IN THE INCOME TAX APPELLATE TRIBUNAL
"SMC-A" BENCH : BANGALORE

BEFORE SHRI A. K. GARODIA, ACCOUNTANT MEMBER

ITA No.2347/Bang/2018
Assessment Year : 2013-14

M/s. Divya Jyothi Credit Co-operative Society Limited, Near Shri Ambabhavani Temple, Kirani Bazar, Talikoti, Dt. Vijayapur. **PAN : AAHAS 4265 R**	Vs.	The Income-Tax Officer Ward-7(2)(1), Bengaluru.
APPELLANT		RESPONDENT

Assessee by	:	Shri. M. Nagaraju, Advocate
Revenue by	:	Shri. Ganesh R. Ghale, Standing Counsel for Department

Date of hearing	:	25.11.2019
Date of Pronouncement	:	14.01.2020

O R D E R

This appeal is filed by the assessee and the same is directed against the order of CIT(A)-7, Bengaluru, dated 05.06.2018 for Assessment Year 2013-14. The grounds raised by the assessee are as under:

The Learned CIT (A) -7 was not justified in dismissing the appeal on the grounds that the condonation of delay is not granted.

1. The order under section 143(3) was passed on 31st March 2016 and communicated to the appellant on 1st April 2016.

2. The Appellant filed an appeal on 26th April 2016, well within the stipulated thirty days allowed for filing the appeal before the first appellate authority.

3. Though the appellant wished to file the appeal electronically, the income tax software was not ready and accepting the appeal in electronic mode.

4. Only against specific letter from the learned CIT (A) dated 06.09.2017 delivered to the appellant on 28th Sep 2017, once again the appeal was sent in electronic mode on 14th October 2017

5. The Rule 45. Form of appeal to Commissioner (Appeals), was substituted vide notification dated 1st March 2016 and effective from 1st April 2016.

6. The substituted Rule 45 (2)(b) states that **" (b) in a case where the assesse has the option to furnish the return of income in paper form, by furnishing the for electronically in accordance with clause (a) of Sub-rule (2) or in paper form."**

7. The ITR form to be used and mode of filing the return is specified in Rule 12 (3) states that:

   "**(3)** The return of income referred to in sub-rule (1) may be furnished in any of the following manners, namely:—

   (*i*) furnishing the return in a paper form;

   (*ii*) furnishing the return electronically under digital signature;

   (*iii*) transmitting the data in the return electronically and thereafter submitting the verification of the return in Form ITR-V;

   (*iv*) furnishing a bar-coded return in a paper form:

   Provided that—

   [(a) a person, other than a company and a person required to furnish the return in Form ITR-7, if his or its total income, or the total income in respect of which he is or it is assessable under the Act during the previous year, exceeds five lakh rupees, shall furnish the return for the assessment year 2013-14 and subsequent assessment years in the manner specified in clause (ii) or clause (iii);"

8. As per the Proviso the appellant is not mandatorily required to file the Return of income in Electronic mode.

9. Hence the appeal filed in paper mode is valid and should have been accepted by the Learned CIT(A) and the question of condonation of delay does not arise.

The learned assessing officer is not justified in disallowing the deduction u/s.80P on the ground that the appellant is a Co-operative bank on the wrong interpretation of the provision of the section 80P (4) and 80P (2)(a)(i) of the Act and on the assumptions inter alia that:

1. Nothing in the bye laws of the co-operative society that prevents the society from accepting deposit from public .
2. The membership of the co-operative society is open and not restricted by any classification or covenant.
3. The nominal members do not carry any right in the society vis-à-vis permanent members who alone have the power to participate in election and voting. And
4. The interest income earned by the society is on deposit of idle and surplus funds.

The appellant is registered under Karnataka Co-operative Society Act 1959 and the provisions of the Karnataka Souharda Sahakari Act, 1997 is not applicable.

Ground – 1.

The Appellant is carrying on the activity of providing credit facilities to its members only which is covered under latter part of the section 80P (2)(a)(i) of the Act.

The Society is not carrying on the activity of the Banking and also not registered as a Bank under the Banking Regulation Act. Carrying on the Banking business without obtaining registration under the Banking Regulation Act is an offence and attracts penal and prosecution provisions of the Banking Regulation Act.

Explanation to section 80P (4) clearly mentioned that for the purpose of that sub-section co-operative bank shall have the meaning assigned in Part-V of the Banking Regulation Act, 1949.

The definition given in Section 56 in Part V of the Banking Regulation Act is as under:

" (CC-i): Co-operative Bank means a state co-operative bank, a central co-operative bank and a primary co-operative bank."

"(CC-ii): Co-operative credit society means a co-operative society, the primary object of which is to provide financial accommodation to its members and includes a co-operative land mortgage bank.

It is clear from the above definition the society is not a bank and the provisions of the section 80P(4) are not applicable to this society.

Further, The High Court of Karnataka, Dharwad Bench in the case of Sri Biluru Gurubasava Pattina Sahakari Sangha Niyamitha, Bagalkot V/s. CIT (Appeal No.5006/2013) has held that there is a distinction between Co operative society and Co-operative bank and held that deduction u/s 80 P is allowable to the Co-operative Society.

Ground – 2.

The Actual Fact is **the society has only one class of members i.e., Permanent members who have the power to participate in the election and voting,** and do not have any nominal members.

The fact was reiterated and the relevant details given in the Auditors Report regarding membership was produced before both the authorities. However they have chosen to ignore the facts and went on the assumptions that the bye laws do not prevent accepting deposit from public.

Coming to a conclusion based on assumptions disregarding the facts of the case is bad in law and opposed to natural justice.

Hence the Learned AO and CIT (A) are not correct in arriving at the conclusion that the society is a bank and disallowing the deduction under section 80(P).

The CIT (A) has wrongly placed reliance on the recent decision of Honourable SC in the case of Citizen Cooperative Society Limited Civil Appeal No.10245 of 2017 for disallowing the interest earned by the society.

The Honourable Supreme Court has inter alia held that:

"We may mention at the outset that there cannot be any dispute to the proposition that Section 80P of the Act is a benevolent provision which is enacted by the Parliament in order to encourage and promote growth of co-operative sector in the economic life of the country. It was done pursuant to declared policy of the Government. Therefore, such a provision has to be read liberally, reasonably and

in favour of the assessee (See – Bajaj Tempo Limited, Bombay v. Commissioner of Income Tax, Bombay City-III, Bombay (1992) 3 SCC 78). It is also trite that such a provision has to be construed as to effectuate the object of the Legislature and not to defeat it (See – Commissioner of Income Tax, Bombay & Ors. v. Mahindra and Mahindra Limited & Ors. (1983) 4 SCC 392). Therefore, it hardly needs to be emphasised that all those co-operative societies which fall within the purview of Section 80P of the Act are entitled to deduction in respect of any income referred to in sub-section (2) thereof. Clause (a) of sub-section (2) gives exemption of whole of the amount of profits and gains of business attributable to anyone or more of such activities which are mentioned in sub-section (2)."

(ii) Since we are concerned here with sub-section (i) of clause (a) of sub-section (2), it recognises two kinds of co-operative societies, namely: (i) those carrying on the business of banking and; (ii) those providing credit facilities to its members. 3 (1992) 3 SCC 78 4 (1983) 4 SCC 392 17 20) In the case of Kerala State Cooperative Marketing Federation Limited & Ors. v. Commissioner of Income Tax (1998) 5 SCC 48, this Court, while dealing with classes of societies covered by Section 80P of the Act, held as follows:

"6. The classes of societies covered by Section 80-P of the Act are as follows: (a) Engaged in business of banking and providing credit facilities to its members; xx xx xx

7. We may notice that the provision is introduced with a view to encouraging and promoting growth of cooperative sector in the economic life of the country and in pursuance of the declared policy of the Government. The correct way of reading the different heads of exemption enumerated in the section would be to treat each as a separate and distinct head of exemption. Whenever a question arises as to whether any particular category of an income of a cooperative society is exempt from tax what has to be seen is whether income fell within any of the several heads of exemption. If it fell within any one head of exemption, it would be free from tax notwithstanding that the conditions of another head of exemption are not satisfied and such income is not free from tax under that head of exemption…"

(iii) In the case of Commissioner of Income Tax v. Punjab State Co-operative Bank Ltd. (2008) 300 ITR 24 (Punjab & Haryana H.C.), while dealing with an identical issue, the High Court of Punjab and Haryana held as follows:

"8. The provisions of section 80P were introduced with a view 5 (1998) 5 SCC 48 6 (2008) 300 ITR 24 (Punjab & Haryana H.C.) 18 to encouraging and promoting the growth of the co-operative sector in the economic life of the country and in pursuance of the declared policy of the Government. The different heads of exemption enumerated in the section are separate and distinct heads of exemption and are to be treated as such. Whenever a question arises as to whether any particular category of an income of a co-operative society is exempt from tax, then it has to be seen whether such income fell within any of the several heads of exemption. If it fell within any one head of exemption,.... It means that a co-operative society engaged in carrying on the business of banking and a co-operative society providing credit facilities to its members will be entitled for exemption under this sub-clause. The carrying on the business of banking by a cooperative society or providing credit facilities to its members are two different types of activities which are covered under this sub-clause. xx xx xx

13. So, in our view, if the income of a society is falling within any one head of exemption, it has to be exempted from tax notwithstanding that the condition of other heads of exemption are not satisfied. A reading of the provisions of section 80P of the Act would indicate the manner in which the exemption under the said provisions is sought to be extended. Whenever the Legislature wanted to restrict the exemption to a primary co-operative society, it was so made clear as is evident from clause (f) with reference to a milk co-operative society that a primary society engaged in supplying milk is entitled to such exemption while denying the same to a federal milk co-operative society."

(iv) The aforesaid judgment of the High Court correctly analyses the provisions of Section 80P of the Act and it is in tune with the judgment of this Court in Kerala State Cooperative Marketing Federation Limited (supra).

(v) With the insertion of sub-section (4) by the Finance Act, 2006, which is in the nature of a proviso to the aforesaid provision, it is made clear that such a

deduction shall not be admissible to a co-operative bank. However, if it is a primary agriculture credit society or a primary co-operative agriculture and rural development bank, the deduction would still be provided. Thus, co-operative banks are now specifically excluded from the ambit of Section 80P of the Act.

(vi) Undoubtedly, if one has to go by the aforesaid definition of 'co-operative bank', the appellant does not get covered thereby. It is also a matter of common knowledge that in order to do the business of a co-operative bank, it is imperative to have a licence from the Reserve Bank of India, which the appellant does not possess. Not only this, as noticed above, the Reserve Bank of India has itself clarified that the business of the appellant does not amount to that of a co-operative bank. The appellant, therefore, would not come within the mischief of sub-section (4) of Section 80P.

Further it was held in the said Case on the facts that:

(vii) 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 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 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.

(viii) 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."

(ix) 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.

Ground – 3.

The Learned CIT (A) once again erred in disallowing interest income earned by the society as an income under the head income from other sources.

The Honourable court had held that interest earned on deposit of idle and surplus fund is taxable under the head income from other sources.

But the actual facts in the instant case is that the interest is earned on the deposit of Statutory Reserve Fund and other specific Funds and not out of deposits of idle and surplus funds.

The Society has to mandatorily transfer every year 25% of its profits to a fund Called Statutory Reserve Fund and such reserve funds are to be mandatorily invested as deposits in co-operative banks and can not be utilized by the society unless permitted by the Registrar of Co-operative Societies. Even the interest earned on such reserve funds has to be transferred to Reserve fund and cannot be used for the business.

Hence it is a mandatory deposit of reserve fund and not any surplus or idle funds.

The Society has taken up construction of building for its business and had raised building funds and is being utilized for construction of the building.

Hence treating the interest earned on the deposits as interest earned on idle and surplus fund is not correct and the appellant has rightly treated the same as business in the course of co –operative business

2. In the course of hearing, it was submitted by learned AR of the assessee that the appeal was filed by the assessee before learned CIT(A) on 26.04.2016 against the order of assessment dated 31.03.2016 but such filing of appeal was in paper format and e-appeal was filed by the assessee on 14.10.2017. He drew my attention to para No.4 of the order of CIT(A) and pointed out that in this para, it was noted by learned CIT(A) that a letter was sent to the assessee by speed post on 06.09.2017 in which this was pointed out by learned CIT(A) that w.e.f. 01.03.2016, the assessee was required to file the appeal electronically and the assessee was requested to file reply on this matter in 15days from the date of receipt of this letter. He further submitted that in para No.5 of his order, learned CIT(A) has noted that the assessee filed a reply on 28.09.2017 in which the

assessee requested the learned CIT(A) to treat the appeal filed in paper as valid appeal because when the appeal was filed in paper format on 26.04.2016, e-filing of appeal was not activated and the assessee was advised to file appeal in paper mode and subsequently, the assessee filed the e-appeal also on 14.10.2017 resulting in a delay 570 days in filing e-appeal although paper appeal was filed within the prescribed time. But learned CIT(A) has not condoned the delay in filing e-appeal. He submitted that in the facts of the present case, the delay in filing e-appeal should be condoned and the matter may be restored back to the file of the CIT(A) for a decision on merit.

3. Learned DR of the Revenue supported the order of the CIT(A).

4. I have considered the rival submissions. In view of this fact that the requirement of filing e-appeal was prescribed w.e.f.01.03.2016 and the assessee was required to file the appeal within 30.04.2016 which the assessee has done by filing the appeal on 26.04.2016 although in paper format and this is the explanation of the assessee that by this time, e-filing of the appeals was not activated. In para 7.1 of his order, it is noted by learned CIT(A) that as per CBDT Circular No.20/16 dated 26.05.2016, it was noted by the CBDT that it has come to the notice of the Board that although e-filing of appeal is compulsory from 01.03.2016, in some cases, the tax payers who are required to e-file the appeal before CIT(A) were unable to do so due to lack of knowledge of e-filing procedure / technical issues in e-filing also. This is also noted by the CBDT in the said circular that EVC functionality for verification of e-appeals was made operation from 12.05.2016 for individuals and from 19.05.2016 for other persons. Therefore, the time limit for filing appeal before learned CIT(A) by e-appeal was extended up to 15.06.2016. Hence it is seen that this claim of the assessee is correct that when the assessee filed the appeal in paper format, the facility of e-filing of appeal was not operational. Considering all these facts, I feel it proper to condone the delay of 570 days in filing the e-appeal before the

CIT(A) and after doing so, I restore the entire matter back to the CIT(A) for a decision on merit because as per the impugned order, there is no decision on merit. Learned CIT(A) should decide the issue on merit after providing reasonable opportunity of being heard to both the sides. In view of this decision, no adjudication on merit is called for at the present stage.

5. In the result, appeal of the assessee is allowed for statistical purposes.

Pronounced in the open court on the date mentioned on the caption page.

Sd/-
(A. K. GARODIA)
Accountant Member

Bangalore.
Dated: 14th January, 2020.
/NS/*

Copy to:

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

By order

Assistant Registrar,
ITAT, Bangalore.