

आयकर अपीलीय अधिकरण "E" न्यायपीठ मुंबई में।

**IN THE INCOME TAX APPELLATE TRIBUNAL "E" BENCH, MUMBAI
BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER
AND SHRI RAMIT KOCHAR, ACCOUNTANT MEMBER**

आयकर अपील सं./I.T.A. No.862/Mum/2017

(निर्धारण वर्ष / Assessment Year : 2012-13)

ITO 20(3)(4) Room No. 616, 6 th floor, Piramal Chambers, Lalbaug, Parel, Mumbai-400012	बनाम/ v.	M/s. Tata Memorial Central Employees Co-op Credit Society, Ground Floor, Tata Memorial Central, Annex Building, Dr. E. Borges Road, Jerbai Wadia Road, Parel, Mumbai-400012
स्थायी लेखा सं./ PAN : AAAAT7660A		
(अपीलार्थी / Appellant)	..	(प्रत्यर्थी / Respondent)
Revenue by :		Shri Ram Tiwari,DR
Assessee by:		Shri. Prakash G. Jhunjhunwala

सुनवाई की तारीख /**Date of Hearing** : **03.07.2018**

घोषणा की तारीख /**Date of Pronouncement** :**31.07.2018**

आदेश / ORDER

PER RAMIT KOCHAR, Accountant Member

This appeal, filed by the Revenue, being ITA No. 862/Mum/2017, is directed against appellate order dated 03.11.2016 passed by learned Commissioner of Income Tax (Appeals)-32, Mumbai (hereinafter called "the CIT(A)"), for assessment year 2012-13, the appellate proceedings had arisen before learned CIT(A) from assessment order dated 26.03.2015 passed by learned Assessing Officer (hereinafter called "the AO") u/s 143(3) of the Income-tax Act, 1961 (hereinafter called "the Act") for AY 2012-13.

2. The grounds of appeal raised by Revenue in the memo of appeal filed with the Income-Tax Appellate Tribunal, Mumbai (hereinafter called "the tribunal") read as under:-

"1. "On the facts and in the circumstances of the case in law, the Ld. CIT(A) has erred in allowing deduction U/s 80P to the assessee even though assessee carries on the banking business and other business in the name of a co-operative credit society?"

2. " On the facts and in the circumstances of the case in law, the Ld. CIT(A) has erred in allowing deduction U/s 80P(2)(a)(i) without considering inserted section 80P(4) and sub-clause (viiia) to section 2(24) vide Finance Act, 2006 w.e.f. 01.04.2007?"

3. "On the facts and in the circumstances of the case in law, the Ld. CIT(A) has erred in not considering the decision of the Supreme Court in the case of M/s Totgar Co-op Sales Society Ltd. (322 ITR 285) wherein interest received by a co-operative society from investment of surplus funds is assessable as "Income from Other Sources" and thus not eligible for deduction U/s 80P of the IT Act, 1961."

3. The assessee filed its return of income on 07-09-2012 declaring total income at 'Rs. Nil' after claiming deduction u/s. 80P of the 1961 Act to the tune of Rs. 82,46,705/- on the grounds that the assessee is a cooperative credit society and only business of the society is to grant medium term, short term and long term loans to its members. The assessee made a claim before the AO that it provides credit facilities to its members only and hence assessee was entitled for deduction u/s. 80P(2)(a)(i) of the 1961 Act to the extent of whole of the profits and gains from business of providing credit facilities to its members. The assessee submitted that it is credit co-operative society providing credit facility to its members duly registered with Maharashtra Co-operative Society Act, 1961 and Section 80P(4) has no applicability. The assessee submitted that it cannot act as clearing agent for Cheques, DDs, Pay orders etc.. It was submitted that it receives deposits from members/shareholders and distribute loans to Members/Shareholders. It was submitted that the assessee did not possess a license from RBI to carry on banking business.It was submitted that provisions of Section 80P(4) has applicability only to Co-operative Banks and not to Credit Co-operative Societies.

The AO vide assessment order dated 26-03-2015 passed u/s 143(3) of the 1961 Act denied the deduction u/s 80P(2)(a)(i) of the 1961 Act to the

assessee by holding that assessee is engaged in the business of banking or providing credit facilities to its members . The AO referred to the provisions of Section 80P(4) of the 1961 Act and provisions of Banking Regulation Act, 1949. The AO observed that the assessee has fulfilled the condition as specified in section 56(c) , Sub-section (ccv) of part V of Banking Regulation Act,1949 for being a Cooperative Bank. It was observed by the AO that the assessee's paid up capital and reserves as on 31-03-2012 was to the tune of Rs. 4.65 crores which is exceeding Rs. 1 lacs. The bye laws of the society do not permit admission of any other Co-operative as member. It was held by the AO that the assessee is a Co-operative Bank in the category of primary Co-operative Bank other than a primary agricultural credit society or a primary co-operative agricultural and rural development bank. Thus as per AO, the assessee is hit by provisions of Section 80P(4) of the 1961 Act read with provisions of Section 56(c)(ccv) of Part V of Banking Regulation Act, 1949 and hence deduction u/s. 80P(2)(a)(i) cannot be allowed to the assessee w.e.f. AY 2007-08, vide assessment order dated 26-03-2015 passed by the AO u/s. 143(3) of the 1961 Act.

4. Aggrieved by assessment order dated 26-03-2015 passed by the AO u/s 143(3), the assessee filed first appeal before learned CIT(A) . The assessee submitted that the assessee is not a Co-operative Bank rather the assessee is an employee Co-operative credit society engaged in providing credit facilities to its members of Tata Memorial Central . It was submitted that primary object of the assessee society is to receive deposits and to provide credit facilities to its members as per its byelaws . It was submitted that all the transactions are with members only . It was submitted that no deposits are accepted from public and nature of the business of the assessee is that of Co-operative credit society providing credit facilities to its members. It was submitted that it is a co-operative credit society registered under the Maharashtra Co-operative Society Act 1961 , providing credit facilities to its members. It was submitted that Banking Regulation Act,1949 is not applicable to the assessee as it is registered under Maharashtra Co-operative Society Act, 1961. It was submitted that the society is not acting as clearing agent for cheques, DDs, pay orders etc.. It was submitted that the society is receiving deposits from members/share holders and loans are distributed to members/share holders. It was submitted that the assessee is

Co-operative credit society registered under Maharashtra Co-operative Society Act, 1961, providing credit facilities to its members and hence deductions u/s 80P(2)(a) and 80P(2)(d) of the 1961 Act was claimed. Thus it was submitted that it is not hit by the provision of Banking Regulation Act, 1949 and the provisions of Section 80P(4) of the 1961 Act. It was submitted that the assessee did not obtain any banking license from RBI. It was submitted that the assessee is entitled for deduction u/s. 80P(2)(a) and 80P(2)(d) of the 1961 Act. The learned CIT(A) considered the submissions of the assessee and allowed the appeal of the assessee by holding as under, vide appellate order dated 03-11-2016:-

“ 5. *DECISION: I have carefully considered the matter. All the grounds of appeal even though argumentative are directed against the action of the AO in disallowing the claim of the appellant for a deduction u/s 80P(2)(a)(i) and u/s 80P(2)(d). All the grounds are therefore disposed together for the sake of convenience.*

5.1 The AO proceeded to analyze the provisions of sec 80P, the Banking Regulation Act, more particularly sec 56(c)(ccv) and a number of case laws. The AO therefore held the appellant to be a cooperative bank and not a cooperative society. He has however not led any facts to show that the appellant is engaged in the business of banking. The AO has examined the provisions of the Banking Regulation Act 1949 and tried to demonstrate how the appellant is a bank. Whether the appellant satisfies the core ingredients of banking business or not has not been examined by the AO at all. Merely because deposits have been accepted and loans advanced, it cannot be held that the appellant is in the business of banking. It is not the case of the AO that public in general could also participate in the activities of the appellant in accepting deposits or granting loans. The bye laws of the appellant do not permit it to open the facilities of accepting deposits and granting loans to the general public. These activities are restricted to its own members. In fact the AO has clearly acknowledged this fact as reproduced supra. The AO has also ignored the fact that the appellant is not authorized to accept any deposits from public nor can it provide any loan/credit facilities to general public as per its bye laws and that all cooperative banks are mandatorily required by sec 22 of the Banking Regulation Act to obtain a banking license from the RBI. The bye laws of the appellant restrict its activities as being confined to members. In fact, I specifically called for the registration certificate issued to the appellant by the Registrar of Cooperative Societies. The same reveals that the appellant is classified as a 'Resource Institution' and the sub classification is 'Loan giving Resource Institution'.

5.3 The case laws quoted by the appellant as well as the AO squarely reveal that (i) where the assessee is in the business of banking by providing various facilities related to banking to the general public at large, the assessee is held to be a cooperative bank and (ii) where the activities of the assessee were limited to the acceptance of deposits from its own members alone and providing loan facilities to its own members only, without providing other banking facilities such as cheque books, drafts etc, the assessee is to be held as cooperative society and not a bank.

5.4 From the facts of the instant case, it is quite clear that the appellant has limited himself to his own members. The appellant has not provided banking facilities either to the general public at large or even to the members of the society. Even the bye laws of the appellant does not provide for banking activities. Therefore facts of this case are not identical with any of the case laws relied upon by the AO. On the other hand, the facts of the instant case are almost similar to the decisions of the ITAT Nagpur & Panaji Benches in the cases of (i) ACIT vs Buldana Urban Coop Credit Soc Ltd 32 Taxman 69, ITAT Nagpur and (ii) DCIT vs Jayalaxmi Mahila Vividodeshagala Souharda Sahakari Ltd, Karwar by ITAT Panaji Bench 23 Taxman 313 where the activities of the assessee were limited to the members of a specific group and the area of operations was also limited to the acceptance of deposits of members and providing credit facilities to only members, which have been held as not falling under banking activities as defined in the Banking Regulation Act. I also find that the matter is now squarely covered by the decision of the jurisdictional Bombay High Court in its decision in the case of Quepem Urban Cooperative Credit Society [2015] 58 taxmann.com 113 (Bombay). Quoting from the same:-

section 80P, of the Income-tax Act, 1961 - Deductions - Income from co-operative societies (Primary Co-operative bank) - Assessment years 2008-09, 2009-10, 2011-12 - Assessee, a co-operative society was registered under Co-operative Society Act - It was engaged in providing credit facilities to its members - It claimed deduction under section 80P(2)(a)(i), which was disallowed by Assessing Officer holding that assessee was a primary co-operative bank, therefore hit by provisions of section 80P(4), which excluded benefit of section 80P - It was found that assessee-society was providing credit mainly to its members and its transactions with non-members were insignificant - Moreover, it was undisputed that bye laws of society did not allow any co-operative society to become its member - Whether on facts, assessee was not a co-operative bank rather it was a co-operative society and, therefore, its claim for deduction was to be allowed - Held, yes [Paras 12, 13] [In favour of assessee]

FACTS

The assessee was a co-operative society registered under the Goa Co-operative Societies Act, was engaged in providing credit facilities to its members. The income so earned from said activity, was claimed as deduction under section 80P(2) (a) (i).

The Assessing Officer disallowed the appellant's claim on the ground that the appellant was a primary co-operative bank and, therefore, hit by the provisions of Section 80P(4) which excluded the benefit of section 80P.

However, the Commissioner (Appeals) allowed assessee's claim holding that assessee was not a cooperative bank but a co-operative credit society.

The Tribunal restored Assessing Officer's order.

On appeal:

HELD

Section 80P provides deduction in support of income of co-operative societies. Sub-section (1) allows deduction to Co-operative Society to the extent its gross income includes any income referred to in sub-section (2) in computing its total income. Sub-section (2) refers to various incomes to which the deduction under sub-section (1) is

available. In this case, the court is concerned with clause (a)(i) of sub-section (2), which refers to a co-operative society engaged in carrying on banking business or providing credit facilities to its members. Thus the deduction is available on either of the two activities i.e., banking business or providing credit facilities to its members. The court is not concerned with the other sub-clauses of sub-section (2) or sub-section (3) of section 80P(4) for the purposes of this case. Sub-section (4) provides that section 80P will not apply in relation to a cooperative bank other than a primary agricultural credit society or primary agricultural and rural development bank. Before the instant court, the appellant is not claiming to be a primary agricultural credit society or primary agricultural and rural development bank but it claims to be engaged in providing credit facilities and not a banking society. Thus, not hit by sub section (4) of section 80P. [Para 8]

There is no dispute between the parties that the appellant is a cooperative society as the same is registered under the Co-operative Societies Act. The appellant is claiming deduction of income earned on providing credit facilities to its members as provided under section 80P(2)(a)(i). It is appellant's case that, it is not carrying on the business of the banking. Consequently, not being a co-operative bank the provisions of section 80P(4) would not exclude the appellant from claiming the benefit of deduction under section 80P(2)(a)(i). However in terms of section 80P the meaning of the words Co-operative Bank is the meaning assigned to it in Chapter V of the Banking Regulation Act, 1949. A co-operative bank is defined in section 5(cci) of Banking Regulation Act to mean a State Co-operative Bank, a Central Co-operative bank and a primary co-operative bank. Admittedly, the appellant is not a State Co-operative Bank, a Central Co-operative Bank. Thus what has to be examined is whether the appellant is a primary co-operative bank as defined in Para V of the Banking Regulation Act. Section 5(ccv) of the Banking Regulation Act defines a primary co-operative bank to mean a co-operative society which cumulatively satisfies its three conditions:

- (1) Its principal business or primary object should be banking business of Banking;
- (2) Its paid up share capital and reserves should not be less than rupees one lakh.
- (3) Its bye-laws do not permit admission of any other co-operative society as its member.

It is accepted position that condition no. (2) is satisfied as the share capital in an excess of rupees one lakh. It has been the appellant's contention that the conditions no. (1) and (3) provided above are not satisfied. [Para 9]

Therefore the issue that arises for consideration is whether the appellant satisfies condition no. (1) and (3) above. The impugned order after referring to the definition of 'Banking Business' as defined in section 5b of the Banking Regulation Act, held that the principal business of the appellant is Banking. Section 5b of the banking regulation Act defines banking to mean accepting of deposits for the purpose of lending or investment, of deposit of money from the public repayable on demand or otherwise. The impugned order juxtaposes the above definition with the finding of fact that the appellant did deal with non-members in a few cases by seeing deposits. This read with Bye-law 43 leads to the conclusion that it is carrying on banking business. This fact of accepting deposits from people who are not members has been so recorded by the Commissioner (Appeals) in his order dated 15-7-2014. Before the Tribunal also the appellant did not dispute the fact that in a few cases they have dealt with non-members. However so far as accepting deposits from non-members is concerned it is submitted that the Bye-law 43 only permits the society to accept

deposits from its members. It is submitted that Bye laws 43 does not permit receipt of deposits from persons other than members, the word 'any person' is a gloss added in the impugned order as it is not found in Bye-law 43. It is undisputed that the transactions with non members were insignificant/miniscule. On the above basis it cannot be concluded that the appellant's principal business is of accepting deposits from public and, therefore, it is in banking business. In fact, the impugned order erroneously relies upon by-law43 of the society which enables the society to receive deposits to conclude that it can receive deposits from public. However, the impugned order relies upon bye-law 43 to conclude that it enables the appellant to receive deposits from any person is not correct. Thus in the present facts the finding that the appellant's principal business is of Banking is perverse as it is not supported by the evidence on record. So far as the issue of primary object of the appellant is concerned the impugned order gives no finding on that basis to deprive the appellant the benefit of section 80P. Consequently there is no occasion to deal with the same as that is not the basis on which the impugned holds that it is a Primary Co-operative Bank. [Para 10]

So far as condition no. 3 of the definition/meaning of primary Co-operative bank as provided in section 5(ccv) of the Banking Regulation Act is concerned, the same requires the Bye-laws of society to contain a prohibition from admitting any other co-operative society as its member. In fact the bye-laws of the appellant society originally in bye-law 9(d) clearly provided that no co-operative society shall be admitted to the membership of the society. Thus there was a bar but the same was amended with effect from 12-1-2001 as to permit a society to be admitted to the membership of the society. Therefore for the subject assessment years there is no prohibition to admitting a society to its membership and one of three cumulative conditions precedent to be a primary co-operative bank is not satisfied. However the impugned order construed the amended clause 9(d) of the appellant's bye-laws to mean that it only permits a society to be admitted to the membership of the appellant and not a co-operative society. According to the impugned order, a society and a co-operative society are clearly -words of different and distinct significance and the membership is only open to society and not to co-operative society. As rightly pointed out on behalf of the appellant the word society as referred to bye-law 9(d) would include the co-operative society. This is so as the definition of a society under the Co-operative Act is co-operative society registered under the Co-operative Act. Besides the qualifying condition 3 for being considered as a primary Cooperative bank is that the bye laws must not permit admission of any other cooperative society. This is a mandatory condition i.e. the bye-laws must specifically prohibit admission of any other co-operative society to its membership. The revenue has not been able to show any such prohibition in the bye-laws of the appellant. Thus even the aforesaid qualifying condition (3) for being considered as a primary co-operative bank is not satisfied. Thus, the three conditions as provided under section 5(ccv) of the Banking Regulation Act, 1949, are to be satisfied cumulatively and except condition (2) the other two qualifying conditions are not satisfied. Ergo, appellant cannot be considered to be a co-operative bank for the purposes of section 80P(4). Thus, the appellant is entitled to the benefit of deduction available under section 80P(2)(a)(i). [Para 12]

The contention of the revenue that the appellant is not entitled to the benefit of section 80P(2)(a) in view of the fact that it deals with non-members cannot be upheld. This for the reason that section 80P(1) restricts the benefits of deduction of

income of cooperative society to the extent it is earned by providing credit facilities to its members. Therefore, to the extent the income earned is attributable to dealings with the non-members are concerned the benefit of section 80P would not be available. In the above view of the matter, at the time when effect has been given to the order of this court, the authorities under Act would restrict the benefit of deduction under section 80P only to the extent that the same is earned by the appellant in carrying on its business of providing credit facilities to its members. [Para 13]

Therefore, appeal is held in favour of assessee and against revenue

5.5 Therefore respectfully following the aforesaid decisions of ITAT Nagpur & Panaji as well as the Hon'ble Bombay High Court, the appellant cannot be held as a cooperative bank, hence deduction claimed u/s 80P(2)(a)(i) cannot be denied to it I find that the AO in the present AY has nowhere led any facts to show that banking facilities such as cheque books, drafts have been provided. Neither is it the case of the AO that facilities have been provided to members of the general public without restricting only to its own members. On facts therefore the AO has not demonstrated as to how the appellant qualifies to be a bank. In the circumstances, I hold that the appellant is a cooperative society and not a cooperative bank and is, therefore, eligible for deduction u/s 80P(2)(a)(i) and 80P(2)(d) of the Income Tax.

6. In the result, the appeal is allowed”.

5. Aggrieved by the appellate order dated 03-11-2016 passed by learned CIT(A), Revenue has come in an appeal before the tribunal . The ld. DR submitted that AO has rightly denied the deduction to the assessee u/s. 80P(2)(a) and 80P(2)d) of the 1961 Act as the assessee is a Primary co-operative bank hit by provisions of Section 80P(4) of the 1961 Act and Banking Regulation Act,1949. The learned DR would rely on the assessment order passed by the AO u/s 143(3) of the 1961 Act for the impugned assessment year.

The Ld. AR on the other hand drew our attention to the appellate order passed by learned CIT(A) for the impugned assessment year , more specifically para 5.4 and 5.5 of the order was brought to our attention and it was stated by learned counsel for the assessee that only employees of Tata Memorial Centre are eligible to become members and membership of the assessee society is not open to general public. Our attention was also drawn to the assessment order dated 21.08.2012 passed by AO for AY 2010-11 and it was submitted that the AO in assessee own case for AY 201-11 has allowed deduction to the assessee u/s 80P of the 1961 Act. The said assessment order dated 21.08.2012 for AY 2010-11 is placed in paper book

at page no. 64 and 65 . It was submitted that Section 80P of the 1961 Act was amended and only co-operative banks were taken out of purview for denial of deduction u/s. 80P(2) as they are hit by provision of Section 80P(4) of the 1961 Act. Reliance is placed by learned counsel for the assessee on large number of cases to support its contentions , which are listed as under:-

1	Quepem Urban Co-operative Credit Society Ltd v. ACIT 377 ITR 272 (Bom-HC)
2	Pr. CIT v. Goa PWD Staff Co-op Credit Society Ltd 73 Taxmann.com 381 (Bom-High Court)
3	CIT v. Ekta Co-op Credit Society Ltd 91 Taxmann.com 42 (Guj-HC)
4	CIT v. Jafari Momin Vikas Co-op Credit Society Ltd 362 ITR 331 (Guj-HC)
5	CIT v. Surat Vankar Sahakari Sangh Ltd 43 Taxmann.com 431 (Guj-HC)
6	Belgaum Merchants Co-op Credit Society Ltd 64 Taxmann.com 274 (Kar-HC)
7	Meghraj Taluka Primary Teachers Co-op. Credit Society Ltd v. ITO ITA No.410/ Ahd/ 2013 (Set of 16 appeals)
8	ITO v. Mumbai Teleworkers Co-op. Credit Society Ltd ITA No.7106/ Mum/ 2012 (Mum-ITAT)
9	ITO v. Jankalyan Nagri Sahakari Pat Sanstha Ltd 54 SOT 60 (Pune-ITAT)
10	ITO v. J.J. Hospital & Grant Medical College Employees Co-op Society Ltd ITA No.5006/ Mum/ 2013
11	Vavveru Co-op Rural Bank Ltd v. Ch. CIT 88 Taxmann.com 728 (AP & Tel-HC)

12	Dirbadevi Sahakar Patpedi v. ITO ITA No.6535/ Mum/ 2014
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Our attention was also drawn to the provision of Banking Regulation Act,1949 to contend that assessee is not a Co-operative Bank as it is only dealing with its members who are present and past employees of Tata Memorial Centre. A categorically statement is made by the Ld. Counsel for the assessee before the Bench that only past and present employee of Tata Memorial Central can become members of the assessee and no outsiders are allowed to become member of the society. Part list of members has been placed on record to contend that there are more than 2000 members of the assessee society and these are all present and past employees of the assessee society . Bye laws of assessee society are placed on record in the paper book filed with tribunal to contend that only employees both present and past of Tata Memorial Central can become members of the assessee society. The Ld. Counsel for the assessee was confronted by the Bench with the recent decision of Hon'ble Supreme Court in the case of The Citizen Co-operative Society Ltd., Vs ACIT, Hyderabad, Civil Appeal no. 10245 of 2017 (Arising out of SLP (C) No. 20044 of 2015) to which Ld. Counsel for the assessee submitted that the case of the assessee is not hit by said decision of Hon'ble Supreme Court as there are no such nominal members and the principles of mutuality is not breached in the case of assessee society as identity between contributor and participant is not breached.

6. We have considered rival contentions and perused the material on record including case laws relied upon . We have observed that the assessee has claimed itself to be a employees credit co-operative society which is receiving deposits and lending money to its members exclusively . A claim has been made by the assessee society that only past and present employees of Tata Memorial Central can become members of the society and the dealings of the assessee is restricted to these members only . Thus, the assessee society has categorically made statements that it deals exclusively with its members who are employees(both past and present) of Tata Memorial Centre and the assessee does not deal with public at large. The

assessee claimed deduction from profits and gains from its above activities within provisions of 80P(2)(a)(i) of the 1961 Act. The assessee society is registered under Maharashtra Co-operative Society Act, 1961. The assessee undisputedly is not acting as clearing agent for cheques , DDs, pay orders etc . The assessee did not hold banking license issued by Reserve Bank of India. While on the other hand the learned AO is of the view that keeping in view provisions of Section 80P(4) r.w.s. 2(24)(viia) of the 1961 Act and also provisions of Section 56(c)(ccv) of Part V of Banking Regulation Act, 1949, the assessee is a primary co-operative bank and is not eligible for deduction as are contained in provisions of Section 80P of the 1961 Act. The learned CIT(A) held in favour of the assessee holding that it is entitled for deduction u/s 80P of the 1961 Act as it is not engaged in the business of banking as there is no evidence/facts brought on record by the AO to prove that the assessee is engaged in banking activities disentitling it to deductions u/s. 80P of the 1961 Act. We have carefully gone through material on record including translated version of extracts of part bye laws, financial statements which are placed on record by the assessee. We have also carefully gone through the orders of authorities below. The AO has extracted relevant provisions under 1961 Act as well Banking Regulations Act, 1949 to hold that the assessee is a Co-operative bank but has not elaborated reasoning and basis for arriving at the said decision prejudicing the assessee as no incriminating material/findings are brought on record by the AO to evidence that the assessee is engaged in banking business and/or mutuality is breached on grounds that complete identity between contributor and participant is not established. In the absence of incriminating evidences on record and reasoned orders, we are afraid we cannot upheld the contentions of the AO per-se on conjectures, surmises and assumptions that the assessee is engaged in banking business notwithstanding the claim of the assessee that it is dealing exclusively with its members who are past and present employees of Tata Memorial Centre and that there is no dealing with members of public which is evident from clause D.1.1. of bye laws which is placed on record. The said clause in its translated version as produced by the assessee, reads as under:

D.1.1

1. *“Any employee who should be permanent employee of Tata Memorial Centre. As well as those employee who’s deduction is going on his Provident Fund.”*

*** “

No evidence is brought on record by the AO that the assessee is dealing with public at large or with non members. It is also not brought on record that the assessee has indulged in banking business . It is also not brought on record by the AO that there is a breach of mutuality on the grounds of loss of identity between contributors and participant. We have also gone through the audited financial statements placed on record which does not evidence any evidentiary incriminating material/information which could prove the findings of the AO so far that the assessee is hit by provisions of Section 80P(4) of the 1961 Act. The assessee no doubt is accepting deposits of various kinds from its members and also extending the ‘loans and advances’ of various kinds to its members but it is not sufficient to hold that the assessee is engaged in banking business . Undisputedly the assessee is a credit co-operative society but this finding is not sufficient to categorise said society as banking institutions to deny benefit of deduction u/s 80P keeping in view provisions of Section 80P(4) of the 1961 Act unless sufficient incriminating evidences were brought on record by the AO to demolish the claims of the assessee. The AO himself in the preceding assessment year 2010-11 vide assessment order dated 21.08.2012 passed u/s 143(3) of the 1961 Act has allowed deduction u/s 80P of the 1961 Act. The learned CIT(A) has passed well reasoned detailed order reversing the decision of the AO, with which we concur. There are several judicial decisions cited by learned AR to support its contentions which are detailed above and not repeated . So far so good. We have at the same time observed that Hon’ble Supreme Court in a recent landmark judgment in the case of The Citizen Co-operative Society Limited(supra) has discussed the issue threadbare and held that no deduction u/s 80P can be allowed where the tax-payer society are dealing with nominal members who are just giving deposits for the purposes for obtaining loans and are in fact not members in real sense . These nominal members are giving deposits to maximise returns and these deposits are used by the said society to advance loans to the members of the first category of members who are real members and thus depositors and borrowers are quite distinct and as such the tax payer in that case was

merely an finance company not eligible for deduction u/s 80P , as also principles of mutuality was broken because complete identity between the contributors and participants was lost leading to breach of principles of mutuality disentitling the taxpayer in that case from deduction u/s 80P. The finding of Hon'ble Supreme Court at para 25 to 28 are re-produced here under:-

“ 25) *So far so good. However, it is significant to point out that the main reason for disentitling the appellant from getting the deduction provided under Section 80P of the Act is not sub-section (4) thereof. What has been noticed by the Assessing Officer, after discussing in detail the activities of the appellant, is that the activities of the appellant are in violations of the provisions of the MACSA under which it is formed. It is pointed out by the Assessing Officer that the assessee is catering to two distinct categories of people. The first category is that of resident members or ordinary members. There may not be any difficulty as far as this category is concerned. However, the assessee had carved out another category of 'nominal members'. These are those members who are making deposits with the assessee for the purpose of obtaining loans, etc. and, in fact, they are not members in real sense. Most of the business of the appellant was with this second category of persons who have been giving deposits which are kept in Fixed Deposits with a motive to earn maximum returns. A portion of these deposits is utilized to advance gold loans, etc. to the members of the first category. It is found, as a matter of fact, that the depositors and borrowers are quiet distinct. In reality, such activity of the appellant is that of finance business and cannot be termed as co-operative society. It is also found that the appellant is engaged in the activity of granting loans to general public as well. All this is done without any approval from the Registrar of the Societies. With indulgence in such kind of activity by the appellant, it is remarked by the Assessing Officer that the activity of the appellant is in violation of the Co-operative Societies Act. Moreover, it is a co-operative credit society which is not entitled to deduction under Section 80P(2)(a)(i) of the Act.*

26) *It is in this background, a specific finding is also rendered that the principle of mutuality is missing in the instant case. Though there is a detailed discussion in this behalf in the order of the Assessing Officer, our purpose would be served by taking note of the following portion of the discussion:*

“As various courts have observed that the following three conditions must exist before an activity could be brought under the concept of mutuality;

*that no person can earn from him;
that there a profit motivation;
and that there is no sharing of profit.*

It is noticed that the fund invested with bank which are not member of association welfare fund, and the interest has been earned on such investment for example, ING Mutual Fund [as said by the MD vide his statement dated 20.12.2010]. [Though the bank formed the third party vis-a-vis the assessee entitled between contributor and recipient is lost in such case. The other ingredients of mutuality are also found to be missing as discussed in further paragraphs].

In the present case both the parties to the transaction are the contributors towards surplus, however, there are no participators in the surpluses. There is no common consent of whatsoever for participators as their identity is not established. Hence, the assessee fails to satisfy the test of mutuality at the time of making the payments the number in referred as members may not be the member of the society as such the AOP body by the society is not covered by concept of mutuality at all."

27) These are the findings of fact which have remained unshaken till the stage of the High Court. Once we keep the aforesaid aspects in mind, the conclusion is obvious, namely, the appellant cannot be treated as a co-operative society meant only for its members and providing credit facilities to its members. We are afraid such a society cannot claim the benefit of Section 80P of the Act.

28) This appeal, therefore, fails and is hereby dismissed with costs".

In the instant case before us based on perusal of bye laws filed before the tribunal, it is observed that the assessee society has carved out two classes of members namely 'Active Members' and 'Nominal Members'. The Active Members as per bye laws are those who have attended General Meeting of the society once in last five years and they have given deposits to assessee society or availed loan from assessee society atleast once in five year but there is another class namely 'Nominal Members' are those society members who as per bye laws are given membership after retirement. These members do not avail loan nor give deposits. While as per audited financial statements which are placed on record, these nominal members are allowed to keep their post-retirement benefits savings with the assessee society. These nominal members are not allowed to borrow from assessee society based on material on record which is before the tribunal. This aspect whether there is any breach of principles of mutuality on account of loss of complete identity between contributors and participants of surplus requires to be verified from records of the assessee society in context of recent decision of Hon'ble Supreme Court in the case of The Citizen Co-operative Society Limited (supra) so far as these 'Nominal Members' are concerned and to determine whether the assessee society gets disentitled to deduction u/s 80P based on breach of principles of mutuality as identity between contributor and participant was lost which the AO shall determine in set aside proceedings. The Constitution of India vide Article 265 provides that taxes not to be imposed save by authority of law. No tax shall be levied or collected except by authority of law. The mandate being to levy and collect correct taxes on correct income computed under authority of law. The

tribunal has wide powers to pass such orders as it deems fit which is the mandate of Section 254(1) of the 1961 Act . Thus in our considered view under these circumstances, in the interest of justice and fairness to both the parties, the matter need to be restored to the file of the AO for limited purposes of verifying as to the rights, roles , entitlements , duties and responsibilities of these 'Nominal Members' in context of the decision of the Hon'ble Supreme Court in the case of 'The Citizen Co-operative Society Limited(supra) as per our elaborate discussions above. Needless to say that the AO shall provide proper and adequate opportunity of being heard to the assessee in accordance with principles of natural justice in accordance with law . The evidences/contentions submitted by the assessee in its defence shall be admitted by the AO in the interest of substantial justice before deciding the issue on merits in accordance with law. We order accordingly.

7. The appeal of the Revenue is allowed partly for statistical purposes as indicated above.

order pronounced in the open court on 31.07.2018

आदेश की घोषणा खुले न्यायालय में दिनांक: 31.07.2018 को की गई ।

Sd/-
(SAKTIJIT DEY)
JUDICIAL MEMBER

Sd/-
(RAMIT KOCHAR)
ACCOUNTANT MEMBER

Mumbai, dated: 31.07.2018

Nishant Verma
Sr. Private Secretary
copy to...

1. The appellant
2. The Respondent
3. The CIT(A) – Concerned, Mumbai
4. The CIT- Concerned, Mumbai
5. The DR Bench,
6. Master File

// Tue copy//

BY ORDER
DY/ASSTT. REGISTRAR
ITAT, MUMBAI