

आयकर अपीलीय अधिकरण “एफ” न्यायपीठ मुंबई में।
IN THE INCOME TAX APPELLATE TRIBUNAL
“F” BENCH, MUMBAI

माननीय श्री विकास अवस्थी, न्यायिक सदस्य एवं
 माननीय श्री मनोज कुमार अग्रवाल, लेखा सदस्य के समक्ष।
BEFORE HON’BLE SHRI VIKAS AWASTHY, JM AND
HON’BLE SHRI MANOJ KUMAR AGGARWAL, AM

(Hearing through Video Conferencing Mode)

आयकरअपील सं./ I.T.A. No.1763/Mum/2020
 (निर्धारण वर्ष / Assessment Year: 2015-16)

&

आयकरअपील सं./ I.T.A. No.1762/Mum/2020
 (निर्धारण वर्ष / Assessment Year: 2016-17)

Jai Hind Co-operative Housing Society Ltd. Plot No.51, N.S.Road No.11 JVPD Scheme, Vile Parle(W) Mumbai-400 049	बनाम / Vs.	ACIT-25(2) 2 nd Floor, Room No.241 Kautilya Bhavan, G-Block BKC, Bandra(E) Mumbai-400 051
स्थायीलेखासं./जीआइआरसं./PAN/GIR No. AAAAJ-2782-R		
(□ पीलार्थी/ Appellant)	:	(प्रत्यर्थी / Respondent)
Assessee by	:	Shri Rajesh R. Shah-Ld. AR
Revenue by	:	Shri Pratap Singh-Ld.CIT DR
सुनवाई की तारीख/ Date of Hearing	:	10/02/2021
घोषणा की तारीख / Date of Pronouncement	:	12/02/2021

आदेश / O R D E R

Manoj Kumar Aggarwal (Accountant Member)

1. Aforesaid appeals by assessee for Assessment Years [in short referred to as ‘AY’] 2015-16 & 2016-17 contest validity of revisional jurisdiction u/s 263 as exercised by Ld. Pr. Commissioner of Income-Tax-25, Mumbai [in short referred to as ‘Pr. CIT’] vide separate orders both dated 03/03/2020. Since facts leading to

invocation of jurisdiction u/s 263 stem from identical set of facts, it is admitted position that adjudication in any year shall equally apply to other year also.

2. For the purpose of adjudication, facts from AY 2015-16 have been referred to by us. The grounds raised by the assessee read as under: -

1. On the facts and circumstances of the case, the Principal CIT -25, Mumbai, erred in passing an order under section 263 of the Act though provisions of S.263 are not applicable to the facts of the case and in law.

2. On the facts and circumstances of the case, the Principal CIT -25, Mumbai has wrongly held that the order is erroneous and prejudice to the interest of the revenue though the Assessing Officer has applied his mind and passed order after considering the full facts available on records. The Principal CIT-25, Mumbai has no jurisdiction to pass an order on account of change of opinion only.

3. The Principal CIT-25, Mumbai, failed to appreciate that:

a) Principal CIT - 25 has no power to revise order merely because Principal CIT is of other view or in his opinion order passed has different view than that of AO.

b) Principal CIT - 25 cannot set aside order to carry out an enquiry/verification, he has to decide what is to be done. The Principal CIT cannot set aside the case to the Assessing Officer for further enquiries or to decide whether the findings recorded are erroneous without a finding that the order is erroneous and how that is so. A mere setting aside to the Assessing Officer implies that the CIT has not decided whether the order is erroneous but has directed the Assessing Officer to decide the aspect which is not permissible.

c) Principal CIT - 7 erred in not appreciating the reply filed in detailed along with evidences which were on record and also not considering the fact that the assessment taken up for scrutiny only to verify the deduction claimed.

4. On the facts and circumstances of the case and in law, the Principal CIT - 25 erred in setting aside the order though there is no error in the order as the AO has allowed deduction under section 80P(2)(d) after verification and considering the various judgments available before him and therefore order is not an erroneous order and hence the same cannot be subject to provisions of section 263.

5. Without prejudice to above the Principal CIT - 25 erred in not considering that the deduction is otherwise allowable under Section 80(2)(d) in respect of interest received from Cooperative Society.

3. We have carefully heard the rival submissions and perused relevant material on record. The judicial precedents have duly been deliberated upon. The prime argument of Ld. AR revolve around the fact that the issue which is subject matter of S.263 jurisdiction was duly considered by Ld. AO during original assessment proceedings and a plausible / possible view was taken in the matter, which could not be said to be contrary to law. The Ld. CIT-DR, on the other hand, relied upon the later decision of Hon'ble Karnataka High Court rendered in **Pr. CIT V/s Totagars Co-operative Sale Society (2017 395 ITR 611)** for the submissions that the interest earned by assessee cooperative society from cooperative banks was not eligible for deduction u/s 80P(2)(d) and since the deduction was erroneously granted to the assessee, the same made the assessment order erroneous and prejudicial to the interest of the revenue amenable to revisional jurisdiction u/s 263. Therefore, the revision as done by Ld. Pr.CIT was perfectly justified.

4. The material facts are that an assessment was framed against the assessee u/s 143(3) vide order dated 08/11/2017. The assessee's case was selected for limited scrutiny and notice u/s 143(2) was issued on 28/07/2016 wherein one of the issue identified for verification was 'deduction under Chapter-VI-A' as claimed by the assessee for Rs.61.40 Lacs while filing the return of income. This deduction was claimed u/s 80P(2)(d) against interest earned by the assessee from cooperative banks. The assessee is a cooperative society. The assessee, vide reply dated 16/08/2017, relying upon the decision of this Tribunal in **Lands end Co-**

operative Housing Society Ltd. (ITA No.3566/Mum/2014 dated 15/01/2016), defended the deduction so claimed. The attention was drawn to the fact that the said decision already considered the decision of Hon'ble Apex Court rendered in **Totgars Co-operative Sale Society Ltd. V/s ITO (2010 322 ITR 283)** but the same was found to be rendered in the context of Sec.80P(2)(a)(i) and not in the context of Sec. 80P(2)(d) and hence distinguishable.

5. However, vide letter dated 13/09/2017, the assessee was again show-caused as to why the interest so derived was not to be disallowed. The same was duly responded to by the assessee vide submissions dated 16/10/2017 wherein the stand as stated above was reiterated. After considering the assessee's replies and submissions, the assessment was framed on 08/11/2017 wherein Ld. AO chose to accept the returned income filed by the assessee.

6. Upon perusal of above factual matrix, it is quite evident that a specific query was raised by Ld. AO during original assessment proceedings regarding deduction claimed u/s 80P(2)(d) which were duly responded to by the assessee. The decision of this Tribunal rendered in **Lands End Co-operative Housing Society Ltd. (ITA No.3566/Mum/2014 dated 15/01/2016)** was brought to the notice of Ld. AO in support of the deduction. Therefore, it could be concluded that Ld. AO was clinched with the issue of deduction u/s 80P(2)(d) and assessee's claim was allowed after due application of mind and a view was already taken in the matter.

7. Subsequently, Ld. Pr. CIT, upon perusal of case records, opined that the order would require revision u/s 263 since the deduction u/s 80P(2)(d) as granted by Ld. AO on account of

interest received by assessee from cooperative bank was required to be denied. The failure to do so has resulted into under assessment of income. Accordingly, a show cause notice was issued to the assessee on 04/12/2019 proposing revision of the order. In the notice, it was pointed out that that cooperative bank are commercial bank which do not fall within the purview of cooperative society and therefore, income so earned would not be eligible for deduction u/s 80P(2)(d). Since the assessment was completed without verifying this issue, the order would require revision u/s 263.

8. The assessee defended the assessment order, *inter-alia*, by submitting that the case law of Hon'ble Apex Court rendered in **Totgars Co-operative Sale Society Ltd. V/s ITO (2010 322 ITR 283)** was rendered in the context of Sec. 80P(2)(a)(i) and not in the context of Sec. 80P(2)(d), as already considered by Mumbai Tribunal in **Lands End Co-operative Housing Society Ltd. (ITA No.3566/Mum/2014 dated 15/01/2016)**. It was also submitted that the issue was specifically verified and a view was taken in the matter which was one of plausible view. It was not a case of omission on the part of Ld. AO to verify the same. It was also pleaded that co-operative banks from which the assessee earned interest income were also cooperative societies under the Maharashtra Cooperative Societies Act. Finally relying upon various judicial pronouncement holding field of validity of jurisdiction u/s 263, it was submitted that there was no error in the assessment order and accordingly, a plea was raised to drop the proceedings u/s 263.

9. However, not convinced with assessee's submissions as well as explanations, Ld. Pr.CIT, invoking Explanation-2 to Sec.263, opined that the issues were not inquired to by Ld. AO which made the order erroneous as well as prejudicial to the interest of the revenue. Accordingly, the assessment order was set aside with a direction to Ld. AO to pass a fresh assessment order considering the issues raised in notice u/s 263. Aggrieved as aforesaid, the assessee is in further appeal before us assailing invocation of revisional jurisdiction u/s 263.

10. Upon careful consideration, as already noted by us in para-6 above, a specific query was raised by Ld. AO during original assessment proceedings regarding deduction claimed u/s 80P(2)(d) which was duly responded to by the assessee. The decision of this Tribunal rendered in **Lands End Co-operative Housing Society Ltd. (ITA No.3566/Mum/2014 dated 15/01/2016)** was brought to the notice of Ld. AO in support of the deduction. The Ld. AO was clinched with the issue of deduction u/s 80P(2)(d) and assessee's claim was allowed after due application of mind and a view was already taken in the matter. Therefore, the allegation of Ld. Pr. CIT that the deduction was allowed without verification and necessary inquiries is bereft of any merits. We find that it not a case of 'no inquiry' but it is a case wherein a plausible / possible view has been taken by Ld. AO after due consideration of issue of deduction u/s 80P(2)(d).

11. The only question that survive for consideration is that whether the view taken by Ld. AO was in accordance with law or not ? We find that the assessee had relied upon favorable decision

of this Tribunal in **Lands End Co-operative Housing Society Ltd. (ITA No.3566/Mum/2014 dated 15/01/2016)** which was rendered after considering the decision of Hon'ble Apex Court in **Totgars Co-operative Sale Society Ltd. V/s ITO (2010 322 ITR 283)**. Further, at the time of framing of assessment on 08/11/2017, the favorable decision of Hon'ble Karnataka High Court rendered in **Pr. CIT V/s Totgars Co-operative Sale Society Ltd. (392 ITR 74 05/01/2017)** holding the view that co-operative bank should be considered as co-operative societies, was also available. This decision has similarly distinguished the cited decision of Hon'ble Apex Court. However, there was subsequent decision of Hon'ble Karnataka High Court in **Pr. CIT V/s Totgars Co-operative Sale Society Ltd. (395 ITR 611 16/06/2017)** which has taken a view favorable to the revenue. Therefore, it could be observed that there were two possible views on the issue at the time of framing of assessment.

12. Dealing with similar conflicting position, Mumbai Tribunal in the case of **Kaliandas Udyog Bhavan Premises Co-op Society Ltd. V/s ITO (ITA No.547/Mum/2017 dated 25/04/2018)** relying upon the order of Hon'ble High Court of Bombay in the case of **K. Subramanian V/s Siemens India Ltd. (1983 15 Taxman 594 / 156 ITR 11)** held that where there are conflicting decisions of non-jurisdictional High Courts then a view which is in favor of the assessee is to be preferred as against that taken against him. Hence, the coordinate bench chose to take a view that interest income earned by a co-operative society on its investments held with a co-operative bank would be eligible for claim of deduction

under Sec.80P(2)(d) of the Act. Similar favorable view has been taken in various subsequent decisions of this Tribunal which has already been tabulated by Ld. AR in the legal paper-book.

13. Considering the above legal position and in view of the fact that no decision of the jurisdictional High court holding the field is available, it could safely be concluded that the issue was a debatable one and the view taken by Ld.AO was one of the possible view which could not be said to be contrary to law. Therefore, the assessment order could not be held to be erroneous and prejudicial to the interest of revenue which would require revision u/s 263.

14. The Hon'ble Supreme Court in **Malabar Industrial Co. Ltd. V/s CIT (243 ITR 83 10/02/2000)** has held that the phrase 'prejudicial to the interests of the revenue' has to be read in conjunction with an erroneous order passed by the Assessing Officer. Every loss of revenue as a consequence of an order of the Assessing Officer cannot be treated as prejudicial to the interests of the revenue. For example, when an Income-tax Officer adopted one of the courses permissible in law and it has resulted in loss of revenue; or where two views are possible and the Income-tax Officer has taken one view with which the Commissioner does not agree, it cannot be treated as an erroneous order prejudicial to the interest of the revenue, unless the view taken by the Income-tax Officer is unsustainable in law. The said principal has been reiterated by Hon'ble Court in its subsequent judgment titled as **CIT V/s Max India Ltd. (295 ITR 282)**. Similar principal has been

followed by jurisdictional High Court in **Grasim Industries Ltd. V/s CIT (321 ITR 92)**.

The Hon'ble Delhi High Court, **CIT V/s Vikas Polymers (194 Taxman 57 16/08/2010)** observed that as regards the scope and ambit of the expression "erroneous", Hon'ble Bombay High Court in **CIT vs. Gabriel India Ltd. [1993 203 ITR 108 (Bombay)]**, held with reference to Black's Law Dictionary that an "erroneous judgment" means "one rendered according to course and practice of Court, but contrary to law, upon mistaken view of law; or upon erroneous application of legal principles" and thus it is clear that an order cannot be termed as "erroneous" unless it is not in accordance with law. If an Income-tax Officer acting in accordance with law makes a certain assessment, the same cannot be branded as "erroneous" by the Commissioner simply because, according to him, the order should have been written differently or more elaborately. The Section does not visualize the substitution of the judgment of the Commissioner for that of the Income-tax Officer, who passed the order unless the decision is not in accordance with law.

15. Therefore, on the facts and circumstances, the revisional jurisdiction as invoked by Ld. Pr. CIT could not be held to be valid under law. By quashing the order dated 03/03/2020, we allow assessee's appeal.

ITA No.1762/Mum/2020

16. As already narrated in opening paragraphs, the jurisdiction u/s 263 in this year has been triggered on identical facts and circumstances to deny deduction u/s 80P(2)(d). We find that similar

queries were raised by Ld. AO while framing original assessment proceedings and the deduction was allowed to the assessee. However, Ld. Pr. CIT opined that the deduction would not be available to the assessee and accordingly, the order was proposed to be revised. Facts and circumstances being pari-materia the same, our adjudication as in AY 2015-16 shall *mutatis-mutandis* apply to this year also. Resultantly, the revision order passed u/s 263 stand quashed.

Conclusion

17. Both the appeal stands allowed in terms of our above order.

Order pronounced on 12th February, 2021.

Sd/- (Vikas Awasthy) न्यायिक सदस्य / Judicial Member	Sd/- (Manoj Kumar Aggarwal) लेखा सदस्य / Accountant Member
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मुंबई Mumbai; दिनांक Dated : 12/02/2021
Sr.PS, Kasarla Thirumalesh

आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकरआयुक्त(अपील) / The CIT(A)
4. आयकरआयुक्त/ CIT– concerned
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
6. गार्डफाईल / Guard File

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt.Registrar)
आयकरअपीलीयअधिकरण, मुंबई / ITAT, Mumbai.