IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH “B”, PUNE

श्री आर. एस. स्याल, उपाध्यक्ष एवं
श्री विकास अवस्थी, न्यायिक सदस्य के समक्ष

BEFORE SHRI R.S. SYAL, VICE PRESIDENT
AND SHRI VIKAS AWASTHY, JUDICIAL MEMBER

आयकर अपील सं. / ITA No.123/PUN/2010
निर्धारण वर्ष / Assessment Year : 2002-03

ACIT, Circle-1, Nashik	**Vs.**	Niphad Sah. Sakhar Karkhana Ltd., Bhausaheb Nagar, Niphad, Dist. Nashik PAN : AAAAN0688A

आयकर अपील सं. / ITA No.1638/PUN/2016
निर्धारण वर्ष / Assessment Year : 2012-13

ACIT, Circle-1, Nashik	**Vs.**	Niphad Sah. Sakhar Karkhana Ltd., At Post. Bhausaheb Nagar, Pimplad, Taluka Niphad, Dist. Nashik – 422 301 PAN : AAAAN0688A

C.O. No.35/PUN/2018
Arising out of ITA No.1638/PUN/2016
निर्धारण वर्ष / Assessment Year : 2012-13

Niphad Sah. Sakhar Karkhana Ltd., At Post. Bhausaheb Nagar, Pimplad, Taluka Niphad, Dist. Nashik – 422 301 PAN : AAAAN0688A	**Vs.**	ACIT, Circle-1, Nashik

Assessee by	Mrs. Shubhada Koppa
Revenue by	Shri Pankaj Garg
Date of hearing	25-06-2019
Date of pronouncement	26-06-2019

आदेश / ORDER

PER R.S.SYAL, VP :

There is one appeal by the Revenue for the A.Y. 2002-03. Another appeal has been filed by the Revenue for the A.Y. 2012-13. The assessee has also filed Cross Objection for the said later year. Since certain issues involved in these appeals are common, we are, therefore, proceeding to dispose them off by this consolidated order for the sake of convenience.

A.Y. 2002-03 :

2. The first issue raised by the Revenue is against the deletion of disallowance of Rs.1,66,31,744/- made by the Assessing Officer (AO) on account of excess price of sugarcane.

3. Briefly stated, the facts of the case are that the assessee is a Co-operative Society manufacturing white sugar and by-products. The AO made addition of Rs. 1.66 crore and odd on account of excess cane price paid, which came to be deleted in the first appeal.

4. We have heard both the sides and gone through the relevant material on record. It is an agreed position between the rival parties that the issue of payment of excessive price on purchase of sugarcane by the assesses is no more *res integra* in view of the recent judgment of Hon'ble Supreme Court in *CIT Vs. Tasgaon Taluka S.S.K. Ltd. (2019) 103 taxmann.com 57 (SC)*. The Hon'ble Apex Court, vide its judgment dated 05-03-2019, has elaborately dealt with this issue. It recorded the factual matrix that the assessee in that case purchased and crushed sugarcane and paid price for the purchase during crushing seasons 1996-97 and 1997-98, firstly, at the time of purchase of sugarcane and then, later, as per the Mantri Committee advice. It further noted that the production of sugar is covered by the Essential Commodities Act, 1955 and the Government issued Sugar Cane (Control) Order, 1966, which deals with all aspects of production of sugarcane and sales thereof including the price to be paid to the cane growers. Clause 3 of the Sugar Cane (Control) Order, 1966 authorizes the Government to fix minimum sugarcane price. In addition, the additional sugarcane price is also payable as per clause 5A of the Control Order, 1966. The AO in that case concluded that the

difference between the price paid as per clause 3 of the Control Order, 1966 determined by the Central Government and the price determined by the State Government under clause 5A of the Control Order, 1966, was in the nature of `distribution of profits' and hence not deductible as expenditure. He, therefore, made an addition for such sum paid to members as well as non-members. When the matter finally came up before the Hon'ble Apex Court, it noted that clause 5A was inserted in the year 1974 on the basis of the recommendations made by the Bhargava Commission, which recommended payment of additional price at the end of the season on 50:50 profit sharing basis between the growers and factories, to be worked out in accordance with the Second Schedule to the Control Order, 1966. Their Lordships noted that at the time when additional purchase price is determined/fixed under clause 5A, the accounts are settled and the particulars are provided by the concerned Co-operative Society as to what will be the expenditure and what will be the profit etc. Considering the fact that Statutory Minimum Price (SMP), determined under clause 3 of the Control Order, 1966, which is paid at the beginning of the season, is deductible in the entirety and the difference between SMP determined under

clause 3 and SAP/additional purchase price determined under clause 5A, has an element of distribution of profit which cannot be allowed as deduction, the Hon'ble Supreme Court remitted the matter to the file of the AO for considering the modalities and manner in which SAP/additional purchase price/final price is decided. He has been directed to carry out an exercise of considering accounts/balance sheet and the material supplied to the State Government for the purpose of deciding/fixing the final price/additional purchase price/SAP under clause 5A of the Control Order, 1966 and thereafter determine as to what amount would form part of the distribution of profit and the other as deductible expenditure. The relevant findings of the Hon'ble Apex Court are reproduced as under:-

> *"9.4. ..... Therefore, to the extent of the component of profit which will be a part of the final determination of SAP and/or the final price/additional purchase price fixed under Clause 5A would certainly be and/or said to be an appropriation of profit. However, at the same time, the entire/whole amount of difference between the SMP and the SAP per se cannot be said to be an appropriation of profit.* As observed hereinabove, only that part/component of profit, while determining the final price worked out/SAP/additional purchase price would be and/or can be said to be an appropriation of profit and for that *an exercise is to be done by the assessing officer by calling upon the assessee to produce the statement of accounts, balance sheet and the material supplied to the State Government for the purpose of deciding/fixing the final price/additional purchase price/SAP under Clause 5A of the Control Order, 1966. Merely because the higher price is paid to both, members and non-members, qua the members, still the question would remain with respect to the*

> *distribution of profit/sharing of the profit. So far as the non-members are concerned, the same can be dealt with and/or considered applying Section 40A (2) of the Act, i.e., the assessing officer on the material on record has to determine whether the amount paid is excessive or unreasonable or not........*
>
> *9.5 Therefore, the assessing officer will have to take into account the manner in which the business works, the modalities and manner in which SAP/additional purchase price/final price are decided and to determine what amount would form part of the profit and after undertaking such an exercise whatever is the profit component is to be considered as sharing of profit/distribution of profit and the rest of the amount is to be considered as deductible as expenditure."*

5. Both the sides are unanimously agreeable that the extant issue of deduction for payment of excessive price for purchase of sugarcane is squarely covered by the aforesaid judgment of the Hon'ble Supreme Court. Respectfully following the precedent, we set-aside the impugned orders on this score and remit the matter to the file of the AO for deciding it afresh as per law in consonance with the articulation of law by the Hon'ble Supreme Court in the aforenoted judgment. The AO would allow deduction for the price paid under clause 3 of the Sugar Cane (Control) Order, 1966 and then determine the component of distribution of profit embedded in the price paid under clause 5A, by considering the statement of accounts, balance sheet and other relevant material supplied to the State Government for the purpose of deciding/fixing the final price/additional purchase

price/SAP under this clause. The amount relatable to the profit component or sharing of profit/distribution of profit paid by the assessee, which would be appropriation of income, will not be allowed as deduction, while the remaining amount, being a charge against the income, will be considered as deductible expenditure. At this stage, it is made clear that the distribution of profits can only be *qua* the payments made to the members. In so far as the non-members are concerned, the case will be considered afresh by the AO by applying the provisions of section 40A(2) of the Act, as has been held by the Hon'ble Supreme Court *supra.* Needless to say, the assessee will be allowed a reasonable opportunity of hearing by the AO in such fresh determination of the issue. It is further made clear that the assessee will be at liberty to raise any other argument concerning the issue before the AO.

6. The only other issue which arises in the appeal is against the deletion of addition of Rs.3,22,58,450/- made by the AO on account of understatement of sale.

7. The facts apropos this ground are that the assessee made sale of certain quantities of sugar to M/s. Jai Jagdish Sugar

Export/Import, Dhule (JJSD) under quota at the rate of Rs.1,080/- per bag. The sugar was delivered by the assessee to JJSD, a merchant, against the release order dated 06-11-2001 from the Director, Krishi Bhawan, New Delhi for export purposes. The AO observed that JJSD failed to produce any proof of having made such exports. The sugar purchased from the assessee meant for export at lower price, was, in fact, sold by JJSD in the local market without the Department's permission. The AO called upon the assessee to explain as to why the difference between the market price and the quota price of such sugar should not be taxed in its hands as understatement of sales. The assessee replied that when it demanded proof of export of sugar from JJSD, they could not produce the same and they deposited the excise duty of Rs. 78,34,195/- from 21-03-2002 to 13-06-2002 with the assessee along with interest of Rs.8,07,544/- on late payment of excise duty, which was duly deposited by it. The assessee submitted that no extra income was earned by the assessee from JJSD warranting any addition. Not convinced, the AO made an addition of Rs.3,22,58,450/-, being, the difference between the market price of Rs.1,430/- per bag and the price at which it was sold to JJSD at Rs.1,080/- per

bag. The ld. CIT(A) deleted the addition, against which the Revenue has come up in appeal before the Tribunal.

8. We have heard both the sides and perused the relevant material on record. The facts of this ground are not disputed in as much as the assessee admittedly sold sugar to JJSD at a concessional rate of Rs.1,080/- per bag on the understanding that the same was meant for export by the latter. JJSD did not export the sugar. Rather, they sold the sugar obtained from the assessee under quota in the domestic market at the prevailing market prices. These facts indicate that the assessee did not understate the sale price. It reflected in its accounts the correct price received from JJSD. The default was committed by JJSD in not actually exporting the sugar purchased from the assessee at a reduced quota price, for which it faced the music. In so far as the assessee is concerned, there is not any default in reflecting the sales at lower price. In fact, the assessee recorded the same sale price of the sugar sold to JJSD, at which it was actually sold. It has been brought to our notice that the assessee took up civil proceedings against JJSD and some arbitration award was also passed. The ld. AR submitted that the Hon'ble Bombay High Court has cancelled the award directing the payment of some

compensation to the assessee. Be that as it may, in our considered opinion, compensation, if any, which the assessee eventually receives from JJSD will be subjected to tax in its hand when it acquires the right to receive the same. In sofaras the year under consideration is concerned, the assessee has neither recovered excess over quota price from JJSD nor acquired right to receive any compensation. We, therefore, hold that the ld. CIT(A) was justified in deleting the addition.

9. In the appeal is partly allowed for statistical purposes.

A.Y. 2012-13 :

10. The only grievance projected by the Revenue in its appeal is against entitling the assessee to deduction on account of expenditure claimed on salaries and wages amounting to Rs.2,72,51,072/-.

11. Briefly stated, the facts of the case are that the assessee raised an additional ground before the ld. CIT(A) that it incurred liability for salary arrears amounting to Rs.2,72,51,072/- as per the registered agreement dated 23-11-2011 which was omitted to be debited to the Profit and loss account or claimed as deduction. The assessee claimed that deduction should be allowed for such

an amount. The ld. CIT(A) noted in para no.8.2 of the impugned order that: "There is no mention about salary arrears by the AO in the assessment order. However, the appellant is entitled for expenditure claimed on salary and wages. The AO is directed to verify the same and allow relief". The Revenue is aggrieved by it.

12. Having heard both the sides and gone through the relevant material on record, it is observed that the ld. CIT(A) has not granted any relief in respect of the expenditure of Rs. 2.72 crore. He simply directed the AO to verify the assessee's claim and then allow relief. In other words, if on verification, the AO finds that the relief is not due, he will deny the same and *vice versa*. The mere fact of restoring the matter to the file of AO, in our considered opinion, does not constitute any cause of grievance to the Revenue in asmuch as the ball has again come back to the court of the AO, who can decide the issue as per law. We are, therefore, not inclined to disturb the impugned order on this score.

13. The first issue raised in the assessee's Cross objection is against the confirmation of addition on account of excess price paid on purchase of sugarcane amounting to Rs.13,55,67,049/-.

14. We have heard both the sides and gone through the relevant material on record. It is observed that similar issue was raised by the Revenue in its appeal for the A.Y. 2002-03, which we have dealt with hereinabove giving certain directions to the AO. The impugned order is set-aside to this extent and the matter is sent back to the AO for deciding this issue afresh as per law in accordance with our observations recorded above.

15. The second issue raised by the assessee in its Cross objection is against the confirmation of addition towards sale of sugar at concessional rate.

16. This issue has also come up before the Pune Benches of the Tribunal in several cases. The Pune Bench has restored it to the file of the AO for fresh adjudication giving certain directions. Relevant finding of the Tribunal in the case of Majalgaon Sahakari Sakhar Karkhana Ltd. Vs. ACIT and others in ITA No.308/PUN/2018, order dated 14-03-2019 reads as under :

> *"11. Having heard both the sides and gone through the relevant material on record, it is observed that the AO made addition of the difference between the market price and the concessional price at which sugar (final product) was given to farmers and cane growers. In this regard, it is observed that this issue has been considered by the Hon'ble Supreme Court in the case of CIT Vs. Krishna Sahakari Sakhar Karkhana Limited (2012) 27 taxmann.com 162 (SC). Vide judgment dated 25-09-2012, the Hon'ble Supreme Court noticed that the difference between the average price of sugar sold in the market and the price of sugar sold by the assessee to its members at concessional rate was taxed by the Department under the head "Appropriation of profit". The Hon'ble Summit Court remitted the matter to the CIT(A) for considering, inter alia,: "whether the abovementioned practice of selling sugar at concessional rate has become the practice or custom in the Co-operative sugar industry?; and whether any Resolution has been passed by the State Government supporting the practice?; The CIT(A) would also consider on what basis the quantity of the final product, i.e. sugar, is being fixed for sale to farmers/cane growers/Members each year on month-to-month basis, apart from others from Diwali?" The issue under consideration can be decided by an appropriate lower authority only on the touchstone of the relevant factors noted in the above judgment. In our considered opinion, it would be just and fair if the impugned orders on this score are set aside and the matter is restored to the file of AOs, instead of to the CITs(A), for fresh consideration as to whether the difference between the average price of sugar sold in the market and that sold to members at concessional rate is appropriation of profit or not, in the light of the directions given by the Hon'ble Supreme Court in the case of Krishna Sahakari Sakhar Karkhana Limited (supra). Restoration to the AO is necessitated because, following the judgment of the Hon'ble Apex Court in the case of Tasgaon Taluka S.S.K. Ltd. (supra), we have remitted the issue of payment of excessive price to the file of AO, and as such, the instant issue cannot be sent to ld. CIT(A) as it would amount to simultaneously sending one part of the same assessment order to the AO and other to the CIT(A), which is not appropriate. We order accordingly.*"

17. Following the above precedent, we set-aside the impugned order to this extent and remit the matter to the file of AO for its fresh determination in accordance with law.

18. In the result, appeal of the Revenue is dismissed and the cross objection of the assessee is allowed for statistical purposes.

Order pronounced in the Open Court on 26th June, 2019.

Sd/-	Sd/-
(VIKAS AWASTHY)	**(R.S.SYAL)**
न्यायिक सदस्य **/JUDICIAL MEMBER**	उपाध्यक्ष/ **VICE PRESIDENT**

पुणे Pune; दिनांक Dated : 26th June, 2019
सतीश

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

1. अपीलार्थी / The Appellant;
2. प्रत्यर्थी / The Respondent;
3. आयकर आयुक्त(अपील) / The CIT (Appeals)-I, Nashik
4. The CIT-I, Nashik
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, पुणे "**बी**" / DR 'B', ITAT, Pune;
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

// True Copy //

Senior Private Secretary
आयकर अपीलीय अधिकरण ,पुणे / ITAT, Pune

		Date	
1.	Draft dictated on	25-06-2019	Sr.PS
2.	Draft placed before author	25-06-2019	Sr.PS
3.	Draft proposed & placed before the second member		JM
4.	Draft discussed/approved by Second Member.		JM
5.	Approved Draft comes to the Sr.PS/PS		Sr.PS
6.	Kept for pronouncement on		Sr.PS
7.	Date of uploading order		Sr.PS
8.	File sent to the Bench Clerk		Sr.PS
9.	Date on which file goes to the Head Clerk		
10.	Date on which file goes to the A.R.		
11.	Date of dispatch of Order.		

*