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 Nos.953 & 954/PUN/2017
निर्धारण वर्ष / Assessment Years : 2009-10 & 2012-13

Shri Ganesh Sahakari Sakhar Karkhana Ltd.,
A/P. Rajangaon Khurd, Tal. – Rahata,
Distt. – Ahmednagar – 413719

PAN : AAEAS0636H

.......अपीलार्थी / Appellant

बनाम / V/s.

Assistant Commissioner of Income Tax,
Circle – Ahmednagar

......प्रत्यर्थी / Respondent

Assessee by	:	N O N E
Revenue by	:	Shri Pankaj Garg

सुनवाई की तारीख / Date of Hearing	: 27-06-2019
घोषणा की तारीख / Date of Pronouncement	: 02-07-2019

आदेश / ORDER

PER VIKAS AWASTHY, JM :

These two appeals by the assessee are directed against the order of Commissioner of Income Tax (Appeals)-2, Pune.

Since, the issues raised in both the appeals are identical, the appeals are taken up together for adjudication and are disposed of vide this common order.

ITA No. 953/PUN/2017, (A.Y. 2009-10)

2. In this appeal, the assessee has assailed the order of Commissioner of Income Tax (Appeals) dated 30-08-2016 for the assessment year 2009-10. The assessee has raised solitary issue of disallowance of Rs.2,96,28,039/- on account of excess cane price paid to sugarcane supplier.

3. None has appeared on behalf of the assessee. The notice of appeal for 06-05-2019 was sent to the assessee on 10-04-2019 through RPAD on the address mentioned in Form No. 36. Despite service, none appeared to represent the assessee. Therefore, the appeal is taken up for adjudication with the assistance of ld. DR and the material available on record.

4. Shri Pankaj Garg representing the Department submitted that the issue raised in appeal is identical to the one already decided by the Tribunal in the case of Majalgaon SSK Ltd. Vs. ACIT in ITA No. 308/PUN/2018 for assessment year 2013-14 decided on 14-03-2019. The ld. DR submitted that the Tribunal while deciding 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. This case may also be restored to the Assessing Officer with similar directions.

5. 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. in ITA No. 382/PUN/2014 for assessment year 2010-11 decided on 13-06-2019. 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."*

6. 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). The Assessing Officer is further directed to 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.

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

ITA No. 954/PUN/2017, (A.Y. 2012-13)

8. This appeal by the assessee is directed against the order of Commissioner of Income Tax (Appeals)-2, Pune dated 22-08-2016 for the assessment year 2012-13. The assessee in appeal has raised two grounds. The first ground is towards disallowance on account of sale of sugar at concessional rate and the second ground of appeal is with respect to excess cane price paid to sugarcane supplier.

9. The ld. DR fairly admitted that both the issues raised in the appeal have been adjudicated by the Tribunal. The ld. DR submitted that the Commissioner of Income Tax (Appeals) while adjudicating the issue of sale of sugar at concessional rate has considered the decision of Hon'ble Supreme Court of India in the case of CIT Vs. Krishna SSK reported as 211

taxmann.com 109. However, the Commissioner of Income Tax (Appeals) has failed to apply the directions of Hon'ble Apex Court in proper manner.

10. We have heard the submissions of ld. DR and have perused the impugned order. The facts relevant to this issue are that the assessee is engaged in the business of purchase of sugarcane, manufacturing and sale of sugar to the members and non-members. The assessee sell sugar at concessional price to the farmers, who are the members of Sahakari Sakhar Karkhana (SSK). These members supply sugarcane to the SSK manufactures. The concessional rate of sugar is lower than the price set by the Government (levy sugar). The said concession i.e. the differences between the levy price set by the Government and the sale price to members, was deemed by the Assessing Officer in the scrutiny assessments as income of the assessee. This issue eventually travelled to the Hon'ble Supreme Court in the case of **Krishna SSK Ltd.** (supra). After due consideration, the Hon'ble Supreme Court gave certain directions to the Income Tax Authorities and remanded the matter to the file of the CIT(A) for complying with the said directions before taxing any such concessional sugar price to the farmers.

11. In the appeal the Commissioner of Income Tax (Appeals) passed the orders after considering the said judgment by the Apex Court. However, while giving effect to the said directions, the Commissioner of Income Tax (Appeals) failed to comply with the directions strictly. For example, the direction relating to income nature of the said concession in sale price and includibility of the concessional sugar price in the total income of the assessee stands unattended by the Commissioner of Income Tax (Appeals)

while passing the order. The adjudication on this crucial direction is essential. In the absence of the decision of the lower authorities on these crucial issues, it is not possible for the Tribunal to adjudicate the issues under consideration raised by the appellants/department. In the above background, Revenue fairly submitted that there is requirement of clear finding of fact and law on the directions by the Hon'ble Supreme Court of India. Thus, the includibility of such concessional sugar price in the total income of the assessee assumes great significance and the same is conspicuously missing in the impugned orders of the Commissioner of Income Tax (Appeals). The Co-ordinate Bench in the case of ACIT Vs. Shankar SSK Ltd. (supra) has restored the issue to the file of Assessing Officer with following observations :

"11. In the light of above, the ld. AR for the assessee furnished following written submissions raising the issues for consideration of the CIT(A) in respective cases :-

"1. Hon'ble ITAT, Pune, in Chh. Shahu SSK ITA No. 1924-26/PN/90 vide order dated 8/8/1996, at paras 32-39, following ratio of A. Raman & CO, 67 ITR 11 (SC), held that no income accrued to the assessee on sale of sugar at concession rate to its members.
2. Hon'ble Bombay High Court, in CIT v. Terna SSSK, 301 ITR 222, has noted that Counsel for the Dept, in view of Circular No. 117 dt. 22/8/1973 did not press this ground in appeal.
3. Hon'ble Supreme Court, in CIT v. Krishna SSK, (2012) 211 Taxman 109 (SC), has not referred to Dept, not pressing this issue in High Court. Hon'ble Supreme Court has given following directions to the CIT(A) to decide the issue:

a) *Whether the difference between market price and the concessional price of sugar sold to members / farmers / cane growers,* ***should or should not be added to total income of the assessee*** *society?*
b) *The CIT(A) will take into account whether the practice of selling sugar at concessional rate to its members / farmers / cane growers, has become a* ***practice or custom in co-operative sugar*** *industry?*
c) *Whether any* ***resolution has been passed by State Govt.*** *supporting the practice?*
d) *CIT(A) will also consider on* ***what basis the quantity of sugar is sold*** *on month to month basis, apart from Diwali.*

4. After above judgement of Hon'ble Supreme Court was pronounced, in various appeals decided by different CIT(A)s, they have taken differing approaches, wherein:
a) CIT(A)s have not decided the issue that was directed by the Hon'ble Supreme Court as to "whether difference between market price and

concessional price of sugar sold should or should not be added to total income of the assessee society". (emphasis ours)

This issue revolves round whether the income sought to be assessed in the hands of the assessee society had at all accrued to it. In of the some of the submissions to C1T(A), this issue was specifically raised and ratio of Hon'ble Supreme Court's judgement in A. Raman & CO, 67 ITR 11 (SC) was relied upon. However, the CIT(A)s have not dealt with the same.

It has been submitted to the Hon'ble ITAT that assessee society has not made secret profits nor has received this difference in price back from the members and as such fictional income which is not received by the assessee cannot be taxed in its hands as held by Hon'ble Supreme Court in CIT v. Calcutta Discount Co. Ltd, 91 ITR 8 (SC).

b) In some appeals before CIT(A), assessee has relied upon the CBDT Circular No. 117 for the proposition that rebate given by Co-op. Society to its members' was not disallowable in Society's hands and therefore the discount given to members in the price of sugar should not be taxed in the hands of the Co-op. Society. In some appeals the CIT(A), after noting the directions in Krishna SSK, has held that relying on the Circular, the said concession given by assessee is not taxable in its hands.

c) In most of the appeals, CIT(A)s have held that supplying sugar at a concession price to members and cane suppliers has become a trade practice and custom of the industry. CIT(A)s have noted that State Govt. has now brought strict uniformity in this practice by issuing an order dt. 1/3/2006 u/s 79A of MCS Act, stating the eligibility for society to sell such sugar, its price and monthly quantum.

d) Most CIT(A)s, having noted the aforesaid order dt. 1/3/2006, held that sugar sold at prices lower than levy sugar as provided of in the said order, would be taxable in assessee's hands at the difference between levy price and concessional price charged for infringement of the order.

e) Some CIT(A)s held that concession sugar sold in excess of quantum permitted by order dt. 1/3/2006, would be taxable in the hands of the assessee society for infringement of the order.

f) Some CIT(A)s held that concession sugar sold to cane growers who were not members was not permitted by order dt. 1/3/2006 and as such was its infringement and therefore, the concession given was taxable in the hands of the assessee society.

g) Some assessee societies have not sold concessional sugar every month but only during Diwali or Gudi Padwa. If such sales were less than 5 kgs per month for the year, CIT(A)s have accepted them to be within the quantum of the order dt. 1/3/2006.

h) Most CIT(A)s have not considered the submission that the Hon'ble Supreme Court in Krishna SSK, had specifically excluded the quantum sold during Diwali and therefore the Diwali sales of sugar at concession to members / cane growers were found acceptable by the Hon'ble Court.

5. It is in the above back ground that the concession given in sugar sold by assessee societies to members or cane growers is required to be adjudicated. On perusal of assessment orders and appellate orders of the CIT(A)s it is seen that the very first issue to be decided, i.e. whether difference between market price and concessional price of sugar sold should or should not be added to total income of the assessee society has not been adjudicated by the lower authorities. This issue goes to the root of the matter and it is necessary for the revenue authorities to consider the same, record

their findings and reasons for their decision.

6. In the event revenue authorities hold that the difference between market price and concessional price of sugar is not at all to be taxed in the hands of the assessee society, then the matter stands concluded and no further findings are required.

7. If however, revenue authorities hold that it is the difference between levy price of sugar plus excise duty (as directed in order dt. 1/3/2006) and the price charged to members / cane suppliers which is to be taxed in the hands of assessee society, they may record their findings and reasons for their decision considering assessee societies contentions that they have not received this difference and hence it is not their income.

8. In the event of aforesaid difference (in 6 or in 7 above) is taxed as income in the hands of the assessee society, the quantity of sugar sold to members / cane growers which is being taxed be specified by the revenue authorities with their findings and reasons for the same. In arriving at the above findings and reasons, as directed by the Hon'ble Supreme Court in Krishna SSK, the authorities would be required to consider:

(a) *impact of custom and trade practice;*
(b) *the State's policy;*
(c) *basis for monthly sales; and*
(d) *sales during Diwali"*

12. In the light of the above, it is the submissions of AR for the assessee and the ld. DR that all these bunch of appeals need to be remanded to the file of Assessing Officer for fresh adjudication for the purpose of giving effect to the directions of Hon'ble Apex Court in proper perspective."

12. The present appeal is restored to the file of Assessing Officer to decide the issue of sale of sugar at concessional rate to members by the assessee in line with the directions of Tribunal in the case of ACIT Vs. Shankar SSK Ltd. (supra).

13. The ground No. 2 of the appeal is against disallowance of Rs.11,34,29,765/- on account of excess cane price paid to sugarcane suppliers. The facts and the ground raised by the assessee in the appeal for assessment year 2012-13 are identical to the one already adjudicated in assessment year 2009-10. Therefore, the findings given by us while adjudicating the appeal of the assessee for assessment year 2009-10 would

mutatis mutandis apply to the ground raised in assessment year 2012-13. Consequently, the ground No. 2 of the appeal is allowed for statistical purpose.

14. In the result, both the appeals of assessee are 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, Pune
4. The Pr. Commissioner of Income Tax-1, Pune
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