IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH "B" : PUNE

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

I.T.A.No.390/PUN./2018
Assessment Year 2013-2014

Shree Someshwar SSK Ltd., Tal. Baramati, Dist. Pune PIN – 412 306. PAN AAAAS2034B	vs.	The DCIT, Circle-14, Bodhi Towers, Salisbury Park, Pune – 37. Maharashtra.
(Appellant)		(Respondent)

For Assessee :	Shri Prasanna Joshi
For Revenue :	Shri Sardar Singh Meena

Date of Hearing :	03.05.2023
Date of Pronouncement :	15.05.2023

ORDER

PER SATBEER SINGH GODARA, J.M. :

This assessee's appeal for assessment year 2013-2014, arises against the CIT(A)-7, Pune's Appeal No. PN/CIT(A)-7/HQ-6(2)/10673/2016-17, dated 20.11.2017, involving proceedings u/s. 143(3) of the Income Tax Act, 1961 (in short "the Act").

Heard both the parties. Case file perused.

2. It emerges during the course of hearing that the assessee has raised its twin substantive grounds challenging correctness of both the learned lower authorities action disallowing its alleged sugar cane purchase price paid to the cane growers in excess of the fair and remunerative price,

"FRP" involving Rs.28,90,45,506/- and sugar sold at concessional rates to them having the amount in question of Rs.2,95,88,241/-, respectively in assessment order dated 09.03.2016 as upheld in the CIT(A)'s lower appellate order.

3. Learned DR at this stage filed before us the tribunal's coordinate bench's common order dated 14.03.2019 involving assessee's appeal ITA.No.1171/PUN./2014 for assessment year 2010-11 as against the Revenue's appeals/ Cross-Appeals for assessment years 2007-08, 2008-09 and 2010-11, restoring both these twin issues back to the Assessing Officer. The relevant detailed discussion qua the former issue reads as under :

"I. EXCESSIVE SUGARCANE PRICE PAID

3. A common issue involved in almost all the appeals is on account of the addition made by the Assessing Officer (AO) towards of excessive sugarcane price paid to members as well as non-members of the respective assessees. On a representative basis, we are espousing the facts in the case of Majalgaon Sahakari Sakhar Karkhana Limited Vs. ACIT, Circle-3, Aurangabad – ITA No.308/PUN/2018 for the assessment year 2013-14. The assessee is engaged in the business of manufacturing of white sugar. During the course of assessment

proceedings, the 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 gave certain explanation by submitting that such payment was solely and exclusively in connection with the business and the entire amount was deductible u/s.37(1) of the Income-tax Act, 1961 (hereinafter also called `the Act'). Relying on the judgment of Hon'ble Supreme Court in the case of DCIT Vs. Shri Satpuda Tapi Parisar S.S.K. Ltd. and others (2010) 326 ITR 402, the AO opined that the excessive price paid was in the nature of `distribution of profits' and hence not deductible. This is how, he computed the excessive cane price paid both to the members and non-members at Rs.22,02,95,387/- and made addition for the said sum. The ld. CIT(A) echoed the assessment order on this point.

4. Facts in all other cases qua this issue, in so far as the assessment proceedings are concerned, are mutatis mutandis similar. It is seen that in some cases, the addition got deleted, fully or partly by the ld. CIT(A), whilst in others the addition got sustained. This led to filing of the cross appeals both by the assessee as well as the Revenue before the Tribunal.

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.....*

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."

3.1. Learned coordinate bench has adopted the very course of action regarding sale of sugar made to members in issue as under :

II. ADDITION FOR SUGAR GIVEN TO MEMBERS AT CONCESSIONAL RATES – [Appeals in which Krishna Sahakari Sakhar Karkhana Limited (SC) not considered by lower authorities]

10. In some of the appeals, there is another issue of giving sugar to members at concessional rates. Such ground is against the disallowance on account of price difference on certain quantity of sugar given to the members at concessional rate.

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."

3.2. The Revenue's case therefore is that we ought to adopt judicial consistency in deciding the assessee's instant twin substantive grounds as well.

4. Mr. Joshi at this stage invited our attention to the latest legislative developments which were not considered in the tribunal's earlier order. He first of all submitted that the

legislature had inserted clause (xvii) to sec.36(1) regarding such a claim of expenditure incurred by a cooperative society engaged in the business of manufacture of sugar for purchase of sugarcane at a price which is equal or less than the price fixed or approved by the government. He then quoted CBDT's circular number 18/2021 clarifying that the relevant phrase "price fixed or approved by the government" in the above phrase to sec.36(1)(xvii) shall also include the price fixation by the state governments through state level Acts/orders and other similar instruments, as the case may be which may also be higher than the price fixed by the central government. Mr. Joshi continued further referred to the latest statutory amendment inserting clause (19) in sec.155 of the Act granting relief as the very issue followed by the Explanatory Memorandum thereto issued in very terms. Mr. Joshi's case therefore is that now since there is much more clarity on the above twin issues, the Assessing Officer may also be directed to consider all these latest amendments and clarifications in his consequential proceedings.

5. We have given our thoughtful consideration to the above rival pleadings and find prima facie force in assessee's stand that the learned Assessing Officer, at the time of finalising his consequential/remand proceedings, shall consider the foregoing intervening legislative developments as

per law after verifying all the necessary facts in light thereof. We order accordingly.

6. This assessee's instant appeal is allowed for statistical purposes in above terms.

Order pronounced in the open Court on 15.05.2023.

Sd/-	Sd/-
[DR. DIPAK P. RIPOTE]	[SATBEER SINGH GODARA]
ACCOUNTANT MEMBER	JUDICIAL MEMBER

Pune, Dated 15th May, 2023

VBP/-

Copy to

1.	The appellant
2.	The respondent
3.	The CIT(A)-7, Pune. Maharashtra.
4.	The PCIT-6, Pune.
5.	D.R. ITAT, Pune "B" Bench, Pune
6.	Guard File.

//By Order//

Assistant Registrar, ITAT, Pune Benches,
Pune.