

**IN THE INCOME TAX APPELLATE TRIBUNAL
“SMC-A” BENCH : BANGALORE**

BEFORE SHRI JASON P BOAZ, ACCOUNTANT MEMBER

ITA No.1032/Bang/2019
Assessment year : 2012-13

M/s. Shri Dhanlaxmi Pattin Sahakari Sangh Niyamit, Near Shankarling Temple, Tq. Jamkhandi, Dist. Bagalkot. PAN : AAALS 1249 K	Vs.	The Income Tax Officer, Ward – 2, Bagalkot.
APPELLANT		RESPONDENT

Assessee by	:	Shri. Ashok G. Mudnur, CA
Revenue by	:	Shri. Karuppusamy, S. R. Addl. CIT

Date of hearing	:	10.06.2019
Date of Pronouncement	:	12.07.2019

ORDER

Per Jason P. Boaz, Accountant Member

This appeal filed by the assessee is directed against the order of CIT(A) - Hubballi, dated 28.11.2018 for Assessment Year 2012-13.

2. Briefly stated, the facts of the case are as under:

2.1 The assessee, a Co-operative Society, providing credit facilities to its members, filed its return of income for Assessment Year 2012-13 on 27.09.2012 declaring NIL income after claiming deduction of Rs.21,58,094/- under section

80P(2)(a)(i) of the Income Tax Act, 1961 (in short 'the Act'). The case was taken up for scrutiny for this Assessment Year and the assessment was concluded under section 143(3) of the Act vide order dated 22.12.2014, wherein the assessee's income was determined at Rs.21,58,094/- in view of the Assessing Officer (AO) disallowing the assessee's claim of deduction under section 80P(2)(a)(i) of the Act by following, *inter alia*, the decision of the Hon'ble Apex Court in the case of Totgars Co-operative Sale Society Ltd., Vs. ITO (2010) 322 ITR 283 (SC).

2.2 On appeal, the CIT(A), Hubballi, vide the impugned order dated 28.11.2018 allowed the assessee partial relief. In this order, the CIT(A) held that (1) the assessee is entitled to deduction under section 80P(a)(i) of the Act in respect of interest income attributable to its business but (2) upheld the AO's rejection of the assessee's claim for deduction under section 80P(2)(a)(i) of the Act in respect of interest received from other investments and deposits which was to be assessed under the head 'Income from Other Sources'.

3. Aggrieved by the order of CIT(A), Hubballi, dated 28.11.2018 for Assessment Year 2012-13, the assessee has preferred this appeal before the Tribunal, wherein it has raised the following grounds:-

1. *The learned Commissioner of Income Tax (Appeals), Hubballi has erred in passing order which is opposed to law and facts of the case.*
2. *The learned Commissioner of Income Tax (Appeals), Hubballi has erred in holding that income from regular members only is eligible for deduction and disallowed Rs 10,95,880/- as relating to Other members u/s 80P(2)(a)(i) which is opposed to law and judicial pronouncements with similar facts:*

The Principal Commissioner of Income Tax Salem-7 Vs M/s S-1308 Ammapet Primary Agricultural Cooperative bank Ltd Ammapet, Salem Tax Case Appeal No 882 & 891 of 2018 dt 6.12.2018 (Madras HC).

3. *The learned Commissioner of Income Tax (Appeals), Hubballi has erred in applying Citizen Coop Society Vs CIT C-9 (1) Hyderabad*

Supreme Court case which facts are different from that of t appellant Society.

4. *The learned Commissioner of Income Tax (Appeals),Hubballi has erred in not considering the provisions of Karnataka State Cooperative Societies Act 1959 regarding types of members eligible to become members as there is no classification/restriction under the Income Tax Act 1961. As held in the **The Principal Commissioner of Income Tax Salem-7 Vs M/s S-1308 Ammapet Primary Agricultural Cooperative bank Ltd Ammapet, Salem***
5. *The learned Commissioner of Income Tax (Appeals),Hubballi has erred in treating Interest earned from Cooperative Banks as Income from Other Sources of Rs 5,09,310/- and disallowed claim u/s 80P(2)(a)(i) even when deposits are out of regular business funds.*
6. *The appellants craves leave to add/alter any of the grounds of appeal on or before the date of final hearing*

4. **Ground Nos. 1 and 6 (supra)**, being general in nature, no adjudication is called for thereon.

5. **Ground Nos.2 and 3**

5.1 In these grounds (supra), the assessee assails the action of the CIT(A) in holding that income from regular Members only is eligible for deduction under section 80P(2)(a)(i) of the Act, and not in respect of income from Associate Members. It is contended by the learned AR that the learned CIT(A) erred in applying the decision of the Hon'ble Apex Court in the case of Citizen Co-operative Society Ltd., Vs. ACIT (397 ITR 1) (SC) as the facts in the case on hand are totally different. According to the learned AR, the order of the CIT(A) is very cryptic without comparing the facts of the case on hand with the facts in the case of Citizens Co-operative Society Ltd., Vs. ACIT (supra). It was submitted that under similar fact situation, the Bangalore Bench in the case of Jyoti Co-operative Credit Society Ltd., Vs. ITO in its order in ITA No.50/Bang/2019 dated 08.05.2019 has restored

the matter to the file of the CIT(A) for fresh decision after affording both the assessee and Revenue adequate opportunity of being heard in the matter.

5.2 The learned DR for Revenue supported the orders of the CIT(A).

5.3.1 I have heard and considered the rival contentions and perused the material on record; including the judicial pronouncements cited. It is seen from the impugned order of the CIT(A) at para 7 thereof that the interest income earned from associate members is Rs.32,46,651/- out of the total interest earned of Rs.47,16,361/-. The CIT(A) held that as per the decision of the Hon'ble Apex Court in the case of Citizen Co-operative Society Ltd., Vs. ACIT (supra) deduction is allowable only in respect of income earned from regular members under section 80(P)(2)(a) of the Act and not income earned from others. The Hon'ble Apex Court in the case of Citizen Co-operative Society Ltd., (supra) at paras 25 to 28 thereof has held as under:-

"25. So far so good. However, it is significant to point out that the main reason for disallowing 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 violation 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 utilised 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 quite 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 ADP 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."

5.3.2 On the similar issue, the ITAT, Bangalore Bench, in the case of Jyoti Co-operative Credit Society Ltd., Vs. ITO in its order in ITA No.50/Bang/2019 dated 08.05.2019, after considering the aforesaid decision of the Hon'ble Apex Court in the case of Citizens Co-operative Society Ltd., (supra), at paras 6 and 7 thereof has held as under:-

"6. I find that as per this judgment of Hon'ble Supreme Court rendered in the case of Citizen Co — Operative Society Limited vs. ACIT (Supra), this is not the ratio that that even if a small portion of total income is earned from nominal members, deduction u/s 80P should not

be allowed qua such income although deduction is to be allowed ,in respect of income from regular members as held by CIT (A) in the present case. In fact, in that case, apart from this objection that most of the business of the assessee was with nominal members, there were various other objections also such as deposit from nominal members-was also received and the same was utilized for giving gold loans to regular members. There is no discussion in the present case about this aspect as to whether deposit was received from nominal members and it was utilized to give loan to regular members. As per the facts of the present case, the interest income from nominal members is Rs. 36,90,730/- out of the total interest earned Rs. 133,14,319/- and hence although it is substantial, it cannot be said that most of the business of the assessee was with nominal members. There was one more objection in that case that the depositors and borrowers are quite distinct and because of this, this was the observation in that case that such activity of the assessee is that of finance business and cannot be termed as co-operative society. There was one more objection in that case that the assessee is engaged in the activity of granting loans to general public as well. In my humble understanding these various objections were considered cumulatively and it was held that the assessee is not eligible for deduction u/s 80P at all and his was not a ratio of this judgment that deduction is to be allowed in respect of earning from regular member but to be disallowed in respect of income from nominal members. In fact, in the present case, apart from this objection that about 28% of interest income is from nominal members, there is no observation about any other aspect of various Objection raised in the case of Citizen Co — Operative Society Limited vs. ACIT (Supra) and it is held by CIT (A) that deduction should be disallowed in respect of interest earned from nominal members by stating that this is the ratio of this judgment of Hon'ble Supreme Court rendered in the case of Citizen Co —Operative Society Limited vs. ACIT (Supra) but in my considered opinion as evident from relevant paras of this judgment reproduced above, this is not the ratio of this judgment.

7. *In the light of above discussion, I Feel that in the interest of justice, the mater should go back to the file of CIT (A) for a fresh decision. Hence. I set aside the order of CIT (A) and restore this matter back to his tile for a fresh decision with the direction that sufficient opportunity should be provided by him to both sides and the assessee should provide complete detail with cogent evidence in respect of business carried out by the assessee with nominal members and general public, if any. The assessee should also demonstrate about the difference in facts of the present case and facts in the case of Citizen Co —Operative Society Limited vs. ALIT (Supra). The AO can also demonstrate as to how the facts are*

similar. Thereafter the CIT (A) should pass speaking and reasoned order as per law.”

5.3.3 Respectfully following the decision of the ITAT, Bangalore Bench, in the case of Jyoti Co-operative Credit Society Ltd., (supra), I am of the view that the interest of substantial justice will be well served, by setting aside the orders of the authorities below on this issue and restoring the matter to the file of the AO for fresh examination and adjudication. I, therefore, set aside the order of the CIT(A) and restore this matter to the file of the AO for fresh adjudication, after affording the assessee adequate opportunity of being heard in the matter and to file details / submissions in this regard as were required to be filed in the case of Jyoti Co-operative Credit Society Ltd., at para 7 thereof (supra) which shall be duly considered by the AO before deciding the issue. It is accordingly ordered. The grounds raised are allowed for statistical purposes.

6. Ground Nos. 4 and 5

6.1 In these grounds (supra), the assessee contends that the CIT(A) erred in not considering the provisions of the Karnataka State Co-operative Societies Act, 1959 regarding the types of persons eligible to be members as there is no classification / restriction under the Act. In this regard, it is contended that the CIT(A) erred in treating the interest of Rs.5,09,310/- earned from Co-operative Banks as 'Income from Other Sources' and disallowing the claim under section 80P(2)(a)(i) of the Act even when the deposits have been made out of regular business funds. In this regard, the learned AR for the assessee submitted that this issue is covered by the decision of the Co-ordinate Bench of this Tribunal in the case of Chatrapati Sivaji Co-operative Credit Society Ltd., Vs. ITO in ITA No.2619/Bang/2018 dated 07.12.2018.

6.2 The learned DR for Revenue supported the orders of the CIT(A).

6.3.1 I have heard and considered the submissions / contentions put forth and perused the material on record; including the judicial decision cited. On an appraisal of the facts / details on record, I find that on similar facts, the Co-ordinate Bench of this Tribunal in its decision in the case of Chatrapati Sivaji Co-operative Credit Society Ltd., Vs. ITO (supra) restored this issue back to the file of the AO holding as under at paras 4 and 5 thereof:-

“4. The learned AR relied on the decision of the Hon'ble Karnataka High Court in the case of Tumukur Merchants Souharda Credit Cooperative Ltd. 230 taxman 309 (Kam), the DR relied on a subsequent decision of the Hon'ble Karnataka High Court in the case of PCIT Vs. Totgars Co-operative Sale Society Ltd. 395 ITR 611 (Karn.). We have carefully gone through the said judgment. The facts of the case before the Hon'ble Karnataka High Court was that the Hon'ble Court was considering a case relating to Assessment Years 2007-2008 to 2011- 2012. In case decided by the Hon'ble Supreme Court in the case of the very same Assessee, the Assessment years involved was AY 1991-92 to 1999-2000. The nature of interest income for all the AYs was identical. The bone of contention of the Assessee in AY 2007-08 to 2011-12 was that the deduction under Section 80P(2) of the Act is claimed by the respondent assessee under Section 80P(2)(d) of the Act and not under Section 80P(2)(a) of the Act which was the claim in AY 1991-92 to 1999-2000. The reason given by the Assessee was that in AY 2007-08 to 2011-12 investments and deposits after the Supreme Court's decision against the assessee Totgar's Co-operative Sale Society Ltd. (supra), were shifted from Schedule Banks to Cooperative Bank. U/s.80P(2)(d) of the Act, income by way of interest or dividends derived by a Co-operative Society from its investments with any other Co-operative Society is entitled to deduction of the whole of such interest or dividend income. The claim of the Assessee was that Co-operative Bank is essentially a Co-operative Society and therefore deduction has to be allowed under Clause (d) of Sec.80P(2) of the Act. The Hon'ble Karnataka High Court followed the decision of the supreme Court in The Totgars Co-operative Sales Society Ltd. (supra) and held that interest earned from Schedule bank or cooperative bank is assessable under the head income from other sources and therefore the provisions of Sec.80P(2)(d) of the Act was not applicable to such interest income. It is thus clear that the source of funds out of which investments were made remained the same in

AY 2007-08 to 2011-12 and in AY 1991-92 to 1999-2000 decided by the Hon'ble Supreme Court. Therefore whether the source of funds were Assessee's own funds or out of liability was not subject matter of the decision of the Hon'ble Karnataka High Court in the decision cited by the learned DR. To this extent the decision of the Hon'ble Karnataka High Court in the case of Tumukur Merchants Souharda Co-operative Ltd. (supra) still holds good. Hence, on this aspect, the issue should be restored back to the AO for a fresh decision after examining the facts in the light of these judgment of the Hon'ble Apex Court rendered in the case of The Totgars Co-operative Sale Society Ltd. (supra) and of Hon'ble Karnataka high Court rendered in the case of Tumukur Merchants Souharda Co-operative Ltd. (supra).

5. *The AO will afford opportunity of being heard to the Assessee and filing appropriate evidence, if desired, by the Assessee to substantiate its case, before deciding the issue before deciding the issue.”*

6.3.2 Respectfully following the aforesaid decision of the Co-ordinate Bench in the case of Chatrapati Sivaji Co-operative Credit Society Ltd., (supra), I am of the view that this issue is to be restored to the file of the AO for fresh adjudication after examination / verification of the facts in the light of the judgments of the Hon'ble Apex Court in the case of Totgars Co-operative Sale Society Ltd., Vs. ITO (322 ITR 283) (SC) and of the Hon'ble Karnataka High Court in the case of Tumkur Merchants Souharda Co-operative Ltd., 230 taxman 309 (Karn). Needless to add, the AO shall afford the assessee adequate opportunity of being heard and to file details / submissions required which shall be duly considered before deciding the issue by way of a reasoned and speaking order. It is accordingly ordered. The grounds raised are allowed for statistical purposes.

7. In the result, the assessee's appeal for Assessment Year 2012-13 is allowed for statistical purposes.

Order pronounced in the open court on this 12th day of July, 2019.

Sd/-
(JASON P BOAZ)
Accountant Member

Bangalore.

Dated: 12th July, 2019.

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Copy to:

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| 1. Appellants | 2. Respondent |
| 3. CIT | 4. CIT(A) |
| 5. DR | 6. Guard file |

By order

Assistant Registrar,
ITAT, Bangalore.