

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

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

ITA No.612/Coch/2019 : Asst.Year 2015-2016

M/s.Vilappil Service Co-operative Bank Limited, C/o.Babu S.Nair & Co. Advocates, Pottakuzhi Road Pachalam, Kochi-682 012. PAN : AAAAV4785E.	Vs.	The Income Tax Officer Ward 2(4) Thiruvananthapuram.
(Appellant)		(Respondent)

SA No.81/Coch/2019 : Asst.Year 2015-2016

M/s.Vilappil Service Co-operative Bank Limited, C/o.Babu S.Nair & Co. Advocates, Pottakuzhi Road Pachalam, Kochi-682 012.	Vs.	The Income Tax Officer Ward 2(4) Thiruvananthapuram.
(Applicant)		(Respondent)

Assessee by : Smt.Shamseera C.Ashraf, Advocate

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

Date of Hearing : 05.12.2019	Date of Pronouncement : 09.12.2019
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ORDER

Per George George K, JM :

This appeal at the instance of the assessee is directed against the order of the CIT(A) dated 05.03.2019. The assessee has also preferred a stay application seeking to stay the recovery of outstanding tax arrears. The relevant assessment year is 2015-2016.

2. The brief facts of the case are as follow:

The assessee is a co-operative society registered under the Kerala Co-operative Societies Act, 1969. For the assessment year 2015-2016, the return of income was filed on 05.07.2016 declaring income of Rs.Nil, after claiming

deduction u/s 80P of the I.T.Act. The Assessing Officer passed an order u/s 143(3) of the I.T.Act vide order dated 20.12.2017 disallowing the claim of deduction u/s 80P of the I.T.Act. The reasoning of the Assessing Officer to disallow the claim of deduction u/s 80P(2) of the I.T.Act was that the assessee was doing the business of banking, and therefore, in view of insertion of section 80P(4) of the I.T.Act with effect from 01.04.2007, the assessee will not be entitled to the deduction u/s 80P(2) of the I.T.Act. The Assessing Officer also disallowed the claim of deduction with regard to interest income received by the assessee on investments made with District Co-operative Banks.

3. Aggrieved by the order of assessment denying the claim of deduction u/s 80P(2) of the I.T.Act, the assessee preferred an appeal to the first appellate authority. The CIT(A) allowed the appeal by holding that the assessee was eligible for deduction u/s 80P of the I.T.Act. The interest income received from other banks and treasury also was allowed as deduction u/s 80P(2)(a)(i) of the I.T.Act. In allowing the appeal of the assessee, the CIT(A) followed the judgment of the Hon'ble jurisdictional High Court in the case of *Chirakkal Service Co-operative Co-operative Bank Ltd. v. CIT* [(2016) 384 ITR 490 (Ker.).

4. Subsequently, the CIT(A) issued notice u/s 154 of the I.T.Act proposing to rectify his order passed, in view of the subsequent judgment of the Full 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 assessee objected to the issuance of notice. However, the CIT(A) rejected the objections raised by the assessee and passed an order u/s 154 of the I.T.Act, disallowing the claim of the assessee u/s 80P(2) of the I.T.Act.

5. Aggrieved by the order of the CIT(A), the assessee has filed this appeal before the Tribunal raising the following grounds:-

"A. It is submitted that the order - Annexure C passed by invoking the provisions under Section 154 of the Income Tax Act by the Commissioner, Income Tax (Appeals), is perse illegal, arbitrary, unjust and the same is liable to be set aside.

B. It is submitted that Section 80P has been incorporated in the Income Tax Act with the purpose of encouraging the Co-operative Sector in the country. As per Section 80P of the Income Tax Act, the Co-operative Societies are entitled to deduct the income generated from the business of banking or providing credit facilities to its members. Section 80P(2)(a)(i) speaks about two kinds of income, one is the Income generated from banking and the income generated from providing credit facilities to its members. As per the new provision of Section 80P(4) of the Act, the provisions of Section 80P shall not apply in relation to any Co-operative Bank other than a primary Agricultural Credit Society or a Primary Co-operative Agricultural and Rural Development Bank. The certificate issued by the Joint Registrar of Co-operative Societies, clearly indicates that the appellant society is a registered Co-operative Society and it has been classified as a primary Agricultural Credit Society under Rule 15(1)(A)(3)(a) of the Kerala Co-operative Societies Rules. Admittedly, the appellant is a primary Agricultural Credit Society and not a Co-operative Bank. Therefore, the provision under Section 80P of the Act and its benefits, the

appellant is entitled to get. The appellant society has been formed mainly for the purpose of providing credit facilities to its members for carrying out Agricultural operations and also assisting the farmers for carrying out the agricultural activities. Therefore, the findings in the assessment order, is absolutely arbitrary, unreasonable and illegal.

C. It is submitted that the powers under Section 154 of the Act can be invoked by the authority only when there is mistake apparent from record. The original appellate order was passed by the respondent on 5-3-2019, on which date the law governing the field is the dictum laid down in Chirakkal Service Co-operative Bank Ltd. (supra). Therefore, the rectification order was passed by the appellate authority correctly applying the law and there is absolutely no mistake apparent from records as on the date of passing the order.

D. It is submitted that the judgment in Mavilayi Service Cooperative Bank Ltd., v. Commissioner of Income Tax was rendered by this Hon'ble Court on 19-3-2019, apparently after 5-3-2019 on which date Commissioner, Income Tax (Appeals) had passed the appellate Order Therefore, instead of invoking the provisions under Section 154 of the Act, the matter should have been taken in appeal.

E. It is submitted that the Hon'ble Supreme Court in the judgment Mepco Industries Ltd., Madurai v. Commissioner of Income Tax and another (SLP No. 9979/2008) had elaborately considered the scope of Section 154 of the Income Tax Act, and also considered the question as to what is a rectifiable mistake and come to a conclusion that an order which was passed on the basis of a law as on the date of passing the order and a subsequent change in law is not a ground for rectification and as such the provisions under Section 154 of the Income Tax Act cannot be invoked in such cases.

F. The Hon'ble High Court in Santha S. Shenoy

(1982(135) ITR 39) came to the finding that the rectification contemplated under Section 154 must be a 'rectifiable mistake', which is a mistake in the light of law in force at the time when the order sought to be rectified was passed. Therefore, the appellate order passed in respect of Assessment year 2015-16 on 5-3-2019, ought not have been rectified on 3-9-2019, on basis of a dictum laid down in a later decision rendered by this Hon Court.

G. It is further submitted that as against the judgment in Mavilayi Service Co-operative Bank, rendered by the Full Bench of this Hon Court, several primary agricultural credit societies have already approached the Hon 'ble Supreme Court by filing appeals and all the appeals have been admitted. Therefore, the issue which was raised. decided, has not attained finality and therefore, no rectification or ought to have been passed by the Commissioner, Income Tax (Appeals).

H. The other grounds will be raised at the time of hearing."

6. The learned AR relied on the grounds raised. The learned Departmental Representative, on the other hand, strongly supported the orders of the Income-tax authorities.

7. We have heard the rival submissions and perused the material on record. The Hon'ble jurisdictional High Court in the case of *Chirakkal Service Co-operative Co-operative Bank Ltd. v. CIT [(2016) 384 ITR 490 (Ker.)]* had held that when a certificate has been issued to an assessee by the Registrar of Co-operative Societies characterizing it as primary agricultural credit society, necessarily, the deduction u/s 80P(2) of the I.T.Act has to be granted to the assessee. However, the Full Bench of the Hon'ble Kerala High Court in

the case of *The Mavilayi Service Co-operative Bank Ltd. v. CIT (supra)* had reversed the above findings of the Hon'ble Kerala High Court in the case of *Chirakkal Service Co-operative Co-operative Bank Ltd. v. CIT (supra)*. The Larger Bench of the Hon'ble Kerala High Court in the case of *The Mavilayi Service Co-operative Bank Ltd. v. CIT (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 The CIT(A) had initially allowed the appeal of the assessee and granted deduction u/s 80P(2) of the I.T.Act. Subsequently, the CIT(A) passed order u/s 154 of the I.T.Act, wherein the claim of deduction u/s 80P of the I.T.Act was

denied, by relying on the 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 (supra)*. The CIT(A) ought not to have rejected the claim of deduction u/s 80P(2) of the I.T.Act without examining the activities of the assessee-society. The Full Bench of the Hon'ble jurisdictional High Court in the case of *The Mavilayi Service Co-operative Bank Ltd. V. CIT (supra)* had held that the A.O. 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. In view of the dictum laid down by the Full Bench of the Hon'ble jurisdictional High Court (supra), we restore the issue of deduction u/s 80P(2) to the files of the Assessing Officer. The Assessing Officer shall examine the activities of the assessee and determine whether the activities are in compliance with the activities of a co-operative society functioning under the Kerala Co-operative Societies Act, 1969 and accordingly grant deduction u/s 80P(2) of the I.T.Act.

7.2 As regards the interest on the investments with Co-operative Banks and other Banks, the co-ordinate Bench order of the Tribunal in the case of *Kizhathadiyoor Service Co-operative Bank Limited in ITA No.525/Coch/2014 (order dated 20.07.2016)*, had held that interest income earned from investments with treasuries and banks is part of banking activity of the assessee, and therefore, the said interest income was eligible to be assessed as 'income from business' instead of 'income from other sources'. However, as regards the grant of deduction u/s 80P of the I.T.Act on such interest

income, the Assessing Officer shall follow the law laid down by the Larger Bench of the Hon'ble jurisdictional High Court in the case of *The Mavilayi Service Co-operative Bank Ltd. V. CIT (supra)* and examine the activities of the assessee-society before granting deduction u/s 80P of the I.T.Act on such interest income. It is ordered accordingly.

8. Since we have disposed of the appeal filed by the assessee, the Stay Application filed by the assessee becomes infructuous and the same is dismissed as such.

9. In the result, the appeal filed by the assessee is allowed for statistical purposes and the Stay Application is dismissed.

Order pronounced on this 09th day of December, 2019.

Sd/-
(Chandra Poojari)
ACCOUNTANT MEMBER

Sd/-
(George George K.)
JUDICIAL MEMBER

Cochin ; Dated : 09th December, 2019.
Devdas*

Copy of the Order forwarded to :

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

BY ORDER,

(Asstt. Registrar)
ITAT, Cochin