

**IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH "B", PUNE**

**BEFORE JUSTICE P.P. BHATT, PRESIDENT AND
SHRI R.S. SYAL, VICE PRESIDENT**

Sl. No.	ITA No./Co.No.	Name of Appellant	Name of Respondent	Asst. Year
1-3	2126/PUN/2012 2127/PUN/2012 2128/PUN/2012	ACIT, Circle-2, Sangli	Sonhira Sah. Sakhar Karkhana Ltd., A/P. Wangi, Tal. Kadegaon, Dist. Sangli PAN : AAAAM1794J	2007-08 2008-09 2009-10
4-6	2129/PUN/2012 2130/PUN/2012 2351/PUN/2012	ACIT, Circle-2, Sangli	Vasantdada Shetkari Sahakari Sakhar Karkhana Ltd., A/P. Madhavnagar Road Sangli PAN : AAAAV0137C	2007-08 2008-09 2009-10
7-8	948/PUN/2012 949/PUN/2012	ACIT, Circle-10, Pune	Shree Vighnagar Sahakari Sakhar Karkhana Ltd., Nivrutinagar, Tal. Junner, Dist. Pune PAN : AAAAS2033G	2007-08 2008-09
9	661/PUN/2016	Sagar Sahakari Sakhar Karkhana Ltd., (Since amalgamated with Samarth SSK Ltd.) Ankusnagar, Tal. Ambad, Dist. Jalna PAN : AAAAS7250F	ACIT, Jalna Circle, Jalna	2011-12
10-11	491/PUN/2014 492/PUN/2014	DCIT, Circle-3, Nanded	Shivshakti Shetkari Sahkari Sakhar Karkhana Ltd., At & Post. Tandulwadi, Tq. Washi, Dist. Osmanabad PAN : AAAAS5851Q	2007-08 2009-10

12-13	2370/PUN/2012 2371/PUN/2012	DCIT, Circle-1, Kolhapur	Appasaheb Nalawade Gadhingalaj Talukar Sahakari Sakhar Karkhana Ltd., A/P. Harali, Mangaon Road, Tal. Gadhingalaj,Dist. Kolhapur PAN : AAAAG0574A	2007-08 2008-09
14-16	485/PUN/2014 486/PUN/2014 487/PUN/2014	DCIT, Circle-3, Nanded	Bhaurao Chavan Sahkari Sakhar Karkhana Ltd., Laxminagar, Degaon Yelegaon, Tq. Ardhapur, Dist. Nanded PAN : AAAAB0959Q	2001-02 2002-03 2006-07
17-18	595/PUN/2012 596/PUN/2012	ACIT, Circle-3(1), Dhule	Shirpur Shetkari Sahakari Sakhar Karkhana Ltd., A/P Shivaji Nagar, Dahiwad, Tal. Shirpur, Dist. Dhule PAN : 4014-PX-7484	1996-97 1997-98
19	2162/PUN/2012	DCIT, Ichalkaranji Circle, Ichalkaranji	Datta Shetkari Sahakari Sakhar Karkhana Ltd., Gat No.230-231, A/P. Dattanagar, Shirol, Kolhapur PAN : AAAAS0597B	2009-10
20-21	1028/PUN/2012 1029/PUN/2012	Shree Shankar SSK Ltd., Sadashivnagar, Tal. Mashiras, Dist. Solapur – 413111 PAN :AAAAS3735M	ACIT, Circle-1, Solapur	2007-08 2008-09

Assessee (s) Represented by : Shri Prasanna L. Joshi
Shri M.K. Kulkarni
Shri Pramod Shingte
Smt. Deepa Khare

None Appeared : Sl.Nos. 1 to 3, 4, to 6, 10, 11 & 19

Revenue by : Shri Pankag Garg

Date of hearing : 12-04-2019
Date of pronouncement : 12-04-2019

आदेश / ORDER

PER P.P. BHATT, PRESIDENT

This batch comprising of certain appeals by the assessees and the others by the Revenue relate to different assessment years captioned above. Since most of the appeals have at least one common issue, we are, therefore, disposing them off by this consolidated order for the sake of convenience.

I. EXCESSIVE SUGARCANE PRICE PAID

2. 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 ACIT, Circle-2, Sangli Vs. Sonhira Sahakari Sakhar Karkhana Ltd. – ITA No.2126/PUN/2012 for the assessment year 2007-08. The assessee is a Co-operative Society engaged in the business of manufacturing and sale of sugar and its bye-products. 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 clause-3 and additional price payable as per clause 5A of the Sugarcane Control Order, 1966, 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.5,29,14,209.50 and made addition for the said sum. The Id. CIT(A) deleted the addition on this point.

3. 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 by the Id. CIT(A), whilst in others the addition got sustained. This led to filing of the appeals both by the assessee as well as the Revenue before the Tribunal.

4. 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 assessee 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.”

5. 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 aforementioned 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.

6. 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.

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

7. 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.

8. 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 Id. 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.

III. DISALLOWANCE OF EXPENSES

9. Another issue in the appeal of the Revenue in *Shivshakti SSK Ltd. Vs. DCIT, Circle-3 – ITA No.492/PUN/2014* is against the reduction in the addition of Rs.50,67,830/- on account of expenses viz. purchases, power & fuel, repairs to machinery, hospitality Advertisement, Travelling Expenses, Telephone expenses etc. to Rs.5.00 lakh by the Id. CIT(A). The AO, on estimation basis, made certain additions from various expenses at some percentage for non-availability of evidences/non-verifiability of details. The Id. CIT(A) restricted such addition to Rs.5 lakh and gave partial relief. The Revenue is aggrieved by reduction in the addition.

10. We find the ld. CIT(A) has categorically mentioned that the assessee is governed by the provisions of Cooperative Societies Act and under the control and supervision of various Govt. authorities. The assessee has maintained books of accounts and the same are subjected to audit. He further noted that the AO failed to verify the books of account and made addition. Under these circumstances and considering the totality of facts and circumstances of the case we are of the considered opinion that the ld. CIT(A) has taken a reasonable view. Thus, we countenance the view taken by the ld. CIT(A) on this score

11. In the result, all the appeals are fully/partly allowed for statistical purposes.

Order pronounced in the Open Court on 12th April, 2019.

Sd/-

Sd/-

(R.S.SYAL)
VICE PRESIDENT

(P.P.BHATT)
PRESIDENT

पुणे Pune; दिनांक Dated : 12th April, 2019
सतीश

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

1. अपीलार्थी / The Appellant;
2. प्रत्यर्थी / The Respondent;
3. The CIT(A) concerned
4. The CIT concerned
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, पुणे
“बी” / DR ‘B’, ITAT, Pune;
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

// True Copy //

Senior Private Secretary
आयकर अपीलीय अधिकरण पुणे ITAT, Pune

		Date	
1.	Draft dictated on	12-04-2019	Sr.PS
2.	Draft placed before author	12-04-2019	Sr.PS
3.	Draft proposed & placed before the second member		JM
4.	Draft discussed/approved by Second Member.		JM
5.	Approved Draft comes to the Sr.PS/PS		Sr.PS
6.	Kept for pronouncement on		Sr.PS
7.	Date of uploading order		Sr.PS
8.	File sent to the Bench Clerk		Sr.PS
9.	Date on which file goes to the Head Clerk		
10.	Date on which file goes to the A.R.		
11.	Date of dispatch of Order.		

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