

THE INCOME TAX APPELLATE TRIBUNAL
"H" Bench, Mumbai
Shri Shamim Yahya (AM) & Shri Shaktijit Dey (JM)

I.T.A. No. 515/Mum/2021 (Assessment Year 2016-17)

Kansara Chawl Cooperative Housing Society Limited 30, 1 st Floor, Sahyog Building, 1 st Bhoiwada Lane Buleshwar, Mumbai-400002. PAN : AAAAK6532G (Appellant)	Vs.	PCIT-19 Room No. 228 2 nd Floor Matru Mandir Tardeo Road Mumbai-400007. (Respondent)
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Assessee by	Shri Pulindra
Department by	Smt. Leena Srivastava
Date of Hearing	11.11.2021
Date of Pronouncement	15.11.2021

ORDER

Per Shamim Yahya (AM) :

This appeal by the assessee is directed against the order of learned PCIT passed u/s. 263 dated 16.3.2021 for A.Y. 2016-17.

2. The grounds of appeal read as under :

1. The appellant submits that the order passed ,by the learned Commissioner of Income Tax (hereinafter referred to as the Assessing Officer) has erred in applying provisions of section 263, for setting aside the order passed by the subordinate Assessing Officer and allowing deduction under section 80(P)(2)(d) of The Income Tax Act, 1961 Rs. 1069788/-.

2. The subordinate Assessing officer has verified the allowability of deduction under section 80(P)(2)(d) of The Income Tax Act, 1961 as the appellant is a Cooperative Housing Society registered under Registrar to the Society. The Interest received from another cooperative Society which was also registered under Registrar to the Society. Section 2(19) of The Income Tax Act, 1961 defines Co-Operative Societies: Section 2(19) "co-operative society" means a co-operative society registered under the Co-operative Societies Act, 1912 (2 of 1912), or under any other law for the time being in force in any State for the registration of co-operative societies; Furthermore, even according to Section 56(i)(ccv) of the Banking Regulations Act, 1949, defines a primary Co-Operative Society bank as the meaning of Co-Operative Society. Therefore, a Co-operative Society Bank would be included in the words 'Co-

operative Society. The appellant has also submitted the evidence of registration of the cooperative bank with Registrar.

3. The Assessing officer has raised the question for deduction under section 80(P)(2)(d) of The Income Tax Act, 1961 with respect to interest received by the appellant from Co-operative Bank and after due submission made at the time of assessment and after applying mind the same has been allowed and the assessment order was passed. Therefore the order passed under section 263 of The Commissioner of Income Tax.

4. The Commissioner of Income Tax has not considered the fact that the appellant is a registered housing society and the bank where the deposits are kept is a Co-operative bank which is also registered under the Co-operative Societies Act, 1912. It is opined that though the co-operative bank pursuant to the insertion of subsection (4) of section SOP would no more be entitled for claim of deduction under section SOP, but however, as a co-operative bank continues to be a cooperative society registered under the Cooperative Societies Act, 1912 or under any other law for the time being enforced in any State for the registration of cooperative societies, therefore, the interest income derived by a co-operative society from its investments held with a co-operative bank, would be entitled for claim of deduction under section 80P(2)(d).

5. Each of the above grounds of appeal are independent and without prejudice to each other.

6. The appellant craves liberty to add, to alter and/or amend the grounds of appeal as and when given.

3. Brief facts of the case are that learned CPCIT in this case noted as under:-

“The case was selected for limited scrutiny through "CASS" for the reason whether deduction under Chapter VIA has been claimed correctly. On verification of records, it is seen that the assessee has received interest from co-operative bank which have been claimed as deduction u/s. 80P(2)(d) of the Act by the assessee which was allowed by the Assessing Officer. The provisions of Section 80(P) do not extend the benefit of interest received from investments made with a co-operative bank to the co-operative housing society, Further, it held that the co-operative bank is a commercial bank and does not fall under the purview of co-operative society and thus interest income is not eligible for deduction under Section 80P(2)(d) of the Act and thus held that the department allowed excess deduction u/s. 80P of the Act to the tune of Rs. 10,69,788/-.

The above mentioned fact was overlooked during the assessment proceedings and the order u/s. 143(3) of the Act for AY 2016-17 was passed on 25.10.2018. Thus, considering the order passed by the Assessing Officer, the assessment order is not only erroneous but also prejudicial to the interest of

the Revenue. A notice u/s. 263(1) of the Act dated 09.03.2020 was issued to the assessee to provide it an opportunity to be heard.”

4. Thereafter learned PCIT referred to notice issued, provisions of the Act and case law. He concluded as under :-

“The above stated decisions postulate that when the Officer is expected to make an inquiry of a particular item of income and if he does not make an inquiry as expected, that would be a ground for the Commissioner to interfere with the order passed by the Officer since such an order passed by the Officer is erroneous and prejudicial to the interests of the Revenue [K.A. Ramaswamy Chettiar v. CIT, (1996) 220 ITR 657, 665 (Mad) 1].

The above referred judgments are now explicit in the section itself and the judgments which state that once inquiry is made, the order is insulated from provision of s. 263 will no longer be applicable by virtue of Explanation 2 to Section 263 inserted w.e.f. 01-06-2015.

I have gone through the assessment records and examined the submissions made by the assessee. After careful examination of the assessment records and reply of the assessee has come to the conclusion that the assessee has failed to discharge the onus as regards to the deduction claimed u/s. 80P(2)(d) of the Act. As per the section 80(P) of the Act, the provisions of section 80(P)(2)(d) do not extend the benefit of interest received from investments made with a co-operative bank to the Co-operative Housing Society.

The Assessing Officer failed to carry out necessary enquiries as warranted by the facts and circumstances of the case and apply the correct provision of Act as discussed above. Thus, the assessment is found to be erroneous insofar as it is prejudicial to the interest of Revenue as envisaged in Section 263 of the Act. There is lack of enquiry by the Assessing Officer on the issue raised in the notice issued u/s. 263 of the Act. The Assessing Officer may have disallowed the deduction claimed u/s. 80P(2)(d) of the Act amounting to Rs. 10,69,788/-, which has resulted in under assessment of income,

Therefore, the assessment order dated 25.10.2018 passed u/s. 143(3) is set aside for passing the order afresh on the issues raised in the notice issued u/s. 263(1) of the Act, after giving the assessee an opportunity of being heard and producing any evidence in this regard.”

5. Against this order the assessee is in appeal before us.
6. We have heard both the parties and perused the records. At the outset we note that the issue on merits is in favour of the assessee by the decision of Hon'ble Apex Court. We find that the ITAT in the case of M/s. Ramaraja Kshatriya Cooperative Credit Society Limited in ITA No. 4896 &

4897/Mum/2019 vide order dated 11.3.2021 has decided as under by referring Hon'ble Supreme Court decision on this issue as under :-

“6. We have heard both the counsel and perused the records. We find that this issue is squarely covered in favour of the assessee by the decision of Hon'ble Supreme Court in the case of Citizen Cooperative Society Ltd. (Civil Appeal No. 10245 of 2017 vide order dated 8.8.2017) and The Mavilayi Service Cooperative Bank Ltd. & Ors. Vs. CIT, Calicut & Ors. (Civil Appeal Nos. 7343-7350 of 2019 dated 12.1.2021). We find that the Assessing Officer has completely erred in treating the assessee as cooperative bank and invoking the provisions of section 80P(4). Section 80P(4) provides that :-

(4) The provisions of this section 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.

Explanation.—For the purposes of this sub-section,—

(a) "co-operative bank" and "primary agricultural credit society" shall have the meanings respectively assigned to them in Part V of the Banking Regulation Act, 1949 (10 of 1949);

(b) "primary co-operative agricultural and rural development bank" means a society having its area of operation confined to a taluk and the principal object of which is to provide for long-term credit for agricultural and rural development activities.

7. Honourable Supreme Court in the case of Citizen Cooperative Society Ltd. (Civil Appeal No. 10245 of 2017 vide order dated 8.8.2017) has settled the law that for being considered as a cooperative bank licence from RBI in this regard is a sine qua non. In absence of the RBI licence as such the assessee cannot be treated as cooperative bank. Hence disallowing the deduction by referring to the provisions of section 80P(4) is completely unsustainable. Moreover section 80P(2)(d) provides exemption to interest earned on fixed deposit in cooperative societies. It is nobody's case that cooperative bank are not cooperative societies.

8. Moreover similar issue was elaborately dealt by a larger bench of honourable Supreme Court in the case of The Mavilayi Service Cooperative Bank Ltd. & Ors. Vs. CIT, Calicut & Ors. (Civil Appeal Nos. 7343-7350 of 2019 dated 12.1.2021) and the issue was decided in favour of the assessee. We may gainfully refer to the Hon'ble Apex Court observation in para 21 as under, wherein the Hon'ble Apex Court referred to its earlier decision of Citizen Cooperative Society Ltd. (supra) :-

“The following propositions may be culled out from the judgment:

(I) That section 80P of the IT Act is a benevolent provision, which was enacted by Parliament in order to encourage and promote the growth of the co-operative sector generally in the economic life of the country and must, therefore, be read liberally and in favour of the assessee;

(II) That once the assessee is entitled to avail of deduction, the entire amount of profits and gains of business that are attributable to any one or more activities mentioned in subsection (2) of section 80P must be given by way of deduction;

(III) That this Court in Kerala State Cooperative Marketing Federation Ltd. and Ors. (supra) has construed section 80P widely and liberally, holding that if a society were to avail of several heads of deduction, and if it fell within any one head of deduction, it would be free from tax notwithstanding that the conditions of another head of deduction are not satisfied;

(IV) This is for the reason that when the legislature wanted to restrict the deduction to a particular type of co-operative society, such as is evident from section 80P(2)(b) qua milk co-operative societies, the legislature expressly says so - which is not the case with section 80P(2)(a)(i);

(V) That section 80P(4) is in the nature of a proviso to the main provision contained in section 80P(1) and (2). This proviso specifically excludes only co-operative banks, which are cooperative societies who must possess a licence from the RBI to do banking business. Given the fact that the assessee in that case was not so licenced, the assessee would not fall within the mischief of section 80P(4).”

9. Respectfully following the precedent as above, we uphold the learned CIT(A)'s order.”

7. Since in the present case no case has been made out by the Revenue or learned PCIT that the Cooperative bank referred in the impugned issues are licensed by RBI the provision of section 80P(4) cannot be imported. Hence, from the above it is evident that issue on merits is in favour of the assessee. When the issue on merits is in favour of the assessee, there is no point of PCIT exercising jurisdiction under section 263 of the Act on that issue. Hence the order of learned PCIT is not sustainable. Hence, we set aside the same and decide the issue in favour of the assessee.

8. In the result, appeal is allowed.
Pronounced in the open court on 15.11.2021.

Sd/-
(SHAKTIJIT DEY)
JUDICIAL MEMBER

Sd/-
(SHAMIM YAHYA)
ACCOUNTANT MEMBER

Mumbai; Dated : 15/11/2021

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT
5. DR, ITAT, Mumbai
6. Guard File.

//True Copy//

PS

BY ORDER,

(Assistant Registrar)
ITAT, Mumbai