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

BEFORE SHRI D. KARUNAKARA RAO, AM AND
SHRI LALIET KUMAR, JM

आयकर अपील सं. / ITA No.2178/PUN/2017
निर्धारण वर्ष / Assessment Year : 2004-05

Nira Bhima Sahakari Sakhar Karkhana Ltd.,
A/p. Shahji Nagar, Tal. Indapur,
Dist. Pune-413106.

PAN : AAAAN1256C .....अपीलार्थी / Appellant

बनाम / V/s.

DCIT, Circle-14,
Pune. .....प्रत्यर्थी / Respondent

Assessee by : None
Revenue by : Shri Pankaj Garg

सुनवाई की तारीख / Date of Hearing : 04.02.2020
घोषणा की तारीख / Date of Pronouncement : 06.02.2020

आदेश / ORDER

PER D. KARUNAKARA RAO, AM:

This appeal filed by the assessee is against the order of the CIT(A)-7, Pune dated 03.07.2017 for the assessment year 2004-05.

2. Despite service of notice by the ITAT, there was none to represent the assessee. Therefore, this appeal is being decided on the basis of material available on record and after hearing the ld. DR for the Revenue.

3. The assessee is engaged in the business of manufacturing of white sugar. In this appeal, the issues raised by the assessee in the grounds of appeal are :-

i. Excess cane price paid by the assessees 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 assessees.

Apart from the above two primary issues, the following two minor issues have also emerged in this appeal :

i. Government Guarantee Fees.

ii. Ceremony Expenses.

4. Before us, at the outset, 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 the present appeal are 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 the ld. DR 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.

A. 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 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.....*
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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 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."

7. Thus, in view of the statement made by the ld. DR for the Revenue 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 granting reasonable opportunity of being heard to the assessee in accordance with law set principles of natural justice. Accordingly, this issue is allowed for statistical purposes.

B. 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 the present appeal where the issue has

been raised, order was passed by the Commissioner of Income Tax (Appeals) subsequent 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. 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 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. After hearing the ld. DR, we find the issue raised in present appeal are identical to 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 decide the issue after granting reasonable opportunity of being heard to the assessee in accordance with set principles of natural justice. Thus, this issue is allowed for statistical purposes.

C. Government Guarantee Fees

11. Another issue that has emerged in this appeal is disallowance made u/s. 43B of the Act in respect of Government Guarantee Fee not paid by the assessee. The authorities below have held that Government Guarantee Fee is akin to tax, cess or fee and hence, non-payment of same would result in disallowance u/s. 43B of the Act. Section 43B(a) of the Act provides that any sum payable by the assessee by way of tax, duty, cess or fee, by whatever name called, under any law for the time being in force shall be allowed only when such sum is actually paid. A bare perusal of the above provision would show that tax, duty, cess or fee should flow from the statute. Any other payments payable or paid to the Government which do not fall within the realm of any enactment would not partake the character of tax, duty, cess or fee as envisaged u/s. 43B of the Act.

12. In the present case, payments made by the assessees on account of Government Guarantee Fees to the Maharashtra Government are in respect of pre seasonal loans. It is neither emanating from the records, nor the Revenue has brought before us any material to show that the assessee is under obligation to pay Government Guarantee Fee on account of statutory requirement as 'revenue' to the State. The Hon'ble Rajasthan High Court in the case of Commissioner of Income Tax Vs. Udaipur Distillery Co. Ltd. reported as 268 ITR 305 has held that 'tax', 'duty', 'cess' or 'fee' constituting a class, denotes various kinds of imposts by State in its sovereign power of taxation to raise revenue for the State. Within the expression of each specie each expression denotes different kind of impost depending on the purpose for which they are levied. The Hon'ble High Court further clarified that merely levy of charge as tax or fee is not conclusive of its character. It is only if any amount becomes payable by way of tax, duty, cess or fee, it falls within the purview of section 43B of the Act. Thus, in the light of above, we hold that the Government Guarantee Fees cannot be put in same bracket as tax, cess or duty and hence, no disallowance u/s. 43B of the Act in respect of non-payment of such fee can be made. Accordingly, this issue is decided in favour of the assessee.

D. Ceremony Expenses

13. The assessee raised another ground relating to ceremony expenses amounting to Rs.2,62,511/-. We find that the Commissioner of Income Tax (Appeals) has allowed 1/4th of the expenditure by following the order of Tribunal in the case of Shivamrut Maryadit vs. DCIT, 71 ITD 157 and

restricted the addition to Rs.65,627/-. We do not find any infirmity in the findings of Commissioner of Income Tax (Appeals). Accordingly, this issue is dismissed.

14. In the result, the appeal of the assessee is partly allowed for statistical purposes.

Order pronounced on this 06th day of February, 2020.

Sd/-	**Sd/-**
(LALIET KUMAR)	**(D. KARUNAKARA RAO)**
न्यायिक सदस्य/JUDICIAL MEMBER	**लेखा सदस्य/ACCOUNTANT MEMBER**

पुणे / Pune; दिनांक / Dated : 06th February, 2020.
Sujeet

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

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The CIT(A)-7, Pune.
4. The Pr. CIT-6, Pune.
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, "**बी**" बेंच, पुणे / DR, ITAT, "**B**" Bench, Pune.
6. गार्ड फ़ाइल / Guard File.

आदेशानुसार / BY ORDER,

// True Copy //

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