आयकर अपीलीय अधिकरण "बी" न्यायपीठ पुणे में ।

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

BEFORE SHRI ANIL CHATURVEDI, ACCOUNTANT MEMBER
AND
SHRI S.S. VISWANETHRA RAVI, JUDICIAL MEMBER

Sl. No.	ITA No.	Name of Appellant	Name of Respondent	Asst. Year
1	2453/PUN/2012	Bhimashankar S.S.K. Ltd., A/P. Pargaon, Tal.Ambegaon, Pune PAN : AAAAB0949G	DCIT, Circle-1(1), Pune	2009-10
2	314/PUN/2017	Mahankali S.S.K. Ltd., A/P. & Tal. Kavthemahankal, Dist.-Sangli PAN : AAAAS4544E	ACIT, Circle-2, Sangli	2010-11
3	603/PUN/2017	Manganga S.S.K. Ltd., A/P. Sonarsiddhanagar, Tal. Atpadi, Dist. Sangli-415301 PAN : AAAAM1794J	ACIT, Circle-2, Sangli	2011-12
4 to 7	716 to 719/PUN/2017	Kumbhi Kasari S.S.K. Ltd., A/P. Kuditre, Tal. Karvir, Dist. Kolhapur-416204 PAN : AAAAK0363M	DCIT, Circle-1, Kolhapur	2010-11 2011-12 2012-13 2013-14
8 to 15	820 to 826 & 2153/PUN/2017	Jawahar Shetkari S.S.K. Ltd., Shri Kallappanna Awadenagar, Hupari-Yalgud, Tal. Hatkanangale, Dist. Kolhapur-416203 PAN : AAAAJ0571C	ACIT, Circle-1, Ichalkaranji	1997-98 1999-2000 2000-01 2010-11 2011-12 2012-13 2013-14 2014-15
16 to 19	855 to 858/PUN/2017	Shri Chh. Shahu S.S.K. Ltd., Jaysingrao Ghatge Bhavan, Tal. Kagal, Dist. Kolhapur PAN : AAAAS1032M	DCIT, Circle-1, Kolhapur	2010-11 2011-12 2012-13 2013-14
20	872/PUN/2017	Vishwasrao Naik S.S.K. Ltd., A/P. Chikhali, Tal. Shirala, Dist. Sangli Pin-415408 PAN : AAAAV0215B	ACIT, Circle-2, Sangli	2011-12

21 to 24	992 to 995/PUN/2017	Shri Bhogawati S.S.K. Ltd., Sushant S. Phadnis, C.A., 613 E Ward, Phadnis Chambers, Shahupuri, 1st Lane, Kolhapur. PAN : AAAAS3731R	ACIT, Circle-1, Kolhapur	2010-11 2011-12 2012-13 2013-14
25 to 27	1044 to 1046/PUN/2017	Appasaheb Nalawade Gadhinglaj Taluka S.S.K. Ltd., A/P. Hirali, Tal. Gadhinglaj, Kolhapur-416502 PAN : AAAAG0574A	DCIT, Circle-1, Kolhapur	2010-11 2011-12 2012-13
28 to 30	1080 to 1082/PUN/2017	Padamshree Dr. D.Y. Patil S.S.K. Ltd., Tal. Vesraf Palsambe, P. Aslat, Tal. Gaganbawada, Kolhpuar PAN : AAAAS6831N	DCIT, Circle-1, Kolhapur	2010-11 2011-12 2012-13

Assessee by : None for Sl.Nos.1 to 3, 16 to 19 & 21 to 24.
Shri M.K. Kulkarni for Sl.Nos.4 to 7, 20, 25 to 27 and 28 to 30.
Shri Prsanna C. Joshi for Sl.Nos.8 to 15.

Revenue by : Shri Hoshang Boman Irani & Shri Abhijit Haldar.

सुनवाई की तारीख / Date of Hearing : 17-10-2019
घोषणा की तारीख / Date of Pronouncement : 20-11-2019

आदेश / ORDER

PER BENCH :

All the above said appeals filed by different assessees against separate orders of CIT(A) involving the same issue for A.Ys. 1997-98 to 1999-01 & 2009-10 to 2014-15 questioning the action of CIT(A) in confirming the additions made on account of excess sugarcane price and

the concessional rate on sale of sugar in the facts and circumstances of the case.

2. Heard respective parties and perused the material available on record. We find, in all the above mentioned appeals, the respective assessees raised two issues including addition made on account of excess cane price and concessional rate on sale of sugar. The similar issue involving excess cane price and concessional rate on sale of sugar came before this Tribunal in a batch of 75 appeals wherein the Co-ordinate Bench of the Tribunal in the case of Manganga Sahakari Sakhar Karkhana Ltd., Vs. ACIT in ITA No.344/PUN/2017 and others remanded both the issues to the file of AO vide order dated 01.10.2019, for ready reference the relevant portion concerning the issue of excess cane price is reproduced hereunder :

<u>Excess Cane Price</u>

> *"4. A common issue involved in almost all the appeals is against the addition made by the Assessing Officer (AO) towards of excessive sugarcane price paid to members as well as non-members of the respective assessees. The facts common to almost all the appeals are that the assesses are engaged in the business of manufacturing of white sugar. During the course of assessment proceedings, the AO observed 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'). Relying on the judgment of Hon'ble Supreme Court in the case of DCIT Vs. Shri Satpuda Tapi Parisar S.S.K. Ltd. and others (2010) 326 ITR 402, the AO opined that the excessive price paid was in the nature of `distribution of profits' and hence not deductible. This is how, he computed the excessive cane price paid both to the members and non-members and made addition for the said sum. The ld. CIT(A) in some cases deleted the addition, fully or partly, whilst in others the addition got sustained. This led to filing of the cross appeals both by the assessee as well as the Revenue before the Tribunal.*

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 SSK Ltd. (2019) 412 ITR 420 (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."

3. In view of the above, the issue involving excess cane price in all the respective assessees remanded to the file of AO for his consideration afresh as indicated above. Thus, the grounds raised in all the appeals involving the excess cane price are allowed for statistical purposes.

4. Now, we shall take up other issue concerning the concessional rate on sale of sugar. The relevant portion of which is reproduced herein below for ready reference.

Concession on sale of Sugar

"6. We have heard both the sides and gone through the relevant material on record. It is observed that this issue cropped up for consideration before the Tribunal in the batch of appeals as discussed infra. The relevant discussion has been made as under:-

> *"11. On a representative basis, we are taking up the appeal filed by Manganga SSK Ltd. in ITA No.344/PUN/2017. The factual matrix of this issue is that the Assessing Officer (AO) observed during the course of assessment proceedings that the assessee had sold/supplied sugar to its members at concessional rate. On being called upon to explain as to why the difference between the Fair Market price and the Concessional price should not be disallowed as it was nothing but distribution of profit, the assessee relied on the judgment in CIT Vs. Terna Shetkari SSK Ltd. (2008) 168 Taxman 266 (Bom.) to contend that similar issue was not pressed by the ld. DR before the Hon'ble Bombay High Court, which implied that the Department acquiesced the decision of the lower courts in allowing relief. Not convinced with the assessee's submissions, the AO opined that the disallowance in the case of Terna SSK Ltd. (supra) was made by the AO as non-business expenditure. In his opinion, supply of sugar at concessional rate as against the prevalent market price was nothing but appropriation of profit and in the nature of application of income. Considering the difference between the market price and the concessional price charged vis-a-vis the quantity supplied by the assessee to its member cane-growers, the AO worked out an addition of Rs.8,32,433/-. The assessee carried the matter before the ld. CIT(A), who noticed that similar issue has been considered by the Hon'ble Supreme Court in the case of CIT Vs. Krishna Sahakari Sakhar Karkhana Ltd. and others (2012) 254 CTR 638 (SC) in which the matter has been restored for ascertaining whether the difference between the Fair Market price and the Concessional price of the sugar supplied to farmers should or should not be added to the total income of the assessee along with consideration of certain other factors. The ld. CIT(A) took note of an order dated 01-03-2006 passed by the Commissioner of Sugar, Maharashtra State, considering the directions issued u/s.79(A) of the Maharashtra Cooperative Societies Rules, 1960 providing, inter alia, that the sugar factories shall sell a maximum of 5kg of sugar per month to its members at the rate of levy sugar plus excise duty on free sugar; the factories shall not sell sugar at concessional rate if it has crushed less than 50% during the last season. In the light of the above order of Commissioner of Sugar, Maharashtra State, the ld. CIT(A) held that maximum 5 kg per month per member can be issued at the levy price and the difference between the levy price and the concessional price actually charged from the members up to the limit of 5 kg per month per member should be taxed in the hands of the assessee; and the difference between the market price and the concessional price on the quantity of sugar sold beyond 5 kg per member per month, should also be added to the total income. To buttress his view, he took support from Nagarbail Salt Owners Co-operative Society Ltd. (2016) 238 Taxman 689 (Karnataka) in which the sale proceeds were transferred to an account called 'Distributable Pool Fund Account' for distribution among the members of the Society. After such transfer, the Society offered remaining income to tax, which point of view of the assessee was jettisoned by the Hon'ble High Court. Based on this panorama of facts and the legal position, the ld. CIT(A)*

reduced the addition to some extent. Aggrieved thereby, the assessee has approached the Tribunal.

12. The assessees under consideration were represented by various ld. Counsel, who made elaborate arguments. They, inter alia, relied on certain decisions to bolster the argument that there can be no addition on account of sale of sugar at concessional price to the members of the assessee co-operative societies. It was submitted, by mainly relying on the judgment of Hon'ble Supreme Court in the case of A. Raman and Co. (1968) 67 ITR 11 (SC), that the law does not oblige a trader to make maximum profit out of his trading transactions. Reliance was also placed on certain other decisions including CIT Vs. Calcutta Discount Co. Ltd. 91 ITR 8 (SC); H.M. Kashiparekh & Co. Ltd. Vs. CIT 39 ITR 706 (Bom.); CIT Vs. Shoorji Vallabhdas & Co. 46 ITR 144 (SC); Rogers Pyatt Shellac & Co. Vs. Secretary of State for India 1 ITC 363 (Cal.); Union of India Vs. Azadi Bachao Andolan 263 ITR 706 (SC); and Vodafone International Holdings B.V. Vs. Union of India 341 ITR 1 (SC) to contend that the profit charged to tax by the authorities below was not in accordance with law as it amounted to taxing notional income.

13. Per Contra, the ld. DR relied on the judgment of Hon'ble Supreme Court in Tasgaon SSK Ltd. (supra) to contend that the authorities below rightly treated the difference between the Fair Market price and Concessional price charged from members of the assessees co-operative societies as 'appropriation of profit'. For supporting the charging of lower price for sugar sold to members as constituting income, the ld. DR drew an analogy from the case of Tasgaon SSK Ltd. (supra) by submitting that, in that case, the price paid over and above the statutory market price for purchase of sugarcane from the members/non-members of the societies has been held by the Hon'ble Supreme Court as 'appropriation of profit' and hence chargeable to tax. He submitted that there is no qualitative difference between the two situations viz., the first in which sugarcane is purchased from the members at excessive price and the differential amount is charged to tax as 'appropriation of profit' and the second in which sugar is supplied at concessional price and the difference between the Fair Market Price and the Concessional Price is charged to tax again as 'appropriation of profit'.

14. We have heard both the sides and gone through the relevant material on record. Before proceeding further, we consider it expedient to mention that the issue of sale of sugar to members of a cooperative society at concessional price came up for consideration before various Benches of the Tribunal across the country. The Pune Benches of the Tribunal vide its order dated 08-08-1996 in Chhatrapati Sahu SSK Ltd. Vs. DCIT (ITA No.1924/PN/1990), a copy placed on record, decided this issue in favour of the assessee by relying on the judgment in the case of A. Raman & Company (supra). Thereafter, several orders came to be passed by various benches of the Tribunal. All such orders were challenged by the Revenue before the respective Hon'ble High Courts. In the case of Terna SSK Ltd. (supra), one of the issues raised by the Department was against the deletion of addition made on account of sugar supply to members at concessional rate. The ld. Counsel for the Revenue did not press this issue before the Hon'ble High Court, as a result of which such ground was dismissed. Various orders passed by

the Tribunal came up for adjudication before the concerned Hon'ble High Courts. The Hon'ble Bombay High Court in CIT Vs. Kisanveer Satara Sahkar Karkhana Ltd. in ITA No.930/2008 vide its judgment dated 30.6.2009 decided this issue in favour of the assessee. In another judgment in CIT Vs. Krishna Sahakari Sakhar Karkhana Ltd. (ITA No.225/2009), the Hon'ble Bombay High Court again decided this issue in favour of the assessee vide its judgment dated 30-06-2009. The Revenue approached the Hon'ble Supreme Court against all such judgments passed by the High Courts. Vide its common judgment dated 25.09.2012 in CIT Vs. Krishna Sahakari Sakhar Karkhana Ltd. (supra), as a lead matter and covering several other cases in which similar issue was decided in favour of the assessee, the Hon'ble Supreme Court set-aside the judgments passed by the Hon'ble High Courts and restored the matter to the CIT(A) for deciding the question afresh as to whether the difference between the actual price of sugar sold in the market and the price of sugar sold by the assessee to its members at concessional rate should or should not be added to the total income of the assessee. Apart from the above question, the Hon'ble Supreme Court further directed the CIT(A) to take into account whether the above mentioned practice of selling sugar at concessional rate has become the practice or custom in the sugarcane industry ?; whether any resolution has been passed by the State Government supporting the practice ? It further held that the CIT(A) before reaching any conclusion would also consider on what basis the quantity of sugar was being fixed for sale to farmers and growers/members for each year on month to month basis apart from Diwali.

15. On an analysis of the position discussed above, it clearly emerges that after the advent of the Hon'ble Supreme Court judgment in Krishna SSK Ltd. (supra), the earlier judgments rendered by the Hon'ble High Courts and the orders passed by the Tribunal in favour of the assessee do not continue to hold the field anymore. Our attention has not been drawn towards judgment of any Hon'ble High Court or order of the Tribunal in which the issue under consideration has been decided after considering the judgment of the Hon'ble Supreme Court in Krishna SSK (supra), which thereby renders the issue in question as virgin.

16. At this stage, it is relevant to note that the Hon'ble Supreme Court in Tasgaon SSK Ltd. (supra) had an occasion to deal with a connected issue of purchase of sugarcane by the sugar factories from its members at excessive price, which we have discussed hereinabove. The AOs in that group of matters had opined that the difference between the price paid as per clause 3 of the Control Order, 1966 determined by the Central Government, being, the Statutory Minimum Price (SMP) and the price determined by the State Government under clause 5A of the Control Order, 1966, being SAP/Additional Price, was in the nature of 'distribution of profits' and hence, not deductible as expenditure. Such an issue came to be decided by the Hon'ble High Courts in favour of the assessee. When the Revenue brought the matter for consideration before the Hon'ble Supreme Court, their Lordships held that the SMP determined under clause 3 of the Control Order, 1966 which is paid at the beginning of the season is deductible in the entirety but the difference between the SMP determined under clause 3 and SAP/Additional Price determined under clause 5A has an element of 'distribution of profit', which cannot be allowed as deduction. That is how, the Hon'ble Supreme Court remitted the matter to the file of AO for considering the modalities and manner in which SAP/Additional price is

decided and to carry out an exercise of considering the 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 Control Order, 1966 and thereafter determine as to what part of the differential amount would form part of the 'distribution of profit.' Relevant discussion has been made in Para 9.4 of the judgment in which it has been categorically held that: "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.' The matter was sent back to the AO with certain directions to find out the element of appropriation of profits embedded in the price fixed under clause 5A.

17. In view of the above judgment in the case of Tasgaon SSK Ltd.(supra), it is clear that the Hon'ble Apex Court has, in principle, held that the excessive cane price paid to the members is, to some extent, in the nature of 'appropriation of profit' which should be charged to tax in the hands of the assessee. When we consider the nature of transaction dealt with by the Hon'ble Supreme Court, being, purchase of sugarcane as raw material in the sugar industry at excessive price in juxtaposition to the sale of sugar as finished product to members at concessional price, we find that both of them directly affect the gross profit of the sugar mills. If a part of the excessive purchase price of sugarcane paid has been held to be in the nature of 'appropriation of profit', then obviously a part of the concession given to members on sale of sugar, by the same standard and on the same parity of reasoning, would also have to be considered as 'appropriation of profit'.

18. At this juncture, it is pertinent to note that the AO has held that the amount in question is disallowable not u/s 37(1) of the Act, but: `supply of sugar at concessional rate, as against the prevalent market price, is nothing but an appropriation of profit and in the nature of application of income'. Thus, the view point of the AO of `appropriation of profit' by the assessee to its members by means of selling sugar at concessional price is based on the premise that a co-operative society and its members are not different from each other in the co-operative structure.

19. In case we proceed with the presumption that the assessee and its members are separate from each other and the transaction is between two independent parties, then patently, there can be no question of earning any income by selling sugar at a price lower than the market price. Tax is levied on income earned and not on loss of potential income. Neither the AO has invoked any specific provision nor the ld. DR has invited our attention towards any provision in the Act warranting the addition in the given circumstances. Further, it is not anyone's case that the provisions of section 92C are attracted.

20. Coming back to the AO's case of `appropriation of profits', which point of view has been noted with approval by the Hon'ble Supreme Court in para 9.4 of the judgment in Tasgaon (supra) holding excess purchase price of sugarcane to be `certainly be and/or said to be an appropriation of profit', we find that such a condition of appropriation of profit pre-supposes some profit which is appropriated directly or indirectly amongst the members. One needs to draw a line of distinction between two situations, viz., the first in which profit is earned from business operations and is passed on to members and the second, in

which potential profit is not earned from members or to simply put, a case of loss of potential profit. Whereas, the appropriation of profit is possible in the first situation, which is akin to the purchase of sugarcane from the members at excessive price resulting in diverting the profit earned from normal business operations to the members in the form of excess price of sugarcane, the appropriation of profit is not possible in the second situation, which is akin to the sale of sugar at concessional rate. The second situation of selling sugar at concessional rate is in the nature of foregoing potential profit which would have been otherwise earned had sugar been sold at market price. As the second situation has the effect of foregoing potential profit, it cannot be equated with an appropriation of profit except where the sale of sugar is made at below the actual cost.

21. Again apropos the view point of the AO in treating the co-operative society and its members as one and the same thing with the theory of appropriation of profit, we underscore the settled legal position that no one can make profit from self. In this regard, it will be befitting to note the judgment of the Hon'ble Summit Court in Sir Kikabhai Premchand vs. CIT (1953) 24 ITR 506 (SC), in which the assessee employed the method of valuing the closing stock at the cost price. The deeds of trust were valued for the purpose of stamp at the market value of the shares and silver bars prevailing at the dates of their execution. The assessee, however, showed the transfer of these shares and silver bars to the trustees in the books of account at the cost price thereof by contending that the market value of the said shares and silver bars, on which the stamp duty was based, could not be the basis for computing his income from the stock-in-trade thus transferred. The Income Tax Officer did not accept this contention and assessed the profit at the difference between the cost price of the said shares and silver bars and the market value thereof at the date of their withdrawal from the business. The AAC, the Tribunal as also the Hon'ble High Court rejected the contention of the assessee. When the matter was brought to the Hon'ble Apex Court, it held, by a majority view that : `The appellant was right in entering the cost value of the silver and shares at the date of the withdrawal, because it was not a business transaction and by that act the business made no profit or gain, nor did it sustain a loss, and the appellant derived no income from it. ..... In the present case disregarding technicalities it is impossible to get away from the fact that the business is owned and run by the assessee himself. In such circumstances, it is wholly unreal and artificial to separate the business from its owner and treat them as if they were separate entities trading with each other and then by means of a fictional sale introduce a fictional profit which in truth and in fact is non-existent. Cut away the fictions and you reach the position that the man is supposed to be selling to himself and thereby making a profit out of himself which on the face of it is not only absurd but against all canons of mercantile and IT law.' The sequitur is that no person can earn profit from himself and there can be no contemplation of profit when the owner withdraws goods from the business. Such withdrawal of goods needs to be valued at cost price only and not the market price.

22. Reverting to the facts of the extant case, we find that the AO has made out a case of appropriation of profit on sale of sugar to members at concessional rate. We have noted above that the appropriation of profit pre-supposes profit which can be appropriated to the members of the co-operative society. In so far as the purchase of sugarcane from members at higher price is concerned, it clearly amounts to business profit percolating to the members in the shape of excess cane price given to the members. For example, if the SMP of sugarcane is Rs.100/- and a sugar factory is purchasing sugarcane from its members at say, Rs.120/-, in a way it is passing on its profit earned from normal business transactions to its members to the extent of excess price paid. This is the essence of the judgment in the case of Tasgaon SSK Ltd. (supra.). But the transaction of sale of sugar to members at concessional rate cannot be considered as appropriation of profit, but a case of not earning some potential profit. To illustrate, if sugar is sold at

concessional price at Rs.80/- against the prevalent price of Rs.100/-, what the sugar mill is doing is that it is charging its members less by Rs.20/-, vis-a-vis sale made to non-members. This differential amount of Rs.20/- is loss of potential profit and not appropriation of profit. Going by the ratio in the case of Sir Kikabhai (supra), the assessee society cannot earn profit from the sale of sugar to its members.

23. It is further relevant to note that difference between the market price of sugar and concessional sale price may entail two situations. The first one is of simplicitor loss of potential profit and second one is of actual loss of profit when sugar is sold to members at below its cost price. Whereas, the simplicitor loss of potential profit cannot be termed as appropriation of profit, sale of sugar to members at below its cost price results in appropriation or distribution of profits earned from normal business operations to members in the garb of sale at a price below the cost price. The position can be understood with the help of an example. Suppose market price of sugar is Rs.100/- and the cost price is Rs.80/-. If the assessee sells sugar at concessional rate to its members at, say, Rs.85/- per kg., it is obviously recovering its cost of Rs.80/- in addition to earning profit of Rs.5/-. In such a situation, the differential amount of Rs.15/- (Rs.100 – Rs.85) cannot be charged to tax because it is a case of loss of potential profit and not appropriation of profit. If, on the other hand, in the given scenario of market price of sugar at Rs.100, the assessee sells sugar at concessional rate of Rs.75/- to its members, which is below its own cost of Rs.80/-, then the differential amount of Rs.5/- (Rs. 80 minus Rs.75) would obviously be `appropriation of profit' to members that was earned from normal business operations and passed on to members in the shape of sale price below the cost price. Whereas such differential amount of Rs.5/- is 'appropriation of profit' to members which should be charged to tax, the difference of Rs.15 (Rs.100 minus Rs.85) is loss of potential profit which cannot be characterized as appropriation of profit so as to magnetize taxability.

24. The ld. AR has relied on the judgment of Hon'ble Supreme Court in the case of A. Raman & Co. (supra) by contending that the law does not require a trader to make maximum profit and hence there can be no taxability on the basis of notional profit which was not actually earned from the members. We do agree with this proposition provided it is not a case of appropriation of profit. We have discussed hereinabove that in case of transaction between two independent parties, the assessee is not obliged to earn maximum profit. However, this proposition is not attracted in case the transaction is not commercial or genuine. Such a proposition cannot be extended to the cases where the amount of profit is intentionally allowed to be passed on to the members or owners. In the same case of A. Raman & Co. (supra) and in the same para no. 8, the immediately next line is an exception to the general rule whereby their Lordships noted that: `By adopting a device, if it is made to appear that income which belonged to the assessee had been earned by some other person, that income may be brought to tax in the hands of the assessee.' Precisely, this is the proposition in the case of Tasgaon SSK Ltd. (supra) as well that an income belonging to the assessee which has been appropriated to the members should be brought to tax in the hands of the assessee only. Similar is the position in so far as sale of sugar at concessional rate to members below the cost price is concerned in as much as the income to that extent which was earned by the assessee from its normal business operations shall be passed on to the members in the form of sale of sugar at a rate lower than its cost price.

25. The ld. CIT(A) in the instant batch of appeals has confirmed the addition towards the difference between the Levy price and the concessional price (upto 5 kg. per member per month) and to the extent of difference between the Market price of sugar and Concessional price (over and above 5kg. per member per month). In this process, the assessees got taxed even for the potential profit to the extent of

difference between the cost price and market/levy price, as the case may be. Ergo, we hold that such a straightway difference between the market/levy price and the concessional price of sugar cannot be construed as appropriation of profit leading to addition as has been extantly done. The impugned orders to this extent are set aside and the matters are restored to the file of the respective AOs for first ascertaining the cost price of sugar to each assessee and then make addition on this issue by treating it is as a case of appropriation of profit only to the extent of the concessional sale price which is below the cost price. However, it is clarified that in determining cost price of sugar to the factory, not only all the direct costs but all the indirect costs should also be taken into consideration. In other words, all items of debit to the Trading and Profit and loss account would constitute cost base. Needless to say, the assessee will be allowed reasonable opportunity of hearing in such fresh proceedings on this issue."

7. Following the precedent, we set-aside the impugned order and remit the matter to the file of the AO for deciding this issue in conformity with the view taken in the aforenoted order.

5. In view of the above, we remand the issue raised involving the concessional rate on sale of sugar to the file of AO for his consideration afresh in terms of the observations made hereinabove. Thus, grounds involving the issue of concessional rate on sale of sugar in all the respective appeals are allowed. Thus, the grounds of assessees are allowed for statistical purposes.

6. In the result, the appeals of assessees are allowed for statistical purposes.

Order pronounced on 20th day of November, 2019.

Sd/-	**Sd/-**
(Anil Chaturvedi)	**(S.S. Viswanethra Ravi)**
लेखा सदस्य / ACCOUNTANT MEMBER	**न्यायिक सदस्य / JUDICIAL MEMBER**

पुणे / Pune; दिनांक / Dated : 20th November, 2019.
RK/GCVSR

<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) concerned
4. आयकर आयुक्त / The CIT concerned
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,

वरिष्ठ निजी सचिव / Sr. Private Secretary

आयकर अपीलीय अधिकरण ,पुणे / ITAT, Pune.