

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

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

ITA No.83/Coch/2019 : Asst.Year 2015-2016

The Income Tax Officer Ward - 4 Tirur.	Vs.	M/s.Pattikkad Service Co- operative Bank Ltd. Pattikkad P.O. Perinthalmanna Malappuram - 679 325. PAN : AACAP0731E.
(Appellant)		(Respondent)

Appellant by : Smt.A.S.Bindhu, Sr.DR
Respondent by : Sri.Hamid Hussain K.P.

Date of Hearing : 19.06.2019	Date of Pronouncement : 20.06.2019
-------------------------------------	---

ORDER

Per George George K, JM

This appeal at the instance of the Revenue is directed against CIT(A)'s order dated 17.10.2018. The relevant assessment year is 2015-2016.

2. The solitary issue raised in this appeal is whether the assessee is entitled to deduction u/s 80P of the I.T.Act?

3. Brief facts of the case are as follows:

The assessee in this case is a registered as co-operative societies under the Kerala State Co-operative Societies Act, 1969. The assessment was completed in the assessee's case by denying deduction claimed u/s 80P of the I.T.Act. The Assessing Officer for denying the claim of deduction u/s 80P of

the I.T.Act, treated the assessee as a co-operative bank and not a co-operative society.

4. Aggrieved by the order of the assessment, the assessee filed appeal before the first appellate authority. The CIT(A) by following the judgment of the Hon'ble jurisdictional High Court in the case of *Chirakkal Service Co-operative Bank Ltd.* (384 ITR 490) allowed the claim of deduction u/s 80P of the I.T.Act.

5. Aggrieved by the order of the CIT(A), the Department has filed the present appeal before the Tribunal. The grounds raised in this appeal read as follows:

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

2. From the table given below, listing the similarities between M/s Citizen Service Co-Operative Society and the assessee, hasn't the CIT(A) erred in relying on the decision ITAT Cochin Bench in the case of M/s Maruthonkara Service Co-Operative Bank Ltd where it has been held that the decision of M/s Citizen Service CO-Operative Society is not applicable to the instant case of the assessee?

M/s.Citizen Co-operative Society	M/s.Pattikkad Service Co-operative Bank Ltd.
Governed by Multi-State Co-operative Societies Act.	Governed by Kerala Co-operative Societies.
Area of operation restricted to the states of Maharashtra, Karnataka and Andhra Pradesh.	Area of Operation restricted to the respective panchayath / municipality of Kerala State.
Activities are confined only to "Members" - Ordinary and Nominal.	Activities are confined to Class A, Class B, Class C and Class D members of which only Class A members are Ordinary (regular)

	members and Class C and Class D are Nominal members. Class C is governed /co-operative bank / NABARD controlled recognized institutions.
No nominal or associate member shall be entitled to dividend or have any interest in the management thereof including right to vote, elect as a director of the board of participate in the general body meetings.	No nominal or associate member (Class B & D) and Class C members shall be entitled to dividend or have any interest in the management thereof including right to vote, elect as a director of the board or participate in the general body meetings.
Only ordinary / resident members have right to dividend and have any interest in the management thereof including right to vote, elect as a director of the board or participate in the general body meetings.	Only ordinary / resident members have right to dividend and have any interest in the management thereof including right to vote, elect as a director of the board or participate in the general body meetings.
Nominal members are just walk in customers, where the only criterion is that they should have an address in the area of operation of the society.	Nominal members are just walk in customers, where the only criterion is that they should have an address in the area of operation of the society or do an activity viz. Trade / business/ occupation in the area of operation.
Nominal members have to pay a membership fee which is not refundable.	Nominal members have to pay a membership fee which is not refundable.
Majority of the deposits and loans of the Society pertains to Nominal Members.	Majority of the deposits and loans of the Society pertains to Nominal Members.
Majority of the income of the society pertains to the interest received from nominal members.	Majority of the income of the society pertains to the interest received from nominal members.
The society does not hold any license from Reserve Bank of India to carry out banking business.	The society does not hold any license from Reserve Bank of India to carry out banking business.

3. The learned CIT(A) ought to have appreciated the fact that there is not even a single point that can be projected as a difference between the M/s Citizen Co-Operative Society and our assessee, M/s Pattikkad Service Co-Operative Bank Ltd. Therefore, the decision of the Apex Court in the case of MIs Citizen Co-Operative Society is squarely applicable in the instant case.

4. The assessee has got four classes of members - Class A, Class B, Class C and Class D members. The bye law of the assessee identifies only Class A members (ordinary members) as real share holders of the society and they have exclusive

privileges over other class members like rights to attend the Annual general Body, right to vote in the administrative board election, right to dividends etc. However Class C members and Class D members are nominal members and do not any of these rights. The cardinal requirement of mutuality is that the contributor to the common fund must be entitled to participate in the surplus and that all the participators in the surplus must be contributors to the common fund ie there should be complete identity between the contributors and participators. This means identity as a class, so that at any given moment of time, the persons who are contributing are identical with the persons entitled to participate. However in the instant case, the members are differentiated in terms of privileges granted to them. Therefore, the identity of the contributors to the fund is different from that of the participators of the surpluses. Therefore we have a scenario which is the same as in the case of M/s Citizens Co-Operative Society Limited. In this context, hasn't the CIT(A) erred in holding that the decision of the Apex Court in the case of M/s Citizen Service Co-Operative Society is not applicable to the instant case of the assessee?

5. Class C and D members are just nominal members who can take loans against security and do not have any other rights. Majority of income is received by the society from nominal members through non agricultural gold loan interest and majority of such income is used to give agricultural loans to ordinary members. In short, major part of the income are collected from nominal members who doesn't have any say in the running of the society and is perused majorly for giving loans to Class A members. Therefore we have an issue here where there is no mutuality between the members of the assessee society where the Class - A members are making profit at the behest of nominal members ie the Class B,C and D members. Once the principle of mutuality is defeated, it has been laid down by the Apex Court that the society is not eligible for deduction u/s. 80P. In view of this, is not the decision of the CIT(A) without merits?

6. It has to be taken into cognizance that the ITAT has made the observation in the case of M/s Maruthonkara Service Co-Operative Bank that the Apex Court in the case of M/s Citizen Service Co-Operative Society has not allowed 80P deduction on the ground that they had violated MACSA norms ie they had carved out a special category of members vis-a vis the nominal members or public at large which are not the real members. This is not applicable in the case of Kerala Co-Operative Societies Act since the same admits nominal members also. The above observation made by the ITAT is not correct. Both Multi-State Co-operative societies act which governs M/s Citizen Service Co-Operative Bank and Kerala Co-

operative societies Act which governs our assessee admits nominal members. The crux of the Apex Court decision was not that the society had violated MACSA norms but it had failed the litmus test of principle of mutuality where the contributors to the fund ie both the category of members - ordinary and nominal were not identical to the participators of the surpluses which constituted only the ordinary members. The principle of mutuality forms the basic principle of any Co-operative Society. For the principle to hold good, there should exist complete identity between the contributors of the fund and the participators of the surpluses. This principle was defeated in the case of M/s Citizen Service Co-Operative Society as the ordinary members were making profit from the nominal members. The same is the issue in the instant case where there is no mutuality between the members of the assessee society where the Class - A members are making profit at the behest of nominal members ie the Class B,C and O members. Once the principle of mutuality is defeated, it has been laid down by the Apex Court that the society is not eligible for deduction u/s. 80P. In view of this, is not the decision of the CIT(A) without merits?

7. Co-Operative society is organized to enable the members to improve their economic conditions by helping them in respective pursuits and not to earn profits. However, a co-operative society is not restrained from earning profits. What is to be avoided is not the profit, but profit motive. Even though the bye law of the assessee speaks nothing about profit making, it discusses about dividend distribution and also regarding the other applications of profit earned. Moreover, the assessee is investing in shares of district co-operative bank and also many different societies and earning dividends. Therefore, even though it is not stated explicitly as the objective of the assessee, it is evident that the assessee is profit driven and distributes its dividend to Class - A members. It was explicitly stated by the Supreme Court in its order in the case of M/s Citizen Service Co-Operative Society as two of the conditions precedent for the concept of mutuality that there should be no profit motivation and sharing of profit. However, as stated above it is crystal clear that the assessee society has clear profit motivation and sharing of profit which defeats the very purpose of the concept of mutuality and therefore the isn't the order of the CIT(A) against the law especially when the Apex Court decision squarely applies in the case.?

8. It is statutory that 20% of deposits collected is to be maintained with the district co-operative bank as fixed deposit in order to maintain liquidity for a society doing banking activities as per Kerala co-operative societies act. However the investments made by the assessee are much more than the

required amount to be deposited in the form of various deposits and shares in Kozhikode district co-operative bank and other co-operative societies. Here, the income is generated from a third party (where the investments are made) and substantial share of income is generated outside the members. Therefore the mutuality entitled between the contributor and the recipient is lost in such a case. In such a case, as laid down by the Hon'ble Apex Court, the society is not eligible for deduction u/s. 80P.

9. A division bench of Hon'ble High Court of Kerala vide order in ITA No : 4 of 2014 dated 31.01.2014 in the case of M/s Perinthalmanna Service Co-Operative Bank Ltd had upheld the order of the Commissioner of income Tax revising the order of the assessing officer in which the assessing officer had granted deduction u/s. 80P merely looking at the registration certificate provided by the Registrar of the Kerala Co-Operative Societies. The Court held that the Assessing Officer has to complete the assessment proceedings after conducting an enquiry and not by merely looking at the registration certificate provided by the Registrar. Whereas, vide order No : 212 of 2013 & Ors, the High Court in the case of M/s Chirakkal Service Co-Operative Bank Ltd had ruled that the assessee was classified as Primary Agricultural Credit Society by the competent authority under the Kerala Co-operative Societies Act, it has necessarily to be held that the principal object of such society is to undertake agricultural credit activities and to provide loans and advances for agricultural purposes. The authorities under the Income Tax Act cannot probe into any issue or such matter relating to such assesses. However, when the case was again taken for hearing in the case of other assesseees, the Hon'ble High Court of Kerala vide order in ITA No : 97 of 2016 dated 09.07.2018 cited has held that since two contrary decisions of benches of equal strength exists for the same issue, the issue should be referred to a larger bench relying on the decision of the Apex Court in the case of M/s Victory Aqua Farm Ltd. Therefore, the issue of deduction u/s. 80P has not attained finality. In this scenario, isn't the order of the CIT(A) relying on the decision of one division bench of the Hon'ble High Court in the case of M/s Chirakkal Service Co-Operative Bank Ltd without merits when there existed another division bench decision of the High Court which was favourable to the revenue?

10. The judicial ratios in the cases of CIT v. Bandipur Club Ltd. [1997] 226 ITR 97 and Wankaner Jain Social Welfare Society v. CIT [2003] 260 ITR 241 (Mad.) wherein it was held that there must be complete identity between the contributors and the participators for the principle of mutuality to hold good.

11. *The Bangalore bench of ITAT in the case of M/s Bapooji Pattin Souhard has remitted the issue back to the assessing officer to examine the issue of 80P deduction in the light of the order of the Apex Court in the case of M/s Citizen Service Co-Operative Society. This may also be kindly taken into account.*

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

6. The learned Departmental Representative relied on the grounds raised in the appeal. Further, the learned DR placed reliance on the latest judgment of the Larger Bench of the Hon'ble jurisdictional High Court in the case of *The Mavilayi Service Co-operative Bank Ltd. V. CIT [ITA No.97/2016 order dated 19th March, 2019]*. The learned Counsel for the assessee, on the other hand, supported the order of the CIT(A).

7. We have heard the rival submissions and perused the material on record. The Larger Bench of the Hon'ble jurisdictional High Court in the case of *The Mavilayi Service Co-operative Bank Ltd. (supra)* held that the Assessing Officer has to conduct an inquiry into the factual situation as to the activities of the assessee society to determine the eligibility of deduction u/s 80P of the I.T.Act. It was held by the Hon'ble High Court that the Assessing Officer is not bound by the registration certificate issued by the Registrar of Kerala Co-operative Society classifying the assessee-society as a co-operative society. The Hon'ble High Court held that each assessment year is separate and eligibility shall be verified by the Assessing Officer for each of the assessment years. The finding of the Larger Bench of the Hon'ble High Court reads as follows:-

“33. In view of the law laid down by the Apex Court in Citizen Co-operative Society [397 ITR 1] it cannot be contended that, while considering the claim made by an assessee society for deduction under Section 80P of the IT Act, after the introduction of sub-section (4) thereof, the Assessing Officer has to extend the benefits available, merely looking at the class of the society as per the certificate of registration issued under the Central or State Co-operative Societies Act and the Rules made thereunder. On such a claim for deduction under Section 80P of the IT Act, the Assessing Officer has to conduct an enquiry into the factual situation as to the activities of the assessee society and arrive at a conclusion whether benefits can be extended or not in the light of the provisions under sub-section (4) of Section 80P.”

33. In Chirakkal [384 ITR 490] the Division Bench held that the appellant societies 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 to be 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 and as such, they are entitled for the benefit of sub-section (4) of Section 80P of the IT Act to ease themselves out from the coverage of Section 80P and that, the authorities under the IT Act cannot probe into any issues or such matters relating to such societies and that, Primary Agricultural Credit Societies registered as such under the KCS Act and classified so, under the Act, including the appellants are entitled to such exemption.

34. In Chirakkal [384 ITR 490] the Division Bench expressed a divergent opinion, without noticing the law laid down in Antony Pattukulangara [2012 (3) KHC 726] and Perinthalmanna [363 ITR 268]. Moreover, the law laid down by the Division Bench in Chirakkal [384 ITR 490] is not good law, since, in view of the law laid down by the Apex Court in Citizen Co-operative Society [397 ITR 1], on a claim for deduction under Section 80P of the Income Tax Act, by reason of sub-section (4) thereof, the Assessing Officer has to conduct an enquiry into the factual situation as to the activities of the assessee society and arrive at a conclusion whether benefits can be extended or not in the light of the provisions under sub-section (4) of Section 80P of the IT Act. In view of the law laid down by the Apex Court in Citizen Co-operative Society [397

ITR 1] the law laid down by the Division Bench Perinthalmanna [363 ITR 268] has to be affirmed and we do so.

35. In view of the law laid down by the Apex Court in Ace Multi Axes Systems' case (supra), since each assessment year is a separate unit, the intention of the legislature is in no manner defeated by not allowing deduction under Section 80P of the IT Act, by reason of sub-section (4) thereof, if the assessee society ceases to be the specified class of societies for which the deduction is provided, even if it was eligible in the initial years."

7.1 In view of the dictum laid down by the Full Bench of the Hon'ble High Court, the issue of deduction u/s 80P(2)(a)(i) is restored to the Assessing Officer. The Assessing Officer shall examine the activities of the assessee and determine whether their activities are in compliance with the activities of a co-operative society functioning under the Kerala Co-operative Societies Act, 1969 and grant deduction u/s 80P(2) in accordance with law. It is ordered accordingly.

8. In the result, the appeals filed by the Revenue are allowed for statistical purposes.

Order pronounced on this 20th day of June, 2019.

Sd/-
(Chandra Poojari)
ACCOUNTANT MEMBER

Sd/-
(George George K.)
JUDICIAL MEMBER

Cochin ; Dated : 20th June, 2019.
Devdas*

Copy of the Order forwarded to :

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

BY ORDER,

(Asstt. Registrar)
ITAT, Cochin