

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

**BEFORE SHRI N.V. VASUDEVAN, VICE PRESIDENT
AND SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER**

ITA No.650/Bang/2020
Assessment Year : 2015-16

M/s. Jyothi Pattin Souhard Sahakari Niyamit, APMC, Gadag. PAN : AAAAJ 2120 P	Vs.	The Principal Commissioner of Income Tax, Hubballi.
APPELLANT		RESPONDENT

Appellant by	:	Shri. R. Chandrashekar, Advocate
Respondent by	:	Ms. Neera Malhotra, CIT(DR)(ITAT), Bengaluru

Date of hearing	:	10.08.2021
Date of Pronouncement	:	13.08.2021

ORDER

Per N.V. Vasudevan, Vice President

This is an appeal by the assessee against the order dated 11.03.2020 of Pr.CIT, Hubballi, passed under section 263 of the Income Tax Act, 1961 (hereinafter called 'the Act'), in relation to Assessment Year 2015-16.

2. The assessee is a Co-operative Society registered under the Karnataka State Co-operative Societies Act, 1959 and is engaged in the business of banking / providing credit facilities to its members. In the assessment completed under section 143(3) of the Act, dated 16.06.2017, for Assessment Year 2015-16, the AO allowed the claim of the assessee for deduction of a sum of Rs.4,92,897/- being interest earned on investments in banks u/s.80P(2)(a)(i) of the Act. In the proceedings under section 263 of the Act, the Pr.CIT took the view that the aforesaid order of the AO was erroneous and prejudicial to the interest of the Revenue for the

reason that interest income amounting to Rs.4,92,897/- was received by the assessee on deposits with co-operative banks and therefore deduction on the aforesaid sum ought to not have been allowed to the assessee by the AO either under section 80P(2)(a)(i) or 80P(2)(d) of the Act. Accordingly, the PR.CIT, Mysore issued show cause notice dated 06.03.2020 to the assessee. The PR.CIT had in a show cause notice referred to the decision of the Hon'ble Karnataka High Court in the case of PR.CIT Vs. Totagars Co-operative Sale Society, 395 ITR 611 for the proposition that the assessee was not entitled to deduction under section 80P(2)(d) of the Act on the interest earned from deposits with co-operative banks.

3. The assessee, in reply to the aforesaid show cause notice of the Pr.CIT, pointed out that the claim for deduction on the aforesaid sum was made under section 80P(2)(a)(i) and not under 80P(2)(d) of the Act and therefore the reliance placed by the Pr.CIT in the show cause notice on the decision of the Hon'ble Karnataka High Court in the case of Totagars Co-operative Sale Society 395 ITR 611(Karn) (supra) will not be applicable. The assessee reiterated its stand that the aforesaid interest income was from the business of providing credit facility to its members and therefore the deduction allowed under section 80(2)(a)(i) of the Act by the AO was correct.

4. The Pr.CIT however did not agree with the aforesaid submissions of the assessee. He referred to the decision of the Hon'ble Karnataka High Court rendered in the case of Tumkur Merchants Souharda Credit Co-operative Ltd., Vs. ITO 230 taxman 309 wherein it was held that interest earned from short term deposits with banks by a society providing credit facilities to its members from capital not immediately required to be lent to the members and which cannot be kept idle, such interest is attributable to

the profits and gains of business of providing credit facilities to its members. The Pr.CIT observed that in a subsequent decision rendered by the Hon'ble Karnataka High Court in the case of Totagars Co-operative Sale Society 295 ITR 611(Karn)(supra), the Karnataka High Court held that the said decision was distinguishable and was contrary to the law laid down by the Hon'ble Supreme Court in the case of Totagars Co-operative Sale Society 322 ITR 283 (SC) and therefore interest income is taxable under the head income from other sources and will not be entitled to deduction under section 80P(2)(a)(i) of the Act. The Pr.CIT accordingly directed the AO to revise the Order of Assessment by bringing to tax the interest income in question. Aggrieved by the aforesaid order of the Pr.CIT, the assessee has preferred the present appeal before the Tribunal.

5. We have heard the submissions of the learned Counsel for the assessee and the learned DR. The learned counsel for the assessee submitted that the issue dealt with by the Hon'ble Supreme Court in the case of Totgars (supra) was regarding taxability of the interest income arising on the surplus invested in short term deposits and securities which surplus was not required for business purposes. The deposits were made out sale proceeds of the members of the assessee whose produce was marketed by the assessee and the money did not belong to the assessee. He pointed out that interest on such deposits/securities, which strictly speaking accrues to the members' account, could not be taxed as business income under section 28 of the Act and it was held by the Hon'ble Supreme Court that such interest income would come in the category of 'income from other sources', hence, such interest income would be taxable under section 56 of the Act and hence not attributable to the business of providing credit facility to its members. It was submitted the ratio of the decision in case of Totgars Co-op. Sale Society (supra), as observed by Supreme Court itself, was confined only to the facts of the case before it & accordingly

cannot be applied in general to all kinds of co-op. societies. It was submitted that in the case of Totgars, the Hon'ble Supreme Court had not spelt out anything with regard to operational funds in the hands of pure Co-operative Credit Societies and the ratio was applicable to co-operative sale societies only. It was submitted that the Assessee in Totgars case had admitted that it had invested surplus funds, which were not immediately required for the purpose of its business, in short term deposits. The surplus funds arose out of the amount retained from marketing the agricultural produce of the members. The Assessee in Totgars case carried on two activities, namely, (i) acceptance of deposit and lending by way of deposits to the members; and (ii) marketing the agricultural produce; and (d) that the surplus had arisen emphatically from marketing of agricultural produces. Whereas, in the case of co-op. credit societies, generally, it doesn't carry out any activity except in providing credit facilities to its members and that the funds are operational funds. The only fund available with the pure credit societies is deposits from its members and, thus, there are no surplus funds as such.

6. It was further submitted that the decision relied upon by the Pr.CIT in the impugned order in the case of Totagars Co-operative Sale Society 395 ITR 611 (Karn) was the case the Hon'ble Court was dealing with the claim of deduction under section 80P(2)(d) whereas in the present case, the deduction is claimed under section 80P(2)(a)(i) of the Act. The learned DR relied on the order of CIT and reiterated the stand of the revenue as contained in the impugned order.

7. We have carefully considered the rival submissions. An order passed contrary to a decision of the Hon'ble Jurisdiction High Court would be in the nature of an order prejudicial to the interest of the revenue being an order passed on an incorrect application of law. In the case of Malabar

Industrial Co. Ltd. vs. CIT[2000] 243 ITR 83(SC), the Supreme Court held that there must be two conditions namely that the order of assessment is erroneous and that the order is prejudicial to the interests of the Revenue which must be satisfied before the Commissioner may invoke his powers under Section 263 of the Act. The Court held that every loss of tax cannot be said to be prejudicial to the interests of the Revenue. If two views are possible, and the AO has adopted one of those views, the order of assessment cannot be prejudicial to the interests of the Revenue. However, when the Assessing Officer does not apply his mind to the issue at hand or violates any of the principles of natural justice, the order shall be prejudicial to the interests of the Revenue. Also, an incorrect assumption of facts or incorrect application of law by the AO would make the order of assessment erroneous and prejudicial to the interests of the Revenue.

8. The Hon'ble Supreme Court in the case of The Totgars Co-operative Sale Society Ltd. Vs. ITO 322 ITR 283 (SC) held that Income from utilisation of surplus funds was taxable under the head income from other sources, and therefore not eligible for deduction u/s 80P. The Hon'ble Karnataka High Court in case of Tumkur Merchants Souharda Credit Cooperative Ltd. vs. ITO (230 Taxman 309), was dealing with a case where deduction u/s.80P(2)(a)(i) of the Act was claimed on interest from the deposits made in a nationalized bank out of the amounts which was used by the assessee for providing credit facilities to its members. The assessee claimed that the said interest amount is attributable to the credit facilities provided by the assessee and forms part of profits and gains of business. The Hon'ble Karnataka High Court after considering SC judgment in case of Totgars (supra) held that since the word income is qualified by the expression "attributable" to the business of Banking is used in Sec.80P(2)(a)(i) of the Act, it has to receive a wider meaning and should be interpreted as covering receipts from sources other than the actual conduct

of business. The Court held a Cooperative Society which is carrying on the business of providing credit facilities to its members, earns profits and gains of business by providing credit facilities to its members. The interest income so derived on the capital, if not immediately required to be lent to the members, they cannot keep the said amount idle. If they deposit this amount in bank so as to earn interest, the said interest income is attributable to the profits and gains of the business of providing credit facilities to its members only. The society is not carrying on any separate business for earning such interest income. The income so derived is the amount of profits and gains of business attributable to the activity of carrying on the business of banking or providing credit facilities to its members by a co-operative society and is liable to be deducted from the gross total income under Section 80P of the Act. The Hon'ble Court also distinguished the decision of the Hon'ble Supreme Court in the case of Totgars (supra) by observing that the Supreme Court was dealing with a case where the assessee-Cooperative Society, apart from providing credit facilities to the members, was also in the business of marketing of agricultural produce grown by its members. The sale consideration received from marketing agricultural produce of its members was retained in many cases. The said retained amount which was payable to its members from whom produce was bought, was invested in a short-term deposit/security. Such an amount which was retained by the assessee - Society was a liability and it was shown in the balance sheet on the liability side. Therefore, to that extent, such interest income cannot be said to be attributable either to the activity mentioned in Section 80P(2)(a)(i) of the Act or under Section 80P(2)(a)(iii) of the Act. Therefore in the facts of the said case, the Apex Court held the assessing officer was right in taxing the interest income indicated above under Section 56 of the Act. The Court also observed that even the Hon'ble Supreme made it clear that they are confining the said judgment to the facts of that case. The Court therefore

concluded that Hon'ble Supreme Court was not laying down any law. Similar view taken in Guttigedarara Credit Co-operative Society Ltd. vs. ITO [2015] 377 ITR 464 (Karnataka). In the case of **PRINCIPAL COMMISSIONER OF INCOME TAX AND ANOTHER vs. TOTAGARS CO-OPERATIVE SALE SOCIETY 392 ITR 0074 (Karn)** in the context of deduction u/s.80P(2)(d) of the Act, it was held that Sec.80P(2)(d) of the Act allows deduction in respect of any income by way of interest or dividends derived by the co-operative society from its investments with any other co-operative society, the whole of such income. The Hon'ble Court held that that the aforesaid Supreme Court's decision in the case of Totgars (supra), was not applicable to deduction u/s.80P(2)(d) of the Act, because the said decision was rendered with regard to deduction under Section 80P(2)(a)(i) of the Act and not under Section 80P(2)(d) of the Act.

9. However, the Hon'ble Karnataka High Court in the case of **PRINCIPAL COMMISSIONER OF INCOME TAX AND ANOTHER vs. TOTAGARS CO-OPERATIVE SALE SOCIETY 395 ITR 0611 (Karn)** took a different view and held that interest income earned on deposits whether with any other bank will be in the nature of income from other sources and not income from business and therefore the deduction u/s.80P(2)(d) of the Act cannot be allowed to the Assessee. The Hon'ble Court followed decision of Hon'ble Gujarat High Court in the case of SBI Vs. CIT 389 ITR 578(Guj.) in which the Hon'ble Gujarat High Court dissented from the view taken by the Hon'ble Karnataka High Court in the case of Tumkur Merchants case (supra) The Hon'ble Court had to deal with the following substantial question of law:

"(I)Whether the assessee, Totagar Co-operative Sale Society, Sirsi, is entitled to 100% deduction under Section 80P(2)(d) of the Income Tax Act, 1961 (for short 'the Act') in respect of whole of its income by way of interest earned by it during the relevant

Assessment Years from 2007-2008 to 2011-2012 on the deposits or investments made by it during these years with a Co-operative Bank, M/s. Kanara District Central Co-operative Bank Limited?

(II) Whether the Supreme Court decision in the case of the present respondent assessee, Totgar Co-operative Sale Society Limited itself rendered on 08th February 2010, in Totgar's Co-operative Sale Society Limited v. Income Tax Officer, reported in (2010) 322 ITR 283 SC : (2010) 3 SCC 223 for the preceding years, namely Assessment Years 1991-1992 to 1999-2000 (except Assessment Year 1995-1996) holding that such interest income earned by the assessee was taxable under the head 'Income from Other Sources' under Section 56 of the Act and was not 100% deductible from the Gross Total Income under Section 80P(2)(a)(i) of the Act, is not applicable to the present Assessment Years 2007-2008 to 2011-2012 involved in the present appeals and therefore, whether the Income Tax Appellate Tribunal as well as CIT (Appeals) were justified in holding that such interest income was 100% deductible under Section 80P(2)(d) of the Act?"

10. The Hon'ble Court held that such interest income is not income from business but was income chargeable to tax under the head income from other sources and therefore there was no question of allowing deduction u/s.80P(2)(d) of the Act. The following points can be culled out from the aforesaid decision:

1. What Section 80P(2)(d) of the Act, which was though not specifically argued and canvassed before the Hon'ble Supreme Court, envisages is that such interest or dividend earned by an assessee co-operative society should be out of the investments with any other co-operative society. The words 'Co-operative Banks' are missing in clause (d) of subsection (2) of Section 80P of the Act. Even though a co-operative bank may have the corporate body or skeleton of a co-operative society but its business is entirely different and that is the banking business, which is governed and regulated by the provisions of the Banking Regulation Act, 1949. Only the Primary Agricultural Credit Societies with their limited work of providing credit facility to its members continued to be governed by the ambit and

scope of deduction under Section 80P of the Act. (Paragraph 13 of the Judgment).

2. The banking business, even though run by a Co-operative bank is sought to be excluded from the beneficial provisions of exemption or deduction under Section 80P of the Act. The purpose of bringing on the statute book sub-section (4) in Section 80P of the Act was to exclude the applicability of Section 80P of the Act altogether to any co-operative bank and to exclude the normal banking business income from such exemption/deduction category. The words used in Section 80P(4) are significant. They are: "The provisions of this section shall not apply in relation to any co-operative bank other than a primary agricultural credit society". **The words "in relation to" can include within its ambit and scope even the interest income earned by the respondent-assessee, a co-operative Society from a Co-operative Bank. This exclusion by Section 80P(4) of the Act even though without any amendment in Section 80P(2)(d) of the Act is sufficient to deny the claim of the respondent assessee for deduction under Section 80P(2)(d) of the Act.** The only exception is that of a primary agricultural credit society. (Paragraph-14 of the judgment)
3. The amendment of Section 194A(3)(v) of the Act excluding the Co-operative Banks from the definition of "Co- operative Society" by Finance Act, 2015 and requiring them to deduct income tax at source under Section 194A of the Act also makes the legislative intent clear that the Co-operative Banks are not that specie of genus co-operative society, which would be entitled to exemption or deduction under the special provisions of Chapter VIA in the form of Section 80P of the Act. (Paragraph 15 of the Judgment)
4. If the legislative intent is so clear, then it cannot be contended that the omission to amend Clause (d) of Section 80P(2) of the Act at the same time is fatal to the contention raised by the Revenue before this Court and sub silentio, the deduction should continue in respect of interest income earned from the co-operative bank, even though the Hon'ble Supreme Court's decision in the case of Respondent assessee itself is otherwise.(Paragraph 16 of the Judgment)
5. On the decision of the earlier decision of the Hon'ble Karnataka High Court referred to in the earlier part of this order, the Court held that it did not find any detailed discussion of the facts and law pronounced

by the Hon'ble Supreme Court in the case of the respondent assessee (Totgars Sales Co-operative society) and hence unable to follow the same in the face of the binding precedent laid by the Hon'ble Supreme Court. The Hon'ble Court observed that in paragraph 8 of the said order passed by a co- ordinate bench that the learned Judges have observed that

"the issue whether a co-operative bank is considered to be a co- operative society is no longer res integra, for the said issue has been decided by the Income Tax Appellate Tribunal itself in different cases.....".

No other binding precedent was discussed in the said judgment. Of course, the Bench has observed that a Co-operative Bank is a specie of the genus co- operative Society, with which we agree, but as far as applicability of Section 80P(2) of the Act is concerned, the applicability of the Supreme Court's decision cannot be restricted only if the income was to fall under Section 80P(2)(a) of the Act and not under Section 80P(2)(d) of the Act.(Paragraph-18 of the Judgment)

6. The Court finally concluded that it would not make a difference, whether the interest income is earned from investments/deposits made in a Scheduled Bank or in a Co-operative Bank. Therefore, the said decision of the Co-ordinate Bench is distinguishable and cannot be applied in the present appeals, in view of the binding precedent from the Hon'ble Supreme Court." (Paragraph 19 of the Judgment)

11. The Hon'ble Karantaka High Court in the aforesaid decision also placed reliance on a decision of the Hon'ble Gujarat High Court in the case of **STATE BANK OF INDIA (SBI) vs. COMMISSIONER OF INCOME TAX** 389 ITR 0578 (Guj) did not agree with the view taken by the Karnataka High Court in Tumkur Merchants Souharda Credit Cooperative Ltd. (supra) that the decision of the Supreme Court in Totgars Co-operative Sale Society (supra) is restricted to the sale consideration received from marketing agricultural produce of its members which was retained in many

cases and invested in short term deposit/security and that the said decision was confined to the facts of the said case and did not lay down any law. The Hon'ble Gujarat High Court held that in the case of Totgars Co-operative Sale Society (supra) decided by Hon'ble Supreme Court, the court was dealing with two kinds of activities: interest income earned from the amount retained from the amount payable to the members from whom produce was bought and which was invested in short-term deposits/securities; and the interest derived from the surplus funds that the assessee therein invested in short-term deposits with the Government securities. The Hon'ble Gujarat High Court in this regard referred to the decision of the Karnataka High Court from which the matter travelled to the Supreme Court wherein it was the case of the assessee that it was carrying on the business of providing credit facilities to its members and therefore, the appellant-society being an assessee engaged in providing credit facilities to its members, the interest received on deposits in business and securities is attributable to the business of the assessee as its job is to provide credit facilities to its members and marketing the agricultural products of its members. The Hon'ble Gujarat High Court therefore held that decision in the case of Totagar Co-operative Sales Society rendered by the Hon'ble Supreme Court is not restricted only to the investments made by the assessee therein from the retained amount which was payable to its members but also in respect of funds not immediately required for business purposes. The Supreme Court has held that interest on such investments, cannot fall within the meaning of the expression "profits and gains of business" and that such interest income cannot be said to be attributable to the activities of the society, namely, carrying on the business of providing credit facilities to its members or marketing of agricultural produce of its members. The court has held that when the assessee society provides credit facilities to its members, it earns interest income. The interest which accrues on funds not immediately required by

the assessee for its business purposes and which has been invested in specified securities as "investment" are ineligible for deduction under section 80P(2)(a)(i) of the Act. (Paragraph-13 of the Judgment)

12. It can thus be seen that the ratio laid down by the Hon'ble Karnataka High Court in the case of Totalgars Cooperative Sales Society in 395 ITR 611 (Karn) is that in the light of the principles enunciated by the Supreme Court in Totgars Co-operative Sale Society (supra), in case of a society engaged in providing credit facilities to its members, income from investments made in banks does not fall within any of the categories mentioned in section 80P(2)(a) of the Act. However, section 80P(2)(d) of the Act specifically exempts interest earned from funds invested in co-operative societies. Therefore, to the extent of the interest earned from investments made by it with any co-operative society, a co-operative society is entitled to deduction of the whole of such income under section 80P(2)(d) of the Act. However, interest earned from investments made in any bank, not being a co-operative society, is not deductible under section 80P(2)(d) of the Act.

13. The CIT was therefore justified in exercising his powers of revision u/s.263 of the Act and directing the AO to tax interest income in question as it is neither of the nature specified in Sec.80P(2)(a)(i) or 80P(2)(d) of the Act.

14. The argument of the learned counsel for the Assessee has been that the AO has applied his mind and allowed the deduction and therefore the jurisdiction u/s.263 of the Act cannot be exercised. On this argument, the learned DR pointed out that the jurisdiction u/s.263 of the Act was exercised by the CIT not for the reason that the AO failed to make proper enquiries before concluding the Assessment but on the ground that his

decision was contrary to decision of Hon'ble Jurisdictional High Court and therefore this argument of the learned counsel for the Assessee cannot be accepted. The argument that the view taken by the AO was a possible view and hence revision u/s.263 of the Act is bad is again not acceptable because, the view that ought to have been adopted was the later binding decision of the High Court in the case of Totagar co-opertive sales society 395 ITR 611 (Karn.).

15. The argument that co-operative Banks are also co-operative societies is again without any basis in the light of the law explained in the case of Totagar co-opertive sales society 395 ITR 611 (Karn.). The reliance placed by the learned counsel for the assessee on the earlier decisions of the Hon'ble Karnataka High Court in the case of Tumkur Merchants Souharda Credit Cooperative Ltd. (supra) that the decision in Totgars Co-operative Sale Society (supra) stands explained by the later decision in the case of Totagar co-opertive sales society 395 ITR 611 (Karn.).

16. For the reasons given above, we uphold the order of the CIT and dismiss the appeal of the assessee.

17. In the result, appeal of the Assessee is dismissed.

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

Sd/-
(CHANDRA POOJARI)
ACCOUNTANT MEMBER

Sd/-
(N. V. VASUDEVAN)
VICE PRESIDENT

Bangalore,
Dated : 13.08.2021.
/NS/*

Copy to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT, Bangalore.

By order

Assistant Registrar
ITAT, Bangalore.