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

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

आयकर अपील सं. / ITA No.854/PUN/2017
निर्धारण वर्ष / Assessment Year : 2012-13

Shri Chh. Shahu Rayat Sakhar Udyog,
Jaysingrao Ghatge Bhavan,
Tal. – Kagal, Distt.-Kolhapur

PAN : AAAAC7358J

.......अपीलार्थी / Appellant

बनाम / V/s.

The Income Tax Officer,
Ward – 1 (3), Kolhapur

......प्रत्यर्थी / Respondent

Assessee by	:	Mrs. Shubhada A. Koppa
Revenue by	:	Shri Pankaj Garg

सुनवाई की तारीख / Date of Hearing : 25-06-2019
घोषणा की तारीख / Date of Pronouncement : 02-07-2019

आदेश / ORDER

PER VIKAS AWASTHY, JM :

This appeal by the assessee is directed against the order of Commissioner of Income Tax (Appeals)-2, Kolhapur dated 11-01-2017 for the assessment year 2012-13.

2. Mrs. Shubhada A. Koppa appearing on behalf of the assessee submitted that the solitary issue raised in this appeal is against excess

cane price paid by the assessee to sugarcane suppliers. The ld. AR submitted that the Tribunal in bunch of appeals has restored this issue to the file of Assessing Officer to decide the issue in light of decision of Hon'ble Supreme Court of India in the case of Commissioner of Income Tax Vs. Tasgaon Taluka S.S.K. Ltd. reported as 412 ITR 420. The ld. AR further submitted that assessment year under appeal is under Fair and Remunerative Price (FRP) regime. Therefore, the law laid down by the Hon'ble Apex Court in the case of Commissioner of Income Tax Vs. Tasgaon Taluka S.S.K. Ltd. (supra) would not apply. The ld. AR to further elaborate her contentions has filed written submissions. The same are as under :

> "*Following facts were not in the appeals decided by the Hon'ble Supreme Court in the case of CIT v. Tasgaon Taluka SSK (2019) 412 ITR 420 (SC) –*
>
> 1. *Hon'ble Court in above judgement, para 9.4 end, has stated "We are restricting the present appeals qua sugarcane purchase price paid by the society to the cane growers above the SMP determined under clause 3 and the difference of sugarcane purchase price between the price determined under clause 3 and clause SA of the Control Order, 1966." Whereas cane price paid from FY 2009-10 was either FRP, or more than FRP, as the regime of SMP + 5A had ceased from 22/10/2009.*
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> 2. *Purpose of fixing FRP was, to take it as the cost of cane while fixing "levy" sugar price as per The Essential Commodities (Amendment and Validation) Bill, 2009 passed on 10/12/2009. "Levy" sugar is the sugar sold through Public Distribution System (fair price shops).*
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> 3. *Union Finance Minister had publicly clarified on 20th Nov, 2009 that if State Govts.' fixed cane prices which were higher than FRP, sugar mills would have to pay them. Thus though FRP was the minimum cane price to be paid by sugar factories the higher cane prices paid by sugar mills would not be considered by fixing "levy" price.*
>
> 4. *Cane payments were more than FRP because farmers' demanded that cane price be linked to sugar realisations of sugar mills. Need for this link was confirmed by report dt. 12th Oct, 2012 of the Committee under chairmanship of Dr. C. Rangarajan constituted by Prime Minister on 20th Jan, 2012. The Committee approved that cane price be fixed at 75% of the mill's sugar realisation or 70% of the mill's realisation for sugar and its by-products.*

5. The Committee recommended a 2 stage cane payment, first FRP and then balance payment linked with realization of sugar and its primary by-products.

6. Affidavits of farmers are on record affirming cane payments received by them were for price of their sugarcane supplied.

7. Same AO, for same year, has allowed cane prices paid by Private Sector sugar mills that were higher than FRP. But same cane prices paid by neighbouring Co-op sugar mills were disallowed as being excess over FRP. This is a clear case of discrimination under article 14(1)(g) of the Constitution.

8. When prices of sugar rise, farmers and their organisations demand linkage of upfront payments to such rise in sugar prices, even if they exceed FRP. To prevent farmers agitations from going out of hand, State Govts. often intervene and facilitate negotiations between sugar mills and farmers organisations. Resultantly, sugar mills become bound to buy cane at prices that are agreed to after negotiations with farmers or on directions of State Govt. and the farmers would be entitled to receive contracted prices which are higher than minimum statutory price, viz. FRP.

As held by coordinate Bench "A" of ITAT Pune in lead case of Siddheshwar SSK in ITA No. 1210/PUN/1997, at para, such appeals would not be governed by the ratio laid down by the aforesaid judgment of Hon'ble Supreme Court in CIT V. Tasgaon Taluka SSK."

3. Shri Pankaj Garg representing the Department submitted that the Tribunal in bunch of appeals lead case being ACIT Vs. Shri Shankar SSK Ltd. in ITA No. 382/PUN/2014 for assessment year 2010-11 decided on 13-06-2019 has restored the issue of excess payment made to the cane growers to the file of Assessing Officer. In these bunch of appeals, there were some appeals wherein similar arguments were raised on behalf of assessee distinguishing Commissioner of Income Tax Vs. Tasgaon Taluka S.S.K. Ltd. (supra). This case may also be restored to the Assessing Officer with similar directions.

4. Both sides heard. The assessee in appeal has assailed the order of Commissioner of Income Tax (Appeals) in disallowing excess cane price

paid to the cane growers. The assessee is a sugar factory engaged in manufacturing of white sugar from sugar cane. The issue of payment of excess sugar cane price paid to the cane growers has been dealt with by the Co-ordinate Bench of Tribunal in bunch of appeals viz. DCIT vs. Vasant Rao Dada Patil SSK Ltd. vide ITA Nos.50 to 52/PUN/2012 for the assessment years 1992-93, 1994-95 & 1996-97 respectively decided on 20.03.2019 and in the case of ACIT Vs. Shri Shankar SSK Ltd (supra). In above set of appeals the Tribunal has restored the issue to the file of Assessing Officer to decide this issue in line with the directions of Hon'ble Supreme Court of India in the case of Commissioner of Income Tax Vs. Tasgaon Taluka S.S.K. Ltd. (supra). In the present appeal the assessee has tried to distinguished the decision of Hon'ble Apex Court in the case of Commissioner of Income Tax Vs. Tasgaon Taluka S.S.K. Ltd. (supra). The Co-ordinate Bench in the case of ACIT Vs. Shri Shankar SSK Ltd. (supra) after considering the binding judgment of Hon'ble Supreme Court in the case of CIT Vs. Tasgaon Taluka S.S.K. Ltd. (supra) has restored the issue back to the file of Assessing Officer with liberty to raise all contentions before the Assessing Officer. The relevant extract of the order reads as under :

> *"5. The Co-ordinate Bench (supra) after considering the binding judgment of Hon'ble Supreme Court in the case of CIT Vs. Tasgaon Taluka S.S.K. Ltd. reported as 103 taxmann.com 57, has decided this issue as under :*
>
> > *"5. We have heard both the sides and gone through the relevant material on record. There is consensus ad idem 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****."*

6. Both the sides are unanimously agreeable that the extant issue of deduction for payment of excessive price for purchase of sugarcane, raised in most of the appeals under consideration, 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 respective A.Os. 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.

7. It is noted that in some of the appeals, the assessees have raised an alternate ground for allowing deduction u/s.80P in respect of the addition.

> *8. The ld. ARs, in some of the cases, which were represented by them, were fair enough not to press such ground as it is only an alternate ground and having become infructuous in view of the restoration of the matter to the AO. No argument was advanced in support of such ground in other cases, even where the ld. ARs participated in proceedings before the Tribunal. Therefore, the said alternate ground in all such cases is dismissed."*

6. From the above, it is evident that, following the judgement in the case of Tasgaon Taluka SSK Ltd. (supra), the Tribunal remitted the issue to the file of the Assessing Officer with the direction to determine what constitutes taxable profits and what constitutes an allowable deduction.

7. Shri Prasanna Joshi representing the assessees submitted that in these bunch of appeals there is segment of appeals wherein the ratio laid down by the Hon'ble Apex Court in the case of CIT Vs. Tasgaon Taluka S.S.K. Ltd. (supra) does not apply. The ld. AR submitted that the Statutory Minimum Price (SMP) regime came to an end on 22-10-2009. Thereafter, the cane price paid to farmers from Financial Year 2009-10 was on the basis of Fair and Remunerative Price (FRP). The ld. AR further explained the purpose of fixing FRP and sought directions that the issue relating to payment to cane growers by the assessee towards purchase of sugarcane post October, 2009 should be made independent of the directions in the case of CIT Vs. Tasgaon Taluka S.S.K. Ltd. (supra). The ld. AR contended that in the changed scenario, w.e.f. assessment year 2009-10 it would be difficult to give effect to the decision of Hon'ble Apex Court. The ld. AR further pointed that the Co-ordinate Bench of Tribunal in the case of bunch of appeals lead case being Siddheshwar Sahakari Sakhar Karkhana Ltd. Vs. DCIT in ITAT No. 1210/PUN/1997 decided on 01-05-2019 has dealt with this issue.

We have considered the submissions of ld. AR, the appeals are restored back to the file of Assessing Officer leaving the question open for consideration and examination by the Assessing Officer. The assessees are at liberty to raise all their contentions before Assessing Officer.

8. Thus, in view of the assertions made by both the sides that the facts in the present set of appeals being identical to the issue relating to excess sugarcane price paid by the assessee the issue is restored to the file of Assessing Officer with similar directions as above in the cases of M/s. Vasant Rao Dada Patil SSK Ltd. (supra) and also consider the contentions of assessee with respect to SMP vis-a-vis FRP regime, where ever raised. The Assessing Officer shall decide the issue, after affording reasonable opportunity of hearing to the respective assessees, in accordance with law. Thus, the issue of excess cane price paid to sugarcane suppliers is allowed for statistical purposes in the aforesaid terms."

5. Thus, the issue relating to excess sugarcane price paid by the assessee is restored to the file of Assessing Officer with similar directions as above in the cases of ACIT Vs. Shri Shankar SSK Ltd. (supra) and also

consider the contentions of assessee with respect to SMP vis-a-vis FRP regime. The Assessing Officer shall decide the issue, after affording reasonable opportunity of hearing to the assessee, in accordance with law.

6. In the result, the appeal of assessee is allowed for statistical purpose.

Order pronounced on Tuesday, the 02nd day of July, 2019.

Sd/-	Sd/-
(R.S. Syal)	(Vikas Awasthy)
VICE PRESIDENT	JUDICIAL MEMBER

पुणे / Pune; दिनांक / Dated : 02nd July, 2019
RK

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

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त (अपील) / The CIT(A)-2, Kolhapur
4. The Pr. Commissioner of Income Tax-2, Kolhapur
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