IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH "B", PUNE

BEFORE SHRI R.S. SYAL, VICE PRESIDENT AND
SHRI S.S. VISWANETHRA RAVI, JUDICIAL MEMBER

आयकर अपील सं. / ITA No.668/PUN/2014
निर्धारण वर्ष / Assessment Year : 2006-07

Shivajirao Nilangekar Patil Sahakari Sakhar Karkhana Ltd. A/P. Ambulga, Tal. Nilanga, Dist. Latur PAN : AAAAS4651F	Vs.	DCIT, Circle-3, Nanded
Appellant		Respondent

Appellant by	Shri Pramod Shingte
Respondent by	Shri Pankaj Garg
Date of hearing	13-09-2019
Date of pronouncement	16-09-2019

आदेश / ORDER

PER R.S.SYAL, VP :

This appeal by the assessee arises out of the order passed by the Commissioner of Income-tax (Appeals), Aurangabad on 15-01-2014 in relation to the assessment year 2006-07.

2. The assessee is a Co-operative Sugar factory engaged in the business of manufacturing and sale of sugar, alcohol and its by-products. A return was filed declaring loss of Rs.13.45 crore and the assessment was completed at loss of Rs.4.49 crore and odd.

3. The first ground is against the confirmation of disallowance on account of excess cane price paid to sugarcane suppliers.

4. The AO observed during the course of assessment proceedings that the assessee paid excessive cane price, over and above the Fair and remunerative price (FRP) fixed by the Government, to its members as well as non-members. On being called upon to justify such deduction, the assessee gave certain explanation by submitting that such payment was solely and exclusively in connection with the business and the entire amount was deductible u/s.37(1) of the Income-tax Act, 1961 (hereinafter also called `the Act'). The AO computed excessive cane price paid both to the members and non-members at Rs.6,26,25,768 and made addition for the said sum. The ld. CIT(A) restricted the said addition on this score to Rs.96,54,850/-, against which the assessee has approached the Tribunal.

5. We have heard both the sides and gone through the relevant material on record. 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 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.....*
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> *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 unanimous that the extant issue of deduction of payment of excessive price for purchase of sugarcane, raised in the appeal under consideration, is squarely covered by the aforesaid judgment of the Hon'ble Supreme Court. Respectfully following the precedent, we set-aside the impugned order on this score and remit the matter to the file of A.O 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.

7. 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.

8. The second ground is against the confirmation of disallowance of Rs.36,294/- on account of sugar sold to members at concessional price.

9. 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 order on this score is set aside and the matter is restored to the file of AO, instead of to the CIT(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.

10. The only other issue which survives in the appeal is against the confirmation of disallowance of Rs.2,64,35,713/- on account of disallowance u/s.40(a)(ia) of the Act.

11. The facts concerning this ground are that the assessee debited Rs.2.64 crore odd on account of H & T payment made to Harvestors and Transporters. The Assessing Officer (AO) observed that such payments were made without deduction of tax at source. On being called upon to explain its stand, the assessee submitted that payment made to each harvestor and transporter was below the stipulated limit. The AO invoked the provisions of section 40(a)(ia) and made the above disallowance. The ld. CIT(A) affirmed the same.

12. Having heard both the sides and gone through the relevant material on record, it is seen from the submissions made before the lower authorities that the assessee claimed to have made payment to various labourers and harvesters through group leaders, who were also members of the labour group and each group consisted of 15-20 gents and 15-20 ladies with payment to each individual at less than Rs.3,000/- to Rs.4,000/- per month. The assessee further submitted that no payment during the year to such individuals exceeded Rs.50,000/-. It is noted that the Hon'ble jurisdictional High Court in the case of *CIT Vs. Dwarkadheesh Sakhar Karkhana Ltd.* vide its judgment dated 08-01-2018 in ITA No.480/2015 has held that the provisions of section 194C are not attracted in respect of payments made by the assessee, a sakhar karkhana as is the assessee also under consideration, to Mukadams and Transporters. As the assessee made payment to group labourers and such annual payments did not exceed Rs.50,000/- per individual, which at the material time was the threshold for invocation of section 194C, respectfully following the judgment in the case of *CIT Vs. Dwarkadheesh Sakhar Karkhana Ltd. (supra),* we hold that the

disallowance u/s.40(a)(ia) has been wrongly sustained. We, therefore, order to delete the disallowance.

13. In the result, the appeal is partly allowed.

Order pronounced in the Open Court on 16th September, 2019.

Sd/-	Sd/-
(S.S. VISWANETHRA RAVI)	**(R.S.SYAL)**
JUDICIAL MEMBER	**VICE PRESIDENT**

पुणे Pune; दिनांक Dated : 16th September, 2019
सतीश

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

1. अपीलार्थी / The Appellant;
2. प्रत्यर्थी / The Respondent;
3. The CIT(A), Aurangabad
4. The CIT, Aurangabad
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	13-09-2019	Sr.PS
2.	Draft placed before author	16-09-2019	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.		

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