IN THE INCOME TAX APPELLATE TRIBUNAL, SURAT BENCH, SURAT
BEFORE SHRI PAWAN SINGH, JUDICIAL MEMBER AND
DR. ARJUN LAL SAINI, ACCOUNTANT MEMBER

ITA No. 1243/AHD/2017, 251 & 252/SRT/2018

(Assessment Years: 2012-13, 2013-14 & 2014-15)

(*Virtual Court)*

Shree Khedut Sahakari Khand Udyog Mandali Ltd., At – Pandvai, Tal. Hansot, Dist. Bharuch, 394 810. **PAN : AAAAS1760N**	Vs.	Income Tax Officer, Ward-1(2), Bharuch.
APPELLANT		**RESPONDEDNT**

Appellant by	Shri S N Soparkar -Sr. Advocate With Ms Urvashi Shodhan Advocate
Respondent by	Shri O P Singh – CIT-DR
Date of hearing	29/09/2020
Date of pronouncement	29/09/2020

O R D E R

PER PAWAN SINGH, JUDICIAL MEMBER:

1. These three appeals by the assessee are directed against the order of ld. Commissioner of Income Tax (Appeals)-1, Vadodara [in short "the CIT(A)"] for the assessment year (AY) 2012-13, 2013-14 and 2014-15. In all appeals, the assessee has raised certain except variation of figures of addition/disallowance on account of Fair & Remunerative Price (FRP), in addition to Statutory Minimum Price (SMP). As the assessee raised common grounds of appeal, thus with the consent of the parties, all appeals were clubbed heard and are decided by consolidated order. For appreciation of facts, the appeal for AY.2012-

13 is treated as lead case. The assessee has raised following grounds of appeal:

1. Ld. CIT (A) erred in law and on facts in confirming action of AO treating additional price paid over and above FRP (Fair & remunerative price) to the cane growers amounted to distribution of profits by the appellant.

2. Ld. CIT (A) erred in law and on facts confirming view of AO treating such payments as application of income assessable in the hands of the appellant.

3. Ld. CIT (A) erred in law and on facts in confirming action of AO that such additional payment is not allowable as business expense u/s 37 of the Act as not expended wholly & exclusively for the purpose of business.

4. Ld. CIT (A) erred in law and on facts in holding that payment of Final Cane Price after close of the year is diversion of the profit at the same time holding purchase price paid as per FRP that is also declared after close of the year as an allowable expense u/s 37 of the Act.

5. Ld. CIT (A) erred in law and on facts treating additional payment made to productive members only from gross receipts as per board resolution as diversion of profit whereas payment of cane price is unrelated to shareholding of the farmers and non-members are also paid the same price.

6. Ld. CIT (A) erred in law and on facts holding that in absence of agreement between appellant & farmers to make payment in excess of FRP declared, the only obligation was to make payment of purchase price as per FRP & hence the theory of overriding title for application of income is applicable to the extent of FRP only allowable as expenditure u/s 37 of the Act.

7. Ld. CIT (A) erred in law and on facts in holding that 'Real Income Theory' is not applicable to the case since surplus remaining after adjusting revenue against expenditure and provisions for anticipated expenditure constitutes taxable profits that should be first offered to tax under Income Tax Act.

8. Ld. CIT (A) erred in law and on facts making irrelevant observation that the appellant has devised a colorable device to distribute the entire profit in the garb of cane price to avoid payment of any tax on its income.

9. Levy of interest u/s 234A/234B/234C & 234D of the Act is unjustified.

10. Initiation of penalty proceedings u/s 271(l)(c) of the Act is unjustified."

2. Brief facts of the case are that the assessee is a Cooperative Society is running Cooperative Sugar Mill engaged in production of sugar and its bye-products. The assessee filed its return of income for AY.2012-13 on 25.09.2012 declaring at 'Nil' income. The case was selected for scrutiny. During the assessment proceedings, the Assessing Officer (AO) noted that the assessee were making payment to sugarcane supplier/agriculturists over and above the SMP declared by the Central Government for particular season (crushing period) in the year. The price paid to the sugarcane growers/agriculturists is exempted from income tax being agricultural income. The AO after issuing show cause notice and considering the reply of the assessee, took his view that adjustment made and price paid by over and above SMP declared by the Central Government, by way of RRP to the sugarcane producer was not incurred wholly and exclusively for the purpose of business, and therefore, not admissible deduction under section (u/s) 37 of the Act. The AO made disallowance of Rs. 70,46,06,950/- being amount incurred over and above the SMP. On appeal before learned Commissioner (Appeals), the action of the AO was confirmed. Thus, further aggrieved the assessee has filed this appeal before Tribunal.

3. We have heard the submissions and Sh. Saurabh Suparkar ld. Senior Advocate/Authorized Representative (AR) for the assessee and Sh. O.P. Singh ld. CIT-DR (DR) for the Revenue and perused the record carefully. The ld. AR of the assessee submits that the grounds of appeal

raised by the assessee are now covered by the decision of Hon'ble Supreme Court in the case of CIT v. Tasgaon Taluka S. S. K. Ltd, reported viz; (2019) 103 taxmann.com 57 (SC). The ld. AR submits that as per the decision of Hon'ble Apex Court, the appeals are liable to be restored to the file of the AO for passing the order afresh. The ld. AR further submits that the Hon'ble Apex Court by considering the question of law whether the sugarcane price paid to the cane grower by the assessee/cooperative society more than the Statutory Minimum Price (SMP) is determined under Clause 5A of control order 1966, can be said to be the share of profit/ appropriation of profit, can be said to be reassuring of profit/appropriation of profit or the allowable the expenditure. The Hon'ble Apex Court held that as per Clause 3 of Control Order 1966, Government in the official Gazette, from time to time fixed the minimum price of sugar cane (SMP) to be paid to farmers. So far as determination of SMP is concerned it is at the beginning of the season. The additional purchase price (SAP) is determined at the end of the season when accounts are settled under Clause-5A. The difference of amount of SMP & SAP has an element of profit and / or one of the components would be profit. The additional price is paid as a matter of incentive. Thus, the entire whole amount of difference between SMP and the SAP *per se* cannot be said to be an appropriation of profit. Only that part/ component of profit, while determining the final price worked out /SAP /Additional price would be and / or the said to be an appropriation of profit and for that an exercise is to be done by the AO

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 fixing the final price/additional price/SAP under Clause 5A of control order 1966.

4. The ld. AR further submits that the grounds of appeal raised and the facts involved in these appeals are similar to ITA No. 1190/Ahd/2017, 248 & 249/Srt/2018, and the order framed in these appeal may be followed in this set of appeal.

5. On the other hand, the ld. DR for the revenue fairly agreed that the issue/grounds of appeal raised by the assessee may be restores to the file of the AO for considering the issue afresh in accordance with the decision of Hon'ble Apex Court, in CIT v. Tasgaon Taluka S.S.K. Ltd (supra). The ld DR for the revenue also agreed that the order passed in ITA No.(s) ITA No. 1190/Ahd/2017, 248 & 249/Srt/2018 may be followed in this set of appeal.

6. We have considered both the parties and have gone through the order of the lower authorities below. We have noted that the assessee in all three appeals have raised identical grounds of appeal as raised in the present appeal as well as the facts are identical as raised in ITA No. 1190/Ahd/2017, 248 & 249/Srt/2018, the facts in these appeal are also almost similar. In ITA No. 1190/Ahd/2017, 248 & 249/Srt/2018, we have restored the similar grounds of appeal to the file of AO, by passing the following order;

> " 7. We have considered both the parties and have gone through the order of the lower authorities below. The AO made addition in the

assessment order by taking view that the amount paid /incurred by assessee over and above the SMP determined by Central Government is distribution of profit and not incurred wholly and exclusively the purpose of income. The additions were upheld by ld. Commissioner (Appeals). Before us, the learned representative of both the parties agreed that the issues raised in the present appeals are directly covered by the decision of Hon'ble Apex Court in CIT v. Tasgaon Taluka S. S. K. Ltd (supra). We have noted that the Hon'ble Apex Court in CIT v. Tasgaon Taluka S. S. K. Ltd (supra) while considering the similar question of law remitted the similar matter to the file of the AO with the following direction:

> **"9.** We have heard learned counsel appearing on behalf of the respective parties at great length.
>
> **9.1** A short question which is posed before this Court for consideration is, whether the sugarcane purchase price paid to the cane growers by the assessee-society more than the SMP and is determined under Clause 5A of the Control Order, 1966, can be said to be the sharing of profit/appropriation of profit or is allowable as expenditure?
>
> **9.2** While considering the aforesaid issue/question, the mechanism for determining the SMP and SAP under the Control Order, 1966 is required to be referred to and considered. As per Clause 3 of the Control Order, 1966, the Central Government may, after consultation with such authorities, bodies or associations as it may deem fit, by notification in the official Gazette, from time to time, fix the minimum price of sugarcane to be paid by producers of sugar or their agents for the sugarcane purchased by them. While fixing/determining the SMP under Clause 3 of the Control Order, 1966, the Central Government is required to consider the following aspects:
>
> "*a* the cost of production of sugarcane;
>
> *b* the return to the grower from alternative crops and the general trend of prices of agricultural commodities;
>
> *c* the availability of sugar to the consumer at a fair price;
>
> *d* the price at which sugar produced from sugarcane is sold by

producers of sugar; and

e the recovery of sugar from sugarcane."

9.3 As per *Explanation*, different prices may be fixed for different areas or different qualities or varieties of sugarcane. As per sub-clause 2 of Clause 3, no person shall sell or agree to sell sugarcane to a producer of sugar or his agent, and no such producer or agent shall purchase or agree to purchase sugarcane, at a price lower than that fixed under sub-clause 1 of Clause 3. Clause 5A, which has been inserted in the year 1974 provides for an additional price to be paid for sugarcane purchased on or after 01.10.1974. It provides that where a producer of sugar or his agent purchases sugarcane, from a sugarcane grower during each sugar year, he shall, in addition to the minimum sugarcane price fixed under Clause 3, pay to the sugarcane grower an additional price, if found due in accordance with the provisions of the Second Schedule annexed to the Control Order, 1966. How the additional price under Clause 5A of the Control Order, 1966 is to be determined is provided in the Second Schedule, which reads as under:

"SECOND SCHEDULE

[*See* Clause 5-A]

The amount to be paid on account of additional price (per quintal of sugarcane) under Clause 5-A by a producer of sugar shall be computed in accordance with the following formula, namely :

$$X = \frac{R - L + A - B}{2C}$$

Explanation— In this formula.

1 'X' is the additional price in rupees per quintal of sugarcane payable by the producer of sugar to the sugarcane grower.

2 'R' is the amount in rupees of sugar produced during the sugar year excluding the excise duty paid or payable to the factory by the purchaser.

3 'L' is the value in rupees of sugar produced during the sugar year, as calculated on the basis of the unit cost per quintal ex-factory, exclusive of excise duty, determined with reference to the minimum sugarcane price fixed under Clause 3, the final working results of the year and the Cost Schedule and return recommended by the such authority as the Central Government may, specify from time to time.

4 'A' is the amount found payable for the previous year but not actually paid [*vide* sub-clause (9)].

5 'B' is the excess or shortfall in realisations from actual sales of the unsold stocks of sugar produced during the sugar year, as on 30th day of September [vide item 7(ii) below] which is carried forward and adjusted in the sale realisations of the following year.

6 'C' is the quantity in quintals of sugarcane purchased by the producer of sugar during the sugar year.

7 The amount 'R' referred to in *Explanation* 2 shall be computed as under, namely:—

i the actual amount realised during the sugar year; and

ii the estimated value of the unsold stocks of sugar held at the end of 30th September, calculated in regard to free sugar stocks at the average rate of sales, namely, during the fortnight 16th to 30th September and in regard to levy sugar stocks at the notified levy prices as on the 30th September.

Explanation.—In this Schedules "Sugar" means any form of sugar containing more than ninety per cent sucrose."

9.4 At this stage, it is required to be noted that Clause 5A was inserted in the year 1974 on the basis of the recommendations made by the Bhargava Commission. As observed by this Court in the case of *Maharashtra Rajya Sahkari Sakkar Karkhana Sangh Ltd.*(*supra*), the Bhargava Commission had recommended payment of additional price at the end of the season on 50:50 profit sharing basis between growers and factories, to be worked out in accordance with Second Schedule to the Control Order, 1966. It is also required to be noted that the additional price is fixed/determined under Clause 5A at the end of the season and as per Second Schedule to the Control Order, 1966. Therefore, at the time when the additional purchase price is determined/fixed

under Clause 5A, the accounts are settled and the particulars are provided by the concerned cooperative society what will be the expenditure; what can be the profit *etc*. It is required to be noted that so far as the SMP determined under Clause 3 of the Control Order, 1966 by the Central Government is concerned, it is at the beginning of the season and while determining/fixing the SMP by the Central Government, the afore-stated things are required to be considered. Therefore, the difference of amount between the SMP determined under Clause 3 and the SAP/additional purchase price determined under Clause 5A has an element of profit and/or one of the components would be the profit. The entire scheme/mechanism while determining the additional purchase price under Clause 5A has been dealt with and considered by this Court in detail in the case of *Maharashtra Rajya Sahkari Sakkar Karkhana Sangh Ltd.* (*supra*). In the said decision, it is observed that the additional purchase price/SAP is paid at the end of the season; the Bhargava Commission had recommended payment of additional price at the end of season on 50:50 profit sharing basis between the growers and factories to be worked out in accordance with Second Schedule to the Control Order, 1966; that the additional purchase price comprises of not only the cost of cultivation, but profit as well; the price thus being paid on recovery of canes and profits made from sale of sugar is not minimum but optimum price which is paid to a cane grower. The additional cane price or additional State fixed price are paid as a matter of incentive. The entire price structure of cane is founded on two basic factors, one, the recovery percentage and other the incentive for sharing profit arrived at by working out receipt minus expenditure. 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. However, this is not the subject matter in the present appeals. We are restricting the present appeals *qua* the sugarcane purchase price paid by the society to the cane growers above the SMP determined under Clause 3 and the difference of sugarcane purchase price between the price determined under Clause 3 and Clause 5A of the Control Order, 1966.

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."

8. Considering the aforesaid decision of the Hon'ble Apex Court and the fact that both the parties were agreeable that the issues raised in the present appeals are covered by the decision of Hon'ble Apex Court. We have further noted that Coordinate bench of Tribunal in case of DCIT v. Ganesh Khand Udyog Sahakari Mandali Ltd.(supra) and Pune bench of Tribunal, in the case of Majalgaon Sahakari Sakhar Karkhana Ltd. Vs ACIT (supra) on similar issues also restored to the appeals to the file of the AO of determination of the issues afresh. Therefore, respectfully following the decision of Hon'ble Apex Court. We restore the file of the AO for deciding the issue as afresh in accordance with the decision to Hon'ble Supreme Court and will pass the order in accordance with law. Needless to direct that before passing the order the AO will consider the facts already available on record and shall grant opportunity of hearing to the assessee. The assessee is also directed to provide all the necessary details, evidences and information to the AO in accordance with the direction of Hon'ble Apex Court in the case of Tasgaon Taluka (supra).

9. In the result, the appeal of the assessee is allowed for statistical purposes."

7. Considering our decision on identical grounds and on similar facts, the appeals under consideration are also restored to the file of AO, with the similar direction as mentioned above.

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

Order pronounced on 29/09/2020 at the time of hearing of appeal.

Sd/-	**Sd/-**
(Dr. ARJUN LAL SAINI)	**(PAWAN SINGH)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Surat, Dated: 29/09/2020
Samanta, PS

Copy to:
1. Appellant
2. Respondent
3. CIT(A)
4. Pr.CIT
5. DR

// True Copy //

By order

Assistant Registrar/Sr. PS/PS
ITAT, Surat