IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "E", MUMBAI
BEFORE SHRI VIKAS AWASTHY, JUDICIAL MEMBER AND
SHRI GAGAN GOYAL, ACCOUNTANT MEMBER
ITA No. 1177/Mum/2022 (A.Y. 2017-18)

Mahim Vividh Karyakari Sahakari Society Ltd.
At –post, Mahim Road,
Palghar-401402.
PAN: AADAM8809M ..... Appellant

Vs.

Pr. Commissioner of Income Tax-1,
Ashar I.T. Park, "A" Wing,
6th Floor, Ambika Nagar,
WIE, Thane (West)-400604. ..... Respondent

Appellant by	:	Sh. Anil Sathe
Respondent by	:	Sh. Prakash mane, CIT-DR
Date of hearing	:	07/09/2022
Date of pronouncement	:	30/11/2022

ORDER

PER GAGAN GOYAL, A.M:

This appeal by the assessee is directed against the order of Pr. Commissioner of Income Tax-1, Thane dated 24.03.2022 under section 263 of the Income Tax Act, 1961 (for short 'the Act') for A.Y. 2017-18. The assessee has raised the following grounds of appeal:

> *"1. On the facts and in the circumstances of the case and in law, the learned Pr. Commissioner of Income Tax erred in passing the order u/s 263 of the Income tax Act 1961 by disregarding appellant's contentions in this regard, and in not appreciating that the provisions of the said section could be invoked only if the order sought to be revised was erroneous and prejudicial to the revenue.*

2. The learned Pr. Commissioner of income tax erred in assuming powers and passing order u/s 263 only on the basis of opinion of the audit team.

3. In the alternative, the learned Pr. Commissioner erred in invoking powers u/s 263 when on the issue relating to deduction u/s 80P (2)(d) the AO had adopted a possible view, and the same was supported by a number of judicial pronouncements by various fore.

4. The learned Pr. Commissioner erred in relying on the Supreme Court's decision in Totgar's Co-operative Society Ltd. which judgment is delivered in the context of sec. 80P (2) (a) (i) and wherein it was held that interest on surplus funds deposited with banks bears the character of income from other sources and not business income, whereas the appellant has claimed deduction under sec. 80P (2)(d) which does not confine the deduction to business income only.

5. The learned Pr. Commissioner erred in contending that the income received by the appellant is from co-operative banks and not co-operative societies, without appreciating the fact that the co-operative banks are in the first instance co-operative societies.

6. The learned Pr. Commissioner erred in invoking the provisions of sec. 80P (4). The mandate of the said sub-section is to deny the benefit of sec. 80P to co-operative banks and not to other co- operative societies investing their funds in co-operative banks."

2. Brief facts of the case are that assessee is a co-operative society registered under the co-operative societies Act. Assessee filed its return of income on 26-10-2017 declaring total income of Rs NIL after claiming deduction of Rs 40, 37,230/- under chapter VI A of the act. The case was selected for scrutiny under CASS for the following reasons.

a) Large deduction under chapter VIA from total income
b) Low income in comparison to high loans /advances/investments in shares appearing in balance sheet.

3. The assessment was completed u/s 143(3) of the I.T. Act on 02-07-2019 accepting the returned income after considering the details filed by the assessee. The AO allowed the deduction claimed by the assessee u/s. 80P of the Act amounting to Rs. 40, 37,230/. It is pertinent to mention that case was selected for scrutiny under CASS for specific reasons as mentioned supra.

4. One of the reasons assigned for scrutiny was verification of the claim u/s. 80P. A specific enquiry was carried out by the AO considering the submissions of the assessee. After verification of the assessee's submission, AO accepted the claim u/s. 80P of the assessee.

5. The assessee is a Co-operative society mainly engaged in carrying on the business of providing credit facilities to its members who are agriculturists. Apart from this, society is also engaged in the activity of marketing of agricultural products grown by its members and purchase of agricultural implements, seeds and other articles intended for agriculture for the purposes of supplying them to its members. The society has been carrying on its activity for the past more than hundred years and has approximately 1300 agriculturalist members.

6. We have considered the submissions of the assessee, order of the AO and show-cause notice u/s. 263 of the Act dated: 07-03-2022. This show-cause was issued by the Ld. Pr.CIT, Thane based on an audit memo raised by internal audit party (IAP) for ready reference and better appreciation we are re-producing herein b**elow relevant portion of the PCIT order as under**:

> ***"3. Internal Audit Party (IAP) vide Audit Memo dated 23.11.2021 raised objection that the assessee has shown total revenue from operation at Rs. 4,08,76,644/- Apart from interest received from members, out of banking business of providing credit facilities to its members. The assessee society had also shown interest from deposits/investments made with various Co-operative Banks amounting to Rs. 58,91,587/- & dividend income from Co-operative Banks at Rs. 96,908/- aggregating Rs. 59,88,495/- which was claimed as deduction u/s 80P(2)(d) of the Act. As the assessee has got the interest/Dividend income of Rs. 59,88,495/- from its deposits made with other than co- operative societies which is not allowable deduction u/s 80P(2)(d) as well as 80P(2)(a)(0) of the Act, the interest income of Rs. 59,88,495/- is not from co-operative societies and hence it is not allowable u/s***

80P(2)(d) of the Act. The same cannot be treated as the income attributable to the activities of the assessee society and therefore, amount of Rs.59,88,495/-on account of interest/ dividend received from investment/ deposits with various Co-op Banks is not allowable to the assessee. The provisions of section 80P (2)(d) of the I.T. Act, 1961 reads as under:

> ***"In respect of*** *any income by way of interest or dividends derived by the co-operative society from its investments with any other any other co-operative society****, the whole of such income"***

The IAP also relied upon the Hon'ble Supreme Court's decision in the case of The Totgar's Co-operative Society Vs ITO and latest decision of the Karnataka High Court, Dharwad Bench vide ITA No. 100069/2016 dated 05.01.2017 wherein it is held that income from other sources and not income from business, hence such interest income would be taxable u/s. 56 of the Act.

IAP further observed that from the ITR/P&L account that the assessee has credited rental income at Rs. 3,62,011/-, discount Rs. 2,07,764/- and other income (which is not specified) at Rs. 22,40,853/- aggregating Rs. 28,10,628/-. The assessee society has claimed the entire other income as deduction u/s 80P of the Act. However, such income does not qualify for deduction u/s 80P of the Act.

With reference to the audit objection raised in various co-operative credit society cases for A.Y. 2017-18, a reply was submitted to the CIT(Audit), Pune vide this office letter dated 04.02.2022 which is reproduced as under:

> ***"It is to state that assessment proceedings completed in the cases of Co-operative societies for A.Y. 2017-18 have been selected for verification by the Internal Audit Parties. The Internal Audit Party has raised the audit objection in all the cases on the issue of interest u/s 80P (2)(d) of the Act holding that the said interest has been received from Credit Co-operative Bank and not from the Credit Co-op. Society.***
>
> ***In this regard,*** *it is stated that the AOs of this charge have verified the objection and have reported that the objections raised by the Internal Audit Party are not acceptable* ***as the interest received by the assessee from Co-op. bank which***

partakes character of the Credit Co-op. Soc. Is an allowable deduction u/s. 8OP (2)(d) of the Act. Even in many of the cases, deduction u/s 80P (2)(d) have been allowed in previous and subsequent years by the department.

Further it is also observed that the objections raised by the IAP on the cases are not acceptable and tenable in purview of judgments of various authorities wherein it has been held that interest received from the Co-op. banks by the Co-op. Credit Societies partakes the character of the "interest received from a Credit Co-op. Society" and the Courts have allowed the deduction of 80P (2) (d). Similar view has also be taken by the Hon'ble ITAT Mumbai 'SMC' Bench in the case of Kaliandas Udyog Bhavan Premises Co-op. Society Ltd. Vs. Income Tax Officer- 21(2)(1), Mumbai (2018) 94 taxmann.com 15 (Mumbai-Trib.). The decision of Hon'ble Supreme Court in the case of Totgar's Co-op, Sales Society Ltd. Vs. ITO (210) 322 ITR 283 (SC) relied/quoted by the audit party is having distinguishable facts, thus, it has been wrongly been relied upon. ***The adjudication by the Hon'ble Apex Court in the aforesaid case was in the context of section 80P (2)(a)(i) and not on the entitlement of a co-operative societies towards deduction u/s. 80(P)(2)(d) of the Act. Further in the judgment of State Bank of India Vs. CIT (2016) 309 ITR 578 (Guj.) it has been held that the interest income earned by co-operative society on its investment on co-op, bank would be eligible for claim of deduction u/s. 80P (2)(d) of the Act. In a recent judgment in the case of Rena Sahakari Sakhar Karkhana Ltd. Vs. Pr. Commissioner of Income Tax-2, Aurangabad being ITA No. the Hon'ble ITAT Pune vide its order pronounced on 07.01.2022 has decided the identical issue in the favor of the assessee and against the Department. In that case, the Ld. PCIT-2, Aurangabad vide order dated 27.03.2018 u/s. 263 set aside the order of AO dated 07.03.2016 wherein the AO had allowed the interest income amounting to Rs. 75,38,534/- received from FDs with Co-operative Banks which was claimed by the assessee as deduction u/s. BOP(2)(d) of the Act. The Hon'ble Tribunal relying on the judgment of Hon'ble High Court of Gujarat in the case of State Bank of India Vs. CIT (2016) 389 ITR 578 (Guj.) wherein the Hon'ble High Court observed that the interest income earned by a co-***

operative society on its investment held with a co-operative bank would be eligible for claim of deduction u/s. 80P (2) (d). Therefore, considering the aforesaid judicial pronouncements, the Audit objection raised by the IAP is not acceptable.

In view of the aforesaid judicial pronouncements mentioned supra, the order passed by the AOs is neither erroneous nor prejudicial to the interest of the revenue and therefore, it is requested to drop/withdraw the above objection."

The CIT (Audit), Pune vide letter dated 17.02.2022 did not accede to withdraw the objection and the reply is reproduced as under:

"The IAPS have raised major audit objections in many cases on the issue of deduction u/s. 80P in the case of Co-operative Societies on interest earned by them on surplus funds which is invested with Co-operative Banks. The objection has been raised relying on the decision of Supreme Court in the case of Totgar's Co-op. Sale Society Vs. ITO, Karnataka: 322 ITR 283 (SC) (2010) in C. A. No. 1622/2010 dated 08.02.2010 and Karnataka High Court decision in the case of PCIT, Hubli Vs. Totgar's Co-op. Sale Society: 395 ITR 611 dated 16.06.2017 (ITA No. 10066/2016)

The brief facts of the decision given by Supreme Court in the case of Totgar's Co-op. Society is mentioned below:

"Supreme Court decision in the case of Totgar's Co-op. Sales Society Vs. ITO, Karnataka: 322 ITR 283 (SC) (2010) in C. A. No. 1622/2010 dated 08.02.2010 Facts: The assessee being a co-op. credit society is providing credit facilities to its members. The society had surplus funds which is invested in short term deposits with the banks and govt. securities and earned income thereon. The assessee therefore claimed deduction u/s. 80P (2) (a) (i) in respect of such interest income. The Tribunal held that such interest income would fall under the head as income from other sources u/s. 56, and not section 28. The High Court affirmed the decision of the Tribunal.

Held: The interest income arising on the surplus, invested in short term deposits which was surplus was not required for business purposes. Therefore, such interest income would be taxable u/s. 56 as held by the AO. The interest on such

investments therefore would not fall within the meaning of expression "profits and gains of business" such interest income could not be said be attributable to the activities of the society. The whole of the amount of profit and gains of business emphasis that the income in respect of which deduction is sought must constitute the operational income and not the other income which accrues to the society. The assessee society earned income on funds which were not required for business purposes at a given point of time. Therefore, on the facts and circumstances of case, such interest income fell in the category of other income which had rightly been taxed by the department u/s. 56.

Further, the Karnataka High Court in the above assessees' case has decided the issue in favor of the department. The brief facts of the case are as under: Karnataka High Court decision in the case of PCIT – Hubli Vs. Totgar's Co-op. Sales Society 395 ITR 611 dated 16.06.2017 (ITA No. 100066/2016) Facts: The assessee co-operative society was engaged in marketing of agricultural produce grown by its members and providing credit facilities to its members. The assessee deposited surplus funds in co-op. banks. The assessee's claim of interest earned on such deposits u/s. 80P (2)(d) was rejected by the AO. The CIT (A) as well as the Tribunal allowed the assessee's claim.

Held: The assessee has now claimed the deduction u/s. 80P (2) (d) and not u/s. 80P (2)(a). The reason is that after the decision of the Supreme Court in the assessee's own case, the assessee has shifted the deposits and investment from Schedule banks to co-op. Bank and such co-op. bank is essentially a Co-op. Society also and clause (d) allows deduction of income by way of interest or dividend derived by the assessee co-op. society from its investments with any other co-op. society. The two essential points required for claiming deduction from gross total income for a co-op. Society are

(1) That the character or nature of income, namely interest on investment or deposits, does not charge irrespective of the fact whether it is earned or received from schedule bank or co-op. Bank

(ii) that what the Supreme Court held in the case of the assessee itself, against assessee was that such interest income on its surplus and idle funds not immediately required for its business, is not income from business taxable u/s. 28 of the Act, but was taxable as income as "income from other sources' u/s. 56 whereas for availing the exemption or 100% deduction u/s. 80P, the income is specified in clauses (a) to () of sub section (2) of section 80P which should be its business or operational income.

The words 'Co-operative Banks' are missing in clause (d) of sub section (2) of section 80P. Even though a co-operative bank may have the corporate body or skeleton of a co-op society, but its business is entirely different and that is the banking business, which is governed by the provisions of the Banking Regulations Act, 1949. Only the primarily agricultural credit society with their limited work of providing credit facilities to its members continued to be governed by the ambit and scope of deduction u/s 80P of the Act. The banking business, even though run by co-op Bank is excluded from the beneficial provisions of exemptions or deduction u/s. 80P of the Act, by way of sub section 4 in section 80P.

Hence, the income by way of interest earned by deposit 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 Schedule Bank or a Co-op. Bank and thus clause (d) of section 80P (2) of the Act would not apply in the fact of the circumstances of the present case.

Against the decision of Karnataka High Court, the assessee has filed SLP which is pending. The reply given by the PCIT is not acceptable for following reasons:

In the audit objections raised by IAPs, the Co-op. credit societies have received interest on investment made with Co-op. Bank from surplus funds, and therefore it is to be treated as income from other sources u/s. 56 of the Act. The reply of the PCIT is silent as far as the surplus funds invested with co-operative banks and interest received thereon has to be taxed as income from other sources u/s. 56. Therefore, the Supreme Court decision and High Court's decision in the case of Totgar's Co-op Society is squarely applicable.

Further, the Hon'ble Karnataka High Court has discussed the provisions of section 80P as a whole and held that - it is the character and nature of income which determines the taxability or exemption from taxability and income which is clearly held to be not exempt and not deductible u/s 80P(2)(a) of the Act by the Hon'ble Supreme Court in the case of the assessee cannot be contrarily held as exempted and deductible merely because the depositor bank, with whom the Investments were made by the assessee happens to be a co-op. Bank. The income by way of interest earned by deposit 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 Schedule Bank or a Co-op. Bank, and thus clause (b) of section 80P (2) of the Act would not apply in the facts and circumstances of the present care. The person or body corporate from which such interest income is received will not change its character, viz. interest income not arising from its business operation which made it ineligible. Co-operative societies and co-operative banks are given different treatment u/s. 194A related to tax deducted at source by legislature. Co-operative societies defined u/s. 2(19) of the Act which provided for relaxation of the definition of co- operative societies only in respect of a regional rural bank which is specifically included in definition of a Co-op. Society. The Hon'ble SC in the case of CIT Vs. Kumbakonam Mutual Benefit Fund Ltd., 53 ITR 241 (SC) and in the case of M/s Bangalore Club Vs. CIT has gone into minute details for deciding the nature/character of principle of mutuality, under which a tax exemption has been claimed by various societies. Also interest earned on surplus fund is other income and not eligible for deduction u/s. 80P, as decided by the Hon'ble Supreme Court in the case of Totgar's co-op Sale society Vs. ITO on 11.02.2010.

The objection raised by Revenue Audit on this issue has been accepted by the Department and remedial action has been taken has been taken by reopening the assessment u/s. 147 and re-assessment orders u/s. 143(3) r.w.s. 147 of the Income-tax Act are also completed. Even the internal audit parties for earlier periods have raised objections on the issue of interest received from co-op. banks. The PCITs have accepted the audit objections and accordingly order u/s 263(1) of the I. T. Act have been passed in many cases. In further appeal, the ITAT has

decided the issue in favor of the assessee. Against the said order of the ITAT, scrutiny report has been sent wherein no appeal to High Court is recommended due to low tax effect. In the case of Sadguru Nagari Sah Patsanstha Maryadit for A.Y. 2014-15, the PCIT has also relied on the decision of Karnataka High Court as the case of Totgar's Co-op. Sales society and not accepted the decision of the ITAT, Pune. Though the decision of the ITAT is not acceptable in principle, they have not gone in further appeal to High Court as the tax effect is much below the monetary limit of filing appeal as per Circular No. 17/20149 dated 08.08.2019.

In view of the above, the reply given by the PCIT on the objections raised is not acceptable, and therefore, it is requested to take necessary remedial action as per law."

With reference to the audit objection raised by the IAP in various cases, directions were sought from the CCIT, Pune. The CCIT, Pune vide letter dated 03.03.2022 discussed the issue as under and directed to take necessary remedial action:

"The IAP has raised the issue of allowance of deductions u/s. 80P(2)(d) of the I.T. Act that the said interest has been received from credit co-operative bank and not from the credit coop. society on the basis of the decision of Supreme Court in the case of Totgar's Co-op. Sale Society Vs. ITO, Karnataka 322 ITR 283 (SC/2010) in CA No. 1622/2010 dated 08/02/2021 and Karnataka High Court decision in the case of PCIT, Hubli Vs. Totgar's Co-op. Sale 395 ITR 611 16.06.2017 (ITA No. 100066/2016). The Supreme Court in the case of Totgar's Co-op. Sale Society Vs. ITO, Karnataka 322 ITR 283 (SC/2010) in CA No. 1622/2010 dated 08/02/2021 has held that the interest income arising on the surplus invested in short term deposits fell in the category of other income which had rightly been taxed by the department u/s. 56 of the I.T. Act. It is also stated that the co-operative societies business is to provide credit facilities to its members and to market their agricultural produce. Hence the interest derived by way of investing surplus amount in short term deposits with the banks and in the government securities would fall under the head "Income from Other Sources" under section 56 and not under section 28 of the L.T. Act

After the decision of the Supreme Court in the assessee's own case the assessee has shifted the deposits and investments from Schedule Banks to Co-operative

Banks and claimed the deduction u/s. 80P (2) (d) of the I.T. Act, as such Co-operative Banks is essentially a Co-operative Society also and clause (d) allows deduction of income by way of interest or dividends derived by the assessee Co-operative Society from its investments with any other Co-operative Society. The assessee's claim of deduction u/s. 80P (2)(d) instead of 80P(2)(a)(i) of the I.T. Act, 1961, was rejected by the A.O. The CIT (A) as well as tribunal allowed assessee's claim.

Further, the Karnataka High Court in the case of PCIT, Hubli Vs. Totgar's Co-op. Sale Society 392 ITR 74 dated 05.01.2017 (ITA No. 100069/2016) has allowed deduction u/s. 80P (2) (d) of the I.T. Act stating that the issue before the tribunal was limited one namely whether for the purpose of section a co- operative bank should be considered as co-operative society or not.

Subsequently the Karnataka High Court in the above assessee's case has decided the issue in favor of the department (PCIT, Hubli Vs. Totgar's Co-op Sale Society 395 ITR 611 dated 16.06.2017 (ITA No. 100066/2016)) stating that the Interest income earned by way of deposits of surplus funds in co- operative bank does not change its character and thus clause (d) of section missioner.

80P (2) of the Act, would not apply in these circumstances. It is also stated that in the order passed by a co-ordinate bench, the only Issue considered was whether a co-operative bank is considered to be a co-operative society. No other binding precedent was discussed in the said judgment. The Bench has observed that a Co-operative Bank is a specie of the genus Co-operative Society, 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. Therefore, the said decision of the Co-ordinate Bench is distinguishable and cannot be applied the present appeals, in view of the binding precedent from the Hon'ble Supreme Court. It is held that the character or nature of income, namely interest on investment or deposits, does not change irrespective of the facts, whether it is earned or received from a scheduled Bank or Co-operative Bank.

That what the Supreme Court held in the case of the assessee itself. Against assessee was that such interest income on its surplus and idle funds not immediately required for its business, is not income from business taxable u/s. 28 of the Act but was taxable as "income from other sources" u/s. 56 of the Act. Whereas for availing the exemption or 100% deduction u/s. 80P, the income is specified in clauses (a) to (f) of sub-section (2) of section 80P which should be its business or operational income.

It was also held that the Words Co-operative Banks are missing in clause (d) of sub-section (2) of section 8OP of the I.T. Act, 1961. Even though the Co-operative Banks may have the skeletal of a Co-op. Society but its business is entirely different and that is banking business. The Co-operative Bank is excluded from the beneficial provisions of exemption or deduction u/s. 80P of the Act by way of sub-section (4) of section 80P. With the decision of the Karnataka High Court (PCIT, Hubli Vs. Totgar's Co-op. Sale Society 395 ITR 611 dated 16.06.2017 (ITA No. 100066/2016)) the assessee has filed SLP which is pending.

Further. The decision quoted by the PCIT in the case of State Bank of India vs. CIT (2016) 389 ITR 578 (Guj.) distinguishable from the facts in the case of Totgar's Co-op. Sale Society.

FACTS: In the instant case assessee is a Co-operative Society registered with the objects of accepting deposits from salaried persons of State Bank of India, Gujarat region with a view to encourage thrift and providing credit facility to them. It was claiming and granted deduction u/s. 80P of the Act. Subsequently the CIT invoked the powers under section 263 on the ground that interest income from the State Bank of India was not exempt u/s. 80P (2) (d). The Hon'ble ITAT has also upheld the decision of the CIT (A). The Hon'ble HC in Para 16 of its order has held that the interest derived from the credit provided to its members which is deductible u/s. 80P(2)(a)(i) and interest derived by depositing surplus funds with State Bank of India not being attributable to the business carried on, cannot be deducted u/s. 80P(2)(a)(i). If the appellant wants to avail of the benefit of deduction of such interest income, it is always open for it to deposit the surplus fund with a Co-

operative Bank and avail of deduction u/s. 80P(2)(d) of the I.T. Act. However, the Karnataka High Court in the above assessee's case decided the issue in favor of the department (PCIT, Hubli Vs. Totgar's Co-op. Sale Society 395 ITR 611 dated 16.06.2017 (ITA No. 100066/2016)) stating that the character or nature of income, namely interest on investment or deposits, does not change irrespective of the facts, whether it is earned or received from a scheduled Bank or Co-operative Bank. Such interest income on its surplus and idle funds not immediately required for its business, is not income from business taxable u/s. 28 of the Act but was taxable as "income from other sources" u/s. 56 of the Act. Whereas for availing the exemption or 100% deduction u/s. 80P, the income is specified in clauses (a) to () of sub-section (2) of section 80P which should be its business or operational income. Also the Supreme Court in the case of Totgar's Co-op. Sale Society Vs. ITO, Karnataka 322 ITR 283 (SC/2010) in CA No. 1622/2010 dated 08/02/2021 has held that the interest income arising on the surplus invested in short term deposits fell in the category of other income which had rightly been taxed by the department u/s. 56 of the IT. Act. Hence, the income by way of interest earned by deposit or investment of idle or surplus funds does not change its character irrespective of the fact whether such interest income is earned from scheduled bank or a co-operative bank. Thus clause (d) of sec. 80P (2) of the Act would not apply in the facts and circumstances of the present case.

The Karnataka High Court has discussed the provisions of section BOP as a whole and held that it is a character and nature of income which determines the taxability or exemption from taxability. In these cases the surplus fund which was not required immediately for business purpose is regularly being invested in the bank and govt. securities to earn interest. The interest on such investments could not fall within the meaning of the expression 'profits and gains of business'. Such interest income could not said to be attributable to the activities of the society. Therefore, such interest income in the category of income from Other Sources and is to be treated as income from other sources u/s. 56 of the I.T. Act.

The Hon'ble ITAT Delhi, in the case of Hindustan Tin Works Ltd. vs. DCIT has held that the power to be exercised u/s. 263 is of supervisory nature. Even though the

view for the AO is in conformity with the decision of the jurisdictional High Court or any other High Court, the Commissioner, to protect the interest of revenue is entitled to invoke jurisdiction u/s. 263 of the I.T. Act. As the SLP is pending in the case of PCIT, Hubli Vs. Totgar's Co-op. Sale Society 392 ITR 74 dated 05.01.2017 (ITA No. 100069/2016Karnataka High Court), I am directed to intimate that necessary remedial action may be taken.

Also, the revenue audit has raised similar objections in many cases of co- operative societies. The same were accepted and remedial action has been taken by reopening the assessment u/s. 147 and reassessment orders have also been completed. Even the IAPS for earlier period have raised objections on the issue of Interest received from Co-operative Banks. The PCIT have accepted the audit objections and order u/s. 263(1) of the I.T. Act have been passed. In further appeal, the ITAT has decided the issue in favor of the assessee. The decision of ITAT is not accepted in principle but no further appeal is filed before the Hon'ble High Court as the tax effect is below the monetary limit for filing appeal as per circular No. 17/2019 dated 08/08/2019.

In view of the above discussion, the interest earned by deposit or investment of idle or surplus funds with Co-operative Bank/Co-operative Society cannot fulfill the character and nature of business income which determines the taxability or exemption from tax and will come in the category of Income from Other Sources u/s. 56 of the I.T. Act.

In the light of above facts and circumstances, I am directed to state that the necessary remedial action may be taken".

7. Assessee raised total of six grounds of appeal out of these 1 to 5 are effective grounds and last one is general in nature. Before proceeding further to decide the merits of the case, it is relevant to adjudicate ground no-2 raised by the assessee challenging the assumption of power by the Ld. PCIT u/s 263 on the given facts of the case.

8. As the Ld. PCIT her-self has mentioned and giving reference of audit memo issued by IAP as mentioned supra. We observed her action u/s 263 is based on objections raised by IAP and not based on her independent application of mind. To assume power u/s 263 Ld. PCIT has to follow the procedure as laid down in Sec. 263. For ready reference and for better appreciation of the matter under consideration we are reproducing herein below the **relevant provisions of sec 263.**

Revision of orders prejudicial to revenue.

263. *(1) The Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner may call for and examine the record of any proceeding under this Act, and if he considers that any order passed therein by the [Assessing] Officer* ***[****or the Transfer Pricing Officer, as the case may be,****]*** *is erroneous in so far as it is prejudicial to the interests of the revenue, he may, after giving the assessee an opportunity of being heard and after making or causing to be made such inquiry as he deems necessary, pass such order thereon as the circumstances of the case justify,* ***[****including,—*

(i) an order enhancing or modifying the assessment or cancelling the assessment and directing a fresh assessment; or

(ii) an order modifying the order under section 92CA; or

*(iii) an order cancelling the order under section 92CA and directing a fresh order under the said section****]****.*

Explanation 1. For the removal of doubts, it is hereby declared that, for the purposes of this sub-section,—

record" [shall include and shall be deemed always to have included] all records relating to any proceeding under this Act available at the time of examination by the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner;

9. The whole exercise u/s 263 has been carried out on the behest of IAP, as discussed and reproduced (supra). The order of Ld. PCIT clearly demonstrates that whole exercise has been carried out in the pressure of departmental IAP and there is no independent application of mind by the Ld. PCIT. Powers in the statute are vested with the authorities prescribed and not in departmental IAP. Ld. PCIT's office itself is not accepting the version of audit objection, still as a matter of superior's instruction, she has to carry out this exercise is a clear violation of statutory powers and mandate. No where it is visible that relevant

record has been referred by the Ld. PCIT AND SHE APPLIED HER INDEPENDENT MIND OVER THAT, rather in her own order it is apparent that whole exercise has been done because of audit objection, which itself is bad in law, as law is in assessee's favor.

10. On the basis of the facts discussed above we are relying on the following judicial pronouncements, wherein it has been held that powers granted u/s 263 has to be exercised with independent application of mind and it can't be a borrowed satisfaction by the Ld. PCIT without referring the record and applying her mind on that. **The Bombay High Court in the case of *CIT* v. *Gabriel India Ltd*. (1993) 71 Taxman 585 (Bombay) after extracting the provisions of section 263(1) of the Act, as they stood then, observed that,...".From a reading of sub-section (1) of section, it is clear that the power of *suo moto* revision can be exercised by the Commissioner only if, on examination of the records of any proceedings under this Act, he considers that any order passed therein by the Income-tax Officer is 'erroneous insofar as it is prejudicial to the interests of the revenue'. It is not an arbitrary or unchartered power. It can be exercised only on fulfilment of the requirements laid down in sub-section (1)."**

Facts of the case and decision of the Tribunal and its reasoning in the case of *A.R. Builders & Developers P Ltd.*

The assessee-company filed its return of income for the assessment year 2014-15 before the due date and on realising audit objection cannot be the starting point or revision and the shareholders of EK Ltd. paid full tax on the capital gains arising out of transfer of their shareholdings based on the revised value at the time of transfer and following the decision of the Supreme Court in the case of *Max India Ltd.* (*supra*), the Tribunal held that "where two views are plausible and the ld. Assessing Officer had taken one of such views, to which CIT did not agree,

would not be a reason for treating the order of the Assessing Officer as one erroneous and prejudicial to the interest of the Revenue. We cannot say that the view taken by the ld. Assessing Officer in the case before us was unsustainable in law".

GANGA ACROWOOLS LIMITED *v.* PRINCIPAL COMMISSIONER OF INCOME-TAX
Mere audit objection and because a different view could be taken, were not enough to say that the order of the Assessing Officer was erroneous or prejudicial to the interests of the Revenue.

[2022] 143 taxmann.com 419 (Gujarat) Pr. CIT *v.* Dipesh Lalchand Shah
[2022] 145 taxmann.com 353 (H.P.) Pr. CIT v. Noor Resorts (P.) Ltd.

11. In view of above we found that the order passed by Ld. PCIT, Thane lacks legal force and out of her jurisdiction also. In the light of above we declare this order of Ld. PCIT as arbitrary, illegal and without jurisdiction. Hence, we quash this order without discussing the merits of the case as the same has become academic now.

12. In the result we allow the ground no. 2 raised by the assessee, consequently the appeal of the assessee is allowed on the ground of illegality and lack of jurisdiction.

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

Order pronounced in the open court on 30th day of November, 2022.

Sd/-	Sd/-
(VIKAS AWASTHY)	(GAGAN GOYAL)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai, दिनांक/Dated: 30/11/2022
SK, Sr.PS
Copy of the Order forwarded to:

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. आयकर आयुक्त (अ) /The CIT(A)-
4. आयकर आयुक्त CIT
5. विभागीय प्रतिनिधि, आय.अपी.अधि., मुबंई/DR, ITAT, Mumbai
6. गार्ड फाइल/Guard file.

BY ORDER,

//True Copy//

(Dy. /Asstt. Registrar)
ITAT, Mumbai