

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

श्री डी. करुणाकरा राव, लेखा सदस्य एवं श्री विकास अवस्थी, न्यायिक सदस्य के समक्ष
BEFORE SHRI D. KARUNAKARA RAO, AM AND SHRI VIKAS AWASTHY, JM

आयकर अपील सं. / ITA No.1090/PUN/2017

निर्धारण वर्ष / Assessment Year : 2013-14

Dyaneshwar SSK Ltd.,
A/p Dyneshwar Nagar (Bhende),
Taluka: Nevasa,
Ahmednagar-414603.

PAN : AAAAS4092H

.....अपीलार्थी / Appellant

बनाम / V/s.

ACIT, Ahmednagar Circle,
Ahmednagar.

.....प्रत्यर्थी / Respondent

Assessee by : Shri Pratik Sandbhor
Revenue by : Smt. Shabana Parveen

सुनवाई की तारीख / Date of Hearing : 23.07.2019
घोषणा की तारीख / Date of Pronouncement : 25.07.2019

आदेश / ORDER

PER D. KARUNAKARA RAO, AM:

This appeal is filed by the assessee against the order of CIT(A)-2,
Pune dated 07.11.2016 for the Assessment Year 2013-14.

2. The grounds raised by the assessee are as under :-

"1. On the facts and in the circumstances of the case the Id. CIT(A) has erred in not allowing the **cane purchase price** actually paid by the appellant and by holding that excess payment over FRP constitutes distribution of profit.

2. On the facts and in the circumstances of the case and without prejudice to Ground No.1 the CIT(A) has erred in deducting the amount of **harvesting and transport** from the Fair Remunerative Price for arriving at the **excess cane purchase price** to be disallowed.

3. On the facts and in the circumstances of the case *Ld. CIT(A)* has erred in sustaining the disallowance of Rs 66,18,618/- made on account of **sale of sugar at concessional rate**.

4. On the facts and in the circumstances of the case *Ld. CIT(A)* has erred in sustaining the disallowance of **contribution** of Rs 20,37,599/- **made to Vasantdada Sugar Institute** duly notified u/s 35(1)(ii) of the Act, overlooking the clear provision of sec 43(2) of the Act.

5. On the facts and in the circumstances of the case and **without prejudice** to above Ground No. 1 to 4, it is to be held that the income of the appellant is totally exempt u/s 80P(2)(a)(ii) of the I.T. Act 1961 as the sugar is an agricultural produce. Refer Full Bench Judgment of Punjab and Haryana High Court in the case of *Budhewal Co-op Sugar Mills Ltd.* - 315 ITR 351.

The above grounds of appeal may kindly be allowed to be altered, amended, modified etc in the interest of natural justice."

3. The assessee in the present appeal is engaged in manufacturing of white sugar. The primary issues raised in this appeal are :

- i. Excess cane price paid by the assessee to sugarcane suppliers, i.e. the price over and above the Statutory Minimum Price (SMP) fixed by State Government for purchase of cane.
- ii. Addition on account of sale of sugar at concessional rate to the members/shareholders by the assessee.

Apart from the above two primary issues, the (i) Provision for Vasantdada Sugar Institute (VSI) Contribution and (ii) Disallowance of Cane Harvesting and Transportation Expenditure have also emerged.

4. Before us, at the outset, *ld. Counsel* for the assessee and the *ld. DR* for the Revenue submitted that the issues raised in the present appeal have already been considered and adjudicated by the Co-ordinate Bench of Tribunal in bunch of appeals. The facts and issues raised in present appeal is similar. The *Ld. DR* furnished copy of order of Tribunal

dated 14-03-2019 vide which bunch of 162 appeals were disposed of by the Co-ordinate Bench, the lead case being Majalgaon Sahakari Sakhar Karkhana Ltd. Vs. ACIT in ITA No. 308/PUN/2018 for the assessment year 2013-14.

5. After hearing both the sides and after considering the order of Co-ordinate Bench in the case of Majalgaon Sahakari Sakhar Karkhana Ltd. Vs. ACIT (supra) etc., we observe that the issues raised in the present appeal have already been considered and decided by the Co-ordinate Bench.

Excess Cane Price Paid to Sugarcane Suppliers

6. The Co-ordinate Bench after considering the judgment of Hon'ble Supreme Court of India 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 assessee 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 aforementioned 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.”*

7. Thus, in view of the statement made by both the sides that the facts in the present appeal are identical, 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 case of Majalgaon Sahakari

Sakhar Karkhana Ltd. Vs. ACIT (supra). The Assessing Officer shall decide the issue after affording reasonable opportunity of being heard to the assessee, in accordance with law.

Sale of Sugar at Concessional rates to the Members/Shareholders

8. The Ld. DR submitted that this issue was decided by the Hon'ble Apex Court in the case of CIT Vs. Krishna Sahakari Sakhar Karkhana Limited reported as 27 taxmann.com 162. In this appeal, where the issue has been raised, either the orders were passed by the Commissioner of Income Tax (Appeals) prior to the date of judgment of Hon'ble Supreme Court of India in the case of CIT Vs. Krishna Sahakari Sakhar Karkhana Limited (supra) i.e. 25-09-2012 and in some cases where the orders have been passed by the Commissioner of Income Tax (Appeals) subsequent to the date of said judgment, the Commissioner of Income Tax (Appeals) has not considered the judgment rendered by the Hon'ble Apex Court on this issue.

9. We find that the issue of sale of sugar at concessional rates has also been considered by the Co-ordinate Bench in the case of Majalgaon Sahakari Sakhar Karkhana Ltd. Vs. ACIT (supra) and has held 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 Id. 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."

10. Both the sides have stated at the Bar that the issue raised in in this appeal are identical to the one already decided by the Co-ordinate Bench. Thus, in view of the above order by Co-ordinate Bench this issue is restored back to the file of Assessing Officer for de-novo adjudication in similar terms. The Assessing Officer shall grant reasonable opportunity of being heard to the assessee, in accordance with law.

Provision for Vasantdada Sugar Institute (VSI) Contribution

11. The Id. AR for the assessee submitted that the issue of provision for VSI contribution has been decided by the Co-ordinate Bench in favour of the assessee by following the order of Tribunal in the case of Bhima S.S.K. Ltd. in ITA No. 1414/PUN/2000. The Id. DR fairly

admitted that this issue has been considered by the Co-ordinate Bench. The Co-ordinate Bench while deciding this issue in favour of assessee has observed as under :

“18. We have heard both the sides and gone through the relevant material on record. It is found that the ld. CIT(A) has determined this issue in favour of the assessee by following the order passed by the Pune Benches of the Tribunal in the case of Bhima S.S.K. Ltd. (supra). No material has been placed on record to show that this order of the Tribunal has been reversed or modified in any manner by the Hon’ble High Court. Respectfully following the precedent, we decide this issue in favour of the assessee.”

12. Thus, in view of the above findings of the Tribunal and submissions of both the sides, the issue is decided in favour of the assessee.

Harvesting and Transportation Expenditure

13. In some of the appeals the issue of disallowance of cane harvesting and transportation expenditure incurred by the assessee has been raised. The expenditure has been disallowed by the Assessing Officer. We find that this issue is squarely covered in favour of the assessee by CBDT Circular No. 6/2007, dated 11-10-2007. For the sake of ready reference the same is reproduced here-in-below :

“1. Instances have come to the notice of the Board wherein Assessing Officers have disallowed the claim of harvesting and transportation expenses incurred by the Co-operative sugar mills for procuring sugarcane from farmers, who are members of such Co-operative Sugar Mills and who are bound under an agreement to supply the sugarcane exclusively to the concerned sugar Mill.

2. The issue of allowability of such expenses in the case of Co-operative Sugar Mills has been examined by the Board. These expenses

are incurred by the Sugar Mills for ensuring an adequate and sustained supply of freshly cut sugarcane that is an essential input for the continuous running of such Mills. These expenses are, therefore; incurred for a commercial expediency and are prima facie wholly and exclusively for the purpose of business. Such expenses are, therefore, allowable in the computation of the income of the Co-operative Sugar Mills.”

Thus, in view of CBDT Circular the harvesting and transportation expenditure are allowable. Consequently, the issue is decided in favour of the assessee.

14. In the result, the appeal is partly allowed for statistical purposes in the manner aforesaid as the case may be.

Order pronounced on 25th day of July, 2019.

Sd/-
(विकास अवस्थी /**VIKAS AWASTHY**)
न्यायिक सदस्य/**JUDICIAL MEMBER**

Sd/-
(डी. करुणाकरा राव/**D. KARUNAKARA RAO**)
लेखा सदस्य/**ACCOUNTANT MEMBER**

पुणे / Pune; दिनांक / Dated : 25th July, 2019.

Sujeet

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

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The CIT(A)-2, Pune.
4. The Pr. CCIT, Pune.
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, “ए” बेंच,
पुणे / DR, ITAT, “A” Bench, Pune.
6. गार्ड फ़ाइल / Guard File.

आदेशानुसार / BY ORDER,

// True Copy //

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