

**IN THE INCOME TAX APPELLATE TRIBUNAL
COCHIN BENCH, COCHIN
Before Shri Chandra Poojari, AM & Shri George George K, JM**

ITA No.562/Coch/2017 : Asst.Year 2011-2012

ITA No.563/Coch/2017 : Asst.Year 2012-2013

The Income Tax Officer Ward - 1 Kannur.	Vs.	M/s.Mowancherry Co- operative Rural Bank Limited, Post Mowancherry, Kannur - 670 613. PAN : AABAT4821C.
(Appellant)		(Respondent)

Appellant by : Sri. A.Dhanaraj, Sr.DR
Respondent by : Dr.K.P.Pradeep, Advocate

ITA No.564/Coch/2017 : Asst.Year 2011-2012

The Income Tax Officer Ward - 1 Kannur.	Vs.	M/s.The Kararinakam Service Co-operative Bank Limited, Kadalayi Post Kannur - 670 007. PAN : AAAAK9728J.
(Appellant)		(Respondent)

ITA No.565/Coch/2017 : Asst.Year 2013-2014

The Income Tax Officer Ward - 1 Kannur.	Vs.	M/s.The Elayavoor Service Co-operative Bank Limited, Mundayad Chowva, Kannur - 670 006. PAN : AAAAE3443N.
(Appellant)		(Respondent)

Appellant by : Sri. A.Dhanaraj, Sr.DR
Respondents by : Sri.Arun Raj, Advocate

Date of Hearing : 27.06.2018	Date of Pronouncement : 03.07.2018
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ORDER

Per Bench

These appeals at the instance of the Revenue are directed against separate orders of the CIT(A). Since common

issue is raised in these appeals, they were heard together and are being disposed off by this consolidated order.

2. The brief facts of the case are as follows:-

The assessees in these cases are primary agricultural credit societies registered under the Kerala Co-operative Societies Act, 1969. The assessees were providing credit facilities to its members. The returns of income were filed by the assessees claiming deduction u/s 80P(2)(a)(i) of the I.T.Act. The assessments were completed by denying the claim of deduction u/s 80P(2)(a)(i) of the I.T.Act. The reasons for denying the benefit of deduction was that the assessees were doing the business of banking, and therefore, in view of insertion of provisions of section 80P(4) of the I.T.Act, the assessees were not entitled to deduction u/s 80P(2)(a)(i) of the I.T.Act.

3. Aggrieved by the order of the Assessing Officer denying the benefit of claim of deduction u/s 80P(2)(a)(i) of the Act, the assessees preferred appeals before the first appellate authority. The CIT(A) following the judgment of the Hon'ble jurisdictional High Court in the case of *The Chirakkal Service Co-operative Bank Ltd. and Others* [(2016) 384 ITR 490 (Ker.)] held that the assessees were entitled to the benefit of deduction u/s 80P(2) of the Act.

4. Aggrieved by the order of the CIT(A), the Revenue has preferred these appeals before the Tribunal, raising following grounds:-

1. *In view of the recent decision of the Hon'ble Supreme Court in the case of The Citizens Co-Operative Society limited vs Assistant Commissioner of Income Tax, Circle- 9(1), Hyderabad dated 8th August 2017, is not the order of the learned Commissioner of Income Tax (Appeals) against law and the facts and circumstances of the case?*

2. *The Commissioner of Income Tax (Appeals) had in the instant case placing reliance on the decision of the Honourable High Court of Kerala in the case of M/s Chirakkal Service Co-op Bank Ltd. And others in ITA 212 of 2013, held that the assessee is eligible for deduction u/s 80P of the Income Tax Act solely on the basis that it has been registered and classified as a Primary Agricultural Credit Society by the Competent Authority under the Kerala Co-operative Societies (KCS) Act. As against this, the Honourable Supreme Court has while deciding in the case of The Citizen Co-Operative Society limited vs Assistant Commissioner of Income Tax, Circle- 9(1), Hyderabad taken into consideration the activities of the assessee society and not relied only on the certificate of registration issued by the Central Registrar of Co-operative societies. In view of this, is not the decision of the CIT(A) against the prevailing positions of law that differentiates between de jure and de facto positions and which permits the principle of penetration of the corporate veil to determine the true nature of the activities of the cooperative society?*

3. *Whether on the facts and in the circumstances of the case, the Commissioner of Income Tax (Appeals) is right in law in holding that the assessee is eligible for claiming deduction u/s 80P on the*

above lines, when in the recent decision in the case of The Citizen Co-Operative Society, the Honourable Supreme Court has, after taking into account the activities of the appellant Co-operative Society, held that the appellant could not be treated as a co-operative society meant only for its members and providing credit facilities only to its members.

4. *The Honourable Supreme Court: had in the case of The Citizen Co-Operative Society limited Vs Assistant Commissioner of Income Tax, Circle- 9(1), Hyderabad observed that the depositors and borrowers in the appellant cooperative society are distinct and therefore, in reality, the activities of the appellant are that of a finance business and cannot be termed as those of a co-operative society. The facts in the present case also fall within the same contextual fabric. The categories of resident members, ordinary members and nominal members exist. This invokes the question of whether the assessee is merely providing agricultural credit to its members thereby validating the claim of tax exemption u/s 80P(4) or performing activities beyond its approved framework that enables disallowance of such claim. In view of this, is not the decision of the CIT(A) without merits?*

5. *The learned CIT(Appeals) ought to have seen that the Honourable Supreme Court in the case of Sabarkantha Zilla Kharid Vechan Sangh Ltd Vs CIT reported in 203 ITR 1027 (SC) had held that the eligible deduction under Section SOP of the Income Tax Act, 1961 in respect of Co-operative societies/banks doing both agricultural and non agricultural activities should not be 100% of the gross profits of such societies etc. but should be limited to the profits generated from agricultural activities alone performed by such assessees.*

6. *The learned CIT(Appeals) ought to have seen that the above Apex Court's decision is in sharp contrast to the decision of the Kerala High Court in*

the case of M/s Chirakkal Service Co-operative Bank & others in ITA 212 of 2013 that held that the authorities under the Income Tax Act cannot probe into the question of whether the assessee Cooperative society is a primary agricultural credit society once it is registered and classified as primary agricultural credit society by the competent authorities under the provisions of the Kerala Co operative Societies Act, 1969.

7. *The judicial ratios in the cases of Rodier Mill Employees Co-op Stores Ltd. vs CIT 135 ITR 355 (Mad), CIT vs Kerala State Co-operative Marketing Federation Ltd.[1998] 234 ITR 301(Ker) and Kerala State Co-operative Agricultural Rural Development Bank Ltd. vs ACIT [ITA No.506/Coch/2010 & S.P. No.67/Coch/2010 hold that carte blanche deductions u/s 80P are not available to cooperative societies merely on the basis of professed agricultural credits on the basis of mere registration and classification. In view of this, is not the decision of the CIT(A) without merits?*

8. *For these and other grounds that may be urged at the time of hearing, it is requested that the order of the CIT(A) may be set aside and that of the Assessing Officer restored."*

5. The learned Departmental Representative relied on the grounds raised. The learned AR, on the other hand, submitted that the issue in question is covered in favour of the assessee by the judgment of the Hon'ble jurisdictional High Court in the case of *The Chirakkal Service Co-operative Bank Ltd. and Others (supra)*.

6. We have heard the learned DR and perused the material on record. We find that an identical issue was considered in

the case of *ITO v. The Chengala Service Co-operative Bank Limited* [ITA No.434/Coch/2017 & Ors. – order dated 05th April, 2018]. In that case, identical grounds have been raised to that of the grounds raised in the present appeals. The Tribunal after considering the judicial pronouncements, held that the assessee is entitled to deduction u/s 80P(2) of the I.T.Act. The relevant finding of the Tribunal reads as follows:-

“7. We have heard the rival submission and perused the material on record. The undisputed facts are that the assessees in these cases are primary agricultural credit societies, registered as such under the Kerala Co-operative Societies Act. The Hon’ble jurisdictional High Court in the case of Chirakkal Service Co-operative Bank Limited & Ors. (supra) had categorically held in para 17 page 14 of the judgment that when a primary agricultural credit Society is registered as such under the Kerala Co-operative Societies Act, 1969, such society is entitled to the benefit of deduction u/s 80P(2) of the Income-tax Act. The Hon'ble High Court was considering the following substantial question of law:

“a) Whether on the facts and in the circumstances of the case under consideration/ the Tribunal is correct in law in deciding against the assessee/ the issue regarding entitlement for exemption under section 80P, ignoring the fact that the assessee is a primary agricultural credit society?”

7.1 In considering the above question of law, the Hon'ble High Court rendered the following findings:

“15. Appellants in these different appeals are indisputably societies registered under the Kerala cooperative societies Act 1969, for sort, KCS Act and the bye-laws of each of them, as made available to

this court as part of the paper books, clearly show that they have been classified as primary agricultural credit societies by the competent authority under the provisions of that Act. The parliament, having defined the term 'co-operative society' for the purposes of the BR Act with reference to, among other thing the registration of a society under any State law relating to co-operative societies for the time being; it cannot but be taken that the purpose of the societies so registered under the State Law and its objects have to be understood as those which have been approved by the competent authority under such State law. This, we visualize as due reciprocative legislative exercise by the Parliament recognizing the predominance of decisions rendered under the relevant State Law. In this view of the matter, all the appellants having been classified as primary agricultural credit societies by the competent authority under the KCS Act it has necessarily to be held that the principal object of such societies is to undertake agricultural credit activities and to provide loans and advances for agricultural purposes; the rate of interest on such loans and advances to be at the rate fixed by the Registrar of co-operative societies under the KCS Act and having its area of operation confined to a village, panchayat or a municipality. This is the consequence of the definition clause in section 2(oaa) of the KCS Act. The authorities under the IT Act cannot probe into any issue or such matter relating to such applicants.

16. The position of law being as above with reference to the statutory provisions, the appellants had shown to the authorities and the Tribunal that they are primary agricultural credit societies in terms of clause (cciv) of section 5 of the BR Act having regard to the primary object or principal business of each of the appellants. It is also clear from the materials on record that the bye-laws of each of the appellants do not permit admission of any other co-operative

society as member, except may be, in accordance with the proviso to sub-clause 2 of section 5(cciv) of the BR Act. The different orders of the Tribunal which are impeached in these appeals do not contain any finding of fact to the effect that the bye- laws of any of the appellant or its classification by the competent authority under the KCS Act is anything different from what we have stated herein above. For this reason, it cannot but be held that the appellants are entitled to exemption from the provisions of section 80P of the IT Act by virtue of sub-section 4 of that sect; on. In this view of the matter, the appeals succeed.

17. In the light of the aforesaid, we answer substantial question: `A' in favour of the appellants and hold that the Tribunal erred in law in deciding the issue regarding the entitlement of exemption under section 80P against the appellants. We hold that the primary agricultural credit societies, registered as such under the KCS Act; and classified so, under that Act including the appellants are entitled to such exemption."

7.2 In the instant cases, the assesseees are primary agricultural credit societies registered under the Kerala Cooperative Societies Act, 1969. The certificate has been issued by the Registrar of Cooperative Societies to the above said effect and the same is on record. The Hon'ble High Court, in the case cited supra, had held that primary agricultural credit society, registered under the Kerala Cooperative Societies Act, 1969, is entitled to the benefit of deduction u/s 80P(2). Since there is a certificate issued by the Registrar of Cooperative Societies, stating that the assesseees are primary agricultural credit societies, going by the judgment of the Hon'ble jurisdictional High Court, assesseees are entitled to deduction u/s 80P(2). However, the Revenue's contention is that the Hon'ble Apex Court in the case of Citizens Co-operative Society Ltd.

(supra) categorically decided when deposits are received from general public / nominal members or loans are disbursed to general public / nominal members, the assessee would be doing the business of banking and therefore, would not be entitled to deduction u/s 80P(2) of the Income-tax Act. In the context of the submission made by the Revenue, let us examine whether the judgment of the Hon'ble Apex Court in the case of Citizens Co-operative Society Ltd. *(supra)* has application to the facts of the present cases.

8. The Hon'ble Apex Court judgment in the case of Citizen Co-operative Society *(supra)* Ltd. was rendered in the context of eligibility of a Credit Co-operative Society for deduction under section 80 P of the Act. The Apex Court, referring to the specific facts of the case held that the assessee therein is not entitled for deduction under section 80P of the Income-tax Act. In the aforesaid case, the Hon'ble Apex Court was not dealing with a case of eligibility of a Primary Agricultural Credit Society for deduction under section 80P of the Income-tax Act. The Hon'ble Supreme Court at Para 23 of the aforesaid judgment had emphasized that even after the amendment made to the provisions of section 80P of the Act by insertion of section 80P(4) of the Income-tax Act, the Primary Agricultural Credit Society is eligible for deduction under section 80P of the Act.

8.1 The assessee society in the case considered by the Hon'ble Supreme Court was established on 31-5-1997 and was registered under section 5 of the Andhra Pradesh Mutually Aided Co-operative Societies Act, 1995. Thereafter as the operations of the assessee had increased manifold and were spread over states of Erstwhile, Andhra Pradesh, Maharashtra and Karnataka, the assessee-society got itself registered on 26.07.2005 under the Multi State Co-operative Societies Act, 2002 (MACSA)

8.2 The Hon'ble Apex Court in the aforementioned case specifically took note of the factual findings of the Assessing Officer (which was stated in para 15 of the judgment) referring to the bye laws and the provisions of Mutually Aided Co-operative Societies Act, 1995. The Assessing Officer was of the view that the assessee therein cannot admit 'nominal members' and most of the deposits were taken from such category of person (as they were not members as per the provisions referred). The Apex Court in para 25 of the Judgment has pointed out that the main reason for disentitling the assessee from getting the deduction provided under section 80P of the Act is not sub-section (4) of the Act. On the contrary, the Hon'ble Apex Court held that the Credit Co-operative Society was not entitled for deduction u/s 80P of the Act for the reason of categorical finding of the A.O. that the activities of the assessee are in violation of the Provisions of the MACSA under which it is formed as the substantial deposits were from 'nominal members' who are actually non-members as per the provisions of law referred. The Hon'ble Apex Court specifically took note of the fact that the assessee therein has carved out a category of 'nominal members' who are infact not the members in the real-sense. Therefore the deposits received from the carved out category viz nominal members who are not the members as per the provisions of the law referred to therein and without the permission of the Registrar of Societies was held to be violative of the provisions and were treated/ proceeded with as deposits from the Public. In other words, in the case before the Hon'ble Supreme Court, the finding on the principle of mutuality was arrived at interalia; on the factual finding that the assessee was receiving deposits mostly from a carved out category of member viz 'nominal member' who are not members as per the provisions of law referred, and that most of the business of the assessee therein was with this carved out category of person and also granting

loans to public and without the approval from the Registrar of the Societies.

8.3 As far as the Kerala Co-operative Societies Act which is applicable to the present case is concerned, the definition of a 'member' as provided in Section 2(1) of the Kerala Co-operative Societies Act includes a nominal member. Section 2 (1) of the said Act is as follows:

"Member" means a person joining in the application for the registration of a co-operative society or a person admitted to membership after such registration in accordance with this Act, the Rules and the Bye law and includes a nominal or associate member"

8.4 The `normal member' is defined under 2(M) of the Kerala Co-operative Societies Act, 1969, which reads as follow:-

"(m) `nominal or associate member' means a member who possesses only such privileges and rights of a member and who is subject only to such liabilities of a member as may be specified in the bye-laws;"

8.5 Therefore, in the present cases, the nominal members are members as provided in law and deposits from such nominal members cannot be considered or treated as from the non-members or from public as was noted by the Apex Court judgment cited supra.

8.6 In this context, it is relevant to mention that the Hon'ble Supreme Court in the case of U.P.Co-operative Cane Union v. Commissioner of Income-tax (1999) 237 ITR 574 (SC)-para 8 of the judgment has observed as under:-

"8. The expression "members" is not defined in the Act. Since a co-operative society has to be established under the provisions of the law made by

the State Legislature in that regard, the expression "members" in section 80P(2)(a)(i) must, therefore, be construed in the context of the provisions of the law enacted by the State Legislature under which the co-operative society claiming exemption, has been formed. It is, therefore, necessary to construe the expression "members" in Section 80P(2)(a)(i) of the Act in the light of the definition of that expression as contained in Section 2(n) of the Co-operative Societies Act."

8.7 The Bombay High Court in Jalgaon District Central v. UOI (2004) 265 ITR 423 (Bom) in the light of the above Supreme Court judgment had held that nominal member is also member under the Maharashtra Co-operative Societies Act and entitled for benefits under section 80P. [Para 17 to 20 of the judgment], as under:-

"17. In case of M/s U.P.Co-op. Cane Union Federation Ltd., Lucknow (cited supra), the Supreme Court has held that the expression "Member" is not defined in the Income Tax Act. Since the Co-operative Society has to be established under the provisions of law made by the State Legislature in that regard, the expression "Member" in Section 80P(2)(a)(i) must, therefore, be construed in the context of the provisions of law enacted by the State Legislature under which the co-operative society claiming exemption has been formed. The Supreme Court has further observed that it is necessary to construe the expression "Member" in Section 80P(2)(a)(i) of the Act in the light of the definition of "Member" given under Section 2(n) of the U.P.Co-operative Societies Act, 1965.

18. The definition of "Member" given in Section 2(19) of the Maharashtra Co-operative Societies Act, 1960 takes within its sweep even a nominal member, associate member and sympathizer member. There is

no distinction made between duly registered member and nominal, associate and sympathizer member.

19. In the case of K.K.Adhikari (cited supra), Division Bench of this Court has held that the definition of a Member under Section 2(19) of the Maharashtra Co-operative Societies Act, 1960 includes a nominal member or a sympathizer member. It is further held that notwithstanding the fact that a nominal member does not enjoy all the rights and privileges which are available to an ordinary member, his status is that of a member as defined in Section 2(19) of the Act.

20. Division Bench of this Court in the case of The Commissioner of Income Tax, Nasik (cited supra) has also taken a similar view that the definition of "Member" under section 2(19)(a) of the Maharashtra Co-operative Societies Act, 1960 includes a nominal member. It is further held by the Division Bench that there is nothing in Section 80P(2)(iii) of the Income Tax Act to the contrary."

8.8 As per section 3 of the Banking Regulation Act, 1949, the provisions of Banking Regulation Act shall not apply to Primary Agricultural Credit Societies. The explanation to section 80P(4) states that 'Primary Agricultural Credit Society' and 'Co-operative Bank' will have the same meaning as provided in Part V of the Banking Regulation Act, 1949. The explanation provided after clause (ccvi) of section 5 r.w.s 56 of the Banking Regulation Act specifically provides that if any dispute arises as to the primary object or principal business of any co-operative society referred to in clauses (cciv), (ccv) and (ccvi), a determination thereof by the Reserve Bank shall be final. The Reserve Bank of India, which is the competent authority as per the Banking Regulation Act, treats assessee society and similar societies as only "Primary Agricultural Credit Society" not falling within the ambit of Banking Regulation Act. The

Reserve Bank of India has given letters to the societies similar to assessee stating that they are Primary Agricultural Credit Societies and therefore in terms of section 3 of the Banking Regulation Act are not entitled for banking license; (Copies of such letter from RBI are placed on record).

8.9 That being the case, the Assessing Officer was not competent and did not possess the jurisdiction to resolve / decide the issue as to whether the assessee was a 'Primary Agricultural Credit Society' or a 'Co-operative bank', within the meaning assigned to it under the provisions of the Banking Regulation Act and to take a contrary view especially in view of the Explanation provided after the clause (ccvi) of section 5 r.w.s Section 56 of the Banking Regulation Act.

8.10 In view of the aforesaid reasoning, we hold that the judgment of the Hon'ble Apex Court in Citizen Co-operative Society Ltd. is not applicable to the facts of the present cases. According to us, the judgment of the Hon'ble jurisdictional High Court is identical to the facts of the present case and is squarely applicable. Therefore, we hold that the CIT(A) has correctly allowed the claim of deduction in the above cases and we uphold the orders of the CIT(A). It is ordered accordingly.

9. In the result, these appeals filed by the Revenue are dismissed.

7. In view of the above order of the Tribunal, we hold that the CIT(A)'s are justified in directing the A.O. to grant deduction u/s 80P(2)(a)(i) of the I.T.Act. It is ordered accordingly.

8. In the result, the Revenue's appeals are dismissed.

Order pronounced on this 03rd day of July, 2018.

Sd/-
(Chandra Poojari)
ACCOUNTANT MEMBER

Sd/-
(George George K.)
JUDICIAL MEMBER

Cochin ; Dated : 03rd July, 2018.
Devdas*

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT (Appeals)-Kozhikode.
4. The Pr.CIT Kozhikode.
5. DR, ITAT, Cochin
6. Guard file.

BY ORDER,

(Asstt. Registrar)
ITAT, Cochin