आयकर अपीलीय अधिकरण "जी" न्यायपीठ मुंबई में।

IN THE INCOME TAX APPELLATE TRIBUNAL MUMBAI BENCH "G", MUMBAI

श्री अमित शुक्ला, न्यायिक सदस्य एवं

श्री रमित कोचर, लेखा सदस्य के समक्ष ।

BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER AND SHRI RAMIT KOCHAR, ACCOUNTANT MEMBER

ITA No. : 3474/Mum/2014
(Assessment year : 2007-08)
ITA No. : 3475/Mum/2014
(Assessment year : 2008-09)
ITA No. : 3476/Mum/2014
(Assessment year : 2009-10)

Yashomandir Sahakari Patpedhi Ltd, 307, Mahavir Apartment, Pant Nagar, Ghatkopar (East), Mumbai -400 075 स्थयी लेखा सं.:PAN: **AAAAY 0015 A**	**Vs**	Income Tax Officer-22(2)(4), Tower No. 6, 4th Floor, Vashi Railway Station Complex, Vashi, Navi Mumbai -400 703
अपीलार्थी (Appellant)		प्रत्यर्थी (Respondent)
Appellant by	:	Shri Abani Kanta Nayak
Respondent by	:	Shri V G Ginde

ITA No. : 3460/Mum/2014
(Assessment year : 2007-08)
ITA No. : 3461/Mum/2014
(Assessment year : 2008-09)
ITA No. : 3641/Mum/2014
(Assessment year : 2009-10)

Income Tax Officer-22(2)(4), Tower No. 6, 4th Floor, Vashi Railway Station Complex, Vashi, Navi Mumbai -400 703	**Vs**	Yashomandir Sahakari Patpedhi Ltd, Mumbai -400 075 स्थयी लेखा सं.:PAN: **AAAAY 0015 A**
अपीलार्थी (Appellant)		प्रत्यर्थी (Respondent)
Appellant by	:	Shri Abani Kanta Nayak
Respondent by	:	Shri V G Ginde

सुनवाई की तारीख /Date of Hearing : 18-11-2015
घोषणा की तारीख /Date of Pronouncement : 11-12-2015

आदेश
ORDER

अमित शुक्ला, न्या. स.:
PER AMIT SHUKLA, JM:

The aforesaid cross appeals have been filed by the assessee as well as by the revenue against order dated 28.02.2014 for the assessment years 2007-08 & 2008-09 and order dated 31.03.2014 for the assessment year 2009-10 passed by CIT(A)-33, Mumbai for the quantum of assessment passed u/s 143(3) r.w.s. 147.

2. It has been admitted by both the parties that facts and material in all the three assessment years are identical, therefore, these appeals were heard together and are being disposed off by way of this consolidated order. In the assessee's appeal, for all the three years, legal issue has been raised vide ground no. 1, challenging reopening of assessment u/s 147 on the ground that such a reopening is based on "change of opinion" which is bad in law. The said ground reads as under:-

> *"On the facts and in the circumstances of the case, and also in law, the learned CIT(A) erred in upholding the legal validity of the reassessment proceedings. The learned CIT(A) failed to appreciate, and ought to have held, that the assessment could not have been reopened on mere change of opinion. Your appellant, therefore, prays that the assessment order dated 16.03.2013 passed u/s 143(3) r.w.s. 147 of the Act be quashed".*

3. Apart from the legal grounds, the assessee has raised the ground regarding treatment of interest income received from 'Maharashtra State Co-operative Credit Society Deposit Guarantee Commission' as "income from other sources" which was claimed as deduction u/s 80P(2) by the assessee.

4. To understand the facts *qua* the legal issue raised vide ground no.1, we will discuss the facts relating to assessee's appeal for the assessment year 2007-08 in ITA No. 3474/Mum/2014 as lead case.

5. Brief facts of the case are that, the assessee is a registered Co-operative Society carrying on the business activities as per its byelaws. One of the main activities of the assessee's society was to collect deposits from members and give interest on such deposits. Deposits were of various types viz., Fixed Deposits; Recurring Deposits; Daily Deposits, etc. All the depositors were the members of the society who are allotted share in the said society. These members get dividends on the share amount and also interest on their deposit amount. The society also gives loan to the members on which it charges fixed rate of interest which is normally fixed by the Board of Directors. The society used to get approval of such rates of interest from the Registrar of Societies. The loans offered to the members were in the form of personal loans, housing loans, vehicle loans, gold loans etc. Thus, the main income of the assessee was interest charged on various loans given to its members. It also used to make certain statutory investments on which it had earned interest. Being a cooperative society purely doing business of providing credit facility to its members, it has claimed exemption of the profit u/s 80P(2)(i). The return of income u/s 139(1) was filed on 31.01.2007 declaring total income of Rs. 68,500/- after claiming deduction u/s 80P. The said return was duly processed u/s 143(1) on 31.03.2009. Thereafter, the said return was selected for scrutiny by issuance and service of notice u/s 143(2). The AO after examining the entire details noted that the interest earned on the deposits made in UTI Bank will not be eligible for deduction u/s 80P(2)(d), hence the same was added back to the total income which was assessed at an income of Rs.

90,990/-, vide order dated 29.09.2009 passed u/s 143(3). After completing the assessment in the aforesaid manner, the assessee's case has now been reopened vide notice dated 29.03.2012, issued u/s 148 on the following "reasons recorded" as supplied by the AO to the assessee vide letter dated 09.08.2012:-

Sub:-Reasons for Re-opening for the A.Y. 2007-08 – reg.

Ref.: Your letter dt. 08.08.2012

In this connection I have to inform you that assessee is a co-operative society, whose principle business is banking business, its share capital and reserves exceeds Rupees One Lakh and is registered under the Maharashtra Co-operative societies Act. Thus the assessee squarely falls within the definition of Co-operative bank provided in part V of the Banking Regulation Act, 1949.The applicability of the amended provisions of Section 80P(4) as per Finance Act, 2006states that the provisions of the section 80(P) shall not apply to any co-operative bank other than a primary agricultural credit society or a primary co-operative agricultural and rural development bank. Further the new sub clause (Viia) has been inserted in clause (24) of section 2 of the I. T. Act to provides that the profit & gains of any business (including providing credit facilities)carried on by a co-operative society to its members shall be included in the definition of income.

3. In view of the above, Assessing Officer have reason to believe that income chargeable to tax has escaped assessment for A.Y. 2007-08 by reason of the failure on part of the assessee to disclose fully and truly all material facts necessary for assessment. Therefore, Assessing Officer has satisfied that this is a fit case for re-opening of assessment .

5. Hence, necessary approval to issue notice u/s. 148 as per provision of Section 151(2) is obtained from Addl. CIT, Range 22(2), Mumbai vide his approval dated 29/03/2012.

This is for your information.

(R.B.KUHIKAR)
ITO 22(2)-4, Mumbai
आर. बी. कुहीकर
R. B. KUHIKAR
आयकर अधिकारी-22 (2)-4, मुंबई

6. Before us, Ld. Counsel submitted that from the perusal of the "reasons recorded", it can be seen that no new tangible material has come on record so as to form "reasons to believe" that any income chargeable to tax has escaped assessment. The assessee's claim for deduction u/s 80P was not only properly disclosed in the return of income but was also enquired upon by

the AO during the course of the original assessment proceedings. The assessee had given a brief note on the business activities and also the details how the assessee is carrying out the business of providing credit facilities to its members and also the applicability of section 80P in the case of the assessee before the AO during the assessment proceeding. In fact, the AO after examining the claim of the assessee u/s 80P has disallowed the interest income of Rs. 21,954/-. Not only that, even in the Audit report, the Statutory Auditors as well as Chartered Accountant have certified the admissibility of deduction u/s 80P. Thus, the issue of claim of deduction u/s 80P has not only been duly examined but also there is proper application of mind by the AO in the course of original assessment proceeding. The assessee had even raised the objections before the AO on the reopening of assessment u/s 147 vide letter dated 17.08.2012, wherein the assessee has given a very elaborate submissions not only on the validity of reopening but also how the assessee is eligible for deduction under section 80P even after amendment brought in section 80P(4), which is not applicable to the assessee as it is purely a cooperative credit society and it does not have any banking license for carrying out any banking activities. Thus, he submitted that such a reopening now to disallow or withdraw the deduction u/s 80P, amounts to "change of opinion" which is not permissible in law, in view of the decision of Hon'ble Supreme Court in the case of CIT vs. Kalvinator of India Ltd., reported in [2010] 320 ITR 561. Ld. Counsel further referred to other decisions of Hon'ble jurisdictional High Court in the case of Asian Paints Ltd vs DCIT, reported in [2010] 308 ITR 348 and Praveen B Barucha, reported in [2012] 348 ITR 325.

7. On the other hand, Ld. DR submitted that what requires to be seen at the time of issuing the notice u/s 148 is, whether the AO has *prima facie* "reasons to believe" that any income chargeable

to tax has escaped assessment or not. The AO in the "reasons recorded" has noted that the amendment in section 80P(4) has been brought by the Finance Act, 2006 which was applicable for the impugned assessment year and this has not been examined by the AO at the time of original assessment proceedings. Such an amendment goes to the very root of the issue involved and adversely affects the assessee's claim for deduction within the scope of amended provision. He further submitted that, simultaneous amendment was also brought in sub-clause (viia) of section 2(24), whereby it provides that profits and gains of any business including providing credit facilities carried on by the Co-operative society to its members shall be included in the definition of an "income". This *inter alia* means that, assessee was no longer eligible for claiming deduction u/s 80P and, therefore, the reopening u/s 147 has rightly been made by the AO within the period of 4 years from the end of the relevant assessment year. He further submitted that, this aspect of amendment has not been considered by the AO by way of query either during the course of assessment proceedings or in the body of the assessment order, therefore, there is no opinion expressed by the AO and hence notice u/s 148 issued for the impugned assessment years cannot be quashed on the ground of "change of opinion".

8. We have heard the rival contentions and perused the relevant material on record as well as the finding given in the impugned orders *qua* the validity of reopening u/s 147. It is an undisputed fact that, assessee being a cooperative credit society was collecting deposits from its members and also giving loan to its members. By virtue of its activities carried out and being a cooperative credit society, it has claimed deduction u/s 80P(2)(a)(i). Such a claim of deduction was duly certified by the Auditors and by the Chartered Accountants in the audit report, which was the

basis for making the claim in the return of income. Such return of income was subjected to scrutiny assessment u/s 143(3), whereby the AO has examined the claim of deduction and disallowed a portion of the deduction after observing and holding as under :-

> *"During the course of assessment proceedings, it is found that the assessee has earned interest of Rs.21,954/- from deposits made in UTI Bank. However, as per the provisions of Sec. 80P2(d), interest earned from its investments in Co-operative Society only will be eligible for deduction. Therefore, interest earned from bank other than a Co-operative i.e. from UTI will not qualify for deduction. Hence interest earned of Rs. 21,954/- is being added to the total income".*

Thus, in this manner, the assessee's claim for deduction of Rs. 1,45,28,498/- was reduced by that amount. After completing the assessment in the aforesaid manner, the reopening of the case u/s 147 has been done, primarily on the ground that amendment has been brought by Finance Act, 2006, whereby sub-section (4) has been inserted w.e.f. 01.04.2007, which provides that provisions of section 80P will not apply in relation to any co-operative bank other than primary agricultural credit society or primary cooperative agricultural and rural development bank. Further, a new sub-clause (viia) has been inserted in section 2(24) whereby the profits and gains of any business including providing credit facilities carried out by a cooperative society to its member shall be included in the definition of 'income'. From the perusal of the "reasons recorded", it is not clear, whether the said amendment brought in the statute is at all applicable in the case of the assessee or whether the assessee falls within the definition of "Co-operative Bank as given in Part VI of the Banking Regulation Act, 1949 or not. First of all, AO has to *prima facie* establish that assessee is a cooperative bank so as to fall within the exception clause provided in sub-section 4 of section 80P. Once that has not been established, then it cannot be held that *prima facie* the "reasons recorded" by the AO clothes him with jurisdiction to

reopen the completed assessment u/s 143(3). The assessee has been registered as a "Cooperative Credit Society" and not as a "Cooperative Bank". For treating the assessee as a Cooperative Bank, it has to be seen *prima facie firstly*, whether the primary object or principal business is banking business or not; *Secondly*, whether paid up share capital and reserve are less than Rs.1 lakh or not; and *lastly*, whether the byelaws of which do not permit admission of any other co-operative society as a member. All the three conditions have to be fulfilled simultaneously and not one of the conditions, as stated by the AO. Nowhere from the perusal of sub-section (4) or Banking Regulation Act, 1949 provides that Cooperative Bank also includes Cooperative Credit Society also. Thus, *prima facie* it cannot lead to any inference that assessee is a Cooperative Bank so as to fall within the exception clause of sub-section (4) of section 80P. Thus, the assertion of the AO in the "reasons recorded" that the assessee is clearly covered within the definition of Cooperative Bank as provided in part V of the Banking Regulation Act, 1949 is not so apparent looking to the overall activities of the assessee and hence such a "reasons recorded" falls within the realm of surmise or presumption which is based on hypothesis that, assessee is engaged in the banking activity, without there being any tangible material coming on record especially when the assessee has been assessed u/s 143(3). Such a tangible material coming on record is *sine-qua-non* for reopening the case u/s 147, especially when already one AO has applied his mind on the given issue. Otherwise, it will give unfettered powers to the AO to reopen the case for reviewing the earlier orders passed u/s 143(3). Once, the AO in the original assessment order has examined the claim of deduction u/s 80P, when such an amendment was already there on the statute, then it does not mean that the AO has not applied his mind to such a statutory provision and simply accepted the claim of the assessee. There is

no material coming on record having live-link-nexus with the formation of belief that assessee is actually doing banking business or is a Cooperative Bank. Thus, in our opinion, the "reasons" as recorded by the AO do not clothe him with the jurisdiction to reopen the assessment within the scope of section 147 and hence such a reopening which is based on "change of opinion" is bad in law and cannot be sustained. Accordingly, we quashed the assessment order passed u/s 147 r.w.s. 143(3). In view of the said finding that impugned proceedings u/s 148 is *void-ab-initio*, the issue on merits in assessee's appeal as well as in Department's appeal have become purely academic and hence infructuous. Accordingly, the appeal of the assessee is allowed.

9. So far as the issue raised by the revenue in its grounds of appeal that Ld. CIT(A) has erred in allowing the deduction u/s 80P(2) to the assessee has also become purely academic and in view of the finding given above, the appeal of the revenue is treated as dismissed, as admitted by both the parties.

10. As stated in the beginning, similar facts are permeating in the assessment years 2008-09 & 2009-10, wherein the earlier assessments were completed u/s 143(3) on similar manner and reopening u/s 147 has been done by recording exactly the similar "reasons" as discussed in the aforesaid appeal. Therefore, our finding given above in the appeal for the assessment year 2007-08 will apply *mutatis mutandis* in these years also and accordingly, in view of the finding given therein, appeal of the assessee for AY 2008-09 and 2009-10 is treated as allowed, whereas cross appeals filed by the revenue for these assessment years are treated as dismissed.

11. In the result, all the appeals filed by the assessee are allowed and that of the revenue stands dismissed.

Order pronounced in the open court on 11th December, 2015.

Sd/-	**Sd/-**
(रमित कोचर)	(अमित शुक्ला)
लेखा सदस्य	न्याईक सदस्य
(RAMIT KOCHAR)	**(AMIT SHUKLA)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Mumbai, Date: 11th December, 2015

प्रति/Copy to:-

1) अपीलार्थी /The Appellant.
2) प्रत्यर्थी /The Respondent.
3) The CIT(A) -33, Mumbai.
4) The CIT– 22, Mumbai.
5) विभागीय प्रतिनिधि "**जी**", आयकर अपीलीय अधिकरण, मुंबई/
   The D.R. "G" Bench, Mumbai.
6) गार्ड फाईल \
   Copy to Guard File.

आदेशानुसार/By Order

/ / True Copy / /

उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण, मुंबई
Dy./Asstt. Registrar
I.T.A.T., Mumbai

*चव्हान व.नि.स
*Chavan, Sr.PS