IN THE HIGH COURT OF JUDICATURE AT BOMBAY, AURANGABAD BENCH, AT AURANGABAD.

Tax Appeal No. 29 of 2008
With

The Commissioner of Income Tax - I,
Aaykar Bhavan, PMT Building, B Wing,
Shankar Seth Road, Swargate,
Pune - 411 037. .. Appellant.

versus

Shri Ganesh Sahakari Sakhar Karkhana Ltd.,
P.O. Ranjangaon Khurd, Taluka : Rahata,
District : Ahmednagar. .. Respondent.

....

Mr. Alok Sharma, Assistant Solicitor General, for the appellant.

Mr. S.V. Adwant, Advocate, for the respondent.

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Tax Appeal No. 62 of 2008
With

The Commissioner of Income Tax - I,
Aaykar Bhavan, PMT Building, B Wing,
Shankar Seth Road, Swargate,
Pune - 411 037. .. Appellant.

versus

Dr. Baburao Bapuji Tanpure,
Sahakari Sakhar Karkhana Ltd.,
At Post : Shri Shivaji Nagar,
Taluka : Rahuri,
District : Ahmednagar. .. Respondent.

....

Mr. Alok Sharma, Assistant Solicitor General, for the appellant.

Mrs. Vaishali Patil Jadhav, Advocate, for the respondent.

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<u>Tax Appeal No. 65 of 2008</u>
<u>With</u>

The Commissioner of Income Tax - I,
Aaykar Bhavan, PMT Building, B Wing,
Shankar Seth Road, Swargate,
Pune - 411 037. .. Appellant.

versus

Shri Jagdamba Sahakari Sakhar Karkhana
Ltd., P.O. - Rashin,
Taluka : Karjat,
District : Ahmednagar. .. Respondent.

....

Mr. Alok Sharma, Assistant Solicitor General, for the appellant.

Respondent served (Absent).

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<u>Tax Appeal No. 66 of 2008</u>
<u>With</u>

The Commissioner of Income Tax - I,
Aaykar Bhavan, PMT Building, B Wing,
Shankar Seth Road, Swargate,
Pune - 411 037. .. Appellant.

versus

Dr. Baburao Bapuji Tanpure,
Sahakari Sakhar Karkhana Ltd.,
At Post Shri Shivaji Nagar,
Taluka : Rahuri,
District : Ahmednagar. .. Respondent.

....

Mr. Alok Sharma, Assistant Solicitor General, for the appellant.

Mrs. Vaishali Patil Jadhav, Advocate, for the respondent.

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<u>Tax Appeal No. 84 of 2008</u>
<u>With</u>

The Commissioner of Income Tax - I,
Aaykar Bhavan, PMT Building, B Wing,
Shankar Seth Road, Swargate,
Pune - 411 037. .. Appellant.

versus

Dnyaneshwar Sahakari Sakhar Karkhana Ltd.,
At Post : Bhenda, Taluka : Newasa,
District : Ahmednagar. .. Respondent.

....

Mr. Alok Sharma, Assistant Solicitor General, for the appellant.

Respondent served (Absent).

....

Tax Appeal No. 106 of 2008
With

The Commissioner of Income Tax - I,
Aaykar Bhavan, PMT Building, B Wing,
Shankar Seth Road, Swargate,
Pune - 411 037. .. Appellant.

versus

Kopergaon Sahakari Sakhar
Karkhana Ltd., At Post : Kolpewadi,
Taluka : Kopergaon,
District : Ahmednagar. .. Respondent.

....

Mr. Alok Sharma, Assistant Solicitor General, for the appellant.

Mr. R.N. Dhorde, Advocate, for the respondent.

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<u>Tax Appeal No. 119 of 2008</u>
<u>With</u>

The Commissioner of Income Tax - I,
Aaykar Bhavan, PMT Building, B Wing,
Shankar Seth Road, Swargate,
Pune - 411 037. .. Appellant.

versus

Mula Sahakari Sakhar Karkhana Ltd.,
At Post : Sonai,
Taluka : Newasa,
District : Ahmednagar. .. Respondent.

....

Mr. Alok Sharma, Assistant Solicitor General, for the appellant.

Mrs. Vaishali Patil Jadhav, Advocate, for the respondent.

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<u>Tax Appeal No. 120 of 2008</u>

The Commissioner of Income Tax - I,
Aaykar Bhavan, PMT Building, B Wing,
Shankar Seth Road, Swargate,
Pune - 411 037. .. Appellant.

versus

Kopergaon Sahakari Sakhar Karkhana Ltd.,
At Post : Kolpewadi,
Taluka : Kopergaon,
District : Ahmednagar. .. Respondent.

....

Mr. Alok Sharma, Assistant Solicitor General, for the appellant.

Mr. R.N. Dhorde, Advocate, for the respondent.

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CORAM : B.P. DHARMADHIKARI
&
SUNIL P. DESHMUKH, JJ.

Date of reserving the judgment : 18th June 2012.

Date of pronouncing the judgment : 10th July 2012.

JUDGMENT (Per B.P. Dharmadhikari, J.) :

1. All these Appeals under Section 260-A of the Income Tax Act, 1961 by Revenue are to be disposed of finally at the stage of admission itself as per earlier orders passed by the Division Benches of this Court. After hearing respective Counsel, we find that following substantial questions of law fall for determination.

(A) Whether the dis-allowance of difference between State Advised Price & Statutory Minimum Price paid by assessee Cooperative Societies to sugar cane farmers by the Assessing Officer has been correctly set aside concurrently by the Appellate Authorities under the Income Tax Act, 1961 in the facts & circumstances of the respective Cases?

(B) Whether a Cooperative Society is not an association of persons within Section 40-A (2) of the Income Tax Act, 1961?

2. It has been brought to our notice that in Tax Appeal 3/2008 on 13.01.2011, Tax Appeal 54/2010 on 25.02.2012 followed the judgment of Hon. Apex Court in ***(2010) 13 SCC 527---Deputy Commissioner of Income Tax, Nashik vs. Shri Satpuda Tapi Parisar SSK Ltd.*** & particularly remanded the matters back to CIT (appeals).

3. We have heard learned ASGI Shri Alok Sharma for Revenue. Adv. Mr. S.V. Adwant, Adv. Mrs. Vaishali Patil Jadhav, Adv. Mr. R.N. Dhorde, have assisted the Court on behalf of respective assessees. They have not disputed the earlier orders passed by this Court. None appears for the respondents in Tax Appeal Nos. 65/2008 and 84/2008, though duly served.

4. The Division Bench judgment of this Court reported at ***2007***

(11) LJS (URC) 73 – Commissioner of Income-tax Vs. Manjara Shetkari Sahakari Sakhar Karkhana Ltd. answers both these questions & the controversy in favour of assessees and Hon. Apex Court has granted special leave to appeal against it vide SLP (civil) 1203/2009. It is connected to SLP (civil) 1126/2009. These Appeals are pending before this Court since 2008 and due to judgment of the Hon. Apex Court in ***(2010) 13 SCC 527---Deputy Commissioner of Income Tax, Nashik vs. Shri Satpuda Tapi Parisar SSK Ltd.*** & particularly, the reasons which weighed with the Hon. Apex Court for remitting the matters back to CIT (appeals), we are also persuaded to dispose of the matters. We find that order of assessment has failed to consider same material aspects as noted by the Hon. Apex Court and the Real Income theory as also theory of Overriding Title. The question whether Section 40-A(2) applies to a Cooperative Society is being answered by the Hon. Apex Court in above SLPs but then in decided matter, assessee Shri Satpuda Tapi Parisar SSK Ltd. is also a cooperative society. The verdict of Hon. Apex Court will put an end to this controversy either way, but time becoming available till then can be utilized to ascertain basic facts essential for proper assessment as laid down by the Hon. Apex Court. It also helps assessee to understand the correct mode & manner of writing their accounts in future. Hence, it is not expedient to keep the matter pending or adjourn it. We find that the respective orders of assessment before us also suffer from the defects pointed out by Hon. Apex Court. Two judgments of the Hon. Apex Court having direct bearing on the controversy involved in all these appeals must be looked into first.

5. Judgment of the Hon. Apex Court in ***(2010) 13 SCC 527--- Deputy Commissioner of Income Tax, Nashik vs. Shri Satpuda Tapi Parisar SSK Ltd.*** is most important. Here. the Hon. Apex Court after hearing extensive arguments on the applicability of Section 40-A(2) of the Income Tax Act, 1961, as it stood at the relevant time, has found that a large number of questions had remained unanswered. Hon. Apex Court states that the applicability of Section 40-A(2) of the Income Tax Act, 1961 is linked to computation under Section 28 and Section 37 of the Act. It was the case of the Department in all cases before Hon. Apex Court that the State advised price (SAP) is determined on the basis of the price recommended by the assessee(s) after the finalization of accounts and, therefore, the differential amount between SAP and SMP would constitute appropriation of profits and not expenditure/expense under Section 37 of the Act. It was the case of the assessee(s)- a cooperative sugar factory that they were/are bound to pay to the cane growers ,the final cane price as per the SAP fixed by the State Government and the mere fact that SAP fixed by the State Government is based on the price recommended by the assessee(s) after finalization of accounts would not constitute appropriation of profits because appropriation would arise only after the profits are determined and profits can be determined only after all the expenses incurred for the business are deducted from the gross income. Hon. Apex Court notices that on the above contentions, two questions required to be considered by the Department are as follows:

> *"Whether the abovementioned differential payment made by the assessee(s) to the cane growers after the close of the financial year or after the balance sheet date would constitute an expenditure under*

> *Section 37 of the Income Tax Act, 1961; and whether such differential payment would, applying the real income theory, constitute an expenditure or distribution of profits?*"

Hon. Apex Court thereafter directs that :--

> "*5. In deciding the above questions, the assessing officer will take into account the manner in which the business works, resolutions of the State Government, the modalities and the manner in which SAP and SMP are decided, the timing difference which will arise on account of the difference in the accounting years, etc.*
>
> *6. In a given case, if the assessee has made a provision in its accounts, then the assessing officer shall enquire whether such provision is made out of profits or from gross receipts and whether such differential payment is relatable to the cost of the sugarcane or whether it is relatable to the division of profits amongst the members of the Society? One of the points which will also arise for determination by the assessing officer will be on the theory of overriding title in the matter of accrual or application of income. Therefore, in each of these cases, the assessing officer will decide the question as to whether the obligation is attached to income or to its source.*
>
> *7. None of these questions have been examined by the authorities below. These questions are required to be examined because, in these case, we are not only concerned with the applicability of Section 40-A(2) of the Act but we are primarily required to consider whether the said differential payment constitutes an expense or distribution of profits?*"

We will also like to note the reasons recorded by the Hon. Apex Court for remanding the matters in paragraph 8 of its judgment:--

> "*8. Ordinarily, we would not have remitted these matters, particularly when they are for Assessment Year 1992-1993, but, for the fact that this issue is going to arise repeatedly in future. <u>It will also help the assessee(s) in a way that they will have to rewrite their accounts in future depending upon the outcome of this litigation.</u> Therefore, in the interest of justice, we remit these cases to the Commissioner of Income Tax (Appeals) concerned. <u>We make it clear that both the parties are given liberty to amend their pleadings before the Commissioner of Income Tax (Appeals) takes up the matter for final hearing</u>. We express no opinion on the merits of the case. The parties are at liberty to argue their respective points uninfluenced by any observations made in the impugned judgments on the applicability of Section 28 or Section 37 of the Act.*"

6. In ***(2003)1 SCC 660—AIR 2003 SC 668- Commissioner of Income Tax vs. Sunil J. Kinariwala***.,Hon. Apex Court explains the difference in concept of application of his income by an assessee & diversion of his income by overriding title . It lays down that the share of the income of the assessee assigned in favour of the Trust there needed to be included in the total income of the assessee. Under the law of partnership, it is the partner and the partner alone who is entitled to profits and a stranger, even if he were an assignee, does not have and cannot have any direct claim to the profits. Thus, when a third person becomes entitled to receive the amount under an obligation of an assessee even before he could lay claim to receive it as his income, there would be diversion of income by overriding title; but when after receipt of the income by the assessee, the same is passed on to a third person in discharge of the obligation of the assessee , it will be a case of application of income by the assessee and not of diversion of income by overriding title.

7. We very briefly point out what the respective assessment orders in matters before us do. The fact that SAP is more than SMP and SAP is fixed at the initiative of assessee Cooperative Societies has been only noted & given importance. It is held that after ascertaining the profits, respective assessees moved the State Government for determination of SAP and thus, it is diversion of profits. As an illustration of application of mind & by way of specimen, We reproduce the observations in paragraph 4.4 of his assessment order dated 16.03.2004 by DCIT, Ahmednagar circle, Ahmednagar in the matter of assessee Shree Ganesh Sahkari Sakhar Karkhana Ltd. for assessment year 2001—2002 in Tax Appeal 29 of 2008 before us. He observes-

> "*Where by obligation income is diverted before it reaches the assessee, it is not deductible , but where the income is required to be applied to discharge an obligation, self-imposed or gratuitous, after such income reaches the assessee, the same consequence,in law, does not follow. It is the first kind of payment which can not be excused from taxation & not the second. The second payment is merely an obligation to pay another, a portion of one's own income, which has been received & since appropriated; while the first type of payment which is diverted before it reaches to the assessee, tantamounts to alienation of income & is not exempt from tax. Therefore, such being the position, the income which has been alienated by way of excess cane price payment to members & nonmembers in the shape*

> *of final cane payment, as per order of the Commissioner of Sugar,M.S., over & above the initial price fixed by the Government is said to be alienated before it reaches to the assessee and it tantamounts to assessee's income liable to chargeable to tax, and required to be added to total income of assessee Karkhana*."

The same is therefore found to be not an expenditure deductible under Section 37 and a payment barred by S. 40-A(2) of the Act. The obligations, if any, in this connection, cast upon the assessees by their respective bye-laws, by various government decisions or resolutions of its own are not looked into and also, are not pressed into service by these assessees. The respective assessment authorities have to apply mind as directed by Hon. Apex Court in paragraphs 5 & 6 of its judgment in ***Deputy Commissioner of Income Tax, Nashik vs.Shri Satpuda Tapi Parisar SSK Ltd.***(supra) & then complete the assessment. "Real Income Theory & Theory of overriding title" needs to be resorted to by them.

8. As Hon. Apex Court has remanded the matters to CIT(Appeals), we also adopt the same course. Accordingly, We quash & set aside impugned orders passed by the respective I.T.A.Ts. & C.I.T. (appeals) assailed before us and place the appeals preferred by respective assessee Cooperative Sugar Factory back before the concerned C.I.T. (appeals). Both the parties to it are given liberty to amend their pleadings before the Commissioner of Income Tax (Appeals) takes up the matter for final hearing as per paragraph 8 in ***Deputy Commissioner of Income Tax, Nashik vs. Shri Satpuda Tapi Parisar SSK Ltd.***(supra). Needless to mention that the said exercise is subject to determination of question of applicability of S.40-A(2) of the Act to Cooperative Societies.

9. Thus, we partly allow all these appeals & subject to adjudication of the applicability of S. 40-A(2) of the Act to Cooperative Sugar Factories by the Hon. Apex Court & its impact on these matters, quash & set aside the orders in appeal passed by the CIT (appeals) & I.T.A.T. impugned in these all Tax Appeals. We remit the matters back to the respective CITs as per directions contained in paragraph 6 here in above. Appeals are thus partly allowed with no orders as to costs.

(SUNIL P. DESHMUKH)
JUDGE

(B.P. DHARMADHIKARI)
JUDGE

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