

IN THE INCOME TAX APPELLATE TRIBUNAL
COCHIN BENCH, COCHIN
BEFORE S/SHRI CHANDRA POOJARI, AM & GEORGE GEORGE K., JM

I.T.A. No.35/Coch/2018
Assessment Year : 2013-14

The Taliparamba Co-operative Bank Ltd., National Highway, Taliparamba, Kannur. [PAN:AAAAT 7036L]	Vs.	The Income Tax officer, Ward-4, Kannur.
(Assessee-Appellant)		(Revenue-Respondent)

Assessee by	Shri Arun Raj, Adv.
Revenue by	Smt. A.S. Bindhu, Sr. DR

Date of hearing	12/03/2019
Date of pronouncement	13/03/2019

ORDER

Per CHANDRA POOJARI, AM:

The appeal filed by the assessee is directed against the order of the CIT, Kozhikode passed u/s. 263 of the I.T. Act dated 14/12/2017 and pertains to the assessment year 2013-14.

2. The facts of the case are that the assessment in this case of for A.Y. 2013-14 was completed u/s 143(3) on 28.3.2016 determining a total income at Rs.28,25,030/-. On perusal of records, it was noticed that the assessment order was prima facie erroneous in so far as it was prejudicial to the interest of revenue.

2.1 The CIT found that deduction of Rs. 7,26,695/- u/s 43D in profit & Loss account for the previous year relevant to AY 2013-14 was allowed which was not in accordance with the provisions of section 43D. Section 43D gives special provision in case of income of public financial institutions or a scheduled bank or a state financial corporation or a state industrial investment corporation, public companies etc. It was noticed that the assessee does not belong to any of these categories mentioned above. However, this was allowed by the Assessing Officer which is erroneous and prejudicial to the interest of revenue. Before the CIT, the Ld. AR relied on decisions rendered in the cases of Allied Motors P. Ltd., vs.CIT (1997) 139 CTR 0364(SC); CIT vs.Chandulal Venichand (1994) 209 ITR 7(Guj) and CIT vs. Sri Jagannath Steel Corporation (1991) 191 ITR 676(Cal.). The Ld. AR also stated that section 43D(a) was amended by the Finance Act, 2017 where co.op. banks have also been included for this deduction u/s.43D with effect from 01.04.2018. The CIT was of the view that the legislature had made it amply clear by stating that the provisions are retrospective. Therefore, considering the fact that this deduction is available only from 01.04.2018 as per the amendment, the CIT held that the Assessing Officer's action in allowing deduction was both erroneous and prejudicial to the interest of revenue. Hence the assessment was set aside with a direction to the Assessing Officer to consider this allowability of the deduction afresh, affording sufficient opportunity to the assessee to offer submissions.

3. Against this, the assessee is in appeal before us. The Ld. AR submitted that

the assessing officer had allowed the claim of the assessee on examination and verification of the claim and records, merely because the view of the principal commissioner of income tax is different on the issue, is no ground to invoke powers under section 263 of the Income tax Act. The Ld. AR submitted that the assessee is a co-operative bank governed and controlled by Reserve Bank of India to which the prudential norms of revenue are applicable and hence, is eligible for deduction under section 43D even though it is not listed in the schedule maintained by Reserve Bank of India. In support of this, the Ld. AR relied on the decision in the case of CIT Aurangabad Vs. Peoples Co-operative Bank and others (ITA Nos. 53,54,58 & 68 of 2014. High Court of Judicator of Bombay, Bench at Aurangabad) and other decisions on this point. The Ld. AR also submitted that section 43D of the Income tax Act had been amended subsequently by Finance Act 2017, by including therein the words "Co-op. banks" for the purpose of deduction with effect from 01/04/2018. Though this amendment was done by Finance Act 2017, this being as amendment to remedy the unintended grievances caused to the Co-op. Banks, the same should be treated as retrospective in operation. The Ld. Submitted that this view was supported by the decision in the case of Allied Motors (P) Ltd., Vs. CIT (1997) 139 CTR 0364 (SC) .

3.1 The Ld. AR submitted that the assessee was following mercantile system of accounting as per the laid out procedure and was providing interest on non-performing assets, as per the procedure laid out by Reserve Bank of India as evident from accounts and hence, was eligible for deductions under section 43D as provided

therein. For this, the Ld. AR relied on the decision in the case of UCO Bank, Calcutta Vs.CIT (1999) 45 CC 599 (SC) read with circular No: F-201/81/84 ITA-II dated 09/10/1984. Thus, it was submitted that the assessee was eligible for deduction under section 43D even if it not a "scheduled bank". Further, the Ld. AR relied on the following case laws:

1. CIT vs. Canfin Homes Ltd. (347 ITR 382) (Kar.)
2. The Sindagi Urban Co-op. Bank vs. Department of Income Tax (ITA No.1530/Bang/2013 dated 05/03/2015) (ITAT, Bangalore)
3. Dy. CIT vs. The Saurashtra Co-op. Bank Ltd. (ITA No. 690/Ahd/2016 dated 31/01/2018 (ITAT, Ahmedabad)
4. Dy. CIT vs. Gondal Nagarik Sahakari Bank (ITA No. 504/Rjt/2015 dated 16/01/2018 (ITAT, Rajkot)

4. The Ld. DR relied on the order of the CIT.

5. We have heard the rival submissions and perused the record. In this case, the main contention of the Ld. AR is that the assessee is a Co-operative Bank and provisions of section 43D(g) is applicable and the assessee is entitled for deduction of interest on sticky loans. The provisions of section 43D(g) was inserted by Finance Act, 2017 which is clarificatory and should be applied. As such, it was submitted that the assessee cannot be denied the applicability of provisions of section 43D(g) of the Act. An identical issue was considered by Ahmedabad Bench of the Tribunal in the case of Karnavati Co-op. Bank Ltd. vs. DCIT (2012) (134 ITD 486) wherein it was held that interest on sticky advances/NPA advances cannot be

brought to tax. The provisions of section 43D are applicable to Co-operative Banks also. The relevant findings of the Tribunal are as under:

"Sec. 43D is in contrast with the fundamental principle of accountancy. The cardinal principle of mercantile system of accountancy is that an income is to be shown in the books of account on accrual basis. The principle is that it is immaterial whether it was actually received or not, but if an income is expected to be received, then it should be brought to books of account as an income accrued to the assessee. Contrary to this recognized principle, this section has prescribed that an income by way of interest shall be chargeable to tax in the previous year in which it is credited. The other deviation from the said accepted principle of accountancy is that an income by way of interest shall be chargeable to tax in the previous year in which it is actually received. The Act says that the incidence of 'credit' or 'actually received', whichever is earlier is to be taken into account for the purpose of chargeability of income by way of interest. Simultaneously, it is noteworthy that this section is an overriding section because the opening words are "notwithstanding anything to the contrary contained in any other provisions of this Act". Therefore, in spite of anything contained in the Act, the provisions of this section shall override those provisions. Once the statute has categorically made a law in respect of public financial institutions that interest is chargeable to tax either in the year in which credited or actually received, whichever is earlier, then it is compulsory to abide by the said rule. No scope is left with the Revenue authorities to ignore these provisions due to unambiguous use of language in the section. As far as the status of the assessee is concerned, the AO has stated that the assessee-bank is a co-operative bank. Undisputedly, the assessee is also governed by the RBI guidelines. Vide an Explan. (d) r.w.s. 36(i)(viii) annexed to s. 430 the definition of the entities incorporated by the section have been defined and in the absence of any contrary material, it is hereby held that the assessee is covered by one of the entities, hence the provisions of s. 43D are to be applied. Next issue is that whether a circular having effect of relaxing rigour of law can be treated as inconsistent with the provisions of a statute. In order to aid proper determination of the income of moneylenders and banks, the CBDT has issued a Circular dt. 6th Oct., 1952, providing that where interest accruing on doubtful debts is credited to a suspense account, it need not be included in assessee's taxable income, provided the ITO is satisfied that recovery is practically improbable. The CBDT under s.119 has power to issue circulars in exercise of its statutory powers. If the Board considers it necessary to lay down certain rules and then direct the sub-ordinate authorities, such directions are required to be followed and such circular would be binding on the Department unless and until held as ultra vires by a Court of law. The Board has powers to relax the severity or the strictness of law and the authorities are required to follow those instructions. As of now the law as laid down is that in terms of CBDT circular the interest is to be added as income only when actually received or credited in respect of

the "sticky advances" while making assessment for a financial institution. It can safely be concluded that by the insertion of a special provision to tax interest income in the case of public financial institution, etc. s. 43D has to be applied in its letter and spirit."

5.1 This decision was followed by the Rajkot Bench of the Tribunal in the case of DCIT vs. Gondal Nagarik Sahakari Bank in ITA 504/Rjt/2015 dated 16/1/2018. The same view was taken by the Bangalore Bench of the Tribunal in the case of The Sindagi Urban Co-operative Bank vs. Department of Income Tax in ITA No. 1530/Bang/2013 dated 05/03/2015 wherein it was held as under:

"8. We have given a careful consideration to the rival submissions. Section 43D of the Act is reproduced below:

43-D: Special provision in case of income of public financial institutions, public companies etc. – Notwithstanding anything to the contrary contained in any other provisions of this Act,-

(a) in the case of a public financial institution or a scheduled bank or a State financial corporation or a State industrial investment corporation, the income by way of interest in relation to such categories of bad or doubtful debts as may be prescribed having regard to the guidelines issued by the Reserve Bank of India in relation to such debts;

(b) in the case of a public company, the income by way of interest in relation to such categories of bad or doubtful debts as may be prescribed having regard to the guidelines issued by the National Housing Bank in relation to such debts, shall be chargeable to tax in the previous year in which it is credited by the public financial institution or the scheduled bank or the State financial corporation or the State industrial investment corporation or the public company to its profit and loss account for that year or, as the case may be, in which it is actually received by that institution or bank or corporation or company, whichever is earlier.

9. Section 43D of the Act was brought in basically intended to overcome the decision of the Supreme Court in *State Bank of Travancore Vs. CIT 158 ITR 102 (SC)* wherein it was held that interest on doubtful advances credited to "interest suspense account" and not transferred to "profit and loss account" should be considered as accrued according to the mercantile system of accounting and was taxable as such. The benefit of exception from the said Supreme Court's decision was given through section 43D to public financial institutions as defined in section 4A of the Companies Act, 1956 scheduled banks as per Explan. (ii) to Section 36(i)(viii) of the Act, State financial corporations established under section 3 or 3A of the State Financial Corporations Act, 1951 and institutions notified under section 46 of the said Act, and State industrial investment corporations which are Government companies as per section 617 of the Companies Act, 1956 and which are engaged in providing long term finance for industrial projects and approved by the Central Government under Sec.36(i)(viii) of the Act. As per section 43D in the cases of above said institutions interest on sticky advances falling under Health Codes 4 to 8 as per the guidelines issued by the Reserve Bank of India will be charged to tax either in the year in which the relevant interest is credited to the profit and loss account or the year of actual receipt of interest, whichever is earlier. Thus, so long as the interest is not received and so long as credits in respect of such interest are confined to "interest suspense account", such interest amounts will not be treated as income of the assessee in view of the non-obstante clause of section 430 even though the assessee is following mercantile system of accounting."

5.1 Reliance is also placed on the decision of the Karnataka High Court in the case of *CIT vs. Canfin Homes Ltd. (2012) (347 ITR 382)* wherein it was held as under:

"In State Bank of Travancore v. CIT [1986] 158 TTR 102 (SC) the Supreme Court held that the concept of reality of the income and the actuality of the situation are relevant factors which go to the making up of accrual of income but once accrual takes place and income accrues, the same cannot be defeated by any theory of real income. Section 145(1) of the Income-tax Act, 1961, is subject to the provisions of sub-section (2). Sub-section (2) provides that the Central Government may notify in the Official Gazette from time to time accounting standards to be followed by any class of assesses or in respect of any class of income. Therefore, the requirement of complying with cash or mercantile system of accounting is subject to the directions to be issued by the Central Government in the matter of accounting standards. After the amendment to section 145 the Board has issued accounting

standards to be followed by way of a Notification No. S.O. 69(E), dated January 25, 1996. Clause 6 defines "accrual" for the purpose of paragraphs 1) to (5) in the accounting standards. "Accrual" refers to the assumption that revenue and costs are accrued, that is, recognised as they are earned or incurred (and not as money is received or paid) and recorded in the financial statements of the periods to which they relate. In this context the guidelines dated April 28, 1995, were issued by the National Housing Bank with reference to non-performing assets. They state the policy on income recognition to be objective should be based on record of recovery. Income from a non-performing asset may not be recognised merely on the basis of accrual. An asset becomes non-performing when it ceases to yield income. The income from non-performing assets, therefore, should be recognised only when it is actually received. A non-performing asset is an asset in respect of which interest has remained unpaid and has become "past due". An amount is to be treated as "past due" when it remains unpaid for 30 days beyond the due date. Interest on the non-performing assets should not be looked upon as income if such interest has remained outstanding for more than six months on and from March 31, 1995. Therefore, if an assessee adopts the mercantile system of accounting and in his accounts he shows a particular income as accruing, whether that amount is really accrued or not, it is liable to tax. His accounts should reflect the true and correct statement of affairs. Merely because the amount accrued but was not realised immediately that cannot be a ground to avoid payment of tax. But, if in his account it is clearly stated that though a particular income is due to him it is not possible to recover it, it cannot be said have accrued and the amount cannot be brought to tax. Once a particular asset is shown to be a non-performing asset the assumption is that it is not yielding any revenue. When it is not yielding any revenue, the question of showing that revenue and paying tax would not arise.

Held accordingly, dismissing the appeal, that the Tribunal was right in holding that income from non-performing assets should be assessed on cash basis and not on mercantile basis despite the assessee following the mercantile system of accounting."

5.2 In view of the above discussions, we are of the view that there are judgments in favour of the assessee on the issue of applicability of section 43D(g) of the Act to the Co-operative Banks. In view of this, we are of the opinion that the order passed by the Assessing Officer is not erroneous and prejudicial to the interests of the

Revenue for the purpose of invoking jurisdiction u/s. 263 of the Act. Accordingly, we quash the order passed by the CIT u/s. 263 of the I.T. Act.

6. In the result, the appeal filed by the assessee is allowed.

Order pronounced in the open Court on this 13th March, 2019

sd/-
(GEORGE GEORGE K.)
JUDICIAL MEMBER

sd/-
(CHANDRA POOJARI)
ACCOUNTANT MEMBER

Place: Kochi

Dated: 13th March, 2019

GJ

Copy to:

1. The Taliparamba Co-operative Bank Ltd., National Highway, Taliparamba, Kannur.
2. The Income Tax Officer, Ward-4, Kannur.
3. The Pr. Commissioner of Income-tax, Kozhikode.
4. D.R., I.T.A.T., Cochin Bench, Cochin.
5. Guard File.

By Order

(ASSISTANT REGISTRAR)
I.T.A.T., Cochin