

**IN THE INCOME TAX APPELLATE TRIBUNAL “E” BENCH, MUMBAI
BEFORE SHRI PAWAN SINGH, JUDICIAL MEMBER
AND SHRI G. MANJUNATHA, ACCOUNTANT MEMBER**

I.T.A. No.2073/Mum/2018
(Assessment Year: 2013-14)

ITO 20(3)(4) Room No. 616, 6 th floor, Piramal Chambers, Lalbaug, Parel, Mumbai-400012	vs.	M/s. Tata Memorial Central Employees Co-op Credit Society, Ground Floor, Tata Memorial Central, Annex Building, Dr. E. Borges Road, Jerbai Wadia Road, Parel, Mumbai-400012
PAN : AAAAT7660A		
(Appellant)	..	(Respondent)
Revenue by :		Shri Manoj Kumar Singh (CIT-DR)
Assessee by:		Shri. Prakash Jhunjunwala (AR)

**Date of Hearing : 03.07.2019
Date of Pronouncement : 03.07.2019**

ORDER

PER PAWAN SINGH, JUDICIAL MEMBER

1. This appeal, filed by the Revenue is directed against the order of Id. Commissioner of Income Tax (Appeals)-32, Mumbai (hereinafter called “the CIT(A)”), for Assessment Year 2013-14. The revenue has raised the following grounds of appeal:

“1. "On the facts and in the circumstances of the case in law, the Ld. CIT(A) has erred in allowing deduction U/s 80P to the assessee even though

assessee carries on the banking business and other business in the name of a co-operative credit society?

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

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

2. Brief facts of the case are that the assessee filed its return of income for Assessment Year 2013-14 on 25-09-2013 declaring total income at 'Rs. Nil' after claiming deduction u/s. 80P of the Act of Rs. 87,08,345/- claiming it to be a Co-operative Credit Society and not a Co-operative Bank and the provision of section 80P(4) will have no application and is entitled to deduction under section 80P(2)(a)(i) of Rs. 59,56,93,111/- and section 80P(2)(d) of Rs. 30,15,243/-. The Assessing Officer disallowed the deduction. However, on appeal before the Id. CIT(A), the action of Assessing Officer was reversed. The Id. CIT(A) reversed the action of Assessing Officer by following the order of his predecessor for Assessment Year 2012-13 dated 11.03.2016. Hence, aggrieved by the order of Id. CIT(A), the revenue has filed the present appeal before us.
3. We have heard the submission of Id. DR for the revenue and Id. AR of the assessee. At the outset of hearing, the Id. DR for the revenue

submits that on identical grounds, the appeal for Assessment Year 2012-13 vide ITA No. 862/Mum/2017 dated 31.07.2018, has been restored to the file of Assessing Officer. The ld. DR further submits that the ld. CIT(A) granted relief to the assessee by following the decision of his predecessor in Assessment Year 2012-13. Therefore, the appeal for the year under consideration may also be restored to the file of Assessing Officer.

4. On the other hand, the ld. AR of the assessee submits that for the purpose of section 80P(2) a Co-operative Bank should be considered as a Co-operative Society as held by Hon'ble Karnataka High Court in PCIT vs. Tatagars Co-operative Sale Society [391 ITR 74], Hon'ble Punjab & Haryana High Court in CIT vs. Haryana State Co-operative Society [234 ITR 714 P&H), Hon'ble Bombay High Court in PCIT vs. Goa PWD Staff Co-op. Society Ltd. [2016] 242 Taxman 422 (Bom). The ld. AR for the assessee further submits that Tribunal while deciding the appeal of revenue for Assessment Year 2012-13 has held that assessee is a Credit Co-operative Society. The ld. AR further submits that the decision of Hon'ble Supreme Court in Citizen Co-operative Society vs. ACIT 397 ITR 9SC) is distinguishable on the facts of present case. The assessee in that case was carrying on banking business for public at large. However, the assessee in the present case is not extending such facility to public at

large and the services of society are available to the members and nominal members of the society. The Id. AR further placed relevant part of audited annual report about the status of members and nominal members. The Id. AR further submits that Co-operative Banks are primarily a Co-operative Society as held by various High Courts referred above, therefore, the assessee is entitled for deduction and that restoring the matter to the file of Assessing Officer for verification of rights, roles, entitlement, duties and responsibilities of nominal member would be a futile exercise.

5. We have considered the rival contention of the parties and have gone through the orders of authorities below and various case laws relied by lower authorities and by Id. representative of the parties. We have seen that on the identical facts and on identical grounds of appeal, the co-ordinate bench of Tribunal has restored the matter to the file of Assessing Officer vide order dated 31.07.2018 in ITA No. 862/Mum/2017 by passing the following order:

“6. We have considered rival contentions and perused the material on record including case laws relied upon . We have observed that the assessee has claimed itself to be a employees credit co-operative society which is receiving deposits and lending money to its members exclusively . A claim has been made by the assessee society that only past and present employees of Tata Memorial Central can become members of the society and the dealings of the assessee is restricted to these members only . Thus, the assessee society has categorically made

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

assessee that it is dealing exclusively with its members who are past and present employees of Tata Memorial Centre and that there is no dealing with members of public which is evident from clause D.1.1. of bye laws which is placed on record. The said clause in its translated version as produced by the assessee, reads as under:

D.1.1

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

*** “

No evidence is brought on record by the AO that the assessee is dealing with public at large or with non members. It is also not brought on record that the assessee has indulged in banking business . It is also not brought on record by the AO that there is a breach of mutuality on the grounds of loss of identity between contributors and participant. We have also gone through the audited financial statements placed on record which does not evidence any evidentiary incriminating material/information which could prove the findings of the AO so far that the assessee is hit by provisions of Section 80P(4) of the 1961 Act. The assessee no doubt is accepting deposits of various kinds from its members and also extending the ‘loans and advances’ of various kinds to its members but it is not sufficient to hold that the assessee is engaged in banking business . Undisputedly the assessee is a credit co-operative society but this finding is not sufficient to categorise said society as banking institutions to deny benefit of deduction u/s 80P keeping in view provisions of Section 80P(4) of the 1961 Act unless sufficient incriminating evidences were brought on record by the AO to demolish the claims of the assessee. The AO himself in the preceding assessment year 2010-11 vide assessment order dated 21.08.2012 passed u/s 143(3) of the 1961 Act has allowed deduction u/s 80P of the 1961 Act. The learned CIT(A) has passed well reasoned detailed order reversing the decision of the

AO, with which we concur. There are several judicial decisions cited by learned AR to support its contentions which are detailed above and not repeated . So far so good. We have at the same time observed that Hon'ble Supreme Court in a recent landmark judgment in the case of The Citizen Co-operative Society Limited(supra) has discussed the issue threadbare and held that no deduction u/s 80P can be allowed where the tax-payer society are dealing with nominal members who are just giving deposits for the purposes for obtaining loans and are in fact not members in real sense . These nominal members are giving deposits to maximise returns and these deposits are used by the said society to advance loans to the members of the first category of members who are real members and thus depositors and borrowers are quite distinct and as such the tax payer in that case was merely an finance company not eligible for deduction u/s 80P , as also principles of mutuality was broken because complete identity between the contributors and participants was lost leading to breach of principles of mutuality disentitling the taxpayer in that case from deduction u/s 80P. The finding of Hon'ble Supreme Court at para 25 to 28 are re-produced here under:-

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

violation of the Co-operative Societies Act. Moreover, it is a co-operative credit society which is not entitled to deduction under Section 80P(2)(a)(i) of the Act.

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

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

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

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

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

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

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

In the instant case before us based on perusal of bye laws filed before the tribunal, it is observed that the assessee society has carved out two classes of members namely ‘Active Members’ and ‘Nominal Members’ . The Active Members as per bye laws are those who have attended General Meeting of the society once in last five years and they have given deposits to assessee society or availed loan from assessee society atleast once in five year but

there is another class namely 'Nominal Members' are those society members who as per bye laws are given membership after retirement. These members do not avail loan nor give deposits. While as per audited financial statements which are placed on record, these nominal members are allowed to keep their post-retirement benefits savings with the assessee society. These nominal members are not allowed to borrow from assessee society based on material on record which is before the tribunal. This aspect whether there is any breach of principles of mutuality on account of loss of complete identity between contributors and participants of surplus requires to be verified from records of the assessee society in context of recent decision of Hon'ble Supreme Court in the case of The Citizen Co-operative Society Limited (supra) so far as these 'Nominal Members' are concerned and to determine whether the assessee society gets disentitled to deduction u/s 80P based on breach of principles of mutuality as identity between contributor and participant was lost which the AO shall determine in set aside proceedings. The

Constitution of India vide Article 265 provides that taxes not to be imposed save by authority of law. No tax shall be levied or collected except by authority of law. The mandate being to levy and collect correct taxes on correct income computed under authority of law. The tribunal has wide powers to pass such orders as it deems fit which is the mandate of Section 254(1) of the 1961 Act. Thus in our considered view under these circumstances, in the interest of justice and fairness to both the parties, the matter need to be restored to the file of the AO for limited purposes of verifying as to the rights, roles, entitlements, duties and responsibilities of these 'Nominal Members' in context of the decision of the Hon'ble Supreme Court in the case of 'The Citizen Co-operative Society Limited(supra) as per our elaborate discussions above. Needless to say that the AO shall provide proper and adequate opportunity of being heard to the assessee in accordance with principles of natural justice in accordance with law . The evidences/contentions submitted by the assessee in its defence shall be admitted by the AO in the

interest of substantial justice before deciding the issue on merits in accordance with law. We order accordingly.

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

6. Considering the fact that the facts of the appeal under consideration are identical and the revenue has raised identical grounds of appeal except variation of disallowances under section 80P. Therefore, respectfully following the order of co-ordinate bench of the Tribunal in ITA No. 862/Mum/2017 dated 31.07.2018, the grounds of appeal for the year under consideration is also restored to the file of Assessing Officer with similar direction.
7. In the result, appeal of the revenue is allowed for statistical purpose.

Order pronounced in the open court on 03.07.2019

Sd/-
(G. MANJUNATHA)
ACCOUNTANT MEMBER

Sd/-
(PAWAN SINGH)
JUDICIAL MEMBER

Mumbai, dated: 03.07.2019

SK P.S.

copy to:

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

BY ORDER

DY/ASSTT. REGISTRAR
ITAT, MUMBAI