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

(Through Virtual Court)

BEFORE SHRI INTURI RAMA RAO, AM
AND SHRI S. S. VISWANETHRA RAVI, JM

ITA No.2612/PUN/2017
निर्धारण वर्ष / Assessment Year : 2014-15

Vishwasrao Naik Sahakari,
Sakhar Karkhana Limited,
A/P Chikhali, Tal. Shirala,
Dist. Sangli.

..... अपीलार्थी /
Appellant

PAN : AAAAV0215B.

बनाम v/s

The Asst. Commissioner of
Income Tax, Circle – 2,
Sangli.

..... प्रत्यर्थी /
Respondent

Assessee by : Shri M. Kulkarni.
Revenue by : Shri Vitthal Bhosale.

सुनवाई की तारीख / Date of Hearing : 17.06.2021
घोषणा की तारीख / Date of Pronouncement : 21.06.2021

आदेश / ORDER

PER INTURI RAMA RAO, AM:

This is an appeal filed by the assessee Co-operative Society directed against the order of Commissioner of Income Tax (Appeals) – 1, Kolhapur dated 11.09.2017 for the assessment year 2014-15.

2. The brief facts of the case are as under :

The appellant is a Co-operative Society registered under the Maharashtra Co-operative Society Act, 1950. It is entered into the business

of manufacture and sale of sugar and its by-products. The return of income for A.Y. 2014-15 was filed on 27.09.2014. Against the said return of income, the assessment was completed by the ACIT – 2, Sangli (hereinafter called as "Assessing Officer") vide order dated 21.11.2016 passed under Sec.143(3) of the Act at a total income of Rs.1,89,46,340/-. While doing so, the Assessing Officer made the following additions :

(i) Excessive sugar cane price paid to its members at Rs.55,06,298/- and;

(ii) Sale of sugar at concessional rate to its members at Rs.1,34,44,039/-.

3. The brief factual material read into the above additions is as under :

(i) Addition on account of excessive sugar cane purchase price :

During the course of assessment proceedings relevant for the year under consideration, the appellant society purchased sugarcane of 424283.200 MTs. Out of which, 19979.310 MTs of sugarcane was purchased by paying a price of 2,620 per MT as against the Fair Remunerative Price (FRP) declared by the Central Government of Rs.2344.40. According to the Assessing Officer, this excess of 275.6 per MT sugarcane aggregating to a sum of Rs.55,06,298/- is nothing but distribution of profits made from the sugar sale which cannot be allowed as deduction and accordingly brought the difference amount of Rs.55,06,298/- to tax.

(ii) Sale of sugar at concessional rate to its members at Rs.1,34,44,039/-.

During the course of assessment proceedings relevant for the year under consideration, the Assessing Officer found that the appellant society has sold 9643.7 quintals of sugar to its members at a concessional price of Rs.500/- per M.T. as against the levied price of Rs.1393.66. According to the Assessing Officer, sale of sugar at concessional rate to its members amounts to appropriation of profits to the members which cannot be allowed as deduction while computing the taxable income of the appellant society. Accordingly, Assessing Officer made addition of Rs.1,34,40,039/-.

4. Being aggrieved by the above additions, an appeal was preferred before the Commissioner of Income Tax (Appeal) – 1, Kolhapur, who vide impugned order dt. 11.09.2017 after discussing at length the mechanism of determining of Fair Remunerative Price (FRP) upheld the addition on account of excess price paid for sugarcane to the members on the ground that the new mechanism applicable for the A.Y. 2010-11 onwards i.e., FRP also includes the element of profit as the reasonable margins to be passed on to the growers of sugarcane on account of 'risk and profit' has also taken into consideration. The relevant scheme of mechanism was set out by the ld.CIT(A) vide para 12 of his order.

As regards to the sale of sugar at concessional price to the members, the Commissioner of Income Tax (Appeals) after referring to the judgments of Hon'ble Supreme Court in the case of CIT Vs. Krishna Sakhar Karkhana Ltd., held that the appellant adopted a device by which the gross sale proceeds themselves are diverted to its own members who supply the

cane. This is nothing but a distribution of profits and accordingly upheld the action of the Assessing Officer.

5. Being aggrieved by the order of Commissioner of Income Tax (Appeals), the appellant co-operative society is in appeal before us in the present appeal. It is submitted before us that the decision of Commissioner of Income Tax (Appeals) is based on the premise that FRP contains an element of profit which is contrary to the facts of the case. It is further submitted that a review petition is pending disposal before the Hon'ble Supreme Court against the decision of Hon'ble Supreme Court in the case of CIT Vs. Tasgaon Taluka SSK Ltd., reported in (2019) 103 taxmann.com 57 (SC). Similarly, it is contended that the ld.CIT(A) has not appreciated the observations made in the decision of Hon'ble Supreme Court in the case of CIT Vs. Krishna Sakhar Karkhana Ltd and accordingly, he prayed that the matter may be remanded back to the file of AO for de novo consideration.

6. On the other hand, the ld.D.R. had not raised any serious objections if the matter is remanded to the file of Assessing Officer.

7. We have heard the rival submissions and perused the material available on record. The first issue in the present appeal relates to the allowability of sugarcane purchase price paid to the members on excess price determined under FRP. The Assessing Officer made a disallowance of price paid in excess fixed under FRP mechanism holding to be an appropriation of profits to its members. The ld.CIT(A) also confirmed the

action of the Assessing Officer after adverting to the mechanism of fixation of FRP.

8. It is well settled proposition of law that any appropriation of profits to its members of a co-operative society cannot be allowed as deduction while computing the taxable income of the co-operative society. The Hon'ble Supreme Court in the case of CIT Vs. Tasgaon Taluka S.S.K. Ltd., (supra) had remitted the issue to the file of Assessing Officer to determine whether the amount paid under the old mechanism under clause 5A of Sugar Cane (Control) Order, 1966 (hereinafter referred to as the "Control Order, 1966") is appropriation of profits or not. The clause 5A of the said order inserted in the year 1974 based on the recommendations made by Bhargav Commission. The provisions of second schedule annexed to Control Order, 1966 clearly provides the mechanism as to how the additional price under clause 5A of the Control Order, 1966 is to be determined. The Bhargav Commission had recommended payment of additional price at the end of the season on 50 : 50 profit sharing ratio between growers and factories to be worked out in accordance with the second Schedule of the Control Order, 1966. Thus, the additional price fixed under clause 5A of the Control Order, 1966 contains an element of profit which is nothing but an appropriation of profits and which is not allowable as deduction while computing the taxable income of the society. The decision of Hon'ble Supreme Court in the case of CIT Vs. Tasgaon Taluka S.S.K. Ltd (supra) is based on above premises. However, as set out by the ld.CIT(A) in his order, the scheme of mechanism of determining the sugarcane price had undergone change from A.Y. 2010-11. The new mechanism is known as "FRP". The distinguished feature of

FRP is that it had done away with the payment of additional price under clause 5A of the Control Order, 1966. The FRP is fixed based on the recommendations of the Commission for agricultural Costs and Prices (CACP) under after consultation with the State Government and associations of sugar industry and cane growers taking into consideration the following factors :

> *a) cost of production of sugarcane;*
>
> *b) return to the growers from alternative crops and the general trend of prices of agricultural commodities;*
>
> *c)availability of sugar to consumers at a fair price;*
>
> *d)price at which sugar produced from sugar cane is sold by sugar producers;*
>
> *e)recovery of sugar from sugarcane; and*
>
> *f) the realization made from sale of by-products viz. molasses, biogases and press mud on their imputed value (inserted vide Notification dated 29th December 2008)*
>
> *g) Reasonable margins for the growers of sugarcane on account of risk and profits (inserted vide Notification dated 22nd December 2009);*

9. No doubt one of the factors considered for the purpose of arriving at FRP includes reasonable margin of sugar factories to be passed on to the sugarcane growers / members but this is not the alone criterion which is taken into consideration. It includes several other factors as well, as referred to (a) to (f) stated above. Therefore, the entire excess sugarcane price paid to the farmers over and above the FRP fixed cannot be said to be a margin of profit passed on to the growers of sugarcane. To determine this element of profit embedded in excess price paid over and above the FRP price, an exercise has to be done by the Assessing Officer by calling upon the assessee to produce the statements of accounts, balance-sheet etc and material supplied to the State Government for the purpose of deciding FRP

etc. Merely, because higher price for sugarcane is paid to the members over and above the FRP cannot *ipso facto* or *per se* is an appropriation of profits as held by the Hon'ble Gujarat High Court in the case of Shree Chalthan Vibhag Khand Vs. DCIT reported in (2015) 376 ITR 419 (Guj) affirmed by the Hon'ble Supreme Court by dismissal of SLP in the case of Shree Chalthan Vibhag Khand Vs. DCIT reported in 239 taxamnn.com 393 (SC).

10. It is a matter of common knowledge that the question of appropriation of profits presupposes existence of profits and would arise only after the profits are determined at the end of the accounting year as held by the Hon'ble Bombay High Court in the case of CIT Vs. Manjara Shetkari Sahakari Sakhar Karkhana Ltd. reported in (2008) 166 Taxman 287, 301 ITR 191 (Bom). It is a question of fact which requires to be determined by the Assessing Officer whether the excess price per sugarcane paid to the sugarcane growers / members is in the nature of appropriation of profits or the payments are made out of the considerations of business expediency. The onus lies on the Department to prove the same by bringing necessary material on record. The Hon'ble Jurisdictional High Court in the case of CIT Vs. Manjara Shetkari Sahakri Sakhar Karkhana Ltd. (supra) held that in the case where neither the profits were determined nor was there any resolution passed in the Annual General Meeting of the Co-operative Society to distribute the profits in the form of higher cane price / bonus, it cannot be said to be distribution of profits or bonus and no disallowance of excess price can be made. Similarly, the Hon'ble Madras High Court in the case of CIT Vs. Aruna Sunrise Hotels Ltd reported in (2018) 93 taxmann.com 361 (Madras) held that the payment made to sugarcane growers / members in

excess of the administered price determined by the Sugarcane Control Order, 1966 is eligible to be treated as an allowable as the revenue expenditure exclusively incurred for the purpose of business.

11. In the light of the above legal position, we are of the considered opinion that this issue requires to be remitted to the Assessing Officer with the direction to undertake an exercise to determine the element of profit paid in the excess price, also examine the business expediency of payment of such excess price to the growers. In case, on verification, it is found that the excess sugarcane price paid to the sugarcane growers / members is only an appropriation of profits, the same should be disallowed. Accordingly, this ground is partly allowed for statistical purposes.

12. As regards to the next grounds of appeal, it relates to the addition on account of sale of sugar at concessional rate to its members, we have gone through the orders of lower authorities, we found that the Commissioner of Income Tax (Appeals) though referred to the decision of Hon'ble Supreme Court in the case of CIT Vs. Krishna Sakhar Kharkhana (supra) had not dealt with the following question raised by the Hon'ble Supreme Court.

> *"38.....*
>
> *Apart from the afore-stated question, CIT(A) would take into account, whether the above-mentioned practice of selling sugar at concessional rate has become the practice or custom in the Cooperative 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 Diwali?*

13. Therefore, this ground of appeal also needs to be restored to the file of Assessing Officer with the direction to address the questions raised by the Hon'ble Supreme Court in the case of CIT Vs. Krishna Sakhar Kharkhana Ltd (supra) and then decide the allowability of the same as revenue expenditure in accordance with the law.

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

Order pronounced on 21st day of June, 2021.

Sd/-	**Sd/-**
(S. S. VISWANETHRA RAVI)	**(INTURI RAMA RAO)**
न्यायिक सदस्य/JUDICIAL MEMBER	**लेखा सदस्य/ACCOUNTANT MEMBER**

पुणे / Pune; दिनांक / Dated : 21st June, 2021.
Yamini

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

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The CIT(A)-1, Kolhapur.
4. The Pr.CIT-1, Kolhapur.
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.