Public Distribution System operations and direct that these surplus funds will be treated as analogous to loan and the said corporation shall pay to the Government on funds so retained interest at the rate of 14% per annum, on surplus generated from 1st April 1990 till further orders."

It is crystal clear from aforesaid GR along with the facts discussed herein above:

(i) Public distribution system operations in respect of foodgrains and edible oils, transferred to the Gujarat State Civil Supplies Corporation Limited should be carried out by the said corporation from the date of its inception for and on behalf of the Government

(ii) *The Government will allow Handling commission on the turnover carried out by appellant on behalf of GOG.*

(vi) *The appellant is carrying out and function PDS as agent of GOG.*

(iv) *The resultant Profit or loss arising out of such activity will be on government account*

(v) *The appellant would retain net surplus fund i.e. after deducting the aforesaid commission payable to Gujarat State Civil Supplies Corporation Limited on account of Government transactions covered under PDS and surplus fund will be treated as analogues to loan and appellant would pay interest to GOG on funds retained by it.*

It is further observed from aforesaid GRs that appellant is carrying out and function PDS on behalf of GOG and resultant profit/loss from such transaction is on government account hence observation of AO at page no 5 of the order that it is nowhere stated in GR that profit/surplus from the activity is the income of government is fallacious. The AO has referred only part paragraph of GR (para 3 of GR dated 1991) and came to conclusion that profit/surplus is loan by GOG to Assessee. These prove beyond doubt that AO has passed the present order very hurriedly and without appreciating proper perspective of transactions and activities carried by appellant.

On careful consideration of various activities carried out by appellant along with modus operandi as discussed herein above, it is observed that appellant estimates the procurement and distribution cost (including transportation and logistics costs) and provides such estimates to the GOG and difference between the distribution price under the schemes mentioned above and the aggregate of purchase price and estimated procurement & distribution cost (provided by the appellant) is reimbursed to the appellant as subsidy by the GOG. The subsidy reimbursed by the GOG is credited to segment related to GOG activities of the profit & loss account maintained by appellant. In case the payment of subsidy by the GOG is higher than the difference between sales realization and purchase price and procurement of distribution cost there is surplus and surplus is not profit of the GOG as observed by the AO but it is excess subsidy received by the appellant on the distribution of various items; under the PDS. Even for carrying out such activity, appellant has earned commission income of Rs.51.17 crore from GOG and offered to tax in profit & loss account. Thus, whatever surplus/loss is earned by appellant for activity carried out on behalf of GOG is belonging to GOG and appellant is retaining such profit on behalf of GOG and such profit/loss cannot be taxed as income of appellant as it is carrying out such activity as agent of GOG and for retaining such income, appellant is paying interest to GOG which is also not disputed by AO. Had it been the income of the appellant, it would never transfer such amount to Government account as loan payable and would pay huge interest. No person would pay interest on income earned by it and belonging to it but assesses is paying interest to GOG as it is surplus earned from activity carried out on behalf of GOG and as such funds are not paid immediately to GOG, it is paying interest. It is observed from the records that whenever there is deficit in such activity, it is not born by appellant but has been recovered from GOG. Thus, surplus generated during the year under consideration from PDS activity for Rs.67.16 crore cannot, be held or taxable as income in hands of appellant.

During the course of assessment proceedings, appellant has also submitted a columnar profit and loss account presenting activities carried out on behalf of GOG and those carried out on its own behalf separately which is also reproduced by AO at page 7 of the order. The sales in respect of activities carried out on behalf of the GOG and the subsidy received in respect of the said sale, is credited to the GOG section of the

columnar profit & loss account whereas purchases and other direct expenses in respect of GOG activities are debited to the GOG section of the columnar profit & loss account and whatever surplus is computed from such activity is transferred to GOG and claimed as expenditure and thus appellant has correctly shown NIL income from its first activity as discussed herein above. The commission income earned for activity carried out on behalf of GOG and income earned from appellant's own activity has been correctly

shown as income of appellant and offered such income for tax in Return of Income.

5.6 Apart from above, it is observed that appellant is consistently following aforesaid practice of accounting its income sine long and such method of accounting has been accepted by Assessing Officer while passing the assessment orders u/s 143(3) of the Act for- A.Y. 2005-06 to 2009-2010 hence AO was not justified in rejecting and making addition in current year when facts of present assessment years are identical with the facts of earlier assessment year.

5.7 Further, in A.Y. 2002-2003, appellant had distributed cement at the behest of the state government at the prices determined by the state government and similar addition made in case of appellant.

While deciding the issue, the Hon'ble Ahmedabad I.T.A.r. vide its order dated 3/3/2009 in I.T.A. No.17/19/Ahd/2006 has held as under:

"We have considered the rival submissions. Under the scheme of the Act what is taxable- is the income accruing to the assessee and not all receipts. Therefore, unless the nature of receipt, demonstrated that it was in the nature of income accruing to the assessee, the same is not liable to tax. in the present case, the assessee was functioning at the behest of the State Government. Due to the earthquake in Gujarat, the cement was required to be distributed at a pre-determined price. Earlier the price was determined at Rs. 101 which was later revised to Rs. 100 per bag. However, what was receivable by the assessee as its income is only handling charges of Rs. 10 per bag which have already been accounted for as income. The excess realization is not belonging to the assessee. The same is refundable either to the State Government or to various NCOs to whom Cement was supplied. Since, the assessee does not have any right over such amount collected, the same is not liable to be included as income of the assessee. Accordingly, the learned CIT(A) was justified in deleting the addition. Ground no.2 fails."

Further aforesaid decision was also confirmed by Hon'ble Gujarat High Court vide its order dated 15/3/2011 wherein it was held as under:

"We are broadly in agreement with the logic adopted by the Tribunal. It cannot be stated that the margin of excess price of cement bags was income of the assessee and it is not in dispute that the assessee was not in the business of buying and selling cement. We find no fault with the logic adopted by the Tribunal. We find that no substantial question of law is arising."

The Hon'ble Gujarat High court in the case of Gujarat Power Corporation Limited (1996) 25 taxmann.com 14 (Guj.) has further held as under :

"Section 4, read with section 2(24), of the Income-tax Act, 1961 - Income - Chargeable as - Assessment year 1932-93 -State Government had sanctioned

certain amount towards its equity share capital contribution in assessee-company Shares could not be allotted in favour of State Government immediately Assessed deposited some in banks In short-term deposits which earned some interest Such amount of interest was agreed over to be paid to State Government Whether amount which remained with assessee was held in trust for and on behalf of State Government and, therefore, interest accrued must also belong to State Government and would not be treated as income in hands of assesses - Held, yes tin favour of assesses]"

In view of aforesaid discussion and on holistic consideration entire facts and respect fully following the decision of Hon'ble Jurisdictional I.T.A.T., and High court in appellant's own case, it is observed that surplus of Rs. 67,16,76,274/- earned from functioning of PDS on behalf of GOG cannot be taxed as income in the hands of appellant as such surplus is excess subsidy received by the appellant on the distribution of various items under the PDS which is belonging to Government and payable to GOG along with interest after reducing commission earned by appellant. Considering the same, addition made by Assessing Officer for Rs.67,16,76,274/- is deleted.

As the issue in hand is similar to the issue decided in AY 2010-11 and also since the contention.'; made by the AO are on similar lines so also the contentions made by the appellant. I find no reason to deviate from the decision taken for AY 2010-11 in the case of the appellant and the addition made of Rs.115,72,37,000/- is hereby directed to be deleted and the relevant ground of appeal is allowed.

Further, the Hon'ble ITAT in appellant's own case for AY 2010-11 in ITA No,334/Ahd/2014 with C.O. 186/Ahd/2014 has allowed the such claim. In such facts, the addition made by the AO of Rs 119,21,78,000,-for AY 20.13-14 and Rs.69,78,79,000/-for AY 2014-15 is held not justified and is directed to be deleted. Relevant ground of appeals for both the years in appeal are allowed."

6. During the course of appellate proceedings before us, the Id. representatives have brought to our notice that similar issue on similar facts has been adjudicated by the Co-ordinate Bench of the ITAT vide ITA No. 1173/Ahd/2016 dated 27-02-2018, ITA No. 334/Ahd/2014 with CO 186/Ahd/2014 dated 01-06-2017 and by the Jurisdictional High Court in the case of assessee itself vide Tax Appeal No. 1643 of 2009 order dated 13-03-2011 in favour of the assessee.

7. We have gone through the decision of Id. CIT(A), Co-ordinate Benches of the ITAT and decision of Jurisdictional High Court as cited

above in this order. Honøble High Court of Gujarat in the case of the assessee vide above cited decision has affirmed the decision of the CIT(A) and the ITAT that the surplus was nothing but the Government fund which the corporation was allowed to retain by the Government under different Government resolutions and conscious decision by the Government. In the light of the above facts and findings, we consider that surplus earned from function of the Public Distribution System (PDS) on behalf of the Govt. cannot be taxed in the hand of the assessee, therefore, respectfully following the decision of Co-ordinate Benches of the ITAT and Jurisdictional High Court, we do not find any infirmity in the order of the Ld. CIT(A). Accordingly, the appeal of the revenue is disallowed.

Cross Objection Nos. 30 & 31/Ahd/2019 filed by assessee

8. At the time of learning, ld. counsel of the assessee has not pressed the cross objections filed by the assessee, therefore, the same stands dismissed.

9. In the result, both the appeals filed revenue and both the cross objections filed by the assessee are dismissed.

Order pronounced in the open court on 27-05-2019

Sd/-
(RAJPAL YADAV)
JUDICIAL MEMBER
Ahmedabad : Dated 27/05/2019

Sd/-
(AMARJIT SINGH)
ACCOUNTANT MEMBER

