आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ

IN THE INCOME TAX APPELLATE TRIBUNAL,
'' C'' BENCH, AHMEDABAD

BEFORE MS SUCHITRA KAMBLE, JUDICIAL MEMBER
And
SHRI WASEEM AHMED, ACCOUNTANT MEMBER

आयकर अपील सं./**ITA No. 640/AHD/2019**
निर्धारण वर्ष/Asstt. Year: 2014-2015

Gujarat State Co-op. Marketing Federation Ltd., 49, Shrimali Society, N.P. Patel Sahkar Bhavan, Opp. Navrangpura Police Station, Navrangpura, Ahmedabad-380009. **PAN: AAAAG2927K**	Vs.	Principal Commissioner of Income Tax, Circle-1, Ahmedabad.

(Applicant)		**(Respondent)**

Assessee by	:	Shri S.N. Divatia, A.R
Revenue by	:	Shri Alok Kumar, CIT. D.R

सुनवाई की तारीख/**Date of Hearing : 25/05/2022**
घोषणा की तारीख **/Date of Pronouncement: 01/06/2022**

आदेश/**O R D E R**

PER WASEEM AHMED, ACCOUNTANT MEMBER:

The captioned appeal has been filed at the instance of the Assessee against the order of the Learned Principal Commissioner of Income Tax, Ahmedabad, dated 26/02/2019 arising in the matter of assessment order passed under s. 263 of the Income Tax Act, 1961 (here-in-after referred to as "the Act") relevant to the Assessment Year 2014-2015.

2. The assessee has raised following grounds of appeal:

1.1 The order passed u/s.263 on 26.02.2019 for A.Y.2014-15 by Pr. CIT-1, Abad setting aside the order passed by AO u/s.!43(3) on 28.12.2016 with a direction to frame a fresh order after making inquiry in respect of eligibility of deduction u/s.80P(2)(d) towards interest income of Rs.3,29,44,728/- earned on deposits with Gujarat State Co-Op. Bank is wholly illegal, unlawful and against the principles of natural justice.

2.1 The Ld. Pr.CIT has grievously erred in law and on facts in holding that the assessment order passed u/s.!43(3) for A.Y.2014-15 on 28.12.2016 by AO was erroneous and prejudicial to the interest of the revenue in as much as the AO had failed to make inquiry in respect of eligibility of deduction u/s.80P(2)(d) towards interest income of Rs.3,29,44,728/- earned on deposits with Gujarat State Co-Op. Bank.

2.2 The Ld. Pr.CIT has grievously erred in law and on facts in exercising the powers u/s.263 when the claim of deduction u/s.80P was examined by AO during the asst. proceeding and he had formed one of the possible views. Therefore, there was a change of opinion on part of Pr. CIT which was not permissible or valid.

2.3 That in the facts and circumstances of the case as well as in law, the Ld. Pr. CIT ought not to have invoked the provisions of section 263 of the Act and set aside the asst. order passed u/s.!43(3) for A.Y.2014-15 on 28.12.2016 by AO on the ground that the same was erroneous and prejudicial to the interest of revenue.

3.1 Without prejudice to above and in alternative, the Ld. Pr. CIT has grievously erred in law and on facts in holding that the deduction u/s.80P(2)(d) towards interest income of Rs.3,29,44,728/- earned on deposits with Gujarat State Co-Op. Bank.
It is, therefore, prayed that the order passed u/s.263 by the Pr. CIT may kindly be quashed.

3. The only issue raised by the assessee is that the learned PCIT erred in holding the assessment framed by the AO under section 143(3) of the Act as erroneous insofar prejudicial to the interest of Revenue under the provisions of section 263 of the Act.

4. The facts in brief are that the assessee in the present case is a Co-operative society and engaged in the business of distribution of agricultural input/output, manufacturing of edible oil, food grains etc. The assessee in the year under consideration declared interest income of Rs. 5,87,58,238/- including interest income of Rs. 3,29,44,728/- on account fixed deposit with Gujarat Co-operative Bank which claimed as exempted under the provision of section 80P(2)(d) of the Act. The AO in the assessment framed under section 143(3) of the Act accepted the claim of the assessee.

5. However, the learned PCIT was of the view that interest income from Co-operative bank is not allowable deduction under section 80P(2)(d) of the Act. The learned Pr. CIT in this regard referred the judgment of Hon'ble Supreme court in case of Totaghar's Co-

operative Sales Society Ltd. reported in 188 taxman 282. But the AO allowed the deduction of the same in the assessment framed under section 143(3) of the Act without making adequate inquiries in this regard. Accordingly, the ld. PCIT purposed to set aside the assessment order as erroneous insofar prejudicial to the interest of the revenue.

6. The assessee in response submitted that interest income earned by it was from another co-operative society which is allowable as deduction under section 80P(2)(d) of the Act. As such, the case law of Hon'ble Supreme Court referred in show cause notice is distinguishable from the facts of the present case in so far it deals with the interest earned from fixed deposit with commercial bank whereas the present assessee has shown interest income from co-operative bank. Further, the Hon'ble High Court of Karnataka in case of PCIT vs. Totaghar's Co-operative Sales Society Ltd. reported in 78 taxmann.com 169 also distinguished the fact of the decision of Hon'ble Supreme court cited above. The assessee also claimed that the issue of allowability of deduction on account of interest income from FD with co-operative bank has been covered in its favour by the judgment of Hon'ble Jurisdictional High Court of Gujarat in case of Surat Vankar Sahkari Sangh Ltd. vs. ACIT reported in 72 taxmann.com 169.

7. However the learned Pr. CIT disregarded the submission of the assessee and set aside the assessment order under section 263 of the Act being erroneous insofar prejudicial to the interest of Revenue by observing as under:

> ***6.1.*** *It is evident from clause 2(d) of section SOP of the Act that the income derived by way of interest from investment with other co-operative societies only is eligible for deduction and the word "Co-operative Bank" is not mentioned in clause [d] of subsection (2) of section SOP of the Act. In the instant case, the interest income was earned by the assessee from the investment/deposits kept with Gujarat State Co-operative bank. Admittedly and undoubtedly Gujarat State Co-operative Bank is not covered within the definition of Co-operative society. Even though Gujarat State Co-operative Bank may have the 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.*
>
> *6.2 Further, the contention put forth by the assessee that the facts of this case and issue raised in the* ***Totagar's Co-operative Sale Society Ltd.*** *Vs.* ***ITO [2010] 322 ITR 0283/ 188 Taxman 282 (SC)*** *is completely different from the issue raised in the present case is also not acceptable. It is pertinent to mention here that even though the section 80P(2)(d] was not specifically argued and canvassed before the Supreme Court, but the section evidently envisages that such interest income should be derived out of the investment/deposits mode with any other co-operative society. In the said decision, the Hon'b!e Supreme Court has held that the interest income earned on surplus and idle funds not immediately required for its business, is required to be taxed U/s 56 of the Act i.e.*

"income from other sources" instead of U/s 28 of the Act. As per provision of section SOP of the Act, for availing exemption or deduction, the income specified in clauses (a) to (f) of subsection (2) of section SOP .-should be business or operational income. It is an undisputed fact that the assessee has earned interest income from its surplus deposits not immediately required (or business and therefore liable to be taxed under the head "income from other sources".

***6.3.** Apart from the above, the plea taken by the assessee that the Hon'ble High Court of Karnataka in the case of PCIT vs. Totagars Co-operative Sale Society [2017]78 taxmann.com 169 (Karnataka) held that for purpose of section 80P(2)(d), a Co-operative Bank should be considered as a Cooperative Society and any interest earned by Co-operative Society from a Co-operative Bank would necessarily be deductible under section SOP, is also not acceptable as the said decision of the Hon'ble Court has not been accepted by the revenue and the matter is still subjudiced before the Hon'ble Apex Court. In addition to this, it is noteworthy to mention here that in the case of same assessee, the Hon'ble Karnataka High Court itself in a later judgment 16.06.2017 (subsequent to the one referred by the assessee, has held that **the income by way of interest earned by deposits or investment of idle or surplus** funds **does not change its character irrespective of the fact** whether **such income of interest is earned from a scheduled bank or a cooperative bank and thus, clause (d) of section 80P(2) of the Act would not apply and therefore** would not **be eligible for deduction.** This judgment also takes into consideration the judgment of Hon'ble Apex Court (supra) in Totagar's case and holds its applicability in SOP (2) issues also. It, therefore, holds that the ratio of Hon'ble Supreme Court in Totagar's case (supra) shall apply for the purpose of section 80P(2] of the Act also and also lays down that the deduction u/s 80P(2)(d)of the Act is eligible only with respect to deposits mode in Co-operative Societies and not in Co-operative Banks, as these two entities are distinct for the purpose of claiming deduction u/s 80P(2](d) of the Act.*

7. In view of the aforesaid legal position and bearing in mind the entirety of the case, am of the opinion that the assessment order passed by the A.O. 143(3) of The IT. Act, 1961 on 28-1 2-201 6 is erroneous in so far as prejudicial to the interest of the revenue as the order has been passed without making correct consideration of legal provisions regarding the issue of eligibility of deduction u/s SOP(2)[d) of the Act (as discussed supra) which has resulted into under assessment as discussed above. By virtue of the powers vested in me u/s. 263 of the I T Act, I hereby set-aside the order 143(3) of the l.T.Act,1961 on 28-12-2016 and direct the Assessing Officer to pass a fresh assessment order after allowing adequate opportunities of being heard to the assessee, in accordance with the law following prescribed procedure and duly examining the aforementioned issue in the light of provision of the I. T. Act, 1961.

8. Being aggrieved by the order of the learned PCIT, the assessee is in appeal before us.

9. The learned AR before us filed a paper book running from pages 1 to 48 and inter-alia contended that the Hon'ble Karnataka High Court in the case of PCIT vs. Totaghar's Co-operative Sales Society Ltd. reported in 78 taxmann.com 169 after distinguishing the facts of the case observed by the Hon'ble Supreme Court has held that interest income from co-operative bank is eligible for deduction under section 80P(2)(d) of the Act.

9.1 The learned AR also contended that the Hon'ble High Court of Gujarat in the case of Surat Vankar Sahkari Sangh Ltd. vs. ACIT reported in 72 taxmann.com 169 has also held that interest from the co-operative bank is eligible for deduction under section 80P(2)(d). Accordingly the learned AR, the AO has taken one of the possible view and therefore the assessment cannot be held as erroneous insofar prejudicial to the interest of revenue.

10. On the contrary, the learned DR vehemently supported the order of the authorities below.

11. We have heard the rival contentions of both the parties and perused the materials available on record. From the preceding discussion, we note that the different High Courts have taken different view with respect to the deduction of the interest by the assessee from the co-operative bank. Some of the judgments are in favour of the assessee and some of them are against the assessee. It is also an admitted fact that the Hon'ble High Court of Gujarat is in favour of the assessee with respect to the interest on deposits made with the co-operative bank. The relevant extract of the judgment of Hon'ble Gujarat High Court in case of in case of CIT vs. Sabarkantha District Cooperative Milk Producers Union Ltd. in Tax Appeal No. 473 of 2014 reads as under:

> *"Considering Section 80(P)(2)(d) of the Act when the only requirement was that the income should be received from investment in Cooperative Societies and the Cooperative Bank which in the present case has been fulfilled, it cannot be said that the learned Tribunal has committed an error in deleting the disallowance of Rs. 1,42,19,515/- under section 80(P)(2)(d) of the Act."*

11.2 Based on the above, it is transpired that the AO has taken one of the possible view by allowing the deduction to the assessee under the provisions of section 80P(2)(d) of the Act. Where two view are possible on the issue and the AO has taken one of the possible view, but the PCIT does not agree with the view adopted by the AO, in such scenario, the order of the AO cannot be held erroneous. In this regard we find support and guidance from the judgment of the Hon'ble Gujarat High Court in the case of CIT vs. Mehsana District Co. Op. Milk Producers Union Ltd. reported in 263 ITR 645 where it was held as under:

> *It is well-settled that the provisions of section 263(1) cannot be invoked to correct each and every type of mistake or error committed by the Assessing Officer, and it is only when the order is erroneous that the section will be attracted. When two views are possible and the Assessing 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 Assessing Officer is unsustainable in law. It was not shown how the*

method followed by the assessee to divide the expenses for the purpose of claiming relief under section 80HH was improper or unacceptable. The Assessing Officer as well as the Tribunal had found that the expenses were apportioned on a rational basis and it would not be open for the Court to go beyond that finding which appeared to have been reached on the basis of the material on record which showed that in the earlier years the same proportion for dividing the expenses was consistently followed. The department had not been able to show that for those earlier two years any objection was raised against such apportionment. [Para 7]

11.3 In view of the above detailed discussion and judicial precedent, we find no error in the order of Ld. AO so as to justify the initiation of 263 proceedings by the Ld. Pr. CIT. Hence the grounds of appeal of the assessee is hereby allowed.

12. In the result, the appeal filed by the assessee is **allowed.**

Order pronounced in the Court on 01/06/2022 at Ahmedabad.

Sd/-	**Sd/-**
(SUCHITRA KAMBLE)	**(WASEEM AHMED)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

(True Copy)

Ahmedabad; Dated 01/06/2022
Manish