

**IN THE INCOME TAX APPELLATE TRIBUNAL
COCHIN BENCH, COCHIN**

Before Shri Chandra Poojari, AM & Shri George George K, JM

ITA No.420/Coch/2018 : Asst.Year 2012-2013

ITA No.421/Coch/2018 : Asst.Year 2015-2016

The Income Tax Officer Ward 2(5), Range – 2 Trivandrum.	Vs.	M/s.Chirayinkeezhu Service Co-operative Bank Limited, No.1155, Bank Building, Chirayinkil P.O. Trivandrum-695 304. PAN : AADAT2148N.
(Appellant)		(Respondent)

ITA No.418/Coch/2018 : Asst.Year 2012-2013

ITA No.419/Coch/2018 : Asst.Year 2015-2016

The Income Tax Officer Ward 2(5), Range – 2 Trivandrum.	Vs.	M/s.Edackode Service Co- operative Bank Limited, No.2523, Bank Building, Edackodu P.O. Korani Trivandrum-695 312. PAN : AAAAE2088B.
(Appellant)		(Respondent)

Appellant by : Smt. A.S.Bindhu, Sr.DR

Respondent by : --- None ---

Date of Hearing : 25.10.2018	Date of Pronouncement : 25.10.2018
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ORDER

Per George George K., JM

These appeals at the instance of the Revenue are directed against separate orders of CIT(A). The relevant assessment years are 2012-2013 and 2015-2016.

2. In the grounds raised, two issues are involved, viz.,
 - (i) Whether the assessee is entitled to deduction u/s 80P(2) of the I.T.Act?
 - (ii) Whether the interest income received from investments with co-operative banks is entitled to deduction u/s 80P(2)(a)(i) of the I.T.Act?

3. Brief facts of the case are as follows:-

The assessees are primary agricultural credit societies. For the assessment years under consideration, the assessments were completed by denying the deduction claimed u/s 80P of the I.T.Act. The reasoning of the Assessing Officer was that the assessees were primarily doing the business of banking and in view of insertion of provisions of section 80P(4) of the I.T.Act with effect from 01.04.2007, the assessees were not entitled to deduction u/s 80P(2) of the I.T.Act. Further, the Assessing Officer treated interest income received on investments made with co-operative banks as 'income from other sources', thereby denying the claim of deduction u/s 80P(2)(a)(i) of the I.T.Act. The Assessing Officer also held that the assessees were not entitled to deduction u/s 80P(2)(d) of the I.T.Act since the interest income received by the assessees were not from a co-operative society but a co-operative bank.

4. Aggrieved by the order of the Assessing Officer, the assessees preferred appeals to the first appellate authority. Before the first appellate authority, it was contended that the

assesseees were entitled to deduction u/s 80P(2) of the I.T.Act in view of the judgment of the Hon'ble jurisdictional High Court in the case of *The Chirakkal Service Co-operative Bank Ltd. & Ors. vs. CIT [(2016) 384 ITR 490 (Ker.)]*. As regards the interest received from co-operative banks, it was contended that it was part of the banking business of the assesseees, hence, entitled to deduction u/s 80P(2)(a)(i) of the I.T.Act or u/s 80P(2)(d) of the I.T.Act, since the interest receipts are only from co-operative banks. The CIT(A), as regards the issue of deduction u/s 80P(2) of the I.T.Act, followed the judgment of the Hon'ble jurisdictional High Court (supra) and directed the A.O. to grant deduction u/s 80P(2) of the I.T.Act, since the assesseees were registered as a primary agricultural credit society. As regards the interest income received on investments with co-operative banks, the CIT(A) following judgment of the Hon'ble Jurisdictional High Court in the case of *The Ottoor Service Co-operative Bank Ltd. v. ITO in Writ Petition (c) No.38566 of 2017* (judgment dated 21.12.2017), held that the assesseees were entitled to deduction u/s 80P(2)(d) of the I.T.Act.

5. Aggrieved by the orders of the CIT(A), the Revenue has filed the present appeals raising the following grounds:-

1. *The Learned Commissioner of Income tax (Appeals), Trivandrum erred in concluding that "the appellant being a Primary Agricultural Credit Cooperative Society registered under the Kerala Cooperative Societies Act is entitled for exemption of its entire income u/s 80P(2)(a)(i) as originally claimed*

and they cannot be treated as Primary Co-operative Bank so as to invoke the provisions of section 80P(4) of the Act."

1.1 It is respectfully submitted that the respondent is essentially, a Co-operative bank and not merely a primary agricultural credit Society and hence the allowance of deduction u/s 80P to the respondent assessee while computing the total income was irregular in nature and also against law.

1.2 The present appeal involves substantial question of law.

(i) The Ld.CIT(A) ought to have seen that the Honble Supreme Court in the case of Sabarkhanta Zilla Kharid Vechar Sangh Ltd. Vs CIT reported in 203 ITR 1027 (SC) has held that eligible deduction u/s 81(1)(d) (substituted by section 80P by Finance (No.2)Act, 1967 w.e.f. 01.04.1968) 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 and gains of business of such societies etc. but would be limited to the profits generated from agricultural activities alone performed by such assessee."

(ii) The Ld. CIT(A) ought to have seen that the above decision of the Apex Court is in sharp contrast to the decision of the Kerala High Court in the case of M/s Chirakkal Service Co-operative Bank & Ors. in ITA No.212 of 2013, where it was held that the authorities under the Income tax Act cannot probe into question 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.

(iii) The Ld. CIT(A) ought to have brought his attention to the decision of the Hon'ble High Court of

Kerala in the case of Perinthalmanna service Cooperative Bank Ltd reported in (2014 363 ITR 68 (Kerala) wherein it was held that "with introduction of section 80P(4) necessarily, an enquiry has to be conducted into factual situation whether co-operative bank is conducting business as a primary agricultural and rural development Bank and depending upon transactions, Assessing officer has to extend benefits available, and he would not merely look at the registration certificate issued under the relevant Co-operative Societies Act or at nomenclature of cooperative bank.

(iv) The appeal involving similar question is pending before the Hon'ble Supreme Court of India in the case of M/s Karakulam Service Co-operative Bank Ltd (Civil Appeal No.11288 of 2016 dated 25.11.2016) and the Ld. CIT(A) should have awaited decision of Hon 'ble Supreme court.

(v) The Id.CIT(A) ought to have noticed that by accepting the claim of deduction u/s 80P(2)(a)(i) and deleting the business income which was brought to tax, "the net of Reserves credited and debited" are allowed by him, which are not allowable and legally incorrect.

(vi) The Ld.CIT(A) ought to have noticed that by accepting the claim of deduction u/s 80P(2)(a)(i) and deleting the business income which was brought to tax, "Reserves / provisions in the P&L account" are allowed by him, which are not allowable and legally incorrect as they are not actual expenses or ascertained liability.

(vii) Among others, the following judicial ratios also indicate that carte blanche deductions u/s 80P are not available to the assessees merely on the basis of professed agricultural credits:

(a) Rodier Mill Employees Co-operative Stores Ltd Vs

CIT 135 ITR 355 (Mad)

(b) CIT Vs Kerala State Co-operative Marketing Federation Ltd (1998) 234 ITR 301 (Ker)

(c) Kerala State Co-operative Agricultural Rural Development Bank Ltd Vs ACIT (ITA No.506/Coch/2010 & SP No.67/Coch/2010)

2. The Learned Commissioner of Income tax (Appeals), Trivandrum erred in concluding that "the income which was brought to tax as income from other sources is exempted from tax by virtue of the provisions of section 80P(2)(d) and in deleting the amount, which was brought to tax as income from other sources".

2.1 While relying on the decision of Hon 'ble High Court in the case of Ottoor Service Co-operative Bank Ltd, the CIT(A) ought to have noticed that the matter is not reached finality in the said order as it is an order on writ petition on stay application, and not on the appeal on disallowance. Further, there is no findings or conclusions in the order, on this issue rather a prima facie observation.

2.2 While stating that, the Honble Supreme Court decision in the case of Totgar's Co-operative Sale Society Ltd relied on by the AO is distinguishable on facts, CIT(A) ought to have agreed with his earlier findings in the "order on stay petition" in assessee's own case, for the same A Y. In this order CIT(A) has held that "the assessee sought exemption/ deduction not from the operational income which they earned from loan and advances given to the members of the society but from the income which accrued from the surplus amount deposited with the district co-operative bank. Since regular business income alone is to be exempted from tax u/s 80P(2)(a)(i) of the Act, to my understandings, the interest received from the deposit the assessee

had with the District Cooperative Bank, State Cooperative Bank and Treasuries shall necessarily be treated as income from other sources only and accordingly be brought to tax.

Further, CIT(A) ought to have confirmed the findings made in his own order on stay petition in appellant's own case for the same A Y that "the benefit available u/ s 80P(2)(d) also cannot be availed by the assessee since no investment was made in another cooperative society registered under the cooperative societies Acts envisaged in the said section of the Act but in the District Cooperative Bank, State Co-operative Bank and Treasuries".

2.3 The assessee's eligibility of deduction u/s 80P has not been reached finality and the issue is challenged by the Revenue before the Hon'ble Apex Court in the case of M/ s Karakulam Service Co-operative Bank Ltd. The CIT(A) , therefore, ought to have found that interest income earned by assessee will be qualified for deduction u/s 80(P)(2)(d), only if the assessee is not hit by the provisions of section 80P(4) of the Act.

3. For these and other grounds that may be advanced at the time of hearing the order of the learned Commissioner of Income tax (Appeals), Thiruvananthapuram on the above points may be set aside and that of the Assessing Officer restored."

6. The learned Departmental Representative relied on the grounds raised. None was present on behalf of the assessee, however, we proceed to dispose off the appeals on merits.

7. We have heard the learned DR and perused the material on record. As regards the issue whether the assessee is entitled to deduction u/s 80P(2) of the I.T.Act, the Cochin

Bench of the Tribunal in the case of *ITO v. The Chengala Service Co-operative Bank Ltd. [ITA No.434/ Coch/2017 & Ors. – order dated 05th April, 2018]*, after elaborately considering all the judicial pronouncements had decided the issue in favour of the assessee. The Cochin Bench of the Tribunal had followed the dictum laid down by the Hon'ble jurisdictional High Court in the case of *The Chirakkal Service Co-operative Bank Ltd. & Ors. (supra)*. The relevant finding of the Cochin Bench 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."

7.1 In view of the above orders of the Cochin Bench of the Tribunal, which has elaborately considered the judicial pronouncements on the subject, we are of the view that the CIT(A) is justified in granting deduction u/s 80P(2) of the I.T.Act.

7.2 As regards the interest received on investments with co-operative Banks, we are of the view that the deduction u/s 80P(2)(d) can be granted only if the interest income is received

out of investments made with co-operative societies. In the instant cases, it is not clear that the interest income was received out of investments made with co-operative societies. Therefore, we are of the view that deduction u/s 80P(2)(d) of the I.T.Act cannot be granted. Further, we find that the investments are made by the assessee-societies in the course of its banking business / providing credit facilities to its members and hence such income will form part of banking activities of the assessees and same is entitled to deduction u/s 80P(2)(a)(i) of the I.T.Act. On identical facts, the Cochin Bench of the Tribunal in the case of *The Azhikode Service Co-operative Bank Ltd. & Ors.* [ITA No.261/Coch/2017 & Ors. – order dated 12th July, 2017] after considering all the judicial pronouncements had decided the issue in favour of the assessees. The relevant finding of the Tribunal reads as follows:-

“7 I have heard the rival submissions and perused the material on record. The solitary issue for my consideration is whether interest received on investments with sub-treasury is liable to be assessed under the head ‘income from other sources’ or ‘income from business’. If the same is to be assessed under the head ‘income from business’, the assessee would be entitled to deduction u/s 80P(2) of the I T Act, in respect of interest received on such investments. The assessee admittedly is providing credit facilities to its members. Section 5(b) of the banking regulation Act 1948 defines banking as ‘the accepting for the purpose of lending or investment of deposits of money from the public, repayable on demand or otherwise and withdrawal by cheque, draft, order, otherwise. Now the question is whether

a cooperative society or a primary agricultural society can do banking business and whether by doing such an activity, it loses the eligibility for deduction u/s 80P(1). The Hon'ble High Court of Karnataka in the case of Sri Biluru Gurubasava Pattina Sahakari Sangha Niyamamitha vs ITO has clearly answered the issue. The Hon'ble High Court, after considering the amendment introduced by Finance Act 2006 w.e.f 1.4.2007 (insertion of section 80P(4) had rendered the following findings:

“Therefore, the intention of the legislature is clear. If a cooperative bank is exclusively carrying on banking business, then the income derived from the said business cannot be deducted in computing the total income of the assessee. The said income is liable for tax. A Cooperative bank as defined under the Banking Regulation Act includes the primary agricultural credit society or a primary cooperative agricultural and rural development bank. The Legislature did not want to deny the said benefits to a primary agricultural credit society or a primary cooperative agricultural and rural development bank. They did not want to extend the said benefit to a Co-operative bank which is exclusively carrying on banking business i.e. the purport of this amendment. Therefore, as the assessee is not a Co-operative bank carrying on exclusively banking business and as it does not possess a licence from Reserve Bank of India to carry on business, it is not a Co-operative bank. It is a Co-operative society which also carries on the business of lending money to its members which is covered under Section 80P(2)(a)(i) i.e. carrying on the business of banking for providing credit facilities to its members. The object of the aforesaid amendment is not to exclude the benefit extended under Section 80P(1) to such society, Therefore, there was no error committed by the Assessing Authority. The said order was not prejudicial to the interest of the Revenue. The condition precedent for the commissioner to invoke

the power under Section 263 is that the twin condition should be satisfied. The order should be erroneous and it should be prejudicial to the interest of the revenue."

7.1 From the above judgment of the Hon'ble Karnataka High Court, it is quite clear that a primary agricultural credit society or a primary cooperative agricultural and rural development bank who do not have license from Reserve Bank of India to carry on the business of banking, is not a cooperative bank, hit by the provisions of section 80P(4) of the Act. The judgment of the Hon'ble jurisdictional High Court in the case of Chirakkal Service Co-op Bank Ltd (supra), is also in support of the assessee as regards the grant of 80P deduction.

7.2 In the instant case, the assessee do not possess any banking license from the Reserve Bank of India and is not exclusively carrying on any banking facility; but it is carrying on business of lending money to its members and therefore is covered u/s 80P(2) of the Act. The judgment of the Hon'ble Apex Court in the case of M/s Totgars Cooperative Sales Society Ltd. (supra) relied by the CIT(A) is distinguishable on facts. The Hon'ble Apex Court in the case of M/s Totgars Cooperative Sales Society Ltd (supra) was dealing with the case where the assessee apart from providing credit facilities to its members was also marketing agricultural produce grown by its members. Sale consideration received from the marketing of agricultural produce of its members was retained by the assessee in that case and was invested in short term deposits/securities. Such amount retained by assessee's society was shown as a liability in the balance sheet and therefore, to that extent interest income cannot be attributable neither to the activity mentioned in section 80P(2)(a)(i) or u/s 80P(2)(a)(iii) of the Act. This distinguishable feature has been taken note by the Hon'ble Karnataka High Court in the case of Tumkur

Merchants Souharda Credit Cooperative Ltd in ITA No.307 of 2014 (judgment dated 28th Oct 2014). The Hon'ble Karnataka High Court was considering the following substantial question of law:

“Whether the Tribunal failed in law to appreciate that the interest earned on short term deposits were only investment in the course of activity or providing credit facilities to members and that the same cannot be considered as investment made for the purpose of earning interest income and consequently passed a perverse order?”

7.3 In answering the above question of law, the Hon'ble Karnataka High Court distinguished the judgment of the Apex Court in the case of Totgars Cooperative Sales Society Ltd (supra) and rendered the following findings:

“9. In this context when we look at the judgment of the Apex Court in the case of M/s Totgars Cooperative Sales society Ltd., on which reliance is placed, the Supreme Court was dealing with a case where the assessee-Cooperative Society, apart from providing credit facilities to the members, was also in the business of marketing of agricultural produce grown by its members. The sale consideration received from marketing agricultural produce of its members was retained in many cases. The said retained amount which was payable to its members from whom produce was bought, deposit/ security. was invested In a short-term Such an amount which was retained by the assessee - Society was a liability and it was shown in the balance sheet on the liability side. Therefore, to that extent, such interest income cannot be said to be attributable either to the activity mentioned in Section 80P(2)(a)(i) of the Act or under Section 80P(2)(a)(iii) of the Act. Therefore in the facts of the said case, the Apex Court held the assessing officer was right in taxing the interest income indicated above under Section 56 of the Act.

Further they made it clear that they are confining the said judgment to the facts of that case. Therefore it is clear, Supreme Court was not laying down any law.

10. In the instant case, the amount which was invested in banks to earn interest was not an amount due to any members. It was net the liability. It was not shown as liability in their account. In fact this amount which is in the nature of profits and gains, was not immediately required by the assessee for lending money to the members, as there were no takers. Therefore they had deposited the money in a bank so as to earn interest. The said interest income is attributable to carrying on the business of banking and therefore it is liable to be deducted in terms of Section 80P(1) of the Act. In fact similar view is taken by the Andhra Pradesh High Court in the case of COMMISSIONER OF INCOME- TAX III, HYDERABAD VS. ANDHRA PRADESH STATE COOPERATIVE BANK LTD., reported in (2011) 200 TAXMAN 220/12. In that view of the matter, the order passed by the appellate authorities denying the benefit of deduction of the aforesaid amount is unsustainable in law. Accordingly, it is hereby set aside. The substantial question of law is answered in favour of the assessee and against the revenue. Hence, we pass the following order: Appeal is allowed."

7.4 The Cochin Bench of the Tribunal in the case of the Kizhathadiyoor Service Coop Bank Ltd., on identical facts has rendered a decision in favour of the assessee. The relevant finding of the Cochin Bench of the Tribunal in the case of Kizhathadiyoor Service Cooperative Bank (supra) in ITA No.525/Coch/2014, read as follows:

7.2 As regards the interest from treasury and banks, we find on identical facts, the Cochin Bench of the Tribunal in the case of the Muttom Service Cooperative Bank Ltd in ITA No. 372/Coch/2010 had decided the matter in favour of the assessee.

The Cochin Bench of the Tribunal in the case of Muttom Service Cooperative Bank Ltd (supra) has distinguished the judgment of the Hon'ble Apex Court in the case of Totgar's Cooperative Sale Society Ltd (supra). The relevant finding of the coordinate Bench of the Tribunal in the case of the Muttom Service Cooperative Bank Ltd (supra) read as follows:

"5. We have considered the rival submission on either side and also perused the material available on record. We have also carefully gone through the order of the lower authority. No doubt, the latest judgment in Totgar's Co-operative Sale Society Ltd vs ITO (supra), the Apex court found that the deposit of surplus funds by the co-operative society is not eligible for deduction u/s 80P(2). In the case before the Apex Court in Totgar's Co-operative Sale Society Ltd vs ITO (supra), the assessee cooperative society was to provide credit facility to its members and market the agricultural produce. The assessee is not in the business of banking. Therefore, this Tribunal is of the opinion that the judgment of the Apex court in Totgar's Co-operative Sale Society Ltd (supra) is not applicable in respect of the co-operative society whose business is banking. Admittedly, the assessee has invested funds in state promoted treasury small savings fixed deposit scheme. Since Government of India has withdrawn India Vikas Patra, as a small savings instrument, funds invested at the discretion of the bank is one of the activities of the banking as per the Banking Regulation Act. Since the assessee cooperative society is in the 4 ITA No.372/Coch/2010 business of banking the investment in the state promoted treasury small savings fixed deposit certificate scheme is a banking activity, therefore, the interest accrued on such investment has to be treated as business income in the course of its banking activity. Once it is a business income, the assessee is entitled for deduction u/s 80P(2)((a)(i). therefore, this Tribunal is of the opinion that the judgment of the Larger Bench of the apex Court in Karnataka State

Cooperative Apex Bank (supra) is applicable to the facts of this case. By respectfully following the judgment of the Apex court in Karnataka State Co-operative Bank (supra), the order of the Commissioner of Income-tax(A) is upheld."

7.3 In the instant case, the assessee is a cooperative Bank. The investment in treasury/banks and earning interest on the same is part of the banking activity of the assessee's cooperative bank. Therefore, the said income is eligible for deduction u/s 80P(2)(a)(i) of the Act. Therefore, the Income Tax Authorities were not justified in treating interest income received by the assessee as 'income from other source' and denying the benefit of section 80P(2) of the Act. It is ordered accordingly."

7.5 In view of the judgment of the Hon'ble Karnataka High Court in the case of Tumkur Merchantgs Souharda Credit Coop Ltd (supra)and Cochin Bench of the Tribunal in the case of Service Coop Bank Ltd.,(supra), I am of the view that the assessee is entitled to the benefit of deduction u/s 80P(2) with regard to interest received on deposits made by the assessee with sub treasury. It is ordered accordingly.

8 In the result, the appeal filed by the assessee in ITA No.261/Coch/2017 is allowed.

*ITA No. 208/Coch/2017; ITA No 209/Coch/2017
ITA No. 210/Coch/2017; ITA No. 263/Coch/2017
ITA No. 268/Coch/2017 & ITA No. 269/Coch/2017*

9 The Id counsel for the assessee and the Id DR agreed that the facts involved in the above appeals are identical to the facts considered by me in the case of the Azhikode Service Cooperative Bank Ltd in ITA no.261/Coch/2017. In the case of Azhikode Service Cooperative Bank I have held that interest on deposits with sub treasury is entitled to the benefit of

deduction u/s 80P(2).Therefore, I hold that assessee's in the above appeals is entitled to deduction u/s 80P(2) for interest received as investment with sub-treasury. It is ordered accordingly.

10 To sum-up, the appeals of the assessee's are allowed."

7.2 In view of the above order of the Tribunal, we are of the view that the assesseees are entitled to deduction u/s 80P(2)(a)(i) of the I.T.Act in respect of interest income received on investments made with co-operative Banks.

7.3 Before concluding, it is to be mentioned that the order of the Cochin Bench of the Tribunal in the case of *M/s.Mutholy SCB Ltd. v. ITO [ITA No.11/Coch/2014 order dated 24.09.2014]* which was relied on by the learned AO, was set aside by the Hon'ble High Court and was remitted to the Tribunal for *de novo* consideration. Subsequent to the remand, the Tribunal vide its order dated 23.03.2017 decided the issue in favour of the assessee by holding that interest income received on investments with sub-treasuries and co-operative banks was entitled to the benefit of deduction u/s 80P(2)(a)(i) of the I.T.Act. The relevant finding of the Tribunal subsequent to the remand by the Hon'ble High Court (order dated 23.03.2017) reads as follows:-

"4. We have considered the rival contentions and perused the orders of the authorities below. Hon'ble Jurisdictional High Court had remitted the appeal back to us with a clear direction to consider circular No.18/2015, dated 02.11.2015 and judgment of their

lordship in the case of Chirakkal Service Co-operative Bank Ltd. vs. CIT 384 ITR 490. Circular No.18/2015, dated 02.11.2015 is reproduced hereunder:-

"Subject Interest from Non-SLR securities of Banks-reg. It has been brought to the notice of the Board that in the case of Banks, field officers are taking a view that, "expenses relatable to investment in non-SLR securities need to be disallowed under section 57(i) of the Act as interest on non-SLR securities is income from other sources".

2. Clause (id) of sub-section (1) of section 56 of the Act provides that income by way of interest on securities shall be chargeable to income-tax under the head "Income from other sources", if, the income is not chargeable to income-tax under the head "Profits and gains of business and profession" .

3. The matter has been examined in light of the judicial decisions on this issue. In the case of CIT v. Nawanshahar Central Co-operative Bank Ltd. [2007] 160 Taxman 48 (SC), the apex court held that the investments made by a banking concern are part of the business of banking. Therefore, the income arising from such investments is attributable to the business of banking falling under the head "Profits and gains of business and profession".

3.2 Even though the abovementioned decision was in the context of co-operative societies/Banks claiming deduction under section 80P(2)(a)(i) of the Act, the principle is equally applicable to all banks/commercial banks, to which Banking Regulation Act, 1949 applies.

4. In the light of the Supreme Court's decision in the matter, the issue is well settled. Accordingly, the Board has decided that no appeals may henceforth be filed on this ground by the officers of the Department and appeals already filed, if any, on this

ground before Courts/Tribunals may be withdrawn /not pressed upon. This may be brought to the notice of all concerned".

It may be true that for application of Sec. 80P(2)(a)(i) of the Act assessee was considered as a primary agricultural credit society based on certificate issued by Joint Registrar, Kottayam. In our opinion para 3.2 of the circular reproduced above has accepted the judgment of Hon'ble Apex Court in the case of CIT vs. Nawanshahar Central Cooperative Bank Ltd 289 ITR 6, as correct for cooperative societies /banks claiming deduction u/s. 80P(2)(a)(i) of the Act. In other words, the Board has taken a view that interest earnings of a cooperative society which was having as its primary business, providing credit facilities to its members who were agriculturists, could be considered under the head income from business and not from income from other sources. Similar view was taken by the Co-ordinate Bench in the case of The Kizathadiyoor Service Cooperative Bank Ltd vs. ITO (in ITA No.525/Coch/2014) dated 20.07.2016. In the circumstances, we are of the opinion that assessee has to succeed in this appeal. Interest earned by the assessee from its deposits placed in Sub-Treasury and banks are eligible for deduction u/s. 80P(2)(a)(i) of the Act. Ordered accordingly.

5. In the result, the appeal of the assessee stands allowed.

Order pronounced in the open court on 23-03-2017."

7.4 The latest judgment of the Hon'ble Telangana & Andhra Pradesh High Court in the case of *Vaveru Co-operative Rural Bank Ltd. v CIT [(2017) 396 ITR 371]* had also decided on identical issue in favour of the assessee. The Hon'ble High Court had held that co-operative societies engaged in providing credit facilities to its members had in course of

business made investments with treasury, bank etc. and earned interest income, such income was eligible for deduction u/s 80P(2)(a)(i) of the I.T.Act. The relevant finding of the Hon'ble High Court reads as follows:-

"32. In simple terms, the position can be summarized like this. If there is a Co-operative Society, which is carrying on several activities including those activities listed in sub- Clauses (i) to (vii) of Clause (a), the benefit under Clause (a) will be limited only to the profits and gains of business attributable to anyone or more of such activities. But, in case the same Co-operative Society has an income not attributable to anyone or more of the activities listed in sub-Clauses (i) to (vii) of Clause (a), the same may go out of the purview of Clause (a), but still, the Co-operative Society may claim the benefit of Clause (d) or (e) either by investing the income in another Cooperative Society or investing the income in the construction of a godown or warehouse and letting out the same.

33. In other words, the benefit conferred by Clause (d) upon all types of Co-operative Societies is restricted only to the investments made in other Co-operative Societies. Such a restriction cannot be read into Clause (a), as the temporary parking of the profits and gains of business in nationalized Banks and the earning of interest income therefrom is only one of the methods of multiplying the same income. To accept the stand of the Department would mean that Co-operative Societies carrying on the activities listed in Clauses (i) to (vii), which invest their profits and gains of business either in other Co-operative Societies or in the construction of godowns and warehouses, may benefit in terms of Clause (d) or (e), but the very same Societies will not be entitled to any benefit, if they invest the very same funds in Banks. Such an understanding of section 80P(2) is impermissible for one simple reason. The benefits under Clauses (d) and (e) are available in

general to all Co-operative Societies, including Societies engaged in the activities listed in Clause (a). Section 80P(2) is not intended to place all types of co-operative societies on the same pedestal. The section confers different types of benefits to different types of societies. Special types of societies are conferred a special benefit.

34. The case before the Supreme Court in Totgars was in respect of a Co-operative Credit Society, which was also marketing the agricultural produce of its members. As seen from the facts disclosed in the decision of the Karnataka High Court in Totgars, from out of which the decision of the Supreme Court arose, the assessee was carrying on the business of marketing agricultural produce of the members of the Society. It is also found from Paragraph-3 of the decision of the Karnataka High Court in Totgars that the business activity other than marketing of the agricultural produce actually resulted in net loss to the Society. Therefore, it appears that the assessee in Totgars was carrying on some of the activities listed in Clause (a) along with other activities. This is perhaps the reason that the assessee did not pay to its members the proceeds of the sale of their produce, but invested the same in banks. As a consequence, the investments were shown as liabilities, as they represented the money belonging to the members. The income derived from the investments made by retaining the monies belonging to the members cannot certainly be termed as profits and gains of business. This is why Totgars struck a different note.

35. But, as rightly contended by the learned senior counsel for the petitioners, the investment made by the petitioners in fixed deposits in nationalised banks, were of their own monies. If the petitioners had invested those amounts in fixed deposits in other Co-operative Societies or in the construction of godowns and warehouses, the respondents would have granted the benefit of deduction under Clause (d) or (e), as the case may be."

7.5 In the instant cases the assessees had made investments with co-operative banks in the course of its business of banking / providing credit facilities to its members. Therefore, it was entitled to deduction u/s 80P(2)(a)(i) of the I.T.Act in respect of interest income that was received on such investments in view of the above judicial pronouncements. It is ordered accordingly.

8. In the result, the appeals filed by the Revenue are dismissed.

Order pronounced on this 25th day of October, 2018.

Sd/-
(Chandra Poojari)
ACCOUNTANT MEMBER

Sd/-
(George George K.)
JUDICIAL MEMBER

Cochin ; Dated : 25th October, 2018.
Devdas*

Copy of the Order forwarded to :

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

BY ORDER,

(Asstt. Registrar)
ITAT, Cochin