

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

श्री डी. करुणाकरा राव, लेखा सदस्य एवं श्री विकास अवस्थी, न्यायिक सदस्य के समक्ष
BEFORE SHRI D. KARUNAKARA RAO, AM AND SHRI VIKAS AWASTHY, JM

Sl. No.	ITA No.	Name of Appellant	Name of Respondent	Asst. Year
1	1030/PUN/2012	Sahakar Maharshi Shankarrao Mohite Patil SSK Ltd., Akluj, Distt.-Solapur PAN : AAAAS3736J	ACIT, Circle-1, Solapur	2007-08
2	1031/PUN/2012	Sahakar Maharshi Shankarrao Mohite Patil SSK Ltd., Akluj, Distt.-Solapur PAN : AAAAS3736J	ACIT, Circle-1, Solapur	2008-09
3	1436/PUN/2012	Rayat Sahakari Sakhar Karkhana Ltd., A/P. Shealewadi, Tal.-Kadad, Distt.-Satara PAN : AABCR7229J	DCIT, Satara Circle, Satara	2008-09
4	986/PUN/2014	Vaidyanath Sant Eknath Sahakari Sakhar Udyog, C/o Vaidyanath Sahakari Sakhar Karkhana Ltd., Pangri, Tal.-Parli, Distt.-Beed PAN : AAGFV6446H	ACIT, Circle-1, Aurangabad	2010-11
5	1251/PUN/2014	ACIT, Circle-1, Aurangabad	Vaidyanath Sant Eknath Sakhar Udyog, At Eknath Nagar, Paithan Road, Tq.-Paithan, Distt.-Aurangabad PAN : AAGFV6446H	2010-11

Assessee by	Mrs. Subhadha Koppa
Revenue by	Mrs. Shabana Parveen
Date of hearing	02.07.2019
Date of pronouncement	21.08.2019

आदेश / ORDER

PER BENCH :

These bunch of 5 appeals by the assessee and the Revenue for assessment years mentioned in the caption against the names of the assesseees, are directed against the orders of Commissioner of Income Tax (Appeals), in the respective cases. All the assesseees, in the present set of appeals are running co-operative sugar factories. They purchase sugarcane from the farmers and sell white sugar after manufacturing the same. The primary issue raised in all these bunch of appeals is : Taxability of “**Excess Sugarcane Price**” paid by the assesseees to sugarcane suppliers, i.e. the price over and above the Statutory Minimum Price (SMP) fixed by State Government for purchase of cane.

2. Both, the ld. AR and the ld. DR unanimously stated that the common issue in all the appeals relating to taxability of excess sugarcane price paid by the assesseees to farmers for supply of sugarcane have already been considered and adjudicated by the Co-ordinate Bench of Tribunal in bunch of appeals with the lead case DCIT vs. Vasant Rao Dada Patil SSK Ltd. in ITA Nos.50 to 52/PUN/2012 for the assessment years 1992-93, 1994-95 & 1996-97, respectively vide order dated 20.03.2019. Both sides prayed that in line with aforesaid order of Tribunal the present set of appeals be restored to Assessing Officer with similar directions.

3. We have heard the submissions of rival sides and have considered the order of Co-ordinate Bench in the case of DCIT vs. Vasant Rao Dada Patil SSK Ltd. (supra). The Co-ordinate Bench after considering the binding judgment of Hon’ble Supreme Court of India in the case of CIT

Vs. Tasgaon Taluka S.S.K. Ltd. reported as 103 taxmann.com 57, has decided the 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 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.**"*

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 assessees have raised an alternate ground for allowing deduction u/s.80P in respect of the addition.

8. The ld. 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 ld. ARs participated in proceedings before the

Tribunal. Therefore, the said alternate ground in all such cases is dismissed.”

4. 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.

5. Mrs. Subhadha Koppa appearing on behalf of the assessee 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 ld. 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 ld. 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 ld. 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 ld. 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.

5.1 The ld. AR further pointed that in ITA No. 986/PUN/2014 for assessment year 2010-11, the correct facts have not been recorded and appreciated by the authorities below. The appellant had taken a sick

sugar factory to run by paying a certain fixed amount and variable amount to the owner Co-operative Sugar Factory's Bank. For the appellant this was a business venture and there was no issue of distribution of profits in the garb of payment of higher cane price to farmers. Therefore, the judgment of the Hon'ble Supreme Court of India in the case of CIT Vs. Tasgaon Taluka S.S.K. Ltd. (supra) will not apply to these facts.

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

7. 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. The Assessing Officer shall also give due consideration to the issues raised by the assessee with effect to applicability/non-applicability of judgment of Hon'ble Apex Court as the case may be and decide the issue accordingly. Thus, the issue of excess cane price paid to sugarcane suppliers is allowed for statistical purposes in the aforesaid terms.

8. Apart from the primary issue relating to excess cane price paid to sugar cane suppliers, there are other issues that have emerged in these appeals. These issues are :

- i. Provision for Vasantdada Sugar Institute (VSI) Contribution;
- ii. Disallowance of contribution towards Area Development Fund; and
- iii. Disallowance of deduction claimed u/s. 80P(2)(d) of the Act.

Provision for Vasantdada Sugar Institute (VSI) Contribution.

9. The ld. AR submitted that the issue of provision for VSI contribution has been decided by the Tribunal while adjudicating bunch of SSK appeals in Majalgaon SSK Ltd. Vs. ACIT in ITA No. 308/PUN/2018 for assessment year 2013-14 decided on 14-03-2019. The Co-ordinate Bench followed the decision rendered in the case of Bhima S.S.K. Ltd. in ITA No. 1414/PUN/2000. The ld. DR fairly admitted that this issue has already been considered by the Tribunal. We observe that the Co-ordinate Bench has decided this issue in favour of assessee by holding as under :

“18. We have heard both the sides and gone through the relevant material on record. It is found that the ld. CIT(A) has determined this issue in favour of the assessee by following the order passed by the Pune Benches of the Tribunal in the case of Bhima S.S.K. Ltd. (supra). No material has been placed on record to show that this order of the Tribunal has been reversed or modified in any manner by the Hon’ble High Court. Respectfully following the precedent, we decide this issue in favour of the assessee.”

9.1 Thus, in view of the above findings of the Tribunal and submissions made by both the sides, the ground is decided in favour of the assessee.

Disallowance of contribution towards Area Development Fund.

10. We find that the Co-ordinate Bench has considered this issue and has restored the same to the file of Assessing Officer by observing as under :

“13. Having heard both the sides and gone through the relevant material on record, it is seen that similar issue came up for consideration before the Hon’ble Supreme Court in the case of Siddheshwar Sahakari Sakhar Karkhana Limited Vs. CIT and others (2004) 270 ITR 1 (SC). In that case, the Hon’ble Supreme Court observed in para 44 that the receipts in the form of Area Development Fund always remained with the assessee. It also noted the contention of the assessee in para 45 that the realisations made towards the Area Development Fund were impressed with the specific legal obligation to spend the money for specified purposes which were unrelated to the business of the sugar factory and hence, could not be treated as income of the assessee. Eventually, the Hon’ble Supreme Court remitted the matter back for fresh determination. It is noticed that in the appeals under consideration, the Id. CITs(A) have not considered the impact of the judgment of the Hon’ble Supreme Court in Siddheshwar Sahakari Sakhar Karkhana Limited (supra) and decided the issue without taking note of the factors directed to be considered in the aforementioned case. In view of the above decision of Hon’ble Supreme Court, we set-aside such impugned orders and remit the matter to the file of the respective AOs for deciding the issue afresh in conformity with the guidelines laid down by the Hon’ble Apex Court in the above judgment.”

10.1 Both sides are unanimous in stating that the issue of disallowance of Area Development Fund in present set of appeals is identical to the one already decided by the Co-ordinate Bench. In the light of directions of Co-ordinate Bench on the issue in hand, the same is restored back to the file of Assessing Officer. The Assessing Officer while deciding the issue in appeal shall grant reasonable opportunity of hearing to the assessee, in accordance with law.

Disallowance of deduction claimed u/s. 80P(2)(d) of the Act.

11. In ITA No. 1031/PUN/2012, the assessee has raised an issue of denial of deduction under section 80P of the Act on interest income earned on deposits with Co-operative Bank. The Assessing Officer

disallowed assessee's claim on the ground that part of investments in deposits was from borrowed funds.

11.1 The contention of the assessee is that own funds of the assessee are sufficient to cover the investments made in deposits with the Bank, therefore, the question of netting off of interest earned on deposits against interest paid on borrowed funds does not arise.

11.2 On the other hand ld. DR vehemently supported the findings of Commissioner of Income Tax (Appeals) and the Assessing Officer.

11.3 Both sides heard. The assessee in appeal is against disallowing assessee's claim of deduction u/s. 80P(2)(d) on the ground that the assessee made investments in deposits by utilizing borrowed funds. The Hon'ble Bombay High Court in the case of Commissioner of Income Tax Vs. Reliance Utilities and Power Ltd. (313 ITR 340) in the context of section 36(1)(iii) of the Act held that where both interest free funds and interest bearing funds are available, and interest free funds are sufficient to cover the investments made, it shall be presumed that investments are made out of interest free funds available with the assessee. Same analogy was applied by Hon'ble Bombay High Court in the case of HDFC Bank Ltd. (366 ITR 505) in respect of disallowance u/s. 14A r.w. Rule 8D(2)(ii). Extending the same principle here, we find merit in the submissions of the assessee. However, no material is brought on record by the assessee to show availability of funds for making investment in deposits during the relevant period. Therefore, we deem it appropriate to restore this issue back to the file of Assessing Officer for the limited purpose of ascertaining fund position when the deposits were made by

the assessee. The Assessing Officer shall decide the issue de-novo in line with our above observations. In the result, the ground relating to disallowance u/s. 80P(2)(d) is allowed for statistical purpose.

12. In the result, the appeals of assessees and the Department are allowed for statistical purpose.

Order pronounced on Wednesday, the 21st day of August, 2019.

Sd/-	Sd/-
(डॉ. करुणाकरा राव/D. Karunakara Rao)	(विकास अवस्थी / Vikas Awasthy)
लेखा सदस्य / ACCOUNTANT MEMBER	न्यायिक सदस्य / JUDICIAL MEMBER

पुणे / Pune; दिनांक / Dated : 21st August, 2019.

RK

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

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त (अपील) / The CIT(A) concerned
4. आयकर आयुक्त / The CIT concerned
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, “ए” बेंच,
पुणे / DR, ITAT, “A” Bench, Pune.
6. गार्ड फाइल / Guard File.

//सत्यापित प्रति // True Copy//

आदेशानुसार / BY ORDER,

निजी सचिव / Private Secretary,
आयकर अपीलीय अधिकरण, पुणे / ITAT, Pune