

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

BEFORE SHRI S.S.GODARA, JUDICIAL MEMBER
AND DR. DIPAK P. RIPOTE, ACCOUNTANT MEMBER

आयकरअपीलसं. / ITA No.1239/PUN/2019
निर्धारणवर्ष /Assessment Year: 2014-15

Rajgad Sahakari Sahakar Karkhana Ltd., Anantnagar, Nigade, Tal: Bbor, Dist: Pune – 412206. PAN: AAAAR 0830 J	Vs	The Deputy Commissioner of Income Tax, Circle-5, Pune.
Appellant/ Assessee		Respondent/ Revenue

Assessee by	Smt. Deepa Khare – AR
Revenue by	Shri M.G.Jasnani – DR
Date of hearing	07/07/2022
Date of pronouncement	13/07/2022

आदेश/ ORDER

PER DR.DIPAK P.RIPOTE, AM:

This appeal filed by the Assessee is directed against the order of Id.Commissioner of Income-tax(Appeals)-13, Pune's, order dated 27.06.2019 for the Assessment Year 2014-15, involving proceedings under section 143(3) of the Income Tax Act, 1961. The Assessee has raised the following grounds of appeal:

- “1. *Excess Cane* - *Rs.62,42,810/-*
2. *Sale of Sugar At Concessional Rate* - *Rs.13,61,057/-*
3. *Entrance Fees and Nominal Fees* - *Rs.29,350/-*
4. *Employees contribution towards PF* - *Rs.9,55,422/-*“

2. Brief facts of the case are that the Appellant Assessee is a co-operative Sugar Factory registered under Maharashtra Cooperative

Societies Act carrying on the business of white crystal sugar. During the assessment proceedings the Assessing Officer (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 filed written submissions by submitting that such payment was solely and exclusively in connection with the business expenditure and the entire amount was allowable u/s.37(1) of the Act. Relying on various judgments, the AO made addition of Rs.62,42,810/-. The Id. CIT(A) affirmed the assessment order on this issue.

2.1. We have heard both sides. We find this issue came up for consideration before the Tribunal setting aside to the file of AO in ITA No.308/PUN/2018, Majalgaon Sahakari Sakhar Karkhana Ltd., & Others order dated 14.03.2019. For the sake of convenience, the relevant finding is reproduced below:

“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 nonmembers, 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 nonmembers 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."

2.2. Following the precedent on this issue, we set-aside this issue to the file of AO, accordingly, the Ground No.1 is allowed for statistical purpose.

Ground No.2:

3. The Assessing Officer (AO) observed that the assessee had sold sugar to cane grower farmers at a concessional rate. Assessee sold the sugar 905 quintals [5027*18 k.g.) to members, but the Fair market price was Rs.3104.02 per quintal. The AO treated the difference as distribution of profit to members and made addition of Rs.13,61,057/- on this issue which has been confirmed by the Id.CIT(A).

3.1 Aggrieved by the order of the Id.Commissioner of Income Tax(Appeals), the assessee filed the present appeal before this Tribunal.

3.2. We have heard both the sides and perused the material available on records. It is observed that the said issue has been decided by the ITAT Pune Bench in the case of Majalgaon Sahakari Sakhar Karkhana Ltd., ITA No.308/PUN/2018 & Others. The ITAT Pune has held as under:

“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).”

3.3. Respectfully following the above decision, we set aside this issue to the file of Assessing Officer for re-adjudication in the light of the Hon’ble Supreme Court’s decision in the case of Krishna Sahakari Sakhar Karkhana Ltd., (2012) 27 taxmann.com 162 (SC), order dated 25.09.2012. Accordingly, the Ground No.2 is allowed for statistical purpose.

4. The Ground No.3 relating to Entrance Fees and Nominal Fees was not pressed by the Id.AR of the assessee. Therefore, the said ground is dismissed as not pressed.

5. The Ground No.4 relating to Employees Contribution towards PF which was deposited late but paid before the due date under section 139(1) of the Act. The AO invoking the provisions of section 36(1)(va) of the Act, made addition of Rs.9,55,422/-. The ld.CIT(A) confirmed the said addition made by the AO. Aggrieved thereby, the assessee approached the Tribunal.

5.1 We have heard both sides. This issue has been decided by the ITAT Pune Bench in favour of the assessee in ITA No.501/PUN/2021, Eknath Dhondiram Mithe Vs. ACIT, order dated 29.06.2022 holding as under:

4. We have heard both the sides. It is seen as an admitted position from the impugned order as well as the statement of facts before the ld. first appellate authority that the assessee did deduct employees' share of EPF and ESI and paid the same after the due date under the respective legislations but before the time stipulated for filing return under section 139(1) of the Act for the year under consideration. In our opinion, this issue is no more res integra in view of several judgments allowing deduction under section 36(1)(va) of employees' share of contribution deposited after due date under the respective Acts but before the date prescribed under section 139 of the Act. The Hon'ble Himachal Pradesh High Court in CIT vs. Nipso Polyfabriks Ltd. (2013) 350 ITR 327 (HP) has held that there exists no difference between employees or employer's contribution and both are to be allowed as deduction if deposited before the due date.

4.1 The ITAT Pune Bench in ITA No.112/PUN/2022 Sunita Suresh Jadhav vs. ITO order dated 21.03.2022 has held that no disallowance is warranted as the amounts were deposited before due date under section 139(1) of the Act.

5. At this juncture, it is relevant to mention that the Finance Act, 2021 has inserted Explanation 2 below section 36(1)(va) providing

that the provisions of section 43B shall not apply for the purpose of determining the due date under this clause w.e.f. 01.04.2021. The effect of this amendment is that if the amount of employees' contribution towards EPF, ESI, etc is delayed by an employer beyond the due date under the respective Acts, the disallowance will be called for notwithstanding the fact that it was deposited before the due date under section 139 of the Act. The Memorandum explaining the provisions of the Finance Bill, 2021, provides that this amendment will take effect from 1st April, 2021 and will, accordingly apply in relation to Assessment Year 2021-2022 and subsequent assessment years. Since the assessment year under consideration is 2019-20, which is anterior to the amendment carried out with effect from Assessment Year 2021-22, we hold that the position of law as set out by various Hon'ble High Courts including the one in CIT vs. Nipso Polyfabriks Ltd. (supra) squarely applies to the facts and circumstances of the instant case, thereby not warranting any disallowance since the amount in question was admittedly deposited before due date under section 139(1) of the Act. The addition is therefore, directed to be deleted.

6. *In the result, appeal of the assessee is allowed."*

5.2. Following the same reasoning, we allow this ground of appeal by the assessee, accordingly, the Ground No.4 is allowed.

6. Thus, the appeal of the Assessee is Partly Allowed for statistical purpose.

Order pronounced in the open Court on 13th July, 2022.

Sd/-
(S.S.GODARA)
JUDICIAL MEMBER

Sd/-
(DR. DIPAK P. RIPOTE)
ACCOUNTANT MEMBER

पुणे / Pune; दिनांक / Dated : 13th July, 2022/ SGR*

आदेशकीप्रतिलिपिअग्रेषित / Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The CIT(A), concerned.
4. The Pr. CIT, concerned.
5. विभागीयप्रतिनिधि, आयकर अपीलीय अधिकरण, "बी" बेंच,
पुणे / DR, ITAT, "B" Bench, Pune.
6. गार्डफ़ाइल / Guard File.

आदेशानुसार / BY ORDER,

// TRUE COPY //

Senior Private Secretary
आयकरअपीलीयअधिकरण, पुणे/ITAT, Pune.