

**IN THE INCOME TAX APPELLATE TRIBUNAL
"B" BENCH, MUMBAI**

**BEFORE SHRI SHAMIM YAHYA, ACCOUNTANT MEMBER AND
SHRI RAHUL CHAUDHARY, JUDICIAL MEMBER**

आयकर अपील सं/ I.T.A. No. 1011/Mum/2021
(निर्धारण वर्ष / Assessment Year: 2016-17)

Nagothane Vyapari Sahakari Patsanstha Maryadit, Bazerpeth Nagothane, Raigarh - 402106 PAN : AAAAN4367N	बनाम/ Vs.	Principal Commissioner of Income Tax Thane-1
(अपीलार्थी /Appellant)	:	(प्रत्यर्थी) / Respondent)
Assessee by:	Shri Rajiv Khandelwal (AR)	
Revenue by:	Shri A.K. Kardam (CIT DR)	

सुनवाई की तारीख / Date of Hearing : 08.02.2022
घोषणा की तारीख /Date of Pronouncement : 29.03.2022

आदेश / ORDER

Per Rahul Chaudhary, Judicial Member:

1. By way of the present appeal the Appellant/Assessee has challenged the order dated 26.03.2021 passed by the Ld. Principal Commissioner of Income Tax Thane-1 (hereafter referred to as 'the PCIT'] under Section 263 of the Income Tax Act, 1961 (hereafter referred to as 'the Act') whereby the Ld. PCIT had set aside assessment order, dated 29.11.2018, passed under Section 143(3) of the Act by holding the same to be erroneous and prejudicial to the interest of the revenue with the direction to the Assessing Officer to examine the applicability of provision of Section 80P(2)(d) of the Act.
2. The Appellant before us is a co-operative society registered under the Co-operative Society Act, 1960. The Appellant filed return of income for the Assessment Year 2016-17 declaring 'Nil' taxable income after claiming deduction under Section 80P of

the Act in respect of interest income earned from surplus amount kept as temporary deposits with banks (including co-operative banks).

3. During the relevant previous year, the Assessee earned interest income of INR 53,78,345/- from normal banking business, interest income of INR 41,85,230/- from co-operative banks (i.e. Sarswat Bank & RDCC Bank), and interest income of INR 5,42,724/- from commercial banks (i.e., Dena Bank & Bank of India).
4. The case of the Appellant was selected for scrutiny and during the assessment proceedings the Assessing Officer (AO) called for the details and breakup of all the receipts and asked the Appellant to justify its claim for deduction under Section 80P of the Act. After examining the reply filed by the Appellant, the AO concluded that the Appellant was not entitled to claim deduction under Section 80P(2)(a)/(d) of the Act in respect of interest income of INR 5,42,724/- from commercial banks and accordingly made disallowance of INR 2,62,244/- (*after allowing deduction for expenses*). The Assessing Officer accepted the contention of the Appellant that deduction under Section 80P(2)(d) of the Act is available in respect of interest income earned by the Appellant on deposit of surplus funds with the co-operative banks. The AO completed the assessment at total income of INR 4,31,610/- vide assessment order dated 29.11.2018.
5. Being aggrieved, the Appellant had challenged the additions made by the AO before the Commissioner of Income Tax (Appeals) [hereinafter referred to as 'the CIT(A')]. However, during the pendency of the aforesaid appeal, the Appellant opted for Direct Tax Vivad Se Vishwas Scheme. The application

filed by the appellant under the said scheme was approved - Form No. 3 was received on 17.11.2020; and Form No. 4 was filed on 02.03.2021.

6. However, on 18.03.2021 the PCIT issued notice under Section 263 requiring the Appellant to submit the response on or before 22.03.2021 through e-mail / e-filing portal, and on 26.03.2021 the PCIT passed order under Section 263 of the Act which has been impugned in the present appeal.
7. The Appellant has challenging the order passed by PCIT on the grounds of violation of principles of natural justice and also on the ground of lack of jurisdiction of PCIT to pass the order under Section 263 of the Act, firstly, on account the assessment order neither being erroneous nor prejudicial to interest of Revenue and, secondly, for the reason that the appellant having had opted for Direct Tax Vivad Se Vishwas Scheme for the relevant assessment year.
8. The Learned Authorised Representative of the Appellant (hereinafter referred to as 'the Ld. AR') submitted that order under Section 263 of the Act was passed without granting sufficient opportunity to the Appellant to put forward the facts and therefore, there was violation of principles of natural justice. On merits he submitted that the AO had raised the issue of allowability of deduction under Section 80P of the Act in the assessment proceedings. After going through the submissions filed by the Appellant, the AO complete assessment after allowing deduction under Section 80P(2)(d) of the Act in respect of interest received from co-operative society and disallowing deduction under Section 80P(2)(a)/(d) of the Act in respect of interest received from banks. Therefore, the AO had carried out necessary inquiry and took a view which was neither erroneous

nor prejudicial. The Ld. AR relied upon the decision of the Tribunal in the case of Kaliandas Udyog Bhavan Premises vs. ITO: ITA No. 6547/Mum/2017, dated 24.04.2018.

9. In response the Learned Departmental Representative relied on order passed by PCIT to justify the exercise of power of revision under Section 263 of the Act the relevant extract of which read as under:

"04. As mentioned above that the assessee has shown interest income of Rs. 57,78,345/-.....

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Thus, the plain reading of the above section describes that the assessee has to invest the surplus fund with co-operative society and not co-operative Banks.It is seen that the assessee has invested the surplus fund with the Co-operative Banks and received interest on the said investments. Interest income would come in the category of "Income from Other Sources and not income from business". Hence, such interest income would be taxable under section 56 of the Act as decided by the Hon'ble Supreme Court in the case of Totgars Co-operative Society Vs. ITO.

05. xx xx

06. Also, vide Finance Act 2006, deduction from income of Co-operative Banks as per the provisions of Section 80P of the Act, has been withdrawn by way of insertion of Section 80P(4) w.e.f. 1/4/2007 which differentiates a co-operative bank in comparison to co-operative society. It is thus clear that a co-operative bank is a commercial bank and does not fall under the purview of a Cooperative Society and interest income is not eligible for deduction u/s 80P(2)(d) of the Income-Tax Act, 1961. Hence, in view of the above, the said deduction is required to be disallowed and added back to income.

07. Considering the above mentioned facts, I am of the considered opinion that the assessment u/s 143(3) made by the A.O. dated 29.11.2018 is prejudicial & erroneous to the interest of the revenue. I therefore, set aside the order of the AO passed u/s 143(3) with the direction to examine the applicability of provisions of section 80P(2) (d) of the Act considering the above discussed facts and to redo the assessment after affording adequate opportunity to the assessee."

10. We have perused the records and considered the rival submissions. A perusal of the assessment order would show that the AO had specifically raised query regarding allowability of deduction under Section 80P of the Act. Relevant extract of the assessment order reads as under:

"3.1 During the course of assessment proceedings, the details and break up of all the receipts have been called for and on perusal of same, it is observed that the society has earned interest of Rs. 53,78,345/- on deposits made with the various cooperative banks, Bank of India & Dena Bank. The provision of section 80P applicable to the year under consideration is being reproduced as under:-

"80P(1) Where, in the case of an assessee being a co-operative society,....."

XX XX

Considering the activities of the assessee society, the interest income earned on deposits made with the various banks cannot be treated as income attributable to the business of society. During the course of assessment proceedings, the AR of the assessee was confronted with the above facts and a question was raised on the allowability of deduction u/s 80P(2)(a)(i) in respect of interest earned on deposits with various banks. The decision of Totogar's to held the interest received on

surplus fund retained by the society and not used for the purpose of the business as income from other sources has been distinguished not correctly. The object of the society to serve its members by offering the credit facilities is the purpose for which the deduction is available. It is for this reason section 80P(2)(d) has been inserted in the act to ensure that any surplus of one society may be utilized by other society to serve their members. The deposits made with the bank has not been extended this deductions which makes the legislative intention very clear that if the funds are utilized by the members of the society then earnings on those funds have been extended the benefit of deductions. Thus if the deposits are utilized for the members then the taxability benefits reaches to the society.This legislative spirit has not been considered in any of the decisions cited by the AR of the assessee. The overemphasis on liability or surplus funds used by the society to. make distinction with Totogar's is actually misplaced, The AR of the assessee argued that alternatively the deduction may be allowed u/s 80P(2)(d) which is acceptable, considering the provision of law made as discussed above. The interest on deposits with State Bank of India cannot be held as business income u/s 80P(2)(a)(i) of the Income Tax Act, and also not fall under the purview of Sec 80P(2)(d) and therefore added back to the total income of the assessee." (Emphasis supplied)

11. From the above, it is clear that the AO had conducted the necessary inquiry and examined the issue of allowability of deduction under Section 80P(2)(a) as well as 80P(2)(d) of the Act. The view taken by the AO is in line with the decision of the Mumbai Bench of the Tribunal in the case of **Kaliandas Udyog Bhavan Premises vs. ITO: ITA No. 6547/Mum/2017**, dated 24.04.2018 wherein after considering the provisions of Section 80P(4) of the Act it has been held by the Tribunal that a cooperative bank continues to be a co-operative society, and even after introduction of Section 80P(4), a co-operative society

is entitled to claim deduction under Section 80P(2)(d) of the Act in respect of the interest received from a cooperative bank.

The relevant portion of the decision is reproduced below:

“7. We have deliberated at length on the issue under consideration and are unable to persuade ourselves to be in agreement with the view taken by the lower authorities. Before proceeding further we may herein reproduce the relevant extract of the said statutory provision, viz Sec. 80P(2)(d), as the same would have a strong bearing on the adjudication of the issue before us.

“80P(2)(d)

(1) Where in the case of an assessee being a co-operative society, the gross total income includes any income referred to in sub-section (2), there shall be deducted, in accordance with and subject to the provisions of this section, the sums specified in sub-section (2), in computing the total income of the assessee.

(2) The sums referred to in sub-section (1) shall be the following namely:-

(a)....

(b)....

(c)....

(d) 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”

Thus, from a perusal of the aforesaid Sec. 80P(2)(d) it can safely be gathered that income by way of interest income derived by an assessee cooperative society from its investments held with any other cooperative society, shall be deducted in computing the total income of the assessee. We may herein observe, that

what is relevant for claim of deduction under Sec. 80P(2)(d) is that the interest income should have been derived from the investments made by the assessee co-operative society with any other cooperative society. We though are in agreement with the observations of the lower authorities that with the insertion of Sub-section (4) of Sec. 80P, vide the Finance Act, 2006, with effect from 01.04.2007, the provisions of Sec. 80P would no more be applicable in relation to any co-operative bank, other than a primary agricultural credit society or a primary co-operative agricultural and rural development bank, but however, are unable to subscribe to their view that the same shall also jeopardise the claim of deduction of a co-operative society under Sec. 80P(2)(d) in respect of the interest income on their investments parked with a co-operative bank. We have given a thoughtful consideration to the issue before us and are of the considered view that as long as it is proved that the interest income is being derived by a co-operative society from its investments made with any other co-operative society, the claim of deduction under the aforesaid statutory provision, viz. Sec. 80P(2)(d) would be duly available. We may herein observe that the term "co-operative society" had been defined under Sec. 2(19) of the Act, as under:

"(19) "Co-operative society" means a cooperative 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 cooperative societies;"

We are of the considered view, that though the co-operative bank pursuant to the insertion of Sub-section (4) of Sec. 80P would no more be entitled for claim of deduction under Sec. 80P of the Act, but however, as a co-operative bank continues to be a co-operative society registered under the Co-operative Societies Act, 1912 (2 of 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 Sec.80P(2)(d) of the Act.

8. *We shall now advert to the judicial pronouncements that had been relied upon by the authorized representatives for both the parties and the lower authorities. We find that the issue that a co-operative society would be entitled for claim of deduction under Sec. 80P(2)(d) for the interest income derived from its investments held with a cooperative bank is covered in favour of the assessee in the following cases:*

- (i) Land and Cooperative Housing Society Ltd. Vs. ITO (2017) 46 CCH 32 (Mum)*
- (ii) M/s C. Green Cooperative Housing and Society Ltd. Vs. ITO21(3)(2), Mumbai (ITA No. 1343/Mum/2017, dated 31.03.2017)*
- (iii) Marvwanjee Cama Park Cooperative Housing Society Ltd. Vs. ITO Range-20(2)(2), Mumbai (ITA No. 6139/Mum/2014, dated 27.09.2017.*

We further find that the Hon'ble High Court of Karnataka in the case of Pr. Commissioner of Income Tax and Anr. Vs. Totgars Cooperative Sale Society (2017) 392 ITR 74 (Karn) and Hon'ble High Court of Gujarat in the case of State Bank Of India Vs. CIT (2016) 389 ITR 578 (Guj), had also held that the interest income earned by the assessee on its investments held with a co-operative bank would be eligible for claim of deduction under Sec. 80P(2)(d) of the Act. Still further, we find that the CBDT Circular No. 14, dated 28.12.2006, as had been relied upon by the Id. A.R, also makes it clear beyond any scope of doubt, that the purpose behind enactment of sub-section (4) of Sec. 80P was to provide that the cooperative banks which are functioning at par with other banks would no more be entitled for claim of deduction under Sec. 80P(4) of the Act. We are of the considered view that the reliance placed by the CIT(A) on the judgment of the Hon'ble Supreme Court in the case of Totgars Cooperative Sale Society Ltd. vs. ITO (2010) 322 ITR

283(S.C.) being distinguishable on facts, thus, had wrongly been relied upon by him. The adjudication by the Hon'ble Apex Court in the aforesaid case was in context of Sec. 80P(2)(a)(i), and not on the entitlement of a co-operative society towards deduction under Sec. 80P(2)(d) on the interest income on the investments parked with a co-operative bank. We further find that the reliance place by the Id. D.R on the order of the ITAT "F" bench, Mumbai in the case of M/s Vaibhav Cooperative Credit Society Vs. ITO-15(3)(4) (ITA No. 5819/Mum/2014, dated 17.03.2017 is also distinguishable on facts. We find that the said order was passed by the Tribunal in context of adjudication of the entitlement of the assessee co-operative bank towards claim of deduction under Sec.80P(2)(a)(i) of the Act. We find that it was in the backdrop of the aforesaid facts that the Tribunal after carrying out a conjoint reading of Sec, 80P(2)(a)(i) r.w. Sec. 80P(4) had adjudicated the issue before them. We are afraid that the reliance placed by the Id. D.R on the aforesaid order of the Tribunal being distinguishable on facts, thus, would be of no assistance for adjudication of the issue before us. Still further, the reliance placed by the Ld. D.R on the order of the ITAT 'SMC' Bench, Mumbai in the case of Shri Sai Datta Co-operative Credit Society Ltd. Vs. ITO (ITA No. 2379/Mum/2015, dated 15.01.2016, would also not be of any assistance, for the reason that in the said matter the Tribunal had set aside the issue to the file of the assessing officer for fresh examination, That as regards the reliance placed by the Id. D.R on the judgment of the Hon'ble High Court of Karnataka in the case of Pr. CIT Vs. Totagars co-operative Sale Society (2017) 395 ITR 611 (Karn), the High Court had concluded that a co-operative society would not be entitled to claim of deduction under Section 80P(2)(d). We however find that as held by the Hon'ble High Court of Bombay in the case of K. Subramanian and Anr. Vs. Siemens India Ltd. and Anr (1985) 156 ITR 11 (Bom), where there is a conflict between the decisions of non-jurisdictional High Court's, then a view which is in favour of the assessee is to be preferred as against that taken against him. Thus, taking support from the aforesaid judicial pronouncement of the Hon'ble High Court of jurisdiction, we respectfully follow the

view taken by the Hon'ble High Court of Karnataka in the case of Pr. Commissioner of Income Tax and Anr. Vs. Totagars Cooperative Sale Society (2017) 392 ITR 74 (Karn) and Hon'ble High Court of Gujarat in the case of State Bank Of India Vs. CIT (2016) 389 ITR 578 (Guj), wherein it was observed that the 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.

9. *We thus in the backdrop of our aforesaid observations are unable to persuade ourselves to be in agreement with the view taken by the lower authorities that the assessee would not be entitled for claim of deduction under Sec. 80P(2)(d), in respect of the interest income on the investments made with the co-operative bank. We thus set aside the order of the lower authorities and conclude that the interest income of Rs.27 48, 553/- earned by the assessee on the investments held with the co-operative bank would be entitled for claim of deduction under Sec. 80P(2)(d)."*
(Emphasis supplied)

12. In view of the above, it is clear that the assessment order passed by the AO was neither erroneous nor prejudicial to the interest of revenue. Assuming arguendo even if the contention of PCIT is accepted, the view taken by the AO regarding allowability of deduction under Section 80P(2)(d) of the Act in respect of interest received by the Appellant from a cooperative bank would still qualify as a plausible view and thereby taking away the jurisdiction of PCIT to invoke powers of revision under Section 263 of the Act. It is settled legal position that in case the view taken by the AO is a plausible view, PCIT cannot be permitted to substitute his opinion in place of the AO to arrive to a contrary finding. Thus, we allow Ground No.1 and hold that in the facts and circumstances of the present case the PCIT lacked the jurisdiction to exercise powers under Section 263 of the Act. Accordingly, the order, dated 26.03.2021, passed by the PCIT

under Section 263 of the Act is set aside and the assessment order, dated 29.11.2018, passed under Section 143(3) of the Act is reinstated.

13. Since we have decided Ground No.1 in favour of the Appellant and set aside the impugned order, the need to adjudicate Ground No.2 and 3 does not arise. Having said that we like to observe that the power under Section 263 have been exercised seemingly in undue haste in violation of principles of natural justice. The Appellant had challenged the additions made by the AO before the Commissioner of Income Tax (Appeals), however, during the pendency of the aforesaid appeal, the Appellant opted for Direct Tax Vivad Se Vishwas Scheme. The application filed by the appellant under the said scheme was approved and Form No. 4 was filed on 02.03.2021. On 18.03.2021 the PCIT issued notice under Section 263 requiring the Appellant to submit the response on or before 22.03.2021 through e-mail / e-filing portal, and on 26.03.2021 the PCIT passed order under Section 263 of the Act, noting that no reply has been filed by in response to notice issued, without giving any further notice or hearing to the Appellant. In our considered view this resulted in the violation of principles of natural justice and unwarranted multiplicity of proceedings at the peril of the appellant herein.
14. For the reasons stated hereinabove, the present appeal by the assessee is allowed.

Order pronounced on 29.03.2022.

Sd/-
(Shamim Yahya)
Accountant Member

Sd/-
(Rahul Chaudhary)
Judicial Member

मुंबई Mumbai; दिनांक Dated : 29/03/2022
Alindra, PS

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT,
Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

**उप/सहायक पंजीकार / (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai**