

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

**SHRI R.S. SYAL, VICE PRESIDENT
AND
SHRI PARTHA SARATHI CHAUDHURY, JUDICIAL MEMBER**

**ITA No. 248 & 249/PUN/2019
A.Y. 2014-15 & 2015-16**

Shree Chhatrapati Shahu SSK Ltd.,
Shahunagar, Kagal, Kolhapur.
PAN: AAAAS1032M

Appellant

Vs.

The Asstt. Commissioner of Income-tax,
Circle 1, Kolhapur.

Respondent

Appellant by : Smt. Shubhada Koppa
Respondent by : Shri B.K. Rao

Date of Hearing : 21-04-2022

Date of Pronouncement : 21-04-2022

ORDER

PER PARTHA SARATHI CHAUDHURY, JUDICIAL MEMBER

Both these appeals preferred by the assessee emanate from a consolidated order of the Id. Commissioner of Income Tax (Appeals)-1, Kolhapur dated 03-12-2018 for the Assessment Years 2014-15 & 2015-16 as per the grounds of appeal on record.

2. At the very outset, the Id. Counsel for the assessee referring to the Grounds of appeal submitted that broadly there are two issues for adjudication in the appeals of assessee for A.Y. 2014-15 and 2015-16; viz. (i) excess sugar cane price paid to the Members and Non-members; (ii) sale of sugar cane at concessional rate to the Members.

3. We find that the same issues have been adjudicated by the Pune Bench of Tribunal in ITA No.2061/PUN/2017 for A.Y. 2014-15 in the case of Karmaveer Shankarrao Kale Sahakari Sakhar Karkhana Ltd., dated 22-12-2020. The relevant part of the judgment is extracted as follows:

“Ground Nos.1 to 14 pertains to “Excess sugarcane price paid to the members & non-members :

5. On this issue, the Co-ordinate Bench of the Tribunal in the case of ACIT Vs. Shri Shankar SSK Ltd. (supra.) has held and observed as follows:

“3. The brief facts on this issue of “Excess Sugarcane Price” i.e. first core issue, include that the production of sugar is covered by the Essential Commodities Act, 1955. According to clause 3 of the Sugarcane (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. This is the statutory minimum price and no such producer or agent shall purchase or agree to purchase sugarcane, at a price lower than that fixed under clause 3. While fixing the statutory minimum price, the Central Government is required to consider the cost of production of sugarcane, the return to the grower from alternative crops and the general trend of prices of agricultural commodities, the availability of sugar to the consumer at a fair price, the price at which sugar produced from sugarcane is sold by producers of sugar, and, the recovery of sugar from sugarcane. Clause 5A was inserted in the order in the year 1974 on the basis of the recommendations made by the Bhargava Commission for payment of an additional price for sugarcane purchased on or after October 1, 1974 (in addition to the minimum sugarcane price fixed under clause 3) at the end of the sugarcane season on a 50:50 profit-sharing basis between growers and factories, to be worked out in accordance with the Second Schedule to the Order. The additional price is determined under clause 5A at the end of the season.

The assessee purchase sugarcane from growers who are their members, as well as from non-members and use the same for manufacturing of sugar. For the purchase of sugarcane, the assessee paid to members and non-members a final price which was in excess of that payable under clause 3 and 5A of the Sugarcane (Control) Order, 1966. The Assessing Officer took a view that the difference between the price paid by the assessee and in terms of clause 3 of the Order, determined by the Central Government, and the price determined by the State Government under clause 5A of the Order (and consequently paid by the assessee to the cane growers) was a distribution of profits and not deductible as expenditure. Alternatively, the Assessing Officer also held that the excess cane price paid to the cane growers over the statutory minimum price was disallowable under section 40A(2)(a) as excessive and unreasonable. The CIT(A) held that the price actually paid for the procurement of sugarcane was to be allowed as business expenditure, and that the excess payment of cane price as fixed by the State Government over and above the statutory minimum price for sugarcane to members and non-members could not be disallowed under section 40A(2)(b) of the Act, despite the fact that profit was one of the components in the price.

4. Referring to the facts and issues, the Ld. Authorised Representatives appearing on behalf of the assessee and Ld. Departmental Representatives representing the Department, submitted, at the outset, that the issue of excess sugarcane price raised in present set of appeals by the assessee/Revenue have already been considered and adjudicated by the Co-ordinate Bench of Tribunal in bunch of appeals with the lead case i.e. DCIT vs. Vasant Rao Dada Patil SSK Ltd. vide ITA Nos.50 to 52/PUN/2012 for the assessment years 1992-93, 1994-95 & 1996-97 respectively dated 20.03.2019.

5. The Co-ordinate Bench (*supra*) after considering the binding judgment of Hon'ble Supreme Court 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 Cooperative 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 aforesaid 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 assesseees have raised an alternate ground for allowing deduction u/s.80P in respect of the addition.

8. The Id. 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 Id. ARs participated in proceedings before the Tribunal. Therefore, the said alternate ground in all such cases is dismissed.”

6. From the above, it is evident that, following the judgement in the case of *Tasgaon Taluka SSK Ltd. (supra)*, the Tribunal remitted the issue to the file of the Assessing Officer with the direction to determine what constitutes taxable profits and what constitutes an allowable deduction.

7. *Shri Prasanna Joshi* representing the assesseees submitted that in these bunch of appeals there is segment of appeals wherein the ratio laid down by the Hon'ble Apex Court in the case of *CIT Vs. Tasgaon Taluka S.S.K. Ltd. (supra)* does not apply. The Id. AR submitted that the Statutory Minimum Price (SMP) regime came to an end on 22-10-2009. Thereafter, the cane price paid to farmers from Financial Year 2009-10 was on the basis of Fair and Remunerative Price (FRP). The Id. AR further explained the purpose of fixing FRP and sought directions that the issue relating to payment to cane growers by the assessee towards purchase of sugarcane post October, 2009 should be made independent of the directions in the case of *CIT Vs. Tasgaon Taluka S.S.K. Ltd. (supra)*. The Id. AR contended that in the changed scenario, w.e.f. assessment year 2009-10 it would be difficult to give effect to the decision of Hon'ble Apex Court. The Id. AR further pointed that the Co-ordinate Bench of Tribunal in the case of bunch of appeals lead case being *Siddheshwar Sahakari Sakhar Karkhana Ltd. Vs. DCIT in ITAT No. 1210/PUN/1997* decided on 01-05-2019 has dealt with this issue.

We have considered the submissions of Id. AR, the appeals are restored back to the file of Assessing Officer leaving the question open for consideration and examination by the Assessing Officer. The assesseees are at liberty to raise all their contentions before Assessing Officer.

8. Thus, in view of the assertions made by both the sides that the facts in the present set of appeals being identical to the issue relating to excess sugarcane price paid by the assessee the issue is restored to the file of Assessing Officer with similar directions as above in the cases of *M/s. Vasant Rao Dada Patil SSK Ltd. (supra)* and also consider the contentions of assessee with respect to SMP vis-a-vis FRP regime, where ever raised. The Assessing Officer shall decide the issue, after affording reasonable opportunity of hearing to the respective assesseees, in accordance with law. Thus, the issue of excess cane price paid to sugarcane suppliers is allowed for statistical purposes in the aforesaid terms.”

Respectfully following the decision referred hereinabove, the issue relating to excess sugarcane price paid by the assessee, the issue is restored to the file of Assessing Officer with similar directions as above in the cases of *M/s. Vasant Rao Dada Patil SSK Ltd. (supra)* and also consider the contentions of assessee with respect to SMP vis-a-vis FRP regime, where ever raised. The Assessing Officer shall decide the issue, after affording reasonable opportunity of hearing to the respective assesseees, in accordance with law. Thus, **Ground**

No.1 to 14 relating to the issue of excess cane price paid to members & non members is allowed for statistical purposes in the aforesaid terms.”

Ground Nos.15 to 18 pertains to “Sale of Sugar at Concessional rate to members”

6. On this issue, the Co-ordinate Bench of the Tribunal in the case of ACIT Vs. Shri Shankar SSK Ltd. (supra.) has held and observed as follows:

“B. Defective manner of giving effect to the directions of the Hon’ble Apex Court in the case of CIT vs. Krishna SSK, (2012) 211 taxmann.com 109 (SC)

9. Taxability of sale of sugar at concessional rates to the members/shareholders. The facts relevant to this issue are that the assessee is engaged in the business of purchase of sugarcane, manufacturing of sugar in their mills and are selling sugar to the members and non-members. All these SSK sell sugar at concessional price to the farmers, who are the members of Sahakari Sakhar Karkhana (SSK). These members supply sugarcane to the SSK manufactures. The concessional rate of sugar is lower than the price set by the Government (levy sugar). The said concession i.e. the differences between the levy price set by the Government and the sale price to members, was deemed by the Assessing Officer in the scrutiny assessments as income of the assessee. This issue eventually travelled to the Hon’ble Supreme Court in the case of Krishna SSK Ltd. (supra). After due consideration, the Hon’ble Supreme Court gave certain directions to the Income Tax Authorities and remanded the matter to the file of the CIT(A) for complying with the said directions before taxing any such concessional sugar price to the farmers. The details of these directions are discussed in the succeeding paragraphs of this order.

10. In all these bunch of appals, respective CIT(A) passed their orders after considering the said judgment by the Apex Court. However, while giving effect to the said directions, the CIT(A) failed to comply with the directions strictly. For example, the direction relating to income nature of the said concession in sale price and includibility of the concessional sugar price in the total income of the assessee stands unattended by the CIT(A) while passing the order. The adjudication on this crucial direction is essential. In the absence of the decision of the lower authorities on these crucial issues, it is not possible for the Tribunal to adjudicate the issues under consideration raised by the appellants/department. In the above background, both, the counsels for the assessee and the Revenue fairly submitted that there is requirement of clear finding of fact and law on the directions by the Hon’ble Supreme Court of India. Thus, the includibility of such concessional sugar price in the total income of the assessee assumes great significance and the same is conspicuously missing in the impugned orders of the respective CIT(A).

11. In the light of above, the Id. AR for the assessee furnished following written submissions raising the issues for consideration of the CIT(A) in respective cases :-

“1. Hon’ble ITAT, Pune, in Chh. Shahu SSK ITA No. 1924-26/PN/90 vide order dated 8/8/1996, at paras 32-39, following ratio of A. Raman & CO, 67 ITR 11 (SC), held that no

income accrued to the assessee on sale of sugar at concession rate to its members.

2. *Hon'ble Bombay High Court, in CIT v. Terna SSSK, 301 ITR 222, has noted that Counsel for the Dept, in view of Circular No. 117 dt. 22/8/1973 did not press this ground in appeal.*

3. *Hon'ble Supreme Court, in CIT v. Krishna SSK, (2012) 211 Taxman 109 (SC), has not referred to Dept, not pressing this issue in High Court. Hon'ble Supreme Court has given following directions to the CIT(A) to decide the issue:*

a) *Whether the difference between market price and the concessional price of sugar sold to members / farmers / cane growers, **should or should not be added to total income of the assessee** society?*

b) *The CIT(A) will take into account whether the practice of selling sugar at concessional rate to its members / farmers / cane growers, has become **a practice or custom in co-operative sugar** industry?*

c) *Whether any resolution has been passed by State Govt. supporting the practice?*

d) *CIT(A) will also consider on what basis the quantity of sugar is sold on month to month basis, apart from Diwali.*

4. *After above judgement of Hon'ble Supreme Court was pronounced, in various appeals decided by different CIT(A)s, they have taken differing approaches, wherein:*

a) *CIT(A)s have not decided the issue that was directed by the Hon'ble Supreme Court as to "whether difference between market price and concessional price of sugar sold should or should not be added to total income of the assessee society". (emphasis ours) This issue revolves round whether the income sought to be assessed in the hands of the assessee society had at all accrued to it. In of the some of the submissions to CIT(A), this issue was specifically raised and ratio of Hon'ble Supreme Court's judgement in A. Raman &CO, 67 ITR 11 (SC) was relied upon. However, the CIT(A)s have not dealt with the same. It has been submitted to the Hon'ble ITAT that assessee society has not made secret profits nor has received this difference in price back from the members and as such fictional income which is not received by the assessee cannot be taxed in its hands as held by Hon'ble Supreme Court in CIT v. Calcutta Discount Co. Ltd, 91 ITR 8 (SC).*

b) *In some appeals before CIT(A), assessee has relied upon the CBDT Circular No. 117 for the proposition that rebate given by Co-op. Society to its members' was not disallowable in Society's hands and therefore the discount given to members in the price of sugar should not be taxed in the hands of the Co-op. Society. In some appeals the CIT(A), after noting the directions in Krishna SSK, has held that relying on the Circular, the said concession given by assessee is not taxable in its hands.*

c) In most of the appeals, CIT(A)s have held that supplying sugar at a concession price to members and cane suppliers has become a trade practice and custom of the industry. CIT(A)s have noted that State Govt. has now brought strict uniformity in this practice by issuing an order dt. 1/3/2006 u/s 79A of MCS Act, stating the eligibility for society to sell such sugar, its price and monthly quantum.

d) Most CIT(A)s, having noted the aforesaid order dt. 1/3/2006, held that sugar sold at prices lower than levy sugar as provided of in the said order, would be taxable in assessee's hands at the difference between levy price and concessional price charged for infringement of the order.

e) Some CIT(A)s held that concession sugar sold in excess of quantum permitted by order dt. 1/3/2006, would be taxable in the hands of the assessee society for infringement of the order.

f) Some CIT(A)s held that concession sugar sold to cane growers who were not members was not permitted by order dt. 1/3/2006 and as such was its infringement and therefore, the concession given was taxable in the hands of the assessee society.

g) Some assessee societies have not sold concessional sugar every month but only during Diwali or Gudi Padwa. If such sales were less than 5 kgs per month for the year, CIT(A)s have accepted them to be within the quantum of the order dt. 1/3/2006.

h) Most CIT(A)s have not considered the submission that the Hon'ble Supreme Court in Krishna SSK, had specifically excluded the quantum sold during Diwali and therefore the Diwali sales of sugar at concession to members / cane growers were found acceptable by the Hon'ble Court.

5. It is in the above back ground that the concession given in sugar sold by assessee societies to members or cane growers is required to be adjudicated. On perusal of assessment orders and appellate orders of the CIT(A)s it is seen that the very first issue to be decided, i.e. whether difference between market price and concessional price of sugar sold should or should not be added to total income of the assessee society has not been adjudicated by the lower authorities. This issue goes to the root of the matter and it is necessary for the revenue authorities to consider the same, record their findings and reasons for their decision.

6. In the event revenue authorities hold that the difference between market price and concessional price of sugar is not at all to be taxed in the hands of the assessee society, then the matter stands concluded and no further findings are required.

7. If however, revenue authorities hold that it is the difference between levy price of sugar plus excise duty (as directed in order dt. 1/3/2006) and the price charged to members / cane suppliers which is to be taxed in the hands of assessee society,

they may record their findings and reasons for their decision considering assessee societies contentions that they have not received this difference and hence it is not their income.

8. In the event of aforesaid difference (in 6 or in 7 above) is taxed as income in the hands of the assessee society, the quantity of sugar sold to members / cane growers which is being taxed be specified by the revenue authorities with their findings and reasons for the same. In arriving at the above findings and reasons, as directed by the Hon'ble Supreme Court in Krishna SSK, the authorities would be required to consider:

- (a) impact of custom and trade practice;*
- (b) the State's policy;*
- (c) basis for monthly sales; and*
- (d) sales during Diwali"*

12. In the light of the above, it is the submissions of AR for the assessee and the Id. DR that all these bunch of appeals need to be remanded to the file of Assessing Officer for fresh adjudication for the purpose of giving effect to the directions of Hon'ble Apex Court in proper perspective.

13. On hearing both the sides, we find there is merit in the submissions of the AR. In all these appeals, the CIT(A) has failed to decide the appeals of the assesseees in consonance with the above discussed direction of Hon'ble Apex Court in the case of Krishna SSK Ltd. (supra). Accordingly, in these bunch of appeals the issue of sale of sugar at concessional price to the members should be ideally remanded to the file of Assessing Officer for fresh consideration and adjudication of the issue on merits and law. In fact, the Hon'ble Supreme Court remanded the issue to the file of the CIT(A) for complying its direction in the case of Krishna SSK Ltd. (supra). However, in order to avoid multiplicity of the proceeding before different officers, and to be in tune with our findings given in para 7 of this order, we find, remanding to the file of the Assessing Officer is appropriate. Thus, we order accordingly. The Assessing Officer shall grant reasonable opportunity of hearing to the assesseees, in accordance with law. Accordingly, the grounds raised in the appeals of the Revenue and the assessee are allowed for statistical purposes."

*Respectfully following the decision cited hereinabove, the issue sale of sugar at concessional rate to member is remanded to the file of Assessing Officer for fresh adjudication for the purpose of giving effect to the directions of Hon'ble Apex Court in proper perspective. The Assessing Officer shall grant reasonable opportunity of hearing to the assesseees, in accordance with law. Thus, **Ground Nos.15 to 18 raised in appeal by the assessee is allowed for statistical purposes."***

4. Respectfully following the decision cited hereinabove, both the issues
 i.e. excess sugar cane price paid to Members and Non-members and the issue

of sale of sugar at concessional rate to Members are remanded to the file of the Id. A.O for fresh adjudication for the purpose of giving effect to the directions of the Hon'ble Apex Court in its proper perspective. The Id. A.O shall comply with the principles of natural justice and adjudicate the issues as per law. The grounds of appeal raised by the assessee in both these appeals are therefore, allowed for statistical purposes.

5. In the result, all the **appeals of assessee are allowed for statistical purposes.**

Order pronounced in the open Court on this 21st day of April, 2022

Sd/-
(R.S. SYAL)
VICE PRESIDENT

sd/-
(PARTHA SARATHI CHAUDHURY)
JUDICIAL MEMBER

Pune; Dated, the 21st April, 2022
Ankam

Copy of the Order forwarded to :

1. The Appellant.
2. The Respondent.
3. The Pr. CIT-3, Pune
4. The CIT(A)-10, Pune
5. D.R. ITAT 'B' Bench
5. Guard File

BY ORDER,

/// TRUE COPY ///

Sr. Private Secretary
ITAT, Pune.

1	Draft dictated on	21-04-2022	Sr.PS/PS
2	Draft placed before author	21-04-2022	Sr.PS/PS
3	Draft proposed and placed before the second Member		JM/AM
4	Draft discussed/approved by second Member		AM/JM
5	Approved draft comes to the Sr. PS/PS		Sr.PS/PS
6	Kept for pronouncement on	21-04-2022	Sr.PS/PS
7	Date of uploading of order	21-04-2022	Sr.PS/PS
8	File sent to Bench Clerk	21-04-2022	Sr.PS/PS
9	Date on which the file goes to the Head Clerk		
10	Date on which file goes to the A.R		
11	Date of dispatch of order		